IN THE SUPREME COURT OF NEW ZEALAND SC 18/2013

[2014] NZSC Trans 8

MAX JOHN BECKHAM

Appellant

v

THE QUEEN

Respondent

Hearing:	1 April 2014
Coram:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	S J M Mount for the Appellant D J Boldt, D J Perkins and M J McKillop for the Respondent

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CRIMINAL APPEAL

ELIAS CJ:

Thank you.

MR MOUNT:

May it please the Court, Mount for the appellant.

ELIAS CJ:

Yes, thank you, Mr Mount.

MR BOLDT:

May it please Your Honours, Boldt for the Crown together with my learned friends Messrs Perkins and McKillop.

ELIAS CJ:

Thank you, Mr Boldt. Yes, Mr Mount.

MR MOUNT:

Yes, thank you. May it please the Court, the first matter, of course, is the appellant's application for leave to raise an additional point beyond that which is raised in the existing written submissions directed to the issue on which the Court has already granted leave and which is a legal submission arising from the material already before the Court. Leave is sought on three grounds. First, it is in the interests of justice. Second, there is no prejudice to the respondent. Third, there are good reasons for the delay in raising the point.

The proposed structure of my submissions this morning is first to provide an overview or summary of the argument, second, to highlight key aspects of the factual background, third, to outline the proposed new point regarding litigation privilege, fourth, to address the reasons in support of the application for leave and if appropriate I will address the topic of consequential orders if the Court does grant leave.

Turning, then, to the summary of the submissions, in a nutshell the appellant's submission so far has been that he should have received a sentence reduction on account of breaches of the New Zealand Bill of Rights Act 1990 by the police in unlawfully seizing copies of recorded conversations between him and his counsel.

The present application is for leave to submit that the police further breached the Bill of Rights by seizing and listening to recorded conversations made by the appellant for the dominant purpose of preparing for the proceeding, namely, the present trial, and which were therefore covered by litigation privilege. Those calls contained information, among other things, about proposed defence evidence, the identity of potential and actual defence witnesses, the appellant's response to the police

allegations, and the evidence that had been disclosed to him, the steps the appellant was taking to prepare for trial, and aspects of defence strategy. In short, the material laid bare a good measure of the appellant's response to the police allegations and a good measure of his defence well in advance of trial in a situation where the police would have had no legitimate access to that material.

McGRATH J:
None of this relates to conversations with his lawyer?

MR MOUNT:
That's right, Your Honour.

McGRATH J:
That's why you're bringing the separate litigation privileges?

MR MOUNT:
Precisely, Your Honour. That's right.

The appellant's submission is that there is nothing technical about this further breach. Teams of police officers systematically listened to the conversations and summarised certain conversations in a schedule. At least one version of that schedule containing summaries of 380 conversations was provided to a police officer who was part of the team prosecuting the appellant on the present charges and who gave evidence for the Crown in the trial on the charges that are under appeal. In other words, there was a clear transfer of the information to the trial prosecution team. It is that schedule, which is 123 pages long, which has only just been provided to current counsel and only just come to the attention of current counsel.

The officer was not only given that written schedule, 123 pages, but he also sought and was provided access to 1000 or more full audio recordings of the relevant conversations and he listened to something in the order of 15 of them. At the very least, the appellant submits that these apparent breaches of the Bill of Rights are relevant to the issue that is already before the Court, namely whether the appellant should have been entitled to a sentence reduction on account of breaches of his rights.

Because the document is already before the Court, no leave is required to call fresh evidence. It is simply a matter of whether the appellant will be given the opportunity to make submissions addressing the material that's on the Court record.

Now, as I said, there are three main grounds on which leave is sought, interest of justice, no prejudice, and good reasons. There are two aspects to the interests of justice submission. First, from the appellant's perspective this is an arguable point which has the very great potential to make a material difference to the remedy to which he is entitled.

Second, the question independently raises questions of general and public importance, specifically does privilege attach to communications by remand prisoners for the dominant purpose of preparing for their trial? In the absence of any exception to privilege, can police lawfully obtain access to those conversations under a search warrant? I note the Court at 3.2 of its memorandum accepts that the new point raises potentially wide-ranging implications for the management of New Zealand prisons.

The second ground is that there is no prejudice given that the argument is essentially a legal argument, turning on the interpretation of the Evidence Act 2006 and the Corrections Act 2004 which can be advanced without the need for any further evidence.

ELIAS CJ:
But how is the materiality to be assessed? On your argument, it's simply on the basis of the schedule. I understand the Crown to be saying that further inquiries would be needed.

MR MOUNT:
Yes. The schedule – and I'll certainly take the Court to some excerpts from it – but the schedule makes it very clear on its face what these calls are about and how they relate to the trial, for example, the appellant uses phrases such as, "Can you find out such-and-such for my case?" It is entirely possible, in my submission, for the Court to make an assessment purely on the face of the record as to what the purpose of the conversations was and how they relate to the charges that are before the Court.

ELIAS CJ:

Well, you're certainly not seeking to go further than the schedule?

MR MOUNT:
That's right, Your Honour. If we get to the point of the issue of consequential orders, the Court will have noted that I do seek an order for further disclosure from the police and that's a matter we can discuss if we get to that point, but certainly my submission is that the issue at this stage is perfectly capable of determination on the present record.

The third ground, just to preview this, is that there are good reasons for the delay in raising the argument, and the short point is that the schedule I've referred to, the 123 page schedule, was not disclosed by the police at any time prior to the trial or, indeed, during the trial. It first was produced to the Court at a hearing that took place two weeks after the verdicts, and in the unusual circumstances in which the schedule was produced at that hearing first no copy of the schedule was provided, it appears either to the defence or to the Crown. So it was not a document on either police or Crown files. It appears that the schedule was present in Court for no more than 10 or 15 minutes and if it passed through defence counsel's hands, which it appears to have, it would have been for a period of no more than 15 minutes and that, again, is apparent on the record before the Court.

So while the document was produced as an exhibit, in the unusual circumstances of that hearing the submission will be that there was no realistic or meaningful opportunity either to analyse or appreciate the significance of the document and indeed it appears that the document sailed under the radar so far as both the defence and the Crown were concerned.

GLAZEBROOK J:
There wouldn't normally be a requirement to disclose a schedule of that kind because that was just summarising for the Crown's purposes in evidence that it was using, so there was nothing wrong in not disclosing it. But you're just saying you weren't aware of it or are you saying there was something wrong in not disclosing it?

MR MOUNT:
I am, Your Honour, submitting there is something wrong although, of course, the first point is part of the explanation for the delays, so even if there was nothing wrong it's part of that.

GLAZEBROOK J:
I understand that is an explanation for the delay.

MR MOUNT:
Your Honour, I do submit there was something wrong. There was a specific request before the trial which indeed went to the point of a memorandum filed in the High Court which sought disclosure of any material relating to the use or documents generated arising from the appellant's telephone calls, and the Crown shortly before Christmas assured the High Court and counsel that there had been full compliance with that request.

GLAZEBROOK J:
So it – the concern is that it was not provided in response to a specific request relating to the telephone calls, as I understand it.

MR MOUNT:
That's correct. Yes. Now, in terms of the Crown's response, the Crown does not appear to challenge the fact that this is an arguable point. Indeed, the Crown submits that it has potentially wide-ranging implications. Nor do I apprehend from the written material filed by the Crown for there to be any suggestion that the Crown or the respondent would be prejudiced if this argument were permitted to be raised. But essentially, the Crown raises three submissions: first, that the point should have been raised earlier; second, to raise the possibility of further evidence; and third, to say that this Court would effectively be sitting at first instance. And again, just at this summary or preview stage, the response of the appellant is first that the root cause of the delay was the nondisclosure of the schedule, second, that at as matter stand there is no need for further evidence, and third, that while it is of course generally desirable for this Court to have the benefit of the views of the lower Courts, this is a legal point which is capable of determination in this Court on the existing record and the dominant consideration should be the interest of justice.

Now before developing the application for leave, if I may take a few minutes to put the application in context and describe key aspects of the factual background? At the end of 2008 the appellant was arrested and remanded in custody for the charges which are now under appeal. There were two sets of charges. Operation Jivaro are the charges before this Court. They were heard in the Auckland High Court and Mr

Murray Gibson was the appellant's counsel for that set of charges. There was a second set of charges, often referred to as the Northland charges, tried in the Whāngārei District Court and Mr Wayne McKean was counsel on that set of charges.

About eight months into the appellant's remand period in August of 2009 police received information that the appellant had spoken about his desire to escape and possibly cause harm either to the officer in charge or to a member of his team. The police referred that matter to the Special Investgiations Group and the officer in charge was Detective Sergeant Jason Lujnevich. That operation was codenamed Operation Valley. So Operation Jivaro is the set of charges before this Court; Operation Valley related to the alleged escape.

In accordance with standard practice all of the appellant's telephone calls out of prison from the payphones within the prison had been recorded under the Corrections Act, which provides a limited power for Corrections to monitor telephone calls; not for police but for Corrections. There are strict controls over the use and release of information recorded under the Corrections Act.

Detective Sergeant Lunjevich decided to apply to the Court under section 198 Summary Proceedings Act 1957 for a search warrant to seize recordings of all of the appellant's conversations out of prison stretching back as far as the records went. The process of preparing the search warrant application took a week and in the course of preparing that application the police officer learned that one of the telephone numbers called by the appellant, not surprisingly, was his lawyer, Mr Gibson. The detective sergeant made a deliberate decision to include that telephone number in the search warrant application because he said that there might be something in those calls, but critically what he did not do is he did not include a number that belonged to the appellant's counsel, nor did he put the application in front of a Judge, it went to a deputy registrar, and he did not refer to any conditions either in the application or in the search warrant itself to protect privileged conversations. He accepted that he knew that there are requirements, special requirements for search warrants involving the risk of legally privileged material but the High Court accepted, and there is no basis on which this can be challenged, that it was an oversight that he did not tell the Court about the fact that this was a lawyer's –

ELIAS CJ:

So you're not challenging that?

MR MOUNT:

I'm not challenging that. There's no basis on which it can be challenged.

An oversight that he did not tell the Court about the intention to seize calls to counsel.

GLAZEBROOK J:

It's rather odd to call something an oversight when you deliberately decide to do it knowing that you don't have any right to do so and there are special reasons to do so.

MR MOUNT:

Yes. I can't challenge the factual finding, but in my submission –

GLAZEBROOK J:

Well why is it a factual finding rather than a –

MR MOUNT:

Yes.

GLAZEBROOK J:

I mean how can it be an oversight when you know full well what you should be doing and you know full well – I suppose that's an oversight that it wasn't put into the application, but frankly it's an astonishing finding.

MR MOUNT:

Your Honour, indeed. At the appropriate time I'll, I will make legal submissions about the effect of that.

The deputy registrar issued that search warrant and in total the police obtained somewhere between 800 and 1000 recordings pursuant to the first search warrant, which –

ELIAS CJ:

We don't have a copy of the warrant do we? I don't think we've got a case on appeal. I've only got the –

GLAZEBROOK J:
It's on the, it's on your –

ELIAS CJ:
– the judgments.

GLAZEBROOK J:
It's on the – there's eight volumes of it and it's on there.

ELIAS CJ:
Nobody told me. But that's all right.

GLAZEBROOK J:
No, I only found out just recently.

MR MOUNT:
Yes. Just for the record, Your Honour, the –

ELIAS CJ:
I didn't know that.

GLAZEBROOK J:
Yes, no, well it's not being printed out apparently and it's all on here but it is indexed.

ELIAS CJ:
I'll just, I'll get mine brought down.

MR MOUNT:
Yes. We received it late on Friday, Your Honour, and I did manage to print a copy over the weekend but I'm afraid –

ELIAS CJ:
No, I don't need a printed copy.

MR MOUNT:

Yes.

ELIAS CJ:

I just really needed to be told that it was there but that's not your fault, Mr Mount.

MR MOUNT:

Yes. Certainly. Yes, and for the record, the search, the application for the search warrant is in volume 2 beginning at page 4, and the search warrant itself is volume 2, page 29.

ELIAS CJ:

Sorry, could you just tell me that again?

MR MOUNT:

Yes. Application, first search warrant, volume 2, page 4, and first search warrant, volume 2, page 29.

ELIAS CJ:

Thank you.

MR MOUNT:

So the first search warrant resulted in the seizure of, as I say, 800 to 1000 calls covering a six month period, and that included nine calls to Mr Gibson, and the total duration of the calls seized was over 100 hours. There can be no doubt that the calls to Mr Gibson were privileged because at the time of the pre-trial argument his instructing solicitor listened to them and swore an affidavit in the High Court that they were covered by privilege, and it's not the time to develop this argument now but at the appropriate time the appellant's submission will be that the seizure of privileged calls pursuant to that warrant was unlawful and in breach of the Bill of Rights, and the question that arises then is one of remedy. Once they received the calls the police had two shifts of officers, a total of nine or 10 police officers, who systematically listened to the calls and noted down their contact on what were called screening reports. and again it's not the time to develop this fully but the police did put in place procedures to avoid substantive listening of the calls to Mr Gibson, and the procedure was that screeners were to use voice identification to identify the calls to Mr Gibson and they were instructed that once they were satisfied it was a call to

Mr Gibson they were to stop listening, and the Court below accepted that there was evidence to show that only three calls to Mr Gibson were listened to by police and then only to the extent necessary to confirm that they were calls to Mr Gibson.

A month after the first search warrant the police obtained a second set of approximately 131 calls from Customs, who in turn had obtained those pursuant to a requisition procedure they have under the Customs and Excise Act 1996. That seizure included a further three calls to Mr Gibson but at an appropriate time the submission will be that the further seizure of privileged calls to Mr Gibson was also unlawful and in breach of the Bill of Rights because the Customs power to obtain the calls specifically excludes privileged material and accordingly it was unlawful, in the appellant's submission. But having received that second batch of calls police continued the process of systematically listening to the calls and continued developing their schedule of the content.

McGRATH J:
Excludes all privileged material? Is that right?

MR MOUNT:
The Customs and Excise Act, it excludes certainly solicitor-client privilege and if I may, Your Honour, very briefly –

McGRATH J:
Come back to it later.

McGRATH J:
– come back to that. Yes. Yes. I'm not certain whether it excludes absolutely all privileged material. That may not be the specific legislative provision. I would rely on the common law for that.

Four months later, in January of 2010, the police obtained a second search warrant from the Court. Now by this time of course the suggestion of an imminent escape plan was no longer advanced and the second search warrant was justified on the basis of alleged money laundering, conspiracy to commit an offence and accessory after the fact. At the time of this second search warrant application again the police included Mr Gibson's number in the application to the Court and again they did not tell the Court that this was a lawyer's telephone number, despite the fact that of

course they knew that they had obtained calls to Mr Gibson both under the first warrant and under the Customs seizure. So again the submission on behalf of the appellant will be that that second search warrant was unlawful.

However, on this occasion police did informally ask Corrections to screen out the calls to Mr Gibson and as a result they didn't receive any calls to Mr Gibson as part of the second search warrant, but they did receive another 754 calls on that third seizure, if you like. Just to summarise, in total the police were in possession at that point of more than 1700 recordings, including 12 to Mr Gibson, and there was evidence that three of those had been partially accessed, although only on the point, on the High Court finding, that Mr Gibson was identified.

The next phase of the background was the disclosure to the appellant of the fact that police had access to these calls. That arose in the context of what became quite a protracted legal dispute over his bail status. He sought bail on a number of occasions in 2009 and 2010. First in November of 2009, the Crown disclosed an 11 page schedule in order to oppose bail. That 11 page schedule, which is not in the case on appeal currently, contained selected excerpts from the larger schedule designed to show that the appellant was at risk of an intention to escape or conceal assets or otherwise had made threats of violence. So these were cherry-picked conversations by the Crown in order to oppose bail.

Critically, however, that 11 page schedule of –

ELIAS CJ:
Why is this not before us? Are you making a submission – you're making the submission, I think, that it's significant to compare the two.

MR MOUNT:
I do have a copy in Court, which I can certainly hand up.

McGRATH J:
But you're relying on the findings of the Judge, I think, primarily, aren't you?

MR MOUNT:
Yes, and I'm also just wanting to make the submission that although the 11 page schedule is before the Court it was nothing like the 123 page schedule that later

emerged, and to that extent I accept it probably should be in the case on appeal, and that can, no doubt, be corrected. It is in Court if the Court wishes it and I can hand it up.

ELIAS CJ:
Yes, perhaps at the adjournment you can give it to the Registrar, thank you.

MR MOUNT:
Certainly.

One important difference the Court will see is that the 11 page schedule, unlike the large document, doesn't contain the columns on the right-hand side which indicate that the police were looking for material of relevance to Operation Jivaro, so that's just one difference which I will return to. But, of course, the calls there were designed simply to show that the appellant should not be granted bail.

There was a similar schedule, I understand, disclosed to Mr McKean in relation to the Northland charges and Mr McKean raised concerns in relation to that. In an affidavit which he filed which said that while he was well aware that Corrections monitored calls, he had never before struck a situation where the content of calls from prison was passed to the officer in charge of a pending trial. That prompted the police and the Crown in June of 2010 to file an affidavit from Detective Inspector Bruce Good. Now, that affidavit was mainly designed to show that the police had not breached privilege, but it disclosed for the first time two things. First it disclosed that police had seized calls to Mr Gibson and that was clear from the affidavit. Second, it was the first time that police disclosed that they had, in fact, seized copies of all of the appellant's calls from prison. Now, this leads to the next phase of the background, which is the effects on the appellant, which I won't dwell on, but having discovered that police were in possession of recordings of all of those telephone calls, including calls to his counsel, that prompted both Mr McKean and Mr Gibson to file material with the Court indicating they could no longer communicate with the appellant while he was in custody. In August of 2010, Justice Duffy, in a bail judgment, accepted that the knowledge that his telephone conversations had been intercepted by the police or provided to the police impeded his access to counsel.

Now, to summarise, to date the case has been put on the basis of the breaches of the Bill of Rights in seizing the counsel calls and then the effects on the appellant in discovering that police had seized those calls in impeding his access to counsel.

The new point that arises, Your Honours, is that a little over two weeks ago I received for the first time from the Crown the 123 page schedule to which I had referred. It had taken me about a month to obtain that document because it was not on the defence file, nor was it, it transpires, on the Crown file. I sought a copy from the High Court and it turned out that the High Court had returned all the exhibits to the police. So having asked my learned friends for the Crown to search the Crown file, which they did more than once very carefully, we ultimately had to obtain a copy from the police. So the copy before the Court is what the police instruct was the exhibit produced at Court, the original exhibit having been returned to police and not being able to be located.

The schedule which is in volume 4 of the case on appeal from page 40 is, as I say, the record of summaries of the telephone conversations.

ELIAS CJ:
Is that usual practice, to return –

WILLIAM YOUNG J:
Yes.

MR MOUNT:
I would not have thought so, Your Honour. It seems irregular that while an appeal is pending for exhibits to be returned.

WILLIAM YOUNG J:
It is. There's no conviction appeal pending.

MR MOUNT:
That's right, Your Honour. Yes. That may have been the reason.

ELIAS CJ:
Yes.

MR MOUNT:

Volume 4 from page 40 is the schedule itself. Now, there are three things about that schedule. First –

ARNOLD J:

Is it the same schedule as is in the annexures to the memorandum?

MR MOUNT:

That's right. It's A in the memorandum. That's a hard copy that Your Honours may have and I do have another copy of that if that's required.

McGRATH J:

Is it headed "Prison calls screening calls"?

MR MOUNT:

That's the one, Your Honour, yes.

McGRATH J:

19 February 2009?

MR MOUNT:

Yes. Now, three things arise from this schedule. First, there are columns towards the right-hand side of the schedule and there's a key in the top right-hand corner, V for Valley, J for Jivaro, and so on. You'll recall that V for Valley was the so-called escape attempt and Jivaro is the present charges. Then there are corresponding columns towards the middle of the document where why is used by the police to indicate relevance to that particular topic. Now, my –

WILLIAM YOUNG J:

What's POCO?

MR MOUNT:

Proceeds of crime, I suspect. Proceeds of crime office.

WILLIAM YOUNG J:

And TAU?

MR MOUNT:

V for Valley, J for Jivaro, K for kidnappings, C for customs, P for prison, and TAU, I suspect that might be threat assessment unit. I'm not certain about that. Now, when you count up the Ys under the J column there are 215 instances where the police had noted a summary as relevant to Operation Jivaro. That is the present set of charges. So more than half of them, 215 out of 380. Now, that is significant, the appellant submits, because an issue that concerned the Court of Appeal was whether there was any nexus or connection between the exercise of listening to the appellant's calls and the present charges. This schedule establishes that link, in my submission, because it indicates that the police were very intent on noting conversations that were relevant to the present charges. For example, and this might be difficult on an iPad, I'm sorry, if Your Honours are able to turn to page 65 on the case of appeal, on the schedule it's page 26, same volume, now, there's just one conversation noted on this page. I have one more hard copy. I wonder if I could pass that up through the Registrar for any Judge who wishes to have a hard copy. It will be a bit easier, I suspect, than working on an iPad. Madam Registrar, if I could give you that –

ELIAS CJ:

Justice Glazebrook – do you want a hard copy?

MR MOUNT:

So tab A of that hard copy document is a, is a hard copy of the schedule. So this is just on the point of the, the link to or nexus to the present charges. So that, that call just reads, "Discussed disclosure papers received from the police. Discussed audio recordings in car and house," and of course there were, there was interception evidence relied on by the police, "general discussion about his case, evidence et cetera, of interest to Jivaro crew."

Now that, that, in my submission, is a clear indication that the police were indeed focused on the evidence that would be of interest to the Jivaro crew, and that is why the submission is made that there was a clear nexus between the operation.

WILLIAM YOUNG J:

Sorry, is this in the context of whether section 56 of the Evidence Act was breached?

MR MOUNT:

It's part of the background still, Your Honour, but I'm, I'm…

WILLIAM YOUNG J:
Would have to – I mean this perhaps is illustrative because you'd have to conclude there was a breach you would have to know whether the dominant purpose of this discussion was preparation?

MR MOUNT:
Correct, Your Honour. That's right. Yes. My submission on that topic is that it is self-evident from the schedule itself that many of these conversations were for that purpose.

WILLIAM YOUNG J:
But how can you tell whether it's that or whether it's just chitter-chatter?

MR MOUNT:
Well there are instances –

WILLIAM YOUNG J:
Or, sorry, or it's a matter that's large in his mind and he's talking about it?

MR MOUNT:
There are a number of instances, Your Honour, where he says, "Can you find me this information for my case?" and it is otherwise apparent from the face of the record that he's asking for things to be done or asking for matters to be attended to that could only possibly mean that he's preparing for his trial. So it's self-evident from the record, in my submission.

So that was the first point arising from the schedule. Just the –

McGRATH J:
But if Max is the recipient of the call?

MR MOUNT:
He's the originator of the call. So he's the – Max is the appellant. It's Max Beckham.

WILLIAM YOUNG J:

And Gary Watt is the son, isn't it?

MR MOUNT:
Gary is the son, yes, and, indeed, was a defence witness.

So the second thing that arises from the schedule is that, as I've already mentioned, this is the document that was given to Detective Peat of the proceeds of crime unit. Detective Peat was part of the investigation and the prosecution team on these charges.

ELIAS CJ:
I can't remember what the story is with the recordings. Are they – there's – you do cover that in your submissions but I can't remember what eth story is. Are they, are they not available?

MR MOUNT:
They are, Your Honour, and that's an area I do need to –

ELIAS CJ:
Oh. Right.

MR MOUNT:
– correct from my memorandum.

ELIAS CJ:
Yes.

MR MOUNT:
They, they were provided. 1725 were provided to the appellant in November of 2010, a few weeks before the pre-trial hearing. So he, he does have disks with several hundred hours of recorded conversations and that material was disclosed, and I apologise to the Court, I had not recalled that when I filed the memorandum last week.

ELIAS CJ:
Right. So he had the, he had what is summarised here?

MR MOUNT:

That's right. Yes. Yes. He did. And the only thing I can say about that of course is that 1725 recordings supplied to counsel just before the pre-trial didn't provide a meaningful opportunity to appreciate the potential significance because it took literally teams of police officers several months to listen to these calls. The sheer volume of them made it physically impossible for counsel to review all of those calls in the time available before the pre-trial or indeed subsequently. As I say, there were nine or 10 police officers who listened to these calls and it took them many months to, to summarise them.

ELIAS CJ:

But the position is that really the material witnesses disclosed before the pre-trial?

MR MOUNT:

The content of the calls was disclosed but crucially what was not disclosed was, one, the extent to which the police had listened to and noted down the content of Operation Jivaro calls. The consistent police position and that of the Crown has been that Operation Jivaro was a completely separate operation focused on the escape attempt. The schedule is the critical document because it is the schedule that reveals the police in fact were focused on and summarised Operation Jivaro calls. So that's the first thing.

WILLIAM YOUNG J:

Wasn't that apparent to Justice Andrews? Didn't the police say, "Yes, of course we listened to the calls with a view of, with a view to, amongst other things, giving information to the Operation Jivaro people if it was relevant"?

MR MOUNT:

All Justice Andrews had in response to cross-examination was acknowledgement by the police that they did listen in part for the purpose of Operation Jivaro. What of course the Judge didn't have and counsel did not have was the schedule which indicates that in fact more than half of what the police were focused on was Operation Jivaro. And the critical thing of course that, that Justice Andrews did not have and that counsel did not have arising from this schedule is proof of the transfer of that information from the Operation Valley team to the trial prosecution team.

WILLIAM YOUNG J:

But didn't the Judge know that too?

MR MOUNT:

No, Your Honour. She didn't.

WILLIAM YOUNG J:

Wasn't it Detective Peat? Didn't he say something about it?

MR MOUNT:

Detective Peat gave evidence that he had received a schedule but his evidence was that it was similar to the 11 page schedule that I've referred to. Now, one point my friend no doubt will make is that the Judge did receive or appears –

WILLIAM YOUNG J:

The Judge received this schedule.

MR MOUNT:

It may've been the only copy of that schedule and indicates in her judgment that she read it, although we don't know the extent to which she read it, but her judgment refers only to the issue whether Mr Gibson's calls are summarised on the schedule and refers in passing to the fact that there was some reference to safety deposit boxes. Doesn't indicate that the Judge had any appreciation of the extent to which matters of trial evidence, defence evidence, detective strategy and defence preparation were contained within the schedule. And that's why my submission is –

WILLIAM YOUNG J:

But your client knew everything had been recorded.

MR MOUNT:

He, he did, Your Honour, and –

WILLIAM YOUNG J:

So he must have known that all discussions he'd had in which he'd discussed the trial had been recorded?

MR MOUNT:

Yes. Yes.

WILLIAM YOUNG J:
And the only ones that weren't listened to were the ones to Mr Gibson?

MR MOUNT:
That's right, Your Honour.

WILLIAM YOUNG J:
So he must've known.

MR MOUNT:
He, he must've known that all, and he did know that all his conversations were recorded. It is, however, in my submission unrealistic to suggest that the appellant, who of course was recovering from a methamphetamine addiction at the time, could have raised with counsel the potential that in addition to the section 54 argument there was also a potential section 56 argument arising out of disclosure and his preparation for trial. So although that is a theoretical possibility, that the appellant could've cast his mind back to remember what he had discussed in these 1700 calls and could have recalled that in perhaps 10 percent of those calls he had discussed matters of trial preparation with others, it's not realistic, in my submission, to have expected the appellant to have raised that point with counsel.

The critical –

WILLIAM YOUNG J:
What did he say in his affidavits when he got bail?

MR MOUNT:
He –

WILLIAM YOUNG J:
He must've referred to what – did he refer to his calls being monitored?

MR MOUNT:
He, he referred to the lack of privacy within the prison and he essentially said that he was concerned about the, the lack of privacy when he was focusing on his lawyer calls and that, that was the issue that he raised. Essentially his position was, "I'm

facing a 60-odd count indictment. I've had 30,000 pages of disclosure. I need to be able to prepare for my trial and I'm not able to do that satisfactorily from prison."

ARNOLD J:
He certainly said in some of these calls in your schedule B in April that he didn't want to talk over the phone because he was worried that the police would hear it and use it against him.

MR MOUNT:
That's right, Your Honour. He did. So that is perhaps not an uncommon fear that a number of people in that position have, that some of his calls might be intercepted by police and, and plainly there's evidence that from April at least onwards he held that fear.

MR MOUNT:
Well it's interesting the recording is done by Corrections but obviously he assumed that it would be available to the police.

MR MOUNT:
That's right, or at least he was – I think what he was concerned about, he knew by that stage that police had an electronic interception operation targeting him. That was Operation Jivaro. So he was no doubt aware of the general possibility that telephone calls can be intercepted and it was probably a legacy of that knowledge that made him concerned about that. Quite a different matter, if leave is given I'll make the submission, quite a different matter to suggest that that knowledge indicated a waiver of any privilege that he'll have over, over his preparatory material for, for proceedings.

So just, just to return to Your Honour Justice Young's question, which essentially is, didn't the appellant know all about this and couldn't counsel have joined the dots at an earlier stage? My submission is that while counsel in theory could've joined the dots because there was a disc containing 1700 calls that had been disclosed, that is not a realistic possibility given the volume of those calls and given the fact that the appellant is not a lawyer and several years after the event could not be expected to appreciate the significance of what he was talking about in those calls.

But I return to the fundamental point, which is that it is this schedule that indicates the transfer of information from Operation Valley to the trial prosecution team. And because there had been a specific request by the appellant for disclosure of information that related to the use or listening or recording of his calls, the bottom line is that if this schedule had been disclosed prior to trial, as I submit it should have been, it is inevitable that counsel would have made the submissions arising out of this schedule pre-trial. So my submission is that the root cause of the delay is the fact that the schedule was not disclosed by police and that the exercise of essentially speculating as to what counsel could have, which breadcrumbs counsel could have followed to have discovered this argument ultimately is not responsive to the fundamental point, which is that because the police did not disclose this schedule prior to trial, that was the, that was the reason the argument was not raised.

ELIAS CJ:

Why would the schedule rather than the suspicion, able to be verified by the disclosure that was made, why should the schedule have triggered a section 56 realisation?

MR MOUNT:

Because, Your Honour, it contains so many clear examples of the appellant disclosing information about his trial preparation. And it's not just the fact that that, those matters have been discussed, which could have been surmised by counsel. It's the fact that the police have then dutifully recorded that, so recorded conversations about who might be a witness and what they might say, and then provided it to the trial prosecution team.

ELIAS CJ:

Do you mean it's the schedule would have brought home the systematic approach?

MR MOUNT:

Yes, and the very – would've brought into focus the very real or the, the reality that the police had actually made use of the, of the information by first recording it and then providing it to the trial prosecution team, or at least to one officer within that.

ELIAS CJ:

But as I think you're really acknowledging, that must have been understood in a general way. It does seem to me that the submission that you're making is more a

matter of degree; that the schedule would have underscored an issue which would have caused counsel to think about section 56.

MR MOUNT:

Your Honour, that, that is correct, that it is part of a question of degree, but the, the material that the schedule provides is that clear link between what the police have the potential to listen to and what they in fact chose to record and provide to, to the trial team. Now that puts it into a wholly different category, in my submission.

ELIAS CJ:

Well it does seem to me that the schedule is important for the appeal as constituted.

MR MOUNT:

Yes.

ELIAS CJ:

But in any event it's really just the linkage with, aha, the penny dropping because of the schedule, because really the facts were essentially, it seems to me, known if a section 56 argument was to be run, and that course wasn't followed.

MR MOUNT:

If we imagine for a moment the scenario of counsel attempting to advance the submission without the schedule, what first would've needed to have happened is for counsel to have received instructions from the appellant that he discussed matters of trial preparation, then the exercise –

ARNOLD J:

Can I just interrupt there?

MR MOUNT:

Yes.

ARNOLD J:

Because while it may be that most people who get tangled up in the criminal justice system have an awareness that their communications with their lawyer are confidential, I wonder really whether many people understand litigation privilege, which is a different concept entirely. So one of the responses to the Chief Justice's

questions may be that it's improbable really that the appellant himself would've raised this, because I mean he's obviously concerned but would he really have understood litigation privilege? So it really was up to the lawyer to try and figure it out really.

MR MOUNT:

Indeed, Your Honour. That, in my submission, that is correct and is why I submit that it is unrealistic to expect that the appellant himself would have said to counsel, "I understand you are advancing submissions based on solicitor-client legal advice privilege. Have you also thought about the fact that I was giving instructions in relation to trial because I'm concerned that that might've raised a further argument." It's simply not realistic, in my submission.

ELIAS CJ:

It's the role, though, that the schedule played, because that's been a major plank in your argument that this late change should be permitted, that it's only the schedule that brings it to the fore. It's the linkage between the disclosure of the schedule and the section 56 argument that bothers me.

MR MOUNT:

Yes. And Your Honour is quite right that the reality of this is that in a theoretical sense counsel might have appreciated the potential for a section 56 argument earlier. And it was only the schedule that broke that into focus. That, that is the reality. And it is the explanation for the delay and it's why of course the appellant's response is, well, if we're looking for the root cause plainly this issue would have been brought into focus if the schedule had been disclosed pre-trial. But Your Honour is quite correct that it is possible to imagine a world in which counsel would have independently thought of this argument aside from the schedule, but what would have required, quite apart from the fact that this whole business of the listening to lawyer calls was a matter that arose very late in the piece and, indeed, the material from the Crown was arriving right up to and including the day of the pre-trial that was focusing on the calls to Mr Gibson, and so the reality is that the focus was such on the calls to Mr Gibson that the potential to go fishing for other arguments was simply not there.

ELIAS CJ:

Can I ask – it may not have anything to do with it but responding to the point that you make that the police investigation has been spent in many weeks and applying a lot of manpower –

MR MOUNT:
Yes.

ELIAS CJ:
– does, under the new criminal disclosure regime – what's the Act? Does disclosure have to be made of internal –

MR MOUNT:
Work product.

ELIAS CJ:
– schedules –

MR MOUNT:
Yes.

ELIAS CJ:
– such as this? Because you had the information, it seems that you're acknowledging, from which the decision could have been taken. It's just you didn't have it very conveniently. So under the new legislation does a schedule such as this have to be disclosed?

MR MOUNT:
There would be a possible argument open to the police that internal work product is not disclosable under the Act. That argument would not have been available to the Crown in this instance for two reasons. One, because there had been deliberate disclosure by the Crown of aspects of this schedule in the course of opposing bail, so it's the 11 page schedule and so on where the Crown had in fact disclosed aspects of the schedule –

ELIAS CJ:
So there'd been a partial and therefore misleading –

MR MOUNT:

That's right. Partial disclosure.

ELIAS CJ:

– information?

MR MOUNT:

And secondly, because ultimately the, the schedule was in fact produced by the Crown, so there can't be any possible suggestion by the Crown that this was privileged from disclosure because it was actually produced by the Crown. So in my submission that's not an argument that's of any assistance to the Crown in this case. Plainly when the Crown chose to produce it on the 29th of April at the post-verdict hearing it was done on the basis that there was an acceptance that this was relevant evidence for Court.

ELIAS CJ:

I'm not sure that the fact that it was disclosed, which, as you say, probably removes any question of confidentiality, is an answer to the question I posed as to whether it really had to be disclosed out of fairness to enable the scope of the arguments available to counsel to be appreciated.

MR MOUNT:

Yes. In my submission it did need to be disclosed, for the reason I've attempted to articulate, which is that it's this document that reveals what information was transferred to the trial team. So once information, as the schedule reveals, was not just recorded by police for their own internal purposes but was given to a witness against the appellant and, and indeed there was reference to this schedule, albeit passing reference, by the Crown witnesses, at that point, in my submission, it's, it's plainly a relevant document and plainly one that needed to be disclosed.

ELIAS CJ:

Well I understand that. I still don't think it's closing on the particular issue of why the late disclosure of this schedule is an answer to the objection that really this was a point that should have been raised earlier. I accept that this schedule is very relevant to the appeal that you've got up and running. But I still am grappling for the linkage which makes it an excuse that it was disclosed late to you.

MR MOUNT:

Yes. Well there is of course, Your Honour, the, the reality that because the schedule indicates that – I think I'll take a step backwards. The consistent position of the Crown and the police has been that the Operation Valley officers were focused on the escape plan and that while there was evidence before Justice Andrews that they also focused to some extent on Operation Jivaro, the submission has been advanced that this was an entirely separate investigation and that the listening to the phone calls was entirely separate because it focused on other matters. What the schedule reveals is not just that the police had the theoretical ability to listen to matters covered by litigation privilege but that they actually did listen to, actually did note down as significant, and then passed them on to the trial team.

ELIAS CJ:

So it goes to materiality?

WILLIAM YOUNG J:

But this assumes–

MR MOUNT:

Yes.

WILLIAM YOUNG J:

– that these are covered by section 57.

ELIAS CJ:

Yes. Yes.

MR MOUNT:

That's right, Your Honour, yes. And that –

ELIAS CJ:

On that assumption.

WILLIAM YOUNG J:

It's the opportunity that he seeks to make that submission and undoubtedly there will be the need for submissions to be heard from both sides on that issue.

ELIAS CJ:

Yes, thank you.

MR MOUNT:

If I could take Your Honours, and I appreciate that with the electronic record it may not be simple, but if I could take Your Honour to just some examples of the types of calls that I'm concerned about in this schedule? The first is page 141 of the case. 105218

ELIAS CJ:

And of the schedule?

MR MOUNT:

Page 102 of the schedule. Now, 3rd of August at 13.45. Some discussion about the case mentioned about Wayne visiting. Max – that's the appellant – has a letter for Jenny which he will deliver through Wayne. It talks about the recovery of precursors by the police was legitimate for the farm. Now, that is an example of the type of conversation I'm referring to because the appellant faced an allegation of manufacturing methamphetamine. Part of the evidence was that precursor chemicals were found on his property and in that conversation, in the context of talking about the case, he says that the recovery of precursors by the police was legitimate for the farm. So there's disclosure there of his partial answer to that count, which is that he had a legitimate reason.

WILLIAM YOUNG J:

But is he doing this in the course of preparation for trial, or is this just a matter, a comment he's making about his case? What's the point? Why is it preparation? I mean, he knows that and he can tell his lawyer he's not having to recruit someone else to, as it were, back his story up.

MR MOUNT:

Yes, Your Honour. In part, the way that someone on remand in prison who undoubtedly is in a vulnerable position, in part the way that such a person prepares for their trial is by discussing the police evidence, discussing the case, and discusses what his response will be. Now, in my submission the purpose of that call is self-evident, that it was discussion about his case and preparation because he was

discussing with his partner the reason that he had the precursor chemicals at the property. But I understand the distinction Your Honour makes.

WILLIAM YOUNG J:
This is ambiguous at best, isn't it? Maybe this is part of preparation for trial. It's equally likely that it's idle chitter-chatter about a matter that's of interest to him. "Don't worry about the case because I've got an answer to the precursor chemicals because they were for legitimate farming purposes."

MR MOUNT:
Well, perhaps another example, Your Honour, if we go to page 48 of the case on appeal, page 9 of the schedule.

WILLIAM YOUNG J:
This is a reference to the moon?

MR MOUNT:
Yes, wants to know what the moon was on the 18th of August for his Court case. Now, in my submission he's making a specific enquiry about the state of potential evidence for the purpose of his Court case and that's, indeed, the basis on which the police have recorded that.

WILLIAM YOUNG J:
What's the significance of the date?

MR MOUNT:
Your Honour, the significance of that date is a matter that I will need to investigate from the trial record and it's not a matter that I've yet had the opportunity to do, but what does appear to be the case from the record is that it's a specific enquiry for the purpose of his Court case and must have been in preparation for trial, in my submission.

Another example at page 125 of the case, or pate 86 of the schedule, 5th of July 2009 at 16.41, Max talks to daughter Jessie, discusses Murray's disclosure. So that's the disclosure provided to his lawyer. Max says he has never been called Captain and talks about somebody cooking at his house in Australia. Now, that response as to

whether he's ever been called by the name Captain is a matter that related to his trial preparations and his response to the charge.

WILLIAM YOUNG J:

But why is it for the dominant purpose of preparation? That's something that he himself knows and he can tell his lawyer. Now, it's quite possible that – I mean, the moon example is an example that may be referable to preparation but the rest seem – the other two seem pretty much idle chitter-chatter.

MR MOUNT:

Yes, if I can perhaps refer to another example, Your Honour, at page 115 of the case and 76 of the schedule, the call on the 17th of June at 9.21. It's the last sentence. "Max wants Renee to come and give evidence to what her father said in front of Harris, which would help Max's case." Now, that, Your Honour, is an example of the appellant obviously making a specific enquiry.

WILLIAM YOUNG J:

But is it, or is it just a statement of fact?

MR MOUNT:

Well, he wants Renee to come and give evidence as to what her father said which would help Max's case, so there's a specific reference to the case and …

WILLIAM YOUNG J:

Yes, but it would be for preparation, would be saying, "Jenny, would you kindly get Renee to come along and see me or go and see my lawyer," but it might be just idle chitter-chatter. "Amongst the other things I'm thinking about, I'm thinking of getting Renee to come along and give evidence."

MR MOUNT:

Well, I suppose the interpretation that I place on the call, Your Honour, or the reference to it, is that he's saying, "I want a specific identified person to come along and give evidence." The topic is identified.

WILLIAM YOUNG J:

Yes, but do you understand the point I'm making to you?

MR MOUNT:

I do, Your Honour, yes.

WILLIAM YOUNG J:

I mean, if he said, "And so please get Murray to go and see her," or, "Please arrange for her to go and see Murray," then it would be a better point. If it's just, "We're just talking about Renee and by the way I want her to turn up and give evidence."

MR MOUNT:

Yes. Of course, from the perspective of the appellant, what is impermissible about this falling into the hands of the trial team is that there is communication about what the appellant believes will be potential evidence to assist him at trial. Now, that is information that the police are simply not entitled to. I understand Your Honour's point is that how do we know that he was – when he called and had this discussion and talked about his case and talked about what a possible witness might say, was he really preparing for trial, or was he just chatting, my submission is he was preparing for trial because he was identifying to the caller, he was vocalising what his response would be to that charge or what potential evidence might be available to him. That's the way that he was preparing for trial.

WILLIAM YOUNG J:

That's just you talking, not Mr Beckham.

MR MOUNT:

Well, it's a matter of interpreting the call that's on the schedule.

WILLIAM YOUNG J:

Did Renee give evidence?

MR MOUNT:

Your Honour, I'm not in a position to answer that question presently because I was not trial counsel, and as I say I've had this schedule for a little over two weeks. The exercise, in my submission, that needs to happen is for me to be able to go through the schedule carefully with reference to the trial evidence so that I'm in a position to assist the Court as to the direct linkages between the schedule and the trial.

Another example, Your Honours, will be at page 161.

WILLIAM YOUNG J:
And of the schedule?

MR MOUNT:
Of 122. And this conversation's the top, it's the top conversation where the appellant swears on his did child and wife, children's lives that the drugs found on his neighbour's property were not his, and –

GLAZEBROOK J:
Sorry, what page? I missed the page number.

MR MOUNT:
Oh, 122 of the schedule or 161 of the case.

GLAZEBROOK J:
Sorry. 161.

MR MOUNT:
Yes, 161.

Swears on his dead child and life, children's lives that the drugs were not his, the drugs belonged to the guy who lived in the house while he was in Australia, and then there's various speculation about what the Judge may or may not have done. But there is identification there of the, the appellant's theory that Lloyd, who's the officer in charge, was on forced leave because he was taking the whole thing personally and was forced to take leave and was paying people in prison to get statements.

Now what's potentially significant about that, in my submission, is that in the first sentence we have identification of the defence theory of the case in relation to one of the charges. Now, I can take as a given Your Honour Justice Young's –

WILLIAM YOUNG J:
Do you know who Scott Pigott is?

MR MOUNT:

He was – yes, he was someone who featured in the trial as being alleged to have been involved in the offending by the appellant.

So we have, we have disclosure in this call of the appellant's theory of the case in relation to an allegation by the police that he was in possession of drugs. The appellant's theory is that in fact an identified person, the guy who lived in the house while he was in Australia, was in fact the person who possessed them. Now, I can take as a given Your Honour Justice Young's point, that is this really in preparation for trial or is it just chatting? And if we perhaps park that point because it, it turns on the ultimate submission that I would like the opportunity to make, namely whether litigation privilege applies. But certainly what it armed the police with was the knowledge of what he appellant's response would be to that charge in advance of the trial.

Another example at page 67 of the case, page 28 of the schedule, this is the call 20 April at 8.50, page 67 of the case, page 28 of the schedule, the long call on that page. General discussion about disclosure, so we know that it's in response to the police disclosure that has been made, and then half way through the call, "Little bit of dodgy talk. Worst bit's on territory and Max 121 phone," and that's talking about intercepted evidence from the Ford Territory vehicle and the phone. "Max will say it is standard conversation. Police allege money talked about is land deals, not drug deals." Well I suspect that might have been intended to be the other way round. "Max goes on about buying land for $400,000 which sold for $600,000. Discussion about properties. Max says police will not know about some deals where he bought a house at Waipapa and sold it making $100,000 profit. Gary thinks Murray", that's the lawyer, "needs to give the police details about the purchase so they can see where the money has come from. Max thinks it should be kept until deps." So there is disclosure in that call about the appellant's response to the police disclosure, namely that he will say it's standard conversation, disclosure of what his defence will be, namely that he had legitimate access to $100,000 profit from selling some land, and also defence strategy where the appellant says well this should be kept until deps and a discussion about what instructions ought to be given to the lawyer and indeed discussion about legal advice received from the lawyer.

Another instance at page 63 of the case on appeal or page 24 of the schedule, the call on 12th of April at 16.07, page 63 of the case, 24 of the schedule. "Discuss where he was on Friday the 12th of December 2008 when he sold meth to an

undercover agent of police. Max" – little bit further down, "Max asks Jenny here he was on the 12th of December 2008 around sale to informant and discussion around Lloyd having paid informants." Now that, Your Honour, is an example that meets your earlier question, whether there's a specific inquiry. "Max asks Jenny, 'Where was I' – where he was on the 12th of December 2008 around sale to informant."

GLAZEBROOK J:
Sorry, I just was having slight trouble with the iPad. What page was that?

MR MOUNT:
63 of the case –

GLAZEBROOK J:
Thank you.

MR MOUNT:
– 24 of the schedule. In my submission it's only possible to interpret that question one way, is, is the appellant preparing for trial, because he asks Jenny where he was on a certain date where the police disclosure has alleged that he was involved in the selling of drugs to an informant, and that, that must be an example of the appellant preparing for trial.

ARNOLD J:
There's another one on page 30 of the schedule where Max asked Gary to go and meet somebody, Marilyn.

MR MOUNT:
Yes Your Honour, that's right. Max – this is the call 20th of April 14.49, "Max asks Gary to meet with Marilyn," and it's in the context of discussing photos and the intercepted conversations from the Ford Territory.

WILLIAM YOUNG J:
Who's Marilyn?

MR MOUNT:
Your Honour, I – again, because I was not trial counsel, that is a matter which I would need to refer to the trial record.

McGRATH J:

What page of the case is that?

MR MOUNT:

Page 69, Your Honour.

McGRATH J:

And what time?

MR MOUNT:

20th of April, 14.49. So it's the top the top call on that page.

McGRATH J:

Thank you. Thank you.

MR MOUNT:

Another example, Your Honour, is page 58 of the case, page 19 of the schedule. A call on the 3rd of April at 11.14. Max speaks to Gary. Gary talks about emails that will disprove the trips to China were not drugs run. Now the significance of that is simply that Gary was a defence witness who did in fact give evidence that the trips to China were not for the purpose of drugs but were legitimate. Now I accept Your Honour's point, was, was the appellant just talking out loud about the evidence or was he actually preparing for trial? My submission nonetheless is that he was preparing for trial in the only way that a prisoner in remand can do, which is by talking to people about the evidence and talking to people about what his response will be to the evidence. So the process of preparation for the trial for a person in that position on remand is one that involves looking at the police evidence, talking about his response and in some instances the recordings contain specific requests: go and do this, go and find out that, or specific identification of witnesses. On other occasions he's simply talking about what his response will be.

ELIAS CJ:

Do you need to take us to any more?

MR MOUNT:

No Your Honour, I –

ELIAS CJ:

We're still setting the scene here for your submission.

MR MOUNT:

It's also – yes, that's right Your Honour. The net effect of it, in my submission, is that the police were, and there are of course dozens more of these conversations, and I don't propose to take any more of the Court's time going through them, but the net effect in my submission is that a good measure of the appellant's response to the charges he faced was placed into the hands of the police, including one of the members of the team who was involved in prosecution, in prosecuting him, and Detective Peat, to put that in context, gave evidence for almost two days against the appellant, so he was not just a passing witness as part of the trial but he was in fact quite an important Crown witness and, indeed, the High Court Judge found that Detective Peat worked closely with the officer in charge in relation the aspects o the trial. So the disclosure to the p team was not incidental but in fact went to an important witness who worked with closely with the officer in charge.

WILLIAM YOUNG J:

I take it none of these calls were relied on?

MR MOUNT:

That's right Your Honour. That's right.

WILLIAM YOUNG J:

How long did the trial take? Three or four weeks?

MR MOUNT:

Nine weeks, Your Honour.

GLAZEBROOK J:

Nine weeks.

MR MOUNT:

Yes. Now –

WILLIAM YOUNG J:

Does it rely – have there been proceeds of crime applications? There presumably have been.

MR MOUNT:
Yes, and that, that litigation is ongoing, in fact.

So the submission – if, if leave is granted to make submissions addressing this topic the submission will be that at least some of these calls are covered by litigation privilege and in accordance with the Evidence Act and the Corrections Act that material should not have been disclosed to police, that was unlawful, and indeed, that the appellant was prejudiced.

WILLIAM YOUNG J:
How can the police control for this?

MR MOUNT:
I'm sorry Your Honour?

WILLIAM YOUNG J:
How can this be controlled for when there's an interception warrant, for instance, in relation to someone who is facing charges? I mean it's one thing to say for calls to lawyers are to be, as it were, not monitored once it's realised they're to a lawyer, but the idle chitter-chatter between a defendant and associates, how is that to be monitored for section 56 privilege?

MR MOUNT:
Your Honour raises an interesting point. Under the – and it's one of the reasons that this is a point of general public importance in my submission, under the Search and Surveillance Act 2012 litigation privilege is specifically one of the privileges that has to be taken into account and a mechanism put in place to protect that privilege when both an interception warrant or an ordinary search warrant is granted. And there is a specific mechanism in the Search and Surveillance Act to deal with that. So far as an ordinary search warrant is concerned, where it appears that there may be privileged material, the mechanism is that that material is effectively sealed, the privilege holder is given an opportunity to claim privilege, and then any dispute is dealt with by the Court. And so what – if, if –

ELIAS CJ:

What's the mechanism in the Search and Surveillance Act?

MR MOUNT:

When the police seek a search warrant, if it appears that there may be privileged material then that material is sealed and delivered to the Court.

ELIAS CJ:

Oh yes. Yes.

MR MOUNT:

But ultimately the Court is –

WILLIAM YOUNG J:

But is that section – sorry, is that – does that include section 56 privilege?

MR MOUNT:

It does, Your Honour, yes. Very explicitly in section 136 of the Search and Surveillance Act.

ELIAS CJ:

Where do we find that? That's in your bundle.

MR MOUNT:

The Search and Surveillance Act, Your Honours, is in, sorry Your Honour, in the supplementary bundle, the white bundle of the appellant's, tab 2.

ELIAS CJ:

You've got, "Additional authorities", "Supplementary…"

MR MOUNT:

Yes. Your Honour, it's the appellant's –

ELIAS CJ:

The – it's the big one. Yes.

MR MOUNT:

Appellant's supplementary bundle. The big one.

ELIAS CJ:
Yes.

MR MOUNT:
Tab, tab 2. The first section to look at is section 136. Section 136 lists the privileges that are recognised and 136(1)© includes the section 56 privilege for preparatory proceedings or litigation privilege. So that's the first thing. explicitly litigation privilege is provided for under the Search and Surveillance Act. And then in terms of the mechanism, the first section to look at is section 145, and 145 imposes a duty on a person if there are reasonable grounds to believe that anything discovered may be the subject of a privilege of a recognised under the subpart. And in such a case the first thing that the person responsible for executing the search warrant must do is to provide the privilege holder with an opportunity to claim the privilege.

McGRATH J:
Which subsection are you in now?

MR MOUNT:
Sir, at 145, subsections (1) and (2). So 145(1), if a person executing a search warrant has, has reasonable grounds to believe that anything discovered may be the subject of privilege recognised, which includes section 56, then under subsection (2) they must provide, (2)(a), must provide any person who may be able to claim the privilege with a reason opportunity to claim it.

Then in terms of the scheme of the Act we actually turn back to section 142. Under 142 a person who makes a claim of privilege has the right to prevent the search of any communication to which privilege would apply pending determination of the claim to privilege. And so the – what that, what that essentially means is that the, the disputed items don't go into police possession, they are not searched pending determination of the claim.

WILLIAM YOUNG J:
But is that for all privileges or is it – this is…

MR MOUNT:

Yes, it's, it's one – we, we go back to section 136 to see which the, what the privileges are, and that's the list –

McGRATH J:
Recognised by the Crown –

MR MOUNT:
– which includes section 56.

ELIAS CJ:
So it's not just a privilege that's claimed to stop production of the evidence. It's a right to stop search?

MR MOUNT:
That's right, Your Honour. Yes.

WILLIAM YOUNG J:
But 143 to 148 are very specific, aren't they?

MR MOUNT:
Yes –

WILLIAM YOUNG J:
143's lawyers' offices, 144 are medical premises et cetera.

MR MOUNT:
Yes. And 145 is the one which is the general –

WILLIAM YOUNG J:
It's general.

MR MOUNT:
– execution of a search warrant. That's right. Yes. So then after 142 we then actually turn back to 146 and that, that is the section which provides the mechanism by which any dispute is resolved. So 146 says that if a person executing a search warrant is unable to search the thing, and that of course is because the privilege

holder has said yes, I do wish to claim privilege, the person may secure it so that the evidence in effect is sealed and preserved.

WILLIAM YOUNG J:
But here he can't really tell that it's privileged until you've heard it, can you?

MR MOUNT:
Well, yes, the, the scenario would be, I suppose, that the privilege holder probably –

ELIAS CJ:
It's reasonable grounds to believe.

GLAZEBROOK J:
Are you suggesting – so one assumes what would happen is that the whole thing goes over to some independent person who then searches through, fishes out all of the privileged material, that is then discussed by the Court if that is challenged as being privileged material?

MR MOUNT:
Yes.

GLAZEBROOK J:
So what would happen here is if, I don't know, the, the talk to Gary or somebody, that would be put in a pot and then somebody, a Judge would decide whether that was a dominant purpose –

MR MOUNT:
That's right.

GLAZEBROOK J:
– of litigation preparation and if so that would be –

WILLIAM YOUNG J:
But when does that happen?

ELIAS CJ:
But this legislation doesn't apply though does it?

WILLIAM YOUNG J:
No, no, no.

GLAZEBROOK J:
No, no, no, but under the –

MR MOUNT:
Under the new regime.

GLAZEBROOK J:
Under the new legislation.

MR MOUNT:
Under the current law that's right.

GLAZEBROOK J:
That would be the –

MR MOUNT:
And this part is why I submit that it's a matter of generally public importance.

GLAZEBROOK J:
A bit like a *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA) injunction, the sort of matters that go into place in respect of that.

MR MOUNT:
That's right Your Honour, yes.

WILLIAM YOUNG J:
But does it mean at as soon as someone's in custody in facing charges it should be presumed that it is likely that any discussion he has with anyone else is subject to privilege and therefore everything has to go into limbo?

MR MOUNT:
Into the limbo.

WILLIAM YOUNG J:

Or is it only when that person starts to discuss the case in a context that suggests that the dominant purpose is or may be preparation?

MR MOUNT:

Well the trigger, Your Honour, is a communication that may be subject to privilege. So in my submission any search of communications of a remand prisoner, and of course they are a special category, but any search of a remand prisoner's –

GLAZEBROOK J:

Well why doesn't it apply just generally to interception warrants once someone's been charged?

MR MOUNT:

Well – yes.

GLAZEBROOK J:

Because one would assume that they might be discussing privileged matters, and they would be very likely to be ringing their lawyers in any event, one would've thought.

MR MOUNT:

Yes. Yes.

WILLIAM YOUNG J:

There might be a problem by the disclosure. It would mean any operation would effectively be disclosed as soon as the search material has to be, as it were, an opportunity is to be heard.

MR MOUNT:

Well of course we're dealing here with the scenario where someone's already been charged, so –

WILLIAM YOUNG J:

Yes I know that.

MR MOUNT:

– so we're not in the, the situation where it's a secret operation pre-charge.

WILLIAM YOUNG J:

But if it did, but if you are in a secret operation Justice Glazebrook's suggestion would mean that once you got it you had to disclose it. So you really couldn't have two warrants, for instance.

MR MOUNT:

Well the, the clear scheme of the Act in, in my submission, is that what the police must do is – what they must not do is take into their own possession prior to it being determined by a Judge and prior to any opportunity being given to the privilege holder, to have privilege tested. So my submission is that what the police did on this opportunity clearly would have been unlawful under the new Act, and I understand all of those policy implications would need to be worked through if leave is granted.

ELIAS CJ:

But you're certainly convincing me, Mr Mount, that we shouldn't touch this argument until it arises in a case where the Act applies.

MR MOUNT:

Well, Your Honour, the argument arises on this case, of course, because the appellant's submission will be that his material covered by litigation privilege was accessed by the police. Now, the Act does not apply, but the consequences of the police obtaining privileged material arise squarely on this case and are indeed relevant to the issue on which the Court has already granted leave, namely, were his rights breached and should he have received a remedy for that breach of his rights.

ELIAS CJ:

I understand how it can be looked to, but I think working out what the practical implications of this legislation are might be something we should hold back from.

MR MOUNT:

Indeed, Your Honour, and I don't suggest that this Court should attempt in this case to answer the questions about the Search and Surveillance Act.

My submission, however, Your Honours, is that in the context in which it arises in this case, the issues for the Court are primarily legal issues, and they primarily turn on

the statutory interpretation of the Evidence Act and the Corrections Act, which the statutes that tell us what is covered by litigation privilege and also which tell us what can be monitored by Corrections.

WILLIAM YOUNG J:

Do you think it would be helpful if we listened to the tapes and then if we listen to the tapes would it not be helped by evidence from Mr Beckham and perhaps an identification of the role each of the other people mentioned played or were to play?

MR MOUNT:

Your Honour, it's – in the two weeks that it's been available to me to date, of course, what I have done is I have made the application for leave to address this matter on the present –

WILLIAM YOUNG J:

But I mean, I'm just dealing with your suggestion that we can just deal with it on the fly. I mean, would it not be something that if we were to deal with we would have to listen to all the tapes, and would we not – or at least what you would say are the best tapes, from your point of view, and secondly, might we not, then, want to hear evidence about what they mean?

MR MOUNT:

Your Honour, if leave is granted, both counsel for the appellant and respondent will have to get to grips with the question of whether any application, a consequential application was made.

WILLIAM YOUNG J:

I'm just dealing with the suggestion that it's just a legal issue that we can deal with, which is what I thought was what you were suggesting, we just look at this exhibit and then look at section 56 and then resolve it on that basis. That is your suggestion, isn't it?

MR MOUNT:

It is. As matters currently stand, and that submission, Your Honour, is advanced on the basis that there are at least some calls which, in my submission, are clear on their face on the material already on the Court record as having been made for the purpose of preparing for proceedings. Now, there will no doubt be a larger category

where the Court – where there could be an argument about what the purpose was and there could be an argument about listening to tapes and so on and so forth, but from the appellant's perspective –

WILLIAM YOUNG J:
Is it the remark? Does a dominant purpose just have to be the dominant purpose associated with the remark or does it have to be the dominant purpose of the conversation as a whole?

MR MOUNT:
The dominant purpose of a particular communication. I mean, no doubt –

WILLIAM YOUNG J:
So one sentence in the middle of a 20 minute call might engage section 56?

MR MOUNT:
It might, Your Honour. In this way, a person charged with an offence may well ring their lawyer and may talk about the weather and may talk –

WILLIAM YOUNG J:
I'm not talking about the lawyer. I'm talking about the call to the wife, to the defendant's wife or something.

MR MOUNT:
Yes. The point would equally apply if it were a lawyer. You can talk about the weather. You can talk about the kids. Then you move on to a new topic. "Now, about my case, the police say that I was in Auckland on the 12th of August selling drugs to an informant. I want to know where I was. Can you help me find out where I was on that day?" In my submission, it's that aspect of the communication which attracts privilege, not the communication about the weather and the kids and those sorts of things. Otherwise, the privilege is rendered meaningless, Your Honour, if the fact that other topics are discussed during the course of the telephone call removed the privileged status from discussion about privilege, preparing for proceedings. The privilege has no meaning at that point.

I should signal, Your Honours, that there are some legal issues that would no doubt need to be determined by the Court. One of them is that in my memorandum I've

referred to the fact that the Corrections Act specifically preserves privilege over prisoner communications. One aspect of that is that it's section 122 of the Corrections Act and in that particular section there is a reference to the repealed Evidence Amendment Act (No 2) 1980. I have relied on section 22 of the Interpretation Act 1999 which says that a reference to a repealed statute should be read as a reference to the corresponding or replacement statute, and I have made the submission that that should be read as a reference to the relevant part of the Evidence Act. Now, my learned friend will point out that whereas the Evidence Amendment Act (No 2) 1980 did not refer to litigation privilege the Evidence Act does, and so there's a legal issue that will arise as to whether the Corrections Act, which specifically preserves privilege, whether that section should be interpreted as applying to litigation privilege or not.

ELIAS CJ:

Where's the provision in the Corrections Act?

MR MOUNT:

The provision of the Corrections Act is in tab 2 of the pink volume. It's section 122. The section applies to evidence that under 1B but for the monitoring would have been privileged by virtue of any provision of Part 3 of the Evidence Amendment Act (No 2) 1980 or any rule of law conferring privilege and so on.

WILLIAM YOUNG J:

What did those encompass?

MR MOUNT:

Those encompassed spousal privilege, which has now gone, but also privilege for communications with a minister and also with a doctor and a psychologist and so on.

WILLIAM YOUNG J:

All of which are picked up specifically in the Evidence Act separately?

MR MOUNT:

Yes. That's right. In that same subpart. So my submission will be that because the Corrections Act did not specify, for example, privilege with a minister, spousal privilege, privilege with a doctor, but instead referred to any privilege of the whole part that should be read as corresponding to the equivalent part of the Evidence Act,

which includes all of those same privileges, privilege with a minister of religion and privilege with a doctor, privilege with a psychologist, but also includes litigation privilege.

ELIAS CJ:
That is expressed as a privilege from production of evidence in Court. It's not expressed as a right – I suppose one has to read it in against search. I mean, you'd probably be backed into the Bill of Rights Act to make that claim, wouldn't you?

MR MOUNT:
If we look at subsection (2) of 122 says, "Evidence to which subsection (1) applies remains privileged," so that's the first clause, and must not be given. So if we read those disjunctively as two clauses in my submission the main point is that it remains privileged.

So that is one of the legal matters that will arise, and I don't suggest that it needs to be resolved presently. But it's just simply to flag that that is a legal issue that arises from the submission.

Another legal issue that arises, potentially, will be the one as to the relevance of the confidentiality of the appellant's communications relevant to preparing for his trial.

The submission, in short, that the appellant will make is that either confidentiality is not required for litigation privilege communications or that in the context of prison telephone communications the mere fact of monitoring by Corrections does not destroy the confidentiality required for litigation privilege, so there are two alternative ways in which that is potentially based.

Again, I don't suggest that the Court needs to resolve that issue today, but it is simply to flag that that's another legal issue that arises from the submission.

ELIAS CJ:
Where's the – since I've got the Corrections Act open, the limited monitoring. What's that contained in?

MR MOUNT:

There are a number of limitations. For example, section 115. No person other than the Chief Executive or an authorised person may monitor prisoner calls, so it's only specific employees within Corrections who can monitor. Then sections 117 and 188 contains the provisions relating to disclosure and there are specific purposes for which calls may be disclosed. In 117(2), for example, an authorised person may disclose for a series of purposes, including the general catch-all necessary to avoid prejudice to the maintenance of the law. Now, that's the subsection, of course, that would apply if a Corrections employee heard a prisoner planning to commit a crime or liaising with someone on the outside about the planned commission of a crime. For example, a prisoner plotting to have a cellphone brought into the jail at the next visit. Now, there's no doubt that Corrections can disclose such a call. There are various other situations in which Corrections can disclose calls. My submission, ultimately, will be that because of section 122 and also because of general legal principle it cannot be appropriate for Corrections to disclose privileged calls and certainly not to the police who are engaged in prosecuting the particular prisoner.

McGRATH J:

But the power in this case that caused Corrections to disclose was a section 117(2)(a) power, was it?

MR MOUNT:

No, in fact, the evidence from Corrections, Your Honour, was that a search warrant was required in order for them to provide the information because under the Corrections Act their legal advice was that for them to disclose under any of these sections, Corrections needed to have listened to the call first and formed a view that there was an appropriate ground to disclose. Now, because of the sheer volume of the calls, police were seeking six months worth of calls. Corrections didn't feel able to go through that exercise and that's why the police went to the Court for a section 198 search warrant. So, in fact, the –

McGRATH J:

Does that sort of preclude the operation of section 117 or override it?

MR MOUNT:

That is a legal issue I might reflect on if I may, Your Honour, but certainly in this case in practical terms that's what happened, yes.

ELIAS CJ:

We should take the morning adjournment now. How much longer do you want to be on your application, Mr Mount?

MR MOUNT:

The next topic which I can turn to is the application for leave and the criteria that apply and then a brief response to the Crown's submissions. I would have thought another half hour or so, Your Honour.

ELIAS CJ:

All right, thank you very much.

COURT ADJOURNS 11.33 AM

COURT RESUMES: 12.00 PM

ELIAS CJ:

Now Mr Mount, we're quite keen to hear from the Crown.

MR MOUNT:

Of course.

ELIAS CJ:

So we would be grateful if you could perhaps wrap up what you want to say shortly.

MR MOUNT:

Certainly.

ELIAS CJ:

We think we understand the argument now.

MR MOUNT:

Certainly Your Honour. Yes.

If I turn to the application for leave, as I signalled at the beginning of my submissions, the, the three grounds on which it is advanced are the interests of justice, prejudice to the respondent and – no prejudice to the respondent and good reason for delay.

The Court has a bundle of authorities, the appellant's additional authorities – leave application, and I will very briefly in light of Your Honour's application refer to four authorities that I submit are of relevance upon the issue of whether leave should be granted or the criteria for leave.

The first of those is at tab D of the appellant's additional authorities, and no doubt it's well known to the Court, and it's the Privy Council's decision in *Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd* [2002] UKPC 25, [2004] 1 NZLR 145 (*Foodstuffs v Commerce Commission*). That was a case in which, tab D of the additional authorities, this was a case in which at paragraph 7 in the Privy Council Progressive sought to raise a point which it had abandoned in the High Court and did not pursue at all in the Court of Appeal. At paragraph 8 that was opposed by Foodstuffs on the basis that Progressive was seeking to resile from the stance that it had adopted below to its advantage in that context and it was pointed out that the Court would not have the benefit of the views of the Court of Appeal on the issue, but nonetheless it was accepted that the issue was essentially one of statutory interpretation and the Privy Council granted leave on the basis of the lack of material prejudice and because of the importance of having the case determined on the correct legal footing.

So in my submission the significance of that authority from the Privy Council is that the considerations that were taken into account by the Court were the overall interest of justice and the importance of having the case determined on the correct legal footing, notwithstanding in fact a change of position by the parties seeking leave where they had effectively abandoned a point in the Court below and were seeking to resurrect it upon appeal.

Next case at tab E, *Telecom Mobile Ltd v Commerce Commission* [2006] NZSC 17, [2006] 3 NZLR 323, which some members of the Court will recall, a case in this Court, paragraph 15 of tab D. The Court may recall that in oral argument a new argument was raised by raised by counsel and the Court of course commented that it was unsatisfactory that a new argument should emerge as late as oral argument, which had not been signalled in writing. But because it was directed to the interpretation of a statute the Court could not properly decline to consider it and, indeed, it turned out to be the successful point.

The next authority at tab F, a decision in the High Court on appeal from the District Court concerning the enforceability of a contract. At paragraph 42 the Court explains that one of the parties sought to rely on the argument, an argument based on estoppel or past performance which had not been argued in the Court below. At paragraph 69 the Court noted that pleadings may, with leave, be amended at any stage and the Court noted that it was well established that appellate Court may allow a party to raise a new point on appeal, especially where it is concerned with matters of law and where there is no prejudice to the other party. There was –

ELIAS CJ:

Mr Mount, these authorities really are ones we're quite familiar with, and I think –

MR MOUNT:

Certainly Your Honour. Yes.

ELIAS CJ:

– the general principles aren't in issue at all. I think you can move on from those.

MR MOUNT:

Right. I can move on. Your Honour, there is one thing I might say as to the legal test –

ELIAS CJ:

Yes.

MR MOUNT:

– and that is on the, on the issue of delay. In my submission, I accept of course that the Court has a legitimate concern to avoid misuse of its process and to avoid parties from essentially wanting to relitigate matters or, or open-ended litigation. But in my submission the predominant consideration must be the interests of justice, and the, the essence of the issue relating to delay in my submission ought to be whether there is anything in the conduct of the party seeking leave that ought to preclude leave being granted. For example, if a party has made an informed waiver of a point at an earlier stage and is seeking to resile from a waiver or undertaking given at an earlier stage, or perhaps a blatant example of a party having decided to run its case on one tactical basis but seeking to adopt a new tactical direction on appeal. So the issue in terms of delay in my submission shouldn't be the finger-pointing exercise of

determining whether it is possible to imagine a world in which the point might have been run at an earlier stage, but rather a question of the overall interests of justice and perhaps whether the party seeking leave has acted in a way that would preclude leave being granted.

ELIAS CJ:

Well for my own part I really don't see that the conduct of the parties is critical. It may be relevant in some cases. In this Court, however, one of the issues of concern is whether we have sufficient perspective to embark upon an issue that hasn't properly been ventilated and may be being put up on the flight a little bit.

MR MOUNT:

Yes Your Honour. Well perhaps if I may respond to that, that issue directly. My submission is that this essentially is a question of law as to the proper interpreting of the scope of litigation privilege and a proper interpretation of the Corrections Act and whether communications for the dominant purpose of preparing for a proceeding remained privileged in the context of prisoner telephone calls and, if so, what the consequences of a breach of that are.

In terms of the evidential record, my submission is that there is sufficient material on the present record for the appellant to raise this as a legitimate and arguable point and for the Court to make a determination, at least in relation to some of the calls. Now I accept that if the, if the matter had been raised pre-trial it may well have been a situation where further evidence might have been called, and of course my submission is that the non-disclosure of the schedule is the reason that this was not raised pre-trial. But my submission is that if – in a nutshell is that the Court is perfectly capable of determining the legal issues, with respect, and that may be, that may be sufficient for the final determination of the appeal. Another possibility is that if the Court reaches a view on the legal issues and it appears that for any reason there are outstanding factual issues those might be remitted to the High Court for further determination, for example as to the question of extent.

WILLIAM YOUNG J:

Wouldn't we have to be satisfied that the sentence was wrong before we could do that? Isn't that the way section 385 of the Crimes Act 1961 works?

MR MOUNT:

That's right Your Honour. The Court would need to be satisfied –

WILLIAM YOUNG J:
So we couldn't it back on the basis that a High Court Judge is to make findings to see whether she was wrong?

MR MOUNT:
Well the Court might, for example, if, and I accept it needs to – a number of things would need to go the appellant's way, but if the Court were to reach the view that the litigation privilege argument was correct and that it's a matter that should have been taken into account, and it is only the question of quantum that remains to be determined, if you had –

WILLIAM YOUNG J:
Yes, you'd have to be satisfied the sentence was wrong though. isn't that the jurisdiction?

MR MOUNT:
The Court might well reach the view that the sentence was wrong and that a discount should have been applied, and it's only the question of quantum that might remain outstanding.

GLAZEBROOK J:
Or wrong in the sense that there was not a relevant factor taken into account, I suppose.

McGRATH J:
I think you have to –

WILLIAM YOUNG J:
Yes. I'll check it. I don't think it's quite as easy as that. I think you have to think that another sentence should have been imposed.

MR MOUNT:
Yes. And my submission is the Court might well reach that view but because there is substance to the point about the breach of the appellant's rights with relation to

litigation privilege, but the only issue remaining being how significant was that breach? In other words, how –

WILLIAM YOUNG J:
I don't think you're listening to me actually. You have to be – I'm pretty sure we have to be satisfied the sentence was wrong.

MR MOUNT:
Yes.

WILLIAM YOUNG J:
I don't think we can send it back for rehearing as to whether it was a good sentence or not.

MR MOUNT:
Right.

WILLIAM YOUNG J:
Do you – I take – but that's the proposition I'm putting to you.

MR MOUNT:
Right. my submission, Your Honour, and I – while my friend's on my feet [*sic*] I'll look at section 385 in more detail, but my submission is that the Court may well reach the view that the sentence was wrong and that therefore the jurisdictional basis to remit would be there.

So that, that in a nutshell, Your Honours, is my response to the point about the fact that new evidence might be required.

The other point, of course, in terms of whether a further evidential foundation might be required is that – is linked to my submission that there is no prejudice to the respondent, and that is because the two points raised by my learned friend in his written material are, one, as to whether the dominant purpose of the communications was for the purpose of preparation, and two, to the extent to which police officers listened to the calls.

Both of those issues, in my submission, are capable of being determined on the face of the material before the Court. But to the extent that they are left ambiguous, that is to the detriment of the appellant but not to the detriment of the respondent.

That is because it wouldn't matter, if my submission, if the police called 20 witnesses to say that they did not listen to these calls.

WILLIAM YOUNG J:
But they didn't, obviously, listen to them. How could they not have listened to them if they've recorded them?

MR MOUNT:
Well, it's there on the face of the document.

WILLIAM YOUNG J:
I think what they're saying is that the calls were not for the dominant purpose of preparation.

MR MOUNT:
Yes. In my submission, in response to that, to the extent that that issue is left unclear it is only to the detriment of the appellant but not to the detriment of the respondent because obviously the point will only succeed to the extent that the Court is persuaded, on the face of the record, that the dominant purpose was for preparation for proceedings, and so in essence any further evidence could only improve the position for the appellant rather than making it a better position for the respondent, in my submission.

Your Honours, the other matter I was proposing to address was in response to my learned friend's submission that this was an available argument in the Courts below. Perhaps if I can simply outline this. It may be that I don't need to take you through it in detail. The question is whether the schedule was in reality available to defence counsel. Perhaps if I can explain the way in which the schedule came to be produced as an exhibit, at the pre-trial hearing Detective Sergeant Lunjevich gave evidence that he had not provided any information to Detective Peat that was derived in any way from Mr Gibson's calls. That evidence was, in fact, not correct. Information had been supplied to Detective Peat that, in fact, contained Mr Gibson's calls. The way in which Detective Peat received that was that having read the 123

page schedule he requested access to the recordings and was, in fact, given a full set of the recordings, including Mr Gibson's calls.

So during the trial, in week five of the trial, the Crown filed an affidavit from Detective Sergeant Lunjevich to correct that position and also from Detective Peat, and in it he made reference to having received the schedule as the trigger to the request for the calls. The response to that from the appellant was an application for the Court to direct the hearing of further evidence on the issue of privilege. That hearing was scheduled after the verdicts. In fact, it took place two weeks after the verdicts in the trial. At the hearing, obviously, the schedule was mentioned as being the trigger for the supply of the recordings, but it was only in the re-examination of Detective Peat that the schedule was, in fact, produced, and it came about in this way. When the Crown re-examined Detective Peat, they asked him about the schedule and his evidence was that it was, in fact, similar to the 11 page schedule but –

ELIAS CJ:
This is covered in your written submissions.

MR MOUNT:
It is, Your Honour. I'm almost finished on the point.

ELIAS CJ:
Yes, but is there an additional point that you want to make about it?

MR MOUNT:
Your Honour, I'm not sure that it was made clear in the written submissions that it was purely in re-examination that this arose.

ELIAS CJ:
In re-examination, I see.

MR MOUNT:
Nor, I think, in the written submissions was it made clear on the face of the evidence that the document was in Court at most 10 or 15 minutes, and that is simply the basis on which my submission is made that although in theory it was available to the

defence, in the unusual circumstances of this hearing in reality it was not. The further point being that –

ELIAS CJ:
What was that hearing being held to determine?

MR MOUNT:
To determine the appellant's application that the Court direct further evidence to be called on the issue of access to privileged calls.

ELIAS CJ:
For the purposes of the verdict?

MR MOUNT:
For the stay application, yes. Because the Peat and Lunjevich affidavits arose in week five of the trial, the Court made a determination that it would deal with the matter after the verdict and that's the reason it happened after the verdicts.

Your Honour, for reference should you need to look at this, the evidence I've been referring to is in volume 4 of the case on appeal and the relevant passages where the schedule was ultimately produced begin with the re-examination on page 13 of volume 4, simply for the reference of the Court.

To summarise, therefore, Your Honours, the application is for leave to present submissions on this material which is an opportunity the appellant seeks in the interests of justice. It is understood that if leave is granted there will be a need for consequential orders in terms of the hearing of the appeal and perhaps that is a matter that I might address once the Court has made a decision as to whether leave will be granted.

Unless there are any further matters at this stage, Your Honours.

ELIAS CJ:
Thank you, Mr Mount. Yes, Mr Boldt.

MR BOLDT:
May it please Your Honours.

The Crown does oppose this application for leave, Your Honours. The issue of the relationship between litigation privilege and calls that are recorded pursuant to the Corrections Act is one of wide-ranging significance. It is an important point but it is not an issue in this case. Despite days of evidence, despite three first instance judgments, despite a lengthy and well-reasoned decision of the Court of Appeal, this is the first suggestion the appellant's litigation privilege has been breached, at least in calls not to his lawyers. I should say section 56 of the Evidence Act was raised at first instance as an adjunct to the breach then asserted of legal professional privilege, but this is the first occasion on which there has been any suggestion there has been a separate breach with regards to, and I think the number is 250 to 300, other calls to persons other than Mr Gibson.

GLAZEBROOK J:
That's not a submission that it's not an issue in this case. It's a submission that's too late to raise it, isn't it?

MR BOLDT:
Well, I suppose it's probably better to say it has never been an issue in this case until now. As a result of that, the evidential record on the point is patchy and incomplete. The focus in the High Court was on legal professional privilege throughout. Other calls were mentioned but only mentioned incidentally. So there was, for example, never an assertion by the appellant himself when he gave evidence that he had made a number of telephone calls for the dominant purpose of preparing for his litigation only to find that the privilege in those calls had been breached.

There was no evidence on his part that he intended those calls to be confidential, which is, of course, a prerequisite for the assertion of privilege in these situations. In fact, his only evidence on the point was entirely to the contrary and if I can ask Your Honours briefly to look at the record in volume 3 of the case on appeal when the appellant himself was giving evidence at I think it's page 17 of the case on appeal which is page 14 of the, the learned Judge's notes of evidence –

ELIAS CJ:
Sorry…

GLAZEBROOK J:

Sorry, you'll have to be a bit slower so we can find it. What page?

McGRATH J:
Which volume? 1?

MR BOLDT:
It's volume 3, Sir, and it's page 14 of the transcript which I think is page 17 of the case on appeal.

ELIAS CJ:
Sorry, volume – say it again?

MR BOLDT:
It's volume 3, Ma'am, and you'll see the I think first document there is notes of evidence taken, this is in during the first stay application before Her Honour Justice Andrews and at page 14 of the transcript, which is page 17 of the case, Mr Beckham himself was talking about what he understood the position would be with respect to –

ELIAS CJ:
Sorry, is it 14 of the transcript?

MR BOLDT:
14 of the transcript –

ELIAS CJ:
Yes. Yes, thank you.

MR BOLDT:
– and, and that's, that's 17 of the, of the case.

He was being asked about his, in effect his expectations as far as privacy and his phone calls were concerned, and he made the point that he regarded phone calls to Mr Gibson as confidential and that, in spite of the fact every one of those calls began with the message, "This call will be recorded, don't carry on with it unless you're comfortable with that," he, he understood his calls to Mr Gibson would be, would be confidential, wouldn't be recorded, wouldn't be listened to. But then he was asked,

and I'm, I'm looking, Your Honours, around about line 25 down, "Was it your understanding that calls to a lawyer were in a different category from other calls you might make?" Answer, "Definitely." What was your understanding with, say, calls to family members, something like that?" And at line 29, "Understood they could be listened to, and friends also."

So what we have there from the appellant is far from an assertion that he believed he could freely discuss confidential matters pertaining to his case with family and friends. There was a clear –

GLAZEBROOK J:
Well the same argument would apply, wouldn't it, if he misunderstood about the lawyers. You'd say, "Well he wasn't expecting it to be confidential because he hadn't understood that they were going to be confidential." And can't possibly take away the privilege with a lawyer can't it? So why would it take away the other privilege?

MR BOLDT:
Well it can, Ma'am, because we have –

GLAZEBROOK J:
So if he hadn't any idea that calls to his lawyer would be privileged, listened to that message and rang anyway, that would override legal privilege? Is that the submission?

WILLIAM YOUNG J:
It might do if you just deliberately have a discussion with a solicitor in the presence of a police officer who you know is listening and you're happy to proceed on that basis. That may not be privileged.

MR BOLDT:
Well, indeed –

GLAZEBROOK J:
Oh, possibly in circumstances like that, but a generalised message on the telephone, I can't imagine that…

MR BOLDT:

But this leads into my point that litigation privilege is a very different creature to legal profession privilege. It's –

ELIAS CJ:
But isn't that a point that we would have to consider if the amendment is granted? And you might well be right about that.

MR BOLDT:
Well, yes Ma'am, and the point really is we are being asked to stretch what is in the, the record here. We are being stretched to, being asked to stretch the evidential foundation in this case, which was at all times targeted towards an asserted breach of legal professional privilege, and look for scraps of evidence that also touch on this question of litigation privilege.

WILLIAM YOUNG J:
Well there'd have to be raw evidence. Probably.

MR BOLDT:
Well, there would in the first instance, Sir, at the very least have to be an assertion on the part of the appellant that he was making particular calls with the dominant purpose of preparing for his –

WILLIAM YOUNG J:
We'd have to listen to the calls, we'd have to hear what the appellant has to say –

MR BOLDT:
Mmm.

WILLIAM YOUNG J:
– and we may have to hear what the police have to say in terms of context.

MR BOLDT:
Indeed, Sir, and my friend's response to that is to say, "Well it's self-evident if you look at the schedule because there were bits and pieces in various summaries which referred to preparation for trial, but of course the police are only going to write down what's of interest, and if we have a couple of sentences where the litigation is touched on in the course of a 20 minute conversation, those are the ones the, the

police are going to be recording, and what we can't say based on the, the fragmented nature of those summaries is that this was a call made for the dominant purpose of preparing for litigation.

GLAZEBROOK J:
Well is that the test?

ELIAS CJ:
No I don't think it is under section 56. It's the communication that you have to look at and that may be a tiny part of the conversation.

MR BOLDT:
Which –

WILLIAM YOUNG J:
Well that's as to whether it's dominant though. I mean it could be for the incidental purpose.

ELIAS CJ:
Which then – what –

GLAZEBROOK J:
Well, yes, but it doesn't –

ELIAS CJ:
– the communication was?

GLAZEBROOK J:
– have to be of the call as a whole.

WILLIAM YOUNG J:
Yes, depends on what you're looking at.

ELIAS CJ:
Yes.

MR BOLDT:

There, there would certainly need to be an examination of the primary evidence rather than this summary the police have prepared, this schedule. This schedule is, with respect, work product. It is the police's impression or summary of some of the calls they listened to. It's not and never was intended to be confidential and my learned friend actually acknowledged that the appellant actually had the best evidence, the, the calls themselves, from approximately November or December of 2010. The defence could've prepared an identical schedule if it had wished and it is certainly going to be my submission when I come to freshness that the, the schedule –

GLAZEBROOK J:
With 10 police officers taking months? Was that the right – do you accept that it took the 10 police officers a long time to make the schedule or do you say that they could've done it in, in a few days?

MR BOLDT:
Oh, well the schedules themselves were, were prepared over a – with some urgency and haste over a period of, of days. The, the calls themselves ranged back months but what the evidence disclosed was that because this was regarded as an urgent inquiry they sat down and intensively and pretty much around the clock began screening and summarising.

GLAZEBROOK J:
Well how long did it take them?

MR BOLDT:
Gosh, Ma'am, I would, I would need to go back and check the evidence.

GLAZEBROOK J:
Well but the submission was that they could've easily have done the same exercise. So could they easily have done the same exercise on the hoof with somebody listening to them and it would take them five minutes?

MR BOLDT:
Well, I'm – no Ma'am and I'm not, I'm not saying that, and if I said it could easily have been done then I probably misspoke, but this was a summary of calls and the appellant had the calls. He of course also knew from around the middle of 2010

when he first received the affidavit from, from Detective Good that upwards of – that something close to 2000 of his calls had been listened to and he knew because that affidavit, Mr Good's affidavit actually broke all those calls down by recipient. So he knew, for example, that hundreds and hundreds of calls to his partner, Ms Taylor, had been intercepted. He knew that six months before this application, perhaps four or five months, before this application was even filed. And he knew what had been discussed and he understood the degree to which calls to people other than his lawyers were in connection with the litigation. So in other words he had all of that information and could have made that assertion at a far earlier stage if he'd wished. But the point about litigation privilege is that it –

ELIAS CJ:

Sorry, what did he know? He knew – he suspected that he was being listened to and he knew that it was being monitored for –

MR BOLDT:

Mmm.

ELIAS CJ:

– under the Corrections Act.

MR BOLDT:

Well, perhaps the best document to take –

ELIAS CJ:

He didn't know about the warrant.

MR BOLDT:

Well he, he did, Ma'am, by the 25th of June 2010, and if I can take Your Honours to, to that document, can I ask Your Honours to look at volume 2? It's actually volume 2, part 2 in the material I'm in.

ELIAS CJ:

But are we concerned with that period? That's outside the period covered by the schedule.

WILLIAM YOUNG J:

Yes, well the point is that he knew about it and could have raised it earlier.

ELIAS CJ:
Oh, oh sorry.

WILLIAM YOUNG J:
That's the argument.

ELIAS CJ:
I'm sorry. Yes, yes.

WILLIAM YOUNG J:
That is the argument isn't it, Mr Boldt?

MR BOLDT:
It is, Your Honours, and just very quickly if I…

WILLIAM YOUNG J:
When the –

GLAZEBROOK J:
Volume 2 what?

WILLIAM YOUNG J:
What's against you is the proposition that he may not have appreciated, probably didn't appreciate, there was such a thing as litigation privilege as opposed to professional privilege.

MR BOLDT:
No but his lawyers did.

ELIAS CJ:
Well…

MR BOLDT:
And, and we're, we're looking at, at – it's page 138 of volume 2. And this is an affidavit filed in connection with the appellant getting bail. And if Your Honours can

see, it's affidavit of Bruce Leonard Good, sworn 25 June 2010. And if I can take Your Honours for a start…

ELIAS CJ:
Sorry, I've just put – I have to find where it is. What page?

MR BOLDT:
The affidavit itself begins at page 138.

ELIAS CJ:
Yes, I've got the affidavit. What page of the affidavit?

MR BOLDT:
And if I can take Your Honours to page 141, Your Honours can see there –

WILLIAM YOUNG J:
At the bottom.

ELIAS CJ:
Oh yes.

MR BOLDT:
– paragraph 18. So that discloses the, the calls received pursuant to the first search warrant. And what we can see there, for example, is that the appellant knew that 537 calls to his partner, Ms Taylor, had been seized. If we go over the page we see paragraph 22. This is the next tranche of calls. These came from Customs, paragraph 22. Paragraph 30, third tranche of calls is set out there. The affidavit also set out the way that the privileged calls were, were screened. And then there's a final schedule in paragraph 31.

GLAZEBROOK J:
Is that a full schedule or is that – is that a summary of – it's just for my marking. I haven't got down to that yet. Is that a –

MR BOLDT:
No, no I believe that's all of them, yes. That's all of the calls.

GLAZEBROOK J:

So that's – so at 31, that's a schedule of –

MR BOLDT:

That's a –

GLAZEBROOK J:

Oh okay.

MR BOLDT:

That's the analysis of the fourth tranche.

GLAZEBROOK J:

All right. That's fine, yes.

MR BOLDT:

And so we, we can see that – and, and it's – I raise this because the assertion here is the appellant had no opportunity to lay an evidential foundation for the claim advanced in this Court, that litigation privilege was breached with respect to calls other than to Mr Gibson. In fact, even in the many months before he received the calls themselves he knew what he police had. Ironically, it was the seizure of the, the calls to the lawyer which was one of the key factors tipping the scales in favour of the appellant receiving bail, which he did shortly after. He said, "I'm worried because they're listening to my calls and I can't communicate freely with counsel," and Her Honour Justice Duffy took that into account, and interestingly it was asserted at that time on behalf of the appellant that a grant of bail would, would remedy the situation and that is then what happened. But the appellant had everything he needed at that stage to say first of all that these were calls with the dominant purpose of preparing for the litigation and secondly that they were intended to be confidential, notwithstanding that he knew they were being listened to and recorded. He went ahead anyway, and I, I do take the point that if I have a conversation if I'm a person involved in litigation and I have a conversation about the case in the presence of a third party, and I undertake that conversation nonetheless, I cannot be said to be operating in circumstances where I have an expectation of confidentiality. In fact in terms of section 65 of the Evidence Act I would be, in my respectful submission at least, deemed to have acted in a way inconsistent with a claim to confidentiality.

McGRATH J:
And waive privilege?

MR BOLDT:
Yes. At – 65(2) sets out circumstances in which privilege is waived. Section 65(2) says, "A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality."

GLAZEBROOK J:
See, the trouble with this though is that he didn't have a choice about his calls being monitored and knew that, so the argument must be he can't make any calls to help himself prepare for trial –

MR BOLDT:
Mmm.

GLAZEBROOK J:
– and that he would have to, if he was going to do that, always go through his lawyer at presumably quite a lot of expense that – and also probably of not overly much inclination of his lawyer to go running off sending messages to people. Understandably.

MR BOLDT:
Mmm. Maybe, but we do see, and it's been referred to already in conversation with Your Honours this morning that there were times when there, there were suggestions, "We shouldn't really be talking about this on the phone because people are, people are listening," and –

ARNOLD J:
There was access to an unmonitored phone wasn't there?

MR BOLDT:

Yes Sir, and that's, that's the other point, although I think, in fairness, that that doesn't really answer Her Honour Justice Glazebrook's point because those do need to be calls to your lawyer if you –

ARNOLD J:

Oh, I see.

MR BOLDT:

– if you wish to have a private and unmonitored conversation.

ELIAS CJ:

But what about section 24 of the Bill of Rights Act and the opportunity to have – is that the – have, to be able to prepare a defence?

MR BOLDT:

Well, and, Ma'am, that does need to be balanced and, and indeed the, the Corrections Act, in my respectful submission, strikes the balance between ensuring litigants can communicate freely with their legal advisors. It does so by ensuring that calls where the prison knows the calls are to your lawyer are exempt from monitoring, and it's also done in practice by the prisons ensuring ther are private and unmonitored telephones available to prisoners to call their lawyers in, in circumstances where there's not even any suggestion anyone might be listening. The Corrections Act though then does provide that all other communications need to be monitored and they are monitored for very good reason, and that is something explained carefully to all inmates, reinforced whenever they are inducted into a new prison, and which they're reminded about at the commencement of every call. So that, in my respectful submission, is where the balance is struck. But what is interesting is that in this case the appellant did say, "Look, in spite of all that I am struggling to prepare my defence adequately. I can't, I don't have sufficient private access to my advisors and to that one might also add my witnesses and others, and I need bail as a result," and that was one of the key factors which impressed Justice Duffy in granting bail.

GLAZEBROOK J:

Well, but if that didn't impress Justice Duffy then his ability to prepare a defence and anybody's ability to prepare a defence would be hampered. If this – if the litigation

privilege does exist and it can be dissipated merely by the fact that you know that your calls might be listened to.

MR BOLDT:
Well…

GLAZEBROOK J:
Because it doesn't mean they will be listened to, it just means they might be listened to because somebody has a lot better things to do, I would imagine, than sitting listening to endless telephone calls.

MR BOLDT:
Well, indeed, Ma'am, and all of which underscores why this is an important point which deserves, deserves a case of its own where it arises squarely and not as a, as a clip-on, I say, with, with great respect to my friend. This is a, this is a late brainwave but it's one which, if it's going to be raised in my respectful submission does need to be raised squarely, it needs to be the subject of evidence, it needs to be the subject from within the prison about implications of any different regime, and –

GLAZEBROOK J:
Why would that – I can understand there will be difficulties in, in the prison possibly, but why would that change the interpretation of a section of the Evidence Act?

MR BOLDT:
Well, Ma'am, I, I anticipate at least that there'll, there'll be an assertion the Evidence Act provision needs to be read consistently with the Bill of Rights Act and it certainly would be the Crown's submission we are very much in the territory of justified limitations on both freedom of expression and – I wouldn't describe it as a, as a limitation on the, on facilities to prepare a defence. It's a, I guess, modification because unlimited access to lawyers is preserved, but –

GLAZEBROOK J:
So you have unlimited access to lawyers but no access to anybody else to have a communication for the dominant purpose, assuming that's what section 56 (inaudible 12:40:33).

WILLIAM YOUNG J:

They can come and see I suppose but it is a limitation.

MR BOLDT:

It's a limitation. Look, the problem would be, I'm sure, and I –

ELIAS CJ:

Can I just – I'm just looking at – sorry, you should finish that answer. I wanted to take you to the Corrections Act.

MR BOLDT:

I, I may've lost my train of thought. Oh, I think, I think I know what I was going to say. The, the problem is if, if the rule were broadened to include not only anyone acting for you in a, in a legal capacity but also anyone who you think might help you with your defence and that calls to such people will not be monitored, I –

GLAZEBROOK J:

But there's not suggestion they're not monitored, is there? It's just that there has to be a system in place if they're provided to the police to – in the same way that there would be with a lawyer. Now, that's subject obviously to the Criminal Disclosure Act 2008, which I'm not getting into.

MR BOLDT:

Mmm. Well, Ma'am, I actually believe there is a suggestion to that effect. The, the Corrections Act defines privileged communications in a particular way. I know it's to be asserted by my friend that –

GLAZEBROOK J:

But I don't think they say that's exempt from monitoring do they? I didn't, I didn't understand that to be the argument.

MR BOLDT:

Well, the –

GLAZEBROOK J:

Because it's very difficult to exempt something from monitoring. What you do is you just monitor all of the phone calls, don't you?

ELIAS CJ:

Well I don't think that's available under –

WILLIAM YOUNG J:

No.

ELIAS CJ:

– the Corrections Act. Section 112 sets out the purposes and they don't include, you know, carrying on an investigation of an offence with which the prisoner is charged.

WILLIAM YOUNG J:

But it does include detecting and investigating. That's the principal purpose. I mean that – the argument again –

ELIAS CJ:

But it's detecting and investigating –

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

– offences committed by prisoners.

WILLIAM YOUNG J:

That's right, but the purpose was, in Valley, don't forget this is a separate investigation, this is –

ELIAS CJ:

Yes, oh, no, I understand the Valley argument but really it's a bit hard to maintain the Valley argument in the face of the schedule.

MR BOLDT:

Well, Ma'am – well, it's not in fact, Ma'am, and I'm, I'll be –

ELIAS CJ:

Right. Yes.

MR BOLDT:

– be happy to come to that in due course –

ELIAS CJ:

Yes. Yes.

MR BOLDT:

– although that might be a matter more for the substantive appeal than for the leave application.

ELIAS CJ:

But is the – but it does look on the face of it that 112 isn't apt for collecting up information of relevance to an offence for which is already, for which the prisoner's already charged.

MR BOLDT:

Well, that's not the purpose of the monitoring –

ELIAS CJ:

No.

MR BOLDT:

– but it does, but if we look at 117, Ma'am, we then look at the purposes for which seized information may be used.

ELIAS CJ:

Yes, well I understand that.

MR BOLDT:

And –

ELIAS CJ:

But if it's been obtained for a purpose – it may have been obtained for the Valley purposes. That's really what you have to establish.

MR BOLDT:

Well, I don't think so Ma'am because the – what section 112 sets out is why you're allowed, why Corrections was allowed to listen in in the first place, why it is they listen in on literally every phone call that goes out from a, from a prison payphone and – with the exception of exempt calls. Those can be automatically excluded. But every other call, it's well known and it's emphasised to inmates, "Every call you make from this public phone here is going to be recorded."

WILLIAM YOUNG J:
Well is the point that the section 17 uses go beyond the section 112 purposes?

ELIAS CJ:
Well how can they?

WILLIAM YOUNG J:
Well they could be – I mean there could be a – the purpose of doing something is X but having legitimately obtained information for that purpose you may use it for incidental purposes.

ELIAS CJ:
Almost like a Court of Appeal judgment.

GLAZEBROOK J:
Well the question will be whether that's subject to privilege.

WILLIAM YOUNG J:
What?

ELIAS CJ:
Sounds like a Court of Appeal judgment.

WILLIAM YOUNG J:
Well. Anyway.

GLAZEBROOK J:
Well the question is whether 117 purposes would be read subject to privilege and the right to conduct a defence properly undertaken in the Bill of Rights, which may or may not be the case but there's certainly an argument available there.

MR BOLDT:

Well, yes there is, Ma'am, and it's, as I say, I, I certainly don't shrink from acknowledging it would be an important point in an appropriate case –

GLAZEBROOK J:

Mmm.

MR BOLDT:

– but –

WILLIAM YOUNG J:

So you're saying it's quite – that if we get into litigation privilege it's quite a big case, quite a big issue?

MR BOLDT:

All by itself. Indeed.

GLAZEBROOK J:

Mmm.

MR BOLDT:

And, and as I say, it is a, it is a tack-on here. It's, it was never the focus of any of the hearings in the Courts below and for that reason we don't have a proper evidential foundation squarely directed at, at these calls as opposed to calls to the Mr Gibson.

ARNOLD J:

Just on that though, Mr Mount said that effectively the appellant took the risk there. I mean at the end of the day the appellant has to show that litigation privilege was breached and Mr Mount took us to various entries on that schedule and just, as I see them at the moment, a number of them seem to me to be equivocal really. And if that's all the information there is Mr Mount's point, I think, was, well, he doesn't get there. But one or two of them or maybe three of them did talk about, "Will you please go and talk to X. Look at this," and those may be more arguable, depending on what the circumstances –

MR BOLDT:

Mmm. Mmm.

ARNOLD J:

– produce. Isn't that the answer really? That we're not, we're not going to have a full-blown inquiry into all of this. At the end of the day the appellant wants to put forward a position. He's content to rely on the materials that he's got plus whatever subsidiary stuff he can come up with. He either gets there or he doesn't.

MR BOLDT:

Mmm.

WILLIAM YOUNG J:

You may wish to rely on the Corrections Act and on the basis that it should be construed in light of what are reasonable and justified limitations affecting the way in which it might be applied in light of the Bill of Rights.

MR BOLDT:

Well, indeed, and I, and that was one, one point that I endeavoured to make with Her Honour Justice Glazebrook's line of questioning. And, and why there would probably need to be – there would need to be evidence from people within the prison service as to the implications associated with –

GLAZEBROOK J:

But what are the implications associated just with not being able to use privileged material in Court and having to have some system for working out what's privileged or not before you hand it over to anyone.

MR BOLDT:

I, I –

GLAZEBROOK J:

And of course the Corrections answer to that was, "Well you go and get a search warrant because we're not going to go and see whether we can hand it over under section 117." So the Corrections answer was to put its hands up and say, "Well, we're not doing anything. We're not handing over anything until you get an order for you, for that to be done."

MR BOLDT:

You would almost need to have – if, if my friend's analysis is correct, sentence by sentence analysis of transcripts of, of calls, because some bits will probably just be general chitchat, other bits may have a criminal purpose associated with them, other bits, all within the same call, might have some maybe directed towards particular litigation which is pending.

ELIAS CJ:

But these – just sticking with the Corrections Act purposes for a moment, the, the monitoring – the Privacy Act 1993 applies to the monitoring, so what's the problem with saying, "If you go outside the limited purposes for which you can disclose the information that you have properly obtained for the purposes prescribed by the Act you have to get a warrant"?

MR BOLDT:

Well, there may be no – well I don't believe there would be any problem with that, Ma'am, except of course that they did get a warrant here.

ELIAS CJ:

Yes. I understand that.

MR BOLDT:

And also, I must say, looking at –

ELIAS CJ:

When was the warrant obtained, by the way?

MR BOLDT:

The first warrant was obtained in August of 2009.

ELIAS CJ:

So, so –

MR BOLDT:

August of 2009 and it –

ELIAS CJ:

So a lot of this stuff is before – this is the Corrections Act stuff?

MR BOLDT:

Correct, Ma'am, because of course all of the appellants phone calls had been monitored and the way it works is they hold the audio recordings for up to six months and they then drop off the system. So what this was was, if you like, a request to pull the last six months' worth of calls that had been obtained.

ELIAS CJ:

So the warrant authorised the delivery of this information –

MR BOLDT:

Yes, yes.

ELIAS CJ:

– did it? Where do –

MR BOLDT:

Correct.

ELIAS CJ:

– find the warrant? Volume…

MR BOLDT:

Now, I can find you that Ma'am.

GLAZEBROOK J:

I've got a note of it, but…

ELIAS CJ:

Oh yes, I took a note of it too.

GLAZEBROOK J:

Yes.

ELIAS CJ:

It was before I got my iPad down.

MR BOLDT:

The second warrant is at 67. The first warrant…

WILLIAM YOUNG J:

Of, sorry, which page?

ELIAS CJ:

Volume 2.

MR BOLDT:

Volume 2, and the first warrant is at 29 of volume 2.

GLAZEBROOK J:

And the challenge here is to the handing over of it, it's not to the collection of it. so I would've thought that Corrections can collect all this material. There's nothing in this case that says they can't collect all of the materials, in fact including the exempt calls, because they are made on a phone that the person takes the risk – well, knows that it's being monitored rather than the, going to the unmonitored phone.

MR BOLDT:

Well actually, Ma'am, I think – I don't believe the calls, the exempt calls can in fact get monitored.

GLAZEBROOK J:

Well they can be collected because they couldn't possibly know whether somebody's ringing their lawyer or not and switch off the recording machine.

MR BOLDT:

In fact I believe the, the evidence is to the contrary, Ma'am. What –

GLAZEBROOK J:

So – what? So every time a lawyer's number is rung the recording, the audio recording switches off? That actually can't be the case. They must record the calls. They don't listen to them but they don't record them.

MR BOLDT:

I will need to check that over the break, Ma'am, because I –

GLAZEBROOK J:

Well then how did they –

MR BOLDT:

– I believe the –

GLAZEBROOK J:

How did they have Mr Gibson's calls if they –

MR BOLDT:

No. Well –

WILLIAM YOUNG J:

Well they probably try and do it by using, letting them use a non-monitored phone.

GLAZEBROOK J:

Well exactly. I mean they wouldn't have had the calls to Mr Gibson if they hadn't been recorded automatically by the Corrections department.

MR BOLDT:

That's true, Ma'am, but, and this, this was an issue and I believe will still be in issue when we get to the substantive appeal. There is a system within Corrections whereby numbers, once they are known to belong to your lawyer, get programmed so the recording does not kick in. And that actually happened with respect to the appellant's calls to Mr Gibson but only after the second search warrant was presented to Corrections. Now what had happened, and there was, there was a little bit of evidence of this from the Corrections expert, from the Corrections witnesses, they knew the name of the person being called and they knew his number, but they said, "It doesn't look as though the appellant told us these were actually calls to his lawyer because if he had –

GLAZEBROOK J:

Oh okay.

MR BOLDT:

– we wouldn't have recorded them. And it was only when it came time for the second warrant and the police said, “Look, we’ve been – we, we actually got a bunch of calls from Mr Gibson this time. We don't want any more calls from Mr Gibson. Please don't give us any,” that Corrections also went, “Oh. Actually, we shouldn't have even been recording those,” and they then took steps within their internal systems to keep Mr Gibson’s calls away from monitoring.

GLAZEBROOK J:

So they don't have a system for asking who your lawyer is and keeping that information up to date?

MR BOLDT:

Well, there was certainly some, there was certainly some cross-examination bat that. I don't believe anyone was able to locate the final form filled out by the appellant, but what that should have noted was, “This is my lawyer,” and the Corrections witnesses, I believe, said, “Look, he can't have indicated that because if he had we wouldn't have listened. We, we would’ve taken it off the list of calls that we monitored.

McGRATH J:

Are you saying Corrections don't make any enquiry into what the subject of conversation’s about?

MR BOLDT:

No.

McGRATH J:

It’s a call of Mr Gibson.

MR BOLDT:

Correct.

McGRATH J:

Because section 114 only prohibits certain calls to lawyers, doesn’t it? Those relating to the prisoner’s legal affairs. And there must be a solicitor-client relationship.

MR BOLDT:

Yes.

McGRATH J:

So you're saying as far as Corrections are concerned, never mind all of that. If it's to the number of a lawyer they're not interested and they, they stop it there?

MR BOLDT:

I do believe that's the case, Sir. I'm going to need to – I, I think the way, the way Your Honour's put it to me makes me want to check again, but –

McGRATH J:

Right.

MR BOLDT:

– but certainly I believe that's the case.

McGRATH J:

Thank you.

MR BOLDT:

They, and, and they, they acknowledged, they did acknowledge that if they'd known a year earlier or if it'd been drawn directly to the right person's attention a year earlier that Mr Gibson was acting for the appellant, then the calls wouldn't have been monitored. And monitored includes recording, as well as listening.

GLAZEBROOK J:

All right.

MR BOLDT:

So, so that was the situation.

McGRATH J:

Yes.

MR BOLDT:

And as I say, it was taken off once, once the police alerted Corrections to the fact there were lawyer calls in among the class they received.

ELIAS CJ:

Just ask you, go back to when u said that this argument is a tack-on and we don't have an evidential foundation for it, that must often be the case where, where a point like this is taken on appeal, on a sentence appeal. It's – there's only evidence here because of the stay applications that were made.

WILLIAM YOUNG J:

Dealt with, it was probably dealt with under the Crimes Act and the right to hear further evidence on appeal isn't it?

MR BOLDT:

Mmm, and - well, indeed, Sir.

ELIAS CJ:

But, no, I understand all that. What I'm just, I suppose, querying is whether, is whether it's a very strong point to say, "Well it's a bit late because we don't have an evidential foundation." Because very often there won't be an evidential foundation until you get to the Court of Appeal and we're only an appellate step away from that. I'm just really wondering how convincing that, that argument is.

MR BOLDT:

Well, Ma'am, I'm not saying it's, it's decisive and obviously this Court has the discretion to hear new points and effectively sit at first instance, which is what this is an application to invite Your Honours to do.

ELIAS CJ:

Well, first instance though would really be in the Court of Appeal in most, in many of these cases.

MR BOLDT:

True, Ma'am, and it does, it does happen not, not infrequently in the Court of Appeal.

ELIAS CJ:

Can we send this back to the Court of Appeal?

WILLIAM YOUNG J:

No.

GLAZEBROOK J:

No.

WILLIAM YOUNG J:

I got looking, I looked at section 385. It was amended in 2008 I think to permit cases to be remitted back, but the context very much – well, it makes it clear to my way of thinking that that can only be done if the Supreme Court's of the view that the, or the Court of Appeal is of the view that the sentence imposed was wrong. Because the purpose is to send it back for the purpose of setting another sentence.

GLAZEBROOK J:

Although, although if you find that they haven't taken into account a whole lot of relevant considerations or mitigation, one might've thought you could still send it back for that to be done.

WILLIAM YOUNG J:

Well it's section, I think it's section 385(2). It reads to me, and not quite so clearly as the earlier version but pretty clearly, that you have to be of the view that the sentence was wrong.

MR BOLDT:

Mmm. And…

WILLIAM YOUNG J:

Because the options given to the, the first instance Court do not include uphold the original sentence.

MR BOLDT:

Mmm. And it is going to be an issue when we, when we come to argue the substantive appeal in any event –

ELIAS CJ:

Yes.

MR BOLDT:

– the degree to which any of this is relevant to the sentencing exercise. It's certainly our submission that even characterising much of what happened as a breach of the Bill of Rights Act, this would – a reduction in sentence would be an inappropriate remedy here because the appellant acknowledged that no prejudice of any kind arose from the way his Operation Valley calls were dealt with and that he suffered no prejudice at all in terms of the fairness of his trial. That was the basis on which the Court of Appeal rejected out of hand the suggestion there should be a reduction of sentence and said, "Well, there's simply no connection between the sentencing exercise and the wrong you assert." And certainly our submission will be that although the Court's got a broad remedial jurisdiction under the Bill of Rights there does need to be a logical connection between the particular breach and the remedy being applied.

Now, Your Honour, I see we've, we've reached –

ELIAS CJ:

Yes.

MR BOLDT:

– 1 o'clock. I, I wouldn't mind, if may, over the break just checking that Justice McGrath raised. I don't foresee going on very much beyond 2.15.

ELIAS CJ:

All right. Well it doesn't look as though we're going to be embark on the appeal. However, perhaps we can confer about that. We'll take the adjournment now.

COURT ADJOURNS: 12.59 PM

COURT RESUMES 2.20 PM

ELIAS CJ:

Yes, thank you, Mr Boldt.

MR BOLDT:

Now, there are just a couple of areas where I've done a bit of checking over the break and in particular in answer to Your Honour Justice McGrath's question, which is aren't exempted calls assessed on a call-by-call basis rather than a recipient-by-recipient basis and indeed they are assessed on a recipient-by-recipient basis, so although the Corrections Act extends the exemption only to calls to a lawyer for the purpose of giving and receiving legal advice. In fact, the way it works in practice, and there is evidence of that in the record which I can take Your Honours to, is that once Corrections confirms that a particular number belongs to a lawyer who is acting in the case, then that number is designated as a non-record number and calls to that number from that point on are not recorded. Perhaps the best discussion of that, Your Honours, can be found in the evidence of Mr Mills, who was a Corrections witness. That can be found in volume 3 of the case on appeal in the first part. Again, the pages have two numbers. If I can direct Your Honours to page 36 of the transcript, which is page 39 of volume 3, and if Your Honours have got that page, really from line 22 on you can see the discussion on there. The number would be entered as non-record after it had been confirmed that it was a lawyer's number but then once you have an approved number which doesn't have the additional noting non-record then the call is recorded, and then it goes over the page. There's a further discussion at 37 from line 26. Actually, the question is at line 26 which is about what happens to the normal warning, you're going to get a call from a prison and this might be recorded. The question is, what happens to that warning when it's a call to a lawyer, and then over on page 3 of the transcript the witness establishes how he knows the answer to that question and gives the answer and confirms at lines 20 and 21 that in fact the call is not recorded, so the warning is different. The bit about "it can be recorded and might be used in evidence" is not played and the call is not recorded. So it does mean if someone were able to get their lawyer's number on to the list and say he and the lawyer were friends they could talk in an unrestricted way.

WILLIAM YOUNG J:

So all these calls are preceded by something, "This call may be recorded and may be used in evidence"?

MR BOLDT:

Every call with the exception of these exempt ones, but every other call and that's something about which there was fairly extensive discussion in the High Court. It's preceded by a message to the recipient which says, "You're going to get a call from a

prison. This call will be recorded and may be used or given in evidence." If you are not happy with that press – I think it's hash or 1. If you are happy with that press a different number and then the call goes through.

WILLIAM YOUNG J:

What's the notice that's given to the prisoners? Are they told that the calls might be used in evidence too?

MR BOLDT:

Definitely. There's again evidence that there are signs up about the place, reminding them that calls are monitored and secondly it's something each prisoner receives by way of an induction whenever they first arrive in any new institution. It's explained to them that calls on the public phone, with the exception of exempted calls, will be, will be monitored.

WILLIAM YOUNG J:

Sorry, but what I'm interested in, the additional thing, "and may be used in evidence."

MR BOLDT:

Now, Your Honour, I – in the course of rereading the, the transcript I did come across the full text of the notice and, my, my learned friend very kindly is passing me the actual notice itself.

GLAZEBROOK J:

It's a – that's the sign up?

MR BOLDT:

This –

GLAZEBROOK J:

Is that – those are the notices up or signs up in the –

MR BOLDT:

That's right, yes.

GLAZEBROOK J:

Is that what you – thank you.

MR BOLDT:

Yes. Yes. And it says, "Section 113 of the Corrections Act allows calls to be monitored. It will be easier to", and it actually sets out there the purposes Your Honour the Chief Justice was referring to in, in section 112. "Information gathered from a telephone call may be given to a Corrections employee or to the police or to another agency or person in accordance with the law if doing so is necessary to maintain the law including the prevention, detection, investigation and punishment of offences for the conduct of proceedings before a court or tribunal, to prevent or lessen a serious or imminent threat" –

WILLIAM YOUNG J:

So these are the section 117 purposes are they?

MR BOLDT:

And, and these are the, are the section 117 purposes.

WILLIAM YOUNG J:

Sorry, 117 uses I mean.

MR BOLDT:

117 uses, yes. And then there is a list of calls exempt from monitoring which includes, following, that includes the Ombudsman, Health and Disability Commissioner, Members of Parliament, but most importantly for our purposes, lawyers. So, so there's full, there's, there's full disclosure of the, of the recording regime. It's designed in part to act as a deterrent to inmates abusing the privilege of making telephone calls.

ARNOLD J:

I know that section 116(c) says there should also be a message, a recorded message that the –

MR BOLDT:

Correct.

ARNOLD J:

– the prisoner will hear.

MR BOLDT:

Yes. And, and I, and that's, that's the case as well, that everybody – there's a, there's a recorded message the, the recipient hears but I also understand there's a recorded message played to the, played to the prisoner.

ARNOLD J:

Yes.

MR BOLDT:

So there can't – there, there isn't any room for, for ambiguity regarding the fact the call is being listened to. What, what happened her that was slightly irregular and there were, as I say, there was, there was evidence of it and, indeed, Mr Mills, who I've just quoted from was, was cross-examined about this, and that is that Mr Gibson's number wasn't entered as an exempt or non-record number until, until early 2011 at the time the second – sorry, early 2010 at the time the second search warrant was served on Corrections because it was only at that point that they had an express notification that this number relates to the person acting for, for this appellant. So, so that's the, the way the prison monitoring system works.

There is another point to make. Your Honours were concerned before the break with how or whether that will compromise a person's ability to defend themselves, knowing that discussions with anybody other than their lawyer will be monitored. I should add there is a residual discretion to allow access to the non-monitored telephone for people other than lawyers and in fact what we can see in, in the evidence in this case on appeal is at least two examples of Mr Gibson, sorry, Mr Beckham, the appellant, being able to make calls to his partner, Jenny, on the non-monitored phone. We can see that, if I can find it – this is volume 2, Your Honours, volume 2 and the page is, page is 78 of the, of volume 2. That's an attachment to the affidavit of Mr Matapo, who explained the way the prison telephone system works, and what we can see at exhibit A there is a schedule of calls made

GLAZEBROOK J:

Do they explain when you can do that? Is it explained in the evidence when you can have access to that phone?

MR BOLDT:

Well, it's explained that you're able to have access to it when it's approved for you to do so, and that will be within unlock hours and, and when no one else is using it.

GLAZEBROOK J:
Well I wouldn't have thought they give permission willy-nilly, do they?

MR BOLDT:
No.

GLAZEBROOK J:
So that's what my question was directed at.

MR BOLDT:
No. Correct, Ma'am, and I guess my –

GLAZEBROOK J:
They – all I was asking was, was there anything in the evidence that said when approval might be given?

MR BOLDT:
Oh, in, in what circumstances –

GLAZEBROOK J:
Yes.

MR BOLDT:
– approval might be given? Well, approval's given when there is a call to a lawyer.

GLAZEBROOK J:
Well I understand that.

MR BOLDT:
That's the important thing, and the second, and the second point is maybe given at the discretion of the, of the staff, and what we can see, for example in schedule A –

GLAZEBROOK J:
So they don't say anything more than that?

MR BOLDT:
No.

GLAZEBROOK J:
Thank you.

MR BOLDT:
And, and what we can see there in schedule A is, is a call to someone specified as "Niece" and the last one on the list is, is a call to Jenny which lasted eight minutes on the 27th of April 2010. So just for completeness and, and there's a similar but far more difficult to read schedule attached to the very next affidavit in the case on appeal, which is a handwritten schedule, and at page 87 again we can see there was a call on the unmonitored phone from, from the appellant to, to a person listed in the schedule as Jenny. So it's not anything like the freedom of communication you would have with people associated with your case if you were at large but obviously there are very good reasons why inmates don't get unfettered access.

I should add also, again by way of a refinement to submission I made before the break, I probably did go too far in asserting that the implication of deeming litigation privileged calls to be privileged for the purposes of the Corrections Act would require them not to be monitored. I think that that submission, on re-reading the way the sections fit together, can't be sustained. It's section 114 which sets out the range of exempt calls, and that obviously does include calls to lawyers. But it doesn't specifically include privileged calls, and the section dealing with privileged calls can be found at section 122. There would be a legal argument as to whether a litigation privileged call is a privileged call for the purposes of section 122 of the Corrections Act because, as you'll see, Your Honours, it extends to solicitor-client communications and also communications that are privileged under any provision in part 3 of the Evidence Amendment Act (No 2) 1980 which did not include litigation privilege in its categories, but I also think it's fair to say, and I think this was a point Your Honour Justice Glazebrook made before the break, I think it is fair to say that if litigation privilege calls were deemed privileged for the purposes of the Corrections Act, they could still be recorded but they would be regarded as privileged for the purposes of this section, which would mean –

ARNOLD J:

And also this language in subsection 2 tends to indicate that just because you know the call is being monitored that won't necessarily amount to waiver, because you've got to have all the warnings under section 116 that it is being monitored, so if litigation privilege does fall within 122. Privilege is not automatically waived by the fact that you've got that knowledge because the Act assumes that you have that knowledge.

MR BOLDT:

That's true, Your Honour. This will undoubtedly, if leave were granted, require further argument because we can see this was a provision tailored for certain specific classes of privileged communication, many of which are now entirely obsolete including, for example, privileges between spouses. Those were the sorts of privileges the legislature had in mind in referring to part 3 of the Evidence Amendment Act, and it may well be the legislature thought it was appropriate in those circumstances, for example, that communications between husband and wife would remain privileged, notwithstanding the notice so people could communicate freely with their spouses. But it's far from clear that in enacting that provision Parliament would have had our current section 56 in mind because, of course, it didn't exist at the time the Corrections Act was passed and it does appear this was an oversight. I went through the list of consequential amendments that were passed when the Evidence Act 2006 was passed and there are an awful lot of them, but the Corrections Act was omitted from the list and so we still have this reference to the relic of the Evidence Amendment Act (No 2) of 1980.

ELIAS CJ:

Still, the current Act must be the governing Act in terms of what privilege is because this is simply what is the consequence of privilege.

WILLIAM YOUNG J:

There's different types of privilege, though.

ELIAS CJ:

I know, I know. But I'm just thinking of spousal privilege. It's gone.

MR BOLDT:

Yes. There's no equivalent to spousal privilege and I can see us having this argument down the track, hopefully not in this case, but in a case where the issue

arises squarely, that those forms of privilege which are carried over into the Evidence Act 2006 would continue to apply. But those which were never around or contemplated under the Evidence Amendment Act 1980 can't have life breathed into them and applied by implication into the Corrections Act when they weren't around when either the Evidence Amendment Act was passed or indeed the Corrections Act was passed, especially in the absence of a Parliamentary intention clearly expressed to import those provisions.

In any event, this is a complex area. I do submit to Your Honours it would be appropriate in part because it arises as a very late entry into the case, in part also, in my respectful submission, because it arises only very tangentially on the facts of this case, it's worth bearing in mind that there are – while there are a number of differences between the way the so-called litigation privileged calls and the legally privileged calls were treated by police, there are also a number of similarities. For example, while none of the legally privileged calls were listened to it's quite clear there are a number of calls, dozens of calls, that are now characterised as being subject to litigation privilege which were listened to. Nonetheless, they all remained quarantined from the Operation Jivaro trial. Now, my friend a number of times this morning spoke about the schedule and the tapes being passed to what he describes as the Operation Jivaro team. Now, in fact, there was a clear decision made within the police that they would not pass any Operation valley material to the Operation Jivaro team. They thought at the time they were doing the screening that this might occur. They thought they may indeed be asked to give the material to the Operation Jivaro folk, hence why there was a special field in the screening reports and why the schedule Your Honours have seen have got a reference to Jivaro, but Detective Inspector Lunjevich, when he gave evidence, said in fact he was frustrated because he'd got a direction from on high, higher than his pay grade, saying, "You must not transfer any of the Operation Valley material to Operation Jivaro." He said he was disappointed because he thought there was some material they had uncovered in the course of Operation Valley that might be relevant to Operation Jivaro but nonetheless he had this clear instruction that that was not to occur.

GLAZEBROOK J:
What's the explanation of the affidavits part way through the trial? Are you getting to that?

MR BOLDT:

Yes, absolutely. I will come to that because this all – well, this arose regarding the transactions with Detective Peat, but if I can first of all take Your Honours to the evidence from Detective Lunjevich regarding why there was no disclosure of the material to the Operation Jivaro team.

If I could ask Your Honours to look at volume 3 of the case on appeal, in particular page 207 of the transcript which is 216 of the case. In fact, the passage I'm looking at begins on the previous page, 215 of the case, 206 of the transcript. Detective Inspector Lunjevich is explaining what they did with the Jivaro material that might be relevant and I'm looking here at line 28, really. "There was never – I was never given instructions to prepare the information for dissemination to Jivaro. That's something I decided myself in trying to work out the best way we could disseminate the information given the labour and resources involved. As we got to the point we could perhaps do some analysis and work out where it was going, the weight, blah blah blah, everything else we were doing, bring it all together, I thought perhaps it could be something in those conversations that may be relevant to the Jivaro squad. I discussed this with my supervisor because I went and did it because it was made quite clear to me that I was not to liaise with the squad with it at all. The decision was made that no, I would not do it, that I was not to disclose it to them at that stage and so I did not disclose it." And then there's a question, "Well, why not?" He said, "Look, I can't say what my boss was thinking. It's likely disclosure to the Jivaro team would ultimately, would have ultimately meant disclosure 'cos they would have received this information and we would have been compromised or there was a potential for compromise."

Then he goes on to say in the last question and answer of the page at line 27, "I felt at the time we were losing value by Jivaro not having access to some of the calls. We weren't going to give them all the calls. Only a number of calls." And on it went, so the officer in charge of Operation Valley certainly contemplated he might have wanted to disclose the material to the Jivaro team but was given very clear instructions not to.

ELIAS CJ:

But those seem to be operational reasons he's referring to. He doesn't seem to have any understanding about the privilege dimension of them.

MR BOLDT:

Well, he goes on to say over the page at 208 of the transcript, it was put to him that the sensitivity around the privileged calls was the reason for the non-disclosure and he said no, that had absolutely nothing to do with it. "There was still a threat, there was still a risk. I was told no."

WILLIAM YOUNG J:
Mr Mount said that Detective Sergeant Peat got the information.

MR BOLDT:
That's right. There was a link between Detective Peat and the Jivaro trial, but it was a fairly – well, this part of the inquiry was not part of the Jivaro case. Detective Peat was involved in the proceeds of crime unit. He was looking for what they believed would be evidence of further financial reserves on the part of the appellant and there was a strong suspicion there was some safety deposit boxes stashed away somewhere, which might lead to further funds being available. It was in that context that he was given firstly a schedule but then was given two disks that had the content. But it's very important what he did with that and what he didn't do with that. It was the involvement of Detective Peat that gave rise to the second hearing in front of Justice Andrews and the possibility that he had somehow misused this material and that there was, in fact, some cross-pollination between Valley and Jivaro. He said, "Look, that's not the case at all. I was looking for specific evidence in relation to my particular inquiry in which I was engaged. I listened to 15 phone calls altogether and that was all. None of those were legally privileged calls. They were calls which I thought might help me to track down this safety deposit box." He also said he did not discuss the disk or the contents of it or indeed even the fact that he was doing this with anyone else. He kept that entirely to himself. There was no reference at trial at all to any of this material. So he was looking for material to do with the Proceeds of Crime Act case. He didn't find anything of any value, but that was it. It didn't go further. It didn't infect or in any way touch the trial and, of course, if it had we would be having a very different appeal today because the appellant in the Court of Appeal was obliged to concede that regardless of what happened to his telephone calls he had an absolutely fair trial and that there was no prejudice occasioned to him of any kind regarding the way these Operation Valley calls were treated.

So I should take Your Honours very quickly to what Detective Peat said. It's volume 4 of the case on appeal.

WILLIAM YOUNG J:
His affidavit is a bit earlier. It's at page 258 of volume 3.

MR BOLDT:
Thank you, Sir.

ELIAS CJ:
258?

WILLIAM YOUNG J:
Yes. Volume 3, 258.

MR BOLDT:
Sorry Your Honours, I'm struggling slightly with the technology as well. 253. Mmm, well – 258 I'm sorry. Yes. And yes, paragraphs 4 and 5 are important and six, indeed. And of course again this affidavit was directed to the original complaint, which is that there'd been a breach of legal professional privilege and so he was able, Detective Peat was able to confirm that he hadn't touched any privileged calls and that he'd only listened to, to 15 and that it hadn't yielded any, any positive results for him. He was, he was cross-examined about that. His cross-examination is in volume 4. But in any event Her Honour made a number of credibility findings in Detective Peat's favour. She found once again there was no compromise of the appellant's legal professional privilege as a result of this and also that it hadn't in any way impacted upon the trial, and so the renewed stay application as a result of his evidence was, was dismissed.

His cross-examination about the way he used the disks, if Your Honours at any point wish to, to look at that, can be found in volume 4, beginning at page 14.

McGRATH J:
That's the cross-examination, sorry?

MR BOLDT:
This is, yes, this is the examination of Detective Peat.

GLAZEBROOK J:
What page, sorry?

MR BOLDT:

Starting, Your Honour, at 14 of the, of the volume, which is 13 of the transcript. He also made it clear over the page at 15 that no one else took any interest in the disks, he kept them entirely confidential, no one else knew about them.

McGRATH J:

So that's – where does it start? At page 13 of the transcript is it?

MR BOLDT:

I'm just trying to think where the, the best place to, to begin. Probably around 17, 18.

McGRATH J:

Right, thank you.

MR BOLDT:

"Once you got the disks and listened to calls you were interested in, what was your attitude then?" Goes on to say where he stored them, who he told about them…

GLAZEBROOK J:

Sorry, what volume? My iPad's suddenly decided it was going to not let me see anything, so is it volume –

MR BOLDT:

It's volume 4, Your Honour.

GLAZEBROOK J:

Volume 4. No. oh yes, it's now letting me search again. That's nice of it.

MR BOLDT:

Now, and when I say – and I, I should have added he was, Detective Peat, who was attached to the proceeds of crime unit, was specifically investigating the money laundering side of, of matters as well, but the, the key point was that this material remained quarantined from the broader Operation Jivaro inquiry and it didn't feature in any way in the, in the evidence.

Now, the final point I wish to make, Your Honours, and, and, oh, and I should add that all of this was supported by, ultimately by findings of fact made by Her Honour in the two judgments she delivered on this issue. So there was a reserved decision number 3 and reserved decision number 4. They are also both in volume 4 of the case on appeal and they can be found at pages 163 and 178 respectively. Her Honour's focus, of course, was on the question of legal professional privilege having been compromised but Her Honour concluded it had not been because none of the privileged calls was listened to and in any event there was no, no cross-pollination between the two proceedings, between the two inquiries.

Now the only other point I want to make, Your Honours, is that though my learned friend said to Your Honours this morning that really the, the schedule which the appellant in this Court characterises as the game changer because it drew together in one place a police summary of some of the content of, of some of the calls, was in effect waved in front of the Court and, and disappeared immediately and didn't receive any, any particular scrutiny. In fact, there were two pages worth of cross-examination about the particular schedule and they can be found – and we're again in volume 4 at pages 36.

ELIAS CJ:
Do we have that schedule or is it the one we don't have?

MR BOLDT:
The schedule is there. It's the big one in volume 4. Between pages 36 and 38 of the case on appeal, you can see Mr Gibson's cross-examination of Detective Peat about the particular schedule. It was produced and was then the subject of cross-examination. Once again, the potential for litigation privilege to be raised was apparent but it simply wasn't pursued at that time. Instead, the cross-examination was directed, as the appellant's objection had been throughout, at seeking to suggest the solicitor-client privilege had been compromised. You can see that indeed some of the very types of calls this Court has been directed to today, calls where the appellant is talking to other parties about Mr Gibson were the subject of cross-examination but it was all directed at the different point, namely, that there was a breach of legal professional privilege, not that any issue of litigation privilege might arise. Her Honour in her judgment, following all this evidence, recorded that she had herself read the schedule and was, in fact, reinforced in her view about the fact none of the calls had been listened to, by the fact that wherever Mr Gibson's name

appeared within the schedule it was clear there was no summary or any content which tended to support the fact they hadn't been listened to.

My submission about all this is, I suppose I need not repeat myself, but it is quite clear the entire evidential inquiry was directed to a very different question than the one this Court is being asked to grapple with now. It could and should have been addressed squarely if it were to be regarded as a matter for a groundbreaking ruling because then Her Honour could have made findings with respect to the types of calls involved, whether they really were for the dominant purpose of the litigation, the legal issues could have been traversed in the High Court and again in the Court of Appeal, but none of this was raised squarely on the evidence and none of it was raised legally in terms of there being an exchange of legal submissions and rulings from the High Court and the Court of Appeal at all. So in this respect this Court will be asked to make a ruling without the full evidential picture, and in my submission, with a very fragmented and unsatisfactory evidential picture, and without any assistance from the lower Courts in terms of the law.

Unless I can assist Your Honours further on this question of leave, those are my submissions.

ELIAS CJ:
Thank you, Mr Boldt. Yes, thank you.

MR MOUNT:
Thank you. May it please the Court, there was a reference by my learned friend to the question of the amount of time that might be taken to have analysed the raw data that was provided to the defence in November of 2010. There was some evidence on that point in volume 3 of the case on appeal at page 133 where it was explained in evidence that the police team, which constituted approximately nine police officers or thereabouts, had towards the end of September 2009 or closer to October had, as it was put, got their head around the first batch of calls. That was the first set of 800 to 1000. So that's at page 133 around line 9.

The upshot of that is that for a team of nine people the first batch of calls took six weeks to analyse, which suggests by a matter of extrapolation that the full set of 1700 calls would have taken the same team of nine people something in the order of three months, 12 weeks, to analyse. Now, that is the support for my submission that

it is wholly unrealistic to suggest that the appellant or his counsel could have been expected to have worked from the raw data to have made the submission regarding litigation privilege.

Another way of analysing the issue is to look at the total duration of the calls and on the information from a spreadsheet disclosed by the police the first set of 800 calls lasted approximately 100 hours, suggesting that the full set of 1700 calls would have been in excess of 200 hours in duration.

WILLIAM YOUNG J:
When was the schedule produced? What day?

MR MOUNT:
The schedule or the audio calls?

WILLIAM YOUNG J:
The schedule that we've got, that we've been looking at today. When was that actually – what day was that produced in evidence?

MR MOUNT:
That was two weeks after the verdicts in April 2011, so that was post-trial.

WILLIAM YOUNG J:
I understand that. So there are – when were the hearings in front of Justice Andrews?

MR MOUNT:
There was the first stay application began on about the 25th of January 2011. It was a trial that was scheduled to and, in fact, did commence on the 7th of February 2011. So the pre-trial argument regarding access to Mr Gibson's calls was slotted in, in late January, just before the start of the trial. So it was in late November that the defence received a disk with 1700 or so calls on it, so at most perhaps six or eight weeks before the first pre-trial with the Christmas period intervening and what we can tell from the evidence is that if the defence had wanted to go through that raw data and had had access to a team of nine people it would have taken about three months.

WILLIAM YOUNG J:

But the defence could have looked through the schedule and seen that the case was discussed on, say, three occasions and listed those tapes.

MR MOUNT:

No, the schedule was not disclosed, Your Honour, until after trial.

WILLIAM YOUNG J:

That's the question I was asking.

MR MOUNT:

Yes. No, not until after trial. That is my principal complaint.

WILLIAM YOUNG J:

Right, so it's disclosed in November 2011?

MR MOUNT:

No, the schedule, April 2011, post trial.

WILLIAM YOUNG J:

But I've got, according to your chronology, 8 June 2011, appellant convicted.

MR MOUNT:

Yes. The convictions were entered at a very late stage only after the Judge had delivered her judgment. So the key date is the verdicts, which is on 11 April or thereabouts.

WILLIAM YOUNG J:

That's not in the chronology.

MR MOUNT:

No, and the reason for that is, believe it or not, there is nowhere on the case on appeal prepared for the Court of Appeal the date of verdicts, and so the date of 11 April has had to be reconstructed from the file, but I believe that to be as accurate as we can be.

ELIAS CJ:

Because the conviction wasn't entered because the stay had to be determined, I wonder, really, whether the date of verdict is as important as you are suggesting here.

MR MOUNT:

I understand the point, Your Honour. Ultimately the question is when the schedule was meaningfully available to the defence, and of course my submission is that it was – although it was in the possession of the defence for five or 10 minutes at that 29 April hearing, because no copy was made available to the defence or the Crown it was not meaningfully available, and certainly if a copy had been provided to the defence, the submission would be much weaker.

ELIAS CJ:

But it is a bit extraordinary that a copy wasn't sought for the purposes of the stay application.

MR MOUNT:

Well, the whole thing is extraordinary in the sense that this came about during the course of re-examination.

ELIAS CJ:

Well, I understand that, but at the time they came to argue the stay application counsel knew about the schedule.

MR MOUNT:

Yes, although what they knew was, of course, that the Judge had – the copy that was brought to Court went to the Judge and the Judge in her judgment said, "Well, I've read this," and the only comment she made about the schedule was directed – perhaps not surprisingly – but directed towards the Mr Gibson call issue so there was nothing in that judgment that would have triggered enquiry, in my submission, as to the broader significance of the schedule.

GLAZEBROOK J:

Am I right, though, that the defence knew about the 11 page schedule because that was related to a bail application?

MR MOUNT:

Correct, yes.

GLAZEBROOK J:

But they didn't actually know about the other schedule until re-examination at the hearing two weeks after the trial so they couldn't have sought it for the purposes of the stay application because it was not known about. Have I misunderstood that? There was the 11 pages that they did obviously know about.

MR MOUNT:

That's right. The only twist to that is that in effect the stay application happened in two bites. There was the further evidence hearing on 29 April, then there was a gap before the stay application so that may be the gap that the Chief Justice is referring to.

GLAZEBROOK J:

And how long was that gap again?

MR MOUNT:

If I may, Your Honour, just turn to the chronology, it was a matter of some weeks. It's that gap that the Chief Justice no doubt will be referring to.

ELIAS CJ:

You might be flattering me.

GLAZEBROOK J:

It's not actually totally clear. It's got 3 May application for further evidence dismissed and then 23 May, second application for stay dismissed. I was assuming the hearing was earlier. But it's probably not terribly important.

MR MOUNT:

17 May was the second application for stay. That was the hearing, yes.

GLAZEBROOK J:

So it was between the first one.

MR MOUNT:

29 April to 17 May, yes, about three weeks.

That was the first matter of response, which was essentially to say that although it is true that the appellant had access to the full batch of calls, the exercise of listening to them would have been impossible in reality.

WILLIAM YOUNG J:
Sorry, just to get back – it wouldn't have been impossible to sample it but that would have required you to obtain a copy of the schedule, run your eye through it, and then say, "I want to listen to tapes 10, 15, and 63."

MR MOUNT:
If the defence had any access to the schedule that would be absolutely correct, but the point is that the defence did seek access, but did not receive it.

WILLIAM YOUNG J:
Yes. I understand.

MR MOUNT:
That's right, Your Honour.

The second matter may well have been cleared up by my learned friend in submissions after lunch but for clarity the appellant certainly does not submit that on any analysis of the law if litigation privilege is found to apply to prisoners' telephone calls that Corrections could not monitor them. It is purely a question of whether police may lawfully obtain access to calls covered by litigation privilege, so it's an issue that arises only at the point at which a search warrant is sought or otherwise the police seek access to them.

The next point by way of response, my learned friend took the Court to the notes of evidence from the first stay application where the appellant acknowledged that he knew that calls to family members and friends could be listened to, could be monitored. The response to that, of course, is the set of legal submissions that are advanced in the appellant's memorandum, the effect of which is to say that confidentiality is not a requirement of litigation privilege under section 56, so again that becomes a statutory interpretation argument and in fact it's a good example of why the argument is capable of determination on the current record in my submission because we already have evidence from the appellant where he acknowledges that

he knew his telephone calls to family members and friends could be listened to, so in a sense it's a point that goes against the Crown because –

ELIAS CJ:
Sorry, that's a submission that section 56 doesn't require confidentiality?

MR MOUNT:
That's right, Your Honour, and it's a statutory interpretation argument because –

ELIAS CJ:
So it only stops the need to go into evidence if a particular view of the statutory interpretation is taken?

MR MOUNT:
Yes. Even if the Court were to decide against the appellant on the statutory interpretation argument, the evidence is there which would suit the Crown, if you like, that the point has been covered in evidence already.

The next point, Your Honours, arises in relation to the question under section 385 of the Crimes Act, the jurisdictional question as to whether this Court would have jurisdiction to remit the case back to the High Court. The appellant's submission is that it is accepted that that power to remit applies only if this Court reaches the view that a different sentence should have been imposed. But again, it's a situation where, of course, that's the appellant's burden because in the event this Court does not reach the view that a different sentence should have been imposed, well, that would simply be the end of the matter.

WILLIAM YOUNG J:
I'm not quite sure what your argument – are you saying that we resisted the view that if you're granted leave to argue the point there should be an adjournment?

MR MOUNT:
No, Your Honour. I'm simply attempting to submit that any restriction on the power to remit is something that could only operate against the appellant rather than against the Crown. It's a submission that there's no prejudice to the Crown.

WILLIAM YOUNG J:

All right, but I'm not quite sure what the point of some of these submissions is. Are you saying that we should decide the case on the material before us but on the basis of your new point?

MR MOUNT:

Well, I'm simply wanting to submit, Your Honour, that on the material available at the moment the case is capable of being determined on the current record so that it is essentially an issue that raises legal points of interpretation of the Evidence Act and the Corrections Act.

ELIAS CJ:

But you're not prepared to commit at this stage to being content to have the case argued on the basis of the evidence that's before the Court? Is that it?

MR MOUNT:

Well, only in the sense that, of course, I've only had the schedule for just over two weeks and depending on where we get to in terms of any further material that arrives from the police, but I do have instructions from the appellant that he is content for a submission to be made that the case is capable of being determined on the present record.

WILLIAM YOUNG J:

What, we should suck it and see?

MR MOUNT:

Well, no one can predict the future, Your Honour, and I suppose the big elephant in the room is that were any further information to arise or further analysis to take place which shows that trial unfairness resulted from police access to these calls, then the appellant might well be in the position of needing to seek leave out of time to appeal against the conviction, but I don't make that submission today, and that submission would only be made after careful analysis of whether it is the case that there is evidence of trial unfairness. So today's application is simply for the opportunity to make submissions arising out of the current record.

The next point, Your Honour, just arising from the issue that arose about the notice that is displayed within the prison, that notice, of course, does say to prisoners that calls may be listened to. In answer to Your Honour Justice Young's question, it

doesn't go on to say "and may be given in evidence" which is not to say that prisoners would be otherwise unaware of that but the direct answer to your question is no, that notice does not say so.

Another point that arose was, of course, the question about the scope of the Evidence Amendment Act (No 2) 1980 and the effect of the Interpretation Act. It's not the opportunity here to play out the submissions that would occur before the Court in the event that leave is granted, but it is simply to say that, of course, the appellant's submission is that on the proper approach to the Interpretation Act the reference ought to be read as a reference to the whole section of the Evidence Act, the relevant section of the Evidence Act, and should the Court be minded to look at the issue, there was some material in the bundle of leave materials, tab HI, from Burrows on Statutory Interpretation that deals with that issue.

The next point, Your Honours, is my learned friend again used the word "quarantined" and made the submission that, in fact, there had been no transfer of information to the Operation Jivaro team. If I could ask the Court to look at volume 4, page 169, at paragraph 15 of Her Honour Justice Andrews' decision. In that paragraph Her Honour describes Detective Peat's position, namely, that he was on the same floor of Harlech House, the police station, as that of the officer in charge and she goes on to say, "He worked closely with the officer in charge on the charges of money laundering laid against the appellant." There were eight or 10 counts of money laundering as part of Operation Jivaro. So Detective Peat gave evidence for almost two days on eight or 10 of the counts in Operation Jivaro and he worked closely with the officer in charge, so while he was part of the proceeds of crime unit, it is on the basis of that finding in the High Court judgment and it was supported by evidence, of course, that I have made the submission that disclosure to Detective Peat was disclosure to a member of the Operation Jivaro investigation team.

WILLIAM YOUNG J:
Is it correct to say, as I understood Mr Boldt to say, that it led nowhere, that what he was looking for was security boxes, bank security boxes, and nothing turned up that was helpful?

MR MOUNT:
That is the state of the evidence and when I make the submission that the appellant is prepared to argue the case on the basis of the evidence, that is the evidence

presently, that there is no evidence that Detective Peat used any information from the schedule to derive evidence. There isn't presently any information about whether Detective Peat otherwise used information from the schedule, by which I'm referring to the tactical matters or the proposed defence witnesses and matters of that kind and, as I say, that is the appellant's burden to bear in the sense that there is no evidence of that. The submission is not available that the police made use of the privileged calls, as he would say they were, thereby rendering the trial unfair.

When my learned friend on this point of the cause being quarantined from Operation Jivaro referred to the evidence of Detective Sergeant Lunjevich at the first hearing, at the only pre-trial hearing, that was a reference to volume 3 at page 216. That's where Detective Sergeant Lunjevich expressed his frustration that he was not able to pass information from Operation Valley to Operation Jivaro. My submission about that evidence is that this is precisely why the non-disclosure of the schedule is a matter of complaint for the defence, because it was the schedule that contradicted or was starkly inconsistent with the evidence that Detective Sergeant Lunjevich gave, and of course if the schedule had been available pre-trial it would have enabled cross-examination on Detective Sergeant Lunjevich by directing him to it to show that in fact, contrary to his evidence, there had been a transfer of information to a key witness from among the Operation Jivaro team.

WILLIAM YOUNG J:
But you knew that, but the defence knew that anyway.

MR MOUNT:
No, the defence did not know that Your Honour.

WILLIAM YOUNG J:
Well they knew that by the time the evidence was given on the stay application.

MR MOUNT:
No Your Honour. No. And that's the critical point.

WILLIAM YOUNG J:
Well when did, where did Detective Peat's evidence come in?

MR MOUNT:

Only after, only after the trial.

WILLIAM YOUNG J:
But that's on the stay application.

MR MOUNT:
No, the, the stay application I'm talking about here is the one that was made pre-trial –

WILLIAM YOUNG J:
Oh I see.

MR MOUNT:
– and that's where Detective Sergeant Lunjevich gave his evidence in January 2011. The defence didn't know about the schedule at all for another three months.

WILLIAM YOUNG J:
But it was known before the second stay application?

MR MOUNT:
Yes, although the second stay application was one that involved no further cross-examination of Detective Sergeant Lunjevich. It was – the second stay application proceeded as a purely legal argument purely on the basis that the 1 March affidavits had changed the position from the first –

WILLIAM YOUNG J:
Oh I see.

MR MOUNT:
– from the first stay application, so the second stay application was on a very limited basis and, again, if, if the schedule had been disclosed prior to the second stay application – prior to the evidence, I'm sorry, prior to 29 April, then undoubtedly defence would have read it and would have had it available in the cross-examination of Detective Sergeant Lunjevich. In fact the schedule was not even in the hands of defence until after Detective Sergeant Lunjevich's evidence had concluded. So it wasn't available for cross-examination of that officer.

My learned friend drew attention to the fact that there was some cross-examination on the schedule, and that is quite correct, and the Court's attention was directed to, once again, volume 4 of the case on appeal at pages 36 to 38, and it was precisely on the basis of those pages of the notes of evidence that I've made the submission that this material was in the hands of the defence for no more, more than 15 minutes. One can see on page 36 of the case on appeal – in fact if we go back to page 35, that Detective Sergeant Lunjevich was still in the witness box at 12.03. That's at the end of page 35. Detective Peat then returned into the witness box immediately thereafter, probably 12.05, and we can see down at the bottom of page 36 that the time had reached 12.10, suggesting that a page of evidence is roughly five minutes or thereabouts, although sometimes less because on page 37 we can see at line 25 of page 37 that there was an objection at 12.12. In other words there had been – two-thirds of a page had taken two minutes. So Mr Gibson's cross-examination was about two or three minutes into it at the time of that objection. And there is then one further page of the notes by that point, perhaps another five minutes at most, so the objective record indicates that Mr Gibson may have had the schedule available to him for, as I say, 10 minutes, 15 at the most.

If I can try to summarise what appears to be the nub of the issue between the Crown and the appellant, there doesn't appear to be any dispute that the point is an important, nor any dispute that it is a material point that has the potential to affect the appellant's case significantly. There doesn't appear to be any dispute that it arises squarely on the record before the Court. The only matters of contention between the parties appear to be, first, that the Crown submits it is simply too late, and secondly there is the issue of whether if in effect the Court is institutionally capable of resolving this issue, in other words whether further evidence would be required or there is some other impediment to the Court addressing the issue. I won't repeat the appellant's submissions on those points other than to say that of course from the appellant's perspective the issue of delay should not trouble the interest of justice and in a situation where there is an important point, one that raises a number of issues of statutory interpretation and which has the effect, potential effect to, sorry, to, to alter the outcome from appellant's perspective quite significantly, and one which, as the, as the length of this hearing may exemplify, raises enough, a number of issues that are clearly important issues, the appellant's submission is that the interests of justice should be the predominant concern.

And finally, although my learned friend has made extensive submissions, none of them as I have apprehended them have indicated any prejudice to the Crown in this argument becoming available to the appellant in this hearing.

ELIAS CJ:
Yes. Thank you Mr Mount. We'll retire for a few minutes and may need to engage further with counsel after that.

MR MOUNT:
As the Court pleases. Thank you.

COURT ADJOURNS: 3.26 PM

COURT RESUMES: 3.44 PM

ELIAS CJ:
Yes. Well, Mr Mount, we've decided we will accede to the application that's been made.

MR MOUNT:
As the Court pleases.

ELIAS CJ:
You had some consequential matters you wanted to raise with us?

MR MOUNT:
Yes Your Honour. The first of those of course would be the timetabling of further submissions. Next will be the question of an application for further disclosure from police. And of course there's also the question of the adjournment of the appeal. The Crown sought that adjournment. The appellant of course has no objection to that and, given the late hour that we've reached today and the impossibility of proceeding, it's effectively a non-issue.

ELIAS CJ:
Well we have to timetable anyway, so –

MR MOUNT:

Yes indeed. Yes.

ELIAS CJ:

– it's overtaken.

MR MOUNT:

Yes. In my memorandum I have sought the opportunity to file reply submissions. I suppose the two options available for Court would be either to reply fuller submissions from the appellant first required by the Crown's response in the usual way.

ELIAS CJ:

Well I think that's a sensible way to proceed, and then we don't need to get into – so I think really you need to put in your last shot submissions –

MR MOUNT:

Yes. Yes.

ELIAS CJ:

– Mr Mount, and the Crown is to have a response to. It may be that – what is the further disclosure that you're seeking?

MR MOUNT:

I, I addressed it, Your Honour, in the memorandum that was filed. It was at paragraph –

ELIAS CJ:

Sorry, I've got so many bits of paper –

MR MOUNT:

Yes.

ELIAS CJ:

– here I might have lost it.

MR MOUNT:

This is the appellant's memorandum of –

GLAZEBROOK J:
24th of March?

MR MOUNT:
– 24 March at –

ELIAS CJ:
Oh yes.

MR MOUNT:
– at paragraph 45. Now the reason for the application is simply that the appellant wishes to know with as much certainty as is available the extent to which there are, there are any other schedules in the possible of the police that record matters of a similar kind, to whom they were disclosed, and what if any use was made of them.

ELIAS CJ:
Mr Mount, you have had the full disclosure of the primary material.

MR MOUNT:
That's right.

ELIAS CJ:
You have had the schedule.

MR MOUNT:
That's right.

ELIAS CJ:
Why do you want the screening reports?

MR MOUNT:
The screening reports are –

ELIAS CJ:

And, indeed, are there any additional screening reports?

MR MOUNT:

I did request these some weeks ago. My learned friend replied saying there were approximately 1000 of them and that it would be too difficult an exercise to disclose them at this late stage. My submission is that they are relevant for the appellant to see because it is those documents that record what information the police saw fit to reduce to writing and if there are more examples of conversations reduced to writing that the appellants submit are subject to litigation privilege. No doubt the parties can confer and if, if there's a need to put them before the Court they can be put into a bundle and simply put before the Court.

ELIAS CJ:

Well what are you suggesting there? That there's no need for us to make any direction at this stage?

MR MOUNT:

If I may speak for my friend for a moment –

ELIAS CJ:

Yes.

MR MOUNT:

– if the Crown is simply willing to make that material available. My learned friend indicates he'd like to be heard on the topic.

Paragraph 45 essentially encapsulates what the appellant seeks. The basis for it is simply that, given that the, the schedule indicates that at least to some extent there has been police exercise which has captured and reduced to writing conversations he submits are subject to litigation privilege, he wishes to know whether there is any other similar information in the possession of police and if so he would like to see it. And that is the basis for the application.

One thing I would say, of course, is that the schedule that we have is one that was prepared in decision of 2009. Police then received a further batch of about 750 calls the next month in January, and so what the schedule that we currently have does not tell us is what, if anything, was recorded from the January calls, and there is a very

real possibility that those, that second, sorry, third batch of calls from January was, were also compiled into a schedule and the appellant wishes to see that, if there is any such document.

GLAZEBROOK J:
Which is to see the schedule and an indication of who the schedule went to? Is that right?

MR MOUNT:
That's right, Your Honour, yes. Yes.

And so the, the wording at paragraph 45 was, "any other material indicating the extent to which potentially privileged conversations or their content were obtained, accessed, noted or disseminated. But my, my friend I think understand the nub of what is sought, which is any other similar schedules, in particular those created post December 2009, and to whom they were provided.

ELIAS CJ:
Thank you. We'll hear from Mr Boldt now.

MR MOUNT:
Certainly.

MR BOLDT:
Your Honours, I'm not concerned about the request for any further schedules similar to the one that was produced as exhibit 3. If there are such further schedules I'll ensure they are located and provided to my friend.

What I do oppose is the further expansion to look for all of the original screening reports done of all of the original calls. The concern I have is, first of all, that the primary evidence is the calls themselves rather than anyone's impression or interpretation of them, and those calls have been in the possession of the appellant for some considerable time.

ELIAS CJ:
Does that primary evidence extend to the January 2010 monitoring?

MR BOLDT:

I believe so, Ma'am. Yes, my friend confirms that. But more importantly, the question is where might we go with that in this Court, because it's one thing to say, well, there was this schedule which was referred to Her Honour and which was the subject of some discussion in the High Court, even if it was from a different angle and without litigation privilege as a square focus. But the question then is, well, what do we do if some anomalies or something the appellant characterises as an anomaly emerges? We really very much are in a position where we would need to be exploring entirely new factual realms, two Courts above where that task ought to be taking place, in my respectful submission.

The application today was, as I understood is, for the appellant to seek to advance his claim there had been a breach of litigation privilege on the basis of the record as it stands, and I have obviously, in light of the Court's finding or the Court's conclusion that's fine, but if the application is to significantly supplement that record and to try to look for brand new things to raise, then I do respectfully submit that would be inappropriate in this Court and that it simply isn't something this Court should entertain, given the fact we have an appeal against sentence and this is something to which those matters are likely to be of only the most tangential and peripheral relevance, if they're relevant at all.

ELIAS CJ:

But you don't resist providing the schedules if they exist in relation to the January 2010 material?

MR BOLDT:

No.

ELIAS CJ:

And it's accepted that the primary material is available to Mr Mount?

MR BOLDT:

The primary material being the calls themselves, absolutely, and certainly if such a schedule exists we'll ensure that's available to the appellant.

ELIAS CJ:

Yes, thank you. Is there anything else anyone wants to say about timetabling because it does seem to me that probably the best thing is to ask the parties to file memoranda as to when they consider how things are to go, what substituted timetable should be put in for the submissions. We hope no further applications.

MR MOUNT:
So do we, and certainly happy to do that, Your Honour, in consultation, perhaps, with the Registrar.

WILLIAM YOUNG J:
There may have to be, for instance, some evidence so have you thought through that?

MR MOUNT:
The first step, in my submission, is to receive any further material. I'll confer with my learned friend. If there's a need for anything further I would hope that we could co-operate.

WILLIAM YOUNG J:
I would be most reluctant to make an assessment of privilege on the basis of these notes.

MR MOUNT:
If there is a need to listen to some calls I'm sure counsel can confer and I imagine that could be done relatively easily within this Court.

ELIAS CJ:
Well, they're all available and they're known. The question would be – and, Mr Boldt, I am not at all inviting this – but the question would be whether it was felt that there was some additional background material that might be necessary to be put in, particularly if there were indications of a possible section 5 argument. But everyone's heart sinks at that suggestion, I'm sure. But perhaps what we could – it may be that what we should do, if counsel are happy for that way forward, is for us to simply adjourn and provide a minute if those on the Bench are in agreement, indicating when we'd expect to have counsel's memoranda about the way forward.

MR MOUNT:

As the Court pleases, thank you.

MR BOLDT:

No objection, Ma'am.

ELIAS CJ:

All right. Thank you, counsel, for your assistance in this matter, in this very difficult case. We'll adjourn.

COURT ADJOURNS 3.56 PM