



Neutral Citation Number: [2018] EWHC 3448 (Ch)

Claim No: CP-2017-000009

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

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 12 December 2018

Before :

THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

**THE COMPETITION AND MARKETS
AUTHORITY**

Claimant

- and -

**CONCORDIA INTERNATIONAL RX (UK)
LIMITED**

Defendant

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

Hearing date: 5 December 2018

Approved Judgment
(Open)

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

Mr Justice Marcus Smith:

A. INTRODUCTION

1. Under section 28 of the Competition Act 1998, the High Court has power to issue warrants enabling the Competition and Markets Authority (the “CMA”) to enter and search business premises for the purposes of an investigation under the Competition Act 1998. Such applications are made without notice to the occupier or person in charge of the premises which are the subject of the warrant, and the application is made in private. Where a warrant under section 28 is granted, it may be challenged by a subsequent application to the High Court.
2. On 5 October 2017, the Claimant – the CMA – applied to Mann J for various warrants under section 28 against (amongst others) the Defendant, Concordia International Rx (UK) Limited (“Concordia”).
3. The application was supported by certain confidential material, which is entirely usual in such applications. After hearing submissions from the CMA, and considering the evidence, Mann J granted various section 28 warrants, including a warrant against Concordia (the “Warrant”).
4. The Warrant applied to documents relating to an investigation into suspected anti-competitive behaviours in relation to a number of pharmaceutical drugs (described in the Warrant as “relevant products”). The relevant products – set out in Annex A to the Warrant – included:
 - (1) Carbimazole 5mg and 20mg tablets (“Carbimazole”); and
 - (2) Hydrocortisone 10mg tablets (“Hydrocortisone”).
5. By an application notice dated 10 October 2017, Concordia applied to have the Warrant discharged to the extent that it applied to Carbimazole and Hydrocortisone. Concordia does not seek to have the Warrant discharged in relation to any other relevant products.
6. That application is due to be heard on 19 December 2018. Before this application can be heard, it is obviously necessary to determine whether Concordia can have sight of the confidential material referred to in paragraph 3 above. This judgment deals with that anterior issue.
7. It is necessary to begin by setting out the context in which an application to set aside or vary a section 28 warrant takes place.

B. THE CONTEXT

8. It is now clear law – following the decisions of the Supreme Court in *R (Haralambous) v. Crown Court at St Albans* [2018] UKSC 1 (“*Haralambous*”) and of the Court of

Appeal in this case [2018] EWCA Civ 1881 (“*Concordia*”)¹ – that the court may, on the making of an *ex parte* application for a warrant, rely upon material which cannot be disclosed to the subject of the warrant on the grounds of public interest immunity (“PII” and “PII Material”): *Haralambous* at [27] and [37]; *Concordia* at [27].

9. Where the issue of a warrant is subsequently challenged, the court must operate a “closed material procedure”, whereby the court considers the PII Material, which is not, however, disclosed to the subject of the warrant (or to the subject’s legal representatives): *Haralambous* at [43], [51], [52] and [59]; *Concordia* at [27]. Neither the subject of the warrant, nor the subject’s representatives, will be present during the “closed material procedure”.²
10. Of course, it will be necessary, before the challenge to the warrant is heard, to determine the proper scope of the PII asserted by the CMA. The appropriate time for the court to form a definite view as to what is protected by PII is upon an application having been made by the subject of a warrant for the warrant in question to be varied or discharged: *Concordia* at [31]. As a matter of practicality, the appropriate time will have to be sufficiently before the hearing of the application to challenge the warrant so as to enable both parties to prepare knowing what material will be available in the “open” part of the proceedings and what material will be available only in the “closed” part of the proceedings.
11. As to the process that must be followed when considering whether material is protected by PII:
 - (1) The general rule is that the court should consider first representations by the party asserting PII (in this case, the CMA), then by the party the subject of the warrant (*Concordia*) in “open” proceedings, then further representations by the party asserting PII in the subject’s absence in “closed” proceedings: *Commissioner of Police for the Metropolis v. Bangs* [2014] EWHC 546 (Admin) (“*Bangs*”) at [31].
 - (2) So far as possible, purely legal matters should be resolved in the “open” proceedings: *Bangs* at [32].
 - (3) Where it is necessary to hold “open” and “closed” hearings, the judge must give “open” and “closed” judgments. It is highly desirable, in the “open” judgment, to identify every conclusion in that judgment which has been reached in whole or in part in the light of points made in evidence referred to in the “closed” judgment and state that this is what has been done: *Bank Mellat v. HM Treasury (No 2)* [2013] UKSC 38 at [68].
12. The hearing before me on 5 December 2018 was conducted according to this process. This is the “open” judgment, which resolves those matters capable of being dealt with without referring to the “closed” material (the “Open Judgment”). There is a separate,

¹ The reason for the delay between the issuing of the application on 10 October 2017 and the intended hearing of that application on 19 December 2018 was the appeal of my decision at [2017] EWHC 2911 (Ch) to the Court of Appeal. That appeal could not be heard – although expedited – until the Supreme Court’s decision in *Haralambous* was handed down.

² Thus, *Haralambous* has succeeded in creating, through the common law, a procedure similar to the statutory procedures protecting material the disclosure of which would be damaging to the interests of national security. These procedures are provided for in sections 6ff of the Justice and Security Act 2013 and CPR Part 82.

“closed” judgment (the “Closed Judgment” [2018] EWHC 3450 (Ch)) which deals with matters arising during the “closed” part of the PII application I heard. This judgment identifies those conclusions which are based upon the findings and holdings I make in the Closed Judgment.

C. THE CMA’S ASSERTION OF PUBLIC INTEREST IMMUNITY

(1) The sensitive material

13. The material over which the CMA asserted public interest immunity comprised:
 - (1) The first affidavit of Ms Ann Pope, the Senior Director for Anti-Trust Enforcement in the CMA, sworn on 29 September 2017 (“Pope 1”). Pope 1 attached one exhibit (“Pope 1 Exhibit”).
 - (2) The first affidavit of Mr Andrew Groves, a Director in the Competition, Consumer and Markets Group in the Enforcement Directorate of the CMA, sworn 29 September 2017 (“Groves 1”). Groves 1 attached one exhibit (“Groves 1 Exhibit”).
 - (3) The first affidavit of Ms Susan Oxley, Project Director, Competition, Consumer and Markets Group at the CMA, sworn 29 September 2017 (“Oxley 1”). Oxley 1 attached one exhibit (“Oxley 1 Exhibit”).
 - (4) The first affidavit of “X” (the name of the deponent is redacted on grounds of PII), sworn 29 September 2017 (“X 1”). X 1 attached one exhibit (“X 1 Exhibit”).
 - (5) The CMA’s skeleton argument in support of its application for the Warrant before Mann J (the “CMA Skeleton”).
 - (6) A transcript of the *ex parte* hearing before Mann J on 5 October 2017 (the “Transcript”).
 - (7) The judgment of Mann J – Neutral Citation [2017] EWHC 2577 (Ch) – in which he determined the CMA’s application.
14. I shall refer to these materials as the “Section 28 Application Materials”, for they all relate to the application under section 28 of the Competition Act 1998 made before Mann J. The Section 28 Application Materials will – self-evidently – be of great importance in Concordia’s application to vary the Warrant.
15. The CMA does not suggest that the entire content of the Section 28 Application Materials needs to be protected by PII. Indeed, very early on in these proceedings, I ordered³ the CMA to make disclosure of all of the Section 28 Application Materials, provisionally redacted:
 - (1) As the CMA considered necessary in the public interest; and

³ The CMA did not oppose the making of this order. The process that has been followed tracks CPR Part 31.19, but (in this case) there was no list of documents, given the nature of the hearing before Mann J. It was therefore necessary – in order to understand the issues between the parties – for the Section 28 Application Materials to be disclosed to the extent this could be done consistently with the public interest.

(2) For relevance.

16. The redactions to the Section 28 Application Materials make clear the reason for the redaction: redactions due to relevance are coloured yellow (“Relevance Redactions”); redactions due to the sensitivity of the material, and which would otherwise be relevant to Concordia’s application, are coloured green (“PII Redactions”). Since that initial disclosure, the CMA has released a further version of the Section 28 Application Materials, scaling back the extent of the redactions.
17. In this judgment, I am concerned to assess whether the non-disclosure of the PII Redactions can be justified – as the CMA assert – on public interest grounds. I am not concerned with the Relevance Redactions.

(2) The basis for the assertion of PII by the CMA

18. So far as possible, a party asserting PII must indicate to the other parties that an application asserting PII is being made and state – without disclosing the material said to be sensitive – at least the category or nature of the sensitive material at issue. Exceptionally, it may be that even disclosing the category or nature of the sensitive material will reveal the very thing that the party asserting PII is seeking to protect, in which case the category or nature of the sensitive material need not be specified unless and until the court has heard the application in “closed” session.⁴
19. In this case, the CMA contended that this was such an exceptional case, where disclosure of even the category or nature of the sensitive material could not be made without thereby disclosing the very thing that the CMA was seeking to protect.
20. For the reasons given in Section C of the Closed Judgment, I find that the CMA was correct in asserting that even the category or nature of the sensitive material could not be disclosed.
21. Inevitably, this significantly inhibited Concordia’s ability to test the CMA’s assertion of PII in this case. Mr Brealey, QC, who appeared for Concordia, was effectively shooting in the dark, and was really only able to articulate a series of points that I should pay particular attention to during the “closed” part of the hearing.

(3) The test for upholding an assertion of PII

22. In *Conway v. Rimmer* [1968] 1 AC 910 at 955, Lord Morris articulated the tension inherent in assertions of PII in the following passage (emphasis supplied):

“There are two aspects of the public interest which pull in contrary directions. It is in the public interest that full effect should be given to the normal rights of a litigant. It is in the public interest that in the determination of disputes the courts should have all relevant material before them. It is, on the other hand, in the public interest that material should be withheld if, by its production and disclosure, the safety or well-being of the community would be adversely affected. There will be situations in which a decision ought to be made whether the harm that may result from the production of documents will be greater than the harm that may result from their non-production.”

⁴ See *R v Davis* [1993] 1 WLR 613 at 617 (*per* Lord Taylor CJ); *R v. H* [2004] UKHL at [20] (*per* Lord Bingham).

23. I have emphasised the second sentence in this passage for a reason. Previously, the successful assertion of PII has meant that material otherwise relevant to a dispute is, on public interest grounds, withheld from both the other parties and the court. In short, the material is simply not deployed.
24. Since *Haralambous* and *Concordia* the position is very different. The sensitive material is deployed and the court must take it into account, but without the benefit of informed submissions from the party from whom the sensitive material is withheld. This is a very significant shift from the law as described by Lord Morris.
25. In *R v. Chief Constable of West Midlands Police, ex parte Wiley*, Lord Templeman identified ([1995] 1 AC 274 at 280-281) three distinct stages in the decision-making process in relation to assertions of PII:
 - (1) Whether the evidence in relation to which PII is asserted is relevant to an issue in the proceedings.
 - (2) Whether disclosure of that evidence would cause harm to the public interest.
 - (3) If so, whether, balancing the public interest in the administration of justice against the harm to the public interest that would be occasioned by disclosure, an order for disclosure should be made.
26. Again, these three distinct stages have to an extent been superseded by *Haralambous* and *Concordia*. Self-evidently, the material over which the CMA asserts PII is relevant: the PII Material was deployed, before Mann J, in order to obtain the Warrant. Unsurprisingly in this case, the CMA conceded that the PII Redactions were relevant. *Ex hypothesi*, that must be the case.
27. But it must be noted that the adverse effect on the public interest in the administration of justice is materially greater under the present dispensation than previously. Previously, the worst that could happen was that relevant material was withheld generally. Now, the position is that relevant material is deployed before the court in the absence of an interested party. Inevitably, the court loses the benefit of the scrutiny and submissions of that interested party.⁵
28. It follows that the adverse effect on the due administration of justice is significantly greater in a case where PII material is being deployed without sight to one party than where it is simply being withheld from everyone. That is because one party (here, the CMA) can refer to and deploy in argument material that is unavailable to the other party to the dispute (here, Concordia).
29. That must mean that the cogency of the PII arguments made by the party asserting PII must be stronger than in a case where the PII material is simply being withheld. In short, the balancing exercise in a case such as this is different to the balancing exercise contemplated in previous cases in that there is this additional factor to take into account.
30. It is obviously not possible, in this Open Judgment, to weigh the importance of protecting the PII Redactions in the Section 28 Application Materials. That requires an appreciation

⁵ This sort of scrutiny is very important in reaching properly founded decisions. See, for example, the research described in Haidt, *The Righteous Mind*, 1st ed (2012) at 75-76.

of why the PII Redactions are sensitive, which can only be gained by examining them. That is done in Section D of the Closed Judgment.

31. Equally, and for the same reasons, it is not possible to consider whether the public interest in preventing disclosure of the sensitive material can be protected in a manner other than through the use of a “closed material procedure”. This is a matter considered in Section F of the Closed Judgment. However, because there is a point of law in issue regarding the ability of the courts to protect PII Material other than through “closed material procedures”, it is appropriate that I deal with this (purely legal) question here. Necessarily, the discussion is an abstract one:

(1) It seemed to be clear law that when considering an assertion of PII the court should “not merely consider whether the immunity is well founded but also... assess how the issue can be resolved fairly. For this purpose, the court will wish to consider whether the position can be resolved by ordering disclosure on terms which protect the public interest”.⁶

(2) Thus, in *Conway v. Rimmer* itself, Lord Pearce contemplated masking or sealing up certain parts of documents and only disclosing the rest:⁷

“If part of a document is innocuous but part is of such a nature that its disclosure would be undesirable, it should seal up the latter part and order discovery of the rest, provided that this will not give a distorted or misleading impression. In all these matters it must consider the public interest as a whole, giving due weight both to the administration of the executive and to the administration of justice.”

It will be observed that this was the course followed in the present case: as I have described, the CMA disclosed to Concordia the Section 28 Application Materials, subject to the Relevance Redactions and the PII Redactions.

(3) By the same measure, it is incumbent on the court to consider whether relevant extracts can be disclosed or a summary made of the relevant material. In *R v. Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274 at 306-307, Lord Woolf stated (emphasis supplied):

“If the legal advisers of a party, who is in possession of material which is the subject of immunity from disclosure, is aware of the contents of that material, they will be in a better position to perform what they should consider to be their duty, that is to assist the court and the other party to mitigate any disadvantage which results from the material being not disclosed. It may be possible to provide any necessary information without producing the actual document. It may be possible to disclose a part of the document or a document on a restricted basis. An assurance may be accepted by counsel. In many cases, co-operation between the legal advisers of the parties should avoid the risk of injustice. There is usually a spectrum of action which can be taken if the parties are sensible which will mean that any prejudice due to non-disclosure of the documents is reduced to a minimum.”

⁶ Hollander, *Documentary Evidence*, 13th ed (2018) (“Hollander”) at [22-09].

⁷ [1968] 1 AC 910 at 988.

- (4) The underlined words appear to suggest that disclosure of a PII document may be limited to solicitors and counsel, which is the view expressed by *Hollander*.⁸ That course comes very close to the creation of a confidentiality ring, which was an approach considered by the Court of Appeal in *Concordia* and rejected by it. The basis upon which the Court of Appeal rejected the use of confidentiality rings was not (or not only) because of their inherent unsuitability in PII Cases⁹ but because “once a court has held that material is protected by PII it cannot be disclosed, whether into a confidentiality ring or otherwise”.¹⁰
- (5) I doubt whether this injunction against disclosure prohibits the redaction of PII materials so as to excise the sensitive parts, or to the provision of a summary or gist, not least because that has been accepted practice since at least *Conway v. Rimmer* and was the process adopted in this case by the CMA. However, it does seem to me to preclude the use of forms of process (such as confidentiality rings) which involves the disclosure of PII material, but under a special process designed to protect the public interest. In such cases, the only proper process is a “closed material process”.¹¹

Accordingly, even if I had concluded (which I did not) that there was some “third way” which would have allowed the disclosure of PII Redactions whilst sufficiently protecting the public interest in keeping such material under wraps, that is a course that would not have been open to me for the reasons given by the Court of Appeal in *Powell v. Chief Constable of North Wales Constabulary* and *Concordia*.

32. In terms of weighing the adverse effect on the due administration of justice, the following points are relevant:
 - (1) *The seriousness of the matter before me.* Obviously, the question of whether the Warrant was properly granted or should be varied is an important one. Section 28 warrants are intrusive, and the right of the subject of the warrant to mount a challenge is an important one. However, on the scale of significance, an application to set aside a section 28 warrant does not involve the liberty of the subject. Nor does it involve the invasion of personal privacy¹² or of a private home. It involves the searching of business premises. Thus, whilst I consider that the present case ranks well-above proceedings where only damages are being claimed, it ranks

⁸ At [22-09]. *Hollander* cites *Science Research Council v. Nassé* [1980] AC 1028 at 1077 (*per* Lord Edmund Davies, citing Lord Denning MR at [1979] 1 QB 144 at 173). However, *Nassé* was not a PII case, and is of limited assistance here.

⁹ *Concordia* at [39].

¹⁰ *Concordia* at [71].

¹¹ Thus, in the unreported case of *Powell v. Chief Constable of North Wales Constabulary* (Court of Appeal, 16 December 1999), the judge at first instance found that material in a civil case was protected by PII, but he devised a procedure whereby the PII Material could be used *in camera*. Although Schiemann LJ rejected this procedure and allowed the appeal on the grounds that it did not sufficiently protect the PII Material in question, Roch and Beldam LJ concluded that “the judge has no residual discretion once he has determined that evidence concerning the informant should not be disclosed”. In short, once PII had been found to exist, the material had to be withheld from the court process.

¹² *Bangs* involved the serious infringement of the liberty of the citizen, in that Ms Bangs was restrained in handcuffs and subjected to an intimate search. Nevertheless, the Court of Appeal made the point that this was less serious than a case where the liberty of the subject was at stake in a criminal trial.

below cases where the liberty of the subject is at stake because the PII material being withheld is relevant to the outcome of a criminal trial.

- (2) *On the facts of the present case, the Warrant would have been executed in any event.* As I have noted, Concordia’s challenge is only in relation to Carbimazole and Hydrocortisone. To the extent that the Warrant applies to other relevant products, it stands without challenge. It follows, therefore, that – whether the Warrant is justified in relation to Carbimazole and Hydrocortisone or not – a section 28 warrant would have been executed against Concordia in any event. This does seem to me to be a significant factor limiting the adverse effects of granting PII to the PII Redactions.¹³
- (3) *Prejudice to Concordia in vindicating its rights.* As to this:
- (a) As counsel for the CMA pointed out, in my earlier decision in these proceedings ([2017] EWHC 2911 (Ch) at [64]), I expressed myself in fairly trenchant terms:
- “*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 the hallmark of a fair litigation process – and because the process has the significant disadvantage of impairing the perceived independence of the judiciary...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.”
- (b) I erred in my conclusion that a “closed material procedure” requires legislative underpinning, as the Supreme Court’s decision in *Haralambous* shows, and my decision was rightly overturned by the Court of Appeal in *Concordia* as a result. In highlighting this passage in his submissions before me, Mr Beer, QC – quite properly – was making the point that I could not allow the concerns I had articulated to prevent the due operation of a “closed material procedure”. That is obviously right. I cannot allow the general concerns articulated in my decision at [64] to automatically outweigh the interest in protecting PII Material through a “closed material procedure”.
- (c) However, I can properly consider the extent to which the due administration of justice is impaired by one party having material that the other does not. The extent will vary from case to case, depending upon the complexity of the issues, and the importance of the PII Material to those issues.
- (d) In this case, the PII Material is fairly central to considering the validity or otherwise of the Warrant, and Mr Brealey, QC, who acts for Concordia, will obviously be materially impaired in the submissions he will be able to make. That said, Mr Brealey, QC has been able to articulate – and will no doubt further articulate before the hearing on 19 December 2018 – the sort of points he would like to make and which the court should be astute to probe

¹³ The fact that, in relation to some of the relevant products, the CMA has concluded its investigations without taking further action is nothing to the point. The point is whether the Warrant was properly granted in the first place: so far as all relevant products apart from Carbimazole and Hydrocortisone are concerned, that is the case.

with the CMA. Equally, I do not consider that I am, in this case, impaired from probing the CMA in relation to the PII Redactions by the fact that I am also the judge in the proceedings. The CMA have made it clear that they expect such probing and are prepared to provide the sort of assistance to me that would normally be unnecessary because it would be done by Mr Brealey, QC and his team. I also take into account that a “closed material process” places upon the CMA the duty of full and frank disclosure that exists in normal *ex parte* applications.

33. I do not consider that there are any other material factors that weigh against the granting of PII in this case. Weighing these factors against the factors outlined in the Closed Judgment at Section D, I conclude (for the reasons that I give in Section E of the Closed Judgment) that:
- (1) The name of the deponent and the deponent’s position within the CMA, which has been redacted on PII grounds in X 1 and the other Section 28 Application Materials is not protected by PII and should be disclosed.
 - (2) Everything else in the PII Redactions, however, is properly protected by PII and cannot be disclosed in “open” proceedings.