



Neutral Citation Number: [2018] EWHC 3476 (QB)

Case No: QB/2018/000090

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2018

Before :

MR JUSTICE FREEDMAN

Between :

- (1) INTERTRADE WHOLESALE LIMITED
(2) DIRECT BOOZE LIMITED
(3) BWA LOGISTICS LIMITED
(4) MILLENNIUM CASH AND CARRY LIMITED
(5) VASANTKUMAR LAKHANI
(6) RISHI LAKHANI
(7) PANNA MASHRU
(8) JOHN RADLEY

Claimants

- and -

- (1) THE COMMISSIONERS FOR HM
REVENUE AND CUSTOMS
(2) CHLOE HAUTCOLAS

Defendants

Alun Jones QC and David Bedenham

(instructed by Rainer Hughes, Solicitors) for the Claimants

James Fletcher (instructed by HMRC) for the First Defendant

Hearing dates: 23rd November 2018

Approved Judgment

Mr Justice Freedman:

Introduction

1. The Claimants apply for injunctive relief in relation to the seizures of very substantial material, electronic and documentary, from the Claimants' premises on 20 June 2018 by HMRC pursuant to search warrants issued on the application of HMRC by Birmingham Magistrates' Court two days before.

The injunction sought is in the following terms, namely:

- a. Review;
- b. Make use of;
- c. Copy, or
- d. Transmit to any other person or authority

Any of the material seized (or photographs, copies, notes or records taken of material documents) from or on the Claimants' premises on 20-21 June 2018."

2. The history of this matters is that there have been associated judicial review proceedings which were dismissed by Supperstone J on 9 November 2018 who gave a reserved judgment ("the Judgment"). I shall at the outset quote from paragraphs 3-4 of the Judgment where Supperstone J said the following:

"3. HMRC is conducting a criminal investigation named "Operation Bowshot" which concerns potential large-scale excise duty evasion and the subsequent laundering of the criminal funds generated. The laundered monies are suspected to be derived from the sale of illicit alcohol imported from the Continent and other organised crime groups across the UK. The total loss to HMRC since 1 April 2010 is estimated to be in excess of £440m. The investigation is being carried out in conjunction with a French Judicial Customs operation, and a Joint Investigation Team ("JIT") agreement was signed on 21 July 2016. The JIT agreement covering the operation has since been extended.

4. The application for search warrants and their execution in respect of an earlier phase of Operation Bowshot were the subject of previous judicial review proceedings. On 11 December 2017 the Divisional Court (Gross LJ and Carr J) found in R (on the application of Superior Import/Export Limited and others) v HMRC and Birmingham Magistrates' Court [2017] EWHC 3172 (Admin) [“the Superior Import/Export case”] that the warrants were vitiated due to their drafting. HMRC failed to meet the requirements of s.15 of PACE and provide sufficient information such that the Justice could properly be satisfied for the purposes of s.8(1) of PACE (see para 86). However the court did not find any bad faith on the part of the HMRC, or make a finding that the statutory pre-conditions for the grant of the warrants were not met. Those proceedings are currently subject to a s.59 application by which the HMRC seeks permission to retain the seized material or copies thereof.”

3. In respect of the Superior Import/Export case, on 21 June 2017, copies of almost all the material seized from properties associated with Mr Harpreet Singh Johal in Kent, were sent to France pursuant to the JIT agreement which records “According to French legislation, all information collected in the framework of the JIT must be included in the judicial file and can be used in the criminal proceedings.” The legal power to transfer material in this way is conferred by section 19 of the Crime International Cooperation Act (“the 2003 Act”).
4. The JIT agreement is an agreement for establishing a joint investigation team (“JIT”) between France and the United Kingdom relating to mutual legal assistance in regard to criminal matters. Its purpose is:

“to facilitate the investigations in France and the United Kingdom into offences of Fraud and money laundering committed by organised crime groups of individuals. It has as its objective the identification and arrest, with a view to bringing them to justice, of the perpetrators.

In particular, the JIT aims to:

- *gather evidence and facilitate the exchange of information between investigation teams, in order to substantiate the links between the criminal organisation/s involved and any additional criminal organisations or individuals identified during the investigation;*
- *facilitate the involvement of investigators from one Member State in the investigations being pursued by the other;*
- ...
- *use the evidence gathered for the purpose of prosecution, and the restraint and confiscation of the proceeds of crime in France and in the United Kingdom...*

It is also stated in the JIT agreement that:

“in England and Wales, seconded JIT members are permitted, subject to UK law and subject to the approval of the JIT leader, to be present and participate at operational meetings and police procedures, at searches, at interviews of witnesses and suspects with technical support, and other operational aspects of the investigation, including surveillance operations.”

5. Under a heading at paragraph 13.2 *“Recording of and use of information obtained during the JIT”*, it is stated as follows:

“Information obtained during the operation of and pursuant to the agreement in Member States party to the agreement, whether obtained directly in the Member State or received from a partner Member State party to the agreement, should be recorded, assessed and processed in each Member state in accordance with the laws and procedures of that Member State.

The confidentiality of material obtained during the JIT shall be respected by the JIT members in accordance of the law and procedure of the Member States.

.....

According to French legislation, all information collected in the framework of the JIT must be included in the judicial file and can be used as evidence in criminal proceedings.”

6. Annexed to the JIT agreement is a list of members of the JIT who include the Second Defendant, namely Chloe Hautcolas, Customs Inspector and other

members headed by Chief Customs Officer Wilfrid Corrazin. The UK members include Helen Wilkes, an investigation officer of HMRC.

7. Following judgment on 11 December 2017, consequential orders were made on 8 January 2018. The warrants were declared unlawful and the warrant quashed and the entries into, searches at and seizures from the Claimants' premises were accordingly unlawful. There was no order made in relation to the return of the documents and/or copy documents save that HMRC was given permission to make an application in Birmingham Crown Court under section 59 of the Criminal Justice and Police Act 2001. No order was made in relation to the materials which had been sent to France on 21 June 2017. It was stated that the claim did not seek any relief in that regard, HMRC had stated that only copy documents had been sent to France and "*the copy documents are now with the French authorities over which this Court has no jurisdiction*".
8. On 11 January 2018, a District Judge made an extradition order against Mr Johal. An appeal was lodged, but Mr Johal has since voluntarily submitted himself to the French authorities and has been bailed. On 18 June 2018, the Birmingham Magistrates Court issued the search warrants referred to in paragraph 1 above. It was said in the judicial review proceedings before Supperstone J that a central plank of the application for search warrants was connections between Mr Johal and Mr Rishi Lakhani, the Sixth Claimant in these proceedings. On 20 June 2018, the warrants were executed by officers of HMRC. The Claimants say in the Particulars of Claim at paragraph 9 that they were assisted in the search by officers of the French Customs Authority

including Ms Hautcolas. At paragraph 11, they say that during the search those officers were liaising with HMRC officers in relation to the search and were also searching for and then passing items to be seized to HMRC officers.

9. By an email dated 27 June 2018 from Karn Chopra on behalf of HMRC to Mr Panessar, solicitor for the Claimants, it was stated that the material taken on the search had not been submitted to the French authorities or any other person. However, Karn Chopra went on to state that HMRC and the French authorities are one team under the JIT agreement so technically the French authorities have the material, although not physically since they have not been provided with the material by HMRC.
10. On 9 July 2018, the Claimants issued the claim for judicial review. On 7 July 2018 and on 17 July 2018, limited injunctive relief was granted by Mostyn J, which was varied on 15 August 2018. On 21 September 2018, Sir Ross Cranston refused an application for permission to apply for judicial review. On 9 November 2018, Supperstone J dismissed the renewed oral application for judicial review.
11. Supperstone J made limited observations in the Judgment where he indicated that if relief was appropriate, it would be in a private law rather than a public law action. He rejected 10 allegations of failure to make full and frank disclosure. In respect of the fourth of those matters entitled “the entries, searches and seizures were unlawful by virtue of s.15(1) and s.16(8) of PACE”, he said the following:

“42. The Claimants contend that the entries, searches and seizures from the premises authorised to be searched were

unlawful, by virtue of s.15(1) of PACE because, contrary to s.16(8), the searches exceeded the authority granted by HMRC.

43. The facts relied on under the first allegation of non-disclosure set out under Ground 1 (see para 10 above) are relied on in support of this ground.

44. In my view this ground does not add significantly to that first ground raising this issue.

HMRC does not accept that the searches exceeded the authority of the warrants. I do not consider this to be a 'clear case'; that being so the court is not in a position to assess the merits of this ground (see Fitzpatrick at para 23 above). There is an alternative private law remedy available to the Claimants, better suited to resolving issues of fact."

12. According to the skeleton argument of the Claimants, these proceedings have been brought because Supperstone J in refusing permission for judicial review stated that the subject matter of the excessive search/seizure ground was more suited to private law proceedings. Whilst this is true, a closer examination of the Judgment of Supperstone J reveals that the Judge was not particularly encouraging in this regard. As noted from the quotation above, the first of the alleged instances of failure to make full and frank disclosure was related to the fourth matter. The first and fourth matters were described as follows:

[the first matter] *"That HMRC intended to search for material relating to companies/individuals not named in the warrants;*

... "

[the fourth matter] *"That HMRC intended to search for items likely to include special procedure and/or excluded material"*

13. In respect of the first matter, at paragraph 10 of the Judgment, Supperstone J said:

"the Claimants contend that HMRC intended to search for material relating to companies and individuals not named in the warrants. In support of this point Mr Jones relies in particular on the evidence of Tristan Thornton, a tax

consultant, about the search of the premises at Millennium Cash and Carry ("MCC") on 20 June, and the evidence of Sanjiv Patel. Mr Thornton refers to a covert list of companies brought onto the premises by a French officer. However, there is no evidence that HMRC was aware of the list during the search or, more importantly, at the time of the application. Ms Nicola Gape, a Higher Investigation Officer acting on behalf of HMRC, who made a note of the application hearing, explains in her witness statement (at para 5) that:

"The material sought was drawn very tightly to enable search officers to have a clear and concise understanding of the items which the warrant gave authority to seize."

There is no evidence to support the contention that there was an intention to hide from the Justice an intention to search for items outside the scope of the warrant."

14. In respect of the fourth matter, the discussion was at paragraphs 16-19 of the Judgment. The Judge found that there was no basis for contending that at the time of the application for warrants HMRC knew that special procedure material or excluded material would be included in the items to be sought. There was reference to legally privileged material, but it was made clear that there was no interest in seeing that material.
15. There was a fourth ground related to the above allegations of non-disclosure, namely that "the entries, searches and seizures were unlawful under s.15(1) and s.16(8) of PACE". Despite the reference to a private law remedy in paragraph 45 of the Judgment, that was not an indication as to any prospect of success of the private law remedy. The Judge was simply making the point that this was not a clear case, and a case with such issues was not suitable for determination by judicial review. Far from giving an endorsement of a private law case, the Judge was asked if he did not permit judicial review to transfer the fourth ground (and a fifth ground relating to handcuffing) to the Queen's

Bench Division pursuant to CPR Pt 54.20. He said at paragraph 50 of the Judgment “I am not persuaded on the material before me that it would be appropriate to order that they be transferred to the QBD to continue as ordinary civil claims under CPR pt 7.”

The argument of the Claimants

17. The Claimants submit that the searches and seizures on 20 June 2018 were unlawful on the basis of the statutory scheme as reviewed in *R v Chief Constable of Warwickshire ex parte Fitzpatrick* [1999] 1 WLR 564, 574ff. That is to the effect that if any (more than de minimis or technical) breach or breaches of sections 15 or 16 of the Police and Criminal Evidence Act 1984 (“PACE”) have taken place, an entry, search and seizure under the warrant is unlawful. Unless the facts are clear, the matter ought to be determined as a private law claim.

18. The Claimants rely in particular on the following provisions, namely

(1) Section 15(1) of PACE provides:

“This section and section 16 below have effect in relation to the issue to constables under any enactment...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) Section 15(6) of PACE provides:

“A warrant-

(a)...

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

(3) Section 16(8) of PACE which provides that:

“A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued.”

19. In the Superior Import/Export case, Carr J identified the following authorities as regards section 15(6)(b):

“68. In R (Energy Financing Team Ltd) v Director of the Serious Fraud Office [2005] EWHC 1626 Kennedy LJ said (at [24]):

“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.”

69. In the same case Crane J also stated (at [37]):

“While for these reasons I would not quash the warrant in the instant case, a warrant should be capable of being understood by those carrying out the search and by those whose premises are being searched, without reference to any other document.”

20. The Claimants prepared witness evidence with a view to contending that the search warrants in this case were executed in a manner which made the entry on or search of premises unlawful due to non-compliance with sections 15 and/or 16, in particular in going beyond that which was permitted under the search orders.

21. The evidence on which the Claimants rely comprises searching for wider material than that permitted in the search warrants. Mr Jones QC addressed the Court by reference to many of the witness statements. The most recent witness statements prepared for this application by the Claimants are the statements of Mr Sanjay Panesar dated 12 November 2018 and the fourth statement of Mr Tristram Thornton dated 21 November 2018. In addition to the four witness statements of Mr Thornton, there are witness statements on behalf

of the Claimants of Sanjeev Patel (two statements), Rishi Lakhani, Ismail Konde, Narender Kumar Patel, Rikin Patel, Viral Mehta, Arun Ramanandi, Ketan Parmar, James Hammond, Priya Lakhani, Dharamkumar Patel and Mitesh Pate. I have read the Claimants' witness statements and take them into account. There is considerable photographic evidence relied upon in support of the application.

22. I do not intend to set out the entirety of what Mr Jones QC read out to me of the evidence, but to set out instead a substantial part of the matters upon which he relied on to give a flavour of what was presented to the Court. In particular:

(1) At paragraphs 50-52 of the witness statement of Tristan Thornton in respect of the search warrant relating to the Millennium Cash and Carry at Barking, reference is made to a white A4 piece of paper with a large list of names and entities wider than the names on the warrant. In the photograph, it is said that there appears the French Officer Chloe Hautcolas of SNDJ, the French Judicial Customs.

(2) At paragraph 80 of his first statement, Mr Thornton said:

“Sometime after this I saw Chloe Hautcolas upstairs taking further part in the search. At this stage she had even ceased wearing her forensic gloves and was simply rooting through the shelving under the TV. I took further photos of Officer Hautcolas doing this which I exhibit as TT7. The final photo in TT7 was taken by Sanjeev Patel, an employee of Millennium, during an earlier period of her searching. Shortly before the end of the day I witnessed a conversation between Officer Croft and Officer Hautcolas. Officer Croft was bagging documents found by Officer Hautcolas and exhibiting them as her own. In particular, I noted a Red and Black notebook containing notes from the Cannes exhibition. I heard Officer Croft ask Officer Hautcolas where that was found and she confirmed that she

*found it in the stack of items on the shelves under the TV. Officer Croft then entered this as **Croft 12**. Whilst Officer Croft was preparing the bag for this, Officer McKnight also came upstairs. To save time I objected to this item as there was no part of the warrant which covered simple notebooks. Officer McKnight looked in the notebook and saw it had entries related to Cannes. He then informed me that they would be seizing the document under s19 PACE on the basis of suspected excise fraud. This was not the only exhibit that Officer Hautcolas provided to Officer Croft, and it appeared to me as though this was not being presented openly and clearly. I am also aware that Officer Hautcolas was actively engaged in searching at least three other places and I do not know what if anything she passed to her HMRC colleagues to exhibit from these.”*

(3) At paragraph 89, Mr Thornton referred to a photograph appearing to show Mr Corrazin on his own searching through invoices at Thurrock.

(4) The evidence of Mr Thornton was amplified in a second statement of Mr Thornton as follows:

“5) The cash room was very small. There were two HMRC officers’ flanking another person (who I later came to know was Ms Hautcolas); one beside her and another stood at a 90 degree angle to her. Each of these individuals had their backs to me whilst they were searching page by page through folders of yellow documents. I saw that the person that I later came to know as Ms Hautcolas had a copy of a list of additional names. I also saw that the HMRC officers each had a copy of the same list propped open in front of them. The white A4 pages with the additional names on stood out starkly against the yellow documents that were being searched through. Those yellow documents can be seen in the photographs I have previously exhibited as TT6. I photographed the list in front of Ms Hautcolas because hers was the easiest to take a photograph of from the limited space left to stand in that room. However, I repeat that I saw that the HMRC officers that were searching through the yellow pages also had copies of the list of additional names propped open in front of them. At that stage, I was not aware that Ms Hautcolas was French; something I did not find out until much later when she was wandering around the cash and carry at Barking alone and I spoke briefly to her. Whilst I cannot comment on when this list of additional names was prepared or by whom, I am concerned that HMRC would now claim that none of their officers were aware of it. Looking back at the pictures I took of Ms Hautcolas’ copy this appears

to be a three page document. I do not know what else was on the pages not showing, but the two HMRC officers I saw searching in the cash room definitely each had a copy of this list propped open before them. I did not ask the names of the HMRC officers in that room and am not certain of their identities. At the time of this photograph to the best of my recollection there was a male and a female officer. The male officer may have been Mr Pocock. I do not doubt that HMRC will have recorded which officers were searching which rooms and can provide this information.

.....

7) For the avoidance of doubt, I did also see other HMRC officers with the aide memoir (sic) produced as NG1. This was not the same document I saw those officers with in the cash room. The aide memoir (sic) copies I saw appeared to be printed on standard HMRC paper which is not white but a darker creamy colour.

8) I also note that HMRC state that Ms Hautcolas was 'supervised' at all times. I do not agree. As can be seen from my pictures in TT7 she was searching without gloves. In addition, as I noted above, I met and spoke with her whilst she was looking around premises alone – there were no officers of HMRC in the vicinity.”

23. In his second statement at paragraphs 9-13, Mr Thornton provides commentary for CCTV footage which it is contended shows the use of a list or lists going beyond the scope of the warrant. The first CCTV footage shows papers being consulted by Ms Hautcolas and being looked at by her and by Mr McKnight: such papers may include an additional list. There is further CCTV evidence appearing to show Mr McKnight referring to paperwork which Mr Klancey appears to accept from Mr McKnight. Mr Thornton at paragraph 14 describes some difficulty in discerning what this paper is, but he believes that it is not the aide memoire.

24. In his fourth statement, Mr Thornton at paragraphs 4-7 provides a number of instances where documents were being removed going beyond the warrants,

and refers to the section 19 controversy. He also referred at paragraphs 8-10 to the allegation about seizing items by reference to an additional list.

25. In a second statement, Mr Sanjeev Patel refers to having seen the additional list which Mr Thornton saw and that it was propped up on a long desk before Ms Hautocolas and makes comments about his observation of the copies of the list.
26. The evidence of Mr Konde refers to searching for jewellery (paragraph 11) and Mrs Priya Lakhani refers to jewellery being removed. Mr Konde referred to using a list of paper with names not on the warrant (paragraph 15).
27. There is evidence of French officers searching for property and in particular rummaging in cabinets and in drawers: e.g. Mr Popat (paragraph 16); Mr Viral Mehta (paragraphs 8 and 9); Mr Dharamkumar Patel (paragraph 16); Mr Rikin Patel (paragraphs 7 and 11).
28. There is evidence of post-it notes on the CCTV which might have prevented recording of the search on the CCTV: see Mr Ramanandi (paragraphs 3 and 4) and Mr Dharamkumar Patel (paragraphs 4 and 14).
29. The Particulars of Claim contain 24 items which were said to have been removed and which went beyond that which was contained in the warrants. Attention is drawn in the evidence for the Claimants and the Defendants to removals of items not in the warrants which might have been justified under section 19 of PACE. Mr Jones QC drew the attention of the Court that this is not a backstop provision for the benefit of the authorities, but that the requirements to fall within it are not widely drawn. He also referred the

Court to paragraphs 63ff of the first statement of Mr Thornton to the effect that officers were seeking to rely upon section 19 of PACE 1984 in respect of the seizure of items which might have fallen outside the warrant, but where the belief of Mr Thornton was that the officers were not able to show relevant reasonable suspicions to justify the reliance on section 19. Subsections (2) and (3) read as follows:

“(2) The constable may seize anything which is on the premises if he has reasonable grounds for believing—

(a) that it has been obtained in consequence of the commission of an offence; and

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

(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.”

30. The evidence relied upon by HMRC includes the following:

(1) A statement of Nicola Gape, a higher investigation officer of HMRC;

(2) A statement of Peter McKnight, a higher investigation officer of HMRC;

(3) A statement of Helen Wilkes, an investigation officer of HMRC.

31. They confirm that:

(1) (Each of them) There was no intention to search outside the warrants;

(2) (Each of them) The materials searched were drawn tightly to enable the search officers to have a clear and concise understanding of the items which the warrant gave authority to seize.

(3) (Ms Gape and Mr McKight) In carrying out a fingertip search and sift, material was uncovered which was believed to be evidence of an indictable offence not covered by the search warrant, in which case the officers used their conferred powers under section 19 of PACE to seize the materials;

(4) (Ms Gape) The additional list described by Mr Thornton was not issued by HMRC; she did not know about it until reading Mr Thornton's witness statement: Ms Hautcolas did not seize any items and the items which she identified and pointed out to a HMRC officer were all covered by the material detailed in the warrant.

(5) (Mr McKight and Ms Wilkes) They were not aware of, nor did they have sight of any other list of names which were in the possession of Ms Hautcolas on 20 June 2018. The search team were only issued with the warrant and with an aide memoire directly taken from the warrant and no additional lists were issued.

The law

32. The application is made for interim injunctions. The law is as stated in *American Cyanamid v Ethicon* [1975] AC 396 with the need for the Court to consider:

(1) If there is a serious question to be tried;

(2) If so, if the Claimants were to establish at trial their entitlement to final relief in the nature of a permanent injunction, whether they would be adequately compensated by an award of damages for the loss they would have sustained as a result of the Defendants' continuing to do what was sought to be enjoined between the time of the application and the time of the trial;

(3) If not, and an injunction were granted but at trial it would appear that the Defendant was entitled to do that for which he was enjoined, whether damages would be an adequate remedy to compensate him for the loss that he would suffer due to the injunction;

(4) If there is doubt as to whether damages is an adequate remedy, the Court then goes on to consider where does the balance of convenience lie as between the Claimants and the Defendants?

33. As to balance of convenience, Lord Diplock in *American Cyanamid* said the following at page 408:

“It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relevant weight to be attached to them. These will vary from case to case.”

and his further statement, at page 409 (after referring to particular factors), that:

“there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.”

34. In *R(Factortame) v Secretary of State (No.2)* [1991] 1 AC 603, the House of Lords considered the application of *American Cyanamid* to a case where an

injunction was sought against a public authority. Lord Bridge stated at page 673:

“Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed": see Smith v. Inner London Education Authority [1978] 1 All E.R. 411, 422, per Browne L.J., and see also Sierbien v. Westminster City Council (1987) 86 L.G.R. 431. Like Browne L.J., I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from his speech which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience.”

35. Eady J considered the issue of balance of convenience in *Faisaltex v Chief Constable of Lancashire Constabulary* [2009] EWHC 1884 (QB). There were some common facts with the instant case. There had been preceding the private law claim, as here, an unsuccessful application for judicial review. The warrants had been held to have been obtained lawfully, as in this case. There were some judicial observations in the judicial review case that cases with disputed matters of facts might be more appropriate for judicial review. As in this case, the Claimants sought a wide ranging injunction preventing law enforcers inspecting material pending the outcome of a private law claim based on excessive seizure. The following parts of the judgment of Eady J are informative:

“4. It is plainly undesirable for the court to become involved in such a way as to inhibit the discharge of the Defendants' duties in the investigation of suspected crimes,

save in so far as it can be demonstrated to be necessary and proportionate to do so.

...

10. *What is now claimed is an injunction to extend the protocol much more widely, so as to prevent the investigators inspecting or retaining material which might be irrelevant to their task. That goes beyond any legitimate function of private law proceedings contemplated by the Divisional Court. They may be apt for resolving issues of fact and law for the purpose of deciding to what remedies the Claimants may ultimately be entitled, but there is no reason why they should be used for the supervision or management of ongoing criminal investigations.*

...

25. *Both parties addressed me on the principles derived from the House of Lords' decision in American Cyanamid v Ethicon [1975] AC 396 and Mr Bird, in particular, considered their application in the context of injunctions sought against public bodies. He referred, for that purpose, to their Lordships' decision in R (Factortame) v Secretary of State (No 2) [1991] 1 AC 603.*

26. *Given the statutory background, which I have attempted briefly to summarise, Mr Bird submits that there is not even a triable issue as to the need for the Claimants to be protected by injunctive relief on the issue of relevance. I would accept that submission. Nevertheless, I go on to consider the balance of convenience. I would agree also with Mr Bird's submission that the balance lies in favour of the court declining to interfere with the examination of the seized material by the Defendants in discharge of their statutory duties.*

27. *Mr Bird's submissions are encapsulated in the following paragraphs of his skeleton argument:*

"45. The Chief Constable and HMRC have a duty to investigate allegations of serious crime, and to do this as thoroughly and as effectively as possible, in the public interest. In this case there was (and is) ample evidence that serious commercial crimes (counterfeiting, VAT fraud and excise fraud on a multi-million pound scale) had been committed. The question was and is as to who had committed them.

46. It is in the public interest that the Defendants should pursue their investigations thoroughly, efficiently and speedily so as to make a report in due course to a prosecutor (in this case RCPO) who can then decide whether criminal proceedings

should be instituted, in accordance with the Code for Crown Prosecutors.

47. The Claimants are seeking the exercise of a judicial discretion to interfere in an ongoing and incomplete criminal investigation, in a way that will necessarily impede it.

48. Injunctive relief is neither necessary nor convenient – the scanning exercise that is in place is a straightforward and workable process that does not require judicial intervention save as a last resort, and then in the more appropriate and cost-effective jurisdiction of the Crown Court.

49. The Claimants' private interest (that the police should not have access to potentially incriminating material until after their civil action is determined) is outweighed by the greater public interest."

28. I agree that these powerful factors are sufficient to determine the balance of convenience in the Defendants' favour.

29. Furthermore, I am not persuaded that damages would be an inadequate remedy for the Claimants if there has indeed been seizure in excess of authority. Their rights can be adequately protected without the grant of an injunction."

36. There was another related case which the Claimants have sought to distinguish, namely *Faisaltex Ltd v Chief Constable of Lancashire Police* [2009] EWHC 799 (QB) (Blake J). This was in the context of an application for injunctive relief against the Chief Constable and HMRC in a private law action arising out of an allegedly unlawful search. The Claimants seek to distinguish it on the facts including the fact that there was no different cover list of the kind referred to in the instant case. However, there are similarities in that there was a finding that there was a finding of a serious question to be tried, but the Court was not prepared to make a wide-ranging order pending consideration of the state of mind of the individual officers who seized the materials. This was a case also where it was submitted, as in the instant case, that the practical arrangements to date were so defective as to require relief in

similar terms to that sought in this action until better arrangements can be agreed or imposed by a judge at a later stage. The Court found that this approach was not justified. This decision provides further assistance to the approach to be adopted in this case, although it is important to recognise that despite similarities, each case is different and to be assessed on its own peculiar facts.

Applying the law to the facts

Serious issue to be tried

37. The threshold in most interim injunction cases, applying the *American Cyanamid* test, is that a case raising a serious question to be tried will suffice. In this case, the Claimants have sought to pitch their case very highly. In paragraph 10 of their skeleton argument, the Claimants contended that the evidence disclosed “*extensive, deliberate, systematic searching for items outside the warrants, and the evidence of other witnesses discloses conscious searching for wider material, including wider documentary material, and personal items such as personal jewellery, which are not listed on the warrants.*” In fact, the citation in paragraph 10 from paragraphs 33-39 of Mr Thornton’s first witness statement does not provide support for this submission. As for the other written evidence of the Claimants, in oral submissions, Mr Jones QC described it even without Mr Thornton as being ‘powerful’. I have to say that I have not found the Claimants’ evidence, with or without Mr Thornton, to be as powerful as submitted by the Claimants.
38. I have the following concerns about the case as to whether there is a real issue to be tried. First, as noted above by reference to *R v Chief Constable of*

Warwickshire, ex parte Fitzpatrick [1999] 1 WLR 564, 574ff, the Claimants say that a breach of sections 15 or 16 of PACE can render an entry or search and seizure under the warrant unlawful. It is important to qualify this by the fact that in this case judicial review proceedings have been brought in which the lawfulness of the warrants have been challenged and those proceedings were dismissed substantively. It is therefore not available to the Claimants to challenge the lawfulness of the warrants. In any event, as Fulford LJ stated in *ex parte Chaudhary* [2014] EWHC 4096 (Admin) at paragraph 61: “*in my view the jurisprudence is clear: the only route to challenge whether a warrant is lawful is by way of judicial review.*”

39. The point that is then taken by the Claimants that notwithstanding that the warrants were lawful, the effect of excessive searching is to render the entirety of a search and seizure unlawful. However, that by itself is not sufficient as is made clear by Fulford LJ in *ex parte Chaudhary* at paragraph 68 as follows:

“I consider that Kennedy LJ in Bramley correctly doubted the decision in Fitzpatrick, as set out above, that a search is rendered unlawful if there is any transgression, in the sense that an item is taken that falls outside the scope of the warrant. I have already cited the relevant passage from Bramley above, and the reasoning set out therein seems to me to be entirely persuasive. As Kennedy LJ observed “section 16(8) [...] only confines the area of search. It has nothing to do with seizure and the fact that something has been seized which should have been left behind does not necessarily mean that the search was too extensive” [10]. There is no sustainable basis in law for contending that whenever there has been a more than de minimis breach of section 16(8) the entirety of the entry, search and seizure under that warrant was unlawful. Instead, the particular documents which were taken in excess of the warrant’s authorisation should be returned and there may be liability in damages.”

40. The Particulars of Claim raise a case to the effect that items have been seized which should not have been seized: see the reference above to the 24 items seized. However, at this stage, there is no analysis of the kind of items seized to show that by their nature, they are more consistent with an intention to ignore the scope of the warrants rather than simply the taking of items in excess of the warrant giving rise to the liability to return the same, but not invalidating the searches.
41. In assessing the nature of the case, there are a number of points by reference to the evidence as follows:
- (1) First, the witness statements are not particularly powerful, being often of a very general nature, and perhaps saying more about allegations of poor execution of the job in hand rather than systemic abuse of the warrants such as to make unlawful the whole operation.
 - (2) Second, the fact that more items were seized than were provided in the warrants does not prove necessarily an intention to take away more items than were permitted.
 - (3) Thirdly, the fact that an investigating officer or more than one had a list which was broader than the warrants does not mean that there was an intention to disregard the warrants. It depends upon how the list was used and whether in fact the intention was to follow the list rather than the warrant.
 - (4) Fourthly, at this early stage in the private law action, the Claimants are able to say that the answers are quite general, and that not all of the points

in issue have been answered. There is no answer yet from Ms Hautcolas. It follows that whilst the above points raise serious questions about the case of the Claimants, they are limited in their force until fuller answers have been provided.

- (5) Fifthly, in the event that there was wrong conduct by a French officer, it has not been identified how HMRC would be liable for such wrong. Prima facie, vicarious liability, if any, would attach to the French authority rather than HMRC, but at this stage it is not possible to rule out a number of ways in which liability might attach to HMRC. That might be a direct liability from a failure to supervise the French officer or a direction of HMRC. Further, at this stage, it is not possible to rule out some vicarious liability of the officer, particularly if there was some direction or control by HMRC of the French officers in the searches.
- (6) Sixthly, even if there is evidence of the use of a list other than the warrant or excessive items taken in one or more of the searches, it does not follow that each of the searches were then invalidated. Indeed, it seems unlikely that an injunction in the terms which effectively invalidates the totality of the searches will be established at trial.
- (7) Seventhly, at a trial, there would remain to be investigated the section 19 PACE defence and the entitlement to seize items by reference to section 19 if and to the extent that the seizure went beyond the entitlement of HMRC by reference to the warrants. However, it is necessary to bear in mind the fact that section 19 is cast in quite narrow terms.

42. Mr Panesar, the solicitor for the Claimants says in paragraph 26 of this witness statement of 12 November 2018 that the correspondence between the parties shows that by reason of the bulk of the property taken, arrangements to isolate legally privileged material (“LPP”), special procedure material (confidential material) and excluded material (as defined in sections 10, 11 and 14 of PACE) are “unworkable and prohibitively expensive”. Mr Lakhani at paragraph 66 expressed concern about special procedure material including about medical records seized. Mr Fletcher on behalf of HMRC informed the Court on instructions that copies of all material taken have been returned to the Claimants (with the originals being retained by HMRC) with the exception of pin-locked and password protected items and high value jewellery. In oral submissions, no particular detriment was identified and no particular order was sought as regards special procedure material, perhaps because copies of the material had been returned. However, what was developed was concerns relating to the protection of the Claimants’ LPP. The Claimants said that even if HMRC were able to resist the injunction on other grounds, in order to protect LPP, the injunction as sought should be granted. It was submitted that the burden should then be on HMRC to apply to have exceptions from the order: this would then enable the Claimants’ LPP to be preserved. I shall return to this at the end of this Judgment under the heading “Legally privileged material”.

43. As regards the case that the intention in the execution of the search was to seize items not covered by the warrants, I regard the evidence as far less “powerful” than the way in which it has been characterised. Mr Jones QC is able to rely upon evidence of the kind referred to above, and particularly of a

list being used going beyond the terms of the warrant. However, it does not follow even if a more extensive list has been used that the intention was to pick up anything other than that set out in the warrant.

44. Looking at the state of the case and the evidence as a whole at this stage, I have come to the conclusion that there is sufficient to get over the low threshold of a serious question to be tried for the case of trespass having regard to the evidence which has been adduced. At this stage of the case, I accept the case of the Claimants that there is a serious question to be tried. I reject the submission of HMRC that this case is not made out. I regard the case to the effect that the searches as executed were unlawful to be far less powerful than was submitted on behalf of the Claimants. My finding of a serious question to be tried is simply for the purpose of this application alone, it is based on the evidence at this stage, and it reflects how low the threshold is for the purpose of the *American Cyanamid* test.

Adequacy of damages

45. There is a cogent argument to the effect that if the Claimants were to establish at trial their entitlement to final relief in the nature of a permanent injunction, they would be adequately compensated by an award of damages for the loss they would have sustained as a result of the Defendants' continuing to do what was sought to be enjoined between the time of the application and the time of the trial. I note that Eady J held that this was the case in the *Faisaltex* case, but I do not have sufficient conviction in this possibility to decide the case on this basis. Since I entertain doubt as to whether damages are an adequate

remedy, I must go on to consider whether damages are an adequate remedy to compensate the Defendants.

46. I am of the view that if an injunction were granted but at trial it would appear that HMRC was entitled to do that for which it was prevented from doing due to the injunction, damages would not be an adequate remedy to compensate it for the loss that it would suffer due to the injunction. Its work in law enforcement would be seriously interfered with and its ability to prosecute the alleged criminal offences underlying the search warrants would be seriously damaged. Further and in any event, there is no evidence of the ability of the Claimants to compensate at all, let alone on the possible premise that they are found guilty of the alleged criminal offences.

Balance of convenience

47. I have come to the view that the balance of convenience is firmly in favour of HMRC. I refer against to the summary of Supperstone J of the nature of the alleged criminality where he stated that *“HMRC is conducting a criminal investigation named "Operation Bowshot" which concerns potential large-scale excise duty evasion and the subsequent laundering of the criminal funds generated. The laundered monies are suspected to be derived from the sale of illicit alcohol imported from the Continent and other organised crime groups across the UK. The total loss to HMRC since 1 April 2010 is estimated to be in excess of £440m.”*
48. The injunction is to prevent the Defendants from reviewing, making use of, copying or transmitting to any other person or authority any of the material seized (or photographs, copies, notes or records taken of material documents)

from or on the Claimants' premises on 20-21 June 2018. The injunction therefore goes far beyond those materials which have been identified as having been seized and being not within the scope of the warrants: it applies to the entirety of the materials taken. The wide scope of the injunction as formulated is such that an injunction if ordered would be likely to impede a lawful and necessary criminal investigation. (I shall return separately to the scope of the relief sought.)

49. Not only was the criminal investigation lawful and necessary, but the process through which search warrants have been sought has been upheld as lawful in the judicial review proceedings before Supperstone J. The warrants were obtained because the Birmingham Magistrates' Court must have been satisfied that there were reasonable grounds to believe that serious crime had been carried out and that search orders were required in order to investigate that crime.
50. This action is designed to show that the search process itself was unlawful because the searching not only went beyond the warrants, but it was intended so to do by the searching officers. At this stage, all that has happened is that a case to the effect has been asserted and evidence has been adduced from which inferences are sought to be adduced. Supperstone J said that he did not consider that this was a 'clear case', and insofar as there are issues of fact, they cannot be resolved at this stage. The Court is considering an interim injunction against a public authority which has been held at the judicial review stage to have been obtaining warrants which were lawful and necessary. If this matter proceeds to trial, there will have to be established the extent, if any,

to which the manner in which the warrants were executed renders the searches and seizures or any of them unlawful. However, for the moment, the position is that if HMRC is restrained from relying on the documents seized from the premises pending such trial, the crime investigation will be delayed and impeded.

51. In my judgment, it is in the public interest that the HMRC should pursue their investigations thoroughly, efficiently and speedily so as to make a report in due course to a prosecutor who can then decide whether criminal proceedings should be instituted. The Claimants are seeking the exercise of a judicial discretion to interfere in an ongoing and incomplete criminal investigation, in a way that will necessarily impede it. A consideration in the balance of convenience is that it is in the public interest for that investigation to be carried out so that if appropriate charges can be brought.
52. Against this, it is submitted by the Claimants that in the event that there is no restraint, there is an imminent danger that the materials seized will be shared with the French Judicial Customs Authority pursuant to the JIT agreement referred to above. To this, HMRC contend at paragraph 20f that it is speculative that the material would be sent to France, and that there is no evidence to support that contention. That submission is not well made having regard to the JIT itself and the consequent inference of sharing of documents and information with the French authorities.
53. The Claimants submit that it will be practically impossible for that material to be recovered in the event that the claim succeeds. Following the Court's inquiry as to whether there were cases as to what occurred in the context of

inter-state cooperation agreements, the Claimants have stated in a note dated 28 November 2018 that there was nothing relevant that they had been found. However, they have sought to advance information from “*lawyers known to the Claimants’ lawyers in France, and familiar with cross-border investigations*”. This was to the effect that if information was passed on to the French authorities and the UK court subsequently found that the search of premises constituted the tort of trespass, but that if an order was made against the HMRC but not against the French authorities for the return of such material, the French authorities would not be obliged to return it. It was stated that it would “*take some time to reduce these answers in France to a witness statement, which will be done if requested, but it is submitted these answers are consistent with the absence of any provision in international instruments requiring return in the circumstances presented here.*”

54. The response of the Claimants to the foregoing is first to deal with the question as to relevant law. They have referred to the case *R (Van de Pijl) v Kingston Crown Court* [2012] EWHC 3745 (Admin) and *Van de Pijl v Secretary of State for the Home Department, Kingston Crown Court* [2014] EWHC 281 (Admin). That case concerned cooperation between the UK and the Dutch authorities. At paragraph 89 of the first of those authorities, the High Court considered that in respect of material passed to the Dutch authorities, that “*it would be sufficient to meet the justice of the case for the MPS and the Secretary of State to inform the Dutch authorities of the orders quashing the search warrant and the s.59 orders and for them to use their best endeavours to persuade the Dutch authorities to return the material and any copies of that material to her or the MPS.*” The Dutch authorities returned the

material. Whilst this is not dispositive of the risk in this case since each case turns upon its own facts, the practical result of that case is consistent with the concept of mutual cooperation which underlies the Convention on Criminal Matters between the Member States of the European Union established by the Council Act on 29 May 2000.

55. It is not surprising to read either of the decision of the High Court in those circumstances or the willingness of the Dutch authorities because prima facie such willingness to return the items must make possible cooperation between the respective authorities.
56. As to the observations of the Claimants in respect of French law and practice, HMRC submit correctly that the content went beyond the assistance sought by the Court. Further, HMRC makes the valid comments that the evidence is not in an evidential format, not identifying the source of the information and not stating the connection between the lawyers who provided the information and the Claimants. It is not apparent or verifiable whether the source of the evidence is from somebody having intimate knowledge of the practice of the French authorities in such circumstances.
57. Those are weighty objections, and in the circumstances, little weight is to be attached to the information provided. I am prepared to assume that there is a possibility to be put into the balance that it might not be possible to retrieve documents from the French authorities, albeit that it is not shown to be anything higher than that. I do not attach more significance than that because I would expect in the event of a successful outcome at trial for the Claimants that the Court would make a similar direction to the one made in the *Van de*

Pijl case, with the real possibility that the documents would be returned as they were in the case above concerning the Dutch authorities. Further, and in any event, having brought Ms Hautcolas into this action as a defendant, the Claimants must recognise that they will need to share the documents with Ms Hautcolas in France.

58. On the basis of the above, and without further consideration of the merits of the case, I have come to the clear conclusion that the private interest of the Claimants that the HMRC should not have access to potentially incriminating material until after their civil action is determined is outweighed by the greater public interest. The matters set out in the first five paragraphs above under the heading of “the balance of convenience” are in my judgment decisive and outweigh any other matters which have been advanced to the Court in this case. Using the language of Hoffmann J in *Films Rover International Ltd v Cannon Film Sales* [1987] 1 WLR 670 at 680 as cited in *Factortame* at 683, the “*a fundamental principle is therefore that the court should take whatever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’* [meaning either by granting an injunction to a party who fails to establish his right at trial or in failing to grant an injunction to a party who succeeds at trial] *in the sense I have described.*”

Legally privileged material

59. I referred above to the concerns of the Claimants about LPP in respect of the order, and their submission that the order should be in the form sought in order to preserve their LPP. They submitted that the Court should provide an injunction in the terms sought in any event and to the extent that HMRC was

entitled to continue its investigation, it should have to justify every step which it took to the Court (absent agreement) so that the Court could ensure that the Claimants' LPP was preserved.

60. In fact, the parties had agreed a procedure which has been judicially endorsed to protect those items which the Claimants say are subject to legal professional privilege ("LPP"): see the orders of Mostyn J dated 17 July 2018 and Robin Knowles J dated 17 August 2018. On 14 September 2018, a lengthy letter was sent on behalf of the Claimants dated 14 September 2014 seeking that HMRC should not review any of the material pending the conclusion of the judicial review claim. On 18 September 2018, HMRC proposed a procedure to identify LPP on a "rolling basis". The procedure involved the documents being considered by independent counsel and returned if appropriate. On 20 September 2018, the application for judicial review was rejected on paper by Sir Ross Cranston, which application was subsequently renewed orally before Supperstone J as above. On 28 September 2018, the Claimants refused the proposal of HMRC and HMRC repeated the proposal.
61. The Claimants applied to the Court supported by the third witness statement of Mr Thornton that HMRC should not review the material pending the conclusion of the judicial review claim. On 2 October 2018, Swift J considered that HMRC should be able to inspect documents and that "*HMRC have put forward an entirely reasonable proposal to address the Claimants' difficulties...to identify material over which LPP is claimed.*" (see paragraph 6 of Swift J's reasons for dismissing the Claimants' applications).

62. There is nothing put before the Court on this application as regards LLP and any other species of information which require protection which indicates that the agreed procedures and the proposal of HMRC do not meet the concerns of the Claimants. The notion that LPP should be addressed by a blunt order preventing review, use of, copying or transmission of any of the items seized is far too wide and disproportionate.
63. The Court refused that in the context of the judicial review proceedings. As noted, the Court has subsequently dismissed the renewed application for judicial review. It is apparent as regards the matter of particular concern to the Claimants of LPP, the Claimants' interests are protected by the procedures of HMRC agreed to or offered to protect LPP. In these circumstances, in addition to the refusal of an injunction because of the balance of convenience, I find that there is no additional justification by reference to LPP or otherwise for the injunction sought. It also follows from this that LPP being protected in the manner indicated above, this does not affect my conclusion that the balance of convenience is against making the injunction sought.

Further matter

64. There is an additional point which does not arise for decision and upon which I have not been addressed. There is a question as to whether an injunction is available against HMRC in private law proceedings, even although it is available in principle in judicial review proceedings: see section 21 of the Crown Proceedings Act 1947 and *M v Home Office* [1994] 1 A.C.377. If an injunction would not have been available, then this might have little practical effect because of the availability of an interim declaration: see *Gee* on

Commercial Injunctions 6th Edition para. 3-032 and CPR 25.1(1)(b). In view of my other findings, I do not rule on any question which might have arisen as to the availability of either an injunction or an interim declaration.

Conclusion

65. In all the circumstances, for all these reasons, the application for injunctive relief is dismissed.