Tell me why—must the court give reasons when granting disclosure orders on paper?

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Corporate Crime analysis: James Fletcher, barrister at 5 St Andrew's Hill, considers the recent decision in Nuttall v National Crime Agency in which the judge rejected a previous decision that when a court granted a disclosure obligation (DO) on a paper application, there was a legal duty to give reasons.

Original news

Nuttall v National Crime Agency [2016] EWHC 1911 (Admin)

What was the background to this case, briefly?

A civil recovery investigation into the applicants, Jonathan and Amanda Nuttall, commenced in 2011. Mr Nuttall was suspected of controlling a UK-based bank account through which some £8m had been laundered. The National Crime Agency (NCA) sought and obtained a DO, two information notices (both in 2011) and a property freezing order (PFO) (in 2015), all under the Proceeds of Crime Act 2002 (POCA 2002). The DO and PFO were obtained ex parte and on paper. The NCA then used the disclosure orders to obtain information notices and acquire information from financial institutions to further its investigation.

The applicants applied for the discharge of the disclosure orders, the information notices which were made pursuant to the disclosure orders, and the property freezing order.

What issues did this case raise?

The most significant issue in this case is that the judge, Collins J, disagreed with what Edis J held in *NCA v Simkus* [2016] EWHC 255 (Admin), [2016] All ER (D) 195 (Feb), namely that when a court granted a DO on a paper application, there was a legal duty to give reasons. At paras [39]–[42] of *Simkus* Edis J had stated that if the court granted an order, then the evidence must have been strong enough to satisfy the requirements and that although it might be a very short judgment, ultimately the law required reasons to be given.

Collins J at para [5] of *Nuttall* says Edis J is plainly wrong to say that reasons must be given. He states that the very fact of an order being granted means that reasons are otiose.

In my view, in *Simkus* Edis J was trying to establish best practices and to make it easier, if at a later date an applicant wishes to challenge an ex parte application on the papers, for all sides and the court to have access to reasons that indicated what was going through the judge's mind at the time the order was made. This would therefore inform applicants as to whether a potential argument was going to have any merit or not.

Collins J disagreed with the requirement to give reasons because applications granted on the papers necessarily mean that the preconditions for granting the order were met. In my view, Collins J's ruling in *Nuttall* may be seen as an indication that he considered the Administrative Court to be busy enough without needing a judge considering a paper application to write reasons for his decision.

What were the main legal arguments put forward? What did the judge decide, and why?

Collins J rejected the applications for discharge of all the orders.

The first substantive argument advanced by the applicants was that there had been too much delay. The DOs were granted in 2011 and information notices provided. In relation to that, the court found that while the NCA should act upon orders as soon as reasonably possible, this particular case was an especially significant ongoing investigation, and as such the NCA needed time to gather information and consider it. Hence the court held that there were no grounds for discharge on delay.

The argument that the DOs should be discharged because the judge didn't give any reasons was rejected, for the reasons discussed above.

There was a wider discussion about the NCA's access to electronic media received as a result of the orders. The applicants suggested that there should be independent counsel involved to ensure people's rights to family life and other articles of the European Convention of Human Rights (ECHR) were upheld when electronic media was analysed by the NCA. The NCA said that it would use a keyword search on the material seized which would serve to eliminate those matters which would not be of interest and identify those which would. The court was satisfied that this would provide a reasonable basis for protection of the applicants' ECHR rights. The NCA argued that if independent counsel was required, taking instructions from both sides would massively delay investigations and increase costs, on which point the court agreed.

There was a separate application to discharge the PFO and it was argued that there was no risk of dissipation. The court pointed out that there is no requirement in POCA 2002 for a risk of dissipation to be proved, but if there is no good arguable case for risk of dissipation then it would be unlikely that an order would be granted. The argument that there was no risk of dissipation was dismissed.

The argument that the NCA had misled the court was also dismissed, as was the argument that an ancillary order requiring the NCA to give information about assets was unmerited.

What are the practical implications of this case for corporate crime lawyers seeking to resist disclosure orders and property freezing orders under POCA 2002?

Collins J confirms that in respect of ex parte paper applications it can be taken as given that the judge has considered the material before them and decided that the evidence was sufficient to meet the requirements for the order. So, in future, it may be harder for people to work out what the judge found important and what emphasis he placed on the material before him.

Are there still any grey areas or unresolved issues lawyers will need to watch out for in this area? If so, how can these be avoided?

Both *Simkus* and *Nuttall* are first instance High Court judgments, but Collins J emphasises his experience referring to his introduction of the practice of seeking DOs on paper when he was lead judge of the Administrative Court. It is possible that someone may take this issue and these two conflicting decisions, and get a higher court to decide on it.

Interviewed by Duncan Wood.

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