Anthony Bell et al v Judge of the Royal Court et al
Court of Appeal
18th May 2016

JUDGMENT 20/2016

Appeal against refusal of leave for application for judicial review to proceed.

IN THE COURT OF APPEAL OF GUERNSEY
(Civil Division Appeal No. 501)

18th May 2016

Before: **Robert Logan Martin QC, President**
David Anderson QC
Sir Michael Birt

Between:

(1) Anthony Bell
(2) Phillip Graeme Hackman
(3) Kevin Perry
(4) Twenty Plus Limited (formerly Guernsey Vision Limited, formerly EV Management Limited
(5) Probe Consultancy Limited
(6) Hexagon Contracts Limited
(7) Castle Holdings Limited (a holding company for the three companies below)
(8) Giroscope Limited
(9) Magneto Guernsey Limited
(10) DGR Management Limited

Plaintiffs and Appellants

and

Judge of the Royal Court in the discharge of his functions of the office of Bailiff under section 1(2)(b) of the Royal Court (Reform) (Guernsey) Law 2008

First Respondent

and

The States of Guernsey acting by and through Lynne Margaret Hamilton of the Guernsey Border Agency

Second Respondent

Advocate J T Le Tissier for the Appellants
Advocate J Hill for the First Respondent
Advocate R Gist for the Second Respondent

JUDGMENT

LOGAN MARTIN JA

THIS IS THE JUDGMENT OF THE COURT

Introduction

1. In their Notice of Appeal, the appellants have sought to appeal against the judgment of the Bailiff, Sir Richard Collas, sitting in the Royal Court, given on 3 December 2015. In that judgment, the Bailiff refused permission to the appellants to proceed with an application for judicial review of a decision of Judge Finch, made on 13 August 2015. In that decision, the Judge issued an order for the production of special material against Ashton Barnes Tee, Advocates, under section 9 of, and Schedule 1 to, the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003 ("the 2003 Law"). The grounds of judicial review of that decision are that the Judge should have granted an adjournment to allow Advocate Ashton for the appellants to take instructions on the evidence being relied upon and that the conditions for the making of a production order were not made out. The appellants seek a declaration that the production order was unlawful, the quashing of the production order, and an order that the documents obtained pursuant to the production order be returned and that any copies made be destroyed.

2. The appeal was heard before us on 16 and 17 May 2015. The appellants were represented by Advocate Le Tissier, a colleague of Advocate Ashton in Ashton Barnes Tee. The second respondent was represented by Advocate Gist. Advocate Hill appeared for the first respondent on 16 May but indicated that he would be making no submissions and was present solely to assist the court if necessary (and which was also the position which he had adopted before the Bailiff). The Court did not require Advocate Hill's presence further and he did not appear on 17 May.

The background circumstances

3. The circumstances concern the power of the Bailiff which is provided by section 9(1) of the 2003 Law to make an order providing "access to special material for the purposes of a criminal investigation". What is "special material" is defined in section 25(1) and it includes personal and business records. Section 25(2) defines the circumstances in which a person holds material in confidence. The procedure for the obtaining of such an order is set out in Schedule 1 which provides in part:

> "1. Subject to paragraph 3, if on an application made by a police officer the Bailiff is satisfied that the access conditions are fulfilled, he may make an order under paragraph 4.
>
> 2. The access conditions are fulfilled if –
>
> (a) there are reasonable grounds for believing –
> (i) that a serious arrestable offence has been committed,
> (ii) that there is material which consists of special material or includes special 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 have been tried without success or have not been tried because it appeared that they would be bound to fail,

(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.

3. In assessing whether it is in the public interest that the material should be produced or that access to it should be given, regard should be had to the duty of confidentiality (as construed in accordance with section 25(2)) under which the material is held.

4. An order under this paragraph is an order that the person who appears to the Bailiff to be in possession of the material to which the application relates shall –

(a) produce it to a police officer for him to take away, or

(b) give a police officer access to it…"

The entitlement of a police officer to make an application pursuant to section 9 and Schedule 1 is applied to customs officers in the case of investigations conducted by customs officers by the provisions of Schedule 5.

4. The circumstances relating to the making of the production order by Judge Finch in this case are summarised in the judgment of the Bailiff and are derived primarily from affidavits of Advocate Ashton and of Lynne Andrea Margaret Hamilton, an officer of Customs and Excise employed by the Guernsey Border Agency ("GBA"), the second respondent. The GBA had begun an investigation into suspected money laundering offences under sections 38, 39 and 40 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 which relate to offences concerning dealing with the proceeds of criminal conduct, otherwise offences connected with money laundering. Those suspected of involvement include the appellants. On 17 March 2015, McMahon DB issued a search warrant pursuant to section 9 of, and Schedule 1 to, the 2003 Law. The search warrant permitted the seizure of documents and other evidence regarding:

> "An investigation into Suspected Money Laundering offences whereby the proceeds of criminal conduct involving but not limited to VAT fraud, fraud and drug trafficking have been disguised utilising invoicing and payroll companies located within the Bailiwick of Guernsey…"

The search warrant then named a number of individuals and limited companies as being involved, including the appellants. The search warrant was issued on an *ex parte* application made by the second respondent and supported by a sworn Information provided by Officer Hamilton.

5. The search warrant was executed on 18 March 2015 at premises in Guernsey and a quantity of material was seized. That material was listed but (with the exception of eight exhibits) was not examined or analysed before 21 April 2015 upon which date the second respondent became concerned that the procedure concerned with the search warrant might have been deficient because of a failure to provide a certified copy to the subject of the warrant as required by sections 10(7) and 11 of the 2003 Law. No further examination of the seized material took place thereafter.

6. On 6 May 2015, Deputy Chief Officer Ferbrache of the GBA decided that a letter should be written to the Advocates representing the appellants informing them of the deficiency in the search warrant. Letters were sent on 13 May to those Advocates, including Advocate Ashton who was then understood to be representing the second and third named appellants. In those letters, the GBA sought consent to examine the seized material and, if that was not forthcoming, indicated that the material would be returned to a nominated person and the GBA would "immediately seek formal consent to the provision of the same seized material" pursuant to specified provisions of the 2003 Law. The GBA sought a response within seven days. In a letter dated 18 May, Advocate Ashton replied on behalf of a client who was not included in the search warrant and seeking the return of documents said to have been seized unlawfully. Following subsequent correspondence, a meeting took place on 16 June between officers of the GBA, including Officers Ferbrache and Hamilton, a police officer, and Advocate Ashton and a colleague. At that meeting, Advocate Ashton made a number of requests, including for the information relied upon to obtain the warrant (subject to public interest immunity principles being applied), and that his clients not be interviewed until they had had sight of the documents.

7. Officer Ferbrache wrote to Advocate Ashton by letter dated 29 June 2015. In that letter, Officer Ferbrache began by stating that Advocate Ashton had confirmed at the meeting on 16 June that he was acting for all of the second to tenth named appellants and that he had given verbal consent for the GBA and/or police to retain in secure storage the material that had been seized under the search warrant for a period to allow matters to be resolved. Officer Ferbrache confirmed that Advocate Ashton had been provided with a copy of the search warrant and the letter also enclosed a copy of the Information which had been sworn by Officer Hamilton but which now contained a number of redactions. Officer Ferbrache stated that he believed that this now satisfied Advocate Ashton's disclosure request and that he looked forward to receiving the appropriate written consent on behalf of Advocate Ashton's clients to examine the material seized. The letter concluded:

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

8. On 8 July 2015, Officer Ferbrache sent an email to Advocate Ashton asking whether he was now in a position to provide the consent of his clients. Advocate Ashton replied that he was still awaiting a signed letter of engagement from the first named appellant, Mr Bell. Advocate Ashton met the first named appellant at his office in the Isle of Man on 13 July 2015 in order to take detailed instructions. On 15 July, Officer Ferbrache sent a further email and on 20 July Advocate Ashton replied to confirm that he had now been appointed to act for Mr Bell and that he was liaising with his English advisers.

9. On 6 August 2015, Phil Hunkin, Head of the Financial Investigation Unit of the GBA, wrote to Advocate Ashton. In that letter, Mr Hunkin stated that the GBA had been in correspondence with Advocate Ashton since 12 May with regard to seeking his clients' consent to retain and examine the material seized on 18 March, and that "The criminal investigation must now be progressed". Mr Hunkin then advised that an application would be made under section 9 of,

and Schedule 1 to, the 2003 Law and that the material seized under the original warrant would be returned and would be the subject of a lawful re-seizure. He then set out the procedure proposed which was that the material would be returned to Ashton Barnes Tee at 1100 hours on 11 August as listed and in sealed exhibit bags and that an application for the new order would be made *inter partes* and on notice and executed as soon as possible thereafter.

10. Following some discussion on the matter of storage, that procedure was followed. The material was returned to Ashton Barnes Tee at 1510 hours on 11 August and Notice for the production of the special material was served on Advocate Ashton by Officer Hamilton at 1529 hours. A copy of the application was emailed at 1046 hours on 12 August together with a draft order. In that email, Officer Hamilton stated:

> "I believe that you already hold copies of the warrant together with the redacted information so have not included them in this email."

11. The application was heard by Judge Finch on 13 August 2015. It was supported by the Information sworn originally by Officer Hamilton but which was now in the same redacted form as had been provided to Advocate Ashton (and which we shall refer to hereafter as "the redacted Information"). The second respondent also provided a further Information sworn by Officer Hamilton ("the second Information") which in summary referred to the procedure which had occurred since the search warrant had been granted but contained no significant additional evidence. The second Information also provided for the availability of an independent Advocate if that became necessary for any material covered by legal professional privilege. Officer Hamilton further referred to the retention of material relating to a particular company, I-Cap Crewing Services Limited, which had been seized. In the redacted Information, she had stated that that company appeared to be a legitimate business but in the second Information she provided reasons why she now considered that it was linked to the other companies referred to. Finally, in the second Information, Officer Hamilton provided a further statement of the grounds upon which she relied in seeking the production order.

12. Before Judge Finch, Advocate Ashton first applied for an adjournment to enable the redacted Information to be produced to him in unredacted form. The Judge refused that application. In referring to this application in his judgment, the Bailiff suggested that it demonstrated a misunderstanding on the part of Advocate Ashton because the Judge was being asked to issue the production order based upon the redacted Information and the Judge had not been shown and was not aware of any additional material which had been before the Deputy Bailiff when the search warrant was granted.

13. The Judge then heard evidence from Officer Hamilton who was cross-examined by Advocate Ashton. In his closing submissions, Advocate Ashton repeated his request that the redacted Information be provided in unredacted form and he submitted that the second respondent had not demonstrated that any arrestable offence had been committed or that the seized material would be of substantial value in any investigation. He submitted by reference to authority that there were no 'reasonable grounds for believing' as required by paragraph 2(1) of Schedule 1 to the 2003 Law. The evidential material produced to the Judge amounted to no more than a suspicion which was not sufficient to justify the making of a production order.

14. After retiring to consider the evidence and submissions, the Judge gave an oral decision. He stated that the question before him was whether the production order should be granted in

a situation where the reason for the application was the previous procedurally defective warrant. He noted that the Information provided by Officer Hamilton was redacted but he accepted that it was nevertheless clear and understandable and the question was whether the redacted Information supported the making of the production order. He was not being asked to proceed upon secret information but whether the requirements of the 2003 Act were fulfilled by what was before him. The Judge concluded his reasons by saying:

> "The warrant has fallen away on what has been put forward and the access conditions are satisfied. An adjournment would, with great respect, serve no purpose except a further delay in investigation which should be carried out as expeditiously as possible in the interest of all concerned. The I-Cap material should, if it proves to be of no value, be returned as soon as possible… The Production Order is therefore granted."

The present proceedings

15. The appellants commenced their application for judicial review to the Royal Court on 2 October 2015. The Cause came before Hazel Marshall LB, on 9 October when upon consideration of an amended application, the Lieutenant Bailiff refused permission for the judicial review of the Judge's refusal to grant an adjournment and adjourned the application for permission to proceed with a claim for the judicial review of grounds for the making of the production order to an oral hearing. The Lieutenant Bailiff further ordered that if permission were to be given, it should be followed immediately by a hearing of the application for judicial review itself (a so-called "rolled-up hearing"). On 6 November, the application for judicial review came before the Bailiff who granted an interim injunction to prevent the inspection of the seized material and that was discharged following the giving of a satisfactory undertaking on 9 November. Since the hearing before the Lieutenant Bailiff on 9 October, there has been no attempt further to challenge the decision of the Judge to refuse an adjournment and Advocate Le Tissier confirmed before us that that was no longer part of his case.

16. The application for judicial review came before the Bailiff for the substantive hearing on 23 November 2015 and he gave his judgment on 3 December. He refused permission to proceed upon the basis that the application had not been commenced promptly by reference to paragraph 6 of the Practice Direction No 3 of 2004, Judicial Review, where it is stated that "Claimants are reminded that… proceedings must be instituted promptly". The Bailiff then referred to the substantive grounds, stating that this "was not strictly necessary", and held that if he had been required to do so, he would have found that the access conditions set out in paragraph 2(a) of Schedule 1 to the 2003 Act had been met.

17. The Notice of Appeal to this Court by the appellants sets out the following grounds:

> "1. The learned Bailiff wrongly refused permission to proceed with the substantive application for judicial review on the ground of delay. In fact, the summons seeking judicial review was issued less than 8 weeks after the decision sought to be reviewed, there was no prejudice to the Second Respondent (or any other person) by the lapse of time and (for the reasons set out more particularly below) the substantive application had merit.

2. The learned Bailiff wrongly held that the First Respondent could properly find that the statutory conditions for the making of a production order were satisfied. In particular:
   (a) The evidence in support of the application for a production order was set out in written informations. These did not contain the necessary factual material to show the conditions for the making of a production order were satisfied;
   (b) The learned Bailiff wrongly held that the Plaintiffs' submissions were directed at a lack of "admissible evidence". They were not. The submissions were that the statutory test was not satisfied on the material adduced before the First Respondent.
   (c) The learned Bailiff wrongly held that the Plaintiffs relied on submissions that individual assertions within the written informations when considered separately were insufficient to meet the threshold for granting the production order. The Plaintiffs' submissions acknowledged that the matters within the written informations should be looked at cumulatively but that in any event so doing could not satisfy the relevant access conditions as there were insufficient facts within the informations to do so.

3. The learned Bailiff (i) failed to consider and/or rule upon the Plaintiffs' submission that the First Respondent did not give proper reasons for making the production order and (ii) did not himself give reasons explaining how the statutory conditions were met on the material placed before him by the First Respondent."

18. In order to deal with these grounds, we begin by addressing the issue of delay which is the subject of ground of appeal 1 and then address the substantive grounds which are the subject of grounds 2 and 3.

Delay

Decision of the Royal Court

19. The Bailiff refused permission to apply for judicial review on the ground that there had been delay on the part of the appellants in issuing the application for judicial review, and that no acceptable reason had been given for the delay.

20. As the Bailiff pointed out, Advocate Ashton had been instructed by the Applicants by, at the latest, 13 May 2015. At the date of the hearing on 13 August, he had already had sight of the redacted Information for over six weeks. His oral submissions of that date challenged the adequacy of the redacted Information in terms which were subsequently reflected in the principal ground (Ground (2)) of the judicial review application. The legal issues were not complex, and should not have required lengthy research or the instruction of English counsel. Further, there was clearly a need for promptness: any delay was likely to prejudice the criminal investigation, and the other suspects in the investigation had a legitimate expectation that the inquiries in respect of them be pursued promptly. Noting by analogy that the time limit for appealing in a civil matter from the Royal Court under the Court of Appeal (Guernsey) Law 1961, is one month from the date of the decision, the Bailiff concluded that proceedings should have been issued within two or three weeks of the

hearing before the Judge, or at the very most within one month. In the circumstances, it held that the interval of 7 weeks and 1 day before proceedings were brought on 2 October was excessive.

21. That conclusion was supported by the second respondent before this court. A table was produced showing cases from England and Wales between 1987 and 2015 in which judicial review was sought against the making of production orders. While it was not suggested to be exhaustive, that list set out all the cases that were found in which the production order application was *inter partes* and the dates of both applications were ascertainable. In three of the seven cases, more than a month had elapsed between the two applications (in one of them, as long as 13 weeks). Permission to apply for judicial review had not been refused in any of those cases on grounds of delay. But in the other four cases, applications were made with greater speed: 21 days, 14 days, 8 days and 1 day. That was submitted to demonstrate that applications for judicial review of production orders can (and, it was submitted, should) be made considerably more quickly than was the case here.

Applicable law

22. It is well established in the law of Guernsey that any application for judicial review must be commenced promptly and without delay. As the Royal Court (Day LB) held in Old Government House Hotel Ltd. v The President of the Island Development Committee and Mighty Mouse Ltd. (unreported, Guernsey Judgment 58/2003, para 46):

> *"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."*

We would add that excessive delay in starting proceedings for judicial review is also contrary to the public interest, because it unnecessarily postpones the time when decision-makers and the public alike can safely treat administrative decisions as final and act upon them with confidence.

23. Practice Direction No. 3 of 2004 reminds Claimants that "*proceedings must be instituted promptly*". However, the law of Guernsey fixes no absolute time limit for the commencement of proceedings for judicial review. Nor does it combine the requirement of promptness with a three-month backstop, as does the law of England and Wales (CPR 54.5, which requires the claim form to be filed "*(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose*").

24. Even the limited flexibility afforded by the English rule has been criticised as insufficiently conducive to legal certainty. In R (Burkett) v Hammersmith and Fulham London Borough Council and another [2002] UKHL 23, [2002] 1 WLR 1593, Lord Steyn (with whom the other members of the House of Lords agreed) expressed the view, *obiter*, that:

> *"there is at the very least doubt whether the obligation to apply 'promptly' is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms. It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty."*

(para 56; see also the comments of Lord Hope, dealing with Scots law, at paras 59-66). A central consideration, as Lord Steyn put it at para 46, is that "*[t]he citizen must know where he stands*".

25. Lord Steyn's remarks proved prophetic in Uniplex (UK) Ltd. v NHS Business Services Authority (Case C-406/08, ECLI:EU:C:2010:45), briefly referred to before us, in which the Court of Justice of the European Union held that a provision expressed in the same terms as CPR 54.5 was in breach of EU law. The Court noted at paras 41 and 42 that the provision "*gives rise to uncertainty*" and that "*a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects*". While the scope of that decision may be limited to claims under EU law, which is of course not generally applicable in Guernsey, it illustrates the dangers inherent in a criterion whose application cannot be reliably anticipated by prospective applicants (and indeed respondents) in judicial review. That comment applies with even more force to Practice Direction No. 3 of 2004, because of the absence of a back-stop, than it does to CPR 54.5.

26. Further guidance was provided in the leading Guernsey case on delay in applying for judicial review, Litchfield v Director of Environmental Health and Pollution Regulation 2014 GLR 175. In a judgment concurred in by the other members of the Court of Appeal, Collas B held as follows:

> *"53. The range of circumstances in which judicial review might be sought are so infinitely varied and the Guernsey case law to date has been so limited that it does not seem to me to be appropriate for this court to be laying down any general criteria. Each case must be reviewed in the light of its own particular circumstances and all the circumstances of the case must be considered. The approach of the judge in the present case was correct: he looked to English case law for guidance but he remained mindful that those cases must be read in the context of the English statute and rules.*
>
> *54. It would not be for this court to specify a time period within which any 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 to what is meant by 'promptly'. However, there may be cases that 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."*

The Court subsequently referred at [60] to "*three months as a guide to what might be considered to be the period within which an application is to be brought if it is to be brought promptly*". But it remains the case, as the Royal Court (McMahon DB) noted in Groucutt v Environment Department [2015] GLR 406, para 19, that there is still no formal time limit in Guernsey.

Appellants' case

27. Against that legal background, we turn to the appellants' submissions in the present case. While noting the differences between the Guernsey Practice Direction and the law of England and Wales (principally, the absence from the Practice Direction of a three-month backstop), Advocate Le Tissier submitted that there was no reason why a materially different

approach should be applied in practice. On the basis of *Litchfield*, he submitted that:

> "*… in general, commencing proceedings within three months of the decision being reviewed should be considered to be instituting proceedings promptly for the purposes of the practice direction unless the length of time would cause such prejudice which requires that the proceedings must be commenced more urgently*".

Adopting the phrase of Silber J in R (Agnello) v The Mayor and Burgess of the London Borough of Hounslow and others [2003] EWHC 3112 (Admin), para 40, he described this a "*rebuttable presumption*" approach.

28. Advocate Le Tissier went on to submit that by bringing proceedings after seven weeks and one day (rather than the one month that the Bailiff indicated in his judgment would have been considered sufficiently prompt), no substantial prejudice had been caused to anyone. The second respondent had loaded the seized material on to analytical software before the action began, but had not begun to examine or analyse it before proceedings were brought. While four persons had been arrested in connection with the investigation, all were on police bail, which in the cases at least of the two who were appellants was unconditional. Reliance was also placed on delays said to be attributable to the second respondent, in particular the interval of five months between the obtaining of the initial (defective) warrant on 12 March 2015 and the obtaining of the Production Order on 13 August.

Conclusion

29. This Court reaffirms the importance, reflected in Practice Direction No. 3 of 2004, of ensuring that judicial review proceedings are brought promptly. The strong public interest in the certainty of administrative decision-making explains why judicial review proceedings need to be brought within a timeframe considerably shorter than the limitation periods applicable to most civil actions.

30. As this Court said in Litchfield, the requirements of promptness will inevitably vary according to the particular circumstances of a case. These include the steps that may need to be taken in order to assemble a claim and accompanying evidence, the effects of prolonged uncertainty as to the finality of an administrative decision, specific prejudice that may be caused to individuals or groups, and the likelihood that the progress of a criminal investigation will be slowed. All these factors speak in favour of a flexible approach.

31. But to leave prospective applicants with no more precise guidance than the single word "*promptly*" would be unsatisfactory, for the reasons advanced by Lord Steyn in Burkett. Citizens need to know where they stand. This requires that deadlines for challenge be not only short but reasonably predictable. If it is to be a useful guide, the requirement of promptness must be accompanied by rules of thumb that assist applicants and respondents alike in predicting how the courts will interpret it.

32. It is such a rule of thumb that this Court sought to provide in the Litchfield case. We resist the label of "*rebuttable presumption*" that the Appellants sought to attach to that formulation, as having an excessively mechanistic feel. Prospective applicants should not consider themselves entitled save only in cases of urgency to the full three-month period. Where relatively little preparatory work is needed and where delay may have serious consequences for individuals or for the public interest, it may be incumbent on prospective applicants to proceed much more quickly, even in cases that might not be described as urgent. Challenges to search warrants and production orders are categories of case in which the courts in this jurisdiction, even in the absence of specific individual prejudice, are likely to expect proceedings to be prepared and lodged well within the three-month period referred to in Litchfield. We note that the Royal Court in Groucutt came to a similar

conclusion in relation to the challenge to planning permission in that case.

33. We are conscious, however, that a literal reading of Litchfield might have led persons in the position of the appellants to assume that in the absence of genuine urgency, they had acted promptly by commencing proceedings little more than half way into the three-month period referred to in that case. In the circumstances, and even allowing for the fact that the decision of the Bailiff was a discretionary one with which we would ordinarily be reluctant to interfere, we do not consider that it would be fair to endorse the conclusion that permission to apply for judicial review should be refused in this case for lack of promptness.

34. We accordingly allow the appeal against the Bailiff's refusal of permission to apply for judicial review on grounds of delay.

Substantive grounds

35. In his submissions before us, Advocate Le Tissier relied upon the skeleton argument for the appellants. What may be regarded as his principal ground concerned the access conditions set out in paragraph 2(a) of Schedule 1 to the 2003 Act and he also addressed a number of further criticisms as reflected in his grounds of appeal. Before we deal with the merits of these, there are two preliminary issues which require to be considered.

36. The first is how we ought to deal with the substantive grounds. In dealing with the application for judicial review at first instance, the Bailiff refused permission to proceed upon the basis of delay. As we have allowed the appeal against his refusal of permission to proceed, the question is whether we should ourselves consider the need for permission as a first step or whether we should regard that as having been given and proceed to determine the appeal by reference to the substantive merits of the application for judicial review. Before us, Advocate Gist accepted that he had not taken any issue before the Bailiff that the application for judicial review was frivolous or vexatious, nor had he sought the refusal of permission on any ground other than delay. In this situation, having allowed the appeal on the ground of delay, we grant permission to apply for judicial review. We therefore address the remaining grounds of appeal by reference to the substantive merits of the application for judicial review.

37. The second preliminary issue is how the court should approach an application for the judicial review of a decision made by a judicial officer. The decision of Judge Finch, in exercising a power granted to the Bailiff by paragraph 1 of Schedule 1, is not the decision of a court as such and is not susceptible to the customary rights of appeal where an appeal court may review the merits of the decision which has been appealed against. The only remedy in the event of challenge in a case such as this is by way of application for judicial review. In that situation, we are satisfied that neither the Bailiff nor this Court can rehear the merits of the application for the production order but rather must apply the principles of judicial review to decide whether the decision made by the Judge was one which was reasonably open to him on the facts which were presented. That is supported by the approach taken by a Divisional Court of the Queen's Bench Division in England in the case of *R (S and others)* v *Chief Constable of the British Transport Police* [2014] 1 WLR 1647 at paras 55-56, and the heading above the latter paragraph. We therefore approach the criticisms made by the appellants by determining whether the Judge was reasonably entitled to reach the conclusion which he did on the material which was placed before him by the second respondent.

38. A production order may be granted by the Bailiff in accordance with Schedule 1 of the 2003 Law. What are referred to as the access conditions are set out in paragraph 2(a) of that Schedule. These are fulfilled if there are "reasonable grounds for believing" a series of four

specified factors. The Bailiff also requires to be satisfied that the making of the order is in the public interest by reference to paragraphs 2(c) and 3. These are the requirements which are in issue in this appeal. There is a further need for the obtaining of the material to have been tried by other methods or to have been bound to fail but that is not put in issue by the appellants. Nor is any issue raised in relation to the confidentiality of any of the special material which is the subject of the production order. In summary, this means that in order to justify the making of the production order in this case, the Judge needed to be satisfied upon a reasonable basis that the access conditions had been met and that the making of the order was in the public interest.

39. The approach in such a situation was considered in *R (S and others)* v *Chief Constable of the British Transport Police* ("*British Transport Police*"). That case concerned the granting of a search warrant under the special procedure in section 9 of and Schedule 1 to the Police and Criminal Evidence Act 1984 (known as "PACE"). The parties proceeded before us on the basis that we should treat that procedure as the equivalent of the procedure under the 2003 Law. In paragraph 32, the Divisional Court said that it is the judge, not the officer who seeks the order, who has to be satisfied that the access conditions relied upon by the applicant are fulfilled. The Court then continued:

> "33. There are three particular requirements which make up the first set of 'access conditions'. The first requirement consists of four sub-requirements and each of those stipulates that there be 'reasonable grounds for believing' that a particular matter is the case. This must mean that the judge (who is the person that has to be satisfied that the 'access condition' relied on has been fulfilled) must be satisfied that the constable had 'reasonable grounds for believing' that each of the four matters set out in this first requirement is the case. These matters are, broadly, first, that an indictable offence has been committed. That is self-explanatory. The second is that there is material in the premises specified which consists of or includes 'special procedure material' and does not also include 'excluded material' (as defined in sections 14 and 11 of PACE respectively). As already explained above, given the definition of 'special procedure material' set out in section 14(2) of PACE, this must mean that the 'special procedure material' sought must be material 'other than items subject to legal privilege'. The third sub-requirement is that such 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'. The fourth sub-requirement is that the material is likely to be 'relevant evidence'."

The Court then considered the information which was required in order to justify the making of the order and stated:

> "45. In relation to the Information itself, which as we say, is the sole basis upon which, ultimately, the judge will grant the search warrant, it is clear from the statutory provisions of PACE to which we have drawn attention above that it must deal with the following: (1) It must set out each of the statutory requirements which has to be satisfied in the particular case before the warrant in question can be granted. There are a number of different routes for obtaining a search warrant and only the route actually selected in a particular case should be dealt with, or else the judge will not know the precise basis of

the application being made. (2) It must show, for each of the relevant statutory requirements, how that requirement is satisfied by setting out all the relevant facts relied on including all facts and matters which are said to show that a particular 'reasonable belief' is justified. It is not enough to assert that a particular requirement is satisfied without explaining how it is said to be so. It is only when the judge can review the facts set out in the Information that he can decide for himself if a requirement has actually been satisfied. Furthermore, it is only then that a party wishing to challenge the warrant can decide whether the order could be challenged because of a failure to satisfy that particular requirement. Hence, an assertion that there are 'reasonable grounds' for a belief will require that basis of the belief to be explained in detail. By the same token, an assertion that, in words of paragraph 2(b) of Schedule 1 of PACE , 'other methods of obtaining the material… have not been tried because it appeared that they were bound to fail' would require details of the facts relied on by the constable for that statement. (3) It must state whether, despite there being 'reasonable grounds' for the constable believing that the material sought consists of or contains 'special procedure material' or 'excluded material', there might be a claim for legal privilege in respect of any communication sought and, if so, how and why that would arise together with precise details of the arrangements which are to be taken to ensure that there will be an independent supervising lawyer present at the time of the search. (4) It must make full and frank disclosure. This means, in the words of Hughes LJ in *Re Stanford International Limited* [2010] 3 WLR 941 at [191] that 'in effect a prosecution seeking an ex parte order must put on his defence hat and ask himself what, if he was representing the defendant or a third party with the relevant interest, he would be saying to the judge, and, having answered that question, that is precisely what he must tell'. This is a heavy burden but a vital safeguard. Full details must be given. It is a useful reminder to the person laying the Information to state expressly which information is given pursuant to the duty of full and frank disclosure…"

Finally, for the purpose of this case, the Court said:

> "61. … the information has to show in the words of paragraph 2 (a) that 'there are reasonable grounds for believing… (iv) that the material is likely to be relevant evidence'. However, as already noted, the last page of the Information merely states (with emphasis added) that 'the material to which this application relates to [sic] is mobile phones and laptops which are suspected to contain evidence of communication of the conspiracy'. Suspicion falls a long way short of the requirement of 'reasonable grounds to believe'. As Sullivan LJ explained in *Eastenders Cash & Carry PLC* v *South Western Magistrates Court* [2011] 2 Cr App R 11 [13]:
>
> > '…it is plain that a belief is more than a suspicion and that the need to have reasonable grounds for a belief imposes a higher threshold than the need to have reasonable grounds for a suspicion'."

40. Advocate Le Tissier emphasised these considerations in the context of the production order made by the Judge and submitted failures in a number of respects. He also emphasised the seriousness of the making of such an order by reference to *R* v *Lewes Crown Court* ex p *Hill* (1991) Cr App R 60, where Bingham LJ said commencing at p 65:

> "The Police and Criminal Evidence Act governs a field in which there are two very obvious public interests. There is, first of all, a public interest in the effective investigation and prosecution of crime. Secondly, there is a public interest in protecting the personal and property rights of citizens against infringement and

invasion. There is an obvious tension between these two public interests because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and total protection of the personal and property rights of citizens would make investigation and prosecution of many crimes impossible or virtually so.

The 1984 Act seeks to effect a carefully judged balance between these interests and that is why it is a detailed and complex Act. If the scheme intended by Parliament is to be implemented, it is important that the provisions laid down in the Act should be fully and fairly enforced. It would be quite wrong to approach the Act with any preconception as to how these provisions should be operated save in so far as such preconception is derived from the legislation itself.

It is, in my judgment, clear that the courts must try to avoid any interpretation which would distort the parliamentary scheme and so upset the intended balance. In the present field, the primary duty to give effect to the parliamentary scheme rests on circuit judges. It seems plain that they are required to exercise those powers with great care and caution…"

41. Reference was also made to the acknowledgement of the same considerations in this jurisdiction in the judgment in the case of *In the Matter of an Order for the Production of Special Material*, Royal Court, 19 January 2015, Judgment 03/2015, where McMahon DB said:

> "38. In reaching these conclusions, as well as when proceeding to consider whether or not to exercise my discretion to make the order sought, I had regard to the passages in *Blackstone's Criminal Practice 2014* (paras D1.155 *et seq*), which explain the process as a matter of English law. Because of the similarities between the two legislative regimes, I consider that this guidance is equally applicable to an application under the 2003 law. It is apparent that, when such an application is made, the Bailiff should proceed with great care and caution…"

42. We accept that these passages provide a guide as to how the Judge ought to have considered the Informations before him and the sufficiency of the material provided before making the production order and we approach our own consideration of the requirements of Schedule 1 to the 2003 Law upon this basis.

43. At the start of our consideration of the contentions for the appellants, it is convenient to deal with what is ground of appeal 3 which is that the Bailiff did not consider the inadequacy of the reasons given by the Judge and did not himself give adequate reasons. In the case of the Judge, we agree that the reasons given orally by the Judge may be said not sufficiently to address the objections which had been put forward by the appellants to the making of the production order. In his decision to make such an order, the judicial officer in question should provide a reasoned explanation as to why he has been satisfied that the requirements of Schedule 1 have been fulfilled and the comparison in this case with the reasoned judgment of the Deputy Bailiff in *In the Matter of an Order for the Production of Special Material* is a stark one. In the case of the judgment of the Bailiff in the present application for judicial review, however, the position is different. The Bailiff had refused permission to proceed upon the basis of delay and he did not strictly need to deal with the merits at all. That he did so to some extent was of assistance to the parties and to this Court but what he said cannot be said to have been a fully reasoned decision because he did not need to provide that having already determined the proceedings. The parties in their written submissions addressed the status of the Bailiff's judgment in this respect and we are satisfied that it may properly be regarded as *obiter dicta* although we do not consider that this gives rise to any substantial issue in the context of this appeal.

44. Where a judge who has granted a production order may be said to have provided inadequate reasoning for his decision, that does not provide a ground by itself for the quashing of the order. In *Burgin* v *Commissioner of Police of the Metropolis* [2011] EWHC 1835 (Admin), Stadlen J, sitting in the Divisional Court with Laws LJ, said:

> "36. In *R (Da Costa)* v *Thames Magistrates' Court* [2002] EWHC 40 (Admin) Kennedy LJ sitting in the Divisional Court said:
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> > "In my judgment the complaints in relation to the width of the warrants are misconceived. Of necessity the warrant does not set out in detail why the Deputy District Judge was satisfied that there were reasonable grounds for suspecting that a fraud offence of a serious nature (which in an indictment might be charged as more than one offence) had been committed. That detail was in the Information, but it was with that in mind that he authorised [the officers] to enter the specified premises and search them for evidence relating to the commission of this offence, including the items set out in the four lettered paragraphs of which complaint is made."
>
> Although principally directed at the challenge to the width of the warrants, in my view Kennedy LJ's observations are a further example of the court being prepared in an appropriate case to draw an inference from the contents of the Information relied on in support of an application for a search warrant that the reasons why the issuing judge decided to issue it were that he was satisfied that on particular evidence contained in the Information identified grounds entitling the applicant to the issue of a warrant were satisfied.
>
> 37. Lest it be thought that, because in an appropriate case the reviewing court may be prepared to infer what reasons lay behind the decision to issue a warrant, there is no practical sanction in the event of a failure to give and record reasons, the decision in *R (Lewes Crown Court)* provides a salutary example of a case in which the court was not prepared to infer from the background information the existence of adequate reasons justifying the issue of the warrant. The many statements in the authorities to the effect that the need to give reasons is not a formality reflect the fact that where reasons are not given the reviewing court will subject to particularly anxious scrutiny any submission that the reasons may be discerned from the Information and/or other background material and will be astute to quash any decision to issue a warrant where the reasons cannot clearly be inferred."

45. What this means in practical terms is that in this case the Court must consider with particular care the information provided to Judge Finch, primarily in the redacted Information and in the second Information, both sworn by the officer seeking the order, and determine whether the Judge was reasonably entitled to decide, based upon that information, that the production order should be granted.

46. In his skeleton argument and before us, Advocate Le Tissier conducted a paragraph-by-paragraph analysis of the redacted Information and submitted in each case the respects in which what had been said by Officer Hamilton did not meet the requirements of Schedule 1 by reference in particular to what was said in *British Transport Police*. We do not accept this approach because in our judgment what is required is that the information which was placed before the Judge be considered as a whole. Although a single item of evidence may by itself be of little probative value, a combination of items of evidence may lead to the

establishment of a circumstantial case and we do not see why the power to obtain a production order which is provided by the 2003 Law should be read as requiring the obtaining of each individual item of special material to be justified individually. Indeed, the potential value of a combination of evidence is recognised in Schedule 1 itself where paragraph 2(a)(iii) refers to the special material being 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". It is fair to say that in the grounds of appeal and in his skeleton argument, Advocate Le Tissier did also acknowledge that the matters contained in the Informations could be looked at cumulatively but in his submissions before the Court he did invite us to draw conclusions based upon individual paragraphs in the redacted Information and we do not accept that this would be legitimate. We therefore reject that approach and have considered what is contained in the Informations as a whole in order to consider whether the Judge was reasonably entitled to be satisfied that the production order should be granted.

47. By reference to what is stated in paragraph 2(a) of Schedule 1, and with the guidance provided in paragraphs 45 and 61 *British Transport Police*, what Officer Hamilton required to set out were the facts upon which she relied in order to come to her reasonable belief in the respects required. She had to demonstrate justification for something more than a suspicion but that does not mean that she had to demonstrate a certainty or a definitive conclusion based on the facts upon which she relied. By reference to paragraph 2(a)(iii) and (iv), she had to have reasonable grounds to believe that the special material "was likely to be" of substantial value and relevant evidence and. of course, the very nature of the obtaining of evidence with a view to criminal proceedings is that the evidence may be sufficient to lead to a prosecution but at the stage of investigation it cannot be known that it will definitively do so.

48. For the purposes of this case, the requisite reasonable belief will need to be of the particular matters required by paragraph 2(a). These are that a serious arrestable offence has been committed, that there is special material on specified premises which is likely to be of substantial value in the investigation of the offence whether taken alone or with other evidence, and that the material is likely to be relevant evidence. The judge considering the application needs also to be satisfied that the obtaining of the special material would be in the public interest having regard to the benefit to the investigation and the circumstances of the person holding the material by reference to paragraphs 2(c) and 3. The issue of the public interest is not a matter which requires to be the subject of a reasonable belief by the officer concerned but there is no reason why he or she should not offer a view in that respect in the information placed before the Judge. There are other considerations which might arise in other cases, for example in relation to confidentiality, but we need not dwell upon them for the purposes of this case.

49. Having considered what is contained in the redacted Information as a whole, we are satisfied that Judge Finch was reasonably entitled to accept that the requirements of reasonable grounds for belief in paragraph 2(a) of Schedule 1 were made out. We do not intend to deal in detail with each of the aspects in which this may be said to have been so, not least because these proceedings are concerned with an ongoing investigation into serious crime and it would be unfortunate if this Court appeared to be making some observation about the sufficiency or otherwise of evidence which might be relied upon at a later date. Nevertheless, we can observe that throughout the redacted Information, Officer Hamilton refers to matters of fact relating to the named individuals and companies mentioned and to the inferences which have been drawn from those facts. There is reference to predicate offences, not least to missing trader tax fraud inferred from the facts referred to in paragraph 9, the apparent transfer of substantial funds involving Guernsey-based companies from sources which are not legitimate in paragraphs 12 and 13, and the

connection between certain of the individuals named and a so-called Organised Crime Group in paragraph 65. We emphasise that this is not an exhaustive summary of what the Judge was entitled to rely upon for the reason just explained but it does appear to us to demonstrate the drawing of inferences based on facts narrated by Officer Hamilton. The position is the same in relation to the existence of material said by her to be likely to be of substantial value to the investigation of the criminal offences referred to and to be relevant evidence. Having regard to the nature of the offences identified, which generally relate to the sources and movement of large sums of money apparently connected with businesses which may not be legitimate, the obtaining of financial and business records would on the face of it seem to be likely to provide relevant evidence to the investigation of those offences, The redacted Information further refers, by way of example, to information provided by a bank in paragraphs 23 to 30 and 33, and the carrying out of an investigation by accountants and the conclusions reached in paragraphs 31 to 32.

50. Having regard to what is contained in the redacted Information taken as a whole, the Court is satisfied that Judge Finch was reasonably entitled to form a belief in respect of the matters specified in paragraph 2(a) of Schedule 1, and as a result that he was reasonably entitled to rely upon that belief for the purposes of granting the production order.

51. Judge Finch also required to be satisfied that the granting of the production order would be in the public interest in the respects specified in paragraphs 2(c) and 3. As already noted, that is an aspect in which the judge considering an application for an order is to be satisfied but in the present case Officer Hamilton had offered her own view in the second Information although it is fair to note that she did little more than offer her own belief in that respect. The need for an order for the obtaining of special material in the respects specified by paragraph 2(a) also to be made in the public interest seems somewhat axiomatic given that it may be said to be self-evident that the obtaining of relevant evidence for the purpose of assisting in the investigation of serious crime is in the public interest. That is also consistent with what was said by Bingham LJ in *R* v *Lewes Crown Court* ex p *Hill*, although that aspect of the public interest requires to be balanced against the public interest in protecting personal and property rights. In the present case, no particular reason was put forward by the appellants before the Judge as to why it would not be in the public interest to make the production order sought and in that situation we are satisfied that the Judge was reasonably entitled to find that the requirement related to the public interest had been met. Whilst many orders pursuant to section 9 and Schedule 1 will be granted *ex parte*, what is said in paragraph (c) appears to envisage that a respondent would be entitled to put forward a particular reason related to the material in question or the individual holding it as to why its production would not be in the public interest. Further consideration of that would be a matter for a future case but in the circumstances of what is before us we cannot see why the Judge was not reasonably entitled to find that the production of the material in question was in the public interest, given the gravity of the potential criminal conduct described by Officer Hamilton and the potential value of the material to the investigation of that criminal conduct.

52. The Court is therefore satisfied that the application for judicial review is not made out on the principal ground and falls to be refused. This leaves three further issues which were raised on behalf of the appellants.

53. The first issue is that the investigation of money laundering in relation to the proceeds of criminal conduct pursuant to sections 38 to 40 of the 1999 Law excludes the proceeds of drug trafficking: see the definition of “criminal conduct” in section 1(1). Advocate Le Tissier referred to the fact that in a number of passages of the redacted Information, Officer Hamilton referred to what was believed by her to be the money laundering in connection

with drug dealing. In our judgment, this does not render the reliance of the Judge on that Information as being unreasonable or otherwise unjustified. Officer Hamilton has referred to an overall course of conduct based upon the facts narrated and has referred to the ongoing criminal investigations. These are all matters of fact from which she derives her reasonable belief that criminal conduct, as properly defined, has taken place including VAT offences and payroll fraud. We cannot see how her references to analogous conduct which is included in the ongoing investigations could render reliance upon the redacted Information as unjustified.

54. The second further issue is that in his skeleton argument and submissions, Advocate Le Tissier identified individual items which were the subject of the production order but which based upon their description could not be of any evidential value. This could be done because when the material originally seized under the search warrant had been returned to Ashton Barnes Tee in sealed exhibit bags, the individual items had been listed and that list was before the Judge as a description of the evidence which was to be the subject of the production order. Particular examples of items which were said to have no potential evidential value included a magazine invoice reminder and post-it notes which were apparently blank. Advocate Le Tissier submitted that the Judge had to be satisfied that the making of the production order was justified in respect of each and every item on the list and that the obvious lack of justification in respect of certain items vitiated the granting of the order.

55. We do not agree. The existence of items which are found on business premises and said to be connected with criminal activity may be of potential evidential value even if the items taken by themselves appear to be entirely innocent. It is not for the judge in considering the making of a production order to decide for himself in advance the individual value of a potential piece of evidence sad to be present on the premises specified. In any event, this matter was not raised with the Judge and in our judgment he cannot be said not to have had a reasonable basis for making the order for the production of all of the items on the list in the overall circumstances described in the Informations by Officer Hamilton when it was not suggested to him that particular items should be excluded. But most importantly, the inclusion of an item which ought not to have been included in a production order does not vitiate the order. By reference once again to English authority, it is apparent that a judge has the power to vary and narrow down a production order after it has been granted and the order might potentially be at risk only if its width could be said to be disproportionate: *R (on the application of Malik)* v *Manchester Crown Court and another* [2008] 4 All ER 403, per Dyson LJ at paras 33 and 85, under reference to *R* v *Central Criminal Court* ex p *Bright* [2001] 1 WLR 754, per Judge LJ at p 688. Thus it would be open to the appellants to apply to Judge Finch to exclude any items included in the production order, but having regard to the nature of the particular items identified by Advocate Le Tissier, we cannot see how their exclusion would render the granting of the production order otherwise disproportionate.

56. The final further issue concerns the inclusion of I-Cap Crewing Services Limited within the scope of the production order. Advocate Le Tissier noted that in paragraph 74 of the redacted Information, Officer Hamilton said she had no evidence or intelligence that this was not a legitimate business; but evidence relating to that company had been seized under the search warrant and was included in the production order. In paragraph 6 of the second Information, Officer Hamilton had revised her position and now gave reasons why I-Cap Crewing Services Limited could now be said to be "intrinsically connected to the companies under investigation". As before, what was stated in paragraph 6 was not to be taken in isolation; but having regard to all of the facts stated and inferences drawn by Officer Hamilton in her Informations as a whole, we consider that the Judge was reasonably entitled to include the I-Cap Crewing Services Limited material within the order and at the hearing

before him it was not suggested that he should not do so. Finally, and as Advocate Gist observed, I-Cap Crewing Services Limited is not a party to these proceedings. On the face of it, but without expressing any definitive view in the absence of argument, it would appear that it might be open to I-Cap Crewing Services Limited now to apply to Judge Finch to vary the production order in its interests upon the same basis as just discussed but we cannot see how this issue could justify the quashing of the production order.

Decision

57. For all of these reasons, we grant permission for the application for judicial review at the instance of the appellants to proceed, and we refuse that application for judicial review.