Neutral Citation Number: [2018] EWCA Civ 1881

Case No: A3/2017/3226

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
Business and Property Courts of England and Wales
CHANCERY DIVISION
COMPETITION LIST
Mr Justice Marcus Smith
[2017] EWHC 2911 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2018

Before:

Lady Justice King
Lord Justice Simon
and
Dame Elizabeth Gloster

- -

Between:

The Competition and Markets Authority	**Appellant**
- and -	
Concordia International RX (UK)	**Respondent**

- -
- -

Jason Beer QC, Rob Williams and Charlotte Ventham (instructed by **Legal Service of the Competition and Markets Authority**) for the **Appellant**
Mark Brealey QC (instructed by **Morgan, Lewis and Bockius UK LLP**) for the **Respondent**

Hearing date: 17 May 2018

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Approved Judgment

Lady Justice King:

1. Under sections 28 and 28A of the Competition Act 1998 ("CA 1998"), the High Court has the power to issue warrants enabling the Competition and Markets Authority ("CMA") to enter and search business or domestic premises for the purposes of an investigation under the CA 1998. Such applications are made without notice to the occupier or person in charge of the premises which are subject of the warrant. In those circumstances, the grant of the warrant may be challenged by a subsequent application to the High Court.

2. The case subject to this appeal is the first occasion on which such a challenge has been made and, as such, raises an important point of principle concerning the ability of the CMA to obtain, and then to defend, warrants issued by the High Court to enable them further to investigate alleged anti-competitive behaviour on the one hand, and to enable the subject of such warrants to challenge the making of them on the other.

3. Specifically, this is an appeal against an order made by Mr Justice Marcus Smith on 20 November 2017 whereby he ordered that the application of Concordia International RX (UK) Limited ("Concordia") to vary or discharge a warrant issued under section 28(1)(b) CA 1998 must be determined without the court relying upon any relevant material the disclosure of which had been withheld from Concordia on the grounds of public interest immunity ("PII").

4. It is agreed between the parties that in the light of the recent Supreme Court decision in *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] AC 236 ("*Haralambous"*) the appeal against the judge's order must be allowed and that, in the light of the decision in *Haralambous* (contrary to the judge's judgment) any judge considering an application to set aside or vary a warrant is entitled, and indeed is obliged, to consider all relevant material regardless of the fact that some of it may be subject to PII.

5. Concordia seeks to cross-appeal (out of time) that part of the judgment by which the judge declined to use a confidentiality ring as a means of protecting sensitive material which qualifies for PII.

6. Given the importance of the issues, and the fact that there are two important ancillary issues remaining unresolved, the parties asked, and the court has agreed notwithstanding that the appeal must in any event be allowed, to hear argument and give a judgment in relation to these two further matters raised (i) as a separate ground of appeal on the part of the CMA: "the procedural issue" and (ii) by the late cross appeal by Concordia: "the PII issue".

7. The procedural issue (Ground 4 of the Grounds of Appeal) is whether the judge fell into error in holding (in his judgment at [70](ii) and (iii)) that the questions of whether or not material is protected by PII and the scope of disclosure in the event of a challenge are matters to be determined as part of the application for the warrant itself (as opposed to at the hearing of any inter partes challenge).

8. The PII issue is as to whether material determined to be subject to public interest immunity and therefore (pursuant to *Haralambous*) to be taken into account by the judge when considering an application to vary or discharge a warrant can, and/or

should, notwithstanding the PII character of the information, be disclosed by the CMA into a 'tight' confidentiality ring compromised of Concordia's external lawyers.

Investigations under the Competition Act 1998: Obtaining a warrant to enter business or domestic premises without notice

9. Under section 25 CA 1998, the CMA may conduct investigations into suspected infringements of competition law. The relevant infringements are anti-competitive agreements and abuses of a dominant position which contravene UK and EU competition law as provided for in six specified cases set out in section 25(2) – (7) CA 1998. In each of these six cases, the threshold for investigation is that the CMA has reasonable grounds to suspect an infringement of the prohibition in question.

10. Under section 26-28A CA 1998, the CMA has various powers to obtain information and evidence in connection with investigations made under section 25. In particular, in relation to the present case:

    a) Section 26 gives the CMA the power to require documents and information which the CMA considers relate to any matters relevant to the investigation.

    b) Section 27 is a power to enter business premises without a warrant.

    c) Sections 28 and 28A enable the CMA to apply to the High Court for the issue of a warrant, giving the CMA the power to enter business or domestic premises.

11. Section 28 CA 1998 applies in three types of case. Two concern cases in which the CMA has sought to exercise its powers under sections 26 or 27 CA 1998 but has failed to obtain the evidence which it seeks (sections 21(a) and (c) CA 1998). The third case (section 28(1)(b) CA 1998) applies where the CMA has reasonable grounds to suspect that:

    i) There are documents on the premises which the CMA has power to require to be produced under section 26; and

    ii) "if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed".

12. The present case concerns a warrant granted under section 28 which enables the CMA to enter and search business premises without first giving notice of its intention to carry out inspections.

13. It goes without saying that the power to enter and inspect business or domestic premises without notice is a draconian one and the granting of such warrants is strictly controlled. Sections 28(7A)(a) and 28(8A)(a) provides that an application for a warrant must be made in accordance with rules of court. The relevant rules are contained in a Practice Direction: Application for a Warrant under the Competition Act 1998 (the "Practice Direction") which, in so far as is relevant, provides as follows:

a) The application is made without notice (*ex-parte*) to a High Court Judge (paragraphs 2.1-2.3).

b) Specific provision is made for the confidentiality of the hearing of the application and the evidence filed in support and the court record cannot be inspected or copied by any person either before or after the hearing without the permission of the court. (paragraphs 3.1 – 3.3 and 6.1).

c) The application must be supported by evidence sworn on oath and must cover all matters on which the CMA relies and all material facts of which the court should be aware including a number of specified matters of substance (paragraphs 4.2-4.3).

d) There are safeguards which prescribe the content of the warrant, the authorisation of the persons who will execute the warrant and the procedural steps to be taken in executing the warrant (paragraphs 4.4, 6.2, 7.1 and 7.3). The material to be provided to the target of the warrant is also specified, but does not include disclosing the supporting evidence.

e) There is provision for an application to the court to vary or discharge the warrant (paragraphs 9.1-9.4). Such an application should be made to the judge who granted the warrant if he is available (paragraph 9.4).

Factual Backdrop

14. The warrant in question relates to the business premises of Concordia. It was granted by Mann J on 5 October 2017 and relates to an investigation into anti-competitive contracts in relation to four drugs. At the time of the application for the warrants, two of the drugs in question, hydrocortisone and carbimazole, had been the subject of ongoing investigations for some 18 months. The CMA had conducted its investigation by issuing requests for information pursuant to section 26 CA 1998. In response, Concordia had disclosed many hundreds of documents. The CMA had moved on to issue Concordia with its written case (the statement of objections) and Concordia had responded with its written case in defence. Concordia has also made submissions at an oral hearing conducted by the CMA on 20 July 2017.

15. The CMA received additional information relating amongst other things to communications held on personal devices. By an affidavit in support of its application for a warrant under sections 28 and 28A CA 1998, the CMA said that, if substantiated, such additional evidence would support a case that there had been an explicit but informal market sharing arrangement between Concordia and Actavis UK, the pharmaceutical company who has an effective monopoly in relation to the supply of hydrocortisone tablets in the UK.

16. The warrants, having been granted, were executed on 10 October 2017. Concordia applied to vary the warrant to exclude hydrocortisone and carbimazole on the basis that it had been cooperating with the CMA investigations and that there was no basis upon which to suspect that it would conceal, remove, tamper with or destroy evidence.

17. On 11 October 2017 at a directions hearing, Marcus Smith J gave directions for the hearing of a preliminary issue to decide whether the CMA was required to disclose to Concordia all of the material which had been before Mann J at the ex parte application. This preliminary issue was to be determined on the accepted premise that (i) the disclosed material was sensitive and (ii) the CMA was acting in fulfilment of its public duties in seeking to protect the material in question.

18. It is the conclusions of the judge at the substantive preliminary hearing which are the subject of the appeal.

The judgment

19. The judge accepted that it is proper for the CMA to adduce PII material in connection with its application for a warrant [67].

20. The controversial issue therefore was as to how the subsequent challenge to the warrant should be determined. The judge held that:

    i) In considering an application to vary or discharge a warrant, the judge hearing the application could not take into account any material protected by PII notwithstanding that it had properly been taken into account by the judge who issued the warrant.

    ii) Issues of PII and disclosure should be determined at the initial ex parte hearing.

    iii) The use of a confidentiality ring to protect sensitive material had been disapproved at the highest level and, even if permitted, would not solve the problem of withholding material from Concordia generally [56- 59].

21. This judgment of Marcus Smith J was handed down after the Supreme Court had heard argument in *Haralambous* but before it had handed down its judgment. Marcus Smith J's judgment was therefore sent to the Supreme Court and was the subject of written submissions. This enabled the Supreme Court to give detailed consideration to the first of these issues in their judgment in *Haralambous*.

22. That being the case, the judge's approach and conclusions in the present case are best summarised by reference to the Supreme Court's analysis. The Supreme Court noted:

> "22… The authorities do not directly address the question of what a court hearing a judicial review application can or should do if it appears that the material withheld is likely to be decisive for a consideration of the legitimacy or otherwise of the issue of the warrant.
>
> "23. The question was however considered in *Competition and Market Authority v Concordia International RX (UK) Ltd [2017] EWHC 2911 (Ch)*"

23. The Supreme Court went on to describe the issues and outcome in this case as follows:

> "23…The issue arose in the *Concordia* case in the context of a search warrant issued ex parte under section 28 of the Competition Act 1998. Section 28 can itself be regarded for present purposes as broadly paralleling section 8 of PACE. But the relevant practice directions provide not only that a warrant under section 28 must be served as soon as possible on the occupier or person appearing to be in charge of the premises (PD paras 7.3 and 8.1), but also that such occupier or person may apply to vary or discharge the warrant to the judge who issued the warrant or, if he is not available, another High Court judge: para 9. Concordia applied accordingly, but the Competition and Markets Authority ("CMA") maintained that it could not, for public interest reasons, disclose all the information on the basis of which it had persuaded the judge to issue the warrant in its final form.
>
> 24. In the course of a careful analysis of the possibilities, Marcus Smith J: (i) rejected a submission that, if the CMA was to be permitted to resist the challenge, it must disclose the full material; (ii) considered that the Supreme Court's judgment in the *Al Rawi case [2012] 1 AC 531* precluded a "closed material procedure", whereby the material withheld could be seen by the court, but not by Concordia; (iii) rejected the CMA's case that some form of confidentiality ring could be established, to allow disclosure to Concordia's counsel, without disclosure to Concordia; and (iv) in these circumstances held that "Concordia's application to vary or partially revoke the warrant must be determined on the basis of such material as is *not* protected by public interest immunity": para 71. In so concluding, Marcus Smith J recognised that the "excluded material may constitute the difference between the section 28 warrant being upheld or varied/revoked": para 70. The question on this appeal is whether the conclusions he reached are correct, at least in the context of a search and seize warrant issued under section 8 of PACE."

24. The *Haralambous* appeal itself arose in the context of criminal warrants, specifically:

    a) Warrants obtained pursuant to section 8 PACE, where an application for a warrant is made *ex parte* to a magistrate; and

    b) Section 59 of the Criminal Justice and Police Act 2001 ("CJPA"), which concerns applications to the Crown Court for authorisation to retain property seized (where there has been a defect in a warrant and the police seek to regularise the position). An application under section 59 has been described as "Notional reconsideration by the magistrate of a fresh section 8 PACE application."

25. It is accepted by all the parties that, given the Supreme Court's conclusion that section 28 CA 1998 "can itself be regarded for present purposes as broadly parallel to section 8 of PACE", the conclusions reached by the Supreme Court in relation to PACE and

section 59 CJPA equally apply to the provisions in relation to warrants under the CA 1998.

26. It follows that in respect of warrants granted under the CA 1998 the following features can be read across from the judgments in *Haralambous:*

    i) The court may, upon the making of an *ex parte* application for a warrant, rely upon information which, in the public interest, cannot be disclosed to the subject of the warrant: *Haralambous* [27 and 37].

    ii) The exclusion from consideration by the court of material which had properly been considered *ex parte* when the warrant was granted, but which on public interest grounds was then withheld on an *inter parte* challenge, could lead to a validly issued warrant being quashed. Such an outcome would result, said the Supreme Court, in "an awkward mismatch between the basis of the original and reviewing decisions" (*Haralambous* [51 and 52]); as, they said, did the approach taken by Marcus Smith J in *Concordia* [52].

    iii) Accordingly, judicial review must accommodate a closed material procedure, where the material could be seen by the judge but not Concordia. The Supreme Court in *Al Rawi* [2012] 1 AC 531 (which prohibited the use of a closed material procedure other than in cases where there was 'parliamentary authorisation') [52] was not directing its attention to this "very special situation" [59].

    iv) By analogy to section 59 CJPA, in an application made *inter partes* to vary or discharge a warrant granted under section 28 and 28A CA 1998, the court can operate a closed material procedure in order for it to have regard to information which, for public interest reasons, is not disclosable: *Haralambous* [43].

27. It is common ground that in the light of the decision in *Haralambous* the judge's decision cannot stand insofar as he held that the proper approach upon an application to vary or set aside a warrant is that there should be "disclosure to the respondent of all of the evidence relied on by the CMA before the judge when the section 28 warrant was issued, except for sensitive material that has found to be protected by public interest immunity, which is then excluded from consideration".

The Procedural Issue

28. The judge was alive to the significance of the decisions he had reached and sought to ameliorate the consequences saying:

> "70. Of course, I recognise that this excluded material may constitute the difference between the section 28 warrant being upheld or varied/revoked. That is the consequence of an exclusionary rule of public interest immunity. I have well in mind the importance of the balance between conflicting interests described in paragraph 51 above. I consider that the risk of a warrant properly granted *ex parte* being properly set

aside on the *inter partes* hearing can (to some extent) be ameliorated, and the balance between competing interests maintained, if the following is borne in mind:

> i) Public interest immunity is not simply asserted, it is adjudicated upon pursuant to the "Bangs" procedure. That involves identifying precisely which material public interest immunity is claimed for and explaining the basis upon which public interest immunity is asserted.
>
> ii) I consider that this process of asserting and adjudicating upon claims of public interest immunity should be incorporated into the *ex parte* application for a section 28 warrant. The CMA should identify at the outset what material it contends should be redacted on public interest immunity grounds (saying why), the redactions being based on the following assumptions:
>
> > a) The *ex parte* application for a warrant in respect of a particular party is successful;
> >
> > b) The application for the warrant is executed on that particular party; and
> >
> > c) That party then seeks to challenge the granting of the warrant.
>
> iii) Such a process would not only enable the scope and extent of the protected material to be identified at an early stage – thereby facilitating a speedy challenge to the warrant, should one be made – but also would enable the CMA and the judge hearing the application to consider whether (in light of any redactions mandated by public interest immunity) the gist of the redacted material could be provided to the Respondent, without revealing sensitive material."

29. It is these observations which the CMA challenges by Ground 4 of their Grounds of Appeal. The effect of the judge's proposal is that the CMA would need to specify at the ex parte hearing what material should be redacted in the event of a challenge to the warrant. Both the court and the CMA would therefore have to make a pre-emptive assessment of whether the gist of the redacted material could be provided to the parties making the challenge. Mr Beer QC on behalf of the CMA refers the court to *Haralambous* paragraph 27:

> "But there is no suggestion, or I think likelihood, that the scheme intended the constable or magistrate at this early stage, when speed is often of the essence, to try to form a definitive view as to what the public interest might ultimately prove to require. That is an exercise which in accordance with the rules falls to be undertaken at a later stage by a magistrate under the

> procedure in the *Bangs case 178 JP 158* and/or the Crown Court under section 59 of the CJPA."

30. Mr Beer further emphasises that the court's proposal is impractical given that the sensitivity of material may vary over time. By way of example, he says; at the point of applying for a warrant, material which relates to the arrangements for inspections may be subject to PII but as soon as the warrant is executed the position may change. The scope of PII, he submits, cannot be "pre-resolved" and must be determined in connection with the challenge to the warrant.

31. I agree. In my judgment the appropriate time for the court to form a definite view as to what is protected by PII is upon an application having been made by the subject of a warrant for the warrant in question to be varied or set aside.

32. Accordingly I would allow the appeal in respect of the challenge to the procedural issue (Ground 4).

Material protected by PII – The proposed cross-appeal

33. In *R v Chief Constable of the West Midlands ex p Wiley* 1995 1AC 274, [1994] 3 WLR 433 Lord Templeman said:

> "If a document is not relevant and material it need not be disclosed and public interest immunity will not arise. In case of doubt as to relevance and materiality the directions of the court can be obtained before trial; a pre-trial conference can help to define the issues and the scope of discovery. If a document is relevant and material then it must be disclosed unless it is confidential and unless a breach of confidentiality will cause harm to the public interest which outweighs the harm to the interests of justice caused by non-disclosure. It has been said that the holder of a confidential document for which public interest immunity may be claimed is under a duty to assert the claim, leaving the court to decide whether the claim is well founded. For my part I consider that when a document is known to be relevant and material, the holder of the document should voluntarily disclose it unless he is satisfied that disclosure will cause substantial harm. If the holder is in doubt he may refer the matter to the court. If the holder decides that a document should not be disclosed then that decision can be upheld or set aside by the judge."

34. This well-established approach accords with both the duty of disclosure and the longstanding principle that it is for the court itself to adjudicate on the existence of PII, *Duncan v Cammell Laird & Co [1942] AC 624*.

35. In the Scottish House of Lords case of *Sommerville and Ors v Scottish Ministers (HM Advocate General for Scotland intervening)*[2007]1 WLR 2734 (a case which, although strictly speaking, is not binding on this court, is not one in respect of which any party in these proceedings seeks to go behind and in relation to which I would in any event accord considerable respect) it was held that the question as to whether the

withholding of material was justified by PII constraints was a matter for the judge to determine and that she could not properly perform that task without herself examining the documents in question [63, 64, 85-86, 154-157, 167, 206-207].

36. A judge, often by way of a closed material procedure, adopts a conventional approach; first, assessing the harm to the public interest which it is alleged disclosure would cause and then conducting a balancing exercise, weighing up the harm to the public interest in disclosure against the harm caused to the individual case where a litigant is to be denied access to relevant material, an exercise often known as the "Bangs" Procedure (*Commissioner of the Police of the Metropolis v Bangs* [2014] EWHC 546 .

37. Pausing there, it seems therefore that in the light of the judgments in *Haralambous* and my view in relation to the procedural issue, once the court has decided what material is protected by PII, the position so far in respect of disclosure is as follows:

    i) When considering an ex parte application made under section 28 and 28A of CA 1998 the judge can and should take into account information which cannot be disclosed to the parties.

    ii) At that stage it is not necessary for the CMA specifically to identify information in relation to which it asserts PII or for the court to make decisions in that respect.

    iii) Upon the making of an application by the subject of a warrant to vary or discharge, the court may consider any material protected by PII by way of a closed material procedure.

Confidentiality Rings

38. Mr Brealey QC on behalf of Concordia submits that that is not the end of the matter as, notwithstanding a judicial determination that certain information is protected by PII, that material can, upon an application to vary or discharge a warrant, be disclosed into a so-called confidentiality ring comprised of the external lawyers instructed on behalf of the subject of the warrant.

39. Mr Beer submits that such a proposition is unarguable. The judge's judgment was, he submits, unimpeachable in relation to this submission when made on behalf of Concordia at first instance. The judge said:

> "*(v) Confidentiality rings are not suitable for dealing with public interest immunity material*
>
> 33. In cases where public interest immunity has been established over certain documents, and where no "closed material" procedure exists, it is not desirable to seek to make this material available to the parties and to the court through a confidentiality ring. In *AHK v. Secretary of State for the Home Department*, [2013] EWHC 1426 (Admin), Ouseley J articulated three reasons why the use of a confidentiality ring was inappropriate in cases of public interest immunity material:

> *(i)* the risk of inadvertent disclosure; *(ii)* the risk, if inadvertent disclosure did take place, that the source might be unknown and suspicion might fall on the innocent; and *(iii)* the problem of how to decide who could safely be admitted to the ring, and who would have to remain outside it.
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> 34. In the earlier case of *Somerville v. Scottish Ministers*, [2007] UKHL 44, [2007] 1 WLR 2734, Lord Rodger deprecated the use of confidentiality rings in public interest immunity cases:
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> > "152. In terms of an agreement contained in a "protocol", under conditions of the strictest confidentiality, senior counsel for the petitioners was allowed to inspect the complete versions of the documents for which the Scottish Ministers were claiming public interest immunity. Although devised with the best of intentions, this procedure was, in my view, wrong in principle. As a result, it not only gave rise to very real practical difficulties but led the court to adopt a mistaken approach to the inspection of the documents by the Lord Ordinary.
> >
> > 153. If the Scottish Ministers' claim that, in the public interest, the redacted parts of the documents should not be revealed was valid, then, in normal course, it was valid against counsel for the petitioners who should therefore not have seen the full version. As it was, counsel for the petitioners was left in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with, his clients or instructing solicitors. He even felt inhibited from revealing it to the Lord Ordinary. The result was a certain paralysis in the procedure. In agreement with all of your Lordships, I am satisfied that no such procedure should be followed in future.""

40. Mr Brealey, before this court (in support of his application for permission to cross-appeal and the appeal if granted), significantly expanded his argument in relation to the use of confidentiality rings. In particular, he relies on three specific matters:

i) The statutory use of confidentiality rings in competition cases;

ii) The application of *R on the application of Mohammed v The Secretary of State for Defence (Mohammed)* [2012] EWHC 3454 (Admin) to competition cases; and

iii) The European perspective.

(i) The statutory use of confidentiality rings in competition cases

41. Mr Brealey says confidentially rings are routinely used in competition cases in respect of commercially sensitive material and could be similarly utilised in relation to

materials subject to PII. In support of this submission, he took the court to the detail of the statute giving the CMA its jurisdiction to obtain section 28 warrants.

42. The CMA is a creature of statute created by section 25 of the Enterprise and Regulatory Reform Act 2013 and replaces the Competition Commission and the Office of Fair Trading (section 26). By schedule 5 of the Enterprise and Regulatory Reform Act 2013, various amendments were made to the Enterprise Act 2002, largely to reflect the creation of the CMA in place of the Office of Fair Trading.

43. By section 5 Enterprise Act 2002 the CMA has the function of "obtaining, compiling and keeping under review information about matters relating to the carrying out of these functions." Information acquired by the CMA in connection with such functions is called "specified information" (section 238 EA 2002).

44. Section 244 sets out relevant considerations as to disclosure in relation to specified information and forms the first of Mr Brealey's building blocks in support of his contention that, in the world of competition law, confidentiality rings are not only routine, but can, and should, extend to the inclusion of information covered by PII.

45. Section 244 provides:

> "244 Specified information: considerations relevant to disclosure
>
> (1) A public authority must have regard to the following considerations before disclosing any specified information (within the meaning of section 238(1)).
>
> (2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.
>
> (3) The second consideration is the need to exclude from disclosure (so far as practicable)—
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> (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
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> (b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.
>
> (4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure."

46. Mr Brealey then took the court to a document published by the CMA in January 2014 called "Transparency and disclosure: Statements of the CMA's policy and approach". In paragraph 4.14, confidential information is identified as:

> "• information whose disclosure the CMA thinks is contrary to the public interest
>
> • commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
>
> • information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual's interests."

47. The policy goes on to consider the disclosure of information in certain circumstances but paragraph 4.23 requires the CMA to have regard to the considerations set out in section 244 (above).

48. By paragraphs 4.29, the CMA may use confidentiality rings (or data rooms) as a means of making disclosure of confidential information "while recognising the restrictive nature of the disclosure." Their use will be restricted to when it is necessary to make the disclosure for the purpose of facilitating the CMA's function by ensuring due process. The policy goes on to say:

> "4.30 Confidentiality rings enable disclosure of specific quantitative and/or qualitative data or documents to a defined group. The group is determined on a case-by-case basis but, generally, disclosure is made to the relevant parties' external (legal and/or economic) advisers."

49. Finally in support of his contention that the use of confidentiality rings can comfortably be extended to all categories of confidential information including material protected by PII, Mr Brealey, whilst acknowledging that section 237 Enterprise Act 2002 does not affect the workings of the Competition Appeal Tribunal, took the court also to paragraph 7.35 of their 2015 "Guide to Proceedings":

> "7.35 In broad terms, confidential information is information the disclosure of which would be contrary to the public interest; commercial information the disclosure of which could significantly harm the legitimate business interest of the undertaking to which it relates; or information relating to the private affairs of an individual the disclosure of which could significantly harm his or her interests: paragraph 1(2) of Schedule 4 to the 2002 Act."

50. For my part it seems to me that the context is important and it is therefore necessary also to look at that paragraph together with paragraph 7.37 which provides:

> "… the need for disclosure in the interest of fairness, on the one hand, and legitimate claims to the confidentiality of

> commercially sensitive information, on the other, may be accommodated by way of disclosure of the information into a confidentiality ring…"

51. Mr Brealey submits that these provisions/guidance confirm that competition cases should be regarded as being within their own discrete category. He suggests that PII information in the world of competition law is regarded as but one of three categories of confidential information and confidentiality rings are routinely used as a means of ensuring disclosure of confidential information.

52. For my part, Mr Brealey's use of section 244 and the policy and guidance as a basis for his global submission that PII material should be disclosed into confidentiality rings is to stretch them to breaking point. It is of significance that section 244 identifies separately (and first) the need to exclude from disclosure information contrary to public interest. Further, it seems clear to me on a proper reading of the policy and guidance documents that the (undoubtedly invaluable) use of confidentiality rings is designed to be in respect of managing sensitive commercial information and not material covered by PII.

(ii) The relevance of Moses LJ's judgment in Mohammed

53. Mr Brealey goes on to submit that support for his submission can be teased out from a number of English and European cases and that there are two strands of authority which support his proposition that, in a competition case, PII material can be disclosed into a confidentiality ring.

54. In order to substantiate such a submission he must successfully distinguish both *Somerville* and *AHK v SSHD*. In order to do so, Mr Brealey depends upon the judgment of Moses LJ sitting in the Administrative Court at first instance, in the case of *Mohammed*.

55. Moses LJ considered *Somerville* in some detail. In that case, all the potentially confidential documents were disclosed to senior counsel upon undertakings not to disclose their contents, notwithstanding the existence of PII certificates. The judge thereafter declined to examine the documents in question. The Scottish House of Lords held that the issue as to whether the withholding of the material was justified by the PII certificates, had been for the judge to determine, which could not be done absent inspection of the documents by her. Lord Mance had said:

> "203. I must start by expressing disagreement with the Inner House's view that the course adopted under the parties' protocol and endorsed by the Lord Ordinary is to be encouraged. On the contrary, in my view. It involves disclosure to another party's (here the petitioners') counsel of material which the public interest may require should not be disclosed to anyone other than the Scottish Executive. It puts counsel in an invidious and unsustainable position in relation to his or her client."

56. In *Mohammed*, Moses LJ, having reviewed *Somerville* in determining that a confidentiality ring could in certain circumstances be put in place, said as follows:

> "14. Lord Mance's speech identifies an important distinction between the procedure adopted in that case and the confidentiality ring proposed in this. In *Somerville* counsel obtained a sight of the very thing he would have been forbidden to see, were the claim to PII to be upheld. In the instant case, counsel for the claimant has not seen and will not see any documents in respect of which the claim to PII is upheld. The proposal only entails disclosure to counsel, on a confidential basis, once the court has seen the documents and heard argument as to where the balance between the public interest in immunity and in the administration of justice in the particular case lies. There is no question of pre-empting the ruling, as occurred in *Somerville*. That case was concerned with the fact that documents had been disclosed unredacted to counsel for the petitioners before the court had had any opportunity to rule whether the claim should be upheld or not. (my emphasis)
>
> 15. A confidentiality ring would only be put in place *after* the court has considered the documents in respect of which immunity is claimed. It provides an alternative to a ruling either to uphold or reject the claim. The procedure adopted in *Somerville* breached the very protection which was sought by the Executive. If a court rules in favour of a confidentiality ring, it is deciding that the public interest demands not complete immunity but rather can be protected by a more limited form of confidentiality."

57. In my judgment, with respect to Mr Brealey, the judgment of Moses LJ does not support his contention that documents in relation to which a judge has determined PII exists may thereafter be disclosed into a confidentiality ring. On the contrary, as the judge said at [14] above, "in the instant case, counsel for the claimant has not seen and will not see any documents in respect of which the claim to PII is upheld."

58. In as much as Moses LJ appeared in paragraph 15 to be advocating some form of halfway house whereby material which would without adequate protection be covered by PII might have something less than complete immunity by way of disclosure into a confidentiality ring, in my view that is no more than the judge, having carried out the appropriate balancing exercise, concluding that certain material is confidential but not subject to PII and its confidentiality can be protected by the use of a confidentiality ring.

59. Subsequently in *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin), Mr Justice Ouseley was invited to review various PII decisions that he had made in that case in the light of Moses LJ's judgment in *Mohammed*. Ouseley J was asked to consider whether certain material could be released to the lawyers subject to undertakings as to disclosure by way of a ring of confidentiality.

60. Mr Justice Ouseley set out his reasons for disagreeing with Moses LJ's view on such a ring [23 to 26] which can be summarised as follows:

    a) The risk of inadvertent disclosure;

b) The risk that if disclosure took place the source would be unknown and suspicion would fall on the innocent; and

c) The difficulty in deciding who would be safe in the ring.

61. Ouseley J went on to say as follows:

> "27 Mr Eadie's skeleton argument made powerful and to my mind unanswerable points about the intense problems which a lawyer only ring would cause. He pointed out that this practice has been disapproved in strong terms in the House of Lords in *Somerville v Scottish Ministers* 2007 1 WLR 273 4 at paragraphs 152-3, Lord Roger and paragraphs 203, 204 Lord Mance. The problems created between client and lawyer are very serious."

62. Finally, *Haralambous* was, of course, itself about the use of PII material. As outlined above, their Lordships approved a procedure whereby, PII having been established, the material could be considered by the judge for the purposes of the application to set aside or vary the warrant by way of a closed material procedure; a process which necessarily excludes the subject of the warrant and their representatives.

iii) The European Perspective

63. Mr Brealey however goes on to say that further support for his contention can be found in *National Grid plc v ABB Ltd* [2012] EWHC 869 (Ch) and the Court of Justice of the European Union ("CJEU") case of *Pfleiderer AG v Bundeskartellamt* [2011] UCR 5161.

64. Concordia relies on these two authorities in support of a submission that, as the CJEU has ruled that confidentiality rings may be used to protect the confidentiality of leniency material, that approach should be used in the present context.

65. In *Pfleiderer*, the CJEU was asked to rule on the lawfulness of a decision of a national competition authority denying a claimant access to documents relating to a leniency application. The CJEU ruled that in the absence of EU legislation setting out common rules relating to disclosure of leniency documents, it fell to national courts to apply their own rules of disclosure. In doing so, national courts had to have regard to the fact that leniency programmes were useful tools in uncovering and bringing to an end infringements of competition law and that these programmes would be compromised if documents relating to leniency programmes were disclosed to those wishing to bring an action for damages. The CJEU went on to hold that EU law did not preclude a person who had been adversely affected by an infringement of EU competition law, and was seeking damages arising from that infringement, from being granted access to documents relating to a leniency procedure involving the perpetrator of the infringement. It was, however, for the national courts to determine the conditions under which such access was to be permitted or denied by weighing up the interests protected by EU law.

66. When the CMA uses leniency material to apply for a warrant, submits Mr Beer, it necessarily follows that the infringement in question remains under investigation and

indeed, the investigation will usually be at its very earliest stages. This, he submits, is in contrast to the authorities upon which Concordia relies. *Pfleiderer* concerns the use which may be made of commission leniency material in the context of civil damages claims which arise out of and are based on a final infringement decision on the commission. Such claims, he says, are of a necessity, made after the relevant investigation has been completed. Mr Beer goes on to point out that in the *National Grid* case, the relevant application for disclosure was made in 2012, some five years following the relevant decision.

67. Mr Beer goes on to submit that under ordinary PII principles, there is a clear distinction to be drawn between the need to protect investigative materials whilst the investigation is ongoing and a decision pending, and the way in which evidence should be treated after an infringement decision has been made and the investigation is complete. In support of this proposition, he refers to Lord Mance's judgment in *Haralambous:*

> "31…Lord Wilberforce went on to note, with reference to a statement by Lord Reid in *Conway v Rimmer*…that, after a verdict or a decision not to take proceedings, "there is not the same need for secrecy… and "the immunity which exists at the stage of initial investigation will lapse" ... However, where, at the stage which the present investigation has reached (pending the outcome of the present appeal), it is accepted that there is a current and continuing public interest in withholding information relied on for the issue of the warrant, that qualification has no application. The interests of other investigations, current or future, may also require the withholding of information in some circumstances."

68. Mr Beer submits that whilst the CJEU did not consider the application of English PII principles, a ruling that there be controlled disclosure of leniency material after the relevant investigation is complete is broadly consistent with those principles. In *National Grid*, Mr Justice Roth, considering the application of *Pfleiderer* to the case before him, said:

> "30. *Pfleiderer* requires the court to conduct a balancing exercise, weighing the interest in disclosure as against the need to protect an effective leniency programme. This is not an easy exercise because the considerations that apply on the two sides are of a very different character, although it has similarities to the task of the court where a claim to public interest immunity is raised…Here, the ECJ makes clear that this is to be done on a case-by-case basis, "taking into account all the relevant factors in the case"."

69. In *National Grid*, Mr Justice Roth was primarily concerned with the dissemination of the European Commission's decision in Case Comp F38.899-*Gas Insulated Switch Gear (The Decision)*. The applications before the court related to a subsequent damages claim made by NGET, who own and maintain the high voltage electricity system in England and Wales and who, it was alleged, suffered substantial losses as a consequence of the overcharging that had resulted from an illegal cartel. The judge

made a series of rulings in a decision which ran to 552 paragraphs with two annexes. In relation to redactions made on the grounds of commercial confidentiality, the judge held that those concerns regarding the sensitive commercial information (in my view in accordance with standard competition practice) were met by disclosure into confidentiality rings [57]. In relation to documents other than *The Decision*, the judge, having examined the documents, concluded that only very limited passages should be disclosed. Finally, in relation to the balance of the leniency materials, Mr Justice Roth said:

> "59… As regards all the other ABB leniency materials, including the responses by ABB to the SO, and the other parts of the Areva document, I find that they are not of such relevance to these proceedings and that the interest of protecting information supplied under the leniency programme outweighs the interest of providing disclosure to assist this compensation claim."

70. In my judgment therefore the decision in *National Grid* is substantially supportive of the approach advocated by Mr Beer, namely:

i) Documents, including leniency materials, which may properly be regarded as protected by PII at the investigation stage may, but will not inevitably, continue to be entitled to such immunity at the conclusion of an investigation when the interest of protecting the information may or may not outweigh the interest of providing disclosure in a compensation claim.

ii) Public interest is but one form of confidential document, commercially sensitive and private information being two other such categories. As has been accepted by Mr Beer, there is no reason why in an appropriate case the latter two forms of confidential information should not be disclosed into a confidentiality ring.

iii) All applications for disclosure are conducted on a case by case basis and are fact sensitive to the particular proceedings.

Discussion and Conclusion

71. In my judgment, nothing in Mr Brealey's carefully constructed arguments is capable, individually or cumulatively, of undermining the fundamental principle that once a court has held that material is protected by PII it cannot be disclosed, whether into a confidentiality ring or otherwise.

72. In reaching this conclusion I have in mind the fact that under ordinary PII principles, there is a clear distinction to be drawn between the need to protect investigative materials whilst an investigation is ongoing and a decision pending and the way in which evidence should be treated after an infringement decision has been made and the investigation is complete (see *Haralambous [31]*).

73. Further, Lord Mance specifically considered the situation where a court is concerned, as here, with the issue of a warrant authorising a search of premises and the seizure of documents saying:

> "64. The issue of a warrant authorising a search of premises and seizure of documents involves a short-term invasion of property. Such a warrant is, as I have pointed out, not specifically directed at, or necessarily even linked with, anyone occupying the premises or having any proprietary or possessory interest in the documents. Save that the taking of documents for so long as is required for the limited purposes of an investigation necessarily affects possession, such a warrant does not affect the substantive position of anyone who does occupy the premises or have any proprietary, possessory or other interest in any documents found therein. All it may do is provide information, and maybe direct evidence, of potential use in a current investigation into an indictable offence which the magistrate or Crown Court is satisfied that there are reasonable grounds for believing has been committed. If the investigation leads to criminal proceedings, any person affected will enjoy all the normal safeguards. Subject to any PII ruling in the conventional sense (in which case the material will not be disclosed or used at trial), there will be full disclosure. ….
>
> 65. In my judgment, it cannot be axiomatic in this context that even the gist of the relevant information must be supplied to any person (such as the occupier or some other person claiming some proprietary, possessory or other interest in the documents) claiming to be affected by, and wishing to object to, the warrant or the search and seizure. Every case must of course be considered in the light of its particular circumstances. ….

74. In my view, the use of a confidentiality ring in competition cases, and specifically in relation to the obtaining and challenging of warrants, has no place in relation to material protected by PII for all the reasons articulated in *Somerville* and *AHK v SSHD*. The use of confidentiality rings is limited to the protection of commercially sensitive information as provided for in section 244 CA 1998 and the January 2014 Transparency and disclosure statement. It follows that, upon an application to vary or revoke a section 28 CA 1998 warrant, the relevant PII material will be scrutinised by the judge by way of a closed material procedure from which the target of the warrant and their advisors are excluded.

75. Both Mr Beer and Mr Brealey have alluded to the possibility of special advocates being appointed as an alternative to a confidentiality ring. Neither side have developed their arguments in this regard, I would therefore highlight only that, whilst a Court dealing with a substantive challenge to a warrant might appoint a special advocate it:

> "...will always be exceptional, never automatic; a course of last and never first resort"

H v H [2004] 2 AC 134 at [22] *per* Lord Bingham.

76. I would therefore allow the appellant's appeal.

77. I would grant Concordia's application for an extension of time to file their cross appeal, grant them permission to appeal but, for the reasons given, dismiss the cross appeal.

Lord Justice Simon

78. I agree.

Dame Elizabeth Gloster

79. I also agree.