

CLIENT ALERT

English High Court confirms no special thresholds for private home search warrants

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The UK competition authority, the Competition and Markets Authority (**CMA**), has the power to apply to court for search warrants for business and domestic premises in competition law investigations. Since 2017, the CMA applied for and has been granted search warrants for domestic premises in nine cases. However, in October 2023, the CMA was for the first time unsuccessful in an application for a search warrant for a domestic premises (in Scotland in this case) in a cartel investigation after the Competition Appeal Tribunal (**CAT**)¹ refused the CMA's application.

The CMA appealed the CAT's decision and on 22 April 2024,² the English High Court held that the CAT had erred in law when refusing the CMA's warrant application.

According to the High Court, the CAT erred when it held that in an application for a search warrant for domestic premises the CMA must always show that the affected person has a "*propensity*" to destroy or conceal relevant documents. The CMA argued that this additional requirement is not contained in UK legislation and would make a successful application practically impossible on the basis that it is unlikely that the CMA will have that type of evidence available at the preliminary stage of a cartel investigation, when search warrants are typically requested.

The CMA argued, and the High Court agreed, that the legislative provisions for the grant of a search warrant for a business or domestic premises are identically worded, and as such should be read with the same "*meaning and effect*". Albeit the CMA accepted that a search warrant for a domestic premises should in general meet a "*higher order of scrutiny*" than applications for warrants for business premises, given how invasive an entry and search can be on a private home,

¹ [Judgment \[2023\] CAT 62](#), 12 October 2023.

² [Judgment \[2024\] EWHC 904 \(Admin\)](#), 22 April 2024.

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in light of the protection afforded to a private life under Article 8 of the of the European Convention on Human Rights (**ECHR**). However, this needs to be assessed on a case-by-case basis.

The CMA's CEO, Sarah Cardell, welcomed the ruling, noting that "*with the increase of remote-working – and electronic communication – it's essential that [the CMA is] able to search domestic premises to secure evidence of potential breaches of competition law where appropriate to do so*"³.

We provide further background regarding the case and details on the CAT and High Court judgments below.

Background of the High Court Judgment

In October 2023, the CMA launched an investigation under section 25 of the Competition Act 1998 (**CA98**) into suspected cartel behaviour relating to the supply of chemicals in the construction sector, involving a number of chemical suppliers and industry bodies (the **Alleged Cartel**).⁴

As part of the investigation, the CMA sought four warrants from the CAT,⁵ to enter and search three business premises in England and Scotland and one domestic premises in Scotland.

Under section 28 (in relation to business premises) and section 28A (in relation to domestic premises) of the CA98, warrants to enter and search premises may be granted if the High Court, Court of Session or CAT are satisfied that there are reasonable grounds for suspecting:

- 1) there are documents on the premises which the CMA has the power to require to be produced⁶ (**Condition 1**); and
- 2) if those documents were required to be produced, they would not be produced, but would be concealed, removed, tampered with or destroyed (**Condition 2**).

The CAT was satisfied that Condition 1 was met in this case for all four applications. In relation to Condition 2, the CMA argued that, as the Alleged Cartel is a "secret" cartel – which is by its nature intended to be covert – it can be inferred that there is a risk of destruction of evidence.

³ Press release available [here](#).

⁴ Case page available [here](#).

⁵ As the CMA was seeking a warrant in relation to premises located both in England and Scotland, only the CAT was competent to hear all four applications. The High Court of England and Wales is competent in relation to application for a warrant to enter and search premises located in England and Wales and the Court of Session is competent for applications in relation to premises located in Scotland.

⁶ Under section 26 of the CA98.

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The CAT was satisfied that such inference was sufficient to meet the requirement of Condition 2 in relation to the three business premises but not in relation to the one domestic premises.

The CAT noted that a “*higher order of scrutiny*” was required to satisfy Condition 2, given the level of intrusion into private life involved in the entry and search of domestic premises.⁷ In particular, the CAT concluded that, to justify the grant of a warrant in respect to domestic premises, the CMA would need to show “*something more*” to suggest that the individual in respect of whose premises the warrant is sought has a “*propensity to destroy*” documents. As no such evidence had been put forward by the CMA in this case, the CAT refused to grant the warrant to enter and search the domestic premises in Scotland (the **CAT Judgment**).

The CAT designated its judgment as a “guideline judgment”⁸, which could be cited before any courts in the future, showing the importance given by the CAT to the principle it had set out.

High Court judgment

The CMA applied for judicial review of the CAT Judgment before the High Court contending that while the ECHR requires a “*higher order of scrutiny*” for warrant applications for domestic premises than business premises, there is no legal basis for the CAT’s view⁹ that the CMA must always provide additional elements evidencing a propensity of an individual to destroy documents in order to satisfy Condition 2 for domestic premises warrant applications.

The High Court agreed with the CMA that, in the context of domestic premises warrants, there is *no general principle* requiring the CMA to *always* provide additional elements evidencing a propensity of an individual to destroy documents in order to satisfy Condition 2.

Whether or not an inference from the suspected existence of a secret cartel is sufficient to satisfy Condition 2 for domestic premises warrant applications will depend on the facts and circumstances of each case. The High Court specifically noted that there may be cases where the position of the individual in the undertaking or the extent of its involvement in the cartel will mean that the inference is enough to justify the issue of a warrant.¹⁰

The High Court also confirmed that, given the error of law contained in the CAT Judgment, the CAT’s ruling should not be treated as a “guideline judgment” and relied on as a precedent.

⁷ Protected under Article 8 of the European Convention on Human Rights.

⁸ [Practice Direction \(Citation of Authorities\) \(2001\) 1 WLR 1001](#) at 6.1 – a guideline judgment is a judgment which purports to establish a new principle or to extend the present law.

⁹ Additional judicial review grounds were brought by the CMA, namely that the CAT exceeded its power by (i) designating the CAT Judgment as a “guideline judgment” which can be cited before any court (i.e. not only the CAT) and (ii) ordering the CMA to disclose certain documents to the subject of the warrant.

¹⁰ Paragraph 58 of the High Court judgment.

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Takeaways

The High Court judgment dispels the CMA's fear that, following the CAT Judgment, it would be practically impossible for the CMA to obtain a search warrant for domestic premises.

The confirmation that the CMA can, in principle, rely on the secrecy and covertness of the "secret" cartel it is investigating to obtain a warrant to enter and search domestic premises sends a strong signal that private homes are not off-limits, particularly given the current hybrid mode of working. Other authorities across Europe have also recently made use of their power to enter and search domestic premises. For example, the French competition authority reported having conducted its first dawn raid at domestic premises in November 2021.

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