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Case Nos: 1611/13/12/2023 (W)

1612/13/12/2023 (W)

1613/13/12/2023 (W)

1614/13/12/2023 (W)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

12 October 2023

Before:

SIR MARCUS SMITH
(President)
THE HONOURABLE LORD ERICHT
PROFESSOR RACHAEL MULHERON

Sitting as a Tribunal in England and Wales for Case Nos. 1611/13/12/2023 (W) and
1614/13/12/2023 (W)

Sitting as a Tribunal in Scotland for Case Nos. 1612/13/12/2023 (W)
and 1613/13/12/2023 (W)

BETWEEN:

THE COMPETITION AND MARKETS AUTHORITY

Claimant

- v -

ANOTHER

Defendant(s)

JUDGMENT (APPLICATION FOR WARRANTS)

APPEARANCES

David Bailey and Graham Middleton (instructed by Competition and Markets Authority) appeared on behalf of the Competition and Markets Authority.

Note: Excisions in this Judgment (marked “[...][~~]”)~~ relate to confidential information.

A. INTRODUCTION

1. This is an application for a warrant permitting the Competition and Markets Authority (the “CMA”) to enter and search business and domestic premises for the purposes of an investigation under section 25 of the Competition Act 1998.
2. The application is brought *ex parte* and without notice for reasons that are well-known and entrenched in the relevant law and practice. For obvious reasons, the application was heard in private.
3. This is an *ex tempore* ruling on the application, and it is necessarily short because we began sitting at 5:00pm on 12 October 2023, and the CMA needs a warrant tonight or tomorrow [X].
4. Accordingly, we take as read the very helpful and detailed written submissions of Mr Bailey on behalf of the CMA (“CMA Skeleton”) and the evidence in the form of one affidavit and one witness statement of Ms Deborah Wilkie, the Director of Cartel Enforcement at the CMA (“Wilkie 1” and “Wilkie 2”). Where we accept a submission or point by the CMA we will simply say so, and our reasons will be as per the submissions and evidence of the CMA. This Ruling will provide broad, essential, background, and focus on those (limited) areas where we explored certain aspects of the CMA’s application with Mr Bailey in order to satisfy ourselves on certain aspects of the application.
5. Section 25, as is well-known, empowers the CMA to conduct investigations into suspected infringements of the Chapter I and Chapter II prohibitions articulated under the 1998 Act.
6. In support of this power of investigation, the CMA has a number of powers to obtain information and evidence in connection with a section 25 investigation.
7. These powers are enumerated in CMA Skeleton/[61], and it is unnecessary to list all of them. We are concerned with sections 28 and 28A. These sections enable the CMA to apply to the High Court or (as here) the Tribunal for the issue of a warrant, giving the CMA the power to enter business or domestic

premises, in order to obtain information and evidence – including “documents”, widely defined (see, eg, section 59(1) of the Act; CMA Skeleton/[62]).

8. There are three cases where the CMA may apply for, and the Tribunal may grant, a warrant under these sections. Only the third case is relevant here and its substance is set out below. We have inserted numbering to assist the parsing of the relevant provisions:

The Tribunal may issue a warrant it is satisfied ^[1] that there are reasonable grounds for suspecting ^[2]

(i) that there are on the premises (business or domestic, as the case may be) documents which the CMA has power under section 26 to require to be produced ^[3]

(ii) where, if those documents were required to be produced, they would not be produced, but would be concealed, removed, tampered with or destroyed. ^[4]

9. These provisions – self-evidently – need to be carefully policed, and CMA Skeleton/[65] carefully articulates the intrusive nature of these powers, even as regards business premises. The position is, of course, *a fortiori*, in the case of domestic premises.
10. We turn to this application. We make some general points first. For reasons that it is unnecessary to explain – but which have nothing to do with the efforts of either the Tribunal or its sponsoring department – the Tribunal’s rules do not make specific provision for the issuing of warrants, although the jurisdiction exists in primary legislation. The application has been dealt with under Rule 115 of the Competition Appeal Tribunal Rules 2015 (the “Rules”), which is a general provision. More specifically, the Tribunal has directed that the application track as closely as possible the rules in England and Wales (so far as premises in England and Wales are concerned) and the rules in Scotland (so far as premises in Scotland are concerned).
11. From the foregoing, it is obvious that this is an application for the issue of a UK-wide warrant, the first time such an application has been made. Although such an application can be granted by a Chair of the Tribunal sitting alone, this application has been heard and determined by a full panel of the Tribunal (the President, Lord Ericht, Professor Rachael Mulheron). That reflects the UK-wide

nature of the application; its importance; and the fact that it is the first time this particular jurisdiction has been exercised. It is also the case that the President is a Justice of the High Court of England and Wales and Lord Ericht is a Senator of the College of Justice and a Judge of the Outer House of the Court of Session in Scotland. The panel has been deliberately selected.

12. No formal originating application has yet been issued. That is entirely usual in such cases. We will ensure that the CMA undertakes to issue such an application in due course. That application will, obviously, be issued in the Tribunal.
13. We turn to the specifics of the CMA's application. The threshold for an investigation under section 25 is that the CMA has reasonable grounds to suspect an infringement: CMA Skeleton/[60]. On the basis of the facts and matters stated in Wilkie 1, that requirement is clearly met.
14. Turning to the requirements of sections 28 and 28A, and using the superscripted numbering, we are satisfied ^{l1} (again on the basis of Wilkie 1) that there are reasonable grounds for suspecting ^{l2} that there are on the premises identified by the CMA documents falling within the CMA's section 26 power ^{l3}.
15. We are more concerned as to whether the second requirement – risk of concealment, removal, tampering with or destruction ^{l4} – is met. As to this:
 - (1) This is a “secret” cartel [~~§~~]. Clearly, secret cartels are and intended to be covert, and will not be publicised. We consider that CMA is, in these cases, entitled to a “strong following wind” that where documents are sought in relation to the secret cartel, they may be concealed, removed, tampered with or destroyed.
 - (2) But is this enough? We have considered the evidence of Ms Wilkie very carefully, and Mr Bailey (counsel for the CMA) has addressed us very fully. It is only the secrecy, the covertness, on which the CMA relies. What, it might be asked, could the CMA produce by way of evidence going beyond this? The fact that we find this a near-impossible question to answer demonstrates both the difficult situation any applicant for a

warrant faces, and it is important that this critical investigative function – which the CMA does not exercise lightly – should not unduly be fettered.

- (3) Accordingly, so far as the business premises are concerned, we are satisfied that the second requirement is met. We confirm that we have proceeded on the basis that the protection of Article 8 of the European Convention on Human Rights, as incorporated in the Human Rights Act 1998, applies to business premises.
- (4) A warrant in relation to domestic premises – here the premises of an individual who we will call Mr X in Scotland – obviously requires a higher order of scrutiny under the Convention and generally. We do not consider that (as regards a named individual) the inference from the suspected existence of a secret cartel of destruction, etc of documents is enough in and of itself to justify the issue of a warrant. Something more to suggest a propensity to destroy needs to be asserted in evidence where a named individual's (i.e. a natural person's) domestic premises are identified for entry pursuant to a warrant, particularly where, as here, those premises are occupied by others, and the scope of the warrant is wide-ranging (although, of course, it could be narrowed, eg to specific devices). We do not consider that there is such evidence in this case, and we are not prepared to grant a warrant in the case of these domestic premises, because we are not satisfied (to this extent) that the statutory requirements are made out.
- (5) Furthermore:
 - (i) We consider that the adverse risks of no warrant being issued are low. We are really talking about obtaining Mr X's electronic devices. If those devices are sought (for instance under section 26) and the device vanishes, cannot be produced or is produced having sustained deletions, then inferences will be drawn against Mr X (and the undertakings he is and was part of) which may be very hard plausibly to rebut.

(ii) We are satisfied that in this modern electronic world, permanent deletion of material can be difficult. Of course, tracking down and restoring such material will involve the CMA in additional effort and expense: but should that effort and expense prove to be necessary because of unjustified deletion then (whatever the retrieved material demonstrates) we make clear that the full economic cost of that effort ought to fall on the party or parties having caused the deletion.

16. Save as regards the domestic premises, the CMA's application is granted. There is one further qualification that needs to be made. The CMA accepts that it is not entitled to see privileged materials. But the process for protecting privilege (described in Wilkie 1/[139]ff) assume physical, hard copy, documents. It is much more likely that privileged material will be found in the electronic documents that will be uplifted wholesale by the CMA. The Tribunal considers that the CMA must, in this regard, have in place some sort of process envisaged by the Court of Appeal in *TBD Owen Holland Limited v. Simons*, [2020] EWCA Civ 1182 (which concerned search orders and privilege, but which is analogous to the present case). Wilkie 2/[19]ff, served shortly before the oral hearing has satisfied us in this regard.

17. This Judgment is unanimous.

Sir Marcus Smith
President

The Hon. Lord Erich

Professor Rachael
Mulheron

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 12 October 2023