Neutral Citation Number: [2020] EWHC 2274 (Admin)

Case No: CO/3962/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 21/08/2020

Before :

HON. MR JUSTICE CHAMBERLAIN

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Between:

The Queen on the application of
Paul Jordan

Claimant

- and –

(1) The Chief Constable of Merseyside Police
(2) Sefton Magistrates' Court **Defendants**

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Henry Gow (instructed by James Murray Solicitors) for the **Claimant**
Graham Wells (instructed by Merseyside Police) for the **First Defendant**

Hearing dates: 14 August 2020

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Approved Judgment

Mr Justice Chamberlain :

Introduction

1 On 5 July 2019, officers from Merseyside Police applied for a search warrant under the Misuse of Drugs Act 1971 ("the 1971 Act") to search the home of Paul Jordan. The factual basis for the application was set out in an application form. In one respect, this was supplemented orally. The warrant was issued by a justice of the peace at Sefton Magistrates' Court. It was executed on the same day.

2 By this claim, Mr Jordan seeks an order quashing the warrant. There are two pleaded grounds of challenge: first, that it was granted on the basis of a deliberately false and exaggerated account of the execution of a previous warrant on 20 February 2019; second, that there were material non-disclosures about that search and about subsequent occasions on which police officers attended but found nothing of interest and took no further action.

3 Permission to apply for judicial review was granted by HHJ Eyre QC, sitting as a Judge of the High Court, on 22 March 2020. By that time, the First Defendant had indicated that he intended to assert public interest immunity ("PII") in respect of part of the contents of the application form, which had been provided in redacted form to the Claimant. Judge Eyre therefore gave directions for determination of the PII claim.

4 On 16 July 2020, Julian Knowles J ordered that the PII claim be determined by a High Court Judge at a remote hearing and that the substantive hearing of the judicial review claim be listed before the same judge. The hearings were both to take place during the vacation if possible.

5 There was a remote hearing before me to determine the PII claim on 14 August 2020. I heard open submissions from Mr Graham Wells for the First Defendant and Mr Henry Gow for the Claimant. In accordance with the usual practice, the Second Defendant was not represented and remained neutral. Mr Wells and Mr Gow were able to make open submissions on the legal principles to be applied. Mr Gow made brief open submissions on the substance of the PII application, but he had not seen the redacted material or the reasons for claiming PII. I considered these in detail with the assistance of Mr Wells in a separate closed hearing.

6 During the course of the closed session, Mr Wells accepted that one further piece of information about one of the reports summarised in the warrant application could be given by way of a "gist". I will direct the First Defendant to provide that information. Otherwise, I uphold the PII claim. In those circumstances, there should be no difficulty in proceeding directly to a substantive hearing. As I indicated in the open hearing, the substantive hearing will take place remotely, before me, on 2 September 2020.

7 In this open judgment, I explain:

(1) the principles I have applied in determining the PII claim;

(2) in general terms, and without revealing the content of the material that attracts PII, why I have upheld the PII claim; and

(3) how the substantive hearing is to be conducted.

8 There is a separate closed annex to this judgment, in which I give further reasons for upholding the PII claim. The annex has not been communicated to the Claimant and will not be made public unless and until the court so directs. I have indicated in this open judgment those of my conclusions that depend in part or in whole on evidence referred to in the closed annex.

(1) The legal principles

9 In general, the effect of a PII claim, if upheld, is that the material to which it relates becomes inadmissible for all purposes. It cannot be relied upon by either side and cannot be considered by the court in reaching its decision on the merits of the case. In this respect, a PII procedure differs fundamentally from a closed material procedure ("CMP"), in which material which the court permits to be withheld from disclosure to one or more parties may still be considered and relied upon by the court in reaching its substantive decision: see *Al Rawi v Security Service* [2012] 1 AC 531, [30]-[40].

10 In *R (Haralambous) v St Albans Crown Court* [2018] UKSC 1, [2018] AC 236, the Supreme Court considered a series of issues about the use of material whose disclosure would be damaging to the public interest by judicial authorities granting search warrants and by courts reviewing such grants. Some of its conclusions are material to this case. They can be summarised as follows:

(a) The statutory scheme for the grant of search warrants under ss. 8 and 15 of the Police and Criminal Evidence Act 1984 ("PACE") envisages a purely *ex parte* procedure in which a constable may rely on information whose disclosure to the subject of the warrant would be damaging to the public interest: [27].

(b) This may include information from an informer whose identity could readily be identified from the nature of the information or information which would reveal lines or methods of investigation: *ibid*.

(c) Such material need not be identified at the time of making the application to a magistrate. It must, however, be identified, if an application for disclosure is made to the magistrate after execution of the warrant in accordance with the procedure in *Commissioner of Police for the Metropolis v Bangs* [2014] EWHC 546 (Admin) and/or if there is an application to the Crown Court under s. 59 of the Criminal Justice and Police Act 2001: *ibid*.

(d) On an application for judicial review challenging a search warrant granted on the basis of material which was not and cannot be disclosed to the claimant, the High Court can hold a CMP, despite the absence of express statutory authority to do so. This enables the High Court to consider all the material before the magistrate, and to rely on that material in reaching its substantive decision, without disclosing it to the claimant: [59].

(e) In a challenge to the grant of a search warrant, there is no requirement to disclose a sufficient gist of the closed material to enable the claimant to address the essence of the case for the warrant: [65].

11 Although the statutory authority for the warrant under challenge here was the 1971 Act, rather than PACE, neither party has suggested that that makes any difference. There is no reason why it should.

12 In *Competition and Markets Authority v Concordia International RX (UK) Ltd* [2017] EWHC 2911 (Ch), Marcus Smith J had held that a CMP was not possible. In the light of *Haralambous*, that judgment was overturned by the Court of Appeal: [2018] EWCA Civ 1881. Marcus Smith J returned to the issue in a subsequent iteration of the *Concordia* case: [2018] EWHC 3448 (Ch), [2019] Lloyd's Rep FC 183. At [11], he summarised the process by which PII claims should be resolved in advance of any hearing to determine the substance of the challenge:

> "As to the process that must be followed when considering whether material is protected by PII:
>
> (1) The general rule is that the court should consider first representations by the party asserting PII (in this case, the CMA), then by the party the subject of the warrant (Concordia) in 'open' proceedings, then further representations by the party asserting PII in the subject's absence in 'closed' proceedings: *Commissioner of Police for the Metropolis v Bangs* [2014] EWHC 546 (Admin) ('*Bangs*') at [31].
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> (2) So far as possible, purely legal matters should be resolved in the 'open' proceedings: *Bangs* at [32].
>
> (3) Where it is necessary to hold 'open' and 'closed' hearings, the judge must give 'open' and 'closed' judgments. It is highly desirable, in the 'open' judgment, to identify every conclusion in that judgment which has been reached in whole or in part in the light of points made in evidence referred to in the 'closed' judgment and state that this is what has been done: *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38 at [68]."

13 I have followed this approach.

14 Later in the same judgment, at [26], Marcus Smith J cited the speech of Lord Templeman in *R v Chief Constable of West Midlands Police ex p. Wiley* [1995] 1 AC 274, 280-281, which explained the three issues to be considered when determining a PII claim:

(a) whether the evidence in relation to which PII is asserted is relevant to an issue in the proceedings;

(b) whether the disclosure of that evidence would cause harm to the public interest; and

(c) if so, whether, balancing the public interest in the administration of justice against the harm to the public interest that would be occasioned by disclosure, an order for disclosure should be made.

15 At [26], Marcus Smith J noted that these three distinct stages had to an extent been superseded by *Haralambous*. In a warrant case it was self-evident that material before the authority which issued the warrant was relevant. But, at [27]-[29], he explained that the availability of a CMP affected the balance to be performed at the third stage – often referred to as the "*Wiley* balance":

> "27. But it must be noted that the adverse effect on the public interest in the administration of justice is materially greater under the present dispensation than previously. Previously, the worst that could happen was that relevant material was withheld generally. Now, the position is that relevant material is deployed before the court in the absence of an interested party. Inevitably, the court loses the benefit of the scrutiny and submissions of that interested party. (Fn: This sort of scrutiny is very important in reaching properly founded decisions. See, for example, the research described in Haidt, *The Righteous Mind*, 1st ed. (2012) at 75-76.)
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> 28. It follows that the adverse effect on the due administration of justice is significantly greater in a case where PII material is being deployed without sight to one party than where it is simply being withheld from everyone. That is because one party (here, the CMA) can refer to and deploy in argument material that is unavailable to the other party to the dispute (here, Concordia).
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> 29. That must mean that the cogency of the PII arguments made by the party asserting PII must be stronger than in a case where the PII material is simply being withheld. In short, the balancing exercise in a case such as this is different to the balancing exercise contemplated in previous cases in that there is this additional factor to take into account."

16 At [32(3c)], Marcus Smith J noted that it was necessary to consider on the facts of each case "the extent to which the due administration of justice is impaired by one party having material that the other does not". This would depend, among other things, on "the complexity of the issues, and the importance of the PII Material to these issues".

17 In my judgment, the applicable principles are as follows:

(a) Before any question of a CMP can arise, it is necessary to consider whether to uphold the PII claim. That involves determination of all three issues identified in *Wiley*: see the endorsement of the *Wiley* approach in *Bangs* and the endorsement of the latter in *Haralambous* at [27].

(b) As to the first *Wiley* question (relevance), any material before the issuing authority which could arguably support the pleaded grounds of challenge will be relevant. So too will any material which could support a further ground of challenge as yet unpleaded. It does not necessarily follow that every piece of information before the issuing authority will *ipso facto* pass the test of relevance.

One obvious example in which some of the material before the issuing authority will not be relevant is the case where the applicant puts forward more than one basis for the warrant and the issuing authority makes clear that one or more of the bases advanced have not been relied upon.

(c) At the third stage (the *Wiley* balance), it is necessary to weigh, on the one hand, the damage to the public interest that would be caused by disclosure and, on the other, the damage to the administration of justice caused by non-disclosure. This involves two calibrated assessments, both fact-specific.

(d) When considering the damage to the public interest caused by disclosure, it will sometimes be obvious that there is a serious risk of grave damage. That be the case where, for example, disclosure would substantially increase the risk that the identity of a covert informer would be revealed. The disclosure of the identity of a covert informer is generally liable to cause grave damage to the public interest because it may lead to his or her suffering physical harm and/or because it may deter others from providing information. In other cases, the party asserting PII may succeed in establishing that disclosure would give rise to a risk of damage to the public interest, but the extent to which disclosure increases the risk, though material, is low; or, although the risk of damage eventuating is substantial, the damage feared would not be grave. It is important for the court to reach its own, level-headed assessment of the *extent* of any damage to the public interest caused by disclosure.

(e) Against this must be weighed the extent of the damage caused by non-disclosure to the public interest in the administration of justice. Any assessment of that damage requires a close focus on the issues in the case (both those pleaded and any others to which the undisclosed material gives rise) and the nature of the closed material. I would certainly not assume that, because the court can now consider that material in a CMP, there is no such damage: any proceeding where the opportunity for adversarial scrutiny is lacking represents a fundamental derogation from the standards of fairness which the common law ordinarily demands. But nor, for my part, would I assume that availability of a CMP means that the adverse effect on the public interest in the administration of justice is materially greater than it would have been previously, when material attracting PII was categorically inadmissible. One of the reasons why the Supreme Court in *Haralambous* was prepared to countenance a CMP in claims of this kind was that, without one, the absence of admissible evidence as to the basis on which the warrant was granted might well have favoured the defendant. Prior to *Haralambous*, the court might have had to apply the presumption of regularity, as in *R v Inland Revenue Commissioners ex p. Rossminster Ltd* [1980] AC 952 and *R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) or might have struck the claim out as untriable, as in *Carnduff v Rock* [2001] 1 WLR 1786. These outcomes would not have served the public interest in the administration of justice. The possibility that a court might apply the opposite presumption, quashing a warrant because it was not possible to consider the material on which it was based, would have been equally unacceptable. The Supreme Court regarded the CMP as preferable to any of these outcomes from the standpoint of the administration of justice: see generally *Haralambous*, at [44]-[59]. It follows that I respectfully disagree with Marcus Smith J insofar as he

held that a higher standard of cogency is required of the arguments advanced by a party asserting PII in a case such as this where, post-*Haralambous*, material attracting PII may be considered by the court in a CMP.

(2) Reasons for upholding the First Defendant's PII claim

The pleaded issues

18 As I have said, the grounds of challenge are: first, that the warrant was granted on the basis of a deliberately false and exaggerated account of the execution of a previous warrant on 20 February 2019; and, second, that there were material non-disclosures about that search and about subsequent occasions on which police officers attended but found nothing of interest and took no further action.

19 Under the first ground, particulars are given of the falsity and exaggeration alleged in paragraph 4 of the Grounds. Whereas the application form said that on 20 February 2019 "a large quantity of cash" had been found at the Claimant's home, in fact it was only £2,130 and the Claimant gave a full explanation of why it was there. And whereas the application says that "cannabis" was found, it was cannabidiol or "CBD", which is not a controlled drug. (The First Defendant says that the magistrate was informed orally of the exact amount of cash found.)

20 The second ground for the most part mirrors the first. The material non-disclosures pleaded in paragraph 6 of the Grounds are failures to mention that no charges were ever brought, that the amount of cash found was £2,130, that the Claimant explained the presence of that amount of cash and that the substance found was cannabidiol (a legal substance). In paragraph 7 of the Grounds, it is further pleaded that the First Defendant should have told the magistrate that officers had visited the Claimant's home on a further three occasions between 20 February and 5 July 2020 after receiving allegations from his former partner Stacey Rae; that on two of these occasions they had "looked around" and on one they had carried out a search; but on no occasion were any drugs found or charges preferred. Complaint is also made of the failure to mention vehicle stops, which also did not result in criminal proceedings. (The First Defendant says these took place after 5 July.)

The material over which PII is claimed

21 As I have said, the application form contains summaries of 14 intelligence reports on which the First Defendant relied to establish the reasonable suspicion necessary to justify the grant of the warrant. Open evidence is given in the statement of Detective Sergeant Jon Hunter of the way in which the reliability of these reports was assessed. The version of the application form that has been served on the Claimant contains redactions in all of the summaries apart from report 13, which deals with the execution of the previous warrant on 20 February 2019.

22 I considered the redacted portions in detail in the closed session, posing the three questions identified in *Wiley*: see [14] above.

(a) Relevance

23 It could be said that redacted portions of the application form are irrelevant to the majority of the pleaded grounds of challenge. Report 13, which deals with what was found when the warrant was executed on 20 February 2019, has been disclosed without redactions. This means that the Claimant can see what was said about it. He does not need any of the other parts of the application form to make good his point that the information the First Defendant gave about what was found on 20 February 2019 was false or exaggerated or omitted materially relevant details. He has everything he needs to advance that argument.

24 This is not, however, the full extent of the Claimant's pleaded case. The Claimant also complains about the failure to mention the three subsequent visits and the nil returns they generated. The First Defendant's pleaded response makes clear at paragraph 20 that these visits were considered "wholly irrelevant to the issue of drugs and drug paraphernalia and so omitted them from the application". In order to evaluate whether it was misleading to omit details of the visits, it is necessary to consider the information that was given to the magistrate. Only in the light of that information is it possible to say whether the omission was so significant as to amount to a material non-disclosure.

25 The material in respect of which PII is claimed therefore passes the test of relevance.

(b) Would disclosure cause harm to the public interest?

26 During the closed session I was able to probe and test the First Defendant's claim for PII. The First Defendant has satisfied me that disclosure of any of the information currently redacted would damage the public interest in ways which have been held in previous authority to justify the assertion of PII. Giving further particulars in an open judgment would risk causing the same damage. I have therefore set out my reasons in the closed annex.

27 In respect of each redaction, I considered whether the redacted information could be "gisted". That means asking whether the substance of the redacted information could be paraphrased in a way that would convey its essential elements without damaging the public interest: see *Wiley*, at 306-7. For reasons I explain in the closed annex, with one exception, I have concluded that it could not.

28 The one exception concerns the date of report 14. After discussion in the closed session, Mr Wells properly conceded that some further information could be given about that. I will direct that this information be provided forthwith.

(c) The *Wiley* balance

29 For reasons explained in the closed annex, the risk of damage to the public interest which would be occasioned by disclosure of the material over which PII is claimed is substantial; and the damage which would be caused if that risk eventuated is serious. Against that, I have to weigh the damage to the administration of justice which would be caused by non-disclosure. In this case, the consequence of non-disclosure is that the material covered by PII will be considered by the court in a CMP. As I have said, any CMP represents a fundamental derogation from the standards of procedural fairness on

which the common law ordinarily insists. There are, however, three features of this case which attenuate the unfairness involved.

30 First, the execution of a search warrant generally involves a significant interference with the privacy and property rights of the individual. But, as Lord Mance said in *Haralambous* at [64], the interference is normally "short term" and is subject to safeguards: anything taken may only be kept for as long required for the purposes of the investigation; and the rules of criminal evidence govern the deployment of anything seized. In this case, it is not said that anything was taken; and there is no separate complaint about the way in which the warrant was executed.

31 Second, a large part of the grounds of challenge are concerned with the way in which the First Defendant represented to the magistrate what had been found when the previous warrant was executed on 20 February 2019. The part of the application form which sets out what was said about that is not redacted. The admission of the closed material into a CMP will therefore not affect in any way the Claimant's ability to make submissions on that central part of his case.

32 Third, although the closed material is relevant to the Claimant's complaint about non-disclosure of the three visits after 20 February 2019, its non-disclosure does not prevent the Claimant from making that complaint, nor from explaining its significance given his belief as to the possible provenance of the intelligence on which the warrant was based. That complaint can then be tested in the CMP in the light of the totality of the material available to the magistrate. At this stage, and bearing in mind that the substantive hearing will involve still closer examination of the material in question, the pleaded issues do not appear to be complex and I have not identified any unpleaded issue to which the material the subject of the PII claim gives rise.

33 Overall, the damage to the public interest that would be caused by disclosure clearly outweighs the damage to the public interest in the administration of justice that would be caused by non-disclosure. I therefore uphold the PII claim, save to the limited extent indicated in [28] above.

(3) How the substantive hearing is to be conducted

34 The Supreme Court in *Haralambous* did not address how the substantive judicial review hearing is to be conducted in a challenge to a warrant where a PII claim has been upheld and the material attracting PII is to be considered in a CMP.

35 In my judgment, the appropriate procedure is as follows:

(a) Where the court grants permission to apply for judicial review in a challenge to a warrant, and it is clear that the First Defendant has claimed or will claim PII over material relevant to the challenge, it should also give directions for: (i) a hearing to determine the PII claim; and (ii) a substantive hearing to determine the application for judicial review. If possible, these two hearings should be listed before the same judge. It may be sensible for the listing of the second hearing to be left to be decided at the first hearing. (This is what was done in the present case by the directions given by Julian Knowles J.)

(b) At the first of these hearings, if the PII claim is upheld in whole or in part, the court should give directions dealing with: (i) the time within which the defendant must disclose and the claimant must respond to any new material; (ii) whether the case is sufficiently exceptional that it is necessary to invite the Attorney General to appoint a special advocate to represent the interests of the claimant in the CMP (see the Court of Appeal's decision in *Concordia* [2018] EWCA Civ 1881, at [75]); and (iii) in the light of these matters, the listing of the substantive hearing. (In the present case, disclosure of the one piece of information which must be disclosed can take place almost immediately; the issues in this case are not complex and it was not suggested that the appointment of a special advocate was necessary; it was agreed that the substantive hearing should be listed on 2 September 2020.)

(c) At the substantive hearing, the open hearing should take place first, with the closed hearing following. The claimant's representatives should be available to return for a short further open hearing in case anything emerges from the closed hearing which on which it is necessary to invite further open submissions. Especially where, as in most cases, there is no special advocate to represent the interests of the claimant, counsel for the public authority has a special obligation to assist the court by identifying any points arising from the closed material which might arguably support the claimant or undermine the defence. The obligation is similar to that which arises when seeking an *ex parte* order. Counsel seeking such an order "must put on his defence hat and ask himself what, if he were representing the defendant or a third-party with the relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge": *In re Stanford International Bank Ltd* [2011] Ch 33, [191] (Hughes LJ). The same goes, *mutatis mutandis*, for counsel representing a defendant in any CMP held in a judicial review claim challenging a warrant.

(d) After the substantive hearing, open and closed judgments should be prepared. To the extent possible, care should be taken to identify in the open judgment every conclusion that has been reached in whole or in part on the basis of evidence referred to in the closed judgment: *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 38, [2014] AC 700, [68].

36 I shall adopt this procedure for the substantive hearing of this claim on 2 September 2020.