IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 658 of 2022

BETWEEN:

[1] KEVIN XIN
[2] CARIBBEAN INTERNATIONAL BREWERY CO. LTD.

Applicants

and

[1] HER HONOUR MAGISTRATE DEBORAH ROGERS
[2] THE ATTORNEY GENERAL OF BELIZE

Respondents

Appearances:

Rt. Hon. Dean O. Barrow, SC and Mr. Adler G.L. Waight for the Applicants
Mr. Godfrey P. Smith, SC and Mr. Hector Guerra for the 2nd Respondent
No appearance for the 3rd Respondent

2023: May 16
October

DECISION AFTER TRIAL

[1] **FARNESE, J.:** Mr. Kevin Xin is a Director and Shareholder of Caribbean International Brewery Co. Ltd. (Caribbean Brewery). On 3rd October 2022, Police Inspector Jian Young, head of the Anti-Trafficking in Persons Unit of the Belize Police Department, searched Caribbean Brewery for persons being trafficked under a warrant issued by the 1st Respondent Magistrate. Police Inspector

Young found a large amount of cash and contacted the Financial Intelligence Unit (FIU) for assistance. The FIU removed the cash from Caribbean Brewery and applied under subsection 38(3) of the Money Laundering and Prevention of Terrorism Act (the MLPT Act) [1] for an order for continued detention of the cash. The Magistrate subsequently made several orders permitting the FIU's continued detention of that cash and refusing to recuse herself after the applicants challenged her initial orders in the High Court. The applicants ask that this court review the FIU's authority to retain possession of the cash and the Magistrate's orders. In addition to arguing that the Magistrate erred in making these orders, the applicants allege that their rights to natural justice, equal protection of the law, and protection from unlawful deprivation of their property have been breached. This matter proceeded to judicial review with the Crown's consent despite denying that the Magistrate erred.

[2] While the FIU can bring an application under subsection 38(3) of the MLPT Act, the 72-hour time limit must be strictly observed. The Magistrate erred in her application of the definition of seizure for the purpose of calculating when the 72 hours expired. Consequently, the application was out of time and her orders for continued detention of the cash are null and void. I further find that her order was tainted by apparent of bias when she failed to clarify that her decision did not take into consideration information from a related proceeding.

[3] Mr. Xin and Caribbean Brewery have not proven that their constitutional rights to equal protection of the law and protection from deprivation of property have been breached. The preliminary and *in rem* nature of the proceedings do not invoke constitutional protections. Furthermore, this court finds that the applicants pre-empted their right to due process by intervening in the application under subsection 38(3) rather than initiating an application under subsection 38(5)(a) of the MLPT Act. The intervention was the result of a misunderstanding, shared by all parties, of the nature of the subsection 38(3) application. A subsection 38(3) application is intended to be an *ex parte* application.

[1] Cap. 104, the Substantive Laws of Belize. Rev. Ed. 2020

Issues

[4] Mr. Xin and Caribbean Brewery challenge the Magistrate's jurisdiction to make the order for continued detention of the cash and who may bring the application. The challenges raise the following issues:

a) Was the FIU permitted to bring the application for continued detention of the seized cash?

b) Was the application for continued detention out of time?

c) Was the Magistrate permitted to adjourn the application for continued detention and what is the legal status of orders made after the adjournment?

The failure of the Magistrate to hear and decide the application for continued detention when the matter was first before her resulted in several interim orders for the cash's continued detention. These interim orders raise further issues:

d) If the Magistrate is permitted to adjourn the application to continue detaining to the cash to at time beyond 72 hours from seizure, can she adjourn and extend the detention without hearing evidence?

e) Was the Magistrate entitled to convert the FIU's application from an application under subsection 38(3) to subsection 38(4) on her own initiative?

f) Was the Magistrate permitted to hear evidence from persons other than PI Young?

g) Did the Magistrate err, resulting in a decision tainted by apparent bias, by considering or otherwise being influenced by extraneous and irrelevant information?

h) Did the High Court's decision not to stay the application for continued detention of the cash result in apparent bias because the AG's counsel was appearing before the Magistrate?

[5] Mr. Xin and Caribbean Brewery also seek declarations that their rights to natural justice and constitutional rights to equal protection of law and from deprivation of property have been violated by these orders:

i. Did any of the Magistrate's rulings and orders violate Mr. Xin and Caribbean Brewery's rights to natural justice and constitutional rights to equal protection of the law and protection from deprivation of property?

[6] I decline to consider Mr. Xin and Caribbean Brewery's request for a declaration that cash seized by PI Young cannot be re-seized by the FIU. The AG has abandoned their claim that the cash was re-seized before this court. After reviewing the submissions, this court sees no need to consider the now academic question of whether cash can be re-seized.

Analysis

[7] Caribbean Brewery and Mr. Xin do not challenge the legality of the search that led to PI Young's discovery of the cash. They object to the Magistrate's initial order that allowed the FIU to retain the seized cash and every subsequent order for the cash's continued detention. Caribbean Brewery and Mr. Xin argue that the **MLPT Act** requires strict adherence to its provisions to lawfully detain cash. They claim that the initial application before the Magistrate was out of time and brought by the wrong person. The AG argues that the application met the requirements of subsection 38(3) of the **MLPT Act**.

[8] Subsection 38(3) cannot be read in isolation to understand what it requires:

> 38(1) A police officer or a customs officer may seize and, in accordance with this section, detain any cash found anywhere in Belize, including at any border, if he has reasonable grounds for suspecting that it is–
>
> (a) property derived from the commission of an offence;
> (b) intended by any person for use in the commission of an offence;
> (c) involved in money laundering or the financing of terrorism; or
> (d) being or has been brought into or taken out of Belize without making the declaration required under section 51A or 77A of the Customs Regulation Act or after making a false declaration.
>
> (2) Repealed.
>
> (3) Cash detained under sub-section (1) shall not be detained for more than 72 hours after seizure, excluding weekends and public and bank holidays unless a magistrate orders its continued detention for a period not exceeding 3 months from the date of seizure, upon being satisfied that–
>
> (a) there are reasonable grounds for the suspicion referred to in sub-section (1); and
> (b) its continued detention is justified while–

(i) its origin or derivation is further investigated; or
(ii) consideration is given to instituting in Belize or elsewhere criminal proceedings against any person for an offence with which the cash is connected.

(4) A magistrate may subsequently order continued detention of the cash if satisfied of the matters mentioned in subsection (3), but total period of detention shall not exceed 2 years from the date of the order made under that sub-section.

(4A) Where cash is detained under this section for more than 72 hours, it shall, as soon as practicable, be paid into an interest bearing account and held there, and the interest accruing on it is to be added to it on its forfeiture or release.

(5) Subject to sub-section (4), cash detained under this section may be released in whole or in part to the person from whom it was seized–

(a) by order of a magistrate that its continued detention is no longer justified, upon application by or on behalf of that person and after considering any views of the Director of the Financial Intelligence Unit to the contrary; or
(b) by an authorized officer, if satisfied that its continued detention is no longer justified.

(6) No cash detained under this section shall be released where–

(a) an application is made under this Act for the purpose of–
(i) the forfeiture of the whole or any part of the cash; or
(ii) its restraint pending determination of its liability to forfeiture; or
(b) proceedings are instituted in Belize or elsewhere against any person for an offence with which the cash is connected, unless and until the proceedings relating to the relevant application or the proceedings for the offence as the case may have been concluded.

(7) On being satisfied that cash detained under this section represents the proceeds of crime or property that has been used in, or in connection with, an offence or is intended to be used in, or in connection with, an offence, the magistrate shall make a forfeiture order.

(8) An order may be made under sub-section (7) whether or not proceedings are brought against any person for an offence with which the cash in question is connected.

(9) Any question of fact to be decided by a magistrate in proceedings under this section shall be decided on the balance of probabilities.

a) Was the FIU permitted to bring the application for continued detention of the seized cash?

[9] Mr. Xin and Caribbean Brewery argue that the FIU does not have the standing to bring the claim. Subsection 38(3) must be read in conjunction with subsection 38(1), which outlines the process for

seizure. Because subsection 38(3)(a) requires that the reasonable grounds relied upon to seize the property be explained to the Magistrate, the applicants argue that the officer who seized the property must make the application.

[10] The AG argues that subsection 38(3) does not specify who can bring the application for continued detention. The MLPT Act and the Financial Intelligence Unit Act[2] (FIU Act) are meant to work cooperatively to combat financial crime. Subsections 5(3) and 7(4) of the FIU Act provide for mutual assistance between the Commissioner of Police and the Director of the FIU. The cash was handed from one law enforcement officer (PI Young) to another (Sgt Hibberd) during the process of seizure as the Acts envision. The FIU subsequently brought the application because officers of the FIU were continuing the investigation of possible financial crimes.

[11] Mr. Xin and Caribbean Brewery raised this issue before the Magistrate who held that the FIU has standing to lodge an application under subsection 38(3).[3] I find no reason to disturb this finding. The MLPT Act is silent as to who can bring this application. The FIU Act does not expressly contemplate the FIU detaining cash in the circumstances presented in this case, but subsection 2(10) the MLPT Act expressly expands the powers of the FIU:

> The powers of the Financial Intelligence Unit under this Act are in addition to and not in derogation from the powers of the FIU under the Financial Intelligence Unit Act, and the FIU may exercise all or any of such powers as the occasion may require.

I find the FIU having custody of the cash after cash has been lawfully seized by one of the police officers assigned to the FIU is an occasion which requires the FIU to make an application under subsection 38(3) if the FIU wishes to detain the cash beyond 72 hours.

[12] The FIU needs an officer's assistance to seize the cash because subsection 38(1) of the MLPT Act limits who can seize cash to police and customs officers. Consequently, any officer working for the FIU has been appointed by the Commissioner or Police.[4] Subsection 7(2) of the FIU Act contemplates the Commissioner of Police referring suspected finance crimes to the FIU for investigation and subsection 7(3) requires the Commissioner of Police to give any assistance the

[2] Cap. 138.02, the Substantive Laws of Belize. Rev. Ed. 2020.
[3] Civ. Action No. 368 of 2022, Notes of Evidence for October 14, 2022.
[4] FIU Act at s .5(3).

FIU requires. Subsection 20(2) of the Police Act[5] makes it clear that an officer seconded to the FIU does not lose the powers given to them by the Police Act:

> Every police officer shall be deemed to be on duty at all times and may at all time be detailed for duty in any part of Belize.

[13] There is also no practical procedural reason to restrict who can bring an application under subsection 38(3) of the MLPT Act. The District Courts Procedure Act[6] outlines that evidence can be admitted through affidavits[7] and witnesses.[8] The basis for reasonable suspicion can be provided to the court by an affidavit in a subsection 38(3) application. Any FIU officer detaining cash would be acting on instructions from the Director of the FIU just as any officer of the Police Department would be acting on the Commissioner of Police's instructions. Legal counsel for the Police Department or the FIU would normally bring the application before the court. The applicants' overly restrictive interpretation frustrates the cooperative regulatory scheme envisioned by the MLPT and FIU Acts and risks officers, who are generally not legally trained, making errors that are fatal to the application.

b. Was the application for continued detention out of time?

[14] Subsection 38(3) requires a Magistrate to consider an application to continue to detain seized cash within 72 hours of the seizure. If the 72 hours was not intended to be strictly observed, the legislator would have measured the time in days as was done elsewhere in the MLPT Act.[9] In addition, the application is for "continued detention" which, on the plain meaning of continued, requires the cash to still be detained.[10]

[15] The AG agrees that timelines for detaining cash that is seized by law enforcement are strictly interpreted because the court is balancing individual rights with preventing crime. I have not been provided with any Belizean cases that have considered what section 38 of the MLPT Act requires to seize and detain cash, however, similar provisions for the detention of cash have been

[5] Cap. 138, the Substantive Laws of Belize. Rev. Ed. 2020.
[6] Cap. 97, the Substantive Laws of Belize. Rev. Ed. 2020.
[7] Ibid. at s.60.
[8] Ibid. Section 18 provides the authority to summon a witness if one does not appear voluntarily.
[9] See e.g. s.11(2) where the subject of a freezing order has 7 days to apply to a judge to have that order discharged.
[10] Commissioners for Her Majesty's Revenue and Customs v. Mann [2021] EWHC 1182 (admin) at para 18.

consistently interpreted in other jurisdictions.[11] The seizure followed an *ex parte* application for a warrant. Allowing an officer to proceed without notice and to seize cash before proof of the commission of an offence recognizes the public interest in not providing the alleged offender with an opportunity to hide or destroy evidence. The court's timely supervision of the seizure, however, balances the exercise of the draconian power to seize cash before proof of an offence with the protection of individual rights.

[16] The parties dispute when the seizure occurred. The Magistrate heard the FIU's application starting at 4:29pm and issued her order at 4:35pm on Wednesday, October 12, 2022. October 10, 2022, was a public holiday, therefore, when one excludes weekends and public and bank holidays, to be valid, the seizure of the cash had to have taken place by 4:35pm on Thursday, October 6, 2022.

[17] Mr. Xin and Caribbean Brewery argue that the cash was seized at 12:30pm on Thursday, 6th October 2022, at the latest. They say the cash was either seized when PI Young initially discovered the cash in the two safes and ordered Mr. Xin to stand away or when PI Young began to count the cash. Cash was found at 8am and 9am and counting began at 12:30pm. The AG does not dispute the applicants' timeline but argues that the seizure did not occur until counting was finished, the money was placed in Sgt Hibberd's custody, a chain of custody report was completed, and a receipt was issued to Mr. Xin. Cash from two safes were counted separately and handed over to Sgt Hibberd at 5pm and 7pm.

[18] The AG claims that when the seizure occurred is a question of fact and this court owes deference to the Magistrate's findings that the cash was seized at 5pm and 7pm. The AG argues that the Magistrate heard from three witnesses who all testified that the cash was seized and detained at 5pm and 7pm and notes that the applicants called no evidence to the contrary. Therefore, this court should not disturb that finding. Mr. Xin and Caribbean Brewery disagree that when the cash was seized is a pure question of fact. They argue that the Magistrate misapplied the law by identifying the formal communication of seizure and not the moment the applicants lost effective

[11] See e.g. Forde v. AG (St. Lucia), SLUHCVAP2017/0024 [Forde].

control of the money as the time when the seizure occurred, so this court is free to quash the Magistrate's order if the finding is incorrect.

[19] The applicable standard of review to the question of whether the FIU brought the application for continued detention in time depends on whether that question is a question of law, a question of fact, or a question of mixed law and fact. The Caribbean Court of Justice in **Chefette Restaurants Ltd. v Harris**[12] explained the difference between these three types of questions:[13]

> A question of law involves the interpretation of the constitution, statutes, or legal principles which will be potentially applicable to other cases. A question of fact requires an interpretation of circumstances surrounding the case at hand; usually a question as to what occurred between the parties. There may also be a mixed question of law and fact. A mixed question concerns the proper application of the law to the facts that have been found.

I find the question is a question of mixed law and fact. The MLPT Act does not define "seizure," therefore, the Magistrate defined seizure before applying that definition and reaching her factual determination. This court only owes deference to questions of fact.[14] The standard of review applicable to questions of law, including the meaning of seizure, is correctness.[15] Moreover, the meaning of seizure is relevant to the Magistrate's jurisdiction to hear the claim because it initiates the timeframe in which she is authorized to make a decision. The standard of review on questions of jurisdiction is correctness.[16] If the Magistrate erred in her interpretation of what seizure requires, the court owes no deference to her finding of when those requirements have been met.

[20] The Magistrate cited two authorities that informed her understanding of the definition of seizure: **R (on the application of Walsh and anor.) v HM Customs & Excise**[17] and **R v Uxbridge Magistrates' Court ex parte Henry**.[18] She concluded that the "seizure took place when the cash was boxed and labelled, and property receipts were given to the first respondent"[19] after distinguishing the facts in the present case from the authorities. She noted that PI Young did not

[12] [2020] CCJ 6 (AJ).
[13] Ibid. at para 39.
[14] Regina (St Helens Borough Council) v Manchester Primary Care Trust [2008] EWCA Civ 93 at para 13.
[15] See e.g. Air Services Ltd. et al v. AG (Guyana) et al. [2021] CCJ 3 at para 38 where the CCJ applied the standard of correctness to interpretation of the Guyana's Constitution.
[16] Minister of Citizenship and Immigration v. Vavilov [2019] 4 SCR 653 at para 17.
[17] [2001] EWHC 426 (Admin) [Walsh].
[18] [1994] Crim LR 581 [Henry].
[19] Civ. Action No. 368 of 2022, Notes of Evidence for October 26, 2022.

inform Mr. Xin that he was seizing the cash and the counting took place on Caribbean Brewery's premises. She also concluded that one cannot seize an unknown quantum of money.

[21] The court in **Welsh** held that seizure occurs when the officer makes "an unequivocal assertion…of authority over the money."[20] The court found that the officer seized cash when he informed the persons on whom the cash was found that they were free to go but the money could not leave until the investigation finished.[21] Although the timing of the seizure was not in dispute, the court in **Henry** nonetheless commented that seizure effectively occurred prior to officers taking possession of the cash and serving the notice of seizure.[22] An officer testified that had Mr. Henry attempted to leave, the money would have been seized earlier. The court also suggested that the actual time of seizure was when the officer had reasonable grounds to suspect that the money was used or intended for use in drug trafficking.

[22] I find the Magistrate erred in her interpretation of seizure in subsection 38(3) when she failed to consider that an unequivocal assertion of authority can occur before the official communication and documentation of the seizure. A seizure occurs when the seizing officer has reasonable grounds to suspect that the cash was used or intended for use for unlawful purposes and was in a position to physically exclude the person from accessing their cash.

[23] I also find that the Magistrate erred in concluding that an unspecified sum cannot be seized. **Henry** and **Walsh** can be distinguished from the present case because the regulatory regime that authorized the seizure in those cases sets a minimum threshold for seizures. A minimum amount of cash is not a precondition of seizure under subsection 38(3). I find it is sufficient that all understood what cash was being seized. While the exact quantity of money being seized was not known, the cash being seized was sufficiently identified and specified.

[24] I find these preconditions of seizure were met when Sgt Hibberd and PI Young decided to remove the cash from the safe to count it. I find it unlike given the large amount of cash found that counting it was necessary to raise the officer's suspicions. As explained in **R (on the application of Merida**

[20] Walsh at para 19.
[21] Ibid.
[22] Henry at 3.

Oil Traders Ltd) v Central Criminal Court,[23] a large amount of cash is "inherently suspicious" in today's world given the prevalence of electronic banking.[24] BZ$2,981,644 was found in one safe and US$260,468 was found in the other. That PI Young reasonably suspected that this money may have been obtained from or intended for an unlawful purpose is evident by his decision to seek assistance from the FIU despite the uncontested evidence that Mr. Xin provided PI Young a lawful explanation for the cash. If those explanations allayed his suspicions, PI Young's interest in the cash would have ended and he would not have asked for the FIU's help.

[25] I also find that a reasonable inference can be drawn that had Mr. Xin or any other person from Caribbean Brewery attempted to leave with the cash, they would have been prevented from doing so. That the counting occurred on Caribbean Brewery's premises is of no consequence. As cash was found, PI Young ordered Mr. Xin to step away from the safe and placed the safe under guard.

[26] Therefore, the Magistrate had no authority to hear the application for continued detention because the 72 hours specified in subsection 38(3) of the MLPT Act had expired. The Magistrate ought to have dismissed the application on that basis. As a result, the Magistrate's order permitting continued detention is null and void. .

c. *Was the Magistrate permitted to adjourn the application for continued detention and what is the legal status of orders made after the adjournment?*

[27] Although my finding that the application under section 38(3) was out of time renders this question moot, whether the Magistrate is permitted to grant the adjournment and decide the application after the 72 hours expired was raised before me. I will, therefore, take this opportunity to make a few comments as a guide for future action.

[28] The Magistrate must decide the application before the 72 hours expires. Subsection 38(3) does not only require that the application be brought before a Magistrate, but also that the Magistrate "order" the continued detention within that timeframe. This plain and straightforward language must

[23] [2017] EWHC 747.
[24] Ibid. at para 49.

be given effect.[25] Similar to what the court found in **Commissioners for Her Majesty's Revenue & Customs v Mann**,[26] I find it significant that subsection 38(6) of the MLPT Act that deals with forfeiture applications permit cash to be detained until proceedings have "concluded."

[29] That the Magistrate adjourned the initial detention decision multiple times initially by consent, but also to obtain further submissions and rule on objections raised by Mr. Xin and Caribbean Brewery cannot displace the clear and direct language of the statute. Unlike Justices of the High Court who have the power to make case management orders to further the overriding objective of dealing with cases justly,[27] that power has not been extended to Magistrates under the **District Courts (Procedure) Act**. The parties, likewise, cannot consent to an adjournment in these circumstances.

[30] After the initial adjournment, the Magistrate at her own initiative amended FIU's application under subsection 38(3) to an application under subsection 38(4) because the 72-hour timeframe was exceeded. The legality of the amendment is discussed below, however, an order was ultimately made by the Magistrate under subsection 38(4) after a hearing was held permitting the cash's continued detention. The AG argues that although the initial application was out of time, the current order permitting the cash's detention is valid because the Magistrate decided that the criteria under subsection 38(4) had been met. Mr. Xin and Caribbean Brewery argue that once the initial application was found to be out of time, extensions were not possible.

[31] I find that obtaining an order under subsection 38(4) does not permit the continued detention of the cash in these circumstances. Similar to subsection (3), the use of the word "continued" in subsection (4) is significant. There must be a valid detention order in place before the court can make an order under subsection 38(4). Although the common law permits the use of unlawfully seized material in certain circumstances, the authorities presented by the parties overwhelmingly establish that the seizure of cash is not such a circumstance.[28] In this case, the initial seizure was not unlawful, but to permit the continued detention of the cash would frustrate the strict timeline

[25] Forde at para 43.
[26] [2021] EWHC 1182 at para 20.
[27] Supreme Court (Civil Procedure) Rules, 2005 at 1.1.
[28] See e.g. R (on application of Merida Oil Traders Ltd.) v. Central Criminal Courts [2017] EWHC 747; R (on application of Cook) v. Serious Organized Crime Agency [2010] EWHC 2119; R (on application of Iqbal) v. S. Bedfordshire Magistrate Court [2011] EWHC 705.

imposed by the legislature for judicial oversight of the exceptional exercise of a police power to seize property without proof of an offence and opens up the use of this power to abuse.

d. *If the Magistrate is permitted to adjourn the application to continue detaining the cash to a time beyond 72 hours from seizure, can she adjourn and extend the detentions without hearing evidence?*

[32] The finding that the Magistrate has no discretion to adjourn an application under subsection 38(3) of the MLPT Act beyond 72 hours from seizure negates the need for the court to address this issue in this case. Subsection (4) allows a Magistrate to "subsequently order continued detention of the cash if satisfied of the matters mentioned in subsection (3)" for up to two years. In any other circumstance, where subsection 38(4) will be invoked, the Magistrate will have previously considered evidence to justify continued detention under subsection (3). No arguments were made before me related to the importance of that material distinction between an application under subsection 38(3) and (4). I, therefore, do not find it appropriate for the court to decide this question without a factual context.

e. *Was the Magistrate entitled to convert the FIU's application from an application under subsection 38(3) to subsection 38(4) on her own initiative?*

[33] The Magistrate relied on her authority under subsection 58(1) of the District Court Procedures Act to amend the application.[29] Subsection 58(1) provides:

> 58.-(1) The court may at all times amend all defects and errors in any proceedings in such court, whether there is anything in writing to amend or not, and whether the defect or error is that of the party applying to amend or not.
>
> (2) All such amendments may be made with or without costs and upon such terms as to the court may seem just, and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made, if duly applied for.

As with the previous issue, this issue only arose because the strict 72-hour timeframe for bringing the application was not observed and has been rendered moot by my previous finding. While the court agrees with the principle outlined by the Privy Council in **Powell v Spence** that Magistrates have the power to correct errors and defects provided such corrections do not affect the substance

[29] Civ. Action No. 368 of 2022, Notes of Evidence for January 5, 2022.

of the application,[30] this specific factual context is unlikely to arise again. One cannot assess whether an amendment is substantive in a vacuum, thus I decline further comment.

f. W*as the Magistrate permitted to hear evidence from persons other than PI Young?*

[34] Having previously held that the FIU is entitled to bring an application under subsection 38(3) because the cash was seized on behalf of the FIU by Sgt Hibberd in a collaborative operation with the Police Department, it logically follows that the Magistrate is permitted to hear from persons other than PI Young. PI Young's involvement with the cash ended when the cash was removed from Caribbean Brewery's premises. Even if this application had met the 72-hour deadline, subsection 38(1) only permits detention for as long as there is reasonable grounds that the money was derived from or about to be used in the commission of an offence. A finding that only PI Young's (or any other officers involved in the initial decision to seize and detain the cash) belief is relevant to an application of subsection 38(3) creates a potential for the abuse of the power to seize cash.

[35] Officers seize cash as agents of the Departments to which they are assigned, including the FIU. After the initial seizure and detention, other officers or agents of the FIU, as in this case, may participate in investigating the source and purpose of the cash. Subsection 38(1) does not authorize officers to detain cash for up to 72 hours, not including holidays and weekends, once they have reasonable grounds for suspecting that the cash was used or intended for use in an offence. The language is clear, cash can be detained if the officer "has reasonable grounds for suspecting…" The use of the present tense is significant. If an officer becomes aware of information that makes that suspicion no longer reasonable before the 72 hours has expired, the cash must be returned because he no longer has reasonable grounds.

[36] If the court can only consider PI Young's belief at the time the money was seized in a subsection 38(3) application, the absurd situation could arise where an order for continued detention could be granted even though the FIU or any other officer involved in the subsequent investigation became aware of a lawful source or purpose of the cash. To avoid this situation, subsection 38(3)(a) and

[30] At para 13.

(b) outline that the Magistrate considers the seizing officer's belief and that the continued detention is justified to further investigate the money's origin and derivation or while prosecution is contemplated. The Magistrate is permitted to hear any evidence that justifies the cash's continued detention.

g. Did the Magistrate err, resulting in a decision tainted by apparent bias, by considering or otherwise being influenced by extraneous and irrelevant information?

[37] Mr. Xin and Caribbean Brewery allege that the Magistrate admitted to considering information from the application for the search warrant that led to the discovery of the cash when she issued her decision to permit continued detention of the seized cash. They argue that this is a reviewable error and would lead a fair minded and informed observer to suspect that the decision may be tainted by bias. The AG argues that the search warrant and the facts surrounding its issue were before the Magistrate because the warrant was tendered as evidence. The Notes of Evidence show that Mr. Xin was questioned about the warrant during the proceedings and the warrant was entered as an exhibit.[31] These facts are not in dispute.

[38] The burden is on the Mr. Xin and Caribbean Brewery to establish that a reviewable error has been made. They rely on statements in the affidavits of Mr. Fortunato Noble and Assistant Superintendent of Police Lillian Lopez who were in the courtroom when the Magistrate gave her oral decision. Mr. Noble recalls that:

> …she also took into account information that was presented to her when she granted the search order of the 2nd Claimant's premises. She declared that she could not ignore the information though it was not before her in the matter she was presently deciding.

ASP Lopez also recalls the Magistrate referencing the search warrant in her oral decision:

> The First Defendant also mentioned that she had issued the search warrant for the search and seizure that occurred at the property of the Second Claimant herein and so was well acquainted with the factual matters which contributed to the FIU's agent's reasonable suspicion at the time of the search of the Second Claimant's premises. The First Defendant did mention that she could not divorce her mind from those facts.

[31] Notes of Evidence for Civil Action No. 368 of 2020 for October 14, 2022 at p12 and 18.

The applicants say that the statements are proof that the Magistrate admitted and considered *ex parte* evidence that was not properly before her and may have been highly prejudicial to Mr. Xin and Caribbean Brewery.

[39] While it is trite law that the Magistrate must decide the application based on the evidence before her, I find that Mr. Xin and Caribbean Brewery failed to prove that the Magistrate considered extraneous and irrelevant material. The application for the warrant and the present application are undeniably related, therefore, it is not enough to merely allege that extraneous and irrelevant material was considered. To prove that the Magistrate erred, the interrelatedness of the two proceedings requires that the applicants precisely identify information before the Magistrate in the warrant application that was not before her in the application for continued detention. The applicants did not identify the extraneous and irrelevant material. They also did not refute the AG's submissions that the evidence led before the Magistrate in both proceedings was the same. The burden is not met if the court is left to speculate if the evidence the Magistrate said she could not divorce from her mind in the subsection 38(3) application is different from the evidence in the warrant application.

[40] Mr. Xin and Caribbean Brewery, however, have established that the Magistrate's comments on her inability to divorce her mind from the warrant application taints her decision with apparent bias.[32] In this case, two witnesses have confirmed that the Magistrate referenced that the warrant proceedings were in her mind as she made her decision. Neither witness recalls the Magistrate expressly stating that the information learned from the warrant application did not influence her decision. Although I have found that Mr. Xin and Caribbean Brewery failed to prove that she considered this information, the test for apparent bias does not require proof of actual bias.

[41] The test for apparent bias in **Porter v Magill**[33] has been adopted in Belize.[34] The **Porter** test provides:

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[32] The applicants asked the Magistrate to recuse herself based on allegation of bias, which she declined to do. Although the applicants have asked for the review of all of the Magistrate's "Rulings and Orders," they made no submissions on the Magistrate's recusal decision, therefore, I decline to review that ruling.
[33] [2002] 2 AC 357 [Porter].
[34] Tabony v. Tabony Action No. 6 of 2018 at para 19 [Tabony].

> …whether the relevant circumstances, as ascertained by the court, would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal has been biased.

A "fair minded and informed observer" was described in **Tabony** as one who is "seized of the relevant circumstances and is aware of the duty of judges to be fair and impartial, but would have no knowledge of any particular judge's capacity or standards."[35]

[42] I find that an informed observer would know that the Magistrate would be required to base her decision on the evidence presented to her in the present matter. It is common practice that judges are called to ignore evidence that they become aware of that is not properly in evidence when they decide the matter. For example, this occurs when evidence is introduced, its introduction objected to, and that objection sustained. When that evidence speaks directly to the issue at hand or may influence the outcome if it were admitted, judges regularly explain how they reached their decision without reliance on that evidence. I find a real possibility of bias was raised when the Magistrate commented she had difficulty separating the two proceedings and not clarifying whether information before her in the warrant application influenced her decision.

h. *Did the High Court's decision not to stay the application for continued detention of the cash result in apparent bias because the AG's counsel was appearing before the Magistrate?*

[43] At the oral hearing of this claim, the applicants' counsel indicated that this issue was no longer before the court as a result of their amended pleadings and the consent order outlining the issues to be judicially reviewed. Paragraph 60 of the amended application raises this issue and the respondent's counsel written and oral submissions on this issue indicate they did not understand that this issue had been abandoned. The applicants also responded to the respondent's submissions on this point in their oral reply. Therefore, a few comments are warranted in light of the consequences of what the applicants argued before the Magistrate in a request for her recusal.

[44] Mr. Xin and Caribbean Brewery initiated the present judicial review application after the Magistrate ruled that the application was not out of time. The application included a request for a stay of the Magistrate's proceedings. After considering oral and written arguments from the legal

[35] Tabony at para 37.

representatives of the applicants and the AG, I dismissed the application for a stay and directed the parties to conclude the process before the Magistrate prior to continuing this claim in the High Court. Mr. Xin and Caribbean Brewery argue that the AG's counsel also acted for the Magistrate in the stay application and was her attorney in the High Court proceedings while hearing the application for the continued detention of the cash. The applicants allege the client-attorney relationship creates an apprehension of bias. The AG disagrees and asserts that the Magistrate has no personal interest in these proceedings and was not represented by their counsel.

[45] I find that a fair-minded and informed observer would consider the circumstances in this case and not find a real possibility of bias because they would understand the Magistrate has no personal interest in the matter. Naming the decision-maker on judicial review applications is longstanding practice in Belize. Unless the pleadings suggest that a decision-maker is not protected by the various immunity provisions that serve as shields from personal liability for decisions made in good faith, a decision-maker has no personal interest in the proceedings. The fact that there is no evidence that the Magistrate was served with the judicial review application despite being named a respondent only reinforces that she was not named in her personal capacity. Further, a finding of apparent bias is unreasonable because of the absence of any evidence that the Magistrate was apprised of the AG's reply to the application or that the Magistrate instructed their counsel.

[46] To find apparent bias in these circumstances will pose enormous practical challenges to the administration of justice in any jurisdiction, but especially a small jurisdiction like Belize. A Magistrate or Judge, as the case may be, would have to recuse themselves in any case with the AG where a decision they make is judicially reviewed and subsequently returned to them from a higher court. Alternatively, the Magistrate or Judge would have to retain independent legal counsel in every matter. That counsel, however, would more likely than not be precluded from appearing before the Judge or Magistrate in any other matter to avoid an apprehension of bias. Such a result is untenable.

i. Did any of the Magistrate's rulings and orders violate Mr. Xin and Caribbean Brewery's constitutional right to equal protection of the law and from deprivation of property?

[47] Mr. Xin and Caribbean Brewery's claim that their constitutional rights to equal protection of the law were violated because the Magistrate heard the continued detention application more than 72 hours after the cash was seized, that she repeatedly ordered the cash's continued seizure on an interim basis pending the final determination of the application, that she extended the cash's detention on one occasion without hearing evidence, and that she heard evidence from persons other than PI Young. They further allege that their right to property was breached because the cash was detained with no lawful authority.

[48] Relying on **Kent Anderson et al v AG (SVG)**,[36] the AG asserts that an application under subsection 38(3) of the MLPT Act is pre-emptive and provisional. Such an application cannot violate the Constitution unless its effect is to conclusively determine rights. They also argue that permission to detain cash under subsection 38(3) is an action *in rem* and not *in personam*, therefore, constitutional protections cannot be invoked.

[49] The burden is on the person alleging the breach to show that there is a prima facie case of a violation. If that case is established, the burden then shifts to the Crown to justify that violation. I find that Mr. Xin and Caribbean Brewery have failed to discharge this burden because, for reasons explained below, I find the proper interpretation of subsection 38(3) is that the application is *ex parte*. The applicants' right to equal protection of the law cannot have been breached as their rights to due process and natural justice have not yet arisen. I find that had these proceedings followed the process outlined in the MLPT Act, subsection 38(5)(a) would have provided a prompt and effective relief that meets the requirements of natural justice.

[50] Subsection 38(5)(a) of the MLPT Act expressly provides the mechanism for Mr. Xin and Caribbean Brewery to challenge the continued detention of the cash. Subsection 38(5)(a) permits a Magistrate to release cash from detention upon an application of the person from whom the cash was seized by challenging the justification for the detention. The experience of this case reinforces that the strict timelines under subsection 38(3) cannot accommodate adjournments to allow for the person challenging the detention to find counsel, gather evidence, etc. because a subsection 38(3) application was not intended to entertain such challenges. Subsection 38(3) is intended to be an

[36] HCVAP 2010/019.

ex parte application as seen in similar legislation in other jurisdictions.[37] Any other interpretation is inconsistent with the presumption that the legislator's actions are constitutional. A right to be heard that is not meaningful cannot be what the legislator intended. Therefore, a subsection 38(3) application must be interpreted as an *ex parte* application.

[51] Subsection 38(3) provides an action *in rem.*[38] In this case the seizing officers knew to whom the cash belonged. That may not always be the case. The owner of the premises where the cash was found or the person in possession may not be the rightful owner. It is for this reason that "Two Million Nine Hundred Eighty-One Thousand Six Hundred Forty-Four Belize Dollars" and "Two Hundred Sixty Thousand Four Hundred Sixty-Eight United States Dollars" were named as respondents in the Notice of Application for Continued Detention of the Seized Cash. Mr. Xin ought to have been named as an interested party and not a respondent.

[52] The applicants have also not addressed the clear authorities provided by the AG that establish that interim measures of this kind generally do not give rise to violations of constitutional rights. An application under subsection 38(3) is not a forfeiture application; the detention does not amount to a compulsory acquisition and a loss of Mr. Xin and Caribbean Brewery's right to the cash. In addition, section 17(2)(m) of the Constitution expressly permits the actions of the FIU:

> (2) Nothing in this section shall invalidate any law by reason only that it provides for the taking possession of any property or the acquisition of any interest in or right over property, …
> (m) for so long only as may be necessary for the purpose of an examination, investigation, trial or enquiry…

In the absence of evidence of bad faith or an abuse of process, the breach of the timeline for bringing an application after 72 hours, which resulted in the cash continuing to be detained until the subsection 38(3) proceedings were concluded, is not an unconstitutional deprivation of property.

[37] See e.g. the treatment of section 38 of the Proceeds of Crime Act in Geelal v. AG (Trinidad and Tobago) Civ. App. No. S-274 of 2017 at para 16 [Geelel].
[38] Ontario (AG) v. $2,030 Canadian Currency, 2006 CanLII 36954 (ONSC) at para 17.

[53] Mr. Xin and Caribbean Brewery rely on **Geelal**[39] to argue that detention without proper sanction is illegal and unconstitutional. The case does not stand for that broad principle. The Magistrate's order was found unconstitutional because it did not provide reasons after granting an *ex parte* application for detention of cash. The Court of Appeal found that reasons are essential to safeguard the right to bring an application for the cash's release. The respondent, therefore, was denied his constitutional right to due process when deprived of his property. A constitutional remedy was awarded as a result. Mr. Xin and Caribbean Brewery were not denied their right to due process. They preempted the due process provided by the MLPT Act when they sought to release the cash within a subsection 38(3) application rather than an application under subsection 38(5)(a).

Disposition

[54] The court orders and declares that:

a) The Rulings and Orders of the 1st Respondent made between 12th October 2022 and 6th January 2023 in Civil Action No. 368 of 2020, which mandated continued detention of cash seized from the Applicants notwithstanding that more than 72 hours had passed since the said seizure, were ultra vires the powers of the Magistrate under section 38(3) & (4) of the MLPT Act and procedurally improper;

b) The Ruling and Order of the 1st Respondent made on 5th January 2023 was tainted by apparent bias;

c) An order of certiorari to quash Civil Action No. 368 of 2020 and all Rulings and Orders made therein is granted;

d) Each party will bear their own costs.

Patricia Farnese
High Court Judge

[39] Geelal at para 59.