

**SFO v TCHENGUIZ - HIGH COURT UPHOLDS CHALLENGE TO SEARCH WARRANTS**

*R (on the application of Rawlinson & Hunter Trustees & Ors) (Claimant) v (1) Central Criminal Court (2) Director of Serious Fraud Office (Defendant) and others [2012] EWHC 2254*

**Abstract**

On 31 July, 2012, the English Divisional Court granted a Judicial Review challenge of search warrants issued against leading businessmen in the context of the Icelandic Bank collapses and alleged fraud. The Court considered the duties of the judge and the Serious Fraud Office when applying for the issue of a search warrant under section 2(4), Criminal Justice Act 1987 in cases involving allegations of serious fraud.

**Facts**

Following the collapse of Icelandic bank, Kaupthing, in 2008, the Serious Fraud Office (“SFO”) began an investigation into alleged irregular lending by Kaupthing to businessmen Robert Tchenguiz (“RT”) and Vincent Tchenguiz (“VT”). As part of this investigation, search warrants for the homes and offices of RT and VT were issued under section 2(4), Criminal Justice Act 1987 (“CJA 1987”). In February 2012, the SFO admitted that its original warrant relating to VT had been “inadvertently miscast” and quashed it, and in June 2012, dropped the case against VT. In the present case, the parties challenged the warrants on the grounds of misrepresentation, non-disclosure and the failure of the judge to give reasons for the grant; the manner of execution of the searches in relation to legally privileged material; the use of a “here and now” notice (served under section 2, CJA 1987) to retain documents; and the lawfulness of the arrest and bail of RT at the time of the searches.

**Judgment**

- (1) The search warrants would not have been granted had the SFO properly explained the background to the case, corrected errors in the submission to the court, and drawn to the judge’s attention matters that weighed against the grant of the warrant. The SFO had a duty to ensure that the case put before the judge was clear and comprehensive so the judge could rely on it. In approving the warrants, the judge must be satisfied personally that the evidence presented to him satisfies the test of reasonable suspicion.
- (2) The judge should provide reasons for the grant or rejection of the warrants.
- (3) An independent lawyer should be present at searches to resolve disputes related to documents covered by legal professional privilege.

(4) The use of "here and now" notice was unlawful: the only way to retain the documents was to rely on section 59, Criminal Justice and Police Act 2001.

(5) The challenges on the lawfulness of his arrest and bail were rejected.

The Court declined to consider the merits of the investigation, stating that this was a matter for the SFO as an investigating and prosecuting authority.

### **Observation**

The Court stated insufficient resources (both financial and human) had been available to the SFO in the present case, and that in order to avoid "incalculable damage" to the financial markets of London, such resources must be made available for the investigation and prosecution of serious fraud in the financial sector.

A number of practical recommendations were set out which will be of interest to those in the SFO applying for future search warrants, and also to those wishing to challenge the same. In particular, in an application, the background of the case must be set out in the written presentation to the judge, transactions must be explained in a coherent and analytical manner, allegations of reasonable suspicion should be set out, allegations must be verified by an accounting/financial markets expert whose independent advice has been expressly sought (and a record kept by the SFO); and matters that might undermine the case for reasonable suspicion should be included.

The Court further recommended a review of the best practice for presenting an application under s.2(4) CJA 1987 in cases of serious fraud should be carried out by the Criminal Procedure Rule Committee (or an ad hoc body established for that purpose), along with a review of how best to allocate such cases to judges, who should be familiar with the financial markets when dealing with these applications.

**13<sup>th</sup> August 2012**