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R v Leeds Crown Court Ex parte Switalski

Queen's Bench Division (Crown Office List)

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HEARING-DATES: 21 December 1990

21 December 1990

COUNSEL:

R Smith QC and D Mitchell for the Applicant; B Stewart for the North Yorkshire Police

PANEL: Neill LJ, Leonard J

JUDGMENTBY-1: NEILL LJ

JUDGMENT-1:

NEILL LJ: This is an application by Mr Stephen Jan Thomas Switalski for judicial review and for an order to quash an order made by His Honour Judge Savill QC on 16th June 1989 for the issue of three warrants authorizing Stephen Grey of the North Yorkshire Police to enter and search the premises specified in the warrants for the material therein specified.

Leave to move for judicial review was granted by Popplewell J on 1st September 1989.

The applicant is a solicitor of the Supreme Court. He is in partnership with three other solicitors including Mr Julian Audsley. The firm practises from premises in Wakefield and in Harrogate. The premises specified in the warrants were the two addresses at which the firm practises and also the private address of the applicant. A fourth warrant was issued at the same time for the search of the home of Mr Audsley. The fourth warrant is not included in the present application.

In each of the three warrants the material specified was the same. It is sufficient to refer to the material as set out in the warrant relating to the firm's Wakefield premises. I turn to page 36 of the indexed bundle which reads as follows:

"The material to which this warrant applies is:

- (1) All files and documents relating to the business as solicitors of Stephen Jan Thomas Switalski and Julian Audsley.
- (2) Any files and documents relating to business as solicitors carried out by the firms of John Delaney & Company and T Lister & Company.
- (3) All other files and documents likely to be of significant value to the progress of the investigation."

It will be seen, as indeed is conceded on behalf of the Crown Prosecution Service, that the material applies to all the files and documents of the practice.

The legislation

Before I come to the facts of the case I must refer in some detail to the relevant provisions of the Police and Criminal Evidence Act 1984 ("the 1984 Act") under which the application for the issue of these warrants was made by

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the North Yorkshire Police. Section 8 of the 1984 Act provides for the issue of warrants by magistrates to enter and search premises for evidence of serious arrestable offences. The section gives a justice of the peace, on written application from a constable, a power to issue a search warrant where he is satisfied that, among other things, there are reasonable grounds for believing that a serious arrestable offence has been committed.

One of the further matters about which a magistrate has to be satisfied, however, before he issues a warrant is that the material on the premises specified in the application "does not consist of or include items subject to legal privilege, excluded material or special procedure material". It will be seen at once therefore that it is unlikely that the procedure under section 8 can be used where a search is made of premises occupied by a firm of solicitors. Indeed this matter is made very clear by the definitions of "items subject to legal privilege" and "special procedure material" set out in section 10 and section 14. I should read first the relevant part of section 14 which is as follows:

14(1) In this Act "special procedure material" means --

(a) material to which subsection (2) below applies;

...

(2) Subject to the following provisions of this section, this subsection applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who --

(a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office

(b) holds it subject --

(i) to an express or implied undertaking to hold it in confidence; or

(ii) to a restriction or obligation such as is mentioned in section 11(2)(b) above."

It is not necessary to refer further to section 11(2)(b). In this case we are concerned with material falling within paragraph (b)(i), that is, material held subject "to an express or implied undertaking to hold it in confidence". It is unnecessary for the purpose of this case to consider further the definition of excluded material. I should, however, next refer to section 10 which provides as follows under the heading "Meaning of items subject to legal privilege":

"(1) Subject to subsection (2) below, in this Act 'items subject to legal privilege' means --

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and

(c) items enclosed with or referred to in such communications and made:

(i) in connection with the giving of the legal advice;

or

(ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in possession of a person who is entitled to possession of them."

Section 10(2) provides as follows:

"(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege."

Special provisions as to access to excluded material or special procedure material are contained in section 9 of the 1984 Act and in Schedule 1. I should first read section 9(1) which provides as follows:

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

I turn therefore to the first schedule to the Police and Criminal Evidence Act 1984

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The schedule contains 16 paragraphs divided into four headings. The first heading is "Making of orders by circuit judge", the second "Notices of applications for orders", the third "Issue of warrants by circuit judge" and, finally, "Costs".

The schedule provides two alternative methods by which access to special procedure material can be obtained. The first method is to obtain a circuit judge's order under paragraph 4 for production of the material or for giving access to the material to a constable. Such an order can only be obtained by application made *inter partes* (see paragraph 7 of Schedule 1).

It is to be noted that upon service of the notice of application it is then provided that the person on whom the application is served:

"11. . . . shall not conceal, destroy, alter or dispose of the material to which the application relates except

--

(a) with the leave of a judge; or

(b) with the written permission of a constable until --

(i) the application is dismissed or abandoned; or

(ii) he has complied with an order under paragraph 4 above made on the application."

The second method is to proceed by way of an application for a warrant authorising a constable to enter and search the premises. This procedure is set out in paragraphs 12, 13 and 14 of Schedule 1. If this method is adopted the application to the circuit judge is made *ex parte*. These paragraphs lie at the very centre of this case and I should cite them in full:

"12. If on an application made by a constable a circuit judge --

(a) is satisfied --

(i) that either set of access conditions is fulfilled; and

(ii) that any of the further conditions set out in paragraph 14 below is also fulfilled; or

(b) is satisfied --

(i) that the second set of access conditions is fulfilled; and

(ii) that an order under paragraph 4 above relating to the material has not been complied with

he may issue a warrant authorising a constable to enter and search the premises.

13. A constable may seize and retain anything for which a search has been authorized under paragraph 12 above.

14. The further conditions mentioned in paragraph 12(a)(ii) above are --

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises to which the application relates;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises by it is not practicable to communicate with any person entitled to grant access to the material;

(c) that the material contains information which --

(i) is subject to a restriction or obligation such as is mentioned in section 11(2)(b) above; and

(ii) is likely to be disclosed in breach of it if a warrant is not issued;

(d) that service of notice of an application for an order under paragraph 4 may seriously prejudice the investigation."

In the present case we are concerned with the first set of access conditions. These are set out in paragraph 2 of Schedule 1 and are in these terms:

2. The first set of access conditions is fulfilled if

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(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 procedure material or includes special procedure material and does not also include excluded material on premises specified in the application;

(iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and

(iv) that the material is likely to be relevant evidence;

(b) other methods of obtaining the material --

(i) have been tried without success; or

(ii) have not been tried because it appeared that they were bound to fail; and

(c) it is in the public interest, having regard --

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

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

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

For the purpose of the present application it is accepted on behalf of the applicant that the first set of access conditions were fulfilled. The issues which arise are (1) whether the judge erred in law in concluding that one of the conditions in paragraph 14 had been complied with and (2) whether the judge acted in excess of his jurisdiction in ordering the issue of warrants which related in effect to all the files and documents in the possession of the applicant's firm.

Before returning to the facts it is necessary, however, to refer to some further provisions of the Police and Criminal Evidence Act 1984. I should go back to section 15. Section 15 bears the heading "Search warrants -- safeguards". Section 15(1) provides:

"This section and section 16 below have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after this Act, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.

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

(a) to state --

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

(ii) the enactment under which the warrant would be issued;

(b) to specify the premises which it is desired to enter and search; and

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

(3) An application for such a warrant shall be made ex parte and supported by an information in writing.

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

(5) A warrant shall authorize an entry on one occasion only.

(6) A warrant

(a) shall specify --

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

(ii) the date on which it is issued;

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(iii) the enactment under which it is issued; and

(iv) the premises to be searched; and

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

Counsel for the applicant in this case drew particular attention to section 15(2)(c) which requires the constable who applies for the warrant to identify, so far as is practicable, the articles or persons to be sought. He also drew attention to section 15(6)(b) which requires that the warrant shall identify so far as is practicable the articles or persons to be sought.

Finally, I should read parts of section 19. That section bears the heading "General power of seizure etc". Subsection (1) provides:

"The powers conferred by subsections (2), (3) and (4) below are exercisable by a constable who is lawfully on any premises.

...

(3) The constable may seize anything which is on the premises if he has reasonable grounds for believing --

(a) that it is evidence in relation to an offence which he is investigating or any other offence; and

(b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.

...

(6) No power of seizure conferred on a constable under any enactment (including an enactment contained in an Act passed after this Act) is to be taken to authorise the seizure of an item which the constable exercising the power has reasonable grounds for believing to be subject to legal privilege."

I return to the facts.

The application to Judge Savill was made on Friday, 16th June 1989. No notice of the application was given to the applicant or to anyone in his firm. Having obtained the warrants the police executed them on Monday, 19th June. They spent two days conducting a search of the specified premises and removing documents.

Before he issued the warrants the judge gave a short judgment of which a transcript has been supplied. I shall refer to parts of that judgment. He set out the nature of the application and went on:

"... The four informations before me in support of this application for warrants under paragraph 12 of Schedule 1 of the Act have been furnished by Detective Sergeant Gray. They relate to the offices of these persons in Harrogate and Wakefield and to their home addresses.

It is submitted that there are reasonable grounds for believing that arrestable offences, serious arrestable offences, have been committed by each of these persons, namely the offences which are set out in the informations -- an offence involving serious interference with the administration of justice, obtaining property by deception, theft, and conspiracy to fraud, all involving substantial financial loss. That there is material to which the informations relate, consisting of special procedure material or includes such material, not excluding material as defined in Part 2 of the Act."

The judge went on to deal with the other elements which were sufficient to satisfy the first set of access conditions set out in paragraph 2 of Schedule 1 to the Police and Criminal Evidence Act 1984. Having dealt with that matter the judge continued at the top of the second page of his judgment:

"Mr Yates, on behalf of the Crown Prosecution Service, has properly drawn to my attention two points that I ought to consider in deciding whether it is appropriate to issue the warrants which are now sought. Firstly, this application is *ex parte* and no other method of obtaining this material has been tried. It is Mr Yates' submission that it is not practicable to communicate with any person entitled to grant entry to any of these premises to which these applications relate. To do so would alert these two persons named to the police investigation, its scope and purpose, with the consequence and substantial probability of the loss or destruction of the material to which these applications relate.

I accept this submission and accordingly I am satisfied that other methods of obtaining the material were bound to fail, that the first set of access conditions have been made out, and that paragraph 14(a) of the Schedule applies, being a fulfilling condition under paragraph 12(a)(ii). Secondly, it is said that some of the sought for material may be items

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subject to legal privilege within section 10 of the Act, and that special procedure material, as defined by section 14, excludes items subject to legal privilege. However, it is submitted that I should nevertheless grant these warrants by reason of the exclusion clause provided by section 10(ii). The material here, I am satisfied, comes within such items in that clause.

Subsection (ii) of section 10 is as follows: 'Items held with the intention of furthering a criminal purpose are not items subject to legal privilege'.

In my judgment it would not be right where a solicitor suspected of serious crime, on reasonable grounds, that he should be afforded the opportunity, through prior notice, further to interfere with the course of justice under the umbrella of legal privilege, and Parliament in passing section 10(ii) must have so intended. Accordingly I am satisfied that it is appropriate to issue these warrants."

The judge went on to say he had been reminded of the decision of the House of Lords in *R v Central Criminal Court ex parte Francis & Francis* [1989] 1 AC 346, [1988] 3 All ER 775 and had also considered a Times report of the decision of the Divisional Court in *R v Maidstone Crown Court ex parte Waitt*. He then went on to sign the warrants.

It will be seen from the judgment that the judge expressed himself as being satisfied as to the condition set out in paragraph 14(a). That was reflected in the wording of the three warrants. The material part of those warrants is as follows:

"I am satisfied (after hearing application) that the first set of access conditions specified in the said Schedule 1 is fulfilled in relation thereto and [these are the important words] that it is not practicable to communicate with the person entitled to grant entry to the premises specified herein."

Counsel on behalf of the applicant has put forward two principal arguments. First it was submitted that the judge erred in law in coming to the conclusion that he was satisfied that it was not practicable to communicate with the person entitled to grant entry to the specified premises. "Practicable", it was said, means feasible. The applicant or one of his partners was available on Friday, 16th June or over the weekend. The court in the Maidstone Crown Court case pointed to the difficulty of trying to argue that it was not practicable to communicate with a firm of solicitors. In any event the correct procedure to be followed in this case would have been by way of an inter partes hearing. Furthermore, if the police wanted to rely on paragraph 14(d) they should have done so expressly.

I see the force of this submission but I am not persuaded that it affords adequate grounds for setting the warrants aside.

As is now accepted on behalf of the police and the Crown Prosecution Service it would have been more satisfactory to have based the case on paragraph 14(d) or possibly on 14(a) and 14(d). 14(d) corresponds with section 8(3)(d), although the wording is slightly different, which is one of the conditions which have to be satisfied before the justice of the peace can issue a warrant under that section. In my judgment "practicable" in this context bears a wider meaning than feasible or physically possible. The same word is used in section 8(3)(a) and (b) and in section 15(2)(c) and 15(6)(b). It is also to be found, though in a different context, in section 3(2) of the Police and Criminal Evidence Act 1984.

It seems to me that in deciding, for the purpose of paragraph 14, whether it is practicable to communicate, one is entitled to consider not only the available means of communication but also all the circumstances including the nature of the enquiries and the persons against whom the enquiries are directed. In the ordinary case where a search is to be made on a solicitor's premises one would expect the application to be made inter partes and I would, in this context, refer to what was said in the Divisional Court by Macpherson J who delivered the leading judgment in *R v Maidstone Crown Court ex parte Waitt* (decided on 21st December 1987). He there said this:

"(3) The preferred method of obtaining material for a police investigation should always be by way of an inter partes order under paragraph 4, after notice of application has been served under paragraph 8. There may be cases, of course, where an ex parte application is justified, usually, we would suspect for the reasons set out in paragraph 14(d). But an ex parte application under paragraph 12 must never become a matter of common form, and satisfaction as to fulfilment of the conditions is an important matter of substance.

I would, with respect, entirely agree with and echo those words that the preferred method of obtaining material in the ordinary case is by way of an inter partes order. The present case, however, is most unusual in that it is the firm of solicitors itself which is the subject of investigation.

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There is a second reason why I would reject the application to quash the warrants on this ground. Let it be assumed that the word "practicable" should be construed narrowly and that it is only apt to cover the physical possibility of communication. What is the position then?

It is perfectly true that the judge made no finding as to the condition set out in paragraph 14(d), that is "that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation".

It is clear from his judgment, however, that he would undoubtedly have been satisfied as to paragraph (d) if he had been asked to make a finding on the matter. Thus, when dealing with the question whether it was practicable to communicate with any person entitled to grant entry to any of the premises, the judge said this: "To do so would alert these two persons named to the police investigation, its scope and purpose, with the consequence and substantial probability of the loss or destruction of the material to which these applications relate".

A little later, when considering section 10(2), he spoke of a solicitor, if given prior notice, being able to interfere with the course of justice.

Judicial review is a discretionary remedy. In my view it would be an affront to commonsense to quash these warrants on the grounds that the judge may have considered the case under the wrong heading when it is perfectly clear that he was in fact satisfied of the matters contained in subparagraph (d).

I turn therefore to the second submission put forward on behalf of the applicant. It is said that the judge acted in excess of his jurisdiction in issuing summonses which related to all the documents in the possession of the firm including a great many documents which are certainly subject to legal privilege and which could not be treated as falling within section 10(2).

I have found this to be a difficult point. Three matters are clear:

(1) Section 8 cannot be used to obtain access to material subject to privilege.

(2) Section 9 is concerned with obtaining access to excluded material and special procedure material. There is no mention in the section of items subject to legal privilege. Moreover, it is apparent from the definition of special procedure material in section 14 that items subject to legal privilege are excluded from this category.

(3) As Lord Bridge made clear in *R v Central Criminal Court ex parte Francis & Francis* [1989] AC 346, [1988] 3 All ER 775 at 369G of the former report throughout both the code for investigations during trafficking cases and the code embodied in section 9 and Schedule 1 of the 1984 Act there "runs a consistent thread that 'items subject to legal privilege' as defined in section 10 of the Act of 1984 are placed beyond the reach of any of the investigative powers conferred".

There is therefore a very powerful argument in support of the proposition that any warrant issued under section 9 and Schedule 1 of the 1984 Act should, however wide its scope, contain some express provision to exclude items subject to legal privilege.

Our attention was drawn to the written issues filed on the applicant's behalf. These were summarized later in argument to which I shall come in a moment. Turning to the written issues as they appear at page 4 in the bundle it was said as follows:

"Within the premises the subject of the warrants were large quantities of legal documents and files. The only parts of those documents and files which would be relevant to the proposed allegations and police investigation and not the subject of legal privilege would be communications passing between the applicant's firm and the Legal Aid Fund or the Crown Court legal aid department, together with bills of costs submitted to the Legal Aid Fund, and all related documents, together with those parts of file which set out the amount of work, the disbursements and attendances upon relevant clients. The majority of the documents would consist of either documents not protected by legal privilege such as wills, conveyances and other documents not within the definition of 'legal privilege' within section 10 of the Police and Criminal Evidence Act and documents which were subject to legal privilege."

In the course of his submissions counsel for the applicant said that there were three categories of documents about which the applicant and the firm were particularly concerned. First, proofs of evidence in both criminal and civil cases -- whether those cases were legally aided or privately funded -- secondly, letters from the solicitors to clients giving legal advice and from clients to the firm seeking legal advice and, thirdly, all notes and memoranda giving advice or recording requests for advice. These were all documents, it was said, which were plainly privileged.

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I see the force of these submissions. But as Mr Stewart emphasized in the course of his submissions on behalf of the Crown Prosecution Service, this is no ordinary case. The subjects of the investigation are the applicant and his firm. Furthermore, and this is of the utmost importance, the scope of the investigation involves a very wide-ranging enquiry into how the firm's business was conducted and the allegations against the applicant include allegations of fraud on the legal aid fund and a conspiracy to pervert the course of justice. In these very special circumstances I cannot see how it was possible to decide in advance what items, which though apparently and prima facie subject to legal privilege, might not be excluded from protection by reason of section 10(2).

I refer again to that subsection which is in these terms: "Items held with the intention of furthering a criminal purpose are not items subject to legal privilege". That subsection was considered by the House of Lords in a different context in *R v Central Criminal Court ex parte Francis & Francis* to which I have already referred. It is clear that the majority of their Lordships gave a purposive construction to that subsection. It is also to be remembered, as was stressed by members of the House in that case, that these investigative powers are given to aid the detection of serious crime.

Counsel for the applicant in his very helpful submissions recognized the difficulty of limiting the material covered by the warrants in advance. It was because of this difficulty, he submitted, that the correct procedure would have been to have had an inter partes hearing. He drew attention to the fact that there is a specific provision, which I have already recited, in paragraph 11 to the effect that as soon as notice of application is served on somebody it becomes a matter which can be dealt with by way of contempt of court if any interference takes place with the material to which the application relates.

I see the force of that submission but in this case I can see reasons for not seeking an order under paragraph 4. I would, however, repeat what Macpherson J said in his judgment in *Waitt*. He said this:

"(1) The special procedure under section 9 and Schedule 1 of the Act is a serious inroad upon the liberty of the subject. The responsibility for ensuring that the procedure is not abused lies with the circuit judges. It is of cardinal importance that circuit judges should be scrupulous in discharging that responsibility.

(2) The responsibility, which is great at all times, is greatest when the circuit judge is asked to issue a search warrant ex parte under paragraph 12. When the constable arrives on the citizen's doorstep with a warrant in his hand, or when the citizen returns home to find the constable already on the premises, or when, above all, he returns to find that the premises have been entered in his absence, and material seized, it is essential that he should be able to find out, in simple language which he who runs may read, the reason why the circuit judge has authorized seizure".

The responsibility of the circuit judge is particularly heavy when he is asked to make an order such as this which one can fairly describe as a blanket order. I expect that such an order will be very rare. We do not know and have not been shown the information which was before the judge. We are concerned here with an application for judicial review.

I hope and expect that judges will exercise extreme caution. It is to be noted that under section 15 they have the power to question the police officer on oath. They have to balance two conflicting public interests -- the interest in the investigation of crime and the interest in maintaining the confidentiality of communications between clients and their legal advisers. That was a balance to which Lord Goff drew attention in the *Francis & Francis* case at page 397.

I regard this second interest -- that is the interest in maintaining confidentiality -- as of the greatest importance and indeed vital for the maintenance of confidence in the legal system. Therefore, the police who have obtained warrants, such as the present, have a very special responsibility to ensure that any information obtained, however inadvertently, is not misused. I would anticipate that in some cases it may well be thought right that the police would be required to give an express undertaking as to the way in which the information will be used so as to emphasize the gravity of the matter.

On the facts of this case and having regard to the very wide-ranging nature of the enquiry which it appears the police were seeking to undertake I cannot say that the judge exceeded his jurisdiction. He is a very experienced judge and no doubt he satisfied himself that an order in these terms was necessary. I therefore would dismiss this application.

JUDGMENT BY 2: LEONARD J

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JUDGMENT-2:

LEONARD J: I agree. In particular, in my judgment, the words "not practicable" in paragraph 14(a) of the first schedule to the Act are to be interpreted in the wider sense and are apt to cover the circumstances found by the circuit judge in his judgment. Alternatively the learned judge's conclusions would have justified the granting of a warrant under paragraph 14(d) and we are asked to grant judicial review which is a discretionary remedy.

As to the submission that the judge acted in excess of jurisdiction I understand the difficulty which would have faced him, in the special circumstances of this case, if he had attempted to limit in advance the subject matter of the warrants. In view of the breadth of the enquiry it would not have been practicable for the warrant to identify the articles to be sought - see section 15(6)(b) of the Act. For the reasons given by my Lord I conclude that the learned judge did not act in excess of jurisdiction. I too would refuse the application.

DISPOSITION:

Application dismissed

SOLICITORS:

Lunn & Macgill, West Yorkshire; Crown Prosecution Service, York Branch