Neutral Citation Number: [2022] EWHC 765 (Admin)

Case No: CO/2809/2021

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

Thursday 31st March 2022

Before:
MR JUSTICE FORDHAM

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Between:
THE QUEEN (on the application of
(1) DLR HOLDINGS LIMITED
(2) ORANGE BOX SYSTEMS LIMITED)

Claimants

and

(1) YORK MAGISTRATES' COURT
(2) THE ENVIRONMENT AGENCY

Defendants

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Andrew Thomas QC (instructed by The Environment Practice) for the **Claimants**
Sailesh Mehta (instructed by the Environment Agency) for the **Second Defendant**
The **First Defendant** did not appear and was not represented

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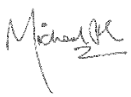
Hearing date: 31/3/22

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. This is a claim for judicial review which impugns two warrants issued by the York Magistrates' Court on 18 May 2021 and executed by the Environment Agency six days later, the Agency having been the applicant for the warrants. The applicable statutory framework was summarised by Blair J in R (Allensway Recycling Ltd) v Environment Agency [2014] EWHC 1638 (Admin) [2014] 1 WLR 3753 at paragraphs 18 to 29. The Magistrates' Court is the first-named Defendant in the proceedings and has at this stage, entirely conventionally and properly, not actively participated in the judicial review proceedings in circumstances where it is a judicial body.

About the claim

2. The remedies sought in the judicial review proceedings are as follows. First, remedies are sought in relation to the warrants themselves, asking the court to quash them (as has been clarified, whether quashing in whole or in part as may be appropriate) and/or to declare that they were unlawfully issued. Then there are remedies sought which relate to the execution of the warrants: in particular, declaratory relief that the execution was unlawful and that the Claimants are entitled to the return or destruction of property that was acquired by the Environment Agency through the execution of the warrants; and also, a claim for damages. Insofar as they relate to the execution stage, the remedies are – as I have understood it – linked to the grounds for judicial review that are advanced, about the warrants and the way in which the warrants were applied for and obtained by the Agency.

3. There were originally seven grounds for judicial review. One of them is not maintained following refusal of permission on the papers. That leaves two 'groups', each consisting of three grounds for judicial review.

    i) One 'group' of grounds for judicial review was granted permission for judicial review on the papers by HHJ Stephen Davies ("the Judge"), but only "as against the Environment Agency". Those grounds, in essence, relate to the way in which the Agency applied for the warrants: the matters that were relied on and their sufficiency; and the matters that were disclosed and their sufficiency.

    ii) The other 'group' of three grounds for judicial review all relate to the wording of the two warrants. One relates to the inclusion within the warrants of the phrase "specifically to search for …", which is impugned as unlawful. The other two relate to the wording in the warrants in which there was a description of the exercise of statutory powers "for the purpose of investigating a suspected illegal waste operation on the premises" and a subsequent reference "to take possession of or to take copies of (as appropriate) any … documents relevant to any waste operation or control of the site, computerised records relevant to any waste operational control of the site … or any other items found suspected to be relevant to the investigation". As clarified orally today by Mr Thomas QC, the Claimants put forward those two grounds as, in effect, parts of a composite holistic question which has at its heart what the Claimants say is the mismatch between the detailed and specific description of the investigation in the

applications made by the Agency to the Magistrates' Court and the description in the wording of the warrants.

The decision on permission

4. I have already mentioned that the Judge on the papers granted permission for judicial review for the 'group' of grounds for judicial review relating to the application, evidence and disclosure by the Agency in obtaining the warrants, but only "as against the Agency". Permission for judicial review was refused by the Judge in relation to the other 'group' of three grounds relating to the wording of the warrants. That was on the basis that the Judge was not persuaded that those grounds were reasonably arguable. The Judge also observed that insofar as the Claimants wished to impugn the way in which the warrants were executed – as exceeding the powers conferred by the warrants – that could and should be by means of the alternative remedy of a claim against the Agency which would need now to be pleaded.

Transfer to the QBD

5. The Judge went on to direct, 'provisionally', that the claim be transferred to the Queen's Bench Division: (i) to deal with the claim against the Agency in relation to the application, evidence and disclosure in obtaining the warrants; and (ii) any new pleading relating to execution of the warrants by the Agency in excess of the powers conferred by the warrants. The Judge's thinking in relation to the transfer to the QBD concerned the nature of evidential and factual issues in the case which made the Administrative Court an unsuitable forum. That unsuitability included not only any issues, if now pleaded, about execution exceeding the powers conferred by the warrants. It also included the points relating to the application, evidence and disclosure – on which the Judge had granted permission for judicial review against the Agency – on which the Judge envisaged that there could be factual disputes, as well as contested issues relating to the 'materiality' of any shortcoming.

Renewal and reconsideration

6. The direction as to transfer was – as I have indicated – 'provisional'. That was because the Judge recognised in his Order that this (and requiring a new pleading at this stage) would all fall to be revisited if the Claimants exercised their right of renewal, at an oral hearing, of the aspects of the refusal of permission for judicial review, and if the Court was invited to reconsider the Order that he had made. That is what has happened.

7. I am grateful to the legal teams on both sides, and Counsel on both sides (Mr Thomas QC and Mr Mehta) who have provided written representations and addressed me orally (at an in-person hearing), answering the Court's questions, to assist me in relation to the questions of what, if anything, it is appropriate in this case for the Court now to do, in light of the Order made on the papers by the Judge.

The grounds which were granted permission

8. It is convenient to start with the grounds on which permission for judicial review have already been granted but only "as against the Agency". It is no part of my role to revisit the Judge's assessment on arguability in granting permission for judicial review (nor can I see any basis in any event doing so; and nor does any party invite me to do so).

The only question for me is as to whether the York Magistrates' Court should be a Defendant in relation to these grounds and, if so, any consequential question regarding the appropriate forum.

9. In my judgment, the threshold of arguability has been crossed as to the Magistrates' Court also being a Defendant, for the purpose of the three grounds on which the judge granted permission for judicial review. It is sufficient, for present purposes, to say this. The arguments entail a 'vitiating' consequence, so that the points which are raised in these grounds, relating to the way in which the warrants were applied for and obtained by the Agency, have the consequence that the warrants which were issued by the Magistrates' Court were themselves contrary to law and should be quashed or declared to have been unlawful. Indeed the 'materiality' point, to which the Judge referred, is one which concerns the materiality for what the Magistrates ordered of the steps which were (or were not) taken or the evidence which was (or was not) put before the Magistrates' Court by the Agency. Given the 'vitiating' consequence of the arguments, if well-founded, given the issues as to 'materiality', and given the remedial appropriateness of the Court being able to consider the implications for the warrants of these grounds – framed specifically to impugn those warrants – permission for judicial review on these three grounds does, in my judgment, needs to include permission against the Magistrates' Court.

10. One illustration of the way in which warrants are 'vitiated' by reference to these sorts of grounds can be found in the decision of the Divisional Court in R (Rawlinson & Hunter Trustees) v Central Criminal Court [2012] EWHC 2254 (Admin) [2013] 1 WLR 1634 at paragraphs 170-179. By way of a footnote, I observe that it will remain open to the York Magistrates' Court – if it wishes to do so – to remain 'neutral' and to avoid incurring any costs or participating in the proceedings.

The grounds which were refused permission

11. I turn next to the 'group' of three grounds on which the Judge refused permission for judicial review, which are renewed. As I have mentioned, a seventh ground was refused permission and has been dropped. In the light of everything that I have read and heard, I am satisfied that the Claimants have crossed the threshold of arguability in relation to these three further grounds. Since that is the only question which I had to answer today, and in the circumstances, it is not necessary for me to go into any detail as to those grounds and their viability. I will simply say this.

12. A number of themes arise from these (linked) grounds. One theme relates to the interrelationship between a warrant and its wording on the one side, and the wording of the underlying primary legislation on the other. Another theme similarly relates to the interrelationship between a warrant and its wording on the one side, and the wording and contents of the underlying application for the warrant. There are questions about whether and to what extent a warrant needs to be understandable on a stand-alone basis; and about whether and how the warrant is as a matter of law illuminated by reference to the statute. There are questions about whether as a matter of law a warrant is illuminated by reference to the application that was made to the magistrates. There are questions as to the practical realities, regarding the materials that were before an issuing magistrates' court and regarding the understanding of a properly-briefed individual executing the warrant, at least one acting for the agency who made the application to the magistrates, and what such a person would and could be taken to understand. There

are also questions about the need for the person against whom the warrant is produced to be able to understand sufficiently the relevant matters that are within the warrant. There are questions about the significance of there being matters within the warrant which, at least arguably, were legally inappropriate. There are questions about others who may be involved in executing the warrant, who may not have been involved in the application to the magistrates, and who may or may not have been briefed by reference to the application documents. There are questions relating to the specificity of the "investigation" which is at the heart of the warrants, so far as concerns the "purpose", and questions of necessity and appropriateness of steps in executing the warrant. There is a specific question (in relation to the first of the three grounds in this 'group') which arises from the fact that the legislation as it was at the relevant time did not permit a "search", though I am told it has now been amended to do so for the future for England and Wales, as it already had been for Scotland (as seen in the Environment Act 1995 section 108(4)(ka) as applicable in Scotland). There are questions as to the subtlety of the line which may fall to be drawn, in design and execution of a warrant, between "search" and other actions ("examination", "inspection" and "investigation").

13. By way of reference points, I mention here that among the cases cited to me were Allensway in which paragraph 37 touches on the interrelationship between what is said on the face of a warrant and the underlying statutory scheme. In that same judgment, paragraph 81 touches on the position, as it was in that case, where the challenge was to the execution of a warrant, and where the warrant did not use the word "search" but the underlying information in the application to the magistrates did use that word. In the present case, it is rather the other way round. Also cited to me was the case of R (Van der Pijl) v Kingston Crown Court [2012] EWHC 3745 (Admin) [2013] 1 WLR 2706, a case which discusses the authorities (as they were in December 2012) in relation to warrants being interpreted on a 'freestanding' basis: see paragraphs 54 to 65 and 97. Also cited was McGrath v Chief Constable of the RUC [2001] UKHL 39, a case which discusses at paragraph 17 the status of a warrant and the consequences for those affected by it.

14. It suffices to say that, in my judgment, the points helpfully put forward by the Environment Agency at this permission stage did not stand as a 'knockout blow' in relation to any of these three grounds for judicial review; nor was I shown any authority which, in my judgment, stands as such a 'knockout blow'. By way footnotes I make these points.

    i) First, it seems to me that there is a potential overlap between the points relating to the way in which the warrants were applied for and obtained (including draft warrants put forward by the Agency) and the further grounds on which I am granting permission for judicial review today.

    ii) Secondly, and in fairness to the Judge, it is appropriate to say that not all of the authorities to which I have been referred had been cited – and the points made by reference to them identified – in the papers as they were when considered by the Judge. One of the features of judicial review proceedings is that conventionally the Defendant or Defendants and any Interested Parties put in their Acknowledgements of Service, with summary grounds of resistance responding to the grounds for judicial review, and what happens next is that the papers go to a judge. That means it can be the case that points that are raised in the summary grounds of resistance effectively only come to be answered by the

claimant at the renewal stage, after the decision by a judge on the papers. In some cases, 'permission-stage reply' documents are put in by the claimant to be put before the paper judge, and these may be considered by the court. Be that as it may, the right of renewal is an important one. The ability of this Court to revisit the position in the light of further assistance is significant. Indeed, the Judge himself expressly envisaged in the terms of his Order that that this Court might be asked to revisit the matters which he had addressed on the papers.

iii) As has been recognised by both the Claimants' and the Environment Agency's Counsel in their oral submissions and exchanged with the Court, one possibility which may fall to be considered is this. I have formed no view about it but simply record it. It is that the answer to the first ground on which I have granted permission, as to the inclusion in the warrants of the language of "to search for", could be an Order for partial quashing which simply deletes those words from the warrants, so that the legal position has been dealt with by the Court. Quashing orders made by courts in judicial review cases always need judicial consideration. But the parties for their part would need to consider whether that is a course, on that part of the case, that is appropriately invited by all of them. That would need to include an opportunity for the York Magistrates' Court to take a position, and make any point, if it wished to do so. I repeat that I am simply recording a possibility to which reference has been made. I am expressing no view, either way, as to its appropriateness or inappropriateness of that course in this case.

Forum

15. The remaining point with which I need to deal is transfer to the Queen's Bench Division or retention within the Administrative Court. The Judge was quite right to recognise, as Mr Mehta for the Environment agency has emphasised today and as the claimant's legal team also recognises, that it can be entirely appropriate for claims relating to warrants and their execution to be dealt with in the Queen's Bench Division rather than in the Administrative Court. An example of a transfer to the QBD is the Rawlinson case: see paragraphs 263, 267 and 288-289. In that case, the Administrative Court dealt in the judicial review proceedings with all of the issues which related to the warrants that were being impugned, including by reference to the way in which they had been applied for. What was then transferred to the QBD for directions and then trial were the issues (including disputed factual matters) which still arose relating to execution of the warrants, in the light of the Administrative Court having dealt with the issues in its judgment in the judicial review proceedings. Even issues relating to execution can be appropriate for the Administrative Court: Allensway was, as I have mentioned, a judicial review which impugned the way in which a warrant had been executed.

16. In my judgment, in light of the grant of permission for judicial review on the remaining three grounds, and in light of the inclusion the grounds on which the Judge granted permission for judicial review of the Magistrates' Court as Defendant (for reasons relating in particular to potential vitiating consequence and appropriate remedy), it is now appropriate for this case to be retained in the Administrative Court. In my judgment, the appropriate forum for the grounds which have been raised is now this Court. Reference has been made by Mr Mehta to the "possibility" that there could be a disputed question of fact, relating perhaps to what happened in the hearing when the ex parte applications were made by the Agency to the Magistrates' Court, or possibly in

relation to some other matter, and Mr Mehta for his part does not exclude the "possibility" that there might even be an application for the Court to hear oral evidence. His submission is that the Judge made an entirely proper case-management decision as to forum, which I should not disturb.

17. In my judgment, the complexion of the case is now different, in the light of the new orders that I have already decided to make. Nor am I persuaded that there is in this case any issue, relating to the way in which the Agency applied for the warrants, which would call for oral evidence. My decision is based on the position as it is today. In my judgment, there is on the face of the materials no disputed primary fact relevant to the determination of the grounds for judicial review; nor any factual aspect of the case which the Administrative Court is incapable of addressing; nor any question requiring oral evidence. Moreover, should any question arise subsequently, as to which any party says that there needs for some reason to be oral evidence, relating to the six grounds on which permission for judicial review has now been granted, that could be revisited and addressed. Questions of 'materiality' are familiar in judicial review challenges and Rawlinson is an example in which the Administrative Court dealt with such an issue. So far as concerns the further grounds on which I have today granted permission for judicial review, they are plainly in my judgment apt for resolution in the Administrative Court. Resolution of all of the grounds in the judicial review claim, in my judgment, appropriately precedes any consequential arguments relating to execution. In so far as there are any further points relating to execution, which are not linked to the grounds for judicial review – such as points about whether execution steps exceeded the authority of the warrants – those have, in my judgment, properly been postponed and can be addressed at an appropriate time.

18. For these reasons I will, in the circumstances, discharge the Order which the Judge made, provisionally, on the papers for a transfer of this case at this stage to the Queen's Bench Division and for a case management conference in that Division.

Order

19. I will look to Counsel for assistance with the precise form of the Order which I should make to reflect the decisions and I have made today and any consequential or subsequent matters.

31.3.22