



Neutral citation [2024] CAT 71

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case Nos: 1690/13/12/2024 (W)
1691/13/12/2024 (W)
1692/13/12/2024 (W)
1693/13/12/2024 (W)
1694/13/12/2024 (W)
1695/13/12/2024 (W)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29 November 2024

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)
LESLEY FARRELL
ROSALIND KELLAWAY

Sitting as a Tribunal in England and Wales

BETWEEN:

COMPETITION AND MARKETS AUTHORITY

Claimant

- v -

ANOTHER

Defendant(s)

JUDGMENT (APPLICATION FOR WARRANTS)

APPEARANCES

David Bailey (instructed by the Competition and Markets Authority) appeared on behalf of the Competition and Markets Authority.

A. INTRODUCTION

1. This judgment is given at the conclusion of a hearing held in private to determine the applications by the Competition and Markets Authority (the “CMA”) for six search warrants under s. 28(1)(b) of the Competition Act 1998 (the “CA 98”). Under that provision, the CMA may be granted a warrant to enter, search and take possession of documents at specified business premises if certain statutory conditions are met. Prior to 2014, such applications had to be made to the High Court. By amendment of the CA 98 that took effect on 1 May 2014, the CMA may, instead, apply to the Tribunal and that is what it has chosen to do in these cases.
2. Although s.28, as amended, states at subsection (7A) that an application for a warrant under that provision must be made, in the case of an application to the court, in accordance with rules of court, and in the case of an application to the Tribunal, in accordance with the Tribunal’s rules of procedure, the Competition Appeal Tribunal Rules were never amended to specify the procedure for making such applications or, indeed, to deal with such applications at all. We are told that the same is the case for the Civil Procedure Rules that apply in the High Court. However, there is a Practice Direction for warrants under the CA 98 that applies in the High Court and the Tribunal has, in practice, adopted the procedure that is set out in that Practice Direction, as suitably modified to encompass the differences between the Tribunal and the High Court.
3. In a recent judicial review of a Tribunal decision on warrants, heard by the Divisional Court, where the court had the assistance of an amicus or advocate to the court, there was no suggestion that this is not the right approach, or that the absence of express rules means that the Tribunal is somehow deprived of the jurisdiction given under s. 28 to issue such warrants. It is the approach which has been followed in this Tribunal as regards, for example, the requirements of the claim form, the necessary affidavit in support and, if so ordered, the warrant itself. It seems to us that it would be perverse if the requirements for an application before the Tribunal were less stringent than for an equivalent application in the High Court.

4. The two statutory conditions for the issue of such a warrant are that the Tribunal must be satisfied that there are reasonable grounds for suspecting, first, that there are on the business premises documents which the CMA has power to require to be produced under s. 26 CA 98; and, secondly, that if the documents were required to be produced under that procedure, they would not be produced but would be concealed, removed, tampered with or destroyed. The statutory power for the CMA to seek and obtain such search warrants has been appropriately described by this Tribunal as a “critical investigative function”: see *CMA v Another* [2023] CAT 62, at [15(2)].
5. The first condition, accordingly, takes one back to s. 26 itself and the associated statutory provisions. In broad terms, and insofar as relevant for the present applications, the CMA has power to request the production of documents when conducting an investigation because it has reasonable grounds to suspect that there is or has been an agreement which has the object or effect of preventing, restricting or distorting competition in the United Kingdom. We should add that “document”, under the statute, has an expanded definition so as to include information recorded in any form, and so covers, for example, text messages on mobile phones and computer hard drives: see s. 59(1) CA 98.
6. Here, the CMA has, for some months, been conducting investigations into suspected bid rigging of tenders for the supply of roofing and construction services to schools and academy trusts eligible for funding under the government's Condition Improvement Fund. The six warrants applied for are to enter and search business premises of seven companies alleged to have been part of this suspected conduct. The background to and the nature of the investigation are described in the affidavit of Mr Sean McNabb, the Director of Cartel Enforcement at the CMA. We have been taken through that affidavit in the course of this hearing and we are impressed by the amount of preparatory work put in by the CMA prior to making these applications.
7. On the basis of what is set out in Mr McNabb's affidavit, we are satisfied that the CMA has reasonable grounds to suspect what would clearly be a serious infringement of the Chapter I prohibition under the CA 98, and therefore that the requirements of s. 25 to start an investigation are satisfied. On that basis,

the CMA then has power under s. 26, to seek documents for the purpose of that investigation.

8. The CMA, of course, cannot be certain that there are such documents on the premises which are the subject of the applications. But as Mr McNabb explains, there are grounds to suspect that the alleged collusion may be continuing or at least partly continuing; and that collusion clearly would involve communication in some form between the participants. Further, there are good grounds to think that each of the relevant companies operate from the specified premises; and in many cases, relevant individuals continue to work at those premises. Altogether, therefore, we are satisfied that there are reasonable grounds to suspect that there will be at least some relevant documents at those business premises.
9. We turn to the second statutory condition. In the application for judicial review heard by the Divisional Court last March and decided by a judgment issued on 22 April 2024, the CMA argued that if there were reasonable grounds to suspect a secret cartel, it was permissible to infer that the second condition under s. 28(1)(b) would be satisfied because the stakes are high and those involved will have taken steps to make detection difficult: see [2024] EWHC 904 (Admin) at [43]. As we read the judgment of the Divisional Court, that submission was not questioned or controverted as regards a s. 28 application made regarding the business premises of undertakings. As the judgment noted, the stakes in question are directed at undertakings and, typically, claims for damages are brought against companies. The only issue in that case was whether the same inference could apply, without more, as regards a s. 28A application concerning domestic premises and therefore directed at individuals. In that regard, the Divisional Court held that the question whether or not the inference is enough will depend on the facts and circumstances of each case: see at [58]. But that has no relevance for the present applications under s. 28 which are all directed at companies in respect of business premises.
10. As Mr Justice Morison stated in the earlier case of *Office of Fair Trading v X* [2003] 2 ALL ER (Comm) 183, at [5]:

“There is ... a strong inducement or motive for hiding the truth. The material which the OFT are most interested to see is relatively easy to conceal, given advance notice.”

Like the judge in that case, we are, accordingly, satisfied that the second condition is satisfied.

11. Finally, under the terms of s. 28, even if the two conditions are satisfied, the issue of a warrant is a matter of discretion for the court or the Tribunal. As to that, we respectfully echo the words of Mr Justice Morison in the 2003 case:

“It is in the public interest that if there has been wrongdoing, it is uncovered and revealed.”

That observation has particular resonance in this case, where public money was directly involved in paying for the projects subject to these tenders. We are clear that, in our discretion, the Tribunal should accede to these applications.

12. We have had some discussion with counsel for the CMA regarding the precise wording of the warrants. We are satisfied that an 8am start to the time at which they may be executed is here justified. Subject to some very minor amendments in the wording which have been accepted by the CMA, each of these applications is granted.
13. This ruling is unanimous.

The Hon. Mr Justice Roth
Acting President

Lesley Farrell

Rosalind Kellaway

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

Date: 29 November 2024