JUDICIARY OF
ENGLAND AND WALES

Rawlinson & Hunter Trustees SA and others v Central Criminal Court

Tchenguiz v Director of Serious Fraud Office and others

High Court (Divisional Court)

31 July 2012

SUMMARY TO ASSIST THE MEDIA

The High Court (Sir John Thomas, President of the Queen's Bench Division, and Mr Justice Silber) has today declared that search warrants issued to the Serious Fraud Office were unlawful as they were obtained by misrepresentation and non-disclosure to the judge.

Introduction

"In these two sets of proceedings two well-known businessmen, Robert Tchenguiz (RT) and Vincent Tchenguiz (VT) and the companies and trusts through which their businesses are carried on, seek to set aside search warrants issued under s.2(4) of the Criminal Justice Act 1987 by His Honour Judge Paul Worsley QC at the Central Criminal Court. They do so on the basis that the warrants were procured by the misrepresentation and non-disclosure of the Serious Fraud Office in the written presentation made to the judge known as the Information and in the oral evidence of the case manager. Challenges are also made to the manner in which the warrants were executed and to the arrest of RT." (paras 1 - 4)

The factual background

The factual background to the case is set out in paragraphs 5 – 71.

Issues in the case

The issues before the court are considered under the following seven headings:

1. Non disclosure and misrepresentation in the Information and evidence given to the judge on the application for search warrants.
2. The failure of the judge to give reasons.
3. The lawfulness of the arrest of Robert Tchenquiz
4. Bail.
5. The conduct of the search in relation to privileged documents.
6. The "here and now" notice.
7. Consequential relief. (para 72)

Issue 1: Non-disclosure and misrepresentation in the information and evidence given to the Judge on the application for search warrants

This is discussed is detail at paragraphs 73 – 201.

In relation to Robert Tchenquiz and R20 Ltd, the Court concluded:

"We regret to conclude that the Information did not properly present the transactions where criminality was suspected in the context of the financial markets in which they were undertaken. The background was straightforward, but it was never explained. The case that was made on the specific transactions was not in the respects we have identified accurately set out; it failed in the respects we have identified fairly to draw to the attention of the judge the points that weighed against the granting of the warrants." (para 170)

"The failure to set out the background, lack of clarity in the presentation in the Information and in the oral evidence, the errors made and the failure to put the matters that weighed against the granting of the warrant have been set out by us in detail. At the hearing before the judge, the oral evidence given at the hearing was both unfair and inaccurate. The tone of that evidence was unjustified. We have no doubt that, if what was in the Information had been presented in such a way that the background was properly explained, the errors were corrected and the matters that weighed against the grant of the warrant had been drawn to the judge's attention, it would have made a real difference and he would not have granted the warrants. This is very far from the case where the failures only might have made a difference; they plainly did, as the warrants would not have been granted." (para 175)

"… it is apparent from what we have set out after a detailed examination of the materials over three days in court and a study thereafter of the evidence presented to us that a case of reasonable suspicion might have been advanced and presented by the SFO to the judge, at least in relation to the making of the Oscatello loan facility and associated arrangements (see paragraph 124 above) and the Money Market loans (see paragraph 136). This would have been a task that did not require corrections or additions by way of disclosure, but it would have required starting again and putting the presentation in a coherent, fair and analytical manner. Whether there was or is such a case of reasonable suspicion, if a case had been made in that way, would then have been for the judge to determine.

"Although we consider such a case might have been made, we cannot accept the submission that it would be just to refuse to quash the decision of the judge. What we would be doing would be permitting the SFO in effect to justify what it had done by adopting a proper and analytical approach in this court and doing what it had manifestly failed to do when it went to Judge Worsley." (paras 176 - 177)

Sir John Thomas went on to add:

"In any event, as Lord Macdonald correctly submitted, as we have set out at paragraph 76, the merits of the investigation and continuing the investigation are not an issue in these proceedings. It is very important that proceedings of this kind are confined to the issues that strictly arise and are not utilised as a means of indirectly seeking the court's view on an investigation. The question whether matters should be investigated is under our constitution the responsibility of the investigating and prosecuting authorities; the role of the courts is strictly limited. There would be highly undesirable consequences if it were otherwise." (para 178)

In relation to Vincent Tchenquiz, the Court concluded:

"As we have already stated the SFO accepted that the warrants should be quashed. There can be no doubt that this concession was right. It was apposite that in the light of the publicity given to the issue of the warrants that those acting on behalf of Vincent Tchenquiz and Consensus were able publicly to set out the nature and extent of the errors made by the SFO." (para 201)

Issue 2: The Judge's failure to give reasons

This is discussed is detail at paragraphs 202 – 208.

Sir John Thomas, on behalf of the Court said:

"It is regrettable that the giving of reasons is not seen as a matter of course and that this court has repeatedly had to give reminders …." (para 207)

But he went on to conclude:

"It was submitted by Rawlinson and Hunter that the judge's failure to give reasons was indicative of a failure by him to scrutinise the application and to enquire why the warrants were needed. We do not accept that this can amount to an independent ground of criticism. The presentation to the judge was so deficient for the reasons we have given that no purpose would be gained by examining how the judge should have dealt with the application in his reasons and whether, if he had done so, that would have shown he had not given appropriate scrutiny to the applications." (para 208)

Issue 3: The lawfulness of the arrest of Robert Tchenquiz

This is discussed is detail at paragraphs 209 – 247.

Sir John Thomas, on behalf of the Court concluded:

"We have therefore come to the clear conclusion that the necessity test was amply made out and so we reject the challenges to the arrest." (para 247)

Issue 4: Bail

This is discussed is detail at paragraphs 248 - 252.

"The case for Robert Tchenquiz was that first the decision to release him on bail was not necessary, proportionate or justified and the facts upon which the risks of absconding were based were inaccurate. In consequence it is said that the bail decision was flawed." (para 248)

Sir John Thomas, on behalf of the Court, concluded:

"Our clear conclusion is that the decision made by the custody officer was one that he was entitled to reach. We cannot therefore accept Lord Macdonald's submissions as reliance could be placed by the police officers on the information and direction given by the SFO, who had carried out detailed investigations and on whom the officers were entitled to rely." (para 252)

Issue 5: The conduct of the search

This is discussed is detail at paragraphs 253 - 267.

"Mr Hugo Keith QC on behalf of Rawlinson & Hunter, Consensus and the TFT companies challenged the way in which the SFO conducted the search as regards their treatment of privileged documents. He contended that the warrants should be quashed because the policy of the SFO as regards searching for privileged material was unlawful and because the manner of the searches exceeded their lawful purpose." (para 253)

Sir John Thomas, on behalf of the Court, concluded:

"However five of the six lawyers sent to the premises of Consensus were not independent. The five were employees of the SFO; only one was independent as that lawyer was a barrister in independent practice. It is clear that in civil search orders, the independent lawyer has to come from a different firm: see CPR 25A.7.6. We do not see how the position in a criminal case can be different. The lawyer must be and be seen to be independent of the SFO; an employee of the SFO is not independent.

"In our view, the policy of the SFO in using its own lawyers was misconceived, though it was, no doubt, adopted because of the lack of resources available to the SFO. How serious the consequences were in the circumstances of this case can only be determined by the evidence that will be heard on the conduct of the search." (paras 266 – 267)

Issue 6: The 'Here and Now' Notice

This is discussed is detail at paragraphs 268 - 284.

On this issue the Court concluded:

"It is undesirable as the new Director had discontinued the investigation and the point is moot. In any event, as we have explained at paragraphs 195-197, we do not know why Grant Thornton put forward the contentions in relation to the valuation by Oliver Wyman nor do we know the reasons why it is said there was a lack of due diligence by Kaupthing. In the absence of that, we do not have the material on which we could have formed any meaningful view. Even if we had, as we have pointed out at paragraph 178, the court should not, unless it is specifically required to do so (as it would be if s.59 was a live issue), express views on whether matters should be the subject of investigation." (para 284)

Issue 7: Consequential relief

The issue of consequential claims is discussed in paragraphs 285 – 291.

"The claimants sought a declaration that the warrants and searches and seizures consequent upon them were unlawful; they relied on decisions to the effect that this was relief that could be granted. Their entitlement to a declaration was accepted by the SFO." (para 286)

"It was common ground that this court should transfer the action to the ordinary list of the Queen's Bench Division under CPR Part 54.20 for the issues of causation and damages, including exemplary and aggravated damages, to be determined by a judge of the Division." (para 288)

Postscript

In a postscript (paragraphs 292 – 294), Sir John Thomas, on behalf of the Court said:

"In our view, there is a more important lesson to be learnt which in fairness to the then Director of the SFO we must make clear. **The investigation and prosecution of serious fraud in the financial markets requires proper resources, both human and financial. It is quite clear that the SFO did not have such resources in the present case**:

i) A fundamental error was a failure to set out the commercial background to the events. The identification of suspected criminality and the drafting of an Information for presentation to a judge requires a team with a proper understanding of the financial markets in which the transactions have been effected.
ii) The drafting of a document such as the Information in a case relating to the financial markets is a formidable task that requires a draftsman with an understanding of the markets, the agreements in issue and accounting issues. The facts and issues must be set out in a clear and analytical manner; this requires very considerable skill. Its presentation to the judge then requires a lawyer with great skill and experience.
iii) Although many investigators are reliant in the first instance on the provision of information by those who have an interest in the transactions such as administrators or lawyers or accountants involved in disputes, it is essential that those charged with investigation and prosecution can scrutinise the information provided with the same level of skill. The SFO should have scrutinised what it was told by Grant Thornton through the use of expertise of at least equivalent experience. The SFO should not have been compelled to rely on Grant Thornton who owed duties to their own clients which rightly took precedence over the interests of the public.
iv) The execution of a warrant requires the presence of independent lawyers where there is the prospect of privileged documentation. This expense has to be resourced.
v) The prosecution of such offences necessitates equality of arms being provided to those investigating and prosecuting. Equality of arms is used most commonly to apply to the unequal position of defendants to an investigation or a prosecution. However, the public interest in upholding the integrity of the financial markets is destroyed if those who investigate and prosecute do not have access to the same level of legal and accountancy skills and human and financial resources as those who are the subject of investigation and prosecution.
vi) The matters in issue occurred in the period between late 2007 to October 2008. Although there are some complex details as regards some of the individual transactions, the case is not a complex one. The investigation should have been concluded a very long time before now, but again this required adequate resources, both human and financial.

"All of these considerations must be taken into account in any consideration of the present case and criticism of those involved, as it is clear to us that the SFO was not properly resourced for this investigation.

"In the present case, the result has been our decision to set aside search warrants against two well known businessmen after a long investigation of transactions in the financial markets. In other cases, the result could have been the failure properly to investigate and prosecute successfully conduct where there could be no doubt as to its criminality and serious effect on public confidence in financial institutions and the financial markets. It is clear that incalculable damage will be done to the financial markets of London, if proper resources, both human and financial, are not made

available for such investigations and prosecutions in the financial markets of London." (paras 293 - 294)

-ends-

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.