

## Search Warrants: In Theory and Practice

There has been a plethora of recent authority in cases challenging the issue of search warrants. The problems raised in these cases have led to relevant changes to the Criminal Procedure Rules Parts 5 and 6 and the publication by the Lord Chief Justice of a series of new forms (including guidance) for the purpose of such applications [for s.8 warrants see Criminal Procedure Rules 2014, r.6.30].

In reality, much of what is said in these recent authorities is a reiteration of principles which have been clear for a number of years. But, as Mr Justice Stuart-Smith put it, “*the flow of the authorities tends towards requiring increasing rigour and precision at all stages of the process*”.<sup>1</sup>

The High Court has expressed time and time again that, when applying for search warrants, “*there is no part of the process that should be regarded as a formality*”.<sup>2</sup> However, the question remains: has this approach filtered down and been applied in practice in the Magistrates’ and Crown courts?

Permission has recently been granted to judicially review the lawfulness of several search warrants obtained using the new form under section 8 of the Police and Criminal Evidence Act 1984 (“PACE”). The applicants were originally refused leave by the single judge but, at the oral permission hearing, were granted leave on six grounds.

The indication from these proceedings is that things have not changed. Although the search warrants were written on the new forms and the magistrate had the benefit of included guidance and numerous authorities, we are still seeing the same basic procedural errors.

When dealing with search warrants, it is clear that solicitors still need to be vigilant: checking the terms of the warrant and, where there may be an issue as to its lawfulness, acting quickly; whether this is through initial correspondence with the persons who applied for the search warrant or by starting the pre-action process.

Some of the grounds which arise and are likely to have application more widely, are as follows:

### **(a) No reasonable grounds to believe that entry will not be granted or the purpose of the search frustrated [s.8(3) PACE]**

For a s8 search warrant to be approved s.8(1)(a) PACE requires that an indictable offence has been committed. The condition of “reasonable grounds” under s8(3) is an additional hurdle, requiring the applicant to show why the warrant is needed. “An assertion that there are “reasonable grounds” for a belief will require that basis of the

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<sup>1</sup> *R (AB and CD) v Huddersfield Magistrates’ Court and the Chief Constable of West Yorkshire Police* [2014] EWHC 1089 (Admin), paragraph 13. See, for example, *R (on the application of Golfrate) v Southwark Crown Court* [2014] EWHC 840 (Admin), *Sweeney v City of Westminster Magistrates’ Court* [2014] EWHC 2068 (Admin), *R (on the application of F, J, K) v Blackfriars Crown Court* [2014] EWHC 1541 (Admin), *Tchengviz v Director of the Serious Fraud Office* [2014] EWCA Civ 472, *R. (on the application of Panesar) v Central Criminal Court* [2014] EWHC 2821 (Admin), *R (on the application of Kouyoumjian) v Hammersmith Magistrates’ Court* [2014] EWHC 4028 (Admin) and *R (on the application of Mills) v Sussex Police* [2014] EWHC 2523 (Admin).

<sup>2</sup> *AB and CD*, paragraph 13.

belief to be explained in detail”.<sup>3</sup> In most cases it will not be sufficient to assert that the condition is satisfied simply because there is a criminal investigation underway. Further, where an *ex parte* application is made, the applicant is under a duty of full and frank disclosure and must make the court aware of any matter that might undermine its application, such as, prior contact and/or cooperation with the occupier. As stated in *Mills*, quoting *Dulai*, “the question for this court, in judicial review proceedings, is whether the information that it is alleged should have been given to the magistrate might reasonably have led him to refuse to issue the warrant.”<sup>4</sup>

**(b) Failure to identify so far as practical the articles sought [s.15(6)(b)PACE]**

“The warrant needs to be drafted with sufficient precision to enable both those who execute it and those whose property is affected by it to know whether any individual document or class of documents falls within it”.<sup>5</sup> Although what amounts to “sufficient precision” will depend on the nature of the investigation, cases such as *AB and CD* and *F, J, K* have emphasised the importance of being specific, particularly in respect of electronic media.<sup>6</sup>

**(c) Reasonable grounds to believe that the material sought does not include special procedure material or material subject to legal privilege**

Special procedure material (‘SPM’) and material subject to legal privilege (‘LPP’) are defined in s.14 and s.10 PACE respectively. This material is excluded and should be listed as such on the face of the search warrant, the rationale being “to make sure both that the officers that carry out the search know precisely what they are entitled to do, and to enable the occupier of the premises where the search is being carried out to understand the proper limits of the power of the officers”.<sup>7</sup> Where there is a real prospect of encountering SPM or LPP any application ought to have been to a circuit judge under s.9 and sch.1 PACE.

Search warrant applications, considered as part of a busy list in the magistrates’ court, and reliant on the applicant putting on their “defence hat”, continue to fall short of the lawful standard, making the search itself unlawful under s.15(1) PACE.<sup>8</sup> Presently, for those who act quickly, the scope to bring judicial review proceedings of search warrants remains.

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<sup>3</sup> *R (on the application of S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), paragraph 45.

<sup>4</sup> *Mills*, paragraph 55.

<sup>5</sup> *R (on the application of Energy Financing Team Ltd) v Bow Street Magistrates Court* [2005] EWHC 1626 (Admin), paragraph 24.

<sup>6</sup> See *AB and CD*, paragraphs 22-23, and *F, J, K*, paragraphs 35-40.

<sup>7</sup> *F, J, K*, paragraph 52.

<sup>8</sup> Re *Stanford International Bank Ltd; Janvey v Westell v Serious Fraud Office v Westell* [2011] Ch.33, CA (Civ. Div.), as applied in *AB and CD*, paragraph 11.