

## COMPETITION APPEAL TRIBUNAL USER GROUP MEETING MINUTES OF FIFTH MEETING HELD ON 24 FEBRUARY 2011

### **Attendees:**

#### *On behalf of the Tribunal*

Sir Gerald Barling – President, Competition Appeal Tribunal  
Charles Dhanowa OBE – Registrar, Competition Appeal Tribunal  
Stephen Hurley – Référéndaire, Competition Appeal Tribunal

#### *On behalf of Users*

Daniel Beard – Barrister, Monckton Chambers  
Roland Green – Chief Legal Adviser, Competition Commission  
Jon Lawrence – Partner, Freshfields Bruckhaus Deringer LLP  
Sarah Turnbull – Legal Director, Office of Communications  
Frances Barr – General Counsel, Office of Fair Trading  
Stephen Wisking – Partner, Herbert Smith LLP  
James Flynn QC – Barrister, Brick Court Chambers

### **Introduction**

The President welcomed everyone to the meeting of the User Group. The President asked the members to approve the minutes of the last meeting of the User Group and the minutes were duly approved. During his introductory remarks, the President also noted that Court 2, whilst currently not in use due to flood damage, was expected to be repaired shortly.

Daniel Beard noted that at the last meeting of the User Group enquiries had been made concerning the appointment of a representative from Northern Ireland. Mr Beard confirmed that he had made contact with possible candidates and would hope to provide an update to the Tribunal at the next meeting of the User Group. The President thanked Mr Beard for his continuing efforts.

### **Part 36 Offer to Settle and Tribunal Guide to Proceedings**

The President noted that the issue of offers to settle under Part 36 of the Civil Rules of Procedure had been raised previously by Jon Lawrence. The President stated that due to recent commitments of the Tribunal, it had not yet been possible to devote sufficient time to considering this topic but that it would be considered in due course. Similarly, the President noted that work to update the Tribunal's Guide to Proceedings was ongoing.

### **Tribunal Workload**

The Registrar stated that there were currently 58 live cases before the Tribunal, a record number in its history. The Registrar also pointed out that the Tribunal was due

to sit for some 23 weeks in Court 1 this year, due principally to a combination of appeals against OFCOM's Pay TV Determination and the OFT's Tobacco Decision. The Registrar remarked that this year would see a notable increase in the number of large scale hearings at the Tribunal.

### **New Tribunal Members**

The President noted that the new members of the Tribunal had been appointed and that some of the new members were already sitting on Tribunal panels hearing appeals. A period of training and induction of the new members was now being undertaken within the Tribunal, using both internal resources, such as the Chairmen and Référéndaires, and external speakers.

### **Competition System**

The Registrar noted that there was an ongoing discussion regarding the possible merger of the Tribunal with the Tribunal Service, with the latter itself merging with the Courts system of England and Wales. A report was due to be put before the Minister responsible in early April.

The President noted the inherent difficulties involved in the Tribunal joining the Tribunal Service, given the nature of the Tribunal's jurisdiction which covers the entire United Kingdom as opposed to only England and Wales.

Mr Beard asked to whom any points on this matter should be presented, in particular regarding the benefits of the Tribunal staying outside of the Tribunal Service. The President noted that the point of contact was an official at the Department for Business, Innovation and Skills ("BIS"). Mr Beard spoke of certain concerns voiced to him regarding any change to the Tribunal's institutional framework.

### **Institutional Structure**

The Registrar pointed out that work was being undertaken by BIS regarding a consultation on institutional structure in the competition landscape. The consultation is due to be published in mid-March.

The President noted that the Tribunal was not the primary focus of the consultation, but that it may be indirectly affected by certain aspects of it, in particular the discussion surrounding the decision making processes with regard to competition cases.

### **Timing of Judgments**

Mr Beard raised a query that had been reported to him regarding the timing of the Tribunal's judgments in relation to the appeals against the OFT's Construction Decision.

The President noted that, together with the appeals lodged around the same time against the Construction Recruitment Forum Decision, the Tribunal had the job of hearing and deciding in parallel some 28 appeals arising from those decisions. The

President also remarked that the Construction Decision was by far the largest yet issued by the OFT and it was therefore inevitable that it would take some time for the Tribunal to hand down its judgments.

### **Listing of Hearings**

Mr Beard raised for discussion the topic of listing of hearings. In particular, he noted that it may be possible to schedule hearings with the assistance of clerks in order to ensure that parties' counsel are available. In addition, whilst in larger cases, such as the appeals against the OFT's Tobacco Decision, a hearing window is specified, it would be helpful if a final date for the hearing could be fixed as soon as practicable.

The President noted that in relation to the hearing of the appeals against OFCOM's Pay TV Determination, it was difficult to know how long the hearing would need to be until the written pleadings had been lodged with the Tribunal. The President also noted that it was already a difficult process to fix dates for hearings due to the need to coordinate the schedules of the three members of each Tribunal panel, in addition to the other workload of the Tribunal.

The Registrar also pointed out that scheduling of hearings was not carried out in an inflexible manner and that there was a sensible degree of consultation with the parties on hearing dates. Often though the underlying regulatory and commercial imperatives of the situation and the multiplicity of parties meant that, in some cases, it would not be possible to accommodate, perfectly, the requirements of all parties. On occasions matters might also be so urgent that no party may be completely satisfied with the listing arrangements – not least the Tribunal itself..

### **Damages Actions**

Jon Lawrence enquired whether the Tribunal was cognisant of the recent comments by Lord Justices Jacobs and Lloyd in *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2 regarding the Tribunal's private damages jurisdiction.

The Registrar noted that the detailed issue of the Tribunal's jurisdiction in this regard was unlikely to be covered in the consultation due to be launched shortly by BIS.

The President noted that the issue had been raised with BIS by the Tribunal. The President was of the view that there was no particular opposition to legislative change in this area but that the primary focus of the BIS consultation at this time was institutional reform.

### **Competition Commission Consultation**

It was noted that the Competition Commission had launched a consultation regarding its role under the Communications Act 2003 in price control references. The consultation was open for a further two weeks and parties were encouraged to respond within the deadline.

### **Any Other Business**

The Registrar remarked that it was likely that the Tribunal's two courts would be used more extensively in future, both by the Tribunal and the Tribunal Service. This, he said, may have implications for scheduling of hearings.

The President noted that, with the tightening of budgets, the Tribunal may not be able to provide a transcript free of charge as a matter of course. In particular the cost of transcripts for major hearings lasting several weeks was outside the scope of the Tribunal's budget and in such cases the Tribunal would leave such costs to be borne by the parties. This would no doubt be a matter that featured in the preparatory discussions at case management conferences prior to the main hearing.

The Registrar also noted that there was likely to be a section in the BIS consultation document regarding the introduction of fees for appeals before the Tribunal. This would encompass transcript costs.

**Date of next meeting**

It was decided that the User Group will next meet on 6 October 2011.