Keynote Speech for the Monckton Chambers/NERA UK Competition Conference 2025

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Introduction

My topic for today is the approach to expert evidence, and especially economic expert evidence, in the CAT. I am sure you've all seen the Practice Direction on Expert Evidence which was published on the CAT website on Tuesday afternoon.

I'm not going to describe that in any detail. Instead, I'm going to give you some insight into the thinking behind some key aspects. As a result, I'm not going to make the usual disclaimer about these just being personal views. What follows is the view from the CAT on these issues.

Just so you know where I am going, there are two main messages I would like to get across to you this morning.

The first is that current practices for preparing expert evidence are putting at risk the independence and impartiality of experts. This needs to stop and the Experts Practice Direction clearly signals a tougher approach in this area.

The second is that the length and complexity of written expert material have become unmanageable and wasteful and the Tribunal has already started to put in place measures to control page lengths and to force the production of more focused reports.

The importance of expert evidence in the CAT

I'd like to start on a positive note by emphasising the importance of expert evidence in the CAT and recognising the tremendous help the Tribunal gets from many experts who give evidence there.

Expert evidence (and especially economic expertise) is central to the resolution of many of the cases in the CAT, whether it is the exposition of economic theory, the application of theory to the facts of the case or quantitative analysis to identify relationships or effects.

The Tribunal is a sophisticated user of that evidence, given the economic expertise which is present on most panels. We are well able to appreciate the careful thought and hard work that goes into the preparation of an expert opinion. We know that we're generally being offered a high-quality product and we have considerable respect for many of the experts who give evidence before us.

There are however some concerning trends emerging in the nature and presentation of economic expert evidence. These are sufficiently alarming to lead us to the conclusion that some form of reset is needed in the way economic evidence is prepared.

Two areas of concern

I want to concentrate today on two areas where I think there is greatest concern. They are:

1. First, a concern that the independence of experts is being diluted. This seems to be happening because the expert is becoming too engaged in the wider strategy and tactics of the case, and the evidence is becoming (deliberately or inadvertently) tailored to fit the legal arguments. As a result, we see an increasing tendency towards advocacy and partiality in written and oral evidence.
2. Secondly, a concern that there are unmanageable volumes of expert material submitted to the Tribunal. This seems to be happening because experts are attempting to cover every point, whether consequential or inconsequential. It adds unnecessarily to costs and tends to obscure the real issues, increasing the scope for mismatch between the approaches of the opposing experts. It also makes the Tribunal's task considerably harder and more taxing.

When we think about the ideal expert evidence as far as the Tribunal is concerned, we're looking for something that ought to be relatively simple. We want an independent, considered and succinct presentation of the key points of difference between the experts.

However, achieving that seems harder than it ought to be. Many reports do not achieve this objective, or their ability to do so is obscured by failings. As I've already said, the most obvious examples of this are reports which contain advocacy, and reports which are unnecessarily long and repetitive.

The problem of advocacy/partiality

Advocacy, or perhaps to put it more broadly as a problem, partiality is a particularly vexing offence. It is, sadly, becoming more, rather than less, prevalent. Let me give you some examples of observations from recent judgments:

- In *Royal Mail v DAF*[1], the Tribunal noted that: "It is perhaps a flaw in the system but in any event appeared quite marked to us in this case that all the experts … came to conclusions that favoured their clients". The Tribunal went on to say "we consider that there should have been more recognition, on certain issues, of the scope for a range of possible results and of the reasonableness of the other

[1] *Royal Mail Group and BT Group v DAF Trucks and others* [2023] CAT 6 at [235].

expert's opinion. As they are aware, the experts' primary duty is to assist us in understanding the factors behind their differing conclusions, rather than defending the conclusions which favoured their respective clients' positions".

- In *Le Patourel v BT*[2] the Tribunal said: "On occasion, all of [the experts] could be said to have strayed into arguing their case and losing objectivity, or speculating".
- In *Cabo Concepts v MGA Entertainment*[3], the President, sitting in the Chancery Division, criticised some of the expert evidence as being "unrealistically slanted" and "neither objective nor balanced".
- In *Kent v Apple*[4], the Tribunal, chaired by me, said that one expert had seemed not to fully understand his duties, to act frequently as an advocate and to maintain arguments that were obviously incorrect.

For a profession where logical thinking is vital, straying into advocacy is also surprisingly illogical. Speaking for myself, and I think probably most CAT Chairs, any significant tendency in an expert report away from impartiality and towards advocacy has the immediate effect of creating doubt about the value of the report as a whole.

That's because once one forms the view the expert is behaving in an impermissible manner in any material respect, there's a suspicion that the whole report may be tainted by the same problem. In short, the assumption becomes that the expert opinion is to be treated with caution. I don't really understand what motivates an expert to put themselves in that position, where they start 10 points down before they even open their mouths. All they've really done is engender suspicion about their reliability. That makes it so much harder for them to get across the good points they might have.

It's also instructive that all the experts who were the subject of criticism in the judgments just cited will have made a declaration about their independence. You'll all be familiar with the sort of wording. For example:

- "I am aware of my duties to the Tribunal as set out in paragraph 7.67 of the Tribunal's Guide to Proceedings" [which, as you probably know, says that expert evidence presented to the Tribunal should be, and should be seen to be, the independent product of the expert uninfluenced by the pressures of the proceedings. An expert witness should never assume the role of an advocate and should not omit to consider material facts which could detract from the expert's concluded opinion]
- Here is another common declaration: "I have included matters which might adversely affect the validity of my opinion"
- And: "I haven't included anything suggested to me by lawyers without forming an independent view"

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[2] *Le Patourel v BT Group* [2024] CAT 76 at [38].
[3] *Cabo Concepts Ltd v MGA Entertainment (UK) Ltd [2025] EWHC 1451 (Ch) at [55].*
[4] *Kent v Apple* [2925] CAT 67 at [25].

It's not easy to reconcile those sorts of statements with the shortcomings set out in those recent judgments.

So why is this problem occurring? My view is that it is largely inadvertent but arises from a form of "mission creep". Over the years, the permitted interaction between experts and the rest of the litigation team has become too flexible. That has led to a blurring of what should be a fairly bright line between the expert and the rest of the litigation team.

There is quite a long history of competition litigation in the UK, in which expert evidence has been deployed – at least 25 years, and some will have had experience of expert evidence in cases even before then. Throughout that time, it's been accepted practice that there will be a degree of dialogue between the expert and the instructing lawyers. I was in the trenches myself for some time, so I know how that works.

The reason why that interaction has been accepted, as desirable and necessary, is largely (in my view) that competition law is a messy mixture of law and economics. It's only reasonable that the economist will want to understand the legal framework they're operating in. To some extent that can and should be dealt with by written instructions, but there's considerable nuance involved with some of the legal issues (and of course reasonably frequent disagreement between lawyers and economists about the right way to resolve competition issues). So a degree of dialogue seems sensible.

Similarly, the lawyers want to understand the economic framework, and that becomes especially important when settling pleadings or making decisions about preparing factual evidence. It's considerably easier to deal with that in a fluid conversation than in emails or note exchanges. So one can see how it has become fairly standard to discuss the issues – legal and economic – with the expert.

Everyone also knows that attempts have been made over time in the wider court system to try and control the dialogue between experts and lawyers. The CAT has tended to follow that approach. For example, the introduction of specific commitments to independence set out in paragraph 7.67 of the Guide and the creation of more precise rules about instructions to experts and how they are recorded.

It is however difficult to legislate to control a dialogue which we all accept will take place, but which ultimately depends on the judgement of those involved as to how it is conducted. And being realistic, usual practice will tend to drift towards the more permissive, unless and until it is controlled by some form of tighter regulation. Given an inch, all of us of might be tempted to take at least a foot, if not the full mile.

It is now clear to me, and other CAT chairs, that the drift towards more extensive interaction between experts and lawyers has gone too far. We see that in reports which take a partisan view, often to be exposed at trial under good cross examination. We see it in the way in which inconvenient points are ignored or dealt with in unsatisfactory

ways, when a truly independent expert would front up to the issue. We see it in reply reports which seek to maintain the unmaintainable. And perhaps most egregiously, we see it in the joint expert process, where experts seem to be constrained in what they are willing to agree and where, one suspects, there is a fair amount of massaging of the expert views by the wider team.

At the extremes, I've heard tales of solicitors and junior counsel involving themselves extensively in the drafting of expert economist reports. That may be done with the best intentions, but it may still give rise to serious questions about compliance with the duties of those lawyers and experts.

There is also the problem that many of these practices have become sufficiently embedded that everyone is doing it. There is therefore no real incentive for any party to call it out, beyond perhaps some trenchant closing submissions about partiality and argumentation. There is, in a sense, a cartel of misbehaviour.

Just to be clear, I'm not in the business of casting blame on anyone for this problem. It is one that arises from the practices I've described and which we have all accepted, expressly or implicitly, as a reasonable approach over a lengthy period. However, the approach is now not working, and we need collectively to recognise that and make the necessary adjustments.

Solutions to the problem of advocacy /partiality

What then can we do about it?

First, and most obviously, The Experts Practice Direction restates the need for and the expectation of independence. The point is to remind everyone (the experts and the lawyers) that, whatever their current approach to this exercise, that requirement remains paramount. It trumps everything.

Secondly, I expect you will see the Tribunal seeking to exercise greater supervision of the expert process. There will for example be clearer requirements of transparency in relation to the instruction of experts. Instructions will need to be shared at an early stage. There will be an emphasis on making sure the experts are working on a similar basis as far as issues and facts are concerned. Prior relationships with clients will be subject to greater transparency and scrutiny where appropriate.

Thirdly, the Practice Direction gives guidance about the presentation of economic evidence, such as the way in which economic theory should fit into the analysis and the disclosure requirements for quantitative analysis. For example, there will be an expectation that initial analysis that materially informs the choice of methodology will be disclosed, especially if it is contrary to the instructing client's interests.

Fourthly (and this goes much wider than the problem of partiality), you can expect guidance about the way in which the CAT will case manage the expert evidence. Let me

give you an example of how that might work. The Practice Direction emphasises the roles of joint expert meetings and the joint expert report that emerges from that. There's a good reason for that. Joint expert statements, if done properly, can be immensely helpful in identifying key issues and differences between experts on those issues. With that tool, the Tribunal can cut through many of the problems that come with long and argumentative reports. You can expect the Tribunal to show a keen interest in the mechanics of that process.

CAT chairs are discussing new ways of managing the joint expert process. One suggestion is that experts might be directed to conduct some or all of the joint discussions, and the preparation of the joint expert statement, in isolation from any contact with the legal teams. That's an approach which has been adopted in some cases in Australia, where it is (somewhat grandly) referred to colloquially as a "conclave". It means that the joint expert discussions and statements ought to reflect the unvarnished views of the experts.

In summary, you should be prepared for much more focus by the Tribunal on the mechanics of these processes.

The problem of excessive volume of expert evidence

Let's turn now to the problem of the volume of expert evidence. I recognise that getting to clearly defined issues requires some exchange of views between experts, in the form of their primary and secondary reports. In this way, differences can be established and tested, and the experts have the opportunity to seek common ground as well as to identify points of disagreement. There also needs to be a place where the reasoning of an expert (and, importantly, any quantitative analysis on which they rely) can be set out clearly. This provides a reference point for any deeper analysis that may be required, such as questioning at trial.

So, the process of preparation of reports, the exchange of those and the opportunity to reply are all valuable and productive steps in the litigation process.

However, there is, again, evidence that we have a problem of excess in this process. Let me give you some more examples from recent cases.

- In *Cabo*, there were 33 economic and valuation expert reports and letters by the close of evidence. The Judge[5] said: "It is an understatement to describe this process as unsatisfactory. In the first place, the volume of expert evidence filed by the economic and valuation experts, and the multiple amendments, revisions and updates to that evidence during the course of the trial, was such that it was impossible properly to digest the new material as it came in. That made following the evolution of the evidence very challenging for both the court and the parties.

[5] *Cabo Concepts Ltd v MGA Entertainment (UK) Ltd [2025] EWHC 1451 (Ch)* at [47].

It was also difficult, in these circumstances, to distinguish material issues from ancillary points of detail".

- In *Kent v Apple*, the written economic expert evidence alone amounted to well over two thousand pages[6]

It is not just a problem of length. There is often considerable repetition in the reports. Sometimes the summaries are almost reports in themselves and this means that it is necessary to read almost the same material twice. There is also often little effort to distinguish the interesting from the important. The simple fact is that many of these reports cease to be useful documents for the Tribunal, because it's simply not possible to read and digest several thousand pages of complex material properly as part of any sensible pre-reading before a trial.

In my experience, you can be very confident that panel members will want to engage in serious pre-reading before the trial starts. That might sometimes be a challenge, especially for those who have a heavy case load and may be going from one hearing to another. However, it is obviously in everyone's interests for the panel to be up to speed with the issues and the key facts.

In any event, there is a natural limit to the time which can sensibly be devoted to pre-reading, even allowing for the expertise of the Tribunal. It can sometimes feel like panel members are being deluged with overwhelming amounts of material which they cannot possibly absorb in any meaningful way. There is also of course a qualitative difference between reading a lot of material quickly and reading a smaller amount of material carefully.

You will have seen another recent Practice Direction, relating to skeleton arguments and other documents, which was published last week. Among other things, that set limits on page lengths for expert reports in applications for collective proceedings orders. It is interesting that there has quite a lot of push back on these limits. Some experts and solicitors have suggested they are unreasonably short. That's an instructive debate, as it illustrates quite neatly some of the problems which lead to excessive expert evidence.

In the recent CPO judgment in *Hammond v Amazon* the Tribunal noted that the methodology question at the CPO stage is "whether the method is plausible, coherent and workable, as opposed to purely hypothetical or unclear or impractical" and went on to say that" the Microsoft test should not lead to a battle of the experts"[7].

I suspect that the push back on the page limits reflects a failure to recognise the limits of the expert exercise at that stage. Instead, there is a tendency to put in expert evidence which is irrelevant to the limited certification test. I understand that the

[6] *Kent v Apple* [2925] CAT 67 at [6].
[7] Hammond v Amazon [2025] CAT 42 at [79].

general view of the economists who sit as CAT panel members is that the page limits are more than sufficient for the required task.

Solutions to the problem of excessive volume of expert evidence

More generally, you can expect the Tribunal to be increasingly directive about the length and nature of expert reports. The purpose of this is to force a focus on the issues that really matter and to discourage the approach of trying to cover every possible point. As I indicated earlier, we are primarily looking for an accessible way into the key issues and the expert positions on those. The objective of any expert report should be to set those out as clearly and simply as possible.

Reports that fail to have this focus are likely to be largely sidelined. The Experts Practice Direction suggests one way this might happen. The Tribunal may require the production of a short report from each expert on the key issues, to be submitted after the preparation of the joint expert statement.

The purpose of that might be to supersede the unhelpful volumes of material already generated by the experts, so that the Tribunal can look at one single report in order to understand each expert's position on the relevant issues.

You should also bear in mind the possibility that excessively long expert reports can give rise to costs sanctions. That might involve disallowing costs of the preparation of those reports or requiring payment of the costs incurred unnecessarily by another party in dealing with that.

Concluding observations

To conclude, the Experts Practice Direction signals a reset in the Tribunal's expectations about the preparation of expert evidence. This is one of those moments where you – the people who are preparing these reports - ought to stop and think carefully about that exercise.

The Practice Direction makes it plain that there is going to be considerably reduced tolerance for advocacy and partiality from expert witnesses. There are some measures there to regulate independence in a tighter way, but you should also be prepared for greater scrutiny by the Tribunal at all stages of proceedings.

There will also be much tighter control on the volume and focus of expert evidence. You can expect the Tribunal to case manage this issue more vigorously.

All of this is designed to make the expert evidence more useful to the Tribunal and to make the whole process more efficient. I recognise that this might require some changes which are uncomfortable. We are, after all, talking about a change in the

culture that surrounds the expert process. However, I hope we can all see the problems that need to be addressed and the benefits of taking steps in that direction.