

**IN THE CITY OF WESTMINSTER MAGISTRATES' COURT
No. 011503187270**

**FOR MENTION ON 12th APRIL 2016 AND FOR FINAL HEARING ON 28th JULY
2016**

DISTRICT JUDGE TEMPIA

**IN THE MATTER OF AN APPLICATION UNDER SECTION 1 OF THE POLICE
PROPERTY ACT 1897**

LAURI LOVE

Claimant

-v-

NATIONAL CRIME AGENCY

Respondent

**SKELETON ARGUMENT OF THE RESPONDENT
AS TO WHETHER THE COURT SHOULD DIRECT THE CLAIMANT
TO DISCLOSE PASSWORDS OR ENCRYPTION KEYS**

1. In its directions of 2nd March 2016 the Court directed the Respondent to file and serve by 29th March 2016 a skeleton argument in support of its assertion that a direction should be made for the Claimant to provide the encryption key or password to the 3 encrypted items of hardware which are the subject of this application. The Court will consider whether or not to make this direction at a hearing on 12th April 2016.
2. On 2nd March 2016 the Claimant was directed to reveal in a witness statement what he maintains was contained in these items. He provided an (unsigned) witness statement dated 22nd March 2016 but this witness statement does not provide this information.

The Police Property Act 1897

3. The Court has a discretion in proceedings under s.1 Police Property Act 1897 as to whether or not to order an item held by the Police to be returned to its owner. There is a “public interest defence¹” under which a Court may decline to order the return of an item if it is not in the public interest to do so. In a case where it would result in the commission of an offence it is strongly arguable that a Court may not order such return.

4. Section 1 of the 1897 Act provides, so far as relevant, as follows:
 - 1 Power to make orders with respect to property in possession of police***
 - (1) Where any property has come into the possession of the police in connection with their investigation of a suspected offence, a court of summary jurisdiction may, on application either by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate or court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or court may seem meet.*

5. This subsection confers a discretionary power (“a court ... may ...make an order”) for the court to order delivery of the property to the person who appears (to the court) to be the owner. That is the relief that Mr Love seeks, apparently on the sole basis that he is the owner of the property (hardware) seized.

6. The Police Property Act 1897 was not designed with computers in mind. In the case of a computer one person may own the hardware, while another person may own (or have rights over) the data which is held within it. An analogy may be made with a locked safe, which has something inside it. Person A may own the safe, but person B may own the contents. The contents may have been stolen from B. The fact that A was the owner of the safe would not make A the owner of the contents.

7. With a well-locked safe (or with a computer) it may not be practicable to separate the contents from the container, or at least not without damaging or destroying one, the other or both. In such a case the discretion afforded to the Court under the 1897 Act may be used to ensure that no delivery is made to Person A of the contents which belong to Person B.

¹ See below

8. The Court will have to consider what “the property” is, when considering whether Mr Love is “*the person appearing to the magistrate or court to be the owner thereof*”. NCA submits that he is not the owner (and has no right to) property which consists of data belonging to Police Oracle, or to arms of the US Government, or to pirated films. To date he has submitted no evidence as to what he says are his rights over this material. He has declined to say what other data is on the encrypted computers.
9. In Chief Constable of Merseyside v Owens [2012] EWHC 1515 (Admin) the High Court recognised the existence of a public interest defence, albeit determining that the facts found by the lower court in that case did not satisfy it. In the recent Northern Ireland County Court² case cited by Mr Love (McCarthy v CC of PSNI [2015] NICty 3) the public interest defence was recognised and the decision of the District Judge to refuse, on the grounds of public interest, to order the return of “legal highs” was upheld on appeal.
10. Article 1 of Protocol 1 to the Convention (A1P1) recognises property rights, but the right to enjoyment of personal property is not absolute. In the instant case the rights of others (data owners) under A1P1 and of individuals to privacy (Article 8) will have to be balanced against Mr Love’s rights as owner of the hardware.

The Issue in the Instant Proceedings

11. The key issues in the PPA proceedings are therefore:
 - (a) whether Mr Love is the “owner” of the data contained within the 6 items of hardware which remain held by the NCA and
 - (b) whether notwithstanding his property rights over the hardware in which the data is contained it would be against the public interest that those items containing the data should be returned to Mr Love.
12. For the 2 unencrypted items the NCA has been able to establish that they contain data to which Mr Love is not entitled, respectively names and passwords of users of the “Police Oracle” website and films copied in breach of copyright.
13. But for the remaining items, the encryption means that the evidence that the NCA can currently give as to their content and data ownership depends upon (a) the limited

² On appeal from a District Judge

view that was possible before the encryption cut in and (b) the Court being asked to draw an inference that similar material is contained upon all the encrypted items.

14. Mr Love knows what data is on his digital media. The NCA has only a partial picture. In order to dispose of the PPA proceedings fairly the Court needs to make a determination. These are civil proceedings brought by Mr Love.
15. The best evidence of what is on the media is for the Court to inspect the contents themselves. The second best evidence is for (1) Mr Love as Claimant and (2) officers of NCA as Respondent to give evidence of what data is on the media.
16. The following steps have been taken hitherto:
 - At interview under caution Mr Love was invited to provide the key or password and declined to do so
 - He was ordered by the Central Criminal Court under s.49 of RIPA 2000 to provide the key or password, but has declined to do so, saying through solicitors (7.2.14) that he had “no information to give”.
 - A direction was made by the Bury St Edmunds Magistrates’ Court in the 2015 PPA proceedings that he should provide the key or password. He failed to do so and chose to withdraw those proceedings about a week before the final hearing.
 - The directions of the Court in the current proceedings (2.3.16) were that he should give particulars of the contents of the files as part of the evidence in the witness statement in support of his PPA application. He has failed to comply with these directions, although it may be inferred from what he says that he accepts that the limited NCA evidence as to content is accurate.
17. At the final hearing of this application, if Mr Love gives evidence, then he will obviously need to give some sort of explanation for the material that the NCA has found, and to give evidence of what else is on the computers. How else can he maintain (a) that he is the “owner” of the data and (b) that the public interest defence asserted by the NCA is not made out?
18. If he gives evidence then it is likely that he will be asked, in Open Court, to provide the password or key so that he can be cross-examined upon the contents. If he declines or refuses then the Court may order him to provide them in Open Court. If

he then provides them then it is likely that an adjournment will be necessary in order for the contents to be produced to the Court in legible and visible form. If he says on oath that he is unable to do so³ then he may be cross-examined as to the veracity of this evidence.

19. In the interests of good case management it would be sensible for this exercise to take place in advance of the hearing rather than at the hearing itself.

Case Management Powers

20. The Court's case management powers for civil proceedings are set in Rule 3A of the Magistrates' Court Rules 1981 SI 552 (as amended)⁴. The core principles are set out as follows:

- 3A**
- (1) The court must actively manage the case. That includes—
- (a) the early identification of the real issues;
 - (b) the early identification of the needs of witnesses;
 - (c) achieving certainty as to what must be done, by whom and when, in particular by the early setting of a timetable for the progress of the case;
 - (d) monitoring the progress of the case and compliance with directions;
 - (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
 - (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion and avoiding unnecessary hearings;
 - (g) encouraging the participants to co-operate in the progression of the case; and
 - (h) making use of technology.
- (2) The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible.
- (3) Each party must—
- (a) actively assist the court in managing the case without, or if necessary with, a direction; and
 - (b) apply for a direction if needed to assist with the management of the case.

21. Specific case management powers are set out in the sub-rules which follow, and of those the following are most pertinent:

- (7) In fulfilling its duty under paragraph (2) actively to manage the case the court may give any direction and take any step unless that direction or step would be inconsistent with legislation, including these Rules. In particular, the court may—
- (a) ...;
 - (b) give a direction on its own initiative or on application by a party;
 - (c) ask or allow a party to propose a direction;
 - (d) ...;
 - (e) ...;
 - (f) ...;
 - (g);

³ Paragraphs 86 – 89 of his witness statement of 22.3.16 asserts that he is “incapable” of providing access, but he says that he can only explain why in closed session; at paragraph 88 he appears to speculate that he may not be able to recall it

⁴ To be found a para 1.2263 of Stone's Manual

- (h) ... and
- (i) specify the consequences of failing to comply with a direction.

- ...
- (13) At every hearing, if a case cannot be concluded there and then the court must give directions so that it can be concluded at the next hearing or as soon as possible after that.
 - (14) At every hearing the court must, where relevant—
 - (a) ...;
 - (b) ...;
 - (c) ...; and
 - (d) where a direction has not been complied with, find out why, identify who was responsible, and take appropriate action.
 - (15) In fulfilling his duty under paragraph (3) actively to assist the court in managing the case, each party must—
 - (a) comply with directions given by the court;
 - (b) ...;
 - (c) make appropriate arrangements to present any written or other material; and
 - (d) ...

...

 - (17) In order to manage the case—
 - (a) the court must establish, with the active assistance of the parties, what disputed issues they intend to explore; and
 - (b) the court may require a party to identify—
 - (i) which witnesses will give oral evidence,
 - (ii) the order in which those witnesses will give their evidence;
 - (iii) whether that party requires an order compelling the attendance of a witness;
 - (iv) what arrangements are desirable to facilitate the giving of evidence by a witness;
 - (v) what arrangements are desirable to facilitate the participation of any other person;
 - (vi) what written evidence that party intends to introduce;
 - (vii) what other material, if any, that party intends to make available to the court in the presentation of the case;
 - (viii) whether that party intends to raise any point of law that could affect the conduct of the case; and
 - (ix) what timetable that party proposes and expects to follow.

22. Put simply, where the case concerns the contents of a computer and one party has the means to decipher the contents but the other does not, then in order to do justice both parties must have access to the contents in order to make submissions as to whether and how the Court should exercise its powers.

23. The Court should also give Mr Love every opportunity to demonstrate that the NCA's case is unfounded, and disclosure of the encryption key or password is the obvious way to do it.

24. The Court will have to decide at the final hearing what (if any) inferences it should draw as to the contents of the items and as to property rights in the data. If Mr Love fails to comply with the direction then it would present an added reason as to why the Court should draw the inference sought by the NCA, namely that there is data on the encrypted items to which Mr Love has no right and which would cause harm to the public interest if it were returned to Mr Love.

Conclusion

25. As part of its case management powers under Rule 3A of the Magistrates' Courts Rules 1981 the Respondent invites the Court to make directions in the terms set out in the attached draft order, to encompass as (1) an obligation on the Claimant and (2) to make clear to him the potential consequence of non-compliance.

26. The Respondent accepts that whether or not the Court does draw an inference adverse to the Claimant will be determined upon all the evidence and after hearing submissions, and this is provided for in the second proposed direction.

Andrew Bird

5 St Andrew's Hill

London EC4V 5BZ

28th March 2016

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Respondent

[Proposed] DIRECTIONS

UPON HEARING [counsel for] the Claimant and counsel for the Respondent

IN EXERCISE OF ITS CASE MANAGEMENT POWERS UNDER RULE 3A OF THE
MAGISTRATES' COURTS RULES 1981

IT IS DIRECTED AS FOLLOWS:

- (1) By **19th April 2016** the Claimant shall provide to the Respondent any necessary password or key so that the Respondent may have access, for the purposes only of defending these proceedings, to the encrypted data stored on the following exhibits:
 - **AH/01/25/10/13** Samsung Laptop and its internal Hard Drive exhibit **AH/01/HD1/25/10/13**;
 - **AH/01/SD1/25/10/13** - SD Card
 - **AH/02/25/10/13** - Western Digital Hard Drive
(together the "encrypted data")

- (2) If the Claimant fails to comply with Direction (1) above then the Court may, subject to any further evidence or submissions, use this fact in support of an inference in these proceedings (a) that the Claimant has no right to some or all of the encrypted data and (b) that the contents of the encrypted data are such that it would not be in the public interest for it to be returned to the Claimant.

Signed:

Dated: