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ANY JUDGMENT, REPORT OR PROFESSIONAL PUBLICATION MUST IDENTIFY THE APPLICANT GENERICALLY AS "A FIRM OF SOLICITORS".

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2011-404-4796

BETWEEN

A
Applicant

AND

DISTRICT COURT AT AUCKLAND
First Respondent

AND

NEW ZEALAND POLICE
Second Respondent

Hearing: 5 December 2011

Counsel: J G Miles QC and S O McAnally for Applicant
H Ebersohn and M Cooke for Respondents

Judgment: 22 December 2011

JUDGMENT OF BREWER J

*This judgment was delivered by me on 22 December 2011 at 4:30 pm
pursuant to Rule 11.5 High Court Rules.*

Registrar/Deputy Registrar

SOLICITORS

Keegan Alexander (Auckland) for Applicant
Crown Law (Wellington) for Respondents

COUNSEL

JG Miles QC

Introduction

[1] The applicant is a firm of solicitors located in Auckland. On 2 August 2011, it was subjected to the attentions of police officers acting on a search warrant issued by the first respondent. The application for the search warrant was instigated by a request from the Director of the Serious Fraud Office of the United Kingdom (“UK SFO”) to the Attorney-General under the Mutual Assistance in Criminal Matters Act 1992 (“MACMA”).

[2] The applicant pleads by way of judicial review that the issue of the search warrant was illegal. The first cause of action pleads disregard of relevant considerations and the second cause of action pleads excess of jurisdiction.¹ The application gives rise to four issues:

- (a) Whether the issuing of the search warrant is amenable to judicial review;
- (b) Whether the warrant application failed to meet the statutory threshold;
- (c) Whether the search warrant issued exceeded its jurisdiction; and
- (d) Whether the subsequent search and seizure was in breach of s 21 of the New Zealand Bill of Rights Act 1990 (“NZBORA”).

[3] The applicant claims the following relief:

- (i) An order pursuant to s 4 of the Judicature Amendment Act 1972 that the search warrant issued by the first respondent on 2 August 2011 is invalid and of no effect;
- (ii) A declaration that all steps taken by the second respondent in reliance upon the search warrant of 2 August 2011 were unlawful and unreasonable;
- (iii) An order that all property removed by the second respondent pursuant to the search warrant, and any copies taken thereof, be delivered to the applicant forthwith including the clones of the

¹ Second amended statement of claim of the applicant, dated 18 November 2011.

applicant's electronic server and laptop computer in the custody of the Registrar; and

(iv) Costs.

[4] The first respondent abides the decision of the Court.

[5] The second respondent opposes the claims on the basis that the search warrant was issued lawfully and all steps taken pursuant to it were also lawful.

Factual background

The UK SFO's request

[6] By written request dated 21 December 2010, the UK SFO requested the assistance of New Zealand pursuant to the MACMA. The request complied with the form provisions in s 26 of the MACMA.

[7] The request for assistance, in general terms, described an investigation into a very significant fraudulent international trading scheme involving many millions of dollars. Many people were alleged to be involved in the fraud and many corporate entities were named and alleged to have been used in furtherance of it. Seven persons were already charged with conspiracy to defraud and their case was said to be pending before the Southwark Crown Court.

[8] A principal of the applicant ("the principal") was described as having "a longstanding association with the conspirators as an advisor, an advocate and intermediary with independent banks, civil litigator and a representative of those alleged to be involved in the conspiracy accused of criminal conduct".

[9] The principal was referred to further:

The role of [the principal] remains under review and his status in these proceedings is subject to the execution of this request and coordination with the New Zealand authorities regarding domestic and international action that is or may be considered.

At the present time, [the principal] is a criminal suspect in OSR.

[10] The request for assistance then went into detail about the principal's involvement in matters related to the alleged fraudulent activity.

[11] The detail of the assistance requested was set out in appendix D of the request. It was summarised as:

In summary, evidence is sought that may be admissible and relevant to this criminal investigation and proceeds of crime considerations.

In particular, evidence is sought that may reveal the control of entities related to the fraud, the movement of funds and benefits from the fraud.

[12] In appendix D, under the heading "search of premises", the following appears:

It is requested that searches be undertaken at the premises of [the applicant] and the residential premises of [the principal] to seize material relating to this investigation for use in criminal proceedings.

The searches are requested to be undertaken without notice.

This request is subject to coordination with the UK authorities and the Australian authorities in relation to the timing of searches planned or requested in those jurisdictions, so as not to prejudice the potential availability of evidential material.

This request is additionally subject to New Zealand's laws on legal professional privilege and any related exceptions for material relating to the furtherance of fraud or crime generally.

The material sought from such searches are as follows:

- 1) Any material relating to the incorporation, management, ownership and control of the persons, firms and entities listed below;
- 2) Any material revealing the accounts, creditors or debtors of the persons, firms and entities listed below;
- 3) Any benefits received by the suspects or defendants listed in this [letter of request] from the persons, firms and entities listed below;
- 4) Evidence relating to client accounts of [the applicant] relating in whole or in part to the persons, firms and entities listed below.

[13] The "persons, firms and entities listed below" consisted of five named persons and six named incorporated entities or groups of entities.

[14] The UK SFO requested that the principal be interviewed under compulsion (to the extent consistent with New Zealand laws) in relation to his involvement with specified suspects, defendants and firms or entities to establish:

- 1) His first engagement with each person, firm or entity;
- 2) The nature of his engagement with each person, firm or entity;
- 3) His knowledge, understanding or evidence of the role of each person, firm or entity as it relates to the fraud under investigation;
- 4) His knowledge, understanding or evidence as to the beneficial and legal ownership and control of each firm or entity.

[15] The request was specifically "... subject to New Zealand's law's on legal professional privilege and any related exceptions for material relating to the furtherance of fraud or crime generally".

[16] A supplementary request for assistance in the matter was made by the UK SFO by writing on 19 January 2011. It (relevantly) requested that the list of relevant persons and entities in relation to whom or which material was sought to be seized and produced in the course of the searches requested be amended. A further five persons were added to the list and more than 40 incorporated entities. In appendix A to the supplementary request, the principal was still listed as a suspect.

[17] In the hearing before me, counsel for the second respondent filed a booklet of documents relevant to the application for the search warrant. It includes an email dated 14 April 2011 from Clive Lambert of the UK SFO to Mr Ebersohn which had not previously been disclosed to the applicant. In it Mr Lambert refers to an email from Mr Ebersohn sent on 15 February 2011. This email has not been disclosed either to the applicant or to the Court. I understand that legal professional privilege is claimed in respect of it. I have no way of knowing whether Mr Ebersohn is taking an unduly technical approach to withholding the email, but it is inconvenient because I now have to draw inferences which might prove to be incorrect. I infer from the rest of the email that Mr Ebersohn (then representing the Attorney-General) raised queries about the propriety of, or the necessity for, the searches requested. Mr Lambert said:

A review has taken place as to the appropriate stance to take in respect to [the principal] but our position remains that we consider a search of [the principal's] business premises to be appropriate due there being a real risk that [the principal] would not fully comply with a compulsory notice.

1. [The principal] describes himself as the global legal counsel for [the first suspect's] numerous interests and he has held that position for a number of years. Material in our possession indicates that [the principal] has set up the myriad corporate entities which provide a veil behind which [the first suspect] disguises his fraudulent activities. It appears that [the principal] has little regard for money laundering provisions and procedures in relation to identifying who his client is. For example, there is the email from [the principal] dated 17 July 2006 that suggests he was content to give advice to one individual [a suspect] in relation to the closing of the [corporate entity's] bank account while including [the first suspect] as an equal recipient of the advice. The [corporate entity] account was an account used to receive the proceeds of the fraud from the victims. [The first suspect] does not appear either as a company director or as an account signatory for this account. In light of this, it would seem surprising that [the principal] would include [the first suspect] as a recipient of the advice unless [the principal] was fully aware that [the first suspect] was the ultimate beneficiary of the receipt into this account. [The principal] enters into correspondence and telephone contact with the bank seeking to unfreeze the account, and arranges a refund of monies to one investor. On 17 July 2006 [the principal] flew from New Zealand to Hong Kong to meet the bank.
2. The reason for the account being closed was because of links to fraudulent trading through Spanish Boiler Rooms. When one of the Boiler Rooms salesmen was questioned in Belgium in relation to the Boiler Rooms activities, [the principal] represented (this individual acting through Belgian legal agents) with the fees for the Belgian lawyers initially being paid for by [a named person] who then forwarded the bill to [the principal]. As such, this was representation that was paid for by [the first suspect] through the complex web of entities that [the first suspect] either controls or instructs to act on his behalf. Such material suggests not only that [the first suspect] was one of the controlling minds behind this wide ranging fraudulent enterprise but also that [the principal] was comfortable accepting instructions and providing advice to [the first suspect] in relation to matters with which [the first suspect] did not have a formal link.
3. There are no identified payments being made to [the principal] for the legal services that he provided to [the first suspect] or to [the first suspect's associates] save for a payment of USD\$480,044.55 in 2007. This lack of an identifiable payment mechanism raises the question as to whether [the principal] is receiving payment through other means.
4. For these reasons we would encourage the use of a warrant to obtain the material sought in the request. However, we fully accept that it is a matter for you to determine the appropriate method to obtain the material sought.

5. *We note your concerns in relation to effecting a warrant for the search of [the principal's] residence and accept those concerns. Due to the lapse of time since the matters that gave rise to this request we accept there may not be sufficient grounds to apply for a warrant to search [the principal's] residence – we therefore withdraw this aspect of our request. But we remain of the view that it would be appropriate to seek a warrant to search [the principal's] business premises.*

[My emphasis]

[18] By supplementary request dated 18 April 2011, the UK SFO added to its request. It asked that a further UK offence be included in the list of offences in respect of which evidence was sought. It also provided the following “additional facts”:

There is evidence that [the first suspect] agreed to pay and [a lawyer] (Senior Partner of [a firm of Australian lawyers]) agreed to receive a secret commission of 4% of the turnover of fraudulently obtained Investors funds for shares handled in Escrow by [a firm of Australian lawyers], unknown to the other partners and staff of that firm. The turnover was some USD\$20m and commissions of some USD\$800k, were due and a schedule of payments has been evidenced. It is submitted that the offence of corruption is made out by the agreement and the implementation of the arrangement.

[19] The firm of Australian lawyers was one of the additional entities named in the supplementary request for assistance dated 19 January 2011 referred to above.

The warrant application

[20] On 8 July 2011, the Attorney-General authorised the second respondent to apply for a search warrant pursuant to s 44 of the MACMA. The Crown Law Office, which had been advising the Attorney-General, assisted the second respondent with preparing the documents necessary for the application.

[21] The application to the District Court was made on oath by a police constable on 12 August 2011. The first two paragraphs of the application are as follows:²

² The copy of the application included in the second respondent’s bundle of documents relevant to the application for the search warrant appears to be incomplete. There are no exhibits marked as such by the Deputy Registrar who took the affidavit of the police constable. There are documents included under the same tab in the bundle which might or might not be the documents referred to. Since no point was taken in the hearing, I will assume that the unmarked documents are copies of the documents referred to in the affidavit of the police constable.

1. I have been authorised by the Attorney-General in writing to apply to a District Court Judge for a search warrant in accordance with section 44 of the Mutual Assistance in Criminal Matters Act 1992. This authorisation is marked with a letter “B” and annexed hereto.
2. This application is made pursuant to a request for assistance from Richard Alderman, Director of the Serious Fraud Office, London, England, (SFO) on behalf of the Government of the United Kingdom (UK). The request has been made to New Zealand by the Home Office, the UK Central Authority for mutual assistance in criminal matters (appendix ‘F’).

[22] The Attorney-General’s authorisation³ to apply for a search warrant is directed to a named police constable (although it describes him as a Detective Sergeant) and lists the subject matter and persons (individual and corporate) in respect of which searches would be made. The authorisation concludes with the following passages:

I AM SATISFIED:

- a) That the request relates to a criminal matter in the United Kingdom, namely a criminal investigation into an allegedly fraudulent investment scheme, involving charges of conspiracy to defraud by way of false representation, obtaining property by deception, obtaining a money transfer by deception, general prohibition upon unregulated activity, money laundering and punishment of corrupt transactions with agents.
- b) All the above charges have a maximum penalty of more than two years.
- c) That there are reasonable grounds for believing that the items listed above are relevant to the proceedings and are located in New Zealand.

In my opinion, nothing in the Mutual Assistance in Criminal Matters Act 1992 precludes the granting of this request.

I hereby authorise you to apply to a District Court Judge for a search warrant in accordance with section 44 of the Mutual Assistance in Criminal Matters Act 1992 in respect of the above items.

[23] The affidavit of the police constable goes on to say that the subject of the application is the principal and that the physical address that is the subject of the application is the address of the applicant. Significantly, the affidavit then advises the issuing Judge:

³ Dated 8 July 2011 and signed by Cameron Mander, Deputy Solicitor-General, on behalf of the Attorney-General.

5. The following information has been provided to the New Zealand Police by the [UK] SFO to support this search warrant application in accordance with section 44 of the Mutual Assistance in Criminal Matters Act 1992. The enquiries, assertions and conclusions outlined below have been made by the [UK] SFO.

[24] The 89 paragraphs which follow are almost verbatim lifted from the request and amended request documents provided to the Attorney-General by the UK SFO.

[25] One exception is paragraph 38, which says:

The extent of [the principal's] role in this matter is still under review.

[26] This paragraph was inserted because the UK SFO had advised the Attorney-General that the principal was no longer regarded as a suspect but that his involvement in the international fraud was instead "under review". However, the police constable nevertheless attached a document from the UK SFO headed "Appendix A – the suspects & defendants". The principal remained named in that document as a person suspected of involvement in the frauds.

[27] I note that paragraph 49 of the constable's affidavit is as follows:

The information in the following paragraphs (50-94) has been provided by Clive Lambert, [UK] SFO Case Manager.

[28] Those paragraphs detail the alleged involvement of the principal with the various entities and persons suspected of involvement in the fraud. They include the paragraph quoted above at [17] to the effect that no payments have been identified as having been made to the principal for his legal services.

[29] Appendix E to the constable's affidavit lists persons, entities and links to the principal. This is one of the UK SFO's documents. In one column it summarises the connection of the various persons and entities with the principal. It occupies 14 closely typed pages.

[30] A comprehensive memorandum in support of the application for the search warrant dated 27 July 2011 and prepared by Mr Ebersohn and another lawyer was filed with the application.

[31] The District Court Judge issued a search warrant in the terms applied for on 2 August 2011. The warrant was executed at the applicant's premises and paper records and electronic data were recovered. Pursuant to another decision of this Court on 8 August 2011, all of that material has been sequestered and to this point the second respondent has had no access to it.

Statutory provisions

Mutual Assistance in Criminal Matters Act 1992

[32] The object of the MACMA is to facilitate the provision and obtaining, by New Zealand, of international assistance in criminal matters, including (relevantly) the obtaining of evidence, documents, or other articles (s 4(b)) and the execution of requests for search and seizure (s 4(f)).

[33] Of some significance, as will be seen, is s 5, which provides:

5 Act not to limit other provision of assistance

Nothing in this Act—

- (a) Derogates from existing forms of co-operation (whether formal or informal) in respect of criminal matters between New Zealand and any other country; or
- (b) Prevents the development of other forms of such co-operation.

[34] The United Kingdom is one of the countries entitled to make requests to New Zealand under the MACMA.⁴ The procedure is that requests for assistance in a criminal matter are made to the Attorney-General⁵ in the form prescribed in s 26. Of present significance is the requirement that the request be accompanied by:⁶

- (i) A certificate from the Central Authority of the foreign country that the request is made in respect of a criminal investigation or criminal proceedings within the meaning of this Act; and

⁴ Mutual Assistance in Criminal Matters (Prescribed Foreign Country) (United Kingdom) Regulations 1993, reg 2(1).

⁵ Mutual Assistance in Criminal Matters Act 1992, s 25.

⁶ Ibid, s 26(c).

- (ii) A description of the nature of the criminal investigation or criminal proceedings and a statement setting out a summary of the relevant facts and law; ...

[35] There is no requirement for any statement to be made on oath or for any information provided to be verified by oath. Section 27 sets out the grounds on which the Attorney-General may refuse a request for assistance. It does not include any ground related to the verification of the information provided pursuant to s 26 of the MACMA.

[36] The MACMA provides for the obtaining and execution of search warrants in compliance with a request for assistance. Since these provisions are at the heart of this case, I will set them out in full:

43 Assistance in obtaining article or thing by search and seizure

- (1) A foreign country may request the Attorney-General to assist in obtaining an article or thing by search and seizure.
- (2) Where, on receipt of a request made under subsection (1) of this section by a foreign country, the Attorney-General is satisfied—
 - (a) That the request relates to a criminal matter in that foreign country in respect of an offence punishable by imprisonment for a term of 2 years or more; and
 - (b) That there are reasonable grounds for believing that an article or thing relevant to the proceedings is located in New Zealand,—

the Attorney-General may authorise a member of the Police, in writing, to apply to a District Court Judge for a search warrant in accordance with section 44 of this Act.

44 Search warrants

- (1) Any District Court Judge who, on an application in writing made on oath, is satisfied that there are reasonable grounds for believing that there is in or on any place or thing—
 - (a) Any thing upon or in respect of which any offence under the law of a foreign country punishable by imprisonment for a term of 2 years or more has been, or is suspected of having been, committed; or
 - (b) Any thing which there are reasonable grounds for believing will be evidence as to the commission of any such offence; or

- (c) Any thing which there are reasonable grounds for believing is intended to be used for the purpose of committing any such offence—

may issue a search warrant in respect of that thing.

- (2) An application for a warrant under subsection (1) of this section may be made only by a member of the Police authorised under section 43(2) of this Act.

45 Form and content of search warrant

- (1) Every warrant issued under section 44 of this Act shall be in the prescribed form.
- (2) Every warrant issued under section 44 of this Act shall be directed to any member of the Police by name, or to any class of members of the Police specified in the warrant, or generally to every member of the Police.
- (3) Every warrant issued under section 44 of this Act shall be subject to such special conditions (if any) as the District Court Judge may specify in the warrant.
- (4) Every warrant issued under section 44 of this Act shall contain the following particulars:
 - (a) The place or thing that may be searched pursuant to the warrant:
 - (b) The offence or offences in respect of which the warrant is issued:
 - (c) A description of the articles or things that are authorised to be seized:
 - (d) The period during which the warrant may be executed, being a period not exceeding 14 days from the date of issue:
 - (e) Any conditions specified by the Judge pursuant to subsection (3) of this section.

Serious Fraud Office Act 1990

[37] One of the applicant's submissions, which I will come to, is that a search warrant ought not to have been granted under s 44 of the MACMA as there was available to the investigating officers the compulsory examination notice procedure under s 9 of the Serious Fraud Office Act 1990 ("SFOA"). (I infer from Mr Lambert's email (set out above at [17]) that this procedure was raised but not considered apt to the situation.)

[38] Section 9 of the SFOA provides a procedure for compelling a witness to answer questions and provide information and documents relevant to an investigation:

9 Power to require attendance before Director, production of documents, etc

(1) The Director may, by notice in writing, require—

- (a) Any person whose affairs are being investigated; or
- (b) Any other person who the Director has reason to believe may have information or documents relevant to an investigation,—

at the time and place specified in the notice, to do any one or more of the following things:

- (c) To attend before the Director:
 - (d) To answer questions with respect to any matter that the Director has reason to believe may be relevant to the investigation:
 - (e) To supply any information specified in the notice with respect to any matter that the Director has reason to believe may be relevant to the investigation:
 - (f) To produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to the investigation.
- (2) Where any document is produced pursuant to this section, the Director may do any one or more of the following things:
- (a) Retain the original document produced, provided that a copy of the document is taken and returned as soon as practicable thereafter:
 - (b) Take copies of the document, or of extracts from the document:
 - (c) Require the person producing the document to provide an explanation of the history, subject-matter, and contents of the document and to answer any other questions which arise from that explanation and which the Director has reason to believe may be relevant to the investigation:
 - (d) Where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.

- (3) Where any person is required to produce any document pursuant to this section and fails to do so, the Director may require that person to state, to the best of his or her knowledge and belief, where the document is.
- (4) Where any person is required to supply any information under this section, and does so by producing a document containing that information, the powers conferred by subsection (2) of this section shall apply in all respects to that document.
- (5) Any person who is required to attend before the Director under this section, shall, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a barrister or solicitor to accompany him or her.
- (6) Section 18 of this Act shall apply to any notice given under this section.

[39] Section 10 enables the New Zealand Serious Fraud Office (“NZ SFO”) to obtain a search warrant in circumstances where the compulsory examination notice procedure is inadequate:

10 Power to obtain search warrant

- (1) The Director may, on application in writing made on oath, apply for a warrant to search any place specified in the application.
- (2) Any Judge who, on such an application, is satisfied—
 - (a) That there are reasonable grounds for believing—
 - (i) That any information supplied pursuant to section 9 of this Act is false or misleading in a material particular; or
 - (ii) That a person has failed to comply with any obligation imposed pursuant to section 9 of this Act; or
 - (iii) That it is not practicable to serve a notice under section 9 of this Act by reason of the fact that the person cannot be located or is absent from New Zealand or other good cause; or
 - (iv) That the service of a notice under section 9 of this Act might seriously prejudice the investigation; and
 - (b) That there are reasonable grounds for believing that there may be, at the place specified in the application, any documents or other thing that may be relevant to an investigation or may be evidence of any offence involving serious or complex fraud,—

may issue a warrant in the prescribed form.

(3) Part 3 of this Act shall apply to any such warrant.

New Zealand Bill of Rights Act 1990

[40] Finally, s 21 of the NZBORA provides:

21 Unreasonable search and seizure

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

Whether the issuing of the search warrant is amenable to judicial review

[41] Before proceeding to discuss the applicant's two substantive causes of action, it is necessary to consider this Court's jurisdiction on review.

[42] In *Gill v Attorney-General*, as in this case, the appellants by way of judicial review sought the quashing of a search warrant (executed at their medical practice) and the return of all material seized.⁷ The Court of Appeal identified the limitations of judicial review in the context of a criminal investigation, noting that judicial review is not the appropriate forum in which to adjudicate upon the strength of a possible criminal case against a target of the search warrant.⁸ It considered that judicial review of the exercise of a prosecutorial discretion or investigative power will be appropriate only in exceptional cases, although:

[20] We have not overlooked the possibility that grounds may exist in appropriate cases to challenge a search warrant by judicial review proceedings. This Court has previously entertained such challenges by way of judicial review where the defect in the search warrant is of a fundamental nature, where the matter could be said to go to the jurisdiction of the issuing officer or where some other ground of true unlawfulness (such as want of jurisdiction) is established.

[43] The Court considered examples of cases where search warrants have been successfully challenged. They were:

⁷ *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433.

⁸ *Ibid*, at [17].

- (a) *Auckland Medical Aid Trust v Taylor*,⁹ in which a warrant was found to be fundamentally defective because it was not issued in respect of a particular offence or with sufficient particularity that the searching officer would know the offence to which the evidence must relate;
- (b) *Tranz Rail Ltd v Wellington District Court*,¹⁰ in which a warrant was found to be invalid on the basis that it was too widely drawn;
- (c) *A Firm of Solicitors v District Court at Auckland*,¹¹ in which the Serious Fraud Office had obtained a search warrant directed to the offices of a law firm, two of whose clients were suspected of committing fraud. The warrant was overturned on a number of grounds including material non-disclosure in the application for the warrant, a lack of specificity, and the absence of a mechanism for dealing with legal professional privilege.

[44] However, the Court of Appeal noted that the above cases were all decided before the enactment of s 30 of the Evidence Act 2006.¹² This section now provides a statutory mechanism for determining in criminal cases whether improperly obtained evidence should be excluded. It is particularly relevant bearing in mind the discretionary nature of judicial review:¹³

[27] ... Even if certain grounds of challenge are made out, this does not mean that relief must follow. It would be open to a court considering a pre-emptive challenge in the course of a criminal investigation and prior to any decision to charge, to refuse to grant relief if it might involve the premature exclusion of evidence divorced from any consideration of proportionality issues.

[45] The Court of Appeal concluded that the rather blunt instrument of judicial review should rarely be permitted to be used to challenge the issue, validity and execution of a search warrant, particularly in the course of an investigation into

⁹ *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA).

¹⁰ *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA).

¹¹ *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA).

¹² *Gill v Attorney-General* at [24].

¹³ *Ibid*, at [27].

alleged criminal offending.¹⁴ Judicial review can provide only an appraisal of the decision-making process against the usual principles. Accordingly, the burden is on the applicant to establish that the decision to issue the search warrant was not properly open to the Judge and that there were other errors affecting the validity and execution of the warrant that merit the grant of a remedy part-way through a criminal investigation.¹⁵

[46] Section 30 of the Evidence Act is, of course, of less relevance in the context of a foreign criminal investigation. Nevertheless, I bear these principles in mind when approaching the applicant's two causes of action alleging illegality. I take the view that relief by way of judicial review in the present proceeding will be appropriate only if the applicants satisfy me that there was a fundamental defect in the search warrant or in its execution.

Whether the warrant application failed to meet the statutory threshold

Applicant's submissions

[47] The applicant's first cause of action pleads that the statutory threshold was not met when the police constable applied for the search warrant under s 44(1) of the MACMA and therefore the warrant that was issued was illegal. The applicant's first submission on this point is that the District Court Judge was not supplied with a factual basis upon which the Court could be satisfied that there were reasonable grounds for believing that there was at the applicant's premises evidence as to the commission of an offence under the laws of a foreign country punishable by imprisonment for a term of two years or more. The requirements laid down by the Court of Appeal in *R v Williams* were not met.¹⁶ The applicant puts forward three grounds in particularisation of this submission:

- (a) The application for a search warrant was not supported by evidence. The police constable relied exclusively upon unsworn statements

¹⁴ Ibid, at [29].

¹⁵ Ibid, at [36].

¹⁶ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 (CA).

supplied to the Attorney-General by the UK SFO. He took no steps to satisfy himself independently that the information was reliable. This was clearly insufficient in light of the serious allegations involving the applicant;

- (b) The application was misleading. Specifically, the principal of the applicant was described in appendix A as a suspect, when he was by that stage only a person whose role was under review.¹⁷ This would have suggested to the District Court Judge that the principal was suspected of, and under investigation for, complicity in criminal activity when the second respondent was aware that he was not a suspect;
- (c) There was material non-disclosure of relevant facts. For instance, the affidavit accompanying the application did not disclose that the UK SFO had in its possession signed statements from and on behalf of the first suspect, containing rebuttals of the substance of the allegations relied upon by the second respondent. The affidavit also stated that there were no identified payments being made to the principal for his services, suggesting that there could have been illegitimate remuneration; yet it failed to disclose that the UK SFO had reviewed only a small portion of the first suspect's banking records upon which the assertion was based.

[48] The applicant further submits that the police constable, in applying for the warrant, failed to disclose, and thereby caused the District Court Judge to overlook, that the UK SFO had also sought the assistance of the NZ SFO in relation to, among other things, interviews with the principal, and that the NZ SFO had agreed to supply the UK SFO with such assistance.¹⁸ It is pleaded that the issuing Judge should have considered this avenue of investigation as an alternative and more appropriate means

¹⁷ Refer above at [26].

¹⁸ This was the source of notices under s 9 of the Serious Fraud Office Act 1990, dated 3 August 2011 and addressed to the principal, which were served on him during the execution of the search warrant.

of obtaining any relevant material, rather than a search of the premises of a firm of New Zealand solicitors.

[49] The applicant also takes issue with the role of a Mr Hudson in relation to the search warrant. The applicant submits that Mr Hudson improperly represented himself as an independent forensic computer expert suitable to perform the task of cloning the applicant's server, when he was in fact an employee of the NZ SFO which was itself involved in the MACMA request.

[50] In summary, the applicant submits that the nature and extent of the deficiencies in the application for the warrant are such that a properly informed decision-maker, having full knowledge of the relevant circumstances, would not have issued the warrant to the second respondent.

Second respondent's submissions

[51] In essence, the second respondent does not deny the factual allegations set out above. The contest is whether, as a matter of law, they should lead to a conclusion that the warrant should not have been issued.

[52] The second respondent's case is that the MACMA provides a formal framework and, in some respects, the legal authority for the State to make and act on mutual assistance requests involving foreign states. The MACMA establishes a filtering system through the Attorney-General pursuant to various requirements, including s 26. Authorisation of the Police to seek a warrant comes after that filtering process. In this case that process can be seen working through the apparent discussion which led to the UK SFO dropping the request for a search of the principal's home.¹⁹ Accordingly, the police constable, upon receiving the authorisation on behalf of the Attorney-General, having had regard to the source of the request and the detailed information accompanying it, had reasonable grounds to believe that a search of the applicant's premises would yield material relevant to the overseas prosecution. The same information having been put before the District

¹⁹ Refer above at [17].

Court Judge meant that the Judge also had reasonable grounds for forming the necessary belief and for acting on that belief and issuing the search warrant.

[53] It was not necessary — in terms of the MACMA scheme or for the purposes of establishing a reasonable belief — that the information upon which the search warrant was based be included in a sworn affidavit from the UK SFO. The source of the information indicates the basis of its reliability, and there is no requirement in the MACMA that it be provided by the foreign agency under oath.

[54] The second respondent does not accept that the application contained misleading or incomplete information. All relevant material was disclosed; the matters of which the applicant complains were not central to the application and, in any event, would not have caused the District Court Judge to refuse to grant a warrant.

[55] As to the submission that the warrant should have been refused in favour of following the compulsory examination notice procedure under s 9 of the SFOA, the second respondent points out that, unlike the SFOA, the MACMA does not contain a practical alternative to the issuing of a search warrant. There is no provision to serve notices requiring the production of documents.

[56] In any event, the existence of an alternative route for obtaining the relevant evidence does not fetter the investigating authority's, or the Court's, discretion to proceed with a search warrant. The Court will only intervene with the exercise of investigative and/or prosecutorial discretion in exceptional circumstances.²⁰ In the circumstances of this case, the search warrant procedure was appropriate, given that the principal's role in the alleged fraud was still being investigated.

[57] Although the NZ SFO did serve a compulsory examination notice on the applicant, an affidavit of Mr Bruce Fox, an investigator at the NZ SFO, explains that this was to cover items sought in the warrant but held off site. The search warrant was only for the principal's workplace and it was under that authority that the search was conducted.

²⁰ *Gill v Attorney-General* at [19].

Discussion

[58] While I accept that the formal framework of the MACMA does not require foreign agencies to provide information under oath, I also agree with the submission of Mr Miles QC to the effect that the MACMA is part of domestic law and must be construed as such. The Court of Appeal in *Solicitor-General v Bujak* commented, in relation to another provision of the MACMA:²¹

In short, in a general way the New Zealand Parliament elected to give as much assistance in New Zealand to overseas law enforcement authorities as it would to New Zealand authorities, but no more. For it would be a rather odd result if a foreign law enforcement agency could get more by way of pre-conviction relief here than could be had by a New Zealand agency.

[59] The grounds for establishing a ‘reasonable belief’ when obtaining a warrant under s 44(1) of the MACMA ought therefore to be construed to set a threshold consistent with equivalent domestic provisions. Section 44 of the MACMA is sufficiently similar to s 198 of the Summary Proceedings Act 1957 (“SPA”) to render cases decided under the SPA relevant to considerations under the MACMA.²² The leading case on the requirements of search warrant applications (and warrants) is *R v Williams*.²³ There the Court of Appeal described the ‘reasonable belief’ test as follows:

[213] Having “reasonable grounds to believe”, the test under s 198 of the Summary Proceedings Act, is a higher standard to meet than “reasonable ground to suspect”, the test under s 60(1) of the Arms Act for example Belief means that there has to be an objective and credible basis for thinking that a search will turn up the item(s) named in the warrant ..., while suspicion means thinking that it is likely that a situation exists. The issuing officer must hold the view that the state of affairs the applicant officer is suggesting actually exists

[60] The Court in *Williams* discussed a number of general principles intended to guide the drafting of warrant applications.²⁴ Importantly for present purposes, an applicant for a search warrant must state the basis for their belief in the truth of the facts which they assert in the application. The source of their information (in this

²¹ *Solicitor-General v Bujak* [2008] NZCA 334, [2009] 1 NZLR 185 at [14].

²² *Webb Ross Johnson v District Court At Whangarei* HC Whangarei CP1/99, 5 February 1999, Salmon J at 8.

²³ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

²⁴ *Ibid*, at [209]–[222].

case, the UK SFO) must be clearly described so that the issuing officer may assess its reliability and cogency.

[61] The Court set out the following useful summary, requiring that applicants for search warrants should:²⁵

- (a) Accurately describe the offence they believe the search relates to.
- (b) Explain what it is they expect to find and why, and where they expect to find it and why. Applicants should be as specific as possible.
- (c) Make sure they describe the place where they expect to find the item accurately, such as the correct address of a house
- (d) Include a description of all relevant information held or received (whether favourable or unfavourable) and all relevant inquiries made.
- (e) When describing the information received, state the date when each piece of information was received, who received the information, and in what circumstances. Provide an assessment (with reasons) of the significance and reliability of the information.
- (f) Describe the relevant inquiries that have been made. State the date on which each inquiry was made, who made it, how each inquiry was conducted, and the circumstances in which it was conducted. Explain (with reasons) the significance of those inquiries.
- (g) Explain any delay between the last receipt of information and/or the last inquiry and the application for a warrant. If there has been a delay in applying for a warrant, make any necessary inquiries to ensure everything contained in the application is current and explain why that is so.
- (h) If information relied on is from an informant, give as much information about the informant as possible, including the informant's name, address and relationship to the suspect (if known) and any specific information on past reliability.
- (i) Indicate in the application who received the information from the informant, when and in what circumstances.
- (j) As far as possible, report information received from an informant in the informant's own words. Consider attaching the original notes of the conversation to the application.
- (k) Disclose all relevant information, even if confidential. Confidential information (for example, as to an informant's identity) does not

²⁵ Ibid, at [224].

have to be disclosed to the suspect (even if later he or she is charged) but it must be disclosed in the warrant application. ...

- (l) Explain the reason for every expression of belief in the affidavit. Applicants should never express a conclusion without saying why.
- (m) Scrutinise the grounds on which they apply for a warrant and consider, taking the role of devil's advocate, whether the application meets the statutory criteria.
- (n) Where practical, refer the application to a superior officer or legal advisor for checking before it is submitted to the judicial officer.

[62] The Court of Appeal noted that a significant departure from the guidelines risks there being a finding that the warrant (and therefore the search) is unlawful.

[63] To similar effect is the Court of Appeal's comment in *R v T* that:²⁶

[9] ... the courts must not lose sight of the fundamental principle that an application for a warrant under s 198 of the Summary Proceedings Act 1957 must be supported by evidence which affords the issuing officer with reasonable grounds to believe that evidence associated with the commission of an offence is at the stated location. Where the application provides such evidence with reasonable specificity, the material supplied is not misleading or selective and the power of search which is sought is not unduly wide, there will be little or no scope for a successful challenge.

[64] And further:²⁷

In *R v Kissling* this Court warned against taking an over-technical approach in challenges to the validity of search warrants under s 198, in particular where factors were "of peripheral significance and ... do not significantly detract from the cogency of what was properly available". Moreover, the Court added: "[i]t is important that defence counsel (and the courts for that matter) do not engage in nitpicking exercises".²⁸

[65] Applying the principles to the present case, I am unable to find any material defect in the second respondent's warrant application that would render it unlawful. I am satisfied that the Court of Appeal's guidelines were appropriately followed.

[66] The warrant application set out in detail (as provided by the UK SFO) the relevant background to establish the basis for the belief that the applicant was in possession of materials relevant to the investigation of serious offences in the UK.

²⁶ *R v T* [2008] NZCA 99, cited in *Gill v Attorney-General* at [32].

²⁷ *Gill v Attorney-General* at [33].

²⁸ *R v Kissling* [2008] NZCA 559, [2009] 1 NZLR 641 at [35]–[36].

Those offences were listed as: conspiracy to defraud by way of false representation, obtaining property by deception, obtaining a money transfer by deception, unregulated activity, money laundering, and corrupt transactions with agents.

[67] In the circumstances of this case, the police constable was entitled to rely exclusively upon unsworn statements supplied to the Attorney-General by the UK SFO. He was not required to take further steps to satisfy himself that the information was reliable (such as requiring an affidavit to be sworn by a member of the UK SFO). The context in which the comprehensive information was supplied indicated its reliability. It can be said to be analogous to the situation of an officer who receives information from an informant who is not known to the officer personally but who has a history of giving reliable information and who has no reason to provide self-serving information in the instant case. Likewise, the District Court Judge was entitled to take the same view.

[68] It is also of relevance that in *Gill v Attorney-General* the Court of Appeal held that there is no requirement that a warrant application exhibit all of the documentary materials which form the basis of the applicant's reasonable belief. A summary in the sworn affidavit is sufficient:

[38] ... A summary of the [materials relied upon] was all that was required to be placed before the Registrar. Given that the s 198 procedure does not contemplate a hearing on the merits, the Registrar is entitled to rely on the sworn statement summarising the position in the affidavit. Axiomatically, any summary must be accurate.

[69] Turning next to accuracy, in my view the alleged defects did not cause the issuing Judge to overlook anything of importance. The search warrant was aimed at the applicant's records in relation to named individuals and corporate entities. The principal was a person of interest but this was not a search warrant predicated on an allegation that the investigating authority had reasonable grounds to believe that the principal had committed criminal offences. The information being sought was the records of a firm of lawyers who could reasonably be assumed to have acted for, and therefore maintained records of and about, persons and entities involved in suspected fraudulent trading. The threshold does not need to be any higher than this.

[70] It is not relevant that the UK SFO had possession of statements from and on behalf of the first suspect rebutting the substance of the allegations relied upon by the second respondent. Placing that material before the second respondent would not have influenced the granting of a search warrant in circumstances where the basis for it was that the first suspect and others were being investigated for serious fraudulent activity. This was a search warrant aimed at acquiring information held by a third party which could reasonably be supposed to assist the investigating authority with its investigation. If denials of culpability by a target of the investigation could preclude the granting of a search warrant, very few would be granted.

[71] It is unfortunate that appendix A to the application for the warrant listed the principal as a suspect. However, that was not what was said in the body of the affidavit. Although the appendix A error might have added to an impression that the principal was personally complicit in fraudulent dealings, I am satisfied that had appendix A omitted the principal's name it would have made no difference whatsoever to the decision of the District Court Judge. The purpose of the search warrant was to obtain the records of the applicant relating to its dealings with the named persons and entities.

[72] I accept that the statement in the affidavit to the effect that there were no identified payments being made to the principal for his services could raise an unjustified inference of complicity. But in a case involving the validity of a search warrant I think it important to step back and look at the application as a whole. It is only if the combined effect of errors or inaccuracies make it more probable than not that the issuing officer would not, or should not, have issued the warrant that the Court should intervene. In this case, against the background discussed, I find that that point has not been reached.

[73] The applicant relies on the decision in *A Firm of Solicitors* in support of its submission that the police constable, in his application, erroneously failed to advise the District Court Judge that the NZ SFO had agreed to serve on the applicant a compulsory examination notice under s 9 of the SFOA. Had that information been disclosed, the Judge might have resolved that a warrant was not necessary and the s 9 procedure would have been more appropriate.

[74] *A Firm of Solicitors* concerned a warrant issued under s 10 of the SFOA to search the premises of a firm of solicitors who were suspected of fraud. The warrant application failed to disclose that an investigating officer had previously spoken to two of the partners at the firm about the situation, that the partners accepted that they had in their possession or control documents relevant to the inquiry and that they agreed to cooperate. The Court of Appeal observed:

[43] We reiterate that an application for a search warrant is an *ex parte* application, and the onus on the applicant reflects the reality that the “other party” will not have an opportunity to be heard. The test was expressed in both *Tranz Rail* and *McColl* as an obligation to provide “all facts which could reasonably be regarded as relevant” to the task of the issuing Judge.

[44] The fact that, on a later analysis in the light of all of the known facts, and with the benefit of hindsight, a particular matter may be found by a Court not to be of sufficient moment to justify invalidating a warrant, does not necessarily mean that the information could not reasonably be regarded as relevant.

[75] The Court held that the omitted information should have been disclosed — it was relevant to the Judge’s enquiry of whether the service of a notice under s 9 of the SFOA might seriously prejudice the investigation (a prerequisite for obtaining a warrant: s 10(2)(a)(iv)). Nevertheless, the Court held that where there remained a risk that the persons being investigated might destroy relevant evidence, the warrant procedure would be appropriate.

[76] In the present case the warrant was issued under s 44 of the MACMA, not under the SFOA provisions. There was no statutory requirement for the Judge to consider the potential prejudice to the investigation or the feasibility of using the compulsory examination notice procedure before a warrant could be issued. It was not for the Judge to decide whether the second respondent should take a less intrusive or a different approach to its investigation. I do not consider that it would have materially affected the Judge’s decision had the investigating authority stated in the application that it intended to use the s 9 SFOA procedure in respect of evidence not secured by the search warrant. So long as the threshold for obtaining a warrant was crossed, that was what mattered.

[77] Similarly, whether there was an absence of grounds to believe that the principal would not comply with a compulsory notice is irrelevant. The application

for a search warrant is a matter of discretion for the investigating authority. So long as reasonable grounds for belief are made out, the District Court Judge was not obliged to refuse to issue the search warrant.

[78] Finally, the pleading that the NZ SFO should not have been involved in any way whatsoever with the cloning of the appellant's electronic server in my view misunderstands the nature of the execution of a search warrant. The execution of a search warrant involves the State seeking access to material. There was no deception or pretext here. The involvement of the NZ SFO was still as a result of the request by the UK SFO. I do not think that Mr Hudson's involvement was inappropriate: the cloning of a computer does not entail the expert viewing the data in any way. In any event, after an urgent application to this Court, another computer expert was brought in in place of Mr Hudson so there could be no prejudice occasioned to the applicant by his involvement.

[79] Accordingly, I find that none of the matters pleaded to, and elaborated on in submission, in respect of the first cause of action are sufficient to point to the sort of fundamental defects in the basis on which the warrant was issued such that judicial review considerations would properly cause me to disturb it. The applicant does not succeed on the first cause of action.

Whether the search warrant issued exceeded its jurisdiction

[80] The search warrant issued on 2 August 2011 authorised a search of the applicant's premises at any time by day or night within a period of 14 days of the date of issue. The warrant contained the standard authorisations necessary for executing a search and seizing evidence. It specified the offences to which the materials were alleged to relate.²⁹

[81] The documents the subject of the warrant were specified in appendix D to the search warrant. The scope of the warrant included, at paragraph 1, "[a]ll relevant physical and electronically stored documents" at the applicant's premises, and authorised the cloning of the applicant's computer drives for the purpose of

²⁹ Refer above at [66].

searching for the electronic documents outlined in paragraph 2. Paragraph 2 stated that, in particular, the following material was sought:

- 2.1 Any material relating to the incorporation, management, ownership and control of the persons, firms and entities listed at paragraph 3.1 to 3.58 below;
- 2.2 Any material revealing the accounts, creditors or debtors of the persons, firms and entities listed at paragraph 3.1 to 3.58 below;
- 2.3 Any record of benefits received by the suspects listed at paragraph 4.1 to 4.26 below or defendants listed at paragraph 5.1 to 5.7 below from the persons, firms and entities listed at paragraph 3.1 to 3.58 below;
- 2.4 Evidence relating to client accounts of [the applicant] relating in whole or in part to the persons, firms and entities listed at paragraph 3.1 to 3.58 below.

[82] Appendix D listed 58 individual persons, firms and entities; 26 suspects (which included the principal); and seven defendants.

[83] The search warrant was specified to be subject to s 198A(2) of the SPA, which provides a specific procedure for documents seized from solicitors' offices. The warrant also specified conditions for dealing with solicitor–client privilege, which permitted the applicant immediately to make claim of privilege (whether in hardcopy documents or in the cloned electronic material) and required the officers to seal the relevant documents and deliver them to the District Court until issues of privilege could be resolved by an independent barrister or by the Court.

Applicant's submissions

[84] The applicant's second cause of action pleads that the search warrant was issued in excess of the proper powers of the District Court, in that the warrant:

- (a) was not sufficiently specific to alert the applicant as to the documents and other material authorised by the warrant to be seized;

- (b) extended the scope of the materials seized beyond those relevant to the investigation (by authorising the cloning of the firm's entire computer server); and
- (c) did not include conditions and safeguards sufficient to prevent the NZ SFO, or the District Court, from accessing material that is irrelevant and/or privileged (and outside the legitimate parameters of the warrant).

[85] It is pleaded that the warrant is, accordingly, on its face illegal and invalid.

[86] The first submission on this point is a complaint about the detail of the warrant (or lack thereof). Although appendix D to the warrant purported to set out the documents and material the subject of the warrant, it was expressed only in general terms. It authorised the search and seizure of any documents and materials relating to a broad range of individual persons, firms, entities, suspects and defendants. It is submitted that much of the materials falling within that scope would not be relevant to the UK SFO's investigation.

[87] The second submission complains that the warrant authorised the taking of a clone of the applicant's entire database of electronic records. This necessarily included records of all of its clients, the vast majority of whom are not named nor related to any of the persons or entities named in the warrant. The applicant submits that not enough was done to deal with the certainty that the vast majority of the information that would be obtained by cloning the applicant's entire electronic database would be irrelevant or privileged.

[88] The applicant acknowledges that the Court of Appeal in *A Firm of Solicitors* stated that, when authorising the search of a lawyers' premises, a warrant could be issued which empowered the removal of a hard drive for subsequent cloning and extraction of relevant (and non-privileged) material, without infringing the statutory provisions governing the execution of search warrants and protection of privilege.³⁰ However, the applicant submits that, in light of the Supreme Court's decision in

³⁰ *A Firm of Solicitors v District Court at Auckland* at [107].

Hamed v R,³¹ courts should be more cautious to “fill in” a legislative gap³² by authorising the cloning of hard drives in the absence of explicit statutory authorisation.

[89] Thirdly, the applicant submits that the warrant prescribed inadequate conditions and safeguards, particularly in relation to the protection of solicitor–client privilege. The search warrant constituted an intrusion into the privacy and business affairs of not only the applicant and the clients named in the search warrant but also every other client in respect of whom the applicant held electronic records. It was, therefore, essential that the search warrant contain stringent safeguards to minimise the damage occasioned by the intrusion to those legitimate interests. The safeguards that were provided were not adequate to protect those interests. The applicant illustrates this by pointing to the role of Mr Hudson, who was held out to be an independent computer forensic expert there to undertake the cloning but who was in fact an SFO employee.

Second respondent’s submissions

[90] The second respondent submits that the warrant was sufficiently specific having regard to the fact that this was a wide ranging fraud that unfolded over several years involving numerous money flows and multiple actors. As noted in the warrant application, there were “opaque arrangements”. In such circumstances there is a limit to the level of specificity that is possible.

[91] The documents to be seized were specified in appendix D to the warrant. Paragraph 1 of that appendix noted generally that all relevant documents were sought but paragraph 2 defined what was relevant. The second respondent submits that the focus of the warrant was on who controlled the various entities and the money flows and other benefits obtained by the various persons and entities. In a fraud involving opaque arrangements and money laundering, who pulled the strings and who got what is obviously important.

³¹ *Hamed v R* [2011] NZSC 101.

³² Cf: Search and Surveillance Bill 2009 (45-2), cl 108(i).

[92] As to the submission that the warrant exceeded its jurisdiction when it authorised the cloning of the applicant's entire computer server, the second respondent relies on *A Firm of Solicitors*, and in particular [112] and [114] thereof, dealing with the practical necessity of cloning at times. The second respondent submits that there can be little doubt that in the current circumstances it was necessary to take a clone of the applicant's computer system. The applicant has not identified any other effective method that would provide the ability to search and obtain the relevant evidence from its computer system.

[93] The second respondent submits that all steps necessary to protect privilege were identified and taken. The warrant contained conditions specifically to protect legal privilege. In respect of hard copy documents, documents that appeared to be privileged or where privilege was claimed were to be placed in a sealed envelope pending determination of the claim of privilege between the parties (with the involvement of the Court where necessary). In fact, during the execution of the warrant the police resolved to treat all documents seized from the applicant's premises as privileged. The parties agreed on an independent barrister to assist the determination of issues as to privilege and the principal was given time for perustration of the documents to review his claim for privilege. The Police have no effective access to the documents taken until privilege is resolved.

[94] As to the protection of privilege of the cloned material, the warrant provides an opportunity for the applicant and its clients to claim privilege over the material in the clone drive. The clone drive will not be searched by the Police while this process is taking place. Once privilege is claimed, an independent barrister is appointed to review the documents over which privilege is claimed. If the parties cannot reach agreement then there is a process by which the Court can determine privilege. Furthermore, the warrant set out a mechanism to protect privilege in any document or material, even where privilege was not claimed, if the Police believe a claim of privilege might conceivably be made in respect of it.

Discussion

[95] A search warrant must be as specific as possible in the circumstances.³³ Specificity is an important protection against the improper use of an intrusive state power. The Court of Appeal in *A Firm of Solicitors* accepted that there may be cases where the wide ranging nature of the suspected fraud makes it difficult to frame the application for a warrant in very specific terms.³⁴ What is required in individual cases will depend on what the issuing Judge accepts as being possible to specify in the particular circumstances. The issuing Judge must be given full information to allow him or her to assess this. Where a solicitors' firm is searched and it is possible to narrow the ambit of the search in a way that would exclude the seizure of a large amount of irrelevant documents and data held by the firm, failure to do so will generally result in the warrant being invalid for lack of specificity.³⁵

[96] A lack of specificity was one of the grounds for holding that the warrant was invalid in *A Firm of Solicitors*. In that case, specificity was more readily achievable (compared to the present case) in that the officers were investigating a specific transaction and a small number of parties. It was thus too broad for the warrant simply to state that all electronic media, hand held computers and electronic storage devices could themselves be items of evidence relevant to the investigation (although they could be included as items that needed to be searched for relevant evidence).³⁶

[97] Particularity is case specific. In the present case, the warrant specified a number of serious offences. It concerned documents that related to a broad range of specified persons, firms, entities, suspects and defendants. Given the number of entities involved and the potential wide ranging transactions, it would have been practically impossible for the warrant to descend to a level of detailing individual documents or even specific files. Yet an overly broad scope is also unsatisfactory. In that regard, the warrant clearly would not have been sufficiently specific if paragraph 1 were read in isolation: “[a]ll relevant physical and electronically stored documents” at the applicant’s premises. But I agree with the second respondent that

³³ *A Firm of Solicitors v District Court at Auckland* at [75]; *R v Williams* at [210].

³⁴ *A Firm of Solicitors v District Court at Auckland* at [76].

³⁵ *Ibid*, at [81].

³⁶ *Ibid*, at [79].

paragraph 2 must be read as determining what documents are “relevant”. Paragraph 2 specified the types of documents sought in relation to the persons, firms, entities, suspects and defendants listed in the appendix. In my view, the manner in which these were set out was appropriate given the wide scope of the investigation and hence the information/materials sought.

[98] I have not reached this view without hesitation. Paragraph 2.3 of appendix D to the search warrant included in the material sought:

Any record of benefits received by the suspects listed at paragraph 4.1 to 4.26 below or defendants listed at paragraph 5.1 to 5.7 below *from the persons, firms and entities listed at paragraph 3.1 to 3.58 below.*

[My emphasis]

[99] The principal, as mentioned previously, is listed among the suspects (at paragraph 4.2 of appendix D). That was an error. He was not a suspect at the time the warrant was issued. I have, therefore, had to consider whether I should for that reason hold the warrant to be invalid. I have decided that I should not:

- (a) The role of the principal relevant to the investigation, including his professional dealings with “the persons, firms and entities” is set out at length in the application. Records of those dealings would be relevant to the investigation and could properly be sought. Whether or not the principal was a suspect would not be an issue affecting relevance;
- (b) Given the principal’s role set out in the application, the material sought in relation to him would be almost entirely included in the categories described by paragraphs 2.2 and 2.4 of appendix D to the warrant;
- (c) Crucially, the warrant confines the material sought in relation to the principal to any record of benefits from “the persons, firms and entities”. There is no intrusion into areas of irrelevance to the investigation.

[100] I do not accept the applicant's second submission that the warrant should not have authorised the cloning of the applicant's server. The practical necessity to take a clone of a computer server in circumstances as this was addressed by the Court of Appeal in *Gill v Attorney-General*:

[115] Computer hard drives inherently contain a mix of relevant and irrelevant material. This Court in *A Firm of Solicitors* accepted that a computer hard drive can be a "thing" relevant to an investigation and able to be searched and removed if necessary, provided there are reasonable grounds to believe that there is data stored on the particular hard drive that may be relevant to the investigation. Obviously such evidence cannot be extracted from the hard drive without the use of forensic investigative techniques and it is often not practicable to carry out those extraction measures on site.³⁷ As O'Regan J said:³⁸

[114] In our view, removal of a hard drive or a clone of a hard drive would be analogous with the removal of a book or very long document which contains a combination of relevant, irrelevant and privileged material. The fact that there is privileged material or irrelevant material in the book should not prevent the officers conducting the search from removing the book. It cannot be contemplated that the search would involve reading the whole book on-site and tearing out the pages containing relevant and non-privileged information for removal.

[116] We accept the submission of counsel for the Ministry that the courts have for a number of years understood and accepted the technical necessity of the practice of the cloning of computer hard drives. We also consider that the appellants' submission that more information should have been placed before the Registrar to justify the cloning of the hard drive in this case is misconceived. We consider that the cloning of the hard drive at Dr Gill's practice was reasonable and lawfully justified as a matter of best practice and in order to ensure that relevant patient records covered by the warrant were seized.

[101] The cloning of computer hard drives necessarily involves collecting information that is not covered by the warrant. But the process does not involve a search of those hard drives by any person. Rather, it is a (relatively) non-obstructive technique for replicating the data so that it can be searched at a later date without interfering with the ongoing work requirements of a firm. If a properly drafted warrant application establishes a reasonable belief that relevant information will be found on a hard drive, the warrant issuing Judge does not err by permitting the cloning of that hard drive (subject to the provision of appropriate safeguards to preserve privilege and to ensure that irrelevant files are not searched or viewed in the process).

³⁷ *A Firm of Solicitors v District Court at Auckland* at [106] and [115].
³⁸ At [114].

[102] I do not accept the submission that *Hamed* disturbs the Court of Appeal's decisions in *Gill* and *A Firm of Solicitors* as to the legitimacy of the process of cloning computer hard drives. *Hamed* involved very different considerations. In that case, the Supreme Court refused to allow the general search warrant provision in s 198 of the SPA to be extended to authorise video surveillance: neither the text nor the purpose of s 198 of the SPA indicates that it governs electronic surveillance. The present case does not involve legislative "gap filling". The process of cloning a hard drive for the purposes of a subsequent search is consistent with the plain words of the search warrant provision in s 44 of the MACMA as well as its purpose — a hard drive is a thing which can contain evidence relevant to an investigation. It is of course commonplace these days for documents to be stored electronically, and there is no reason why the use of that medium of storage should stifle legitimate searches.

[103] As to the third submission — that the search warrant failed to incorporate adequate conditions and safeguards — the observations of the Court of Appeal in *Gill* are pertinent:

[136] It is essential that searches involving law firms, where privileged information will be held, must involve a very clear focus on the preservation of legal professional privilege. The SFO should involve appropriate legal advisers in the preparation of the application for a warrant: it may be that senior counsel should be engaged. The application needs to be carefully drafted, as does the affidavit in support, to ensure that the issuing Judge has before him or her a very clear picture of the alleged criminal offending, the state of the investigation and the nature of the evidence which the SFO believes may be obtained in the conduct of a search of the relevant law offices. The issuing Judge must be clearly informed that there is likely to be privileged material (and much irrelevant material) at the premises being searched (especially on computer systems likely to be at the premises) so he or she can address his or her mind to the need for conditions to preserve privilege where no waiver of privilege has been given.

[137] The application should be accompanied by a memorandum of counsel, setting out the legal issues which require decision by the issuing Judge, and outlining the arguments on both sides. Where it is proposed that there will be cloning of a computer hard drive, or removal of a computer hard drive with subsequent cloning, there should be an affidavit from an appropriately qualified computer expert explaining why that is necessary ..., what the process involves and the safeguards which will be followed.

[138] There will be a need for extensive conditions to ensure the protection of privileged material, and the provision of an opportunity to the firm to refuse to disclose privilege material as permitted under s 24(1), with the invoking of the s 24(5) procedure in the case of disputes. As mentioned below, it may well be that the most appropriate course will be to provide for

an independent lawyer to be present at the search for the purpose of reporting back to the issuing Judge on the conduct of the search, and to ensure that the safeguards set out in the conditions of the warrant are followed.

[104] Having regard to this guideline, I agree with the second respondent's submissions, summarised above at [93]–[94], that the warrant did put in place appropriate conditions and safeguards to protect solicitor–client privilege and to ensure that documents and material irrelevant to the investigation were not searched. The search warrant provided specifically that any documents or material, whether hardcopy or electronic, in respect of which privilege was claimed or anticipated, were to be sealed immediately and not opened until the issue of privilege is resolved with the assistance of an independent barrister or, where necessary, the intervention of the Court. No one in the investigating team would see the information until questions of privilege or privacy had been resolved with respect to it. In those circumstances, I am satisfied that there was sufficient protection of privacy interests and of the legal professional privilege held by the applicant's clients.

[105] As to the applicant's submission regarding Mr Hudson, I consider that to be a red herring.³⁹

[106] Accordingly, the applicant does not succeed on the second cause of action.

Whether the search and seizure was in breach of s 21 of the NZBORA

[107] Being satisfied that the warrant lawfully authorised the search of the applicant's premises, I also accept that there was no infringement of the applicant's right to be secure against unreasonable search or seizure. This was not a situation where a lawful search was nonetheless "carried out in an unreasonable manner" or where "the circumstances giving rise to it make the search itself unreasonable".⁴⁰

Decision

[108] A summary of my findings is as follows:

³⁹ Refer above at [78].

⁴⁰ *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) at 407; see *R v Williams* at [24] and [227].

- (a) Judicial review of a search warrant, where a criminal investigation is ongoing, is rarely an apt process. A warrant would have to be clearly illegal before being declared such.
- (b) The warrant application did not fail to comply with the statutory threshold in s 44 of the MACMA and as expanded upon in *R v Williams*.
- (c) The District Court Judge was entitled to find reasonable grounds made out on the material before him. I say this having particular regard to the purpose of the Mutual Assistance legislation and the verifying role of the Attorney-General.
- (d) I am not persuaded that the matters omitted from the warrant application, or which were included but in error, were material enough to cause the warrant to be invalid.
- (e) I am not persuaded that the application for the warrant should have included the possibility that the UK SFO could request the NZ SFO to first seek a s 9 SFOA order. I base this on the prerogatives of an investigator, the wording of the MACMA, the fact that although the principal was not a suspect, his role in the alleged fraud was under review, and that many of the documents required would be in electronic form and it would be impossible to verify whether everything had been produced, let alone counter the risk of it being destroyed.
- (f) Whether the warrant was specific enough will depend upon an analysis of the facts. In this case it was.
- (g) I am satisfied that the warrant gave sufficient protection for privilege and privacy.
- (h) There was no breach of s 21 of the NZBORA.

[109] I decline the application.

[110] The second respondent is entitled to costs. If they are to be claimed, the second respondent must file a memorandum as to quantum by 29 February 2012. The applicant may file a response by 20 March 2012.

Brewer J