Neutral Citation Number: [2025] CIGC (Civ) 34

Cause No: G2024-0236

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

KEITH MYERS

Applicant

-and-

(1) AREK JOSEPH J.P.
(2) COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE SERVICE

Respondents

Appearances:	**Mr Nicholas Dixey of Nelsons for the Applicant**
	Mr Tim Parker SC of counsel instructed by Ms Marilyn Brandt and Ms Celia Middleton of the Attorney General's Chambers for the Second Respondent
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**29 October 2025**
Ex tempore judgment delivered:	**29 October 2025**
Finalised judgment approved:	**19 November 2025**

Judicial review—claim settled shortly before trial—whether to order costs on the indemnity basis

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JUDGMENT

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1. This judicial review matter was scheduled for a substantive hearing in the week commencing 21 July 2025 in respect of the Applicant's public law claim. However, during the preceding week, the parties agreed terms of a consent order granting the Applicant the substantive relief that he had sought in the judicial review proceedings. The only outstanding issue in relation to the Applicant's public law claim is the basis on which the Second Respondent should pay the Applicant's costs. The matter has therefore been listed before me today to hear argument on that question.

2. The Applicant has been represented by Mr Nicholas Dixey of Nelsons, and the Second Respondent has been represented by Mr Tim Parker SC instructed by Ms Marilyn Brandt and Ms Celia Middleton of the Attorney General's Chambers. There has been no appearance by or on behalf of the First Respondent, who has not played any part in the proceedings.

3. The materials before me for the purpose of this hearing comprise the affidavits for the substantive judicial review and two further affidavits sworn on behalf of the Applicant by a legal assistant at Nelsons for the purpose of putting into evidence certain correspondence which is potentially relevant to the resolution of the costs issue. I have also been provided with written submissions prepared by counsel on each side, which have been helpful in formulating my views on the costs issue. I will briefly set out the background to the Applicant's claim and to the issue regarding the basis for payment of the Applicant's costs that arises as a result.

4. The Applicant is a criminal defence attorney in the Cayman Islands. In May 2024, the Court of Appeal gave judgment in an appeal against conviction by an individual who had previously been represented by the Applicant at her trial. The judgment of the Court of Appeal criticised the Applicant's conduct in certain respects regarding his representation of the appellant in that case and directed that the Royal Cayman Islands Police Service should carry out an investigation into his conduct. One of the concerns expressed by the Court of Appeal was that an affidavit that the Applicant had sworn for the purposes of the appeal proceedings to refute an allegation that he had behaved in a sexual way with the appellant prior to trial, culminating in close sexual contact, appeared to be contradicted by a number

of WhatsApp messages passing between the Applicant and his former client during the period when he represented her, which had only come to be available to the Court of Appeal after the Applicant's affidavit had been sworn.

5. The investigation was assigned to Detective Superintendent Peter Lansdown. He considered at that stage that he was investigating an allegation of potential perjury on the part of the Applicant in respect of the affidavit that the Applicant had sworn for the appeal proceedings.

6. Under DSI Lansdown, Detective Sergeant Graham was assigned as the lead detective. At the commencement of the investigation, in around May 2024, it was recognised by the police officers that any documents and electronic devices in the possession of the Applicant were likely to include legally privileged material. They sought guidance from the Director of Public Prosecutions, who advised the police team that if any electronic device were to be seized, then an independent lawyer would need to be instructed to consider the content of the electronic device in order to ensure that any privileged material was appropriately ring-fenced from the police investigation. Thus, it appears that the police investigation team understood from an early stage that there was a need to be cautious and that the case was likely to raise sensitive issues regarding legal professional privilege.

7. On 15 June 2024, the police recovered a mobile phone from a guesthouse operator. Apparently, a tourist had found the phone on the seabed near Cheeseburger Reef whilst snorkelling. The tourist had been able to turn the phone on and had guessed the code to unlock it. They had identified that it had belonged to the Applicant and after carrying out an internet search decided that they should pass the phone to the police. The phone was examined forensically and indicated that approximately 200 messages had been deleted from a conversation between the Applicant and a number associated with the appellant in the Court of Appeal case. DS Graham was notified of this on 22 July 2024.

8. On the same day, DS Graham was passed a forensic data extraction report concerning a mobile phone recovered from an abandoned vehicle in July 2023. The phone was attributed to a Mr Sven Connor, who was murdered on 7 December 2023. The extraction report revealed a number of messages during the period from 30 June 2023 to 14 July 2023 between the Applicant and Mr Connor. The Applicant was at that time defending one of the persons accused of Mr Connor's murder. This caused DS Graham to have further concerns about the Applicant's conduct.

9. On 1 August 2024, the Applicant voluntarily attended a police station for an interview under caution by DS Graham concerning the perjury matter. The Applicant provided a pre-prepared written statement, including exhibits, setting out his response to the allegation of perjury made against him. The Applicant answered questions put to him by DS Graham concerning that police inquiry. He also gave an explanation as to why his mobile phone had been found in the sea in June 2024. The Applicant was not willing at that time to answer any questions about his relationship to Mr Connor and the messages between them that had been identified by the police on the phone recovered from the abandoned vehicle. Instead, the Applicant indicated that he would be prepared to respond to questions from the police on that different issue on another occasion.

10. The evidence that would have been presented at the judicial review was that, following his meeting with the Applicant on 1 August 2024 and a discussion with the DPP, DS Graham considered that the Applicant's representation of the person accused of Mr Connor's murder gave rise to concerns that the Applicant should be charged with perverting the course of justice.

11. DS Graham made the decision to apply for a search warrant to search the Applicant's home. In early September 2024, DS Graham made some inquiries with the Court in order to seek an appointment to meet a magistrate to review the search warrant. The response that DS Graham says that he received from the Chief Magistrate's Personal Assistant was that it was policy that magistrates should no longer endorse search warrants because that gave rise to a risk of the magistrates being conflicted from dealing with the matter in the future. DS Graham considered it would be appropriate to seek a search warrant from a Justice of the Peace instead. DS Graham does not appear to have considered that it might be preferable to make his application for a search warrant to a Grand Court Judge. The advice from the Chief Magistrate's Personal Assistant, and the recourse to a Justice of the Peace, was subsequently echoed in an email from the Clerk of Court dated 18 September 2024.

12. It is possible that there was a miscommunication between DS Graham and the court staff resulting from his request to "review" the search warrant rather than stating that he wanted a magistrate to authorise the search warrant. However, if the court staff did understand that DS Graham wished to have a magistrate authorise the search warrant, then I have significant doubts regarding the correctness of that advice. One of the statutory functions of a magistrate is to review and to authorise search warrants, and I do not consider that it is appropriate for the court to refuse to perform that

statutory function. If a particular magistrate is involved in the grant of a search warrant and is conflicted in respect of any subsequent criminal matter as a result, which should not be assumed to be the case, it should not be difficult for other magistrates to be available to deal with the matter going forwards.

13. DS Graham prepared his application for a search warrant on 4 September 2024 and met with the First Respondent later on 4 September 2024, when the First Respondent authorised the search warrant.

14. DS Graham, along with other officers, executed the search warrant at the Applicant's home early on 5 September 2024, at around 6.20 am. The Applicant was threatened with arrest. The police officers seized a SIM card holder, two mobile phones and a laptop. This was done in the face of protests by the Applicant to the officers at the scene that at least his laptop, if not the mobile phones as well, contained legally privileged material.

15. Later, during the course of 5 September 2024, the Applicant's attorneys contacted the police and notified them that the Applicant’s laptop and the mobile phones were likely to contain legally privileged material and demanded that the police not extract any data from those devices pending a challenge to the lawfulness of the grant of the search warrant and its execution.

16. The police returned the Applicant’s phones to him on 6 September 2024 as well as the SIM card holder. The officers did not, however, return the Applicant’s laptop until 17 September 2024. It is accepted by the Second Respondent that data from the Applicant’s mobile phones and laptop was extracted and was retained by the police officers, notwithstanding the protests of the Applicant and his attorneys. The data extraction from the Applicant’s laptop, and probably from his mobile phones, took place sometime after the Applicant’s protests were first set out in detail in a letter from the Applicant's attorneys to the police officers sent during the course of the afternoon of 5 September 2024. However, the Second Respondent’s case is that the extracted data was not and has not been reviewed by any officers at any time.

17. The Applicant commenced his application for judicial review on 17 September 2024. The Applicant sought to quash the search warrant on the grounds that it was defective and wrongly issued. The reasons that it was contended that the search warrant was defective included that the offence specified

as providing the basis for the search warrant did not exist as a matter of Cayman Islands law, having been repealed, which is a fairly fundamental flaw. In addition, the Applicant alleged that the police had failed to comply with guidance given in previous authorities, in particular *R v Ebanks, Ex Parte Henderson* [2009] CILR 57, regarding how the seizure of documents and electronic devices that are likely to contain legally privileged material should be handled procedurally.

18. In correspondence dated 18 November 2024, the Attorney General's Chambers accepted on behalf of the Second Respondent that the warrant was defective. However, they made no wider concession regarding the consequences of the defective nature of the search warrant.

19. As I have indicated the judicial review was due to come on for trial during the course of the week of 21 July 2025. On 31 October 2024, I had given directions, amongst other things, for service of skeleton arguments by both sides in the period leading up to that trial. However, rather than serving a skeleton argument as required by my Order, the Second Respondent engaged in discussions with the Applicant to try to settle the case. The Second Respondent did not file and serve his skeleton argument for the hearing even after it was pointed out by the Court that any ongoing negotiations were not a good reason to fail to do so.

20. Shortly before the trial was due to commence, the public law aspect of the judicial review was resolved. In essence, the Second Respondent conceded the vast majority of the Applicant's claims. The parties agreed a consent order that largely followed the form of a draft consent order that had been proposed by the Applicant's attorneys in January 2025, some six months earlier, but which the Second Respondent had refused to agree at that time.

21. The Applicant's position throughout these proceedings has been that the obtaining and execution of the search warrant was unlawful; that the Applicant's electronic devices should be returned and that any data extracted from the devices or the laptop should be permanently deleted. That position was communicated, as I have indicated, first, in a letter sent to DS Graham by the Applicant's attorneys on 5 September 2024, the day on which the search warrant was executed. It was repeated in a pre-action protocol letter dated 11 September 2024 and it has continued to be the Applicant's position throughout the course of these proceedings, which were filed on 17 September 2024.

22. The Second Respondent has not provided any kind of defence or justification for the conduct of his officers at any stage during the course of the proceedings. The Second Respondent has not provided any kind of explanation for the refusal to delete the data extracted from the Applicant's devices and uploaded to the police forensic hub until receipt of Mr Parker's skeleton argument for this hearing, where some explanation has, for the first time, been proffered in respect of the continued retention of that data. The Second Respondent has not offered any apology to the Applicant for the way in which the matter was handled by his officers.

23. Mr Dixey has shown me certain correspondence, including without prejudice save as to costs correspondence, in the context of determining the costs issue. Mr Parker submits that that correspondence does not really take the matter very much further and I am inclined to agree with him on that submission, because the Applicant has not achieved in July 2025 an outcome that is significantly better than it was asking for at earlier stages of the case. However, that is because the Applicant has effectively achieved everything that he was asking for in the proceedings.

24. In terms of the applicable law, the guidance on circumstances in which an award of indemnity costs may be appropriate is set out in GCR O.62, r.(4)11 which simply states:

> *"(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."*

25. I gave the meaning of that provision some thought in a case last year, *Armand Hammer Foundation Inc v The Hammer International Foundation and Others* (unreported, 06/11/24). I consider it is helpful to refer to that judgment as it synthesizes a number of previous authorities dealing with the proper approach to the making of an order for indemnity costs. Firstly, it is always worth reminding parties, and readers of judgments like this, that an order for indemnity costs is not punitive in nature; it is compensatory. It simply reverses the presumptions which are made in the course of a taxation of costs as to whether costs that have been incurred are reasonable or are not reasonable, where there is doubt on that question. On a standard basis taxation, any doubts as to reasonableness are resolved in favour of the paying party, whereas on an indemnity basis taxation any doubts are resolved in favour of the receiving party. Those provisions are set out in GCR O.62, r.13(1) and r.13(3). The second difference is that on a standard basis taxation, the costs recoverable must be proportionate to the amount in issue, the importance of the case and the complexity of the issues; whilst there is no such

limitation when an order for indemnity costs is made. This is addressed in GCR O.62, r.13(2). As I said in paragraph 4 of the judgment in *Armand Hammer*, the effect of an award of indemnity costs is therefore more closely to reimburse the receiving party for the actual costs that they have incurred in the proceedings. However, whichever of these two bases of costs is ordered, the receiving party does not, in practice, receive a complete indemnity against all fees and expenses incurred, because some fees or expenses are almost always determined to have been unreasonably incurred.

26. In paragraphs 5 to 15 of the judgment in *Armand Hammer*, I went through a relatively detailed review of the Cayman Islands and English authorities addressing the circumstances in which indemnity costs might be ordered. For the purpose of this judgment, I will simply pick out one or two of the highlights from that survey of the law. The first comes from the judgment of Smellie CJ in *Ahmad Hamad Algosaibi and Brothers v Saad Investments Company Ltd* [2012] 2 CILR 1, where the learned Chief Justice reminds practitioners in paragraph 10 that the jurisdiction to order indemnity costs is wide and flexible allowing the court to exercise its discretion as the circumstances of the case may require. Smellie CJ then set out a quotation from *Simms v Law Society* [2006] Costs LR 245, a decision of Carnwath LJ, where the learned Lord Justice said, towards the end of the passage quoted by Smellie CJ:

> *"[…] when considering an application for the award of costs on the indemnity basis, the court is concerned principally with the losing party's conduct of the case, rather than the substantive merits of his position."*

27. It is also worth noting that in *Woods Furniture and Design Ltd v James* [2020] 2 CILR 543, a decision of the Cayman Islands Court of Appeal, Field JA said at paragraph 75:

> *"[…] In my judgment, when deciding whether costs should be taxed on the indemnity basis, the court should have regard exclusively to whether the requirements of O.62, r.4(11) have been met."*

28. In light of my review of those authorities, I concluded at paragraph 16 in *Armand Hammer* that:

> *"[…] the starting point and the ending point is the wording of GCR O.62, r.4(11). In order to obtain an order for costs on the indemnity basis, the applicant must persuade the Court that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently. The Court should not seek to apply a gloss to the plain words of the Rule. […]"*

29. The cases cited in *Armand Hammer*, I indicated, seemed to me to provide examples of the kinds of considerations that the court might take into account in a particular case and the kinds of situations

where an order for indemnity costs might be appropriate and I interpose there that those are the familiar terms of the conduct being "out of the norm", "unreasonable to a high degree", etc. I continued:

> *"[…] ultimately, each case must be considered individually and a decision made whether or not the threshold test in the Rules has been met, before the Court then considers how to exercise its discretion as to costs. Whether or not the proceedings have been conducted improperly, unreasonably or negligently is much easier to determine in the context of the particular case before the Court than trying to describe those characteristics in the abstract."*

30. Having set out the applicable law, and I record that there was no substantive disagreement between Mr Parker and Mr Dixey on the law, I now turn to my decision, firstly, on the basis of taxation to be applied.

31. Mr Dixey seeks valiantly to bring into play the weakness of the underlying merits of the investigation and the potential prosecution of the Applicant. But in my judgment, those aspects are not relevant to the question whether or not I should order indemnity costs regarding, as the Rules require, the conduct of *these* proceedings. I therefore do not take into account the nature of the conduct of the Second Respondent's officers in obtaining and executing the search warrant; that conduct will be addressed in due course by way of the Applicant's continuing private law damages claim against the Second Respondent.

32. However, having said that, I agree with Mr Dixey that the nature of the police officers' conduct is relevant to the merits of the defence that the Second Respondent was intending to put forward in relation to the judicial review claim. And that conduct is therefore relevant to the assessment of the strengths and weaknesses of the Second Respondent's position in the judicial review proceedings and, hence, the Second Respondent's conduct of its defence to the Applicant's claim.

33. Mr Parker seeks to argue that there was a basis for the Second Respondent not to have conceded destruction of the data downloaded from the Applicant's electronic devices, even if it had been obtained illegally. Mr Parker puts this forward as the reason why the Second Respondent's concession of the essence of the Applicant's claim was only made in July 2025, rather than, for example, in January 2025, which is when the Applicant's attorneys argue the Second Respondent ought to have conceded the Applicant's claim.

34. Mr Parker relies on two cases to support that argument. The first is *R (on the application of Cook) v Serious Organised Crime Agency* [2011] 1 WLR 144, a decision of the Divisional Court comprising Leveson LJ and Ouseley J (as he then was). Mr Parker draws my attention to a passage in the judgment of Ouseley J at paragraphs 26-28, where the learned judge said this:

> *"26. The Serious Organised Crime Agency object to any further relief as sought by Mr Bowers. He seeks the destruction of copies made of the documents and a prohibition on the use of the information contained in them. His concern is with the information rather than with the physical documents on which the copies have been made and which do not belong to him at all. He submits that further relief in the form of an order for their destruction and for a prohibition on the use of the knowledge or information contained in them is necessary for an effective remedy in relation to the unlawful search and retention of the documents, in addition to the order for the return of the document and damages.*
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> *27. Although we have not seen the documents, as I have said, it has not been suggested that they fall outside the scope of section 19(2) of PACE. It is not suggested that they were legally professionally privileged, which might override any disclosure provisions. It is not suggested that they contain purely private information or have a confidential quality that might override what would otherwise be the plain inference that they are relevant to a criminal investigation falling within section 19(2). It is well recognized at common law that material that has been unlawfully obtained may be admitted in evidence and subject to control by section 78 of PACE. Where the common law permits evidence to be admitted in those circumstances, it is plain that the common law does not require the material to be destroyed beforehand and the information contained within it not to be used. Quite the contrary. The common law contemplates that the information will be available for use in order for it to be produced in evidence at all. For there to be a case that article 8 required the court to order destruction, a great deal more would have to be shown in relation to what the documents were for such a balance to be struck by this court.*
>
> *28. In any event, the proportionality remedy in relation to that aspect of the unlawful obtaining and retention of documents lies in the use of section 78 of PACE in relation to admissibility in a criminal trial. […]."*

35. Ouseley J in paragraph 27 records that legally privileged documents, and certain other kinds of documents, are to be treated differently from the documents in consideration in that case. Mr Parker accepted in argument that legally privileged material could never be read, used or relied upon for any purpose. However, he contends that the police would have been entitled to rely on any evidence that was obtained, even if illegally obtained because the search warrant was defective, if that evidence was not legally privileged and was relevant.

36. Mr Parker then relies on a subsequent decision in the case of *R (on the application of Cummins) v Manchester Crown Court* [2010] EWHC 2111 (Admin). *Cummins* is also a decision of the Divisional Court comprising Leveson LJ and Ouseley J. Mr Parker took my attention to paragraph 13 where Ouseley J said:

> *"13. In addition to the return of the documents the claimant seeks destruction of all the copies and an order that no derivative use be made of any knowledge gained as a result of the unlawful search and seizure, together with the details of those who have seen them. As I explained in* Cook v SOCA*, in relation to copies of the documents no authority has been cited for the proposition sought. I have no doubt that section 78 of PACE amply controls the use to which any copies of documents could be put, bearing in mind that the deployment of unlawfully obtained evidence is not necessarily and inevitably prohibited irrespective of the circumstances (see* Sang *[1980] AC 402) and the many cases that developed the exclusionary principles which follow both from that decision and section 78."*

37. Mr Parker's position is that the Second Respondent was properly entitled to consider that the material that had been extracted from the Applicant's electronic devices might continue to be relevant to the ongoing criminal investigations and, therefore, the Second Respondent was entitled to continue not to concede the destruction of that data and to continue to contest the judicial review proceedings.

38. Mr Parker sets out at paragraph 46 of his skeleton argument, the following grounds for the Second Respondent taking the position that he was entitled to continue not to concede destruction of the extracted data:

38.1 the likelihood that the data contains evidence of an offence;

38.2 the likelihood that the Applicant might be charged with an offence;

38.3 the public interest in ensuring relevant permissible evidence is put before the court;

38.4 the availability of other evidence as the investigation progresses, to prove the required elements of an offence;

38.5 the fairness of using the data in evidence against the Applicant at a trial; and

38.6 the risk, if any, of the Applicant successfully seeking a permanent stay of proceedings at any such trial.

39. Mr Dixey responds to that argument by taking my attention to the decision of the Divisional Court in the case of *R (on the application of Satish Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin). On this occasion, the Divisional Court comprised Davis LJ, and Hickinbottom J. Mr Dixey first draws my attention to the fact that the Divisional Court in that case had clearly considered, at paragraph 134, the decision in *Cook v SOCA*, and in paragraph 138, considered other subsequent relevant authorities on the question of the destruction of wrongly obtained evidence.

40. At paragraph 140, Hickinbottom J, giving the leading judgement of the Divisional Court, said this:

> *"140. The question is, therefore, was the conduct of the NCA in this case such that it should be relieved of any benefit of the unlawful searches? After careful consideration, I have concluded that it was.*
>
> *141. As I have already indicated, on the evidence before this court, I am unpersuaded that the NCA officers acted in bad faith. However, they acted with patent and egregious disregard for, or indifference to, the constitutional safeguards within the statutory scheme within which they were operating. The individual officers, I accept, were acting out of ignorance: but that ignorance was deep, it ran to inspector-level, it related to the fundamentals of the scheme being operated and there were no systemic checks to ensure warrants were not issued without even consideration of the requirements of sections 15 and 16 of PACE. Given the system then in place, it was almost inevitable that an application for a warrant would be grossly deficient; and, given that these warrants appear to have been regularly dealt with by lay magistrates in Birmingham, that the issued warrants would be grossly deficient.*
>
> *142. This is not a case where the error in the application and thus the warrant was relatively minor. The errors were grave, and went to the very root of the statutory scheme. It is not a case in which it can be said that, had due disclosure been given to properly informed magistrates, they would inevitably have issued the warrants in any event. Indeed, whatever the documents seized might reveal, there is considerable force in Mr Jones' submission that, on a section 59 application, a Crown Court judge in this case could only properly exercise his discretion by entirely refusing the application to retain – although, even where a judge might allow a section 59 application, that is no bar to this court intervening in an appropriate case to restrict or prohibit retention of material by the investigating agency."*

41. Higginbottom J expressed his conclusion at paragraph 146:

> *"146. In terms of relief, subject to submissions in respect of the precise order, I would declare the relevant warrants unlawful; order the NCA to deliver up the seized material, and to deliver up or destroy all copies, schedules and other work product derived from the seized material; and, subject to further order, prohibit the NCA from using the material or anything derived from the material for the purposes of this investigation or for any other purpose."*

42. Davis LJ expressly stated at paragraph 156 his agreement with the judgment of Hickinbottom J and with the orders that he proposed. That is a strong Divisional Court expressing very serious criticisms of the way in which the warrant in that case had been obtained, involving very serious and fundamental deficiencies, and concluding that an order for delivery up of the wrongfully obtained material, destruction of all copies and a prohibition of the use of material and information derived from it.

43. In this case, notwithstanding Mr Parker's submissions at paragraph 46 of his skeleton argument that I have recited, there is no evidence from the Second Respondent that any of the factors identified formed any part of the Second Respondent's decision-making regarding the retention of the data and

the decision not to concede the entirety of the Applicant's claim in the judicial review proceedings at any time before July 2025.

44. Mr Parker invites me to accept what is said in paragraph 46 of his skeleton argument on the basis that those are his instructions, but it seems to me that that is not an appropriate way to go about dealing with important applications like this. If the Second Respondent wishes to rely upon material of that kind, it should have been properly addressed in evidence, coming from the relevant officers within the police service who made those decisions, in order to justify and to explain the reasons why the Second Respondent did not concede the Applicant's claim until the week before the trial was due to take place.

45. In addition, it seems to me there is a real difficulty with my accepting those assertions in any event, given that the Second Respondent's position is that the data extracted from the Applicant's devices has never been reviewed, and so it is difficult to see, in my judgment, how any of the Second Respondent's officers could have a legitimate belief that there is any material there that would be relevant to an offence. If the police have no idea what is the content of the material that has been extracted, then it seems to me they cannot form a proper view as to the potential evidential relevance of that material to the possible offences that they were investigating.

46. In the circumstances, in my judgment, there is no proper explanation why the Second Respondent capitulated to the Applicant's claim only the week before the trial and did not do so, given its capitulation, at any earlier stage of the proceedings.

47. The picture that is painted by the material that is properly before me for the purposes of this application is therefore, in summary, that:

47.1 there was an initial acknowledgement by the Second Respondent's officers that the question of legal privilege was going to be an important issue that needed to be handled carefully and sensitively;

47.2 there was a total failure by the Second Respondent's officers to engage with that issue in obtaining and executing the search warrant; and

47.3 there were serious, substantive and procedural failures in obtaining and executing the search warrant.

48. It seems to me that, throughout the conduct of the Second Respondent's defence of these proceedings, the Second Respondent should have recognised that position. Applying the overriding objective and also applying the duty on a respondent in a public law claim to stand back and look critically at its own decision-making, the Second Respondent should have recognised at a very early stage that this case was essentially indefensible, and it was not just a weak case.

49. On the material that is before the Court, it does not appear that the Second Respondent did any of that until approximately one week before the trial was due to take place. In those circumstances, I conclude, and I accept Mr Dixey's submission, that the Second Respondent's conduct of the public law aspects of this case has been improper, unreasonable or negligent within the meaning of GCR O.62, r.4(11).

50. It seems to me that it was unreasonable for the Second Respondent to concede that the warrant was defective but at the same time not to concede the Applicant's wider claim in November 2024, having regard to the nature and seriousness of the deficiencies in obtaining and executing the search warrant, which should have been apparent and obvious to anyone reviewing the underlying merits of the claim that was being advanced at that stage.

51. Until Mr Parker's skeleton argument, there has never been any substantive explanation for the Second Respondent's position that has been put forward. I bear in mind that the Second Respondent was directed to file a skeleton argument in advance of the trial and simply did not do so. When I was informed that the Second Respondent was trying to resolve the matter, I made clear that that did not relieve the Second Respondent of its obligation, as ordered, to file a skeleton argument and directed that it should do so as soon as possible. The Second Respondent still did not file any skeleton argument and took a further two or three days, during which period I repeated my request for the Second Respondent’s skeleton, before the matter was finally resolved by way of a consent order.

52. That is not to be taken as an indication that I do not encourage consensual resolution of cases. I clearly do and I emphatically encourage parties to resolve their differences if it is possible to do so. But at

the same time, it is not acceptable for a party to fail to comply with court orders that have been made. And the consequence, as I have indicated, is that I have absolutely no information before me apart from Mr Parker's skeleton argument as to why it is that the Second Respondent continued to contest the Applicant's claim up until the week before the trial.

53. I have concluded on the information and the material that I have seen that the Second Respondent's conduct of the defence of the Applicant's public law claim is improper. It was unreasonable to a high degree and to the extent that it is necessary to say so, I do say that it was outside what I would expect to be the norm for the conduct of a respondent to judicial review proceedings.

54. Mr Parker submits that if I were to reach that conclusion, I should pay careful attention to determining the date from which any order for indemnity costs should be applied. He invites me to delay the imposition of any such order until a period perhaps a few weeks before the trial was due to commence in July 2025. However, there is no evidence filed on behalf of the Second Respondent to explain when and why he changed his mind regarding his resistance to the Applicant's claim, which would be necessary for me to understand what had changed between November 2024 and July 2025, if anything.

55. It seems to me that the issues which formed the basis for the Applicant's judicial review application were raised in correspondence by the Applicant's attorneys on the very day that the search warrant was executed, on 5 September 2024, in an admirably detailed letter, given the time available to the Applicant's attorneys to put it together; and were followed up, very shortly afterwards, by the pre-action protocol letter. In my judgment, there is no basis to delay the date from which an indemnity costs order should apply. I conclude that it should apply from 5 September 2024 and I will order that it takes effect from that date.

56. Finally, I am asked to determine the question of a payment on account of costs. Unusually, in this case, I have a relatively detailed bill that has been put into evidence by the Applicant that totals some US $114,000 for fee earner time and just under US $6,700 for disbursements that have been incurred by the Applicant. Mr Dixey indicated in argument, and this is obvious from the face of the document, that the draft bill in evidence does not include any of leading counsel's fees, and so the draft bill is

likely to be a significant understatement of the Applicant's likely costs to be recovered in relation to the public law claims.

57. In the recent case of *Williams v Kuwait Ports Authority* (unreported, 27/07/24), the Court of Appeal addressed the question of the appropriate approach to the quantification of a payment on account of costs. I will start, first of all, at paragraph 24, where the Court of Appeal said this:

> *"24. In* Scully Royalty*, this court at [54]-[55] specifically approved the observations of Kawaley J in* Al Sadik v Investcorp Bank B.S.C. *[2019] (2) CILR 585 at [25]. Key extracts from those observations are as follows:*
>
> > *'(b) The governing principle underpinning this power, and the raison d'être for the rule, is that (per Jacob J in* Mars UK Limited v Teknowledge Limited*...):*
> >
> > > *'The successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount.'*
> >
> > *(c) ... The principle that a successful party should be paid some of his costs immediately and before taxation is not simply 'an important consideration'. It is the governing and predominant principle articulated by the interim payment on account of costs rule;*
> >
> > *(d) The purpose of the rule is to enable the court to avoid the injustice of delayed payment of all costs until the total amount is determined upon taxation through a summary partial assessment. This is because the need to carry out a detailed assessment through taxation is 'not a good reason' for not ordering some costs to be paid immediately..."*

Those principles are now generally accepted as underpinning the jurisdiction to make an order for a payment on account of costs.

58. As to the deduction that should be made to reflect the fact that an interim assessment is being made, rather than a detailed taxation being carried out, the Court of Appeal said this at paragraphs 45 to 49 in *Williams*:

> *"45. Turning to the approach to quantum, we were referred to a helpful discussion in the judgment of Asif J in* The Armand Hammer Foundation Inc v Hammer International Foundation *(unreported, Grand Court, 24 April 2024). Asif J pointed out that there were two approaches to the quantum of interim payments.*
>
> *46. The first was that applied by this court in* Scully Royalty*, namely, to take a percentage of the total costs (being the costs as in the schedule of costs in this case setting out the total amount claimed at the rates allowed by the Practice Directions). In* Scully Royalty*, which concerned an order for standard costs, this court said that 50% of the total costs was often awarded on the basis that this was a conservative approach which should not lead to an overpayment. However, this observation was not intended to establish any fixed percentage, as all the circumstances of the particular case have to be considered.*
>
> *47. The alternative approach discussed in* Armand Hammer *was first to make a discount to reflect what Asif J referred to as a useful rule of thumb, namely that 85% of the total costs will be recovered in taxation on an indemnity basis and 65% in taxation of costs on the standard basis.*

> *The court then makes a further discount to minimise the risk of overpayment, which Asif J considered should normally be in the region of 10% to 20%.*
>
> *48. Asif J preferred the first approach, as taken in* Scully Royalty*. It is not for this court to be over prescriptive as to the exact method of quantifying any interim payment. The task of the Judge when fixing a figure is simply to achieve a fair balance between the injustice of the receiving party being kept out of money to which he is entitled on the one hand and the risk of ordering an overpayment by the paying party on the other.*
>
> *49. However, for my part, I agree with Asif J that the simpler approach is to take a single discount from the total costs, not least because it avoids the risk of a double discount as described by Asif J at [13] of his judgment."*

59. I apply that approach when determining the appropriate amount for a payment on account of costs that the Second Respondent should pay. In my judgment, the disbursements, which have clearly had to be paid by the Applicant, should be recovered in full now. There is no reason for those to be discounted by any percentage reduction. Those are hard payments that have had to be made and so the full amount of those, just under US $6,700 dollars, should be paid. As far as fee earner time is concerned, it seems to me that I should reduce the figure that I allow in terms of the total fees claimed of US $114,000. The reduction in my judgment that I should apply is one of 25% which starts with the rule of thumb indication of an 85% recovery for indemnity costs (ie a 15% reduction) but includes an additional reduction to allow for the possibility that additional sums may be taxed off in due course, and to achieve the required conservative approach to the amount of the payment on account of costs in favour of the Applicant.

60. Applying a 25% reduction would result in a recovery of about US $85,500 for fee earner time. Adding back on the disbursements of US $6,700 gives a figure of US $92,200 roughly. Bearing in mind that the draft bill is clearly an understatement, given that it does not include leading counsel's fees, I will round that figure up to US $95,000, which is the figure that the Second Respondent should pay. Payment should be made within 28 days. In addition, the Second Respondent shall pay the Applicant's costs of the hearing to determine the costs issue, to be taxed on the standard basis if not agreed.

Dated 29 October 2025

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT