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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

6 November 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:

COMPETITION AND MARKETS AUTHORITY

Claimant

- v -

ANOTHER

Defendant(s)

JUDGMENT (APPLICATION FOR WARRANTS) (CLOSED OR OPEN)

1. By an application made *ex parte* and without notice, the Competition and Markets Authority (the “CMA”) sought four warrants to enter and search business and domestic premises of certain defendants for the purposes of an investigation under section 25 of the Competition Act 1998.
2. In a written *ex tempore* judgment circulated in draft that day,¹ the CMA’s application was substantially granted. We will refer to this judgment as the “Closed Judgment”. By direction of the President, the deemed date of hand-down of the Closed Judgment was 7:30am on Tuesday 17 October 2023, but the hand-down was on a closed basis only.
3. The Closed Judgment itself contains redactions of particularly sensitive matters, which are marked as such in the Closed Judgment. These were settled by the Tribunal after the Tribunal had consulted with the CMA. They do not represent the full redactions sought by the CMA.
4. The issue dealt with in this Judgment is whether – maintaining the redactions described in the previous paragraph – the Closed Judgment should now be rendered open, and the President’s direction (described in [2] above) varied accordingly.
5. By an application made on 27 October 2023, supported by a witness statement of Juliet Enser, Senior Director, Cartel Enforcement, at the CMA, the CMA seeks to preserve the closed status of the Closed Judgment until further order; alternatively for an “open” judgment to be published confined to the application case numbers and the fact that the CMA applied for four warrants; alternatively, for the closed status of the Closed Judgment to be maintained until the CMA has issued its statement of objections in the investigation.

¹ Although that sounds like a contradiction in terms, this is the best description. A written judgment was circulated shortly after argument, and the CMA left court knowing that the order issuing the warrants had been made, for the reasons given, and subject to perfection of the relevant documentation, including the judgment.

6. There is no doubt that the Tribunal can operate a “closed” process, and it frequently does so in some form or other. Thus, confidentiality rings are the norm, and not the exception, in the Tribunal’s processes; *ex parte* applications are not unknown; judgments are frequently redacted; and it is not unknown for a fully closed judgment to be handed down. However, in all cases, such closed processes must be justified: for they constitute a derogation from the principle of open justice. It is to be stressed that even if some form of closed process can be justified, that process must be no more extensive than is necessary. It must be noted that the extent of any protection conferred is justifiable may diminish with the effluxion of time.
7. Where – as here – warrants are sought by the CMA in circumstances where the CMA asserts reasonable grounds for suspecting that, if the documents the subject of the warrant were required to be produced, they would be concealed, removed, tampered with or destroyed, self-evidently that application must be made in secret, i.e. *ex parte* and without notice to the parties the subject of the warrant. That state of affairs must continue, at least until the warrants – if they are granted – have been executed. Failure to observe such levels of confidentiality runs the risk of provoking the very reaction – the elimination by destruction or otherwise of documents – that the warrants are expressly intended to avoid.
8. In this case:
 - (1) By its application, the CMA sought four warrants. The Tribunal made orders issuing warrants in respect of three. The application for the fourth warrant failed. We will refer to the defendants against whom warrants were issued as the “Defendants”; and the party in respect of whom the CMA’s application failed as “Mr X”. No further details as regards the identity of these persons emerges from the Closed Judgment.
 - (2) The three warrants were executed by the CMA against the Defendants on 17 October 2023. The moment the warrants were executed, a certain degree of secrecy was inevitably lost. One cannot execute warrants

under section 28 or 28A of the Competition Act 1998 without the target of those warrants being made aware of the fact that an application has been made and granted. A number of documents – in addition to the warrants themselves – were served on the Defendants. Those documents make clear that the Defendants could, if so advised, challenge the orders issuing the warrants.

- (3) The Closed Judgment was deemed handed down at 7:30am on Tuesday 17 October 2023, 30 minutes before the earliest time at which the warrants could be executed. That time was selected so that the CMA would be able to provide the reasons for the orders issuing the warrants to the Defendants.² Anyone served with an order made *ex parte* without notice has an entitlement to apply to have that order set aside. The more serious the order, the more important that right. Generally speaking, as a matter of proper practice, the reasons for the order should be provided when the order is served. The CMA was reminded of this in correspondence from the President prior to the execution of the warrants. Of course, in many cases, due to the pressures of time, a judgment will not have been produced by the time the order is executed, and a note of the judgment (prepared by a solicitor acting for the applicant) will have to do.³ In this case, of course, a redacted judgment – the Closed Judgment – was prepared for this very purpose.

9. The imperative of secrecy is self-evident up to the execution of the warrants. The Closed Judgment needed to remain closed until at least that point. But that is not the question before us now. Two weeks have passed since the execution

² In fact, discussions with the CMA went later than this, doubtless because other aspects of the warrants process were taking up the CMA's time. Hence the use of the word "deemed". For reasons we give below, we consider the reasons for an order issuing a warrant to be important, and we consider that it will be incumbent on anyone applying for a warrant to ensure that adequate open reasons are available to be given to any target of any warrant.

³ This is the practice in respect of other "without notice" orders, like freezing orders and search and seizure orders, where time usually does not permit the creation of a final judgment from the transcript. In cases such as this, there is usually more of a gap between the granting of the order and the execution of the warrant, so that a (if necessary, redacted) version of the judgment granting the warrants can be handed down and given to the target of the warrant. That occurred in the *Competition and Markets Authority v. Various Unnamed Defendants*, [2019] EWHC 662 (Ch), where the English High Court granted various warrants sought under section 28 and issued an open judgment recording its reasons.

of the warrants, and the Closed Judgment says nothing about: (i) the identity of the Defendants or Mr X, (ii) the basis for the CMA's suspicions triggering the applications under section 28 and section 28A; or (iii) the CMA's section 25 investigation. Neither the CMA's application notice nor the statement of Ms Enser identifies any part of the Closed Judgment that could prejudice the investigation or any further execution of the warrants, if and to the extent that needs to occur. There is nothing identified by the CMA in this case to lay in the balance against the principle of open justice, which in this case must prevail.

10. In conclusion, we make two further points:

- (1) Lest the CMA have wider concerns about open judgments and section 28 and section 28A warrants, questions of keeping material closed is a fact specific one that needs to be (and will be) considered on a case-by-case basis. The Tribunal appreciates the sensitivity of many of the CMA's investigations and would do nothing to prejudice them. But the invocation of closed material procedures requires justification; and in this case, no justification for the continued use of closed material procedures so far as the Closed Judgment is concerned has sufficiently been articulated.
- (2) The section 28 and section 28A regimes constitute considerable intrusions into private life and the exercise of these powers must, in all cases, be closely justified. Hence the intense process of application, the burden of which falls on the CMA, and the obligation (because of the *ex parte*, without notice nature of that process) of full and frank disclosure, which also falls on the CMA. These protections are very important. It follows that the publication of appropriately redacted open judgments, recording the reasons for the exercise (or non-exercise) of this jurisdiction is peculiarly important,⁴ not merely so that the instant case can appropriately be challenged, but so that there is

⁴ See also *Competition and Markets Authority v. Various Unnamed Defendants*, [2019] EWHC 662 (Ch) at [6] and [12].

guidance in future cases. The Closed Judgment is a “guideline judgment” and may in future be cited before any court.⁵ In the current application, the CMA submitted as a public policy reason for the Closed Judgment remaining closed that were the reasoning in the Closed Judgment to be followed, it would be more difficult for the CMA to obtain warrants under section 28A in respect of domestic premises. If and to the extent that submission is suggesting that the reasons of the court in any given case should not be published because a party does not like or accept the outcome, then we reject that as a reason for keeping any judgment closed.

11. The application is dismissed.
12. This Judgment is unanimous.

Sir Marcus Smith
President

The Hon. Lord Ericht

Professor Rachael
Mulheron

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

Date: 6 November 2023

⁵ *Practice Direction (Citation of Authorities)*, [2001] 1 WLR 1001 at [6.1]. The same goes for the decision referred to above, *Competition and Markets Authority v. Various Unnamed Defendants*, [2019] EWHC 662 (Ch).