



COMPETITION APPEAL TRIBUNAL

**Meeting of the Tribunal User Group**

**Held remotely via MS Teams on 10 December 2020 at 4.45pm**

**Attendees:**

*On behalf of the Tribunal:*

Peter Roth - President  
Peter Freeman - Chairman  
Charles Dhanowa – Registrar  
Mark Collyer - Referendaire

*On behalf of the Users:*

Sarah Cardell – General Counsel, CMA  
Jessica Radke - CMA  
John McInnes - CMA  
Catriona Munro – Partner, MMS Law  
Mark Sansom – Partner, Freshfields LLP  
Euan Burrows - Partner, Ashurst LLP  
Tom de la Mare QC – Barrister, Blackstone Chambers  
Martin Ballantyne - Ofcom  
Stephen Wisking - Partner, Herbert Smith Freehills LLP

*From the Department for Business, Energy and Industrial Strategy:*

Fran Spawls – Head of CMA & CAT Sponsorship Team

**Apologies:**

John Turner - Barrister, Monckton Chambers

**1. President's introduction**

- 1.1. The President welcomed everyone to the User Group meeting and explained that the purpose of this meeting was to discuss the agenda items set out below.

**2. Review of practice: remote and hybrid hearings**

- 2.1. The President asked the User Group about their experiences of remote hearings in the CAT to date. The general consensus was that remote hearings are working very well.
- 2.2. Euan Burrows said that he had been involved in a recent very large case management conference conducted remotely and this had worked well generally. In relation to MS Teams, he said that it was important for counsel to see the three members of the CAT panel on the screen at the same time. He also said that remote hearings are difficult to manage,

particularly when multiple parties are involved. He suggested, therefore, that the CAT should consider carefully the structure and timing of remote hearings. All attendees said that the live streaming of CAT hearings was a good thing.

- 2.3. Mark Sansom agreed that case management conferences and pre-trial reviews in the CAT are working very well remotely. He said that, in a case with which he had been involved, counsel had problems pinning individuals in MS Teams. He said that this was more of a problem with MS Teams (which was working well generally) rather than the CAT, but it is suboptimal when advocates cannot see each other and the CAT panel. He stated further that the Webex software had worked well in a recent hearing he had attended in the Supreme Court, but Webex had its own problems.
- 2.4. The Registrar said that the issue about counsel seeing the full CAT panel on screen is a problem with MS Teams (i.e. whoever speaks will appear on screen), and that the software will hopefully address this issue in the near future.
- 2.5. Sarah Cardell said that, from her experience to date, cross-examination tends to work better when a witness is cross-examined in person i.e. not remotely. Peter Freeman said that he had recent experience of a witness giving evidence remotely via a conference room and noted that the CAT had to rely on the professional ethics of the legal team to ensure that they are not coaching or helping the witness during cross-examination.
- 2.6. Several attendees said that remote hearings can raise difficult issues regarding confidentiality. Tom de la Mare QC observed that hybrid hearings are more practical when the CAT is dealing with heavy cases which involved significant amounts of confidential information.
- 2.7. The Registrar explained that, in order to deal with confidentiality issues and remote hearings, he is contemplating sending the parties two meeting links in advance of a CAT hearing: (1) the primary link to the open proceedings; and (2) a secondary link to a private space. This would enable the parties to move back and forth between the hearing and the confidential space. Mark Sansom supported this proposal.
- 2.8. Catriona Munro asked how the CAT intends to deal with hearings after the Covid-19 pandemic has ended. The President explained that the CAT is focusing on the current situation, but in the longer-term interlocutory hearings could, with the parties' consent, be heard remotely. The general consensus is that witnesses should give their evidence 'live'. The President said that he hoped the live streaming of CAT hearings will continue post pandemic. This would be beneficial in very large hearings where it might obviate the need for many observers to travel to the hearing.

### **3. Declarations: section 47A CA 1998**

- 3.1. The President explained that the CAT is currently unable to make declarations under the Competition Act 1998 (CA98). He said that this power is needed particularly in the context of collective actions. The President stated that this issue has been raised with BEIS. There was general support among users for the proposal that the CAT should be granted the power to make declarations under the CA98.

### **4. Practice direction: skeleton arguments**

- 4.1. The President noted that other courts, for example, the Court of Appeal and the Commercial Court, have Practice Directions in place which limit the length of skeleton arguments. The President said that lengthy skeleton arguments were often difficult to absorb and that shorter

more focussed skeleton arguments were, on the whole, more useful. Peter Freeman echoed the President's remarks and he said that shorter skeleton arguments are more effective, even in complex cases.

- 4.2. The President stated that the CAT intends to make a practice direction that a claimant/appellant/applicant's skeleton argument shall not exceed 20 pages, and a respondent/defendant's skeleton argument (where they face two or more parties) shall not exceed 25 pages. The President said that the parties will have liberty to apply for a longer page limit.
- 4.3. Mark Sansom agreed that imposing page limits on skeleton arguments was a good idea, but he thought that the new page limits would be challenging for counsel, and that there would need to be flexibility for an extension in suitable circumstances.
- 4.4. The President said the practice direction would also address other practical issues such as labelling of bundles, etc.

## **5. CAT Rules Review: introduction by BEIS**

- 5.1. The President introduced Fran Spawls from BEIS who would be conducting a review of the CAT Rules of Procedure.
- 5.2. Fran Spawls noted that the statutory deadline for the Secretary of State to review the CAT Rules (1 October 2020) has now passed, and that delay had largely been due to the impact of Covid-19. She said that the Secretary of State will hopefully give approval for the review to move ahead in January 2021. BEIS will issue a call for evidence which would be open for around 8 weeks. The aim at this stage would be to identify high level issues with regard to the operation of the Rules since they were brought into force in 2015 and then to determine areas where detailed changes might be made. BEIS would be keen to discuss points arising from the consultation with the User Group in early Spring.

## **6. Embargo arrangements: release of judgments**

- 6.1. The President noted that the CMA has raised this issue with the CAT on a number of previous occasions.
- 6.2. Sarah Cardell said that there are different approaches in other courts, and she queried whether there would be any benefits of adopting a consistent approach. She explained that a practical problem the CMA faces is that it is precluded from sharing the outcome of the judgment with other CMA staff and, particularly, with its press department. This is problematic as the public pick up on judgments very quickly and they then approach CMA for comment. Martin Ballantyne said that OFCOM had experienced similar problems. Sarah Cardell noted that, in some cases, the terms of the embargo allowed the CMA to share the outcome of the judgment with other staff prior to the judgment being formally issued.
- 6.3. Stephen Wisking echoed the points made by Sarah Cardell. He said that the problems identified are common for everyone. A potential solution could be to allow in-house lawyers to view the draft and this might alleviate some of the problems identified.
- 6.4. Mark Sansom said that the embargo arrangements in a recent Supreme Court case had worked well where in-house lawyers had been allowed to view the draft judgment and it

was permitted to inform clients of the outcome 24 hours before the judgment was issued. This had allowed the parties to deal with media queries.

- 6.5. Euan Burrows explained that the rules need to be even-handed and fair. A potential leak of a confidential draft judgment could move share prices and so there was a need for sensible constraints. Peter Freeman agreed and said that while there were practical arguments in favour of wider sharing of the judgment prior to handing down, sometimes there could be a real risk of inadvertent leaks. He noted that this issue is extremely difficult to police. Accordingly, there often needed to be strict rules in place as a leak of price sensitive information could cause huge problems.
- 6.6. The President added that not all parties might be based in the UK, and so there would be no obvious sanction. The solution could be that the parties provide the CAT with a list of named individuals. The President said that ensuring a consistent approach with the courts is problematic as different courts had different practices and procedures: for example, costs and permission to appeal applications were not dealt with in the CAT at the handing down of the judgment but came afterwards. He said that the CAT will need to think about a way it can accommodate the practical points made by the User Group.

## **7. Impact of Brexit**

- 7.1. The President stated that it is extremely difficult to predict what might happen after Brexit, but it seemed clear that there will be an increase in the number of mergers investigated by CMA (which will involve largescale mergers which were previously dealt with by the European Commission). This is likely to create significant additional work for the CMA and, as a consequence, the CAT, since some of the CMA's decisions in those cases are likely to be challenged. The President said that the CAT is keen to maintain its practice of determining merger applications quickly, but this will be challenging. The President asked Sarah Cardell whether the CMA has considered how the new s.60A CA98 will be interpreted going forward.
- 7.2. Sarah Cardell explained that more mergers will come the way of the CMA and inevitably there will be more challenges in the CAT. She said that there was no update on how the CMA will interpret s.60A CA98 and it will have to be seen what developments will occur in this regard. She also pointed out that Brexit will increase the number of CA98 cases the CMA investigates and the number of such appeals to the CAT.

## **8. Any other business**

- 8.1. Tom de la Mare QC suggested that it might be sensible to standardise CAT confidentiality rings. He said that confidentiality could in some cases be overclaimed and trying to obtain the release of material outside the confidentiality ring could also be difficult. He acknowledged that this is a complex subject but if the CAT introduced a model order, this would be beneficial.
- 8.2. Stephen Wisking agreed that it can be difficult managing confidential material. He noted that most of the material disclosed into the confidentiality ring does not surface at trial. Euan Burrows agreed that confidentiality rings can be costly to establish and administer. He said that a model order which can be adapted as necessary, is a good idea.
- 8.3. The President remarked that a model order could be created. This would not be binding on the parties, and they could revise and adapt the order where necessary. A model order could be the best way to proceed and the CAT could set up a working group drawn from the solicitor members of the User Group. A draft could then be presented to the whole group

for consideration. The President noted, however, that it is difficult to lay down rigid rules in this area and that general presumptions about confidentiality may not work. The President said that he had recently given a judgment in the High Court regarding the over-claiming confidentiality.

- 8.4. Tom de la Mare QC referred to The Trade Secrets (Enforcement, etc) Regulations SI 2018, No.597 Reg 10 – preservation of confidential material in course of proceedings.
- 8.5. The President said that the issue should be placed on the agenda for the next User Group meeting. He noted that these points be considered during the BEIS consultation on the Rules.

The President thanked those present for their helpful comments and wished everyone a Happy Christmas. The meeting concluded at 5.45pm.