



Neutral Citation Number: [2019] EWHC 47 (Ch)

Claim No: CP-2017-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 16 January 2019

Before :

THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

**THE COMPETITION AND MARKETS
AUTHORITY**

Claimant

- and -

**CONCORDIA INTERNATIONAL RX (UK)
LIMITED**

Defendant

**Mr Jason Beer, QC, Mr Rob Williams and Ms Charlotte Ventham (instructed by The
Competition and Markets Authority) for the Claimant**
**Mr Mark Brealey, QC (instructed by Morgan, Lewis and Bockius UK LLP) for the
Defendant**

Hearing date: 19 December 2018

Approved Judgment
(Open)

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. On 5 October 2017, the Competition and Markets Authority (“CMA”) applied to Mann J for warrants under section 28 of the Competition Act 1998 against, amongst others, the Defendant, Concordia International Rx (UK) Limited (“Concordia”). The application was made by the CMA without notice and in private: this is the default procedure laid down in a practice direction (the “Practice Direction”) that in part governs the making of such applications.
2. The application was supported by certain confidential material. This is entirely usual in such applications. After hearing submissions from the CMA, and considering the evidence, Mann J granted various section 28 warrants, including a warrant against Concordia (the “Warrant”).
3. The Warrant applied to documents relating to an investigation into suspected anti-competitive behaviours in relation to a number of pharmaceutical drugs (described in the Warrant as “relevant products”). The relevant products – set out in Annex A to the Warrant – included:
 - (1) Carbimazole 5mg and 20mg tablets (“Carbimazole”); and
 - (2) Hydrocortisone 10mg tablets (“Hydrocortisone”).
4. By an application notice dated 10 October 2017, Concordia applied to have the Warrant discharged to the extent that it applied to Carbimazole and Hydrocortisone. Concordia does not seek to have the Warrant discharged in relation to any other relevant products.
5. This Judgment determines that application. It does so pursuant to a process described in my judgment of 12 December 2018 ([2018] EWHC 3448 (Ch)), whereby I have taken into account in a “closed material procedure” certain material, protected by public interest immunity (“PII” and “PII Material”), that was before Mann J on the *ex parte* hearing in October 2017.
6. Although the use of a “closed material procedure” in cases such as this has been the subject of detailed consideration both in these proceedings¹ and in the Supreme Court,² other aspects of the procedure whereby section 28 warrants are to be challenged has received only incidental consideration. Before considering the substance of Concordia’s application, it is necessary to consider what that procedure entails.

B. THE PROCEDURE FOR DISCHARGING OR VARYING A WARRANT

7. Where a warrant is granted, the Practice Direction provides for a process whereby the warrant may be varied or discharged:

¹ *The Competition and Market Authority v. Concordia International Rx (UK) Limited* [2017] EWHC 2911 (Ch) and [2018] EWCA Civ 1881.

² *R (Haralambous) v. Crown Court at St Albans* [2018] UKSC 1 (“*Haralambous*”).

“Application to vary or discharge warrant

- 9.1 The occupier or person in charge of premises in relation to which a warrant has been issued may apply to vary or discharge the warrant.
 - 9.2 An application under paragraph 9.1 to stop a warrant from being executed must be made immediately upon the warrant being served.
 - 9.3 A person applying to vary or discharge a warrant must first inform the named officer that he is making the application.
 - 9.4 The application should be made to the judge who issued the warrant, or, if he is not available, to another High Court Judge.”
8. Neither the Competition Act 1998 nor the Practice Direction gives any guidance or lays down any procedure for the hearing of applications to vary or discharge a warrant granted pursuant to section 28. As I noted in paragraph 6 above, although the “closed material procedure” has been considered in the courts, other aspects of the procedure whereby a warrant may be challenged have only been considered incidentally.
 9. Whilst the question of whether a “closed material procedure” could be used remained at large, the CMA’s position was that a section 28 warrant granted to the CMA remained valid until quashed. The CMA contended that if there was no “closed material procedure” available in these cases, then the CMA must be presumed to have acted lawfully in executing the warrant unless and until the party the subject of the warrant could provide reasons to the contrary. In this way, the granting of the warrant could be reviewed – albeit in a limited way – without disclosing the PII Material that was deployed on the *ex parte* application for the warrant.
 10. This approach – deriving from a series of cases beginning with *Inland Revenue Commissioners v. Rossminster Ltd*³ – was considered by the Supreme Court in *Haralambous* at [48]:

“The approach taken in *Rossminster* was therefore (i) to treat the onus as being on the applicant for judicial review to establish that the warrant should be quashed and (ii) to treat the applicant as unable to satisfy this onus, in circumstances where the original decision-maker had access to material withheld on public interest grounds from the person affected seeking judicial review; (iii) this result followed from the application of the maxim *omnia praesumuntur rite esse acta*.”
 11. The Supreme Court considered the *Rossminster* approach to be unattractive “in that it is in some circumstances capable of depriving judicial review of any real teeth”.⁴ The Supreme Court considered that it was undesirable to create a mismatch between the material before the judge considering whether a warrant should be granted *ex parte* and the material before the judge reviewing that decision.⁵ The Supreme Court ensured that there was no such mismatch, even in a case involving PII Material, by holding that any review of the granting of a warrant, where that warrant had originally been granted after

³ [1980] 1 AC 952.

⁴ At [52].

⁵ At [52].

consideration of PII Material, “can and must accommodate a closed material procedure”.⁶

12. I considered – albeit for a different purpose⁷ – the nature of the application to vary or discharge a section 28 warrant in my earlier judgment in these proceedings. There, I drew an analogy with the return date for injunctions obtained *ex parte*.⁸ In its written submissions to me, Concordia contended that the analysis contained in my earlier judgment was correct. In its written submissions, the CMA drew a limited analogy to the process whereby an order permitting service out of the jurisdiction is challenged.⁹ In light of the decisions of the Court of Appeal and the Supreme Court, it seems to me that the process whereby an order permitting service out of the jurisdiction is challenged constitutes a good starting point for an analysis of the present jurisdiction more generally. That is the starting point that I propose to adopt. But, I stress, it is only that – a starting point, which must be adjusted in light of the specific process before me.

13. The process whereby an order permitting service out of the jurisdiction can be challenged was considered in *Microsoft Mobile Oy Ltd v. Sony Europe Limited*:¹⁰

91. If a party served pursuant to such an order is minded to challenge it, this will be done on the *inter partes* return date of the applicant’s original *ex parte* application for permission to serve out of the jurisdiction. At this point, the court will reconsider, and decide *de novo*, by way of rehearing, whether permission to serve out should be given. It is for the party seeking to serve out – Microsoft Mobile – to demonstrate that this is a proper case for service out. The position is clearly explained in Briggs, *Civil Jurisdiction and Judgments*, 6th ed. (2015) (hereafter “Briggs”) at p.460:

“The application is made without the opponent’s being notified that it is being made; the court will almost always grant permission unless there is a very obvious flaw in the application. If permission is granted, as in practice it almost always is, and service is effected in accordance with it, the defendant may dispute the jurisdiction by challenging the order which granted permission, and the service which was made pursuant to it, by applying under CPR Part 11. The *inter partes* procedure which then follows marks the point in the process at which the court will investigate whether permission to serve should have been granted. **The fact that permission was granted to the claimant in the first place is largely irrelevant at this point: it leaves no footprint; no onus is placed upon the defendant who applies to have the permission set aside; the application is in effect a rehearing of an application for permission, with the onus lying on the party who needed the permission in the first place.** The court is not inhibited from discharging or varying the order, and for which the claimant now in substance (if not in form) reapplies, by reason of the fact that it has already been made.”

92. However, the question on the re-hearing is whether it was proper to grant permission on the date upon which the order to serve out was granted, not (in the light of changed circumstances or fresh evidence) whether it would be right to grant it as at the time of

⁶ At [59].

⁷ I was dealing with the CMA’s contention that the *Rossminster* process ought to apply.

⁸ [2017] EWHC 2911 (Ch) at [37] to [45]

⁹ CMA’s supplemental submissions at [4]. The analogy was limited to the point in time at which the decision should be assessed.

¹⁰ [2017] EWHC 374 (Ch).

the *inter partes* application. In *ISC Technologies Ltd v. Guerin* [1992] 2 Lloyd's Rep. 430 at 434, Hoffmann J. stated:

“Mr. Crystal said I should look at the position today. An application under R.S.C. O.12, r.8 is a rehearing of the application to the Master and the exercise of a fresh discretion. It should therefore take into account whatever has since happened. I do not agree. The application is under R.S.C. O.12, r.8(1)(c) to discharge the Master's order giving leave to serve out. **The question is therefore whether that order was rightly made at the time it was made. Of course, the court can receive evidence which was not before the Master and subsequent events may throw light upon what should have been relevant considerations at the time. But I do not think that leave which was rightly given should be discharged simply because circumstances have changed. That would mean that different answers could be given depending upon how long it took before the application came on to be heard.** The position is quite different when the application is for a stay on grounds of forum non conveniens. In such a case, the appropriate time to consider the matter is the date of the hearing.”

93. As Evans L.J. noted in *Mohammed v. Bank of Kuwait and the Middle East KSC* [1994] 1 WLR 1483 at 1492, “[t]he question for the court is whether the evidence in support of the application justifies the order which is applied for being made. The evidence may be produced then or subsequently, but it must be directed at the situation at the date when the application is made.””
14. I recognise that analogies, even apt ones, cannot be pressed too far. The section 28 procedure for obtaining a warrant is far more rigorous than Professor Briggs suggests the service out process to be. Furthermore, the challenge to a section 28 warrant is, according to the express terms of the Practice Direction, an application “to vary or discharge the warrant”,¹¹ which clearly implies not a re-hearing of the application *de novo* but a review of the original, *ex parte*, decision.
15. Recognising that analogies are not perfect, I consider that the procedure to vary or discharge a warrant contained in the Practice Direction operates in the following way:
- (1) The process involves not a *de novo* re-hearing of the original application, but an “on the merits” review of the decision made on the occasion of the *ex parte* application. The review is not a judicial review. Thus, on an application under paragraph 9.1 of the Practice Direction, the question is not whether the *ex parte* decision should be set aside on judicial review grounds, but whether that decision was correct on the merits.
 - (2) Because the application to vary or discharge the warrant is made by the subject of the warrant (and not by the CMA) it is incumbent upon the applicant to articulate why the warrant should be varied or discharged. That said, given the intrusive nature of the warrant and the fact that the warrant will likely have been obtained on the basis of at least some PII Material, the judge should be astute to consider whether the statutory tests for the grant of the warrant have been met and the CMA, so far as such PII Material is concerned, will owe a duty of full and frank disclosure to the court in relation to such material. Clearly, where the applicant cannot press a point because it has not seen the relevant material, justice and the “closed material process” require the CMA and the court to take up this burden.

¹¹ Paragraph 9.1 of the Practice Direction.

- (3) A section 28 warrant may be granted in three types of case:
- (a) A “Section 28(1)(a) Case”, where there are reasonable grounds for suspecting that documents required to be produced pursuant to sections 26 and/or 27 of the Competition Act 1998 have not been produced.
 - (b) A “Section 28(1)(b) Case”, where there are reasonable grounds for suspecting that:
 - (i) There are, on business premises, documents that would be responsive to a section 26 production demand;
 - (ii) But that, if such a demand were made, they would not be produced, but would be concealed, removed, tampered with or destroyed.
 - (c) A “Section 28(1)(c) Case”, where there has been a thwarted attempt to enter premises pursuant to section 27.
- (4) In each case, the question is whether the statutory tests for the making of a warrant have been met as at the time of application to the judge. It follows that the question before the court – just as in service out cases – is whether the order originally made was correctly made at the time. In consequence, the material originally before the judge on the making of the application will be critical when reviewing the judge’s decision. That is not to say that the applicant cannot adduce further evidence. But any new evidence must go to the correctness of the decision originally made. New evidence cannot be adduced to suggest that events subsequent to the original decision show that the original decision was wrong.

16. In light of these principles, I turn to the application made by Concordia.

C. CONCORDIA’S APPLICATION TO VARY OR DISCHARGE THE WARRANT

(1) Concordia’s application

17. The Warrant was granted pursuant to section 28(1)(b) of the Competition Act 1998: it was a Section 28(1)(b) Case. Concordia’s challenge was based on the second statutory requirement: it was contended that there were no reasonable grounds for suspecting that – if a section 26 production demand was made – documents would not be produced, but would be concealed, removed, tampered with or destroyed.

(2) Background

18. In order to understand the basis for Concordia’s contention, it is necessary to set out some of the background:

- (1) CMA investigations into both Carbimazole and Hydrocortisone had been on-going since early 2016. The focus of the investigations was a suspicion of market-sharing in relation to the supply of these drugs.
- (2) During the course of these investigations, various section 26 notices, requiring (amongst other things) the production of documents were issued by the CMA to Concordia. Not only do section 26 notices require the production of information,

but (as a corollary) the subject of the notice must not (amongst other things) dispose of, falsify or conceal a document falling within the ambit of the notice.

- (3) As is often the case with section 26 notices, the CMA negotiated a document retrieval methodology with Concordia's solicitors, then Messrs Clifford Chance. Pursuant to that methodology, specific types of document (notably emails) of 11 specific custodians were searched, and a considerable volume of documentation was produced. The precise details of the retrieval methodology do not matter. What is important to note is that the methodology was limited both as to type of document searched and as to the custodians whose documents were searched.

(3) The relevant materials

19. It was in these circumstances that the CMA applied for the Warrant. The documents that are relevant for the purposes of this application are as follows:

- (1) The first affidavit of Ms Ann Pope, the Senior Director for Anti-Trust Enforcement in the CMA, sworn on 29 September 2017 ("Pope 1"). Pope 1 attached one exhibit ("Pope 1 Exhibit").
 - (2) The first affidavit of Mr Andrew Groves, a Director in the Competition, Consumer and Markets Group in the Enforcement Directorate of the CMA, sworn 29 September 2017 ("Groves 1"). Groves 1 attached one exhibit ("Groves 1 Exhibit").
 - (3) The first affidavit of Ms Susan Oxley, Project Director, Competition, Consumer and Markets Group at the CMA, sworn 29 September 2017 ("Oxley 1"). Oxley 1 attached one exhibit ("Oxley 1 Exhibit").
 - (4) The first affidavit of Ms Claudia Berg, Senior Legal Director at the CMA, sworn 29 September 2017 ("Berg 1"). Berg 1 attached one exhibit ("Berg 1 Exhibit").
 - (5) The CMA's skeleton argument in support of its application for the Warrant before Mann J (the "CMA Skeleton").
 - (6) A transcript of the *ex parte* hearing before Mann J on 5 October 2017 (the "Transcript").
 - (7) The judgment of Mann J – Neutral Citation [2017] EWHC 2577 (Ch) – in which he determined the CMA's application.
20. The four affidavits – Pope 1, Groves 1, Oxley 1 and Berg 1 – together with their exhibits and the CMA Skeleton were the materials before Mann J on 5 October 2017. He heard the submissions recorded in the Transcript, after which he gave an *ex tempore* judgment.
21. Although all of the materials contained some redactions on the grounds of PII, some of these redactions were removed as a result of my ruling of 12 December 2018 ([2018] EWHC 3448 (Ch)).¹² However, the bulk of the redactions related to Berg 1 and the Berg 1 Exhibit. These redactions I considered to be properly protected by PII and could not be disclosed to Concordia in these proceedings.¹³ To the extent that this evidence needed to

¹² See [33(1)] of my judgment.

¹³ See [33(2)] of my judgment.

be considered for the purposes of this application – and I say now, this evidence was very material to the application – it had to be considered in a “closed material process”.

(4) The *ex tempore* judgment of Mann J

22. The relevant parts of Mann J’s judgment are as follow (emphasis added):

“3. Without enumerating all, or indeed any, of the evidence which has been placed before me, I am satisfied that on the evidence which was placed before me, that the CMA is entitled to carry out its investigation and to seek the documents that it seeks. I am satisfied that it is entitled to a warrant to enter the premises – both business and domestic – in order to secure the documents in question. I am satisfied that there are reasonable grounds for suspecting that if the undertakings concerned were given notice of the requirement to produce documents, there would be a risk of destruction and tampering within the two sections.

4. That conclusion as to the suspicion of risk to the documents arises notwithstanding two factors, which I have borne permanently in mind. The first is that, to an extent, at least two of the undertakings would have had notice of the interest of the CMA in their activities, because the CMA has engaged with those undertakings via notices and objections, and the like. **However, those notices were focussed on different types of abuse from those which now primarily concern the CMA and which are used to support the application made to me.** A canny operator in those firms may well by now have realised that the CMA was interested and there is a real possibility that if they behave as nefariously as the CMA fears they will become a destroyer of evidence. Nonetheless, the flagging of the interest in the **other potential abuses** is not sufficient to require the conclusion that whilst there once might have been suspicion of risk of destruction, there no longer can be because the undertakings will have long ago destroyed the incriminating material. I am satisfied there is still a proper degree of likelihood that the documents still exist on the business premises and elsewhere, and that there is a risk of destruction were the CMA to give notice of its intentions and views in advance of securing the documentary material in question. By documents, I mean, of course, both hard copy documents and documents held in digital form”.

The second factor that Mann J bore in mind – considered in paragraph 5 of his judgment – is immaterial for present purposes.

(5) Concordia’s contentions

23. Concordia contends that Mann J’s reference to “different types of abuse” and “other potential abuses” betrayed a material misunderstanding of the situation, such that the Warrant so far as Carbimazole and Hydrocortisone are concerned must be discharged or varied. Concordia say that, so far as Carbimazole and Hydrocortisone are concerned, the CMA was only ever investigating one type of abuse and that it had issued section 26 notices in furtherance of that investigation. The suggestion that different types of abuse were involved might have led the Judge to consider that one reason for granting the Warrant under section 28 was that it was targeted at different documents.

24. Since, before me, the CMA disavowed any suggestion that different types of abuse or other potential abuses were the reason for the Warrant, one can readily understand Concordia’s point. Clearly, if the ambit of the (later) section 28 Warrant is wider than or different to the earlier section 26 notices, the force of the point that Concordia was pre-warned of the CMA’s interest diminishes. Conversely, if the ambit of the section 26

notice is the same as the later section 28 Warrant, then the documents falling within the scope of the notices are protected by the obligation not to dispose of or conceal these documents.¹⁴ The CMA would have to contend that Concordia had deliberately withheld documents covered by the section 26 notices, which could then only be recovered under section 28.

25. To an extent, because of the PII Material that it did not see, Concordia was inhibited (quite understandably) in precisely how to formulate this argument. Having seen this material, I do not suffer from this disadvantage, and it seems to me appropriate – given the “closed material procedure” that I should seek to frame Concordia’s point as cogently as the evidence permits. It seems to me that Concordia’s essential point was that the application to Mann J should have been framed as a Section 28(1)(a) Case and not (as it was framed) a Section 28(1)(b) Case.¹⁵
26. That would have required the CMA to identify reasonable grounds to suspect non-compliance with the section 26 notices that had been issued by the CMA previously. The CMA identified no such grounds before Mann J. This leads on to Concordia’s second point, which is that the CMA failed properly to bring to Mann J’s attention the extent of Concordia’s compliance with the document retrieval methodology that had been agreed between it and Concordia.¹⁶

(6) Analysis

27. Having reviewed all of the material that was before Mann J, I do not consider Concordia’s contentions to be well-founded. I have reached that conclusion because of the PII Material that Concordia has not seen.
28. I consider that I am able to articulate in an open judgment why it is that Concordia’s application must be dismissed. The following paragraphs make points in relation to the PII Material without compromising that material.¹⁷ A draft of this Judgment was shown to the CMA before circulation to Concordia so that I might have the CMA’s assurance that it was satisfied that the PII material would not be compromised by the open publication of this Judgment, and I have received that assurance.
29. The CMA’s investigations into Carbimazole and Hydrocortisone inevitably had a certain focus. In other words, within the scope of investigations it had commenced, the CMA pursued certain lines of inquiry or focussed on certain specific matters. These lines of inquiry or areas of focus resulted in the section 26 notices that I have described¹⁸ and caused the CMA to consider the scope of the document retrieval methodology to be appropriate.

¹⁴ See paragraph 17 above.

¹⁵ See paragraph 15(3) above.

¹⁶ See paragraph 18 above.

¹⁷ For convenience, and to show my reasoning, I reference the relevant parts of the PII Material, without quoting from it. The PII protecting the material obviously continues to stand, notwithstanding such references.

¹⁸ See paragraph 18 above.

30. The CMA then received the material described in Berg 1 and the Berg 1 Exhibit. This material has been redacted on PII grounds that I have found to be proper. As a result of this material:

- (1) The CMA's lines of inquiry or areas of focus shifted.¹⁹
- (2) The CMA came to appreciate that the scope of the document retrieval methodology was no longer appropriate both in terms of the type of document reviewed and the range of custodians. I find that the CMA was entitled to conclude that the document retrieval methodology was too narrow in terms of the type of document being reviewed²⁰ and wrongly focussed in terms of the custodians.²¹

31. These points were clearly made in Groves 1 at paragraphs 84 and 85. In particular, Mr Groves stated (at paragraph 84):

“The CMA's investigation has progressed since Concordia provided its response to the CMA's requests. The CMA now considers that Concordia's response was incomplete, and suspects that as a result, there remain documents relevant to the Investigation on Concordia's premises, which have not yet been provided by the CMA. Specifically, the CMA now understands that the methodology proposed by Concordia is likely to have resulted in the following material omissions of relevant documents...”

These potential omissions were then spelt out.

32. I find that the CMA was entitled to conclude that there were reasonable grounds for suspecting that there were, on Concordia's premises, documents that were not responsive to the document retrieval methodology that would fall with the ambit of the section 28 warrant that it sought. Accordingly, the first requirement to establish a Section 28(1)(b) Case was made out. Equally, this clearly was not (despite the previous section 26 notices) a Section 28(1)(a) case: there is no suggestion that Concordia had not complied with the terms of the document retrieval methodology.

33. Of course, the limits to the document retrieval methodology might have been agreed entirely innocently by Concordia. However, there were certainly reasonable grounds for suspecting that the search limits had been framed with a view to ensuring that certain types of document and certain custodians were excluded from the search. Paragraph 20 of Berg 1 states:

“Overall, if the information obtained by the CMA is correct, it is reasonable to suspect that the relevant personnel at Concordia who were responsible for managing the response to the CMA's section 26 notices ought to have know that Concordia's response to the CMA's section 26 Notice was incomplete. That said, I am aware that Concordia would argue that it has fully cooperated to date and that it facilitated the CMA's investigation by assisting the preservation/imaging of the relevant parts of its IT infrastructure by way of imaging in the liothyronine, fusidic acid and carbimazole excessive and unfair pricing investigation (“Project Forest”). Moreover, some (although not all) of the individuals that the CMA considers were omitted in Concordia's

¹⁹ **PII Material** Berg Exhibit 1/tab 2/paras 13 and 14.

²⁰ **PII Material** Berg Exhibit 1/tab 3/paras 18, 19, 20 and 23.

²¹ The custodians are described in paragraph 79 of Groves 1. Compare **PII Material** Berg Exhibit 1/tab 3/paras 10 and 12.

response in relation to hydrocortisone were later included in the documents produced by Concordia in relation to Project Forest.”

34. If that is right – and I consider there were reasonable grounds for this suspicion – then a (further) section 26 notice requesting production of the very documents deliberately omitted from the scope of the document retrieval methodology might very well provoke concealment of, removal of, tampering with or destruction of these very documents. That point is made in paragraphs 100 to 104 of Groves 1, and I find that there were reasonable grounds to suspect that the second limb of section 28(1)(b) was satisfied.

D. CONCLUSION

35. For the reasons I have given, Concordia’s application must fail. Whilst I can see why Concordia was concerned by the reference to new and different abuses in paragraph 4 of the judgment of Mann J, it is clear that Mann J was using the term “abuse” in a non-technical way. He was not referring to the “abuse” being investigated by the CMA – as I have said, that abuse always remained the same – but rather to the shift in focus caused to the CMA’s investigation by the information described in Berg 1 and the Berg 1 Exhibit. That, as it seems to me, is an entirely understandable use of the term “abuse”.