IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2018/CLE/GEN/00820
2018/CLE/GEN/00821
2019/CLE/GEN/00038

BETWEEN:

1. DALE GIBSON
2. CHARVETTE STRACHAN
3. KENTON FINES

Plaintiffs

AND

1. THE ATTORNEY GENERAL
2. COMMISSIONER OF POLICE
3. RYAN COOPER

Defendants

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Bjorn Ferguson for the 1st and 2nd Plaintiffs
	Frederick Smith, KC with Raven Rolle for the 3rd Plaintiff
	Luana Ingraham and David Whyms for the Defendants
Heard:	21 February, 10 March, Submissions 19 March 2025

RULING

KLEIN, J.

Practice— Disclosure—R.S.C. 1978 Order 24, Rule 5(2)—CPR 2022 Part 28.14—Legal Privilege—Public Interest Immunity ("PII")—Complaints against police—Police Complaints and Corruption Branch ("CCB")—Investigators' Reports generated during process of CCB investigations—Whether PII prohibits use of documents in civil proceedings—Balancing exercise—Whether public interest in non-disclosure outweighs interest in plaintiffs' presentation of case—Police Act

INTRODUCTION & BACKGROUND

1. The central issue with which this interlocutory Ruling is concerned is whether the defendants are entitled to assert public interest immunity ("PII") in respect of reports generated by senior officers of the Police Complaints and Corruption Branch ("CCB") in the course of investigating complaints made by the plaintiffs against police officers, so as to preclude the use of those documents in the plaintiffs' civil claim for alleged police brutality and other violations of their rights.

2. The civil claims arise out of the plaintiffs' arrest and questioning some years ago on suspicion of having committed violent offences (i.e., armed robbery and attempted murder) in Eleuthera, for which they were never charged or prosecuted. On an oral motion by the plaintiffs, the Court ordered the CCB file in relation to the complaints disclosed, but reserved the issue of whether several of the documents in the file were subject to privilege (in particular PII) for legal argument after the defendants claimed privilege in respect of two reports.

3. Apart from the fact that the boundaries of PII remain unresolved at common law, the matter is further complicated by the fact that the two reports seeking to be withheld were inadvertently disclosed to the plaintiffs.

Factual and Procedural History

4. This trial has been plagued with issues relating to discovery from inception. Throughout, the plaintiffs have contended that discovery by the defendants has been far from satisfactory, and the Court has made several orders to attempt to address this deficiency. At the outset of the trial, the Court made an order for the defendants to provide discovery by way of a list of documents by 19 February 2021 and inspection and exchange of documents by 5 March 2021. On 15 July 2021, the 3rd plaintiff filed a summons pursuant to Ord. 24 rule 16(1) R.S.C., *inter alia*, for leave to strike out the defence and/or to enter default judgment for failure to make discovery.

5. In an oral Ruling on 29 November 2021, I refused the claim for default judgment and ordered the defendants to file a list of documents, verified by affidavit, to include the documents (which were in their possession) set out in the 3rd plaintiff's letter to the defendants dated 15 June 2021, in which they sought further discovery. I also ordered the disclosure of a copy of the complaint made by the 2nd plaintiff to the CCB and awarded costs thrown away by the adjournment of the trial due to the discovery issues be paid to the plaintiffs. Pursuant to the Order, the defendants filed a List and Bundle of Documents on 13 December 2021, disclosing the documents which were said to be in their possession.

6. When the trial resumed, after a long hiatus due to illness of lead counsel for the 3rd plaintiff, complaints were once again made about the adequacy of the discovery made by the defendants. On 13 February 2025, during the examination-in-chief of one of the police officers who interviewed the plaintiffs after their arrest, evidence was led regarding the complaints made by the plaintiff to the CCB, the disciplinary charges brought against the police officer, and the outcome of the proceedings, which resulted in the charges being dismissed on technical grounds. Counsel for the 3rd plaintiff, supported by counsel for the 1st and 2nd plaintiffs, represented to the Court that this was the first time that the plaintiffs were being made aware of the outcome of the CCB investigations and, before embarking on cross-examination, requested that the witness be excused so that a legal issue could be raised. After hearing submissions, the Court rejected an attempt by the plaintiffs to re-visit the issue of general disclosure, but made a limited Order for discovery of the CCB files and a few other documents. This required the defendants to produce to the Court and counsel by 20 February 2025 copies of the CCB file associated with the investigations/complaints of each of the plaintiffs, as well as the detention record for the 2nd plaintiff and the record of interview for all the plaintiffs.

7. Pursuant to that Order, the defendants served a bundle containing the CCB documents and also filed a list of documents ("the list") on 24 February 2025. By affidavit filed 27 February 2025, the defendants deposed that while the CCB file had been disclosed, the other documents which the Court ordered discovered could not be located. In the list, privilege was also claimed over one of the documents associated with the file, which was described as a "*Minute Paper representing an internal document for the purpose of giving and receiving instructions and taking legal advice".* On 21 February 2025, on a mention hearing, counsel for the defendants advised that the documents served contained all of the documents from the CCB file save for a report that was removed on the basis that it was privileged. In view of the claim of privilege, the Court directed the report over which privilege was being asserted to be produced to the Court for its inspection. The defendants were also directed to tabulate and paginate the CCB File.

8. The paginated and tabulated bundle was served on 6 March 2025, headed "*Complaints & Corruptions Branch File*" (the "**Bundle**"). The Bundle contained at Tab 6, a report dated 15 January 2019 by the Director, Complaints and Corruption Branch (a Chief Superintendent), to the Deputy Commissioner of Police and to the Head of the Enquiry Tribunal ("the Director's Report"). This document was not included amongst the documents originally served and said to comprise the CCB File. The disclosure of this document was apparently included by mistake, as it was the document over which the defendant claimed privilege. The defendants also claimed privilege over a report written to the Director of the CCB by a senior police investigator (an Assistant Superintendent of Police) ("the Investigator's Report"), which had been disclosed among the earlier documents.

9. Having reviewed the Director's Report, I indicated to counsel that my preliminary view was that the report should not be disclosed in the public interest, but I directed the parties to lodge brief written submissions on the issue which the Court would consider on the papers.

ANALYSIS AND DISCUSSION

Summary of the arguments

3rd plaintiff

10. Counsel for the 3rd plaintiff makes three main submissions in support of disclosure, one procedural and two substantive. Firstly, it is submitted that the defendants have not properly complied with the requirements for asserting privilege, and in any event only claimed privilege in respect of the Director's Report. In this regard, they set out the procedural rules for claiming privilege both under the *1978 R.S.C.* (since the case started under those rules) and the *CPR 2022*, which are similar in substance:

> Part 28.14 of CPR 2022:
>
> "(1) A person who claims a right to withhold disclosure or inspection of a document or part of a document must—
>
> (a) make such a claim for a document;
>
> (b) state the grounds on which such a right is claimed,

in the list or otherwise in writing to the person wising to inspect the document."

Order 24, Rule 5(2):

"(2) If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds."

11. The second strand of the argument is that the court must then assess the documents to determine whether or not they are in fact "*subject to legal professional privilege*" ("LPP"), as seemingly claimed by the defendants. The 3rd plaintiff disputes that any form of legal privilege attaches to the reports. Counsel cited **Price Waterhouse (a Firm) v BCCI Holdings (Luxembourg) SA and Ors.** [1992] 583 BCLC ("**Price Waterhouse**") for an exposition of the principles relating to LPP and litigation privilege ("LP"). In that case, legal advice privilege was defined as [588]:

"…privilege which attaches between a client and his legal adviser for the purpose of giving or obtaining legal advice. Litigation does not have to be in contemplation. It does not matter whether the communication is directly between the client and his legal adviser or is made through an intermediate agent of either.

Later down [589], their Lordships distinguished between legal advice privilege and litigation privilege as follows:

"A different privilege attaches to documents brought into existence for the purpose of actual or contemplated litigation. Where this is only one of several purposes for which the documents are brought into existence, legal professional privilege attaches to them only if it was the dominant purpose: see *Waugh v British Railways Board* [1979] 2 All ER 1169."

12. The third point is that, even if the Court were to consider that the disclosure of the reports would be contrary to the public interest, the Court must conduct a balancing exercise to see whether there are factors which would justify the claim for PII over the plaintiffs' right to a fair trial and the administration of justice. They contend that the interest in the administration of justice should prevail in favour of disclosure. Counsel referred to the leading case of **R v Chief Constable of West Midlands Police ex p Wiley** [1995] 1 AC 274, ("**ex parte Wiley**"), Lord Templeman observed that:

"Public interest immunity is a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal proceedings. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of a document outweighs the public interest in securing justice …".

13. Based on the above arguments and the facts of this case, the 3rd plaintiff submits that the Court should come to the following conclusions. Firstly, that there is no basis on which the Court can or ought to consider whether the Investigator's Report is privileged, as there is no privilege asserted (at least not formally) in respect of that document. Secondly, that there is no evidence that the reports were prepared either for the purpose of obtaining legal advice or in contemplation of litigation, even though the asserted grounds to privilege appear to be a claim for LPP. The

documents are merely summaries of the investigation of the complaints, and they are therefore not subject to legal advice privilege or litigation privilege.

14. Thirdly, that the legislative framework does not make any provisions for secrecy of the proceedings of the CCB or any documents generated in that process, and therefore there is no statutory prohibition on disclosure. In this regard, counsel drew attention to s. 81 of the *Police Force Act 2010*, which provides for the establishment of the CCB and the Police Complaints Inspectorate ("Complaints Inspectorate"), which is the civilian oversight body. They emphasize that the section actually requires the submission of a final report on all investigations, suggesting that the process is meant to be open and transparent. The referenced section provides:

> "81. (1) The Commissioner shall continue to maintain for the purposes of this Act, a unit of the Force to be known as the Complaints and Corruption Branch, in this Act referred to as "the Branch".
>
> (2) The Branch shall be charged with the responsibility for –
>
> (a) investigating complaints made by members of the public against members of the Force;
>
> (b) submitting to the Inspectorate and to the Commissioner—
>
> (i) at the end of every quarter, a progress report on the work undertaken by the Branch;
>
> (ii) a final report on all investigations;
>
> (c) such other duties as the Commissioner may assign to it from time to time."

15. To the extent that the defendants claim PII (as argued in their submissions), the 3rd plaintiff submits that there are several reasons why this claim should fail when the Court conducts the balancing exercise that it is required to perform. These are as follows:

(i) the defendants made no claim to public interest immunity in their list, as required by Part 28 of the CPR 2022, and/or Ord. 24, r. 5(2):

(ii) the disclosure of the reports will not inhibit investigating officers of the CCB effectively carrying out investigation into alleged misconduct of police officers in the future;

(iii) investigative reports do not fall into the class of PII, save where they raise issues that may relate to national security, such as disclosure of a police informant;

(iv) the reports do not contain sensitive or confidential information, but if the court finds otherwise, it would still be in the interests of justice that the material is disclosed if it would be helpful to the 3rd plaintiff's case;

(v) disclosure would not damage the public interest or result in the ineffective functioning of the CCB, as officers are duty bound to carrying out investigations, and neither will it put a damper on the officers' willingness to testify in future investigations, as they are not afforded any rights to anonymity under the Tribunal's Procedure.

First and Second Plaintiffs

16. The arguments of the 1st and 2nd plaintiffs were largely subsumed in arguments presented by the 3rd plaintiff, but they too contended that the documents should be disclosed in the interest of justice and fairness. They did not submit any authorities and indicated that they were relying

on the legal authorities cited by the 3rd plaintiff. However, they emphasized in particular that (i) there was no public interest immunity as a class in respect of documents disclosed during investigations against police officers (**ex parte Wiley**); and (ii) the reports do not reveal anything that would be injurious to the public interest, as they do not reveal police methodology, equipment or technology.

Defendants

17. As mentioned, the defendants resist disclosure on the grounds that the documents are either privileged or covered by PII or both. They rely on several grounds. The first is that the documents which the plaintiffs seek to have disclosed are hearsay evidence, which do not come within the s. 39(2) exceptions of the *Evidence Act*, and therefore should be excluded as hearsay (s. 38, 39(1), (2)). They contend further that s. 123 of the *Evidence Act* specifically provides for evidence of a person's conviction to be admissible in civil proceedings and, therefore, by parity of reasoning, in a case where there is no conviction, copies of documents on the case file such as the content of the charge sheet and witness statements, are of no evidential or probative value.

18. In oral submissions, the defendants contended that the production of the documents was not necessary and suggested that they did not satisfy the *R.S.C* Order 24, r. 13 requirements. In effect, the plaintiffs were on a fishing expedition.

19. They also submitted that, notwithstanding the production of the file by virtue of the Court's order, they had not waived any PII which might attach to any particular document. Further, they argue that disclosure of the complaints file in any event ran the risk that it "*would invariably encompass items whose disclosure would be inimical to the public interest*" and in respect of which the defendants would be entitled to assert privilege on the grounds of confidentiality and/or public interest immunity. The main cases on which the defendants rely are **Taylor v Anderton (Police Complaints Authority)** [1995] 1 WLR 447, and **O'Sullivan v Commissioner of Police of the Metropolis** [1995] The Times, 3 July 1995.

20. In **Taylor**, the Court of Appeal set aside the decision of the judge who refused a claim for public interest immunity in respect of reports and working papers prepared by investigating officers during investigations into police conduct pursuant to the *Police and Criminal Evidence Act 1984*, on which the plaintiff sought to rely in a civil claim against the police for various torts connected with his trial for dishonesty by the police. In doing so, the Court of Appeal stressed that the production of such reports and papers would only be ordered where the public interest in disclosing their contents outweighed the public interest in preserving their confidentiality. It also emphasized that in the context of PII arising in civil proceedings, the trial judge had a discretion to determine the preliminary question of whether the documents were 'necessary' for the purposes of RSC Ord 24, r. 13 for 'disposing fairly of the cause or matter', and if that were determined in favour of the claimant, to decide where the balance of public interest lay and to order production if appropriate. **Sullivan** was similarly decided.

21. The defendants also relied on the case of **McHari Institute v The Department of Public Service et al.** (2012/PUB/jrv/00033), which applied the House of Lords' decision in **Three Rivers District Council v Bank of England (No. 5)** [2003] 3 WLR 667, affirming the absolute nature of

legal privilege. In **McHari**, the Judge held that a Minute Paper containing legal advice between the Attorney General and the Ministry of Public Service was subject to LPP. For reasons that will become clear, I am not of the opinion that this case assists the defendants on the facts of the instant case.

Court's discussion

22. The doctrine of PII allows the courts to sanction the withholding of otherwise relevant evidence on the grounds that its disclosure would create more harm to the public interest than the benefit to be derived from its disclosure for the vindication of the rights of the person claiming disclosure. It involves a delicate balancing exercise, as the court must balance the public interest to non-disclosure with the right to a fair trial, which has constitutional underpinnings.

23. In **Conway v Rimmer** [1986] 1 AC 910 (at 955), these competing interests were described by Lord Morris as follows:

> "There are two aspects of the public interest which pull in contrary directions. It is in the public interest that full effect should be given to the normal rights of a litigant. It is in the public interest that in the determination of disputes the courts should have all relevant material before them. It is, on the other hand, in the public interest that material should be withheld if, by its production and disclosure, the safety or well-being of the community would be adversely affected. There will be situations in which a decision ought to be made whether the harm that results from the production will be greater than the harm that might result from their non-production."

24. Coming back to the facts of this case, I agree with the plaintiffs that the nature of the two reports which the defendants seek to withhold do not properly come within the class of LPP or LP. Therefore, the cases relating to LPP and litigation privilege are not relevant to the issues which the Court has to decide in this matter.

25. As discussed, the documents were generated as part of the CCB file, and do not contain legal advice, nor were they prepared in contemplation of litigation. They were recommendations based on preliminary investigations as to whether any officers should be charged with disciplinary offences as a result of complaints made by the plaintiffs. In my view, therefore, the only basis on which a claim for non-disclosure could possibly be made out (other than the general grounds for resisting discovery) is in a claim for PII.

Procedural issues

26. While the RSC always made an exception for the disclosure of any documents that were considered "*injurious to the public interest*" (*Ord. 24, r. 15*), it does not contain the detailed provisions that are to be found in *CPR Part 24* regarding the procedure for asserting a right to withhold disclosure on the grounds of public interest. As noted, part 28.14 provides for a party claiming a right to withhold disclosure or inspection of a document to make such a claim in the "list" (of documents), indicting the grounds relied on, or otherwise in writing to the person wishing to inspect. Further, 28.14(2) provides for a person seeking to withhold disclosure to apply to the court without notice, supported by affidavit, asserting a right or "duty" to withhold disclosure. Any claims for privilege or orders made without notice in that regard may be challenged by a

person who objects to the claim (e.g., there is general power to set aside a without-notice order), and on such a hearing the court will make an order for disclosure unless satisfied that there is a right to withhold disclosure.

27. The plaintiffs are right to point out that the proper procedure was not strictly followed by the defendants, in that they only asserted a claim to privilege in respect of one report, and even then the stated ground was not PII. But I am not of the view that non-compliance with the Rules is fatal to the defendants' claim for PII, if there is otherwise merit in it. The CPR provides for the ground to be indicated in the list or "*otherwise in writing*" to the person seeking inspection or discovery. In this regard, the defendants in their written arguments asserted a claim to privilege based on LPP and/or PII, and so it cannot be said that the plaintiffs were not notified in writing of the grounds on which the claim was being made. In any event, the issues had been canvassed before the Court, which was clearly of the view that PII was engaged and invited submission on the issue.

28. Furthermore, the plaintiffs concede in their written submissions that the court may, of its own motion, consider whether the disclosure of a document would be contrary to the public interest. This is because a claim for PII exists to protect the interest of the State, and not the interest of any party or even one of the branches of the State: see **Makanjoula v Comr of Police of the Metropolis** [1992] 3 All ER 617, and **ex parte Wiley**. In **Makanjoula**, Bingham LJ said (at 623), a passage endorsed in **ex parte Wiley**:

> "Where a litigant asserts that documents are immune from production or disclosure on public interest grounds he is not (if the claim is well founded) claiming a right but observing a duty. Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even when it is to their disadvantage in the litigation. This does not mean that in any case where a party holds a document in a class prima facie immune he is bound to persist in an assertion of immunity even where it is held that, on any weighing of the public interest, in withholding the document against the public interest in disclosure for the purpose of furthering the administration of justice, there is a clear balance in favour of the latter. But it does, I think, mean: (1) that public interest immunity cannot in any ordinary sense be waived, since, although one can waive rights, one cannot waive duties; (2) that, where a litigant holds documents in a class prima facie immune, he should (save perhaps in a very exceptional case) assert that the documents are immune and decline to disclose them, since the ultimate judge of where the balance of public interest lies is not him but the court…".

29. Based on the authorities, it seems to me that the court has to approach the question of PII in two phases. The first is to examine whether discovery/disclosure would be justified on the usual grounds on which discovery is ordered in civil proceedings, that is whether the documents are relevant and whether discovery is "*necessary either for disposing fairly of the cause or matter or for saving costs*" (as the rule was expressed under Ord. 24 of the R.S.C. 1978), or whether it relates to the disclosure of "*documents which are directly relevant to the matters in question in the proceedings*" (CPR 28.4). Only if the court considers that the documents ought to be disclosed within the general principles that it goes on to decide whether the documents are entitled to be withheld from disclosure by conducting a balancing exercise as to the public interest in withholding and the interest in the administration of justice.

30. The approach was articulated with clarity in the judgment of Bingham J. in **Air Canada v Secretary of State for Trade (No. 2)** [1983] 1 All ER 161 [at 166] as follows:

> "2. If the court is satisfied that the party seeking to withhold the documents has made a valid claim for public interest immunity the next step to determine is whether the party seeking production is able to show a public interest in production. To do so, such party must show not only that the documents are relevant…but that they are necessary for disposing fairly of the cause or matter or (to put it in a different way) are necessary for the due administration of justice [the Court of Appeal differed from the judge on the phrase "due administration of justice": see [1983] 1 All ER 161 at 181, 187, [1983] 2 AC 394 at 411, 418-419]…If it appears to the court that the documents are likely for the due administration of justice the court is confronted with the second aspect of the public interest, fit to be weighed in the balance against the first. 3. If the court is satisfied that there is a public interest both in production and non-disclosure it must consider the relative substance of each claim with a view to forming judgment whether, on balance, the public interest will be better served by the withholding of the documents or by their production….But the task of the court is to weigh the harm which production would cause to the business of government or public administration against the harm which non-disclosure would do to the just determination of the particular case and decide where the balance of public interest lies."

31. Counsel for the plaintiffs in oral submissions asserted that the disclosure of the file was important for two main reasons: (i) that it showed that the CCB considered that there was sufficient evidence to charge several officers with disciplinary offences, based on the events which are the basis for the civil claims; and (ii) that access to the documents in that file would permit them to properly cross-examine the defence witnesses.

32. Counsel for the defendant did not specifically take the point that discovery was not necessary for disposing fairly of the action or for saving costs, or that the documents were not directly relevant to matters in question in the civil proceedings. She did assert, when the application for discovery of the complaints file was raised during the trial, that the plaintiffs could not claim to be caught off guard by the revelations relating to the CCB disciplinary proceedings. This was because they were aware of those proceedings and their statements to the CCB were disclosed in the defendants' bundle of document. In addition, it was contended that as the police officers against whom the complaints were made were being called as witnesses, the plaintiffs would be able to cross-examine them on the CCB process, to the extent that the issue was relevant to the civil claim.

33. It has been clear, at least since **ex parte Wiley**, that documents coming into existence as a result of police investigations are not *prima facie* entitled to PII, and that the question of whether PII applies has to be conducted on a case-by-case basis, in relation to the particular documents. That case overruled a series of United Kingdom Court of Appeal cases which had upheld the class immunity in favour of such documents (see, for example, **Makanjuola v Commissioner of the Metropolis** [1991] 3 All ER 617, and **Halford v Sharples** [1992] 1 W.L.R. 736).

34. I therefore would not have been prepared to reject the plaintiffs' request for discovery simply on the basis that the documents might be said not to be necessary for the fair disposal of the matter or for saving costs (even if these points had been taken by the defendants). But this is not to say that there is not some merit in the contention that the material, while it may be relevant, cannot be decisive of any of the issues which have to be determined in the civil claim. Further,

the plaintiffs were always aware of the disciplinary proceedings (even if perhaps unaware of the outcome) and were therefore never impeded from pursuing that line of inquiry in cross-examination.

35. Contrary to the submissions of the plaintiffs, I am of the view that there is a real risk of prejudice to an important public interest if the reports are ordered to be disclosed, which is the effective functioning of the police CCB process. I must, therefore, go on to consider where the balance lies between non-disclosure in the public interest and the administration of justice.

36. As mentioned above, the plaintiffs advanced several points in support of their argument that the balance lay in favour of disclosing the reports. In particular, and as may be summarized, they state that: (a) the reports do not concern any sensitive or confidential information such as issues relating to national security or policing, such as the disclosure of police informants; (b) the reports cannot inhibit investigations as officers are duty bound to carry out investigations, and officers who are subject of the enquiry are also required to testify and afforded no immunity; (c) the material would be helpful in vindicating the plaintiffs' rights in the civil action.

37. The main grounds advanced by the defendants to be weighed in the balance are that: (a) the documents would constitute hearsay evidence and would be inadmissible in any event; (b) the disclosure of such documents would be inimical to the public interest and the "functioning of Government"; and (c) in any event a gist of what is contained in the two reports is already disclosed in the case diary in the file.

38. In assessing the balance in accordance with the principles outlined above and the facts of this case, including the parties' submissions, I would highlight several factors. Firstly, contrary to what was submitted by the plaintiffs, I am of the view that the prospect of the disclosure of the reports would have an inhibiting and chilling effect on the reports of investigative officers in the future. I find apposite some of the factors identified by the Court of Appeal in **Taylor v Anderton** (see para. 13), but I would highlight only a few. The most obvious is that an investigating officer should be free to express his/her views with candidness, and without fear that those views might be disclosed in civil proceedings by litigants.

39. Indeed, it is highly unlikely that the reports of the investigating officers would have been disclosed to either the complainants or the defendants even in the police disciplinary hearing itself. It appears that charges stemming from CCB investigations are dealt with in the same manner as the charging of major offences against police discipline (see ss. 4, 6 of the *Police Disciplinary Regulations*). This procedure requires, *inter alia*, for evidence to be taken on oath or affirmation, subject to cross-examination, and for "documentary evidence" which is intended to be introduced at the Enquiry to be supplied with the charges to the defendant.

40. In this regard, it is important to point out that these reports contain opinions and recommendations of the officers only. If it turned out that proceedings were not instituted based on them, potentially damaging views on the officer's conduct might nevertheless have been recorded against that individual by the investigator. It would be contrary to the public interest and injurious to the effective functioning of the Police Force and the CCB process if documents of such a nature were made available for use in civil proceedings before the Supreme Court.

41. Secondly, in my judgment, the plaintiffs' contention that the documents are required in the interest of the administration of justice with respect to the presentation of their case is overblown. Put at their highest, the reports by the Investigating Officer and the Director simply recommend that charges should be brought based on their preliminary investigations. In any case in which charges are brought against police officers resulting from complaints by members of the public, it stands to reason that there would be some preliminary investigation or other scrutiny done before charges are laid. The CCB could not just accept at face value every complaint made against police officers. Some will no doubt be genuine, but the possibility that some may be vendetta based on legitimate law enforcement action or conduct cannot be ruled out. But as noted, such reports are only recommendations or opinions which, at the end of the day, might prove to have been mistaken or inaccurate based on the finding by the Tribunal, after hearing evidence, or on review by the Inspectorate.

42. Thirdly, another factor which I took into consideration (and which was mentioned by defendants) is that the gist of what is contained in the reports is already in the complaints case diary which is included in the file. This is in keeping with the principle that any derogation from full disclosure for the purposes of PII should be the minimum derogation, and therefore where a redaction or gist of the document can be provided, that should be done (**R v H and Another** [2004] UKHL 3.

43. Fourthly, another concern that I think might be of some significance, is that opening the door to permit reliance on reports of investigators generated in connection with CCB disciplinary proceedings could possible create an inroad for abuse. Individuals with pending civil actions against the police could seek to exploit the use of such documents in their civil action. This could not have been the legislative intention of Parliament in creating an internal body to deal with complaints against police officers from the public, and in making such a body subject to civilian oversight.

44. As far as discovery and disclosure in civil proceedings are concerned, it is clear that the tide has shifted more and more in favour of open disclosure, and these advances cannot be turned back. But there are still powerful and convincing reasons why certain documents or classes of documents should remain subject to protection, and I think they are made out in this case. For the reasons given above, I am of the view that the public interest in non-disclosure outweighs any assistance to be derived by the plaintiffs in the presentation of their case. The documents are protected by PII and ought not to be disclosed or relied on.

45. In coming to this conclusion, I have not lost sight of the fact that the reports have inadvertently been disclosed. However, the court retains an equitable jurisdiction to prevent the use of privileged or confidential documents which have been disclosed by mistake: see, **ISTIL Group Inc v Zahoor** [2003] EWHC 165 (Ch) [at 74]. Furthermore, as several of the cases make clear, PII is a duty which exists to protect the public interest, and which cannot be waived. The defendants were therefore right to assert that they had not waived any privilege that existed in respect of any of the documents. In the circumstances, I will order that the plaintiffs are restrained from the use of the Director's and Investigator's Reports.

46. By way of a second-string argument, the defendants also suggested that, in hindsight and based on a review of the authorities, the entire file should be protected. This argument is simply not sustainable in light of the ruling of the House of Lords in **ex parte Wiley**, and the cases which have followed. Those cases exploded the doctrine of class immunity in respect of documents generated during a police disciplinary process. As noted, the statements of the plaintiffs to the CCB had already been disclosed as part of general discovery. In any event, the File contains the following kinds of documents: administrative correspondence associated with the investigation, summonses issued to the witnesses, copies of the charge sheets against the police officers, statements of the complainants, the record of interview of the police officers charged, the CCB case diary connected with the complaints and investigation process, and miscellaneous associated documents submitted by the complainants or uncovered by the investigators, such as the plaintiffs' antecedents, medical notes, and a summary of the outcome of the proceedings. It is reasonably clear that these are not documents that would *prima facie* be covered by LPP and, as indicated, a number of them are already disclosed in the civil proceedings.

47. I should also indicate that part of the role of the court in ordering disclosure is to ensure that there is a level playing field between the parties. So to the extent that any documents are disclosed that are helpful to the case of the defendants, they may also be used by the defendants. It is also trite that the duty of disclosure and the role of the court in policing it to ensure fairness is a continuing one, and therefore the fact that these issues have arisen well into the trial cannot be impugned, even though it is clearly more appropriate that such issues be taken at the case management or pre-trial stage.

CONCLUSION & DISPOSITION

48. For the reasons given, I would hold that the reports of the Investigating Officer and the Director are entitled to public interest immunity and ought to be withheld from disclosure. To the extent that they have been disclosed, the plaintiffs are restrained from making any use of them.

49. Because of the manner in which this application arose, I am of the opinion that no order for costs is appropriate, and I so order.

Klein J.,

8 May 2025