Neutral Citation Number: [2024] EWHC 386 (Admin)

Case No: CO/177/2023; AC-2023-LON-405

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2024

Before

MR JUSTICE SWIFT

- -

Between

THE KING
on the application of

(1) L1T FM HOLDINGS UK LIMITED **(2) LETTERONE CORE INVESTMENTS S.A.R.L**	**Claimants**
- and –	
SECRETARY OF STATE IN THE CABINET OFFICE	**Defendant**
- and –	
UPP CORPORATION LTD	**Interested Party**

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Tom Hickman KC, Paul Luckhurt (instructed by **Akin Gump LLP, Solicitors**) for the **Claimants**
Sir James Eadie KC, Rory Phillips KC, Georgina Wolfe, Emmanuel Sheppard, **and Karl Laird** (instructed by **GLD**) for the **Defendants**

Jennifer Macleod for the **Interested Party**

Tim Buley KC and Alex Jamieson (instructed by **SASO**) **Special Advocates**

Hearing dates: 29 November 2023 (open and closed hearings) and 6 February 2024 (closed hearing only)

OPEN JUDGMENT: SECTION 8 APPLICATION; APPLICATION TO REDACT DOCUMENTS OTHER THAN FOR REASONS OF NATIONAL SECURITY

APPROVED SUBJECT TO EDITORIAL CORRECTION

A. Introduction

1. These proceedings concern a decision made on 19 December 2022 by the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") in exercise of powers under section 26 of the National Security Investment Act 2021 ("the 2021 Act") to order the First Claimant to sell its shareholding in UPP Corporation Limited. The Second Claimant is the parent company of the First Claimant.

2. On 7 July 2023 I made an order under section 6 of the Justice Security Act 2013 ("the 2013 Act") for a closed material procedure. Since then the Secretary of State has disclosed documents in closed form to the Special Advocates, and in open form to the Claimants. Closed documents were disclosed to two groups: the first in July 2023; the second in September 2023:

   (1) the submission made to the Secretary of State on 19 September 2022 for the purpose of his decision under the 2021 Act and some of the documents annexed to that submission;

   (2) letters passing between the Secretary of State and the Home Secretary, the Foreign Secretary, the Secretary of State for Digital Culture Media and Sport, and the Chairman of the BEIS Select Committee, respectively, in December 2022;

   (3) ministerial submissions made to each of the Home Secretary, Foreign Secretary and the Secretary of State for the Digital Culture Media and Sport, respectively, in December 2022;

   (4) emails concerning the decision, sent on various occasions between August 2021 and August 2023;

(5) minutes of meetings of the Investment Security Unit Board on 18 January 2022 and 31 March 2022;

(6) a submission made to the Secretary of State in August 2023.

Open versions have been provided to the Claimants.

3. The Secretary of State has applied under section 8 of the 2013 Act for permission that certain material be disclosed only to the court and to the Special Advocates. Following discussion between counsel for the Secretary of State and the Special Advocates a small number of matters remain in dispute.

4. In addition, apart from the section 8 process, the Secretary of State has applied to redact names of civil servants from the disclosed documents. This application, which is not made on the ground that it is necessary to make these redactions to protect the interests of national security, concerns both the open and the closed versions of the disclosed documents.

B. Decision

(1) The form of the open versions of some closed documents

5. This point concerns the 19 December 2022 submission to the Secretary of State; some of the documents annexed to the submission the December 2022 letters and the December 2022 submissions to the Foreign Secretary and the Home Secretary.

6. There are various ways in which a document containing closed material (i.e. material which if disclosed would cause damage to the interests of national security) may be rendered suitable for disclosure as an open document. One is by redacting closed material from the document by blacking out relevant parts. Another is by re-typing the part of the document that does not comprise closed material in a new document, indicating with gaps, or ellipses, or other markers where text has been omitted. I will refer to this as "plain paper" versions of documents. A further possible approach is to gist/summarise closed material into a new form that is capable of open disclosure and provide the gist/summary either in a new document created for the purpose of open disclosure, or by putting it in an open witness statement. On other occasions these approaches may be used in combination, or the approach used might be a variation of one or the other of them. However, when any of these techniques is used it is clear that the document disclosed as an open document is something different from or less than the original document that contained closed material and has been disclosed to the Special Advocates.

7. In this case the Secretary of State has taken a different approach. Versions of each of the relevant original documents have been prepared omitting the text that is closed material. However, the new versions created are not "plain paper" versions of the original document. Rather, they have been made to look like original, complete

documents. For example, the versions of the 19 December 2022 submission to the Secretary of State and the documents annexed to it have the appearance of being the documents seen by the Secretary of State when he took the decisions challenged in these proceedings. This appearance is reinforced by the fact that information not disclosed on other grounds (relevance and LLP) has been redacted by blacking out sections in the text.

8. The Special Advocates' submission is that this approach is wrong in principle. The documents disclosed as open documents appear to be something they are not – i.e. complete, original documents. Their concern is that it is not necessary to present open documents in this form to prevent damage to the interests of national security, and that as presented, the open documents have the potential to mislead the Claimants and their open representatives who will take the documents at face value and assume they were documents seen by the Secretary of State and used by him when taking his decision. The Special Advocates submit that this risk is particularly significant in claims for judicial review, such as the present claim, where what is or is not contained in the document seen by the decision-maker may be the focus of argument as to the legality of the decision.

9. The Special Advocates submit that if the open documents are to remain in the form that they presently take they should be marked as containing gisted/summarised material, and marked to show where text has been redacted. The submission is that these annotations should be added in the margins of the open versions of the documents.

10. Following disclosure of the open documents it was apparent that the Claimants were under the misapprehension that the versions of the 19 December 2022 ministerial submission and the annexes to it provided to them were the versions seen by the Secretary of State when he took the challenged decision. The Secretary of State has taken steps to dispel this misapprehension. The first step was to provide the Claimants with a new, annotated index for the disclosed material that index now bears the following general statement.

> "Where the documents below contain redactions or gists, they have been served unredacted (other than for LLP) and without gists on the Special Advocates in CLOSED."

Further, document by document, the index states whether the document includes gisted/summarised text or has been the subject of unmarked redactions.

11. The Secretary of State has also agreed that each of the open documents will now be marked as follows:

> "This is not an original document. This document is an OPEN version of a CLOSED document which contains gists and redactions in addition to the marked LLP redactions set out."

Finally, the Secretary of State has also offered to write to the Claimants at the end of the section 8 process in the following terms:

> "You will be aware that the OPEN material that has been disclosed thus far contains gists and redactions that have been applied for reasons of national security (as described in the amended indexes). Where it is possible to do so, GLD have applied black redactions or gists labels to specific passages within the documents to show where changes have been made. However, for reasons of national security, not all redactions or gisted language can be located, displayed or specifically referred to as such within the document. Where it is the case that a document contains gists or redactions that are not visible on the face of the document in addition to being described in the index, we have sought to make this clear within the document itself. In the amended OPEN material that is being disclosed following the outcome of the section 8 hearing labels have now been applied to the first page of documents in OPEN to indicate when a document is not an original and contains redactions and /or gists of CLOSED wording that are not visible on the face of the documents."

I consider that these steps will be sufficient to remove the misapprehension that the decision document provided as open disclosure were the documents seen by the Secretary of State.

12. The point that remains whether the approach taken to open disclosure in this case is generally appropriate. The Special Advocates submit, and I agree, that the approach here is different to the one taken in many other cases where a closed procedure has been used.

13. The issue as I see it, is whether open disclosure of documents in the form disclosed by the Secretary of State in this case is necessary to avoid disclosure of material that would be damaging to interests of national security. This is the obligation imposed on the court by CPR 82.14(10), an obligation which is required to be imposed on the court by section 8(1)(c) of the 2013 Act. If disclosure in that form is necessary for that reason, the Special Advocates' submission must be rejected.

14. While it is too late to change course in this case and prepare documents in different form, concerns regarding national security damage would be sufficiently met by disclosing documents containing the text that can be disclosed without causing damage to the interests of national security in a plain paper version, i.e. not in documents that are made to look like the original documents. Each plain paper version

should, as appropriate, be labelled so that it is clear that the text includes a gisted/summarised version of the original text or that part of the text of the original document has been removed/redacted. I accept that it was not appropriate for the Defendant to have created open version of documents containing closed material by simply blacklining or any similar approach relying on the use of gaps or other markers that would indicate the position and extent of the material removed. However, the open versions of these documents ought not to have been prepared to look like the original documents; they ought not to have pretended to be something they were not.

15. Since there is no national security reason that requires the open versions to be presented in this way, the court is entitled to consider whether the form in which the documents were presented risks prejudice to the Claimant's and their open representatives. The court is able to do this as much in proceedings that are subject to a closed material procedure, as in proceedings that are not. It is right that notwithstanding the work done by the Special Advocates, the existence of a closed material procedure impairs any claimant's ability to pursue his claim. But there is no reason why the extent of that impairment needs to go beyond that which is required to avoid damage to the interests of national security. To avoid the risk of misunderstanding (and consequent prejudice) the documents in issue here ought to have been prepared as plain paper versions of the original documents containing the text that did not comprise closed material and summarised/gisted text as appropriate, and marked as such, e.g. as a plain paper version of an identified original document which had been redacted and in part summarised/gisted.

16. In this case, the remedial steps that the Secretary of State has taken since the open documents were disclosed (i.e. the annotated index referred to above) and the steps the Secretary of State proposes to take (see above, at paragraph 11) will be sufficient to remove the prejudice caused by the form of the open disclosure as originally made. There is no need in this case for the open versions of the documents to be re-made.

(2) Is there a need for further annotation of the open versions of the closed documents?

17. The Special Advocate's next submission is that when the text is an open document is a summary/gist of text in closed document there should be marginal note in the open document against that text to that effect and, when text has been redacted there should be marginal note in the open version next to the relevant paragraph saying that text has been redacted from the original.

18. The Secretary of State has accepted that in some instances a marginal note can be added. The points of agreement and disagreement on this matter are set out clearly in the table prepared by counsel. That table speaks for itself and there is no need to recite its contents in this judgment.

19. So far as concerns the areas of disagreement I accept the submission of the Secretary of State on each matter. Two general points apply. *First*, the only situation in which

it might be necessary to annotate an open version of a closed document at all will be where, absent such annotation, the open document could mislead the claimant. What happened in this case when open disclosure was first made is in point. The open versions had been made to look like originals giving the impression they were the documents the Secretary of State had seen when taking his decision. Even when the form of an open document could mislead it will only be possible to address that risk by applying annotation if that process would not itself risk disclosure of information damaging to the interests of national security. If the addition of annotation ran that risk a different solution would be required, for example presenting the open material in a different way. The *second* general point is that the extent to which a claimant risks being "misled" by the open version of a closed document needs to be kept within sensible bounds. In the present case, where the open versions pretended to be original documents, even to the extent of containing black line redactions for LLP and irrelevant material, that risk was obvious. It is only right that such documents carry a general endorsement concerning redactions and summaries/gistings, at least where (as in this case) there is no national security reason why the general endorsement should not be applied. Beyond this, the position must be less absolute. An open version of a closed document from which closed material has been removed will, by definition, be something less than the original document and to that extent will always present a claimant with the chance to misunderstand. That chance is inherent in the open/closed litigation procedure. It is one of the reasons why Special Advocates exist. In most, if not all, instances where the form of an open document raises the possibility that the claimant might misunderstand what it is, for example mistake the open version for the original document, that problem will be sufficiently addressed by a general endorsement of the sort the Secretary of State has agreed to apply in this case. In most, if not all, instances no further marginal annotation will be required for that purpose. If, in a particular case there was demonstrable benefit in the open representatives knowing where summarised/gisted text appeared, that case could be made by the Special Advocates in the section 8 process, and the Secretary of State could address whether such an indication presented risk of damage to the interests of national security. But I suspect such an occasion will be rare occurrence.

20. In this case, the points now raised by the Special Advocates do not engage support from any overriding requirement drawn from principles of fairness. The general argument in favour of marginal annotation is not particularly strong. Set against this, the Secretary of State relies on general consideration and some matters more specific to the documents and the parts of them that are the subject of this submission. The purpose of removing text or summarising/gisting text is to permit information to be disclosed into the open part of the proceedings. What the summary can contain, what text is to be removed, is an exercise in evaluation by reference to the requirements of national security. One matter going into the evaluation process will be how obvious the existence of the redaction or the summary/gist will be. In some instances, there may well be a trade-off between this and the extent of the information that can remain in the open document or be included in the summary/gist.

21. Taking the Secretary of State's submissions on these points in the round, the approach applied in this case is to the effect (a) that there is no general requirement for marginal notes on open documents to indicate where text has been redacted or where summaries/gists have been deployed; but (b) where and to the extent such an

indication can be given without giving rise to the concern that pointing out the change risks giving away sensitive information, an annotation will be added as a matter of good practice. I agreed that this is the correct approach. I agree with the way in which it has been applied, point by point, on the parts of the documents put issue by the Special Advocates in this case. In the premises, insofar as the Special Advocates requests for the application for marginal notes have not been accepted by the Secretary of State, those requests are refused.

(3) Further specific points raised by the Special Advocates

22. Three specific points of disclosure were requested by the Special Advocates. I accept the Secretary of State's submissions on each of these points. No further disclosure on these matters is required.

(4) Secretary of State's application to redact names (not made on national security grounds)

23. The Secretary of State applies for permission to redact all documents disclosed in this case (both those disclosed as closed documents to the Special Advocates and the documents provided as open disclosure to the Claimants), to remove the names of all civil servants save for the names of civil servants working in the Senior Civil Service grades. This application is to similar effect to the one made by the Secretary of State for the Home Department in *R(IAB) v Secretary of State for the Home Department*. That application was refused by me ([2023] EWHC 2930 (Admin)); an appeal against that decision was dismissed by the Court of Appeal ([2024] EWCA Civ 66).

24. The effect of the judgment of the Court of Appeal in *IAB* is that names of civil servants may not be redacted from documents disclosed in judicial review claims as a matter of course, but only if there is good reason to do so; see per Bean LJ at paragraph 28 – 33.

25. In part, the Secretary of State's application in this case is made on the basis of the same matters relied on in *IAB* – i.e., that the names should be redacted on grounds of relevance. That submission failed in *IAB* and it fails in this case for the same reasons.

26. Further, the Secretary of State relies on evidence on a witness statement made by Jacqueline Ward, the Director of the Investment Security Unit. The latter part of that evidence is under the heading "Confidentiality and National Security". Ms Ward explains that the identity of civil servants who work on decisions taken in exercise of the powers in National Security and Investment Act 2021 may be of interest "to those seeking to undermine the UK's national security such as hostile actors". Her evidence is that this reason applies to all civil servants not working in senior civil service grades and is a sufficient reason to redact their names from the disclosed documents.

27. I disagree. Ms Ward's statement does not set out any specific national security reason for the redaction of the names of all civil servants in junior civil service grades. Leading Counsel for the Secretary of State accepted that there was no national security assessment to the effect that all such names needed to be redacted. The Secretary of State's general application, that the names of all civil servants outside the senior civil service should be redacted, therefore fails.

(5) Application to redact certain names to protect the interests of national security

28. The Secretary of State's alternative submission concerns the names of (a) GCHQ officers working in the National Cyber Security Centre; and (b) certain NCA officers. The Secretary of State's submission that the names of officers in each of these groups should be redacted in the open disclosure rests on information in two schedules which describe the work of each group and the reasons why that work and the interests of national security could be put at risk by publication of their names.

29. The Special Advocates are neutral on this point. The Claimants have made representations on the general point in the letter dated 5 February 2024.

30. Having considered each schedule carefully, I accept the Secretary of State's submission that in this case the names of the officers in these two groups should not be disclosed.