

IN THE HIGH COURT OF JUSTICE CO/4970/2001
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
Royal Courts of Justice
The Strand
London

Monday 22 July 2002

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

(The Lord Woolf of Barnes)

and

MR JUSTICE CURTIS

THE QUEEN

On the application of

NTL GROUP LIMITED - Claimant

and

IPSWICH CROWN COURT - Defendant

and

CHIEF CONSTABLE OF SUFFOLK CONSTABULARY - Interested Party

Computer Aided Transcription by

Smith Bernal, 190 Fleet Street, London EC4

Telephone No: 020-7421 4040

(Official Shorthand Writers to the Court)

MR ANTHONY HUDSON (instructed by Messrs Charles Russell,

London ECFA 1RS) appeared on behalf of THE CLAIMANT

THE DEFENDANT was not represented and did not appear

MR RUPERT OVERBURY (instructed by the County Solicitor,

Corporate Services, Suffolk County Council, Ipswich IP4 2JS)

appeared on behalf of THE INTERESTED PARTY

J U D G M E N T

(As Approved by the Court)

Monday 22 July 2002

THE LORD CHIEF JUSTICE: This is the judgment of the court. This is an application with leave of the single judge by NTL Group Ltd, a telecommunications company, for judicial review of a decision by His Honour Judge Deveaux at Ipswich County Court dated 27 September 2001. First, he granted an application by the Chief Constable for a special protection order under section 9 and Schedule 1 of the Police and Criminal Evidence Act 1984 ("PACE") dated 14 September 2001 and served on 17 September 2001. Secondly, he refused an application by NTL: (1) to be permitted to destroy or dispose of material relating to the application; and (2) to exempt any material relating to the application which might have come into existence before the order to produce was made.

The background can be stated shortly. The Chief Constable's application under the Act, as already indicated, was made on 14 September 2001. It was made upon the uncontested basis that the police had good reason to believe that a number of persons were engaged in a widespread conspiracy to defraud and to obtain property by deception from members of the public. There was no dispute that the application was made in the appropriate form and that it complied with the appropriate conditions for such an application.

NTL has a computer system which automatically stores e-mails from the relevant internet provider. In the present case those e-mails were routinely overwritten (in other words destroyed) one hour after being read by the recipient. An unread e-mail is kept for a limited period.

According to the evidence of Diane Connolly, an assistant legal director of NTL, within their e-mail client system there are two sub- systems: first, POP and second, IMAP. Customers decide whether to choose POP or IMAP. NTL cannot change the options. If a customer chooses POP, e-mails are automatically deleted within one hour of their being read, though that period may be shorter. It is not possible for NTL to prevent e-mails of only one customer from being automatically deleted. The system would have to be changed. It would apply to all customers and this would cause the NTL server to collapse because of the number of e-mails. The only way NTL can retain e-mails of a customer on POP is to transfer a copy to a different e-mail address from that of the intended recipient.

The facts set out by Diane Connolly are not disputed by the respondents to this application.

On the application being made, NTL disputed that they should be required to comply with the request of the Chief Constable for access to special procedure material on two grounds. First of all, NTL held the material in confidence. Secondly (and this was the contention which has given rise to these proceedings), to comply with the request would involve them in committing an offence under section 1 of the Regulation of Investigatory Powers Act 2000 (the "RIP Act").

After the hearing on 27 September, the judge ordered NTL to disclose the material to the police and held that NTL would not in the circumstances be committing any offence under section 1 of the RIP Act by complying with the requirement contained in the application: that, pending the making of an order, the relevant material should be preserved in accordance with the terms of paragraph 11 of Schedule 1 to the Police and Criminal Evidence Act 1984.

The issues which this application for judicial review raises are ones of statutory construction which are by no means easy to resolve. We are most grateful for the assistance which we have received both from Mr Hudson on behalf of the NTL and from Mr Overbury on behalf of the Chief Constable. In order to determine the issue it is necessary to refer to the relevant statutory provisions which are contained either in PACE or in the RIP Act. Section 9 of PACE provides, so far as relevant:

"(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule."

"Special procedure material" is defined by section 14 of the Act. Here it is not in dispute that we are concerned with special procedure material. It is therefore unnecessary to refer to those provisions, but it is to be noted that we are in an area where the provisions are concerned with the investigation of serious arrestable offences.

Schedule 1 to PACE sets out the grounds on which an order may be made. So far as relevant it provides as follows:

"1 If on an application made by a constable a circuit judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below."

Paragraph 2 of Schedule 1 sets out the access conditions. Again there is no dispute here that the access conditions were fulfilled. However, Mr Hudson draws attention to the strict access conditions because he submits they indicate the intention of Parliament to constrain the exercise of the section 9 and Schedule 1 provisions. Paragraph 11 of Schedule 1 provides so far as relevant:

"Where notice of an application for an order under paragraph 4 has been served on a person, he shall not conceal, destroy, alter or dispose of material to which the application relates except --

(a) with the leave of a judge; or

(b) with the written permission of a constable,

until --

(i) the application is dismissed or abandoned; or

(ii) he has complied with an order under paragraph 4 above made on the application."

As I understand the position here, NTL did make an application to the police that they should have permission to destroy the material or dispose of it under paragraph 11 of Schedule 1, and they made a similar application to the judge under paragraph 11, and it was that application of theirs which was refused by the judge.

It is to be observed that, so far as damage to the confidentiality of the material is concerned, paragraph 11 is not inconsistent with the responsibility of NTL to keep information confidential. The only circumstances when information would be disclosed to the police is upon an order being made under paragraph 4. If an order is made under paragraph 4 then NTL accepts that they would be required to disclose the information which was then within their system. But it is their submission that the order made by the court cannot apply to information within the system prior to the order being made because if they were to take steps as contemplated by paragraph 11 of

Schedule 1 to preserve that information, they would be committing an offence under section 1 of the RIP Act.

Section 1 of the RIP Act provides so far as relevant:

"1. Unlawful interception

(1) It shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of --

....

(b) a public telecommunication system.

(2) It shall be an offence for a person --

(a) intentionally and without lawful authority, and

....

to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of a private telecommunication system."

As subsection (2) refers to a "private telecommunication system", we understand that it has no application here. It is submitted that subsection (1) is applicable here.

Subsection (5) is important. It provides:

"Conduct has lawful authority for the purposes of this section if, and only if --

....

(c) it is in exercise in relation to any store communication of any statutory power that is exercised (apart from this section) for the purpose of obtaining information or of taking possession of any document or other property."

Section 2 defines the meaning of "interception". Subsection (2) provides:

"For the purposes of this Act, but subject to the following provisions of this section, a person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if, he --

(a) so modifies or interferes with the system, or its operation, or

(b) so monitors transmissions made by means of the system,

as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication."

If subsection (2) ended there, the problems to which this case gives rise would not exist because subsection (2) only applies, first of all, to communications in the course of transmission; and secondly, to make some or all of the contents of the communication available while being transmitted to a person other than the sender or intended recipient of the communication.

The interception which is here relied upon by NTL is their action in sending the e-mail to a second address in order to preserve the e-mail. On the ordinary use of language, without the subsequent provisions of section 2, when this happens would not be described as "in the course of its transmission". Secondly, the transmission will not make some or all of the contents of the communication available while being transmitted to a third person since what was intended is that the e-mail should be retained until the order under section 4 was made by the judge if he was prepared to do this. However, subsection (2) has to be read with subsections (7) and (8) which read as follows:

"(7) For the purposes of this section the times while a communication is being transmitted by means of a telecommunication system shall be taken to include any time when the system by means of which the communication is being, or has been transmitted is used for storing it in a manner that enables the intended recipient to collect it or otherwise have access to it."

Subsection (7) has the effect of extending the time of communication until the intended recipient has collected it. It is essential on the evidence in this case that if NTL are to preserve the material, they take action before the intended recipient has collected the e-mail. Subsection (7) means that we are here concerned with what happens in the course of transmission.

Subsection (8) provides:

"For the purposes of this section the cases in which any contents of a communication are to be taken to be made available to a person while being transmitted shall include any case in which any of the contents of the communication, while being transmitted, are diverted or recorded so as to be available to the person subsequently."

Mr Hudson submits that that is precisely what happens in this case. The contents are transmitted to the further e-mail address so that they may subsequently be available to the police in the event of the court making an order under Part 4 of Schedule 1 to PACE. Although I have considerable doubts as to whether it was ever intended that the provisions to which I have just referred should have the effect of making what happened here an offence created by section 1 of the RIP Act, it seems to me that the language of the provisions of section 2 being clear, Mr Hudson's submissions are correct. Subject to what I say hereafter, an offence would be committed by NTL if they were not entitled to rely upon some lawful authority for doing what they are required to do if they are to comply with paragraph 11 of Schedule 1 of PACE.

The question then arises whether the provisions of paragraph 11 of Schedule 1 provide the authority which is required in section 1(5)(c) of the RIP Act for NTL to take the action which that paragraph requires a person upon whom an application under section 9 of PACE to take.

Mr Overbury submits that undoubtedly section 9 gives the power to the police to take action. That action is to make an application. I would accept that submission. However, as I understand section 1(5) of the RIP Act, it is not the police who require lawful authority for the action which

they are taking, but NTL which is required to have lawful authority for the action which it would have to take if it was to give effect to the clear statutory provisions of paragraph 11 of Schedule 1 to PACE. So far as that is concerned, if NTL are not in a position to take that action without committing an offence then this would mean that the power under section 9 of PACE would be almost totally worthless. At the very moment when the judge makes his order on the application, a momentary snapshot may be obtained of the position of the communications between the persons who give rise for the application to be made, but otherwise the power would be wholly unhelpful to the police in exercising their powers to detect serious crime. I find it impossible to accept that it was the intention of Parliament in legislating in the terms that it did in section 1 of the RIP Act for all practical purposes to defeat the powers of the police under section 9 in this area.

In my judgment, the answer to the arguments skilfully advanced by Mr Hudson to the contrary is that it is implicit in the terms of paragraph 11 of Schedule 1 of PACE that the body subject to an application under section 9 (here NTL) has the necessary power arising implicitly from the language of paragraph 11 of Schedule 1, read together with section 9, to take the action which they apparently have to take in order to conserve the communications by e-mail within the system until such time as the court decides whether or not to make an order. That being so, that implicit power provides the lawful authority for the purposes of section 1(5) and no offence will therefore be committed if NTL acts in accordance with paragraph 11 of Schedule 1 when served with an application under section 9.

As already anticipated, no harm will be caused to any third party in consequence of this being done because unless a judge is prepared to make the order and therefore remove the protection which would otherwise exist for third parties, the police have no right to be informed of the contents of the material retained by NTL. In addition, there is a further less significant protection for NTL in that the application itself can only be made to the judge with the approval of a senior police officer of a superintendent level or above. The judge therefore came to the right conclusion in granting the application in this case and in refusing the cross-application of NTL. I would dismiss this application.

MR OVERBURY: I am grateful, my Lord. There is the question of costs. In the proceedings below each party bore their own costs, but it has been agreed between us that whoever won today would be making the application for costs.

THE LORD CHIEF JUSTICE: You would like summary assessment?

MR OVERBURY: Yes. My Lord, I think there might have been a slight miscalculation or mis-adding up. I think it comes to £4,415.

THE LORD CHIEF JUSTICE: Your costs?

MR OVERBURY: Yes.

THE LORD CHIEF JUSTICE: You have informed your learned friend?

MR OVERBURY: Yes.

THE LORD CHIEF JUSTICE: And he agree that that is so?

MR OVERBURY: I believe so.

THE LORD CHIEF JUSTICE: Mr Hudson?

MR HUDSON: My Lord, we do not take any point on the costs. We accept that we ought to pay them and we accept the amount.

THE LORD CHIEF JUSTICE: Yes, it does not seem unreasonable. It was quite a tricky point.

MR HUDSON: Yes.

THE LORD CHIEF JUSTICE: We will therefore make a summary order for costs in that sum.

MR HUDSON: My Lord, yes. My Lord, I have an application for the court to give us permission to appeal on this point on the basis that it is a difficult point.

THE LORD CHIEF JUSTICE: Is this a civil matter or is it a criminal cause?

MR OVERBURY: My Lord, I think there is authority to say that these applications are criminal matters.

THE LORD CHIEF JUSTICE: I am sure Mr Hudson will accept what you say, Mr Overbury. I thought it might well be criminal.

MR HUDSON: My Lord, I am happy to accept that.

THE LORD CHIEF JUSTICE: Then your only course is to ask for us to certify that the point we have just determined is a point of general public importance and then, if we think it is right, to give you leave. You submit that this is a point of general public importance?

MR HUDSON: My Lord, I do. It really does go to the police powers and also exactly what NTL can and cannot do, and it extends beyond NTL, as I tried to indicate in my submissions, and would extend to other situations in which these applications are made.

THE LORD CHIEF JUSTICE: Yes, and you ask for leave?

MR HUDSON: My Lord, yes.

THE LORD CHIEF JUSTICE: What do you say, Mr Overbury? Do you say that this is of general public importance?

MR OVERBURY: My Lord, I think I would have to agree, yes. It is important. It is a new aspect of investigation. So, yes, I would agree.

THE LORD CHIEF JUSTICE: Mr Hudson, if you do not mind, we would ask you to put the precise point in writing, submit it to Mr Overbury beforehand, and we can deal with the matter without bringing you back, but we think we should actually see the point you wish to raise before we certify.

MR HUDSON: My Lord, yes.

THE LORD CHIEF JUSTICE: I am afraid we very rarely, as you probably know, grant leave. We leave it to the House of Lords whether to give leave or not. Subject to seeing the point, we would be prepared to certify that it is a point of general public importance, but we will not grant leave.

I should make it clear that, from the point of view of publicity, anything said in my judgment or in argument that is appropriate for publication, nothing should be published which reveals the identities of the third parties referred to in the application.