Neutral Citation Number: [2017] EWHC 2911 (Ch)
Claim No: CP-2017-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
COMPETITION LIST

Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 16/11/2017

Before :

THE HONOURABLE MR. JUSTICE MARCUS SMITH

- -

THE COMPETITION AND MARKETS AUTHORITY

Claimant

- and -

CONCORDIA INTERNATIONAL RX (UK) LIMITED

Defendant

- -

Mr. Jason Beer, Q.C., **Mr. Rob Williams** and **Ms. Charlotte Ventham** (instructed by the **Legal Service of the Competition and Markets Authority**) for the **Claimant**
Mr. Mark Brealey, Q.C. (instructed by **Morgan, Lewis & Bockius UK LLP**) for the **Defendant**

Hearing date: 3 November 2017

- -

Approved Judgment

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

Mr. Justice Marcus Smith:

A. THE CMA'S APPLICATION FOR A SECTION 28 WARRANT

(1) Section 28 of the Competition Act 1998

1. On 5 October 2017, the Competition and Markets Authority (the "CMA") applied to Mr. Justice Mann, without notice and in private, for a warrant under section 28 of the Competition Act 1998 against (amongst others) the Defendant, Concordia International Rx (UK) Limited ("Concordia"). As I shall describe, applying for a section 28 warrant without notice and in private is the default procedure laid down in a Practice Direction that in part governs the making of such applications.

2. Section 28 of the Competition Act 1998 provides as follows:

> "**Power to enter business premises under a warrant**
>
> (1) On an application made to it by the CMA, the court or the Tribunal may issue a warrant if it is satisfied that-
>
> (a) there are reasonable grounds for suspecting that there are on any business premises documents-
>
> (i) the production of which has been required under section 26 or 27; and
>
> (ii) which have not been produced as required;
>
> (b) there are reasonable grounds for suspecting that-
>
> (i) there are on any business premises documents which the CMA has power under section 26 to require to be produced; and
>
> (ii) if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed; or
>
> (c) an investigating officer has attempted to enter premises in the exercise of his powers under section 27 but has been unable to do so and that there are reasonable grounds for suspecting that there are on the premises documents the production of which could have been required under that section.
>
> (2) A warrant under this section shall authorise a named officer of the CMA, and any other of the CMA's officers whom the CMA has authorised in writing to accompany the named officer-
>
> (a) to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose;
>
> (b) to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the application under subsection (1) was granted ("the relevant kind");
>
> (c) to take possession of any documents appearing to be of the relevant kind if-

(i) such action appears to be necessary for preserving the documents or preventing interference with them; or

(ii) it is not reasonably practicable to take copies of the documents on the premises;

(d) to take any other steps which appear to be necessary for the purpose mentioned in paragraph (c)(i);

(e) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found;

(f) to require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form-

(i) in which it can be taken away, and

(ii) in which it is visible and legible or from which it can readily be produced in a visible and legible form.

(3) If, in the case of a warrant under subsection (1)(b), the court or (as the case may be) the Tribunal is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation concerned, the warrant shall also authorise action mentioned in subsection (2) to be taken in relation to any such document.

(3A) A warrant under this section may authorise persons specified in the warrant to accompany the named officer who is executing it.

(4) Any person entering premises by virtue of a warrant under this section may take with him such equipment as appears to him to be necessary.

(5) On leaving any premises which he has entered by virtue of a warrant under this section, the named officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them.

(6) A warrant under the section continues in force until the end of the period of one month beginning with the day on which it is issued.

(7) Any document of which possession is taken under subsection (2)(c) may be retained for a period of three months.

(7A) An application for a warrant under this section must be made-

(a) in the case of an application to the court, in accordance with rules of court;

(b) in the case of an application to the Tribunal, in accordance with Tribunal rules.

(8) In this section "business premises" has the same meaning as in section 27.

3. Section 28 pertains in three types of case:

   i) 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 have not been produced.

   ii) A "Section 28(1)(b) Case", where there are reasonable grounds for suspecting that:

      a) There are, on business premises, documents that would be responsive to a section 26 production demand;

      b) But that, if such a demand were made, they would not be produced, but would be concealed, removed, tampered with or destroyed.

   iii) A "Section 28(1)(c) Case", where there has been a thwarted attempt to enter premises pursuant to section 27.

4. This was a Section 28(1)(b) Case.

(2) The Practice Direction

5. The Practice Direction for making an application for a warrant under section 28 provides as follows:

"**Application for a warrant**

2.1 An application by the OFT[1] for a warrant must be made to a High Court judge using the Part 8 procedure as modified by this practice direction.

2.2 The application should be made to a judge of the Chancery Division at the Royal Courts of Justice (if available).

2.3 The application is made without notice and the claim form may be issued without naming a defendant. Rules 8.1(3), 8.3, 8.4, 8.5(2)-(6), 8.6(1), 8.7 and 8.8 do not apply.

Confidentiality of court documents

3.1 The court will not effect service of any claim form, warrant, or other document filed or issued in an application to which this practice direction applies, except in accordance with an order of the judge hearing the application.

3.2 CPR rules 5.4, 5.4B and 5.4C do not apply, and paragraphs 3.3 and 3.4 have effect in its place.

3.3 When a claim form is issued the court file will be marked 'Not for disclosure' and, unless a High Court judge grants permission, the court records relating to the application (including the claim form and documents filed in support and any warrant or order that is issued) will not be made available by the court for any person to inspect or copy, either before or after the hearing of the application.

[1] The CMA is the statutory successor to the Office of Fair Trading or "OFT", which it replaced.

3.4 An application for permission under paragraph 3.3 must be made on notice to the OFT in accordance with Part 23.

Contents of the claim form, affidavit and documents in support

4.1 The claim form must state –

(1) the section of the Act under which the OFT is applying for a warrant;

(2) the address or other identification of the premises to be subject to the warrant; and

(3) the anticipated date or dates for the execution of the warrant.

4.2 The application must be supported by affidavit evidence, which must be filed with the claim form.

4.3 The evidence must set out all the matters on which the OFT relies in support of the application, including all material facts of which the court should be made aware. In particular it must state –

(1) the subject matter (i.e., the nature of the suspected infringement of the Chapter I or II prohibitions in the Act, or of Articles 81 or 82 of the Treaty establishing the European Community[2]) and the purpose of the investigation to which the application relates;

(2) the identity of the undertaking or undertakings suspected to have committed the infringement;

(3) the grounds for applying for the issue of the warrant and the facts relied upon in support;

(4) details of the premises to be subject to the warrant and of the possible occupier or occupiers of those premises;

(5) the connection between the premises and the undertaking or undertakings suspected to have committed the infringement;

(6) the name and position of the officer who it is intended will be the named officer;

(7) if it is intended that the warrant may pursuant to a relevant provision of the Act authorise any person (other than an officer or a Commission official) to accompany the named officer in executing the warrant, the name and job title of each such person and the reason why it is intended that he may accompany the named officer.

4.4 There must be exhibited to an affidavit in support of the application –

(1) the written authorisation of the OFT containing the names of –

(a) the officer who it is intended will be the named officer;

[2] Now Articles 101 and 102 of the Treaty on the Functioning of the European Union.

(b) the other persons who it is intended may accompany him in executing the warrant; and

(2) In the case of an application under section 62, 62A or 63 of the Act, if it is intended that Commission officials will accompany the named officer in executing the warrant, the written authorisations of the Commission containing the names of the Commission officials.

4.5 There must also be filed with the claim form –

(1) drafts of –

(a) the warrant; and

(b) an explanatory note to be produced and served with it; and

(2) the written undertaking by the named officer required by paragraph 6.2 of this practice direction.

…

Listing

5. The application will be listed by the court on any published list of cases as 'An application by D'.

Hearing the application

6.1 An application for a warrant will be heard and determined in private, unless the judge hearing it directs otherwise.

6.2 The court will not issue a warrant unless there has been filed a written undertaking, signed by the named officer, to comply with paragraph 8.1 of this practice direction.

The warrant

7.1 The warrant must –

(1) contain the information required by section 29(1), 64(1) or 65(1) of the Act;

(2) state the address or other identification of the premises to be subject to the warrant;

(3) state the names of –

(a) the named officer; and

(b) any other officers, Commission officials or other persons who may accompany him in executing the warrant;

(4) set out the action which the warrant authorises the persons executing it to take under the relevant section of the Act;

(5) give the date on which the warrant is issued;

(6) include a statement that the warrant continues in force until the end of the period of one month beginning with the day on which it issued; and

(7) state that the named officer has given the undertaking required by paragraph 6.2.

…

7.3 Upon the issue of a warrant the court will provide to the OFT –

(1) the sealed warrant and sealed explanatory note; and

(2) a copy of the sealed warrant and sealed explanatory note for service on the occupier or person in charge of the premises subject to the warrant.

Execution of warrant

8.1 A named officer attending premises to execute a warrant must, if the premises are occupied –

(1) produce the warrant and an explanatory note on arrival at the premises; and

(2) as soon as possible thereafter personally serve a copy of the warrant and the explanatory note on the occupier or person appearing to him to be in charge of the premises.

8.2 The named officer must also comply with any order which the court may make for service of any other documents relating to the application.

8.3 Unless the court otherwise orders –

(1) the initial production of a warrant and entry to premises under the authority of a warrant must take place between 9.30am and 5.30pm Monday to Friday; but

(2) once persons named in the warrant have entered premises under the authority of a warrant, they may, whilst the warrant remains in force –

(a) remain on the premises; or

(b) re-enter the premises to continue executing the warrant,

outside those times.

8.4 If the persons executing a warrant propose to remove any items from the premises pursuant to the warrant they must, unless it is impracticable –

(1) make a list of all the items to be removed;

(2) supply a copy of the list to the occupier or person appearing to be in charge of the premises; and

(3) give that person a reasonable opportunity to check the list before removing any of the items.

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.

Application under section 59

10.1 Attention is drawn to section 59 of the Criminal Justice and Police Act 2001, which makes provision about applications relating to property seized in the exercise of the powers conferred by (among other provisions) section 28(2) of the Act.

10.2 An application under section 59 –

(1) must be made by application notice in accordance with CPR Part 23; and

(2) should be made to a judge of the Chancery Division at the Royal Courts of Justice (if available)."

(3) The granting of the application and the execution of the warrant

6. Mr. Justice Mann granted the application for a section 28(1)(b) warrant and the CMA was provided with a sealed warrant and sealed explanatory note, together with copies of the same for service on Concordia, pursuant to paragraph 7.3 of the Practice Direction on 6 October 2017 (the "Warrant").

7. The Warrant was executed on 10 October 2017.

B. THE APPLICATION BY CONCORDIA TO PARTIALLY DISCHARGE OR TO VARY THE WARRANT

8. On the same day as the Warrant was executed, 10 October 2017, Concordia applied, on notice to the CMA, to partially discharge or to vary the Warrant:

i) 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:

a) Carbimazole 5mg and 20mg tablets ("Carbimazole"); and

b) Hydrocortizone 10mg tablets ("Hydrocortizone").

ii) As regards Carbimazole and Hydrocortizone, Concordia contended that section 28(1)(b)(ii) was not satisfied. There were, it was suggested, no reasonable grounds for suspecting that documents relating to these drugs would – if required to be produced – be concealed, removed, tampered with or destroyed because both Carbimazole and Hydrocortizone had been the subject

of investigation by the CMA, during which investigations Concordia had fully and openly co-operated with the CMA.

iii) In short, Concordia contended that the prior investigations of the CMA had demonstrated that there were no reasonable grounds for suspecting that documents relating to these drugs would be concealed, removed, tampered with or destroyed because Concordia's conduct during the course of those investigations had demonstrated openness and co-operation rather than a propensity to conceal, remove, tamper with or destroy.

iv) It might also have been contended that the prior investigations of the CMA had put Concordia on notice, such that if there was a propensity to conceal, remove, tamper with or destroy relevant documents on the part of Concordia, they would already have been destroyed. The application was not made on this basis, this question of prior notice in relation to Carbimazole and Hydrocortizone is an obvious one going to the issue of whether there are (at the time of the application) reasonable grounds for suspecting that documents relating to these drugs would be concealed, removed, tampered with or destroyed.

9. That application came before me. I granted it, varying the Warrant so as to delete from Annex A the references to Carbimazole and Hydrocortizone. I did so on the basis of extremely limited evidence: I had before me:

i) The Warrant; and

ii) Some evidence regarding the CMA's prior investigations into Carbimazole and Hydrocortizone and Concordia's response to those investigations.

10. My order gave the CMA liberty to apply, preferably to Mr. Justice Mann or to me, to vary the order I had made.

C. SUBSEQUENT HEARINGS

(1) The hearings on 11 October 2017

11. On 11 October 2017, there were two hearings in relation to the Warrant. The first, before Mr. Justice Mann, was at the initiative of the CMA pursuant to the liberty to apply referred to in paragraph 10 above. The second was a directions hearing that took place pursuant to a request for such a hearing that I made very early on 11 October 2017.

(2) The hearing before Mr. Justice Mann

12. At the hearing before Mr. Justice Mann, Mr. Justice Mann set aside my order of 10 October 2017. Concordia's written submissions (adduced at the later directions hearing that day) state:

> "Mann J. reinstated Carbimazole and Hydrocortizone. This was after Concordia was asked to leave the Court so that the Judge could have a dialogue with the CMA. When Concordia returned, the CMA was asked to make a short statement which

> was to the effect that additional information had been obtained that merited the warrant. The Judge gave a provisional judgment reinstating the two products on the basis of the information that the CMA had given."

13. The CMA satisfied Mr. Justice Mann that the requirements of section 28(1)(b)(ii) were met, but did so by relying on material that it was not prepared to disclose to Concordia. I make absolutely no criticism of this: as I explain in paragraphs 46 to 50 below, I proceed on the basis that this material was sensitive and that the CMA was acting in fulfilment of its public duties in seeking to protect this material.

(3) The directions hearing

14. The purpose of the directions hearing was to consider how best to resolve Concordia's application to vary or discharge the Warrant. This is the first time that a section 28 warrant has been challenged: for this reason, there is no law directly on point. Clearly, to resolve Concordia's application it would be necessary to determine whether the process whereby the CMA was able to justify the Warrant to Mr. Justice Mann on the basis of material of which Concordia knew nothing was the correct approach, or whether some other process should be followed. Equally clearly, that question would need to be determined in the abstract: requiring the CMA to disclose sensitive material that it had, quite deliberately, withheld in order to resolve Concordia's application before the determination of this anterior question would effectively pre-judge the issue and cause to be published material which the CMA considered ought to be kept private.

15. As a result of the directions hearing:

i) The CMA was ordered to provide in redacted form the material that had been deployed before Mr. Justice Mann, a copy of the order made by him, a note of the submissions before him and a note of the judgment rendered by him.[3] I made this order, not to prejudge the manner in which applications to vary or discharge warrants should be dealt with, but to ensure that Concordia had, at the earliest opportunity, as much material as the CMA considered it was able to provide. This material was provided to Concordia by the CMA under cover of a letter dated 18 October 2017:

> "Further to the directions of Mr. Justice Marcus Smith of 11 October 2017 ("the directions"), and to the letter of Mr. Steven Brilliant of 12 October, you will find herewith the following documents:
>
> (i) affidavit of Andrew Groves;
>
> (ii) affidavit of Susan Oxley;
>
> (iii) affidavit of Ann Pope;
>
> (iv) affidavit of a 'Senior CMA Employee';

[3] Although this was the subject-matter of an order, I should put on record that the CMA has been nothing other than completely co-operative and helpful in the course of this application. I have no doubt that the CMA would have provided this material willingly, but it seemed best to have the position formalised in an order.

(v) indexes to the bundle of exhibits for each of the affidavits numbered (i) to (iv) above;

(vi) transcript of the hearing on 5 October before Mr. Justice Mann;

(vii) the CMA's skeleton argument for that hearing; and

(viii) Mr. Justice Mann's judgment of 5 October.

The affidavits at (i) to (iv) were before Mr. Justice Mann when he granted warrants relating to premises of Concordia following the hearing on 5 October. All the documents now disclosed have been redacted to protect the public interest in accordance with the directions.

Redactions have been made to (i) material that does not go to whether the requirement of section 28(1)(b)(ii) of the Competition Act 1998 was met (these redactions appear in black) and to (ii) material that goes to this requirement but which is also sensitive (these redactions appear in grey). In one case the particular sensitivity of the material in the affidavit has led us to redact the name of the deponent who is referred to above at (iv) as 'Senior CMA Employee'."

ii) A hearing was scheduled to determine the question of how applications to vary or discharge warrants should be dealt with, in general terms. That hearing took place on 3 November 2017.

D. THE RELEVANT LEGAL LANDSCAPE

(1) Analogous cases

16. Neither the statute 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. There is no case-law relating to the procedure for varying or discharging a warrant: as I have noted, this is the first occasion on which a warrant granted pursuant to section 28 has been challenged.

17. There are, however, analogous cases, most notably where a search warrant is granted pursuant to section 8 of the Police and Criminal Evidence Act 1984. As in the case of section 28, this procedure obliges a constable seeking a warrant to apply *ex parte* to a justice of the peace or judge, stating in writing the basis for the application. Also, just as in the case of section 28, the Police and Criminal Evidence Act does not lay down a process whereby a warrant granted pursuant to section 8 is to be challenged.

18. The common law has, therefore, stepped into the breach, and a body of case-law has evolved for dealing with those cases where Parliament provides for an order to be obtained against a respondent (the "Respondent") on the *ex parte* and without notice application of an applicant (the "Applicant"). Although this case-law is not strictly binding in relation to section 28, it is clearly highly persuasive. It is, therefore, important to state the law in this area, before considering the specific case that section 28 gives rise to.

(2) The relevant law

19. The relevant law can best be stated as a series of propositions.

(i) The Respondent has a right to challenge the warrant obtained by the Applicant

20. It is accepted that such a right of challenge exists: R. (Energy Financing Ltd) v. Bow Street Magistrates Court, [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316 at [24](9); Gittins v. Central Criminal Court, [2011] EWHC 131 (Admin) at [27]; Haralambous v. St. Albans Crown Court, [2016] EWHC 916 (Admin) at [32].

21. In many cases, the challenge will be by way of judicial review:[4] in the case of section 28, the procedure is specified in paragraph 9 of the Practice Direction. It will be necessary to consider further the nature of that procedure, but it is self-evidently not one of judicial review.

22. It is worth pointing out that in many cases a challenge to the granting of the warrant may take place after the event: the warrant is made *ex parte* and without notice, and will often be fully executed before any challenge can be mounted. To this extent, section 28 cases may be exceptional. In the first place, the Respondent (as here) may be well able to mount a swift challenge; and, of course, the warrant granted under section 28 has a "life" of one month from the date on which it is issued.[5]

(ii) On such a challenge, the Respondent is, prima facie, entitled to see all of the material on which the Applicant relied and on which the judge granting the application based his or her decision

23. R. (Cronin) v. Sheffield Justices, [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 was not a case where the granting of a search warrant was being challenged by way of judicial review, but where a declaration was sought by the Respondent (a Mr. Cronin) that the justices hearing an application for a search warrant pursuant to section 8 of the Police and Criminal Evidence Act 1984 were obliged to record their reasons and keep a record of the proceedings. That application was refused, but in the course of his judgment Lord Woolf CJ said this (at [29]) regarding the provision of information:

> "A further point made by Mr. Cragg [counsel for Mr. Cronin] is the fact that in this case a copy of the information was provided by the justices on request. Subsequently, it was questioned whether it would be desirable to provide information unless there was some legal justification for doing so. Information may contain details of an informer which it would be contrary to the public interest to reveal. The information may also contain other statements to which public interest immunity might apply. But, subject to that, if a person who is in the

[4] See, for example, R. v. Crown Court at Lewes, ex parte Hill, (1991) 93 Cr App R 60 (a challenge to an application granted under section 9 of the Police and Criminal Evidence Act 1984, concerning access to "special procedure material"); R. (Cronin) v. Sheffield Justices, [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 (not a direct challenge to the lawfulness of a warrant granted under section 8 of the Police and Criminal Evidence Act 1984, but an application by way of judicial review seeking a declaration that the justices granting the warrant were obliged to record their reasons and to keep a record of the proceedings); R (Austen) v. Chief Constable of Wiltshire, [2011] EWHC 3385 (Admin) (judicial review challenging the basis on which a section 8 warrant was granted and the grant of the warrant by magistrates); Gittins v. Central Criminal Court, [2011] EWHC 131 (Admin) (judicial review of a warrant granted under section 9 of the Police and Criminal Evidence Act 1984).

[5] See section 28(6) of the Competition Act 1998.

position of this claimant asks perfectly sensibly for a copy of the information, then speaking for myself I can see no objection to a copy of that information being provided. The citizen, in my judgment, should be entitled to be able to assess whether an information contains the material which justifies the issue of a warrant…"

24. This is obviously right;[6] and the requirement of disclosure must apply with even greater force where the Respondent is not simply seeking information about why the warrant was granted, but is actually seeking to challenge the issue of that warrant. In Gittens v. Central Criminal Court, [2011] EWHC 131 (Admin), Gross LJ noted at [27]:

> "…When an application for judicial review is launched seeking to quash the grant of a search warrant, it is, again, in some respects, akin to the "return date" for Mareva, Anton Piller and Restraint Orders. Ordinarily, the expectation will be that the party challenging the grant of the warrant must be entitled to know the basis upon which the warrant was obtained."

(iii) However, the disclosure of such material may be tempered by the need to withhold information on the grounds of public interest immunity.

25. All of the judicial statements regarding the desirability of disclosing the information upon which the warrant was granted are qualified by reference to the need to protect sensitive information. The basis upon which such sensitive information is protected is by way of the well-known ground of public interest immunity.[7]

26. It is well recognised that evidence can be excluded on the grounds of public policy. In R. v. Hallett, [1986] Crim LR 462, Lord Lane CJ referred to the rule as one of exclusion:

> "Thus it seems to us that the rule is a rule of exclusion, that is to say it is a rule which excludes evidence as to the identity of informants, unless the Judge comes to the conclusion that it is necessary to override the rule and to admit the evidence in order to prevent a miscarriage of justice, and to prevent the possibility that a man may, by reason of the exclusion, be deprived of the opportunity of casting doubt upon the case against him…"[8]

27. It is unnecessary, for the present, to articulate in any detail the process by way of which a judge adjudicates upon the existence of public interest immunity. Nor is it necessary to describe the manner in which sensitive material needs to be identified or

[6] See also R (Energy Financing Ltd) v. Bow Street Magistrates Court, [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316 at [24](10); R (Austen) v. Chief Constable of Wiltshire, [2011] EWHC 3385 (Admin) at [49].

[7] See, for example: R. (Cronin) v. Sheffield Justices, [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [29] (*per* Woolf LCJ); R. (Energy Financing Ltd) v. Bow Street Magistrates Court, [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316 at [24](10) (*per* Kennedy LJ); Gittens v. Central Criminal Court, [2011] EWHC 131 (Admin) at [28] (*per* Gross LJ); R. (Austen) v. Chief Constable of Wiltshire, [2011] EWHC 3385 (Admin) at [49] (*per* Ouseley J).

[8] Unreported, save in the Criminal Law Review. This quotation is from the transcript, cited in R. v. Agar, (1990) 90 Cr App R 318 at 323 to 324.

how the grounds for that sensitivity are articulated.[9] I proceed on the basis that the redactions made by the CMA in the material provided pursuant to my order are justified on public interest immunity grounds. It may be that these redactions will have to be considered on another occasion, but this is not that occasion.

28. Two general points regarding public interest immunity do, however, need to be made:

    i) First, at least as traditionally understood, the rule is an exclusionary rule. The material is excluded from the proceedings. It is not made available to the party who does not have it and, critically, the judge does not rely upon this material when forming his or her judgment.

    ii) Secondly, the public interest in allowing material to be withheld may clash with the public interest in the administration of justice, which may require the disclosure of such documents so that hearings can be conducted fairly. Inevitably, this involves a balancing exercise, where these competing interests are weighed one against the other. It is not inevitably the case that the need to withhold evidence in the public interest outweighs the importance of disclosing it in the interests of the administration of justice.

29. In short, the general position is that public interest immunity is used as a "shield" – to protect that information unless, in the interests of justice it needs to be disclosed – and not as a "sword", whereby that information can be withheld from a party but nevertheless deployed before the judge determining the issue before him or her.

30. The exception to this general position is Haralambous v. St Albans Crown Court, [2016] EWHC 916 (Admin). It is necessary to consider this case in some detail:

    i) A search warrant was issued pursuant to section 8 of the Police and Criminal Evidence Act 1984 and executed. As a result, certain property was seized and retained by the police. An application for judicial review was commenced seeking a declaration that the issuing and execution of the search warrants was unlawful.

    ii) Whilst these judicial review proceedings were pending, the police issued an application under section 59 of the Criminal Justice and Police Act 2001. According to section 59, the Crown Court may authorise the retention of unlawfully seized materials under a search warrant if it would immediately become appropriate to issue a fresh search warrant (section 59(7) of the 2001 Act).

    iii) The section 59 application having been made, the police then effectively abandoned their defence of the judicial review proceedings. The parties lodged a consent order with the court, quashing the warrants, declaring the seizures under them to be unlawful and the material seized to be returned, but subject to any order made as a result of the section 59 application.

[9] As to the procedure, see Commissioner of Police for the Metropolis v. Bangs, [2014] EWHC 546 (Admin). As to the extent to which the sensitivity of the information is balanced against the importance of its disclosure, see Tariq v. Home Office, [2011] UKSC 35, [2012] 1 AC 452, in particular at [27] (*per* Lord Mance JSC).

iv) That application was duly made and was supported by evidence over which public interest immunity was asserted. The judge hearing the application reviewed the public interest material, and found that there should (in the public interest) be no further disclosure. He then proceeded to accede to the section 59 application, on the basis that an application for a search warrant under section 8 was made *ex parte* and that a warrant could perfectly properly be granted by a magistrate looking at the sensitive material:

> "I therefore rule that the Applicant in this case would be entitled to re-apply for a section 8 search warrant in reliance upon information which I have ruled it is not in the public interest to disclose. The issue of such a warrant by Magistrates in such circumstances would not be unlawful even though the redacted documents thereafter supplied to the Respondent contained insufficient material to enable him to judge whether the warrant in question was issued on a lawful basis…"

v) The section 59 application was, therefore, granted, and it came before the Divisional Court on a judicial review of that decision. As the judgment makes plain (at [2]), the court recognised that "[t]his judicial review raises for express decision whether a person whose premises have been searched and whose property seized under a search warrant must have enough information grounding the warrant to judge its lawfulness and the retention of the material seized under it." The court concluded that the judicial review must fail and that the decision to grant the section 59 application should not be quashed. The court considered the nature of the process for applying for section 8 warrants, and identified three important features of the statutory background against which the common law right to obtain information needed to be seen:[10]

a) First, the court considered the *ex parte* nature of the process for applying for a search warrant pursuant to section 8 of the Police and Criminal Evidence Act 1984. The court drew a clear distinction between *inter partes* applications – where it was "[i]nherent in the concept…that each party should know what material the other was asking the court to take into account"[11] – and *ex parte* applications.[12]

b) Secondly, the court emphasised the nature and extent of the statutory safeguards built into the procedure for applying for a section 8 search warrant, including in particular "that the constable applying for a warrant must swear a written information and answer on oath any

[10] See [38].

[11] The court referenced the statement of Lord Toulson in R. (British Sky Broadcasting Ltd) v. Central Criminal Court, [2014] UKSC 17, [2014] 1 AC 885 at [30]: "…Parliament recognised the tension between the conflicting public interests in requiring that an application for a production order shall be made "*inter partes*". The Government had originally proposed that a production order might be made ex parte, but that proposal met opposition and was dropped. When an application for a production order is made, there is a *lis* between the person making the application and the person against whom it is made, which may later arise between the police and the suspected person through a criminal charge. Equal treatment of the parties requires that each should know what material the other is asking the court to take into account in making its decision and should have a fair opportunity to respond to it. That is inherent in the concept of an "*inter partes*" hearing."

[12] See [27] to [28].

question that the justice of the peace or judge hearing the application asks".[13]

c) Thirdly, a "crucial feature of Parliament's scheme…is that it has interposed the judiciary to scrutinise independently whether a request of the police or the Executive for a search warrant meets the statutory preconditions".[14]

vi) In light of these features, the court considered that disclosure of the protected material "would frustrate Parliament's intention in establishing a relatively simple system for the issue of search warrants"[15] and would place insufficient weight on the public interest in the investigation and prosecution of crime.[16] Accordingly, the court concluded that the judicial review could not succeed in the context of a warrant issued under section 8 and that the position was no different in the case of a section 59 application:[17]

> "43. A difference between the procedure under section 8 of [the Police and Criminal Evidence Act 1984] and section 59 of the 2001 Act is that the latter inevitably follows the execution of the warrant, the seizure of material and a recognition that the warrant is at the very least vulnerable to being quashed. Not infrequently, as in this case, the warrant will have been quashed. Whilst Parliament did not provide expressly that such applications should be *inter partes*, someone in the position of this claimant should be in a position to oppose the application…
>
> 44. Whilst such an application is *inter partes*, at the heart of the judge's consideration is the notional re-consideration by the magistrate of a fresh section 8…application. In those circumstances, it would be artificial for the judge in the Crown Court to restrict himself to considering material that could be disclosed if (as here) there is additional information which quite properly would be considered by the magistrate were a fresh application to be made. We do not accept that Parliament can have created a procedure with that as its result."

(iv) A "closed material" process is not permitted absent specific legislative sanction

31. By a "closed material" process, I mean a process whereby a court considers (generally, with very specifically framed safeguards) evidence or material which is not available to one of the parties before it. A fuller definition is contained in Al Rawi v. Security Service, [2011] UKSC 34, [2012] 1 AC 531 at [2]. There is, in short, precisely the sort of absence of equal treatment between the parties as was referred to by Lord Toulson in R. (British Sky Broadcasting Ltd) v. Central Criminal Court [2014] UKSC 17, [2014] 1 AC 885 at [30].[18]

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[13] See [29] to [30].

[14] See [31] to [33].

[15] At [40].

[16] At [41].

[17] See [42] to [44].

[18] See fn 11 above.

32. The Supreme Court concluded that a "closed material" process could only be put in place by legislation.[19] There was one exception to this. The "Bangs" procedure (to refer to the latest judicial description of the process) is a reference to the decision in Commissioner of Police for the Metropolis v. Bangs, [2014] EWHC 546, where Beatson LJ set out the procedure to be followed by a court when adjudicating upon public interest immunity claims. Essentially, this involves a hearing in private where (to the exclusion of other parties) the party asserting the immunity explains to the court why that immunity is necessary, and the court adjudicates on the question. The Court of Appeal in Al Rawi made clear that such cases could only be adjudicated upon using a "closed material" procedure.[20]

(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.[21]

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:

> "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."

[19] See [69], [74], [95] and [192].

[20] See the decision of the Court of Appeal in Al Rawi, [2010] EWCA Civ 482, [2012] 1 AC 531 at [40] and [48].

[21] See [20] to [28].

E. THE PROPER PROCESS TO BE FOLLOWED WHEN APPLYING TO VARY OR DISCHARGE A WARRANT ISSUED UNDER SECTION 28

(1) Introduction

35. In light of the legal landscape described in Section D, I turn to consider the process to be followed where an application to vary or discharge a warrant issued under section 28 is made.

36. The contentions of the parties as to how this process should operate were as follows:

    i) The CMA, basing itself essentially on Haralambous,[22] contended that the material it had redacted on grounds of public interest immunity could be considered by the judge on an application to vary or discharge the warrant, whilst being withheld from Concordia.

    ii) Concordia contended that the interests of confidentiality in sensitive documents and Concordia's right to properly test whether the warrant had indeed been properly granted were best met by creating a limited confidentiality ring, initially confined to one or two members of Concordia's external legal team. Concordia did not shrink from contending that it might, in due course, be necessary to expand the scope of the confidentiality ring, and indicated that (if the need arose) this could be the subject of a separate application.

(2) The nature of the application to vary or discharge a section 28 warrant

37. It is necessary to begin with a consideration of the nature of the application to vary or discharge a section 28 warrant. The Practice Direction is silent on this point. In my judgment, there is considerable force in Gross LJ's statement in Gittins v. Central Criminal Court, [2011] EWHC 131 (Admin) at [27] that, in the case of challenges to section 8 warrants, the judicial review process is akin to the "return date" for freezing orders, search and seizure orders and the like.[23]

38. The reason why applications for section 8 warrants, section 28 warrants, freezing orders and search and seizure orders are typically made *ex parte* and without notice to the Respondent is because, were notice to be given, the very purpose of the order would or might be thwarted. The material being searched for would be moved or destroyed or assets sought to be frozen dissipated. Hence an application to a judge on an *ex parte* without notice basis.

39. Of course, as soon as the order has been granted or the warrant issued, the Applicant can move at once to execute it, and the Respondent's ability to circumvent or thwart the order or the warrant is, if not eliminated, significantly diminished.

40. Of course, the very fact of execution tells the Respondent of the existence of the order or the existence of the warrant. That is inevitable. It follows that the return date is generally, and rightly, *inter partes*:

[22] See paragraph 30 above.

[23] See paragraph 24 above.

i) There is nothing to be gained by continuing the *ex parte* process. The element of surprise has necessarily gone.

ii) The Respondent is entitled to be heard on a challenge to the original grant of the order or warrant.

41. Gee says this about the return date for a commercial injunction:[24]

> "An application to discharge the injunction takes the form of a complete rehearing of the matter, with each party being at liberty to put in evidence. Thus, e.g. the defendant may seek to persuade the court that on all the evidence there is insufficient risk of a judgment being unsatisfied to justify the granting of Mareva relief. The court decides the application on all the evidence before the court. This includes evidence of matters which have occurred since the without notice application, so for example it would include evidence resulting from execution of a search order or how the defendant has acted in relation to an order for disclosure of information and the information obtained…"

42. In my judgment, it is appropriate that the application to vary or discharge a warrant issued under section 28 be by way of a rehearing: the CMA, for entirely understandable reasons, obtains the order *ex parte* and without notice. If and when there is an *inter partes* hearing, it is only fair to the Respondent for the court to approach the matter afresh.

43. The CMA contended that if a warrant issued under section 28 could not be justified on the basis of the evidence before the court at the *inter partes* application to vary or discharge that warrant, because the court had excluded from consideration material protected by public interest immunity, then the warrant could not be discharged. The CMA's written submissions contended as follows:

> "60. For the reasons set out above, the CMA submits that the correct analysis in law is that, to assess whether the warrant under challenge was valid, the Court must have regard to all the evidence on the basis of which that warrant was granted, even if some of that evidence cannot be disclosed to Concordia having regard to the public interest.
>
> 61. It is nonetheless important to note that, if the Court were to reject that submission, and to exclude from consideration salient evidence which has not been disclosed to Concordia because of its sensitive nature, that would put Concordia in a *worse* position, not a better one. That is because:
>
> a. The warrant granted to the CMA remains valid unless and until it is quashed…
>
> b. The CMA is presumed to have acted lawfully in executing the warrant unless and until the challenging party can provide reasons to the contrary…
>
> c. Absent any consideration of the critical but sensitive material bearing on section 28(1)(b)(ii)…, the Court would be in no position to assess whether there was in fact a basis for the warrant having regard to any objections made by Concordia. It certainly could not presume that there was no such basis.
>
> d. The application for variation would accordingly fall to be dismissed without more – specifically, the Court could not conclude that the CMA had acted

[24] Gee, Commercial Injunctions, 6th ed. (2016) at [24-020].

> without proper basis simply because the relevant sensitive material was not before the Court…
>
> 62. The validity of the warrant would thus become incapable of a fair trial…Indeed, this may become the position for most if not all warrants granted under section 28, which frequently depend on sensitive material such as leniency proffers."

44. I reject this contention for the following reasons:

i) First, it presupposes that material protected by public interest immunity can be taken into account by the court without being disclosed to the Respondent. That is the very issue here under consideration, and it would be wrong to presume that the CMA's basic contention – that such material can be taken into account by the court, without being disclosed to the Respondent – is correct. Indeed, as I have noted,[25] apart from the decision in Haralambous, the cases on public interest immunity all state that documents protected by public interest immunity are simply excluded from the court's consideration. Lord Dyson JSC made the point extremely clearly in Al Rawi v. Security Service, [2011] UKSC 34, [2012] 1 AC 531 at [41]:

> "…no form of closed material procedure can properly be described as a development of the common law of PII…In many ways, a closed procedure is the very antithesis of a PII procedure. They are fundamentally different from each other. The PII procedure respects the common law principles to which I have referred. If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. The effect of a closed material procedure is that closed documents are only available to the party which possesses them, the other side's special advocate and the court…"

Were the CMA to have deployed public interest immunity material at the hearing before Mr. Justice Mann on the CMA's application for the Warrant, then Mr. Justice Mann certainly did not rule on whether such material was protected by public interest immunity. It seems to me that that question is an open one, yet to be determined. The propositions at paragraphs 61(c) and (d) of the CMA's written submissions take as established the very matters here under consideration, and I proceed on the basis that were public interest immunity to be successfully claimed over some or all of the material redacted by the CMA, then one possible outcome (to put the matter no higher than that) is that this material would have to be excluded from the court's consideration when dealing with an application to revoke or vary the Warrant. It follows that the propositions at paragraphs 61(c) and (d) of the CMA's written submissions are only correct if this Judgment goes a certain way.

ii) Secondly, the CMA's contention pre-supposes that an application to vary or discharge a warrant issued under section 28 puts the burden on the Respondent to show that the warrant was wrongly issued. As to this:

[25] See paragraphs 25 to 29 above.

a) It is clear that, even if this is right – and for the reasons I give below, I am satisfied that it is not – the Respondent is entitled to see the material pursuant to which the warrant was granted. The CMA is presupposing that the material it has redacted should, for the purposes of Concordia's challenge, remain redacted. Again, this is the very point here under consideration, and it seems to me that it would be wrong in principle to presume:

   i) That the material redacted by the CMA will remain redacted; and

   ii) That this material, were it to be disclosed to Concordia, would not reveal any grounds for suggesting that the warrant was wrongly issued.

b) I am satisfied that the burden is not on the Respondent to show that the warrant was wrongly issued. As I have indicated, I agree with the statement of Gross LJ in in Gittins v. Central Criminal Court, [2011] EWHC 131 (Admin) at [27], and I consider that the consequence of the application to vary or revoke being akin to a "return date" is that the hearing on the return date is a re-hearing. On that re-hearing, the court will decide the issue on the evidence then before it. As I have noted, it cannot be presumed that that evidence will comprise all of the material that was before Mr. Justice Mann. If there is a successful application for public interest immunity in relation to some or all of the redacted material, then (on one view at least) that material will be excluded from the court's consideration.

Either way, whilst I accept the CMA's proposition at paragraph 61(a) of the CMA's written submissions that the warrant remains valid until quashed, it is perfectly possible for the warrant to be quashed either because the material presently redacted is produced and shows that the Warrant was wrongly granted or because the material is not produced and cannot be relied upon to justify the issuing of the Warrant.

45. I therefore proceed to the central question: how is material that may be protected by public interest immunity to be treated when there is an application under the Practice Direction to vary or revoke a warrant issued pursuant to section 28?

(3) The proper treatment of evidence that may be protected by public interest immunity

(i) The sensitivity of the material deployed by the CMA on a section 28 application

46. There are four points that need to be made in this regard.

47. First, I am going to proceed on the assumption that the evidence deployed in this case contains material that is capable of being protected by public interest immunity. I shall assume that all of the material redacted by the CMA in this case is so sensitive that an application to withhold that material from Concordia would or might succeed.

48. Secondly, I should say that I accept that this is quite likely to be the case in most applications under section 28. I have read with great care the witness statement of Ms. Ann Pope, the CMA's senior director for anti-trust enforcement in the competition, consumer and markets group of the CMA. Her statement sets out, in careful detail, the public interest grounds which support non-disclosure of confidential information at this stage of a CMA investigation. I accept that evidence.

49. Thirdly, I should also say that I accept that were the CMA, on making an application for a warrant under section 28, to be faced with the risk that sensitive material would or might be disclosed into the public domain or even just to the Respondent, then this would have a significant adverse effect on the CMA's willingness to make section 28 applications. That, I accept, would not be in the public interest.

50. Fourthly, and finally, I should stress that it is unlikely to be the case that the CMA will have the choice, when making a section 28 application, of omitting sensitive material that it would wish to as subject to public interest immunity. It seems to me that the CMA will have a choice between making the application (disclosing sensitive material to the judge) or not making the application at all. Paragraph 4.3 of the Practice Direction identifies the evidence that the CMA must place before the court on a section 28 application. That evidence must include "all material facts of which the court should be made aware". There is, thus, entirely unsurprisingly, a duty of full and frank disclosure on the CMA when making the application. That duty of full and frank disclosure may very well oblige the CMA, if it chooses to make a section 28 application, to disclose to the court material that it would wish to protect by way of public interest immunity. It seems to me important to evaluate the applicable procedure in this light.

(ii) A balancing exercise

51. I entirely accept that this is a case where competing public interests are at stake. There is the public interest in the effective investigation of infringements of competition law and there is the public interest in protecting the rights of (in this case) a business from infringement and invasion. To adopt and adapt the words of Lord Bingham CJ in R. v, Crown Court at Lewes, ex parte Hill, (1991) 93 Cr App R 60 at 66:

> "There is an obvious tension between these two public interests because [competition law infringements] could be most effectively investigated…if the personal and property rights of citizens could be freely overridden and total protection of the personal and property rights of citizens would make investigation…of many [competition law infringements] impossible or virtually so."

(iii) Four possible options

52. I am going to assume that at an *ex parte* without notice hearing a warrant is issued by a High Court judge under section 28. I shall assume that that warrant was granted on the basis of materials that include materials that the CMA would wish to protect by way of public interest immunity. An application is then made by the Respondent to vary or discharge the warrant. As I have found, I consider that that application is to be treated like the "return date" for a freezing order or a search and seizure order. In short, the hearing of the application will be by way of re-hearing.

53. The question before the court will, therefore, be whether, on the basis of the evidence before it on the "return date", the requirements for the issue of the warrant laid down in section 28 have been met. The true question is whether the warrant can, on the basis of this evidence, be maintained. Unless there is evidence before the court that can enable it to reach the conclusion that the warrant was properly granted – taking account of subsequent events – the warrant must be discharged.

54. There are four possible procedural options for conducting this re-hearing:

i) *Option 1: Disclosure to the Respondent of all of the evidence relied upon by the CMA before the judge when the section 28 warrant was issued.* This would ensure a parity of arms. It would oblige the CMA to disclose to the Respondent all of the material it relied upon before the judge, including sensitive material that the CMA might wish to protect by way of public interest immunity.

ii) *Option 2: Disclosure to the Respondent of all of the evidence relied upon by the CMA before the judge when the section 28 warrant was issued, except for sensitive material that has been found to be protected by public interest immunity, which is then excluded from consideration at the inter partes hearing.* This, in effect, is Option 1, except that material which has been found to be protected by public interest immunity is excluded from the re-hearing. This might very well entail a Bangs hearing before the *inter partes* hearing, to determine whether the sensitive material is, indeed, protected by public interest immunity, which would involve a degree of balancing between the competing interests of disclosure in the interests of the due administration of justice and withholding in order to protect sensitive material. However, to be clear, material protected by public interest immunity would be excluded, under Option 2, from the court's consideration on the re-hearing. It may be that, as a result, the warrant could no longer be justified by the CMA and would have to be set aside, even though sufficient evidence to justify issuing the warrant existed before the judge hearing the *ex parte* section 28 application.

iii) *Option 3: Disclosure to the Respondent of all of the evidence relied upon by the CMA before the judge when the section 28 warrant was issued, except for sensitive material that has been found to be protected by public interest immunity, which is then taken into account by the judge at the re-hearing, but withheld from the Respondent.* This is the option contended for by the CMA. Under this option the material found to be protected by public interest immunity and deployed before the judge at the *ex parte* application continues to be considered by the court, but without the Respondent seeing it at any stage.

iv) *Option 4: Disclosure to the Respondent of all of the evidence relied upon by the CMA before the judge when the section 28 warrant was issued, except for sensitive material that has been found to be protected by public interest immunity, which is then taken into account by the judge at the re-hearing, and to which the Respondent is permitted limited and controlled access.* This is the option contended for by Concordia. Under this option, the material found to be protected by public interest immunity and deployed before the judge at the *ex parte* application continues to be considered by the court, but with the

Respondent having limited sight of that material (e.g. through identified persons admitted to a confidentiality ring).

55. I propose to consider these various options, both in light of the law as I have described it in Section D and in light of the practical implications of each option.

(iv) Option 4: Disclosure to the Respondent of all of the evidence relied upon by the CMA before the judge when the section 28 warrant was issued, except for sensitive material that has been found to be protected by public interest immunity, which is then taken into account by the judge at the re-hearing, and to which the Respondent is permitted limited and controlled access

56. It is quite clear that the use of confidentiality rings to protect sensitive material that qualifies for public interest immunity has been disapproved of at the highest level. I refer to the authorities cited at paragraphs 33 to 34 above. It seems to me that the points made in AHK and Somerville are well made, and that Somerville is in any event binding on me.

57. The practical implications of the use of a confidentiality ring in a case such as this need to be borne in mind. Concordia contended for a confidentiality ring confined – at least in the first instance – to lawyers external to Concordia. They, it was suggested, would examine the public interest immunity material, and determine whether, in light of this and the "open" material, it could be contended that there were not reasonable grounds for suspecting that documents would be concealed, removed, tampered with or destroyed.

58. The problem with such a process is that submissions on this point could not sensibly be made without seeking instructions from Concordia itself. These instructions could not be sought, because of the obligations imposed by the confidentiality ring. The creation of a confidentiality ring in the circumstances of this case – even if permitted, which I find it is not – would not solve the problem of the withholding of the sensitive material from Concordia generally. In this regard, it is helpful to refer to a decision of the Competition Appeal Tribunal in 2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited, [2012] CAT 7, where the Tribunal considered precisely this problem in the context of confidential (as opposed to public interest immunity) material, and concluded that a confidentiality ring confined to external lawyers simply could not create a basis for a fair trial.

59. For these reasons, I reject Option 4 as the procedural basis for conducting a hearing at which it is sought to vary or revoke a section 28 warrant.

(v) Option 3: Disclosure to the Respondent of all of the evidence relied upon by the CMA before the judge when the section 28 warrant was issued, except for sensitive material that has been found to be protected by public interest immunity, which is then taken into account by the judge at the re-hearing, but withheld from the Respondent.

60. I do not consider that Option 3 is one that is open to me as a matter of law. The CMA urged me to follow the decision in Haralambous, considered in paragraph 30 above. However, the basis of the decision in Haralambous was that the relevant application for the section 8 warrant was the *ex parte* application to the magistrate, not a

subsequent *inter partes* challenge to a section 8 warrant originally granted *ex parte* and without notice.

61. By definition, the case that I am considering is not *ex parte*, but *inter partes*. I do not regard Haralambous as applicable in this case. Rather, this is a case of an *inter partes* hearing, where I consider the statement of Lord Toulson in R. (British Sky Broadcasting Ltd) v. Central Criminal Court, [2014] UKSC 17, [2014] 1 AC 885 at [30] to pertain:

> "Equal treatment of the parties requires that each should know what material the other is asking the court to take into account in making its decision and should have a fair opportunity to respond to it. That is inherent in the concept of an "inter partes" hearing."

62. I appreciate that the court in Haralambous considered that reliance on public interest immunity material not available to the Respondent did not constitute a "closed material" process.[26] On the very specific facts of that case, this may be right. But I have no doubt that were I to sanction a process whereby, at an *inter partes* hearing, a section 28 warrant could be justified on the basis of material available to the CMA and available to the court, but not available to Concordia, then that would constitute precisely the sort of "closed material" process that (according to the Supreme Court in Al Rawi) ought only to be sanctioned by Parliament. I refer, in particular, to the statement of Lord Dyson JSC quoted in paragraph 44(i) above: I fail to see how Option 3 can be regarded as anything other than a "closed material" process.

63. The fact that many of the cases that I have referred to in Section D refer to the protection of sensitive material by way of public interest immunity[27] is nothing to the point. These cases simply refer to the exclusion of such material from the court process, and in no way justify a "closed material" process.

64. Al Rawi made clear that a "closed material" process requires legislative underpinning. That is both because such a process is intrinsically unfair – because it eschews the level playing field that is a hallmark of a fair litigation process – and because the process has the significant disadvantage of impairing the perceived independence of the judiciary. Take the present case: Mr. Justice Mann reached a different conclusion to me on Concordia's application to vary the Warrant, based on material that he and the CMA had access to, but which was withheld from Concordia. That process was unavoidable, given the need to avoid pre-determining the very issue here under consideration, and I have no doubt that Mr. Justice Mann was correct in his conclusion. But that rests entirely on an untestable faith in the judge's ability to test – in an adversarial context where the Respondent fights under an informational disadvantage – the CMA's argument. It is not right – unless stipulated by legislation – that a judge be placed in the position of having to send a party out of a courtroom, and then hand down a decision against that party based or apparently based on material not seen by that party.

65. I regard it as altogether irrelevant that a warrant issued under section 28 may constitute a less serious type of infringement against the liberty of the subject than other forms of encroachment. I recognise that Concordia is a business, and that the

[26] Haralambous at [39].

[27] See paragraph 25 above.

Warrant related to business premises. It may be that these facts would justify more extensive public interest immunity redactions in this case than in other cases. But the seriousness or otherwise of the invasion of the rights of subjects is nothing to the point: the point is that the process contemplated by Option 3, whereby a section 28 warrant is justified by "closed material", is inherently undesirable and not one to be adopted without legislation.

(vi) Option 1: Disclosure to the Respondent of all of the evidence relied upon by the CMA before the judge when the section 28 warrant was issued

66. Option 1 can be disposed of relatively swiftly. Option 1 proceeds to cause all material deployed before the judge on the *ex parte* application to be disclosed to the Respondent, without any assessment of whether that material is protected by public interest immunity. That, as it seems to me, must in principle be wrong.

67. As Haralambous shows, it is perfectly proper for an Applicant for a warrant to disclose to a judge, on an *ex parte* application, material that might be protected by public interest immunity. Indeed, as I have noted,[28] the Practice Direction requires the CMA to make full and fair disclosure to the judge on the *ex parte* application, and that may very well require the CMA to reference material that is protected by public interest immunity.

68. Option 1, therefore, is flawed because it fails to take due account of the CMA's interest in protecting sensitive material.

(vii) Option 2: Disclosure to the Respondent of all of the evidence relied upon by the CMA before the judge when the section 28 warrant was issued, except for sensitive material that has been found to be protected by public interest immunity, which is then excluded from consideration

69. That leaves Option 2. Option 2 contemplates the interposition of a public interest immunity review between the *ex parte* and *inter partes* stages. At the *ex parte* application for a section 28 warrant, the judge sees everything that the CMA proposes to rely upon, including material that may be protected by public interest immunity. Assuming the warrant is granted, then prior to any *inter partes* application to vary or revoke the warrant, public interest immunity material must be identified and excluded. The *inter partes* hearing then proceeds on the basis of the evidence that is not excluded.

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

[28] See paragraph 50 above.

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.

F. DISPOSITION

71. I conclude 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. The material disclosed by the CMA has been redacted on grounds of relevance (black shaded areas) and public interest immunity (the grey shaded areas).[29] Clearly, a judge needs to be satisfied as to the correctness of these redactions. Equally, the CMA should have liberty to submit an affidavit setting out the "gist" of any redacted material. It will then be possible, on the basis of this evidence, to determine Concordia's application.

72. I will hear the parties on the next steps and on the appropriate form of order. I should only add that I am conscious that Haralambous has been appealed to the Supreme Court, and that the appeal was heard on Wednesday 8 November 2017. Judgment is awaited. I propose to send a copy of this judgment for the attention of the Supreme Court, given the importance of the Haralambous decision to the CMA's submissions before me.

[29] See paragraph 15(i) above.