



Search and seizure – Supreme Court rules on competition case

July 2017

The Competition and Consumer Protection Commission (the “**CCPC**”) recently lost its appeal against a decision of the High Court, which concerned a search it had carried out at the premises of Irish Cement Limited (“**ICL**”) in May 2015.

The Supreme Court found that the CCPC had breached the right to privacy of ICL, CRH Plc (“**CRH**”) - ICL’s parent company and a senior executive within the CRH group (together “**the Respondents**”), under both Irish law and under the European Convention on Human Rights, due to the way in which it carried out the search.

The Supreme Court decision will undoubtedly impact on search and seizures carried out by the CCPC in future cases. It may also influence other regulators to take a more refined approach to search and seizure powers granted under different legislation.

Background

The CCPC was investigating whether ICL may have engaged in anti-competitive practices between January 2011 and 12 May 2015, on foot of allegations that it was using exclusive purchasing arrangements, rebates or other inducements to distributors of bagged cement, which had the effect of excluding competitors from the Irish market. The allegations concerned only ICL’s activities within the State and not elsewhere.

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In May 2015, the CCPC conducted a search of ICL's premises under section 37 of the Competition and Consumer Protection Act 2014 (the "Act"). This gave the CCPC broad search and seizure powers, including allowing it to take copies of, and/or seize, records which it found at the premises when investigating potential competition law breaches. As required by the Act, the CCPC had obtained a search warrant from the District Court prior to conducting the search.

One of the central issues in the case was whether the CCPC was entitled to copy the entirety of Mr. Seamus Lynch's email account, a former managing director of ICL, but who is now a managing director of Ireland and Spain for CRH Europe. The material copied included correspondence with CRH subsidiaries in other European locations.

The Respondents argued that documents relating to Mr. Lynch's functions and activities which were separate and unrelated to ICL were outside the scope of the search warrant and should not be reviewed by the CCPC. The High Court agreed with this position and the CCPC appealed that decision to the Supreme Court.

Criticisms

The Supreme Court dismissed the CCPC's appeal and was critical of the search procedure which it adopted in this case at the outset. It noted that the search warrant was couched in broad and unspecific terms and did not identify the suspected offence or the suspected persons. Although the Respondents' lawyers were shown a copy of the search warrant on the day of the search (and ultimately given a copy of it), the Supreme Court found that in the absence of any specific information regarding the scope of the investigation on the warrant, the Respondents' lawyers were unable to make any meaningful observations to the CCPC officials as the search took place.

The Supreme Court also stated that at the time of the search, the CCPC had information available to it, which would have enabled it to conduct a more focused search. This was due to the relatively narrow scope of the investigation, the methodology of search (involving electronic data which is often susceptible to key word search) and the specific nature of the offences being investigated.

It noted that the search was pre-planned and that the pre-search procedure was not a focused one, in identifying any specific email data by reference to the time, place or identity of the writers, or addresses. The Supreme Court remarked that when the CCPC seized all of Mr. Lynch's email account, it must have been aware that it would inevitably take large quantities of material outside the scope of its investigation and was critical of the fact that the CCPC did not take any steps to avoid such an event. It implied that a better approach may have been for the CCPC to do a keyword search on site, which would have narrowed down the material which was copied.

The Supreme Court noted that in some situations it may not be possible to have a more narrowly defined search warrant or search (e.g. in relation to more serious types of crime where the scope of

the warrant must be broader and there was an urgent need for searches) but it said that those considerations did not apply in this case.

Decisions

The Supreme Court dismissed the CCPC's appeal and found that the CCPC had acted outside of the powers contained in section 37 of the Act, in breach of the Respondents' constitutional right to privacy and in breach of their rights under Article 8 of the European Convention of Human Rights (which also relates to privacy). The Supreme Court granted an injunction preventing the CCPC from reviewing any material or any of the data "*which were the fruits of this unlawful search.*"

The Supreme Court noted that although the Act provided a mechanism whereby privileged legal material which was seized could not be reviewed by the CCPC, it did not address what would transpire if material which was not covered by the search warrant was seized. It noted that this was a matter for the Oireachtas, but said in the absence of any such legislative provision dealing with the issue, it was for the CCPC to try and reach agreement with the Respondents as to how any seized material which was alleged to be outside the scope of the warrant, would be dealt with.

Mr. Justice Charleton suggested some steps which could be taken to resolve the issue (this included the Respondents specifying what material should not have been seized, the parties using key word searches to identify relevant material and the destruction by the CCPC of any irrelevant material).

Comment

The Supreme Court has made clear that save in exceptional circumstances, search warrants by the CCPC will need to be more precise so as to enable the subject of the search to understand what is being investigated and presumably therefore to make informed objections if necessary, about any data being seized. It is also evident, that in competition law cases, the Supreme Court expects the CCPC to conduct more pre-planning in relation to searches so as to limit the amount of irrelevant material being seized.

Aside from the CCPC, other regulators have broad powers of search and seizure. The Supreme Court ruling should serve as a cautionary note to them, to show restraint when exercising their powers, as the excessive seizure of material will be open to challenge.

Dillon Eustace
July 2017

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