

A – and- Her Majesty’s Revenue & Customs (“HMRC”) : Challenge, the lawfulness of a search warrant issued by HMRC in the HIGH COURT OF JUSTICE -

Rubber –Stamping Process

Following the High Court decision in *Rawlinson & Hunter Trustees SA v Central Criminal Court* [2012] EWHC 2254 (Admin) which concerned the Serious Fraud Office’s ill fated decision to execute search warrants against the Tchenguiz brothers, search warrants and the ability to challenge them have been very much in the news.

The High Court has shown an increasing willingness to intervene in improperly issued search warrants in recent years. It can quash warrants, order return of documents seized, order damages and costs.

As Mr Justice Underhill said in *R (Mercury Tax Group Limited v HMRC* [2008] EWHC 2721 (Admin):

“The authorities repeatedly emphasise that the approval of a judge to the issue of search warrants – which unless properly justified represent a gross intrusion on civil liberties - cannot be a rubber stamp: it is his duty to subject the information put before him to jealous scrutiny”

There has until recently been some confusion, however, over whether the information required to comply with the safeguards under section 15 of the Police and Criminal Evidence Act 1984 (PACE) needs to be contained in full within the warrant or if it is sufficient that the issuing court was satisfied as to what was being sought by the investigators and / or that this was explained to the suspect by the officers executing the search warrant.

On the face of it, section 15 of PACE does not require much information to be included within the warrant. The requirement is that the warrant identifies “so far as is practicable” the person or material sought. There is no requirement under the Act to state the name of the suspect, his business or even the offence under investigation. The question of what is practicable will depend upon the nature of the investigation and the type of material being sought. The police will often not know in advance what (or who) is likely to be lurking under the bed. Understandably, those applying for warrants will not want to make a rod for their own backs by stating too tightly in advance that which they are seeking. This tension often leads to challenges of warrants.

What degree of precision is required within the warrant? In *R (Energy Financing Ltd v Bow Street Magistrates Court* [2006] 1 W.L.R 1316 Mr Justice Underhill said:

A warrant [under Section 2 CJA 1987] needs to be drafted with sufficient precision to enable both those who execute it and those whose property is affected by it to know whether any individual document or class of documents fall within it.

This did not sit comfortably, however, with the earlier observations of Lord Justice Rose in *R (Fitzpatrick) v Chief Constable of Warwickshire* [1999] 1 WLR 564 in which the court refused to quash a warrant which contained quite general information about what was being sought. The court held that it was sufficient that the officers conducting the search were able to explain to the occupant what it was that they were entitled to seize. For instance, where the warrant authorised seizure of "records relating to the stated offence" the court held that the warrant would comply with PACE as the occupant could ask "what stated offence?" The answer from the searching officer would leave those at the scene in no doubt as to what was being sought.

Applying the decision in *Fitzpatrick* begs the question what if nobody was not present at the time of the search; or if for example only a landlord or cleaner was at home when the officers arrive?

Some clarification on this point has been provided in a recent case in which we acted on behalf of the Claimant. In this case a number of warrants were issued by the court allowing HMRC to search a number of premises and for a wide range of material. One warrant related to our client.

The warrant contained some information as to what HMRC were entitled to seize but did not on its face explain what the business under investigation was, who the suspects were, what the investigation concerned or quite what documents were being sought; other than for example "*banking records relevant to the offence under investigation*". We brought a claim for judicial review and were granted permission to challenge the warrant.

The court rejected the argument deployed by HMRC that the warrant could be remedied by reliance upon information provided to the Magistrates, information given to the officers in a briefing before the search, and explanations provided to the suspect at the scene. The court disapproved the reasoning in *Fitzpatrick* and endorsed our interpretation of the law that the warrant itself must explain both to those executing it and the occupants what is within and outside its terms.

The court also expressed concern that HMRC had made no notes of what was said at the *ex parte* hearing and that no reasons were given or recorded by the Magistrates.

The warrant was declared to be unlawful and quashed, costs were awarded to the Claimant. HMRC had agreed to return the originals shortly before the hearing.

It is clear following this judicial review that those who apply for and issue warrants in future must set out what they are entitled to seize within the warrant so both the suspect and those executing the warrant can understand from the document itself what can and cannot be taken. It is also now clear that even in cases smaller and more straightforward than (for example) *Tchenguz*, a proper note of what is said at the *ex parte* hearing must be kept and reasons noted by the issuing court. Failure to comply with the safeguards under section 15 will lead to warrants being quashed and in an appropriate case the return of the material and or damages and costs.

**IN THE HIGH COURT OF JUSTICE
LORD JUSTICE PITCHFORD and MR JUSTICE FOSKETT**

**Monty Jivraj of Jeffrey Green Russell Solicitors acted for the Claimant
instructing Helen Malcolm QC and Matthew Butt of 3 Raymond Buildings.**

**HMRC solicitor's office acted for the Defendant instructing Andrew Bird of
5 St Andrew's Hill.**