Neutral Citation Number: [2024] EWHC 904 (Admin)

Case No: AC-2023-LON-003735

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 22 April 2024

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT

And

MR JUSTICE BUTCHER

- -

Between :

THE KING (on the application of the COMPETITION AND MARKETS AUTHORITY)	**Claimant**
- and -	
THE COMPETITION APPEAL TRIBUNAL	**Defendant**

-and-

(1) SIKA LIMITED
(2) MASTER BUILDERS SOLUTIONS UK LIMITED
(3) MR X

Interested Parties

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- -

Marie Demetriou KC and Richard Howell (instructed by **the Competition and Markets Authority**) for the **Claimant**
Naina Patel as Advocate to the Court (appointed by the **Government Legal Department**)
The Defendant and the Interested Parties did not appear and were not represented

Hearing dates: 13 and 14 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Julian Flaux C:

Introduction, the Grounds and other background

1. The claimant, to which I will refer as "the CMA", seeks to judicially review three decisions of the defendant, to which I will refer as "the CAT", in relation to applications made by the CMA for four warrants under sections 28 and 28A of the Competition Act 1998 ("CA 1998") to search premises occupied by the Interested Parties. Pursuant to the Order of Swift J dated 15 January 2024, we held a "rolled-up hearing" to determine whether permission to apply for judicial review should be granted and, if it was, to then determine that judicial review. The CMA sought three warrants under section 28 to search business premises occupied by the first and second Interested Parties (two of which were in England and one in Scotland). It also sought a warrant under section 28A to search domestic premises in Scotland occupied by, amongst others, the third Interested Party, Mr X, whose identity is the subject of an anonymity order made by Murray J on 15 December 2023.

2. The CAT (constituted of the President, Sir Marcus Smith, Lord Ericht and Professor Rachael Mulheron) heard the applications *ex parte* at a hearing in private on the evening of 12 October 2023 and granted the CMA the warrants sought in respect of the business premises but refused the application in respect of a warrant to search the domestic premises of Mr X. Reasons for the decision were given in a judgment handed down to the CMA in private on 17 October 2023, [2023] CAT 62 ("the warrants judgment").

3. An issue then arose as to whether the warrants judgment should be published and, in a judgment dated 6 November 2023, [2023] CAT 68 ("the publication judgment") the CAT decided that it should be. In [10(2)] of the publication judgment, the CAT stated that: *"….the publication of appropriately redacted open judgments recording the reasons for the exercise (or non-exercise) of this jurisdiction is peculiarly important, not merely so that the instant case can be appropriately challenged, but so that there is guidance in future cases"*. The CAT concluded that the warrants judgment was *"a 'guideline judgment' and may in future be cited before any court"*, referring to [6.1] of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 ("the 2001 Practice Direction") issued by Lord Woolf CJ. The CAT stated that this applied not only to the warrants judgment but to an earlier judgment of Marcus Smith J in the Chancery Division in *CMA v Various Unnamed Defendants* [2019] EWHC 662 (Ch) ("the 2019 High Court judgment"). Neither the warrants judgment nor the 2019 High Court judgment contained an express statement that "it purports to establish a new principle or to extend the present law" as required by [6.1] of the 2001 Practice Direction.

4. On 30 November 2023, the CMA wrote to the CAT informing it that in the absence of a right of appeal under the CA 1998, it would be applying to the Administrative Court for judicial review of the refusal by the CAT to grant a warrant to search Mr X's domestic premises and of the CAT's designation of the warrants judgment and the 2019 High Court judgment as "guideline judgments" within the meaning of the 2001 Practice Direction. The CMA indicated that it no longer actually sought a warrant in respect of Mr X's domestic premises.

5. The warrants judgment was published by the CAT on 7 December 2023. The judgment as published made clear on its face that the CAT had been sitting as a Tribunal in England and Wales in respect of the application for warrants in relation to business premises in England and as a Tribunal in Scotland in respect of the application for warrants in relation to the business and domestic premises in Scotland. The CAT is, of course, a UK Tribunal. In a letter of 7 December 2023 in response to the CMA's letter of 30 November 2023, the CAT drew attention to the fact that it had sat as a tribunal in Scotland in respect of the Scottish warrant applications and that its constitution had included Lord Ericht, a Judge of the Outer House of the Court of Session. It asserted that it would seem incontrovertible that any review of the CAT's decision on the application for a warrant in respect of the domestic premises of Mr X was a matter for the Court of Session.

6. The warrants in respect of the business premises were not challenged by the first or second Interested Parties. However, on 8 December 2023, the President made an Order of his own motion which identified the first and second Interested Parties as respondents and directed that there should be a hearing on 19 January 2024 to determine whether the originating applications for the warrants and supporting material, together with the transcript of the hearing in private on 12 October 2023 should be published on the CAT website. He directed that by 15 December 2023, the CMA should identify those parts of the supporting material in respect of which public interest immunity ("PII") was claimed and provide the balance of the supporting material to the respondents (i.e. the first and second Interested Parties) by 20 December 2023. A timetable was set for submissions in relation to publication of the material on the CAT website.

7. On 15 December 2023, the CMA issued its Claim Form in the present proceedings, with its Statement of Facts and Grounds. Three Grounds are advanced. The first Ground concerns the refusal of the CAT to grant a warrant in respect of Mr X's domestic premises. In the warrants judgment, the CAT held that one of the conditions for granting a warrant under both section 28 and section 28A of CA 1998, namely that there were reasonable grounds for suspecting that there were on the premises (whether business or domestic) documents which the CMA has power under section 26 of CA 1998 to require to be produced, was satisfied. In relation to the second condition in section 28(1)(b)(ii), that, if those documents were required to be produced, they would not be produced, but would be concealed, removed, tampered with or destroyed, the CAT found [at [15(1) to (3)]] that, given that this was a secret cartel case where there is a strong motive to conceal evidence of the parties' involvement, an inference could be drawn that this condition was satisfied in relation to the business premises.

8. However, in relation to the identically worded provision in section 28A(1)(b)(ii), the CAT found at [15(4)] of the warrants judgment that the inference from the suspected existence of a secret cartel of destruction etc of documents was not enough in and of itself to justify the issue of a warrant in respect of domestic premises. Something more to suggest a propensity to destroy needed to be asserted in evidence when a named individual's domestic premises are identified for entry pursuant to a warrant, particularly where, as here, other persons occupied the premises. By Ground 1, the CMA contends that the CAT erred in law on the basis that, since the two provisions in sections 28 and 28A respectively are identically worded, they should be given the

same meaning and effect. Even though the CMA no longer seeks a warrant in respect of Mr X's premises, so that to that extent the Ground is academic, the CMA still invites the Court to determine it, since it raises a pure point of law of general application and the approach of the CAT would place an unwarranted fetter on the power to grant warrants under section 28A of CA 1998.

9. By Ground 2, the CMA does not challenge the decision to publish the warrants judgment, but contends that, in deciding that the warrants judgment and the 2019 High Court judgment are guideline judgments which can be cited in any Court, the CAT has exceeded its powers. The CMA contends that neither judgment may be cited because neither contains the necessary express statement under [6.1] of the 2001 Practice Direction. Furthermore, it was not within the powers of the CAT to determine whether, under the practice of the Supreme Court or the Courts of Scotland and Northern Ireland, the two judgments could be cited before those Courts.

10. Ground 3 seeks to challenge the Order of 8 December 2023 which the CMA contends was *ultra vires* and unlawful. The CAT erred in law (i) by requiring the CMA to identify PII material within the supporting material in the absence of any indication of an intention to challenge the warrants by the Interested Parties; and (ii) by proposing to make the supporting material available to the public at large without any request for access. The CAT explained in its letter of 7 December 2023 that the reason the Order was being made was because the warrants judgment *"cannot be fully understood (still less challenged)"* without the disclosure of the supporting material. This assertion was inconsistent with its position in the publication judgment, where it stated that the warrants judgment contained "*the reasons for the order* [granting or refusing the warrants]". This Ground seeks an order quashing the Order of 8 December 2023 and prohibiting the CAT from proceeding further.

11. In a letter of 11 December 2023 in response to correspondence from the CMA challenging the jurisdiction of the CAT to make the Order of 8 December 2023, the CAT said:

> "It is incumbent upon the CMA to provide information to the Respondents so as to enable those Respondents to consider their legal position. No respondent can take proper advice without the fullest information that can properly be provided. *Prima facie*, and without any directions from the tribunal, a party who has obtained, *ex parte* and without notice, an order against a respondent, must put that respondent in a position where the respondent can effectively respond."

12. In the same letter, the CAT had also said that there had been no indication in the 12 October 2023 application that there was material relied on in respect of which PII was claimed. This was factually incorrect, as the CMA pointed out in its letter in response, also on 11 December 2023. This prompted a response from the CAT also the same day in which it was said:

> "If the Respondents, with proper information, choose not to challenge the grant of the warrants, then the President considers that there is force in the CMA's point that identification of PII material (which should have been done as part of the

> application process) is (at this late stage) an unnecessary cost and expense."

13. The CAT indicated in that second letter that it was staying [2] to [4] of its Order of 8 December 2023. The first and second Interested Parties having indicated that they did not intend to challenge the warrants, on 19 December 2023, the CAT wrote to the CMA saying that the hearing on 19 January 2024 would be vacated. On the same day, the President made an Order vacating the hearing and rescinding the directions made in the Order of 8 December 2023.

The submissions

14. As is usually the case where the defendant to a judicial review is a Court or Tribunal, the CAT took no part in the proceedings. The Interested Parties also took no part. However, pursuant to the Order made by Swift J dated 15 January 2024, an Advocate to the Court was appointed by the Attorney-General to address whether the CAT had erred in law or acted in excess of jurisdiction as alleged in the Grounds. The Court had the benefit of helpful written and oral submissions from Ms Naina Patel as Advocate to the Court, for which we are grateful.

15. On behalf of the CMA, Ms Marie Demetriou KC submitted that the CAT had misapplied the statutory test which was the same under both section 28(1)(b)(ii) and section 28A(1)(b)(ii) of CA 1998. Its approach made it practically impossible to obtain a warrant for domestic premises. There had been nine cases since 2017 in which a warrant had been granted in respect of domestic premises, in none of which the judgment had been published, let alone been designated a guideline judgment.

16. She submitted that, in the case of business premises, the CAT had correctly concluded that in the case of a secret cartel, it could be inferred that there was a risk of destruction etc, so that this second condition in section 28(1)(b)(ii) was satisfied. However, the CAT had fallen into error in concluding that in the case of domestic premises, the drawing of the same inference was not sufficient to satisfy the identically worded second condition in section 28A(1)(b)(ii). The description of the nature of cartels given recently by the Court of Appeal in *R (Volkswagen) v Competition and Markets Authority* [2023] EWCA Civ 1506 at [57] was as applicable in the case of domestic premises as business premises:

> "Cartels are, characteristically, covert and ever more international, as the CJEU pointed out in *Aalborg (ibid)* paragraph [55], page 1466B - D of the report. Increasingly, exploiting modern technology, illicit communications between competitors are conducted by burner phones and across encrypted channels. Information is kept close to the chest to minimise the prospect of detection which carries with it the risk of huge financial penalties and claims for damages, including in United Kingdom collective actions. We do not accept the suggestion that Parliament is unaware of the realities of life. A long time ago, Lord Denning, in an early cartel case in the United Kingdom, (*Registrar of Restrictive Trading Agreements v WH Smith and Son and others* [1969] 1 WLR 1460), famously observed - albeit not in a case

> concerning extraterritoriality - that Parliament was well aware of the lengths cartelists would go in order to suppress evidence of their connivance:
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> > "In construing the Restrictive Trade Practices Act 1956, it is useful to remember the mischief which was aimed at. At one time traders used to come to restrictive agreements between themselves which were contrary to the public interest. They used to get together so as to seize all the trade for themselves, to keep up prices for their own selfish profit, to shut out any newcomers who might cut prices, and so forth. In order to get rid of such practices, Parliament required that all restrictive agreements should be registered and said they were to be void unless they were proved to be in the public interest. It put a duty on traders themselves to register the agreements. But it is obvious that some traders would not do their duty. People who combine together to keep up prices do not shout it from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing, nor even into words. A nod or a wink will do. Parliament was well aware of this. So it included not only an "agreement" properly so-called, but any "arrangement" however informal."'

17. Ms Demetriou KC accepted that the CAT was correct in [15(4)] of the warrants judgment to say that a warrant in respect of domestic premises requires a higher order of scrutiny under the European Convention on Human Rights ("ECHR") and generally, but it had been wrong to go on to conclude that this compelled a different construction of an identical statutory provision. The CAT had concluded that to justify the grant of a warrant in respect of domestic premises, the CMA would have to show something more than participation in the cartel, namely a propensity of the particular individual in respect of whose domestic premises the warrant was sought to destroy or conceal documents. She referred to [14] of the witness statement of Ms Enser, the Senior Director, Cartel Enforcement at the CMA which said that the CMA considers it would be a very rare case in which it would be able obtain evidence of such a propensity, particularly at the launch of an investigation, which is when applications for search warrants typically need to be made.

18. Ms Demetriou KC drew attention to the fact that, as recorded in the transcript of the hearing on 12 October 2023, during the course of argument, the President had said that the CAT understood that there was an impetus for targets of the powers under sections 28 and 28A of CA 1998 to try to avoid further damage by deleting material, that in the case of business premises, the CAT was prepared to attach sufficient weight to that general inference to grant the warrants and that the CAT accepted that the same impetus to delete arose in the case of domestic premises. However, the CAT had then imposed incorrectly the additional requirement in the case of domestic premises to show a propensity of the individual to destroy or delete.

19. In relation to Ground 2, Ms Demetriou KC referred to the 2019 High Court judgment, at [11] of which Marcus Smith J had referred to the decision of the Court of Appeal in *CMA v Concordia International* [2018] EWCA Civ 1881; [2018] Bus LR 2452

("*Concordia*") which held that the time to determine what material should be redacted on the grounds of PII was when an application was made to challenge the warrant, rather than at the stage of the *ex parte* application for the warrant. She also noted [12] of Marcus Smith J's judgment where he had said that an undertaking served with a section 28 warrant was entitled to as much information about the basis on which the warrant had been obtained as the CMA could safely give it. She submitted that on an application for a warrant there will be a lot of material which is subject to PII and it will be practically impossible to give as much information as possible to an undertaking when a warrant is served without going through the PII exercise at that stage.

20. Ms Demetriou KC referred to [6.1] of the 2001 Practice Direction which states:

> "6.1 A judgment falling into one of the categories referred to in paragraph 6.2 below may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after the date of this Direction that indication must take the form of an express statement to that effect. In respect of judgments delivered before the date of this Direction that indication must be present in or clearly deducible from the language used in the judgment."

[6.2] identifies as one of the categories of judgment: "Applications attended by one party only".

21. She also referred to [28] of the judgment of Waller and Dyson LJJ in *Secretary of State for Communities and Local Government v Bovale Limited* [2009] EWCA Civ 171; [2009] 1 WLR 2274 dealing with the binding nature of a Practice Direction:

> "How far is a practice direction binding? In our view a judge is bound to recognise and has no power to vary or alter any practice directions, whether brought in under the section 5(1) procedure or under the Section 5(2) procedure or indeed any existing practice directions issued pre-2005 Act. There are powers under the rules, as we have already indicated, to apply case management powers in particular cases but otherwise practice directions must, as it seems to us, be binding on the court to which they are directed. The issue of a practice direction is the exercise of an inherent power, even when carried out pursuant to section 5(1) or 5(2). If a Head of Division exercised that inherent power to give directions as to a procedure to be adopted in a particular court as happened before the 2005 Act, and a fortiori if the direction is given with the approval or agreement of the Lord Chief Justice and Lord Chancellor, it cannot be open to another judge of the court to which the practice direction is intended to apply to ignore that practice direction or to suggest in a judgment that a practice direction should no longer be followed in that court."

22. Ms Demetriou KC submitted that, in deciding that the warrants judgment and the 2019 High Court judgment could be cited in any Court, the CAT exceeded its powers. The 2019 High Court judgment was in a case where there was only one party in attendance and there is no reference in it to it being citable, so under the 2001 Practice Direction it cannot be cited. The CAT also said that the judgments could be cited in any Court which must include the Court of Appeal and the Supreme Court but the CAT had no power to say they were citable other than in the CAT itself. She accepted that in principle the CAT could decide that a particular judgment was citable in the CAT, as the 2001 Practice Direction does not formally apply to the CAT. There is no reference to the 2001 Practice Direction in the CAT Guide but it has chosen to direct itself by reference to the 2001 Practice Direction.

23. She noted that Ms Patel's skeleton argument referred to *Napp Pharmaceutical v Director General of Fair Trading* [2002] EWCA Civ 796; [2002] 4 All ER 376, an appeal from the Competition Commission Appeal Tribunal, a predecessor of the CAT, in which the Court of Appeal had given important guidance on practice and Brooke LJ had noted at [60] that this was not subject to the limitation on citation in [6.1] of the 2001 Practice Direction. Ms Patel had also referred to a number of cases where the Courts had permitted departure from the 2001 Practice Direction, including the decision of the Court of Appeal in *Agoreyo v Lambeth LBC* [2019] EWCA Civ 322; [2019] ICR 1572 where Singh LJ held at [88]-[90] that a particular decision of the Court of Appeal in an application for permission to appeal could be cited. Ms Demetriou KC submitted that merely because the 2001 Practice Direction had not been observed in some cases, it did not follow that one could just ignore it.

24. In relation to Ground 3, she submitted that the Order of 8 December 2023 was unlawful and *ultra vires*. When it was made, the warrants in respect of the business premises had been executed and the CMA had served the material that the CAT had ordered it to serve on the first and second Interested Parties by [3] of the Order of 12 October 2023. The CMA also provided a copy of the warrants judgment to the first and second Interested Parties. The first and second Interested Parties could have applied for more information under the procedure recognised by this Court in *Commissioner of Police for the Metropolis v Bangs* [2014] EWHC 546 (Admin). The CMA accepted that the CAT had a similar jurisdiction where there was an application by an Interested Party for more information, to order disclosure subject to PII. However, the Interested Parties here had made no application for such information and the CAT had no jurisdiction of its own motion to order the CMA to produce such disclosure. The Order of 8 December 2023 had treated the first and second Interested Parties as parties to the litigation which they are not.

25. Ms Demetriou KC submitted that the Order that the CMA identify those parts of the supporting material in respect of which PII was claimed and disclose the remainder to the Interested Parties in circumstances where the Interested Parties had not intimated an intention to challenge the warrants was contrary to the decision of the Court of Appeal in *Concordia*. Ms Demetriou KC submitted that the approach in the correspondence from the CAT on 11 December 2023 quoted at [11] and [12] above was also contrary to *Concordia* and other authorities.

26. She referred to the decision of the Supreme Court in *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1; [2018] AC 236. That concerned a search and seizure warrant under section 8 of the Police and Criminal Evidence Act 1984 but the

Supreme Court considered the judgment of Marcus Smith J at first instance in *Concordia* ([2017] EWHC 2911 (Ch)), which had been handed down after the argument in *Haralambous* but before judgment. In his judgment, Marcus Smith J had decided that whilst it was proper for the CMA to rely upon PII material on an application for a warrant under section 28 of CA 1998, on an application to vary or discharge the warrant the judge could not take account of material protected by PII. His reasoning was summarised by Lord Mance DPSC giving the judgment of the Supreme Court at [24]:

> "In the course of a careful analysis of the possibilities, Marcus Smith J:
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> (i) rejected a submission that, if the CMA was to be permitted to resist the challenge, it must disclose the full material;
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> (ii) considered that the Supreme Court's judgment in *Al Rawi* precluded a "closed material procedure", whereby the material withheld could be seen by the court, but not by Concordia;
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> (iii) rejected the CMA's case that some form of confidentiality ring could be established, to allow disclosure to Concordia's counsel, without disclosure to Concordia; and
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> (iv) in these circumstances held that "Concordia's application to vary or partially revoke the warrant must be determined on the basis of such material as is <u>not</u> protected by public interest immunity" (para 71).
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> In so concluding, Marcus Smith J recognised that the "excluded material may constitute the difference between the section 28 warrant being upheld or varied/revoked" (para 70). The question on this appeal is whether the conclusions he reached are correct, at least in the context of a search and seize warrant issued under section 8 of PACE."

27. At [27] Lord Mance DPSC confirmed that, on an *ex parte* application for a warrant, the Court can rely upon information which on grounds of PII cannot be disclosed to the subject of the warrant. However, he concluded at [52] that the exclusion from consideration of that PII material by the Court when there was an *inter partes* challenge to the warrant would result in "an awkward mismatch between the basis of the original and reviewing decisions". He considered that: "Judicial review should be effective and able to address the decision under review on the same basis that the decision was taken." Accordingly it must accommodate a closed material procedure where the PII material can be seen by the judge but not by the party challenging the warrant.

28. As Ms Demetriou KC pointed out, in the light of the decision in *Haralambous*, it was common ground before the Court of Appeal in *Concordia* that Marcus Smith J's decision could not stand, at least to the extent that he concluded that the PII material

could not be considered on an application to vary or discharge the warrant. Ms Demetriou KC referred to [70(ii)] of Marcus Smith J's judgment in *Concordia* where he said:

> "ii) I consider that this process of asserting and adjudicating upon claims of public interest immunity should be incorporated into the *ex parte* application for a section 28 warrant. The CMA should identify at the outset what material it contends should be redacted on public interest immunity grounds (saying why), the redactions being based on the following assumptions: a) The *ex parte* application for a warrant in respect of a particular party is successful; b) The application for the warrant is executed on that particular party; and c) That party then seeks to challenge the granting of the warrant."

29. She submitted that this was canvassing the same approach as was adopted by the CAT in the December 2023 correspondence and the Order of 8 December 2023 in the present case. The Court of Appeal in *Concordia* had made it clear that this was wrong and that the appropriate time for the Court to form a definitive view as to what was protected by PII was on an application being made by the subject of the warrant to vary it or set it aside ([31] of King LJ's judgment). The approach of the CAT in this case had undercut the decision of the Court of Appeal in *Concordia*.

30. Mr Richard Howell made oral submissions on behalf of the CMA on the issue of jurisdiction, specifically whether this Court rather than the Court of Session has jurisdiction in respect of the Grounds of judicial review. He pointed out that the power to grant warrants under sections 28 or 28A of CA 1998 was originally conferred on the Court alone, that is the Chancery Division of the High Court in England and Wales or the Court of Session in Scotland. With effect from 1 May 2014 under section 41 of the Enterprise and Regulatory Reform Act 2013, the CAT acquired concurrent jurisdiction. Although that Act at the same time conferred on the Secretary of State the power to make CAT Rules governing applications for warrants, no such Rules have been enacted.

31. The CAT Rules which there are were made under section 15(1) of the Enterprise Act 2002. Mr Howell submitted that although under Rule 3, Parts 2 and 6 of the Rules ostensibly apply to *"all proceedings before the Tribunal"* neither Part applies to applications for a warrant. Part 2 is headed "Appeals" and an application for a warrant is not an appeal. Ms Patel accepted that within Part 2, Rules 9 to 15 did not apply to applications for a warrant but submitted that Rules 16 to 23 did apply. Mr Howell submitted that that could not be right: either the whole Part applies to applications for a warrant or none of it does. Ms Patel focused particularly on Rule 18 headed "Forum", (1) of which provides:

> "The Tribunal, after taking into account the observations of the parties, may at any time determine whether any proceedings, or part of any proceedings, before it are to be treated, for all or for any purpose (including a purpose connected with any appeal from a decision of the Tribunal made in those proceedings) as proceedings in England and Wales, in Scotland or in Northern Ireland."

However, Mr Howell submitted that this Rule and other Rules such as Rules 19 and 21 did not encompass judicial review since there was no "appeal" from the decision of the CAT within the meaning of those Rules.

32. He submitted that, where there were a number of decisions by the CAT challenged on this application, it was properly before the Divisional Court because of the connecting factors. He relied on the decision of the House of Lords in *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47; [2007] 1 AC 521. That concerned the rejection of an asylum claim by the petitioner. He was living in Glasgow but the appeal was heard by the adjudicator in Durham for the convenience of the petitioner's representative who lived in Sheffield. The adjudicator dismissed the appeal and the Immigration Appeal Tribunal ("IAT"), sitting in London, refused leave to appeal. The petitioner petitioned the Court of Session for judicial review. The Secretary of State objected to the jurisdiction on the basis that the hearings before the adjudicator and the IAT had taken place in England. Both the Lord Ordinary and the Inner House on appeal held that the Court of Session had no jurisdiction. The petitioner's appeal was allowed by the House of Lords.

33. Having stated at [21] of his judgment the general principle that under the common law the superior courts of a country have jurisdiction to review the decisions of inferior courts or tribunals made within the jurisdiction of the superior court, Lord Nicholls of Birkenhead continued at [22] and [24]:

> "22. This general principle must be handled circumspectly where the issue concerns the jurisdiction (legal powers) of courts of the constituent parts of the United Kingdom. The different parts of the United Kingdom cannot be treated as foreign countries when the decision sought to be reviewed was made by a tribunal or minister exercising powers under laws applicable throughout the United Kingdom. In the present case that is the position. The adjudicator and the IAT were implementing laws, and exercising powers, applicable nationwide. The adjudicator and the IAT are United Kingdom tribunals. In *Executors of Soutar v James Murray & Co Ltd* [2002] IRLR 22, 23, para 8, Lord Johnston said the border between England and Scotland is of no relevance to the jurisdiction of employment tribunals; their jurisdiction is national. The same is true of adjudicators and the IAT.
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> …
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> 24. To my mind the nationwide nature of the legislation and the two-tier appeal structure of adjudicators and the IAT point to the conclusion that, in the same way as adjudicators and the IAT have jurisdiction (legal power) throughout the United Kingdom, so the superior courts of the constituent parts of the United Kingdom have jurisdiction to review decisions of adjudicators and the IAT wherever made. Once it is recognised that adjudicators and the IAT are properly to be characterised as United Kingdom tribunals, there can be no occasion for attempting to confine the supervisory jurisdiction of the courts

> of England or Scotland by rigid rules or, even less, by rules whose bounds are vague. In respect of decisions of these tribunals the Court of Session and the High Court have concurrent jurisdiction. Decisions of the Court of Session and the High Court made in exercise of this concurrent jurisdiction are binding throughout the United Kingdom."

34. At [25] he noted that whether or not the jurisdiction was exercised would depend upon whether the Court was the appropriate forum, applying *Spiliada* principles. A similar point was made by Lord Hope of Craighead at [62]:

> "There is clearly much to be said for regarding the statutory rule as the best guide, for the purposes of the plea of forum non conveniens, as to whether in any given case the appropriate forum for judicial review is the Court of Session or the High Court. But it would not be right to treat this as a rule that was inflexible. The question, after all, is where the issue may be tried more suitably for the interests of all the parties and the ends of justice. All other things being equal, it will normally be possible to resolve the issue by reference to the place where the determination of the adjudicator was made rather than the petitioner's place of residence. But in my opinion the facts show that it would not be appropriate to resolve it in that way in this case."

35. Mr Howell submitted that this Court is the appropriate forum for the determination of all the Grounds, even though one of the business premises and Mr X's domestic premises were in Scotland. He submitted that it would be wrong in principle to bring two parallel sets of proceedings, one in this Court and one in the Court of Session, relying on the decision of the Court of Appeal in *R (Liberty) v Prime Minister* [2019] EWCA Civ 1761; [2020] 1 WLR 1193 at [27]-[28]. He submitted that, whilst the location of the premises to be searched was an important factor, it was not of overwhelming weight. If the application for warrants in respect of the business premises had been refused, he submitted that it would have been appropriate to bring one claim before the English Court.

36. None of the Grounds turns on any issue of Scottish substantive or procedural law. There is a single UK law which this Court is able to apply. The Scottish law officers had been informed of the proceedings but had elected not to intervene. On the issue of convenience, Mr Howell submitted that it would not be convenient to insist that some or all of the case should be litigated in Scotland. Furthermore, Ground 2 was clearly a matter for this Court since it concerned the status and effect of the English 2001 Practice Direction, and so far as Ground 3 is concerned, the Order of 8 December 2023 could be challenged in both jurisdictions as two of the premises are in England.

37. Mr Howell also made submissions as to whether the Court should refuse permission to apply for judicial review and decline to decide the Grounds on the basis that they were now academic points. He referred to the decision of the Court of Appeal in *L, M and P v Devon County Council* [2021] EWCA Civ 358 applying the principles laid down by Lord Slynn in *R v Home Secretary ex parte Salem* [1999] AC 450 at 457 which Elisabeth Laing LJ at [29] summarised as follows:

> "In that passage, Lord Slynn accepted (as both counsel had agreed) that the House of Lords had a discretion to hear an appeal where there is an issue involving a public authority on a point of public law, even if, by the time of the hearing 'there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.' Statements to the contrary in other cases and in the relevant Practice Direction 'must be read accordingly as limited to disputes concerning private law rights…' He qualified that by saying that 'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future'."

38. Mr Howell submitted that there was a good reason in the public interest to determine the Grounds which were against the background of actual, not hypothetical facts. There was a real public interest in having certainty about the conditions under sections 28 and 28A of CA 1998 and about the status of the warrants judgment and the 2019 High Court judgment.

39. Ms Patel began her oral submissions as Advocate to the Court by focusing on the legal framework. She submitted that in circumstances where no Rules specific to applications for search warrants had been enacted, it made sense to construe Rule 115 in Part 6 of the CAT Rules as applying generally to proceedings in the CAT including in relation to such applications. Rule 115 provides:

> "General power of the Tribunal
>
> 115.—(1) Subject to the provisions of these Rules, the Tribunal may regulate its own procedure. (2) A power of the Tribunal under these Rules to make an order or direction includes a power to vary or revoke the order or direction. (3) The President may issue practice directions in relation to the procedures provided for by these Rules."

She pointed out that, in its skeleton argument for the October 2023 hearing before the CAT, the CMA had said that the CAT could regulate its own procedure under Rule 115 and that it should apply the Practice Direction: Application for a Warrant under the Competition Act 1998 which is applicable to applications to the Chancery Division.

40. Ms Patel took the Court to the evidence put before the CAT by the CMA concerning the involvement of Mr X but it is not necessary to refer to any of that for present purposes. A little later in her submissions the Court went into closed session briefly to enable Ms Patel to refer to and make submissions about certain confidential material,

but since none of that has any effect on the conclusions I have reached and the reasons for them, it is not necessary to produce any closed judgment.

41. In relation to Ground 1, Ms Patel noted, by reference to [9] of the judgment of the CAT in *Airwave Solutions v CMA* [2022] CAT 4 that "reasonable grounds for suspecting", the first requirement or condition under section 28 and section 28A of CA 1998, has both subjective and objective elements which are necessarily fact dependent. In relation to the second requirement under section 28(1)(b)(ii) and section 28A(1)(b)(ii) she noted that the latter relating to domestic premises had been enacted, after the CA 1998 had come into force, at the same time as an amendment confining to business premises the power of entry on notice but without a warrant under section 27 to give effect to a commitment by the Government that a warrant should always be required to enter domestic premises. The document in which that proposal was made: Department of Trade and Industry, *Modernisation - a consultation on the Government's proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998* in April 2003 had referred to a desire to strengthen the safeguards for domestic premises. This was reflected in Article 21(3) of the Regulation which says that the Court may ask the national competition authority for more detailed reasons for an inspection of domestic premises as opposed to business premises. She submitted that, even though sections 28(1)(b)(ii) and 28A(1)(b)(ii) are identically worded, separate consideration is required in relation to the facts for each, so that it may be appropriate to draw an inference in the case of business premises but not in the case of domestic premises.

42. Ms Patel pointed out that the documents which there must be reasonable grounds for suspecting are on the premises and if required to be produced would be destroyed are, under both sections, documents relevant to the CMA's investigation and to the involvement of the undertaking in anti-competitive conduct. In the case of business premises, there could be a risk of destruction by any number of people in an undertaking. In the case of domestic premises under section 28A, the documents are still those relevant to the investigation, not to the individual whose domestic premises they are. That individual could be involved merely as a witness. She submitted that, in the case of domestic premises, the risk of destruction etc was much narrower and really limited to destruction by the occupier. Accordingly she submitted only certain types of more culpable involvement by the individual in the anti-competitive conduct give rise to the risk of destruction.

43. The CMA argued that if there were reasonable grounds to suspect a secret cartel, it was permissible to infer that the second condition was satisfied in each case because the stakes are high and those involved will have taken steps to make detection difficult. However, Ms Patel pointed out that the stakes in question are directed at undertakings, not individuals. The penalties imposed under section 36 CA 1998 are imposed on undertakings and typically claims for damages are brought against companies. The stakes do not exist in the same way in relation to individuals. Where the warrant is directed at an individual's domestic premises, there is nowhere to hide and if the documents are destroyed by them a strong and damaging inference of guilt can be drawn which acts as a disincentive to destruction or concealment in the first place.

44. Ms Patel pointed out that, even where the statutory requirements under section 28 or section 28A CA 1998 are met, the Court or Tribunal still has a discretion as to

whether to grant a warrant and in the case of domestic premises, there is a balancing exercise for the purposes of Article 8 of the ECHR to determine whether the warrant should be granted given the level of intrusion involved. This balancing exercise also comes into play in determining whether there are "reasonable grounds for suspecting" within section 28A(1)(b)(ii).

45. In relation to Ground 2, Ms Patel submitted that the circumstances in which comments in a public judgment justify the intervention of the Court on judicial review are narrow. She referred to [21] to [27] in the judgment of Silber J in *R (Farah) v HM Coroner for the Southampton and New Forest District of Hampshire* [2009] EWHC 1605 (Admin). In any event, the reference to the judgments being guideline judgments which could be cited in other cases was no more than an indication as to the CAT's likely practice through its view of the importance of the two judgments, given that the CAT is not bound by the 2001 Practice Direction. She pointed out that such comments had been made in other cases by judges about judgments given by other judges which do not contain the express statement referred to in [6.1]. She referred to the judgment of Lewison LJ in *Bishop v Chhokar* [2017] EWCA Civ 2717 at [3]-[4] stating that the earlier permission to appeal judgment of Aikens LJ in the same case ([2015] EWCA Civ 24) "deserves to be better known because it contains a valuable discussion of the remedies available when a litigant complains that a judgment in the county court has been procured by fraud" notwithstanding that it did not contain the statement required by [6.1] of the 2001 Practice Direction.

46. Ms Patel also pointed out that the need for the express statement in [6.1] was not in any event strictly observed even in the senior courts. Her skeleton argument identified a number of such cases including *Agoreyo*. In her oral submissions she also referred to *VTB Bank v Mejlumyan* [2021] EWHC 3053 (Comm) where Bryan J referred to and relied upon an earlier judgment of Andrew Baker J which he considered gave a careful exposition of the relevant principles in relation to prohibitory anti-suit injunctions, notwithstanding that it did not contain the express statement required by [6.1] of the 2001 Practice Direction. She also noted that the practice of the Courts was to permit departure from the 2001 Practice Direction and allow citation of cases that fall within [6.1] notwithstanding the absence of an express statement, referring to *Napp*.

47. Ms Patel submitted in respect of the 2019 High Court Judgment that the CAT had not been seeking to bind practice in the senior Courts and in any event that judgment could always have been cited in the senior Courts with permission even absent the express statement pursuant to [6.1] of the 2001 Practice Direction, as had occurred in the cases referred to in the previous paragraph.

48. As regards the warrants judgment, since that had originally been handed down in private, the publication judgment was the first appropriate time to state that the warrants judgment could be cited as a guideline case even if the 2001 Practice Direction applied to the CAT which it did not. The 2019 High Court judgment could be cited in the CAT anyway. Ms Patel submitted that even if there was an error of law in the respect identified in Ground 1, given the way in which the comments about citation had been implemented, this was not an appropriate scenario for intervention by this Court.

49. In relation to Ground 3, Ms Patel submitted that the Order of 8 December 2023 was made when the CAT did not yet know whether the warrants judgment had been served on the first and second Interested Parties or whether the warrants would be challenged. It was the CAT seeking to pre-empt the position if there were a challenge, in circumstances where there are no CAT Rules covering warrants. She submitted that there were obvious difficulties with the conclusion that the appropriate time for the Court to form a definitive view as to what was protected by PII being when the subject of the warrant made an application to vary it or set it aside. This necessarily limits the information on the basis of which a view can be taken about whether to make such an application in the first place. She contended that it could be argued that the right to sufficient information to determine whether to launch a challenge to the warrant was part of the right to be informed of the reasons, referring to [25] to [29] of the decision of this Court in *Bangs*. She submitted that the Court of Appeal in *Concordia* was not considering this intermediate position of ensuring that the subject of the warrant had sufficient information to decide whether or not to launch a challenge.

50. Furthermore, she submitted that there might well be an issue whether it was appropriate to give the subject of the warrant such information irrespective of whether they had requested such disclosure or challenged the warrant, on the basis that Article 6 of the ECHR applies. In addition, it could be argued that even in the absence of such a request or challenge, the CAT had power to make the Order it did under Rule 115 as long as in doing so, it did not interfere with the granting of the warrant.

51. In relation to the issue of jurisdiction, Ms Patel agreed that the CAT was exercising powers conferred by UK-wide legislation such that the Courts of each part of the UK have concurrent jurisdiction, subject to the Court declining such jurisdiction where another forum was more appropriate. She submitted that it could be argued that Grounds 1 and 2 are for the Court of Session. She submitted that Rule 18 of the CAT Rules applied to all proceedings including applications for a warrant, so that because the CAT had determined that the proceedings before it in relation to the warrant in respect of Mr X's domestic premises were in Scotland, that governed any onward challenge to the CAT's decision, whether by appeal or judicial review. She submitted that the nexus of Ground 2 with the warrants judgment and Ground 1 meant that for it too, the appropriate forum was Scotland. If Grounds 1 and 2 were to be heard in the Court of Session it would be sensible for Ground 3 also to be heard by that Court, alternatively it could be heard separately by this Court.

52. Ms Patel also submitted that the Court should refuse permission to bring the judicial review because the claim was academic. Ground 1 raises a point which requires consideration of evidence to understand the approach of the CAT and is necessarily fact specific. To the extent that the issue of the interpretation and application of section 28A(1)(b)(ii) CA 1998 arises in other cases where warrants under that provision are sought, it can be more effectively argued then, in the context of relevant facts which might support a different approach.

53. In relation to Ground 2, the 2001 Practice Direction does not apply to the CAT so confusion is unlikely. Ms Patel submitted that, in any event, neither the warrants judgment nor the 2019 High Court judgment was erroneous, the latter clearly endorsing the approach of the Court of Appeal in *Concordia* that PII should be determined at the time of an *inter partes* challenge, not at an *ex parte* application. So

far as Ground 3 is concerned, the Order has been rescinded, so that ground is entirely academic.

Analysis and discussion

54. Analytically, the first question which needs to be addressed is the jurisdictional one of whether this Court or the Court of Session should hear the present rolled-up application. In my judgment, it is clear that both Courts have a concurrent jurisdiction to hear a judicial review of the decision of the CAT as a tribunal with UK wide jurisdiction, as Ms Patel accepted. The issue is whether, applying the principles derived from *Tehrani* set out at [32] to [34] above, this Court or the Court of Session is the more appropriate forum to consider and determine the Grounds. In my judgment, this Court is the more appropriate forum for a number of reasons.

55. First, it would not be sensible or appropriate to divide up the Grounds so that some of them are heard here and some in Scotland. As is apparent from the analysis set out below, one of the issues which arises, particularly in relation to Grounds 2 and 3, is whether the CAT (and Marcus Smith J in the 2019 High Court judgment) are right that when the warrant is served, the CMA should provide as much information as it safely can about why the warrant was sought. This issue involves consideration of the decision of the Court of Appeal in *Concordia* and of the Divisional Court in *Bangs*, English authorities, for consideration of which this Court is more appropriate than the Court of Session.

56. Second, in my judgment, Rule 18 of the CAT Rules does not apply and so, contrary to the CAT letter of 7 December 2023, the fact that the CAT may have been sitting in Scotland for the application in respect of the Scottish warrants does not dictate that any judicial review of its decision should be heard in Scotland. Rule 18 (the relevant paragraph of which is set out at [31] above) is in Part 2 of the CAT Rules which, as the heading to each Rule in that Part makes clear, only applies to "Appeals" and the applications for warrants were not appeals to the CAT. Furthermore the present proceedings are not an appeal from a decision of the CAT within the meaning of Rule 18 but an application for judicial review.

57. Third, Ground 2 is clearly a matter for this Court as opposed to the Court of Session since it concerns the English 2001 Practice Direction and the designation of guideline cases by English Courts. Fourth, although Mr X's domestic premises are in Scotland, I agree with Mr Howell that the location of the premises should not be of overwhelming weight, particularly since none of the Grounds raises any distinct issue of substantive or procedural Scottish law, so that this Court is well able to deal with the issues raised by Ground 1. Finally, although the Scottish law officers have been informed of these proceedings, they have elected not to intervene. In all the circumstances, I consider that this Court is the more appropriate forum to consider and determine all the Grounds.

58. Grounds 1 and 2 need to be addressed together. The difficulty with [15(4)] of the warrants judgment is that, to the extent that the CAT has stated that the inference from the suspected existence of a secret cartel of destruction etc of documents which is sufficient to justify the issue of a warrant in respect of business premises is never enough to justify the issue of a warrant in respect of domestic premises, but something more to suggest a propensity to destroy is always required, that goes too

far. There may very well be cases where the position of the individual in the undertaking or the extent of his or her involvement in the cartel will mean that the inference is enough to justify the issue of a warrant without some additional evidence of propensity, which as Ms Enser points out in her witness statement, might be very difficult to obtain. I also agree with Ms Demetriou KC that the description of the nature of secret cartels given in the *Volkswagen* case set out at [16] above is as applicable to domestic premises as to business premises. 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.

59. Ms Patel submitted that because the CMA no longer seeks a warrant in respect of the domestic premises of Mr X, Ground 1 is academic and on that basis the Court should refuse to give permission for judicial review on that Ground. However, particularly given the CAT's indication in the publication judgment that the warrants judgment is a guideline case which can and should be followed in the future, I consider that, since [15(4)] of the warrants judgment does contain the error of law I have identified, it is important to correct that error so that it is not repeated in subsequent cases by the CAT following and repeating that erroneous reasoning. It follows that the warrants judgment should not be treated as a guideline judgment and should not be followed in future cases by the CAT.

60. So far as the 2019 High Court judgment is concerned, as Ms Demetriou KC pointed out, in that judgment, Marcus Smith J recognised that the Court of Appeal in *Concordia* had held that the appropriate time for the Court to determine what material should be redacted on the grounds of PII was when the subject of the warrant made an application to vary or discharge it, not at the earlier stage of the *ex parte* application for the warrant. The point which troubled Marcus Smith J in [12] of the 2019 High Court judgment, about the subject of a warrant not having sufficient information to decide whether to make an application to vary or discharge the warrant, can be addressed by the subject of the warrant applying to the Court or the CAT for the CMA to disclose further information pursuant to the *Bangs* procedure, as the CMA accepted in Ms Demetriou KC's reply submissions. However, to the extent that Marcus Smith J was indicating that when the warrant was served on the undertaking which was the subject of it, the CMA should in effect volunteer as much information as the CMA can safely give the undertaking, absent any such application or even an intimation that such an application will be made, that seems to me to be contrary to the very clear principle laid down by the Court of Appeal in *Concordia* as to when the PII exercise should be undertaken.

61. As Ms Demetriou KC pointed out, having to give as much information as the CMA can safely give the subject of the warrant at the time that the warrant is served may in practical terms mean that the CMA has to go through the PII exercise at that stage, notwithstanding that no application under the *Bangs* procedure has been made or intimated. I consider that at the stage that the warrant is served, the CMA need not disclose additional information as contemplated by Marcus Smith J in [12] of the 2019 High Court judgment. It is sufficient at that stage that with the warrant was served the detailed Explanatory Note which did clearly set out the entitlement of the

subject of the warrant to make an application to set aside or vary the warrant. The first and second Interested Parties were also supplied by the CMA with a copy of the warrants judgment which gave the reasons for the warrants being granted. There is no additional need for the CMA to volunteer as much information as can safely be given as Marcus Smith J suggested. It follows that [12] of the 2019 High Court judgment goes too far and contains an error of law. It should not be regarded as a guideline judgment and should not be followed in future cases by the CAT.

62. To the extent that, in the publication judgment, the CAT also said that the warrants judgment and 2019 High Court judgment were guideline judgments which could be cited in any Court, I consider that the CAT exceeded its powers, since it could not dictate the status of those judgments in any Court or Tribunal other than the CAT itself. However, in any event, given my conclusion that both judgments contain errors, they cannot and should not be treated as guideline judgments either in the CAT or in any Court.

63. Had it not been for the errors of law in the judgments, I would not have considered that the failure to set out the express statement in [6.1] of the 2001 Practice Direction in either judgment precluded that judgment from being a guideline judgment, essentially for three reasons: (i) there is an express reference in the publication judgment to the warrants judgment being a guideline judgment and for these purposes the two judgments should be read together, particularly since, as Ms Patel pointed out, the warrants judgment had originally been handed down in private so that the publication judgment was the first appropriate time to state that it could be cited as a guideline judgment; (ii) in any event the 2001 Practice Direction does not apply to judgments of the CAT; and (iii) the absence of an express statement in the 2019 High Court judgment would not preclude it from being a guideline judgment if that had been appropriate, as is evident from the number of cases where judgments have been regarded as guideline judgments even when they did not contain the express statement.

64. Turning to Ground 3, on the basis of the authorities, specifically the Divisional Court in *Bangs* and the Court of Appeal in *Concordia*, the two situations in which the CMA may need to disclose further information to the subject of the warrant are first if the subject makes an application for further information under the *Bangs* procedure and second if the subject makes an application to vary or discharge the warrant. In both those cases it may well be necessary for the CMA to engage in the PII exercise and determine what of the material which was before the CAT or the Court on the application to issue the warrant is the subject of PII. As the Supreme Court recognised in *Haralambous* in the passages from the judgment of Lord Mance DPSC referred to at [27] above, on a challenge to the warrant by way of judicial review, it may be necessary for the Court to consider the material subject to PII under a closed material procedure.

65. However, where no application for further information has been made or intimated and there is no challenge to the warrant, the Court or the CAT does not have power of its own motion to order the CMA to disclose further information to the subject of the warrant (thereby necessitating the CMA engaging in a PII exercise). This is what the CAT purported to do in paragraphs 2 and 3 of the Order of 8 December 2023, notwithstanding that the first and second Interested Parties had not intimated any intention to challenge the warrants or to seek further information pursuant to the

Bangs procedure. This exceeded the power of the CAT and was an Order that should not have been made. I also question on what basis the CAT would have had any power to order the supporting material to be published on the CAT website (as contemplated by paragraphs 4 and 5 of the Order). The supporting material will have been specific to this case and since the determination of what could be published would entail the CMA engaging in a PII exercise and, possibly, the CAT conducting a closed material procedure, this Order does indeed undercut the decision of the Court of Appeal in *Concordia*. That decision made it very clear that the appropriate time for a Court (or for that matter the CAT) to form a definitive view as to what material is protected by PII is when there is a challenge to the warrant, not before. As Ms Demetriou KC submitted, the approach of the CAT in making the Order was essentially the same approach as Marcus Smith J had adopted in *Concordia* at first instance in [70(ii)] of his judgment quoted at [28] above, an approach which was disapproved by the Court of Appeal at [28] to [32] of the judgment of King LJ.

66. It follows that the Order of 8 December 2023 was misconceived and should not have been made. Ms Patel submitted that, since the Order was rescinded on 19 December 2023, Ground 3 was academic and the Court should refuse permission for the judicial review on that basis. However, in the letter of 19 December 2023 indicating that the hearing on 19 January 2024 was being vacated, the CAT made it clear that its intention had been to ensure that the first and second Interested Parties had the material necessary to make an application to challenge the warrants should they wish to make such an application. That does seem to suggest that the CAT still considered that, in an appropriate case, it could take proactive steps of its own motion to order the CMA to disclose additional material not covered by PII to the subject of a warrant. For the reasons given in the previous paragraph that is not a course which is open to the CAT and to the extent that it remains under the misapprehension that it is, I consider that, in relation to Ground 3, this Court should clearly state that the Order of 8 December 2023 did exceed the powers of the CAT, to ensure that the same course is not taken by the CAT in future cases.

Conclusion

67. In the circumstances, I would give the CMA permission to bring this judicial review and I would propose granting it the following relief:

(1) In relation to Ground 1, a declaration that the CAT erred in law in concluding in the warrants judgment that in the case of applications for a warrant in respect of domestic premises under section 28A(1)(b)(ii) CA 1998 something more to evidence a propensity to destroy beyond the inference to be drawn from the existence of an alleged secret cartel is always required.

(2) In relation to Ground 2, a declaration that the 2019 High Court judgment and the warrants judgment contain the errors of law identified at [59] to [61] above and should not be cited as guideline judgments before the CAT or before any Court.

(3) In relation to Ground 3, a declaration that in making the Order of 8 December 2023, the CAT exceeded its powers.

68. Since this relief differs somewhat from the relief sought in the Claim Form, I would propose giving the CMA and the Advocate to the Court the opportunity to make short

written submissions about what relief should be granted and about consequential matters such as costs before any Order is finalised.

Mr Justice Butcher

69. I agree.