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Case Nos: HC11C01423,
HC12E02766 and HC12B03451

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building,
Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 12/03/2015

Before :

MR JUSTICE HENDERSON

- -

Between :

(1) SECRETARY OF STATE FOR HEALTH AND OTHERS	**Claimants**
- and -	
(1) SERVIER LABORATORIES LIMITED	
(2) SERVIER RESEARCH AND DEVELOPMENT LIMITED	
(3) LES LABORATOIRES SERVIER SAS	
(4) SERVIER SAS	**Defendants**

And between:

(1) SCOTTISH MINISTERS AND OTHERS	**Claimants**
-and-	
(1) SERVIER LABORATORIES LIMITED	
(2) SERVIER RESEARCH AND DEVELOPMENT LIMITED	
(3) LES LABORATOIRES SERVIER SAS	
(4) SERVIER SAS	**Defendants**

And between:

(1) WELSH MINISTERS AND OTHERS	**Claimants**
-and-	
(1) SERVIER LABORATORIES LIMITED	
(2) SERVIER RESEARCH AND DEVELOPMENT LIMITED	
(3) LES LABORATOIRES SERVIER SAS	
(4) SERVIER SAS	**Defendants**

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JUDGMENT ON TERMS OF THE CONFIDENTIALITY ORDER

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 when it is handed down may be treated as authentic.

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MR JUSTICE HENDERSON

Mr Justice Henderson:

Introduction

1. This judgment concerns the terms of the confidentiality order which the court should make when directing the defendants ("Servier") to give disclosure in the present proceedings of the decision adopted by the European Commission ("the Commission") on 9 July 2014 in case COMP/AT.39612 addressed to Les Laboratoires Servier SAS and other companies in the Servier group ("the Decision").

2. As matters now stand, the Decision is confidential to Servier. I was informed that a redacted version of it intended for general publication is in the course of preparation by the Commission, but it is not known when it will be ready for publication. In any event, for the purposes of the present proceedings it is common ground that both the claimants and the court need to have access to the original confidential version of the Decision. There are at least two reasons for this. First, the parties must be able to review their pleaded cases, define the issues, and deal with disclosure of documents in the light of, and consistently with, the Decision. Secondly, the court itself must ensure that it complies with its own duty under Article 16 of Council Regulation (EC) No. 1 of 2003 ("the 2003 Regulation") to avoid taking decisions which are in conflict with the Decision.

3. To that end, the terms of a draft confidentiality order were agreed between the parties, and provisionally approved by the court, in August 2014. I considered it prudent, however, to request the Commission's opinion on the terms of the draft order in accordance with the procedure laid down in Article 15(1) of the 2003 Regulation and the Co-operation Notice of 27 April 2004. A similar procedure has been followed in other recent English competition law cases, including the National Grid and MasterCard litigation. The Commission clearly has an important interest in seeking to maintain the confidentiality of its decisions, particularly having regard to the duties imposed on it by Article 339 TFEU, even though the case law of the European Court establishes that confidential documents obtained from the Commission may be disclosed in proceedings before a national court: see the judgment of the General Court of 18 September 1996 in Postbank NV v Commission, Case T-353/94, [1996] ECR II-921, ("Postbank") at paragraphs 89, 90 and 92.

4. My request to the Commission was sent on 2 September 2014, and on 22 December 2014 the Commission gave its opinion. It was forwarded to me under cover of a letter dated 23 December from the Director-General, Competition, which unfortunately did not reach me until 12 January 2015.

The Commission's Opinion

5. After setting out the legal background, some of which I have summarised above, and referring to the judgment in Postbank, the Commission said at paragraph 12 of its opinion:

> "It is then for the national court to effectively guarantee appropriate protection of confidential information that belongs to legal or natural persons from whom the information was obtained by the Commission (i.e., the originators of the

> information). Although this is not a situation where the Commission is itself asked to provide the Decision to the Court, the Commission considers that its obligations under Article 339 TFEU mean that it should draw the Court's attention to the entitlement of the undertakings concerned to the protection of their confidential information. In addition to Article 339 TFEU, the Commission also draws attention to the provisions of Articles 7 and 8 of the Charter of Fundamental Rights, which are relevant here as the High Court is implementing EU law by being seised of proceedings in which the cause of action is the alleged loss to the Claimants arising from an infringement of EU competition law. It follows from these provisions that the rights of those whose confidential information is liable to be used must be taken into account."

6. The Commission then pointed out that information supplied to it by third parties (including, but not confined to, the parties under investigation) in the course of its enquiry had to be supplied in a non-confidential version, but such information would not necessarily be considered non-confidential in relation to the wider world, including the present claimants. I was informed that the Decision includes information gathered from some 40 third parties, apart from the addressees of the Decision. Furthermore, by virtue of Article 15(4) of Regulation (EC) 773/2004, documents obtained through access to the Commission's file by any of the addressees of a Statement of Objections shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU.

7. In the light of these principles, the Commission stated its "Intermediate conclusion" in the following terms:

> "17. The Commission therefore respectfully submits that the Charter of Fundamental Rights and the general principle of sincere co-operation between the Commission and national courts implies that the High Court should have regard to the rights under Article 339 TFEU of persons concerned when deciding upon the disclosure of the confidential version of the Decision."

8. Next, the Commission addressed the first question put to it by the High Court which asked whether the Commission:

> "have any objection to the High Court ordering Servier to disclose, and provide a copy of, the Decision to the Claimants and to the High Court subject to the terms of the confidentiality club?"

9. The Commission began by saying that, as appears from its letter in the National Grid case, which was quoted in the High Court's request, it did not consider that "there is any basis to object in principle to the disclosure of the confidential version of the Decision", particularly given the High Court's view that such disclosure was necessary not only to facilitate the claimants' cases, but also to ensure compliance with Article 16 of the 2003 Regulation.

10. The Commission went on, however, to express certain concerns about the terms of the proposed confidentiality club. I would summarise those concerns as follows:

    1) First, although the terms had been agreed between Servier and the claimants, no other third parties had been involved in negotiating the proposed arrangements. The agreement of Servier would not necessarily ensure that the interests of third parties in the protection of their confidential information would be sufficiently protected. The court should therefore give consideration to the position of third parties.

    2) The proposed categories of individuals who would have access to the confidential version of the Decision, namely "Professional Advisers" and "Permitted Recipients", were not limited to named persons, and the list of "Permitted Recipients", identified by name or function in the schedule to the draft order, could be amended at any stage of the proceedings, either with the written consent of the parties or the consent of the court.

    3) The confidentiality club was "considerably more widely drawn than in similar arrangements" which the Commission had seen in other proceedings in which damages are sought for infringements of Articles 101 and 102. In particular:

        (a) the list of Permitted Recipients might include persons who had commercial relationships with the addressees of the Decision or third parties, and might also include "persons holding political functions";

        (b) provision was made for parts of the Decision to be shown to persons outside the confidentiality club if Servier agreed, even if the information to be disclosed originated from a third party; and

        (c) disclosure outside the club was also permitted if such disclosure was required by the Scottish Parliament or the Northern Ireland Assembly. This could potentially permit the disclosure of confidential information for purposes other than the application of Articles 101 and 102.

11. The Commission was also concerned that paragraph 5 of the draft order might be too widely drawn in that it envisaged use of the confidential version of the Decision for the purposes of "issuing new proceedings arising out of the subject matter of these proceedings". It was not clear that the nature of any such new proceedings would be confined to proceedings for the application of Articles 101 and 102.

12. The Commission then stated its conclusion on the first question, as follows:

> "31. The Commission has, in principle, no objection to the disclosure of the confidential version of its Decision in the *Servier* case, provided that adequate protection is given to confidential information, notably that obtained from or concerning Third Parties. The Commission does however

> consider that it would be desirable for the draft Confidentiality Order to be tightened with respect to the protection offered to business secrets and other confidential information, in particular:
>
> (1) the arrangements for the protection of confidential information do not take account of any concerns that Third Parties might have;
>
> (2) the broad and open ended membership of the confidentiality club, and the possibility for disclosure outside the confidentiality club; and
>
> (3) the potential use of confidential information in other proceedings, which it appears might not be proceedings applying Articles 101 and 102 TFEU."

13. In the light of the Commission's answer to the first question, the second question put by the High Court did not arise and the Commission therefore did not answer it.

Developments since 12 January 2015

14. Given the concerns raised by the Commission, I decided to circulate the opinion on a confidential basis to the parties' legal advisers and asked them to try to reach agreement on how the concerns might be met. For that purpose, I also authorised the lawyers to take instructions from their clients. Within two weeks, a large measure of agreement had been reached. On 30 January 2015 the solicitors for the English claimants, Peters & Peters Solicitors LLP, wrote to inform me that although the majority of the amendments proposed collectively by the claimants had been agreed by Servier, the parties were still divided on a single issue. Before coming to that issue, I will first record the matters on which agreement had been reached. They were incorporated in a revised draft of the confidentiality order which Peters & Peters had prepared.

15. The most significant of the agreed revisions were the following:

    (1) Any additional or substitute Permitted Recipients were now to be approved by the court, and not just by Servier and those two of the other five addressees of the Decision (Teva and Mylan) which had responded to letters sent in September 2014 by the solicitors for Servier and the English claimants inviting them to make known any objections they might have to disclosure of the Decision. Of the other three generic manufacturers which were addressees, two failed to respond, while the third (KRKA) confirmed that it had no objection to disclosure of the Decision.

    (2) The provision authorising disclosure of the Decision if required by the Scottish Parliament or the Northern Ireland Assembly was deleted, and the remainder of the relevant provision was tightened so that it authorised disclosure outside the club only where required "pursuant to any applicable law or regulation, or any order of a Court of competent jurisdiction".

(3) A requirement was inserted for copies of the Decision (in both hard and soft copy) to be destroyed or made inaccessible at the conclusion of the proceedings, or when an individual ceased to be involved in the proceedings.

(4) Use of the Decision in any new proceedings was expressly limited to proceedings for the application of Articles 101 and/or 102 TFEU.

(5) A new paragraph was inserted to clarify that any person outside the club who was shown any part of the Decision, with the approval of the court, would himself be subject to the terms of the confidentiality order.

(6) The Permitted Recipients put forward by the English claimants were now identified by name, and two of the Welsh claimants' Permitted Recipients were removed.

16. The point upon which agreement could not be reached was this. Servier considered that membership of the confidentiality club should be limited to external professional advisers and two in-house lawyers who had no involvement in either commercial or political matters. Only in this way, said Servier, could the Commission's concerns about the width of the club's proposed membership be allayed. If any of the claimants wished to expand the club at a later stage, they could apply to the court (on notice to Servier) explaining who they wished to add, and why.

17. This proposal was unacceptable to the claimants, who pointed out that the individuals identified as Permitted Recipients in the revised draft order included those who had ultimate responsibility for the conduct of the cases on behalf of the relevant claimants. Unless the Decision, or information contained in it, could be disclosed to such persons, the authorised lawyers (whether in-house or external) would be unable to take instructions from their clients. Nor could the relevant decision making be devolved to civil servants, because they are fully accountable to ministers for all their actions and it would be contrary to constitutional principles to exclude the relevant ministers from the club. Confirmation was given that none of the Permitted Recipients was involved in any commercial dealings with the addressees of the Decision; while the fact that some of them had political functions was an inevitable consequence of the nature of the claimants. It was emphasised that all of the non-lawyer Permitted Recipients were senior government ministers or civil servants, who had substantial experience of handling and maintaining the integrity of highly sensitive and confidential information.

18. In the light of this disagreement, the claimants (and subsequently Servier) invited me to decide the issue on paper, while expressing their willingness to attend a hearing if I preferred.

19. On 2 February 2015 I circulated a further note to the parties' lawyers, saying that before reaching a conclusion on the matter in dispute I would like them to consider two further matters. First, I thought it would be helpful if the English, Scottish and Northern Irish claimants were to provide a written summary of the respective roles of the named individual Permitted Recipients whom they wished to include in the confidentiality club, in the same way as the Welsh claimants had already done. Secondly, I said:

> "I would like the parties to consider the feasibility and acceptability of a "two tier" approach to the problem, whereby (in broad terms) (a) disclosure of the full version of the … Decision would be made in the first instance to the Professional Advisers and those of the Permitted Recipients who are in-house lawyers or civil servants with conduct of the case, but (b) disclosure of the whole or parts of the Decision, or of information derived from it, to the remainder of the Permitted Recipients (including all holders of political office, other than law officers) should be made on a reasonable "need to know" basis by those in the first category, so as to enable them to seek and obtain instructions relating to the case from time to time."

I then said that, if a criterion of this general nature were acceptable and workable in practice, I envisaged that the principle should be expressed in the body of the order and its working out should then be left to the good sense and professional obligations of the persons concerned.

20. The first of my proposals was not controversial, and helpful summaries of the respective roles of the named individual Permitted Recipients have now been provided by all of the claimants.

21. My second proposal was also accepted by all of the claimants, and on 13 February 2015 Peters & Peters sent me a further revised version of the draft confidentiality order which was intended to give effect to it. The revised draft drew a distinction between Tier 1 and Tier 2 Permitted Recipients, who were identified as such in the schedule. In the first instance, only the Professional Advisers and Tier 1 Permitted Recipients would be provided with copies of, and be permitted to inspect, the Decision. The draft then continued:

> "3. Notwithstanding anything in paragraph 2 of this order [*i.e. the initial disclosure of the Decision*], if in the opinion of any of the Claimants' Solicitors it becomes reasonably necessary to do so for the purposes set out in paragraph 6 below, copies and/or any parts of the Commission Decision and/or any information derived from the Commission Decision, may be disclosed to and inspected by any of the Tier 2 Permitted Recipients.
>
> …
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> 6. The Professional Advisers and Permitted Recipients shall use the Commission Decision only for the purpose of these proceedings or for the purposes of issuing new proceedings for the application of Article 101 and/or Article 102 [*TFE*U] arising out of the subject matter of these proceedings (and for no other proceedings or use)."

22. This proposal was still unacceptable to Servier. In an email sent earlier on 13 February Servier's solicitors, Bristows LLP, said they did not consider that it would be sufficient to alleviate the Commission's concerns. Servier's position was amplified

in a letter sent to me later the same day. Servier questioned whether it was appropriate that the decision whether to make any disclosure of the Decision to Tier 2 recipients should be left to the claimants' discretion, and reiterated their view that any decision to make disclosure outside a select group of people from whom the claimants obtain their day to day instructions should be made by the court following an application on notice to Servier. Complaint was also made about the proposed number of Tier 1 recipients, and the inclusion of a number of ministers in the proposed list of Tier 2 recipients. The risk of unnecessary disclosure to ministers was said to be "highlighted by the proximity of the forthcoming General Election", which could see some of them lose their positions and move to posts in industry before publication of a non-confidential version of the Decision. Servier therefore invited me to make the order in the form submitted to me on Servier's behalf on 30 January 2015.

23. A further round of correspondence then ensued, but without any significant change to the positions adopted by the parties.

Decision

24. All the parties are content for me to decide this question on paper. I have considered whether to convene an oral hearing, but concluded that it is unnecessary to do so.

25. In my judgment the changes proposed by the claimants, the division of Permitted Recipients into two tiers, and the opportunity which has now been provided to the other addressees of the Decision to make their concerns known, together provide sufficient and appropriate safeguards to meet the concerns raised by the Commission in its opinion.

26. In the first place, I am satisfied that, although the number of Permitted Recipients is larger than one would normally expect to find in a confidentiality club, it could not sensibly be reduced. The large number is accounted for by the involvement of four different sets of health authorities in the three different legal jurisdictions which make up the United Kingdom, and the fact that healthcare is a devolved function. The claimants have made efforts to prune the list still further, but I accept the assurances of their solicitors that this process has now been carried as far as it reasonably can.

27. Secondly, Servier's proposal to limit the Permitted Recipients to a limited number of in-house lawyers is in my opinion unrealistic. In-house lawyers have to act on instructions, and they can only receive their instructions from civil servants in the relevant departments who are themselves answerable to, and take their instructions from, ministers. All of these levels in the decision-making chain need to be reflected in the list. Nor am I attracted by the suggestion that recipients at senior civil service or ministerial level should be added on an ad hoc basis, with separate applications being made to the court as and when necessary. Such a procedure would be very expensive in time and resources, to little apparent purpose. Far better, in my view, to start with a carefully planned list which covers all the levels in the decision-making hierarchy.

28. Thirdly, I do not accept Servier's submission that the two-tier proposal adds nothing of substance because it is left to the claimants to decide what material should be disclosed to the second-tier recipients. It is important to note in this connection that the decision will be made by the claimants' solicitors, not by the claimants

themselves. In deciding what disclosure it is appropriate to make in order to obtain instructions, the claimants' solicitors can in my view be relied upon to have full regard to the Commission's concerns, and to the need to limit disclosure to that which the relevant decision-makers will in practice need to see.

29. Fourthly, the need for instructions to be taken ultimately from politicians is unavoidable under our constitution. Those members of the confidentiality club who hold ministerial office will be bound by the terms of the order, just like the other members. They will all be accustomed to dealing with confidential matters, and they will appreciate that the restrictions on the use to which they may put material disclosed to them will continue to apply even after they have left office.

30. Similarly, the claimants' solicitors have all confirmed, as I understand it, that none of the Permitted Recipients is involved in any financial dealings or negotiations with any of the addressees of the Decision. In the nature of things, no such confirmation can currently be given in relation to unknown third parties who may have supplied confidential information to the Commission. However, the interests of any such third parties are in my view adequately protected by the terms of the proposed order, and in practice I find it hard to see what more could be done at this stage. If any particular causes for concern do emerge once the Decision has been disclosed, it would always be open to Servier or any interested third party to apply to the court for such further directions as might be appropriate.

31. In conclusion, I would like to say that I acknowledge with gratitude the helpful and constructive suggestions made by the Commission in its opinion. Having done my best to take them into account, I will now order disclosure of the Decision subject to the terms of the revised draft of the confidentiality order enclosed with Peters & Peters' letter of 16 February 2015 addressed to my clerk. The only modification to the draft which I would suggest is that paragraph 7(a) should become a separate paragraph numbered 8, and the subsequent paragraphs should be renumbered accordingly.

32. When the disclosure order and the confidentiality order have been sealed, I propose to send copies of the orders and of this judgment to the Commission. I will confirm to the Commission that I, and the parties, are content for its opinion to be published, as requested in the Director-General's letter to me of 23 December 2014. I also propose to send to the Commission copies of the schedules prepared by the claimants setting out the respective roles of their Permitted Recipients. Meanwhile, this judgment must remain confidential to the parties and their legal advisers until the Commission has published its opinion.

Postscript

33. This judgment was circulated in draft to the parties and their legal advisers on 4 March 2015, and finalised in the terms of paragraphs [1] to [32] above on 5 March 2015. The Commission has subsequently published its opinion on its website on 11 March 2015, so this judgment is no longer confidential and will be handed down in the usual way on 12 March 2015 at 10.00 am. No attendance by the parties is necessary.