Analysis
Eastenders Cash & Carry: lessons learnt

SPEED READ **There are important lessons to be learnt from HMRC's unfortunate experiences when seeking to uphold search warrants and restraint orders in the *Eastenders Cash & Carry* case where an alcohol diversion fraud was suspected. HMRC must ensure they have sufficient evidence before applying for these invasive orders. Asserting suspicions will not, without supporting evidence, satisfy the Court that the threshold requirements have been met. Practitioners representing taxpayers can also learn from HMRC's embarrassing dénouement. Sometimes a conciliatory approach is appropriate, but there are other cases where a more aggressive response is warranted. *Eastenders Cash & Carry* was one such case.**

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HMRC will wish to forget their recent experiences in the criminal investigation involving Eastenders Cash & Carry Ltd. HMRC were routed, and by the time the litigation finished, a raft of search warrants, restraint orders and receivership orders had been quashed. The episode must have cost HMRC hundreds of thousands of pounds in wasted legal costs.

Background

Towards the end of 2010, following a criminal investigation which started earlier in the year, HMRC suspected that Eastenders Cash & Carry, and those running the company, had perpetrated a serious tax fraud resulting in approximately £23 million of lost tax revenue. The alleged fraud (an 'alcohol diversion fraud') was thought to have involved the smuggling into the UK of 925 consignments of alcoholic goods obtained abroad, with no UK excise duty or VAT being accounted for or paid.

HMRC have followed this company's activities for many years. In 1997, some of those running the company had been convicted of similar offences, and between 2007 and 2010 HMRC had detained alcoholic consignments from Eastenders stores on 17 occasions. Detention of alcohol consignments in October 2009 and December 2009 sparked litigation when the company unsuccessfully sought judicial review of HMRC's actions (*Eastenders Cash & Carry v HMRC* [2010] EWHC 2797).

Criminal investigation

At some time during this period, HMRC received information from the Belgian and French authorities regarding the movement of alcohol consignments between bonded warehouses in Belgium and France. These consignments were thought to have been owned by Eastenders Cash and Carry Ltd or related businesses. An audit trail revealed that these companies had paid large sums of money to the Belgian bonded warehouse.

Consequent upon this information, HMRC assembled extensive evidence of observations, lorry interceptions, payments to buffer companies and missing companies, fraudulent and duplicate documents, and failures to register for VAT and maintain accurate records. In short, there was significant evidence to establish reasonable grounds for suspecting that a serious alcohol diversion fraud had been committed.

At the end of 2010, HMRC took more assertive action against the company and those involved in its management by seeking a raft or search warrants under the Police and Criminal Evidence Act (PACE) 1984 and restraint orders under the Proceeds of Crime Act (POCA) 2002.

Search warrants

On 2 December 2010, HMRC laid an Information before Judge Horton at Bristol Crown Court seeking 31 search warrants under PACE 1984 s 8 for 11 business premises and 18 homes. A second Information was laid for a search warrant, under PACE 1984 s 9 and Sch 1, relating to solicitors offices owned by one of the suspected offenders. This Information was laid under s 9 and Sch 1 because HMRC wanted to seize confidential documents (known as 'special procedure material') and documents in respect of which legal professional privilege may attach.

In order to obtain the warrants, HMRC were required to satisfy Judge Horton that, among other things, there were reasonable grounds for suspecting that a serious criminal offence had been committed and there was material on the premises likely to be of substantial value to the investigation. Judge Horton must have been satisfied since he granted the warrants which HMRC had sought.

The initial challenge

Shortly after the search warrants were executed, the solicitor and one of the alleged offenders urgently obtained an injunction from a deputy High Court judge preventing HMRC from inspecting or copying documents removed from the solicitor's office. On 3 February 2011, Lord Justice Toulson and Mr Justice Edwards-Stuart varied the injunction by upholding the prohibition in respect of documents taken from the solicitor's professional offices but permitting HMRC to inspect and copy documents found in other parts of the building (*R (on the application of Windsor) v Bristol Crown Court* [2011] EWHC 411 Admin).

The claimants also applied to the Court for disclosure of the Information on which the search warrants were issued. Generally, investigating authorities regard an Information as a highly sensitive document since it contains confidential information about the investigation but in this case, mindful of the judicial review proceedings, HMRC agreed to

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disclose a redacted version so as to enable the Court to review whether or not the warrants were lawfully issued. The High Court criticised Judge Horton for not ensuring that there was a shorthand writer present at the hearing when HMRC applied for the warrants. The proceedings were not recorded, Judge Horton gave no reasons and there was no contemporaneous note.

Restraint orders

Meanwhile, on 6 December 2010, three days after obtaining the search warrants and the day before the warrants were executed, HMRC (represented by the Crown Prosecution Service) applied *ex parte* to Judge Hawkins QC sitting at the Central Criminal Court (CCC) for restraint orders under POCA 2002 s 40 against the suspected offenders. Judge Hawkins QC granted the orders after a 40-minute hearing which took place when he interrupted an unrelated complex jury trial involving an alleged murder.

For a restraint order to be made, Judge Hawkins QC needed to be satisfied that there was reasonable cause to believe that the alleged offender had benefited from his criminal conduct.

Challenging the restraint orders

On 23 December 2010, the alleged offenders asked Judge Hawkins QC to discharge the restraint orders he had made. The alleged offenders adduced evidence, which HMRC were unable to contradict, that the company's wholesale cash and carry business supplying groceries along with wines, beers and spirits, had a total turnover of £150 million, employed 120 employees and at least 95% of the company's business was legitimate. Accordingly, the alleged offenders contended that HMRC could not show they had reasonable cause to believe that they had benefited from the criminal conduct alleged against them.

Judge Hawkins QC rejected these contentions and the alleged offenders appealed to the Court of Appeal (Criminal Division). The case was heard on 25 and 26 January 2011, with judgment given on 8 February 2011.

The Court of Appeal, led by Lord Justice Hooper, was aghast at what had happened. The Court ruled that there was insufficient evidence before Judge Hawkins QC to demonstrate reasonable cause to believe that the alleged offenders had benefited from their criminal conduct. HMRC's suspicions of alcohol smuggling fell short of reasonable cause for believing that the 925 consignments had been dishonestly diverted.

The Court was also less than amused that HMRC had, somewhat slackly, relied upon suspicions founded on material obtained from foreign authorities rather than exercise their powers to enter a trader's premises and 'track and trace' goods, so as to confirm whether or not duty had been paid.

However, in order to permit HMRC to present further evidence, the Court suspended its order quashing the restraint orders which Judge Hawkins QC had made (*R v Windsor and others* [2011] EWCA Crim 143).

The case returned to the CCC on 21 February 2011 when, after HMRC presented further evidence, Mackey J ruled that, if anything, the balance had shifted in favour of the alleged offender's case. Mackey J determined that the Court of Appeal's order should take effect.

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Search warrants: second challenge

Following discharge of the restraint orders, on 15 March 2011 the alleged offenders applied to the High Court seeking an order quashing the search warrants which Judge Horton had issued. They contended that the test for evidential sufficiency for issuing a search warrant was, in effect, the same for granting a restraint order and if there was insufficient evidence to support the restraint orders, the search warrants must be quashed too. The High Court, led by President Sir Anthony May, agreed. In a situation where evidence in two sets of proceedings was substantially the same, it was not open to the High Court to reach a different determination on the facts. Accordingly, the search warrants were quashed (*R (on the application of Panesar) v Bristol Crown Court* [2011] EWHC 842 Admin).

Lessons for prosecutors

Hooper LJ articulated some important guidance for prosecutors to follow in future cases. Applications for search warrants and restraint orders ought to be made before the same judge when the timing between the two applications is very close and applications should be made some days before the date set for execution of the search warrants.

Moreover, applications must be listed before a judge with sufficient time to read and absorb the papers, and to conduct a proper hearing. It is preferable to list complex applications before a High Court judge sitting in the Crown Court with experience of complex fraud cases, or a Crown Court judge with similar experience. Judges were reminded that when they make restraint orders they should bear in mind the draconian consequences of such orders.

On any view, the Court of Appeal has set the bar high, and if HMRC are to obtain search warrants and restraint orders in tax investigation cases, they must have good evidence and be sure of their ground.

Lessons for defenders

There are multiple lessons for defenders too. In this case, an aggressive stance adopted at the outset has paid dividends for the suspected offenders. Practitioners representing taxpayers should always press HMRC for swift disclosure of the Information, and where any invasive power is exercised defenders must scrutinise whether the action is proportionate and the criteria for exercise of the power are truly made out. ■

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