

HIGH COURT REJECTS CAT'S STANDARD FOR CMA DOMESTIC PREMISES RAIDS

On 22 April 2024, the High Court ruled that the Competition Appeal Tribunal (CAT) had “*erred in law*” when setting a different legal standard for the Competition and Markets Authority (CMA) to exercise its powers to raid domestic premises, as compared to business premises.¹ The judgment represents a significant victory for the CMA, whose approach to pursuing domestic dawn raids had come under scrutiny in the CAT’s initial ruling in October 2023.

This briefing follows our initial client update on the CAT judgment ([here](#)) and discusses the key points of interest from the High Court judgment.

BACKGROUND

In October 2023, the CMA applied to the CAT for warrants to enter and search three business premises as well as one individual’s private residence in Scotland, as part of its antitrust investigation into the construction chemicals sector.

The warrants were sought by the CMA under sections 28 and 28A of the Competition Act 1998 (CA98) (in respect of business premises and domestic premises, respectively), whereby the CAT may issue a warrant if it is satisfied that there are reasonable grounds for suspecting:

- that there are documents on the premises which the CMA has the power to require to be produced; and
- where, if those documents were required to be produced, they would not be produced but rather would be concealed, removed, tampered with or destroyed. This case turned on the interpretation of this second limb.

The CAT agreed to grant all three warrants sought by the CMA in respect of the business premises. This was on the basis that the second limb of the above test was met given the secrecy of the alleged cartel conduct, from which it could be inferred that documents may be concealed, destroyed, etc. As regards the CMA’s request for a warrant to raid domestic premises, however, the CAT applied a different (higher) standard and declined to issue the warrant.

The CAT determined that a warrant in relation to domestic premises requires a “*higher order of scrutiny*” and that the secrecy of the alleged cartel conduct was not, of itself, sufficient for the second limb of the test to be met. Rather, the CAT found that something more to “*suggest a propensity [of the individual] to destroy*” documents needed to be asserted by the CMA in evidence when seeking a warrant to raid domestic premises. For our detailed analysis of the CAT judgment, please refer to our December 2023 [client briefing](#).

The ruling, which the CAT referred to as a ‘guideline judgment’² for future cases, dealt a potentially significant blow to the CMA’s evidence-gathering strategy in light of the shift to hybrid and remote working practices. The CMA applied to the High Court for judicial review of the CAT’s judgment.

As is usual where the defendant to a judicial review is a court or tribunal, the CAT took no part in the proceedings; however, an Advocate to the Court was appointed to address whether the CAT had erred in law or acted in excess of its jurisdiction.

THE HIGH COURT JUDGMENT

The CMA accepted that the CAT was correct that a warrant in respect of domestic premises generally requires a “*higher order of scrutiny*” under the

¹ *The King (on the application of the CMA) v CAT* [2024] EWHC 904 (Admin), available [here](#).

² The CAT referred to Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.

European Convention on Human Rights (ECHR) and generally.

However, the CMA argued that the CAT had been wrong to conclude that this compelled a different construction of the identical statutory provisions in sections 28 and 28A CA98. The CMA argued that the CAT had wrongly concluded that the CMA would have to show something more than participation in the cartel to justify the grant of a warrant in respect of domestic premises (i.e. a propensity of the individual in respect of whose domestic premises the warrant was sought to destroy or conceal documents). The CMA's Senior Director of Cartel Enforcement had stated in their witness statement that it would be a very rare case in which it would be able to obtain evidence of such a propensity, particularly at the launch of an investigation (when applications for search warrants typically need to be made).

In response, the Advocate to the Court argued, amongst other things, that the risk of destruction was much narrower for domestic premises and really limited to destruction by the occupier. Accordingly, they argued that only certain types of more culpable involvement by the individual in the alleged conduct would give rise to destruction risks. They also argued that even if the conditions of sections 28 or 28A CA98 are met, the court or tribunal still has a discretion as to whether to grant a warrant and that, for domestic premises, a balancing exercise was necessary for Article 8 of the ECHR (right to respect for private and family life).

The High Court agreed that the CAT had erred in law. It found that the CAT was wrong in concluding that the inference arising from the suspected existence of a secret cartel of a propensity to destroy or conceal documents is *never* sufficient, of itself, to justify the issue of a warrant in respect of domestic premises.

According to the High Court, requiring additional evidence of a "*propensity to destroy*" in all cases, beyond that inference, "*goes too far*" - particularly in circumstances where that additional evidence might be very difficult to obtain. There may well be cases where an "*individual's position*" in a company or the "*extent of [their] involvement*" in the conduct means that this inference is enough to justify the issue of a warrant, without some additional evidence of a propensity to destroy etc. relevant material.

³ See CMA press release, available [here](#).

“Whether or not the inference is enough will depend upon the facts and circumstances of each particular case. Therefore, to the extent that the CAT has sought to lay down a principle that, in the case of applications for a warrant in respect of domestic premises, something more to evidence a propensity to destroy beyond the inference is always required, that is an error of law.”

In addition, the High Court found that the CAT had exceeded its powers in deciding that its judgment, as well as a 2019 High Court judgment cited by the CAT, are ‘guideline judgments’ that can be cited in any court. The CAT could not dictate the status of those judgments in any court or tribunal other than the CAT itself. In any case, the High Court ruled that the judgments in question contained errors and so could not be treated as ‘guideline judgments’ before the CAT or any other court.

The High Court also found that the CAT had acted *ultra vires* when ordering the CMA to disclose further information to the subject of the warrant, as the CAT has no power to do so on its own motion (i.e. without the interested party challenging the warrant or applying to obtain further information).

COMMENT

The CMA has welcomed the ruling, stating that “*the original judgment by the Competition Appeal Tribunal risked seriously undermining our ability to enforce effectively against illegal cartels*”.³

The CMA has signalled that, given current flexible and home working practices, it sees its ability to raid private residences as “*essential*” to secure evidence where secret cartels are concerned.⁴

The judgment clarifies that the CMA's evidence-gathering activities will not always be subject to a much higher standard where warrants for raids at domestic premises are concerned. Overall, the case also serves as a reminder to the CAT about the limits on its powers and signals the CMA's willingness to apply for judicial review where it considers that the CAT has “*gone too far*”.

As previously reported, the Digital Markets, Competition and Consumers Bill, which is expected to receive royal assent later this Spring, will also enhance the CMA's dawn raid powers in domestic settings - in particular, by giving the CMA the power to ‘seize and

⁴ *Ibid*.

sift' documents (see [this edition](#) of our Competition and Regulatory newsletter for further information). It is also understood that, since 2017, there have been nine warrants granted for domestic premises raids by the CMA. In light of these developments, companies

should consider taking stock of their dawn raid preparedness, not only in respect of their business premises but also in relation to their employees' private homes.

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