REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 100 of 2002

H.C.A. No. 733 of 2002

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

AND

IN THE MATTTER OF AN APPLICATION BY NORTHERN CONSTRUCTION LIMITED ALLEGING THAT THE PROVISIONS OF SECTION 4(a),(b)and(c) AND SECTION 5(2),(e)and(h) OF THE SAID CONSTITUTION PROTECTING ITS FUNDAMENTAL RIGHTS AND FREEDOMS HAVE ARE BEING AND ARE LIKELY TO BE CONTRAVENED IN RELATION TO IT FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE CONSTITUTION

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

AND

NORTHERN CONSTRUCTION LIMITED

Respondent

Panel: I. Archie C.J.

R. Hamel-Smith J.A.

W. Kangaloo J.A.

Appearances: Dr. L. Barnett S.C.; Mr. M. Quamina instructed by Ms. C.Cielto for the Appellant.

Mr. A. Alexander S.C.; Mr. F. Hosein instructed by Mr. D. Maharaj for the Respondent

Date of delivery: 27th February 2009

JUDGMENT

Delivered by I. Archie C.J.

1. The trial judge in this case found that a search warrant issued pursuant to section 33 of the Proceeds of Crime Act, 2000 ["the Act"] and executed at the Respondent's premises was unlawful because section 33 was itself unconstitutional, not being reasonably justifiable in a society that has 'proper respect' for the rights and freedoms of the individual. The particular defects in the section were said to be the absence of any specified procedure for obtaining warrants or of any standard of credibility, the absence of any definition of *'excluded material'* and the lack of any provision for access to or copying of seized material[1].

2. The appellant succeeds on the appeal because none of the matters complained of renders the meaning or operation of section 33 uncertain or arbitrary, nor do they individually or cumulatively constitute an erosion of or derogation from protected fundamental rights that is arbitrary, excessive or disproportionate. The trial judge wrongly focused in his analysis on the potential for abuse and failed to give adequate consideration to the fact that the issue of the warrant was subject to judicial oversight, which was the

[1] Section 33 of the Act is reproduced in its entirety as an appendix to this judgment

means of ensuring due process and the protection of individual rights.

3. The cross-appeal is also dismissed.

4. The Act is based on a model developed in the 1990's and adopted by several commonwealth jurisdictions. As was demonstrated, it therefore contains provisions that are very similar to those found in other jurisdictions and section 33 is by no means unique in so far as most of the alleged 'defects' are concerned. The model legislation was developed because of the realization that cross-border cooperation was essential in combating money laundering, which was international in scope. It was therefore desirable to encourage comity between nations and to attempt to achieve some degree of consistency in their respective legislative regimes.

5. That is relevant to the analysis that follows, since the Respondent had the heavy burden of showing that the impugned provision was not *'reasonably justifiable'*. The implication of the language of the constitution is that *'reasonableness'* may be measured against some generally accepted norms regarding how such matters may be dealt with in societies that have proper respect for individual rights and freedoms[2].

Background Facts

6. In 1997 the Anti-Corruption Bureau was established as a part of the Trinidad and Tobago Police Service and in October 2000 a team headed by Superintendent Piggott began investigations into allegations of financial impropriety in respect of what is now commonly referred to as the Piarco Airport Project. During the

[2] The preamble to our constitution, for example, recognizes the universality of our fundamental rights and freedoms as necessarily springing from a shared humanity.

course of those investigations, Supt. Piggott formed the view that reasonable grounds existed for believing that several offences had been committed by the respondent in respect of which documentary evidence existed at its premises in Point Lisas.

7. Supt. Piggott applied for and obtained a warrant pursuant to the Indictable Offences (Preliminary Inquiry) Act ("the first warrant"). The warrant was executed with the assistance of two civilians Mr. Lindquist and Dr. Marshdorf who had been retained as part of the investigation for their forensic accounting expertise. They assisted in the identification of documents thought to be relevant to the investigation.

8. It is important to note that, at that stage, the search was conducted with the cooperation of the respondent's officers/employees. Because of the volume of documents involved, it was agreed that disruption of the respondent's business would be minimized if the search were to be suspended upon the respondent's undertaking to provide, in tranches, relevant documents of the classes requested by the police.

9. The search took place on January 25, 2002. However, according to Supt. Piggott, having begun a study of the seized documents he formed the opinion that there had been a series of transactions whose purpose was the concealment of the proceeds of crime. Additionally, he deposed at the trial to the fact that ***"during the period January 26th to 28th, 2002"*** he received information from a confidential source that relevant documents were being shredded at the respondent's premises.

10. Further, according to Supt. Piggott, the respondents failed to deliver on January 28, 2002, as agreed, a copy of a status report on documents that had been requested. On January 29, 2002 attorney for the respondent wrote to Supt. Piggott advising that the client was objecting to any further attendance of Messrs. Lindquist and

Marshdorf at the respondent's premises. Not surprisingly, Supt. Piggott apparently formed the view that the cooperation that he had anticipated was no longer being extended, at least to the same degree.

11. Accordingly, on January 29, 2002 Supt. Piggott made an application before a High Court Judge ["the warrant judge"] and was granted a warrant pursuant to section 33 of the Act ("the second warrant") to search the respondent's premises. The timeline and the alleged sequence of events are important because one of the conditions of which the judge had to be satisfied before issuing the second warrant was that ***"the investigation for the purposes of which the application is made might be seriously prejudiced unless a police officer could secure immediate access to the material".***

12. That condition is applicable under both section 33(3) and section 33(4) of the Act, which are distinct and disjunctive provisions. In the warrant the judge specified that he was satisfied that the requirements of both subsections had been met [the relevance of this becomes more apparent later in the discussion regarding the absence of definitions of legally privileged and excluded material as those definitions do not apply to section 33(4)]. However, the trial judge was of the view that the warrant judge could only have been so satisfied <u>if he had been misled by Supt. Piggott.</u> It is best to deal with that finding at an early stage because the judge placed significant reliance on that inference in support of and by way of illustration of his conclusion that the absence of any prescribed mode of application rendered section 33 unconstitutional.

<u>The Trial Judge's Analysis</u>

13. With regard to the timeline, the learned judge said that Supt. Piggott waited for four days to apply for a warrant when shredding

had already been in progress for three days. In fact, what Piggott said in his evidence was that information had come to him *during the period 26th to 28th January* so it is not clear that the shredding, if any, began on the 26th or if it did, that the information came to Piggott on the same date.

14. More importantly, in the face of Supt. Piggott's evidence that ***"I also indicated to [the judge] the information which I had received that documents which were relevant to the Airport Probe were being destroyed at the Applicant's office"***[3], the trial judge declared that there was a material inconsistency between what Supt. Piggott deposed and what the warrant judge, by the warrant, certified that he was satisfied about. Whatever the learned judge's misgivings about the procedure adopted by the warrant judge, that is simply not the case[4].

15. The learned trial judge also criticized Supt. Piggott for failing to depose, in these proceedings, that he believed or thought either that it would not be appropriate to obtain an order under section 32, or that the investigation might be seriously prejudiced unless a police officer could secure immediate access to the material. With respect, that is not to the point. This is not a malicious prosecution action. The person who had to be so satisfied was the warrant judge. Nor is it a requirement of section 33, as the trial judge seemed to think, that the person in respect of whose premises the warrant is issued must have participated in the commission of the offence or benefitted from its proceeds.

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[3] Affidavit of Maurice Piggott dd April 2, 2002 @ para 45

[4] In the warrant, the judge specified that he was satisfied that there were reasonable grounds for believing that two companies had committed or conspired in committing of specified offences, that there was material at the respondent's premises that was likely to be of substantial value to the investigation **and** that the issue of a warrant was appropriate by reason of section 33(3) **and** (4) of the Act.

16. On the question of whether Supt. Piggott must have misled the warrant judge, the trial judge took the view that Supt. Piggott could have held no honest belief that any relevant material, at the time he made the application, could not be particularized, as required by section 33(4). Interestingly, he placed reliance, inter alia, on paragraphs 7 to 10 of the affidavit of the respondent's attorney in which she describes the material requested by Supt. Piggott and concludes that Piggott was requesting ***"the whole shop".*** That expression is the very antithesis of ***"particular material"*** which is in turn different from ***"material of a particular description"***. An example of the latter would be ***"all documents pertaining to the relationship between x and y especially contracts relating to the supply of goods for project z"***. If one were to drill down to the definition of particular material then an example may be ***"a contract dated 7th June 2001 between c and d for the supply of a tractor".***

17. On that analysis and a perusal of the lists exhibited to the attorney's affidavit as "SC2" and "SC5", there is no reason to suppose that Supt. Piggott must inevitably have misled the warrant judge if he told him that the material sought could not be particularized. One must also realise that this type of investigation often proceeds in stages with the material recovered at one stage leading to further lines of inquiry, which take some time to develop to the stage of reasonable certainty. If information is in fact received that material is being disposed of, it is unlikely to come in minute detail and the relevance of certain material may not be apparent until it is lost.

18. Finally, as regards the question whether section 33 of the Act derogated from protected rights in a manner that was excessive, having regard to the legitimate objectives of the Act, the trial judge took what he called a 'contextual approach'. He pointed to waning public confidence in the police service and a 'general suspicion'

that police action may at times be politically motivated. Neither of those circumstances is unique to Trinidad and Tobago or even uncommon. Furthermore, one has difficulty in appreciating how the political environment that existed after 2001 [the 18-18 tie in Parliament] could have any bearing on the constitutionality of the Act when it was passed in the year 2000.

19. In my view, it is an approach that carries the inherent danger of reframing the issue into an inquiry as to what is reasonably justifiable *in this society*. It carries with it the temptation, on the one hand, to justify increasingly draconian steps as the 'easy way out' or, on the other hand (depending on one's subjective viewpoint), to demand perfection rather than reasonable solutions from draftsmen. It introduces an unnecessary element of subjectivity. While context is important as a measure of proportionality, as is discussed later in this judgment, political considerations must be approached with extreme caution.

20. I have been at pains up to now to set out why, in my view, the cumulative effect of the approach taken by the learned trial judge and the assumptions that he made along the way may have led him to form a different conclusion from mine on the constitutionality of section 33 after he undertook a comprehensive and painstaking analysis of the applicable legal principles.

The Principles Of Law

21. There is no dispute in this case that, having regard to the fact that the Act was passed with the required special majority under the constitution, the onus was on the applicant/respondent to show that, to the extent that it derogates from protected fundamental rights, the impugned provision goes further than is reasonably necessary or is reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

22. It is a heavy burden because the responsibility for balancing the rights of the individual with the necessity, for the good of the society as a whole, to have effective means of combating crime lies in the first instance, with Parliament. Courts must not intervene merely on the basis that a judge or judges form the view that more appropriate means could have been devised. There is always room for reasonable disagreement or what was described during the course of submissions as a 'margin of appreciation'.

23. The learned trial judge adopted the test articulated by Gubbay CJ in **Nyambirai v National Social Security Authority [1996] 1 LRC** and subsequently endorsed by the Privy council in **de Freitas v Permanent Secretary of the Ministry of Agriculture (1998) 53 WIR 131.** It is to the effect that, in determining whether a statutory provision arbitrarily or excessively invades the enjoyment of a fundamental right, regard must be had to whether:

- The legislative objective is sufficiently important to justify limiting a fundamental right;
- The measures designed to meet the legislative objective are rationally connected to it; and
- The means used to impair the right or freedom are no more than is necessary to accomplish the objective

It is with regard to the last criterion that the 'margin of appreciation' applies and that is where the learned trial judge's analysis focused.

24. For the purpose of the analysis that now follows, I have found it convenient to adopt the headings used by him in his analysis of the criticisms leveled at section 33.

The Unlimited Nature of the Search Warrant

25. Having rejected the argument that the failure to specify, in section 33, the time and number of entries permitted by a warrant did not render it unconstitutional, the judge nevertheless accepted that the failure to include any safeguard in respect of the unreasonable and excessive retention of seized material was a fatal flaw. He found that this was an unnecessary abridgment of fundamental rights. This was despite the fact that, on his analysis, that position was not really different from what existed at common law and in existing local statutes. It was important to remain focused on the fact that, whatever the various formulations given in the decided cases, the underlying test is whether the provision under scrutiny is *reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.* While it is true that that may be an evolving concept, one cannot say that Parliament, in failing to include a proviso as suggested, acted outside the so-called 'margin of appreciation'.

26. A judge issuing a warrant has continuing supervision of his order[5] and it is always open to a person affected by the seizure of any material to apply to the judge for access to and/or copies of any documents. The learned trial judge's conclusion is, upon closer analysis, really the result of a view that it would have been 'better' or 'more desirable' to have included the contemplated restrictions. That is a reasonable view but not the only reasonable view. As long as Parliament has chosen from among a range of reasonable options, the provision cannot be unconstitutional.

[5] see e.g. section 33(6), which requires the person to whom the search warrant is issued to report back to the judge within a specified time.

Absence of Definitions

27. Section 33(5) prohibits the seizure, by a warrant issued under that section, of any *'excluded material'* or *'items subject to legal privilege'* without defining either of those expressions. The trial judge found that failure to define the former made the section arbitrary, unworkable and disproportionally derogatory of individual fundamental rights. The suggestion that, as in this case where the warrant judge actually specified on the warrant what was to be excluded[6], it should be left to the discretion of the judge issuing the warrant, was met with the argument that it introduced an unacceptable level of uncertainty and would be subject to the caprice of individual judges. That argument has considerable force if one is designing an ideal statute but that is not the exercise on which the court is engaged.

28. A preferable approach is to look at what obtains at common law and in our existing statutes. Stripped of the words *"and excluded material",* section 33(5) permits exactly what has previously been permitted in respect of criminal investigations and, on the judge's own express analysis, would have been unobjectionable. It is difficult to see how the inclusion of words that were clearly intended to benefit persons subject to search warrants could actually make it worse.

29. If it is impossible to attach any certainty to the meaning of those words, it does not follow that section 33 is unconstitutional and must be invalidated. Any uncertainty can be avoided by reading the provision as if the 'offending' superfluous words were deleted. That would be in accord with the current accepted approach to statutory interpretation.

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[6] The warrant was in a standard form that included definitions of *'items subject to legal privilege'* and *'excluded material'* that coincided with the definitions in the Dangerous Drugs Act [1991], s38 (repealed by section 61 of the Act.)

Absence of Procedural Rules

30. Section 59 of the Act provides that ***"The Minister may make Rules for regulating and prescribing the procedure to be followed under this Act."*** That would presumably include the procedure to be followed in applying for a warrant under section 33. No such procedure was prescribed. The trial judge focused on the permissive language of section 59 and found it to be inadequate because the making of appropriate regulations was not a precondition to the exercise of the power to issue a search warrant.

31. In his words:

> *"Here on a reading of section 33 of the PCA it cannot be said, from the words used or the context or the nature of the provision, that it was the intention of Parliament that a condition precedent to the exercise of the power to issue a search warrant was the existence of a prescribed method for the application. Nor, in my opinion, can it be said that the existence of such a procedure is strictly necessary for the exercise of the power or jurisdiction to issue a search warrant. However, for the reasons I have given at (d) and (e) above, it is the failure of Parliament to prescribe a proper procedure* ***and/or of the Minister to make regulations for same,*** *that render the section not reasonably justifiable in a democratic society. That is to say, at least in the context of this criticism, the shortcoming of Parliament was in its failure to prescribe the making of an acceptable procedure a condition precedent to the exercise of the power to issue a warrant and to opt rather for an unregulated exercise of that power.* ***I do not accept therefore, that there was no jurisdiction for the judge to issue a warrant in the absence of a prescribed procedure, but what I do find, is that the absence of***

a procedure makes the entire process unjustifiable in a democratic society" [my emphasis]

32. That raises some difficult questions:

- If such regulations had been passed by the time the matter had come before the judge for consideration, would the statute still have been unconstitutional?

- If the answer is no, then of what relevance is the permissive nature of the language? The only relevant consideration would be whether, in fact, appropriate regulations are in place

- However that raises the further question whether an unconstitutional statute is unconstitutional 'ab initio' or only when it is declared to be so by the court and, if it is the latter, in what way is its 'constitutionality' suspended and dependent on the coming into force of subsidiary legislation? One might frame the issue this way. On the trial judge's analysis, if section 59 had been expressed as a pre-condition then the statute would have been constitutional and the warrant judge would simply have lacked jurisdiction until such time as the appropriate regulations had been passed. But what if the regulations that were eventually passed were wholly inadequate? What would then become of the statute's "constitutionality"?

33. A clue to where the analysis went wrong may be found in the last sentence of the quoted extract and that is in the shift from 'jurisdiction' to 'process'. The real difficulty in this case is the process that was apparently followed by the warrant judge. The trial judge, having referred to **Peters & Chaitan v The Attorney General**[7]

[7] Civil Appeal nos. 21 & 22 of 2001

correctly concluded that this was not a case where the creation of regulations was a condition precedent to the exercise of jurisdiction. It would then be logically inconsistent to assert that the absence of a prescribed procedure **makes** the statute unconstitutional [in the sense of not being justifiable in a democratic society or a society that has proper respect for individual rights and freedoms].

34. The question that one must then go on to consider is whether, in the absence of prescribed procedures for applying for the issue of a warrant, the scheme of the statute provides sufficient minimum safeguards for the protection of those rights or, to put it another way, for ensuring that they are not unnecessarily or arbitrarily infringed. That addresses two other aspects of the criticism of the Act referred to by the trial judge:

Absence of a Specified Procedure for Applying for a Warrant/ Absence of a Standard of Credibility

35. The short answer is that the safeguard is present in the requirement that the issue of a warrant is subject to a judicial discretion that must be exercised '*judicially'*. We must start from the presumption that judges will act judicially and in his analysis the learned trial judge had no difficulty in gleaning from the authorities an articulation of the basic principles that would be involved in a judicial approach to the exercise of a discretion.

36. In his judgment, he relied heavily on the case of **Hunter et al. v. Southam Inc. 11 D.L.R. (3rd) 420** in support of his conclusion that the Act should have specified a procedure for obtaining a warrant, which would have included a requirement for evidence **on oath**. My understanding of that case is that the Canadian Supreme Court was more concerned with the fact that the Commission that was supposed to approve searches might not be able to act impartially and '*judicially'* having regard to its other functions under the Combines Investigation Act.

37. The trial judge acknowledged that there are other respected jurisdictions with similar legislation in which there was no specific requirement for evidence on oath. However, he sought by reference to other jurisdictions such as the United Kingdom ["the U.K."] to demonstrate that procedures set out ***in other enactments***[8] provided the necessary safeguards. Implicit in the learned trial judge's reasoning therefore, is the acceptance that the constitutionality of an Act can be influenced by an external source [such as another enactment]. If that is the case, then the whole body of case law and practice that surrounds the application for warrants should be of relevance in guiding the approach of a judge in the exercise of his discretion under section 33 of the Act.

38. In the case of the U.K. for example, section 15 of the Police and Criminal Evidence Act ["PACE"] provides such a procedure. Interestingly, however, although it requires the application to be by *"an information in writing",* no definition of *"information"* is given. What section 15 provides is for the constable applying to answer on oath any question that the justice of the peace or judge hearing the application asks him. One might therefore expect that if an officer were to turn up at a judge's chambers with a bundle of documentary evidence and a report detailing his investigations, he could simply be placed on oath as to the truth of the contents of his report although it would be convenient for him to have sworn an affidavit.

39. One must appreciate that there are two separate considerations operating. The oath speaks to the truth of any information supplied to the judge and draws attention to the serious and intrusive nature of a search warrant. It is therefore a deterrent to anyone falsely or recklessly moving the court to issue same, as deleterious consequences could follow. The relevance or probative value of the information (if true) as regards the matters of which the judge must be

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[8] e.g. P.A.C.E [1984] (U.K.)

satisfied before issuing the warrant is another matter entirely unaffected by whether or not the information is supplied on oath.

40. Although it may be conceded that one may generally feel more comfortable about placing reliance on information presented under oath, I do not accept that information, particularly documentary information which a judge may peruse would not be ***credible*** simply because it is not attached to an affidavit. It is for the judge to satisfy himself both as to the credibility of the source and of the inferences to be drawn from any information supplied. I accept that the preferable practice would be for it to be presented in affidavit form but can see no reason to invalidate section 33 by reason of the omission of which the respondent complains.

Abuse of Process

41. In its revised skeleton arguments, the appellant expressly abandoned the argument that this motion was an abuse of process because alternative means of redress were available. Instead, reliance was placed solely on the assertion that the respondent had failed to demonstrate that the matters complained of had any impact on its fundamental rights.

42. However, once the alternative remedy argument was abandoned, the difficulty that the appellant faced is that any assertion that property has been seized and retained pursuant to an unconstitutional statutory provision must, if correct, inevitably involve a deprivation of property without due process. The fact of the search and seizure is not disputed. If the applicant's motion were based solely on the retention of documents, then the position would be different. Therefore, in the light of the appellants approach and the absence of full arguments on this issue I would be content to leave the trial judge's finding undisturbed and leave the resolution of any misgivings to a more appropriate case, should one arise in the future.

The Cross-Appeal

43. The cross-appeal focused on two issues. The first was the finding of the trial judge that, in the absence of a prescribed procedure for the issue of the second warrant, the warrant judge still had jurisdiction to do so. For the reasons that are set out earlier in this judgment it is apparent that he did have jurisdiction and I do not propose to deal with this separately except to say that I agree with the reasoning of the trial judge on this issue.

44. The second issue raised in the respondent's grounds was the trial judge's finding that the seeking of relief in respect of the first warrant by constitutional motion was an abuse of process. The trial judge undertook a careful and, in my view, a correct analysis of the case law and principles regarding alternative or parallel remedies to application by way of constitutional motion. He was careful to draw the valid distinction between the first and second warrants, and there was nothing in the issues raised on the first warrant to bring it peculiarly within the realm of constitutional relief. I can add nothing useful to his analysis and it is unnecessary for me to rehash it in this judgment. The respondent cannot succeed on this ground.

Guidance on Procedure

45. The unease that was clearly felt by the trial judge about the absence of any record of what actually happened at the application for the warrant is understandable. However, his function was not that of a reviewing court. The underlying complaint was about an exercise of discretion by a court of equal and concurrent jurisdiction. As was pointed out in **Peters & Chaitan v The Attorney General**, there is no separate constitutional bench in this jurisdiction. Complaint about the issue and execution of the second warrant ought to have been addressed to the warrant judge in the first instance and any dissatisfaction about the outcome addressed by way of an appeal. As has been already pointed out, a judge issuing a warrant retains

supervision of his order and would also be competent to address any constitutional issues placed before him.

46. As to the procedure to be followed in the absence of specific rules, the application should ideally be in writing and on oath (or affirmation) with copies of any supporting documentation annexed. The judge should make a careful note of any oral supporting information supplied, whether initially or in response to the judge's inquiry, and any such information should also be taken on oath. Copies of all supporting documentation should be kept with appropriate safeguards for preserving confidentiality, as the potential for compromise of sensitive investigations is readily apparent. That should satisfy the requirements for transparency and accountability and preserve a record for review by an appellate court if that becomes necessary.

Disposition

47. For the reasons set out above I would therefore allow the appeal, dismiss the cross-appeal and set aside the declarations and orders of the trial judge. The respondent will pay the appellant's costs of the appeal and cross-appeal as well as the trial below certified fit for Senior and Junior Counsel

Ivor Archie

Chief Justice

I have read in draft the judgment of the Chief Justice and I agree and have nothing to add.

R. Hamel-Smith

Justice of appeal

I also agree.

W. Kangaloo

Justice of Appeal

APPENDIX

S. 33 of the Proceeds of Crime Act (Act No. 55 of 2000) is reproduced here for ease of reference.

33. (1) A police officer may, for the purposes of an investigation, in or outside of Trinidad and Tobago, into—

(a) a specified offence;

(b) whether a person has benefitted from a specified offence;

(c) the extent or whereabouts of the proceeds of a specified offence; or

(d) drug trafficking,

apply to a Judge for a warrant under this section in relation to specified premises.

(2) On such application the judge may issue a warrant authorising a police officer to enter and search the premises if the judge is satisfied—

(a) that an order made under section 32 in relation to material on the premises has not been complied with;

(b) that the conditions in subsection (3) are fulfilled; or

(c) that the conditions in subsection (4) are fulfilled.

(3) The conditions referred to in subsection (2)*(b)* are—

(a) in the case of a specified offence that is not drug trafficking, that there are reasonable grounds for suspecting that a person has benefitted from the commission of a specified offence;

(b) in the case of a specified offence that is a drug trafficking offence, that there are reasonable grounds for suspecting that a specified person has carried on or has benefitted from drug trafficking;

(c) that the conditions in subsection (6)*(c)* and *(d)* of section 32 are fulfilled in relation to any material on the premises; and

(d) that it would not be appropriate to make an order under that section in relation to the material because—

(i) it is not practicable to communicate with any person entitled to produce the material;

(ii) it is not practicable to communicate with any person entitled to grant access to the material or entitled to grant entry to the premises on which the material is situated; or

(iii) the investigation for the purposes of which the application is made might be seriously prejudiced unless a police officer could secure immediate access to the material.

(4) The conditions referred to in subsection (2)*(c)* are—

(a) in the case of a specified offence that is not drug trafficking, that there are reasonable grounds for suspecting that a person has benefitted from the commission of a specified offence;

(b) in the case of a drug trafficking investigation, that there are reasonable grounds for suspecting that a specified person has carried on or has benefitted from drug trafficking;

(c) that there are reasonable grounds for suspecting that there is on the premises any such material relating—

(i) to the person; and

(ii) in the case of a specified offence that it is not a drug trafficking offence, to the question whether that person has benefitted from the commission of a specified offence or to any question as to the extent or whereabouts of the proceeds of the commission of a specified offence is likely to be of substantial value, whether by itself or together with other material, to the investigation for the purposes of which the application is made, but that the material cannot at the time of the application be particularised; or

(iii) in the case of an investigation into drug trafficking, that there are reasonable grounds for suspecting that there is on the premises material relating to the specified person or to drug trafficking which is likely to be of substantial value, whether by itself or together with other material, to the investigation for the purpose of which the application is made, but that the material cannot at the time of the application be particularised; and

(d) that—

(i) it is not practicable to communicate with any person entitled to grant entry to the premises;

(ii) entry to the premises will not be granted unless a warrant is produced; or

(iii) the investigation for the purposes of which the application is made might be seriously prejudiced unless a police officer arriving at the premises could secure immediate entry to them.

(5) Where a police officer has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege and excluded material, which is likely to be of substantial value, whether by itself or together with other material, to the investigation for the purposes of which the warrant was issued.

(6) The person to whom a search warrant is issued shall furnish a report in writing to the judge who issued the warrant—

(a) stating whether or not the warrant was executed;

(b) if the warrant was executed, setting out a brief description of anything seized;

(c) if the warrant was not executed, setting out briefly the reasons why the warrant was not executed.

(7) A report with respect to a search warrant shall be made within ten days after the execution of the warrant or the expiry of the warrant whichever first occurs and if the judge who issued the search warrant died, has ceased to be a judge or is absent, the report shall be furnished to the Chief Justice.