



Neutral Citation Number: [2015] EWHC 1085 (Ch)

Case No: HC-2015-001218

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/04/2015

**Before :**

**MRS JUSTICE ROSE**

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**Between :**

**European Securities and Markets Authority**

**Applicant**

**- and -**

**DTCC Derivatives Repository Limited**

**Respondent**

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**Javan Herberg QC** (instructed by Cleary Gottlieb Steen & Hamilton LLP) for the Applicant  
The Respondent did not appear and was not represented

Hearing date: 18 March 2015  
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**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 as handed down may be treated as authentic.

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MRS JUSTICE ROSE

**Mrs Justice Rose:**

1. The European Securities and Markets Authority ('ESMA') has applied for authorisation to carry out an inspection at the premises in England of a trade repository, DTCC Derivatives Repository Limited ('DTCC'). I should make clear at the outset that there is no suspicion that DTCC has engaged in wrongful conduct of any kind – the proposed inspection is simply part of ESMA's general supervisory functions. DTCC has been notified of the inspection and has indicated that it will cooperate fully with the visit by the ESMA officials. Although the visit is therefore conducted with the consent of DTCC, ESMA still requires the authorisation of the High Court. I made the order giving authorisation shortly after the hearing of the application on 18 March 2015. As this was the first time that such an application has been made, I am giving this short judgment to set out the principles that apply to the exercise of this power.
2. ESMA was established under Regulation (EU) No 1095/2010 (OJ L 331, 15 December 2010 p. 84) (the 'ESMA Regulation'). The preambles to the ESMA Regulation note that the financial crisis in 2007 and 2008 exposed important shortcomings in financial supervision in relation to the financial system as a whole. A move towards more integrated European supervision was called for in order to reflect the increasing integration of the financial markets in the Union. ESMA formed part of the new European System of Financial Supervisors established to exercise supervisory powers to provide a high, effective and consistent level of regulation and supervision. Functions are conferred on ESMA by other EU instruments including for our purposes Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27 July 2012, p 1), also known as the European Markets Infrastructure Regulation or 'EMIR'. That Regulation notes that over-the-counter derivatives lack transparency as they are privately negotiated contracts and any information concerning them is usually only available to the contracting parties. They create a complex web of inter-dependence which can make it difficult to identify the nature and level of risks involved. This poses a risk to financial stability such that the Pittsburgh summit in September 2009 agreed that all standardised OTC derivative contracts should be cleared through a central counterparty and reported to trade repositories. This reporting obligation will enable information on the risks inherent in derivatives markets to be stored centrally and make it easily accessible to ESMA and other regulators. ESMA was given responsibility for the registration and supervision of trade repositories to ensure that they are subject to strict operational, record-keeping and data-management requirements.
3. ESMA first received applications from trade repositories for registration in March 2013. ESMA assessed their compliance with the requirements set out in the EMIR and in November 2013 it registered six trade repositories. Those trade repositories can therefore be used by EU counterparties to derivative transactions to fulfil their trade reporting obligations under the EMIR.
4. The EMIR confers on ESMA certain supervisory powers:
  - i) Under Article 61, ESMA can 'by simple request or by decision' seek information from trade repositories if that information is necessary for it to carry out its duties under the Regulation.

- ii) Under Article 62, ESMA can conduct investigations by examining records, data and procedures, asking people for explanations of documents, interviewing people who agree to be interviewed and requesting records of telephone and data traffic.
  - iii) Under Article 63, ESMA may carry out on-site inspections at any business premises or land. Where the proper conduct and efficiency of the inspection so require, ESMA may carry out the on-site inspection without prior announcement. The officials authorised by ESMA to conduct the inspection may enter any business premises or land of persons who are subject to an investigation decision and have various powers including to seal premises, books and records.
5. The exercise of these powers is subject to Article 60 which provides:

“The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 61 to 63 shall not be used to require the disclosure of information or documents which are subject to legal privilege”
6. Articles 61 to 63 require ESMA to inform the competent authority of the Member State concerned of their intended exercise of power – in England that is the Financial Conduct Authority. Article 63 also provides that instead of carrying out the on-site inspection itself, ESMA can require the FCA to carry out inspections on its behalf or to provide assistance to the ESMA officers carrying out an inspection. ESMA has powers to impose fines on trade repositories which provide incorrect or misleading information. It can also impose periodic penalty payments on those who refuse to submit to an on-site inspection: see article 65(1) and article 66(1)(b)(iii) of the EMIR.
7. The EMIR provides that some powers may be made subject by national rules to authorisation from a judicial authority in the Member State. This applies if a request for records of telephone or data traffic is made under article 62(1)(e) or an on site inspection is to be carried out under article 63. In those situations the EMIR sets out the role of the national court:

“63.9 Where authorisation as referred to in paragraph 8 is applied for, the national judicial authority shall verify that ESMA’s decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations. Such a request for detailed explanations may in particular relate to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures. However, the national judicial authority may not review the necessity for the inspection or demand to be provided with the information on ESMA’s file. The lawfulness of ESMA’s decision shall be

subject to review only by the Court of Justice following the procedure set out in Regulation (EU) No 1095/2011”

8. Both the power to request records of telephone and data traffic and the power to order on-site inspections have been made subject to authorisation by the High Court by the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 (S.I. 2013/504) (‘the Domestic Regulations’). Regulation 17 provides that ESMA must obtain authorisation from the High Court before any official of, or person authorised by, ESMA carries out an Article 63 inspection. Where the FCA is required to carry out the inspection on ESMA’s behalf, it also must obtain authorisation from the High Court. Regulation 17 also provides:

“(3) The High Court may grant authorisation for the purposes of paragraph (1) or (2) if satisfied, on an application made to the High Court in accordance with rules of court by ESMA or the FCA, that—

(a) ESMA has initiated an Article 63 inspection; and

(b) the Article 63 inspection would be neither arbitrary nor excessive having regard to the subject matter of the inspection.

(4) The High Court must conduct the assessment referred to in paragraph (3) in accordance with Article 63(9) of the EMIR regulation, and may exercise the powers conferred by that paragraph for the purposes of making its assessment.”

9. The remaining sub-paragraphs of regulation 17 provide for the High Court to issue a warrant if satisfied that there are reasonable grounds for believing that a person whose business premises are to be inspected has refused or would refuse to comply with such an inspection without a warrant. A warrant issued under this power authorises a constable to enter and search the premises, take copies of documents and use such force as may be reasonably necessary to execute the warrant.
10. The application by ESMA for authorisation before me today is supported by an affidavit of Verena Ross, the Executive Director of ESMA. She sets out the background to ESMA and the EMIR and the jurisdiction of the court. She also describes DTCC’s business and gives details of the premises to be inspected.
11. At the hearing Mr Herberg QC acting for ESMA showed me the decision adopted by ESMA on 17 February 2015 requiring DTCC to submit to an inspection. The decision does not provide for the use of any coercive measures such as the power to seal business premises and it does not grant the power to request records of telephone and data traffic. The decision sets out the two matters which will be investigated during the inspection. It also -
- i) gives the location, date and subject of the inspection
  - ii) sets out the powers that the persons authorised can exercise

- iii) informs DTCC of the potential penalties under article 66 of the EMIR if they do not submit to the inspection or if they provide incorrect or misleading answers to questions
  - iv) informs DTCC of its right to appeal to the Board of Appeal and from there to the Court of Justice of the European Union
  - v) annexes the text of article 66 of EMIR.
12. I have also seen -
- i) The authorisation by ESMA of five named people who are vested with the powers set out in the decision. The authorisation again describes the purpose of the investigation and refers to the power to impose a periodic penalty if DTCC does not submit to the inspection.
  - ii) The email exchange between ESMA and the Director of Legal & Compliance at DTCC showing that DTCC have been informed of the date of the inspection and that they intend to cooperate with it.
  - iii) The letter from ESMA to the Chief Executive of the FCA informing him of the forthcoming inspection; its date, subject and location and explaining in general terms the two matters that will in particular be investigated.
13. Having seen all this documentation I am satisfied that it is appropriate to grant authorisation for this inspection. I made one amendment to the draft order that was provided, in exercise of my power to ensure that the inspection would be neither arbitrary nor excessive having regard to its subject matter. That amendment was to state in the order that the inspection is subject to Article 60 of the EMIR relating to the non-disclosure of legally privileged information and documents. I consider that a reference should be made to this important safeguard on the face of the documents which are presented to the company.
14. In her affidavit Ms Ross referred to the possibility that future applications of this kind might be granted after consideration of a paper application by the court without the need for an oral hearing. This would be pursuant to CPR 23.8(c) which provides that the court may deal with an application without a hearing if the court does not consider that a hearing would be appropriate. The Chancery Guide comments that this is a useful provision where the parties consent to the terms of the order sought or where:
- “although the parties have not agreed to dispense with a hearing, and the order is not consented to, the order sought by the application is, essentially, non-contentious. In the latter case the order will be treated as being made on the court’s own initiative and will set out the right of any party affected by the application who has not been heard to apply to vary or set aside the order.”
15. The Guide goes on to say that this is not an appropriate course where the matter is contentious and that ‘It will normally be wrong to seek an order which imposes sanctions in the event of non-compliance without notice and without a hearing’. A

failure by a subject company to submit to an order of the kind I am making here, would not amount to a breach of that order. It would potentially attract the penalties set out in the EMIR. It may also in certain circumstances prompt ESMA to come back to court to seek a warrant under regulation 17(5) – (9) of the Domestic Regulations. But it would not amount to a contempt of the court.

16. The Chancellor has indicated that he is content that future applications for authorisation by either ESMA or the FCA pursuant to regulation 17 of the Domestic Regulations can be submitted to the court for consideration on the papers in the following circumstances:
  - i) The company subject to the inspection has been informed of the inspection and has indicated its intention to submit to the inspection.
  - ii) In cases where the application is made by ESMA, that the FCA has been informed and does not wish to be heard at a hearing of the application.
  - iii) The application does not seek a power to seal business premises or books and records, does not include a request for records of telephone and data traffic and does not request the issue of a warrant.
17. The application should be issued by ESMA and allocated a case number rather than treated as a pre-issue application. The judge or master, on considering the application, may of course decline to deal with the matter on the papers and direct that a hearing should take place.