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Keynote Closing Speech

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Good afternoon everyone, it is a pleasure to be here to make some concluding remarks for this conference and thank you to the organisers for inviting me.

I'm going to say some words about the Competition Appeal Tribunal. Now, I know Mrs Justice Bacon opened the conference by talking about the CAT, and I can see you're all thinking: "I hope they talked about this beforehand". …Well, the good news is that we did, and I won't be repeating any of what Mrs Justice Bacon has already said. My focus will be on the structure and jurisdiction of the CAT, and how it can be critically assessed some twenty years after it was set up.

A great deal has happened in the world of competition litigation since the CAT was conceived as part of the new regime brought into effect by the Competition Act 1998. One important initial purpose of the CAT was to provide an adequate route for appeals of infringement decisions, including the imposition of penalties, made by (as at that stage) the Office of Fair Trading and other sectoral regulators.

The CAT's early jurisdiction also included merger control (that is, appeals of administrative decisions by the then Competition Commission under the Enterprise Act 2002), private actions for damages under section 47A of the Competition Act and appeals under the Communications Act 2003.

That jurisdiction has subsequently been extended in 2015, under the Consumer Rights Act of that year, to encompass collective proceedings, and also to appeals under the Subsidy Control Act 2023. The Digital Markets bill contemplates further jurisdiction for the CAT in relation to digital markets, both as to appeals of the CMA's decisions in connection with its digital markets functions and the private enforcement of breaches of requirements imposed under the legislation.

Alongside all of those evolutions over the last twenty years, we have had a continuous diet of infringement appeals, ebbing and flowing between Chapter I and Chapter II prohibitions, we had a boom in telecoms regulatory appeals which has now somewhat faded away, we've seen the demise of the OFT and the Competition Commission and the creation of the Competition and Markets Authority in 2013, the development of case law relating to follow on actions and most recently the explosion of collective proceedings following the Supreme Court decision in *Merricks*[1]. Oh, and there was something called Brexit as well.

Against that background of very significant change, it seems sensible – indeed necessary – to ask the question: how fit for

[1] Mastercard v Merricks [2020] UKSC 51

purpose is the CAT today and for the future? Or putting it another way, would Sir Christopher Bellamy (as he was then) and Charles Dhanowa have set things up the same way in those early days, if they knew then what we know now? I want you to imagine that we have put them in a time machine and we've sent them back to the year 1999. How might they do things differently in setting up the CAT, given full foresight of what's coming down the road?

First of all, I will start with some things which they might rightly view as conspicuous and enduring successes, and they therefore may feel needs no change at all. The implementation of a panel approach comprising lawyers, economists and others with specialised competition, regulatory or business experience has been an unqualified success.

Despite the best efforts of many lawyers, there's no getting away from the fact that competition work – in its broadest sense – has economics flowing through its blood. There are various ways to give a decision maker a transfusion of the necessary economic context. For example, you can have experts presenting competing views in an adversarial system, or you can have a single expert appointed by the court in a civil system, and no doubt many other variants. None of those, in my view, come close to the effectiveness of the Tribunal's approach of embedding an economist in the decision making panel itself.

That feature has a value beyond the important task of ensuring the CAT makes the best decision it can in any given

case. It also allows the CAT to play a meaningful role in the development of the interface between competition law and economics. A great deal can be said about the relationship between the two – and I'm not going to say it here, at 5 pm on a Friday afternoon.

It suffices to say that the development of a coherent body of law which properly reflects economic principles is essential if we are to meet the policy objective which underlies the competition enforcement and regulatory regimes – that is, the maintenance of effective and efficient markets which deliver for consumers.

One can see that process at work in the CAT's judgments – most obviously, in cases like Trucks 1, with Derek Ridyard's dissenting judgment on the question of pass on. As most of you will know, Mr Ridyard was the economist on the panel for this lengthy trial, and his dissenting judgment reflects his perspective as an economist, essentially questioning whether the legal categorisation of the majority reflected real life conditions. These observations have been picked up and discussed in subsequent cases, and I anticipate that they will continue to create a focus for debate going forward.

There are two things to note about that debate. First, we see the economist's perspective being incorporated into the development of the legal principles, thereby (one hopes) bringing the law closer to the reality of economic life. Secondly, there is a healthy transparency about all that, with the argument being conducted in plain sight and available for all to comment on.

The only problem with what I have characterised as this great success is the scarcity of suitable panel resource. There is a relatively narrow pool of people who are suitable, willing and able to serve as CAT panel members. That creates a potential bottleneck, at least if cases are generally to have an economist on the panel, which is certainly our expectation. The same point can be made about experienced competition lawyers who serve as ordinary panel members – and who bring particular value if the Chair of the panel is not themselves from a competition background.

This scarcity of resource is to some extent simply a reflection of the size of the available pool of candidates, which is naturally limited for suitably qualified economists and competition lawyers. But there are some structural features which arguably make it more difficult to attract the right people.

First, the part time, fee paid nature of most panel members (including some of the Chairs) has advantages and disadvantages. It creates a flexible pool of resource on a very efficient basis – effectively a zero hours contract, devised before the gig economy had even been invented. However, it also means that panel members cannot rely on the CAT for assured employment. If a panel member is assigned to a case with a four month trial, and that settles the day before it starts, a big hole appears in their diary. As cases get larger and longer, it may become harder to persuade panel members to make such long but uncertain commitments.

Secondly, conflict of interest considerations mean that competition practitioners (be they lawyers or economists) cannot take up panel roles while they are still practising. That excludes some of the most suitable candidates, at least until they retire from private practice. Now, effective and transparent processes to manage conflicts are essential to the integrity of any court and nothing I say should be taken to suggest otherwise. But it is interesting to see the Tax Tribunals using current tax practitioners as deputy judges, presumably on the basis of a case by case assessment of potential conflict of interest.

Thirdly, the appointments of panel members (including the part time Chairs) are time limited. Inevitably, it takes time in a docket system to build up a case load, so there is the peculiar feature that panel members become more and more useful over time but inevitably fall off a cliff at some stage. The appointments process is not without its administrative challenges, and there is something of a sense that we are losing people almost as fast as we are appointing them.

I am not sure I know the answer to these issues, but as the CAT's case load grows in both volume and complexity, it may be that different tenure arrangements are required in order to ensure a sustainable panel of members.

I would now like to touch on a few points about the jurisdiction of the CAT which might exercise the minds of our time travellers. This has clearly been a moving feast, but with a relatively simple starting point of an appellate body for appeals from administrative decisions by regulatory and

competition authorities. It is understandable, in that context, to have set up a statutory tribunal with no inherent jurisdiction and relatively narrow tramlines for the cases it can accept. That, however, has become problematic with the addition of private actions.

Let me give you a couple of examples. In one recent case, a claimant, asserted a chapter II abuse of dominance and sought damages. The defendant argued that it would, absent the abuse, have acted in more or less the same way. which foreclosed any claim to damages. The claimant pleaded, in their reply, an estoppel, based on previous representations and conduct by the defendant. In other words, the claimant was arguing that the defendant was prevented by its previous conduct from saying that it would have acted a particular way. So far so good. But then the defendant sought to argue that the CAT could not decide this estoppel point, as it was out with the statutory jurisdiction of the CAT.

Now, I don't want to get into the merits of that argument, though many of you may already have formed views on it. The mere fact that it was raised – just prior to the pre-trial review – created something of a procedural time bomb. Should the Tribunal leave it until the trial to decide the point, and what would happen if it decided at trial that it didn't have jurisdiction? Or should it hear the point as a preliminary issue, with all the complications that can come from divorcing an issue from the underlying facts? Either way, it was an unsatisfactory situation – though to be clear, I am making no criticism of the defendant for raising the point.

Another example which some of you may be familiar with is the Sport Radar litigation, which involved three different actions in which:

1. the CAT had jurisdiction over competition issues; and
2. the Chancery Division of High Court had jurisdiction over non-competition issues.

The President sat as Chair of the CAT panel to determine the competition matters but also sat, independently of the other CAT panel members, to decide the Chancery matters. There was a further, related High Court case which the President (sitting as a Chancery Judge) was to decide. Needless to say, there were some complex discussions and rulings[2] about how the cases could be tried together and the status of evidence given in one part of a case (for example in the CAT) in the other part (in Chancery).

So there is a practical fix for this jurisdiction problem, which one sees playing out in Sport Radar, with the President wearing two hats. There are of course a number of other High Court Judges who sit regularly in the CAT and who could perform the same function.

This may provide a pragmatic solution in many cases, but I suggest it is far from a perfect one, giving rise to all sorts of potential procedural and substantive complexity. It also cuts across the operating model of the CAT, in which there are a number of part time Chairs who carry out a lot of the day to day work and are not High Court judges.

[2] See for example [2022] CAT 12

And if a sufficiently significant issue of jurisdiction arises late on in a case, then it may be necessary to replace the part time Chair, which is entirely inconsistent with the CAT's approach of docketing cases to a panel for the life of the proceedings.

The issue may arise in a slightly different way in relation to some of the recent collective actions in the CAT. Without naming any names, it has been said by some that the subject matter of certain claims strays beyond competition law and may really be something else in disguise. That may or may not indeed be the case, but it is perhaps somewhat unhelpful to have boundaries that create distortions in the way cases are presented to the court.

So it does seem to me that the extensions of the CAT's jurisdiction to private actions have not fully addressed this jurisdiction issue. There is of course concurrent jurisdiction between the High Court and the CAT for private actions based on competition law, but there are good reasons to ensure that mainstream competition claims flow through the CAT – for example to take advantage of the specialisms there, and in particular the panel composition, including economic expertise, but also to encourage consistency of development of the law, as well as reducing pressure on other courts.

That is not to say every competition case should be heard in the CAT, and that may well not be appropriate in, for example, cases which feature a significant non-competition element. That decision is something which might sensibly be

left to judges in the High Court and the President of the CAT to decide between them where cases are best tried.

In conclusion on this point, there seems a good argument that the jurisdiction of the CAT could be framed by our time travellers in a wider and more practical way.

While I'm on the subject of jurisdiction, I am sure you would all be disappointed if I didn't mention standard of review. That is the old chestnut of whether the test to be applied in any particular public law appeal is judicial review or merits.

The original appeal jurisdiction conferred on the CAT was intended to satisfy the ECHR in relation to quasi criminal penalties imposed on infringers, so it made sense for that to be a full appeal on the merits. Since then, merger cases have come with a judicial review standard, telecoms appeals have been cut back from appeal on the merits to judicial review "plus", subsidy control is judicial review and the current version of the Digital Markets bill contemplates the same test.

To be very clear, the CAT's approach to this question is to apply the test it is told to apply, and it is not in the business of lobbying for one test or another. It is however something of a perplexing landscape to navigate – even for the legally qualified, let alone the non-legal panel members, who frequently find the distinction to be something of a mystery.

My observation is that the multiplicity of tests encourages collateral argument, creates a degree of gaming and in fact neither judicial review nor full merits appeals are particularly

effective when faced with the key questions in any particular case. These are:

1. First, has something gone sufficiently wrong here that the CAT should interfere with the regulatory decision, and if so,
2. Secondly, what should be done about it?

Full merits appeals can encourage deployment of the kitchen sink, which means that the parties spend more than is perhaps necessary, the resource of the CAT is overused, and the appeal generally becomes harder to case manage. It is quite difficult, faced with a test of "full merits", to case manage out the less meritorious elements, albeit that the requirement to set out grounds of appeal up front does act as some form of limiting factor.

On the other hand, judicial review claims often involve a degree of pushing square pegs into round holes, as the claimant seeks to characterise the thing that has gone wrong into a conventional formulation of a judicial review case. This creativity creates collateral disputes, obscures the real issue of what may or may not have gone wrong and often results in a mismatch between the information available to the CAT and the evidence which discloses what has really happened. As a consequence, cases which fall on or near the line are always going to be hard to resolve fairly and are very susceptible to the same problem on appeal.

Bearing all that in mind, surely it would not be too difficult for our time travellers to construct a reasonably flexible standard of review for a proven and specialist tribunal, which has many

times recognised the margin of appreciation for a regulator and which is always subject to Court of Appeal oversight. In my view, that would create considerable efficiencies in the management and disposition of all public law cases.

My last point on jurisdiction concerns the Court of Appeal, rather than the CAT. I expect most of you are familiar with the issue of whether an appeal from the CAT in a private damages action involves both a point of law (that's generally uncontroversial and well understood) and is a decision as to the award of damages (which is the controversial bit and, despite recent Court of Appeal clarification, is still somewhat obscure).

The practical problem is that a decision which is not "as to an award of damages" can't be appealed, so any challenge to the CAT decision can only be by way of judicial review in the administrative court. This seems to be a surprising proposition at least insofar as the point is a substantive one. The Court of Appeal have, helpfully and pragmatically, allowed "rolled up" appeals, where they sit as both the Court of Appeal and a Divisional Court, allowing them to hear the challenge on either basis. But it is not a great situation, not least because the CAT has to deal with any number of judicial review applications in which it is named as the respondent.

Even more usefully, in hearing appeals in *Trucks* (collective proceedings) and *FX*[3], the Court of Appeal has endorsed a

[3] See *UK Trucks Claim Limited v Stellantis N.V.* [2023] EWCA Civ 875; *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 876. Since this talk was delivered, the Court of Appeal has again

wide interpretation of what a CAT decision "as to damages" might encompass. But we are still left with some uncertainty, and it is not obvious what the point of the requirement is. Standing back, it must be right that any party who is subject to an outcome which would in ordinary proceedings be appealable should have that right here (subject always of course to the proviso that the appeal must be on a point of law). It isn't clear to me what the requirement that the decision be "as to damages" adds, and I would suggest we could all live safely and more easily without it.

I'm now going to leave jurisdiction and I'll move on to say a few words about procedure and in particular the approach taken in the CAT rules. I think it is fair again to say that the approach taken at the beginning in the CAT rules has very much stood the test of time – perhaps somewhat remarkably, given the very extensive changes in the nature of the CAT's work. The key to that has been the docket system operated at the CAT throughout its existence and the emphasis on close case management that this permits and facilitates.

In this regard, there is a very real difference between the approach under the CAT rules and under the CPR. The CAT rules proceed on the basis that throughout the case, the same panel, and in particular the legal chair, will be on top of the issues, will direct the course of the case through close case management and will most of all not let the adversarial nature of the proceedings create inefficiency.

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addressed the issue in *Nippon Yusen Kabushiki Kaisha and ors v McLaren* [2023] EWCA Civ 1471, supporting the "broad approach" to the test of "as to damages".

In the High Court, the CPR is itself a recognition that the adversarial system, for all its benefits, can create waste and lack of focus, and it seeks to contain that by careful and close regulation of the parties' activities.

The point I am making here is that it would be wrong, and indeed potentially counterproductive, for parties to approach procedural matters in the CAT by immediate reference to the CPR. It is true, of course, that there are many good processes in the CPR which can be used in the CAT, without reinventing any wheels. It is also true that there is an invariable familiarity with the CPR among CAT users and at least among the panel chairs. But that does not mean that the CPR approach will be the best one for a CAT case – especially where the CPR approach is relatively formulaic and detailed, in order to capture a wide range of situations and to prevent divergence.

I recently asked the parties in a case to prepare costs budgets showing the costs for each stage of a case and I found it interesting that I was immediately offered form H, which many of you will recognise as the CPR's template form for costs budgeting. Now, I have no objection to form H [a view that may or may not be shared by others in the room], but all I really wanted (and asked for) was five or six lines with a number beside each one. I expect we all like to reach for what is familiar, but one of the advantages of the CAT's approach is that there is room for innovation and experimentation to get the best (the most efficient) solution for any particular problem.

That flexibility has been endorsed by the Court of Appeal in *FX*, where Lord Justice Green agreed with the CAT's approach in *FX, Qualcomm* and other cases and confirmed that the CAT was not bound by the usual rule set out in *Hollington*, which is all about the admissibility of prior decisions. That was because the CAT, as a sophisticated tribunal, was well able to form its own view on the value of prior findings[4].

Let me give you another example of the flexible approach of the CAT. In the Interchange Fee litigation, many thousands of individual claims are being advanced against Mastercard and Visa. The Tribunal has ordered that three trials should take place, with trial one commencing in February 2024, so only some four months away. At a CMC yesterday, it became apparent that trial one was in jeopardy, because of various problems relating to disclosure and evidence.

As a consequence, there was an informal CMC convened at 8 am this morning, where the President and I ran through the various problems with junior counsel. That hearing, which someone aptly nicknamed the "breakfast club", will continue on a fortnightly basis to make sure the timetable to trial is maintained.

The CAT rules were from the start premised on the Tribunal having flexibility to manage each case the best way, based on a close understanding of the underlying subject matter and mechanics of the case. That was absolutely the right

[4] *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 876 at [99] and [100]

approach and holds good today, despite the many changes in caseload.

I predict that future amendments to the CAT Rules will endorse the original approach, by providing for ever more discretion and flexibility, rather than the other way round. I would encourage you all to think about how that flexibility can most usefully be employed to get your cases tried efficiently and reliably.

I am now nearing the end of my remarks and I am anxiously hoping that Lord Bellamy and Mr Dhanowa have navigated the Time Vortex and have returned safely and to the same family circumstances. Anyone who has watched Back to the Future will know of the perils of messing around with the past. More prosaically, I have to acknowledge that, to the extent the structure of the CAT needs primary legislation to effect changes, we may be waiting a while for that.

However, there are some levers within the CAT's control – most obviously the Rules and associated Practice Directions – and I think you can expect those levers to be pulled fairly vigorously.

I think I have now probably said more than enough, given the time of day and the fact that it is a Friday. Thank you for your attention and I wish you all a relaxed and possibly even a sunny weekend.