



ND COURT OF THE CAYMAN ISLANDS

CAUSE NO: GC0236 OF 2024

KEITH MYERS

Applicant

AND:

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

Respondents

NOTICE OF MOTION

TAKE NOTICE that pursuant to leave of the Honourable Chief Justice, Judge of the Grand Court at the Law Courts, George Town, Grand Cayman will be moved on **1st day of October 2024 at 9:30 am** or as soon thereafter as counsel can be heard, by counsel on behalf of the Applicant for an order for directions ahead of the substantive hearing for an order for the relief in the terms, and on the grounds set out in the Form 53 Application.

AND for an order that the costs of and incidental to this motion may be paid by the Respondents.

AND such further or other orders or relief as the Honourable Court deems fit.

AND FURTHER TAKE NOTICE that on the hearing of the motion the Applicant will rely upon the Affidavit of the Applicant sworn on 17 September 2024 and his exhibit KM-1.

Dated this 19th day of September 2024.

Nelsons Legal

Nelsons Legal

TO: The Clerk of the Court
 The Respondents

AND TO The Honourable Attorney General

This Notice of Motion was filed by Nelsons Legal, Attorneys-at-Law for the Applicant herein whose address for service is P.O.Box 30069, The Grand Pavilion, West Bay Road, Grand Cayman KY1-1201



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APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of the applicant	The Applicant is: Keith Myers # 4 Downtown Reach George Town Grand Cayman Cayman Islands
Name, address and description of the respondents	The First Respondent is: Arek Joseph, Justice of the Peace 31 The Avenue South Sound Grand Cayman Cayman Islands

	The Second Respondent is: The Commissioner of The Royal Cayman Islands Police Service Royal Bank of Canada Building 4th Floor 24 Shedden Road George Town
Judgment, order, decision or other proceeding in respect of which relief is sought	A search warrant issued by the First Respondent at the request of police officers from the criminal investigation department of the Royal Cayman Islands Police Service, who in turn report to the Second Respondent, a copy of which is attached to this application ("the Warrant").
Relief Sought (i) An order of certiorari quashing the Warrant. (ii) A declaration that the entry of police officers on 5 September 2024 into the Applicant's home at # 4 Downtown Reach, George Town, Grand Cayman, Cayman Islands ("the Home") was unlawful. (iii) A declaration that any review, downloading and storage of data from the electronics seized, by officers reporting to the Second Respondent, and / or their agents on their instructions, which included confidential data and data subject to legal professional privilege, was unlawful. (iv) An order of mandamus requiring the Second Respondent to erase or destroy any and all digital or physical copies of the all the data downloaded from the items seized. (v) An order of mandamus requiring the Second Respondent to commission and provide to the Court and to the Applicant a verifying affidavit from a suitably qualified expert confirming:	

- a) the destruction of the data, and;
- b) which individuals / entities or agencies reviewed the data or had access to it.

- (vi) An order prohibiting any of the Second Respondent's officers or other agents who have seized the electronics from the Home (or who have reviewed or had access to the data on the items seized) from participating in any further criminal investigation of the Applicant, or sharing any intelligence garnered from the items with any other enforcement officer or agent charged with any criminal investigation of the Applicant.
- (vii) Damages, including aggravated damages and exemplary damages, for trespass to land and goods, and / or damages.
- (viii) Costs on the indemnity basis.
- (ix) Such further or other orders or declarations as the court deems just.

AND a direction that this application for judicial review be expedited, and that a return date for the substantive hearing be set on or before 2 October 2024.

AND the Applicant reserves the right to seek further relief upon receipt of disclosure in respect of the circumstances in which the Warrant was issued.

Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant

The Applicant is represented by Nelsons, The Grand Pavilion Commercial Centre, 802 West Bay Road , Bougainvillea Way, PO Box 30069, Grand Cayman KY1-1201

Ref: 7239-00001

Signed

Nelsons legal

Dated 17th
September
2023

GROUND ON WHICH RELIEF IS SOUGHT

1. The Applicant has requested, by way correspondence dated 5 September 2024 to the Second Respondent's officer, Detective Sergeant Andrew Graham. and the pre-action Protocol letter before action directed to the Second Respondent dated 11 September 2024, full disclosure of the circumstances in which the application for the Warrant was made to the First Respondent. To date, the Second Respondent and his officers have failed to comply with these requests. Accordingly, the Applicant reserves the right to amend these grounds upon receipt of further disclosure.
2. The decision of the First Respondent, dated 4 September 2024, upon the application of officers who report to the Second Respondent, to issue the Warrant to enter and search the Home and seize cellular phones, SIM cards and other electronics was *ultra vires* and accordingly unlawful *ab initio* because:
 - a) The Warrant states that the First Respondent was satisfied by information on oath that there is a reasonable suspicion of the commission of the offence of Conspiracy to Defeat Justice contrary to section 107 (d) of the Penal Code (2022). This offence was repealed on 29 December 2022 by section 3 of the Penal Code (Amendment), Act 2022, and is therefore absent from the 2024 revision of the penal code. The transitional provision at section 6 of the amending act only saved proceedings pending at the commencement. No such proceedings were pending. For completeness, even before its repeal, this offence was not an arrestable offence in any event. Accordingly, section 45 (1) (a) of the Police Act (2021 Revision) was not satisfied.
 - b) The Applicant is a criminal defence attorney. There could be no reasonable grounds for the First Respondent to believe that the electronic items to be seized would not contain data subject to legal privilege (within the meaning of

section 57 of the Police Act) and so section 45 (1) d) of the Police Act was not satisfied – see also *R v Chesterfield Justices, Ex p. Bramley* [2000] Q.B. 576.

- c) None of the conditions set out of section 45 (3) of the Police Act applied.
3. The Warrant was executed at the Home on the morning of 5 September 2024. When the warrant was executed, two mobile telephones and a laptop belonging to the Applicant were seized which, in addition to personal data, contained confidential data and communications which are covered by legal privilege. The seizure of the items by the Second Respondent's officers was unlawful because:
- a) the warrant was granted unlawfully; and
 - b) The seizure was unauthorised in any event pursuant to section 53 (6) of the Police Act where the officers had reasonable grounds to believe that the electronics contained data subject to legal privilege.
4. In accordance with the dicta of *R v Ebanks, Ex Parte Henderson* [2009 CILR 57], the purpose of the requirement that a search warrant should be issued by a court or Justice of the Peace is to interpose a judicial decision between the citizen and the power of the state. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses that would inevitably flow from allowing a police officer to decide for himself whether the conditions under which he was permitted to enter private property and search and seize personal possessions had been met.
- i) Applications for search warrants involving complex legal issues ought not to be made to a Justice of the Peace. They should instead be made to the Grand Court. This would have been obvious to any fair-minded police officer. This is a case involving the seizure of electronics belonging to a criminal defence attorney who is a sole practitioner, and so was always likely to contain confidential data subject to legal privilege.

- ii) The First Respondent ought to have been advised by the Second Respondent's officers that he should seek independent legal advice before issuing the Warrant.
- iii) The officers of the Second Respondent were obliged to make full and frank disclosure of the relevant legal principles and material facts and documents to the issuing authority (in this case the First Respondent) when making the application (see *Rea v Gibbs* [1994-95 CILR 553], to include:
 - a) The ingredients of the offence in respect of which the offence was suspected; whether it was arrestable, whether it was a subsisting offence in the Cayman Islands; and there was admissible evidence which would support a reasonable suspicion that the Applicant had committed the offence- to include any evidence or account given by the Applicant that would tend to undermine that suspicion;
 - b) The law in respect of items containing material subject to legal privilege, and the relevance of that to whether the First Respondent had the power to issue the warrant; and
 - c) The level of co-operation of the Applicant with the investigation so as to inform the First Respondent as to whether a warrant was necessary.

Given that the offence was repealed in December 2022, was not arrestable even before repeal, and that the First Respondent had no power to issue a Warrant in any event to seize materials subject to legal privilege, it is clear that the obligations set out above could not have been complied with.

- 5. The officers seized two mobile telephones and a laptop belonging to the Applicant. Both telephones contained material subject to legal privilege. The laptop is a work laptop and contains mostly client files. This was explained to the officers at the time it was seized. The telephones were returned on the afternoon of 6 September 2024. The police have only this afternoon returned the laptop notwithstanding the demands of the Applicant.

The Applicant's electronics have all been uploaded to the Royal Cayman Islands Police Service digital forensic hub over objection of the Applicant in writing.

6. The conduct of the Second Respondent's officers was egregious. To quote Cresswell J in *R v Ebanks, Ex Parte Henderson* at paragraph 159, not only was this a fishing expedition, it was a fishing expedition in certain waters that the police should, on any view, never have been allowed to enter.
7. The consequences of legal privileged materials being unlawfully seized by police is a matter of considerable magnitude. The materials will contain the Applicant's past and present client's instructions and endorsements in respect to multiple criminal investigations and prosecutions. All are interested parties. The refusal by the police to return the Applicant's laptop until the date of this application has frustrated his ability to comply with his own duty to advise his present and past clients of the unlawful seizure.

NELSONS

17 September 2024