

Judicial Communications Office

20 December 2017

COURT FINDS HMRC SEARCH WARRANTS UNLAWFUL

Summary of Judgment

The Divisional Court, sitting today in Belfast, found that search warrants issued in respect of four former partners in KMPG were unlawful as the Statements of Complaint supporting the applications did not state the statutory provision under which the warrants were issued.

The application for judicial review was brought by four applicants: Eamonn Donaghy (“ED”); Jon D’Arcy (“JD”); Paul Hollway (“PH”); and Arthur O’Brien (“AOB”). All four applicants were previously partners in the accountancy firm KPMG. They were all also partners in a separate enterprise called Focused Finance Partnership (FFP).

Her Majesty’s Revenue and Customs (“HMRC”) conducted a civil inquiry into the tax affairs of the FFP partnership. It corresponded with the Nominated Partner of FFP, ED, over the course of 13 months from July 2013 until August 2014 in the context of that enquiry. The letters raised some questions and asked for various documents. ED replied to each letter. No further contact was made by HMRC until 25 November 2015, when it executed search warrants it had obtained without notice to the partners in FFP to enter and search their homes and workplace. In total two judges and one lay magistrate were involved in the granting of five search warrants given the location of the homes and the fact that one of the warrants related to business premises. In these proceedings, the applicants challenged the legality of the decisions of HMRC to seek warrants to enter and search the premises.

The legislation authorizing the issue of search warrants in Northern Ireland is the Police and Criminal Evidence (Northern Ireland) Order 1989. In addition to the statutory framework, the level of intrusion inherent in the execution of a search warrant is such that Article 8 of the European Convention on Human Rights (ECHR) is engaged. Interference with the applicants’ Article 8 rights has to be justified as necessary and proportionate. The search, seizure and retention of the applicant’s property and goods also constitutes an interference with their right to peaceful enjoyment of their possessions pursuant to Article 1 of the First Protocol of the ECHR.

Lord Justice Treacy, delivering the judgment of the Divisional Court, said the question at the core of this challenge was whether or not it was necessary for HMRC to apply for search warrants and, if so, whether it was appropriate for the judges to issue such warrants on the basis of incomplete and inaccurate Statements of Complaint (SOCs) which supported the warrant applications. The applicants asserted that it was not necessary because they were cooperating fully with HMRC on a voluntary basis and there was neither need nor justification for HMRC to seek the coercive tool of search warrants. The applicants further contended that HMRC actively misled the judges in the SOC they presented, so that the judges misapprehended the facts of the situation and were misled into issuing warrants which, on the true facts, ought never to have issued. Finally, the applicants alleged that the

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true motivation for HMRC's application for search warrants was to 'capitalize' on their civil investigation of 'high profile individuals' in order to gain publicity for their work.

Did the Applicants cooperate with HMRC?

The Court reviewed the correspondence and said it showed that 16 items of correspondence passed between the parties in the 13 months from 3/7/2013 to 11/8/2014 by which point the matter had been passed to the Fraud Investigation Service (FIS) for further work. Lord Justice Treacy said the replies sent by ED were timely and that he appended volumes of information to the responses he provided. In one letter dated 27/06/2014, ED explained that some materials that had previously been requested were not available. In its last letter of 11 August 2014 HMRC acknowledged receipt of ED's latest response and thanked him for 'providing a comprehensive and detailed response' to its last letter.

The applicants placed much emphasis on this letter, specifically on the fact that its existence and contents were not disclosed to the judges, and stated that it created the impression that HMRC believed the applicants were cooperating fully with the civil enquiry. Lord Justice Treacy, however, referred to other pieces of correspondence which he said made it clear that ED sometimes provided responses that were considered unclear, ambiguous, and/or irrelevant to HMRC's enquiries. He further stated that there were occasions when ED "simply denied the existence of correspondence" which HMRC expected would exist and had requested:

"Should the HMRC investigators have accepted this voluntary statement at face value? The information they sought would have shed light on a series of transfers of large sums of money between two legal entities in which all the applicants were involved. It would be normal business practice to have *some* accompanying paperwork for large transactions of this kind. ED simply asserts in his voluntary response to this enquiry that no paper trail ever existed. Experienced investigators into alleged tax fraud are highly unlikely to accept such an assertion at face value, nor is it in the public interest that they should do so. Moreover, they are also entitled to take account of this statement when forming their assessment of both the *completeness* and the *value* of the voluntary disclosures made by the applicants during the civil investigation."

Lord Justice Treacy said that a careful review of the correspondence suggested that while ED responded assiduously to every letter he received from HMRC, the content of his responses "may not have been as fulsome, as helpful, or as complete as the applicants assert. HMRC certainly felt these responses left room for a reasonable suspicion to develop to the effect that some materials might not have been disclosed under the voluntary process."

The applicants argued that HMRC decided to seek the warrants before it had completed the enquiries it ought to have undertaken by correspondence and other voluntary contact with the applicants and that there was no good reason to believe that the applicants would not voluntarily provide whatever information and documentation it properly required. The Court said it was clear that HMRC did not agree with this assessment and found that HMRC's evaluation of the materials supplied during the civil investigation was a tenable

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view which they were entitled to take on the basis of the materials before them. It dismissed the applicants claim that the decisions to seek the warrants were unreasonable, unnecessary and disproportionate and constituted an unlawful interference with their rights under Article 8 and Article 2 of Protocol 1 of the ECHR.

Were the judges misled by what HMRC said about the level of cooperation in the SOC's?

HMRC provided evidence that the SOC's were each sworn on oath by a HMRC investigator and set out the background to the application including: details of the tax returns received for FFP and the large sums of money that were declared as losses and in respect of which tax relief was sought; the backgrounds of each of the partners in FFP; the grounds for HMRC's suspicion that an indictable offence may have been committed; and a review of the materials received via the civil enquiry except for the last two letters sent and received within that context.

The SOC's for the residential search warrants included a comment which Lord Justice Treacy said clearly conveyed the impression that HMRC was not satisfied that full voluntary disclosure had been made by the applicants and that "that would appear to be a fair representation of its evaluation of the materials supplied during the civil investigation". The SOC for the search of the business premises also included the statement: "there has been limited cooperation with the four partners to date...." The judge said that again, this appeared to be a fair representation of HMRC's suspicions, founded upon a tenable evaluation of the underlying materials.

All five SOC's included the following inaccurate statement:

"The last correspondence from HMRC regarding this civil enquiry was June 2014, to date none of the partners have contacted HMRC to establish if the enquiry has been resolved."

Lord Justice Treacy noted that the first part of this statement is factually wrong as the last correspondence from HMRC was on 11 August but it is neither referred to nor appended to the SOC's. He also commented that the SOC omitted any reference to ED's letter of 27 June.

Were the judges materially misled by these omissions?

The test to be applied in such circumstances is whether the information which is alleged should have been given to the judge might reasonably have led him to refuse the warrant. The Court said this test needs to be applied in the context of the information given in the SOC as a whole. It noted that the SOC's set out the independent investigative steps HMRC took after June 2014 and summarized its evaluation of the evidence accumulated from all the materials gathered up to the date of the applications. The SOC's also reviewed a selection of the key points made in ED's disclosures which it has evaluated as being suspicious and concluded by specifying the offences which HMRC suspects may have been committed by the applicants. The documents expressed HMRC's belief that informing the applicants of the intention to seek a search warrant might prejudice an ongoing investigation.

Lord Justice Treacy said that, having reviewed the contents of all the correspondence, it was clear that the SOC's conveyed a *materially* accurate account of HMRC's evaluation of the

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information HMRC had gathered from the applicants during the civil investigation and materials it had gathered since by other means:

“Considering all the information presented in the SOC’s we find that the judges were justified in finding that the statutory grounds for issuing a search warrant had been satisfied in each case.”

The Court then considered whether there was there anything in the two undisclosed letters that might have changed this and led the judges to refuse the warrants? It held that neither of the two undisclosed letters had any content significant enough to cause any of the judges to refuse to issue warrants. For this reason the Court dismissed the applicants’ complaint that the application for the search warrants was made on the basis of incorrect and misleading information provided to the judges.

The final element in this part of the applicants’ case related to their contention that HMRC had an unlawful collateral purpose in making the warrant applications, namely that they were seeking publicity for their work. They alleged that the presence of this collateral purpose rendered the entire warrant application process *ultra vires* and infected it with bad faith. Lord Justice Treacy said that the basis upon which this argument was advanced was “highly speculative and based on a range of inferences drawn by the applicants”. He commented that the HMRC officers had set out their motivations on oath in affidavits which deny the existence of the alleged collateral purpose and that no application was made to cross examine anyone about this affidavit evidence. The Court dismissed this element of the applicants’ case.

Procedural Unfairness

The applicants claimed that the manner in which the warrant applications were made, and the manner in which the judges conducted the applications were procedurally unfair. The complaints focused upon the alleged absence of any evidence that essential procedural requirements took place such as the swearing in of the officers presenting the SOC’s, a concern that no-one took a note of the proceedings and that the only material placed before the judges was an SOC which was not retained by the judge or by the court clerk. The applicants complained that this left open the risk that documentation might be altered after the proceedings and that no one would be in a position to check a later document against the original.

Lord Justice Treacy stated that whilst such suspicions and theoretical possibilities may exist there was no evidence that anything of this kind actually took place. He referred to affidavit evidence which pointed to the conclusion that all the proceedings were conducted in a procedurally appropriate way and no application was made to cross-examine any of the deponents of these affidavits. The Court was not persuaded that procedural unfairness took place and dismissed this complaint. The Court emphasized the importance of carefully scrutinizing the case made in support of an application, keeping a proper record of the ex parte hearing and recording the reasons for the decision reached. Lord Justice Treacy stated that a failure to comply with this guidance will render a decision more vulnerable to attack.

Execution of the warrants

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This complaint alleged that the manner in which the warrants were executed was unreasonable. Lord Justice Treacy said the Court had looked at the evidence in relation to this which consisted of affidavit evidence from those involved in the searches and from those whose premises were searched. He said there were some conflicts in the evidence presented but that it was not appropriate for the court to seek to evaluate these conflicts in the context of a judicial review application. The Court dismissed this complaint.

Lawfulness of the warrants issued

The applicants initially made the claim that the SOCs failed to identify the statutory provision under which the warrant was sought. After the hearing of the case they applied to make a further amendment which claimed the warrants did not contain sufficient detail to allow anyone reading the contents, whether the recipient or one of the searchers, to know with sufficient specificity what was lawfully authorized under the terms of the warrant. All of the warrants referred to the 'alleged offenders' without naming them anywhere on the warrants, they referred to items 'which might link the alleged offenders to the offending' and without specificity to 'other items which are likely to be kept at the premises'.

Lord Justice Treacy said that that form of words constituted a breach of the requirement under the relevant legislation which requires that a warrant shall identify, so far as is practicable, "the articles or persons to be sought". He said that nowhere on the face of the residential warrants did it state who the 'alleged offenders' were, though this information was given in each of the SOCs. He further stated that the warrant for the search of the business premises failed to specify on its face what the suspected offences were. It also failed to name the 'alleged offenders' and included the catch all authority to search for 'other items which are likely to be kept at' the search address. The judge said it was clear the warrants were not sufficiently precise and limited to comply with the requirements of the legislation which seeks to restrict the authority to search, so that it only applies to items which are clearly linked to the suspected offences and the suspected offenders in that case.

Lord Justice Treacy, however, said there was no reason why the warrants should have contained this excessive scope of authority to search:

"The names of the offenders are all set out in the SOCs. They could easily have been transferred to the face of the warrants which HMRC drafted but that did not happen. Also, the judges either did not check for or did not notice these errors and as a result they all issued warrants that are unlawful under Art 17(6)(b) because they do not 'identify, so far as is practicable, the articles.... to be sought.' "

The other ground of complaint in respect of the legislation was that HMRC failed to state the statutory provision under which the warrant would be issued. In this case the statutory provision did appear on the faces of the draft residential warrants but not in the SOCs supporting the applications. Lord Justice Treacy said that for the avoidance of doubt, and in any future training given to HMRC or judges about the legal requirements for issuing valid search warrants, it would be best practice to include the statutory provision on **all** the documents presented during a warrant application. The Court accepted that the requirement to give reasons can be satisfied judges by signing a warrant on the basis of acceptance of the information contained in the supporting SOC. The reasons contained in

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that SOC may then become the reasons for the judge's decision. However, that decision and the reasons for it must also be adequately conveyed to the recipient of the warrant. Where, as here, the warrants omits an important piece of information then that warrant will fail to convey the judge's reasoning adequately.

Conclusion

The Divisional Court considered that the warrants issued in this case were unlawful as the SOCs failed to state the statutory provision under which the warrant was issued. It asked the parties to make representations on how this matter could be remedied.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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