

## COMPETITION APPEAL TRIBUNAL USER GROUP MEETING MINUTES OF THIRD MEETING HELD ON 25 FEBRUARY 2010

### **Attendees:**

#### *On behalf of the Tribunal*

Sir Gerald Barling – President, Competition Appeal Tribunal  
Charles Dhanowa OBE – Registrar, Competition Appeal Tribunal  
Vivien Rose – Chairman, Competition Appeal Tribunal  
George Lusty – Referendaire, Competition Appeal Tribunal

#### *On behalf of Users*

Daniel Beard – Barrister, Monckton Chambers  
Simon Jones – Legal Adviser, Competition Commission  
Jon Lawrence – Partner, Freshfields Bruckhaus Deringer LLP  
Catriona Munro – Partner, Maclay Murray & Spens LLP  
Sarah Turnbull – Legal Adviser, Office of Communications  
Frances Barr – General Counsel, Office of Fair Trading  
Stephen Wisking – Partner, Herbert Smith LLP

#### *Apologies*

James Flynn QC – Barrister, Brick Court Chambers  
Polly Weitzman – General Counsel, Office of Communications

### **Introduction**

The President welcomed everyone to the third meeting of the User Group. He began by encouraging members of the Group to send to the Tribunal in advance items for the agenda in order to make the best possible use of these meetings.

### **Chairmen of the Tribunal**

The President referred to the recent addition of Marcus Smith of Fountain Court Chambers as a new part-time Chairman of the Tribunal. He noted that the new Chairman will, at first, participate as a “wing member” in a few cases in order to gain familiarity with the Tribunal’s working practices.

The President noted that there had been some progress on putting in place in Scotland and Northern Ireland arrangements such as those which exist in England & Wales in relation to the Chancery Division, enabling certain judges in those jurisdictions to sit as chairmen of the Tribunal where appropriate. The Ministry of Justice are aware of the existing asymmetry and have been supportive in helping the Tribunal to make progress on this issue. They will be discussing the matter with the Judicial Appointments Commission.

## **Fees**

The President noted that the Registrar had been extremely busy recently, participating in several studies being carried out on a number of subjects by BIS and the National Audit Office. Amongst the points that had arisen was whether there was any scope for levying fees in respect of the CAT's services. The President noted that the CAT, unlike other courts, does not charge any fees, despite the high quality service that is provided (which includes, inter alia, free transcription services in respect of all parts of the hearings as well as judgments and other rulings), and it cannot be excluded that fees or charges might be introduced in the future. The Registrar noted that discussions on this issue were at a very early stage, but welcomed submissions from all parties.

## **Notices of new proceedings on the Tribunal's website**

The Registrar drew attention to the fact that notices of new proceedings published on the Tribunal's website now provide details of the solicitors representing the appellant / applicant / claimant. This is with a view to allowing third parties easily to make contact with these solicitors if they are considering joining the proceedings.

The Registrar invited comments from the Group on the Tribunal's practice of publishing notices on the Tribunal's website in relation to new claims for damages brought in the Tribunal, and the particular point in time at which such notices are published. The Registrar explained that the practice has been to wait until service had been effected on all defendants, including those overseas, although this created a risk that the notice would not be published until some time after receipt of the claim form.

Daniel Beard and Jon Lawrence noted some of the risks involved in publishing the notice before all defendants are served, particularly to the extent that a party sees the Tribunal's notice and then attempts to establish jurisdiction in another country before service is properly effected for the purpose of the Tribunal's proceedings.

Jon Lawrence enquired about the Tribunal's practice upon the transfer of proceedings from the Chancery division. The Registrar confirmed that the Tribunal would publish a notice on its website in relation to such a transfer.

## **Damages claims**

Jon Lawrence asked whether the Tribunal was concerned about the migration of damages actions to the High Court. The President said that although the Tribunal continues to receive new cases, the migration of damages cases to the High Court is a matter of a concern. The only solution would be the creation of a stand-alone action in the Tribunal. This would create a level playing field between the High Court and Tribunal, enabling parties to enjoy a genuine choice as to which forum was best suited to their particular claim. As things stood, problems of limitation and the so-called "Italian torpedo" issue provided incentives to begin in the High Court in certain cases. The President stated that he had pointed out the anomalous nature of the present jurisdiction of the Tribunal on numerous occasions and expressed the hope that the Group would also press for the necessary reforms.

## **Guide to Proceedings**

There was some discussion of progress towards the issue of a revised Guide to Proceedings. Daniel Beard drew attention to the ongoing construction appeals, which were likely to raise a number of novel procedural issues for the Tribunal, and asked whether it would be appropriate to postpone the issue of a revised Guide until after these appeals have concluded, so that the Guide might benefit from their outturn. This was generally thought to be a good idea.

Frances Barr noted that there are a number of practical issues that might be addressed more immediately, even if discussion of other issues is postponed until the conclusion of the construction appeals. She referred in particular to the Tribunal's practice of handling correspondence by email, and the use of judgments issued under embargo.

## **Judgments under embargo**

There followed a general discussion of the Tribunal's recent practice in relation to embargoed judgments. Daniel Beard referred to the standard form of embargo under the Civil Procedure Rules, but noted that public bodies experience greater problems than private parties in recognising the limits of an embargo (as they do not have the same delineation of personnel). Steven Wisking noted the usefulness of giving private parties a small amount of time to prepare a suitable press response.

The President noted that this was a fairly self-contained issue that could be addressed in the near future. It was agreed that members of the Group would gather views from their colleagues and provide these to the Tribunal to allow further discussion of this issue.

## **Use of email by the Tribunal**

Frances Barr said that there was a need for clear guidance from the Tribunal about the circumstances in which it is acceptable to correspond by email.

The Registrar noted that the Tribunal has started to gradually introduce email correspondence, notably in the construction appeals, but said that this was an issue that merited careful consideration. The existing system based primarily on fax and postal communication had worked well. A move to wider use of email was inevitable but had to be coupled with a revision of the Tribunal's internal working practices in order to ensure the development of a robust system which kept track of communications. There was no particular magic in this – it just required time to think through and would be tackled when there was time to do so. The Registrar also noted that if the Tribunal did increase its use of email it would be important for Tribunal users to follow certain rules, in particular to avoid long chains of repetitive email correspondence.

### **Learning from recent Communications Act cases**

Simon Jones referred to discussion at the first User Group meeting, and said that it would still be helpful to have a general discussion of lessons learned from recent price control references. Sarah Turnbull said that OFCOM would need to consider whether this could be done while a number of references were on foot, or whether certain generic case management issues could still be considered in the meantime. The matter was held over for further discussion.

### **Recruitment of new Tribunal members**

The Registrar noted that, by the time of the next User Group meeting, BIS should have begun the process of recruiting new lay members.

### **Date of next meeting**

It was decided that the User Group will next meet at 5.30pm on 14 October 2010.