The Eighth David Vaughan CBE, QC Antitrust Litigation Lecture

24 November 2022 at 6:00pm

Sir Marcus Smith
President of the Competition Appeal Tribunal

Inner Temple Lecture Theatre

ADJUDICATING COMPETITION QUESTIONS

MARKETS, COMPETITION AND THE LAW

Introduction

1 It is often the case that we are presented with the fruits of an "evidence-based" inquiry. Indeed, "evidence-based practice" seems to have taken over decision-making in many areas, including (I looked at their website) the Chartered Society of Physiotherapy.[1] The Chartered Society define this approach in the following, rather circular, terms:

> *"Evidence-Based Practice (EBP) requires that decisions about health care are based on the best available, current, valid and relevant evidence."*

So, evidence-based practice is based on…evidence. As long as its current, valid and relevant. Well, I'm glad I cleared that up!

2 The problem is that the practice of modern courts – and I am including, in particular, the courts operating out of the Rolls Building and the Tribunal that I am privileged to lead, the Competition Appeal Tribunal – adopt a rather similar approach to that of the Chartered Society of Physiotherapy. These courts have moved far away from rules of admissibility: it is rare that we will say that something is "inadmissible". Instead we say – I have done so many times myself – "this goes to weight, not admissibility".

3 In doing so, we have, in effect, abandoned the law of evidence, whose purpose it is (as *Phipson* tells us) "to lay down rules as to what matter is or is not admissible for the purpose of establishing facts in dispute".[2] In other words, the role of the law of evidence is to define that material which we can and cannot admit in order to prove a certain fact.

4 The facts which are proven or not proven by "evidence" are not things like the law of physics – like gravity – something which exists unchangeably, and which we are trying to understand. Facts are what render causes of action successful or unsuccessful, and the rules of "evidence" by way of which such facts are proved contain very much what we, the courts, say they should contain. More precisely, evidence is what the law defines it to be.

5 Time was when identification evidence needed to be corroborated and – if not corroborated – was excluded and not merely the subject of a warning as to weight (as now).[3] Longer ago still, the evidential rules for testing for witchcraft were at the same time both clear and arbitrary. The "swimming test" – if you floated, you were a witch, if you sank you weren't – had all the disbenefits of arbitrariness and irrationality. But the rule was, at least, clear as a means proving or disproving a fact in issue.

6 I am not here to advocate for a return to the past. Strict rules of evidence have a tendency

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[1] www.csp.org.uk/professional-clinical/clinical-evidence/evidence-based-practice/what-it (accessed 15 November 2022).

[2] Malek (ed), *Phipson on Evidence*, 20th ed (2022) at [1-01].

[3] As to the warning now given, see *Phipson*, *op cit*, [14-12].

– it's inevitable – to exclude material that is probative, and that is a bad thing. Anyone who has sat through all eight of Colin Tapper's lectures on the law of hearsay (as I did in the late 1980s) will appreciate how quickly technicality in relation abstruse points of law can accrete, to the benefit of none and the confusion of all.

7 What I am going to say, however, is that the nature of anti-trust litigation (and, it may be, markets litigation more generally) renders an understanding of the purposes of the law evidence increasingly important – even if we stick to the mantra that weight, not admissibility, is what matters.

8 I am going to address a number of issues which concern or arise out of evidence in competition claims, which issues make the adjudication of such claims and their case management both interesting and tricky.

(1) The problem of multiple, similar, claims

9 In competition cases, the same facts give rise to multiple claims. The cartel that fixes the price of widgets gives rise to a potential cause of action vesting in each purchaser of the over-priced widget. As we all know, the story doesn't end there. If the purchaser of the widget is not the ultimate consumer, but someone who uses the widget as a component in order to make blodgets, and increases the price of blodgets because of the inflated price of their widget component, why then an indirect claim is generated, vesting in each person who has been (indirectly) overcharged. The price of the overcharged widget has been passed on to the purchaser of the blodget.

10 Aside from questions of causation, loss and damage, where (generally speaking – and subject to certain qualifications I will make) the loss is individual, these claims will bear a remarkable similarity to each other, particularly when considering questions of infringement. Of course, these claims will be legally similar, but I am not very worried about that. We have a doctrine of precedent and, over time, law that is unclear or uncertain becomes clear and certain – or, at least, clearer and more certain.

11 The problem that I am going to talk about exists in relation to questions of fact. The facts relating to one market abuse, one competition infringement, will generate multiple causes of action. Yet the findings in one case will not bind the tribunal hearing later cases. That is because there is no identity of parties and so no room for *res judicata* or issue estoppel. It may be that there is a "lead" case approach that can be adopted, along the lines of *Ashmore v. British Coal Corporation*.[4] In *Ashmore*, 14 sample cases proceeded to trial out of 1,500 claims under the Equal Pay Act 1970. When the representative sample was selected before the Industrial Tribunal, it was agreed that the decisions in any of the sample cases would not be binding upon the applicants or the respondents in any of the non-selected claims, although it was hoped that the decisions would assist with the resolution of the other claims. The 14 sample cases were dismissed after a hearing before the Industrial Tribunal and subsequent appeals by the employees were unsuccessful. Mrs Ashmore subsequently sought to proceed with her own claim, which had been stayed pending determination of the sample claims. Her employers successfully obtained a strike-out order on the basis that it was an abuse of process to seek to re-litigate issues determined in the sample claims. Mrs Ashmore's appeal to the Court of Appeal was refused.

12 The critical factor in this failed attempt at "re-litigation" was the sheer similarity between Mrs Ashmore's claim and the failed claims that had preceded it. Stuart-Smith LJ considered that it would bring the law into disrepute, and be a source of grave injustice, if a later claim based on the same evidence should succeed, when prior claims had failed.[5]

13 *Ashmore* is a useful weapon in the procedural armoury, but I fear that it will not be sufficient to resolve the concerns that I have. That is because the concerns that I have,

[4] [1990] 2 QB 338.

[5] [1990] 2 QB 338 at 352 and 354-355.

have already manifested themselves in the past, and *Ashmore* did not resolve them. Whilst it is, quite self-evidently, wrong for very similar background facts to give rise to radically different outcomes where in nature the same competition infringement is being alleged, that is exactly what happened at first instance in the Mastercard/Visa MIF litigation. This litigation, – having featured at first instance before the Competition Appeal Tribunal, Popplewell J and Phillips J (as they then were) – went up to the Court of Appeal, thence to the Supreme Court, were then remitted back to the CAT, and fortunately settled.

14 All three cases concerned a claim that MasterCard and/or Visa had infringed competition law in establishing and implementing certain fees known as MIFs – multilateral interchange fees. The first case concerned a claim by Sainsbury's against MasterCard, with Sainsbury's alleging that the fees it was required to pay on debit- and credit-card transactions under MasterCard's scheme were in violation of competition law.[6] This was one of those cases where there was no mystery about the allegedly infringing arrangement, which was there, for all to see, in the contractual documentation. The question was whether an overt contractual provision infringed competition law, and this was – and remains – a very hard question of law and fact.

15 In *Sainsbury's*, the Tribunal – and I should declare an interest here, for I was one of its members – had to consider many issues, one of which was whether there was an infringement by effect. In considering this question, we carried out the traditional analysis of identifying the allegedly infringing provision (obvious here) and trying to work out what its harmful effects were by reference to what the position would have been in the absence of the allegedly infringing agreement or provision. In other words, we carried out a "counterfactual" analysis. In later cases, this "counterfactual" analysis was somewhat dubiously characterised as a question of fact.[7] That is a point I will be returning to.

16 At the moment, I am considering how common factual questions (not necessarily counter-factual ones) can result in different outcomes. Our conclusion, in *Sainsbury's* – based on the somewhat limited evidence before us – was that in the counterfactual world, the MIF would have been replaced by bilateral interchange fees negotiated between each participating bank and MasterCard.[8] This, we also concluded, would result in a better market in terms of outcome, for the reasons we articulated.[9] It is easy to see why MasterCard was so opposed to this, because the difference in benefit to Sainbury's of a bilateral system over and above a multilateral system would directly feed into the calculation of Sainsbury's damages, as, indeed, it did in our decision.

17 Come the next case, tried in the Commercial Court before Popplewell J, MasterCard had re-arranged the deck-chairs.[10] Popplewell J was invited to follow or "read across" previous decisions of the EU Commission. He declined to do so, for reasons which (if I may respectfully say so) are unimpeachable.[11] Of course, what is sauce for the goose, is sauce

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[6] *Sainsbury's Supermarkets Limited v. MasterCard Incorporated*, [2016] CAT 11.

[7] That is not a characterisation that I would necessarily agree with. See *Sainsbury's* at [180], especially footnote 102.

[8] The counterfactual options were set out at [153]. MasterCard contended that the bilaterals option was not open to the Tr bunal (at [179] to [181]), an argument that prevailed – a beit in somewhat different form – in the Court of Appeal, but which we rejected. For the reasons given in [182] to [197], we concluded that bilaterals would be concluded if MIFs were not permitted.

[9] At [196] to [197].

[10] *Asda Stores Ltd v. MasterCard Inc*, [2017] EWHC 93 (Comm).

[11] At [84] and [85]:

> "84. Mr Lowenstein, QC [counsel for the Claimants] urged me to approach the issues by starting with the MasterCard Commission Decision, and applying it to the EEA MIFs for the majority of the claim period (which were not the subject of the Decision), and to the UK and Irish MIFs for the claim period, unless I could identify material differences which justified drawing a distinction. This process was characterised as "read across". This suggested approach reflected the way the claims had been framed in the Statements of Case, with the Claimants relying on the MasterCard Commission Decision and MasterCard identifying respects which made its application to the current dispute inappropriate. This in turn infected the framing of the Phase 1 issues and of some of the issues on which the experts were asked to express their views.
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> 85. I do not consider that this is a helpful way to address the issues which I have to decide, for a number of reasons. First, I am not bound by the Commission's findings of fact and although it is sometimes possible to discern the evidence before the Commission which informed its conclusions, that is by no

for the gander, and Popplewell J took exactly the same approach in relation to the decision of the Tribunal in *Sainsbury's*:[12]

> "There is also, of course, a very substantial overlap between the factual issues decided by the CAT and those I have to decide. Here too I am not bound by the findings, although the parties agreed I should take them into account and give them such weight as I thought appropriate. It is important to keep in mind in this context that the evidence before me was not the same as that before the CAT in important respects. For example, the CAT Bilaterals counterfactual, which is at the heart of the CAT's conclusion, **was a construct of the Tribunal itself**; it had not been addressed in the witness statements or experts reports of either party and had not been put to factual witnesses. By contrast the parties put before me detailed factual and expert evidence on the point, tailored specifically to the findings and reasoning in the CAT Judgment, which was all to the effect that such bilaterals were unrealistic. Moreover there was no identity between expert evidence in the two trials: Dr Niels gave evidence for MasterCard in both cases but different experts gave evidence on behalf of the respective claimants. They were not expressing the same views. For example, in the CAT proceedings Sainsbury's and its expert accepted that a MIF at some positive level was lawful; whereas the Claimants before me and their expert contended that any MIF above zero was unlawful. Nor was there anything like identity in the factual evidence put before the CAT and this court, either documentary or oral. The CAT had documentary material which was not in evidence before me and vice versa. The CAT heard from four Sainsbury's witnesses whose evidence I did not have; whereas I heard from a variety of Claimants' witnesses whose evidence was not before the CAT. Some MasterCard witnesses were common to both sets of proceedings but some were not. The experience of having arguments and evidence tested in the Sainsbury's proceedings inevitably led to fuller or more focused evidence before me on some points, both factual and expert; for example Dr Niels had the opportunity to consider over time, and address in writing, points which he had faced in cross-examination in the CAT without forewarning. Even where the evidence was materially similar, I must make my own assessment of the witnesses and the other evidence before me; it would be an abdication of judicial responsibility simply to accept findings of fact made by the CAT."

With one qualification, I respectfully agree. My qualification: I am going to push back against the assertion that the bilaterals counterfactual was a "construct" of the Tribunal and not put to the witnesses or the parties. As the judgment in *Sainsbury's* makes clear, it was.

18 What this passage does is highlight the very considerable difficulties that arise in litigating market-wide issues in sequential, party-against-party cases. The fact is that we are going to have to find a way of resolving market-wide issues consistently between cases, in a manner that is also fair to the individual litigants. We have made a great deal of progress in this regard, although much remains to be done. The first step to ensuring consistency is to "house" all these claims in a single jurisdiction, under "one roof" as it were. The Court of Appeal in the *MIF* appeal made clear that similar cases falling within its jurisdiction should be transferred to the Tribunal.[13] That has now happened. The Rolls Building has done a clear-out of common cases, and the CAT now has a fine collection (running into the thousands) of interchange fee and trucks cases.

19 But housing claims under the same jurisdictional roof does not solve matters. All it does is create the potential for resolving similar issues in similar proceedings in the same – or at least not inconsistent – way. That potential needs to be achieved. It may be that *Ashmore* and sampling will be a tool that we can deploy, but it may also be that an issues based approach, involving all parties in all relevant claims, is the answer. Tribunal *aficionados* will have clocked the Tribunal's Practice Direction 2/2022 on Umbrella Proceedings, where Rule 17 of the Tribunal Rules 2015 has been pressed into service to enable an issue in one case to be plucked out and heard, if appropriate, by another Tribunal that has similar issues before it. We are in the early stages of seeing whether Umbrella Proceedings can do what we would like them to do – resolve, in a single forum, multiple similar issues. And it

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> means generally the case. There is a logical flaw in the suggestion that this court should follow another tribunal's findings of fact unless it can identify a specific and material difference in evidence when this court is not in a position to identify the extent of the evidence before that tribunal. There was, for example, a lively debate on whether by reference to the memorandum referred to at recitals 626ff and in Annex 7 the Commission had considered UK MIFs. It remains unclear exactly what aspect of this evidence the Commission took into account or how, without an understanding of which it is impossible to assess the validity of any "read across"…"

[12] At [93], emphasis added.

[13] [2018] EWCA 1536 (Civ) at [356] to [357].

would be dangerous to underestimate the procedural and logistical difficulties that arise.

20 But even in these early foothills of the process, we are discerning positive effects. Many claimants seek a stay of their proceedings. The Tribunal is happy to grant such a stay, but it is on terms. First, an undertaking is extracted that whatever happens in the proceedings binds the party to the stay. And, secondly, there is an exposure to the need to give disclosure, should that be ordered, notwithstanding the stay. So, you do go to the back of the queue, at your own request, unlike Mrs Ashmore you can't re-litigate and the evidence in the stayed case – if relevant – will be available to the other parties in those proceedings that do go ahead.

21 Long story short: this is, I believe, an instance where we can – with careful case management – "have our cake and eat it", in that we decide individual cases individually, and yet also consistently. We do so, by ensuring that evidence in different cases is heard and considered across and in those different cases, where common issues exist.

(2) What is the nature of the "counter-factual"?

22 My first topic has, thus, been concerned less with the law of evidence, and more with ensuring that the same evidence is heard in similar cases. My concern has thus been more with "case management", albeit with a close focus on the evidence and the issues that arise.

23 My next topic concerns the "counterfactual" question that is so common in competition law analysis. It's called counterfactual for a reason: it involves an analysis that is contrary to the facts as they stand. In many cases – and I am certainly not trying to be exhaustive here – it involves imagining what the market would have been like absent the infringing agreement or provision or act.

24 The question that I am going to ask is the extent to which this is entirely a factual question. "Counterfactual" questions arise in every claim for damages for breach of contract or where a tort has been committed and the tortfeasor claimed against. The court's duty is to put the claimant in the position they would have been in had the contract been minimally complied with or had the tortious act or omission never taken place. Although not expressed as counterfactuals, these questions are precisely that. Take the person injured by another's tort, such that they can never work again. The actuarial tables will be consulted to see how long they would have lived, but for the accident. Evidence will be adduced to show what that person's career structure would have been, so that loss of earnings (as one of many heads of damage) can be assessed over a defined period of time. These are difficult questions of factual judgment, done by our courts every day.

25 To what extent are the questions that arise in a competition case different, if at all? I think they are different, in that they contain – or can contain – what I am going to call a "normative element". But before I go to this "normative element", there are a few points of more general application that I ought to make.

26 First, entirely unsurprisingly, the evidence of expert economists is of cardinal importance before the Tribunal, reflected in the fact that to enable proper evaluation of that evidence, the panels of the Tribunal comprise an economist. Economic or econometric[14] evidence is common, and we are beginning to see the deployment of behavioural economists and game theorists. That is all grist to the mill. If it is of assistance, and is genuine opinion evidence, we'll admit it. It is evidence of a very different quality to that admitted in other disputes, but the fact is that an analysis of markets involves an altogether broader brush than the resolution of a bilateral dispute of fact between *A* and *B*.

27 Secondly, however, and in contra-distinction to my first point, economic evidence is not the be-all and end-all, and there are limits to the extent to which economists can assist in understanding an industry. Economists are not industry experts. No matter how eminent,

[14] Use of statistical or mathematical models to test hypotheses.

no economist can tell us (or, if they do, it is not proper opinion evidence) how deep-sea cables are laid or how credit-card transactions actually work. We must beware of overreach in terms of how parties deploy their economists – and the parties must be aware of the limits and well as the strengths of this sort of evidence.[15]

28 Thirdly, where we are presented with rival expert opinion, the Tribunal may prefer the view of one expert over another and adopt that view wholesale. In my experience that is the exception rather than the rule. It is certainly possible for the Tribunal to adopt a magpie-like approach, and select the nice, shiny bits from each expert's evidence, and so reach a conclusion neither expert has necessarily contended for. The submission that an expert's work cannot be critically re-worked by the Tribunal is one that crops up quite often in competition cases, and it seems to me is something that needs to be rejected, for the reasons given by the Tribunal in *Cardiff Bus*:[16]

> "395. In closing, 2 Travel re-worked some aspects of Dr Niels's calculations. Mr Flynn, on behalf of Cardiff Bus, objected to this (Transcript Day 10, page 23):
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> "This goes to the PwC report, 30 per cent market share estimate, and re-works some calculations of Dr Niels in a way that was not put to Dr Niels at trial. We say this approach is simply unacceptable. This is inadmissible new evidence, unsupported by an expert's report and not put to our expert for comment. That sort of approach again should form no part of the Tribunal's conclusions in this matter. The Tribunal's task is, if I may say, a difficult one possibly, but making sense of the evidence that was given at trial, and not subsequent attempts to re-jig it."
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> 396. We address this point briefly, in case Cardiff Bus were minded to suggest that the Tribunal is fettered in this way.
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> 397. Of course, it is absolutely right that the Tribunal can only determine this case on the evidence before it, and cannot have regard to factual material that was not adduced before it. Neither Mr Good, nor Dr Niels nor Mr Haberman adduced such factual material. They provided expert opinion evidence. In particular, Mr Good and Dr Niels sought to assist the Tribunal in what sort of revenue would have accrued to 2 Travel had the Infringement not taken place. **We have found their work extremely helpful, and have taken it fully into account, but we certainly do not consider that the opinion evidence in their reports must be used on a "take it or leave it" basis. It is for the Tribunal – based upon the factual evidence – to make an assessment of what would have happened in the counter-factual scenario, and this may very well involve re-working calculations done by the experts or adopting an approach which – although it draws on the work of both experts – adopts neither approach completely. That is what has occurred in this case. Our approach is neither that of Mr Good nor that of Dr Niels but – based upon the factual evidence we have heard – represents our concluded view as to what would have occurred in the counter-factual scenario.**"

29 This, third, point is one which I suspect crops up more often in the case of economic evidence than in other types of expert evidence. That fact is that economists need to apply their judgment across a range of questions, where the factual underpinning is both fluid and open-textured in terms of what is or may be relevant. In other words, the range of reasonable opinion in economic judgment is far wider than arises in – say – the expert engineer who explains how an oil valve works or the expert software designer who explains a particular piece of computer functionality.[17] Put it more cruelly – and I hope any economists in the audience will forgive me – economists were put on earth to make astrologers look good.

30 These issues of assessment of evidence are, I think, general, although competition cases may involve these points emerging with a particularly hard edge. But I also said that competition cases involve a "normative element", which I do think is specific to competition

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[15] See the warning in *Sainsbury's* at [36]*ff*; and see, generally, the outcome and factual analysis in *BridNed Development Ltd v. ABB AB*, [2018] EWHC 2616 (Ch), substantially affirmed on appeal at [2019] EWCA Civ 1840.

[16] *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited*, [2012] CAT 19, emphasis added.

[17] See Smith, *Lawyers come from Mars, and economists come from Venus – or is it the other way round? Some thoughts on economic evidence in competition cases*, (2019) Competition Law Journal 1.

law. When rejecting the Tribunal's "bilateral" analysis in *Sainsbury's*, Popplewell J said – and I think that this was a criticism – that the bilaterals counterfactual, which was rightly said to be at the heart of the CAT's conclusion, was "a construct of the Tribunal itself". As I've said, I disagree in that the point was evidentially based on material before the Tribunal, albeit that that material was in different form before Popplewell J, hence the different finding made. It is right to say that the approach was not advocated for by either party – but that is simply a reflection of "Magpie" approach I have already described. As I have said, I do not consider that a court is required to choose between two arguments advanced by experts, without considering alternatives, justified by the expert evidence, in the teeth of what the experts were contending as their opinion. Not to be critically evaluative of the experts' view is itself an abdication of judicial responsibility, and in *Sainsbury's* we considered very carefully Dr Niels' reasons why there would be no bilateral interchange fees; found those reasons wanting; and rejected them.

31 But there is a more fundamental issue that arises when assessing counterfactuals where a market is involved, which goes well-beyond the question of whether the evidence exists to make a given finding or not. It is, I think, necessary to bear in mind that markets contain this "normative element". My point is that it is a mistake to consider markets as somehow inherent or natural or self-evident. Markets are completely unlike the actuarial tables used in the assessment of the quantum of PI claims. The outcome there is informed by the actuarial tables, which are governed by the laws of statistics. A claimant cannot choose to have a greater life expectancy than the expectancy predicted by the tables, save to the extent there is a material variable not catered for in those tables. And nor can a judge – properly at least – make such a finding in defiance of the statistical laws.

32 But markets are not like actuarial tables. They do not come in a single shape or size. The point is illustrated when one comes to talk about the term "free" market, as if the more deregulated a market, the better and more competitive it is. That is, if I may say so, nonsense; and the fact that it is so not only de-bunks the notion that regulation is a bad thing, it also informs the "normative element", namely that markets are what we make of them.

33 Let me start by de-bunking the notion that regulation and competitive markets are inimical to one-another. The most efficient markets (in terms of articulating price by the interaction of supply and demand) are the most regulated. I'm talking about exchanges. It is interesting that in his description of the market, Marshall had primary recourse to exchanges as good examples of working (or competitive) markets.[18] The point about exchanges is that the variables in the contracts for the buying and selling of whatever the product is are limited essentially to quantity/volume, price and time for delivery. The product itself – whether it is a share or a ton of copper – is fungible, standardised. This limitation means that the forces of supply and demand are given free rein, and pricing through the interaction of supply and demand is more accurate, not in terms of what the price "should be", but of what the market thinks the price is. That, of course, is what markets are all about: the generation of a market price.

34 Exchanges do not arise out of nowhere. Nor do the rules for auctions or quasi-exchanges like the FX markets. Markets are *made* (whether by accident or design) and are neither inherent nor inevitable but are sculpted by their legal underpinning, which can be various. If we take the view that markets are what we make them, then – when considering them in their operation in the "real world" and when considering the counterfactual scenarios that arise in any given case –we need to understand and explain market structures before we ever get to market definition (for example). Granted, this point is probably usually swept up in the market definition exercise that we all undertake from time-to-time. My suggestion is that market operation – what the market is trying to achieve, and the rules that enhance and constrain it – needs to be carefully borne in mind.

[18] Marshall, *Priniples of Economics*, Prometheus Books (1997), and abridgement of Marshall's 8th edition of this work (1920) at 140-141.

35 Alvin Roth has written books on the designing of markets.[19] In his introductory chapter, Roth makes the critical point that markets are not about the price – that's an important element, but only an (optional) element that not all markets have – but about matching supply and demand. Meeting need. He describes markets – for instance, donor markets – which operate not on money or conventional supply and demand but on matching donors of kidneys to those who have the need for a kidney. He makes the important point that even altruism requires structure if it is to work efficiently:[20]

> "Sometimes a matching process, whether formal or ad hoc, evolves over time. But sometimes, especially recently, it is designed. The new economics of *market design* brings science to matchmaking, and to markets generally. That's what this book is about. Along with a handful of colleagues around the world, I've helped create the new discipline of market design. Market design helps solve problems that existing marketplaces haven't been able to solve naturally. Our work gives us new insights into what really makes "free markets" free to work properly.
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> Most markets and marketplaces operate in the substantial space between Adam Smith's invisible hand and Chairman Mao's five year plans. Markets differ from central planning because no-one but the participants themselves determines who gets what. And marketplaces differ from anything-goes laisse-faire because participants enter the marketplace knowing that it has rules.
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> Boxing was transformed from brawl to sport when John Douglas, the ninth Marquess of Queensberry, endorsed the rules that bear his name. The rules make the sport safe enough to attract competitors but don't dictate the outcome. In just this way, marketplaces, from big ones like the New York Stock Exchange to little ones like a neighbourhood farmer's market, operate according to rules. And those rules, which are tweaked from time to time to make the market work better, are the market's design. *Design* is a noun as well as a verb; even markets whose rules have evolved slowly have a design, although no one may have consciously designed them."

36 In short, market definition – and I am not in any way denigrating what is an important tool – needs to be preceded by an understanding of "market design" or by an understanding of the true environment in which a market actually operates. And that requires evidence from those who know how the market works, or should work, which will probably not be evidence from an economist in the first instance – although such economic evidence will, generally, be a critical analytical tool.

37 Put another way, a counter-factual question in a competition case does not simply involve asking "How would this market be, if the infringement was not occurring?", but also "How should this market be, if the infringement was not occurring?" Focussing only on the first question implies that if the infringement were removed, there is only one possible counter-factual outcome. And that, without mincing my words, is not right, and is merely a reflection of the erroneous notion that the market is a single construct or interface that is in some fixed way inevitable in its form. So the criticism of the outcome in *Sainsbury's* is, in my respectful submission, wrong for two reasons. First, a minor point, there was evidence for the conclusion reached. That is a minor point because courts in later cases had to consider the facts as evidenced before them, and reach their decisions based on these and not on other facts. But secondly – and this, to my mind, very important – the question whether the counterfactual in the MIF cases is a bilateral or multilateral scenario is not straightforwardly a question of fact. It is a question, in essence, of what structure would best serve the interests of the consumer. Of course, that is a question that will be informed by the evidence and the facts, but it contains a very important normative element that should not be disregarded.

(3) Evidential "gaps"

38 I am moving on to my final point, which is a short one. But that is only because it requires a degree of unpacking and discussion, which is a matter for another time and not today. Anyone who has done a competition case is likely to have been presented with solid lines representing the supply and demand curves for a product – demand and supply schedules, as Keynes would call them. Almost never will the evidence support an unbroken supply or

[19] See, for example, Roth, *Who gets what and why?*, 1st ed (2015).

[20] Roth, 6-7.

demand curve. The data simply will not exist. The difficulty of obtaining complete data is made very clear in *Economics for Competition Lawyers*:[21]

> "…a lot of the time that economists spend working on competition cases actually involves trying to locate this demand curve. They need this, for example, to delineate the relevant market, to measure market power, or to simulate the price effect of a merger. Economists can normally observe only one price-quantity point in the field, which is the current price and quantity.[22] If they are lucky, they can observe a few more points – for example, if the price has changed from last year, and a different quantity was sold at that price (even then, quantity changes may be due to factors other than price changes). But it is never possible to see the full relationship between price and quantity. Economists have to assess empirically the properties of demand in the vicinity of the price-quantity points they can observe. They will in particular want to know how sensitive demand is to price…"

39 The true nature of the demand and supply in relation to a given product or in a given industry is hugely difficult to identify, and a great deal of material that comes before the Competition Appeal Tribunal has the flavour of material that would not be given the time of day in other courts. I'm not thinking so much of expert evidence, but (for example) of the surveys and questionnaires describing consumer preferences that have been served up to me in more than one price control appeal. And I say this with no disrespect to those doing the serving up. The fact that such material is adduced is a sign of the paucity of data that will exist in many competition and market disputes.

40 Evidence – as I have already said – is a pretty eclectic concept in competition cases. That is because the traditional rules of evidence (even if, these days, they are not exclusionary, but go to weight) are singularly unsuited to the sort of issues that come up in competition and market cases. We have to deal with statistical evidence and econometrics; artificial intelligence and its use in the review of mass data. It is a matter for separate and careful consideration just how courts should deal with "market" or "economic" evidence like this. Since we cannot prove very much of the demand curve with the empirical evidence lawyers are used to, it's important that lawyers – and judges in particular – begin to get their thinking caps on as to how this sort of evidence is to be marshalled and controlled and these issues "proved". Ought we to have some form of "laws of economics" that sets out how the Tribunal is going to approach certain questions, so that parties know that they are going to have to adduce evidence that disputes it?

41 For example, unless evidence is adduced to the contrary, the Tribunal could say "we will proceed on the basis that the demand curve, as is normal, slopes downwards, left to right. And the supply curve does the opposite." I say this not to constrain the parties, but to encourage them to invalidate the proposition advanced. I'm taking a leaf out of Karl Popper's Falsification Theory. The philosopher Karl Popper suggested an alternative, which could be called negative verification, or falsification. Under negative verification, tests would be conducted with the express purpose of failing, thereby disproving a theory. Perhaps we need to give our economists something to take aim at, so as better to articulate disagreement.

Tribute to David Vaughan

42 I only knew David by his reputation and – to adopt the happy phrase of David Anderson in his tribute to David[23] – through the future judicial talents he attracted to Brick Court, like David Lloyd Jones, Gerald Barling and Nicholas Green, to name but three.

43 And what a reputation it was and is. I think he would have liked the present state of play. Competition law, in all kinds of surprising ways, has reverted to something a bit like the Wild West, as it was when David first turned it into a "proper" practitioner subject, with digital markets, two sided markets and an increased recognition that competition really matters to the consumer. The evidence that we hear is critical to shedding a light on these

[21] Niels, Jenkins & Kavanagh 2016, [1.26].

[22] Actually, even this goes too far: market participants are – quite understandably – enormously reluctant to release such data into the public domain, as it shows much too much of their market position.

[23] David Anderson, QC's tribute to David Vaughan, given at Temple Church on 30 April 2018.

important subjects, and for that reason I make no apology for addressing adjectival and not substantive law tonight.

44 But I want to end with words drawn – with permission – from David Anderson's moving tribute to David at his memorial service.

> "I don't know whether Vaughan the young cavalry officer had the same qualities as Vaughan QC. If so, we must imagine him not in an immaculately drilled squadron, manoeuvring on the plain, but on a daring mountain raid with his band of irregulars: approaching at a wild gallop, gleefully scattering his enemies, then feasting with much merriment by the fire."

Thank you to Clifford Chance and Brick Court for arranging tonight. And thank you all for your kind attention.