Case Summary

Next Digital Limited (壹傳媒有限公司) and Others v Commissioner of Police

HCMP 1217, 1218, 1221, 1222, 1239 and 1240/2020;
[2021] HKCFI 1677; [2021] 5 HKC 411
(Court of First Instance)
(Full text of the Court's decision in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136429&currpage=T)

Before: Hon Wilson Chan J
Dates of Hearing: 24 – 27 May 2021
Date of Decision: 10 June 2021

Jurisdiction – originating summons for injunctive relief – challenge to lawfulness of search warrant – a public law matter to be dealt with by judicial review – procedural exclusivity principle in NSL context – exception of collateral to private law claims for damages not applicable on facts – abuse of process

Validity of search warrant – police entitled to invoke powers under NSL and Police Force Ordinance (Cap. 232) – power under common law to reasonably take and detain material evidence – marginal notes on warrants a technical defect — warrant valid if containing basic details provided for in empowering statute – no requirement to set out definition of "specified evidence", specific limb under the NSL 29 offence or information enabling speculations on targets of investigation in warrant – sufficiency of information in warrant assessed pragmatically – no specific form for warrant under Sch. 1 to IR — search and seizure of digital devices – measures in NSL 43(1) to be applied by law enforcement authorities not limited to National Security Department of Police – warrant validly issued

Return of seized material – Court not to predetermine question of relevance before completion of criminal investigation – injunctive relief – unnecessary or overtaken by events with inspection protocol by Court – no jurisdiction to grant injunctive relief against Commissioner of Police acting in official capacity – no irreparable damage to Plaintiffs – no adequate remedy to criminal investigation being impeded

Background

1. The Plaintiffs commenced proceedings by Originating Summonses after the Commissioner of Police ("the Commissioner") had searched their premises in execution of search warrants resulting in seizure of materials. They later took out summonses for the amendment of the respective Originating Summonses ("the Amendment Summonses")in order to:

(a) challenge the validity of the relevant search warrant(s) on a myriad of grounds ("the Lawfulness Challenge");
(b) add a new prayer for the return of seized materials on grounds of irrelevance in addition to the originally pleaded grounds based on legal professional privilege ("LPP"), journalistic materials ("JM") and the scope of the search warrants;
(c) add a new claim of trespass, conversion and/or detinue; and
(d) add a new prayer for an interlocutory and/or final injunction to restrain the Commissioner from accessing, reviewing and/or making any use of the seized materials which fell within the proposed categories for return of materials.

2. The Commissioner opposed the above proposed amendments save for those relating to (c) above, which involved factual disputes. In respect of those proposed amendments, the Commissioner reserved his right to apply for conversion into a writ action where appropriate and/or necessary.

3. The Plaintiffs in HCMP 1217/2020 ("the 1217 Plaintiffs") also applied for interlocutory injunction against the Commissioner ("the 1217 Injunction Summons").

Major provision(s) and issue(s) under consideration

- NSL 3(3), 8, 29, 42(1) and 43
- IR, r. 2(1)and Sch. 1 (Rules Relating to Search of Places for Evidence), s. 2
- Crown Proceedings Ordinance (Cap. 300), ss. 2 and 16
- Police Force Ordinance (Cap. 232) ("PFO"), ss. 50(7) and 60
- Rules of the High Court (Cap. 4, sub. leg. A) ("RHC"), Order 53

4. In dismissing the applications, the Court discussed:

(a) whether it had jurisdiction to entertain the Lawfulness Challenge; (paras. 9-22)
(b) whether the Lawfulness Challenge was an abuse of process; (paras. 23-54)
(c) whether the Lawfulness Challenge was bound to fail under the following categories:
    (i) marginal note challenges;
    (ii) particularity challenges;
    (iii) digital devices challenge;
    (iv) take and sift challenge;
    (v) post of informant challenge; (paras. 55-77)
(d) the proposed prayer for the return of seized materials on grounds of irrelevance; (paras.78(1) and 81-83)
(e) the proposed prayer for interlocutory and/or final injunction; (paras.78(2) and 84-85)
(f) whether the Court could grant injunctive relief against the Commissioner acting in his official capacity; (paras. 86-92) and
(g) lastly, the 1217 Injunction Summons. (paras. 93-99)

Summary of the Court's rulings

(a) Whether the Court had jurisdiction to entertain the Lawfulness Challenge

5. It was well-established that any challenge as to the lawfulness of a search warrant was within the exclusive purview of judicial review. Such challenge could only be brought by way of judicial review proceedings. This sprang from the public nature of the remedy sought: a declaration of invalidity of search warrants was by nature a public law matter. The present Court had no jurisdiction to entertain the Lawfulness Challenge by way of an ordinary civil action which was private law proceedings. In the absence of jurisdiction, the Court could not entertain the intended amendments. (paras. 9-11, 13-14, 19, 22 and 53)

(b) Whether the Lawfulness Challenge was an abuse of process

6. Further or alternatively, the Lawfulness Challenge was caught by the well-established "Exclusivity Principle". As a general rule, it would be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action, and by this means to evade Order 53 of the RHC for the protection of such authorities. (paras. 23-24)

7. The reason for the general rule of procedural exclusivity was to give effect to the protection of public interest inherent in the judicial review procedure which afforded procedural safeguards to the public authorities, including: (a) the leave requirement for judicial review against groundless or unmeritorious claims; (b) the requirement for the applicant to come to court with full and candid disclosure of material facts; (c) a time limit of three months unless delay could be justified; and (d) the exclusion of automatic discovery. (para. 25(2))

8. The Exclusivity Principle applied with full force in the present case, such that the Lawfulness Challenge was ruled to be an abuse of process and should not be allowed to run: (paras. 29 and 41)

(a) The starting point was the well-established position that a warrant issued by a magistrate was valid until and unless it was quashed. (para. 30)

(b) Police officers acting in execution of a warrant were protected by s. 60 of the PFO. The fundamental basis of the Lawfulness Challenge was the validity, lawfulness and legality of the search warrants, which could hardly be said to be merely collateral or incidental to the private law claims for damages based on trespass, detinue and conversion. (paras. 32 and 34)

(c) The Commissioner (and an authority in a comparable position in future cases) would be deprived of the procedural safeguards of the judicial review mechanism if a private law action could henceforth be used as an alternative avenue to challenge the lawfulness of a search warrant. (paras. 36-37)

(d) In the context of an on-going investigation into, among others, a suspected serious crime under the NSL, it was all the more so that safeguards such as the leave procedure remained in place. The leave requirement prevented investigating authorities from being vexed with unmeritorious legal challenges that might result in undue delay in investigation and compromise its effectiveness. The duties of the law enforcement and judicial authorities under NSL 3(3), 8 and 42(1) were also relevant. (paras. 38 and 40)

9. In relation to the arguments put forward by the Plaintiffs regarding the Exclusivity Principle, the Court added that:

(a) the issuance of search warrant was a public law act. A lawfulness challenge against a search warrant was also a public law matter. There was strong public interest in its validity, if in issue, being challenged promptly and properly; (paras. 44(1) and 52)

(b) the collateral challenge exception to the Exclusivity Principle had no application on the facts of the present case as the Plaintiffs did not need to have the search warrant declared unlawful to seek return of materials or to claim for damages against the Government; (para. 44(2))

(c) by commencing the present action by way of Originating Summons instead of judicial review, the Plaintiffs had effectively bypassed the need to obtain leave, which included the requirement for promptitude and the need to satisfy the court upon a full and frank disclosure that the proposed grounds for review were reasonably arguable, which was a higher hurdle to surpass than that of an application for leave to amend an Originating Summons; (para. 45)

(d) to permit a recipient of a search warrant to mount a public law challenge of the lawfulness of the warrant almost a year after its issuance and execution would wreak havoc to law enforcement in Hong Kong; (para. 48)

(e) the existence of factual dispute was not a reason to depart from the Exclusivity Principle; (para. 51)

10. The Lawfulness Challenge, being an attempt to circumvent the Exclusivity Principle, amounted to an abuse of process. Given the importance of judicial review safeguards, coupled with the pertinence of not compromising the integrity and effectiveness of criminal

investigations, especially in the NSL context, the Exclusivity Principle must apply with full force to prevent abuse. (para 54)

(c) Whether the Lawfulness Challenge was bound to fail

11. As the Court agreed with the Commissioner's position on lack of jurisdiction and the Lawfulness Challenge being an abuse of process, it was not strictly necessary to consider the merits of the proposed amendments. The Court nevertheless discussed the Plaintiffs' arguments for completeness. (para. 55)

(i) Marginal Note Challenges (Unlawfulness Grounds 1 and 2)

12. The Plaintiffs submitted that the coverage of the collusion offence under the NSL and of the conspiracy offence at common law in the relevant warrants were unlawful as the marginal notes of the warrants cited s. 50(7) of the PFO and Sch. 1 of the IR respectively. (para. 58(1)) The Court held:

(a) It was wrong to assume that the power under s. 50(7) of the PFO could not cover NSL offences and therefore the warrants citing that provision must be unlawful when it covered the collusion offence.

(b) The suspected conspiracy offence was part and parcel of an ongoing investigation into offence endangering national security. The 1217 Plaintiffs' bare assertions as to the relevance (or the lack thereof) of the investigatory materials to particular offences were speculations which could not be given any material weight. It ignored the fact that police investigations were still ongoing and evolving.

(c) In executing a warrant, the police were empowered under the common law to reasonably take and detain goods which they

came upon and reasonably believed to be material evidence in some other crime.

(d) The police were vested with, and entitled to invoke, the powers both under the NSL and the PFO in investigating offences against national security. But for the marginal note, there was nothing on the face of the warrants to suggest that the police and the Chief Magistrate were not exercising such powers. The marginal note in the relevant warrants was a mere technical defect which could not affect the validity of the warrants.

(e) The court should look to the substance rather than the form. By issuing a warrant the wording of which mirrored the precise wording of s. 50(7) of the PFO, the Chief Magistrate must have directed himself to the enquiry under (among others) that provision and was invoking (among others) the measures under it. (para. 59)

(ii) Particularity Challenges (Unlawfulness Grounds 3, 4 and 5 and Additional Unlawfulness Ground 2)

13. The Plaintiffs submitted that the relevant search warrants were unlawful because they failed to expressly refer to:

(a) "specified evidence" under Sch. 1 of the IR and the authority to search for the same under s. 2 of Sch. 1;
(b) the particulars and dates of the offences under investigation;
(c) the fact that the Chief Magistrate was satisfied that there was reasonable ground for suspecting that any specified evidence was in the place. (para 58(2))

14. The Court held that there was a distinction between what was desirable to be included in a warrant and that which if absent rendered a

warrant invalid. A warrant was valid as long as it contained the basic details provided for in the statute. The Plaintiffs' proposed contentions were doomed to fail. (para. 60)

Failure to refer to "specified evidence" and s. 2 of Sch. 1 of the IR

15. There was no substance in the complaint. (paras. 61-62)

(a) There was no requirement in either Sch. 1 of the IR or s. 50(7) of the PFO that the definition of "specified evidence" must be expressly set out.

(b) The requirements for a valid warrant under Sch.1 of the IR were satisfied on the face of the relevant warrant itself.

(c) Because of the way the warrant was framed, the Commissioner had applied for a more limited form of warrant than would otherwise be available under Sch.1 of the IR.

(d) So far as the difference in wording between the relevant warrant and the empowering provision (Sch. 1 of the IR) could be characterised as any defect, this could not be a sufficient basis to nullify or render unlawful the warrant.

(e) The other relevant warrants had expressly restricted the seizure to materials which were "likely to be of value" to the investigation of (among others) the relevant offence. This sufficiently conveyed the scope of the search, which was the same in substance as "specified evidence" under Sch. 1 of the IR (defined as "anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security").

(f) A pragmatic approach was to be adopted in assessing the sufficiency of information. The difficulty of the police officer to specify a particular piece of information to be relevant should be recognised especially when an investigation was at its initial stage.

(g) Sch. 1 of the IR did not provide any specific form for the warrant. Neither the wording of s. 2 of Sch. 1 nor the authorities on warrants supported the submission that the warrant issued under Sch. 1 must specify a number of details.

(h) Insofar as the 1217 Plaintiffs relied on their speculation that the seized items under the warrant concerned could not be relevant to the collusion offence and hence the scope of seizure went beyond the scope of "specified evidence", that was also pure speculation as to the details of the investigations and confidential contents of the information laid before the Chief Magistrate.

Failure to refer to the particulars and dates of the offences under investigation

16. These grounds were also devoid of merits. (para. 63)

(a) As a general principle, if the empowering statute did not require any particular form for the warrant, the warrant would be held valid so long as it contained the *basic details* provided for in the statute. Neither s. 50(7) of the PFO nor Sch. 1 of the IR provided for any prescribed form for a search warrant. The only question was whether the search warrants contained such basic details. (para. 63(1))

(b) It might be impracticable to be specific about the offences at the investigation stage and secrecy considerations might come into

play (which would be all the more so in criminal investigations in the NSL context). (para. 63(2))

(c) The complaint that the warrant for the collusion offence under NSL 29 did not spell out which of the "offences" under NSL 29 had been relied on was premised upon an erroneous interpretation of that provision. There was only one single offence under NSL 29, i.e. the collusion offence. The various limbs under NSL 29 were different possible acts which could constitute the collusion offence instead of separate offences. There was no requirement that the search warrants themselves must specify any particular limb of possible acts under NSL 29 to be valid and lawful. The relevant search warrants had clearly identified NSL 29 as the relevant offence in question. (paras. 63(3) and 65(2))

(d) The authorities cited by the Plaintiffs were not decisions by the English or Hong Kong courts. These cases must be approached with caution as the relevant empowering statute might be very different. The principles governing the validity requirements of a search warrant in those jurisdictions were different from those set out in the Hong Kong cases. (para. 65(4) and (7))

(e) The scope of search was dependent upon the facts of the case and the exigencies of the investigation in question. That it covered a smaller or larger area or fewer or more entities was neither here nor there. (para. 66(1))

(f) On a plain reading of the relevant search warrant, it was clear that the documents or records of the companies were "likely to be of value … to the investigation" of the two offences, which was the information required to be conveyed to the recipient of the warrant. It needed not provide information to enable

speculations as to targets of the ongoing investigations. (para. 66(2))

(g) The Commissioner was entitled to rely on public interest immunity. It was nonsensical to suggest that details provided in an affirmation should have been included in a search warrant. (para. 66(3))

(h) Where the wording of the warrant concerned tracked the wording of s. 50(7) of the PFO, it confirmed that the Chief Magistrate would have been satisfied that the PFO requirements had been satisfied. (para. 69)

Failure to state the fact that Chief Magistrate was satisfied there was reasonable ground for suspecting that specified evidence was in the place

17. This complaint was doomed to fail. By issuing the warrant, the Chief Magistrate must have been satisfied by the information laid before him that the requirement under s. 2(2) of Sch. 1 of the IR was met. There was no requirement under s. 2(2) of Sch. 1 that the warrant must contain a statement to point out the obvious (i.e. that the magistrate was satisfied that the statutory conditions were met). (para. 70)

(iii) Digital Devices Challenge (Unlawfulness Ground 6)

18. The relevant Plaintiffs submitted that the search warrant was unlawful because it authorised the search and seizure of personal mobile communication devices along with other materials. In essence, they argued that a separate warrant was required for the contents of such digital devices. Noting that the warrant specifically provided for "business records, accounting documents, personnel documents, digital documents, digital devices, company kit or any other articles relating to the business operations of the following companies", the Court held that

it plainly authorised the search and seizure of both the physical digital devices and the digital documents therein. (paras. 58(3) and 71-73)

(iv) Take and Sift Challenge (Unlawfulness Ground 7)

19. The execution of the search warrant was said to be unlawful because instead of sifting through the materials on the spot, the police officers took them away for examination at places other than the premises specified in the warrants. The Court held that reliance by the relevant Plaintiffs on an English case was misguided. (paras. 58(4) and 74)

(v) Post of Informant Challenge (Additional Unlawfulness Ground 1)

20. The relevant search warrant was said to be unlawful because the police officer who laid the information was posted in the Commercial Crime Bureau rather than the National Security Department ("NSD") of the Police. (para. 58(5))

21. The Court held that this ground was doomed to fail as a matter of law. It was incorrect that the NSL only conferred power on police officers posted in the NSD to apply the measures under NSL 43(1).

(a) NSL 43 and Sch. 1 of the IR had to be read as a whole.

(b) It was clear from NSL 43(2) that the measures stipulated in NSL 43(1) were to be applied by law enforcement authorities not limited to the NSD;

(c) It was clear from NSL 43(3) that the phrase "the measures stipulated in [NSL 43(1)]" referred to the powers under NSL 43(1)(1) to (7). The IR was accordingly made, with its seven

schedules each dealing with one measure under NSL 43(1)(1) to (7), including Sch. 1 concerning search warrants.

(d) Both the wording of r. 2(1) of the IR and s. 2(1) of Sch. 1 of the IR referred to "a police officer" as opposed to an officer in the NSD. (para. 76)

22. Accordingly, all grounds of the proposed Unlawfulness Challenge were devoid of merits. This was a further reason why the amendments should not be permitted to be introduced, in addition to want of jurisdiction and/or breach of the Exclusivity Principle. (para. 77)

(d) Proposed prayer for return of seized materials on grounds of irrelevance

23. Insofar as LPP and JM were concerned, the request for immediate delivery-up had been overtaken by events. Following the Commissioner's LPP Direction Summons, a Protocol for joint inspection had been laid down for the parties to identify items which were subject to LPP and/or JM. The joint inspection was then in progress. (para. 80)

24. The complaint under this head could be divided into two subcategories: (a) allegations of irrelevance of the seized materials to the offences which the Plaintiffs contended were not covered by the search warrant relying on its marginal note; and (b) general allegations of irrelevance of the seized materials to the offences named in the search warrant. (para. 81)

25. It was impermissible for the Court to predetermine the question of relevance before the criminal investigation came to an end: (para. 82)

(a) There was no basis for a law enforcement agency to deliver up or return materials seized as part of an ongoing police

investigation subject to completion of investigation and criminal proceedings.

(b) By seeking directions to determine the question of relevance, the Court was being asked to impede on existing criminal investigation, and to carry out the impossible task of determining at that stage what were and what were not relevant materials for an on-going criminal investigation, which should not be allowed.

(e) Proposed prayer for interlocutory and/or final injunction

26. The proposed amendment served no useful purpose and was not necessary for determining the real question in controversy between the parties: (para. 84)

(a) Insofar as an interlocutory injunction was concerned, that was overtaken by events because the treatment of all seized materials (except the action where no LPP claim was asserted) was then covered by the Protocol as ordered by the court. To the extent that the Plaintiffs asked for a new requirement to restrict the Commissioner from accessing the part of the materials to which he might have access under the Protocol pending the final resolution of the Originating Summonses, that was in effect an application for variation of the Protocol through the backdoor which should not be allowed. Such interlocutory injunction was in any event circular and unworkable, and would only have the effect of paralysing criminal investigations in the interim, which was contrary to the spirit and letter of the Protocol.

(b) Insofar as final injunction was concerned, that was unnecessary because upon the resolution of the Originating Summonses in the present proceedings, materials which ought to be returned

would be returned according to the court's determination or parties' agreement as to the relevant claims.

(f) Whether the Court could grant injunctive relief against the Commissioner acting in his official capacity

27. The Plaintiffs argued that injunction could be obtained against an officer personally although he had been acting in his official capacity. The Court held that it could not be asked to grant injunctive relief against the Commissioner acting in his official capacity. (para. 86)

(a) Section 16 of the Crown Proceedings Ordinance (Cap. 300) applied to preclude the court from granting any form of injunctions against the HKSARG, interlocutory or otherwise, in private law proceedings. (paras. 87 and 91)

(b) Where an officer was sued in his personal capacity, an injunction could be obtained against him. But where he was sued in a representative capacity, no injunction should be granted. (para. 92(2))

(c) The Commissioner was clearly sued in his representative capacity. The acts complained of were the application for and execution of search warrants. It was difficult to see how such acts could be classified as a personal wrong on the part of the Commissioner himself. (para. 92(4))

(g) The 1217 Injunction Summons

28. The Court dismissed the 1217 Injunction Summons. (paras. 94-97)

(a) There was no utility in the 1217 Injunction Summons.

(b) The 1217 Plaintiffs had failed to address the Commissioner's submissions as to the balance of convenience:

(i) there was no suggestion of irreparable damage caused to the 1217 Plaintiffs unless the 1217 Injunction Summons was allowed;

(ii) on the contrary, the 1217 Plaintiffs ignored the need to continue criminal investigation for which damages could not be an adequate remedy if impeded;

(iii) in criminal proceedings, evidence which were found to have been obtained improperly (for example, lack of authority or invalidity of search warrants) did not *per se* preclude the admissibility of the evidence in criminal trials;

(c) The 1217 Plaintiffs' submissions were premised on there being a determination that the warrants had been ordered or agreed to be quashed. But there was no case-law supporting the suggestion that a final order for, among others, immediate return of seized documents might be made on an interlocutory basis.

(d) Any suggestion of an injunction against the Commissioner did not get off the ground because the Court had decided that it did not have jurisdiction to entertain the Lawfulness Challenge which was also an abuse of process.

29. There was then in place the Protocol ordered by the Court to deal with any LLP/JM claims. Having benefitted from the Protocol, the 1217 Plaintiffs could not at the same time put everything to a standstill by the 1217 Injunction Summons. (para. 99)

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