Neutral Citation Number: [2023] EWHC 3021 (Admin)

Case No: CO/2890/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2023

Before :

LORD JUSTICE SINGH
and
MR JUSTICE GARNHAM

- -

Between :

NEWCASTLE UNITED FOOTBALL COMPANY LIMITED	**Appellant**
- and -	
COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS	**Respondents**

- -
- -

Cairns Nelson KC and Tom Godfrey (instructed by **RPC LLP**) for the **Appellant**
Andrew Bird KC (instructed by **HMRC Legal Services**) for the **Respondents**

Hearing date: 19 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10 a.m. on 29 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE SINGH

Lord Justice Singh :

Introduction

1. This is the judgment of the Court on an appeal by way of case stated from the Crown Court at Kingston upon Thames (HH Judge Shetty or "the Judge").

2. At the hearing we heard submissions from Mr Cairns Nelson KC, who appeared with Mr Tom Godfrey for the Appellant, and from Mr Andrew Bird KC, who appeared for the Respondents. We are grateful to them and their teams for their written and oral submissions.

Factual background

3. On 15 April 2014 HMRC (the Respondents) advised the Appellant that they were conducting a civil enquiry into agents' fees in accordance with Code of Practice 8 (the "Agent Fees Enquiry").

4. On 20 April 2017, in the course of a criminal investigation into the Appellant's tax affairs, the Crown Court at Leeds granted warrants authorising officers of the Respondents to enter and search the Appellant's premises in Newcastle upon Tyne under para 12 of Schedule 1 to the Police and Criminal Evidence Act 1984 ("PACE").

5. On 26 April 2017, the Respondents executed the search warrants. Due to the volume of material, the Respondents used powers under sections 50 and 51 of the Criminal Justice and Police Act 2001 ("CJPA") to seize both hard copy and digital records where there were reasonable grounds for believing that they might fall within the remit of the warrants ("the Seized Material").

6. On 17 January 2018, the Respondents issued Notices of VAT Assessments to the Appellant in the sum of £2,034,802 for the VAT quarters commencing 1 February 2011 to 1 October 2016 with interest which continues to accrue ("the VAT Proceedings").

7. On 29 January 2018, the Respondents made a claim in the County Court Money Claims Centre against the Appellant regarding Class 1 National Insurance Contributions for the tax years ending 19 April 2012 to 19 April 2017, in the sum of £4,250,714.01 (that sum being inclusive of interest to 19 January 2018), plus a £10,000 Court fee and legal costs ("the NIC Proceedings"). Interest continues to accrue at a daily rate of £318.20. The claim is currently stayed.

8. On 11 May 2018, in the VAT Proceedings, the Appellant appealed against the Respondents' VAT assessments to the First-tier Tribunal (Tax Chamber) ("The FTT").

9. In a decision dated 4 January 2019, the Crown Court at Blackfriars ordered the Respondents to review the Seized Material under section 53(3) of the CJPA to determine whether each document fell within the scope of the warrants, and whether legal professional privilege applied under that provision ("the Relevance Review").

10. The Relevance Review took place between March 2019 and July 2020, giving rise to over 9,350 items in dispute between the parties.

11. On 6 May 2021, the Respondents wrote to the Appellant to confirm that the criminal investigation into the Appellant's tax affairs was closed, but that the investigation still indicated "tax non-compliance of a serious nature". Accordingly, the Respondents confirmed that "the matter will now be referred to colleagues elsewhere within the Fraud Investigation Service" and, further, that the Appellant's related "...appeals against the assessments to Income Tax, National Insurance Contributions and VAT [which] are currently stayed by the First Tier Tribunal" will also be "dealt with under the banner of civil investigation".

12. To assist in the civil investigation, the Respondents confirmed that they would return all hard copy material, but would retain digital copies of material that is "thought potentially relevant to any tax irregularity and therefore the civil assessment and collection of tax (i.e. potential civil investigation)" and share it with colleagues responsible for any civil investigation pursuant to section 17 of the Commissioners for Revenue and Customs Act 2005 ("CRCA").

13. On 21 July 2021, the Appellant made an application to the Crown Court at Kingston upon Thames under section 59(2) and/or (5) of the CJPA for the return of the retained material. As all hard copy documents and electronic storage devices had been returned to the Appellant, the application related to the retained digital copies of the material that did not attract a claim of legal professional privilege ("the Copy Documents").

14. In a judgment dated 18 January 2022, handed down on 8 February 2022, the Judge refused the Appellant's application. In an order dated 11 February 2022 he ordered as follows:

    (1) The Respondents are to prepare and deliver a Schedule identifying all the copies of documents that their criminal investigation team have determined should be shared with their civil investigation team (para 7).

    (2) The Appellant then has 14 days to identify and put forward reasons as to which documents they consider should not be shared with the Respondent's civil investigation team to which the Respondents then have 14 days to respond (paras 8 to 9).

    (3) Absent an agreement between the parties, the Appellant is also entitled to apply to the Court to determine whether the Copy Documents or any of them should be shared (para 10).

15. On 28 February 2022, the Appellant applied to the Crown Court to state a case for the opinion of the High Court pursuant to section 28 of the Senior Courts Act 1981.

16. On 16 March 2022, the Respondents wrote to the Court agreeing that it was appropriate that such an application be granted and adding a further three questions to be asked of the High Court on the appeal.

17. On 5 April 2022, the Judge agreed to state the case, and the Case Stated dated 22 July 2022 was served on the parties on 25 July 2022.

18. On 26 May 2022, in the VAT Proceedings, the Respondents made a specific disclosure application to the FTT. At the hearing we were informed by Mr Nelson that, on 16 October 2023, three days before the hearing before us, the FTT granted the application by HMRC for disclosure of a range of documents including those relevant to this appeal. In that sense therefore the appeal has become academic but it nevertheless raises important issues of principle for both parties.

19. On 4 August 2022, the Appellant submitted their notice and grounds of appeal, but in error this was submitted to the Court of Appeal and not the High Court. The Appellant correctly submitted the notice and grounds of appeal to the High Court on 5 August 2022, and applied for an extension of time on 8 August 2022.

20. On 19 August 2022, the Respondents filed a Respondents' Notice which included a cross-appeal regarding paras 7 to 11 of the Order below, which imposed conditions on their retention and use of the Copy Documents as summarised above.

Material legislation

Police and Criminal Evidence Act 1984

21. The key provision in PACE is section 22(1), which provides:

> "(1) Subject to subsection (4) below, anything which has been seized by a constable or taken away by a constable following a requirement made by virtue of section 19 or 20 above may be retained so long as is necessary in all the circumstances."

22. Section 22(2) to (4) provide as follows:

> "(2) Without prejudice to the generality of subsection (1) above–
>
> (a) anything seized for the purposes of a criminal investigation may be retained, except as provided by subsection (4) below–
>
> (i) for use as evidence at a trial for an offence; or
>
> (ii) for forensic examination or for investigation in connection with an offence; and
>
> (b) anything may be retained in order to establish its lawful owner, where there are reasonable grounds for

> believing that it has been obtained in consequence of the commission of an offence.
>
> (3) Nothing seized on the ground that it may be used–
>
> (a) to cause physical injury to any person;
>
> (b) to damage property;
>
> (c) to interfere with evidence, or
>
> (d) to assist in escape from police detention or lawful custody,
>
> may be retained when the person from whom it was seized is no longer in police detention or the custody of a court or is in the custody of a court but has been released on bail.
>
> (4) Nothing may be retained for either of the purposes mentioned in subsection (2)(a) above if a photograph or copy would be sufficient for that purpose."

23. Schedule 1 to PACE concerns "special procedure" material. This requires the warrant of a judge of the Crown Court. The search warrant that was granted by the Crown Court at Leeds on 20 April 2017 was issued under para 12 of Schedule 1 to PACE.

24. The underlying power which was used to seize material in this case was that contained in para 13 of Schedule 1 to PACE:

> "A constable may seize and retain anything for which a search has been authorised under paragraph 12 above."

25. It is clear from the terms of section 21(5) of PACE that a constable may photograph or copy, or have photographed or copied, anything which he has power to seize without a request being made under subsection (4) of that section. There can, accordingly, be no question but that the copies made in the present case were made with lawful power to do so.

26. It is common ground that the relevant provisions of PACE apply in the present case just as they would to constables. This is the effect of the Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order (SI 2015 No 1783). Article 3 of that Order provides that the provisions of PACE contained in Schedule 1 to the Order, which relate to investigations of offences conducted by police officers, shall apply to relevant investigations conducted by officers of Revenue and Customs. The Act is to have effect as if the words and phrases in column 1 of Part 1 of Schedule 2 to the Order were replaced by the substitute words and phrases in column 2.

27. Article 5 of the Order provides that, where in the Act a constable is given power to seize and retain any thing found upon a lawful search of personal premises, an officer of Revenue and Customs shall have the same power.

Criminal Justice and Police Act 2001

28. Section 50(5) of the CJPA confirms that the powers within that Act to seize material where it is not reasonably practicable to examine the material on site during the execution of a search warrant are those contained in Part 1 of Schedule 1 to the CJPA. Schedule 1 confirms that the powers of search and seizure exercisable under section 50 are those provided for by Part II in PACE ("Powers of Entry, Search and Seizure"), which encompasses those PACE powers which can be found at sections 8 to 23 of PACE and, relevantly for present purposes, contains at section 20 the express extension of the general power of seizure to computerised information. It follows that the underlying power to seize the computers and information contained in them derives from section 20 of PACE.

29. Any material seized under section 20 of PACE through the section 50/51 CJPA procedure may be retained in accordance with and subject to the provisions of section 22 of PACE and section 57 of the CJPA.

30. Section 53(1) to (4) of the CJPA provide as follows:

> "(1) This section applies where anything has been seized under a power conferred by section 50 or 51.
>
> (2) It shall be the duty of the person for the time being in possession of the seized property in consequence of the exercise of that power to secure that there are arrangements in force which (subject to section 61) ensure—
>
> > (a) that an initial examination of the property is carried out as soon as reasonably practicable after the seizure;
> >
> > (b) that that examination is confined to whatever is necessary for determining how much of the property falls within subsection (3);
> >
> > (c) that anything which is found, on that examination, not to fall within subsection (3) is separated from the rest of the seized property and is returned as soon as reasonably practicable after the examination of all the seized property has been completed; and
> >
> > (d) that, until the initial examination of all the seized property has been completed and anything which does not fall within subsection (3) has been returned, the

seized property is kept separate from anything seized under any other power.

(3) The seized property falls within this subsection to the extent only—

(a) that it is property for which the person seizing it had power to search when he made the seizure but is not property the return of which is required by section 54;

(b) that it is property the retention of which is authorised by section 56; or

(c) that it is something which, in all the circumstances, it will not be reasonably practicable, following the examination, to separate from property falling within paragraph (a) or (b).

(4) In determining for the purposes of this section the earliest practicable time for the carrying out of an initial examination of the seized property, due regard shall be had to the desirability of allowing the person from whom it was seized, or a person with an interest in that property, an opportunity of being present or (if he chooses) of being represented at the examination."

31. Section 56(1) to (3) of the CJPA provide as follows:

"(1) The retention of—

(a) property seized on any premises by a constable who was lawfully on the premises,

(b) property seized on any premises by a relevant person who was on the premises accompanied by a constable, and

(c) property seized by a constable carrying out a lawful search of any person,

is authorised by this section if the property falls within subsection (2) or (3).

(2) Property falls within this subsection to the extent that there are reasonable grounds for believing—

(a) that it is property obtained in consequence of the commission of an offence; and

> (b) that it is necessary for it to be retained in order to prevent its being concealed, lost, damaged, altered or destroyed.
>
> (3) Property falls within this subsection to the extent that there are reasonable grounds for believing—
>
> (a) that it is evidence in relation to any offence; and
>
> (b) that it is necessary for it to be retained in order to prevent its being concealed, lost, altered or destroyed."

32. Also relevant are sections 57 and 63 of the CJPA but we will set out material provisions in those sections later, when we consider submissions made about them.

33. The application by the Appellant to the Crown Court in the present case was made under section 59 of the CJPA 2001. So far as relevant this provides, in subsection (2) that any person with a relevant interest in seized property may apply to the appropriate judicial authority, on one or more of the grounds mentioned in subsection (3), for the return of the whole or a part of the seized property. The grounds set out in subsection (3) include, at para (d) that the seized property is or contains something seized under section 50 or 51 which does not fall within section 53(3).

34. The powers of the Court are then governed by section 59(5), which provides that the appropriate judicial authority may give such directions as the authority thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property.

Commissioners for Revenue and Customs Act 2005

35. The former Commissioners for the Inland Revenue and the Commissioners for Customs and Excise were merged by the CRCA.

36. Section 17 of the CRCA, so far as material, provides that:

> "(1) Information acquired by the Revenue and Customs in connection with a function may be used by them in connection with any other function.
>
> (2) Subsection (1) is subject to any provision which restricts or prohibits the use of information and which is contained in–
>
> (a) this Act,
>
> (b) any other enactment, or

> (c) an international or other agreement to which the United Kingdom or His Majesty's Government is party."

37. Section 18(1) of the CRCA provides that Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs. But subsection (2) provides that subsection (1) does not apply to a disclosure which is made for the purposes of a function of the Revenue and Customs (and for various other specified purposes).

The judgment of the Crown Court

38. At para 1 of the Case Stated the decision of the Crown Court is summarised in the following way:

> "The decision to refuse the application of the Applicant under section 59(2) and or (5) of the Criminal Justice and Police Act 2001 (CIPA) for the return of the copies of hard documents and any digital copies of computer material seized by the Respondents under search warrants in the circumstances of the Respondents closing any further criminal investigation into the Applicant's affairs."

39. In a thorough judgment the Judge refused the application made by the Appellant to him under section 59 of the CJPA but, in the course of his judgment, he accepted some of the submissions which had been made on its behalf. The Respondents submit that he was wrong to do so and invite this Court to correct what they submit are errors in his judgment. Conversely, the Appellant invites this Court to allow its appeal against the actual decision of the Judge, refusing its application to him.

40. On the first issue before him, the Judge decided that section 22 of PACE applies to copies of documents and not only to the original property which has been seized: see para 26 of his judgment.

41. Secondly, the Judge accepted the Appellant's interpretation of sections 57 and 63 of the CJPA, concluding that, following an earlier decision of the Divisional Court, to which we will return below, the act of copying creates a new "property" that has been "seized" from the original owner: see paras 62-63 of his judgment. Nevertheless, the Judge proceeded on the basis that that conclusion did not in fact take the Appellant's submission much further: see para 63.

42. Thirdly, the Judge turned to section 17 of the CRCA. He drew a distinction between "information" and property which has been seized. He did not consider that section 22 of PACE is an enactment restricting or prohibiting the dissemination of information within the meaning of section 17(2) of the CRCA: see para 74, in particular at sub-para (iii) of his judgment. The Judge considered that the Appellant's

submissions that the Respondents could only share "work product or work done on documents without including the documents themselves" could make any benefit or utility from the provisions unworkable. HMRC would be in the "bizarre position of having the conclusion or supposition without the documents that supported it": see para 74(v) of his judgment. The Judge did not consider that his interpretation of the CRCA was incompatible with the European Convention on Human Rights ("ECHR"): see para 77 of his judgment.

43. At para 79 the Judge said that he proposed to make certain directions, which included a direction that HMRC should determine which documents and information within them are to be shared pursuant to section 17 of the CRCA within three months of the date of the Court's Order and must provide a schedule of the same copied documents (not to include work product documents) to the Appellant. On their cross-appeal the Respondents submit that he was wrong to make those directions having determined the Appellant's application under section 59 against it.

The Questions in the Case Stated

44. At para 2 of the Case Stated the following five questions of law are set out for the opinion of this Court:

(1) Whether, irrespective of section 17 of the CRCA, section 22 of PACE on its true construction operates so as to require the return or permanent deletion by HMRC, once a criminal investigation by HMRC has concluded, of copies and images made by HMRC of documents (hard copy or electronic data) seized under criminal investigation (PACE and CJPA) powers, in circumstances where the seized originals have been or will be returned?

(2) If section 22 of PACE does require the return or deletion of copies or images, do the words "so long as is necessary in all the circumstances" in section 22(1) include the case where HMRC seeks to retain the copies and images for the public (but non-criminal investigation) purposes of HMRC?

(3) If a power to retain documents under section 22 of PACE lapses with the cessation of a criminal investigation, is section 22 of PACE a provision that restricts or prohibits the use of information in such documents for the purposes of section 17(2) of the CRCA?

(4) Where documents are seized under the terms of a search warrant and then subsequently the criminal investigation is discontinued and the right of retention of those documents under section 22 of PACE lapses, is the Criminal Investigation team of HMRC entitled thereafter to pass copies of those documents to the Civil Investigation Team of HMRC by reason of section 17 CRCA, or is the transfer gateway limited to information contained in documents that HMRC is entitled to retain under section 22 of PACE?

(5) Where HMRC has a power, conferred by section 17 of the CRCA, to use "information" and that information consists, in part, of copies or images of documents (hard copy or electronic data) seized under criminal investigation

(PACE and CJPA) powers, was HHJ Shetty correct in law to impose terms or conditions, using the power to make directions under the CJPA, upon the retention under section 17 of those copies or images?

45. We will consider Questions 1 and 2 (which concern section 22 of PACE) together. We will then consider Questions 3 and 4 (which concern section 17 of the CRCA) together. Finally, we will consider Question 5 before setting out our answers to all of the questions below.

Submissions for the Appellant

46. The submissions for the Appellant on the five questions raised in the Case Stated are helpfully summarised as follows, at para 18 of its skeleton argument:

> "i) Pursuant to section 22 PACE, when a criminal investigation is at an end, HMRC is obliged by law to return or destroy the Seized Material that it seized under its criminal powers of compulsion regardless of whether that material be original documents, hard copy documents or soft copies digital images of documents contained on a computer. This is irrespective of any powers conferred in section 17 CJPA.
>
> ii) That the power to retain seized material under section 22 PACE is confined to such a period as is necessary in all of the circumstances for the purposes for which the property was seized under section 19/20/schedule 1 PACE/section 50 CJPA. There is no general power to retain property for public purposes.
>
> iii) That section 17 CRCA should be construed strictly. It does not provide a power to retain seized material which HMRC would otherwise be required to return. The power to share acquired information internally within HMRC is a power to share information that HMRC is entitled to retain. Section 17 is not a power of retention; it is a power to share that which HMRC is entitled to retain. In any event the power is subject to the express statutory limitation on the right of retention under section 22 PACE. Acquired information can only be shared if there is a right of retention. As such, section 22 PACE restricts any such dissembling of material pursuant to section 17 CRCA.
>
> iv) When a criminal investigation is discontinued and the right of retention lapses under section 22 PACE, HMRC is not entitled by virtue of the section 17 gateway to pass copies of those documents to the civil enforcement team of HMRC. HMRC are entitled to use and share its own work product generated by the criminal investigation by reason of section 17 CRCA but not the seized material or copies thereof if the power of retention lapses. HMRC have extensive records by way of schedules summarising the nature and content of the Seized Material (not least because of its duties regarding record

> keeping for the purposes of disclosure under the Criminal Procedure and Investigations Act 1996 and the Code of Practice made under it) and the appropriate course is to seek to deploy its extensive civil powers to obtain information from the Appellant, or any third party, if it considers it appropriate.
>
> v) That the Crown Court had clear jurisdiction to consider the application pursuant to [section] 59 CJPA because of the retention provisions in section 57 CJPA and it had the power to make the order sought (ie the return of hard copies and the deletion of digital copies of the seized material) under section 59 CJPA. Further, the Crown Court was correct in law in imposing terms or conditions, under CJPA, upon the retention under section 17 of those copies or images."

Questions 1 and 2: section 22 of PACE

47. Mr Nelson submits that, contrary to the submissions made on behalf of HMRC, the Crown Court correctly applied the provisions of section 22 of PACE to copies of material as if they are the same as the originals seized. He submits that the submission for HMRC is based upon a misconstruction of section 22, in particular subsection (4).

48. He submits that section 22(4) codifies the common law position: see *Ghani v Jones* [1971] QB 693, at page 709, where Lord Denning MR said that the police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned. Mr Nelson submits that in that passage "article" must mean not only the original but a copy. If the reasoning did not apply to copies, then the Court would have said so and would have not sought to distinguish between copies, originals and articles. He submits that the Court did not intend that a copy could be retained indefinitely. Similarly he submits that section 22(4) of PACE means that the original may not be retained at all if a copy would suffice but does not mean that, if a copy would suffice, the copy may be retained indefinitely.

Authorities on section 22 of PACE

49. Although a large number of authorities was drawn to our attention we will address the principal ones upon which the Appellant relies.

50. The nature of the statutory purpose in section 22 of PACE was considered in *Marcel v Metropolitan Police Commissioner* [1992] Ch 225, both at first instance (by Sir Nicolas Browne-Wilkinson V-C) and by the Court of Appeal. The Appellant accepts that the *ratio* of the decision is that, while there is no power of voluntary disclosure by the police in the particular circumstances to a private individual for private purposes

(a civil claim for damages), the position is different where the police receive a subpoena from a court. However, Mr Nelson relies on certain dicta in *Marcel*.

51. First, at page 234, the Vice-Chancellor said that section 22 envisages retention of material where it is necessary for "police purposes". That of course was in the context of seizure by the police, whereas, in cases such as the present, seizure may take place by another public authority such as HMRC.

52. Next, Mr Nelson cites the following observation by the Vice-Chancellor which was approved by Dillon LJ at page 256:

> "It may also be, though I do not decide, that there are other public authorities to which the documents can properly be disclosed, for example to City and other regulatory authorities or to the Security Services. But in my judgment the powers to seize and retain are conferred for the better performance of public functions by *public bodies* and cannot be made to make information available to *private* individuals for their *private* purposes." (Emphasis in original)

That, in our view, is perfectly consistent with the stance taken by HMRC in the present case: HMRC is of course a public authority and wishes to use the material retained for public purposes.

53. The main reason why Mr Nelson cites *Marcel* is for the dicta of Sir Christopher Slade, at pages 262-263, as to the meaning of the phrase in section 22(1) of PACE, "so long as is necessary in all the circumstances". Sir Christopher Slade said that, in its context, this phrase can only mean "so long as is necessary for carrying out the purposes for which the powers given by section 19 and 20 have been conferred". It is interesting to note that Sir Christopher Slade immediately went on to say that he would not attempt a comprehensive statement of those purposes but they clearly include (among others) the primary purposes of investigating and prosecuting crime and the return to the true owner of property believed to have been obtained in consequence of the commission of an offence. He thought that they would also authorise acts which were reasonably incidental to the pursuit of those primary purposes, including in appropriate circumstances the disclosure to third parties of seized documents. Where, however, what was envisaged was disclosure to a third party for purposes such as the assistance of the victims of suspected crime in civil proceedings, such a construction of section 22 would go beyond the police purposes for which the powers given by section 19 and 20 were conferred by Parliament.

54. In *R (Scopelight) v Chief Constable of Northumbria* [2009] EWCA Civ 1156; [2010] QB 438, the issue concerned the power of the police to provide seized material to a private prosecutor after the police investigation had come to an end. At first instance Sharp J held that retention to make voluntary disclosure to a private individual was not permitted, following *Marcel*. The Court of Appeal reversed this aspect of her decision and concluded that seized material could be shared with a private prosecutor because of the public purpose behind that disclosure, namely a trial of a criminal allegation by a court. Leveson LJ observed, at para 23, that the language of section 22(1) is broad. Mr Nelson emphasises that, at para 30, Leveson LJ endorsed the view of Sir Christopher Slade in *Marcel* that the phrase "so long as is necessary" means

"necessary for carrying out the purposes for which the powers given by sections 19 and 20 have been conferred". On the face of it that suggests, Leveson LJ said, that the limiting feature within the examples set out in section 22(2) is the investigation of any criminal offence and the use of the material in any criminal trial.

55. Next Mr Nelson relies on the decision of the Divisional Court in *Chief Constable of Merseyside v Owens* [2012] EWHC 1515 (Admin); (2012) 176 JP 688, in which a video tape was seized by the police under PACE powers during an investigation into an arson. The tape was said to show the perpetrator depositing the petrol at the door of the premises but apparently it was not possible to identify the culprit. The police wished to retain the video under section 22 of PACE for the investigation of crime even though there had been a decision not to prosecute and the owner required it back. The judgment of the Court was given by Sir John Thomas PQBD. At para 18, he said that there is nothing in section 22 which suggests that the power of retention can be for any purpose other than a purpose for which it was originally seized. At para 19, he cited both *Marcel*, in particular the dicta of Sir Christopher Slade which we have cited above, and what Leveson LJ had said in *Scopelight*, at para 30.

56. Mr Nelson also drew our attention to *R (PML Accounting Ltd) v HMRC* [2018] EWCA Civ 2231; [2019] 1 WLR 2428. That case concerned the claimant's request for an order that the defendants should destroy "work product" derived from what the claimant said was an unlawful notice requiring information and documents to be provided by it. The judge's refusal to grant relief in that case was upheld by the Court of Appeal by a majority.

57. On the basis of that decision Mr Nelson accepts that HMRC is entitled to keep the work product or derivative material that it has generated over the last 4½ years of this investigation, which must be voluminous, and he accepts that it would be impracticable to separate out the work product and derivative material from the seized material from that which has been generated from other sources. It is also accepted that this derivative material would fall within the scope of information which has been acquired but can be shared under section 17 of the CRCA.

58. He submits, however, that to go further and to give effect to a wider public purposes test would infringe both the principle of proportionality and the requirement of a sufficiency of legal definition in Article 1 of the First Protocol to the ECHR, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Analysis

59. We do not accept those submissions on behalf of the Appellant. In our judgment, this approach does not fully take account of the different types of interest which the common law seeks to protect in this context. The first type of interest to be protected is property rights. That is what the requirement to return the original seized property is concerned with. The common law protects property rights with jealous care: see e.g. *Entick v Carrington* (1765) 19 State Trials 1029. It may be that the protection of property rights indirectly also protects an interest in privacy but this is privacy in the sense of seclusion, not privacy in the sense that the content of certain information is private. We return to privacy interests below.

60. So far as a copy of a document is concerned it is highly unlikely that there will be any property right on the part of the individual affected. It is natural to suppose that the property in the paper on which a hard copy is made vests in the public authority which has produced that copy. If there is a digital copy, both the hardware and software are likely to be the property of the Respondents, and certainly not the Appellant's.

61. This leads us to the second type of interest which the law seeks to protect in this context, which is an interest in the privacy or confidentiality of the information which is contained in the document rather than the document itself. That gives rise to other considerations. In our judgment, the law protects those interests in a different way, in particular through obligations of confidentiality and the law relating to privacy and data protection. But, in our judgment, section 22 does not have the effect of requiring the return of copies in this context.

62. Furthermore, the concession which is made by Mr Nelson would make it very difficult in practice to have a workable rule. He accepts that HMRC may retain their work product and derivative material but, if that work has quoted in large part or perhaps even completely the information which was contained in the copy which they have obtained, it is difficult to see what practical distinction there would be between retention of the copy and retention of the work product.

Section 57 of the CJPA

63. Mr Nelson also relies on the provisions of section 57 of the CJPA. Subsection (1) makes it clear that this section has effect in relation to various "relevant provisions", which include, at para (a), section 22 of PACE.

64. Section 57(2) provides:

> "The relevant provisions shall apply in relation to any property seized in exercise of the power conferred by section 50 or 51 as if the property had been seized under the power of seizure by reference to which the power under that section was exercised in relation to that property."

65. Subsection (3) provides:

> "Nothing in any of sections 53 to 56 authorises the retention of any property at any time when its retention would not (apart from the provision of this Part) be authorised by the relevant provisions."

66. Subsection (4) provides:

> "Nothing in any of the relevant provisions authorises the retention of anything after an obligation to return it has arisen under this Part."

67. Mr Nelson submits that, in short, section 57 provides that the property seized in this case under section 50 of the CJPA shall be treated as having been seized under sections 19 or 20 of PACE and subject to the rights and limitations of retention in section 22.

68. One then comes to section 63, which has the sidenote "Copies". Subsection (1) provides that, subject to subsection (3), "(a) in this Part, 'seize' includes 'take a copy of', and cognate expressions shall be construed accordingly; (b) this Part shall apply as if any copy taken under any power to which any provision of this Part applies were the original of that of which it is a copy; …".

69. Mr Bird places emphasis on subsection (3), which provides that subsection (1) does not apply to section 50(6) or 57. Mr Bird submits that it is plain on the words of the statute that section 57 simply does not apply in this context.

70. In order to meet this difficulty Mr Nelson submits that section 63 is merely an interpretation provision and it would be curious that such a wide-ranging power to retain copies does not feature in the operative provisions of Part 2 of the CJPA themselves.

71. He also relies on the explanatory note to section 63, at para 180:

> "This section provides that almost all of Part 2 shall apply to copies as it does to originals. Accordingly, the powers in sections 50 and 51 and the protections in sections 54, 55 and 59 apply to copies of material taken under the powers vested in Schedule 1. The powers listed in subsection (3) are powers given to the police and others to obtain production of hard copies of material stored in electronic form. Subsection (1)(c) provides that the protections in Part 2 apply to material obtained under those powers too."

Mr Nelson submits that there is probably a typographical error in the explanatory note when it refers to subsection (3) when it appears to be referring to the powers listed in

subsection (2). We agree with that but it does not appear to us that it takes matters further so far as the issue in the present appeal is concerned.

72. Mr Nelson then submits that the key to the proper construction and meaning of section 63(3) starts with an examination of section 50(6), to which section 63(3) specifically refers. Section 50(6) provides:

> "Without prejudice to any power conferred by this section to take a copy of any document, nothing in this section, so far as it has effect by reference to the power to take copies of documents under section 28(2)(b) of the Competition Act 1998 … shall be taken to confer any power to seize any document."

73. Mr Nelson then refers to section 28 of the Competition Act 1998, which provides that the Competition and Markets Authority may apply to a court or tribunal for a search warrant in given circumstances. Mr Nelson submits that section 28(2) of the 1998 Act operates a presumption that the searching officer will take copies or extracts from relevant documents rather than the original itself unless it is necessary to seize the original to preserve it etc or where it is not reasonably practicable to take copies on the premises. Be that as it may, it seems to us that this has no relevance to the simple point made by Mr Bird, that section 57 is also excluded from the application of section 63(1).

74. Mr Nelson submits that section 63(3) excludes section 57, not in order to remove the limitation within section 22 of PACE on retention of copies, but to avoid the difficulties that treating copies as originals may cause to the exercise of the "relevant provisions" within section 57 of the CJPA. In other words his submission is, in effect, that it excludes only the operation of section 22(4) of PACE. The fundamental difficulty with that submission is that is not what Parliament has said, when excluding section 57 from applying, which includes the entirety of section 22 of PACE. Mr Nelson submits that, if Parliament had intended to remove the rights of an individual to the return of, for example, copies by way of images of the content of a hard drive seized under section 50 of the CJPA, it would have said so. With respect, this is to reverse the fundamental point that Mr Bird makes (correctly in our view): that, if Parliament had intended to remove only the application of section 22(4), it could and would have said so in terms.

75. Next Mr Nelson submits that his interpretation entirely accords with the approach taken by the Divisional Court in *R (Business Energy Solutions Ltd) v Crown Court at Preston* [2018] EWHC 1534 (Admin); [2018] 1 WLR 4887, in which the judgment was given by Green J, with whom Bean LJ agreed.

76. At para 54 of Green J's judgment, the first issue in that case was identified as being whether the data that was copied by the authority onto its own systems from the seized computer devices amounted to "seized property" which was capable in principle of being and should be subject to "return" under section 53(2)(3) of the CJPA. Green J addressed that issue at paras 70-88.

77. Mr Nelson relies on Green J's analysis at paras 70-76 and, in particular, his conclusion, at para 76:

> "… [A]pplying a purposive construction of the CJPA 2001 … the act of copying creates a new 'property' that has been 'seized' from the original owner".

78. We agree with what Green J said at para 72:

> "*Prima facie*, any act of copying would amount to a breach of copyright and the original owner would be able to assert the normal rights and incidents of property ownership over the copies. However, under the Copyright Patents and Design Act 1988 there are well established exceptions to copyright for copying in judicial proceedings and copying which is pursuant to the exercise of a statutory power (cf sections 45 and 50). Copying pursuant to a lawful warrant would appear to fall within one or even both of these exceptions. On this basis it could be argued that (i) the copy is not part of the 'seized property'; and (ii) in any event it is not the property of the original owner of the device. On the other hand, this might seem to be a very technical analysis of the Act. Standing back, the duty to return property, which is not within the scope of the warrant, flows from the importance that the law attached to property rights and to the need to limit and control the intrusive power of search and seizure."

79. Where, with respect, we differ from his reasoning is that he considered that section 63 addresses those concerns: see paras 73-76, leading to his conclusion at para 76, which we have quoted above. That reasoning omits reference to the crucial provision in section 63(3), which disapplies section 57 in this context.

80. In his skeleton argument Mr Nelson suggested that the decision in *Business Energy Solutions* was binding on this Court but, at the hearing before us, he accepted that it is not strictly binding, although we should normally follow it unless we are satisfied that it is wrong: see *R v HM Coroner for Greater Manchester, ex p. Tal* [1985] QB 67. Mr Nelson submits that it was correctly decided and that the absence of reference to section 63(3) in it is explicable by the fact that the Court implicitly accepted the construction which he now seeks to place upon the relevant statutory provisions. With respect, we do not consider that the Court in that case addressed the issue which we now have to address. In particular, as Mr Nelson acknowledges at para 76 of his skeleton argument, it was simply not argued by the respondent in that case that, once a copy was made, the power to order return under section 59 ceases.

Questions 3 and 4: section 17 of the CRCA

81. Mr Nelson made it clear in his oral submissions that his arguments are confined to those documents which he described as being "in quarantine", i.e. before the

examination required by section 53 has been completed. He accepts that, once the section 53 examination is concluded, the information can be shared as between the criminal and civil departments of HMRC.

82. Mr Bird responded by submitting that in fact HMRC has confined its wish to retain and use information by way of copies to copies of material which has already passed the section 53 sift, for example excluding material which is subject to legal professional privilege or journalistic material.

83. In our judgment, the Judge was plainly correct to hold that the terms of section 17(1) of the CRCA permit the Respondents to share information which they have obtained for the purpose of a criminal investigation with others within HMRC for their (civil) tax collection purposes even after the criminal investigation has been concluded. Both are "functions" of HMRC. The language of section 17(1) is about "use" of "information" and not about the retention of the underlying documents, let alone the original documents which were seized. Section 22(1) of PACE is, for the reasons we have set out above, concerned with the latter, and so does not restrict or prohibit the use of the information such as to fall within section 22(2).

84. This interpretation would not have the undesirable consequence that HMRC can simply treat the information arbitrarily and violate the Appellant's privacy interests with impunity. Mr Bird is clearly right to submit that HMRC would not be free to use the power in section 17 in any way that they please. They will be constrained in the exercise of that power by the principles of public law.

85. Furthermore, it is clear that they will be subject to an obligation to respect the confidentiality of the information which they have obtained using compulsory powers. This was made clear by the Court of Appeal in *Marcel*, which was followed by Eder J in *Tchenguiz v Director of the Serious Fraud Office* [2013] EWHC 2128 (QB); [2014] 1 WLR 1476, at paras 10 and 15, citing the judgment of Sir Nicolas Brown-Wilkinson in *Marcel* at page 237; the judgment of Dillon LJ at page 256; the judgment of Nolan LJ at page 261; and the judgment of Sir Christopher Slade at page 265.

86. The point was expressed most clearly by Nolan LJ, who said:

> "In the context of the seizure and retention of documents, I would hold that the public law duty is combined with a private law duty of confidentiality towards the owner of the documents. … It arises from the relationship between the parties. It matters not, to my mind that in this instance, so far as the owners of the documents are concerned, the confidence is unwillingly imparted."

87. Last but not least, HMRC would be subject to their obligation to comply with Convention rights in the HRA, in particular the privacy rights which are set out in Article 8 of the ECHR.

Question 5: section 59 of the CJPA

88. In the context of Question 5 before us, Mr Nelson did not seek vigorously to uphold the directions which the Judge made in the Court below. He informed this Court that the Appellant had not asked the Judge to make those directions.

89. For the reasons set out more fully below, we have reached the conclusion that the Judge was wrong to make the directions which he did. In essence, this is because he had by that stage refused the Appellant's application under section 59 of the CJPA and was *functus officio*, that is he had completed the judicial task that was before him and had no jurisdiction to do more.

Our answers to the questions in the Case Stated

90. In the light of the above analysis we would answer the five questions in the Case Stated as follows.

91. Question 1: If one takes section 22 of PACE in isolation, it does not, on its correct interpretation, require the return or permanent deletion by HMRC of copies and images of documents once a criminal investigation has concluded. On its true interpretation, section 22 is concerned with the seized originals and not with copies or images. Section 22 is concerned to ensure that there is no greater interference with property rights than is necessary to achieve the purposes of criminal investigation. It does not address other interests which may be protected by the law, for example the confidentiality or privacy interests in the content of the information which is contained in documents. Those interests are protected by other rules of law.

92. We have also reached the conclusion that the Respondents are correct in their interpretation of section 63(3) of the CJPA. This disapplies section 57 and therefore section 22 of PACE. This is the natural interpretation of the relevant provisions. The Appellant's submissions were contrived and require an unnatural interpretation to be given to them. Furthermore, the Divisional Court in *Business Energy Solutions* did not consider the impact of section 63(3) and, in any event, its analysis is not binding on this Court.

93. Question 2: In any event, if section 22 does apply, the words "so long as is necessary in all the circumstances" include the case where HMRC seek to retain the copies and images for public (but non-criminal investigation) purposes. These include the purpose of the collection of taxes.

94. Question 3: Even if a power to retain documents under section 22 of PACE lapses with the conclusion of a criminal investigation, section 22 is not a provision that restricts or prohibits the use of information in such documents for the purposes of section 17(2) of the CRCA. The Judge was right to conclude that "information" is different from the underlying documents.

95. Question 4: Section 17(1) of the CRCA does permit HMRC to share information which has been obtained for one of its purposes for another of its purposes. The Judge was correct about this.

96. Question 5: Once the Judge had concluded as he did that HMRC had the relevant power to share the information under section 17 of the CRCA, he was wrong in law to impose terms or conditions on the exercise of that power. That was not a matter for the Crown Court, which was *functus officio*, having refused the Appellant's application to it. Section 59(5)(c) of the CJPA does not confer power on the Crown Court to impose such terms or conditions on the exercise of the section 17 power. This does not mean that section 17 confers an unfettered discretion. It is governed by the normal principles of public law but those are a matter, if circumstances warrant it, for an application to the Administrative Court by way of judicial review. HMRC would also be subject to the law of confidentiality, in accordance with *Marcel*, and their duties under the HRA.

97. Finally, we would observe that the questions as set out in the Case Stated do not depend on a submission which was made on behalf of the Appellant at the hearing before this Court. Mr Nelson submitted that the crucial point in the present appeal is that, when the decision was communicated on 6 May 2021 that the criminal investigation had been concluded, the process of examination of documents in section 53 of the CJPA was still underway and had not yet been completed. In our opinion, this is a false point. The questions of law which this Court is called upon to address in the Case Stated are all premised on the basis that it is only the documents which have been examined under section 53 and are found by HMRC to be relevant which are the subject of the decision of the Crown Court.

Conclusion

98. For the reasons we have set out above, we dismiss this appeal and allow HMRC's cross-appeal.