The David Vaughan CBE, QC/Clifford Chance Annual Lecture on Anti-Trust Litigation

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"Competition litigation: what the next few years may hold"

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Introduction

I am, needless to say, very aware of the honour of giving this, the first David Vaughan CBE, QC/Clifford Chance Annual Lecture on Anti-Trust Litigation. Like so many others, I owe a great deal to David's vision and inclusiveness. Our paths first crossed in Brussels nearly 35 years ago when, in a sabbatical from the Bar, I was doing a *stage* at the European Commission, and David had taken the revolutionary step of forming a Brussels law partnership with three other English barristers. David soon took silk, I joined his London chambers, and thereafter for many years we worked together, albeit fulfilling very different roles, in what can be described as an extended white knuckle ride through the domestic and Luxembourg court systems.

It is impossible to think of anyone more worthy of having his name associated with an event of this kind, than David Vaughan. In an unrivalled practice in EU law at the Bar for approaching half a century "not out", David, or DV as he is affectionately known in his Chambers, has appeared well over 100 times in the Court of Justice and General Court in Luxembourg, and has pioneered EU law in general and competition law in particular in the courts of this country. At what was probably the most frenetic period of a generally fast-paced, high level practice at the Bar, David somehow managed to suggest, edit and contribute to a two volume addition to Halsbury's Laws of England dealing with European law. This major work was so well-received that it became available separately as Vaughan on the Law of the European Communities. He combined all this with his Visiting Professorship in European Law at Durham University, in which post he followed his good friend and mentor, the late and much-lamented Lord Slynn of Hadley.

David's fame of course extends far beyond these shores and beyond the bounds of the Kirchberg: in La Coruna and Madrid he is regarded as a saint as a result of his success for the Spanish fishermen in the *Factortame* saga, and in Cyprus he is a hero in the light of his victories in *Anastasiou.*

His prowess is certainly no less in the field of anti-trust. On dark winter evenings at the Berlaymont building in Brussels, tender young officials in DG Comp are no doubt regaled by war-scarred Commission veterans with bloodcurdling tales of ancient battles known by haunting names such as: *PVC I* and *PVC II*, *LDPE* and *Soda Ash*; they tell how the Mighty Vaughan, on behalf of ICI, managed, almost single-handedly, to keep the Commission dragon at bay for a generation or more. It is hardly an exaggeration to say that there are those who completed their pupillages, practised for 10 or 15 years as junior barristers, took silk and became judges while these cases were still progressing majestically through the system! Many of us had walk-on parts in such sagas, but David remained the constant who saw them through to the end – if indeed they have ended.

This same pattern of astuteness in spotting winning points, combined with strategic intuition, team building, attention to detail and dogged tenacity, leading (usually) to ultimate success, has been repeated countless times throughout his career. Examples abound, but the ICI competition cases, the *Factortame* litigation, the Sunday trading campaign and more recently David's tireless work for the People's Mojahedin of Iran, readily come to mind. No wonder he is described as "a legend", "a great motivator and team player", "a great fighter", "innovative", "silk of choice", and "doyen of competition law", to mention just a few of the accolades over the years. How fitting that his huge and continuing contribution in the competition area should now be marked in this way.

One cannot help but wonder whether he could have achieved quite so much without the constant and energetic support of Lesley, his wife, and without the enormous stability which she and their children, William and Kitty, provide.

The subject of this lecture

It would be easy, and possibly more entertaining, to recount to you stories about David's remarkable career for the remaining time, but with characteristic modesty he has suggested that I should not concentrate on the many cases in which he has entered the fray and emerged victorious, but should instead say something about what the future may hold for us in this field. Elizabeth Morony, too, has given me the helpful steer that in looking at future developments I should touch more on practice and procedure than on competition policy. Beyond that I have been given more or less free rein, and I need hardly add that whatever I say represents my own personal view and not that of the Competition Appeal Tribunal (CAT), the High Court or anyone else.

The tectonic plates of our competition world have certainly been on the move throughout my incumbency at the CAT, with the production of a quite bewildering number of reviews, consultations and concrete proposals across a number of related areas. The shaking and quaking have in recent months reached the very highest readings on the Richter scale. But the earthquake analogy should not be pushed too far, because many of the proposals are actually very positive for the UK system, even if some are less obviously so.

There is therefore a lot one could talk about, but I will do my best not to stray too far from the practical, and the core of this lecture will consist of some comments on the changes which are in train with a view to beefing up the *private* enforcement of the competition rules in this country.

Of course, it is not possible entirely to separate public and private enforcement. Private actions are and will remain for the most part so-called "follow-on" claims, wholly or mainly dependent on an infringement decision of the national competition authorities or the EU Commission. Also, as last week's proposal by the Commission for a new directive on private enforcement highlights, there is a tension between public and private enforcement, caused by, on the one hand the claimant's requirement for as much documentary disclosure as possible in order to prove its case, and on the other hand the need to provide appropriate protection for leniency regimes at both EU and national levels. Without these schemes there would be many fewer cartel decisions, and correspondingly fewer follow-on actions. So I will make some passing observations about possible changes in the *public* enforcement arena.

In that connection I will mention briefly the consultation on regulatory and competition appeals published by BIS this very day.[1] Although the consultation is largely concerned with appeals from *ex ante* decisions of sectoral regulators, appeals against infringement decisions under the Competition Act 1998 are included within its scope.

Finally, I will say a word about the position of the CAT, of which I have been privileged to be President for nearly six years, and in particular about the importance of safeguarding judicial independence in our competition and regulatory system amidst the current cascade of institutional and other developments and reviews.

You will be relieved to hear that I do *not* intend to touch on the very major shake-up to the UK's competition institutions. Much has already been said and written about the forthcoming replacement of the Competition Commission and the Office of Fair Trading by the new Competition and Markets Authority, and there is a limit to the utility of any further predictions about the way in which it will operate. As far as the CAT is concerned, the most direct effect is that the legislation that brings the CMA into being – the Enterprise and Regulatory Reform Act 2013 – creates a new power in the Tribunal[2] to issue entry, search and seizure warrants in England, Wales and Northern Ireland on an application by the CMA.

Private enforcement/CAT jurisdiction

By far the most significant and positive development in the field of private enforcement in the UK since the advent of the Competition Act 1998 and the creation of the CAT, is the government's decision this year to establish the CAT as (in the Government's words) "a major venue" for private enforcement of the competition rules in the UK. These proposals, if implemented, will I believe have a real impact on the effectiveness of our system.

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1 "Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform" 19 June 2013.

2 Under Schedule 13 of the Act, which amends various provisions of the Competition Act 1998.

(1) Damages actions in the CAT – current position

Well-intentioned though it was, the follow-on damages jurisdiction afforded to the CAT by section 47A of the Competition Act 1998 (introduced by the Enterprise Act 2002) has proved something of a disappointment. The anomalous restrictions, to which the power of the CAT to determine these claims is subject, were not perhaps fully appreciated when the statutory provisions were framed. Their effect, as explained in an array of CAT and Court of Appeal decisions, is that in the context of a claim for damages the specialist competition tribunal has no power to decide whether an infringement of the competition rules has taken place; it cannot make any findings beyond the four corners of the authority's infringement decision, and its jurisdiction is restricted to determining issues of causation and quantum of loss.

As Lloyd LJ observed in *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd*:

> "It seems somewhat anomalous that the specialist tribunal is entrusted with the decision as to infringement or no on an appeal from a regulator, but is not allowed to touch that question in a claim for damages ... [T]hat can have a significant limiting effect on the scope of proceedings under section 47A."[3]

And, as Patten LJ made plain in an earlier judgment in the *Enron* saga:

> "It is not open to a claimant ... to seek to recover damages through the medium of section 47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement ... The Tribunal ought therefore ... to be astute to recognise and reject cases where there is no clearly identifiable finding of infringement and where they are in effect being asked to make their own judgment on that issue."[4]

The illogicality of this situation is underscored by the fact, to which Lloyd LJ drew attention in the passage I have quoted, that in the context of its role as a tribunal sitting on *appeals* from an infringement, or indeed from a non-infringement, decision, the CAT has full jurisdiction to determine the question of liability.

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3 [2011] EWCA Civ 2, at [143].

4 *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647, at [31]; see also per Carnwath LJ at 64.

This jurisdictional disability, together with other procedural differences between a follow-on claim in the CAT and a similar claim in the High Court, have meant that the CAT's jurisdiction in private enforcement has not been used as much as I believe it would have been but for these constraints. Only three follow-on damages actions have proceeded to trial before the CAT (*Enron*[5]; *2 Travel*[6]; and *Albion Water*[7]). Of course, that is three more than have reached that stage in the High Court – and in two of the three CAT actions damages were awarded – an event which has yet to occur in the High Court. Other such claims have been settled and/or withdrawn (see, for example, *Vion Food Group*[8] and *Moy Park*[9]) or are stuck in a mire of procedural and jurisdictional challenges, mainly as a result of the statutory constraints (see, for example, *Emerson*[10]; *Deutsche Bahn*[11]; and *BCL Old*[12]).

Throughout my time as President, we have argued for jurisdiction over stand-alone and hybrid claims to be given to the CAT. This is now bearing fruit. The landmark reforms proposed by the Government in its response this January to the *Private Actions in Competition Law* consultation[13] will, as I have said, mark the single biggest reform to UK competition law in recent years. Last week, the Government published the text of the Consumer Rights Bill, schedule 7 of which contains provisions which will rationalise and significantly enhance the CAT's private enforcement role. If and when they become law, these measures will enable the CAT to entertain stand-alone claims and, more controversially, opt-out collective actions. The Bill is to undergo pre-legislative scrutiny over the coming months.

By coincidence, only the day before its publication, the European Commission published its own long-awaited proposals on related topics. From the UK perspective the proposed changes to national procedures and jurisdiction are of much greater significance. Nevertheless, I will say a word about the EU initiatives too.

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5 Case No. 1106/5/7/08.
6 Case No. 1178/5/7/11.
7 Case No. 1166/5/7/10.
8 Case No. 1201/5/7/12.
9 Case No. 1147/5/7/09.
10 Case No. 1077/5/7/07.
11 Case No. 1173/5/7/10.
12 Case No. 1098/5/7/08.
13 Private Actions in Competition Law: A consultation on options for reform - Government response; January 2013, p. 5.

(2) Stand-alone / hybrid claims for damages

The proposed extension of the CAT's jurisdiction to hear standalone as well as follow-on actions is to be reflected in a substituted section 47A of the Competition Act 1998 covering actions founded on "*alleged*" and not just *established* infringements of the prohibitions, as at present. This is a most welcome reform, enabling the CAT at last to address the question of infringement in private claims and not just in public enforcement cases. It will also allow the CAT to make better use of the considerable expertise in its panels of Chairmen and Members. The Government has recognised that this specialist expertise, combined with the Tribunal's flexible procedures and efficient case management, make the Tribunal well-equipped to take on this enhanced role.

However, there remain a number of unanswered questions about the new jurisdiction.

For example, it is not clear whether, and if so how, the CAT will be able to address issues or causes of action that are not based on competition law but are connected with, and ancillary to, a competition law action. The proposed legislation is silent on this issue, and it would be unfortunate if the existence of a subsidiary cause of action were to prevent the CAT determining the competition claim, or lead to some bifurcation and transfer to the High Court of all or part of the proceedings. It is important not to introduce an unintended limitation on the Tribunal's jurisdiction that could affect its desirability as a venue for damages actions, and frustrate the stated intention of the reforms. There are a number of possible solutions to this question, but it will need to be addressed.

(3) Injunctions (but not interdicts)

The CAT will also be given power to grant interim and final injunctions, both in stand-alone actions and in the new collective redress proceedings. In deciding whether to do so, the CAT is to be required to apply the principles which the High Court would apply.[14] This remedy will be a very important, indeed an essential, tool once the new jurisdiction to determine stand-alone claims commences. Harm resulting from a breach of the competition rules is not always capable of being fully compensated by an award of damages. Irreparable

[14] See the proposed new subsections 47A(3)(c) and 47D(2) of the Competition Act 1998.

damage can occur, and the ability to injunct an allegedly infringing undertaking at an early stage, before such damage has been sustained, is likely to be a crucial form of relief in the context of abuse of dominance cases, especially for SMEs.

The requirement that the CAT must apply the same principles as the High Court, raises the question whether the CAT would have the power, or feel it right on occasions, to waive the normal condition for grant of an interim injunction, namely that a suitable cross-undertaking in damages be given by the applicant. Arguments had been made that this rule should be relaxed, particularly in cases brought by SMEs under the proposed fast-track procedure. On the other hand, vigorous objections have also been made to any such relaxation. It remains to be seen how this question will be taken forward as the draft measure goes through the legislative process.

As far as the enforcement of injunctions is concerned, the Bill stops short of providing the Tribunal with contempt powers, and requires the Tribunal to certify a breach of an injunction to the High Court. The High Court will then enquire into the matter before determining whether the person is in contempt. This process seems to envisage a double trial of the alleged breach of the CAT's order, with evidence and argument being able to be deployed on the same issues in both the CAT and the High Court.

The Government does not propose to afford the CAT jurisdiction to grant interdicts in Scotland. Its Response noted that no tribunals currently sitting in Scotland have that power and stated that it is important not to undermine the primacy of the Scottish Court of Session. Therefore injunctive relief will only be available when the CAT is sitting as a tribunal in England & Wales or in Northern Ireland.

(4) Fast-track regime

As I mentioned, the draft legislation requires the introduction of a "fast-track" in the CAT, for what are referred to in the Government's Response as "simpler" competition claims. The fast-track is to be constructed by Tribunal rules, which will specify the procedure and identify the factors relevant to determining whether a claim is suitable for this treatment. The Bill also stipulates that such claims be heard by a chairman sitting alone, rather than by a normal Tribunal

panel of three. The Government Response stated that the procedure is "intended to be principally for the benefit of SMEs, and the CAT will seek to prioritise cases involving companies which would otherwise find it more difficult to obtain access to justice."[15]

A few comments are appropriate:

The establishment of a fast-track is a worthy aspiration. Indeed the Tribunal already invariably aims, through its flexible rules and active case management, to streamline every case to the extent practicable in the light of its circumstances.

There is no attempt to identify what would constitute a 'simple' case, and in the competition field simplicity is not often encountered. One cannot assume, for example, that because the parties are of a relatively small size, the issues raised by the claim will be simple, any more than the opposite is true where larger parties are involved. Very complex issues can arise in relation to claims brought by small companies: *2 Travel* and *Albion Water* are cases in point.

It is not clear why it should be thought that the expertise of the Tribunal's panel of Members is dispensable in a fast-track case. Although there is something to be said for giving the Tribunal more flexibility to sit with a Chairman alone, for example where a case raises only questions of law, there is no reason to believe that this is more likely to be appropriate in fast-track cases. The reverse may be true – where matters are to be resolved swiftly there may be all the more need for relevant economic, accountancy or other expertise, which the CAT's multi-disciplinary constitution provides. I very much hope that the composition of the Tribunal will not ultimately be prescribed by legislation in this way, but will be left to the discretion of the Tribunal in the light of the particular circumstances.

In its Response the Government stated that the Tribunal will have power to limit the amount of evidence and expert witnesses produced by each side. In fact the Tribunal already has this power and regularly exercises it as part of its general case management.

Finally, the Government indicates that the fast-track should focus on injunctive relief. In practice, as I have said, the CAT's power to grant such relief is likely to be one of the most important reforms to benefit SMEs.

[15] Government Response, point 4.22.

(5) Collective redress

Of the proposals made by the Government in January this year, the introduction of a new system of collective redress for competition claims is by some margin the most controversial, but I believe it is one that should be cautiously welcomed. There is simply no point in giving citizens rights if there are no effective remedies and procedures enabling those rights to be enforced. The deficiencies of section 47B of the Competition Act 1998 and of the other options available in civil proceedings are well known. I became President of the CAT in the aftermath of the *Football Shirts* litigation where it was recognised that section 47B, while a useful addition to the CAT's jurisdictional arsenal, would not prove effective in the context of mass claims for relatively small sums of money.

Nor is the position much better in the High Court: the Group Litigation Order procedure is fine so far as it goes, but it too is unsuitable for mass claims of that kind, being, like section 47B, opt-in only in nature. Any hopes that CPR Rule 19(6) might fill the procedural gap were removed by the recent decision of the Court of Appeal in *Emerald Supplies.*[16] In that decision the Court clarified the criteria for a representative action under the Rule in such a way that it would be difficult to use the procedure if damages were an element of the cause of action.

So, as things stand there is in the UK no effective procedural mechanism to be used as a vehicle for small mass claims – in any area of law. As a result there is the potential for tortfeasors to avoid liability to many victims, and private enforcement of competition law is not as effective as it should be.

In its proposals for reform the Government has rightly taken a cautious approach, mindful no doubt of the risk of opening the way to abuses of the kind which are perceived to have arisen in some other jurisdictions. Thus, under the proposed legislation the new collective actions regime will *not* apply across the board but only to competition claims. Also the CAT will have exclusive jurisdiction in claims under this new system. The system will cover both follow-on and stand-alone claims, and – significantly – opt-out as well as opt-in procedures.

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[16] See *Emerald Supplies Limited & Anr v British Airways plc* [2010] EWCA Civ 1284; on appeal from [2009] EWHC 741 (Ch).

The Government recognises the need for there to be a set of strong safeguards in place to ensure that the introduction of a regime which includes the possibility of an opt-out procedure does not lead to the inadvertent creation of a litigation culture. Foremost amongst these safeguards will be the requirement that the CAT should certify that claims are suitable to be brought as collective proceedings, and that it is appropriate to authorise the claimant to act as a representative in those proceedings. A fundamental condition of the suitability of claims is that they raise the same, similar or related issues of fact or law. In addition the Tribunal must identify the class of persons whose claims are eligible for inclusion in the proceedings, and must specify whether the proceedings are to be opt-in or opt-out.

I will just say a word or two more about some of the features of the proposed scheme.

Representatives

Claims will not be able to be brought by legal firms, funders or special purpose vehicles. But there will be no requirement for a list of suitable bodies to be established by statutory instrument, as at present under section 47B. The CAT will assess the suitability of the representative at the certification stage of each case, and, for persons other than class members, whether it is "just and reasonable" for that person to act as a representative in the claim. This will be assessed pursuant to factors to be contained in the new Tribunal rules.[17]

This leaves open the question who, other than actual victims, will, in practice, be bringing these representative claims. In its Response, the Government referred to "genuinely representative bodies" such as trade and consumer associations, and those certainly seem the most likely candidates.

Suitability

Another knotty question at the centre of the certification process relates to the requirement that the representative body demonstrate that a collective action of the kind sought would be the most appropriate way of bringing the claim(s) of the class members. Here the devil will be in the detail which, again, is to be contained in Tribunal rules specifying the relevant factors to take into account in deciding whether claims are suitable for collective proceedings, and if so

[17] Enterprise Act 2002, proposed new subsection 15B(2)(c).

whether by opt-in or opt-out.[18] It is to be hoped that these factors will be accompanied by a reference to "all other relevant circumstances", as it would be very difficult to anticipate and formulate every factor which might be pertinent in a particular instance.

Where the claim is a mass *consumer* claim for relatively small individual amounts, it is likely that the alternative to an opt-out collective claim would be no claim at all, and in principle this factor would favour such a procedure (provided all other criteria were satisfied). Where however the class is relatively small, perhaps comprising businesses, or a mixture of businesses and consumers, the matter will not necessarily be so clear cut.

Commonality

Under the proposed legislation, claims can only be brought as collective proceedings if the Tribunal considers that they raise "the same, similar or related issues of fact and law". In some cases this *may*, and I stress *may*, be a straightforward matter. But anyone who is inclined to underestimate the problems which are likely to arise in relation to the requirement that the claims raise issues common to all members of the class, has only to read the US Supreme Court's recent decision in *Comcast Corp v Behrend* of 27 March this year, to be disabused.[19]

There the Supreme Court, by a slim majority of 5:4, overturned the certification of a class by both the District Court and the Appeal Court on the basis that the claimants' economist's damages model was not sufficiently specific to the certified theory of harm to satisfy the rule that questions of fact or law common to the class must predominate over individual issues. According to the majority, it did not allow the court to be satisfied that damages were capable of being quantified on a class-wide basis. The majority criticised the lower courts for rejecting the appellants' arguments to this effect on the basis that to address it would mean getting too deeply involved in a question on the merits of the case.

In a scathing dissent, the minority[20] state that it is almost universally recognised that individualised damages calculations do not preclude certification, and that the majority's judgment disturbed factual findings made by two lower courts,

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18 Enterprise Act 2002, proposed new subsection 15B(2)(b).

19 http://www.supremecourt.gov/opinions/12pdf/11-864_k537.pdf

20 Justices Ginsburg and Breyer, joined by Sotomayor and Kagan JJ.

contrary to the Supreme Court's established practice. Moreover, those findings by the lower courts were probably correct, and the inadequacies of the model identified by the majority judgment were fundamentally misconceived and contrary to the established facts.

Such diametrically opposed positions, in a court and jurisdiction already very familiar with the issues raised by opt-out collective actions, serve as a timely warning to all concerned that we will need to approach the task allotted to us with considerable humility and caution.

On any view the issues become very complex where a proposed class includes both direct and indirect purchasers of cartelised goods. Although both may have a common interest in establishing the *infringement*, the need to demonstrate that the class as a whole was harmed by the alleged infringement might put the direct and indirect purchasers at loggerheads; they will almost certainly not have a common interest at the causation and quantification stage.

Of course in some cases such difficulties may be capable of resolution by the certification of issue-based sub-classes.

Preliminary merits

In its Response the Government stated that the CAT would be required, as part of the certification process, to engage in a preliminary merits assessment. Presumably it is intended that this should be one of the "suitability" factors, to be fleshed out in Tribunal rules, since there is no express reference to it in the Consumer Rights Bill itself, so far as I can see.

Whilst this is, no doubt, intended as a sensible safeguard to ensure that unmeritorious claims are not certified, it raises a number of questions.

If a merits threshold is applied in every case, then there is likely to be a mini-trial along the lines of a summary judgment application, adding to the overall costs of proceedings.

There is also a question as to the standard the CAT should apply when considering the merits. Should it merely be satisfied that the claim is not manifestly hopeless, or should there be a higher threshold such as "reasonably arguable", or "realistic prospect of success"?

Costs and Funding

As to the funding of collective actions, damages-based fee arrangements will not be enforceable for opt-out collective actions,[21] whilst conditional fee agreements and after-the-event insurance will remain available as funding options for such claims. The prohibition of DBAs in this field is said to be necessary to avoid the creation of a litigation culture. However such agreements are now permitted within certain limits in general civil litigation as part of the Jackson Reforms.

Damages

Unsurprisingly the Government has decided that US-style treble damages have no place in UK competition law, notwithstanding the probable origin of the idea in the English Statute of Monopolies of 1624.

Exemplary damages are also to be prohibited in collective actions, whether opt-in or opt-out.[22] Whilst this would carve out an exception from the general law of damages in the context of collective redress, and would preclude an assessment such as those recently made by the Tribunal in two recent cases,[23] this prohibition is unlikely to have a dramatic impact on the effectiveness of the proposed procedure. Awards of exemplary damages are extremely rare. Further, under Court of Appeal case law one of the pre-conditions to the availability of exemplary damages is that no fine has been imposed on the infringing undertakings, and it is perhaps unlikely that there will be many infringements suitable for an opt-out collective claim which have not have attracted a fine.

Disposal of Residual Damages

A hotly disputed question in the consultation was what should happen to any unclaimed damages paid out by a defendant in an opt-out action. The Government has decided that such sums should be paid to the Access to Justice Foundation.

From a judicial point of view this decision is very welcome. Had a *cy-près* approach been adopted it would probably have led to undesirable and costly

21 Proposed new subsection 47C(7).

22 Proposed new subsection 47C(1).

23 *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 and *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6.

satellite litigation in the Tribunal between various would-be recipients. The proposed solution seems more likely to promote simplicity and certainty.

Collective settlements

The proposed provision for a collective settlement scheme is also to be welcomed. It would provide the UK with a procedure similar to the very successful mass settlement arrangements which have been operating in the Netherlands since about 2005, across all sectors and not just competition.

EU developments

I promised a brief word on recent developments across the water in Brussels. Last week the European Commission published a draft directive on private enforcement, which is intended to remove procedural obstacles to damages actions in all the Member States, and to address the important issue of access to leniency documents and the broader interaction of public and private enforcement. On the same day, the Commission unveiled a communication and recommendation on a common framework for collective redress mechanisms in connection with violation of EU law rights. And, as a bonus, DG Comp also published two further documents – a communication and a staff working paper – containing an extremely helpful *vade mecum* on the quantification of damages in competition law actions.

Draft directive on private actions

In the draft directive, probably the most dramatic proposal for many other Member States is the introduction of documentary disclosure obligations in actions for damages. This alone should ensure that the measure has a bumpy ride in the Council and European Parliament, as such disclosure is by no means the norm across Europe, and is anathema in some Member States.

From the UK perspective a more interesting proposal is the one which would protect certain leniency documents from disclosure. Corporate statements in support of a leniency application and settlement submissions are to be absolutely protected, whereas certain other categories of documents would enjoy temporary protection until the Commission's administrative process is completed.

The draft directive also has a measure to limit a successful leniency applicant's liability for damages, so that in the first instance he is only liable for loss caused by his own transactions affected by the cartel, and is relieved of joint and several liability for damages resulting from transactions of the other cartel members. However, the provision enables the claimants to come back for a second bite if they fail to collect from the other cartelists. The leniency applicant's joint and several liability is then revived. I may not have grasped all the subtleties of this proposal, but if enacted it would seem a fruitful source of litigation.

Draft Communication and Recommendation on collective redress

The EU debate in the area covered by these documents extends not only to competition claims, but to other circumstances of "mass harm" relating from violation of an EU law right.

In particular, the Recommendation adopts "opt-in" collective actions and collective settlement regimes as the appropriate basic standard, capable of being applied by all 28 Member States. Understandably it does not propose to ask all those States, with very differing levels of sophistication in their justice systems, to attempt to introduce opt-out procedures. However the Commission expressly envisages that there are Member States in which an opt-out remedy can be "justified by reasons of sound administration of justice". This seems a sensible and pragmatic approach.

Regulatory appeals consultation

This important document was published by BIS today, and I have not really had much time to take stock of it in its final form.

The key questions about which views are being sought include the following:

- Whether the standard of review and permitted grounds of appeal in appeals against infringement decisions under the Competition Act and some regulatory decisions, should be scaled back to a judicial review standard or to more closely defined grounds than at present.

- Whether on appeal before the CAT the introduction of material and evidence which was not put to the competition authority or regulator

during the administrative procedure should be subject to greater restriction than at present.

- Whether decisions of the authority taken in the course of a Competition Act investigation, but which are currently not open to review in the Tribunal, should be brought within the Tribunal's jurisdiction, instead of having to proceed in the Administrative Court.

- Whether a consistent standard of review should be introduced in other regulated sectors, including aviation, energy, postal services, water and rail, and whether appeals from these bodies should be rationalised in other respects, including the appeal body.

- Whether there are other possible improvements to regulatory investigations and decision-making, and to the operation of the Tribunal itself.

There are some very positive aspects to the consultation, whatever the original impetus for it may have been. For example, few would argue that the current patchwork of appeal or judicial review routes in respect of *ex ante* regulatory decisions from the various utility regulators, is anything other than a complete mess, and could not usefully be rationalised. Also to be welcomed are a number of proposals relating to the CAT. These include the introduction of a mechanism to enable Court of Session judges in Scotland, and High Court judges in Northern Ireland, also to sit in the CAT, and the suggestion that the CAT rather than the Administrative Court should hear interlocutory disputes which arise in the course of a Competition Act investigation.

However, some aspects of the paper are less obviously positive. Time does not allow me to highlight more than a couple.

<u>Standard of review in competition appeals</u>

Revisiting the question whether to constrain the grounds upon which the liability element of competition infringement decisions can be challenged, is a cause for concern. Leaving aside the issue of compliance with Article 6 ECHR, a finding of infringement of the competition rules has a number of very serious reputational and financial consequences for a company and for the executives involved. It can result in huge penalties, including an uplift in penalty in the

event of any recidivism by the company. Further, such a finding can be used as a binding base for a follow-on damages action.

When the Government recently decided not to introduce a prosecutorial system for these cases with the advent of the new CMA, but to stick with the current administrative system, it was on the basis that appeals against infringement decisions of the CMA would be subject to an appeal on the merits, as now. In its March 2012 response to a consultation paper the Government said this:

> "The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and therefore intends that full merits appeal would be maintained in any strengthened administrative system."

It is therefore puzzling to say the least that these apparent second thoughts should have arisen so soon. Any change of the kind envisaged would be ironic, given the current lively debate in Europe about the adequacy of the General Court's jurisdiction to review the Commission's infringement decisions. Of course, this is a consultation not a decision, and it is possible that no change in this regard will ultimately be made.

New evidence

Another cause for concern relates to the possibility of significantly restricting the introduction, on appeal, of what the consultation paper calls "new evidence".

The first point to note is that what is being spoken of as "new evidence" is nothing of the kind. In the administrative procedure, evidence is not placed before an impartial court or tribunal: this first happens on appeal to the CAT. So it is somewhat misleading to confuse that with the *Ladd v Marshall*[24] situation, where a matter has been heard and decided by a lower court and a party seeks to adduce new evidence on appeal to a higher court. In competition appeals the CAT is, in practice, a court of first instance.

Further, there is simply no evidence that material which could have been adduced at the administrative stage is somehow being withheld in order to be deployed on appeal. The CAT's current rules are perfectly adequate to enable it to exclude or limit evidence where the interests of justice so require.

[24] [1954] EWCA Civ 1.

If restrictions of the kind set out in the paper are imposed on the CAT then, far from streamlining appeals, which is the ostensible object of this consultation exercise, it will almost certainly lead to additional and/or longer appeals both in the CAT and in the Court of Appeal, as the parties dispute the CAT's admission or exclusion of material by reference to the proposed statutory criteria.

Other aspects

There are several other issues raised by the consultation which require comment, and the CAT will make a considered response in due course.

CAT and judicial independence

Finally, as I near the end of my time as its President, perhaps I might be allowed one or two reflections on the position of the CAT, situated as it is between some big beasts, in the form of very powerful regulatory bodies and huge industry players. Equally, the Secretary of State for BIS, the CAT's sponsor department, is also on occasions a party to judicial review proceedings before the CAT, as in the *HBOS/Lloyds TSB* merger case.[25]

Compared to these institutions and companies the CAT is tiny in budgetary and personnel terms, comprising only 1 full-time judge (the President), a registrar and a staff of about a dozen. In addition there are currently 6 fee-paid chairmen, 15 or so inaptly named "ordinary members" – they are far from ordinary and are very distinguished. Plus we have the valuable ability to call on the Chancery Division judges for additional judicial assistance. Our annual budget is about £3.7 million, and a large part of that is the rent of our premises in Victoria House. In comparison with the regulators and companies who form the bulk of our litigants, the CAT is a small cottage industry.

On the other hand the cases we deal with, as well as being factually, technically and legally complex, are often extremely sensitive and of great importance to the immediate litigants and others – sometimes a whole sector may be affected.

Sensitivity and importance also exist from the point of view of the regulatory decision-maker. The authority or regulator may have been investigating for a

[25] Case No. 1107/4/10/08.

long time, and may feel, rightly or wrongly, that its credibility is to some extent at stake in an appeal from its decision. In some cases a set-back in the CAT may be much harder for the decision-maker to swallow than it is for a losing appellant, who may be more likely to adopt a philosophical attitude of "you win some, you lose some", even where the commercial consequences of losing an appeal are significant. Such differences in reaction are understandable, given the very different interests at stake.

However, it would be troubling if the risk of a regulatory or enforcement decision being overturned on appeal were to lead to a desire to protect decisions from an appropriate level of scrutiny by an independent judicial body. In the present regulatory climate, where very significant and commercially intrusive powers are given to regulators, acting in the public interest, it is all the more important that the exercise of those powers should be subject to proper judicial oversight. It is not now appropriate, if it ever was, to speak of judicial deference in this context, if by deference is meant that there should be "no go" areas where, in effect, a rubber stamp will be applied by a court. This would be to place a virtually untrammelled power of commercial life and death into the hands of an administrative agency.

Few, if any, would argue for such a situation. But it is equally important that the powers of a tribunal such as the CAT properly to examine and adjudicate upon a reasonable ground of challenge to a regulatory decision should not be overly circumscribed by artificial and restrictive rules as to, for example, the evidence which may or may not be admitted and considered by the court, or other matters which are normally within the scope of a court's discretion when seeking justly to resolve disputes which fall within its jurisdiction.

And it would be of even greater concern if pressures for changes of that kind were to be seen as a response to judgments of a court. All courts can and do go wrong. The proper way of addressing perceived errors of adjudication is by appeal to, in the CAT's case, the Court of Appeal, not by seeking to undermine the effectiveness of judicial oversight by spurious suggestions for reform of the appeal process.

We must also be wary of the consequences which could arise, albeit unintentionally, from constant pressures for review and change. Judicial independence is vital to all our well-being. It is in the public interest that it

should be jealously safeguarded at all times. Our democracy and our freedom depend upon it. This applies no less in the competition and regulatory field where infringement decisions and regulatory initiatives can have very real and sometimes adverse consequences for individuals and companies. It is crucially important that courts, particularly small specialist ones, whose judicial personnel are few in number and well-known to their users, should not have to expect that giving a judgment to this or that effect might well lead to intense lobbying for jurisdictional and procedural changes, with the aim of lessening the scrutiny to which certain decisions would be subject in the future. To achieve such aims would do nothing at all to improve the quality of regulatory decision-making, and would create unwholesome pressure on the courts concerned.

I emphasise that I am not here speaking of proposals for reform where the need for reform is properly and fully evidenced by examples of where things have gone awry, or where genuine procedural improvements to the system can be made.

In a recent address to the Commonwealth Law Conference, the present Lord Chief Justice referred to the need for "eternal vigilance" in matters of judicial independence, and to the importance of avoiding "the first small, even tiny, steps" that might lead to something clearly unacceptable.

By way of example he described how, in the context of the Control Orders issued under the Prevention of Terrorism Act, a former Home Secretary was moved publicly to criticise the "total refusal" of the Law Lords to discuss the issues of principle involved in these matters, and to suggest that it was time for the senior judiciary to engage in a serious and considered debate about how best legally to confront terrorism in modern circumstances. The former Home Secretary suggested some "proper discussion" between the then Home Secretary and the Law Lords with a view to the latter, in effect, providing guidance about what kind of measure would not be liable to be struck down. Surely, he said, the idea that such discussions would compromise the independence of the members of the court was "risible".

In his speech the LCJ observed that, had they taken place, such discussions between the members of the court and the executive would have represented one of those tiny first steps of which we should eternally beware.

We cannot afford to be complacent. A cautionary tale of where “first tiny steps” can end up is that of Judge Maria Afiuni, a Venezuelan judge who granted bail to a banker connected with the political opposition. The banker jumped bail and fled the country. The late President Chavez then had Judge Afiuni jailed, announcing on TV that in another era she might have been brought before a firing squad. He did not say whether this would have been preceded by a trial!

Just as we need fearless judges, so we also need fearless lawyers and advocates. This brings me back to where I began, when I mentioned David Vaughan’s tireless efforts in representing the People's Mojahedin of Iran. Thanks to those efforts an injustice was put right when they were de-listed in Europe as a designated terrorist organisation subject to sanctions. And in consequence of that case other similar injustices were corrected in Luxembourg. David is particularly proud that as a result he is forever banned from Iran, and he receives a steady stream of carpets and chocolates every year.

I would have liked to regale you with other stories, such as the occasion when Jane Fonda expressed a particular desire to play the role of David in a Hollywood film about another of his forensic victories. However my time is up and these stories must wait – perhaps next year’s speaker will oblige.

Thank you for listening.