SPEECH TO THE UK COMPETITION LAW CONFERENCE 2023

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Sir Marcus Smith, President of the UK Competition Appeal Tribunal

"A VIEW FROM THE CAT"

It's just over a year – a year plus one week – since I last spoke at this conference, and it is a great pleasure to be back.

"A View from the CAT" is exactly the title that my talk has last year. Don't worry – I'm not going to read out what I said last time. "A View from the CAT" is an admirably broad title, but it does have to be is current. And looking back over what I said last year, it is interesting to see how things have moved on. The one thing you can say about the competition world is that it does not stand still.

Like last time, I am going to take this opportunity to hear from you. I am going to try and leave some time for questions. I really do want to hear from you as to what we are doing right and what we are doing wrong. I am a firm believer that all organisations and systems can be improved.

So, where do I begin?

The CAT is very busy

You will all know that the workload at the CAT has expanded and is continuing to expand. The CAT's functions have grown from a purely appellate jurisdiction

(including, of course, judicial review) to private actions, and the jurisdiction scope of these has grown incrementally over the years. It has grown from follow on actions to stand alone actions to the (unique) collective actions regime. Subject to one point I will make in a moment, the workflow from our appellate jurisdiction has remained more or less constant; the private law work has grown, and grown appreciably in recent years. The first substantive trucks decision – *Royal Mail Group Ltd v. DAF Trucks Limited*, [2023] CAT 6 – was handed down recently, to considerable interest. A large number of collective proceedings are going through the certification process and – absent settlements – will keep the Tribunal very busy for years to come.

There has also been a significant augmentation of our appellate jurisdiction – broadly conceived to include judicial review – in the form of "subsidy control" – state aid, as was. In the EU, state aid was something of a moribund thing – few references to the EU Commission, and a very slow decision-making process. The UK regime – a month in – is showing signs of being an altogether friskier animal. One case already in, with the CMC done and dusted and a trial listed for July this year; another case on its way; and I strongly suspect more to come.

The implications of "busy-ness" are multiple, and really raise questions of scalability. To expand on that:

(1) I am not particularly troubled by the availability of judges to chair tribunals. In addition to myself, the CAT has dedicated chairs to draw upon (Hodge Malek, KC, Andrew Lenon, KC, Bridget Lucas KC, Justin Turner KC and Ben Tidswell) as well as a number of High Court Judges, Northern Ireland Judges and Scottish Judges made available to me, as needed, by their respective division

heads. We are also in the foothills – these things do take time! – of a JAC selection process to appoint five new chairs.

(2) Ordinary members – and particularly economists – are a different story. Here there is real bottleneck potential. The list of ordinary members is fixed, and the term served limited to eight years. Our presently 20 members will become functus in the next couple of years; we have just had a very successful round to appoint 20+ new ordinary members; but with two such members on every Tribunal, this is an obvious bottleneck given the number of distinctly constituted tribunal panels that we have to have.

(3) Court capacity is also an issue. We have two physical court rooms, and one courtroom dedicated to remote hearings, which we are in the process of properly fitting out. I don't much like the idea of a dedicated remote hearing room – I'd rather have courts flexible in their use (i.e. in-person, hybrid or remote options) – but needs must when the devil drives, and we are presently listing three or four cases in parallel for the first time in our history. That obviously has implications for conferences room, and our staff are spreading ever thinner.

My philosophy for hearing cases at the CAT is that we should offer to list at a slightly faster pace than the parties are absolutely comfortable with – and that remains the position, notwithstanding the considerable increase in work. Nevertheless, resourcing for the future has become a significantly more urgent matter, and that is a matter I am obviously transmitting to the CAT's sponsoring department.

Process and procedure

I am very briefly going to touch on two matters that I did address last time.

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.

The notion of "livestreaming" is permanently embedded in a Statutory Instrument. 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. 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.

We do not, as yet, have recordings of our hearings – even those livestreamed – available. I personally think it a good idea that we move in that direction – but I would be interested to hear whether that is something that is of any interest, or whether it is simply something I should drop!

Electronic working

Last year, I said that 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. You will not see changes in the Tribunal's working practices at the moment, but you can rest assured

that we are working hard on this, and this remains a subject that is extremely close to my heart,

User group

The CAT has always had a user group, but (with Ben Tidswell as chair) its meetings have become more regular. The CAT is enormously aided by the input it receives from those who give of their time to serve.

Substantive law

I am not – there simply isn't time – really going to talk about any areas of substance as in the substantive law. But I am going to trip through the various jurisdictions, and give a sense of what is going on.

(i) Subsidy control

The first thing to say is that the jurisdiction is "live". The second thing is that the cases are coming in – as I have said. The third thing, extrapolating from these new filings, and from what I am hearing "on the exchange", as it were, is that there is a lot more to come. The fourth thing – and this came as a bit of a surprise to me – is that these cases can be quite small. Important – particularly to the protagonists – but not necessarily high value.

Competition law has a deserved reputation for being a rich litigant's forum – competition lawyers and economists do not come cheap. The CAT is actually very small litigant friendly – no fees and free transcription (at least in the case of the smaller hearings). But I am very conscious that small cases need to be encouraged, and not

put off. And if subsidy control involves such cases – and the indications are it may well – then we need to gear up accordingly.

It is intrinsic to subsidy cases that they can have an unfortunate “freezing” effect on the giving or not-giving of subsidies. That means that these cases need to be tried fast. And, because of their likely size, costs are going to have to be controlled. We are, of course, feeling our way, but that is my sense of where we are going in this jurisdiction.

(ii) Appeals

So, last time I was here, I had a good deal to say about “ambulatory drafts”, and their use in three pharmaceutical appeals.

Appeals from the CMA (and, but less frequently, from the sectoral regulators) raise very difficult questions. The Authority faces enormous challenges in policing our markets. The job they do is a difficult one, and a very important one. The Authority (and, indeed, Ofcom and the other 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.

I remain 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 we have got it right. The ambulatory draft was a process I put in place – and used – in the hydrocortisone appeal, which I heard at the end of last year and the beginning of this. The ambulatory draft was – I still like to think – a nice idea, but it is not one we will be repeating.

Why is that?

(1) Imposing what was essentially a co-operative venture on an adversarial process was always going to be a tall order, and the parties were (rightly) concerned to make no concessions that were against their interests.
(2) That rendered the process of putting together a draft difficult and – much more to the point – expensive and time consuming both for the parties and for the Tribunal. At the end of the day, this cost in time and money could not be justified in terms of the benefit that accrued.
(3) That being said – there was a benefit. Writing the judgment now – and I will say no more for that reason – the ambulatory draft is a helpful resource. But not helpful enough.

The underlying problem – which ambulatory drafts were seeking to resolve – remains. The time and money spent re-litigating that which has been decided in the decision under appeal needs to be slimmed down. So, it's back to the drawing board on this.

I will repeat what I said last time. 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.

That brings me to a minor diversion in my whistle-stop tour of jurisdictions, to say something about the CAT's Rules.

The CAT's Rules

These date from 2015, and are in need of revision. There have been a lot of developments that need to be reflected in the rules, which I plan to have promulgated in 2024. So the drafting is going on now, and we consult while we draft. The CAT user group is fully engaged, as is a new Rules Advisory Committee that I have established, to take a look at "big picture", controversial questions.

We are taking the opportunity to look at any improvements that we can make going forward – e.g. as to disclosure. I am not going to go into the detail, but I will share with you a few of the principles that will inform the process:

(1) Change, generally, is a bad thing. Rules are intended to be predictable, and change gives rise to uncertainty and procedural in-fighting. Witness what happened after the so-called "Woolf reforms". So the review will be to the "judicial review" standard, and not the "on the merits" standard (if I can resurrect a debate that I hope is long-dead). The fact that – starting from a blank canvas

– the rules might be differently written does not mean that they are going to be re-written. There is enormous virtue in the status quo.

(2) So, changes will be targeted to those areas that really matter. Disclosure is one. Handling of appeals is another. We will incorporate the learning contained in the various Practice Directions issued since 2015.

(3) I do not want the volume – the size – of the rules to expand. There is a regrettable trend towards over-complexity in any code, and I don't want that happening here. I am also keen that a large amount of structured discretion be retained – or even developed further. Cases to the Tribunal are docketed, and the parties (in almost all cases) know what they are doing. An overly prescriptive approach does not commend itself.

Big picture items will include:

(1) "Ambulatory drafts 2". My thinking this time round is instead of imposing an additional layer of work, we try to reduce the volume of paperwork, and allow the decision under review to do more of the heavy lifting.

(2) Disclosure. In the last year, I have made a number of unusual disclosure orders, including various orders in *Genius Sports*, which have met with a variety of responses – some of them printable! Disclosure is certainly something that

needs to be tackled early, and ideally with the involvement of experts. It may be that we should differentiate between data and other documentary disclosure.

(3) Confidentiality. Again, an area where I am trying to push back encroachments into open justice, not just because open justice matters, but because the costs of confidentiality regimes are disproportionate to that which they are protecting.

Back to my jurisdictions…

(iii) Private actions

Let me start with collective proceedings. This is a jurisdiction that has continued to expand, but all of the cases are still in the foothills of the process.

That is entirely unsurprising. Any new jurisdiction needs to find its feet and bed down, if I can use those two (totally inconsistent) metaphors. My feeling is that we now know where we are going on certification; but a lot of questions remain for the future. The settlement process. Handling of conflicts within the class that emerge later. And the relationship between collective actions and other litigation where claimants have opted-out or not opted-in.

The trials of these matters are all, of course, chunky pieces of litigation – and the CAT's diary is looking very busy in 2024 and 2025. We're double-booking courtrooms, as I touched on in my comments earlier. We have no sense, as yet, of the settlement rate…and I doubt if anyone does.

Private actions are also thriving. We have multiple cases concerning trucks and interchange fees, many of them transferred into the CAT, 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 UK judiciary are making these transfers.

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 something we are trying to deal with through the Umbrella Proceedings Practice Direction. This PD articulates a simple concept – plucking a common issue out of multiple cases, and having it heard before a single tribunal. Of course, the practicalities are very complex. Ensuring the issues are precisely defined in not easy, and we need to be careful to ensure that the process does not introduce delay. Diaries are particularly difficult, particularly in these very busy times.

One common issue that crops up in most of these cases is pass-on. I don't want to say very much about this – it is both too complex and too contentious for a talk like this – but this is a prime subject for umbrella proceedings. It seems to me that we need to strive to get before the court all levels of claimant – direct and indirect – so that one hearing can resolve the entitlement to a single fund of damages consistently amongst all interested parties.

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.