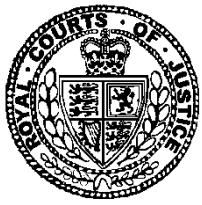

Neutral citation No: [2018] EWHC 3158 (Ch)

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

No. CP/2017/000009

Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 8 November 2018

Before:

HIS HONOUR JUDGE PAUL MATTHEWS

(Sitting as a Judge of the High Court)

B E T W E E N :

THE COMPETITION AND MARKETS AUTHORITY — Claimant

- and -

CONCORDIA INTERNATIONAL RX (UK) LTD. — Defendant

MR J. BEER QC, MR R. WILLIAMS and MS C. VENTHAM (instructed by the Competition and Markets Authority) appeared on behalf of the Applicant.

MR M. BREALEY QC (instructed by Morgan Lewis & Bockius UK LLP) appeared on behalf of the Respondent.

J U D G M E N T

(Transcript prepared from defective recording)
(Transcript prepared without the aid of all documentation)

HHJ PAUL MATTHEWS:

1 In the course of conducting a CMC in this matter, the question has been raised on behalf of the defendant, Concordia International, as to whether the court should invite the Attorney General to appoint a special advocate to take part in two further hearings, to which I will refer below. This arises in connection with the challenge made on behalf of the defendant to a warrant issued on 6 October 2017 under s.28 of the Competition Act 1998 to authorise the claimant, the Competition and Markets Authority, to search premises, business premises as it happens, occupied by the defendant and to seize relevant material. The challenge to the warrant relates, however, to only part of the matters the subject of the warrant. In other words, in large part, the warrant is not challenged.

2 I am giving judgment *ex tempore* in this matter, although it raises an interesting – a very interesting – question of some novelty in the context of competition law and warrants under s.28, because this is a case in which there is a need to move on quickly. It is hoped that the further hearings to which I will come will be arranged to take place in December this year, and, accordingly, given my existing commitments, there is no time for me to write a judgment.

3 So far as the background to the dispute that has arisen and the litigation which it has provoked are concerned, I am not going to set out details here. Everyone listening to this judgment now knows them all very well. For anyone coming to the matter afresh, I simply incorporate by reference the first eighteen or so paragraphs of the judgment of the Court of Appeal in this matter dated 7 August 2018, in which the background and the statutory basis

for the decision for the question to be determined are set out. In that decision of the Court of Appeal the court reversed the decision of the judge, Marcus Smith J, and held that a judge who was considering a challenge to a warrant under s.28 was obliged to take account of all the relevant material, including any that was subject to PII, as happens to be the case here. This was a decision which was, in effect, foretold because of the decision of the Supreme Court in the *Haralambous* case (*R (on the application of Haralambous) (Appellant) v Crown Court at St Albans & Anor (Respondent)* [2018] UKSC 1). This, by an unfortunate coincidence of timing, happened to be decided either too early or too late, depending on your perspective, and resulted, as I say, in the Court of Appeal reversing the decision of the judge.

4 Now, it is agreed between the parties that this CMC is to lead to two further hearings and that they are to be separated in time by, say, approximately two weeks. The first of these will be a hearing to determine whether or not the material for which public interest immunity (PII) is claimed on behalf of the claimant authority is a good claim, and the material really is covered by PII. Then, secondly, there will be the hearing of the substantive challenge to the warrant. Now, ideally, the same judge would deal with all three hearings, the CMC and the two following hearings. That is not, however, possible here, partly because I am a bird of passage in this building, normally sitting in Bristol, and I do have a full list for the next few months. However, enquiries with the Listing Officers have shown that it should be possible to find one judge of this Division to do both hearings in December, sufficiently separated in time.

5 As I have already said, the Court of Appeal, in its decision in August, said that the challenge to the warrant had to be decided by including reference to the material which was subject, or claimed to be subject, to PII, but which was, for obvious reasons, not shown to the

defendant. So the defendant is hampered, significantly hampered, by not having seen the PII material and, of course, will not see it (so far as it is confirmed to be subject to PII) at the substantive hearing. The defendant says that makes the proceedings unfair. Accordingly, the defendant says the unfairness can be, to some extent, counterbalanced by the appointment of a special advocate who will be able to see the PII material.

6 The evidence before me in relation to this question, for the purposes of this hearing, has been both open and closed. Some of the closed evidence has, since it was originally produced to the court and not shown to the defendant, been redacted and produced to the defendant in a redacted form. So it is partly open in that sense. I have also had the advantage of being addressed by both Mr Mark Brealey QC on behalf of the defendant and Mr Jason Beer QC on behalf of the claimant in open session. That took the greater part of yesterday. At the end of the day I was addressed, for a little less than fifteen minutes, by Mr Beer QC alone, in closed session, after Mr Brealey QC and his clients had left the courtroom.

7 I want to say just a few words about the idea of the special advocate, because that is what this application is all about. First of all there are a number of contexts in which statutory provision is made for the appointment of a special advocate. None of those, however, applies in this case. Yet it is well established now that the courts may invite the Attorney General to appoint a special advocate in a case where there is no statutory procedure, as long as the circumstances make it appropriate.

8 As to what those circumstances are, it is clear from the cases that the appointment of a special advocate, certainly in a non-statutory case, is regarded as an exceptional event, indeed one to be the event of last resort, rather than in any sense a default position. I was taken, in particular, to the decision of the House of Lords in *R v H* [2004] 2 AC 134 where,

at paras.19 through to 21, Lord Bingham, on behalf of the Judicial Committee of the House of Lords, set out some of the history of the role of special advocate, and, in para.22, he summarised the requirements, if I can term them so, as that the appointment should always be exceptional, never automatic and should be a matter of last resort. He went on to say – and I am paraphrasing – that the judge had to be satisfied that no other course would meet the need for fairness to the defendant.

9 Those sentiments have appeared in other cases too. They appeared in the decision of the Divisional Court in *R (on the application of Malik) v Manchester Crown Court & Anor.* [2008] EWHC 1362 (Admin) and, in particular, at paras.96 to 99. There, that court gave some history, once again, of the special advocate and then made the same point as Lord Bingham, that it had to be an exceptional case and a matter of last resort to appoint a special advocate. The sentiments of Lord Bingham were also echoed, and partly quoted, by King LJ in the Court of Appeal's decision in this case, to which I have already referred, at, I think, para.75 of the decision.

10 I was referred to other cases, but the only other one I want to mention at this stage is the decision of the President of the Family Division of the High Court in *Re A* [2012] Fam 102, dealing with forced marriages. Sir Nicholas Wall, President, gave a decision in relation to the question whether or not special advocates were to be appointed in forced marriage cases where issues of PII material were raised and had to be dealt with.

11 So, it is clear on the authorities that it is competent for the court, in a non-statutory case, to seek the appointment of a special advocate, but it is also clear that this is something exceptional, and a special case has to be made out for that appointment. The question really is what matters are to be taken into account by the court in deciding whether or not that exceptional test is satisfied. A number of factors or issues were canvassed before me. It

seems to me that there are perhaps half a dozen points which the court ought to consider, certainly on the facts of this case. I am far from saying that there are no others that could be considered in appropriate cases.

12 Firstly, there is the seriousness of the issue that has to be determined with the assistance, if that is what is to happen, of the special advocate. That comes from the *Malik* case at para.100. Then, certainly in this case, it is relevant to take account of the nature of the exercise which has to be undertaken. A submission was made to me by Mr Beer QC on that point, arising from the Practice Direction in relation to such challenges. Thirdly, there is the relevance of the duty on the claimant Authority, in this case, of full and frank disclosure to the court because the application for the warrant is necessarily an *ex parte* application. So the sub-question in relation to this is: is there any material before the court to show that that duty may not have been fulfilled or may have been breached in any way? The fourth matter is how far the special advocate can further the absent party's case. That appears from *Malik* at para.102. Of course, for that purpose, one has to have regard to a number of things, including the nature of the case and what the court will actually be doing. In this case, of course, the court will largely be reviewing the material that was before Mann J when he made the decision to authorise the issue of the warrant, although I bear in mind that that is not necessarily the whole of the exercise. The fifth point is whether there is something which the special advocate can do which it would not be appropriate for the judge to do. That appears from para.92 of *Re A.* Sixthly, and as an overall, overarching point, is the court satisfied the no other course will meet the requirement of fairness to the defendant? That, as I have already said, comes from *R v H* at para.22. So those are the points which I have tried to address in considering this question.

13 First of all, the seriousness of the issue to be determined. The question is, was this warrant justified under s.28 in relation to two drugs out of seven, hydrocortisone and carbimazole? That, of course, is a matter which is of some importance to the defendant. Nevertheless, one must bear in mind that that is only two of the seven drugs which were the subject of the warrant. Or, if you put it in terms of the particular products, I think it is three out of twelve products which were the subject of the warrant. It is to be noted that no challenge has been made in relation to the rest of the warrant, so it is tolerably clear that the search and seizure, the execution of the warrant, would have taken place in any event. Therefore, if it turns out that the inclusion of hydrocortisone and carbimazole was wrong, then that will have caused only a marginal increase in damage rather than the whole of the damage. In fact, of course, there is no evidence before the court of any actual damage suffered. I come back to this point shortly.

14 Thirdly, it is the case that the claimant was already conducting an investigation into the defendant's dealings with these products at the time that the warrant was applied for. Fourthly, it should be borne in mind that there is no question of imposing sanctions for the infringement of provisions of the Competition Act before the defendant has had the opportunity to see the relevant evidence on which the allegation of such infringement is based. Obviously, the defendant would have the opportunity to make representations in relation to that.

15 Now, Mr Brealey QC reminded me that, of course, one must bear in mind the potential consequences of a warrant of this nature being obtained and executed. It may authorise the taking away of virtually all the important elements of business records, computers, mobile phones, files and so on. Mann J had this well in mind, as appears from the transcript, now partly open, of the hearing at which he authorised the warrant, in paras.9 and 10. Mr Brealey

QC also reminded me that, if the execution of the warrant was obstructed, that could result in criminal penalties being imposed on persons who were guilty of that obstruction. But, as I said a few moments ago, there is no evidence here that that defendant has suffered any particular damage as a result of the execution of the warrant, or indeed that anyone is facing penalties for obstruction. Mr Brealey QC says that that is not the point; we should look at the theoretical problems in judging whether the issue can be counted as serious. I accept that all intrusion into others' property rights, both real and personal, is important, particularly to those persons, but also to the sense of wellbeing of the community and the rule of law. In itself, however, it does not necessarily make the issue to be determined a particularly serious issue, and, where there are no claims for loss or any prosecutions for offences resulting as a result of the execution of the warrant, the level of seriousness, at a minimum, at least cannot be said to be exacerbated. I would accordingly judge the seriousness of this particular case as somewhere in the middle of the spectrum; it is neither at the bottom, nor at the top.

16 I turn to the nature of the exercise to be undertaken. It is clear from the Practice Direction in relation to challenges to warrants under s.28, and in particular para.9, that this is intended to be not a complex or protracted procedure but, instead, a summary one. So the court will bear in mind that the appointment of a special advocate would risk turning the procedure into something more complex and more long-lasting. However, I do accept the point that Mr Brealey QC made, that an application for the discharge of a warrant or part of a warrant applies not only for obvious errors such as misdescribing the premises or ascribing them to the wrong occupier, or something like that, but can also apply to a case in which it is said that the conditions for the issue of the warrant under s.28 have not been met. So the nature of the exercise, then, is one which is relatively straightforward, and not to be

overcomplicated, but may involve considering whether, as a matter of law, the warrant could or should have been issued at all.

17 I turn to the third question, the duty of full and frank disclosure to the court. To show that there is a question as to whether the duty has been properly discharged by the claimant, the defendant relies on what it calls a discrepancy in the evidence. The phrase, "the key driver", is used in various places. It is said that what has happened here is that, at one point in time, *some* of the evidence was regarded as the key driver for the application, and yet, at another time, *other* evidence was regarded as that key driver.

18 We need, here, to distinguish between two different sources of evidence which have been relied upon by the claimant in making the application. For convenience, and because these are the words that have been used in the evidence, I will distinguish them as "whistle-blower", which is the first, and "source", which is the second. As to this first, the claimant says in the evidence that it received submissions from a whistleblower, or possibly two whistleblowers, on 12 October 2016 and then 13 January 2017. I take that from the affidavit of Ms Pope at paras.111 to 113 and the affidavit of Mr Groves at para.54. As to the second of them, the claimant received what it says was further information after the issue of the statement of objections, which, its evidence is, was in March 2017. Now, during the course of the argument, there was some discussion as to whether there was an issue about these dates. As a result of what Mr Brealey QC has said, and indeed what Mr Beer QC has accepted, it is clear to me that there was a mistake in part of the oral submission to Mann J on 5 October 2017. This is where Mr Beer QC referred to a statement of objections in relation to the *defendant*, when he meant to refer to such a statement in relation to *Auden McKenzie*, a third party. This is, I think, at p.294, letter B of tab 7 of the open bundle.

19 So, the question is: what is this further information, this "source"? The other way of describing this part of the evidence is as the affidavit of a person referred to simply as "X", because the identity of that person has been redacted. And this is also referred to in Mr Groves' affidavit at para.57 and in his witness statement made on 31 October 2018, so just over a week or two ago, at paras.13 to 16, and that is found at volume 2, tab 17, at p.1903.

20 So far as I can judge, the evidence to Mann J was that the whistleblower's evidence was not enough in itself to substantiate the allegations concerning hydrocortisone. I take that from Mr Groves' affidavit at para.55. I have taken the trouble to read again the relevant passages in the evidence to which I was referred, and also to look again at the closed material which I had the opportunity of looking at for the first time yesterday. In order not to prejudice any of the confidentiality to which the closed material is subject, I will simply say that, from my review of the open and the closed material, it is clear to me that, in relation to the allegations concerning hydrocortisone and carbimazole, the key driver, if that is the right phrase, for the application for the warrant was the evidence of the "source" rather than the evidence of the "whistleblower". So, in my judgment, on proper examination there is no discrepancy here. That is also, as it happens, confirmed by the gist given in open session, by Mr Williams of counsel to Mann J on 11 October 2017 at volume 1, tab 10, p.138.12. Thus the defendant would have been aware thereafter that it was the information received after the statement of objections that was the driver. I also refer in this connection to the witness statement of Mr Groves of 31 October 2018 at paras.13 to 16, where he also says that the new information was obtained after the issuing of the statement of objections.

21 As it happens, an interesting feature of this case is that much of the redacted material relating to the whistleblower was subsequently *unredacted,* so that it became available to the defendant. This process was explained by Ms Pope in the second witness statement she

made on 8 October 2018 at paras.11 to 13 and then paras.15 to 19. When I consider whether there is any material before me to show that there may not have been proper, full observance of the duty of full and frank disclosure to the court, I do not find the discrepancy which Mr Brealey QC said I should find. Of course, I have had the advantage, as he has not, of reading the *whole* of the evidence before the judge and not merely some of it. It is clear, of course, that the judge saw all of that too, and that he evidently did not see any discrepancy either. But I want to go on and say this: that even if there were a discrepancy of the kind which Mr Brealey QC asserts, I am still not satisfied that it would be necessary for a special advocate to be appointed. This is because, in this particular case, that point is in the open, it can be addressed by, and no doubt will be addressed by, the defendants in submissions before the judge on the substantive hearing, the judge will also be alive to it and will, I am sure, be astute to see if there could have been any breach of duty of full and frank disclosure. However, on the material before me, as I say, I see none.

22 The fourth question was how far the special advocate can further the absent party's case. So far as the PII question is concerned, judges are well used to dealing with this kind of question without the assistance of special advocates. It is particularly acute in the criminal courts, where it happens, more or less, on a daily basis. But it also is a feature of civil litigation too these days. Of course, a special advocate would not be able to take instructions on the evidence that he or she might see of any damage caused by revealing the PII material. Nor could the special advocate adduce any new evidence on it, because he or she would not be able to take instructions. So the advantage of having a special advocate here would simply be to test and probe the material, and to add an extra pair of eyes to those of the judge so that it might be hoped that points would be picked up that otherwise might not be. But that is as far as it goes.

23 In relation to the substantive application, the important thing to bear in mind is that this is a review of the decision that the judge made, largely using the material which was before him in October 2017. It is not a procedure for making a new decision on whatever material might now be available *de novo*. I do, of course, accept that the defendant is entitled to refer to other material which it knows of, which may tend to show that the conditions were not met. That might involve some question of a failure to make full and frank disclosure to the judge, or it may not, as the case may be. But it is not necessary to have a special advocate to do that. The defendant can do that for itself and, in addition, the judge can also take the point for himself or herself. So I conclude that the advantage of having a special advocate to further the defendant's case is actually very limited in this case.

24 The fifth point was whether there was anything which the special advocate could do which it would not be appropriate for the judge to do. Well, one thing which Mr Brealey QC mentioned was to apply for the discharge or the variation of the warrant once having seen the closed material. Yet, of course, that is the very job which the judge would be wanting to think about for himself or herself: having seen all the material, including the closed material, does this actually justify the issue of the warrant at all? And there would undoubtedly be some kind of discussion in court if there were such material. So, although I can see that a special advocate may be able to take the point, I do not see that the judge on looking at the material would meekly fold his or her hands and refuse to take the point. However, I do accept, as I have already said, that the special advocate would be able to add an extra pair of eyes, and might pick up something which the judge missed. Four eyes are, after all, better than two. But that is not, in my judgment, something which it would not be appropriate for the judge to do. It is simply that the more hands you have the lighter the work, or the better the work is done, if you like, and that is all there is to it.

25 So I come to the last point, which is really the overarching point here: is the court satisfied that there is no other course which will meet the requirement of fairness to the defendant? I bear in mind in particular here a point made to me by Mr Brealey QC about the submission that the claimant had made in writing to Marcus Smith J on 3 November 2017. This was that there was the possibility of appointing a special advocate where it was necessary to support the fairness and the justice of the proceedings. It seems to me that this submission goes to exactly the point raised by Lord Bingham in *R v H*. Yet it does not go any further, and does not amount to any kind of acceptance of the idea that it must always be justified to appoint a special advocate in all cases.

26 So, taking the matter as a whole, am I satisfied that there is no other course which will meet the requirement of fairness, bearing in mind the answers which I have given to the first five points which I have already raised? I have to say No, that I am not satisfied that a special advocate is needed in this case. Drawing the threads together, I emphasise once more, as the earlier cases have already done, the exceptional nature of the appointment of special advocates. It cannot be done merely because it is desirable to do so or because it might produce a better or a more efficient result. It has to be because it is needed in order to restore some missing fairness in the procedure which cannot sufficiently be supplied by other methods.

27 I come back to a question which I raised with Mr Brealey QC during the course of the hearing: what makes this case special? Why is it necessary in this case, where it would not be necessary in other cases? And I think that there are elements of this in the earlier case law, where the exceptional nature of the appointment is being emphasised. It cannot be the case that the appointment of a special advocate becomes a matter of routine. There has to be something here which justifies it. Mr Brealey said, "Well, this is the first case of its kind,

application to vary a warrant under s.28 and there is a lot of PII material which I cannot see, and that makes it special". He also says that, really, the question is not an entirely fair question because each case does depend on its own facts. Very true. He says, or he said at that point in his submissions, that it was enough for there to be a reasonable case to show a discrepancy between the whistleblower and the affidavit X evidence, the change in the key driver point. However, I have found that, on my review, there is no such discrepancy properly understood. He further says it is a complicated case, it is not an ordinary binary criminal case, and that justifies it. Finally, as I have said previously, he said that the discrepancy point made the case special.

28 As to that last point, I have already dealt with it. As to the question of how complicated the case is, the difficulty is that, if this is a complicated case then most competition cases of this kind will also be complicated, because that is the nature of the litigation, the kind of disputes which are going on, the nature of the jurisdiction being exercised by the authority in applying for the issue of the warrants. I am not at all satisfied that this case is so complicated that it makes it special for the purposes of the appointment of a special advocate. As to whether it was a fair question and each case depending on its own facts, of course it is true that every case is different. But the House of Lords, the Court of Appeal and the Divisional Court have all said that it has to be an exceptional case to appoint a special advocate. They must have recognised that every case turns on its own facts too, and yet they still said what they have said. So I do not think it is an unfair question.

29 And, lastly, this is the first case. I agree it is or, at any rate, I am told it is and I accept it, but I do not think that that makes the case special for the purposes of the appointment of a special advocate. I also accept that four eyes are better than two, and if the judge is not a competition lawyer that will slow things down, but, to my mind, they go to efficiency and

not to the necessity for the appointment of a special advocate. Therefore, in this case, I decline to invite the Attorney General to appoint a special advocate.

LATER

30 Mr Beer QC applies for the claimant's costs of the hearing yesterday and today, dealing with the appointment of a special advocate. He says he has won and his client should have its costs. In principle, I see the justice of that. The general rule is that the question of costs is in the discretion of the court, but that if the court decides to make an order then the winner should have his or her or its costs paid by the losing party. In this case there can be no doubt that, so far as concerns the application for the appointment of a special advocate, the winner is the claimant. So far, so clear.

31 The problem is that, as Mr Brealey QC points out, the assessment of those costs will involve disentangling those elements of the costs incurred which are referable only to the special advocate point from those that have been incurred and are referable, either separately or partly, to the other parts of this case, PII and, in particular, the substantive challenge. That is not so easy, and may create logistical problems. I have some sympathy with that. Nevertheless, I think that, in principle, Mr Beer is right and that, given that he has won, I should make an order which reflects that, otherwise I simply reserve the costs to the judge hearing the second and third hearings. But that judge, as Mr Beer quite rightly says, will probably find it difficult to take a view on the costs.

32 So what I should do is make an order which reflects the fact that the issue which was fought yesterday and today has been resolved in favour of the claimant by giving the claimant its

costs of and occasioned by that issue and leave the actual assessment, as he says, for a costs judge to deal with in due course.

_____

CERTIFICATE

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This transcript has been approved by the Judge (subject to Judge's approval)