Messrs (1) (2) and (3). Companies (4) (5) and (6) and Company (7) for 3 more Companies
Royal Court
3rd December 2015

JUDGMENT 57/2015

Application for permission to apply for a judicial review or a Production Order

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between: **Messrs (1) (2) and (3). Companies (4) (5) and (6) and Company (7) for 3 more Companies** **("the Applicants")**

-v-

(1) Judge John Russell Finch **("First Respondent")**

and

(2) The States of Guernsey

("Second Respondent")

Hearing date: **23 November 2015**
Judgment handed down: **3 December 2015**
Before: **Sir Richard Collas, Bailiff**

Advocate for the Applicants: **Advocate J T Le Tissier**
Advocate for the First Respondent: **Advocate J Hill**
Advocate for the Second Respondent: **Advocate R Gist**

Cases, legislation and references referred to:

R (S) Chief Constable of BTP (2014) 1WLR 1647

Judicial Review in England and Wales – The State of the Art Jersey Law Review 2003, vol 7

Old Government House Hotel Ltd v The President of the Island Development Committee and Mighty Mouse Ltd (unreported , Guernsey Judgment 58/2003)

Litchfield v Director of Environmental Health and Pollution Regulation (C.A.) 2014 GLR 201

Groucutt v Minister of the Environment Department and Lavinia Holdings Ltd (Royal Court, Judgment 30/2015)

Introduction

1. The story in this matter begins on 17 March, 2015 when the Deputy Bailiff issued a search warrant in respect of certain documents and materials. That search warrant was later found to be deficient for a technical reason explained below. The seized material was returned to the Applicants' Advocates and immediately thereafter, on 13 August, an application was made to the Judge of the Royal Court for a production order to enable the Second Respondent to regain possession of the documents and materials in order to continue its investigations.

2. In this judgment, I adopt the following definitions:

    a. the 17 March search warrant is "the Search Warrant";
    b. the Information laid on oath in support of it is "the Original Information";
    c. the redacted version of the Original Information is "the Redacted Information";
    d. the material and documents seized are "the Seized Material";
    e. the production order issued by the Judge of the Royal Court on 13 August is "the Production Order";
    f. the Judge of the Royal Court is "the Judge"; and
    g. the second information laid in support of the request for the Production Order is referred to as "the Second Information".

3. In the application before me, the Applicants are seeking:

    (1) permission to pursue an action for judicial review of the Production Order on the ground that the conditions for the making of a production order were not made out; and

    (2) if permission is granted:
        a. a declaration that the Production Order was unlawful;
        b. an order that the Production Order be quashed; and
        c. an order that the documents obtained pursuant to the Production Order (the Seized Material) be returned and that any copies made thereof be destroyed or returned.

4. The Applicants were represented at the hearing before me by Advocate J. Le Tissier of ABT Advocates, one of whose colleagues, Advocate Ashton, had previously been acting. The First Respondent was represented by Advocate Hill who made no submissions and the Second Respondent was represented by Advocate Gist who resisted the application.

Factual background

5. The Second Respondent, that is to say the Guernsey Border Agency, has been concerned with a criminal investigation into suspected money laundering offences under sections 38, 39 and 40 of The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, as amended, involving, inter alia, the Applicants. The allegations are that the alleged offences have resulted in a serious financial loss to Her Majesty's Revenue and Customs. The investigation is described as being multi-agency, involving other jurisdictions.

6. On 17 March 2015, the Deputy Bailiff issued the Search Warrant under section 9 and Schedule 1 of The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, as amended, ("PPACE") on the *ex parte* application of the Second Respondent supported by the Information laid on oath by Customs Officer Lynne Hamilton.

7. The Search Warrant was executed the following day at an address in Guernsey where the Second Respondent took possession of the Seized Material. On 21 April it was realised by the Second Respondent that there may have been a technical deficiency in the Search Warrant in that a properly certified copy of the warrant had not been made or provided to the subject of the warrant, in accordance with sections 10(7) and 11 of PPACE. No further examination of the Seized Material was carried out following the identification of the technical defect. Prior to then, all that had had happened was that the Seized Material had been listed but not examined or analysed, with the exception of eight exhibits.

8. On 6 May, a decision was taken by the Second Respondent to write to the Advocates representing those with an interest in the Seized Material. One week later, a letter was sent to the Advocates concerned, including Advocate Ashton who was then representing two of the individuals named on the Search Warrant. Within the letters, consent was sought to retain and examine the Seized Material. The Second Respondent also indicated that if such consent were not forthcoming, it would seek a fresh warrant after the Seized Material had been returned.

9. In subsequent weeks, correspondence was exchanged between the Second Respondent and Advocate Ashton and a meeting took place between them on 16 June. The details of the communications are not relevant to this judgment but are set out in affidavits sworn for the purposes of the judicial review proceedings by Advocate Ashton, dated 1 October and 9 November, respectively and by Customs Officer Hamilton dated 27 October and 13 November respectively.

10. A key date in the chronology was 29 June. On that day the Second Respondent sent a letter ("the 29 June letter") to Advocate Ashton who was then representing not only the companies subject to the Search Warrant but also at least two of the individuals named in it. He said he was also awaiting confirmation of instructions from a third individual who he described as a very busy man.

11. The 29 June letter confirmed that the Seized Material would be retained by the Second Respondent in safe storage pending a resolution of the procedural deficiency in the issuing of the Search Warrant. Enclosed with the 29 June letter was a copy of the Redacted Information in reply to Advocate Ashton's request to see the Original Information that had been laid before the Deputy Bailiff when granting the Search Warrant. In the 29 June letter, the Second Respondent again sought written consent to enable the Seized Material to be examined. It concluded:

> *"I am mindful of our conversation for the need to expedite the matter a (sic) soon as possible and in doing so, I anticipate saving all of us, including your clients, considerable time and expense".*

12. I emphasise two matters. Firstly, as at 29 June the Applicants' Advocate had sight of the Redacted Information. Secondly, the Second Respondent and the Applicants were all agreed on the need for expedition.

13. On the 29 June and 8 July bail amendments were made to suspects in the case, including but not limited to Advocate Ashton's clients. One of the suspects complained of the further delay and the fact that bail was being extended to January 2016.

14. On 8 July, the Second Respondent chased Advocate Ashton for a response to the 29 June letter. He replied the same day, explaining that he had been away for most of the previous week and was awaiting a signed copy of the letter of engagement from one individual. He advised that he had drafted a response which was being reviewed by his clients.

15. On 15 July the Second Respondent chased Advocate Ashton again and on the next day received a response saying he was in the UK but would reply the following day, that is to say 17 July. On 20 July, the Second Respondent received an email saying Advocate Ashton would revert when he was able. The email requested that any application for a fresh warrant should be on notice to the parties as Advocate Ashton's clients would wish to challenge the warrant.

16. On 6 August, the Second Respondent wrote to Advocate Ashton informing him that as it had still not received a reply, it considered that every avenue to obtain consent had been exhausted so the Seized Material would be returned by delivering it to Advocate Ashton's offices. (The companies had vacated their Guernsey offices.) The letter advised that a fresh application to seize the same material would be made *inter partes* and on notice.

17. There was some discussion regarding Advocate Ashton's concerns as to how he would store the Seized Material after its delivery to him before the Seized Material was eventually delivered to him at 1510 hours on 11 August 2015. Nineteen minutes later, at 1529 hours, notice was served on Advocate Ashton informing him of an application that was to be made for the production of the Seized Material.

The Production Order

18. On 13 August the application to produce the Seized Material was made by the Second Respondent to the Judge of the Royal Court pursuant to section 9 and schedule 1 of PPACE, supported by the Second Information laid on oath by Customs Officer Hamilton to which was exhibited the Redacted Information in the same redacted form as had been sent to Advocate Ashton on 29 June. The Second Information contained little or no evidence that was not already known by Advocate Ashton. It referred to the original Search Warrant and the Seized Material that had been returned to Advocate Ashton. It provided for the availability of an independent Advocate in case of the presence of any material that might be covered by Legal Professional Privilege. It also sought the retention of material relating to a company that had previously been considered to be conducting a legitimate business but which was now thought to be intrinsically connected to the companies under investigation. (I refer to that company as "C Ltd".) Substantively, the evidence relied upon to support the application for the Production Order was that contained in the Redacted Information.

19. At the hearing of the application before the Judge, Crown Advocate Fiona Russell appeared on behalf of the Second Respondent and Advocate Ashton on behalf of his clients.

20. Advocate Ashton wanted to know what had been redacted from the Original Information in order to produce the Redacted Information. He sought an adjournment of the hearing to enable the Original Information to be produced to him *"in order that we (sic) can defend ourselves (sic) against various allegations that are contained in the information."*

21. The Judge rejected the application for an adjournment on the ground that the proper time to answer any allegation would be in any subsequent criminal proceedings. I comment that, in my judgment, Advocate Ashton's request showed a fundamental misunderstanding of the application. The Judge was not the judge who saw the Original Information when granting the Search Warrant. He only saw the Redacted Information and was not aware of the additional material contained in the Original Information seen by the Deputy Bailiff.

22. At the hearing before the Judge, Customs Officer Hamilton gave oral evidence during which Crown Advocate Russell asked her to elaborate on the steps taken to obtain consent from those concerned. She was then cross-examined by Advocate Ashton. His questions were directed principally to two issues. First, the material pertaining to C Ltd that he sought to have excluded and secondly, he sought to show that neither he nor his clients had been dilatory.

23. Advocate Ashton made several points in his closing submissions. He repeated his request for the Original Information to be produced in its unredacted form. He submitted that no evidence had been put forward to show either that any arrestable offence had been committed or that the Seized Material would be of substantial value to any investigation. He cited R (S) Chief Constable of BTP (2014) 1WLR 1647 as authority for the proposition that *"suspicion falls a long way short of the requirement of 'reasonable grounds to believe'".* He argued that the evidential material produced to the Judge was a reflection of suspicions held by the investigators but fell short of the threshold required before he should be satisfied that a production order could be issued. Advocate Ashton also made submissions in respect of costs.

24. After retiring to consider his decision, the Judge returned and delivered a short judgment in which he made clear that he was judging the matter on the material put before him, not on any secret material. He was satisfied that the access conditions under PPACE were fulfilled. He rejected the application for any adjournment on the ground that it would serve no purpose other than to delay the investigation which needed to be carried out expeditiously. In relation to C Ltd, he directed that any material belonging to it should be returned as soon as possible if it was found to be of no value. He then granted the Production Order in the terms sought.

Subsequent events

25. The Production Order was executed and the Seized Material was produced to the Second Respondent on 14 August 2015. In his second affidavit, Advocate Ashton stated that:

> *"following the Court reaching its decision to grant a production order on 13 August 2015, I took instructions and began researching whether his decision might be subject to judicial review, which is complex and unfamiliar to Guernsey.*
>
> *I consider it reasonable and appropriate that a potential application for judicial review should be fully considered and felt that such an application warranted*

thorough and detailed research. As part of this research I took advice from English counsel."

26. After explaining why it would be wrong to act lightly and without thoroughly satisfying himself as to the grounds, Advocate Ashton said *"a large volume of information was considered and reviewed in preparing the application."*

27. In my judgement, it should not have taken Advocate Ashton a long time to review the material required for the application for judicial review. All of it was documentation that he had had in his possession for some time and with which he was familiar. As I have said, the Second Information contained little or no new material. The principal document was the Redacted Information which he had seen for the first time on 29 June. Most of it was material with which Advocate Ashton should have been very familiar, having had conduct of the case on behalf of various clients since 13 May, if not earlier.

28. Advocate Ashton requested a transcript of the 13 August hearing. He received the transcript on 26 August.

29. A summons seeking judicial review was issued on 2 October, more than seven weeks after the decision of the Judge that was sought to be reviewed. The initial summons had to be amended because it had failed to comply with the requirements of Practice Direction 3 of 2004 in that it omitted to seek permission to proceed with the claim for judicial review. Leave to amend was granted when the cause was first tabled in court on 9 October, eight weeks and one day after the Production Order was granted.

30. The grounds pleaded in support of the application for judicial review were that:

    (1) the court was wrong not to grant an adjournment; and
    (2) conditions for the making of a production order were not made out.

31. On 15 October, Lieutenant Bailiff Her Honour Hazel Marshall QC refused permission to proceed with the claim for judicial review on ground (1) and adjourned the application on ground (2) to an oral hearing. She also directed that, if permission were given, the substantive application should follow immediately thereafter.

32. The second limb of the 9 October cause was an application for an injunction to restrain the Second Respondent from examining the Seized Material or using or sharing it with any person until the conclusion of these proceedings. The application for an injunction was not initially pursued but on 6 November, after an *inter partes* hearing, I granted an interim injunction to hold a neutral position pending the hearing of the substantive matter. As at that date I was advised that examination of the Seized Material had not yet been able to proceed, largely because of issues involving special software that had been procured by the Second Respondent to deal with the material, the installation of the software, training for the operation and some technical difficulties, not to mention staff absences.

33. When I granted the injunction, I indicated that in view of the need to progress the investigation as soon as possible, I would discharge it if the Second Respondent were to offer an undertaking in appropriate terms to the effect that any information or intelligence obtained from analysing the Seized Material would not be used or shared with any other person, pending the conclusion of the substantive application.

34. On 13 November, the Second Respondent offered an undertaking in terms acceptable to me and, on that basis, I discharged the injunction.

35. An attempt by the Applicants to obtain disclosure of a forensic accountancy report referred to in the Redacted Information was not pursued and was formally withdrawn on 13 November. The application for permission to pursue judicial review and the substantive application were heard by me on 23 November. Advocate Le Tissier appeared for the Applicants, Advocate Gist for the Second Respondent and Advocate Hill for the First Respondent. I reserved judgment.

Delay

36. The first objection taken by the Second Respondent to the application for permission to apply for judicial review was on the grounds of delay.

37. Both counsel accepted that there is a requirement that any application for judicial review is commenced promptly and without delay. The issue between them was whether or not there had been any delay, as a matter of fact, in the present case.

38. It is well established that delay is a ground for refusing judicial review of an administrative decision. As Beloff, JA wrote in Judicial Review in England and Wales – The State of the Art Jersey Law Review 2003, vol 7, page 29:

> *"The main common feature of public law remedies is that they are discretionary in nature: they can be refused on grounds of delay, lack of utility; interference with good administration or with the rights of third parties; improper conduct by the applicant, or the existence of an available alternative remedy."*

39. In the first, leading, case of judicial review in this island, Old Government House Hotel Ltd v The President of the Island Development Committee and Mighty Mouse Ltd (unreported, Guernsey Judgment 58/2003), Day, LB held, para 46:

> *"There has, as a matter of fact, been delay in bringing these proceedings. Whether that was culpable delay on the part of the Applicants is largely immaterial. Far more important is that the greater the delay, the greater may be the inevitable detriment to a third party who has placed legitimate reliance upon the apparent validity of the impugned act."*

40. That decision preceded Practice Direction No 3 of 2004 which declares at paragraph 6 *"Claimants are reminded that …. proceedings must be instituted promptly …."*.

41. In Litchfield v Director of Environmental Health and Pollution Regulation (C.A.) 2014 GLR 201, the Court of Appeal held (in a judgment delivered by me with which the other judges agreed) at paragraphs 54 and 55:

> *"54. It would not be for this court to specify a time period within which an application must be brought (unless good reason can be shown for any delay beyond such period), whether three months or otherwise. I endorse the provisions of the Practice Direction that an application must be brought promptly. In my view, a period of three months may be considered an appropriate guide as to what is meant by "promptly". However, there may be cases which are so urgent that even a delay of three months may be too long.*

> *55. Where there has been delay, the court will have to examine the reasons for the delay and the burden will be on the applicant to show that it can be explained for good reasons. The prejudice or detriment to any third party if the relief is granted will be a factor to consider although the extent of prejudice or detriment may not be known at the leave stage and may have to be considered as part of the substantive decision."*

42. The issue was considered by McMahon DB in Groucutt v Minister of the Environment Department and Lavinia Holdings Ltd (Royal Court, Judgment 30/2015). He noted that there is no formal time limit in Guernsey, three months is merely *"a guide associated with promptitude",* he said. In the circumstances of that case he concluded that the proceedings should have been instituted two weeks earlier than they were in fact commenced and he therefore refused permission to proceed even though the three month *"guideline"* period had not expired.

43. In the present case, I find the explanations for delay given by Advocate Ashton in his affidavits and by Advocate Le Tissier in his oral submissions on behalf of the Applicants to be unconvincing.

44. I take account of the fact that Advocate Ashton had been instructed in this matter as at 13 May and possibly earlier. On 29 June, he received the Redacted Information having previously requested it. He was already aware that if consent to use the Seized Material were not forthcoming the Second Respondent would be seeking a further warrant or order.

45. As at the date of the hearing on 13 August, Advocate Ashton had had sight of the Redacted Information for over six weeks. At the hearing, in oral submissions, he challenged the adequacy of it in declaring it to be insufficient to meet the relevant threshold. Ground (2) of the judicial review application is merely a repetition of the submission he was putting forward on 13 August.

46. In his affidavit he deposed that immediately after the Production Order was granted he was reviewing whether it be challenged. Yet, there was nothing new of any substance – he was already well aware and was, or should have been, familiar with it.

47. He promptly obtained a transcript of the hearing but even if he had not done so, it should not have delayed him. Little was said at the hearing that was of any real relevance and in any event he had been present, it was a short hearing and he had, or should have had, his own recollection of what transpired as well as his notes.

48. Instructing English counsel should not have delayed matters. The legal issues were not complex and should not have required lengthy research. There clearly was a need for promptitude; Advocate Ashton had previously agreed the need to expedite the matter. The Applicants were not to know that the Second Respondent was not yet in a position to commence its examination of the Seized Material.

49. Any delay was likely to prejudice the criminal investigation in this jurisdiction and with consequential delays in the other jurisdiction involved. Furthermore, the other suspects in the investigation have a legitimate expectation that the inquiries in respect of them be pursued promptly. At least one had already complained of the delays and the extension of his bail.

50. In all the circumstances, there was delay in issuing the judicial review proceedings which could, and should, have been issued within two to three weeks of the hearing before the Judge, or at the very most within one month. Counsel did not refer to the time limits for appeals from decisions of the Royal Court under The Court of Appeal (Guernsey) Law 1961, and I have not taken account of the provisions of that Law but I note in passing that even in a civil matter, the time limit for appealing is one month from the date of the decision.

51. In conclusion, the delay on the part of the Applicants in issuing the application for judicial review was excessive and no acceptable reason has been given for the delay. I therefore refuse permission to proceed.

Substantive Ground

52. Although it is not strictly necessary, I will deal briefly, with the substantive ground relied upon namely that *"conditions for the making of a production order were not made out."*

53. Advocate Le Tissier emphasised that the test under section 2(a) of Schedule 1 of PPACE was to be satisfied there were *"reasonable grounds for believing"* that the access condition set out therein were fulfilled. He correctly submitted that mere *"suspicion"* falls a long way short of *"reasonable grounds to believe"* see, inter alia, R(S) v Chief Constable of the British Transport Police [2014] 1 WLR 1647 at [41].

54. He then proceeded to analyse the Redacted Information paragraph by paragraph to show that none of the facts stated therein are by themselves sufficient to meet the required threshold. He frequently referred to the lack of evidence.

55. In doing so, he missed the point of the threshold test the Judge was required to apply. The Second Respondent did not require admissible *"evidence"* at this stage. The purpose of the criminal investigation is to enable the material to be examined so as to establish whether there is any evidence in the Seized Material to support any criminal charge.

56. Furthermore, it is wrong to dismiss each individual assertion of fact in the Redacted Information as being insufficient by itself to meet the threshold. In doing so, he looked at each assertion separately from any others. The thrust of the Redacted Information and consequently the thrust of the Second Information produced to the Judge was that the cumulative effect of each and every one of the assertions amounted to *"reason grounds for belief"*. It is the cumulative impact of the Redacted Information when read as a whole that is important and that matters.

57. In his judgment the Judge stated that he had had regard to the content of the Redacted Information and to no other material. Shortly before retiring he had been handed a copy of R(S) v Chief Constable of the British Transport Police by Advocate Ashton as authority for his proposition that belief requires more than suspicion. In the Judge's decision he stated that he was persuaded the access conditions were satisfied.

58. For my part, having reviewed the totality of the Redacted Information. I am persuaded that there was sufficient material to satisfy the threshold test and I do not need to repeat it all in this judgment. It was a long and detailed information, even allowing for the redactions.

59. Consequently, if I had to decide the substantive ground, I would find that the access conditions were met.

60. Permission to pursue an application for judicial review is refused for the reasons I have given in paragraphs 43 to 51.

61. Counsel were unavailable to attend court when I was proposing to hand this judgment down. I am therefore issuing it in written form and will sit to hear any consequential applications if required. Any consequential applications should be in writing and submitted to the Deputy Greffier as soon as possible and in any event within fourteen days.

Sir Richard Collas
Bailiff