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2016 No. 15285

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
DIVISIONAL COURT (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY EAMONN DONAGHY, JON D'ARCY, PAUL HOLLWAY & ARTHUR O'BRIEN FOR JUDICIAL REVIEW

and

IN THE MATTER OF APPLICATIONS BY HMRC FOR SEARCH WARRANTS AND THE DECISIONS TO GRANT THOSE SEARCH WARRANTS BY A LAY MAGISTRATE, DISTRICT JUDGE (MC) HAMILL, AND HIS HONOUR JUDGE MILLER QC

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Before: Gillen LJ, Weir LJ and Treacy J

TREACY LJ (delivering the judgment of the Court)

Introduction

[1] This application for Judicial Review is brought by four applicants namely Eamonn Donaghy Belfast; Jon D'Arcy Belfast; Paul Hollway Belfast; and Arthur O'Brien, Saintfield. All four applicants were previously partners in the accountancy firm, KPMG. They were all based in the Belfast office. In addition they were all also partners in a separate enterprise called Focused Finance Partnership ("FFP").

[2] 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, Eamonn Donaghy ("ED"), over the course of 13 months from July 2013 until August 2014 in the context of that enquiry. The correspondence raised some questions and asked for various documents. ED replied to each letter. On 27 June 2014 ED replied to a HMRC letter dated 7 June 2014. He provided some

documents with his response. On 11 August 2014 HMRC acknowledged receipt of this letter, thanked him for his 'detailed and comprehensive reply', and said it would revert to him after a pre-arranged period of leave by the investigating HMRC officer had elapsed.

[3] 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. Because the residential premises were situated in two separate court divisions they were heard by two different judges namely District Judge (MC) Hamill and a lay magistrate. Because the final warrant related to a business premises where items subject to legal privilege, excluded material or special procedure material might be present, it was sought in the County Court before His Honour Judge Miller QC. In total therefore three judges were involved in the granting of these five search warrants.

[4] This application concerns (i) the decisions by HMRC to seek warrants to search the applicants' homes and workplace, (ii) the means by which those warrants were obtained, (iii) the decisions by the judges and lay magistrate concerned ("the judges") to grant the warrants and (iv) the manner in which the warrants were executed.

Order 53 Statement

[5] Leave was granted on all grounds within the amended Order 53 Statement. The main reliefs sought by the applicants were:

(a) a declaration that the decisions of HMRC to seek warrants to enter and search the premises in question were unlawful;

(b) a declaration that the warrant applications by HMRC were made unlawfully;

(c) a declaration that the decisions of the judges to issue the warrants were unlawful;

(d) an order of certiorari to quash the warrants;

(e) a declaration that the warrants were executed unlawfully;

(f) an order of mandamus requiring HMRC to return all the material seized under the authority of the warrants.

[6] The principal grounds relied upon by the applicants in relation to HMRC's decision to seek search warrants are as follows:

(i) 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. There was no good reason to believe that the applicants would not voluntarily provide whatever information and documentation it properly required.

(ii) The application was made on the basis of incorrect and misleading information provided to the judges. In particular, HMRC failed to provide an accurate account of the correspondence, misinformed the judges about the correspondence and misled them into believing that the applicants had failed to respond to inquiries by HMRC and failed generally to cooperate with HMRC, with the result that the judges misapprehended the relevant facts.

(iii) Contrary to Article 17 of PACE, the Statements of Complaint ("SOCs") failed to identify the statutory provision under which the warrant was sought.

(iv) The decisions to seek the warrants were *Wednesbury* unreasonable and the manner in which the applications were made was procedurally unfair.

(v) The manner in which the warrants were executed was *Wednesbury* unreasonable.

(vi) The decisions to seek the warrants and the manner in which they were executed were unnecessary and disproportionate and constituted an unlawful interference with the applicants' rights under Article 8 and Article 2 of Protocol 1 of the ECHR.

In relation to the issue of the warrants by the judges the principal grounds relied upon are:

(vii) The decisions to issue the warrants were *Wednesbury* unreasonable and the manner in which the applications were conducted was procedurally unfair.

(viii) The warrants were unnecessary and disproportionate and the decisions to issue them constituted an unlawful interference with the applicants' rights under Article 8 and Article 2 of Protocol 1 of the ECHR.

(ix) The judges have failed to provide adequate reasons for their decisions.

Statutory Framework

[7] The legislation authorising the issue of warrants in Northern Ireland is the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the Order").

Four of these warrants were sought under Art 10 of the Order which, insofar as is relevant, provides as follows:

> "*Power of justice of the peace to authorise entry and search of premises*
>
> 10.—(1) If on an application made by a constable a justice of the peace[1] is satisfied that there are reasonable grounds for believing—
>
> (a) that an indictable offence has been committed; and
>
> (b) that there is material on premises mentioned in paragraph (1A) which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and
>
> (c) that the material is likely to be relevant evidence; and
>
> (d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and
>
> (e) that any of the conditions specified in paragraph (3) applies in relation to each set of premises specified in the application,
>
> he may issue a warrant authorising a constable to enter and search the premises.
>
> (1A) The premises referred to in paragraph (1)(b) are—
>
> (a) one or more sets of premises specified in the application ..'
>
> (3) The conditions mentioned in paragraph (1)(e) are—
>
> (a) that it is not practicable to communicate with any person entitled to grant entry to the premises;
>
> ……

[1] Now 'lay magistrate' by virtue of section 10 the Justice (Northern Ireland) Act 2002

(c) that entry to the premises will not be granted unless a warrant is produced;

(d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them."

[8] In the case of the search of the applicants' place of work it was believed that the evidence sought there might include items subject to legal privilege, excluded material or special procedure materials, therefore the application was brought using the procedure set out in Art 11 of the Order. Insofar as relevant Art 11 provides:

> "11.—(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 and in accordance with that Schedule. "

[9] Schedule 1 provides that such applications must be made before a County Court Judge who may grant the application if satisfied that the relevant access conditions have been complied with. The relevant access conditions under Schedule 1 are that:

> "(a) there are reasonable grounds for believing—
>
> (i) that an indictable offence has been committed;
>
> (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application ……
>
> (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and
>
> (iv) that the material is likely to be relevant evidence;
>
> (b) other methods of obtaining the material—
>
> (i) have been tried without success; or
>
> (ii) have not been tried because it appeared that they were bound to fail; and
>
> (c) it is in the public interest, having regard—

(i) to the benefit likely to accrue to the investigation if the material is obtained; and

(ii) to the circumstances under which the person in possession of the material holds it,

that the material should be produced or that access to it should be given."

Search warrants—statutory safeguards

"17.—(1) This Article and Article 18 have effect in relation to the issue to constables under any statutory provision, including a statutory provision passed or made after the making of this Order, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless the warrant complies with this Article and is executed in accordance with Article 18.

(2) Where a constable applies for any such warrant, it shall be his duty—

(a) to state—

(i) the ground on which he makes the application;

(ii) the statutory provision under which the warrant would be issued;

…

(c) to identify, so far as is practicable, the articles or persons to be sought.

…

(3) An application for such a warrant shall be supported by a complaint in writing and substantiated on oath.

(4) The constable shall answer any question that the justice of the peace or judge hearing the application asks him.

…

(6) A warrant—

(a) shall specify—

(i) the name of the person who applies for it;

(ii) the date on which it is issued;

(iii) the statutory provision under which it is issued; and

(b) shall identify, so far as is practicable, the articles or persons to be sought.

(7) Two copies shall be made of a warrant which specifies only one set of premises and does not authorise multiple entries....

(8) The copies shall be clearly certified as copies by the justice of the peace or judge who issues the warrant."

Article 8 ECHR & Article 1 of The First Protocol

[10] In addition to the statutory framework with its built-in safeguards it is clear that Article 8 ECHR & Article 1 of The First Protocol apply in this case. 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 inevitably engaged. The *prima facie* interference with the applicants' Article 8 rights has to be justified under Article 8(2) as necessary and proportionate.

[11] Lord Woolf CJ in R (Cronin) v Sheffield Justices [2002] EWHC 2568 (Admin) (paras19-20) explained the key principles in relation to Article 8 by reference to the judgment of the European Court in Funke v France (1993) 16 EHRR 297:

> "Any search of premises made without the consent of the occupier will automatically be an interference with article 8(1). If it is to be compatible with article 8, it will be necessary for it to be shown that it falls within article 8(2). For that to be the case … (the)… interference must be in accordance with the law; there must be a legitimate aim and it must be proportional."

[12] The search, seizure and retention of the Applicant's property and goods also constitutes an interference with his right to peaceful enjoyment of his possessions pursuant to Article 1 of the First Protocol of the European Convention, which states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or

to secure the payment of taxes or other contributions or penalties."

Discussion

[13] The question at the core of this challenge is whether or not it was **necessary** for HMRC to apply for search warrants in this case and, if so, whether it was appropriate for the judges to issue such warrants on the basis of the incomplete and inaccurate SOCs which supported the warrant applications. The applicants assert that it was not necessary because they were cooperating fully with HMRC on a voluntary basis so there was neither need nor justification for HMRC to seek the coercive tool of search warrants in their case. Moreover the applicants claim that in order to justify the warrant applications HMRC actively misled the judges in the SOCs 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, in this part of the complaint, the applicants allege that the 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. It is alleged that this collateral purpose rendered the whole application process ultra vires of its true statutory purpose. The entire search warrant operation therefore became unlawful and was infected with bad faith.

[14] These three major aspects of this challenge are all interrelated in that they all turn upon an evaluation of the level of cooperation which existed between the applicants and HMRC and the reasons for HMRC's decision to seek search warrants. For this reason I will deal with these three elements of the claim together.

Did the applicants cooperate with HMRC?

[15] A review of the correspondence shows 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. Throughout the process the replies sent by ED were timely, being sent, at most, a matter of weeks from the date on which HMRC's request for information was received. It is also clear that ED did append volumes of information to the responses he provided.

[16] His responses included a letter dated 27/06/2014 which:

(a) Explains that some materials that had previously been requested are still not available;
(b) Gives the date on which FFP's bank account was opened and encloses a copy of its initial bank statement;
(c) Provides a written account of how one loan to a specific

company had performed.

[17] In terms of the content of the responses and the *quality* of the co-operation given, two matters are relevant. First HMRC made some specific comments about this. 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.

[18] The applicants place so much emphasis on this letter, (specifically on the fact that its existence and contents were not disclosed to the judges), that it is reproduced in full below. The emphasis is added by the applicants.

> "I confirm receipt of your letter and enclosures of the 27th June 2014 and **very much regret** that I am **again** writing to you to **apologise** for **delay on my part**. **I am grateful to you for providing a comprehensive and detailed response to my last letter.**
>
> Unfortunately a further period of unexpected absence from the office on my part is now followed by planned leave, meaning there will be yet **further delay** before I can get back to you. I am sorry for any inconvenience that this may cause, but will aim to let you have a reply by mid-September 2014**."**

[19] Clearly this piece of correspondence creates the impression that HMRC believed the applicants were cooperating fully with the civil enquiry. However, other pieces of correspondence also include comments on the nature of the cooperation received. For example:

- letter dated 14/1/2013 [*sic* - in fact the year was 2014 and the date shown was incorrect] says:

  > 'Whilst noting your explanations ... I am still unclear ...' It then seeks copies of further information 'in order to remove any ambiguity ...'

- A letter dated 11/4/2014 says:

  > 'it seems the response you have provided in relation to the … letter of 25 February 2014 is not understood. What was actually being sought was [copies of clearly specified bank accounts] ...

> **Unfortunately those account statements you have kindly provided do not appear to assist at all in this regard."** [Emphasis added]

[20] From these comments it is clear the ED sometimes provided responses that were considered unclear, ambiguous, and/or irrelevant to HMRC's enquiries.

[21] In addition there were occasions when ED simply denied the existence of correspondence which HMRC expected would exist and had requested. For example:

- a letter dated 13/3/2014 responding to a request for copy correspondence between two companies in both of which the applicants were involved stated baldly:

> '**There has been no correspondence between FFP and Jeap Ltd in relation to the loans.**' [Emphasis added].

[22] 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.

[23] 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.

[24] A careful review of the correspondence suggests 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.

[25] The applicants have 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. **There was no good reason to believe that the applicants would not voluntarily provide whatever information and documentation it properly required".** [Emphasis added]

[26] In light of its subsequent actions it is clear that HMRC did not agree with this assessment. Having reviewed the contents of all the correspondence and the other underlying materials we find that HMRC's evaluation of the materials supplied during the civil investigation was a tenable view which they were entitled to take on the basis of the materials before them. For this reason we dismiss the argument set out above and also the applicants' related claim that:

> (v) 'The decisions to seek the warrants were Wednesbury unreasonable…'
>
> and
>
> (iv) 'The decisions to seek the warrants…. were unnecessary and disproportionate and constituted an unlawful interference with the applicants' rights under Article 8 and Article 2 of Protocol 1 of the ECHR.'

[27] The next question we must consider is: **Were the judges misled by what HMRC said about the level of cooperation in the SOCs?**

[28] All the SOCs are comprehensive documents running to some 12 pages in length. The unchallenged affidavit evidence is that they were each sworn on oath by a HMRC investigator. The SOCs for all the residential warrants are identical and there are some small differences in the SOC grounding the warrant to search the business premises. All five SOCs 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;
- A review of the materials received *via* the civil enquiry EXCEPT for the last two letters sent and received within that context.

[29] The review of the civil enquiry includes the following statement in all the SOCs:

> "Mr Eamonn Donaghy responded to each letter from HMRC issued to him on behalf of FFP and also provided loan agreements, bank statements and financial statements in relation to relevant companies. In a letter dated 13/03/2014 Mr Donaghy said that there was no

> correspondence between FFP and Jeap Ltd in relation to the loans."

[30] This paragraph clearly conveys the impression that HMRC was not satisfied that full voluntary disclosure had been made by the applicants and, as noted in the previous section of this judgment, that would appear to be a fair representation of its evaluation of the materials supplied during the civil investigation.

[31] The SOC for the business premises also includes the statement:

> "there has been limited cooperation with the four partners to date…."

Again, this appears to be a fair representation of HMRC's suspicions, founded upon a tenable evaluation of the underlying materials.

[32] All five SOCs also include the following inaccurate statement as para 2.11:

> "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."

[33] The first part of this statement is factually wrong. The last correspondence from HMRC which bears upon the civil enquiry is the letter of 11 August reproduced in full above. That letter is neither referred to nor appended to the SOCs. Para 2.11 also omits any reference to ED's letter of 27 June the contents of which are summarised above at para [16].

Were the judges materially misled by these omissions?

[34] The test to be applied in such circumstances is set out in the case of R (Dulai) v Chelmsford Magistrates Court [2013] 1WLR 220 at [45] in the following terms:

> "the question for this court in judicial review proceedings is whether the information which is alleged should have been given to the Magistrate might reasonably have led him to refuse the warrant."

[35] This test needs to be applied in the context of the information given in the SOC as a whole. The present SOCs continue for some four pages after para 2.11. In these pages HMRC sets out the independent investigative steps it took after June 2014 and summarizes its evaluation of the evidence accumulated from all the materials gathered up to the date of the applications. It also reviews again a selection of the key points made in ED's disclosures which it has evaluated as being suspicious. It concludes by specifying the offences which it suspects may have been

committed by the applicants. It expresses its belief that informing the applicants of the intention to seek a search warrant might prejudice an ongoing investigation.

[36] Having reviewed the contents of all the correspondence it is clear that the SOCs convey a *materially* accurate account of HMRCs evaluation of the information it had gathered from the applicants during the civil investigation and materials it had gathered since by other means.

[37] Considering all the information presented in the SOCs we find that the judges were justified in finding that the statutory grounds for issuing a search warrant had been satisfied in each case: *i.e.* the conditions contained in Art 10(i) in the case of the residential warrants and in Art 11 and Schedule 1 in the case of the warrant for the business premises.

[38] Was there anything in the two undisclosed letters that might have changed this, that might reasonably have led the judges to refuse the warrants? Considering first the letter of 27/06/2014 set out above, the most relevant piece of information in that letter is the date upon which FFP opened its own bank account. That date was later than might have been expected and, if anything, the disclosure of the actual date of opening of the account might only have strengthened some of the suspicions of HMRC. We consider that the applicants were not prejudiced in any way by the omission of this information from the SOCs. In relation to the final letter of 11 August, this was essentially a polite holding letter which contained no factual material relevant to the key decision the judges needed to make. Overall we consider that neither of the two undisclosed letters had any content significant enough to cause any of the judges to refuse to issue warrants.

[39] For this reason we dismiss the applicants' complaint that:

> (ii) The application was made on the basis of incorrect and misleading information provided to the judges. In particular, HMRC failed to provide an accurate account of the correspondence, misinformed the judges about the correspondence and misled them into believing that the applicants had failed to respond to inquiries by HMRC and failed generally to cooperate with HMRC, with the result that the judges misapprehended the relevant facts.

[40] The final element in this part of the applicants' case relates to their contention that HMRC had an unlawful collateral purpose in making the warrant applications, namely that they were seeking publicity for their work. It is alleged that the presence of this collateral purpose rendered the entire warrant application process *ultra vires* and infected it with bad faith.

[41] The basis upon which the above argument is advanced is highly speculative and based on a range of inferences drawn by the applicants. The HMRC officers

implicated in this 'bad faith exercise' have set out their motivations on oath in affidavits which deny the existence of the alleged collateral purpose. No application was made to cross examine anyone about this affidavit evidence. Accordingly, we accept this evidence and dismiss this element of the applicants' case.

[42] Of the applicant's claims against HMRC we dismiss the following: [6](i), and (ii). In relation to both HMRC and the judges we dismiss the claim set out at [6](x) and (xiii) that their decisions to seek and to issue warrants was *Wednesbury* unreasonable. What remains of the applicants' case now falls into three categories:

- Claims that the way in which the applications were made and were heard was procedurally unfair;

- Claims that the manner in which the warrants were executed was *Wednesbury* unreasonable and that it was unnecessary and disproportionate and constituted an unlawful interference with the applicants' rights under the ECHR and the First Protocol;

- Claims related to the lawfulness of the particular warrants issued namely that:

    - Their contents contravened Art 17 of PACE;

    - They were unnecessary and disproportionate and that the decision to issue them constituted an unlawful interference with the applicants' convention rights;

    - The judges failed to give adequate reasons for the issue of these warrants.

We will deal with each of these remaining arguments in turn.

Procedural Unfairness

[43] In relation to HMRC it is alleged that:

> "The ……manner in which the [warrant] applications were made was procedurally unfair."

[44] In relation to the judges it is alleged that:

> "The manner in which the applications were conducted was procedurally unfair".

[45] These complaints focus upon the alleged absence of any evidence that essential procedural requirements such as the swearing in of the officers presenting the SOCs did take place in these cases. Also there is 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 clerk of the court. The applicants complain that this leaves 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.

[46] Whilst such suspicions and theoretical possibilities may exist there is no evidence in this case that anything of this kind actually took place. Indeed, there is affidavit evidence which points 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. Accordingly, we are not persuaded that procedural unfairness in fact took place and therefore we dismiss this complaint. However, it is clear that the case made in support of the application should be carefully scrutinized, a proper record of the *ex parte* hearing should be kept and the reasons for the decision should also be recorded. A failure to comply with this guidance will render a decision more vulnerable to attack. Compliance also ensures that the decision maker properly, judicially and demonstrably addresses the issues in play particularly since the outcome will often entail judicially authorised coercive measures engaging the fundamental rights of citizens.

Execution of the warrants

[47] This complaint alleges that: 'The manner in which the warrants were executed was *Wednesbury* unreasonable.' We have looked at the evidence in relation to this which consists of affidavit evidence from those involved in the searches and from those whose premises were searched. There are some conflicts in the evidence presented and it is not appropriate for this court to seek to evaluate these conflicts in the context of a judicial review application. We therefore dismiss this complaint on the grounds that it is not a suitable issue for this court and that the parties have alternative and better equipped methods of redress open to them in relation to the matter of execution of warrants.

Lawfulness of the warrants issued

[48] The applicants made the initial claim that:

> (iii) Contrary to Article 17 of PACE, the Statements of Complaint (SOCs) failed to identify the statutory provision under which the warrant was sought.

After the hearing of this case, and in light of the publication of a recent Divisional Court decision in *Re O'Neill JR* [2017] NIQB 37 on a similar point, the applicants applied to make a further amendment to their Order 53 Statement which claimed:

> "The warrants are in breach of Art 17 of PACE which requires them to contain sufficient detail to allow anyone

> reading the contents, whether the recipient or one of the searchers, to know with sufficient specificity what is lawfully authorized under the terms of the warrant. In this case all of the warrants refer to the 'alleged offenders' without naming them anywhere on the warrants, they refer to items 'which might link the alleged offenders to the offending' and they refer without specificity to 'other items which are likely to be kept at the premises'. That form of words constitutes a breach of the requirement under Art 17 of PACE, as per the judgement of the Divisional Court in Martin O'Neill's application for judicial review in which judgement was delivered on 30th May 2017. HMRC failed to draft the warrant correctly and the judges and lay magistrate each approved an unlawful warrant."

[49] The respondent has had the opportunity to reply to this application to amend and has submitted substantive arguments in reply, and, having considered all the relevant material, we have decided to accept the amendment and deal with the substantive points it raises. We shall treat the above additional ground as a claim that the warrants issued fail to comply with Art 17(6)(b) of PACE.

[50] Art 17(6)(b) requires that a warrant:

> "(b) shall identify, so far as is practicable, the articles or persons to be sought."

[51] All the residential warrants in the present case state that the relevant judge is satisfied that there are reasonable grounds to believe that an indictable offence has been committed and they each set out the suspected offences on the face of the warrant.

[52] The next section of each of these warrants then seeks to set out the material that may be searched for in order to enable the investigators to confirm or dispel these reasonable suspicions. Each warrant explains that the target material is that which 'may link the alleged offenders to the offences for the period from 1/1/2005 to the present in relation to a series of named companies'. Nowhere on the face of the **warrant** does it specify who these 'alleged offenders' are. We know from the SOCs that some of the linked companies named in the warrant comprise the four suspects whose names also appear in the SOCs. However, we also know that some of the linked companies comprise persons who are **not** named as alleged offenders within the complaints. The paragraph dealing with what the materials targeted in the search will be provides no means for the recipient of the warrant to know what materials related to the named companies they must relinquish because they are linked to alleged offenders, and which materials linked to those companies they are entitled to hold back because they relate to a person who is not an alleged offender. Because the warrants fail to name the alleged offenders they make it impossible for the warrant recipients to know which materials fall within the authority to search

and which fall outside that authority. This defect means the warrants fail to satisfy Art 17(6)(b) because they fail to 'identify, so far as is practicable, the articles ….. to be sought."

[53] The warrant for the search of the business premises fails to specify on its face **both** who the suspected offenders are, **and** what the offences themselves are. It gives the warrant recipient even less material upon which he/she might judge what lies within the search authority and what lies outside it and for this reason it also fails to comply with Art 17(6)(b).

[54] In addition to the above defects all five of the warrants in this case state that the investigators may also search for "other items which are likely to be kept" at the target address. The warrants do not require that these 'other items' must be linked to the alleged offences or the suspected offenders. It is clear that warrants drafted with such a broad catch-all phrase must breach Art 17(6)(b) as this phrase actively undermines all attempts to delimit and make clear the scope of the authority to search. For this reason too we find that all these warrants fail to comply with the requirements of Art 17(6)(b) and are therefore unlawful SOCs.

[55] In the present cases there is no reason why the warrants issued 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.'

[56] The other ground of complaint under Art 17 is that HMRC has failed to comply with Art 17(2)(a)(ii) which states:

> "(2) Where a constable applies for any such warrant, it shall be his duty—
>
> (a) to state—
>
> …
>
> (ii) the statutory provision under which the warrant would be issued;
>
> …"

[57] The applicants interpret this to mean that the HMRC officer applying for the warrant must state the relevant statutory provision in the SOC he presents. In the present cases the statutory provision did appear on the faces of the draft residential warrants but not in the SOCs supporting the applications. 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.

[58] It follows from the finding that the warrants failed to comply with Art 17(6) that they also failed to provide adequate reasons for their decisions to grant

warrants. We accept, on the authority of Cronin v Sheffield Justices [2002] EWHC 2568 Admin, 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 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.

[59] For the above reasons we consider that the warrants issued in the present case were unlawful. We now invite the parties to address us on the subject of remedies.