Neutral Citation Number: [2020] EWHC 1640 (Admin)

Case No: CO/1064/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 June 2020

Before:

THE RT HON THE LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HON MR JUSTICE JAY

- -

Between:

THE QUEEN **(oao TERRA SERVICES LIMITED)**	**Claimant**
- and -	
(1) NATIONAL CRIME AGENCY **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT** **(3) INNER LONDON CROWN COURT**	**Defendants**

- -
- -

Monica Carss-Frisk QC and Robin Barclay QC
(instructed by **Macfarlanes LLP**) for the **Claimant**
Guy Ladenburg (instructed by **National Crime Agency**) for the **First Defendant**
Clair Dobbin (instructed by **Government Legal Department**) for the **Second Defendant**
The **Third Defendant** was neither present nor represented

Hearing dates: 18th and 19th March 2020

- -

Approved Judgment

THE LORD CHIEF JUSTICE and MR JUSTICE JAY:

Overview

1. On 13th December 2018 a PACE search warrant ("the Warrant") was executed by officers of the National Crime Agency ("the NCA") at a storage facility known as Unit M20, 289 Kennington Lane, London SE11 ("the Unit"). The officers seized and removed 11 boxes containing voluminous documentation in both paper and electronic form. These boxes belong to Terra Services Limited ("Terra") although the licensee of the Unit was an employee of that company, Mrs Tatyana Talyanskaya. The Warrant had been applied for by the NCA on the same day following a direction from the UK Central Authority ("the UKCA"), part of the International Criminality Unit of the Secretary of State for the Home Department which had in turn received a Letter of Request from the US Department of Justice ("DoJ") to take steps to obtain these documents.

2. Approximately 15 months later, after three Divisional Court hearings and a separate hearing in CLOSED before May J, this Court is now seized of a "rolled up" application for judicial review. This delay is regrettable and some of it is the fault of Terra. The Defendants do not oppose this application on the ground of delay and we therefore say no more about it.

3. The decision to grant the Warrant was made by HHJ Kelleher sitting at Inner London Crown Court on 13th December 2018, but as we have said this claim for judicial review also challenges other matters. Terra challenge the *ex parte* application for the Warrant and the Warrant itself. (The matters which are said to undermine the application can be directed to the Warrant itself). There are two other challenges:

    i) a decision of the NCA, said to have been made on 26th November 2018, to authorise under section 93 of the Police Act 1997 ("the Authorisation") a covert search and examination of the material stored at the Unit (here, we are simply setting out Terra's case, because the existence of the Authorisation is neither confirmed nor denied ("NCND") by the NCA).

    ii) a decision of the Secretary of State, following her receipt of the Letter of Request, to direct the NCA under section 13 of the Crime (International Cooperation) Act 2003 ("the CICA") to apply for "a search warrant (or other appropriate measure)" to obtain material from the Unit ("the Direction").

4. Terra had abandoned two claims in advance of the hearing, and before us Ms Monica Carss-Frisk QC indicated that she would not be pursuing her client's claims in relation to five Requests for Information ("RFIs") issued by the NCA under the Crime and Courts Act 2013 to the Kennington Branch of the licensor of the Unit, Big Yellow Storage, between 19th November and 13th December 2018 in relation to Mrs Talyanskaya in particular.

5. Our provisional assessment was that the claims in relation to the RFIs would struggle, not least because the NCA has wide powers to investigate serious crime. Section 7 of the Crime and Courts Act 2013 does not limit those powers (which, in the context of what the subject of the request may do, is apt to cover "information" in the form of the provision of documents), and compliance with RFIs is not mandatory. We might

add that the reason why the two other claims have not been pursued is that they could not be sustained in the light of the decisions of this Court made during the course of this litigation. On 5th November 2019 Irwin LJ and May J upheld the NCA's claim for non-disclosure of material on the ground of Public Interest Immunity and the Secretary of State's claim to confidentiality in respect of the Letter of Request. On 13th December the same composition of this Court ordered the claim to proceed by way of "rolled up" hearing which would include a closed material procedure (in line with the principles expounded by the Supreme Court in *R (oao Haralambous) v Crown Court at St Albans and another* [2018] UKSC 1, [2018] AC 236). Terra's application that a Special Advocate be appointed was refused by the same composition of this Court in January of this year, with an application to certify a point of law of general public importance being refused in February.

6. We received submissions over the course of two days, both in OPEN and CLOSED hearings. Having considered those submissions, we refuse permission on Terra's grounds insofar as they relate to the Authorisation and the Warrant (including the application for the warrant). We grant permission on Terra's grounds insofar as they relate to the Direction, because we recognise that the decision of this Court (Butler-Sloss LJ and Laws J, as he then was) in *R (Propend) v Central Criminal Court* [1996] 2 Cr. App. R. 26 supports its case; but we dismiss the application for judicial review against the Secretary of State.

7. Notwithstanding the range and detail of the arguments deployed by Ms Carss-Frisk against the NCA, our conclusion that permission should be refused means that this judgment may be less full on these aspects of this case. We are also handing down a CLOSED judgment which is relevant to the case against the NCA.

Dramatis Personae

8. Terra was incorporated on 15th July 2003 and describes itself as a management services company. According to the NCA's skeleton argument, Terra carries on business as a general commercial company acquiring and holding interests in other companies and providing financial and management services. Upon incorporation, or perhaps only after January 2018 because Terra's evidence is inconsistent about this, Terra's registered office was at 8 Cleveland Row, London SW1A 1DH. On 2nd November 2018 it changed its registered address to 100 Pall Mall, St James, London SW1Y 5NQ. Its company secretary between incorporation and 25th April 2018 was Mr Paul Hauser who was an English solicitor and a commercial litigation and arbitration partner at the US law firm Bryan Cave Leighton Paisner LLP ("BCLP") until 31st December 2019. Upon his resignation, Mrs Talyanskaya was company secretary of Terra until 19th September 2018 when she also resigned.

9. It is in the public domain that Mrs Talyanskaya was admitted to practise as a solicitor in England and Wales on 15th February 2011. According to the Amended Statement of Facts and Grounds, since April 2018 she was employed as in-house legal counsel at Terra (the skeleton argument gives a different date). There is a dispute as to whether the NCA either knew or ought to have known this.

10. Originally, the sole director of Terra was Pavel Ezubov, who is a cousin of Oleg Deripaska. The latter is, or at least has been, associated with Paul Manafort and Rick Gates, who have been found or have pleaded guilty in the US to a wide variety of

financial crimes. On 6th April 2006 Mr Deripaska was registered as Terra's person of significant control ("PSC"). On the same date he was registered as PSC of another company, EN+ Consult, a wholly owned subsidiary of the EN+ Group. Terra and EN+ Consult worked out of 8 Cleveland Row, at least since January 2018. On 25th January 2018 Paul Ezubov replaced Mr Deripaska as PSC of Terra although the latter remained PSC of EN+. In April 2018 the US Office of Foreign Assets Control imposed financial sanctions on both Oleg Deripaska and EN+ Consult. Mr Hauser, as a US citizen was unable to continue as company secretary of both companies, which may explain Mrs Talyanskaya's appointment in April.

11. The role and responsibilities of the NCA do not require exposition. Under the CICA the Secretary of State is the "territorial authority" to whom overseas authorities may direct requests for mutual legal assistance and who may act on those requests to direct that a search warrant be applied for. The UK Central Authority ("the UKCA") is the body within the Home Office that handles such requests. Ms Clair Dobbin told us that there are 16 officials working within this division with 16 support staff.

The Facts

12. There is a mass of evidence before us, much of which is disputed and some of which has arrived very late. The judicial review process does not enable us to resolve many of the factual issues; some may only be addressed in CLOSED; and, in any event, the real focus should be on what was believed or ought with reasonable diligence to have been believed, as the case may be, by the relevant decision makers. Ms Carss-Frisk's observation that she proceeds "blindfolded" in relation to the terrain covered by the CLOSED material is of course correct, but we have evaluated that material both carefully and critically with the assistance of Mr Guy Ladenburg for the NCA.

13. Aside from the lateness of the fourth and fifth witness statements of Mr Neill Blundell, solicitor for Terra, we draw attention to the fact that there is no witness statement from Mrs Talyanskaya. Terra has chosen to provide us with her account through the medium of its solicitor. Hearsay is admissible in judicial review proceedings but direct evidence will usually be better than a second-hand account uncritically relayed by an intermediary.

14. For the purposes of this application for judicial review, the essential factual structure is as follows.

15. On 24th October 2018 an individual named Barry Searle was arrested for suspected money laundering after leaving the premises of Terra/EN+ and approximately £100,000 in cash, in two currencies, was seized from him. Later, he was released without charge.

16. At 11:55 on 26th October 2018 Sergio Fernandez, described variously by Mr Blundell as an employee of EN+ and as "a security guard/receptionist/facilities manager in the building", telephoned Big Yellow Storage to ask about licensing storage space for documents. A transcript of the call is available, having been obtained pursuant to one of the RFIs issued by the NCA, from which it appears that Mr Fernandez described the documents as "it's just the company documents, err something that, you know, documents that relate to the company, so paperwork that relates to the company". When asked if these would be "like deeds to a property", Mr Fernandez volunteered:

"erm … I'm not sure. I think it would just be paper that relates to you know the day to day running of the business". He agreed that they were "like invoicing and that sort of thing". The Unit was described by the Big Yellow Storage employee as 5 foot by 5 foot and 8 foot high. Mr Fernandez said that the licensee would be the company although for the time being he was leaving his name as the reference.

17. At 13:36 on the same day Mr Fernandez phoned back and explained that his manager wanted the hiring to be under her name. He added:

> "How quickly can it be changed cos (sic) base … we've been given this sort of mission to get rid of the items, sort of before 4.30 cos that's what time you guys er …"

18. Mr Fernandez was aware that Big Yellow Storage would close at 4:30pm. Mr Blundell has very recently explained (providing detail that had not been given before) that Terra was intending to move to new office premises in St James's Square but it became apparent at a late stage that these would not be ready in time. Temporary new premises in St James's Place were organised for 29th October but there was insufficient space. Assuming that this late-advanced account is correct, it is not suggested that the NCA was aware of the nature of the difficulty. The hiring of the Unit had the appearance of urgency and haste.

19. At 13:41 on 26th October the details on the hiring account were changed to Mrs Talyanskaya. Her contact email had the domain name "@ terraservices.co.uk". When the account was opened with Big Yellow Storage, the primary address given was 8 Cleveland Row and Mrs Talyanskaya gave her personal details for the purpose of setting up a direct debit and for insurance.

20. That afternoon, Mrs Talyanskaya and Mr Fernandez transported some 13 boxes of hard copy documents and electronic storage devices to the Unit.

21. Ms Carss-Frisk advanced a range of submissions about these documents. She described them as being in the nature of a legal archive and that the NCA either knew or ought to have known that. According to Mr Blundell's understanding, the archive had been created and collated by Mr Hauser, Ms Talyanskaya and other lawyers at BCLP over many years when they had represented Terra and other clients, including Mr Deripaska, in relation to various commercial transactions as well as legal and arbitral disputes in England. It follows, she submits, that most of the documents were subject to legal professional privilege ("LPP").

22. Ms Carss-Frisk made two further headline submissions about these documents. First, she contended that the vast majority did not relate to Messrs Manafort and Gates, and to the limited extent that they did the US investigation was clearly coming to an end with the criminal trials. Secondly, she made a detailed submission about documents pertaining to litigation involving a Cyprus-registered company, Surf Horizons Ltd (associated with Mr Deripaska) and Pericles Emerging Market Partners LP (beneficially owned by Messrs Manafort and Gates). The minutiae of all of this matters little: the gravamen of the submission was that the Surf/Pericles documents were subject to LPP, were the only documents in the overall cache that did relate to Messrs Manafort and Gates, were already within the possession of the US DoJ, and to

the extent necessary could have been obtained from Surf itself, or Mr Deripaska, because it or he would have every incentive to co-operate with the NCA.

23. We understand the force of these points but they are limited. They presuppose that the only persons of interest to the Americans were Messrs Manafort and Gates.

24. Much evidence and submission was also devoted to the question of what proportion of the documents in the Unit did attract LPP. We have explanations in the recent evidence of Ms Elisabeth Holley for the NCA, and by Mr Blundell. This evidence is all after the event in the sense that it is directed to the results of the sift carried out by the NCA under the protection of Independent Counsel. We express the matter in these terms because we are not concerned with the outcome but rather with what the NCA knew or ought to have known at the time the application for the Warrant was made. In any case, we are not in a position to resolve the factual disputes that have arisen. It is agreed that what is in issue, irrelevant documents having been excluded from account, are approximately 100,000 pieces of paper (the use of the term "document" has given rise to some confusion because Ms Holley and Mr Blundell do not appear always to be using it in the same sense, the latter explaining that one document may comprise hundreds of pieces of paper). Ms Holley's evidence is that the paper documents found to attract LPP have been limited in number and of the electronic documents thus far reviewed by Independent Counsel at most 217 out of 16,609 have been deemed to attract LPP. On the other hand, Ms Carss-Frisk informed us during her reply that out of 13,604 relevant pages Terra says that 7,203 are privileged.

25. The next event, or alleged event, in this sequence is an Authorisation which Terra claims was obtained by the NCA on 26th November. We put the matter in this way because the NCA has not resiled from its stance of NCND. Our attention was drawn to the redacted copy of a document which purports to be an Authorisation dated 26th November 2018. The "Unit Activity" log shows that the Unit was opened during the early hours of the morning of 27th and 28th November, but we cannot agree with Mr Blundell that "it is clear from the documents that officers from the NCA then accessed the Unit".

26. We will address the issue of NCND below but, subject to that, we will proceed on the hypothetical basis suggested to us by the NCA.

27. On 7th December 2018 the Letter of Request was sent by the US DoJ and received by the UKCA on the same day. A redacted copy is available from which that date is apparent. At 17:17, again on the same day (and not on 12th December as the NCA's skeleton argument erroneously states), the UKCA emailed the NCA explaining that the "conduct under investigation is Money Laundering, Tax Offences, Fraud – Non-Cyber Enabled and other offences in the United States", the subject of the email being "Search Warrant/Production Order direction". The following direction was given:

> "This request has been considered by the UKCA and has been accepted. Subject to your own assessment and any operational restraints you may wish to raise, under section 13 of [CICA], you are hereby directed to apply for a search warrant (or other appropriate measure) under section [16(1) and 16(3)] of CICA."

The parenthesis "or other appropriate measure" clearly includes and is probably limited to an application for a Production Order.

28. On 12th December 2018 a senior officer of the NCA, Ms Louise Song, filed the application for a search warrant at the Inner London Crown Court. The application was made pursuant to the Direction and to section 16(1) of CICA and section 9 and paragraph 12 of Schedule 1 to the Police and Criminal Evidence Act 1984 ("PACE"). A heavily redacted copy is available but not the schedule of sensitive material. It is worthy of note that under the rubric "the material" was specified the following:

> "Hard copy and electronic records, financial documentation, correspondence and communications containing evidence of money laundering, tax offences and fraud offences listed above between, among, involving or for the benefit of individuals and entities listed below: [18 individuals or entities including but not limited to Terra, Messrs Manafort and Gates, Mr Deripaska, Mr Searle, Mr Hauser, Mrs Talyanskaya, Pericles and Surf]

29. Under the heading "Duty of Disclosure" it was stated that the majority of the individuals targeted had no previous convictions although Mr Deripaska was sanctioned in the US, Mr Manafort had been convicted in the US (Mr Gates' conviction was mentioned elsewhere) and Mr Searle had historic convictions in the United Kingdom.

30. The application notice stated that the hearing should last 30 minutes with 45 minutes allowed for pre-reading. Finally, it stated that "it is anticipated that the material sought may be mixed with items subject to legal privilege, however no excluded material is anticipated".

31. The hearing of the Application took place on 13th December. A redacted transcript is available and we have considered it with care. Ms Song gave oral evidence and was questioned by HHJ Kelleher mainly as to the practicalities concerning LPP. As for the substance of the Application, Ms Song made clear that the US authorities "obviously have a better understanding" and "their request dictates so with the list of names and companies". Guided by the NCA's note on the law, HHJ Kelleher went through the legal pre-requisites point by point. He addressed these systematically in his redacted ruling. Two aspects of the ruling merit specific mention:

> "The basis of the application is that the authority submits that there is material within the premises which could be of assistance and provide evidence in an ongoing US investigation into a number of criminal offences committed by two US subjects. Paul Manfoor (sic) and Rick Gates. The offences are set out on the proposed warrant and their equivalent UK offences are also listed there."

and (somewhat later in the proceedings)

> "[COUNSEL]: Although this is a fairly limited to names and conduct, there is not a date parameter set out on the face of the warrant: a "from and to" date. It is difficult to give a precise set

> of date parameters and it is whether your Honour thinks that this is actually necessary given the - as I say, the fairly limited scope of people that are relevant to this –
>
> [JUDGE]: I have already been through the reasons why the material fulfils the criteria. Unless you are submitting to me that there may be reason to believe that there is material that falls outwith the scope of this investigation –
>
> [COUNSEL]: No, your Honour has dealt with it, the material and the reasons for that.
>
> [JUDGE]: It does not seem to me that this needs to be addressed. If there is good reason to believe that, then I should have been told of that already.
>
> [COUNSEL]: No, no."

32. The terms of the Warrant duplicated the Application as regards the description of the material and the 18 targets. The Warrant did not authorise a search of items subject to LPP from which it flowed that any such potential items would need to be removed and independently examined.

33. We take the various decisions under challenge in chronological order although, for forensic reasons which were entirely understandable, Ms Carss-Frisk followed a different course.

The Authorisation

34. The Authorisation was granted by an officer of the NCA pursuant to section 93 of the Police Act 1997. That required the authorising officer to believe that it was necessary for the specified action to be taken for the purpose of preventing or detecting serious crime, and that the taking of the action was proportionate. However, in relation to property which constitutes "office premises" and where "the action authorised … is likely to result in any person acquiring knowledge of matters subject to legal privilege", section 97 requires the authorisation to be approved by a Judicial Commissioner before it takes effect. It is accepted that the Authorisation in this case (on the hypothesis which we are continuing to make) was not subjected to such approval.

35. Section 97(8) applies relevant provisions of the Offices Shops and Railway Premises Act 1963 to the term "office premises".

36. Section 1(2)(a) of the 1963 Act defines "office premises" as "a building or part of a building, being a building or part the sole or principal use of which is as an office or for office purposes". By section 1(2)(b), "office purposes" include "the purposes of administration, clerical work, handling money and telephone and telegraph operating". Section 1(2)(c) defines "clerical work" as including "writing, book-keeping, sorting papers, filing, typing, duplicating, machine calculating, drawing and the editorial preparation of matter for publication".

37. The NCA has drawn attention to various provisions of the 1963 Act applicable to office premises regulating standards in relation to cleanliness, lighting, ventilation and the provision of sanitary facilities.

38. Section 65(2) of the Regulation of Investigatory Powers Act 2000 ("RIPA") provides that the Investigatory Powers Tribunal, to which Terra has made a complaint, is the appropriate forum, but not the "only appropriate tribunal", for the adjudication of complaints relating to authorisations of this sort.

39. Logically, we should address first of all the submission of Ms Carss-Frisk that the NCA's stance on NCND is not sustainable in these particular circumstances, especially where a copy of the authorisation is before the court. She referred us to the general statements of principle in *DIL and others v Commissioner of Police of the Metropolis* [2014] EWHC 2184 (QB) and *Mohammed v SSHD* [2014] EWCA Civ 559, although the context of those cases was somewhat different. The most recent exposition of the principles is to be found in *Al Fawwaz v SSHD* [2015] EWHC 166 (Admin), paras 74-80 in particular.

40. Given that the NCA is prepared to address Terra's case on the law on the hypothetical basis that there *was* an Authorisation, it is difficult to see how and why the mask of NCND should be raised. Terra's legal case would not be enhanced by confirmation that the Authorisation actually exists; what it really seeks or needs for the purposes of its argument on LPP in the context of sections 93 and 97 of the 1997 Act is sight of the full document and of any supporting evidence. For obvious reasons, that would be impermissible. Neither Terra's Amended Statement of Facts and Grounds nor its skeleton argument advanced the contention that the assertion of NCND was unsustainable, and for that reason no evidence on that topic has been filed by the NCA. We have noted that the bundle contains what purports to be a redacted copy of the Authorisation, which we understand was provided to Terra's solicitors by Big Yellow Storage. We do not therefore comment further. We cannot accept Ms Carss-Frisk's submission that the Divisional Court (Irwin LJ and May J) stated in terms that an Authorisation existed: it was merely recording Terra's case on the point. We can envisage there being sound public interest considerations, bearing on operational matters within the NCA, which militate against Terra's late case that the cover of NCND should be taken away. Ms Carss-Frisk's submission on this topic cannot be taken any further.

41. Terra accepts that exceptional circumstances must be demonstrated before the discretionary remedy of judicial review may be invoked in the face of section 65(2) of RIPA: see *R (Privacy International) v IPT* [2019] UKSC 22, [2019] 2 WLR 1219 and, more generally, *R (Grace Bay II Holdings) v Pensions Regulator* [2017] EWHC 7 (Admin), paras 44-59 in particular. The exceptional circumstances prayed in aid by Ms Carss-Frisk are many. The covert search is intimately linked with the applications for the Warrant and for judicial review; the evidence demonstrates that there has been such a search; the issues are limited; and there is a closed material procedure to provide adequate protection. However, her concession in oral argument that any invalidity in the Authorisation does not undermine the Warrant is, in our view, fatal to her whole case as to the existence of exceptional circumstances. The intimate nexus that has been asserted falls away at that point, not least because Terra can obtain no practical benefit in these judicial review proceedings without successfully assailing the Warrant. In any event, we should point out that the fact that a closed material

procedure may be necessary to resolve any issues bearing on the merits (e.g. belief as to the likely existence of material subject to LPP), as opposed to the law, is another reason why the IPT is the appropriate tribunal.

42. We have concluded that it is not arguable that exceptional circumstances exist so as to displace the standard expectation that the matter should proceed in the tribunal.

43. However, we should touch on Terra's submission that this locked container should be regarded as part of a building used as an office or for office purposes within the statutory definition. The argument was that the Unit was "effectively an annex" and in the nature of being a storage facility which had become an office. The obvious answer to that submission is that a container, assuming that it is a "building" for these purposes, whose sole purpose is to store items in a passive manner is neither an "office" nor within the list of "office purposes"; nor is there any basis why it should somehow be accommodated within those purposes. The statutory requirements as to safety, cleanliness and ventilation are plainly inapposite.

44. Terra has not advanced any arguable grounds in relation to the Authorisation, and permission must therefore be refused in this respect.

The Direction

45. The Direction was made by the UKCA pursuant to section 13(1) of CICA, which provides:

> "Where a request for assistance in obtaining evidence in a part of the United Kingdom is received by the territorial authority for that part, the authority may –
>
> (a) if the conditions in section 14 are met, arrange for the evidence to be obtained under section 15, or
>
> (b) direct that a search warrant is to be applied for under or by virtue of section 16 or 17 …"

46. Section 16 of CICA provides:

> "(1) Part 2 of [PACE] is to have effect as if references to indictable offences in section 8 of, and Schedule 1 to, that Act included any conduct which –
>
> (a) constitutes an offence under the law of a country outside the United Kingdom, and
>
> (b) would, if it occurred in England and Wales, constitute an indictable offence."
>
> (2) But an application for a warrant or order by virtue of subsection (1) may be made only -
>
> (a) in pursuance of a direction given under section 13, or

> (b) if it is an application for a warrant or order under section 8 of, or Schedule 1 to, that Act by a constable for the purposes of an investigation by an international joint investigation team of which he is a member."

47. We accept the submission of Ms Clair Dobbin for the Secretary of State that the purpose of section 16 is to extend the application of Part 2 of PACE to applications for search warrants made pursuant to a direction. The phrase "under or by virtue of" is slightly puzzling inasmuch as the more natural reading of these provisions is that the application should be envisaged as made under PACE rather than under the CICA, the former applying by extension of the latter: hence the "by virtue of". However, this semantic issue does not require resolution because it does not matter: the application for the Warrant was made under PACE, and it was not Terra's submission that it could not be. What is clear is that the existence of a lawful direction is a statutory precondition.

48. Ms Dobbin also drew our attention to the structure of Schedule 1 of PACE which she submitted was important. Three points arise. First, the requirements for production orders (para 4 of Schedule 1) and search warrants (para 12) may be regarded as cumulative in the sense that an applicant must demonstrate to the judge hearing an *ex parte* application for a warrant that the pre-requisites for a production order have been fulfilled as well as the additional and more onerous conditions for a warrant. Secondly, an application for a search warrant cannot be made unless – insofar as is germane to the instant case – "other methods of obtaining the material (sc. an application for a production order) … have not been tried because it appeared that they were bound to fail". Thirdly, a number of the requirements for warrants listed in para 14 of Schedule 1, in particular those relating to whether service of a production order might seriously prejudice the investigation, would not be within the institutional or operational competence of the UKCA to assess.

49. In March 2015 the Home Office published *Guidelines for Authorities Outside of the United Kingdom* in relation to *Requests for Mutual Legal Assistance in Criminal Matters*. Ms Carss-Frisk submitted that although these Guidelines did not directly address the UKCA's decision-making process they did illuminate it to the extent that foreign governments were effectively being advised how the authorities here would exercise their discretion. The Guidelines advise foreign governments that the UKCA will consider a request within 30 days of receipt, and:

> "In practice the UK accedes to most requests received and in general there is a presumption that MLA will be provided *where all the requirements of the investigative measure under UK law have been met*. However, the central authorities retain a wide discretion when considering whether to accede to a request." [emphasis added]

Possible grounds for refusal are said to include national security, politically motivated investigations, and the like.

50. We were taken to other parts of these Guidelines which it is unnecessary to set out, but we refer to the following advice to foreign governments given under the heading of "search and seizure":

> "It is not sufficient for a request to be accompanied by a search warrant issued by an authority in the requesting state. Central and executing authorities in the UK do not have the authority to issue warrants themselves; they must be in a position to convince a court to issue a search warrant. … If the evidence requested can be obtained without obtaining a search warrant, the central authority will seek an alternative method of execution instead."

51. In our judgment, these Guidelines do not bear the weight sought to be invested in them by Terra. Foreign governments have no interest in the practicalities and machinery in obtaining search warrants, or for example in any division of responsibility as between the UKCA and "executing authorities". Contrary to Ms Carss-Frisk's submission, this is broad and general advice directed to an overseas audience which is not intended to govern how relevant decisions are made within the UK. Still less are they an aid to statutory construction.

52. The UKCA relies on evidence from Philip Newman, who is a solicitor and employed as a caseworker within this agency. His evidence is that it is UKCA's practice to consider the Letter of Request and whether it can be acceded to. If so, it will then be for the relevant law enforcement agency to apply to the court for a search warrant or for such other order as it considers appropriate. It is for that agency to make its own assessment of how to proceed, within the parameters set out in the Letter of Request, subject to any operational restraints it may wish to raise. Here, the UKCA was satisfied that sufficient information had been given by the requesting authority, and the direction letter (sent in the form of an email) followed the standard format.

53. Further, Ms Dobbin emphasised para 39 of the Secretary of State's Summary Grounds of Defence, which explains:

> "An official from the UKCA considered (inter alia) whether the request provided details of the specific material or type of material to be seized and why the material requested was considered both relevant and important evidence to the investigation or proceedings. The UKCA official was satisfied that this was the position. As set out below, the Secretary of State is content to proceed on the basis that the LoR is set out in similar terms to the search warrant, as regards the materials sought."

54. Ms Carss-Frisk grouped her submissions under four headings. First, she submitted that the UKCA, acting on behalf of the Secretary of State, has a discretion whether to accede to the request or not, and to make a direction. Secondly, she contended that in exercising that discretion scrutiny must be given to the Letter of Request to ensure that the assistance sought would be a lawful action as a matter of domestic law. Thirdly, and connectedly, she submitted that in addition to deciding whether to accede to the Letter of Request, the UKCA was duty-bound to consider what measure should be directed. Fourthly, she contended that the scrutiny carried out by the UKCA in the circumstances of this case was plainly inadequate, given the speed with which the direction was given.

55. Ms Carss-Frisk placed particular reliance on the case of *Propend* which she submitted was authority for the proposition that a direction which did not identify the measure to be taken in specific and unequivocal terms was unlawful. This was because a direction which offered alternative courses of action could not by definition comply with the statutory requirement that the UKCA be satisfied that it was right to apply for a particular measure, particularly in circumstances where these alternative applications were mutually inconsistent. She further submitted that an application for a warrant which was predicated on an unlawful direction was itself unlawful, and we do not doubt the correctness of that last proposition.

56. Ms Dobbin submitted that analysis of sections 13 and 16 of CICA shows that the UKCA does not have to satisfy itself that the PACE criteria have been fulfilled. The NCA is independent of the UKCA and carries out its own constitutional role. She further submitted that there is no logical or practical support for the proposition that a direction which specifies an application for a search warrant or *some less intrusive* measure (if that be the NCA's assessment) should be regarded as unlawful. She observed that *Propend* was decided on different facts and on the predecessor statute to CICA; and, if necessary, she contended that it should not be followed. She submitted respectfully that the decision was wrong. Applying the principle articulated by Robert Goff LJ, as he then was, in *R v Manchester Coroner, ex parte Tal* [1985] 1 QB 67), we should decline to follow it.

57. As we have already said, the reason why we have decided to grant permission to apply for judicial review on this aspect of Terra's challenge is that *Propend* lends support to its case. That said, we have concluded that the statutory scheme read in the light of basic public law principles cannot be construed in the manner pressed on us by Ms Carss-Frisk. Moreover, the suggested approach is impracticable.

58. A number of authorities bear of the issue of statutory construction.

59. In *R (Secretary of State for the Home Department) v Crown Court at Southwark* [2014] 1 WLR 2529, this Court (Moses LJ and Griffith Williams J) held that the Secretary of State could direct that an application be made for a production order despite the absence of explicit wording in section 13(1)(b) of CICA to that effect: this was an inadvertent drafting omission which could be corrected. Moses LJ pointed out that the term "statutory search power" embraces an application for, and the obtaining of, a production order. This case did not consider the question of whether a direction which covers both species of power as alternatives may be lawful.

60. *Propend* was decided on the terms and effect of section 7(4) of the Criminal Justice (International Co-operation) Act 1990 ("the 1990 Act"). In that case the Secretary of State directed that an application for a search warrant be made under section 7(2) of the 1990 Act or section 8 of PACE (this is the semantic point we referred to under §46 above), or for a production order under section 9 of and Schedule 1 to PACE. The Divisional Court held that this was unlawful because the statute conferred power to issue only a unitary as opposed to a multiple direction.

61. Laws J gave the first judgement with which Butler-Sloss LJ agreed. He noted that it was accepted that the Secretary of State possessed a discretion whether she would make a direction at all, although the circumstances in which she might refuse would be rare. Given that she was required to carry out some assessment of the merits of the

application made by the requesting state, "in our view such an exercise is inextricably linked to the making of a judgment as to what form of application is appropriate" (at 33E). The nub of Laws J's reasoning was that the different forms of application were "in large measure mutually inconsistent", and that the premise of a multiple direction was that one or more of the forms of application covered by it was actually inappropriate.

62. The *ratio* of the decision appears in the following passages:

> "A multiple direction could only be lawful if, on its true construction, the statute contemplated that the police should have the duty to decide, if the Secretary of State chose to confer such a duty, whether any particular form of application should be made at all. We do not believe that the Act can be read as distributing such contingent and differential functions between the Secretary of State and the police.
>
> In our judgment, the Secretary of State has not only the responsibility of deciding whether assistance should be given to the requesting state; in our view, he must decide *what* assistance should be so given.
>
> …
>
> It was submitted to us by Mr Richards that the police possess an experience and expertise in the administration of the PACE procedures which the Secretary of State does not share. But he has specific responsibilities under the Act of 1984 to oversee certain processes by the police: see section 66. So that submission does not, in our judgment, assist the Secretary of State." [at 34C-F]

63. *Propend* was considered by Brooke LJ sitting in this Court, albeit *obiter*, in *Gross and others v Southwark Crown Court and others* [1998], 24th July, unreported. Brooke LJ drew attention to PACE Code B placing an obligation on the police to undertake relevant inquiries: this alone caused him to doubt the correctness of Laws J's conclusion. Brooke LJ's reasoning on the issue arising in the present case was as follows:

> "Unless the language of the statute forbids it, it appears to me to be desirable in a case of this kind that the Secretary of State, having considered the nature of the documents being requested and concluded that they consist of special procedure material, or include such material and do not include excluded material, should be able, if the Request he has received permits it, to direct the police to apply for whichever of a production order or search warrant under Sch 1 of PACE as appears to them to be appropriate once they have completed the inquiries required by their Code of Practice.

> When I turn back to s.7 of the 1990 Act, it appears to me that the Secretary of State is entitled to give such a direction. Once the police had completed their inquiries and had satisfied themselves as to the appropriateness of the remedy they were seeking, they would be making their application in pursuance of the direction of the Secretary of State and the requirements of section 7(4) of the Act would be satisfied.
>
> It follows that I consider Laws J was wrong to construe s.7 quite so restrictively."

64. We accept the core submission of Ms Dobbin. There is nothing in sections 13 and 16 of CICA which requires the UKCA to decide for itself which statutory search power should be the subject of the direction. The discretion in section 13 imported by the subjunctive "may" must of course be exercised in accordance with well-established public law principles. In dealing with Letters of Request the UKCA is required to look both outwards and inwards: outwards to what the requesting state has said in the letter, and inwards towards those institutionally responsible for making operational and judgmental decisions on the ground. The circumstances in which the UKCA might be able properly to second-guess or question the reasoning of a friendly foreign state will of course be rare: see, for an exceptional example, the *JP Morgan Chase Bank National Association v The Director of the Serious Fraud Office* [2012] EWHC 1674 (Admin). For altogether different reasons, the UKCA will not be in a position properly to assess whether a search warrant is truly required. This requires a PACE-compliant inquiry by the relevant authority, being in the nature of an exercise which that authority is duty-bound to conduct in relation to all applications for search warrants and production orders. It is not in the nature of an exercise which the UKCA is either institutionally competent or required to conduct.

65. For other reasons too, the language of sections 13 and 16 does not compel the conclusion which attracted Laws J. Section 16 is directed solely to the relevant authority and not to the UKCA at all. Moving away from the circumstances of the present case, and addressing the issue more generally, if the NCA were convinced that the Letter of Request was plainly inappropriate, or that, having been directed, say, to proceed by way of warrant, it was equally obvious that such an application would be wrong, the matter could not proceed mechanistically to the door of the court. The NCA would be bound to draw the UKCA's attention to the difficulty. Section 13 is directed solely to the UKCA and not to the relevant authority. The language of the 1990 Act referred to "warrant or order", but section 13(1)(b) must now be read in the same way, following the *Southwark Crown Court* case. If the UKCA knew that a unitary application for one or the other was inappropriate, it could not lawfully issue a direction on that basis; but if it reasonably believed that a search warrant should be applied for but in the event that further investigation revealed that such a step was not necessary because a lesser form of intrusion would be appropriate, we cannot ascertain anything in the section, read in the light of relevant public law principles, which should forbid (to use Brooke LJ's verb) a multiple application expressed as alternatives. Given the way in which Schedule 1 to PACE is constructed, it is not correct in our view to express these alternatives as "mutually inconsistent". As we have pointed out, they in reality overlap, because a search warrant must fulfil the same criteria as a production order; and then some additional criteria which are

cumulative in nature and not antithetical. A warrant may only be applied for if the relevant authority certifies that other methods have either been tried without success or would be bound to fail.

66. Overall, we agree with Ms Dobbin that the standard form of direction achieves a sensible and practicable distribution of responsibility as between the UKCA and the relevant authority. If, on the other hand, the UKCA were compelled to issue unitary directions, obvious difficulties would flow from the relevant authority being unduly straitjacketed: either because it was being asked to do too much (in which circumstances it would know that the court would refuse the application) or too little (in which circumstances the public interest would not be furthered in situations where rapid action is often required).

67. Ms Carss-Frisk's subordinate submission was that CICA imposes on the UKCA a duty to test the Letter of Request and/or to carry out its own investigations. She relied on the *Tameside* principle (*Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014) to inquire or establish facts before exercising a judgement. That, arising as an adjunct of the *Wednesbury* principle arising where the statute requires the decision-maker to be satisfied of X before doing Y, is very much context specific. There is no basis here for importing a public law obligation to inquire or investigate in circumstances where the statute itself makes it clear – under section 16 – that UKCA is not charged with the power to make the appropriate application. The extent of UKCA's duty to test the Letter of Request is to satisfy itself that it is not so obviously flawed, incoherent or misplaced that any application to a court based on a relevant direction would be pointless. Beyond that, the UKCA is entitled to trust the relevant authority to conduct the appropriate evaluation of the merits of the warrant (or the production order, if so advised) during the course of preparing the application for judicial determination.

68. Furthermore, we cannot accept Ms Carss-Frisk's submission that the Letter of Request was too widely drawn. On the assumption that the application for the warrant was in similar terms to the Letter of Request, we can better consider that submission in the context of her arguments on the breadth of the Warrant itself.

69. Finally, we reject Ms Carss-Frisk's submission that the UKCA acceded to Letter of Request without proper scrutiny; that is to say, effectively rubber-stamped. The evidential basis for that submission is wholly lacking. HHJ Kelleher was informed that 45 minutes reading time was required. We do not believe that it would have taken long for the appropriate official within the UKCA to conduct the limited level of scrutiny and analysis that was necessary.

70. *Propend* should either be regarded as an authority confined to the predecessor legislative regime or, in our respectful view, should not be followed. It does not represent the law on the true construction and application of sections 13 and 16 of CICA.

71. It follows that we do not uphold Terra's case in relation to the Direction.

The Application for and the Warrant Itself

72. As we have already said, it is convenient to address Terra's case in relation to the Warrant compendiously.

73. Ms Carss-Frisk advanced two broad submissions in relation to the Warrant. First, she contended that the NCA failed in its duty of candour to give full and frank disclosure to HHJ Kelleher. Secondly, she argued that a number of the PACE criteria cannot have been satisfied.

74. In developing her case on the first issue, Ms Carss-Frisk submitted that it was "a crucially important fact" that Mrs Talyanskaya is a solicitor of good standing and some experience. Terra's primary case is that the NCA did know this from all the information it had at its disposal, and inferences may be drawn from the fact that a simple internet search would have revealed the position. In the alternative, it was submitted that this was information which the NCA could with reasonable diligence have acquired. The same applies, it was contended, in relation to Mrs Talyanskaya's continuing role as Terra's in-house counsel. It was submitted by Ms Carss-Frisk that this was information which was likely to have been seen by the NCA officers who carried out the covert search (and our attention was drawn to the exhibit to Mr Blundell's fifth witness statement), and capable of throwing light on the nature of the documents that she was storing. Ms Carss-Frisk submitted that had a production order been directed to her personally as distinct from the company, she would have been obliged to comply with it, both in line with the express terms of the order and her professional duties.

75. In similar vein Ms Carss-Frisk submitted that it was also a highly relevant fact that Mr Hauser was previously the company secretary of Terra and a partner of BCLP.

76. On the footing that full and frank disclosure was not given, Ms Carss-Frisk submitted that the Court must then identify what effect full disclosure might have had on the judge's decision. If it might have made a difference to the outcome, the warrant should be quashed: see Elias LJ (for the Divisional Court) in *R (Mills and Mills) v Sussex Police and Southwark Crown Court* [2014] EWHC 2523 (Admin), paras 37, 41 and 46.

77. Ms Carss-Frisk added that it was not sufficient in the application form merely to say that there was a possibility that the documents sought would include LPP material. These documents were in the nature of being a legal archive and "a lot" were likely to be subject to the relevant privilege. Had that fact been disclosed, HHJ Kelleher might have taken a different view.

78. As for Terra's case in relation to the specific PACE criteria, Ms Carss-Frisk's submissions overlapped to some extent with her case on non-disclosure. For example, HHJ Kelleher had to be satisfied that proceeding by the route of a production order would have been "bound to fail"; and it is contended that he would or might not have been so satisfied had he been aware of Mrs Talyanskaya's status. Given that so few of the documents related to Messrs Manafort and Gates (it is said), both the "likely to be evidence of substantial value" and the public interest criteria could not have been fulfilled. But the separate point which was raised in this context was the absence of any possible reasonable belief that the majority of the individuals and entities

specified in the warrant other than Messrs Manafort and Gates had committed indictable offences. Terra suggest, on the one hand, that it appears that HHJ Kelleher limited his finding that there was a reasonable belief that indictable offences had been committed to Messrs Manafort and Gates. If that be right, there is an obvious "disconnect" between that finding and the terms of the warrant itself. On the other hand, if it is appropriate to look beyond these two individuals, Ms Carss-Frisk submitted that although the reasonable belief criterion was satisfied in relation to Mr Yanukovych and The Party of the Regions, an examination of the OPEN materials demonstrates that it could not have been as regards the 14 others.

79. As for terms of the Warrant itself, Ms Carss-Frisk submitted that they were impermissibly wide and ambiguous. In particular, there were no date parameters and the Warrant is not limited to any particular transactions: it is wide-ranging and unspecific. The fact that problems have arisen during the course of the sift underscores these inherent flaws.

80. Finally, Ms Carss-Frisk submitted that it is clear from the available materials that HHJ Kelleher did not give proper scrutiny to the application.

81. In replying to these submissions, Mr Ladenburg stated that HHJ Kelleher was informed during the application for the warrant that Mrs Talyanskaya was an employee of a UK-based law practice, and that Mr Hauser was an employee of a law practice. He submitted that had HHJ Kelleher been informed in terms that both of these individuals were English solicitors, that information would and could have made no difference to the outcome. Mr Ladenburg was not able to go further in the OPEN hearing.

82. Mr Ladenburg further submitted that the provision of date parameters is not a statutory precondition. His overarching point was that the reach of the warrant was defined by the scope of the Letter of Request, and that in practical terms an investigator will not be aware of the precise ambit of the materials sought. He or she is constrained to apply for a warrant on the basis of what is reasonably believed operationally, because only a certain amount of detail will be available.

83. Notwithstanding the forceful way in which Terra's case on these issues was advanced by Ms Carss-Frisk, we have not been persuaded that the threshold of arguability has been crossed. Some of our reasons for that conclusion cannot be given in OPEN. We approach the matter as follows.

84. We agree with Ms Carss-Frisk that the importance of full and frank disclosure in *ex parte* applications for search warrants is well-recognised. The basic principles were summarised by Hickinbottom J, as he then was, in *R (Chatwani) v The National Crime Agency, Birmingham Magistrates' Court* [2015] EWHC 1283 (Admin), at para 106. In *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court and others* [2006] 1 WLR 1316, para 24, Kennedy LJ encapsulated the matter in these crisp terms:

> "(3) … If an application is to be made for a warrant it is the duty of the applicant to give full assistance to the district judge, and that includes drawing to his or her attention anything that militates against the issue of a warrant."

85. That Mrs Talyanskaya was and is a practising solicitor is a relevant fact which ought to have been disclosed to HHJ Kelleher. Whether he would have drawn the inference from the reference to her being an employee of a UK-based law firm that she was employed as a solicitor is not clear: he might well have done, but we would prefer not to speculate. Even if Terra is right that Mrs Talyanskaya remains its in-house counsel, we cannot agree that the documents recently exhibited by Mr Blundell proves that she had that status in November or December 2018. Further, we have not been shown anything in the public domain which demonstrates that Mrs Talanskaya was Terra's in-house counsel at the material time. Our remaining conclusions on the non-disclosure issue are set out in the CLOSED judgment.

86. Terra's case that the Unit was essentially a legal archive must be evaluated with reference to what was believed or ought with reasonable diligence to have been ascertained by the NCA by 13th December 2018. There is nothing in the OPEN evidence that shows that the NCA ought to have come to this conclusion. Even if it is appropriate to extend the ambit of inquiry to after-acquired facts, it seems to us that this issue is quantitative, not qualitative. We are unable to resolve the disputes which have arisen as to what proportion of the (potentially relevant) documents actually inspected either arguably or do attract privilege. Even on the figures advanced by Ms Carss-Frisk in her reply, it is apparent that a significant number of the hard copy documents inspected to date are not covered by LPP, and her submissions did not cover the electronic documentation. Ultimately, this is a point which does not assist Terra's case on the issue of non-disclosure.

87. We have noted that Ms Carss-Frisk suggests that the sole objects of DoJ interest were Messrs Manafort and Gates. For the purposes of this OPEN judgment we can make explicit, and this is borne out by the terms of the Warrant itself, that the material sought was not limited to Messrs Manafort and Gates. To the extent that Terra's case is predicated on that premise, it is wrong.

88. Ms Carss-Frisk's submissions directed to the breadth of the Warrant and the Application may be addressed in this way. As we have said, the starting point for the investigation must be correctly defined. This is an inquiry into various criminal offences committed in the US "between, among, involving or for the benefit of" 18 individuals and entities. It follows, in our judgment, that the observations of Kennedy LJ in *Energy Financing Team Ltd and others v SFO* [2005] EWHC 1626 (Admin), para 24(5) are particularly apt:

> "When there is an ongoing investigation into, for example, the affairs of a company such as EPRS, which appears to have been at the centre of the fraud, it will always be difficult to say precisely what documentation of value to the inquiry may be recovered from those justifiably suspected of being in contact with the main target company, but nevertheless 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. If that is done it seems to me that the specificity required will be no less than would be required for a notice under section 2(3) were it practicable to serve such a notice, and although the terms of the warrant may be wide it

> will not simply be fishing if it is directed to support an investigation which has apparent merit."

The instant case is *a fortiori* inasmuch as the Warrant is not limited to just one entity at the centre of the fraud, or a main target company. Thus, the present case is closer to what Simon Brown LJ (for the Divisional Court) had in mind in *R v SSHD and others, ex parte Fininvest SpA and others* [1997] 1 WLR 743, at 752H when he said:

> "What is under investigation here is, after all … a wide-ranging, multi-faceted, international fraud involving far-reaching allegations against a large number of individuals in connection with an even larger number of companies. Considering, moreover, that it is at the investigative stage, one could hardly look to greater particularisation of the offences than is contained in the letter of request."

89. Nor can we accept Ms Carss-Frisk's submission that it was incumbent on the NCA as applicant and/or HHJ Kelleher as responsible for the terms of the Warrant itself to specify date parameters. This is not a statutory requirement, although it will often be both appropriate and necessary if the ambit of inquiry is in fact circumscribed temporally. That was not the position here. These documents were all conveniently located in one enclosed Unit, and there were reasonable grounds to believe that within these boxes would exist material that would be of a substantial value to a wide-ranging investigation. This was the case that the NCA was advancing to HHJ Kelleher. Counsel was drawing to his attention an issue which at least needed to be considered, but he cannot be interpreted as saying that date parameters were required. It is clear from the exchange read as a whole (see §31 above) that the NCA's instructions to Counsel were that the Unit did not contain irrelevant documents solely because they fell outside a particular date range.

90. There is no merit in the submission that HHJ Kelleher failed to accord sufficient scrutiny to the Application as advanced both in writing and orally. Much is apparent in OPEN material from the questions he asked and from his ruling, but it is obvious that Terra has not been given the full picture. We will cover this aspect of Terra's case in the CLOSED judgment.

91. For these reasons, we refuse permission in relation to Terra's various challenges to the Application and the Warrant.

Disposal

92. Permission to apply for judicial review is refused in relation to Terra's challenges to the Authorisation and the Warrant. It is granted in relation to the Direction, but the application for judicial review in that regard is dismissed.