IN THE SUPREME COURT OF NEW ZEALAND SC 18/2013

[2015] NZSC Trans 7

MAX JOHN BECKHAM

Appellant

v

THE QUEEN

Respondent

Hearing:	3-4 March 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	S J M Mount, A F Pilditch and A H H Choi for the Appellant D J Boldt, D G Johnstone and M J McKillop for the Respondent

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CRIMINAL APPEAL

MR MOUNT:

May it please the Court. Mount, together with Mr Pilditch and Mr Choi for the appellant.

ELIAS CJ:

Thank you Mr Mount.

MR BOLDT:

Yes may it please the Court. Boldt, Johnstone and McKillop for the Crown.

ELIAS CJ:

That you Mr Boldt, Johnstone and McKillop. Right, Mr Mount.

MR MOUNT:

Yes thank you Chief Justice, may it please the Court, in a moment I will address the preliminary points that need to be dealt with but if I might say by way of introduction, the case presents, in my submission, two important and interesting questions for the Court. First, when is it appropriate for the Court to order a reduction in sentence as a remedy for breach of the Bill of Rights Act 1990 and second, the question that arises from the newly disclosed material, is it consistent with the Bill of Rights guarantees of a fair trial and right to counsel, for the police to gain unlawful access to details of a defendant's trial preparation and strategy and make this available to a member of the prosecution team before trial?

As to the second question, Courts in the United States and Canada have for several decades had to grapple with the question of unlawful police intrusion into defence preparation. Of course this is the twenty fifth anniversary of the Bill of Rights in New Zealand and to my knowledge it's the first time that the Court has had to grapple with the problem in New Zealand.

The appeal has followed a somewhat complicated path and I hope to simplify matters. I have prepared a one page synopsis of the oral submissions.

ELIAS CJ:

That would be helpful because it has, it's developed.

MR MOUNT:

It's voluminous Your Honour that's right. Now there is a one page oral skeleton which I belief ought to be in front of the members of the Court at the moment. It's entirely a skeleton of the appellant's oral submissions.

O'REGAN J:

The one with the big bundle.

MR MOUNT:
The one with the big bundle, that's right.

ELIAS CJ:
Yes I see, yes I have it.

MR MOUNT:
Yes. And you will see that the argument proceeds in three parts and at first a factual overview, second, addressing the specific breaches of the Bill of Rights that the appellant relies on and third, the question of remedy. Now together with the one page skeleton there is a further bundle of authorities, volume 7, to which I will refer during the course of argument.

If I can turn then to the preliminary issues and there are three. First, since the last hearing the appellant has filed an application for leave to appeal his convictions. The reason for that application is that the appellant submits that the unlawful access to his trial preparation and strategy compromised his right to a fair trial. If the Court accepts that argument then the appellant submits that the relevant convictions ought to be overturned and as a result he has filed the application for further leave. But at the same time, perhaps 90% of what I might say on that topic is equally relevant to the sentence reduction argument.

ELIAS CJ:
Yes I must say that subject to what Mr Boldt has to say, it had seemed to me that the best course will be to hear you and then we can deal with the conviction point either as not available to you, that that's argument or as whether it's an appropriate remedy, if we get to that point.

MR MOUNT:
Yes thank you Chief Justice that had been my proposal as to the best way to deal with it?

ELIAS CJ:
Yes, Mr Boldt are you content with that?

MR BOLDT:

No concern at all about that.

ELIAS CJ:
Thank you.

MR MOUNT:
There were two other preliminary matters raised in the Court's original leave judgment. I did touch on these last year but conscious that we have a new member of the bench. If I might reiterate that the first of those was the question of the affidavit the appellant filed last year. Now the short point is that it is no longer necessary for him to rely on that affidavit and he instead relies simply on the findings of Justice Duffy in the High Court which essentially traversed the same ground. So in essence that is a non-issue.

The second was the question of factual findings in the Courts below and there are two areas that I submit are issues of mix fact and law where the appellant challenges what could be regarding as factual findings. They are first the finding of no nexus in the Court of Appeal where the Court concluded that operation value was entirely independent of and unconnected to Operation Jivaro or these charges and the appellant's submission is that any factual component of that finding is unsupported by and indeed contrary to the evidence. The second is the finding that the police acted in good faith and I accept that I cannot challenge the factual component of that finding, such as it is but my legal submission is that the label "good faith" is not apposite to characterise what occurred in this case.

ELIAS CJ:
So is your – do you accept that you cannot assert that the police officers acted bad faith but you're saying that there's a submission you make that it's not properly characterised as being in good faith is that -

MR MOUNT:
Yes it's a slightly convoluted position that I find myself in, Your Honour. It is that the factual component, I cannot assert for example that the police officer consciously turned his mind to misleading the Court. I am bound by the Court's below in terms of their factual findings. The short answer I think to your question is yes, it means I can't make a positive assertion of bad faith but I certainly can make the submission and do that good faith is not an appropriate label for what occurred here.

ELIAS CJ:
Is it necessary for you to counter good faith?

MR MOUNT:
It is a relevant factor in my submission when we come to the question of remedy.

ELIAS CJ:
Yes.

MR MOUNT:
Whether the Crown can rely on this being a good faith misjudgement by the police or whether that's not the appropriate label.

ELIAS CJ:
Right, okay thank you.

MR MOUNT:
If I may then turn to the first point on the skeleton overview which is the first factual proposition and this is the unlawful seizure of all of the appellant's recorded telephone calls over an 11 months period while he was on remand on the charges in this case. There are three separate seizures that are relevant, amounting to more than 1700 recorded conversations with a total duration of more than 220 hours. The story begins just before Christmas in 2008 when the police arrested the appellant, and he was remanded in custody on these charges. There were two sets of charges. The label Operation Jivaro, typically used to refer to the Auckland High Court charges under appeal today, and on those charges Mr Murray Gibson represented the appellant. There was a second set of charges, often referred to as the Northland charges, on which Mr Wayne McKean represented the appellant, and they were heard in the Whangarei District Court.

About eight months into the appellant's remand period, the police, it appears, received information that the appellant had talked about escaping and perhaps doing some unspecified harm to the officer in charge. Those allegations ultimately went nowhere. The appellant was not even interviewed on them. But the police referred the matter to the special investigations group, which is a group of police officers who dealt with, among other matters, the Urewera terror raids and within the special

investigations group the officer in charge was Detective Sergeant Jason Lunjevich and their operation was entitled Operation Valley. Now, so far as the appellant is aware, Operation Valley consisted of essentially one thing, which was a very large-scale data fishing exercise involving the comprehensive and systematic review of most or all of the 1700 calls I referred to a moment ago. All of those recordings had been made under the Corrections Act 2004, which provides a limited power for specific approved Corrections officers to monitor prisoner telephone calls.

The regime is set up in the Corrections Act 2004, which is in the pink volume of authorities at tab 2. We can see at tab 2 that in section 112 sets out the purpose of the monitoring regime. I should say this is a regime brought in, in 1999 and later in the argument I'll take the Court to the select committee reports that relate to this particular regime. So far as the purposes are concerned, the principle purpose is to increase the safety of the community, and then there are a series of specific purposes, all focused on the behaviour of prisoners, in other words, offences committed by or misdeeds carried out by prisoners, those who are in prison at the time.

Under section 115 only specific people delegated by the Chief Executive are entitled to monitor prison telephone calls. Under section 119, the Privacy Act 1993 applies to the monitoring of calls, and under section 117 there are specific situations in which information can be disclosed from the monitoring regime, and we see under subsection (2) that any disclosure requires belief on reasonable grounds that various situations exist.

Importantly for the present case, in section 122 there is a specific section that says that privilege continues to apply to any material monitored, notwithstanding the monitoring regime.

Detective Sergeant Lunjevich learned of the monitoring regime, with all of its various provisions, and decided to apply for a section 198 Summary Proceedings Act search warrant to seize recordings of all of the phone calls made by the appellant going back for six months. He spent a week preparing the search warrant application and he learned in the course of that that one of the approved telephone numbers called by the appellant belonged to Mr Murray Gibson, the appellant's lawyer.

Detective Sergeant Lunjevich made a deliberate decision to include Mr Gibson's number in the search warrant application and admitted this was deliberate. He said, among other things, "I'm a detective. It wasn't a blasé decision. It was something that I thought about." He admitted he knew that there were likely to be privileged calls and said, "I know myself that seizing of these telephone calls were likely to be privileged." He also accepted that he knew that there were special requirements where search warrants are likely to involve legally privileged material and he knew that it was likely that he would receive some of the calls to the lawyer.

He explained that his thought process was that he thought there might be something in the calls that would be relevant to his investigation, but inexplicably he did not tell the Court that the police were seeking recordings of conversations with a lawyer and nor did he propose any conditions in the application to preserve and protect privileged conversations.

Perhaps at this point it's worth just looking very briefly at volume 2 of the case on appeal. If we go to page 25, to the search warrant application itself, if you have numbers at the top, 95.

GLAZEBROOK J:
Exhibit 11A, which is about the fourth one in.

MR MOUNT:
This is where the police set out the various numbers that they believed were relevant. (09) 3760389, that's Mr Gibson's telephone number. We can see inexplicably that the four numbers above are identified as to whose number.

GLAZEBROOK J:
What are the numbers below?

MR MOUNT:
Various other individuals and it was accepted by the police officer that he did the usual police technique of establishing whose numbers they were but simply didn't include that information in the application. So if we move on two pages to paragraph 40, the assertion is made that a search would locate the following items and we can see Mr Gibson's telephone number in the list. There is nothing at all in the application to the Court to indicate that that's a lawyer's telephone number. Then we

have the search warrant itself on the next page, 99 at the top and again we see the same number, 3760389, in the search warrant with no mechanism in the warrant to protect privilege in those calls.

The result of that search warrant was that the police obtained approximately 1000 recordings of the appellant's telephone calls in prison over a six month period which included at least 10 calls to two lawyers, nine to Mr Gibson and another to the appellant's property lawyer, Mr Palmer.

ARNOLD J:
So how many of the 10 were made by Mr Beckham and how many by other inmates?

MR MOUNT:
Four of the calls to Mr Gibson were made by the appellant and five by another prisoner, Mr Gilpin.

Now, there's no doubt that the calls to Mr Gibson were privileged. The instructing solicitor listened to those calls and filed an affidavit in the High Court which said that they were and that was ultimately accepted by the Crown. It was also acknowledged by the police in evidence that they listened to one of the privileged calls, at least one, in its entirety. That was a call by Mr Gilpin, not by the appellant. But we knew that because the person who listened to it made extensive notes about the privileged nature of the conversation, about the details of the conversation.

But it was also acknowledged in evidence that the police had used what they called voice identification to identify the other calls to Mr Gibson by the appellant. The High Court found that on the basis of Detective Sergeant Lunjevich's evidence alone that the police had listened to just enough of the calls to Mr Gibson to satisfy themselves that they were privileged calls to Mr Gibson, although the police did acknowledge that it was within the discretion of each officer how much to listen to in order to so satisfy themselves.

O'REGAN J:
And these are all calls on the monitored phone?

MR MOUNT:

That's right. Yes. The evidence was that there are two types of phone that you can use from within the prison. The monitored payphones, which have a recorded message, and are available more or less any time to the prisoners. There are also office phones, which are located within the prison officers' area, and the evidence was from Mr Matapo, the Corrections officer who was called, the prisoners are entitled to use the office phone if a lawyer calls, although he thought they would be limited to perhaps one a week to non-lawyers on that call, but they could call lawyers from the office phone, as well. The office phone, the evidence was, that is not recorded.

O'REGAN J:
Was there any evidence as to why he didn't and Mr Gilpin didn't avail themselves of the non-monitored system?

MR MOUNT:
Yes, there was. What the appellant said, perhaps ironically, was that he felt he had greater privacy on the payphones because he said that the prison officers are usually within earshot when you use the office phone. There was some dispute about that but that was the evidence from the appellant, that he felt he had greater privacy out in the yard rather than in the prison officers' office.

Now, we're still at the factual summary. When we come back to the legal section of my submissions I will, of course, be submitting that the seizure of calls on this warrant was unlawful as a result of the non-disclosure of the likelihood of privileged material being obtained.

Just to continue the outline, there was a second seizure of calls about a month later. This was a seizure which was perhaps a little unusual because it was a seizure by police from Customs. Now, Customs were quite intimately involved in the investigation into the appellant and indeed six Customs officer gave evidence in this trial and it was clear that there was quite a close relationship between Customs and the police in terms of this investigation.

Now, on at least two occasions, or more than likely three, Customs used an inquisitorial power that they have under the Customs and Excise Act to requisition call recordings from Corrections. The power that Customs have is modelled on the familiar Commissions of Inquiry Act 1908 inquisitorial power, where they can

essentially simply requisition material from any person under the Customs and Excise Act.

Now, the first that we have in evidence was on 11th of August 2009 and it was accompanied by an email that said, "As discussed, I've rolled over the requisition," which rather suggests that there must have been an earlier one, although Corrections couldn't find any record of that earlier one. Then there was a second requisition on the 3rd of September 2009. Both of these are in the documents before the Court. Now, following the second requisition –

ELIAS CJ:
That requisition under section 161, which Act was that?

MR MOUNT:
The Customs Act.

There is something interesting in terms of the dates. The first requisition by Customs appears to coincide almost exactly with the beginning of the police interest in obtaining recorded telephone calls, so there may be an inference from the evidence that the close co-operation between Customs and police was what twigged police to the idea of seizing telephone calls. But that's no more than an inference in the evidence. In any event, in mid-September 2009 police collected another batch of telephone calls from Customs. At the time they did that, the evidence was that they knew, of course that it was possible or even likely that Customs would also have privileged material because they'd been listening to calls for a month by this stage. They had themselves listened to privileged material by this stage. So the evidence was that the police knew well that it was likely that they would obtain further privileged material from Customs, but they did nothing to invite Customs to put in place any filter to prevent the transfer of privileged material from Customs to police.

So again when I'm at the legal part of the submissions, I will submit that this second seizure was also unlawful, but the third seizure was five months after the first. It was in February of 2010 and it followed on from a warrant that had been granted in January of 2010. So by this stage the police operation of the special investigations group had been going for about five months and had uncovered no evidence at all of any escape plan. But nonetheless the police decided to apply for a second search warrant to obtain another large batch of calls and of course on this occasion the

police knew that they had twice by then obtained privileged calls. They knew that their systems had not prevented privileged material from being listened to, at least in part. They did continue to know, of course, about the importance of legal privilege but inexplicably for the second search warrant the police again deliberately included Mr Gibson's telephone number in their application to the Court, and again they failed to tell the Court that they were including a lawyer's telephone number in their search warrant application, and indeed they incorrectly told the Court that calls that were deemed to be privileged had not been listened to. Now in fact police accepted that was wrong, they had listened to privileged calls. There was Mr Gilford's call where they listened in full and there were the calls to Mr Gibson from the appellant where they'd listened to just enough to ensure that they were satisfied it was Mr Gibson.

ELIAS CJ:
They said that in the application for the search warrant.

MR MOUNT:
Yes, yes there was just a passing reference.

ELIAS CJ:
Do you have a page reference to that?

MR MOUNT:
Yes.

ELIAS CJ:
You don't need to take us to it.

MR MOUNT:
It's page 60 of the numbered volume. I think if we look at the stamped numbers at the top it's 118.

ELIAS CJ:
Of volume? Which volume?

MR MOUNT:
Still volume 2 I'm sorry.

ELIAS CJ:

Oh yes, thank you.

MR MOUNT:

The paragraph reference, it's paragraph 9 of the second application. It talks about the fact that the police had received 972 telephone calls and they said, "All calls except those deemed to be privileged, such as calls to a solicitor, were listened to and brief notes created to summarise the main points of the conversation."

WILLIAM YOUNG J:

That's not quite what – it's not – I mean that's ambiguous but it is – does rather suggest that they were aware that calls were being made to solicitors but in respect of those calls they weren't being listened to and summarised.

MR MOUNT:

That's right, the assertion is made that, "We listened all the calls except those which we deemed to be privileged to a lawyer." I suppose Your Honour is right that I think read literally it's saying that the calls to a solicitor were not listened to and that's the inaccuracy in my submission. The other important omission from that paragraph is the failure to tell the Court that rather than just stumbling across some calls to a solicitor, which might be the inference from paragraph 9, they had in fact deliberately obtained calls to a solicitors and that these were in fact calls that were identified in the search warrant itself.

Now the police in the High Court did give some insight into their thought process for the second search warrant, page 216 of volume 3 of our case. The police officer said, "I still turned my mind after all of this there was potentially, perhaps unlikely, something that may be needed." So this is volume 3 of the case.

WILLIAM YOUNG J:

What page?

MR MOUNT:

216. If this one is numbered in your bundle, it's 216 down the bottom.

GLAZEBROOK J:

Up the top.

MR MOUNT:

Or else if you've only got the top numbers, it's page 207 of the notes.

GLAZEBROOK J:

207?

MR MOUNT:

Yes.

GLAZEBROOK J:

Yes I think you can just assume we don't have numbers.

MR MOUNT:

The numbers down the bottom, yes.

GLAZEBROOK J:

No, for some reason.

ELIAS CJ:

Sorry what are you taking us to in it?

MR MOUNT:

The, I'm sorry if I could just find the exact reference. I've managed to confuse myself in terms of the page numbers.

GLAZEBROOK J:

It is 216 actually of the notes of evidence I think.

MR MOUNT:

216 thank you.

GLAZEBROOK J:

If you were talking about, "I turned my mind."

MR MOUNT:

That's exactly it, 216 at the top of the page, "I turned my mind after all this." Line 15. And so his thought process was that potentially he might need to obtain and listen to the lawyer calls and then he goes on to say, "I felt that if I needed to perhaps I had time to go back to Corrections and say, 'I served the warrant on you, I now need those calls' and put in place the processes that I intended to occur." So in essence the police officer's thought process was that he would need a warrant to seize lawyer calls just in case they became relevant. On this occasion he in fact contacted Corrections after he got the warrant and said, "Please don't give me the calls to Mr Gibson at this stage." So he did refrain from actually receiving the calls on this occasion but his idea was that he would have that in his back pocket for a rainy day as it were in case it became necessary to listen to the lawyer calls later and at an appropriate time I will make the submission of course that this was equally unlawful by the police and that that was in fact an insidious form of thinking by the police that they could enlist the Court to obtain a search warrant for lawyer calls without telling the Court anything about their intention to do so.

WILLIAM YOUNG J:
The Court would've known presumably that lawyer calls had been intercepted and recorded?

MR MOUNT:
No, in my submission, Your Honour. The evidence from Corrections was that it's most unusual for lawyer calls to be recorded. Their process is –

WILLIAM YOUNG J:
But I mean sorry, wasn't it apparent from the bit you took us to a little while ago that some lawyer calls had been recorded?

MR MOUNT:
That's right, from paragraph 9 of the application, the Court would've been able to infer that the police had received some calls to a solicitor. What they didn't know was the fact that that had been done as part of the very warrant, if you like, that the lawyer's number had been included directly.

Now in my submission the series of events just outlined is a somewhat remarkable series of events for a senior police officer to have taken it upon himself to obtain two search warrants purporting to authorise seizure of calls to a lawyer without advising

the Court of this fact and acknowledging that, in the case of the first warrant, he spent a week preparing it, consulted with senior officers and was aware of the fact that there are special requirements for searches involving legal privilege.

ELIAS CJ:

Is there nothing in the warrant that identifies why these numbers are identified in the applications for the warrant?

MR MOUNT:

The applications are strangely silent on any direct linkage between specific numbers and particular individuals and a substantive reason for wanting to seize those calls.

ELIAS CJ:

Was that usual?

MR MOUNT:

In my submission no, given the onus on the applicant to show reasonable grounds to believe that particular evidence will be evidence of offending. In this instance, in my submission, it was incumbent on the police to lay an evidential foundation for linking calls to a particular number to a particular offence. Of course my difficulty is I have only got the redacted form of the search warrant, so I don't know whether underneath the black there is something that might have provided a greater link but in my submission the search warrants, both of them on their face, are very thin, to say the least, in terms of justifying why calls to particular numbers ought to be seized.

ELIAS CJ:

Why are they redacted, these search warrants to you?

MR MOUNT:

The applications were redacted to protect what I understand to be informant information. Now of course I can't enquire into the basis for that so I don't know.

ELIAS CJ:

Yes.

MR MOUNT:

The Crown may well be able to assist further on that.

ELIAS CJ:
Yes thank you.

MR MOUNT:
The unredacted versions will no doubt be available to the Court if you wish to see them but of course I haven't seen them.

Now the Crown's submission, at least in opening to the High Court, was that there had been no unlawful actions by the police and no breach of the Bill of Rights Act and indeed the actions of the police were entirely reasonable throughout.

ELIAS CJ:
One thing that I haven't got my head around, a lot of things, but one of them is, and I'm just not sure in your – I don't think it's set out in the chronology is there was – it was a developing case during the course of the – so the High Court didn't have some information that you now have.

MR MOUNT:
That's correct.

ELIAS CJ:
You'll be identifying for us what information, if it's material, they didn't have, won't you?

MR MOUNT:
Certainly I will, yes, yes. At the moment we're still very much in the area where this material was all before the High Court.

WILLIAM YOUNG J:
Can I just say something? Were these numbers the numbers which Mr Beckham had permission to call?

MR MOUNT:
Yes.

WILLIAM YOUNG J:

Is that the way they were selected?

MR MOUNT:
Yes. The police made a decision to apply for everything. That's why I call it a grand scale fishing expedition. So the police decided they would seize the whole lot and then very systematically work through them.

The High Court's assessment of all of this is in volume 3 at almost the end of the volume. There is a handwritten number 85 on the version that I've got. It should be paragraph 82 of the High Court decision. The High Court finding at paragraph 82 was to accept the characterisation by the officer that it was simply an oversight that he had failed to tell the Court about his plan to seize calls to counsel, and that he did not deliberately and consciously make a decision to withhold the information from the Court.

So across the page, (d) is the High Court finding that Detective Sergeant Lunjevich did not act in bad faith. Now, my submission on this, as I outlined a moment ago, is that it is very difficult to reconcile the notion of good faith with a deliberate decision on two occasions to apply to the Court with a search warrant without informing the Court that you are seeking calls to a lawyer. My submission is that the Court should adopt the approach of the Canadian Courts, that approach being to say that where the police are aware of a legal requirement and fail to comply with it, whether that is done consciously and deliberately or whether that is simply a failure to know what they should have known, then the label "good faith" cannot be used. The particular passage I rely on is in the yellow bundle of authorities, tab 12. It's paragraph 99 I rely on. It's the second sentence, "The Crown admits for a time police proceeded to intercept communications without in any way giving consideration to the fact a solicitor was involved. I find it difficult to see how one could conclude the police were acting in good faith. I do not believe it is open to the police to say simply they misapprehended the scope of their authority. The police must be considered as being aware of the effect of solicitor/client privilege and the importance the Courts have placed on it. To paraphrase the findings of the Supreme Court of Justice Sopinka, either the police knew they were acting improperly or they ought to have known. Whichever is the case, they cannot be said to have proceeded in good faith as the term is understood in the context of the charter." The quote is set out immediately below. "Where police powers are constrained by statute or judicial

decision does not open to a police officer to test the limits by ignoring the constraint and claiming later to have been 'in the execution of my duties'."

WILLIAM YOUNG J:

That's rhetoric, in a way, isn't it? Obviously it's not open to a police officer to defend something that was unlawful by saying, "Well, I thought it was lawful. I wasn't thinking about it." If the good faith of the officer is in question, then the thought processes might also be material.

MR MOUNT:

My submission here, Your Honour, is that when we look at the various facts and it ultimately was accepted by the police that twice they applied for search warrants knowing full well that there was likely to be legally privileged material available and they did not tell the Court that the label good faith cannot appropriately be applied to that.

WILLIAM YOUNG J:

So that is a challenge to the Judge's finding of fact?

MR MOUNT:

Well, the Judge's finding of fact was that this was an oversight, that he simply hadn't turned his mind to it. Now, I accept that factual component. I can't say that he deliberately turned his mind to the topic. My submission is that even if we accept that, even if we accept that this was blundering and a woeful ignorance of the legal requirements the police cannot avail themselves of the label "good faith" in that instance. At the very best, they can simply say that it was a significant failure by the police but not done with a deliberate intention to mislead the Court.

ELIAS CJ:

What's the reason for good faith here? Is this misfeasance in public office? What is it directed at? If you're running a Bill of Rights Act argument, it's relevant but it can't be determinative, can it?

MR MOUNT:

That's right, Your Honour. Ultimately in the Bill of Rights context in my submission one has to look at the effect of the breach of rights, and in a sense whether the police did that deliberately or whether they did it carelessly, the right is still breached and

from that perspective it's not material, but when we come to the remedy part of the submissions certainly the Crown places quite some reliance on saying, well, these are very minor and immaterial breaches of the Bill of Rights because this is simply something that's done in good faith. The police in essence made a mistake but it's no more than that.

ELIAS CJ:

But there's no authority, is there, that constrains us to providing a remedy only if there's bad faith.

MR MOUNT:

That's right. In fact, that was something that was dealt with in the context of abuse of process in the High Court, and the High Court did accept my submission to precisely that effect. The Crown had said in the High Court that unless you could find bad faith then there would never be a situation where police conduct amounted to an abuse of process. My submission, which the High Court accepted, was that you don't need an affirmative finding of bad faith, and that's a submission I say is equally relevant to the remedy of sentence reduction.

O'REGAN J:

So you're accepting that this was an oversight by the officer, so are you accepting that he didn't do it deliberately? Because the note I took was you said that he deliberately applied for a search warrant without telling the Court that there was a lawyer's number included in it.

MR MOUNT:

He certainly accepted that, that it was a deliberate decision to apply for a search warrant and that he knew that it was a lawyer's number.

O'REGAN J:

But the High Court has found that his actions were an oversight, was it?

MR MOUNT:

That's right.

O'REGAN J:

Are you challenging the oversight finding, or not?

MR MOUNT:

Well, I am submitting that given the accepted position that he knew what he was doing, he knew he was applying for a search warrant to a lawyer's office, the police cannot use the label "good faith".

WILLIAM YOUNG J:

You are dancing around on the head of a pin. He knows this is all going to be examined later. It's all going to be out in the open. He doesn't actually target Mr Gibson's telephone calls, the calls to Mr Gibson in a way that suggests he really wants to know there and then what's in them.

MR MOUNT:

Well it remarkably –

WILLIAM YOUNG J:

So just wait a minute.

MR MOUNT:

Sorry.

WILLIAM YOUNG J:

So he knows it's going to be looked at, he doesn't go in there all out looking to see what Mr Beckham is saying to his lawyer. In fact he doesn't actually seek those calls when the Customs have them and he says, presumably, that wrongly, as it now turns out, he thought he didn't have to make more elaborate disclosure when he applied for the search warrants. Now that's wrong but it's hard to get bad faith out of him. I mean why would he do it in bad faith? Why would he swear affidavits and apply for search warrants that he knows are defective, knowing that they're going to be examined later?

MR MOUNT:

Well I'm not sure he necessarily expected this ever to be examined in a Court. It has all the hallmarks of being a situation where, in essence, he made a decision to obtain everything and see what happened. But remarkably he did in this instance say that he did turn his mind to the calls to Mr Gibson and did say that he might well need to listen to them. So he was very clearly aware of the fact that he was obtaining

privileged material and so to that extend it wasn't a situation where he could say in any way that he inadvertently obtained the material.

WILLIAM YOUNG J:
I don't think he is saying that. He's not saying that.

MR MOUNT:
Yes and I just need to say of course that he did receive privileged material from Customs and he didn't do anything to prevent that happening. It was the second warrant where he did say to Corrections, "Don't send me any more calls to Mr Gibson." Just to return to Justice O'Regan's question –

ELIAS CJ:
I would quite like at some stage to be taken to the officer's explanation that the Judge relied on in making that finding.

MR MOUNT:
Yes.

WILLIAM YOUNG J:
Sorry and while you do that can I just check, I thought it was he told Customs that he didn't want the calls to Mr Gibson.

MR MOUNT:
No it was the third occasion where he said that to Corrections.

WILLIAM YOUNG J:
Okay.

MR MOUNT:
So to Customs he did. He accepted he knew that it was likely he'd get more privileged material and he did nothing to stop that happening.

ARNOLD J:
Can I just ask one thing that I'm not entirely clear about?

MR MOUNT:

Yes.

ARNOLD J:

If, as I understand it, what the detective did was simply get a list of the approved numbers and those are the numbers in the warrant. In other words the numbers that Mr Beckham was entitled to call from the pay phone.

MR MOUNT:

Yes.

ARNOLD J:

And what would have been the mechanism if he had said, "Well I don't want any calls to Mr Gibson" because the record that you get doesn't give you a telephone number, the record of the conversations. So what would have been the mechanism that would've been adopted to filter them out?

MR MOUNT:

There was some evidence on this of course from Mr Mills, the Corrections Officer because it was the very mechanism that was used for the January warrant, the second warrant. Mr Mills made it quite clear that it was relatively easy for Corrections simply not to pass on calls to a specific number. In fact I think he explained that it was quite a manual process for him to bundle together the calls that were being supplied to the police and so it was simply a matter of them not supplying calls to a particular number.

ARNOLD J:

I see, okay thanks.

ELIAS CJ:

The appropriate filter mechanism in your submission would have been to exclude the number from the warrant.

MR MOUNT:

From the warrant in the first place, that's right, yes, yes.

GLAZEBROOK J:

And I thought you'd said last time that there was actually a mechanism for not recording those calls and I think you said that earlier. Perhaps you can take us to that because I thought I'd asked that last time and been told that actually they can just record things from particular numbers but I might have mis-remembered that.

MR MOUNT:
Yes that particular evidence is in volume 3 and it's page 73 of the notes of evidences, the top of the page.

ELIAS CJ:
Is it where exhibit J is produced, is that the page?

MR MOUNT:
That's the one, yes exhibit J at the top of the page, line 20, "If you had been told by anyone at police or customs they had received lawyer calls what would you have done? I would've taken action, ensured that the number became a non-record number and had it taken off the system." So his evidence was that where Corrections know that –

ELIAS CJ:
Sorry whose evidence is this?

MR MOUNT:
I'm sorry this is Mr Mills, he's the Corrections Officer in charge of the telephone monitoring system.

GLAZEBROOK J:
Has he got somewhere where he explains how they do the recording a bit earlier, it sounded as though he might?

MR MOUNT:
Yes.

GLAZEBROOK J:
He says, "As I've previously given evidence I would have ensured it became non-record."

MR MOUNT:

That evidence is page 48.

GLAZEBROOK J:

48, thank you.

MR MOUNT:

Where he just outlines that it's a matter of sending an email to the admin person at the prison to say that the particular number belongs to a lawyer and so it should be a non-record number.

ELIAS CJ:

The warrant would of course authorised recording despite Correction's practice on this.

MR MOUNT:

The warrant would authorise seizure of material that already existed but this wasn't a surveillance warrant, it wasn't a forward looking warrant.

ELIAS CJ:

Oh it wasn't, yes of course, yes.

MR MOUNT:

Just a Summary Proceedings Act warrant.

ELIAS CJ:

Yes.

MR MOUNT:

So the position is that if Corrections had followed their usual process and indeed if they'd followed what the Corrections Act contemplates, then the calls to Mr Gibson would never have been recorded in the first place but nonetheless they were recorded and this, in my submission, does aggravate the position to some extent because the police knew from an early stage that Corrections were recording calls to a lawyer and indeed if the police had told Corrections that at any stage they would've stopped that process. And that's the effect of Mr Mills' evidence at the two pages I've just taken the Court to.

GLAZEBROOK J:
Why were they recording all of them in the first place if it wasn't their usual practice? Was that at the police request?

MR MOUNT:
I don't believe there's any –

GLAZEBROOK J:
Because they must have known that was Gibson's number because he's not exactly an unknown lawyer.

MR MOUNT:
Yes and there was specific evidence to that effect. The Corrections staff they well know who Mr Gibson is, they could only put it down to it being an oversight again that those calls were actually recorded.

I think the Chief Justice asked earlier if we could go to the evidence recording the thought process of the police. It's 105 of the notes of evidence in the volume we're in, volume 3.

ELIAS CJ:
Sorry whose evidence is this?

MR MOUNT:
So this is the evidence of Detective Sergeant Lunjevich under evidence-in-chief, page 105. So half-way down the page, line 18 or just maybe line 15, "At that stage I was turning my mind to seizing whatever conversations Corrections held. I felt at the time it was possible that conversations relating to the matter I was investigating there may be something in the phone calls to Mr Gibson. I didn't know because I didn't know a great deal at the beginning of the enquiry." And then he goes on to outline his thought process over the next couple of pages. He's specifically saying he didn't ever suspect that Mr Gibson was involved in anything unlawful but his evidence was very clear that he did turn his mind specifically to the issue of Mr Gibson's calls and think that he may well need to listen to those.

ELIAS CJ:

So is it at 104 that he's describing how these calls came to be recorded?

MR MOUNT:

I'm sorry, 104 he is describing how he learned about the process within the prison. He contacted Mr Mills, who's the intelligence officer, who's familiar with operating the system.

ELIAS CJ:

I see, it's from about 102. So the sequence was that the detective spoke to Mr Mills and the recordings were arranged after that?

MR MOUNT:

That's correct. That's right.

ELIAS CJ:

And then application subsequently was made for warrants to seize?

MR MOUNT:

I'm sorry, that is the sequence in the sense that he spoke to Mr Mills. He found out how the system works. That was part of the week-long process of preparing the warrant, and then the warrant retrospectively sought six months worth of calls, which had been recorded over the previous six months. So the material obtained – this was August 2009. He obtained the calls that went all the way back to February of 2009.

ELIAS CJ:

But why had they been recorded before then?

MR MOUNT:

An oversight by Corrections to have recorded the solicitor calls. They shouldn't have been, but they were.

O'REGAN J:

But all calls – those phones record all calls.

MR MOUNT:

The monitoring regime contemplates that all of the calls are recorded but only certain calls are listened to. It's obviously not possible to listen to all of them.

ELIAS CJ:

I see, yes.

ARNOLD J:

Under the Corrections Act, section 114 says that certain calls are exempt from monitoring, but then section 122 appears to contemplate that such calls may nevertheless be monitored and says if they are evidence is not admissible.

MR MOUNT:

Yes. 122 contemplates the reality that privileged material may occur in the course of almost any telephone call, whether it's known in advance or not that the call will result in privileged material. But section 114, as Your Honour points out, is the one that says these are exempt calls and they shall not be monitored. Now, what that means is they shouldn't be recorded and they shouldn't be listened to.

WILLIAM YOUNG J:

Is that dealt with in practice by using the phone in the office? Obviously not a complete system.

MR MOUNT:

No. The evidence from Mr Matipo was that the Corrections actually encouraged prisoners to put their lawyers' numbers on the approved list for the payphones because, I think, they couldn't cope with the number of prisoners needing to speak to their lawyers through the office.

WILLIAM YOUNG J:

Right, so what system did they have for not monitoring them?

MR MOUNT:

The system was, as Mr Mills described it, that when they know it's a lawyer they take that off the record list so the calls to that number are not recorded.

WILLIAM YOUNG J:

I see, so there's two lists, there's the approved list and the record list.

MR MOUNT:
That's right. Yes.

GLAZEBROOK J:
So where do they say it was just an oversight that Mr Gibson's number wasn't taken off?

MR MOUNT:
There was a reasonably lengthy exchange that occurred towards the notes of evidence where he said he simply didn't think of it. That's at page 217 at the top.

GLAZEBROOK J:
Oh no sorry why Corrections have not taken Mr Gibson's off.

MR MOUNT:
Oh I'm sorry, yes I may need to come back to that Your Honour.

GLAZEBROOK J:
Yes I thought you may.

MR MOUNT:
That's right, in essence the evidence of Corrections was we didn't realise that was Mr Gibson's number, although they certainly knew who Mr Gibson was.

GLAZEBROOK J:
Yes.

MR MOUNT:
It was just I think explained as being an oversight. Now if I can just try and sum up my submission on this point. It is that whatever one makes of the characterisation of this as an oversight, the Crown cannot avail itself of the label "good faith" as a way to minimise the seriousness of the breach of rights involved here. That is because the, in my submission, the Canadian approach which requires that before the police can adopt the label "good faith" there needs to be objectively defensible conduct and the material that the police admitted they subjectively knew in this case, in my submission cannot possibly bear the label "good faith".

I am somewhat hamstrung, I accept, by the fact that there are the concurrent findings in the Courts below and I wouldn't think that the Court to think for a moment the appellant in reality accepts the police were simply acting by way of an oversight here but I accept the difficulty that any appellant faces in this Court seeking to overturn factual findings that have been through the two Courts below.

ELIAS CJ:

How did the Court of Appeal – you've taken us to the High Court decision on good faith, bad faith, what do the Court of Appeal say?

MR MOUNT:

There's no detailed discussion in the Court of Appeal of the factual issues. In essence they simply –

ELIAS CJ:

Treat them as unappealable do they?

MR MOUNT:

They say they were well justified on the evidence.

GLAZEBROOK J:

Well it isn't really what she was saying that they didn't deliberately set out to listen, to hide from the Court that they wanted those calls and they wanted to listen to them because in fact they didn't listen to them except to identify and his evidence was they wanted to park them in case maybe they needed them in the future but does the finding go any further than that?

MR MOUNT:

That's right, Your Honour, in my submission, if we can just look paragraph 84 of the Court of Appeal decision, this is where the Court of Appeal dealt with these facts. They say, "The failure in the…" they call it an interception warrant application, of course it was actually a search warrant, "to avert to the possibility that privilege calls might be seized was an oversight, not a deliberate decision to conceal. Did not act in bad faith or with any improper motive."

ELIAS CJ:

Sorry what page was that?

MR MOUNT:

Paragraph 84 and then 87 they say, "We are satisfied the appellant has not provided any basis upon which the factual findings should be disturbed, amply supported by the evidence." So where that gets us to, in my submission, is that the Court of Appeal has accepted that the appellant can't say the police officer deliberately decided to mislead the Court. My submission is that effectively that doesn't matter, even if he didn't deliberately set out to mislead the Court, given what he knew and given what he did the Crown can't rely on the label "good faith".

O'REGAN J:

But the Court doesn't say "good faith" does it? It says, "He didn't act in bad faith or with an improper motive" is what the –

MR MOUNT:

Yes that's true, Your Honour. That's exactly right, that is the phrase that they use and the way I've put later in the legal submissions is that that's certainly not a factor which the Crown can rely on as in any way mitigating the seriousness of the breach.

WILLIAM YOUNG J:

But it's part of the mix isn't it? I mean aren't we sort of quibbling round labels?

O'REGAN J:

I mean if he'd done it deliberately and with an improper motive it would be a lot worse wouldn't it?

ELIAS CJ:

Because the punitive or the corrective process, the inhibitory motive for dealing in one way or another with evidence or remedy would come into play.

MR MOUNT:

Yes, yes, that's right. And I accept I'm unable to advance the affirmative submission that this was bad faith in that category. My submission ultimately though is that at most this can be a neutral factor because when we look objectively at what the police knew and what they did, this was still a very serious intrusion into his rights.

ELIAS CJ:

And there's still the submission you can make that – which is a prophylactic submission that better processes should have been employed in this area.

MR MOUNT:

Yes certainly. Perhaps then if we turn to the second point on the skeleton which is the systematic review of material that was obtained by the police. What happened was that within hours of receiving the calls the police began a large scale data fishing exercise as I've labelled it and there were two shifts of officer, up to nine officers, who systematically worked their ways through the calls and noted their content down on screening reports. Those screening reports were compiled into a schedule and by December 2009 the schedule had grown to 123 pages. That's the schedule that we have in volume 4 of the case on appeal.

The focus of the officers, in listening to the calls and preparing the schedule, was at least as much on looking for information of value, as they put it, to the current trial as it was to the alleged escape attempt and the way it was described by Detective Sergeant Lunjevich was that if we could obtain some other value out of the information, we would.

ELIAS CJ:

Sorry you said the emphasis was on what?

MR MOUNT:

On finding information of value to the current case, Operation Jivaro. So it was as much on this case as it was on the alleged escape attempt and so he confirmed that it was part of the brief of those listening to the calls right from the start to look for matters that could be relevant to this case as well as various other matters.

ELIAS CJ:

You put it in quotation marks but that's not an acknowledgement that was made in evidence. That's your description, is it?

MR MOUNT:

It is an acknowledgement made in evidence, Your Honour. At page 192 of the notes he confirmed that it was part of the brief of the screen is to look for matters relevant to Operation Jivaro from the commencement. The phrase "obtain some other value"

is used at page 194 of the notes of evidence. Another phrase he used, page 207 of the notes of evidence, was that, "I thought there would be something in the conversations that may be of relevance or context to the Jivaro squad." Three references are 192, 194 and 207. 207 is from the very top, line 1. 194 is line 23. "If we could obtain some other value out of it, we would." He went on at 27 to say, "We're simply trying to use the product as best we possibly could."

WILLIAM YOUNG J:

He said at 207 that the a problem with giving it to the Jivaro people was that it would then be disclosed and it would then open up, make it apparent that there was not Operation Valley going on.

MR MOUNT:

Yes. There was potential for compromise he was concerned about. Now, of course, that objection ultimately fell away because he did give the information in full to Detective Peat but at least initially he didn't give it to the Jivaro team.

WILLIAM YOUNG J:

Was there any there that did assist with the Operation Jivaro?

MR MOUNT:

That's my submission. There was a lot of material in what the screeners listened to and then recorded in the schedules.

WILLIAM YOUNG J:

Did it provide assistance to the Operation Jivaro team?

MR MOUNT:

That will be, no doubt, one of the major points of contention in this appeal. My submission is that there was a lot of strategic and other information that would be of value to the Jivaro team.

ELIAS CJ:

By reference to that schedule, were you going to identify anything by way of illustration?

MR MOUNT:

Yes, indeed. Just to summarise the submission before I get into detail on it, and perhaps at the sort of factual overview I won't go through every point but just to summarise it, there were, in my submission, a large number of areas in which the schedule and the calls themselves contained insights into the defence preparation and the defence strategy, which at the very least would be of assistance to the Operation Jivaro team. Perhaps I can give you some examples.

ARNOLD J:

Can I just stop you a second, just to be clear about this, for the calls in relation to Mr Gibson, do you accept that what the Court of Appeal said at paragraph 83 is right, that there were a number, 12, to listen to, to some extent, and only three of them involved the appellant. They were listened to only to the extent necessary to identify, so in relation to those calls, is that accepted or not?

MR MOUNT:

That is accepted so far as the calls to Mr Gibson are concerned, yes.

ARNOLD J:

So what we're talking about now are the conversations with other people protected by the broader litigation process?

MR MOUNT:

That's exactly it, yes, and privilege over the calls to Mr Gibson hasn't been waived so there's simply nothing I can say about the calls to Mr Gibson, but to be very clear, it's the much broader group of calls I submit gives rise to this new area of potential importance to the Court, and that is the information listened to by the police that revealed trial preparation strategy and indeed instructions to counsel in a number of instances.

ARNOLD J:

It becomes very difficult as a practical matter in a case like this. I mean, let's say Mr Gibson's calls had not been recorded and your argument would be that nevertheless a lot of the – or parts of other calls are protected by litigation privilege. So does that mean, then, that there has to be a process in every one of these cases for vetting all the calls that Corrections monitor?

MR MOUNT:

My submission, Your Honour, is that where it is known that it is likely that there will be litigation privilege material, then yes.

ARNOLD J:

Well, that will be in every case, won't it, because that's what people on remand will talk to people about.

MR MOUNT:

Yes. Every case where there is police seizure of remand prisoners' calls, there does need to be a process to ensure that first, so far as possible litigation privileged material is not seized, but I accept there will be practical difficulties in that.

ARNOLD J:

But that's impossible, isn't it? That would mean that the inmate would have to somehow signal, "I'm now going to talk about aspects of my case with my wife, my friend, whatever." So that can't seriously be suggested, can it?

MR MOUNT:

I accept that it probably could not ever be done, if you like, mechanically or in advance by screening out particular numbers. But what does need to happen, in my submission, is the position in the Search and Surveillance Act 2012, so the submission I advance is in fact that which Parliament has adopted, is that where it's known that there's likely litigation privilege material, steps have to be taken to ensure that the privilege holder has the ability to object to it being used but in very practical terms what would need to be done, in my submission, is to have an absolute assurance that that material does not find its way to those who are involved in investigating and prosecuting the particular prisoner. So –

GLAZEBROOK J:

In practical terms that means people have to listen to it twice. You'd have to pay someone to go through and listen to it, then presumably somehow mechanically get rid of those bits of the calls, then hand them over to the investigating officer to listen to them all over again. If you're looking at listening to six months of calls, that really is, in practical terms, just about impossible, isn't it?

MR MOUNT:

In practical terms, just to use this case an example, I accept that the appellant would have little basis for an objection if there had actually been separation between Operation Valley and the team who were prosecuting him, investigating him and prosecuting him.

GLAZEBROOK J:
But they could have been investigating and prosecuting him from Operation Valley, so just because nothing came of that, if in fact he'd been planning to escape and/or asked someone to bash them to deter them or whatever the allegation was, then Operation Valley itself could have had a prosecution arising from it.

MR MOUNT:
That's right. This is a position which exists, of course, in the instance of interception warrants for those who have already been charged and who either might be on remand or who are facing active charges, and so it's a situation that confronted the Court in the *Turner v R* [2013] EWCA Crim 642 case, which I'll take the Court to, and –

ELIAS CJ:
Sorry, I'm just trying to get it straight. So is your argument really that there should have been an interception warrant application in this case with the protections built into that and that using the – and that the Corrections monitoring is for the purposes of the corrections Act, it's not an investigative system, and if it's to be used to assist an investigation, there have got to be safeguards put in place, because people will be talking about the trials and the trial tactics when on remand.

MR MOUNT:
Yes, certainly for remand prisoners my submission is that when a search warrant process such as this is used there must be safeguards put in place to ensure that privileged information about the prisoner's preparation for trial is not supplied to those who are investigating and prosecuting the prisoner on those charges. Now, I accept that in some instances there will be a legitimate for a section 198, well it's now in the Search and Surveillance Act, but in some instances there may well be a legitimate justification to seize recorded calls from prison. All the police need to do is to ensure that as they listen to that material, they take proper steps to ensure that any privileged conversations they listen to are not given to those who could use them to the detriment of the defendant.

GLAZEBROOK J:

But who – let's assume that in this case the allegation was that the knobbling of witnesses, if you like, in the particular case.

MR MOUNT:

Yes –

GLAZEBROOK J:

What do you say you do in those circumstances – or the attempt to do so, what do you say you do in those circumstances?

MR MOUNT:

In those circumstances there needs to be separation between the police officers who are investigating the knobbling of witnesses, who would have a proper basis to listen to telephone calls, and the police officers prosecuting the prisoner or the earlier charges on which he's remanded, so that the police can properly say that there has been no transfer of privileged information from those phone calls to those who might use the privileged information.

ELIAS CJ:

Well shouldn't the seizure be confined to evidence of the crime that's being investigated –

MR MOUNT:

Yes.

ELIAS CJ:

– isn't it the scope of the warrant for seizure here which battened onto the fact that these prisoners, being in a controlled environment, were being monitored?

MR MOUNT:

Yes, that's stage 1, but the police obviously need to be careful that when they seize prison phone calls they seize only those for which there is a legitimate basis to say they maybe evidence of particular offending.

ELIAS CJ:

Well they'll be drug dealing and matters like that, which will be evidence of crimes being investigated.

MR MOUNT:
Yes.

ELIAS CJ:
But simply seeking warrant for all calls that are being monitored by the Department for Corrections, for Corrections purposes, maybe something different.

MR MOUNT:
That's right Your Honour. That wholesale approach, if you like, trawling through all of the calls over a six month period, ought not to occur, in my submission, it's very unusual.

ELIAS CJ:
You're going to take us to the policy of the Corrections Act –

MR MOUNT:
Indeed.

ELIAS CJ:
– in due course, I'm sorry, we're into the facts at the moment.

MR MOUNT:
I've got that, yes indeed Your Honour, yes. If I could just go back to Justice Glazebrook's question for a moment. In practical terms almost always when this arises, in my submission, the separation is quite easy to achieve. That is because those who are entrusted with the job of listening to and monitoring prisoner telephone calls are specific authorised prison officers and so it's very clear –

GLAZEBROOK J:
But they're not going to be – in a case like this they were not going to be monitoring those calls. They hadn't even listened to any of them and had no intention of doing so, hence the warrant.

MR MOUNT:

Hence the warrant. But in most situations when there's evidence of someone arranging a drug deal, or knobbling a witness, or otherwise conducting unlawful conduct from within prison, that will come to the attention of the police because prison officers, authorised prison officers will have heard that and at that point, in fact, there is a specific mechanism for those officers to disclose the particular conversations. So it's –

GLAZEBROOK J:
Yes, except one could imagine they might have heard a couple of conversations and then the police investigated that, may need to have a look at other, listen to other conversations.

MR MOUNT:
That's right.

GLAZEBROOK J:
Because I can't imagine that the – well it maybe there are only one or two conversations but presumably Corrections are sampling?

MR MOUNT:
Yes so the scenario then – I accept Your Honour is correct. The scenario would be that an intelligence officer would hear evidence of an unlawful act from within prison, notify the police of that potential crime, and there may well be an instance where the police would then want to seize further calls in pursuit of the investigation into that crime. All that would need to be done in that instance to protect litigation privilege, in my submission, would be to ensure separation between he police officers, who are investigating the specific crime from within prison, and the ongoing investigation into the charges for which the prisoner is on remand.

ELIAS CJ:
We'll take the adjournment now thank you.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.52 AM

MR MOUNT:

Perhaps if I could begin by returning to Justice Glazebrook's question about the evidence from Corrections as to whether they knew about this being Mr Gibson's number and how that came about. That's in volume 3, page 43 of the notes of evidences, the evidence of Mr Mills, line 18. He was asked –

GLAZEBROOK J:

Sorry I missed the page number.

MR MOUNT:

Page 43 at the top, line 18. This is where he says that he had no expectation at all that there were lawyer calls that had been recorded. His assumption was that it would've marked as such on the system or he agreed perhaps that admin staff might have picked it up. So in essence Corrections were saying, "Look we didn't know there were lawyer calls that were being recorded."

WILLIAM YOUNG J:

When did Lunjevich know that the number was Mr Gibson's number?

MR MOUNT:

As part of his preparation for the warrant over that week.

WILLIAM YOUNG J:

Oh he see, so he identified each of the approved numbers.

MR MOUNT:

Yes. So we were at point 2 on the skeleton dealing with the focus of the call screeners on extracting value for this case and the second part of that being the fact that calls and summaries revealed information about defence trial preparation and instructions to counsel and strategy. I anticipate returning in more detail to this when we arrive at the legal submissions but if I may summarise some of the examples for the Court and also give a cross-reference that much of this material is included in paragraph 40 of the appellant's written submissions together with appendix 1 which is an analysis of call transcripts but just to give you a sense of the material that I submit was in this category. One example relates to the police discovery of precursor chemicals at the appellant's property. At trial part of his defence was to say that there was an innocent household use for such material. That was

something which featured both in the defence closing and in the cross-examination of various Crown witnesses. That defence, that strategy is very clear from the schedule itself. That's volume 4. If I can make the assumption that volume 4 also has no page numbers, it's page 102 of the internally paged paginated schedule, 102 of 123. This is the call on the 3rd of August at 1.45 pm. The schedule says, "Some discussion about the case and mention about Wayne visiting, Wayne being the lawful. Max has a letter for Jenny which he will deliver through Wayne. Talks about the recovery of precursors by the police was legitimate for the farm." So there's very specific identification there of what his defence will be in relation to a piece of Crown evidence.

Now the transcript of that call is in volume 5 and I'm not sure whether volume 5 has page numbers and that this was call 17. So it's page 86 of the volume, volume 5, letter G down at the bottom. MB is the appellant. He's talking here to his wife Jenny and says, "The cops say that's a precursors, this is precursor, like in my cupboard because they have acetone for painting, caustic soda for clearing the drain, iodine for the cows, that's all part of the farm." And then he goes on to say across the page, page 87, "It's for animal and for the ringworm on the kids or whatever because they're trying to say I've got precursors." Further down, letter D, "It's not illegal to have iodine." And he goes on to give his explanation about how and why he was using the precursor. So what the police recorded in their schedule and what was clear from the call itself was a very specific preview of the defence actually run at trial.

Another example related to the appellant's explanation for fingerprints that were found on items of glassware at his property. At trial he had two responses to the fingerprints found on items. One was that he explained that he used glassware in manufacturing olive oil on his property and the other was that he said another Northland man, Frank Murray, had been at his property and had been engaged in illegal activity while the appellant was overseas and when the appellant came back he evicted Mr Murray from the property and he speculated that that might have been how his fingerprints arrived on glassware. So this was something which was conveyed through various witnesses and also in the closing address and if we're still on volume 5, if we go back to call 2, we can see at page 12, letter D and he's talking about, "Kicking him out of my house while we were in Australia. They did something in my house I didn't approve of." And a little further down, just above letter F, "That's why my prints possibly could be on something."

GLAZEBROOK J:

What's the harm that you say arose from this or is it just – so what's the submission in terms of harm arising from this?

MR MOUNT:

The submission, Your Honour, is that the police and indeed the Crown were placed in possession of information about the appellant's trial strategy and preparation and it was information that would have been at the very least potentially useful to the Crown in preparing for trial.

WILLIAM YOUNG J:

But isn't this just him chatting about the case? It's not him asking people what they can recall or recruiting witnesses, he's just saying well – he's just making a comment about aspects of the case against him, isn't he?

MR MOUNT:

Well my submission is twofold. There are, in my submission, clear indications that what the appellant was doing throughout these calls was preparing for trial.

WILLIAM YOUNG J:

The other thing, it must be common now that what he was saying here was untrue? Because he doesn't really dispute the fact that he was guilty does he?

MR MOUNT:

The position is not quite clear as it's portrayed by the Crown in the sense that he, at the sentencing hearing made it very clear that he accepted a number of things, there were other things that he was less accepting of the result but so far as the innocent household uses of the chemicals is concerned, I'd have to get specific instructions as to what he now accepts as the position but I doubt very much he'd resile from the fact that he did have specific household uses. He has to accept the jury's verdict that the material found by the Crown was not in that category.

WILLIAM YOUNG J:

Were precursors?

MR MOUNT:

That's right.

GLAZEBROOK J:

But even if it was – even if he was preparing for trial, what's the harm? If it was useful to the Crown what harm? Did it diminish the – I mean either the defence was true or it wasn't. I myself have difficulty in seeing whether the Crown new about it then or found it out at the trial, in fact if they found it out at the trial they might have asked for rebuttal evidence which actually is usually worse than having it brought out in the course of the Crown case.

MR MOUNT:

Yes. To answer that question Your Honour, the harm is that, and I'll take the Court to a number of examples from the North American case law, the harm is that the balance of a fair trial as it exists in our system requires that the Crown is not forewarned about the defence that a criminal defendant will advance at trial.

WILLIAM YOUNG J:

That's not true, it's not a requirement that the Crown not be forewarned, it's just that the Crown doesn't have a right to be forewarned.

GLAZEBROOK J:

And in our new system defence are encouraged to forewarn and they're encouraged to forewarn in defence statements at the beginning. So the old fashion trial by ambush is so far from the modern system as to be in antiquity isn't it?

MR MOUNT:

Well certainly there have been a number of developments to try to identify the issues and try to streamline the trial process but none of those developments has taken away the privilege that exists for a criminal defendant to prepare their trial, to prepare their strategy, prepare their witnesses, out of the gaze of the Crown prosecutor. So returning the harm, you know, the harm is that armed with this information the possibility exists that the Crown can prepared itself to respond to specific lines of defence in a way that they're not entitled to do.

GLAZEBROOK J:

But why aren't they entitled to do it? If he brings up – because in a trial process if they knew nothing about this innocent explanation until he gets in the box, the Crown

could easily say, “I wish to call rebuttal evidence to show that you just would not have those quantities of those chemicals and that combination of quantities unless it was for a use other than farm use.” And as I say a rebuttal, a witness would be much more devastating than them dealing with it in the course of the Crown case. So they’re entitled, aren’t they, to meet that evidence?

MR MOUNT:
I’m not suggesting for a moment that they're not entitled to meet it. The advantage that accrues to the Crown in knowing in advance what a particular strategy will be is a tactical and practical advantage that our simply does not allow, in my submission.

WILLIAM YOUNG J:
Well but this is – say Ms Beckham had decided to have a bit of a chat with the officer in charge of the case and said, “Look you guys are wasting your time, all the stuff you think are precursors are really just for the farm, iodine for dealing with animals, acetone for paint and of course there was this guy Frank who was doing some work on the farm but Max kicked him off.” What would be wrong with the police acting on that?

MR MOUNT:
If that were disclosed voluntarily to the police in a situation –

WILLIAM YOUNG J:
But you keep on saying it in such general terms it does, forgive me for saying, drive me bonkers, to say the police aren’t entitled to be forewarned strikes me as a gross overstatement and if they are forewarned they’re entitled to do something about it.

MR MOUNT:
The starting premise of my submission here and it’s articulated in the legal submissions and so we are to that extent jumping ahead and I will try to stick to the structure as best I can but it’s paragraph 7 of the skeleton where I’ve crystallised the legal submission on this topic and that is that, “Where a member of a prosecution unlawfully acquires privileged details of a defendant’s trial preparation, there is a rebuttable presumption that the fairness of the trial process has been compromised.”

WILLIAM YOUNG J:
So the big question is the unlawfully then?

MR MOUNT:

Yes I accept that. If the police lawfully acquire information about trial preparation.

WILLIAM YOUNG J:

And you'll be taking us to authority about the rebuttable presumption.

MR MOUNT:

Certainly I will. So trying to stick as best I can to the skeleton outline, at point 2 I simply try to set out the factual basis which indicates that there were in fact a number of aspects of the appellant trial preparation which were revealed through the calls and through the schedules. Now I've taken the Court to two of those, first the innocent household use for chemicals, secondly the explanation for fingerprints. Now there are a number of others too. One of the important ones was the appellant's explanation or the appellant's account that the money used to purchase particular assets was legitimately derived money. That in particular focused on an apartment in the central city in Auckland which he said was purchased with legitimate money and which the Crown at trial said was purchased with the proceeds of crime.

WILLIAM YOUNG J:

Was that relevant to a money laundering charge?

MR MOUNT:

It was relevant to both a money laundering charge also to two counts that the Crown referred to as bridging counts. The way those came about was there had been two interception operations run against the appellant, one in 2006, another in 2008 and there were two counts put into the indictment, 10 and 11, which alleged that in between the periods of those two interception warrants, in effect the appellant had continued to manufacture and deal in drugs and part of the Crown's argument in closing was to submit that the assets the appellant obviously had access to during that period in between was part of a proof that he was continuing to deal in drugs and so the legitimacy or otherwise of assets that he acquired, including the apartment during that period, were very much trial issues for the jury.

WILLIAM YOUNG J:

Was he convicted on those charges?

MR MOUNT:

He was yes, he was. And so we see from the schedule reference, in fact this is a call, page 26 of the internal numbering of the schedule, a call on the 16th of April 8.03 am.

WILLIAM YOUNG J:

Sorry page 12?

MR MOUNT:

Page 26 of the internal pages.

WILLIAM YOUNG J:

So on the schedule?

MR MOUNT:

Yes.

O'REGAN J:

Where is it in volume 5?

MR MOUNT:

So in volume 5 it's called 15, page 81.

GLAZEBROOK J:

What was the date of the call sorry?

MR MOUNT:

About letter. This was a call 16 April 2009.

WILLIAM YOUNG J:

Why are these calls collected together? Are these the ones that were referred to at trial?

MR MOUNT:

No these are the calls, none of which was referred to at trial but which the appellant has placed before the Court as being examples of his trial strategy that was placed into the hands of the prosecution team.

So in the schedule on page 26, the way it's been noted down by the police is with the preface, "Of interest to Jivaro crew, discusses money, none of the apartments have been purchased with drug money." And so the police note it specifically as relevant to Operation Jivaro and –

GLAZEBROOK J:
It's a fairly self-evident defence isn't it? They say it's drug money, it's hardly a surprise to say you say it's not.

MR MOUNT:
That's right, Your Honour. It's not an offence that would be unable, impossible for the Crown to anticipate. My submission when we get to the legal submissions is that it doesn't matter whether we're talking about a particularly good strategy or a bad strategy. To put it in very blunt language, it's helpful to know where your enemy is weak, as well as knowing where your enemy is strong. And so for a practical trial prosecutor to know that a defence is going to be just the standard defence, just the ordinary defence, and that there isn't anything tricky, there's nothing unusual or particularly spectacular about an accused's defence, that is valuable strategic information in my submission.

So just returning to that example, the schedule specially noted of interest to the Jivaro crew apartment not purchased with drug money, and we see it in the transcript of the call about page 81, letter C. "They're trying to say the money for my apartment is money owed to me from drug deals. Not one of the people who have given me money are involved in drugs, not one." There were a number of other calls where specifically the topic of money, where it came from, and its legitimacy were discussed in the context of preparing for trial. So my submission is that this was another important aspect of the appellant's trial strategy which was revealed.

Another example, and again Justice Glazebrook will undoubtedly point out that this is an obvious strategy, but intercepted conversations were an important part of this trial and the appellant's strategy was to argue that a number of the intercepted conversations had been taken out of context and that what he was talking about was standard conversation, as he put it, and so we see at page 28 of the internal numbering of the schedule a call with the appellant's son, who is a defence witness,

where it's recorded by the police, "Max will say it is standard conversation." So that's half way through the summary of the call.

Now, when we look at the transcript, in fact, the police haven't quite correctly recorded it. It was Murray that's going to say it's standard conversation, in other words, the lawyer's defence will be this was a standard conversation. That's volume 5 page 23. So perhaps if we're looking at call 5 in volume 5 for a moment, a conversation between the appellant and his son, it begins on page 20. The first page of the conversation is the discussion about which particular legal papers need to be shown specifically to Mr Gibson as defence counsel. It's clear from page 21 between letters A and B that the younger Mr Beckham has got a large amount of the defence disclosure and is assisting his father to go through that and to understand what the police case against him will be, and he says at letter B, "I really should be seeing Murray and giving him a copy of what I've got." Then after letter C, he goes on to talk about the material that he thinks Murray should have.

So from letter E, the younger Mr Beckham talks about what the police are trying to do by way of the police case and then goes on to talk about, through page 22, particular intercepted conversations and how they might be approached. So at the bottom of page 22, in the context of this overall discussion of what the defence case will be, line G, the appellant says, "They just try and play half an hour or an hour's tape so the jury – everything on there sounds like dope dealing but they don't play the other 100 hours." Then at the top of page 23 we have, "Murray is going to say, 'No, no, this was a standard conversation.'" It goes on to talk about land deals and particular properties.

Then at the bottom of 23, letter G, "Yes, it's all land deals. What they don't understand they never realised I paid $400,000 for Mangonui and sold it for up to six million." Top of page 24, they don't know that yet, and then between letters A and B on page 24, Gary Beckham talks about a meeting with Rick. Now, we know from the papers that Rick is Rick Palmer, the lawyer who dealt with land transactions. So letter B, "Me and Rick have come to the conclusion, but Murray has to okay it. We believe we should send every transaction to do with the property. We should send down what we paid for it." Then at letter E, the appellant is talking about the information the police don't have, how much he paid for particular properties, the son agrees they haven't got any of that. Across the page, page 25, the son is talking about what the appellant should tell his lawyer. "You tell Murray when you're talking

to him tell Murray that's what I believe. What I'll do is I'll go to Rick, I'll get the financial details. We send them to them as evidence. Murray has to send it in as evidence."

Then at the bottom of letter G, the appellant talks about whether to save it for depositions. At the top of page 26, there's the link drawn to the money laundering charges and a further discussion about a particular property.

Then across at page 27 around letter D we get to specific discussion about the apartment, and as I say this was one of the money laundering charges and also important to the bridging counts. The appellant says, "It's like the apartment. Jenny's father paid $30,000. My friend down the road paid some money. Jenny put in 25. None of those people have ever been involved or even now with drugs."

So that's just an example of the way in which both note it in the schedule and then in the call themselves. There's a reasonably detailed preview.

O'REGAN J:
Are you saying that he, that this meant that he couldn't raise these matters at trial or that it was the way he raised them was compromised in some way? I mean, in what way did this make his trial unfair?

MR MOUNT:
My submission is that his trial was presumptively unfair because of the police possession of this.

O'REGAN J:
No, I'm asking you what, factually, impact it had on the trial, not presumptively.

MR MOUNT:
I accept, Your Honour, that I cannot point to any obvious or spectacular examples where the Crown turned left rather than turned right or asked a particular question rather than another question because of information they learned in these recordings.

O'REGAN J:

So are you really asking us to say we should give a remedy as a sort of punishment against the police for having done this rather than because your client actually suffered any detriment?

MR MOUNT:

I'm not, Your Honour. The legal proposition I advance at paragraph 7 is not suggested to be a punishment against the police. My submission is that it is not necessary for a defendant to show the precise way in which the Crown deployed strategic information that they learned through unlawful access to defence preparation. The reality is that proving that, proving what strategy a Crown prosecutor adopted or what preparation a Crown witness undertook in order to prepare for a trial is always going to be very difficult for a defendant to establish and the response of Courts and other jurisdictions has been to say that that type of enquiry, the enquiry into the specific ways in which defence strategic information was used by the police to prepare to give evidence and so on, is not an enquiry that it is necessary for a Court to embark on. In part, in my submission, because it is a type of enquiry that, in my submission, is both difficult for a defendant to embark upon, would require considerable examination of what the preparation process was for each Crown witness, what each prosecutor knew, how they deployed that information in the overall preparation of their trial and so in essence what Courts in other jurisdictions have said and I'll come to this at part 7 of the skeleton, is that that is not a burden that is appropriate to place on a defendant to show the specific ways in which this information was used.

ARNOLD J:

You indicated at the beginning of that answer you were talking about information unlawfully obtained.

MR MOUNT:

Yes.

ARNOLD J:

Now are you saying this is unlawfully obtained because it's privileged or is the illegality in something else, putting aside the client privilege point?

MR MOUNT:

Yes the submission will be twofold Your Honour. First that it was unlawfully obtained because it was obtained under an invalid search warrant. So to that extent all of this material was unlawfully obtained.

ARNOLD J:
So the search warrant was invalid because of the failure to specifically address the solicitor/client privilege?

MR MOUNT:
Yes my submission is that the failures in both search warrants were sufficiently fundamental that all the material seized under those warrants was unlawfully obtained.

ARNOLD J:
All right.

MR MOUNT:
And then there's, if you like, a belt and braces submission which is that in addition, because the material is subject to legal privilege, litigation privilege specifically, it's also unlawful to have obtained it because it's privileged material.

ARNOLD J:
I mean if you take a case where there's a murder and there are several suspects, police very often get warrants to record conversations in cars or houses or places like that and if in the course of those conversations the suspects who let's assume are ultimately charged, talk with confederates about how are we going to explain this or what are we going to do and this sort of thing, on your analysis if that material is protected by litigation privilege, it makes the interception unlawful?

MR MOUNT:
No Your Honour, it's not as broad as that in my submission. I take my cue on this from the Search and Surveillance Act which has codified the law and what that Act says about the surveillance – sorry interception warrant situation as you've just described is in section 140 and we have it in what's labelled in "Appellant's Supplementary Bundle of Authorities", it's a white bundle about an inch thick, tab 2.

ARNOLD J:

But this wasn't in force was it at the time?

MR MOUNT:

That's right, Your Honour, no. I take it as my cue, as I say as reflecting the common law position but of course it does reflect the law today and perhaps the first thing to –

ELIAS CJ:

Sorry is it respondent's or appellant's?

MR MOUNT:

So appellant's supplementary bundle of authorities. So it's tab 2 which is extracts from the Search and Surveillance Act 2012 and probably the first thing to look at is section 136 which outlines the particular privileges that are recognised in this part, and they include legal professional privilege (b) communications with legal advisers, and (c) litigation privileges in section 56 of the Evidence Act 2006, so litigation privileges specifically included as a relevant privilege in this Act, or in this part. So if we turn across the page to section 140 which is dealing with surveillance, or interception warrants. Subsection (2) requires that a person undertaking surveillance must take all reasonable steps to prevent the interception of any communication or information to which a privilege applies. And (b) destroy any record of such a communication if it is obtained unless that is impossible or impracticable in the circumstances.

ARNOLD J:

But just ignoring this provision for a moment and going back to the pre-Act position.

MR MOUNT:

Yes.

ARNOLD J:

If you're right that the information was unlawfully obtained because of its nature, its characteristics, it seems to me that would apply in other situations where the basic warrant is legally obtained but the quality of what occurs at some point in the interaction is between the person being surveilled and people he or she is talking to would render that unlawful in your analysis. Would render the capture of that information unlawful.

MR MOUNT:

If we assume for our hypothetical scenario that we are dealing with material that is clearly subject to privilege, so it's legally privileged material, and if we assume for the hypothetical that that has come into the possession of the prosecution team, that is the police officers involved in prosecuting a defendant, then in my submission that will be unlawfully obtained material unless – I'll need to think about this, but unless the police have taken all reasonable steps and complied in full with their legal obligations.

ARNOLD J:

Well, I mean we could make it easier I suppose just by saying well let's assume that we didn't have the problem with Mr Gibson's number.

MR MOUNT:

Yes.

ARNOLD J:

Saying that wasn't there.

MR MOUNT:

Yes.

ARNOLD J:

So we can take all that out of the way, that illegality is gone.

MR MOUNT:

Yes.

ARNOLD J:

Your argument is still that having obtained this material the police have obtained it unlawfully, notwithstanding that the warrant was valid, because of the quality or nature.

MR MOUNT:

In fact I make a prior submission and that is that the duty to alert the Court to the potential of privileged material, and to put in place a mechanism to avoid receiving privileged material, extends to material covered by litigation privilege, such that this

material, in my submission, could never have been lawfully obtained. In my submission this man was a remand prisoner –

GLAZEBROOK J:
So you actually couldn't ever listen to any of the phone calls because you could never have a mechanism in place to – do you see the difficulty?

MR MOUNT:
No Your Honour –

GLAZEBROOK J:
What – so you'd have a search warrant but then said a totally independent person is going through all of these calls to pick out what might possibly be subject to litigation privilege, and then and only then is it going to be passed on to anyone?

MR MOUNT:
The –

GLAZEBROOK J:
So the unlimited resources of the Crown would really mean something in those circumstances, rather than just be defence rhetoric.

MR MOUNT:
Well again taking my cue from the Act, which certainly the view of the Law Commission was simply codifying the existing position. Where –

GLAZEBROOK J:
I'm sure they weren't really thinking of litigation privilege in that sense but…

MR MOUNT:
I'm not sure if we have the particular material in the bundles but they do make an explicit reference to litigation privilege and of course it is written into the Act. Section 145 is the section that has codified the law, in my submission, and what it says is that if someone has reasonable grounds to believe that material discovered in a search maybe the subject of a privilege then the duty is to providing the person that you believe maybe able to claim that privilege with an opportunity to claim it, but if that is not possible then there's the necessity to apply to a Judge for directions as to the

appropriate way to deal with the situation So there is, in my submission, a mechanism that is practicable to deal with this position. Section 146 further sets out the steps that someone involved in such a search needs to go through. So I'm not sure whether I've fully answered Justice Arnold's questions about the unlawful status of this material but given –

WILLIAM YOUNG J:
Does your argument turn on the search warrant being invalid for other reasons?

MR MOUNT:
My argument is significantly weakened if the search warrant is found to be valid. My submission, if we have to imagine a situation where the search warrants were valid and lawful, although in fact, I would need to check this, my understanding is that there was, in fact, ultimately a Crown concession in the High Court that the –

WILLIAM YOUNG J:
No, I'm just, what I'm really looking at is you've got a strong submission that the search warrants were invalid because insufficient attention was paid to legal professional privilege.

MR MOUNT:
Yes.

WILLIAM YOUNG J:
Do your complaints about the chit chat in relation to the case depend upon the conclusion that the warrant was for other reasons and valid. Or do you say that it makes the whole process invalid, that they picked up the chitter-chatter of other cases?

MR MOUNT:
I'm not wanting to necessarily embrace Your Honour's characterisations of the discussions as chit chat. My submission is that if the court reaches the conclusion that there's no privileged material here, and the warrant was lawful, then obviously the appellant has little basis for complaint. In other words if the police lawfully, entirely lawfully, obtained material then his basis for complaint is very much reduced.

WILLIAM YOUNG J:

We're going around in circles. Does the fact that their warrant picked up discussions between the appellant and others about the case make it unlawful?

MR MOUNT:

Well perhaps only when we get to the stage when that is then transferred to the actual prosecution team. So mere possession by the police if they are generally separated from those who are involved in prosecuting the appellant, I have difficulty submitting that that is unlawful. What makes it relevant to trial fairness is when that information is provided to the very people who are prosecuting the appellant.

ARNOLD J:

But that, I mean, in the sort of example that I was giving before, it would be the investigatory team for the offending who gets the warrant, you know, to intercept the telephone calls of the principal suspect, or something of that sort, so the material will go directly to the prosecuting group.

MR MOUNT:

Perhaps I can assist by referring to the process that is put in place, just in a practical sense, in the UK. We saw it in the *Turner* case, which was referred to in the submissions. It's in the new bundle at volume 7. We ran out of colours and the label buff volume has been used. The *Turner* case is tab 2. This is a case of the Court of Appeal in the UK.

GLAZEBROOK J:

Sorry, you'll just have to wait.

MR MOUNT:

Now just to orientate the Court to this case.

WILLIAM YOUNG J:

It's quite well known in New Zealand.

MR MOUNT:

That's right, it's known in New Zealand because the victim was a New Zealander. A young man ultimately was convicted of murdering his girlfriend. The police applied, sorry, authorised the use of intrusive surveillance, we can see at paragraph 15, which involved the interception of communications within the suspect's home. There was a

complaint later made by the defence that the police had intercepted privileged communications and that's what this case deals with. Paragraph 23 is the paragraph that explains how the precise problem that you've referred to, Justice Arnold, is dealt with in the UK, and that –

ARNOLD J:
Is this the solicitor/client or litigation?

MR MOUNT:
Both.

ARNOLD J:
Both? Thanks.

MR MOUNT:
So paragraph 23 refers to the relevant code of practice which permits the use of covert surveillance even when the surveillance may result in the acquisition of knowledge of matters subject to legal privilege as defined in section 98 and section 98 is tab 7 of the same bundle and in short it's both solicitor/client and litigation privilege. So the relevant code of practice in the UK says that you can have surveillance even when there may be privileged materials discussed but there must be –

WILLIAM YOUNG J:
So you're telling me, can you just slow down on section 98?

MR MOUNT:
Yes, of course.

WILLIAM YOUNG J:
So it's quite a complex section.

MR MOUNT:
It is, section 98, tab 7.

WILLIAM YOUNG J:
What bit are you relying on?

MR MOUNT:

Subsection (3). Subsection (2) is assuming solicitor/client privilege. Subsection (3) is litigation privilege.

WILLIAM YOUNG J:

It only applies between professional legal advisers.

MR MOUNT:

Or a client or a representative and any other person which are made in connection with or contemplation of legal proceedings and for the purpose of such proceedings.

WILLIAM YOUNG J:

Doesn't this only apply to where it's the professional legal adviser is having a discussion with the client or a person representing his client – oh I see. Between legal adviser or his client.

MR MOUNT:

Or, yes.

WILLIAM YOUNG J:

And any other person. Okay, I understand now.

MR MOUNT:

Yes, so 98(3) is litigation privilege in short.

GLAZEBROOK J:

I'm having difficulty that one.

WILLIAM YOUNG J:

It's the "or" that's critical in (3)(b)

MR MOUNT:

Yes.

ELIAS CJ:

But it's, "Or any such representative and any other person."

WILLIAM YOUNG J:

So you take out professional legal adviser –

GLAZEBROOK J:

Oh and any other person.

MR MOUNT:

And any other person, that's right, yes. So it would apply to a communication between the client and any other person for the purpose of proceedings.

WILLIAM YOUNG J:

It does assume that there's a professional or legal adviser in there, doesn't it?

MR MOUNT:

Well, no, it assumes that a professional legal adviser can have conversations subject to –

WILLIAM YOUNG J:

No, no, but (3)(b) does presuppose that there's a professional legal adviser.

MR MOUNT:

Not in my submission because of the "or". Oh I see, "Or his client." I see, yes.

WILLIAM YOUNG J:

No, because of the "his".

MR MOUNT:

Yes.

WILLIAM YOUNG J:

I mean it's – okay well it's different from us and I'm not quite sure – it may imply that it's a communication between the client and another person for the purpose of laying the results before the professional adviser which is the old fashioned way in which –

MR MOUNT:

Litigation privilege was conceptualised.

WILLIAM YOUNG J:

– privilege was described –

MR MOUNT:

That's right.

WILLIAM YOUNG J:

– and discovery privilege.

MR MOUNT:

That's right. In any event it is clearly a privilege that would have applied in this case because –

WILLIAM YOUNG J:

Well, maybe not, because he probably didn't have a lawyer then.

MR MOUNT:

He had Mr Gibson.

WILLIAM YOUNG J:

No, no –

MR MOUNT:

Oh Mr Turner, no, no, Mr Turner did have a lawyer and that's part of the basis of the complaint, yes. So back to paragraph 23 of –

GLAZEBROOK J:

Was that pre-arrest or was he on bail in *Turner*?

MR MOUNT:

It was pre-arrest but he had sought legal advice.

GLAZEBROOK J:

Yes. So he knew he was being investigated in other words?

MR MOUNT:

He was clearly the prime suspect. So back to paragraph 23 –

GLAZEBROOK J:
Sorry, what tab?

MR MOUNT:
Tab 2. Towards the second half of paragraph 23 the Court explains that surveillance maybe committed when there's a risk of acquiring privileged material but essentially you need to go through extra steps to protect the privileged material. First of all you need to have exceptional and compelling circumstances to justify the warrant. But the risk of acquiring legally privileged matters should be recognised and so far as possible removed entirely. Then it goes on to say, "Unless the risk can be entirely removed, it is necessary for steps to be taken and for the application to explain the steps which will be taken to ensure that any such information will not be used, either for the purposes of further investigations or during the course of any subsequent criminal trials." So there's a requirement that there be that separation –

WILLIAM YOUNG J:
But they plainly didn't, the Court plainly didn't think the chitter-chatter between Turner and his parents was, although it related to the case, was privileged.

MR MOUNT:
What they found there was that because the police had followed all the rules and had, in fact, ensured that separation between – so it wasn't necessary for them to answer that question.

WILLIAM YOUNG J:
But it can't ensure the separation between themselves and what Turner said to his parents about the case.

MR MOUNT:
Ah –

WILLIAM YOUNG J:
Because otherwise the issue wouldn't have arisen.

MR MOUNT:

Well the privilege was, of course, defeated in the context of that case by the fact that he made incriminatory comments about what he had done. So –

WILLIAM YOUNG J:
But why should that affect the privilege? Wouldn't that be all the more reason for applying it?

MR MOUNT:
No, in my submission in this instance there was nothing to suggest that what he was doing was lawfully preparing for trial but instead he was conspiring with his parents. I think they were ultimately convicted for assisting him to defeat the purpose of the course of justice. There was a specific plan to manufacture a defence and so on.

WILLIAM YOUNG J:
But does that mean that what's – I mean that of course is it were is a later development of being convicted, or I presume at the same time as *Turner*, but can the privilege be excluded because it's really about concocting a false defence rather than, as it were, can we work out where we were that day, could you look at a dairy, and stuff of that nature?

MR MOUNT:
Well certainly if you are attempting to pervert the course of justice in your preparations you can't claim a privilege over that. The issue didn't –

WILLIAM YOUNG J:
But that might be decided later because you only, it's only obvious you attempted to defeat the course of justice once the Court has decided you're guilty.

MR MOUNT:
Yes. Well what the Court said at 24 is that arrangements, "Must focus meticulous attention on a need to preserve legal privilege," and of course there's no basis here for thinking it's anything other than privilege as defined in section 98.

GLAZEBROOK J:
I would have thought there's a reasonable amount. I would have thought they were thinking of lawyer client privilege myself.

MR MOUNT:

Well they've made a specific reference in paragraph 23 to privilege as defined in section 98 which we know includes also litigation privilege.

WILLIAM YOUNG J:

Well they may have a rather narrow view of this section 98(3)(b) privilege, that is communications that are more obviously referable to preparation and are not just discussions of interest about the way the case might pan out.

MR MOUNT:

Yes, for the purpose of our current question, which is going back to Justice Arnold's question, how are the police to deal with a situation where they are, they're investigating a crime and they may well stumble across materials subject to litigation privilege. We have to assume that we've got material that is clearly subject to litigation privilege and so we leave aside your point, Justice Young, about things that might be thought to be at the margins of litigation privilege. So we need to assume we're dealing with clearly litigation privilege material. The point I was simply wanting to draw from the case is at paragraphs 25 and 27 in particular. So at the end of 25 the Court records, "There is nothing to suggest that any information which might have been subject to legal privilege was disclosed to investigating officers." So in other words there was a very clear separation between those who were conducting the surveillance, doing the listening, and the investigating officers. It's for this reason I point the case out at this point Justice Arnold, because your question was, how can there be that separation, and in this instance –

GLAZEBROOK J:

Do they say what did happen? Have we got the facts of what happened?

MR MOUNT:

Yes. We can see at paragraph 27 that –

GLAZEBROOK J:

No, no, what was the evidence in terms of how they did that separation?

MR MOUNT:

Yes, to the extent that we can see in paragraph 27 that there were surveillance officers who are separation from the investigating officers so paragraph 25 the

phrase is used “investigating officers”. Paragraph 27 we talk about the surveillance officers.

O’REGAN J:
But that’s because a surveillance officer did actually listen to what was said about legal advice, didn't they?

MR MOUNT:
They may have listened for brief moments.

O’REGAN J:
They turned off the recording, according to this.

MR MOUNT:
That's right. They turned off the recording, continued to listen for brief moments, but used their best efforts to comply with the principles relating to legal privilege.

GLAZEBROOK J:
But if you’ve got mechanical recording like you do in the – that’s not possible, is it, so the surveillance officers were listening live, from the sound of it.

MR MOUNT:
They were. It would have been possible, Your Honour, in this case because in fact we had precisely the same pattern that we see in this case and that is the group of officers were doing the listening. They were a separate group of officers from those who were doing the investigating and in this case it would have been as simple as the police ensuring that the information about trial preparation and so on is not transferred to those doing the investigating. So as I say, the purpose for drawing this case to the Court’s attention is to answer the Court’s question about whether it would be possible to devise a system that could ensure that separation. My submission is that what *Turner* shows us is that it is perfectly possible to devise such a system.

GLAZEBROOK J:
So is your submission that because they didn't put this in place and tell the Court about it the warrant was invalid? You did say that at one stage.

MR MOUNT:

Yes.

GLAZEBROOK J:
So let's leave aside the legal professional privilege for now because we're looking at the question of principle. So assume there was nothing of that. The only thing was that they wanted to get this information from Corrections.

MR MOUNT:
Yes.

GLAZEBROOK J:
You say they had to tell the Court that they'd put in a system of separation and have that system of separation, otherwise the warrant was invalid. Is that the submission?

MR MOUNT:
That's right, Your Honour. The principle that has been established for decades that there needs to be a mechanism to preserve solicitor/client privilege also ought to apply to preserving litigation privilege.

O'REGAN J:
But I think you also said that the fact the warrant was unlawful for that reason wouldn't have been a problem in terms of sentence reduction unless the information had been passed on to the officers who were investigating him for the crime for which he was on remand. Is that what you're saying? The problem wasn't that the police had the information. It was that that information was allowed to get into the hands of the officers investigating the offences for which he was on remand.

MR MOUNT:
Yes, Your Honour. I think I would not be able to submit that there was any fair trial implication if material of this sought had been genuinely isolated from the prosecution team. I might be left with a submission that there was nonetheless an unlawful and unreasonable search and seizure under section 21 and so the – I would be left in my submission with a section 21 basis for submitting that the appellant's rights were breached and then it might become a question of whether sentence reduction would be appropriate for that section 21 breach.

O'REGAN J:

Wouldn't the normal, I suppose, remedy would be to exclude any evidence that was wrongly obtained.

MR MOUNT:
Yes.

O'REGAN J:
Not applied here because that evidence wasn't relied on at trial.

MR MOUNT:
No, no evidence was relied upon at trial directly arising from the unlawful search. That's right.

GLAZEBROOK J:
You're actually suggesting because the prosecution had information about trial strategy that made the trial unfair and the conviction should go.

MR MOUNT:
I am, Your Honour, yes.

GLAZEBROOK J:
And that means you could never retry the person no matter how overwhelming the evidence of guilt because that would always be known to the prosecuting authorities, wouldn't it?

MR MOUNT:
That has been the consequence in a number of the other jurisdictions who confronted this problem.

GLAZEBROOK J:
You perhaps better take us to those because it seems an extraordinary result to me, frankly.

MR MOUNT:
If I could try to stick to the skeleton argument, I'm happy to take the Court to that directly now but it may be better discipline for me to try to stick to the factual account in part 1 and to move to part 3, which is the dissemination of this information.

ELIAS CJ:

It might really be better for you to go to part 7 since we kept coming back to it and I don't want to throw you off. It's just that we do seem to have covered a lot. Perhaps you should complete what you think we need to know, the background we need to know, before you close on the right to fair trial and right to counsel.

MR MOUNT:

Yes. Well, perhaps if I try very briefly to summarise what I would say under part 3 and then I'll move directly to part 7 because it's obviously the area of particular interest to the Court. The significant point under part 3 is that the police did was in December of 2009 to give the full schedule and indeed a set of the full recordings to Detective Peat. Detective Peat was a key member of the investigation team. He gave evidence in relation to about a quarter of the indictment faced by the appellant, so there were 12 money laundering counts. He worked very closely with the officer in charge and he –

WILLIAM YOUNG J:

Did that continue to be Detective Sergeant Schmid?

MR MOUNT:

It did, yes, and if one looks at the notes of evidence he was the single largest witness by page count in the notes of evidence, so he was very much a key figure in the prosecution team within the police. So it's the dissemination to Detective Peat that provides the basis for much of what I say in terms of the trial. So I turn, then, to part 7.

GLAZEBROOK J:

And what did he do with it, do you say?

MR MOUNT:

He read the schedule in full. He requested the full audio recordings and received them. He selected a number of calls that were most relevant to his aspect of the investigation and he said that was about 15 calls. He then parked the calls because he said that he hadn't – the inquiry that he undertook, having received the calls, didn't take him anywhere and he was conscious that there was a potential problem with the officer in charge being thought of as the victim or potential subject of the appellant's

escape and so therefore he didn't discuss the disks with anyone from the Operation Jivaro team.

WILLIAM YOUNG J:
But he was in the Operation Jivaro team, or not?

MR MOUNT:
He was part of the Operation Jivaro team.

WILLIAM YOUNG J:
With anyone else in the Operation Jivaro team?

MR MOUNT:
That's right. The way that the operation name was used by the police, they drew an internal distinction between the Operation Jivaro drug squad detectives and Detective Peat, who was part of the proceeds of crime office. But if we use Jivaro to actually refer to this whole trial, he was very clearly part of the investigative team for the trial. So the police would say he wasn't part of Operation Jivaro but he was, in fact, a key member of the investigation of this case.

WILLIAM YOUNG J:
So the 15 transcripts he printed, did they line up with the ones that we've got in volume 5?

MR MOUNT:
You don't have a record of which 15 he listened to, so we don't know which calls he listened to in full other than to know that they were the ones that he believed would be most relevant to his work.

WILLIAM YOUNG J:
So did he do nothing in writing about those calls? He didn't?

MR MOUNT:
That's right.

GLAZEBROOK J:

He could have listened to the apartment one if he was proceeds of crime, so he was doing proceeds of crime. He wasn't doing drugs, is that right?

MR MOUNT:
That's right. His focus was very much on the financial side of the case but we don't have the details of exactly what he listened to.

WILLIAM YOUNG J:
So did the Crown prosecutors listen to the call, do we know?

MR MOUNT:
There's no evidence of that and I don't submit that they did.

WILLIAM YOUNG J:
So is there no evidence that the calls that you've taken us to actually found their way to the officer in charge of Operation Jivaro or the prosecutors in a practical sense?

MR MOUNT:
There's an evidential gap on that, Your Honour, and that's why I at point 7 of the argument rely on the possession of this material by the prosecutor and I don't advance the submission – I can't establish by the evidence that –

WILLIAM YOUNG J:
I see, so by possession you just mean that the tapes are there. You don't mean tapes were listened to or transcripts read?

MR MOUNT:
I have to accept that there has to be meaningful possession by the prosecutor and my proposition at paragraph 7 is that it's a rebuttable presumption. Now, if it could be established by the police that nobody listened to the material, no one looked at it, that it was simply tucked away on a back shelf somewhere, well, clearly the presumption would be rebutted.

WILLIAM YOUNG J:
It's not very likely that the prosecutors themselves would have gone and listened to tapes at random. How many hours were there?

MR MOUNT:

220 hours, something like that.

WILLIAM YOUNG J:

It would have taken sort of four and a half standard weeks to listen to them.

MR MOUNT:

I accept that, Your Honour. That's right.

WILLIAM YOUNG J:

It's not just in the way in which criminal litigation is done. One doesn't imagine it was very likely, so unless there's a document trail one would probably assume that these transcripts didn't find their way to the prosecutors.

MR MOUNT:

Well, my submissions don't rely in any way in asserting that the prosecutors listened to this material.

WILLIAM YOUNG J:

Those transcripts that are in volume 5, they're not transcripts that were prepared for trial?

MR MOUNT:

Correct, yes. That's right. At the hearing last year, we went through the unhappy saga of the late provision of this material. The Court will recall that the schedule we've been looking at in volume 4 was in fact not disclosed to the defence until after the trial verdicts and it came about in a very unusual way. It was something of an afterthought in the context of Detective Peat's re-examination in a post-verdict hearing to address abuse of process and so –

WILLIAM YOUNG J:

Did that schedule become available to the prosecutors or the Operation Jivaro team before the trial?

MR MOUNT:

We don't have any evidence of that, so again I'm not asserting that the prosecutors had the schedule.

WILLIAM YOUNG J:
So that's an Operation Valley schedule?

MR MOUNT:
It's an Operation Valley schedule that was provided to Detective Peat, so to that extent it's part of it and he read it in full so it's in Operation Jivaro.

ELIAS CJ:
When was it provided to him?

MR MOUNT:
In December 2009, so more than a year before trial.

Before I leave point 3 on the overview, I should address what undoubtedly my learned friend will say about Detective Peat's receipt of the information. What I expect the Crown will say is that he simply received this information and he did nothing with it and told no one about it. We do have a factual finding from the High Court that Detective Peat told nobody about the disks. My submission is that what we don't have, and where we have an evidential gap, is what Detective Peat did with the information he learned as a result of reading the schedule. So while there is a clear factual finding that he didn't talk about the disks, what we don't know is what he did with the information from the schedule.

WILLIAM YOUNG J:
Was it suggested to him that he had done anything?

MR MOUNT:
It wasn't, and the difficulty we have is that, as I say, this schedule didn't arise until after the trial verdicts and it came about as an afterthought in the context of the re-examination of Detective Peat. So it was perhaps in the defence hands for no more than 15 minutes and it appears that there wasn't a copy of the schedule retained either on the defence file or on the Crown file after that hearing, and so my submission is that undoubtedly if this schedule had been disclosed, as it should have been, in my submission, before trial then there would have been a full evidential examination of what Detective Peat did with the information he learned, who he talked to about –

WILLIAM YOUNG J:
So it's referred to in his evidence at trial?

MR MOUNT:
No, no.

WILLIAM YOUNG J:
Evidence after trial?

MR MOUNT:
Evidence after trial, yes. What happened was –

ELIAS CJ:
You said in re-examination. That's what, at which hearing?

MR MOUNT:
At a hearing that took place after the trial verdicts.

GLAZEBROOK J:
Have we got this somewhere?

MR MOUNT:
We have, yes. It's set out – the sequence is a little bit unusual but it's set out paragraph 60 of the appellant's submissions.

GLAZEBROOK J:
I meant the raw material.

MR MOUNT:
Yes, the evidence itself, yes.

GLAZEBROOK J:
In your submissions – you don't need to take us to it if you've got the references in your submissions.

MR MOUNT:

Yes, the various references are in the footnotes so paragraph 60. I see the time.

ELIAS CJ:
All right. So where have you got to? Have you got to the end of 3?

MR MOUNT:
We're between 3 and 4 in terms of a factual identity but of course we've gone straight to the heart of a number of the legal issues. I hope that will mean that I can move through the legal submissions much more quickly.

ELIAS CJ:
All right, thank you, we'll take the adjournment now.

COURT ADJOURNS 1.00 PM
COURT RESUMES: 14.14 PM

MR MOUNT:
If the Court pleases I will turn to part 7 of the skeleton now.

WILLIAM YOUNG J:
Detective Peat does deal with this at the back of volume 3. He says that he didn't – he listened to the calls, 15 calls, didn't undertake any further enquiries, did undertake some enquiries in respect of safety deposit boxes but was going to do them anyway, no positive result. "Met with Mr Johnstone, counsel for the Crown. Mr Johnstone sought to confer with me none of my evidence would touch upon information which I would become aware of as a result of Operation Valley, that's the position, I did however advise him that I had two discs containing Mr Beckham's recorded calls and other material and of the extent to which I would access them." There's much suggestion that forensic advantage was taken of the calls, is there?

GLAZEBROOK J:
Yes could we have the page?

WILLIAM YOUNG J:
Well there's no page.

O'REGAN J:

It's about five pages in from the back of volume 3.

GLAZEBROOK J:
After Lunjevich?

MR MOUNT:
The affidavit of Detective Peat.

WILLIAM YOUNG J:
It's one back from Lunjevich.

GLAZEBROOK J:
One back from Lunjevich thank you.

MR MOUNT:
Yes. That's right, this came about because Detective Lunjevich had said pre-trial that none of the privileged calls to Mr Gibson had gone to anyone else, in fact it transpired that Detective Peat had received a disc containing the calls to Mr Gibson. This came to the attention of the Crown prosecutors during the trial and quite properly the Crown filed an affidavit with the Court to correct the record by showing that in fact Detective Peat had received the calls to Mr Gibson but went on to say that he hadn't listened to them or made use of those calls to Mr Gibson in any way.

This led the defence to apply again for further evidence to be called about the possession and use of privileged calls and also to apply again for stay. So after the trial verdicts there was a hearing, first of all to decide whether the defence application for further evidence to be called should be granted and then after that was declined, to deal with the second stay application.

So was evidence called post-verdict, more particularly about what Detective Peat received and what he did with it but the whole focus of that hearing was on his access to the calls to Mr Gibson, there wasn't any focus on his access to the schedule, because the defence didn't know about it until re-examination.

WILLIAM YOUNG J:
I've got the dates in my – when was the verdict?

MR MOUNT:

The verdict, if we just look at the chronology, the verdicts were on or about the 11th of April 2011.

WILLIAM YOUNG J:

Well looking at this affidavit it's clear from Detective Peat's affidavit that he had received a schedule.

MR MOUNT:

That's right. There was reference to the fact that he received a schedule but the schedule itself hadn't been disclosed at that stage.

WILLIAM YOUNG J:

Yes.

MR MOUNT:

And there was nothing in the affidavit to indicate that it was in fact 123 pages long and it revealed all of this information about what the appellant submits is trial preparation. So from the appellant's perspective he was not – he hadn't seen the schedule at that stage and so he didn't know what was in it.

WILLIAM YOUNG J:

But it did say they included a summary of the content of the calls. So one would infer from that that it was quite a big schedule.

ELIAS CJ:

"Where these schedules included a summary of the content of the calls." None of the calls were – it's not really describing the schedule is it?

MR MOUNT:

Yes the short point Your Honour is there was nothing in that affidavit that in fact alerted either the appellant or his counsel and I should say I was not counsel at trial. My name is included in the notes of evidence as having been there at trial, in fact I wasn't trial counsel and I wasn't there for this phase of the hearing but whether or not there was something in there that might have alerted the appellant to the true position in relation to the schedule, he hadn't actually received the schedule and he wasn't alerted to its significance.

The factual finding, while we're dealing with this topic, the factual finding about what Detective Peat did was contained in the judgment of the High Court, dated the 3rd of May 2011, so this is well after the trial verdicts. If we look in volume 4, the particular page is page 671 in the handwritten pages at the top, it's about 20 or 30 pages from the end. I'm sorry it's about 40 or 50 pages from the end.

ELIAS CJ:
Sorry this is the volume with the schedule in it?

MR MOUNT:
That's right, the same volume that has the schedule.

O'REGAN J:
It's in a separate volume I think, there's a second volume of volume 4, it's in two parts for some reason.

MR MOUNT:
Sorry I'm not privy to the way in which the bundle has been prepared for the Court, I'm sorry about that.

MR MOUNT:
So this is the High Court's judgment. If it's of any help it's before the sentencing notes, before the pre-sentence report.

O'REGAN J:
I think we've all got it now.

MR MOUNT:
So this page begins with (b) and goes down to (g) and the relevant finding is (c). And so what the Court found there was that Detective Peat did not tell anyone that he had the discs and that was in the context of cross-examination that occurred about whether anyone else might have listened to the calls to Mr Gibson even though Detective Peat said he didn't listen to the calls to Mr Gibson and if we go back to the evidence, it's at the beginning of volume 4, and there are lots of numbers in the copy that I have but it is the page that has a handwritten "710" at the top, the beginning of volume 4. It looks to have been page 13 of the original typed notes of evidence. And

perhaps if we go back one page to 709 or page 12 of the original notes, we can see that it's the re-examination of Detective Peat at the end of his evidence and this is where the schedule emerges for the first time so far as the defence are concerned.

GLAZEBROOK J:
"Re-examination, you were asked questions about a schedule of calls that you had."

MR MOUNT:
Yes.

GLAZEBROOK J:
So he must have been asked about it before then?

MR MOUNT:
Yes it was that reference to the schedule in the affidavit. I'm sorry I should have explained that the defence still didn't have the schedule at this stage and the question that he was asked was about whether the – was focussed on whether there was any information about the calls to Mr Gibson on the schedule. That goes all the way back to page 2.

GLAZEBROOK J:
699 I think.

MR MOUNT:
Yes that's right page 2 or 699. So in re-examination he's asked more about this schedule. He says he doesn't have it with him. He's asked about whether the schedules contained Mr Gibson telephone, he didn't know and asked about whether there was indication that there were calls involving Mr Gibson and he said, "No not when I looked through." Line 10 of page 701 he was asked, "Once you saw the schedules how interested in them were you?" He said, "Initially I was very interested in the calls because I was interested in the money laundering side of the investigation." He then obviously received the discs and listened to calls. That's where he talks about making the safety deposit box enquiry. Then he says there were issues, this is line 19, "Issues concerning Detective Sergeant Schmid, threats made against him and to avoid problems in that respect I decided that information in any of the calls wasn't taking me anywhere so I just parked the enquiry. Now what were the problems about Detective Sergeant Schmid, he had threats against him.

He wasn't privy to these discs and the content of them and it wasn't to be discussed with him nor other staff members." So he was then asked –

ELIAS CJ:
It's not terribly clear, the cause and effect in that explanation.

MR MOUNT:
Yes. Pausing there Your Honour, that's right I don't understand myself why it is that this was seen being the impediment to discussion of matters in the schedule of the calls but whatever the thought process was it seemed to be because of Detective Sergeant's Schmid's status and the potential target of the escape.

Then we move, at the bottom of the page, to the physical storage of the discs and what he told other members of the asset recovery unit about the discs. It's at the top at 711, "I didn't even disclose the fact that I had the discs." And then further down that page, line 21, "Did you receive any approach from any member of the Operation Jivaro drug investigative team for access? No. Did any member of that team, including Detective Sergeant Schmid express an interest in obtaining access to the discs? No. Any indication that any member of that team was aware of the discs? No." It was at that point that the detective was then asked if he could – or what would be involved in going away to get the schedules. Another witness was interposed, the detective went off to his office Harlech House, came back later, page 35 or 732 of the notes. He came back and was asked some more questions about the schedule at that point and so the other relevant passages are at 734 where he was asked at line, "Do the staff that were working with you have access to those schedules? If they'd gone through the Jivaro they could've found a schedule I printed off." And it's clarified from the Court that what he's talking about there were staff members from the asset recovery unit who could have had access to the schedules if they'd had a look at the folders. So it was a slightly unusual evidential position because we can see in fact from page 732 that the detective returned to Court with a copy of the schedule shortly before 12.10. You see at the bottom of the page we have the time and the time stamps are every 20 minutes I believe. So he comes back to Court, he's got the schedule, it's produced as exhibit 3, this on page 732. He's asked a few questions and we can see two thirds of the way down, page 733, there's an objection at 12.12, so it's two minutes into the examination. So we're running at about two minutes a page and then he finishes his evidence on 734. So

it's probably something in the realm of about 10 minutes or so that he is questioned about the schedule.

And then as I said before there was the slightly unusual position where clearly it was in the hands of counsel for that 10 minutes perhaps, no more than 15, produced as an exhibit but no copy was provided to the defence or it appears the Crown and so it was only in preparation for this appeal where I asked the Court for a copy of the exhibit, the Court didn't have it, it was obtained via the Crown from the police and that's the way in which we've got the schedule in volume 4. So it was very much an afterthought. It came up during re-examination and it was passed through the hands of counsel for a very brief time and it had never been disclosed in the usual way, as I submit it should have been well in advance of trial, which would have allowed a proper evidential examination of what Detective Peat gained from the schedule and who else he talked to about the information that he, in my submission, must have obtained from the schedule.

ELIAS CJ:
Mr Mount, I'm getting a little lost as to the significance of this. What do you take from that?

MR MOUNT:
It is part to explain the evidential void that we have about what police did with the information in the schedule.

WILLIAM YOUNG J:
Well it's not really a void is it? They basically say that with the exception, as I mentioned, they did nothing.

MR MOUNT:
The factual finding in my submission is he told no one about the discs, he made an enquiry and then he parked it. So I accept Your Honour that's right there's no evidence that in listening to the calls or in reading the schedule, there's no evidence as to specifically what the police did other than the enquiry that was made and obviously the second search warrant that was applied for on the basis of Detective Peat presumably heard. So they did do something, they applied for another search warrant and they made another enquiry.

GLAZEBROOK J:

I guess that was on the basis of what Detective Peat heard.

MR MOUNT:

Because Your Honour when we look at the second search warrant application, in volume 2, and this again the page numbering is awkward but it's 119 at the top of the page, paragraph 16. Paragraph 16 specifically relies on Detective Peat having read the summaries and it goes on to say, "In his opinion these summaries relate to conversations about money laundering." So quite clearly Detective Peat had – or his review of this material was used as the basis in part for the second search warrant.

ELIAS CJ:

I cannot find it sorry.

GLAZEBROOK J:

Just after the Duffy minute.

MR MOUNT:

Yes it's maybe a third of the volume 2 and there's a – see the page numbers aren't much use because they change so much.

ELIAS CJ:

Yes I have it thank you.

MR MOUNT:

Yes so paragraph 16 of the application refers to what Detective Peat did and what his opinion was about calls. But what is slightly curious about that is that if we go back to volume 4 where we just were, page 703 at the top, the detective said he wasn't involved in the January search warrant, which is obviously not correct on the face of the application, but does tend to suggest that the detective's memory of what he did as a result of reading the schedules was not perfect at the time that he was questioned about this.

WILLIAM YOUNG J:

You may well be right, not necessarily, I mean Detective Peat may have just made a note of what the – because that looks as though it's a quote, doesn't it?

MR MOUNT:

In the search warrant application it does and of course we've had no disclosure of any note that he created so the inference, in my submission, is he must have been involved in the search warrant application. So to go back to the Court's question, what did he do with the information. Well he was clearly involved in preparations for the second search warrant. He also says that he made another enquiry and he looked at –

GLAZEBROOK J:

Although he may just have handed that to Lunjevich, and there was nothing wrong with him handing it to Lunjevich, was there, because presumably that team had read all of them anyway.

MR MOUNT:

That's right. I'm not suggesting there was anything improper. It's just a question of did he do anything with the information.

WILLIAM YOUNG J:

But he does say that, albeit it in general terms, that it was associated with the inquiry into –

MR MOUNT:

Into the money laundering and so on.

WILLIAM YOUNG J:

The safety deposit box.

MR MOUNT:

Yes, yes. This is all just simply to say that it's not that he did nothing with the information, he did do something. He participated in acquiring a new warrant. He made an enquiry into the safety deposit boxes, although he said he had it in mind to do that anyway, and then his evidence was that he simply parked the enquiry because he didn't see this providing any further value. So the evidential void that I refer to is that while we have a reasonable amount of evidence about what he did, so far as the Courts and Mr Gibson were concerned, namely that he didn't listen to them, and that what he did with the discs, namely that they were in his office and he didn't talk to anyone about the discs, the distinction I seek to draw is that we don't

have evidence about what Detective Peat did with the information that he must have gathered from reading the schedule and listening to the calls that he listened to. So far as –

WILLIAM YOUNG J:
Sorry, I thought what he did say in very general terms was that he followed up that information in relation to safety deposit boxes.

MR MOUNT:
He did that.

WILLIAM YOUNG J:
And isn't that at least consistent with what is said in the second search warrant application?

MR MOUNT:
Very much so, yes. I'm not suggesting that the second search warrant application was misleading in that way. The distinction I'm seeking to draw is that for the purpose of today's hearing I submit that an important question is, what did Detective Peat do by way of preparing for trial with the information that he gained from the schedule and the calls. In other words, did it help him to prepare his evidence, did it –

GLAZEBROOK J:
"I decided the information and the calls wasn't taking me anywhere."

MR MOUNT:
That's right.

GLAZEBROOK J:
Well it doesn't suggest he did much with them if he thought it wasn't taking him anywhere?

MR MOUNT:
That's probably the high point of the evidence from the Crown's perspective, would be that paragraph. In my submission –

GLAZEBROOK J:

Well we can't speculate that he might have done something when he says he didn't. it's not the high point, it says he didn't do anything. He looked up that, something that he was going to look up anyway, and then decided there wasn't anything else there that was going to be of any assistance.

MR MOUNT:

That evidence, in my submission, is focused on whether he carried out any more enquiries, whether he did anything in a practical sense, in other words. Although, of course, we do know he did, he applied for a second – or he assisted to apply for the second search warrant so it's obviously not literally correct what he says.

ARNOLD J:

What are you expecting us to do on something we don't have any evidence on?

MR MOUNT:

I accept, Your Honour, that there is an evidential void about what Detective Peat did with the information he learned.

WILLIAM YOUNG J:

I think it's not a void. I think you're asking us to go – that the evidence, satisfactorily detailed or not, and I don't think it is very detailed, does indicate that he did nothing material.

MR MOUNT:

What it doesn't indicate is what benefit was it to him to know where the defence would be coming from at trial?

WILLIAM YOUNG J:

I think it's implicit, at least, that it was of no benefit. He didn't talk to the prosecutor about it other than in the limited sense that he mentions.

MR MOUNT:

Well, that topic in my submission wasn't explored in evidence at all because the distinction I'm trying to draw, and I understand it's a subtle one, perhaps, but the distinction is I submit we are left in a position where what's important about Detective Peat is he is an integral part of this prosecution. He receives information about the

defence approach and he continued to remain an integral part of the prosecution, knowing what he knew about the defence approach.

WILLIAM YOUNG J:

But it's far from clear, really. I mean, presumably what he's interested in is the money laundering discussions. He looks at about 10 or 15 discussions. You take out another 10 or 15 discussions. There's probably not a lot of commonality in them.

MR MOUNT:

Clearly there's some in the sense that all of the material about the apartment and the assets and so on, that's very much squarely in the money laundering zone.

WILLIAM YOUNG J:

But did he listen to them? I mean, just about everything in a sense is money laundering.

MR MOUNT:

We don't have prove of what he listened to.

O'REGAN J:

But we don't have evidence, so we can't make any findings if we don't have evidence. I just don't see where this is taking you to. All you're saying is, "I can't make my case because I don't have any evidence."

MR MOUNT:

Well, no, the proposition of a legal sort that I've made at paragraph 7 on the skeleton is that it doesn't rely on proof of what the prosecution did with the information.

GLAZEBROOK J:

It has to rely on some kind of materiality, surely. You can't say if you unlawfully get some information about what somebody might have been thinking at trial strategy was that because in fact the trial strategy is tied up with evidence of money laundering anyway because in that case we don't know who Jenny was and who gave money into it. He says they had nothing to do with drugs. How do we know? Investigation might have shown that Jenny was deep in drugs and so therefore it might have been evidence of money laundering despite him saying that she's had nothing to do with drugs, thinking maybe it couldn't be proved. So how can you split

up trial strategy and that and how can you say for something that's so unbelievably trivial is that, that it somehow takes the whole trial process, including in relation to the drug deals?

MR MOUNT:

My submission is that when one analyses the material that Detective Peat possessed it included information that could well be to the advantage of the prosecution to know. I accept that I can't prove on the evidence, or that the evidence does not establish, specifically what he did with that knowledge and that's why the legal –

GLAZEBROOK J:

Let's assume there's all of that evidence there. Why is that – I think it comes to your paragraph 7. Why is that going to take the whole trial? Because even assuming there is everything that you've taken us to so far and assuming that might give some marginal advantage possibly to a prosecutor with no evidence that it even went to the prosecutor, where are the authorities that say that means it's an unfair trial, that's it, no matter how insignificant, how little it went to anybody, how little anybody ever did with it.

MR MOUNT:

Perhaps if I turn, then, to part 7 with those authorities.

ELIAS CJ:

Isn't your point, really, that that's why there's a rebuttable presumption that the difficulties with evidence that you're – it just seems that perhaps you're inverting the argument a little, that because you're not able to show that it was material but your submission as I understand it, although we haven't got on to number 7, is that there's a rebuttable presumption that it was material, effectively.

MR MOUNT:

Yes, in fact, I submit that the information was material and I can show materiality. What I can't show is how it was, in fact, deployed at the trial.

ELIAS CJ:

Well, you can't show that it was material. It was potentially, you can say, helpful but unless it was helpful to the Crown case, where's the harm that we could take into account?

MR MOUNT:

Yes, and Your Honour is quite right that this ultimately becomes, it brings into focus the question of onus. I accept that if the onus is on the defendant to show the precise way in which information gained by the prosecution was then used to the prosecution's advantage or to his detriment, then this appellant cannot succeed. If, on the other hand, the legal position is that once material is in the possession of the prosecutor, the onus turns to the prosecution to show that they have maintained appropriate separation between those prosecuting the trial and this information, that's when the presumptive prejudice arises. So it very much brings into focus the legal submission.

ELIAS CJ:

I mean, you do have a threshold, because you do have to convince us that it was potentially –

MR MOUNT:

Yes.

ELIAS CJ:

– damaging for the defence that the prosecution was in possession of this information.

MR MOUNT:

I accept that and that it – I need to at least be able to put this information into the category of trial strategy or other information that could potentially assist the prosecution. At that point, I submit, the onus shifts to the Crown.

ELIAS CJ:

Well, I think you'll need to take us to the authorities that establish that proposition.

MR MOUNT:

Certainly. If we move to part 7, there is a preliminary point I can deal with very quickly and that is that the appellant has not at any stage conceded that he received a fair trial. This is something my learned friend relies on, I think, about seven times in his submissions, that there's been a concession. If I could very swiftly deal with that, the relevant passage is in volume 1 at paragraph, sorry, page 15, at the top of the page about a centimetre in.

O'REGAN J:

What is this document?

MR MOUNT:

These are the written submissions of the appellant in the Court of Appeal.

GLAZEBROOK J:

And where are they, sorry?

MR MOUNT:

Volume 1 –

O'REGAN J:

Volume 1, page 15.

MR MOUNT:

– page 15, at the top. Now paragraph 36 is the relevant paragraph. Now in that paragraph, if the Court has it, it was accepted that on the available evidence the police misconduct did not imperil his ability to receive a fair trial. This has been interpreted by the Crown as a concession for all purposes that the trial was fair. There were, of course, two qualifications in paragraph 36. First it was on the available evidence, and at that stage the schedule was not available, and, second, the acceptance in that paragraph related to the police misconduct, which was the possession of calls to Mr Gibson. So the position hasn't changed, in fact, from paragraph 36. The appellant continues to accept that police possession of Mr Gibson's calls did not in and of itself render the trial unfair, so –

GLAZEBROOK J:

To say the schedule wasn't available when it was an exhibit is slightly difficult, isn't it, because enquiries could have been made of the Court to have a copy of the exhibit and then its absence would have been found a lot earlier. I accept that –

MR MOUNT:

Yes, I accept that, Your Honour, yes.

GLAZEBROOK J:

– it didn't actually happen to be there but…

MR MOUNT:

I accept that, yes. That's quite right, and of course that's what happened for this appeal, that those enquiries were made and the schedule was obtained. I should have qualified that: the schedule was not in the possession of counsel, either for the Crown or the defence.

GLAZEBROOK J:

Yes.

MR MOUNT:

In an unusual circumstance it was sitting in the Court, no one else had it, it seems, apart from the police. The police of course had it the whole way through…

GLAZEBROOK J:

And the record-keeping of the Court is slightly odd when the, and the exhibit wasn't kept for some reason.

MR MOUNT:

Yes, in our last hearing Justice Young said he thought it –

GLAZEBROOK J:

They will often be, they will be sent back in many cases.

MR MOUNT:

They were sent back, because of the conviction appeal being dismissed perhaps. But, in any event, that's the way it transpired. So I should have said, when paragraph 36 was drafted counsel was not aware of the content of the schedule, and so the acceptance in paragraph 36 was simply that possession of the calls to Mr Gibson didn't make it an unfair trial. So it's not a situation, in my submission, where there has been a previous concession that would affect this submission.

If I might turn then to the four principal authorities that the appellant relies on for the proposition identified in paragraph 7 on the skeleton. The first of those four is in the new bundle of the volume 7 buff coloured volume, tab 1. So the first of the four authorities is *R v Bruce Power Inc* (2009) 98 OR (3d) 272 (CA). This was a health and safety prosecution of some individuals and a power company following an industrial accident at a nuclear power plant. Following the accident the power

company commissioned an investigation report for the purpose of preparing for any possible legal proceedings. Paragraph 22, we see the description of the report by the first instance Justice of the Peace who said, "Does not contain within any legal strategy or thoughts or opinions of legal counsel. It was primarily informational in its content." Nonetheless –

GLAZEBROOK J:
What paragraph?

MR MOUNT:
Paragraph 22. So primarily informational, no legal strategy or thoughts or opinions of counsel. But in the indented passage just after that, "Nonetheless the JP reached the view that it clearly set out items that could be used to the disadvantage of the defendants and that the report was intended to be privileged. Now unfortunately there's no expansion in the report of exactly what the information was that could be used to the disadvantage of the defendants. So all we know is that it didn't contain any legal strategy, primarily informational, but there was material in there that could disadvantage the defence. At 24 the conclusion was that the report was both subject to solicitor/client and to litigation privilege and that privilege had not been waived. The way it came into the hands of the prosecution was that there had been a union rep on the committee that conducted the report. The union representative had not returned his copy as he said he would and he later met with the investigator and the Crown prosecutor and a copy was supplied to the prosecution by the union rep. There was protest by the defence at that point and the case was taken off the prosecutor who had read the report and given to a new Crown prosecutor. We see that in paragraph 32. So the new counsel for the Crown gave an assurance that he had not discussed the case with the original Crown. So once this issue arose the new prosecution team is put in but the first instance Judge said there is, at paragraph 32 here still, "There is no accurate indication that the knowledge of the contents of the report have not been used in the preparation of the prosecution of this matter.

Furthermore, this is the difficulty I expressed earlier in the day, at paragraph 48 the Court in the Court of Appeal expands on the question of the nature of the report and they say that it was primarily informational but did contain matters that could be used to the disadvantage of the defence. But the Court went on to say it would be difficult, if not impossible, for a witness who has read the report to erase its contents from his or her consciousness. Moreover, and this is the significant part in my submission –

O'REGAN J:
Where is this?

MR MOUNT:
Paragraph 48, sorry we are jumping around in the decision a little bit, "It would be difficult, if not impossible, for the Court to determine what effect the report may have had on a witnesses' testimony, and whether the prosecutor's strategy had been indirectly at least affected by his witnesses having read the report." So you are very much in the territory that we've had in this case, in my submission –

ELIAS CJ:
There was no evidence though. The inspector did not testify.

MR MOUNT:
Yes, that's right. The inspector was the person who had been party to obtaining this report having, I should have said, originally agreed that he wouldn't obtain it. So the inspector was culpable to the extent that he had been told it was privileged and effectively decided to obtain it nonetheless. I would draw an analogue there between that inspector's conduct and the police here who knowing material is privileged nonetheless receive it.

So in paragraph 52, or just above paragraph 52, we see that the Ontario Court of Appeal faced very much the question that we have in this case. "Where the Crown has come into possession of a defence document protected by solicitor/client and litigation privilege," although I accept we're only dealing with litigation privilege here, "does the accused bear the burden of proving actual prejudice or will prejudice be presumed." The Court said that the answer is found in the judgment of Justice Binnie in *Celanese Canada Inc v Murray Demolition Corp* [2006] 2 SCR 189, and the quote just below is that, "Prejudice will be presumed to flow from an opponent's access to relevant solicitor/client confidences."

Now *Celanese*, just for the Court's reference, is discussed in the next couple of paragraphs. It arose in a civil context of an Anton Piller order and what occurred in that case is that counsel obtained improper access to privileged material and the decision for the Court was whether as a result of that counsel should be removed from the case. In the absence of specific proof as to how they had used the

information the Supreme Court in that case held that, “Even in the absence of proof of prejudice, prejudice would be presumed,” and so it’s that concept from the civil law that has been adopted by the Ontario Court of Appeal in this case. Now in the criminal context, and so at 55, we see, in the second half of the paragraph, “In my view the above cases support the proposition that when the Crown comes into possession of a defence document protected by solicitor/client and litigation privilege, prejudice to the defence will be presumed. The presumption is, however, rebuttable.”

If we turn over to paragraph 65 we see that, as in this case –

ELIAS CJ:
Can you really say that the question of prejudice wasn’t rebutted here, on the evidence, which was accepted by the trial Judge?

MR MOUNT:
In this case?

ELIAS CJ:
Yes.

MR MOUNT:
Yes, Her Honour –

ELIAS CJ:
Because she accepted that nothing had been done with it, and she had evidence, whereas in these cases there doesn’t seem to have been any evidence.

ARNOLD J:
That was only the solicitor/client privilege, wasn’t it?

MR MOUNT:
The whole focus of that hearing was on the solicitor –

ELIAS CJ:
Ah, yes, I’m sorry, yes.

MR MOUNT:

– on the calls to Mr Gibson.

ARNOLD J:

I mean, this seems to me to be somewhat of a probable from our point of view, because this is the first Court in which litigation privilege has been raised. As you know, it only attaches if the dominant purpose of the communication was – and, I mean, a number of these excerpts, as the timing shows, were part of much larger communications –

MR MOUNT:

Yes.

ARNOLD J:

– and all that's been recorded is a few minutes, some cases it's longer, of material that's potentially relevant. Now, your argument seems to be that we should regard that portion as privileged –

MR MOUNT:

Yes.

ARNOLD J:

– but, I mean, there's a larger question that I presume you're going to come to at some point –

MR MOUNT:

Yes.

ARNOLD J:

– were these things even protected by litigation privilege at all?

MR MOUNT:

Yes.

ARNOLD J:

And how are we to determine that, given that we're not really fact-finders –

MR MOUNT:

Yes.

ARNOLD J:

– and how are we to assess the dominant purpose of these communications?

MR MOUNT:

Yes. I –

WILLIAM YOUNG J:

But can I just add to that – and this is an entirely new case, presented for the first time here, so there's been no opportunity for the Crown to rebut anything – I confess to not liking a proposition as broad as that which emerges from the Ontario Court of Appeal decision.

MR MOUNT:

Yes.

WILLIAM YOUNG J:

I mean, isn't it a little bit on the hooter of coming up at this stage with an argument and saying, "Ha ha, you haven't rebutted prejudice."

MR MOUNT:

I –

WILLIAM YOUNG J:

It must have been perfectly obvious to your client and his legal representatives that the police had heard him discussing his case with his relations and friends.

MR MOUNT:

We did traverse some of this ground, of course, last year at the hearing.

WILLIAM YOUNG J:

Yes.

MR MOUNT:

My submission, Your Honour, is, I suppose, twofold. First, that while I readily accept that it is an unusual and distinctly uncomfortable position for everyone in this room to be in, to be confronting these issues in effect for the first time, now. The reality is that the reason for that was that the police did not disclose this schedule containing all of that information before trial, it didn't come about until the very unorthodox way in which it emerged post-verdict. The second part of the response is that while in theory a well-educated defendant might well have said to his or her counsel, "I need to alert you to the fact that in my telephone calls with others, not just with you, I discussed my preparation for the trial and therefore I'm concerned about litigation privilege –

WILLIAM YOUNG J:

But he's not discussed – I mean, the truth is he's not discussing his preparation for the trial, he's just discussing aspects of his case, he's imparting information as to what his defence is going to be. He's not doing so for the purpose of preparation or trial, he's doing so, on the face of it anyway, for the purpose of exchanging information with those who are on his side.

MR MOUNT:

That's of course a separate point, and my submission will be that dominant purpose can be established here. But just –

WILLIAM YOUNG J:

Sentence by sentence phrase-by-phrase.

MR MOUNT:

Well, portion-by-portion, and in fact in some cases quite signature portions of the telephone calls. But that's of course a separate point, and I certainly will address the Court on that. But returning to Justice Arnold's question about the evidential position, I do accept of course that this is an unusual and very, in many respects, a very unsatisfactory position for all of us to find ourselves in. And all I can say is that, as a matter of reality, had the schedules been disclosed – and of course we mustn't forget that there was in fact a second schedule that hadn't even been disclosed at all, this is a 39 page schedule that only was disclosed following the direction of the Supreme Court last year – so if those two documents had been disclosed, as I submit they should have been pre-trial, then there would have been an evidential foundation and

plainly this would have been an argument that would have been advanced. The question is, where does that leave us, and I accept it's an unsatisfactory position to be in.

GLAZEBROOK J:
To a degree he certainly had no reasonable expectation of privacy though, did he, because he was knowingly talking on a phone that was recorded, as against choosing to go to the office?

MR MOUNT:
My submission, Your Honour, is that his reasonable expectation, judged objectively, must have been that the agencies of the state would follow the law, and we know from earlier looking at the Corrections Act that there is no basis on which lawful calls between a remand prisoner and any other person can be disclosed to the police unless there are reasonable grounds to believe that they are evidence of an offence.

ELIAS CJ:
I'm sorry, can you pause?

MR MOUNT:
Yes.

WILLIAM YOUNG J:
He did know, it's clear he knew he was likely to be the subject of surveillance, because he was very careful not to say where the security boxes were, he said he wasn't prepared to do so on the phone.

MR MOUNT:
In common with most defendants who discover that there's been an interception warrant granted against him, he became somewhat paranoid about who might be listening to him. But –

WILLIAM YOUNG J:
Is this noticed, that these calls are monitored, up beside the phone?

MR MOUNT:
Yes, it is, yes.

WILLIAM YOUNG J:

So when he was saying this he would have had right in front of his face a notice saying, “This call is maybe monitored”?

MR MOUNT:

And, what’s more, there’s a verbal message that is read out at the beginning of every call saying, “This call will be recorded and may be listened to and may be used in evidence,” so there is a specific message at the beginning of the call. So there’s no question he knew that there was the ability for the prison service to listen. My submission on reasonable expectation of privacy is that while he plainly knew that there was the possibility that Corrections might listen, he certainly did have a reasonable expectation of privacy vis-à-vis the police, because in fact the law says that the police cannot receive this material and that the prison monitoring –

GLAZEBROOK J:

They must be able to receive the material via – that's not right, is it?

MR MOUNT:

Well, they’re –

GLAZEBROOK J:

Isn’t that based on you saying that the warrant was unlawful? Because of course they can receive the material, if there’s a – if they’re talking about killing somebody in the shower of the prison and planning how they can do it, then that would be passed over to the police with no difficulty, would it?

MR MOUNT:

That's quite right, Your Honour. Here I’m referring to otherwise lawful conversations on a monitored prison telephone. If a remand prisoner or any prisoner makes a lawful phone call and discusses lawful matters with any other person, in that instance there’s no mechanism, in my submission, for that information to go to the police, and we know that –

ARNOLD J:

Well, what say the remand prisoner calls up, say in this case his wife, and says, “Look, go and speak to X, I want to know what X would say about this,” –

MR MOUNT:

Yes.

ARNOLD J:

– and it's clearly related to his defence, so the wife goes off and does that, has a discussion.

MR MOUNT:

Yes.

ARNOLD J:

I mean, what if the police were to approach X completely independently, no knowledge at all that the wife had spoken to him, and so to X, "Well, what do you know about this?" and X says, "Well, I'll tell you exactly what I told the wife of the inmate when she came to talk to me about this," and discusses it? X is not breaking any privilege, is he?

MR MOUNT:

No, that's right, Your Honour, in my submission, and this goes to another one of the legal issues that arises in this case, and that is the extent to which confidentiality is required for litigation privilege, and my submission is that confidentiality is not required, and that flows from the Evidence Act itself, and the consequence of that is exactly as you say, that someone who has been approached in furtherance of preparing for litigation is not themselves prevented from speaking to others, unless they voluntarily assume an obligation of confidence of course, so we'll assume that's not the case. But if someone has been approached as a potential witness they are at liberty to speak to the police.

ARNOLD J:

Right, and why is that?

MR MOUNT:

Because unless they have voluntarily assumed an obligation of confidence then they remain at liberty, as with any citizen, to speak to the police.

ARNOLD J:

Well, there's no property in a witness, it sort of reflects a public policy –

MR MOUNT:

Yes, yes.

ARNOLD J:

– interest, doesn't it?

MR MOUNT:

That's right. And when we come to that part of the legal argument, which is back in part 6, where I address the suggested need for confidentiality and litigation privilege which has been advanced by the Crown, my submission will be that, as the Supreme Court of Canada had found, there is no requirement for litigation privilege, and the reason is very much as Your Honour has just said, that litigation privilege conversations are of a different character to solicitor/client conversations, which are very clearly required to remain confidential.

WILLIAM YOUNG J:

So if Mr Beckham had been sitting in front of me at a game of football talking to his son and I knew one of the detectives, and I passed on to the detective, "He's going to say that the precursors, what you say were precursors, were just part of his farming operation," would that be a breach of anything?

MR MOUNT:

Quite possibly not, Your Honour. Of course the difference we have here is that there's a statutory regime which says that information cannot be disclosed unless certain preconditions exist, and none of those preconditions existed here vis-à-vis lawful cause in preparation for trial. We need to assume when we're testing this proposition that these are, in fact, privileged conversations. This goes very much to the question of waiver which is advanced by the Crown and I'll certainly turn to that. If I can try to stay on track in terms of paragraph 7 I was going to take you through the four principal authorities that support the proposition I advance.

The first of the four, could I just insert a footnote here? I accept that the four authorities I refer to all arise either solely or principally in the context of solicitor/client privilege and so I am inviting the Court to make something of an extension to the principle by extending it to litigation privilege material. Partial exception to that is, of course, that was a case of litigation privilege as well as solicitor/client privilege and in fact one might think, looking at what in fact happened, this was the preparation of a

report well before any charges were filed. It was perhaps as much in the litigation privilege category as it was in the solicitor/client privilege category. The author of the report wasn't a lawyer. It was a committee of people who had been formed to prepare this report.

What happened in this case is set out from page 539 on the right-hand side. The police seized a computer and there was an immediate protest by the defence that the computer contained privileged material. That was raised with the Court, who made an order that communication between counsel and client remain unread and also a similar order in relation to communications to and from a private investigator. Now, regrettably what happened was despite that order of the Court, in good faith the police electronic crime lab, when they were analysing the computer, did go through various materials on the computer, including some of the privileged material.

Five documents were found to have been privileged, and these were documents that had been forwarded on to the prosecution team, but there was one in particular, which was an email from the defendant to his wife, which was found to have contained trial strategy. Now, there was a stinging dissent in the case. The dissenting Judge is the one who most directly addressed the consent of the email. That's page 561 on the right-hand side. Towards the bottom of that right-hand column the dissenting Judge points out that of the five documents subject to privilege only one, an email from the defendant to his wife, contains certain trial strategy proposed by the defendant. Only a single document contained trial strategy and from the perspective of the dissenting Judge across on page 562 he said that the documents in question bore no indication that they contained privileged attorney/client communications.

Further at 564 on the top left-hand side, the dissent emphasised that – and this is the sentence beginning, "It bears emphasis, moreover, that a review of the email reveals that the trial strategy contained therein is typical of what would be expected in a case involving the charge at issue, that is, causing injury to a child." So one email to the wife revealing standard trial strategy.

Now, if we go back to 560 at the bottom right, we see that in fact on learning of the position, the prosecutor provided defence counsel with the documents immediately upon receiving and reviewing them, so there was immediate and full disclosure by the prosecutor about the fact that he or she had obtained privileged material.

WILLIAM YOUNG J:
So the prosecution got material that on its face was not obviously privileged and that resulted in a presumed prejudice to the defendant? Should we follow that?

MR MOUNT:
Well, I better finish taking the Court through the case. Now, I observed a moment ago that this was a case that produced a stinging dissent and so I readily accepted this is an area in which judicial minds can diverge in terms of the appropriate response. But if we go back to page 541, top right-hand side, so beginning just at the bottom left, none of the documents was in the form of a communication from defendant to counsel but rather contained the narrative thoughts, musings and opinions of a layman and on their face they did not appear to be privileged. This is a finding of the trial Court, so the trial Court rejected any remedy on the basis that none of this material was in the form of a communication from defence to counsel, but rather contained narrative thoughts, musing and opinions of a layman which, on their face, didn't appear to be privileged." And we see further on at the top of 541 that the Court also reiterated that because the privilege documents had not been given to the police department the defendant had not been prejudiced.

The conclusion of the Supreme Court of Connecticut is at 542 in the left, bottom left-hand column, and this is just next to the [1,2] in other words head note 1 and head note 2, "For the reasons that follow we conclude generally that prejudice may be presumed where the prosecutor has invaded the attorney/client privilege by reading privileged materials containing trial strategy, regardless of whether the invasion of the attorney/client privilege was intentional," and then at the top right-hand in [3], "Because the privileged materials at issue contained the defendant's trial strategy and were disclosed to the prosecutor, the defendant was presumptively prejudiced by the prosecutor's intrusion into privileged documents."

We then turn across to 544, and the Court relies on another case, *Briggs v Goodwin* 698 F 2d 486 (DC Cir 1983), which happens to be tab 9 of the same volume that we're in at the moment, and this is the US Court of Appeals in the federal jurisdiction and –

GLAZEBROOK J:
I'm sorry, page…

MR MOUNT:

544, top left-hand corner, and about 10 or 15 lines down there's the sentence beginning, "Mere possession by the prosecution of otherwise confidential knowledge about the defence's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is inherently detrimental, unfairly advantages the prosecution and threatens to subvert the adversary system of criminal justice. Further, once the investigatory arm of a government has obtained information that information may reasonably be assumed to have been passed on to other governmental organs responsible for prosecution. Such a presumption merely reflects the normal high level of formal and informal co-operation which exists between the two arms of the executive."

GLAZEBROOK J:

You'd have to have a look at the discovery rules there and the trial procedure rules, because they do have quite singular discovery rules, and I think in some instances you don't even get discovery from the prosecution unless you provide equal discovery. So it is a totally different – I mean, I find it is a astonishing, absolutely astonishing conclusion and it wouldn't be a case that I would be persuaded to follow in any sense, but I suspect that a lot of it is to do with the very different trial.

MR MOUNT:

Well, here in fact there was disclosure by the prosecution of the fact that they had this material –

GLAZEBROOK J:

No, I understand that, but I'm saying just generally disclosure rules, they are quite singular in the States, and will depend state-by-state as well. But the idea of an adversarial trial where nobody knows anything about the other side, and if you know even the inkling of the other side that that somehow is going to create major unfairness of the trial, just doesn't fit with our Criminal Procedure Act 2011 at all –

MR MOUNT:

It may fit, Your Honour, if –

GLAZEBROOK J:

– or the modern way of disclosure, does it?

MR MOUNT:

It may fit with a rebuttable presumption such as I've advanced in paragraph 7, because it's not a position in which mere possession is the end of the case in all instances.

GLAZEBROOK J:

Well, it is a bit, on the majority's reasoning here, because it would taint forever more any prosecutor who takes it over.

MR MOUNT:

Well, just to be concrete about this –

GLAZEBROOK J:

And it's some email to the wife that nobody would even have realised was privileged and it's only privileged because he happened to have given it to his attorney.

WILLIAM YOUNG J:

He didn't actually, he was going to.

GLAZEBROOK J:

Oh, he was going to, sorry.

WILLIAM YOUNG J:

He said he was going to.

MR MOUNT:

Yes. I suspect Justice Young will enjoy the dissent of this case more than the majority decision.

But my submission is that I do not need to advance a proposition that is as extreme as the Court has outlined there. My proposition is a somewhat more modest one, perhaps more in line with *R v Bruce Power* in the Ontario Court of Appeal, namely that once the prosecution are in possession of strategic information – and I've also included defence evidence from instructions to counsel – that is sufficient to trigger an onus on the Crown to establish that they have cured the presumptive prejudice that arises. Now that is not such a harsh rule in my submission, because there is a full opportunity for the Crown to rebut that presumption –

WILLIAM YOUNG J:

Well, only if they know what the complaint is. I mean, the Crown didn't get an opportunity to rebut anything here, because it wasn't told that there was a complaint about litigation privilege breach.

MR MOUNT:

Well, had the Crown followed –

WILLIAM YOUNG J:

I know, you're going to say that it's all down to them for not producing the schedule earlier, to which there may be a response that it was obvious anyway.

MR MOUNT:

Well, indeed, the other thing to say, Your Honour, is that there is evidence from Detective Sergeant Lunjevich that he was overawed, if you like, by his superiors, so he formed the view that having obtained these thousand or more calls they ought to be reviewed for the purpose of extracting value for this trial, but his superiors had given him a very clear indication that he was not to disclose any information to this trial and that he was not at all happy about that. Now, in fact, had the police followed the directive that appears to have come from superior officers and had this information remained segregated from the trial prosecution team, then the appellant would have very little to rely on. What's not explained in the evidence is why it was that Detective Sergeant Lunjevich did disclose the information to Detective Peat and whether that was simply disobeying the directive from his superiors, or whether he went back to them and cleared this disclosure, if you like. It may have relied in part on an internal police distinction between the Operation Jivaro team, that's Detective Sergeant Schmid, and the Proceeds of Crime office, but in my submission that internal distinction completely collapses on the basis that Detective Peat was a critical Crown witness in this trial and so therefore was very much part of this case from the beginning to the end.

Continuing with *Connecticut v Lenarz* 22 A 3d 536 (Conn 2011) just for a moment longer, at 548, halfway down the left-hand column in 548, the Court gives some explanation as to the policy underlying this rule, and that is to say that, "The attorney/client privilege is inextricably linked to the very integrity and accuracy of the fact-finding process itself. Even guilty individuals are entitled to be advised of strategies for their defence in order for the adversary system to function properly.

Any advice received as a result of a defendant's disclosure to counsel must be insulated from the government." And there's a point that arises in response, Justice Glazebrook, to your earlier point.

I accept, of course, that the Criminal Procedure Act and developments in the criminal procedure area very much move towards a more rational trial process where trial by ambush is discouraged and counsel are encouraged to identify the issues at an early stage, there's now a requirement for defence disclosure of expert evidence. But in my submission none of those developments comes anywhere near a requirement that defence strategy and defence pre-trial preparation, including instructions to counsel as we have in this case, be disclosed to the prosecutor, and so the fundamental principles or building blocks of the adversarial system, in my submission, remain intact, despite the developments in the Criminal Procedure Act.

O'REGAN J:
So is your position that we should make a presumption against the Crown, even though we know the Crown hasn't had a chance to rebut it?

MR MOUNT:
As Justice Arnold observed, we're in such an unusual position in this case, because this argument has, in practical terms, become available only in this Court. What does the Court do? And I accept to many that that's –

O'REGAN J:
Well, we can't –

WILLIAM YOUNG J:
We could say it's too late.

O'REGAN J:
We can't make a presumption that could be rebutted in circumstances where the other party hasn't had a chance to rebut it, can we? I mean, that just isn't fair.

MR MOUNT:
Well, in my submission, I suppose I can answer it in two parts and you'll be able to predict the first part of that, which is to the extent that there is unfairness to the

Crown, that is counterbalanced and more than counterbalanced by the unfairness to the appellant in having lost the opportunity many years ago.

O'REGAN J:

You're asking us to make a decision on the basis of an unfair process. It doesn't matter why. This Court doesn't make decisions that are based on completely unfair processes. It's just not appropriate and you shouldn't really be asking us to do it.

MR MOUNT:

Perhaps if I could address the second part of the response and that is having identified what, in my submission, is a proper legal argument that was available to the appellant. If the Court were to reach the view that his trial was rendered unfair, of course, the Court will have its normal options as to whether to order a retrial or whether to quash convictions. No doubt various considerations will be considered by the Court at that stage, including the consideration that you've just referred to, namely whether the Crown ought to be given an opportunity to respond. Obviously the appellant's primary submission is that many years after the trial, five years since the trial, having received new disclosures as recently as last year in this Court, the appropriate response of the Court would be to say to the Crown, "If you had disclosed this material at the time, you would have had an opportunity. Your failure to do so" –

O'REGAN J:

But the fact that you're saying we should set free someone who's been convicted of drug dealing because the Crown was late in disclosing something is just completely disproportionate.

MR MOUNT:

There would be, no doubt, various remedial options open to the Court. If I am able to persuade the Court that the –

ELIAS CJ:

Wouldn't it just have to be unpackaged in a rational way and if you were able to persuade us that we should adopt a presumption, then that's probably as far as we could take it. The Crown would have to be given – be asked whether it wanted to be given an opportunity to rebut the presumption. I mean, that is the – we can't speculate as to whether there is rebuttal, either. But I should say that I'm still left

quite confused about the circumstances in which a rebuttable presumption arises because these authorities so far are relatively loose and I'm not sure whether they should be followed in the way that you're suggesting here, which is quite an absolutist response. If there's any tainting, there's a rebuttable presumption.

MR MOUNT:

Yes. Perhaps if I could return to the first point, which is what do we do if it appears that there is a rebuttable presumption and that is being triggered. That becomes a question of natural justice, in my submission. Ought the Crown to be given that opportunity and as the Court has observed there would be a mechanism to give the Crown that opportunity and to indicate what it wished to do. As to the second part of the question, I accept that the onus is very much on me to persuade the Court that the approach I've suggested in paragraph 7 is an appropriate one.

ELIAS CJ:

You haven't taken us to the footnote which seems, really, to spell out what you're asking us to do, the footnote at page 548.

MR MOUNT:

Yes, perhaps if I can refer to our bundle at tab 11, another case from the Court of Appeal.

ELIAS CJ:

Is that the proposition that you are contending for, that where defence strategy has been disclosed to the prosecutor it's presumed that the disclosure, being inherently prejudicial, there should be a presumption that it is prejudicial?

MR MOUNT:

Yes, and it's set out at paragraph 7 of the skeleton. That's my submission that for the reasons that are set out in these North American authorities it's not as harsh as it might first seem to require the Crown to establish, once the defence strategy has been disclosed, or aspects of the defence strategy have been disclosed.

ELIAS CJ:

That suggests there's no assessment of materiality. Is that what you are contending for, too?

MR MOUNT:

The trigger is where – and as I put it here, privileged details of trial preparation, strategy, and instructions to counsel or defence evidence. Now, clearly they would need to be in the sense that they would need to have some potential ability to affect the fairness of the trial.

WILLIAM YOUNG J:

I may be wrong, but I take it trial strategy was one that was being developed with counsel and was to be laid before counsel.

MR MOUNT:

In the North American cases, that's right.

WILLIAM YOUNG J:

And that's the sort of idea you get from the case on dominant purpose and that's my recollection of the discovery rule that these are documents that are being obtained for the purposes of being put before legal advisors and that's what preparation means, not chitter-chatter between people who've got an interest in the case and they're just talking about it because it's the biggest thing in their lives at the time.

MR MOUNT:

For this part of the submission, we need to assume that litigation privilege is properly triggered and I accept that I had another hurdle to jump in this appeal, and that is to persuade the Court that what we're dealing with here was litigation privilege rather than chitter-chatter.

So what I was going to refer to at the bottom left of 548 is the statement by the Court that this is the adoption of a statement. We think the inquiry into prejudice must stop at the point where attorney/client confidences are actually disclosed to the Government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and jeopardise the very process by which guilt and innocence are determined.

GLAZEBROOK J:

Can you just say *Lenarz* it would have been rebutted? Because what they said was because they read it it's a remedial on retrial. So just because one prosecutor had read it that then takes it forever, so how could they rebut it? They got it but never

read it? It doesn't really seem rebuttable on this presumption and it seems to taint forever absolutely everything no matter how significant or insignificant it was and no matter that frankly no advantage could have arisen from it whatsoever.

MR MOUNT:

The inquiry into the rebutting of the presumption could only ever be fact-specific but it's not difficult to think of instances where, for example –

GLAZEBROOK J:

In *Lenarz* how could they possibly have rebutted it? Because *Lenarz* on the majority says as soon as you've got it, as soon as it's trial strategy it's rebuttable but in fact because they read it in this case, that's it and forever?

MR MOUNT:

It does appear to be a particularly strong position adopted by the Court in that case. In other instances it's not difficult to imagine that for example someone charged with a number of counts might be able to establish that there is a presumption of prejudice in relation to some charges but not all, for example. It might be possible that in a particular instance the Crown could show that they have been successful in insulating the prosecution team from the information that was gained about defence strategy, but that will always be a fact-specific inquiry, in my submission. In my submission the principle is sound and how that principle is applied in any particular case is, of course, a matter for that particular case.

WILLIAM YOUNG J:

The simple thing would be to get another prosecutor.

GLAZEBROOK J:

No, but you can't here.

WILLIAM YOUNG J:

I know, that's what I mean. I mean, I thought that the most obvious and least intrusive response would be to say, you know, of a very nervous Judge, "How can I be sure there isn't going to be some – we'll just get another prosecutor from another office," or it's –

MR MOUNT:

That's right. The inquiry would need to begin always with establishing who knew this information, what did they know, and from that one can have a sensible inquiry into what might need to be done in order to remedy it. It's only once we know who has been in possession of the information and what they did with it that that inquiry can sensibly proceed. And I should not in passing that in this case the appellant did apply to the HC for an order that everyone who possessed privileged calls in the context of the lawyer calls should be called to give evidence, and the Court declined that. Now had that order been granted, had there been a full factual inquiry into what information had been received by those who'd listened to the lawyer calls, and had there been disclosure of the schedule, we would no doubt have had a much fuller evidential position in this case.

If we turn to the *United States v Levy* 577 F 2d 200 (3d Cir 1978) case, which is tab 11, and –

O'REGAN J:

Is this your third authority?

WILLIAM YOUNG J:

Number 3.

MR MOUNT:

Yes, it is. I'm sorry, before I do the *Levy* I'll just finish with one point from, one further point from *Lenarz* and this is in part in answer to Justice Glazebrook's question. Top of 550 on the left-hand side, "Presumption of prejudice may be rebuttable, for example, the state may be able to show that no person with knowledge of the privileged communications had any involvement in the investigation or prosecution of the case. The privileged communications contained only minimal information, while the state had access to all of the privileged information from other sources." But they go on to say that, "In light of the important constitutional right at issue the state must rebut the presumption by clear and convincing evidence." So the Court did in fact go on to give some examples of what they concluded would have rebutted the presumption in this case.

ELIAS CJ:

Before we go to *Levy*, I've just turned up *Briggs* –

MR MOUNT:

Yes.

ELIAS CJ:

– which is the other case cited in *Lenarz*. It seems, from my quick reading of that, that there have to be – and it cites *Weatherford v Bursey* –

MR MOUNT:

Yes.

ELIAS CJ:

– the Supreme Court decision – that there has to be a threat of significant harm to the defendant. How does that come into the test? "If it's a non-deliberate violation of the sixth amendment there has to be a threat of significant harm," and then there's discussion of whether "significant harm" has to amount to prejudice in the trial.

MR MOUNT:

Yes. *Weatherford v Bursey* 429 US 545 (1977) was one of a series of cases in the United States arising from the use of informants and the particular probable that arises with informants is that they sometimes, their co – the people they're investigating get charged and then to maintain the cover they attend various meetings with counsel.

ELIAS CJ:

Lawyers and things, yes.

MR MOUNT:

And that creates a particular probable –

ELIAS CJ:

Yes.

MR MOUNT:

– and so that was the problem that was dealt with there.

GLAZEBROOK J:

I think in *Lenarz* too they said, sixth amendment is different from trial strategy," for some reason best known to themselves, so, "Sixth amendment has a different test," they said, and *Lenarz* trial strategy is an absolute –

MR MOUNT:

Yes.

GLAZEBROOK J:

– sixth amendment is not absolute. Personally I would have thought it was probably the other way round but…

MR MOUNT:

So the –

GLAZEBROOK J:

Not the sixth amendment would be absolute but that it was much worse sixth amendment violation than trial strategy but…

MR MOUNT:

So the particular approach taken in *Briggs*, the top of 494, was the Court of Appeal's interpretation that threat of significant harm does not have to amount to prejudice in the sense of altering the actual outcome of the trial.

ELIAS CJ:

No, but my query is really do you postulate a threshold of significant harm in what you're urging on us. It's a threat of significant harm, so it's not that it has to be demonstrated, but I think I'm still grasping for why it was significant in this case if that's the test. Now, if you say, well, it doesn't need to be, the threat doesn't need to be of significant harm, it can be any – then you're setting it quite highly and you've got a problem perhaps there, too, because the Court may find that difficult to swallow, but I hadn't understood you to be adopting a threshold of threat of significant harm, for example.

MR MOUNT:

That's right, Your Honour. I don't put the threshold that high. I do accept that there needs to be materiality threshold, in other words, the strategy or instructions to counsel had to be capable of affecting.

ELIAS CJ:
Right, that's what I was feeling for. So it had to be capable of what?

MR MOUNT:
Capable of assisting the Crown in its prosecution of the case or undermining the position of the accused. So in other words, having a material impact on the trial itself.

ELIAS CJ:
And then as to whether it did, you rely on the presumption which is rebuttable.

MR MOUNT:
That's right. The examples given by the Court in the submissions where the presumption could be rebutted, in my submission, are relatively obvious ones where, for example, the Crown can show that no one with knowledge of this information actually participated in the prosecution of the defendant or where the information in fact looked at in the round was not of any particular significance.

At tab 11 this is one of the informant or undercover officer informant cases and so the short facts are summarised at the bottom right-hand corner of 204. We see the summary of the findings where the District Court held that the DEA, the prosecutor, which at all times knew that its informer was sharing a lawyer with a co-defendant, attempted to obtain information about this trial and at the very least learned the defence strategy would be to concentrate on the credibility of two key Government witnesses. So across the page at 205, the Court concluded that this established unequivocally that not only the DEA agents, in other words, the enforcement agents, but also the prosecution became privy to that particular strategy. The Court below adopted the rebuttable presumption approach and the Court below held that the presumption had, in fact, been rebutted.

Across at 208, the Court of Appeal has addressed the topic which has risen a couple of times today. The Court was there considering whether there ought to be an approach requiring how prejudicial to the defence a particular disclosure was and

they said in the sentence beginning, “But it is highly unlikely that a Court can.” Now, they arrive at a certain conclusion as to how the Government’s knowledge of any part of the defence strategy might benefit the Government in its further investigation of the case. In a subtle process, a pre-trial discussion with potential witnesses, a selection of jurors and so on, so down at the bottom of the page the sentence beginning, “At that point, a trial Court applying an actual prejudice test would face the virtually impossible task of re-examining the entire proceeding to determine whether the disclosed information influenced the Government’s investigation or presentation of its case or harm to the defence in any other way.”

Now, this is very much the reasoning that underlies the policy decision to opt for a rebuttable presumption, and that is that to place the onus on the defence is both unfair and impractical because it would require the Court to try and reconstruct every tactical decision made by the prosecution throughout the trial, how is the witness briefed? How did the witness prepare him or herself to answer certain questions? At what point did the Crown prosecutor settle on particular strategy about which questions to ask, which witnesses to call, how to frame a closing address, how to frame an opening address. It’s not difficult to imagine that that inquiry could be both exceedingly difficult but also very uncomfortable for the Court trying to examine the process of a trial to establish whether actual prejudice occurred or not. It’s for that reason that at the bottom of 209 on the left-hand side the Court reached the view that the enquiry into prejudice must stop, and this is the quote I read earlier at the point where attorney/client confidences are actually disclosed and that any other rule would not be practical or desirable.

At 210 on the left-hand side by [6] the Court said that because there had been actual disclosure of defence strategy, remembering that all the strategy was in that case was which particular witnesses the defence would focus on challenging in terms of their credibility, the Court concluded the appropriate remedy was dismissal of the indictment.

ELIAS CJ:
Mr Mount, where do you think you are going after this because I am conscious of the time.

MR MOUNT:

I am sure I can finish by four and I will need to return to part 6 of the submissions which deal with litigation privilege in particular. I have the burden of persuading the Court, in particular, I suspect, Justice Young, that in fact we are dealing with material here that was subject to litigation privilege rather than chit-chat and also I'll need to address the other legal issues that arise about confidentiality and waiver, in other words, I carry the onus here of establishing there has been disclosure of privileged material.

When we get to the stage of a remedy, there's not much to be said at point 8 because either the Court is persuaded that a fair trial has been compromised or it's not. So that's relatively brief, but we then get to point 9 which was the original basis of this appeal, namely, the question of sentence reduction. I'm confident I can finish by tomorrow.

O'REGAN J:
Is that fair? This is a two-day hearing and you're asking for one and a half days.

MR MOUNT:
I carry quite a significant burden of persuading the Court on a number of topics. I'm certainly happy to curtail my submissions as required.

ELIAS CJ:
I think, Mr Mount, you will have to conclude by the morning adjournment, but even then it's pretty unfair to the Crown. We will hear this part and adjourn at four. Carry on.

MR MOUNT:
We can finish off the fourth case and then I will make sure that tomorrow I'm able to move through the material as swiftly as I can. The fourth case is *R v Desjardins* (1991) 274 APR 149 (NLSCTD), it's in the yellow volume, tab 12. The basic factual position is outlined at paragraph 11, and the situation was that the police obtained an interception warrant and during the currency of the inception warrant continued to listen to discussions with a lawyer. The Court in paragraph 12 reviewed tapes of the various and transcripts of the various communications and found a number of matters of significance in relation to the present trial, and they are set out at paragraph 12, including assessment of witnesses, possible questions, approach to a severance application and so on.

The upshot of that was that the Court concluded that there was material of a strategic nature that was discussed, and at paragraph 82 the Judge made the point that, “The conversations intercepted did not reveal information of such a sensational nature as to make it immediately obvious that the police had obtained an overwhelming advantage or that the accused had been irremediably disadvantaged,” but nonetheless found that the nature and number of the conversations would possibly have led to the direction and result of the trial being affected. The earlier finding at 79 – and this goes to the threshold issue the Chief Justice raised earlier – was that the Crown’s obtaining of the information resulted in the Crown gaining access to defence strategy and gave the Crown an advantage in the trial. Back at paragraph 82, the Judge expressed the principle, at the bottom of the paragraph, by saying, “Our adversary system entitles the accused to have their defence counsel put forward their defences and strategy without the Crown being given prior notice as to them…

O’REGAN J:
This was actual communications with the counsel, wasn’t it –

MR MOUNT:
Yes, that's right.

O’REGAN J:
– that they’d listened to?

MR MOUNT:
Yes. There was some discussion back at paragraph 63 about the relevance of the fact that the Crown prosecutor had not been provided specifically with the conversations, but nonetheless at the bottom of 63 the Judge concluded there could be no assurance the state had built a solid wall of ignorance around a group of its employees and, at 64, that even with good faith on the part of the police there would be a real risk of the flow of information to the prosecutor being manipulated, even unconsciously, to counter defence strategy, which knowledge had been obtained by the interceptions. He went on to find, very much consistently with the American authorities, that information in the hands of the police had to be treated as though it were known to the Crown prosecutor.

And the conclusions reached by the Court in that case are summarised at 118, where the Court concluded that, “Police interception of conversations between a solicitor and client during preparation for trial is a violation of charter rights to a fair trial, even though the prosecutor has been insulated from knowledge,” and, at 2, that is not excused because of the existence of probable grounds to justify the warrant in the first place, and across at sub (4) the Court concluded that, at the bottom of that paragraph, “The interception of solicitor/client conversations will not be justified when it results in information being supplied to the Crown with respect to defence evidence or strategy in an ongoing trial.” And so this was very much an adoption in the Canadian context of the North American approach, which places that strategic information into a particular category.

So I’ve managed, miraculously, to address that case right on the dot of 4 o’clock.

ELIAS CJ:
That’s great, Mr Mount.

All right, well, we’ll take the adjournment now and resume at 10 tomorrow. Thank you very much.

COURT ADJOURNS: 4.01 PM

COURT RESUMES ON WEDNESDAY 4 MARCH 2015 AT 9.59 AM

ELIAS CJ:
Yes, Mr Mount.

MR MOUNT:
May it please the Court, first may I pass on apologies on behalf of Mr Pilditch, who is unable to be here today.

ELIAS CJ:
Yes, that's fine, thank you.

MR MOUNT:
Conscious of the time and taking on board the Court's comments yesterday I'd like to turn, if I may, to part 2 of the skeleton, at number 6, the breaches of the Bill of Rights in this case. There are five that the appellant relies on, and the first brief submission to make is that it is important in my submission to make specific findings and to identify the specific breaches in issue. Despite the fact that breaches of the Bill of Rights have been relied on by the appellant from the very beginning of this case, the Courts below did not make specific findings about which rights had been breached, if any, and in my submission it is important to do that because it's not possible to have a sensible discussion about remedy until one has identified which right is in issue and specifically how it has been breached.

Having said that, the first three breaches relied on by the appellant are, in my submission, uncontroversial and rely on very orthodox law, that is, the three unreasonable seizures of material by the police. On those issues, I'm happy to rest on my written submissions which begin at paragraph 67 of the appellant's submissions.

The issue where there appears to be a real contest between the appellant and the respondent is the issue I'll turn to now, if I may, conscious of the time. That is the privileged status of the calls seized by the police.

GLAZEBROOK J:
Sorry, you referred to paragraph 67 of your submissions?

MR MOUNT:

Yes. That is where, Your Honour, I deal with the specific breaches of the rights and I continue on to deal with –

GLAZEBROOK J:

Which submissions are you referring to?

MR MOUNT:

The consolidated appellant's submissions, 28 July.

GLAZEBROOK J:

All right. I'm sure you're right. I'm sure I've got the wrong set. Oh, yes.

ELIAS CJ:

But you're not taking us to them, are you? You're just referring to the submissions we've read.

MR MOUNT:

That's right. I will give you another reference now to paragraph 73 of the same submissions, which is where I turn to the issue of the privileged status of the calls. They're in two categories, legal advice privilege and litigation privilege. Legal advice privilege is in two categories. There are the calls to Mr Gibson, which we've already talked about. Uncontroversially, those are privileged. There's also the call to Mr Palmer, which emerged only with the schedule. That, also, in my submission, is a privileged call. But the other category which is potentially important, in my submission, are the calls, and I'll identify three, which were noted on the schedule.

GLAZEBROOK J:

Do you say the Palmer call was listened to or not listened to?

MR MOUNT:

The schedule says not listened to so it's in the same category as the Gibson calls. If we rely on what the screening report said it was not listened to. I don't have evidence that it was specifically listened to beyond that point of identifying a lawyer.

O'REGAN J:

So what is the problem, then, if they weren't listened to?

MR MOUNT:
I'm merely submitting, Your Honour, that these were calls that were unlawfully seized and which were privileged and I accept that I don't have evidence that they were in fact listened to.

The three calls which, however, were listened to and which, in my submission, also fall into the category of legal advice privilege, are calls 2, 3 and 8 using the numbering in volume 5 of the case on appeal. I'll take the Court to those very briefly, if I may. Call 2 begins on page 11. This was a call between the appellant and his wife noted by the call screeners as relevant to Jivaro. We see at the beginning of the call that there is some discussion about what material various lawyers have got, so the reference in the third line to Arthur or Wayne. Arthur was Arthur Fairley, a Whangarei lawyer. Wayne McKeague, obviously, is named. He was acting for the appellant. Also he acted for the appellant's wife, Ms Taylor.

It's the paragraph at the bottom of the page that begins to deal with matters that the appellant wishes to have conveyed to his counsel. He says, "Tell Murray all this they said about me importing. I've never done that in my life. They're saying in there I'm known as the boss or Captain. Never in my life, not one text or phone call, will they ever find I'm called Captain." Now, that reference to Captain was a reference to what had been sworn to in an application for an interception warrant where the police had asserted to the High Court that the appellant was known as Captain. So in this passage the appellant was asking his wife to pass on to his lawyer the fact that certain police evidence was untrue and unreliable. He goes on, on page 12, to convey further information about another alleged alias, the boss, and so on. Then he goes on to talk more about the possible reason for fingerprints being on certain items.

Now, under the Evidence Act, of course, communications to a solicitor are privileged where they're made directly to the solicitor or through an authorised representative, so my submission is that this call is an example of instructions being conveyed to a lawyer through an authorised representative.

As it happens, the Crown did not advance at trial an assertion that the appellant was known as Captain, so this was an instance where the Crown pulled back from something they had said in an interception warrant. Now, I observe in passing that

one might well say that a strategy of the defence would be to point out various weaknesses in material relied on by the Crown. "They say I was known as the Captain. There's no proof of that."

WILLIAM YOUNG J:
But how could they say he was known as the Captain unless they had evidence of it?

MR MOUNT:
We don't know, of course.

WILLIAM YOUNG J:
But how could they say at trial he was known as the Captain without producing evidence to that effect?

MR MOUNT:
Well, we know that they swore it in an affidavit.

WILLIAM YOUNG J:
I know that, but how could they give that at trial unless there was evidence?

MR MOUNT:
Well, that's right. We don't know what the reason was that the Crown decided not to advance the allegation that he was known as the Captain. My submission is simply that this is in the category of information about a potential line of defence which could, at least potentially, be of assistance to the Crown to know where they might come under attack from the defence.

O'REGAN J:
It's a pretty frail read, frankly.

MR MOUNT:
We saw yesterday in the various cases that it's not uncommon when we come to look back at a particular trial that particular instances of strategy look unspectacular or even mundane. In the context of a trial, small pieces where one side is able to say, "Now, look at the unreliability of the Crown evidence. There's an assertion here. We can show that this is unfounded," can assume much greater significance. But I accept that on its face it's certainly not in a spectacular category.

The second call in this category is call 8, so volume 5 at page 36. I should have said for reference that the interception warrant application is tab 14 of the new bundle filed by the appellant yesterday.

So call 8, page 36 of volume 5, another conversation between the appellant and his wife. Now, this is a conversation that occurred after police approached Ms Taylor's father for evidence about money that he contributed leading to the purchase of an apartment, the significance of that being the Crown relied on that purchase as being evidence of the appellant continuing to deal in drugs, particularly during the bridging account period.

Now, we see towards the bottom at letter F, "You talk to Murray first thing in the morning, do you hear me?" Then across at page 37, there's further discussion about particular facts of the situation. "He gave you the money to do what you like with it," in other words, the money was a gift. It wasn't done as a loan as, you know, whatever you want to do with it. They asked him if he financed the property. Well, he didn't.

Then we get across to page 38 at the top. "I'll ask Murray to see if he wants them to write a letter to that nature or say something or talk to them." Then across at page 39, the letter B, "Yep, talk to Murray earlier if you want to." Letter C, "Talk to Murray tonight or in the morning." The whole tenor of this call, in my submission, was the appellant from his position in prison through his wife asking for his lawyer's advice about how to deal with potential evidence relating to a very important point in the trial, namely, purchase of an apartment and the source of funding for that.

ARNOLD J:
So are you saying these communications are protected by legal professional litigation, solicitor/client privilege?

MR MOUNT:
I am, Your Honour.

ARNOLD J:
Right, so they shouldn't have been monitored in the first place.

MR MOUNT:

That's right, Your Honour.

WILLIAM YOUNG J:

You have to monitor them to know, though, don't you?

MR MOUNT:

Yes. The way the Corrections Act deals with that is to say that if a monitor becomes aware that a call is an exempt call as they're listening they must stop and take all reasonable steps to ensure it's deleted.

WILLIAM YOUNG J:

The whole call or just the little bit that's deleted?

MR MOUNT:

The way that the Act is phrased is that if it's an exempt call the call should be deleted. I'm not sure that the Act contemplates partial deletion of a call.

GLAZEBROOK J:

There's some 50 minutes here on page 37 of irrelevant conversation, from the look of it.

MR MOUNT:

That's seconds. The whole duration of the call is eight minutes 28.

ARNOLD J:

So section 114 talks about calls relating to the prisoners' legal affairs between a prisoner and a barrister or a solicitor of the High Court and you say, well, in reality that means one has to include in that anyone acting as a go-between between the prisoner and the barrister and solicitor?

MR MOUNT:

Yes, Your Honour, another alternative being that the section 122 privileged evidence catch-all applies in this instance.

ARNOLD J:

Well, all that says is you can't use it in evidence. It doesn't really help you very much, does it?

MR MOUNT:
The topic, of course, of monitoring by Corrections might be something of a re-hearing here because we know that in fact none of these conversations were monitored by Corrections. What happened was that the police got them all by way of a warrant, so in a way predicting what might have happened if someone from Corrections had listened is beside the point, but I accept that the regime set up for exempt calls may, in fact, not catch the category that we're dealing with here, namely where instructions are passed to a lawyer through an agent.

That may well be the case because the exempt call regime does seem very much to be designed in a somewhat blunt way, in other words, once a lawyer's telephone number is identified all the calls to that number are automatically treated as exempt. So there's no subtlety in terms of trying to distinguish between privileged and non-privileged conversations with a lawyer. They are all treated as exempt, and in practical terms that might be the only way that Corrections can approach that, I would accept.

The third call in this category is call 3, page 14 of the same volume. Another call between the appellant and his wife. They're discussing whether a particular lawyer is dealing with a proceeds of crime matter and just above letter F the appellant is saying, "What I need is really only Carleen's Court papers, Court proceeding papers, whatever happened." Then at F the appellant says, "Because Lloyd's been trying to push her and them other girls to try and get a statement to say I supplied them drugs. He's threatening them and they want to make a complaint about him."

GLAZEBROOK J:
Who is Lloyd?

MR MOUNT:
Lloyd is the officer in charge, Lloyd Schmid. This was at least a potential line of defence in the trial, the allegations that the officer in charge, Detective Sergeant Schmid, had acted unethically and there was a line of questioning designed to establish that he'd been under investigation by the police. It was shut down, if I can use that phrase, quite swiftly by the Crown and ultimately was not a particularly

effective defence strategy, but nonetheless attempting to impugn the character of the officer in charge was certainly one of the defence lines of attack.

ARNOLD J:

Actually, this conversation illustrates the sort of difficulty that seems to me, at least, is inherent in your argument because this conversation is a 15 minute conversation. Nothing of relevance is recorded in the first nine minutes and 53 seconds. You then get one minute of relevant conversation then there's a further three minutes of nothing and then 45 seconds of relevant conversation. You're saying that the existence of that two minutes in a 15 minute conversation renders the whole thing privileged?

MR MOUNT:

I don't go that far, Your Honour. I submit that we are in a situation akin to that in the interception warrant scenario where it is incumbent on the police to put in place a process that first of all recognises the potential for privileged material to be listened to and be upfront with the Court about that, then put in place a process where those listening to the calls are very conscious of the potential risk of privileged material being listened to and absolutely clear about the fact that any such information cannot be passed to those who are responsible for prosecuting and investigating the defendant, so the –

ARNOLD J:

But the only process would involve listening to this – somebody who knew what the case was all about listening to these hundreds of calls with really close attention to be able to say, "Well, this two minute bit of this 15 minute call might raise a question."

MR MOUNT:

It wouldn't be any more onerous on the police than in fact what they already did in this case, namely to ensure that those listening to the calls are briefed sufficiently about the case to have a broad understanding about what is potentially relevant to the case. But then for – and this is what didn't happen in this case – for those people –

ARNOLD J:

But this has to be an independent person, doesn't it?

MR MOUNT:

A mechanism that might well be found to be appropriate in the particular case, in my submission, could include a separate group of police officers doing the listening and those officers –

ARNOLD J:

But that's different. They're listening to it live so you're accepting, then, are you that police can build Chinese walls that are effective?

MR MOUNT:

I'm accepting that in a particular instance they might well be able to show that that was effective, yes. Of course, this case is not so different from the interception warrant situation because, in fact, the police obtained such a large volume of material that although they weren't listening live it wasn't all that different from listening live. The same challenges are presented in the sense that you might have a conversation where they talk about the weather and the fishing and then they get on to talking about the case. In my submission, it's not hard to think of a mechanism that would still respect privilege while allowing the police operationally to do what they need to do. So to satisfy the requirements of the law, what the police need to do is at least be upfront with the Court at the start and put in place a mechanism that actually is effective.

ELIAS CJ:

Can you remind me, when were these transcripts prepared?

MR MOUNT:

These transcripts were prepared by the appellant last year after we were last together in this room.

ELIAS CJ:

So in terms of what, your criticism of the police, it's for having the recordings?

MR MOUNT:

Yes. That's right.

WILLIAM YOUNG J:

They had the haystack and you've come up with a few needles that were concealed within it that they didn't actually identify.

MR MOUNT:
Well, in many cases we see from the schedule that they did identify those needles.

WILLIAM YOUNG J:
Not in the way that you've dealt with them.

MR MOUNT:
Well, perhaps if we look at the first one, the boss or captain, that's in the schedule at volume 4 again, page 86 internally of the schedule.

WILLIAM YOUNG J:
Yes, that's what he says but they don't recognise that it's solicitor and client, that there might be a solicitor and client privilege there.

MR MOUNT:
That's right. They don't. What they've done is they've noted a Y in the J column to show it's relevant to Jivaro. So they've obviously recognised the potential significance to this case. They've noted down – they've obviously formed the view that this is potentially relevant never being called Captain. In the names column on the right-hand side we see that they're obviously conscious that this relates to Mr Gibson because they've said, "Murray Gibson, lawyer." Now, that, one might think, might be a little bit of a clue to the potential for privilege to be an issue with this call. So having noted down this information that Max said he has never been called Captain, they then provide that, this schedule to Detective Peat, part of the investigation team. He's involved in prosecuting the appellant and that's where I submit that the very real problem arises because the needle was, in fact, identified by those listening and given to the investigation team.

ELIAS CJ:
So just encapsulate the submission that you're making to us. You're taking us to examples of what you say are litigation privilege in the recorded messages and the submission is?

MR MOUNT:

Both litigation privilege and solicitor/client privilege. This is the foundation for – because we've jumped out of order, of course – the submission at part 7 that privileged material identifying trial strategy is then provided to part of the investigation team. It is also related to the breach of the Bill of Rights by endeavouring to show that this was not just a theoretical breach but in fact the unreasonable seizure of material had very real consequences from the appellant's perspective.

ELIAS CJ:

Well, it's the real consequences I think that we're struggling with a little bit here as opposed to the theoretical.

MR MOUNT:

Yes. In the call we've just been looking at is, in my submission, an example of that real consequence because a defence strategy to identify the police have got something wrong in an interception warrant application he's not known as captain.

WILLIAM YOUNG J:

But they couldn't have given evidence at trial that he was known as "Captain" unless they had evidence. If they had evidence, then what he said in the intercepted conversation was wrong, and if they didn't, then what he said was right. Wasn't this sort of a self-limiting issue?

MR MOUNT:

Well, from time to time, Your Honour, the police evidence proves to be incorrect and this might have been an opportunity for the defence to establish just that.

ELIAS CJ:

You mean this forewarned them not to put in evidence the fact that he was called Captain?

MR MOUNT:

That's the potential strategic value of this to the Crown to know in advance.

WILLIAM YOUNG J:

Well, how could they put in evidence that he was called Captain if they didn't have evidence of someone calling him Captain?

MR MOUNT:

That's right, Your Honour, but of course what this might have alerted the police to was the fact that their evidence was not as good as they thought it was.

GLAZEBROOK J:

And you come back to if any bit of trial strategy is given to the Crown and then effectively the trial can't go ahead and there can't be any retrial?

MR MOUNT:

No, Your Honour.

GLAZEBROOK J:

Well, that's what those cases said.

MR MOUNT:

My proposition at 7 is simply that the transfer of strategic information triggers a presumption, if it's material, and it is then up to the Crown to establish that the trial can go ahead in a fair way.

GLAZEBROOK J:

Well, yes, except that on those cases you showed us it didn't look as though you could ever rebut that presumption absent – well, actually, frankly, on the American ones it looked as though you could never rebut the presumption, but absent having some totally independent person who then had absolutely nothing further to do with any part of any investigation whatsoever, so what do you say they could have done to rebut in this case, because they haven't had the opportunity to rebut. It looked fairly rebutted to me on the evidence, that Detective Peat didn't do much with it, didn't pass it on to anyone. No one seems to have discussed it with the prosecutor and yet you say that's not enough to rebut so what could have rebutted it?

MR MOUNT:

My submission, of course, is that the evidence doesn't go quite as far as the Crown would like to submit and that the evidence only shows that Detective Peat didn't discuss the disks themselves with others rather than the strategic information, but in this case to rebut – or, of course, going back to the very start, what the police would have needed to have done would have been to follow the law from the beginning, but having obtained this material, it would be perfectly possible in my submission for the

police to engage in a more fact-specific exercise to show whether particular counts remain untainted by any strategic information, to call evidence from Detective Peat as to who he talked to, call evidence from anyone that he did talk to about what he said, and to show that there was, in fact, separation between strategic information obtained and the trial itself.

ELIAS CJ:

Well, we seem to be getting back into the facts in some detail. Perhaps you could just – if those are your illustrations, if there are other illustrations you want to draw our attention to and then are you going back to point 7 or are you going to remedy at that stage?

MR MOUNT:

No, I'm conscious of time and I'm wanting to reserve some time to deal with the sentence reduction argument that, after all, being the original basis upon which the leave was granted. The other matter that I did want to address because it appears to be a real contest between the appellant and the Crown is the litigation privilege point and the various hurdles that the appellant needs to overcome in order to establish that calls are subject to litigation privilege.

ELIAS CJ:

Well, perhaps you could simply give us the references. We've got the flavour of what you're talking about, I think. But if there are other references you want us to look at, then we can get on to the submissions you want to develop.

MR MOUNT:

There are, in my submission, 10 matters of strategy of materiality that were revealed in privileged calls. I have mentioned some of them before, but for completeness the first was the fact that the appellant would submit there was an innocent household use for precursor chemicals. This was something in the defence closing, volume 7 page 314. It was in various cross-examination questions asked of police witnesses. It's in volume 4 at page 141 at call 17.

The second is the appellant's strategy to do with fingerprints on glassware. This featured in the defence closing, volume 7 page 317 and the cross-examination of the officer in charge in volume 6 pages 130 and onwards and in volume 4 in the schedule, page 125 and in call 2. Third was his explanation, again, about fingerprints

and specifically that these arose because of his involvement in making olive oil. This is something that featured in the defence closing, volume 7 page 317, and in the examination-in-chief of Gary Beckham, volume 7 page 20, it's shown in call 23 at volume 5 page 105D.

The next is that money came from legitimate sources, not drug dealing. This is something that featured in particular in the Crown's closing in relation to the bridging accounts, volume 7 pages 278, 279 and there was a defence response in its opening, volume 6 page 60, in the defence closing volume 7 page 311, and 350 at 344. It featured in the schedule volume 4 page 65 and call 15, page 81 of volume 5, call 8, page 37A of volume 5, call 5, volume 5 pages 22 to 25, and call 12.

The next that intercepted conversations have been taken out of context and had been edited selectively, this was part of the defence opening volume 6 page 59, the cross-examination of Detective Sergeant Howard, volume 6 page 80, and in the defence closing volume 7 pages 301 and 327. It was in the schedule, volume 4 page 67, and in call 5 pages 21 to 23.

I've already referred to some specific Crown allegations that the defence would suggest were weak, including the use of the word "captain". A second example was the denial that he was involved in manufacturing on the 10th of December. It was in the summary of facts, volume 5 page 173 and call 15 volume 5 page 81 there was a denial of that and ultimately that was not advanced at trial, so far as I am aware. There was particular inquiry about whether …

ELIAS CJ:
So what's the prejudice there, that if not forewarned the Crown might have pressed that?

MR MOUNT:
Yes. The chain of reasoning, Your Honour, is that as we have seen in criminal trials, for the Crown to advance a weak allegation can harm the Crown case and so the potential strategic advantage to the Crown in knowing where the defence will seize upon an allegation with the aim of showing it to be false –

ELIAS CJ:

It's very speculative, isn't it, because how would one know that the Crown would have? That's really the point that Justice Young has been putting to you.

MR MOUNT:

That's the reason, Your Honour, that as I understand it, the North American cases had said that it's not a necessary or appropriate question for the Court to engage in to find out why the Crown turned left or turned right in the trial and that's why having potentially valuable strategic information raises a presumption, then it's for the Crown to establish that there was no effect.

O'REGAN J:

It's reasonably predictable someone's going to deny what they're accused of, isn't it, if they're defending the case?

MR MOUNT:

Yes. It is predictable that they will deny things, but –

O'REGAN J:

So why are we concerned about this?

MR MOUNT:

It is valuable information for the prosecutor, in my submission, to know which specific allegations will be seized upon by the defence as being –

O'REGAN J:

Well, he was defending all of them.

MR MOUNT:

That's right, although in fact if we look at the defence closing by the trial there were a number of things that he acknowledged, that he was addicted to methamphetamine or was addicted to heroin, I think also methamphetamine, and his counsel closed on the basis that there were a number of allegations where the jury might well see something in them, a middle category and then a category that they might well think is not established, so it was a mixed picture.

WILLIAM YOUNG J:

He wasn't – I mean, I take it in the summary of facts at 173 and 174 is right, that he's found in a car with 28 grams of methamphetamine, $330,000 in cash, a pen gun with a round in the chamber, and a large machete knife, for none of which items he had an explanation other than he'd done something stupid.

MR MOUNT:
That's right, Your Honour, so he was always in great difficulty in this trial. There's no doubt about that.

WILLIAM YOUNG J:
That casts a bit of a shadow over everything that had happened before as to whether the acetone really was for innocent purposes or whether it might have been used in conjunction with making methamphetamine.

GLAZEBROOK J:
It's just really in light of that sort of evidence to say that some small bit of defence strategy may possibly have got into the hands of the Crown would mean that he effectively gets away with major drug dealing with very, very strong evidence against him is just not something that one would normally countenance in the New Zealand system. You have to look at what is actually a miscarriage of justice so mere delay, however egregious and the fault of prosecutors, doesn't lead to a stay unless you can't get a fair trial and an assumption you can't have a fair trial because some totally predictable – well, in fact it's not only predictable, you would have to say that in order to counter a money laundering charge, you would have to either have the Crown to prove or alternatively have an alternative explanation, so it's not in the least bit surprising. In fact, it's almost inevitable that that would be the defence because otherwise there isn't a defence.

MR MOUNT:
If I could answer your question in two ways, and I certainly understand the Court's concern, first in my submission if the process were followed properly here, if this material had been available to the defence pre-trial. It may well have been open to the Crown to establish in a more nuanced way which counts were entirely unaffected by the strategic information and the matters raised by the Court might well have been among those as opposed to counts that might well be affected by the strategic information, and we saw that type of nuanced approach in that case was that the Court said strategic information had been disclosed about the likelihood that the

defence would challenge matters that went to one of the particular counts but not others. So that certainly is a possibility where the Court can undertake a more nuanced appraisal.

The second response, Your Honour, to the general unpalatability point is that if one puts aside this particular appellant and looks forward at the state of the law, in my submission the proposition I've advanced at paragraph 7 is an appropriate prophylactic rule to establish and is not overbroad because it does simply require the Court to establish in any particular case where this type of information has entered into the prosecution possession that such possession of the material has been dealt with appropriately, so from a forward-looking perspective, in my submission, this is an appropriate approach.

GLAZEBROOK J:
But why if it was forward-looking would it be appropriate to apply to the next Mr Beckham who comes around caught bang to rights with a whole pile of drugs and illicit money in a car and weapons?

MR MOUNT:
Because, Your Honour, it might well be possible for the Crown to establish without too much difficulty if they'd approached the case ethically and responsibly and conscious of their obligations that there have in fact been no transfer of strategic information that would affect the counts on which he's bang to rights. One would hope that in fact if the police are following the law they ought to be able to establish quite readily that there has been no taint to the fairness of the trial, but if something has gone wrong and that has affected perhaps one part of the trial rather than other parts of the trial, that's something that could be looked at in a fact-specific way.

GLAZEBROOK J:
The police can, in fact, act totally unlawfully and illegally and under the Evidence Act here evidence can come in, so why suddenly in respect of something like this, which comes about – which is relatively difficult – I can understand the legal professional privilege and talking to the lawyer, and really they shouldn't have recorded it in the first place, they shouldn't have had them. That's accepted by the Crown in any event, so let's talk about these sort of 20 second bits of conversation in the middle of what is clearly other relevant conversation. I mean, I don't know but one of those conversations there was a whole load of stuff about vats in China. Now, I imagine

that could well have been relevant to the charges. I have no idea what vats in China were, but it's a conversation that is certainly within the same conversation that you're saying was effectively litigation privilege.

MR MOUNT:

My submission, Your Honour, it should not be difficult in a fact-specific way.

GLAZEBROOK J:

Well, it might not be difficult but how can you justify an absolute rule when the Evidence Act itself allows unlawfully-obtained and unreasonably-obtained evidence nevertheless to be used at trial?

MR MOUNT:

My submission, Your Honour, is that it's not an absolute rule.

ELIAS CJ:

It's a rebuttable presumption, in your …

MR MOUNT:

It's a rebuttable presumption, yes.

GLAZEBROOK J:

It's a rebuttable presumption that says if you had totally isolated it then that doesn't have that effect, but if in fact somebody in the investigation team, and you say here Detective Peat had it, then it does affect the whole trial, so it's not a rebuttable presumption in any sensible manner. It's not a balancing test, an Evidence Act balancing test at all.

MR MOUNT:

Just to pick up on Justice O'Regan's point and the Chief Justice's point yesterday, we haven't in this case heard what the Crown might advance in terms of evidence to rebut the presumption in this case and I don't want to speculate about that.

GLAZEBROOK J:

That still doesn't deal with my point, that whatever they put up your proposition is that if it gets into the hands of one of the prosecutors or the prosecuting team, the whole trial has to be stayed and, in fact, possibly forever if you …

MR MOUNT:

That's not my submission, Your Honour. My submission is that if there is strategic information in the possession of the prosecution the rebuttable presumption applies and in any particular case –

GLAZEBROOK J:

But say they can't rebut it. I'm saying they can't rebut it so they know that they can't rebut the presumption that Detective Peat discussed with everybody that his defence would be that it was a legitimate transaction and you say in that case there is a stay, so it's not a balancing Evidence Act test in respect of unlawful evidence. It's an absolute bar.

MR MOUNT:

The rebuttal nature of the presumption would have to be a fact-specific inquiry in each case, and I'm not suggesting for a moment that it would be absolute and in black and white.

GLAZEBROOK J:

But what you don't get is the point I'm making. Assume that whatever test you use, you can't rebut, and then you say it's black and white.

MR MOUNT:

I would accept that an absolutist approach would be inappropriate and that's why I don't advance an absolutist approach.

GLAZEBROOK J:

I think we're at cross-purposes.

MR MOUNT:

We may be, Your Honour. I don't think I can take that any further.

The next of the list of strategic points in fact feeds into a matter just raised, and that is the defence strategy to establish that trips to China were legitimate and had no connotations with drugs. This was advanced in the defence closing volume 7 page 347 in cross-examination of various witnesses and it was something that was raised in the schedule volume 4 page 58 in call 6 and call 16, and specifically there was –

GLAZEBROOK J:
The bit I read didn't seem to have anything to do with Murray. You are on to litigation privilege now, are you?

MR MOUNT:
I am identifying the various points of strategy revealed in calls, most of which are litigation privileged calls, yes.

The next, and there are just three more, was the defence strategy to establish that the officer in charge had behaved unethically. That was in the cross-examination of Detective Schmid volume 6 page 114. The issue was then resolved on page 160 of the same volume and led into a related matter. It was revealed in the schedule, volume 4 page 160, and in call 3 –

GLAZEBROOK J:
I was looking at page 15 on China. That doesn't seem to have anything to do with any sort of privilege, does it? You see there the difficulty is to mix up, to separate out what's litigation privilege and what's actually evidence in respect of a particular transaction because it must be legitimate if he starts talking about China and the allegation was that's where the material came from. That's relevant to the case and if the line of investigation comes off that I would have seen it as perfectly legitimate. If at some stage later or even in the same conversation he said, "I will say that in Court," I can't see that that changes the issue.

MR MOUNT:
Yes. If I'm able to persuade the Court that a particular call is privileged, then mere relevance to the case would not justify the police in using it. On the other hand, if the call revealed itself criminal offending, attempting to pervert the course of justice, something like that, then of course privilege would be defeated.

GLAZEBROOK J:
But do you say, then, if you mention anything the whole call is privileged or only that part?

MR MOUNT:
Only that part, Your Honour.

GLAZEBROOK J:

Well, this part comes after a relevant conversation on page 15.

MR MOUNT:

Yes, it does, Your Honour. That's quite right. In a process that is operating properly, in my submission, all that is required is that the police go through a process to ensure anything privileged in that is not transferred to the prosecutors, and I accept in a fact-specific way sometimes material will be privileged and sometimes it won't be.

ARNOLD J:

If, when we're talking about litigation privilege, the communication must be for the dominant purpose of the anticipated legal proceedings and I don't understand, assuming that call 3 is a litigation privilege example, and it doesn't matter if it's not because there'll be similar ones, how do you assess the dominant purpose? You say, as I understand it, to just look at the particular extract and treat that as the communication rather than the whole conversation. Is that right?

MR MOUNT:

Yes. That's right.

ARNOLD J:

So what is the role of the dominant purpose qualification in the Evidence Act, because it's hardly ever going to apply in this sort of case because obviously the extract is about the litigation, but if it's two minutes in an hour-long conversation you're just looking at the two minutes. Obviously that's the dominant purpose, that two minutes. But it's not the dominant purpose of the communication, the hour-long conversation.

MR MOUNT:

Yes. Perhaps if I could answer that question first by taking the Court to the orange bundle of authorities, tab 1, paragraph 159. Federal Court of Australia 2004 in a civil context dealing with, in my submission, precisely this point and the Court holding that if a conversation or a note can be divided up such that privileged and non-privileged material can be segregated, the communications for the dominant purpose of obtaining legal advice will be privileged, even if the balance of the communications, perhaps even most of them, go to other matters.

ARNOLD J:

So this is legal privilege, but that's been accepted for a long time that if the Board of Directors, for example, if you have to discover the notes of their meetings and there may be a paragraph that deals with legal advice that they've received and you provide the full document of that but with that cut out, but we're talking about litigation privilege which engages, as I understand it, other issues. Why does that analysis apply or have you got authority which says it does?

ELIAS CJ:

Well, does it turn on what's the communication, whether it is what is said or whether it's the whole conversation and surely one would have thought that it would be the same for litigation privilege as it is for legal privilege, that you look at the actual communication and if that – if the dominant purpose of that is for litigation privilege, for litigation purposes, it's privileged. But maybe there is authority on it.

WILLIAM YOUNG J:

But I take the *Guardian Royal Exchange v Stuart* case, I mean, it must have been the case that some of the report in issue was directly referable to likely litigation, albeit that most was on the question whether or not the insurer should decline liability. So if you're right, it would almost certainly be the case that some of the material in that case should have been regarded as subject to litigation privilege.

ELIAS CJ:

Perhaps it should have been.

GLAZEBROOK J:

Which was the *Stuart* case?

WILLIAM YOUNG J:

That's the *Guardian Royal Exchange v Stuart*. It's the one that settles dominant purpose. It's the 1985 case.

MR MOUNT:

Yes, I'm not sure if I have got that immediately to hand, Your Honour. My submission is, as the Chief Justice has said, that there can't be a principle basis on this point for drawing a distinction between solicitor/client and litigation privilege,

and to take the example of the board of directors meeting, if there was to be a board meeting one of the directors phones in. Item 10 on the board agenda is preparation for upcoming proceedings, and we have to assume for the purpose of this example that it's unequivocally protected by litigation privilege. My submission is that anyone obtaining a recording of that full telephone call would be obliged to treat the portion covered by litigation privilege as privileged and equally any written set of minutes of the meeting, it would be appropriate to redact the portion dealing with the litigation privilege discussion in the same way as it would be if it had been solicitor/client privilege. So in my submission there's no principle basis to draw a distinction.

ARNOLD J:
So what is the role of the dominant purpose test, then? If you just focus on the excerpt, what role does dominant purpose fulfil?

MR MOUNT:
That item on the board agenda or that excerpt of the conversation has to be for the dominant purpose of preparing for proceedings. So it's the same test but just applied to –

ARNOLD J:
Well, by definition it will be because you're only looking at the tiny little excerpt.

MR MOUNT:
Well, not necessarily Your Honour because there's still scope in any particular instance to argue about whether, when they got to item 10 on the board minutes, were they actually preparing for litigation or were they simply informing themselves about a potential issue that might deal with the –

ARNOLD J:
But that's another part of the test, which is that there must be litigation and prospect. The context must be right.

MR MOUNT:
Yes, but in my submission the dominant purpose test is directed to that very question. What is the purpose of this aspect of the meeting or aspect of the document or aspect of the conversation? If it is, in reality, directed to preparing for a Court case then it's privileged. If it's not, it's not.

I'm very conscious of the time. There were three objections raised by the Crown to the applicability of litigation privilege in this case, dominant purpose, confidentiality, and waiver. I won't say any more about dominant purpose. I'll move to confidentiality, if I may.

The Crown's submission is that the calls in this case cannot be privileged because of the statutory monitoring regime and therefore the absence of confidentiality, and no doubt my learned friend will point to various comments by the appellant at which it's clear that he's aware that his calls might be listened to.

My submission here is that litigation privilege, unlike solicitor/client privilege, does not have a requirement of confidentiality. Now, this set of submissions is set out in the written material and it's from paragraph 78 of the appellant's written submissions and you'll see there is a statutory interpretation argument supported by a Supreme Court of Canada case and also by academic commentators so I won't say any more about that now unless the Court wishes to ask any questions. I'm happy to rely on the written submissions at this stage.

I'll turn, if I may, to the question of waiver and this case my submission is that –

ELIAS CJ:
Are there any other authority than that, because the extract that you've quoted from is pretty slight and I would have thought that confidence underlines all privilege.

MR MOUNT:
Yes. If I begin with my statutory interpretation argument, and we may want to have the relevant sections of the Evidence Act in front of us, they're in the white volume tab 1, so this is appellant's supplementary bundle of authorities, and the particular matter I draw to the Court's attention is that sections 54 and 57, that is, solicitor/client privilege and settlement negotiations, both have an explicit requirement of confidentiality. Section 56, on the other hand, does not. My submission is that that is a significant omission from section 56 and given that it's contained within the very part in issue that can hardly have been something that Parliament did not intend to give meaning to, in other words, confidentiality is not required by section 56.

O'REGAN J:

So even if you put the information on the Internet, it would still have privilege attached to it?

MR MOUNT:
In that instance, Your Honour, if you put it on the Internet, in my submission section 65 waiver might well apply. My submission on waiver is that waiver will apply where communication is voluntarily disclosed such that the adversary can have access to it, litigation privilege being focused on the process of litigation and entitling the party to prepare away from the gaze of their adversary, so in any instance where a party produces material in a way that the adversary can access it, then I would submit that section 65 waiver would apply.

O'REGAN J:
Why do you need a waiver if you don't need confidentiality?

MR MOUNT:
I'm assuming that privilege had arisen at the time something was created and then there's a decision to put it on the Internet. So in my submission that's the way that that section 65 can be reconciled with 56.

The commentators who have addressed the topic have made the point that the nature of litigation privilege is such that very frequently, for example, when one is briefing a witness or briefing an expert, there won't be explicit requirements of confidentiality imposed on the witness or the expert and this is in part what Justice Arnold was asking about yesterday, and that's why in a conceptual way confidentiality is not required for litigation privilege to arise but if a party deliberately acts in such a way that is inconsistent with confidentiality vis-à-vis the adversary, then privilege is waived in my submission.

Perhaps again in light of the time I could just read into the record that specifically on that topic of waiver applying to disclosure to an adversary, the *Westinghouse and Philippines* case from the US Court of Appeal in the new bundle tab 4 is particularly relevant on this topic and to a lesser extent the *British Coal* case, which is in tab 5 of the same volume, and the selective waiver article which is volume 6 bundle of authorities, tab 31.

Conscious as I am that I need to give the Crown an opportunity to respond, perhaps it's an appropriate moment to turn to the sentence reduction argument, which is the argument at point 9 on the skeleton. In the appellant's written submissions, it begins at paragraph 122.

The Court of Appeal held in volume 1 of the case, paragraph 64, this is on page 89 of volume 1, there are two relevant paragraphs, first at paragraph 64, the Court said that Operation Jivaro was a completely separate investigation which highlights the lack of nexus between the alleged abuse and the convictions under appeal. They then returned at paragraph 94 under the topic of sentence reduction to say that the ground of appeal must fail because of the decisive feature that there is no nexus between any alleged police misconduct under Operation Valley and the sentencing exercise for the drug offending under Operation Jivaro.

My submission is that the Court erred both as to its legal approach and on the facts on this topic. First as to the law, there is an important misunderstanding between the appellant and the respondent on this point. The Crown's submissions had assumed that the appellant says that no connection is required between a breach and the sentencing exercise. That is not the case. The appellant's submission is that a connection is required. But the appellant's submission is that the approach to that connection should be a broad and flexible approach, rather than a narrow or rigid approach, and the specific approach that the appellant submits is appropriate is set out in paragraph 132 of the appellant's submissions.

The appellant accepts that in common with other areas of Bill of Rights jurisprudence there does need to be a connection between a breach and remedy. But the test at paragraph 133 should be approached in a broad and generous way and a breach should be ignored only if there is no connection in the sense above to the charges that are faced.

This, in my submission, is consistent with New Zealand and overseas authorities and in a case which will be well familiar to Members of the Bench, to the approach in *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207, the Court of Appeal *Williams*, which talked about a generous approach to causation, the point of determining whether there's an unreasonable search, adopting the Canadian case of *Bartle v R* [1994] 3 SCR 173. Now, I accept that we're dealing here with an analogous area rather than the exact same area, but my submission is that in interpreting the Bill of Rights, when

looking for a connection between a breach and a remedy, while there needs to be a connection that connection does not need to be approached in a rigid or restrictive way.

Now, the –

ELIAS CJ:
Well, the rigidity that you're criticising in the Court of Appeal approach is in confining the police misconduct to the Operation Valley investigation.

MR MOUNT:
Yes, of course my –

ELIAS CJ:
So it's just – you're just urging us to look at the substance of connection, is that right?

MR MOUNT:
That's right Your Honour and my submissions at 132 are that where a breach occurs as part of the process of investigating or dealing with an accused in relation to a charge that is sufficient to establish a connection and that certainly applies here.

GLAZEBROOK J:
Is that because of Detective – I can never remember the – they always have these titles, whatever his name is, Peat's involvement or is it because Valley was effectively connected to the Jivaro in the sense that it was the investigating officer of Jivaro who was at risk if in fact the information had been correct?

MR MOUNT:
I wouldn't necessarily rely on the latter if that was all we had but the -

GLAZEBROOK J:
All right, so you'd accept – so it's actually Detective Constable Peat's involvement or Sergeant Peat or whatever he was.

MR MOUNT:

Detective Peat certainly but also so far Valley is concerned, it's the fact that the people listening to the calls were specifically instructed to and did in fact look for evidence relevant to this case.

ELIAS CJ:
Well the schedule is that –

MR MOUNT:
Establishes that, yes.

ELIAS CJ:
- is the demonstration of that.

MR MOUNT:
Indeed yes.

ELIAS CJ:
I mean I don't think it's that sort of nexus that's in issue really is it? It's the – it's whether it's substantial enough?

MR MOUNT:
Yes that may well be the case Your Honour. I had certainly understood the way that the Court of Appeal were approaching the issue is to say that there was simply no connection between the two. They accepted the Crown submission that these were completely separate investigations with no connection or not relationship to each other whatsoever and on the facts, of course, in my submission, that must fail I set the reasons out at 137. I won't go through all of those because in my submission it's very clear on the evidence we've been going through.

ELIAS CJ:
Well most of the past day and a half has been devoted to that.

MR MOUNT:
To that connection, so we very clearly do have a connection. My submission at 139 of the written submissions, from 139 is that the Court also have erred in approaching the question of when a sentence reduction is an appropriate remedy. Of course the difficulty is that the Court of Appeal didn't set out their reasoning in any depth at all.

It's a one or two paragraph consideration of the topic. The approach that I submit is appropriate is from paragraph 152 of the written submissions and that is that once there has been found to be a sufficient connection the Court should address the nature of the breach and all relevant circumstances in determining whether to aware a remedy and I've outlined various factors at 153 that I submit are relevant to that enquiry.

And the point that I imagine may be underlying the question from the Court is the relevance of prejudice in that test which another way of I suppose describing the effects of this.

ELIAS CJ:
Well there has to be a Bill of Rights remedy, so it's not necessarily determinative but in order for that – for sentence reduction to be an appropriate remedy, you know, something has to be explained there.

MR MOUNT:
Yes, yes. In my submission, from a legal perspective, it's a matter of going through the various factors I've outlined at 153. Now the first of those is of course the strength of the connection between the breach and the accused's case. So in the situation where there's only a slight connection between the two, clearly that would count against there being any remedy or at least any significant remedy. Nature of the breach, effects, steps taken to remedy, justification and so on. My submission from 158 and again this is potentially an area where I may diverge from the Crown to some extent, is that the degree of prejudice to an accused, in other words the extent to which they are affected by a breach, ought to be one factor in the balancing test and ought not necessarily to be determinative in any particular case. And at 158.1, in my submission is the Court should take a broad approach to prejudice and any material detriment ought to be sufficient to establish prejudice for this purpose. And I've cited various cases at 161 from the international case law where sentence reduction is a much more established remedy, to indicate that the remedy has been given in many situations where, on a narrow view of prejudice, it would be found that there had been none. And these are at 161, cases where for example someone has been arbitrarily detained or assaulted or in the case of the first instance, illegal interception of conversations.

GLAZEBROOK J:

I can certainly understand it in terms of illegal detention because that would be the normal remedy one would expect for – well even if one's been on bail legally, electronic bail in some way legally, then one can get a sentence reduction because of the restrictions on liberty et cetera. Even more so if you've been unlawfully detained I would've thought. In fact one might get even more of a reduction for that as well as possibly damages but it's not so obvious the link in other cases where there hasn't been prejudice in some way. I mean I understand that that first one that you refer to was nevertheless a – but it was fairly egregious.

MR MOUNT:
Yes it was unlawful recording of telephone conversations with another person. I understand the Court's question entirely that the link is probably most clearly seen in instances where someone has been unlawfully detained or perhaps assaulted, although there are a number of those cases where someone has been assaulted by the police and arguably on the approach to prejudice of course that has no effect at trial but sentence reduction has nonetheless found to have been appropriate.

In light of the time perhaps Your Honours, to give the Crown the chance to address you, I could turn to the final section of the submissions in the written material explaining why in my submission the appellant ought to have received a sentence reduction in this case. The starting point at 171 of the written submissions is that in my submission the breaches of the Bill of Rights in this case were serious. There were a number of instances where the police obtained, unlawfully obtained privileged material under search warrant and at 172 I've set out the background, I won't need to go through that again.

At 173 I've noted that of course the conduct of the police in this case did interfere with his access to counsel and that's a matter of particular significance in my submission, both as to the nexus but also as to the need for a remedy and there of course I rely –

GLAZEBROOK J:
And bail wasn't an adequate remedy?

MR MOUNT:
Bail addressed the matter from a prospective point of view, so from that time on it obviously increased his access to counsel but it did not address retrospectively the

inhibition that he had in consulting with counsel. My submission of course is that even if the Court is not persuaded by the appellant's submission that the fairness of his trial was compromised, nonetheless the police actions in this case in summarising and then providing digests of his calls to the investigating officer was a further aggravation of the unreasonable search and seizure and which was relevant to the question of remedy. In other words even if that conduct did not prevent a fair trial it nonetheless, at the very least created a risk of that and so from the appellant's perspective cannot be described as minor or trivial or inconsequential. In other words there was a real world consequence for the appellant and that, in my submission just standing back from the case, did in reality mean that one of the investigators was in possession of a good measure of his defence approach and so my submission is that that constituted a form of prejudice and constituted a further reason for the remedy of sentence reduction in this case.

At 181, I've highlighted the fact that in this instance the police did not do what I submit they should have done and that is to have notified the Court and counsel for the appellant at early stage about their possession of privileged material and seek to remedy that promptly and transparently and I've drawn an analogy with similar police conduct in a case overseas. I've made the submission at 188 that no other effective remedies exist for the appellant in this case and that in the particular instance sentence reduction was the appropriate response for the breaches of his rights.

As to the quantum, from 189, I accept that there's no rigid formula, there's no tariff as such for quantum but I've noted that the international variation has been between 10% and 50%. This Court indicated 25% for undue delay was generous in *Williams* but in that case there was no police misconduct and no reckless disregard for rights which has, I submit, occurred in this case and so the submission of the appellant is that something in the order of 30 to 50% would be appropriate but I accept of course that it will be a matter for the Court to make its overall assessment of what the appropriate remedy ought to be in order to vindicate the breach of rights in this case.

Having had a very slow first day, I seemed to have been able to move through things much more quickly today. I'm certainly delighted to answer any further questions from the bench but otherwise happy to allow the Crown to have their turn.

ELIAS CJ:

Yes thank you. Any questions? No, all right we'll take the morning adjournment now which will enable Mr Boldt to take over that.

COURT ADJOURNS: 11.24 AM
COURT RESUMES: 11.47 AM

ELIAS CJ:
Yes Mr Boldt, thank you.

MR BOLDT:
May it please Your Honours. Now in front of each of Your Honours should be two new bundles and I do apologise for providing the Court with still more.

ELIAS CJ:
A blue and a white one?

MR BOLDT:
A blue and a white one and there are just a handful of additional authorities which deal with the question to a greater or lesser degree of litigation privilege. The white one was one we prepared last night. In fact in light of a few of the questions that emerged during yesterday's discussion between the Court and my friend and I'll take Your Honours to particular passages in those judgments as we go along.

Now what I propose to begin by doing is to attempt to isolate those matters that are seriously in contention between the parties.

ELIAS CJ:
Well you've heard the exchanges.

MR BOLDT:
Yes.

ELIAS CJ:
And we'd expect that you could probably tailor your response to meet some of the matters that were exercised in the Court and in particularly it may be that on the conviction appeal you will want – well we're very interested in hearing your overview. It may be that it won't be necessary to get into too much detail on that.

MR BOLDT:

No Ma'am and I certainly hope I am tailoring the oral submissions to the areas where I saw there was – there were issues of genuine contention still. There a number of things though which are, in my submission, not in contention in this case and the first, and this is in my respectful submission an extremely important point. The first point is that subject to this new issue of litigation privilege which has arisen for the first time in this Court, there is no dispute and has not been any dispute that the appellant received a fair trial and there was quite some discussion of this both in argument in the Court of Appeal and indeed in the Court of Appeal's judgment but if I might, Your Honours, take you to paragraph 47 of the Court of Appeal's decision and I can just read to Your Honours the last sentence of paragraph 47, "The appellant accepts that the police misconduct in this case did not in any way imperil his ability to receive a fair trial. No specific prejudice relating to any aspect of his trial on the serious drugs charges is alleged. So the starting point is that the trial was fair unless something in this new material persuades the Court there may be a problem.

The second point is that the appellant now acknowledges –

ELIAS CJ:

Sorry, when you say the "new material", just remind me what wasn't before the Court of Appeal.

MR BOLDT:

The new material is the litigation privilege argument, and that is the entirety of volume 5 in the case on appeal. That wasn't –

ELIAS CJ:

The Court of Appeal didn't have volume 5?

MR BOLDT:

Volume 5 consists by and large, Ma'am, of the transcripts now said to be subject to litigation privilege and, of course, that was not a point advanced at any stage in either of the Courts below, and I will address Your Honours in a moment on whether there was any real impediment to that having occurred, but for better or for worse this Court is being asked to sit at first instance, in effect, on that issue.

Now, the second important starting point, as I say, that the appellant does not any longer contest his guilt and that also is recorded in the Court of Appeal's judgment at paragraph 131. The Court of Appeal noted, "Although Mr Beckham pleaded not guilty to the charges, it now appears that he no longer denies the offending and has, according to the pre-sentence report, accepted responsibility for it."

I can also just perhaps give Your Honours the reference without needing to take you to the particular paragraph, but this was made clear in the appellant's own sentencing submissions before Justice Andrews in the High Court. That can be found at volume 4 of the case on appeal at page 194. The appellant openly acknowledged at that point that he was involved in significant-scale drug offending.

So that, in my submission, is not a bad starting point for this appeal. It was submitted in the Court of Appeal on behalf of the Crown that no matter what occurred with respect to the parallel inquiry, the Operation Valley inquiry, no miscarriage of justice could have arisen and, of course, the Crown maintains that submission in this Court.

WILLIAM YOUNG J:
What happened to Mr Beckham's co-offenders? Ms Taylor was found guilty of money laundering.

MR BOLDT:
Correct.

WILLIAM YOUNG J:
What about the others?

MR BOLDT:
They were acquitted, my learned friend Mr Johnston tells me. It's interesting, of course, though, that Ms Taylor was charged effectively as a party to some of this offending and that needs to be borne in mind when we analyse the telephone calls between the appellant and Ms Taylor. It's also not in dispute, Your Honour, and indeed the Crown has accepted all along, that the police should have set out the measures they proposed to take to preserve the legal professional privilege in the calls they were seizing pursuant to the search warrant. It's accepted that the absence of proper provision in the warrant application and therefore appropriate conditions in the warrant itself meant that the warrant could not lawfully authorise the

seizure of legally privileged calls. So the Crown does not accept the search warrant was invalid. What the Crown does submit, however, is that the warrant could not lawfully authorise the seizure of the privileged calls. We say, of course, that the seizure of the other 99.9% of those calls which were not legally privileged was unaffected, but of course that further should have been done to ensure that legally professionally privileged calls could be seized and therefore it has been accepted throughout that the seizure of those calls was unlawful and, indeed, unreasonable.

It's an open and interesting question, Your Honours, indeed whether a search warrant was even required in these circumstances. Section 117 of the Corrections Act provides a set of circumstances in which people in the position of the officers in the corrections facilities may disclose calls that had been monitored under those provisions in the Act.

ELIAS CJ:
But that would require some assessment by them.

MR BOLDT:
And it requires reasonable grounds to believe that provision is required for a number of conditions, one of which is the investigation and prosecution of offences. In any event, a warrant was obtained here. We say it was a perfectly good warrant except to the extent it purported to authorise the seizure – well, in fact, it did not purport to authorise the seizure of privileged calls and therefore it could not lawfully authorise the seizure of privileged calls.

Now, there are three issues which, in my submission, are clearly in dispute in this Court. The first is whether, with the exception of those legally privileged calls, which we've always accepted were privileged, these other calls, the 24 that are highlighted by the appellant in volume 5 are privileged at all, and of course we say they are not.

The second issue is whether the appellant – this appellant or an appellant in this appellant's position – needs to point, as every other person challenging a conviction in New Zealand does, to some actual risk of genuine miscarriage of justice before an appeal against conviction can be allowed or do we have a situation, as the appellant is contending in this Court, where regardless of possible impact on the safety of the conviction or the fairness of the trial, prejudice is assumed unless it is affirmatively excluded by the Crown, and of course it's our submission that issues of privilege

engage exactly the same kind of analysis as any other complaint about things that may or may not have gone wrong during a trial. The first issue is, is there a problem? The second issue is, can a miscarriage of justice be established on the basis of the material before the Court? We say there was nothing here even capable of affecting the safety of these convictions, let alone any suggestion that that actually – that there was a problem with the conviction itself.

The third issue is, is a sentence reduction available for a breach of the Bill of Rights Act, and the Crown accepts, as it always has, that the answer is yes. But we do also say there needs to be some nexus between the breach and the sentencing exercise. In other words, the breach needs to impact in some way upon either the offence or the offender to the point where you can logically say this deserves some credit as part of the sentence. It's not enough in my respectful submission to say, number 1, my rights have been breached, and number 2, therefore I am entitled to a particular remedy of my choosing whether or not there is a relationship between the breach and the sentencing exercise.

It's also important, Your Honours, to note that what happened with respect to these Operation Valley calls was extensively canvassed in the High Court. And in the end, the Operation Valley calls, it's probably not unfair to say it became the appellant's only defence. He tried repeatedly to use the fact there were these Operation Valley calls and the police had obtained them to have the charges thrown out. He did that before trial and then when Detective Peat emerged during trial he had another go. This was, as I say, not because there was any real doubt about his guilt but because this material presented an opportunity to perhaps suggest there was a problem, somehow, with the trial process but because it did in the end represent the appellant's only real defence or his only real chance of acquittal on these charges, what happened was exhaustively explored before Her Honour Justice Andrews and, of course, there were multiple findings of fact made, some of which, I have to say, are difficult to reconcile with some of the submissions which have been advanced on behalf of the appellant in this Court, and I will take Your Honours, I think, now to some of those important findings because they do inform the whole analysis subsequently. So there are two main judgments from Justice Andrews which are relevant. The first is at page 232 of volume 3 of the case on appeal.

Now, there are a number of passages in this judgment which are of considerable importance. Most importantly, the Judge found that although the police did not set

out for the issuing officer the steps they proposed to take to preserve the privilege in the warrant application, they did in fact take careful steps to preserve the privilege. The way Her Honour phrased her finding was, “There was no destruction of the legal professional privilege.” Now, Your Honours can find Her Honour’s findings at paragraph 82 of that judgment.

There was an assertion this morning on behalf of my friend that there was at the very least reckless disregard on the part of the police for the importance of maintaining the legal professional privilege in the calls to Mr Gibson. That submission, in my respectful submission, can be contrasted with Her Honour’s finding at paragraph 82A, “I accept Detective Sergeant Lunjevich’s evidence that his failure to say in his application that he was seeking to seize calls to Mr Beckham’s counsel and to outline his planned procedure was an oversight. I accept he didn't turn his mind to the need to disclose that and that he did not deliberately and consciously make a decision to withhold that information from the Court. This is not to be taken as condoning it or to say that he didn't make any mistake, but far from being reckless disregard it was simply a failure to think about it or to think about the importance of it in this context.”

Moreover, the police did have in place a plan for dealing with the privileged calls. That was always part of the plan and Her Honour finds over the page at paragraph C that there has been no destruction of Mr Beckham’s right to legal professional privilege.

D, Her Honour, of course, finds as has already been discussed that he didn't act in bad faith or with any improper motive.

E is also important, and it remains important despite what subsequently emerged regarding Detective Peat, whose role I’ll come on to in a moment. But Her Honour accepted that Detective Sergeant Lunjevich’s inquiry, namely, Operation Valley, was independent of and quarantined from the drug squad’s Operation Jivaro investigation.

Then at F, importantly, too, Her Honour recorded the prosecutor’s acknowledgement that there was not, of course, going to be any evidence obtained during the course of Operation Valley that would in any way intrude into the Operation Jivaro trial.

So all of those points are, in my submission, important as providing background and context to the submissions now made. Operation Valley was a collateral and separate inquiry and the police actually went to some considerable lengths to ensure they were quarantined from one another.

The key thing is with these legally professional privileged calls, they were not listened to at all except to the very small extent necessary in a couple of cases to establish. They were calls to the lawyer, at which point the listening stopped.

Now, the second major judgment emerged after the role of Detective Peat came to light. The Crown learned subsequently and in the course of preparing to call his evidence, that one of the Operation Jivaro witnesses had had access to the Operation Valley tapes, so the Crown immediately arranged for the Court to be updated by way of an affidavit and then following the trial there was a further hearing, and that was entirely focused upon the role of Detective Peat and whether the fact he had received these calls in any way altered Her Honour's conclusions with respect to the role of the Operation Valley tapes as they impacted upon the Jivaro trial.

Now, it's correct, perhaps, to observe that Detective Peat sat outside both squads. He wasn't part of the special group that investigated Operation Valley, nor was he part of the drug squad. He, as we've heard, was in the asset recovery part of the police and Detective Sergeant Lunjevich approached Detective Peat and provided him with the disks because he was concerned to try to establish whether the appellant had any other concealed funds he might be able to draw on in the event he did make good what was then a suspected escape from prison and so they were very concerned to at least investigate whether there might be further funds outside prison Mr Beckham would be able to draw upon in the event he made good his escape. The reference to why Detective Sergeant Lunjevich approached Detective Peat and provided him with those disks can be found in volume 4 of the case on appeal and Your Honours will be able to find this. It's at page 19 of the notes of evidence at the very bottom of the page. The full page outlines Detective Sergeant Lunjevich's reasons for approaching Detective Peat.

So there was this very slight overlap, but – and this is the really important thing – even then strict quarantine between the two operations was maintained.

ELIAS CJ:

But hang on, I thought there was a money laundering charge.

MR BOLDT:

Yes, there was, Ma'am, but the Operation Valley calls in no way impacted upon Detective Peat's evidence with respect to any of that.

ELIAS CJ:

No, but the indication here he thought the conversations may be of interest to Mr Peat as well must be a reference to Mr Peat's role in the money laundering aspect of Jivaro, isn't it?

MR BOLDT:

Well, it may be, Ma'am, but what I was about to come on to say the important point there is that none of the evidence Detective Peat gave at trial was in any way impacted upon by the access he had to the Operation Valley tapes.

ELIAS CJ:

Well, that might be so but I'm really querying the submission that you've made to us that Mr Peat was really outside all of this, because it seems that he was asked to look at this not because of the Operation Valley dimension but because of the Operation Jivaro interest.

MR BOLDT:

Well, I'm looking on page 716 at the first exchange and I certainly take Your Honour's point that he then said plus there may have been material that would have been of interest to him anyway, but the motivation for supplying the tapes in the first place is set out there in the first long answer given by Detective Sergeant Lunjevich at the time. "I was investigating a potential escape. I felt that I did want to know if Mr Beckham had some other assets or funds available to him which may have had an effect on my inquiry."

WILLIAM YOUNG J:

To cut to the chase, at page 22 at 719 he accepts that it's also relevant to bail and money laundering charges.

MR BOLDT:

Of course, but at least exploring the motivation for the supply of the disks, it's been submitted, and certainly remains a heavy implication, that these were supplied and then used in the Operation Jivaro.

ELIAS CJ:

But if there was anything interesting in them, presumably they would have been used.

MR BOLDT:

What we do know, Your Honour, is that for whatever reason, they were not. Detective Peat listened to a small number of the calls. He was, we know, particularly interested in tracking down safety deposit boxes which he thought existed outside and which the police had not yet located, and he had a look but nothing came of that, and what was also important was that when the prosecutor approached Detective Peat to talk about his evidence and the existence of his access to the Operation Valley tapes came to light. One of the first things he did was to seek assurance that none of the evidence he proposed to give as a witness in Operation Jivaro wasn't in any way influenced by the Operation Valley tapes, and that assurance was given. We can find that – in fact, Your Honours took my learned friend to that yesterday in the affidavit of Detective Peat. So what he also did, and we know this and Her Honour made a positive finding about it, too, was that Detective Peat maintained strict confidentiality with respect to those Operation Valley tapes. He didn't talk about them with anyone. He didn't tell anyone else he had them. So it is true we have two – if we treat this like a Venn diagram, there are two large circles, one labelled "Valley", one labelled "Jivaro", and in the middle there is a tiny intersection, and that intersection is Detective Peat, but the fact he was that intersection was what spurred the whole second hearing following trial where Her Honour was asked to reconsider the findings she had made prior to trial, and that is what all this evidence is directed to and which Her Honour then made some very clear findings of fact about.

ELIAS CJ:

She didn't have the schedule, however, did she?

MR BOLDT:

Indeed she did, Ma'am, and it was produced as an exhibit.

ELIAS CJ:

In this hearing?

MR BOLDT:

In this hearing, yes, and we can actually see its production at page 35 of the transcript and it has 732 at the top. You'll remember the discussion yesterday was that Detective Peat had been speaking about a schedule. He had and, of course, the question was, "Well, what schedule is this and do you have it?" to which he said, "Actually, I don't have it with me," and so he was stood down to enable him to go away and get it and it was provided to the defence. There was a very brief further cross-examination about it and we can see that at the bottom of that page, 732, and over the page to 733. Now, it was then produced as an exhibit. It was also referred to by Her Honour in the judgment she then issued on the second stay application. So the existence of this schedule was well known and, in fact, in my respectful submission it also appears clear the reason more wasn't made of this schedule, the reason it appears Mr Gibson saw there was no lawyers' calls involved in the schedule and therefore there was nothing that was going to help advance the submission that legally privileged calls had intruded into the trial, and he looked at it and asked a few questions and it then went in and nothing more was made, the reason why nothing more was made was until a year or so ago it just never occurred to anyone that litigation privilege might also be an issue at this trial. The facts were known but in terms of actually saying, "You know what, not only is this a breach of legal professional privilege, there might also be a litigation privilege issue." It didn't, in fact, in my respectful submission, occur to anyone until recently and that's the real reason we're grappling with this issue for the first time in this Court.

ELIAS CJ:

That might be so, but just harking back to your point about Jivaro was sort of not really centre stage. The schedule does indicate that it was. What is KCB? Are they other investigations? Kidnapping?

MR BOLDT:

I think it's Kaitaia Prison and something else my learned friend recalls from having looked at it. Kidnapping, Customs and prison, my learned friend tells me.

ELIAS CJ:

Well, are these different cases? The kidnapping was the Whangarei one, wasn't it?

MR BOLDT:

Yes.

ELIAS CJ:

Well, it looks as if all of these things are of interest. It wasn't just Operation Valley.

MR BOLDT:

Well, you're right, Ma'am, right up until the point about what was then done with them.

ELIAS CJ:

I understand the force of that submission and where that goes. I'm just indicating that frankly it seems a little bit more significant than the Judge appears to have thought, because she certainly accepts from the evidence that this was all about Valley, but the schedule doesn't suggest that.

MR BOLDT:

Well, in fact, Her Honour heard evidence from Detective Sergeant Lunjevich at the first hearing that he was quite disappointed not to be able to share the Operation Valley calls with the Operation Jivaro team. He had certainly looked at the calls with other potential uses in mind, including the possibility of transmission to the Jivaro team because he thought, gosh, there's some good stuff in here and stuff the Operation Jivaro team would be really interested in, and certainly he screened that with Jivaro in mind, with the kidnapping charges in mind, thinking, in fact we probably stumbled across a bit of a treasure trove here and this will be very helpful in these other prosecutions. The important thing was, though, he was then told "don't you dare", and there was quite an extended discussion in cross-examination with Detective Sergeant Lunjevich in the first hearing before Justice Andrews in which he said, "Yes, I actually thought we were losing value by not sharing that material more broadly, but I was told by my superiors this must not happen. These two inquiries need to be – there needs to be complete quarantine maintained between them." So he was disappointed about that.

ELIAS CJ:

So are you saying that Peat prepared this schedule perhaps in the anticipation that it was to be shared, but that that was countermanded, is that right?

MR BOLDT:

No, Ma'am, I believe Peat received the schedule but he didn't prepare it.

ELIAS CJ:

Who prepared the schedule?

MR BOLDT:

I think that was prepared by Detective Sergeant Lunjevich and his screening teams.

ELIAS CJ:

So he had access to it?

MR BOLDT:

Detective Sergeant Lunjevich did.

WILLIAM YOUNG J:

He's Operation Valley.

MR BOLDT:

Operation Valley.

ELIAS CJ:

Oh, he's Valley, yes, of course.

MR BOLDT:

So that was what happened, it was done by the Valley team –

ELIAS CJ:

Yes, see.

MR BOLDT:

– and not only with the kidnapping in mind, I readily accept that, Your Honour, but of course the important thing was, indeed, to Detective Sergeant Lunjevich's quite open disappointment, he was told, "No, just don't," and –

ELIAS CJ:

And what was the basis for that? That wasn't – I'm just thinking back now – it wasn't the legal professional privilege, it was that the warrant –

MR BOLDT:

No, I can take Your Honours to the passages, although again I…

ELIAS CJ:

Just perhaps give us the references if you like.

MR BOLDT:

It's in volume 3 of the case, towards the end. It's in the notes of evidence, and within the notes of evidence really the best part is pages 207 and 208 of those notes – this is Detective Sergeant Lunjevich giving his evidence.

ELIAS CJ:

Yes.

MR BOLDT:

And we can pick it up in the passage at the top of the page, "I discussed this with my supervisor before I went and did it because it was made quite clear to me I was not to liaise with the squad," that's the Jivaro squad, "at all, the decision was made that, no, I would not do it, I was not to disclose it to them at that stage, so I did not disclose it." And then the question was, well, why? "A raft of reasons, I can't say what my boss was thinking. It's likely that disclosure to the Jivaro team would have ultimately meant disclosure, because they would have received this information we would have been compromised or there was a potential for compromise." But then in the last passage he quite openly, as I say, expresses his frustration about that, "I felt at the time we were losing value by Jivaro not having access to some of the calls. Were weren't going to give them all the calls, there was only a number of calls, Max Beckham moaning about Lloyd, therefore we were selective about what actually had value," but anyway, over the page, he says, "My supervisor said no, therefore we stopped prepared for dissemination and continued with our inquiry," and there was an question about, "Was that because you had the privileged calls?" and he said, "No, I can quite categorically say that was not a reason I did not disclosed, I'd moved past that issue." So that was the point and there was a very responsible decision taken within police at senior levels that these two inquiries should remain entirely

separate. And that also was the basis on which Detective Peat received the disks, he didn't use them for the Jivaro evidence either, and he didn't tell anyone else he had the material.

So all of that was the subject of careful findings from Justice Andrews in her decision on the second application, and Your Honours can find that – again, this is volume 4 and I'm operating off the iPad so it's a little hard to help orientate Your Honours to where to find it in an –

GLAZEBROOK J:
It might be in that second volume of volume 4, we had a small volume.

O'REGAN J:
I think it's right at the beginning of the second volume, header number 658, it's at the top of the page.

MR BOLDT:
Yes, 658, you're right, Sir, and it's reserved judgment number 3 of Andrews J.

ARNOLD J:
I think the right one is 673. 658 is dealing with calling further evidence, I think.

MR BOLDT:
Well, true, Sir, but in terms of the important findings Your Honour made they can be found later in this judgment, at paragraph 42 for example, which is page 670. There are a series of findings there. Of course they were directed primarily to this issue of lawyer/client privilege, because that was the nature of the challenge at the time. But finding (c) is also an important one, and in particular the last sentence, "I accept Detective Peat did not tell anyone he had the disks." And then the judgment immediately following applies those findings to the second application for a stay, and Her Honour simply reproduces those findings at page 680 and dismissed the stay application for the second time. And of course this was occurring post-trial, and therefore Her Honour was able to assess that second application and the role of Detective Peat in light of the evidence she had heard at the trial, and was able to view it through a lens of whether there could possibly have been any substantive intrusion into the trial process. Admittedly Her Honour was focused at that time solely on the question of legal professional privilege, but Her Honour's findings about

the role of Detective Peat and, importantly, that that quarantine was maintained, were important and are important even on this broader attack that we are facing in this Court.

GLAZEBROOK J:
And just so I can just be absolutely clear, the affidavit was of Detective Peat, which referred to the schedule, was before trial?

MR BOLDT:
It may even have been filed during trial –

GLAZEBROOK J:
Or during the trial.

MR BOLDT:
– and my friend confirms that. It emerged, as I saw, Your Honour, because the Crown learned that actually Detective Peat had this, and of course quite properly immediately alerted the Court to the fact that at least something that everyone had believed at the time of the first hearing wasn't in fact correct, so that opened up the way for this new challenge following the convictions.

GLAZEBROOK J:
So filed during the trial you think?

MR BOLDT:
During the trial, yes, and that, as I say, Ma'am, gave rise to the second application afterwards.

GLAZEBROOK J:
But nevertheless would have been available – it indicated there was a schedule?

MR BOLDT:
Oh, yes, and, as I say, even in Her Honour Justice Andrews' judgment, Her Honour refers to this schedule and says she's inspected it – that's at paragraph 17 of that first judgment I referred Your Honours to, and it's page, got 665 at the top. Paragraph 16, "The schedules provided to him by Detective, to Peat by Lunjevich, did not contain summaries of all the recorded calls, Detective Peat was stood down in order to

produce a copy of the schedule and a copy of the updated schedule given to him on 15 December 2009 was produced as an exhibit," and Her Honour goes on to say, "I have examined the schedule. Although the calls by MB to Gibson are listed, the schedule does not contain a summary of any of those calls," several references to "Murray" throughout the schedule, against some of those references are notes identifying Mr Gibson with the comment "lawyer", the summaries of some calls include references to safety deposit boxes.

So the fact the schedule was there and floating around was – and I say this with great respect – was of no surprise, in fact this judgment was looked at in some detail in the Court of Appeal. The existence of those schedules was, well, that schedule, was well-known. The reason we're in the uncomfortable position of considering litigation privilege for the first time isn't because there's been some new evidence that had been surreptitiously withheld, but just because it's a submission that's only, in my submission, recently been thought of.

But, in any event, we come on then to consider this question of litigation privilege and we do, as will already be apparent, we do reject the appellant's submissions in a number of distinct respects with respect to the litigation privilege claim now advanced for the first time. There are, as I say, several problems. The first is these were not private calls, and as has already been discussed in argument between, with my learned friend, every call commenced with a warning that the call would be recorded and could be used in evidence. So, in terms of an expectation of privacy with respect to the contents of these calls, there simply wasn't any. And I've also reproduced in my written submissions the appellant's own acknowledgement that calls to, he knew calls to family and friends could be recorded and listened to, and I've set that out in the references to it at paragraphs 74 and 75 of the written submissions.

Now yesterday Your Honour Justice O'Regan asked why the appellant didn't use the private phone in the prison to have these conversations, and the answer is he did, and he used the private phone repeatedly, he was actually a very frequent user of the private prison telephone system. And Your Honours can find the schedule of the calls he made using the private line, when he was in Auckland Central Remand Prison, at – goodness, now I in my case on appeal it says page 78. It's volume 2 at a schedule which was attached to the affidavit of Mr Matapo, who was the ACRP Acting Prison Manager…

ELIAS CJ:

Is that meant to be just a schedule of, or is in…

MR BOLDT:

It's exhibit A to Mr Matapo's affidavit.

ELIAS CJ:

All right.

GLAZEBROOK J:

Is it handwritten?

O'REGAN J:

A whole lot of handwritten phone calls, is that it?

MR BOLDT:

Now it's just before that, Your Honour. That's the equivalent schedules from his time up in Whangarei, which were messy and handwritten, whereas the ACRP schedule is just all in one page and it shows…

GLAZEBROOK J:

Like – is that…

MR BOLDT:

That's the one I'm looking at, yes, Your Honour.

O'REGAN J:

Is it immediately before an affidavit of Cheryle Moana Mikaere?

MR BOLDT:

That's it, Sir. And so we can see there are all these calls made by the appellant on the private facility, and we can see who they were to. Mostly they were to lawyers, there's one to, there's a couple there to Mrs Hobbs at IRD, there's another name there, "Anne Trellis", which I don't recognise, and at the end we see "Jenny". So Mr Beckham was quite clearly able to make private calls to have private discussions, and he was well aware of this and well understood the difference between the two types of calls. And what we can see – and I don't propose to take Your Honours

through the horrible handwritten pages that follow – but they're, because his name appears once on each of those pages, and the second one of those, just as an example, and by this time he was, he'd been moved to Whangarei, in the second of the handwritten pages about nine lines from the bottom we see a private call to Jenny, the fourth page there were a couple of calls one after the other. And so, anyway, what we can see is that he was a frequent user of the private facility, and plainly the genuinely sensitive was for those discussions and not for the discussions where he was, where he knew he was being listened to.

Now it's also telling, in my respectful submission, that only the tiniest proportion of the calls that were seized and listened to are said to be subject to litigation privilege. Remember, we're talking about around 1700 calls that were seized, of which 24 are before the Court, so 98 to 99 percent of the time he apparently steered very well clear of even discussing his case. But it's also quite evidence, in my submission, that those calls that are before the Court, those that are found in volume 5 of the case on appeal, disclose a person tailoring what he is saying to the high likelihood he is being listened to. There are a couple of good examples of that – and if I can take Your Honours for example to call number 17, and am I right in thinking Your Honours don't have any pages for this volume either?

O'REGAN J:
I think we do for volume 5.

MR BOLDT:
Ah, well –

ELIAS CJ:
We've got the calls…

GLAZEBROOK J:
They're at the bottom of the page.

MR BOLDT:
Oh, yes, so page 86 is the one I'd like to take Your Honours to first of all. And if we look at the first statement from Jenny on that page, these are things you shouldn't be saying on the phone because it gives away everything you shouldn't be telling, and

the appellant responds. But it's quite clear they are being careful because they're being listened to.

WILLIAM YOUNG J:
Sorry, just tell me what page it is, I've just found volume 5.

MR BOLDT:
86, Sir.

ELIAS CJ:
Page 86 at the bottom.

MR BOLDT:
So this is call 17. And there's another example at call 20, which is page 96, and that's the first statement from the appellant on page 96. I need to talk to you about it but I need to talk to you about private, but it will say blah, blah, blah. So again he's saying, "We need to talk about this but we can't do it now, you know, there are ears listening to us."

It's also evident when you read your way through these calls that pretty much everything else was consistent with a public and aggressive denial of the charges and an abuse of the police. Indeed, it's not an exaggeration to say that a lot of this almost sounded like a rehearsed line designed to be listened in to by law enforcement, and so he attempts in – a good example is perhaps page 23, which is call 5 – it might be said this is an attempt to just throw people off the scent by saying, "These aren't drug deals, these are land deals, I'm going to show that," and an attempt to explain away the unexplained cash. And there are indignant denials from time to time, and a good example of that you can find at page 47 in call 10. And we know these denials ultimately proved to be false, and so if he was doing anything here it was a rhetorical device, knowing people were likely to be listening in, and it certainly wasn't something that could in any way have rebounded to his detriment. In any event, it was done entirely conscious of the fact people were listening in and that it could be provided to the police. Remember, the calls all started with a warning that not only was it being listened to but it might be used in evidence, and he quite clearly is tailoring what he is saying in light of that.

Now this is important because an expectation of privacy in the preparation of your material for a hearing is one of the critical rationales for litigation privilege, and that's something which emerges as a common feature in many of the decisions both in New Zealand and overseas. If I might just take Your Honours to a few of those cases which stress the importance of confidentiality in the context of litigation privilege. The first is this Court's decision in the case of *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45, which Your Honours can find, it's in the white supplement.

GLAZEBROOK J:
In your new white supplement –

MR BOLDT:
No, it's –

GLAZEBROOK J:
– or the other white supplement? The other white supplement.

MR BOLDT:
It's appellant's supplement bundle of authorities, and that's behind tab 7, Your Honours, it's a decision of the Court given by Your Honour the Chief Justice, and paragraph 21 of that decision is the important paragraph, section 56, this is about halfway through the paragraph, a little over, section 56, "Like the common law of litigation privilege it replaces, is concerned rather with preserving confidentiality in the preparation for a proceeding. What matters is the character of information made, received, compiled or prepared by or on behalf of the parties privilege it is. If for the dominant purpose of preparing for a proceeding the information is within the scope of the privilege." But clearly that is because there is an expectation of a zone or privacy or confidentiality around your preparation. And that reflects a number of other New Zealand decisions that have discussed litigation privilege.

The next important one from this jurisdiction is the *Ophthalmological Society of New Zealand Inc v The Commerce Commission* [2003] 2 NZLR 145 (CA), that's in the same volume of the authorities behind tab 10, and again paragraph 20 is of critical importance. And looking at in particular the passage at the very top of page 152, "As it is of the essence of privilege that the material to which it attaches is confidential, where a party's use of the material destroys that confidentiality, even if

unintentionally, or is inconsistent with the party legitimately continuing to assert it, the privilege is treated as waived." So, again, if there's no expectation of privacy or confidentiality in the communication then we simply don't have litigation privilege.

The *Stuart* decision, the *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA) decision, members of the Court, well, President Cooke expresses the same sentiment…

GLAZEBROOK J:
Whereabouts is that?

MR BOLDT:
I'll just find my index, Your Honour.

ARNOLD J:
Where's that, the *Guardian Exchange* case, *Stuart?*

MR BOLDT:
I'll just find my index, Your Honour. That's in the beige volume, Your Honours, at tab 18.

ELIAS CJ:
I'd say that's sort of lemon.

O'REGAN J:
Buff, it was called "buff" yesterday.

ELIAS CJ:
No, no, it's not the buff one, it's the –

MR BOLDT:
No, it's not the buff, it's the beige.

ELIAS CJ:
– lemony one.

GLAZEBROOK J:

A supplementary volume, yes. It's very confusing.

MR BOLDT:

And it's, I think…

O'REGAN J:

So which case is this you're referring to?

MR BOLDT:

This is the *Stuart* case, Sir, or the *Guardian Royal Exchange,* Guardian Royal Assurance case, and it's a decision actually of Justice Cooke as he was at the time of this decision, at the bottom of page 601 of the report. And the issue in this case, as Your Honours have observed, was whether New Zealand should adopt a dominant purpose test or a sole purpose test or some other purpose, as the guide for whether litigation privilege applied. But at the very bottom of page 601 His Honour observes, "Of course there will always be borderline cases, as there are with most tests, but to require the sole purpose to be submission to the legal advisor would frustrate, I think, expectations of confidentiality naturally and reasonably entertained by people involved in litigation or about to be." So, again, we're talking about just the natural expectation of privacy.

The final New Zealand case I'd refer Your Honours to on this point is a case called *Crisford v Haszard* [2000] 2 NZLR 729 (CA), and *Crisford v Haszard* is in that first white supplement, the one we've already been looking at, behind tab 5. And *Crisford v Haszard* interestingly was a case involving phone calls, sorry, involving a recorded conversation, although not raising anything like the same issue we have in the present case, that was a recording of, it was a covert recording of a conversation between the parties, and the suggestion was the covert recording should be treated as subject to litigation privilege, and the Court of Appeal rejected that, and the basis on which the privilege was rejected in that case was because there could have been no expectation of confidentiality in the original conversation, so if there was no such expectation of confidentiality in the conversation there equally could not be an expectation of confidentiality with respect to the recording.

O'REGAN J:

So whereabouts are you exactly referring us to?

MR BOLDT:

There a summary of litigation privilege at paragraph 18, but the discussion of the status of the recording starts at paragraph 21 and noted that – and at paragraph 23 we see there was a submission that the conversation wasn't non-confidential, and the Court goes on to note that there can never be any expectation of confidentiality in those sorts of conversations, and if there's no expectation of confidentiality in the conversation itself, equally, and this is paragraph 30, there can't be any expectation of confidentiality in a record of such conversation. And at the very final, the very bottom of page 30, the Court adopted the information having originated with the one party, "There is no secrecy to guard." And that's again, simply an illustration of the same point. The claim for privilege failed because what was encapsulated in the document wasn't encapsulated, as it wasn't ever intended to be confidential there could be no expectation of privacy or confidentiality with respect to it, and therefore litigation privilege wasn't available.

The Evidence Act, in my respectful submission, is also consistent with a rule that unless there is an expectation of privacy and confidentiality there can be no privilege, and I draw Your Honours attention to section 65, which is the waiver provision. 65(2) provides that, "A person who has a privilege waives the privilege if that person voluntarily produces or discloses the contents in circumstances that are inconsistent with a claim of confidentiality." And, again, the whole point of the warning at the beginning of each of the calls is that there can be no expectation of confidentiality with respect to the contents of these calls; you're on notice from the moment the call commences, it's being recorded, it can be listened to, it can be used against you. So whether we analyse this, as I've said in my written submissions, as a pre-condition of invoking the privilege itself or whether we look at it as an issue of waiver, in my submission the answer is the same: in the absence of an expectation of privacy of confidentiality you don't have the privilege.

The only other case that gives us at least some guidance in this area, the other New Zealand case, is also in this white supplement volume and it's behind tab 18, it's the *R v Uljee* [1982] 1 NZLR 561 (CA) decision. Now that's not a case of litigation privilege, it's a case of legal professional privilege. But that was the case where a police officer eavesdropped upon a privilege communication between suspect and client and, perhaps very surprisingly by today's standards, the Crown sought to try and use it. And the Court in fact not even, the Court regarded this as a reasonably finely balanced question, noting that there was authority that could go both ways, but

held exactly as we would expect, that where someone listens in on a lawyers conversation or a conversation with a lawyer, there is, the privilege remains, and so of course the material can't be used. But the Court draws a significant distinction between that kind of situation, where you have someone basically listening at the keyhole, with a discussion that is made where someone is known to be listening in, and Your Honours can see that at page 569 of the *R v Uljee* [1982] 1 NZLR 561 (CA) decision, towards the bottom of the page, so it's at about line 48, "In New Zealand there's no compelling reason for drawing a distinction according to the stage at which a consultation occurs or on any other basis. If the true intention is that the communication was not intended to be confidential there is of course no problem. Where outsiders were known to be within earshot, it might be right to draw that inference." So, again, admittedly in the context of legal professional privilege rather than litigation privilege, it appears clearly established on the basis of our authorities and, indeed, our Evidence Act, that if you're not expecting your conversation to be private then the privilege simply won't attach.

Now, my friend seeks to meet that by saying, "Oh, but there are other sorts of interest protected by litigation privilege that don't necessarily engage a requirement of confidentiality," and my friend points to a second and, with respect, quite different sort of occasion on which litigation privilege might be invoked, such as where you go and brief and expert or where you speak with a witness, the draft brief will be subject to litigation privilege, but the content of the discussion won't be regarded as secret.

I think the answer to that is, well, the draft brief you take from your witness, which you put on your file, requires you to treat it as confidential before the privilege will attach. In other words, if I go to brief a witness and take a draft brief and I then drop it round to the opposing party, well, clearly that's a waiver. The conversation may not be confidential but what privilege attaches to is the record I take and keep and put on my file, and if I don't treat that as confidential then the privilege is lost.

WILLIAM YOUNG J:

What you said then triggered a faint memory that may be faulty, but that when the practice of requiring briefs of evidence to be exchanged before trial in civil cases started to become effectively mandatory it was said that this is unfair, it's a breach of litigation privilege because it requires a brief of evidence which is privileged to be –

MR BOLDT:

Handed over, yes.

WILLIAM YOUNG J:

– handed over.

MR BOLDT:

Yes. Although of course you still don't have to call the person, so you retain that degree of surprise. But you're right, Sir, but unless and until I'm required to hand something over – and it may also be of course I can brief eight witnesses but decide in the end I only want to use four of them, I don't have to hand over the other four draft briefs, those are mine to keep and not to disclose. On the other hand, if I choose to disclose them, if I treat them as not confidential, or, let's say, if I talk about them or read them out in front of the opposing party, well, the privilege or the confidentiality with respect to that is lost. Now my friend says, "But those conversations aren't confidential, the actual discussion counsel has with the witness isn't confidential," and that's entirely true. The witness can go straight round to the opposing party and say, "Hey, guess what, I've just been seen by the lawyers on the other side and this is what I told them," but that is rather beside the point. The important thing and the thing to which the privilege attaches is the record the lawyer takes of the conversation and puts on that file, and nothing will destroy that privilege other than a voluntary disclosure of it to somebody on the other side of the case, or should I say, "Conduct inconsistent with the claim of confidentiality," that's the standard provided in the Evidence Act and that is what would destroy privilege in that situation. But again, this is like taking a witness brief with the other party in the room or knowing you're being listened to, that is, in my submission, entirely inconsistent with a claim of confidentiality.

Now there are other cases about waiver, and in the new bundle I handed up today there's a decision of the – this is the new white bundle – I won't take Your Honours to it but it's a case called *Mann v Carnell* [1999] HCA 66, (1999) 201 CLR 1, which is a decision of the High Court of Australia in the case of disclosure where the Court simply says, "Look, if you choose to deal with privileged material, you choose to disclose it to a stranger, you're taken to have your own reasons for doing that and you can't then continue to maintain a claim of privilege, that's entirely uncontroversial in my respectful submission, and that is what has happened here.

Now I'm about to come on to dominant purpose, which in my submission is the second major probable, but I see we're at 12.59 so would that be a convenient time…?

ELIAS CJ:
Yes, that's is a convenient time, yes.

GLAZEBROOK J:
As you're about to come on to dominant purpose, I was quite interested in the summary at paragraph 18 of *Crisford v Haszard*, which rather than even dominant purpose takes it a bit further back in that it, Mr Mount was basically saying litigation and privilege attaches to trial strategy and that doesn't seem to be borne out by paragraph 18 of that case, so even further back than dominant strategy, but perhaps you can…

MR BOLDT:
Well, we can come on to that, I'll certainly say that. That certainly is how the privilege used to be encapsulated, and I think in quite a number of those judgments, but we'll talk about that after the break.

ELIAS CJ:
All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 1.00 PM
COURT RESUMES: 2.18 PM

ELIAS CJ:
Yes thank you Mr Boldt.

MR BOLDT:
Now before the break I was just coming onto the question of dominant purpose Your Honour. Justice Glazebrook referred me to paragraph 18 of *Crisford v Haszard* which set out the –

ELIAS CJ:
Where is that?

MR BOLDT:

That's in the white volume, called Appellant's supplementary bundle of authorities and that's behind tab 5 and that recorded the traditional way litigation privilege had always been expressed prior to the enactment of section 56, namely that it was there to protect communications which are made with a view to obtaining information to be submitted to a legal professional advisor. Now that formulation of the privilege, as I say, wasn't new, that was taken from a number of cases but most authoritatively the *Stuart* decision of the Court of Appeal which is the respondent's supplementary bundle. That's probably the buff rather than the beige.

GLAZEBROOK J:

Do you say 56 has changed that?

MR BOLDT:

Well, no, no, Ma'am, I'm coming on to say –

GLAZEBROOK J:

Because I would have thought it doesn't.

MR BOLDT:

No, and indeed if in fact 56 was enacted with the express intention of preserving the law as it existed prior to the Evidence Act being passed – but if I can just, because the Law Commission indicated section 56 was designed to codify the decision of the Court of Appeal in the *Stuart* decision, it's perhaps important just to have a look at the relevant passages from *Stuart.*

GLAZEBROOK J:

I'm sorry, I've lost *Stuart* again.

MR BOLDT:

Sorry, Ma'am, now that's in –

GLAZEBROOK J:

Okay, thank you.

MR BOLDT:

– the respondent's supplementary volume, and it is tab 18, but that's the first in that volume. And I'll just briefly take Your Honours to a couple of passages from the judgment of Justice Cooke and another passage from Justice Richardson.

At page 601 around line 23 there's an important passage, because it does draw this distinction between legal professional privilege on the one hand and litigation privilege on the other. "There's a broad distinction," His Honour says, "on the one hand between confidential communications between a client and solicitor or barrister for the purpose of giving or obtaining professional advice and on the other the preparation of a report, whether internal in an organisation or from an outside source, wholly or partly for the purpose of submission to legal advisors." His Honour goes on to say, "We dealt with the former class of case in *Uljee*, which I discussed with Your Honours before the break, "and it was pointed out that it was immaterial whether the communication was connected with Court proceedings, that accords with Lord Edmund Davies in *Waugh*, clearly in that class of case there's no probable of dual purposes unless made for a criminal or unlawful purpose, the communication is sacrosanct." And I will come on a little later to submit to Your Honours that the cases do make clear that legal professional privilege is regarded as sacrosanct, whereas litigation privilege is regarded as a, is not as fundamental to the operation of our legal system, and that will be in response to my friend's submission that any presumption of the whole process being tainted that might arise in the case of legal professional privilege can't be applied with equal force to litigation privilege, but I'll come to that.

Justice Cooke, over on page 602 then, sets out to encapsulate the rule as he would frame it, and that's at line 10, "I would propose as the New Zealand rule that when litigation is in progress or reasonably apprehended a report or other document obtained by a party or his legal advisor should be privileged from inspection or production in evidence if the dominant purpose of its preparation is to enable the legal advisor to conduct or advise regarding the litigation." Justice Richardson made a similar observation over at page 605, and I refer in particular to about line 23 on page 605, in talking about the dominant purpose test striking the appropriate balance he says, "It holds the scales in even balance, whereas at the other extreme, unless read down, by refusing to rank as a purpose any considerations other than submission to legal advisors which were in mind a sole purpose test, would provide extraordinary narrow support for the privilege." So again it's a submission to legal advisors that was regarded as an important pre-condition, or an intention to do that,

and was regarded as an important pre-condition before that privilege could be invoked in New Zealand.

Now of course –

ARNOLD J:
It's also interesting at the very bottom of 604 and the top of 605 – perhaps you mentioned this but, and I apologise if you did – but Justice Richardson makes the point that the public interest is best served by, "Rigidly confining within narrow limits litigation privilege effectively."

MR BOLDT:
Indeed, Sir, and in fact just a little further up towards, in that final paragraph on page 604, His Honour says, "There is all the difference in the world between confidential communication between and client and his solicitor," and the sort of thing we're talking about here, and making the point it's important, because privilege is always an intrusion into the otherwise clear presumption of openness in litigation, that it should be kept within relatively narrow confines, and this is a particular branch of privilege for which the Courts were careful to ensure it didn't overflow its banks in a way, I am bound to submit, the sort of expansion proposed in the present case would cause.

Now the Law Commission then considered litigation privilege as part of the codification project, and in fact I have, I should say by probably due to my not making my instructions clear enough, we've produced the entire report behind tab 21 of that volume, but really the only bit I need to take Your Honours to can be found at page 151, and deals with the draft section 57 in the Evidence Code, and what we can see is section 57 there, now that's not exactly the same as the privilege in that it became section 56 but it is very close. It's a slightly more truncated description of the classes of case but there was not, as I understand it from having a look at the Select Committee report, any intention to alter the meaning of section 56, it was just to try to make it a little bit clear. But what is important there, as we can see from the commentary at 151, is section 57 was intended to state the existing law laid down by the Court of Appeal in the *Stuart* case.

Now of course it's telling, I'm sure my friend would say, "Well, where's reference in the Evidence Act to the need to provide material to your solicitor? Surely if that were

a requirement then that would be reproduced." I think the key, in, well, in my respectful submission, the key is this phrase, "For the dominant purpose of preparing for a proceeding or an apprehended proceeding," and that's in section 56(1). So we're not just in a situation where it's enough that you are talking about your case, it's not enough to be even going through the indictment with your partner over the phone and saying, "Count 3's rubbish and count 4's and that money was all legitimate in all of this," it's not enough that you're simply talking about the case. What you need to be doing is actually taking active steps to advance your preparation for the case. Now most obviously that will be where you are doing or preparing things to provide to your solicitor, who is going to conduct the case for you, whether for example it is by discussing the case with a private investigator or talking to witness or whatever. If you're not actually driving the case forward in the communication, in my respectful submission, you're outside section 56(1), particularly when we read that section in light of the case as it was designed to codify.

So it's my submission that actually a far smaller portion, a far smaller fraction, of these calls that have been reproduced in this Court are capable of qualifying as preparatory material. Certainly there are a number of discussions where the appellant talks about what he's doing for his defence, but the only bits that would even be capable, in my respectful submission, of qualifying as litigation privilege, are those where the appellant is actually asking the person at the other end to take some active steps on his behalf in order to drive the case forward, and there are, I admit, some examples of that, there are bits and pieces where he says, "Can you talk to so-and-so, can you get so-and-so to speak to Murray, can you do those things?" Now that might potentially qualify, were it not for some of the other problems we're going to come to. But just chit-chat is not going to get you there. A good example, if I'm in prison and I'm on the phone to my mum and she says, "How's your defence going?" and I say, "It's great, I've got three guys lined up to give false alibi evidence on my behalf and I've paid them each a thousand dollars," now, look, I'm plainly discussing the case, but I'm not driving my defence forward, and if I'm stupid enough to say such a thing with people I know to be listening in, then I have no complaint if that then gets broadcast at my trial. So, in my submission, that's what the communication needs to be directed towards.

But of course there's another problem, and that is what is the dominant purpose of these communications? And it's quite clear in my respectful submission there is perhaps one call out of the entire 24 that could be said to be directed to the

discussion of the case, as a dominant purpose. There are a number of others, or all the other, where perhaps the discussion of the case drifts in and out, there are occasions where they talk about it for a minute or two or half a minute or even three minutes, but the rest of the discussion is about unrelated things. And the one call, that is perhaps in a different category, is call number 6, and that's the one where there's a call to Mr Gary Beckham and he says, "Look, I'm at Rick's now," that's Rick Palmer, and then there's a little bit of a preliminary discussion and then Mr Palmer is put on the phone. But what's interesting about that, as my friend acknowledged this morning, is the moment that happened they stopped listening, none of the people who, well, the people who had been monitoring that call immediately recognised there was a legal discussion and they stopped monitoring at that point. But all the other calls, they drift in and they drift out, and every call is, begins with a period of unrelated discussion.

Now the way the appellant seeks to get around that in this Court is to say, "The communication isn't the phone call, the communication is the particular section of the phone call where the parties are discussing the case." In other words, effectively each communication is nearly infinitely divisible and as long as a particular phrase or a part sentence is to do with the case that, in the appellant's analysis at least, constitutes a separate communication, and as long as that is for the dominant purpose of the litigation then the privilege applies.

So that does raise an interesting and perhaps important question, and that is, well, what is a communication for the purpose of s 56 of the Evidence Act? Now the dictionary isn't terribly much help, I can say the relevant definition – and I haven't put it in the submissions – but the relevant definition from the Oxford Dictionary is, "A letter or message containing information or news," so it doesn't take us very far. But it does raise this question of, well, how divisible are these communications? And there isn't a lot of authority on the point, but there is some, and the best authority in my submission, or the best authorities, come from Australia, where this issue has arisen in a litigation privilege context at least once and where the Court has sought to draw on the way it works, also in the case of legal professional privilege.

If I can take Your Honours to the blue volume I handed up this morning and ask Your Honours to turn to tab 2. Now this is a, in a decision, a case called *Ensham Resources Pty Ltd v Aioi Insurance Company Limited* [2012] FCA 710. It is, as so many of these cases are, an insurance case, where the issue of particular reports

commissioned by the insurer were in issue. It's a decision of Federal Court of Australia, three Judges, and they did split to an extent on this issue, although I'll come on to submit the differences between them are more differences of emphasis rather than being major differences of substance. Now the judgment of the majority – and this was the decision, the third Judge was dissenting as to the result and also gave a much more expanded analysis of what you do where you have multiple purposes within a single document – but the majority on this can be found at page 7 of the decision, paragraph 35, and I have to say that this paragraph 35 is not a, it's not a straightforward paragraph, and I think it might be because a couple of words are around the wrong way, but I'll come to that. So, "When the communication is contained in a document and the document is brought into existence for the dominant purpose of anticipated legal proceedings, that document will be subject to legal professional privilege. In some cases the whole of the document will be the communication. For example, if a solicitor requisitions an expert's report from an expert in relation to litigation, the whole of that report will be privileged. That is because the document 'is' the communication. Sometimes the document might not be the whole of the communication," and I actually think it makes a lot more sense if that sentence were to read, "Sometimes the communication might not be the whole of the document" but anyway, "but the communication will be included in the document. In that case the party seeking to rely on legal professional privilege must confine the claim to the relevant communication in the document when a document that's been brought into existence for the dominant purpose of anticipated litigation is subsequently discovered. It's usually assumed the whole document was brought into existence for that dominant purpose, but if it's only certain communications in the document that satisfy that purpose it's only those communications that are protected." So that's a, I suppose you would say that is a conventional view and applies the sort of redaction approach that we're familiar with in the case of legal professional privilege, also to cases of litigation privilege.

But the decision of Justice Buchanan seeks to challenge that simply by saying, well, number one, litigation privilege is different from legal professional privilege, the emphasis is different and they serve quite different purposes and, secondly, the whole point of having dominant purpose as your test is an acknowledgement that there might be more than one reason for embarking upon a particular communication. It is possible – and the question then becomes, well, what's the main reason this document was created or this communication, this conversation was had? And His Honour says, "If there are multiple purpose, the inclusion of non-

privileged purposes may well give rise to a suggestion the communication wasn't made for the dominant purpose of the litigation but, in any event, by and large documents should stand or fall as a whole."

So I'll just take Your Honours to the important passages. Paragraph 131, though it's late in this analysis, is an important starting point, because there His Honour is drawing a distinction between litigation privilege and legal professional privilege. This is paragraph 131 and it's the latter part of that paragraph, "Litigate privilege exists to protect confidentiality. In the case of client legal privilege where confidentiality is attached to actual communications, the character of the communication is decisive," and that echoes of course what Justice Cooke said in the *Uljee* decision, "The character of the communication is decisive. In the case of litigation privilege, on the other hand, purpose is decisive. Once the requisite purpose is established a response to it is regarded as confidential and privileged without the need to demonstrate that all the content of a document sought and obtained pursuant to a privileged purpose is independently privileged.

His Honour drew on a number of High Court decisions, most notably – and it's in the second bundle we handed up today, and I don't need to take Your Honours directly to it because the main passages are reproduced here in Justice Buchanan's decision – but the case of *Waterford v Commonwealth* (1987) 163 CLR 54 and the judgment of Justices Mason and Wilson is important because they're talking about legal privilege, "The presence of matter other than legal advice may raise a question as to the purpose for which it was brought into existence," but that's simply a question of fact to be determined by the tribunal. And the other passages from this judgment which are important – I think the whole judgment commends reading but paragraphs 117, 121 and 123 are all important in this analysis, and in my submission this is certainly the only judgment I was able to find where a Court actually grappled with the difference between the two sorts of privilege and what the dominant purpose test means in the context of litigation privilege.

Now the way the Australian Courts have sought to treat this – and I have to say even the case of *Kennedy v Wallace* [2004] FCAFC 337, [2004] FCR 185 to which my friend referred this morning, which is a legal professional privilege case, but also in the *Waterford* decision, which is in the white volume – is to ask how easily divisible the document might be, or how easily divisible the communication might be, and if a communication is complete co-mingled, if you have privileged, well, material to do

with the litigation, material that has nothing to do with the litigation, altogether, and it's very hard to carve things in a sensible way, then you don't divide, you treat the whole document as either one thing or the other. And even, as I say, in *Kennedy v Wallace*, which my friend relied on this morning in support of his submission that you should be redacting, in the context at least of legal professional privilege, the Court in that case said, in fact in the very paragraph before the one my learned friend took you to, the Court said often it's not going to be possible to carve a document up like that and it should stand or fall as a single entity, and it's only where it's clearly divisible that you start to look at redacting. And, in my submission, applying that kind of a rule is the sensible one in this context. What that means is, if beginning with a conversation there is a clear separation between the part of the conversation that is to do with the case and the part of the communication that is not, to the point where you can fairly characterise it as an entirely separate communication, then in my submission redaction would be available. There are certain example of we can readily imagine, such as where you have one phone call, you speak to person A for 10 minutes, then you speak to person B, I think you can easily say there are two communications within that. Equally, there could be a signpost where you're talking to someone and say, "I need to talk to you about preparing for my case," and then, "All right, let's talk about other things," or vice versa, and you can –

ELIAS CJ:

It's a very formal submission though, isn't it, because if you accept that there are cases where it is appropriate to segment, whether you've introduced this portion by a particular formula of words, or some break or other, it shouldn't really matter. An inference should be able to be drawn that it is dealing with a discrete matter.

MR BOLDT:

Yes, and I certainly wouldn't require in any formalistic sense that there be an announcement, but there does need to be quite clear delineation between the communication which is said to be privileged and the communication which plainly is not privileged. And drifting in and out in a phone call that is quite clearly a jumbled up co-mingling of personal conversation and discussion about the case, in my submission, doesn't get you there. It certainly –

ELIAS CJ:

Well it may not be the structural thing. It may simply be that if it is a mish-mash it's much more difficult to draw the inference that the dominant purpose was preparation for litigation.

MR BOLDT:

Yes, and I mean we may simply be expressing the same sentiment in different ways. I mean a very clear example, and of course it's much easier, with respect, to documents where you can have things set out quite separately. A good example was the one raised in discussion between my learned friend and Your Honour Justice Arnold this morning about some minutes of a board meeting. Well clearly when you reach item 8 on the agenda and the discussion turns to a discrete topic, namely the litigation, it would be eminently sustainable to say that passage in the notes, or in the minutes that is under this particular heading, constitutes a separate communication from the balance of the minutes. On the other hand it will often note be anywhere near so straightforward and in my submission there do need to be clear lines capable of being drawn because the communication itself has to be analysed against the test in section 56 and that means as Justice Buchanan says, and I think is a matter of common sense and statutory interpretation, there can be multiple purposes within a single communication, that's accepted, and so in light of that acceptance it makes little sense to then go chopping communications up into small pieces in order to isolate a tiny bit which can be said to have a dominant purpose of the litigation. Generally, there will be a one to one overlap, and even the majority in *Ensham* says that. Normally the document will be the communication and if it is for the dominant purpose of the litigation then the whole thing is privileged. If the dominant purpose is not the litigation then none of it is privileged. On the other hand it may clearly be able to be divided in a way where you can say, actually it's two separate communications within a document, but unless you can establish that with a relatively bright line, in my submission, you don't get there.

The dominant purpose test needs to be given effect to and as is ay there's infinite subdivision of the communications being urged upon the Court by my friend would not do that. It would take a call that is plainly not for the dominant purpose of discussing the litigation and elevating the very tiny portions that do discuss the litigation to an unwarranted status as a separate communication in and of itself. And there are examples in the calls where even just individual exchange is said to be privileged. So entirely surrounded by irrelevant communication. And in just about every case it's only a small part of the call that is said to be privileged. So in my

respectful submission the dominant purpose test can't be satisfied, where you have an unfocused series of conversations of this kind. Here, where there is so much co-mingling, it is appropriate to treat each call as a separate communication and to ask was this for the dominant purpose, not even just of discussing the case, but of preparing for the case, and in my respectful submission none of those calls actually qualify in that respect, with the possible exception, as I say, of call 6, where the listening was curtailed. So it's our submission that unless it can be clearly divided the letter or the conversation or whatever will stand and fall as a whole.

I should very quickly, and I'll just give Your Honours the references, because I know we have quite a lot to get through. But the *Waterford* decision is in this white volume I handed up to Your Honours today at tab 5. It's a decision of the High Court and there are just two passages I would draw Your Honours' attention to, and that is the decision of Justices Mason and Wilson at pages 66 and 67, and perhaps even more clearly on this question of divisibility of communications, Justice Deane at page 85 and His Honour there, "If it were not possible to classify the contents of the document into distinct parts, it would be necessary to determine whether the contents as a whole were outside the protection of legal professional privilege," and I do submit that's an appropriate rule to guide us in terms of what constitutes communication for the purposes of section 56.

I should just very briefly responds on the submission made about call this morning by my friend who said, you know, this is a clear example of discussion about preparing for a case. What it was, and this is call 8 at page 36 of volume 5, is a discussion between Mr Beckham and Ms Taylor about how to stop Ms Taylor's father from making a statement to police. That was what that was all about and to try very hard to impress upon MR Gibson the need for Mr Taylor Senior not to speak, and that's the sort of thing that appears from time to time here. It certainly would be my submission that even to the extent that qualifies as a piece of preparation for the legal proceedings, would probably be disqualified from being privileged in any event because quite obviously people should not be conspiring together to try to figure out how to stop people making statements to the police. But anyway.

I'll move on to the next stage of the submission and that is a submission that even if this, even if any of these conversations are privileged, there was no violation of the appellant's legitimate rights with respect to the privilege in the context of the present case. Now there might, in theory, have been a problem if this evidence had been

given at trial and later on at it had turned out it was subject to legal professional privilege – sorry, to litigation privilege but of course it wasn't. in the Court of Appeal the appellant submitted that, we were of course only talking about legal privilege in the Court of Appeal, but in that Court the appellant submitted that any breach of legal professional privilege, it was a little bit like touching the third rail. It didn't matter how lightly you brushed it, it was fatal, and it was going to constitute an abuse of process for the prosecution to go forward and the case on which the appellant relied heavily in the Court of Appeal was the English decision in *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60 which has subsequently been doubted or rejected by the Privy Council and the Supreme Court in the UK. Now I didn't understand that point, and of course that point has not been directly pursued in this Court. There isn't a repeat of this submission that there should be, in effect, a presumptive abuse of process whenever legal professional privilege is violated, and yet the same submission in effect is made that where either legal professional privilege or litigation privilege are breached, you create a prima facie miscarriage of justice which it is then incumbent upon the Crown to rebut, albeit without reliance on the English authorities, but with reliance on the North American authorities discussed between the Court and my learned friend yesterday.

Now it's our submission that New Zealand Courts have constantly rejected that analysis and in particular have never suggested that privilege, or breaches of privilege, deserve to be elevated into a class of their own whereby some irregularity or illegality with respect to privilege deserves to be accorded infinitely greater weight than any other thing that might go wrong during the course of a trial. Now *Uljee* is a case we've already looked at, but that's a very good example. Now there you had a police officer listening in on a conversation surreptitiously, hearing an admission to the lawyer, writing it down, and trying to give evidence about it at trial, and the Court of Appeal there so I say actually you know in a far more finely balanced analysis than we would expect today, said no that privilege remains and that evidence may not be given. But the Court said exclusion is an appropriate recognition of the breach here and that's what happened, the evidence wasn't given at trial and the prosecution was able to sail ahead. Now on the appellant's analysis in this Court the mere possession by police of that would have been enough to imperil the entire prosecution. There wasn't, and never has been, any suggestion, prior to this case in New Zealand, that breaches of privilege should be elevated to such a level.

It is important in this context to note that even though a breach of legal privilege would not get you prima facie let alone automatically a stay in abuse of process. Litigation privilege is not regarded as being as important or as sacrosanct as legal professional privilege in any event. I've already taken Your Honours, we've already looked at that passage from Justice Richardson's decision in *Stuart* which was all about how we keep this branch of privilege under control and noted there really is all the difference in the world between a tool designed to help you prepare your litigation in private and the sort of a fair and frank exchange between solicitor and client which is required in order to give, to enable our legal system to function properly.

There are other cases, however, which make much the same point. A good one is to be found, again in this new bundle from today, the respondent's supplementary bundle of authorities. It's a decision of the Ontario Court of Appeal and the important paragraph is –

ELIAS CJ:
What tab?

MR BOLDT:
Sorry Ma'am. Tab 1. It's page 255 of the report. There is a very helpful analysis in the lengthy quotation set out there on 255 of the difference between legal professional privilege and litigation privilege. Then the Courts' summary at 24 which, in my submission, sums things up nicely, it can be said in these excerpts quoted without the underlying authorities but there's nothing sacrosanct about this form of privilege. It's rooted as is solicitor/client privilege in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel what Sharp calls a zone of privacy and what is termed in the United States protection of the solicitor's work product. Then over the page, and this –

WILLIAM YOUNG J:
It's quite interesting that the report wasn't privileged in the hands of the employee.

MR BOLDT:
Yes, yes, well quite. And it's, which I think dovetails with the sorts of discussion we had before the break as well.

WILLIAM YOUNG J:

But if you treat the litigation privilege as a sort of a essentially a discovery rule, it would now be entirely circumvented with third party discovery, because if you're not happy when the insurance company claims privilege for the assessors' report and just seeks third party discovery against the assessor.

MR BOLDT:
Mmm.

WILLIAM YOUNG J:
So, well that couldn't be right though could it?

MR BOLDT:
Well I suppose, Sir, it does depend on the purpose for which the document was created.

WILLIAM YOUNG J:
Well it's an insurance, it's an assessor's report that is, on the face of it, privileged.

MR BOLDT:
Mmm.

WILLIAM YOUNG J:
Privileged in the hands of the insurer but could the insurer just, as it were, cut out the middle man and seek third party discovery against the assessor?

MR BOLDT:
That raises the very same issue as the one my friend raised with the Court as an answer to the claim there's a requirement for confidentiality, and it's a little bit like your discussion with the witness. Your draft brief you obtained from the witness is privileged in your hands but you can't stop the witness from –

WILLIAM YOUNG J:
Showing it to anyone.

MR BOLDT:
Showing it to anyone, and talking to anyone, and so there is – but where the confidentiality applies is my copy in my hands is privileged and no one can force me

to disgorge it if I'm the solicitor who has caused it to be created, or asked it to be created, and in terms of the significance of it, paragraph 43 is also important. It notes, "Solicitor/client privilege stands against the world. Litigation privilege is a protection only against the adversary, and only until termination of the litigation. It may not be inconsistent with litigation privilege vis-à-vis the adversary to communicate with an outsider without considering a waiver but a document in the hand of an outsider will only be protected by a privilege if there's a common interest in litigation or its prospect, which again goes some way towards addressing that topic."

In any event Your Honours, and I don't want to spend more time on this than is necessary, this is a different sort of privilege. It's certainly not sacrosanct in the way solicitor/client privilege is regarded as sacrosanct. It's mostly a discovery rule and it does require a clear expectation of privacy before it can be engaged. As is ay the Ontario Court talks about it being motivated by this need to preserve a zone of privacy around your preparation for the litigation and if you, this is coming back to waiver, if you choose to deal with that information in a way inconsistent with any expectation of privacy, then you certainly can't later on assert the privilege.

Section 53(4) of the Evidence Act effectively reflects what the Court of Appeal said in *Uljee* about the consequences of a breach of privilege, and that is that you just don't get to use the material and as I say there is no basis in my submission for elevating a breach of privilege to anything beyond an admissibility issue, unless somehow the breach of privilege creates some issue as to whether a person can then obtain a fair trial, and then we are into the ordinary abuse of process analysis with all the reluctance on the part of a Court ever to take that extreme step and only to entertain it in a situation where quite plainly a fair trial is impossible. So we are a very, very long way, in my submission, from a situation where irremediable prejudice should be assumed unless somehow the Crown successfully establishes that a fair trial is possible.

Now the other issue, I'll try and skate over this very briefly because it is possible Your Honours won't need to engage with it, but my friend has made a good deal of the submission that the calls remained privileged in the hands of Corrections and couldn't be used in a manner inconsistent with the privilege and in particular the reliance, at least in the written submissions, although it didn't get any emphasis in oral argument, on section 122 of the Evidence Act, which is the provision which says

if there are any privileged calls among the monitored calls then they remain privileged –

ELIAS CJ:
The Corrections Act.

MR BOLDT:
I'm sorry, did I say the Evidence Act? I meant the Corrections Act, you're right. Section 122 of the Corrections Act, and that simply provides that the document remains privileged and must not be given in Court except with the consent of the person entitled to waive the privilege. Now this gives rise to a statutory interpretation argument which, as I say in my written submissions, could probably occupy this Court for a case all by itself, and that is how do we deal with the fact litigation privilege is not among the heads of privilege referred to in part 3 of the Evidence Amendment Act (No 2) 1980, but is referred to in the relevant part of the Evidence Act, and the appellant says, well we just import in its entirety part 2 of the Evidence Act, or part 2, subpart 8 of the Evidence Act, and so we treat that reference in section 122 to the Evidence Amendment Act (No 2) 1980, to a reference to part 2, subpart 8, of the Evidence Act 2006.

Now as I say the Court may not need to address this but we do find ourselves in the territory of having to ask what does the context require –

WILLIAM YOUNG J:
What does it really matter? Isn't it just, isn't section 122 just an evidence exclusion rule?

MR BOLDT:
Well, I don't understand it to be treated as that. I think perhaps the appellant places more weight on the "and" in the middle of that section.

WILLIAM YOUNG J:
Sorry where, where's that? But isn't it just saying that evidence is covered, if evidence is gathered through the monitoring process but is privileged, to use a loose word, then it can't be given any evidence?

MR BOLDT:

And, Sir –

WILLIAM YOUNG J:
And even if you're not trying to give it in evidence.

MR BOLDT:
No, no, indeed, and of course that's been our case throughout in that, that reflects the protection in section 53(4) so where's the problem. But I do understand the submission to have been made that because the section, section 122, provides that it remains privileged, there is also an enhanced obligation of confidentiality on the part of Corrections with respect to it.

WILLIAM YOUNG J:
Well isn't, I suppose, I've thought about this. Isn't section 114 intended to preclude vanilla examples of privilege, communications between the solicitor and the prisoner about the prisoner's legal affairs?

MR BOLDT:
Mmm.

WILLIAM YOUNG J:
So just don't recall it all.

MR BOLDT:
Yes.

WILLIAM YOUNG J:
If per chance privilege material is recorded and is available to be given in evidence then section 122 operates as a sort of longstop?

MR BOLDT:
Yes. Sir, I would agree entirely with that analysis. As long as there's n suggestion any other analysis might apply to that section then I'm more than happy to leave it there. What I can say is, I've dealt with this in my written submissions in any event, and our submission is to the extent the Court needs to examine this issue, and as I say you may well not need to examine it, our submission is that it's only those provisions from the old Act that have a direct equivalent in the new Act which should

be thought to have been transferred over, and we can at least infer a very clear intention on the part of Parliament in selecting some forms of privilege for that protection but not others. That litigation privilege wasn't intended to be one of those that Corrections should be keeping an eye out for in the exercise of its function of monitoring. Given how impractical and indeed impossible it would be, especially for a remand prisoners who are probably always talking about their cases, it would be very, very difficult to get to a position where that kind of privilege would have to be looked for, recognised and somehow separated out from all the other forms of privilege – from all the other material in the phone calls. It's notable that the other forms of privilege all pretty much depend on who you're talking to, like a minister of religion, or a lawyer. It's very clear, just on the basis of the other person, the person on the other end, whether a call is privileged or not. There really can't, in my submission, have been any intention that calls should have to be analysed, word by word or phrase by phrase, to try and decide whether something is straight into an area of litigation privilege and that, in my submission, is why litigation privilege was not included as one of those heads of privilege. But in any event.

I can move on unless Your Honours have any further questions on the issue of privilege. I'm happy to move to this question of sentence reduction for breaches of the Bill of Rights Act. Your Honours, I think our submissions have been well signalled in the written material we've provided to the Court. It's quite clear there is no bar to a Court providing a degree of credit in the sentencing exercise for breaches of the Bill of Rights Act where that is an appropriate remedy for a breach that has been established. Now here I do concede a breach to the Bill of Rights Act with respect to the legally privileged calls which were obtained by police and those are the very small number which were obtained pursuant to the first warrant and the second tranche obtained from Customs. There were no privileged calls obtained pursuant to the second search warrant. In fact police asked Corrections not to provide any lawyer calls pursuant to the second warrant and in my submission that was appropriate because the second warrant could not lawfully authorise the seizure of privileged calls without proper conditions being in place to safeguard that material.

So that is the breach which certainly the Crown accepts in this case and the question then becomes, well, is it appropriate for there to be a reduction in sentence. Now the Court of Appeal, as my friend outlined this morning, rather roundly dismissed the submission any reduction in sentence might be appropriate here. The Court did that on the basis there was simply nothing in the acknowledged breach which impacted in

any legitimate way on the sentencing exercise. There was nothing that impacted upon the circumstances of the offence or of the offender which meant some reduction in sentence might be appropriate. We can obviously draw a very clear contrast between cases where there has been a breach which we submit, at least in this case, did no harm of any sort to anyone, and which didn't intrude upon the trial process, let alone culpability or mitigation, and those sorts of breaches of the Bill of Rights Act where someone's liberty, interest, is in some way compromised by the unlawful behaviour of a State officer, and where it would be an appropriate recognition of that to reduce the sentence slightly. Now Your Honours are well familiar with the sorts of cases where sentence reductions have been regarded as appropriate. The most obvious is in cases where the right to be tried without undue delay has been breached, and the reason for that is obvious enough. If a person has had to endure an unduly long period on remand, with all of the anxiety caused by awaiting trial, then it is appropriate that they have some credit for that at the other end of the process, by having a shorter sentence. Beyond that, as I have suggested in written submissions, it isn't obvious or easy to imagine other kinds of cases where there will be a clear nexus, or even a loose nexus, in fact, between the breach of the Bill of Rights Act and factors legitimately available to be taken into account at sentencing. The appellant in this case asks for a reduction in sentence, and I hope I don't do him a disservice when I say, it's because that is the remedy that would be of most utility to him right now, and that's because he happens to be serving a long prison sentence and he would like it to be a shorter prison sentence. Well, it's my respectful submission, that is not the way the remedy's regime within the Bill of Rights Act works.

The most obvious analysis, or the most relevant analysis, was conducted by this Court in the *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 case in which the Court stressed the need for the remedy to fit the breach. The Court noted that a declaration may not be an appropriate remedy in a lot of cases. The Court also noted that it is the public harm that is done which should drive the remedy. It's not all about the victim. What it is, is it's about recognising and appropriately responding to a breach of fundamental rights on the part of the State. So – and also that remedies, because it's a public law context where the Bill of Rights Act is invoked, should be forward looking. What they should do is mark the breach and do what they can to make sure breaches of that kind don't happen again in the future. Now in the present case obviously to begin with the severity of the breach is a very important factor in deciding what remedy might be appropriate. It is our submission,

although my friend says there were multiple unlawful warrants and egregious reckless breaches, that the breach here was a modest one.

As we've seen from the findings of fact, reached after exhaustive evidence on two separate occasions in the High Court, no one set out to breach the appellant's rights. Whatever happened, happened as an oversight. It certainly wasn't a deliberate breach which might require a more condoned response. No actual harm was done. That is the second important point. If we – certainly concentrating on the legally privileged calls, both the High Court and the Court of Appeal held, look, this did not intrude or impact in any way upon the fairness of the trial process. Therefore, there is simply nothing in the context of this case to remedy. It maybe – in other words we'd look at, what we say at least, is a minor breach of section 21, that is the unreasonable seizure of a small number of privileged calls, as a matter separate from and unrelated to the criminal trials that just happened to be happening to the same person at roughly the same time. So our submission is the remedy needs to be driven by the breach and it can't simply find its way into this case because that would be convenient for the appellant. Now clear authority –

ARNOLD J:
So just to be clear on the broad and generous test to nexus that the appellant proposed your argument is still you don't get there?

MR BOLDT:
No, Sir, I have no problem with a broad and generous approach, but there needs to be some link of some sort and here, in my submission, no matter how broad or generous you are in your application, given the findings of fact in the High Court, and concurred in by the Court of Appeal, and might I say the concession recorded in the Court of Appeal's judgment that the trial, at least on the information available at that time, was fair, then there is simply nothing in this case the breach, to which the breach might speak.

Now there is a very good and relatively recent decision of the Supreme Court of Canada which deals with exactly this issue and that is the *R v Nasogaluak* 2010 SCC 6, [2010] 1 SCR 206 case and that is in the blue volume of authorities Your Honours. That's not today's blue volume but the blue bundle of authorities that was originally filed. I think that's the appellant's bundle, volume 2, and it's behind tab number 23. Now that was a case where a driver was pursued and stopped on suspicion of having

been intoxicated and he was then beaten up by the police and the question was to what degree should the assault result in a mitigation in the otherwise appropriate sentence. The Court effectively said, look, you can do this when it is appropriate and relevant in the particular case but you don't just do it because the police have done something you want to punish them for. Paragraph 4 is a very good encapsulation of the rule from the case. The Supreme Court said, "Where the state misconduct does not relate to the circumstances of the offence or the offender, however, the accused must seek his or her remedy in another forum. Any inquiry into such unrelated circumstances falls outside the scope of the statutory sentencing regime and has no place in the sentence hearing. Likewise, a reduction of sentence could hardly constitute an 'appropriate' remedy within the meaning of s.24(1) of the *Charter* where the facts underlying the breach bear no connection to the circumstances of the offence or the offender."

There are other passages in the judgment to similar effect. Paragraphs 42 and 43, those passages simply discuss the sentencing regime in Canada and that is in many respects, I think in material respects, similar to the Sentencing Act in New Zealand. And paragraph 49 the final sentence is useful. "Provided that the impugned conduct relates to the individual offender and the circumstances of his or her offence, the sentencing process includes consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society."

So that, in my submission, reflects the broad and generous test. If you can link it in some way even broadly to the sentencing exercise then it might be available as a remedy but in this case, given the findings of fact, there simply is no such connection. In my submission the breach provided of course the Court confines it to the breach of legal professional privilege, was of a fairly modest nature in any event, and I say that without wanting in any sense to excuse the police from having unlawfully and unreasonably obtained privileged phone calls. But of course it's important what they then did with them which was precisely nothing. They ensured they were not listened to and they took steps to ensure the privilege was protected and preserved. Now that's the breach we accept, in my submission, that's the only breach present in any case and nothing more in those circumstances than a declaration would be required, particularly given the police's very prompt acknowledgement, they made a mistake in that regard and a declaration of that sort would be amply sufficient, in my respectful submission, to ensure the breach was marked and that there was no future

reoccurrence. A stern word, and of course the High Court has already sternly admonished the police for the breach, as did the Court of Appeal, and in my submission – and of course the police were dismayed that they broke the law in that respect, but nothing more, in my submission, would be required given the absence of any prejudice.

Now there were other suggestions of specific prejudice in the present case and for example it was submitted that once he learned of the monitoring the appellant was far more circumscribed in terms of his dealings with counsel in discussions. Well first of all, that was used as the basis on which the appellant was granted bail. In fact it was submitted in the High Court that because of this intrusion, or destruction as he was alleging at that time, that if it's legal professional privilege, the only proper remedy would be for the appellant to be given bail and he then was given bail and remained on bail for many months leading into the trial. So that concern about intrusion into the relationship between the appellant and his solicitor was already given some recognition in the High Court and he received something akin to a remedy in that respect.

But I come back to the point, they didn't listen to the calls, the police didn't listen to the calls. The appellant may have perceived a greater intrusion into his relationship with counsel than the evidence subsequently brought out but the remedy or any remedy associated with that breach needs to be driven by what actually happened and not by concerns that the appellant had.

As to the litigation privilege, well as I say there was never any suggestion on the part of the appellant that any prejudice whatsoever had arisen from that until relatively recently and this was, of course, despite Mr Beckham having been a participant in all of these calls and therefore knowing full well what he had said and had not said, and knowing full well there were people listening in.

So in my submission, of course, in theory a reduction in sentence is available but here there, even on the broadest and most generous approach, there's no connection that might make a reduction in sentence appropriate in this case, and in my submission there ought accordingly be no intrusion into what is otherwise accepted as an entirely appropriate 18 year sentence. This is a very long sentence, reflecting the very, very serious nature of the offending committed by the appellant, and it would, in my submission, be entirely disproportionate to the very minor breach

for that otherwise entirely appropriate sentence to be reduced in recognition of some mistakes the police made which didn't impact upon the fairness of the trial or the proceeding in any other way.

Now Your Honours I think I've come to the end unless there is anything that Your Honours want to take further?

ELIAS CJ:
No, thank you Mr Boldt.

MR BOLDT:
May it please Your Honours. Those are my submissions.

ELIAS CJ:
Yes, Mr Mount?

MR MOUNT:
May it please the Court. I will address a relatively small number of points in the order they were raised by my learned friend. The first of those related to the suggestion that the appellant had free access, if you like, to the unmonitored office phone. We saw the schedule of calls that he had made. The evidence at the High Court was that he would have access to that phone once a week. It was something that was clarified by the learned trial Judge at page – sorry, I've got the wrong volume. Page 96 of the notes of evidence in volume 3. Indeed when one looks at the schedule that we saw earlier in my learned friend's submissions, that that list of calls made from the office phone I think was about 40 calls over the period of an entire year. So my submission by way of response is simply that the office phone, the unmonitored office phone is a relatively limited option for a prisoner in comparison to the payphones which are monitored.

Second, my learned friend made something of the instructions from senior officers to Detective Sergeant Lunjevich that contrary to Detective Sergeant Lunjevich's instincts, he should not disclose information from Operation Valley to Operation Jivaro. In my submission, of course, the two important points that arise are first that he did, in fact, make such a disclosure, and as I've said we didn't have evidence as to whether he simply disobeyed the directions of senior officers or whether events moved on. But from the –

WILLIAM YOUNG J:
Well he presumably disclosed it when Operation Valley came to an end?

MR MOUNT:
In fact the information which Detective Peat in December 2009, then they got the January warrant with some calls that arrived in February, so Operation Valley in that sense continued on for several more months. But it did change its focus to be more directed towards money laundering and the area that Detective Peat had been working in.

The second point that arises is that the detective sergeant was asked about the reason, as he understood it, for non-disclosure, and he specifically disavowed the proposition that the reason for the non-disclosure through to Operation Jivaro was anything to do with privilege. He understood it in a slightly confusing way to be about the assault allegations or the threats against Detective Sergeant Schmid. But certainly on the evidence there was no consciousness within police of the need to segregate these calls in order to protect privilege.

ELIAS CJ:
Well it seems to have been principally about not wanting to prejudice Operation Valley.

MR MOUNT:
Yes, by disclosure.

ELIAS CJ:
That was the – yes.

MR MOUNT:
That's the reason, one of the reasons that was given, that's right.

GLAZEBROOK J:
And these calls you have to be referring to litigation privilege because the solicitor/client privilege they didn't listen to, didn't use and knew they shouldn't.

MR MOUNT:

That's right, Your Honour, although of course they were – they did in fact disclose solicitor/client privilege calls to Detective Peat so the transfer occurred but I accept there's no –

GLAZEBROOK J:
I thought in the evidence that I've just read it said they didn't, they've given specific instructions not to transfer those ones over? I don't know whether there were any findings on that and I couldn't find the passage anymore.

MR MOUNT:
It amounts to the same thing because Detective Peat certainly gave very clear evidence both in his affidavit and orally that he didn't listen to any of the solicitor/client calls to Mr Gibson.

WILLIAM YOUNG J:
I think by mistake some of the solicitor/client calls hadn't been deleted from the discs that he got.

MR MOUNT:
Correct. They were –

WILLIAM YOUNG J:
But he didn't listen to them.

MR MOUNT:
But he did not listen to them, that's right. It may, in fact, be, Your Honour, that this was the reason for the need for the affidavit, that Detective Sergeant Lunjevich initially said Detective Peat did not get the calls to Mr Gibson. That subsequently transpired to be incorrect, hence the affidavit, hence the further disclosures.

The next point is my learned friend has said that perhaps only 1% or 2% of the calls fall into what the appellant submits are the litigation privilege category. So of the 1700-odd calls he says only 24 fall into that category. Of course the position is that the 24 calls placed before the Court are those that the appellant has, in the time available and with the resources available, been able to transcribe for the Court, and I can immediately say that the appellant has not had up to nine officers in two shifts able to listen to all of the calls. So the likelihood, in fact it's almost certain, is that,

certainty, is that there will be more than the 24 but the 24 just represent those that the appellant has placed before the Court.

GLAZEBROOK J:
Well presumably by looking at the schedule and analysing which ones did have anything summarised about so if there had been any indication in the schedule of other calls presumably you would have listened and transcribed those as well.

MR MOUNT:
Well –

GLAZEBROOK J:
And after all Mr Beckham does know what he talked about and when, one assumes, and would at least have his memory jogged by seeing the schedule?

MR MOUNT:
We listened to as many of them as we could in the time available. You're quite right that there was an attempt made to be as targeted as possible in that process. My submission is simply that it's not correct to make an assumption that it's limited to the 24. In fact the opposite assumption is more likely to be correct, namely that there are more than that.

So far as the question of confidentiality is concerned in relation to litigation privilege, this is quite clearly a significant legal issue and quite clearly one on which the appellant and respondent have made sharply divergent submissions. Rather than simply take the Court through what the appellant has said, again, on the topic, I am content to rest on the written submissions that have been filed, but certainly I wouldn't want it to be thought that there is any lack of disagreement as between the appellant and the respondent on that issue.

My learned friend made something of call 8 in volume 5 and submitted that this was an example of the appellant trying to stop a potential witness from speaking to the police and suggested that the appellant had acted improperly in call 8. In my submission to the contrary the appellant was acting properly because rather than placing any pressure on the potential witness Mr Taylor, his direction was to speak to Mr Gibson, the lawyer, about it and to place the matter into the lawyer's hands, and

so while my learned friend is quite correct that there was real discussion as between the appellant and his wife over the question of the police approach to Mr Taylor –

WILLIAM YOUNG J:
He didn't want Ms Taylor's father to talk to the police. That's pretty clear, isn't it?

MR MOUNT:
I think I have to accept Your Honour that you are correct that there is a sense at page 37 when he says, "They can say that yes they did loan me the money but they don't wish to be interviewed." Of course that is a statement of fact as to what any person approached by the police can say.

WILLIAM YOUNG J:
So Ms Taylor says he gets tongue-tied, he'll just say whatever they want him to say and then just agree with them. Just signed a bit of paper and that's what I don't want him to do. And it would seem that Mr Beckham and Ms Taylor were as one on this point?

MR MOUNT:
I accept, Your Honour, that that is the overall tenor of the discussion. My submission in response is simply that it's quite proper for the appellant to say what you do about this is talk to Murray, talk to the lawyer about it rather than attempting to place any pressure on Mr Taylor directly not to speak to the police.

GLAZEBROOK J:
So it's all right to tell your lawyer to pressure someone not to speak to the police?

MR MOUNT:
I think we can make the assumption Your Honour that the lawyer, as an officer of the Court, would be well aware of what can and cannot be said to a prospective witness about their rights and their requirements to speak to the police.

WILLIAM YOUNG J:
That's not entirely right, appropriate for the lawyers to go around telling people don't talk to the police when they're not their client? I sort of have a slight sense of unease about that, as to whether that's a really good thing in life.

MR MOUNT:

I do need to be clear, there's no suggestion that that, in fact, happened. What the appellant is saying is talk to Murray about it, you talk to Murray and, in fact, we don't know whether that conversation took place, but my submission is that so far as the appellant's conduct is concerned, his direction to raise it with the lawyer was the appropriate response.

Next in relation to the validity of the search warrants. The Crown's submission has been that the warrants remained valid but for the reference to the privilege calls, as I understand it. I want to be clear that from the appellant's perspective, the appellant's submission is that the defects in the applications for the search warrants were of such a fundamental nature that the warrants in both cases were invalid in full and the Crown has not at any stage made anything akin to a section 204 type argument, to say that the defects were of such a nature that they could be overlooked. So just to make that submission clear, that from the appellant's perspective it is a submission that the search warrants were invalid in full.

Finally in relation to the sentence reduction submissions. The Crown has submitted that the appellant simply seeks a remedy on the basis of utility and suggests that that is an unprincipled way to approach the remedial jurisdiction of the Court. My submission is that the appellant has squarely based his case on the principles in *Taunoa*, namely that following a breach of the Bill of Rights the task of the Court is to find and effectively to vindicate the breach of the rights. The submission in this case is that arising from the various breaches of the Bill of Rights, a sentence reduction is the effective remedy that will appropriately vindicate the breaches and that no other remedy, my learned friend mentioned a declaration for example, no other remedy would effectively vindicate the breaches in this case.

Unless there are further questions those are the submissions for the appellant. May it please the Court.

ELIAS CJ:

Thank you Mr Mount. Thank you counsel for your help in this matter. We will reserve our decision on it.

COURT ADJOURNS: 3.44 PM