

Challenging Search Warrants

2 Jan 2014

The calm before the storm...

You have just had your home or your business searched. You have been arrested, questioned and, if you're lucky, bailed. You may even have been charged. Now suddenly, your life has become complicated. But most of all, the real problem is worry; worry about the course of potential criminal litigation and what the future holds in store. This might feel like the calm before the storm but recent case law suggests there may be hope for those on the wrong end of a search warrant.

The Law

The majority of warrants are issued under the *Police and Criminal Evidence Act 1984* (PACE) and the conduct of the searches is governed by the PACE Code of Practice B. Applicants must state the object of the search and provide sufficient information to satisfy the Court that it is necessary. There must be reasonable grounds for believing that an offence has been committed and that there is material on the premises likely to be of substantial value to the investigation. There are numerous other procedural rules that must be followed regarding both the application and the conduct of the search. These rules are important, get it wrong and the search and the warrant may be quashed and the property returned. If that happens that may be the end of any chance of the prosecution using the product of the searches in any subsequent litigation.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500

Fax +44 (0)1422 430 526
DX16001 HX1

Essentially there are two types of challenges. First, there is Judicial Review – there are strict time limits and the costs are higher but the advantage is that it will be a High Court Judge that will consider the application and he/she may be more inclined to take a robust approach to the principle that a search is a serious infringement of people's private lives (Article 8) and demand the highest standards of those making ex- parte applications. The other process is in effect a statutory appeal against the grant of the warrant; this is under s59 of the *Criminal Justice and Police Act 2001*. Though this power applies to all forms of search and seizure it is usually used in relation to the seizure of material seized under s50 of that Act. This procedure is also more likely to be used by the Crown where, after seizure, an error is spotted in relation to the seizure; the prosecution may apply under s59(5) to retain the material on the basis that if the property were returned it could immediately be re-seized under a properly issued warrant. Any such application by the Crown should be on notice;

R (Van der Pijl) v Kingston Crown Court [2013] 1 WLR 2706.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500

Fax +44 (0)1422 430 526
DX16001 HX1

In

R (Cook) v Serious Organised Crime Agency [2011] 1 WLR 144

, SOCA (now known as the 'National Crime Agency') were investigating a fraud allegation. Warrants were applied for, issued and the searches undertaken. The warrants only provided details of the relevant addresses in schedules to the warrant that were then not left at the searched premises, in contravention of the rules. Thus, though the officers were lawfully at the premises, the seizure of computers and documents etc was rendered unlawful. SOCA agreed to pay damages and certain legal costs. But that was not the end of it because when the suspect asked for the return of his property he was told that in fact SOCA were re-seizing the items under powers in PACE. COOK started a civil Judicial Review action. The High Court held that unlawful seizure could not be rendered lawful by subsequent re-seizure. SOCA had to take care in drafting warrants in the future and Cook's material was to be returned. However, SOCA were later involved in a similar Judicial Review with the same Judge, Leveson LJ, but with the opposite result;

R (Cummins) v Manchester Crown Court [2010] EWHC (Admin) 2111

In the Cummins case SOCA, in their investigation of a money-laundering allegation, had again improperly seized material and were forced to return it. This time however SOCA then obtained a Production Order under the *Proceeds of Crime Act 2002* compelling Cummins to deliver to SOCA the very same material. This was possible because of the particular offence being investigated. The Court found there was no reason why SOCA should be in any worse position than if the warrant had never been sought or why those the subject of an unlawful warrant should somehow be better off.

R (R. Tchenguiz & R20 Ltd) v Serious Fraud Office & Others [2012] EWHC 2254 (Admin).

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1

This case received a lot of publicity – it was in fact two joined Judicial Review actions that resulted in search warrants being quashed and the Court heavily criticizing the SFO. The case concerned the collapse of the Icelandic bank – Kaupthing in 2008 following the world wide banking crisis. The brothers were significant clients of the bank and had borrowed huge sums of money from it.

A committee had been set up by those concerned with ensuring the return of as much of the debt owed to the bank as possible. The committee instructed a large UK based accountancy and insolvency practice, Grant Thornton (“GT”), to investigate on their behalf. The committee got their report in December 2009. It suggested that the lending by the bank to the brothers’ interests was highly irregular, e.g. that no proper due diligence had been carried out and that senior management at the bank had manipulated financial data to allow excessive lending to take place.

The case was reported to the SFO which led to the SFO producing its ‘Information’ to a Judge sitting at the Old Bailey to secure search warrants. The brothers’ premises were searched and they were both arrested. The Judicial Review challenges which followed examined in detail the complex commercial arrangements that the brothers engaged in with the bank but essentially the Court’s ultimate, and serious criticisms of the SFO, boiled down to over-enthusiasm (to put it kindly) by the investigators in the presentation of their case to the Old Bailey Judge.

Misleading the Old Bailey Judge

One striking example of the SFO’s failure to properly present its case to the Old Bailey Judge was its complete reliance on the GT report.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1

This is something we see often in cases that start off with a civil aspect but develop into fraud allegations. The police are sent material, created by others, to demonstrate the guilt of their potential civil opponents. There was no independent scrutiny of GT's findings despite the SFO's complete reliance upon it. So, for example, just before the collapse of the bank large sums were transferred from Iceland to an account in Luxembourg. This was relied upon by GT as a possible attempt to dishonestly remove funds from those entitled to them. But, there were other plausible innocent explanations for this transaction that the Judge had not been made aware of. This was because the SFO had simply not investigated those possibilities because it relied so heavily on the GT report. This aspect weighed heavily in the High Court's ultimate damning of the SFO.

Duty of Applicants

All the material relating to the grant of a warrant must be provided to the Judge. The case of the Texan cricket billionaire was a case in point when Hughes LJ said in re Stanford [2010] 1 WLR 941, 191

, that in presenting the case the advocate must;

...put his defence hat on and ask himself, what, if he was representing the defendant or a party with a relevant interest, he would say to the judge.

The Judge must be personally satisfied that there are proper grounds for suspicion and the application should never be a rubber-stamping exercise.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1

The Information relied, in part, upon RT's restructuring of certain loan obligations which, the SFO contended, showed a reasonable suspicion of dishonest conduct and therefore justified the grant of the search warrants on its own. The restructuring actually involved some complex arrangements between a trust, *off-shore companies and others but the SFO's version evidenced a clear* 'lack of understanding' by the investigator and at least one serious factual omission about a technical aspect of the arrangements. The Court found that it was a "*matter of great regret that the Information adopted the tone it exhibited and did not clearly explain the arrangements.*" (para 112). The effect was that the Information contained a 'serious defect' as it "*did not explain the reality of the position*" in respect of the relied upon restructuring (see para 120).

Other, even more recent case demonstrates how the higher Courts demand the highest standards for these ex- parte applications. For, example in the Van de Pijl case (see above) the High Court stressed the importance of the actual warrant – that provides lawfulness for entry and seizure. If it does not comply with the statutory requirements then, it follows, that the search and seizure are unlawful. In that case the application before the Judge contained the names of the suspects. However, the warrant itself did not, it just referred to 'suspects'. The warrant was quashed – s15(6)(b) of PACE requires "*so far as is practicable, the articles or persons to be sought*" -- it did not name the suspects, the warrant was quashed.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1

There
is
also
the
recent
case
of
Where
(Amend)
was
Revenue
Review
Customs
[2013]
Authorities
By
the
High
Court.
That
case
concerned
an
allegation
of
conspiracy
to
defraud
related
to

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1

film tax relief. A search warrant was executed on a company director's premises in relation to suspected tax evasion. The Court held that the warrant was too widely drawn and had failed to identify the articles or the offence for which the information was sought as is required by the safeguards under s15 of PACE.

Another recent case is illuminating:

R v (S, F, L) v Chief Constable of British Transport Police & Southwark Crown Court [2013] EWHC 2189 (Admin)

. That case concerned "excluded material" – i.e. material held in confidence such as journalistic material and "special procedure material" – this includes material held by legal professionals in confidence but which is not itself legally privileged. Warrants which may involve this sort of material have a slightly different test. In this case there was somewhat of a cut and paste approach to the application, despite the serious intrusion. All PACE applications require the applicant to show why "*other methods of obtaining the material have not been tried because it appeared they were bound to fail* ." This may seem fairly obvious – officers cannot always demand the material by a Court Production Order as the suspect may destroy the material. But the applicant has to say that. There must be some assertion of this as it is essential that the Judge is persuaded of all the elements of the test – the Judge said in the S,F,L case the assertion that other routes were 'bound to fail' "*would require the details of the facts relied on by the constable for that statement.*"

Conclusion

If pro-active defending is going to be a feature of your case then it maybe that the best place to start is a challenge to the search warrants – effectively this maybe a challenge to the investigation itself; it may simply not be possible, and it will certainly not be plain sailing if it is; but if a challenge is possible then it might, just might, steer you clear of that impending storm.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1

RAHMAN RAVELLI

Aziz Rahman is a Solicitor- Advocate and Partner at the leading Criminal Defence firm Rahman Ravelli Solicitors, specialising in Human Rights, Financial Crime and Large Scale Conspiracies/Serious crime. Rahman Ravelli are members of the Specialist Fraud Panel and have been ranked by Legal 500 as an 'excellent' firm with Aziz Rahman being described as 'first class and very experienced'. The firm is also ranked in Chambers & Partners.

in serious and complex criminal defence cases based at 23 Essex Street Chambers, London. He is a contributing author to Covert Human Intelligence Sources, (2008 Waterside Press) and is ranked by both Legal 500 Chambers & Ptnrs.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0)121 231 7025

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1