SPEECH TO UK COMPETITION LAW CONFERENCE 2022

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A VIEW FROM THE CAT

Introduction

Thank you very much for inviting me to speak today. And thank you, in advance, for your attention. I know that you have been listening intently since 9 o'clock this morning, and it has been a long day.

"A View from the CAT" is an admirably broad title, and I am going to treat it as such. I am not simply going to touch upon recent substantive competition law, but practices and procedures as they have changed – or may change in the future – in competition litigation before the CAT.

I also want to take this opportunity to hear from you. So, I am going to try and leave some time for questions, and I really do want to hear from you as to what we are doing right and what we are doing wrong.

The CAT and I are old friends: I was appointed a chair back in 2009, and sat part time until I was appointed to the High Court bench at the beginning of 2017. Since then, as listing has permitted, I have done a variety of CAT hearings. The frequency of those

hearings has dramatically increased with my appointment as President in November last year.

I have, therefore, more than enough experience of the CAT's many virtues. But I hope that I remain sufficiently objective and independent to be able to respond constructively to points suggesting how we can do better.

I am a firm believer that all organisations and systems can be improved.

So, where do I begin?

Recovery out of COVID

We have all suffered through the last two years, but we have all learned a great deal, the courts and those who serve them in particular. The civil courts in this country – in particular the Business and Property Courts – have coped remarkably with the pandemic, and business has not so much been adjourned as reinvented.

The story with the CAT is similar. We have done hearings remotely but are now in a position (as we have been for some time) to do hearings in person again. The age of this pandemic is hopefully drawing to a close, and really the question for us is <u>what lessons have we learned that we should take forward</u>?

The pandemic has been appalling in its human cost, but as a limited silver lining, we can take the following points:

(1) Remote hearings really do work. We can deal with electronic bundles, and with counsel from all over the place. We do not consider that in person hearings are otiose – far from it – but we see the remote hearing as an added, important, tool in the swift and efficient conduct of business. The Tribunal will continue to

be responsive to suggestions that its hearings be transacted remotely simply on grounds of efficiency. This will always be a judicial decision, but we are very sensitive to context and issues of practicality.

(2) Related to this, the notion of "livestreaming" is now permanently embedded in a Statutory Instrument. It started as a COVID measure, but now – and for the future – many of our hearings will go out live, where that is appropriate. That means a greater degree of public access, and I am huge fan of open justice. It is good to have the ability for the public to see what we do without having to make the trip to Salisbury Place.

(3) But livestreaming also means more efficient litigation. The teams who litigate in front of us do not actually have to be in front of us. Large portions of them can operate remotely and that saves time, cost and effort. It also, I think, improves efficiency of working.

Electronic working

It is fair to say that working electronically has become much more ubiquitous.

But – and I speak as a fan of electronic materials – paper bundles still represent a very efficient way of organising material.

But the days of the paper bundle are numbered. One of our medium-term objectives is the development of an end-to-end electronic filing process, so that documents are filed once only electronically, and then used throughout the preparation to the hearing itself.

There is, as it seems to me, no point in having a Tribunal docketed to as case without also having the electronic case management tools to do the job.

User group

We understand that change needs to be implemented sympathetically.

The CAT has always had a user group.

My intention is that the user group will now meet more regularly (4 times a year).

Looking at our website this morning, I wondered also whether the details of the user group ought to be augmented on our website (where presently we only have the minutes). That is something I obviously need to discuss with the user group itself, first.

I see the user group as important for two reasons:

(1) The members will act as “lightning rods” to convey market feeling. Particularly in new or developing areas, like subsidy control or collective proceedings.

(2) The meetings of the user group are intended so that such market feeling can be conveyed to us.

Substantive law

I will have more to say on process and procedure, but I am going turn next to say a bit about substantive matters.

The Chinese wish “may you live in interesting times” was, I think, intended as a curse and not a blessing. Most of us prefer the comfort of the everyday, rather than the perpetual crisis of “interesting times”.

Just as we have coped with and learned from COVID, so too we will cope with and learn from Brexit.

Brexit has, of course, happened. There is nothing we can do about it, and we have to accept the UK's withdrawal from the EU as the given fact that it is.

But the consequences of Brexit have not, I think, yet been properly felt in this jurisdiction. But they will be.

There is the old joke of the weather forecaster reporting the weather off the English coast:

"Fog over the English Channel. Continent cut off."

Well, that is where we sit now, but it is worth unpacking a few of the implications:

(1) For a judge, the most obvious change that has been felt is the inability to make references to the Court of Justice. That of course is an entirely logical and necessary consequence of Brexit.

(2) Past-EU law continues as a guide, sometimes even binding. But – as the absent preliminary reference procedure makes clear – we are masters of our own fate now, and the courts will have to decide new questions on their own, without reference to Europe. Given the continuing similarities between EU and UK competition law, that is going to create unavoidable stresses. One does not have to be pro-European to want international harmony with other jurisdictions.

(3) Of course, we will strive to decide rules that are worded the same way similarly, but the chances of the CJEU following us on a new question that we have

decided first I would rank at close to zero. The CJEU relies only its own case law and has never cited the law of Member States when deciding the questions before it. I don't think English law has much chance of being cited in these circumstances.

(4) The Common Law courts however are intrinsically keen on understanding – as part of the incremental development of our law (even statute law) – how other jurisdictions do things, and the CAT is no exception. But we will look not just to Europe, but the competition world broadly conceived when seeking helpful analogies or answers to difficult questions.

(5) I do think we can expect pretty quick divergence on new questions as a matter of inevitability.

(6) That is particularly the case on jurisdiction. We are out of the Brussels Regime. Lugano was thought to be an option, but it would appear that rules of jurisdiction only serve to serve the single market. Like other members of the UK judiciary, I find that bemusing, but this is a situation not of our making. So the common law rules apply, and we will see a rise of *forum conveniens* and the anti-suit injunction. Very different law.

(7) Our regulators are similarly going to be ploughing their own furrow, and that is likely to affect the content of the regulatory appeals and private actions that we, the CAT, will hear.

So we can expect a great deal of change. The tectonic plates are, I think, shifting.

That, of course, is not just due to Brexit. We live in interesting times for other reasons. This is the age of the digital platform and an information economy raises very different competition questions than the more tangible markets that we had in the past. Of course, the old markets remain, but we do very much live in a new age, and the "two sided market" is, perhaps, the most ubiquitous example of this.

Subsidy control

Perhaps the biggest change is the translation of the law of EU state aid into a UK-wide regime of subsidy control. There is very little that I can say about this new jurisdiction. The legislation is still in passage, and the rules of process have yet to be crafted.

Subsidy control, as with all of the CAT's jurisdictions, is a UK-wide jurisdiction. But it is clear that subsidy control is likely to be locally important because subsidies themselves are significant in local terms. And local cases should be heard locally.

That is a factor that I am giving a great deal of thought to.

Case law before the CAT: private actions

I tried, with Alex Carlisle and Peter Freeman, the first private action in the CAT to result in an award of damages – *Cardiff Bus*. Since then, the volume of private litigation – I'm leaving on one side collective actions, to which I will come – has expanded dramatically. We had follow-on actions; we now have stand-alone actions, and their number is great and increasing.

That is particularly so given the steer of the Court of Appeal in the interchange fee litigation. Competition actions – particularly where consistency is important – ought to be transferred to the CAT, and I am pleased to say that my colleagues in the Chancery

Division and the Commercial Court have listened and responded. These transfers are taking place.

Of course, transferring the proceedings is just the first step. Thereafter, the single tribunal tasked with the resolution of these proceedings must endeavour to resolve them and resolve them consistently. That is actually quite a tall order, because *res judicata* and issue estoppel will rarely lie, and the question is how far can one manage separate cases so as to achieve consistent but independent outcomes? That is an issue that we are very much alive to, but which is far from being resolved.

That brings me to collective proceedings, which – after a slow start – are really beginning to blossom and flower. We have many of these actions. There are 15 presently live before the Tribunal – all big beasts, but in the relatively early foothills of their respective processes. A lot of difficult questions are being resolved, and I am confident that the regime will bed down before long.

The regime is an important one: not only does it ensure that those who have been harmed obtain redress – access to justice is hugely improved – but it also holds those who have infringed to account and aids in the development and evolution of our competition law. I very much hope that the necessary degree of interlocutory litigation – and appeals in that regard – will end or at least reduce over time, and that we will have instead a steady stream of cases that can proceed, unimpeded, to trial or settlement, as the case may be.

I certainly have every expectation of this being achievable.

Case law before the CAT: appeals

The fact that I am dealing with appeals second is no reflection of their importance. It is just that regulatory appeals have been with us from the beginning and represent our original *raison d'etre*. The fact that this jurisdiction has been added to merely adds to the various jurisdictional views that one can have from the CAT.

But these additional jurisdictions do not in any way detract from the importance of these appeals. They are a critical part of the CAT's workload.

Appeals – and they mainly come from the Competition and Markets Authority, raise very difficult questions. The Authority face enormous challenges in policing our markets. The job they do is a difficult one, and a very important one. The CMA (and, of course Ofcom and the other sectoral regulators) we interact with recognise, as do we, that a strong appeal process is the hallmark of a confident and robust system of regulation.

Such an appeal process renders decision-making better in the longer run. I don't think anyone can seriously challenge that.

But I am unsure as to how far the "usual" processes before the Tribunal can properly deal with the complexities of markets, and so the complexities of regulating them. We are all used to pleadings, and related tools for parsing the issues and identifying common ground – lists of issues, agreed statements of fact, expert meetings, and so on. The volume of material generated is usually formidable.

But do these tools help achieve better hearings with clearer and quicker outcomes?

I am not sure that they do. Or rather, whilst I think they go in the right direction, I do not think that they go far enough.

There are a number of appeals of pharmaceutical decisions before the Tribunal, including in particular the hydrocortisone and liothyronine appeals. These are both *sub judice*, and there is a limit to what I can say. But you can see my interlocutory judgments in these cases, and I would invite you to look at them, if you have not already. The regime of "ambulatory drafts" articulated in those decisions is a novel one, and I don't want to say too much in what is very much an area under development in these cases. But the following points do need to be made:

(1) These are not judgments. They are not even draft judgments or tentative judgments or judgments writ in water. They are not judgments.

(2) What they are, are documents intended to synthesise, with a high degree of specificity and accuracy, those areas of common ground and those areas of dispute that exist between the parties. Of course, the common ground sits right next to the highly contentious. Delimiting where one ends and the other begins is hugely important.

(3) Articulating the common ground saves argument at the hearing, saves judgment writing time and – most importantly – throws into starker relief the true issues that have to be resolved, improving focus of all up to and during the hearing.

I have a nasty feeling that the process of producing ambulatory drafts that actually do what they are supposed to do will involve the Tribunal in a lot of work; and it may also

be that the process falls flat on its face as over-ambitious and not practical. We will see.

It may be that it is impossible to produce an ambulatory draft that is not also, in some form, a draft judgment, reached in advance of argument. That is a risk that the parties are concerned about, and I can understand that concern. I can only say that if this proves to be a real concern – and I don't think it is – the process will stop and stop that day.

Whilst we must be open to different, and hopefully better, ways of doing things, that cannot be at the price of a fair trial. On that we will never compromise.

Disclosure

Ambulatory drafts are peculiarly suited to regulatory appeals, where questions of disclosure do not arise, and where what is under consideration is an administrative decision made after detailed fact-finding.

Disclosure is particular to private actions. Disclosure is also that area of civil procedure that is most under scrutiny. On the one hand it is a powerful and important tool that makes this jurisdiction attractive – particularly, for the trial of stand-alone cartel claims.

On the other hand, it is enormously, and increasingly, expensive.

I can't pretend to have an answer. The Business and Property Courts Practice Direction has been given a mixed reception by the market and might be said to be going not far enough, given that the documentation that causes the trouble and the expense is generally speaking electronic.

I wonder whether – rather like the way in wrestling one player uses the weight of the opponent to win – that is the way of cracking electronic disclosure:

(1) Instead of the producing party reviewing the electronic documentation in its possession, custody and power, that documentation (all of it – all relevant custodians, on a broad and not a narrow basis) is put on a secure third party server.

(2) That is true of all producing parties – who, of course, will be receiving parties in those cases where they are not producing.

(3) Receiving parties will be entitled to search this material how they please – page turn, keyword, concept grouping, other AI.

(4) The price is that their every move will be the subject of potential audit. The third party provider of the server will record every person accessing the database and every access request. Should there appear a failure to report what is clearly a privileged document, so that it may be withdrawn, then that will be seen, and there can be consequences. The same would go for other, court imposed, limits on the disclosure process.

It's just a thought…but you can expect some serious consideration being given to disclosure – and other rule changes – in the coming months.

Conclusion

That has been a somewhat breathless view from the CAT, and that is because I am keen for some discussion and exchange, if you are willing.

So if there is anything you want to hear more about, or something I have omitted that you want to know about or a narrow question on a point of interest…now is your time.