

Competition Commission Appeal Tribunals

Annual review 2002/03



Contents

- 02** President's statement
- 04** Judgments of the Competition Commission Appeal Tribunals
- 05** Competition Commission Appeal Tribunals – overall activity
- 06** Competition Commission Appeal Tribunals – activity by case
- 07** Membership of the Competition Commission Appeal Tribunals

President's statement

This has been the third full year of the Tribunal's existence, but its last as part of the Competition Commission. From 1 April 2003, the Appeal Tribunal was renamed as the Competition Appeal Tribunal and became entirely separate from the Competition Commission. Much of this year has been devoted to making the necessary arrangements to ensure a smooth transition to the new regime created by the Enterprise Act 2002.

A total of six applications were received during the year, and seven judgments were handed down. The judgments clarified a number of procedural issues at the interlocutory stage, and the BetterCare judgment, heard in Belfast, gave a final ruling on the substantive issue of what constitutes an undertaking for the purposes of the Competition Act 1998. The text of all of these judgments can be found at www.catribunal.org.uk, or in the Competition Appeal Reports, published by Jordans.

The year 2002/2003 has also seen the first appeals to come before the Appeal Tribunal against decisions of regulators other than the Director General of Fair Trading. Appeals were lodged against decisions of the Director General of the Office of Water Services (Aquavita) and the Director General of Telecommunications (Freeserve).

Interlocutory and final judgments

Several of the judgments handed down by the Tribunal during the course of the year related to the question of what constitutes an 'appealable decision' within the meaning of the Competition Act 1998. Three such cases have come before the Tribunal to date, all relating to the rejection of a complaint by the relevant Director. The first case, BetterCare, the judgment last year set out a detailed framework for deciding what constitutes a decision, and whether it is an appealable decision. The two other cases which raised similar questions, although in completely different sectors, came before the Tribunal, and were ruled on, during the course of this year. In both cases, namely Freeserve and Claymore/Express Dairies, the Tribunal unanimously found in favour of the applicants that the relevant Director had indeed taken a decision when rejecting their complaints and that such a decision could be appealed to the Tribunal.

Other interlocutory judgments related to the disclosure of documents (Aquavita), and the costs implications of withdrawing an appeal (Hasbro).

Judgment on the substantive issues raised in Freeserve was delivered in April 2003, and the Claymore/Express Dairies' cases remain pending. The substantive issue raised in BetterCare was heard in Belfast in May 2002 and judgment in that case was handed down in August.

The Enterprise Act 2002

The Enterprise Act 2002 received Royal Assent in November 2002, and came into force in stages in April and June 2003. The Act is to a large extent faithful to the initial proposals put forward as the Enterprise Bill and, as predicted last year, the Act will radically alter the responsibilities of the Appeal Tribunal.

The major proposals for reform all withstood Parliamentary scrutiny and will form the new landscape of competition regulation in the UK. These include the removal of ministerial involvement in the majority of competition decisions, the introduction of a criminal offence for certain cartel activity, and enhanced opportunities for bringing private actions for damages. The Competition Appeal Tribunal will play a crucial role in this new landscape. In addition to its current jurisdiction, it will ensure that determinative rulings of the CC, as well as relevant decisions by the OFT, the Secretary of State, or ministers, are subject to an effective and rigorous review procedure. It will provide an alternative forum for private actions brought by or on behalf of parties who have suffered loss as a result of breaches of either of the 1998 Act Prohibitions and Articles 81 and 82 of the EC Treaty, as found by decisions of the relevant enforcement agency.

The new Act also reforms the somewhat cumbersome nature of the current procedure under section 47 of the Competition Act 1998, which does not confer on an interested person, who is not the addressee of a decision, the right to appeal direct to the Appeal Tribunal against an adverse decision.

The Communications Bill

The Communications Bill, equally revolutionary in its own way, is currently before Parliament. The Bill envisages a new structure for the communications industry, including the setting up of Ofcom, which will encompass the functions currently carried out by Ofcom and other regulators. In the Bill it is envisaged that decisions taken by Ofcom under the Competition Act 1998 and a range of other decisions arising from Ofcom's regulatory functions will be appealable to the Competition Appeal Tribunal.

The adoption of Council Regulation 1/03

After a lengthy period of negotiation, the Council of the European Union formally adopted a new Regulation in November 2002 to replace the stalwart but now outdated Regulation 17/62. Regulation 1/03 will come into force on 1 May 2004 and, as anticipated, from that date national courts and tribunals will have the power to apply Article 81 (3) of the EC Treaty. This sea change in the enforcement of Community competition law will have effects on national competition law and the Appeal Tribunal looks forward to playing a full role in that development.

Members of the Appeal Tribunal

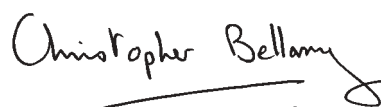
As with last year, the membership of the Appeal Tribunal has remained unchanged during the year. As ever, I am extremely grateful to the members of the Appeal Tribunal, both to those who have sat on appeals and to all those who have continued to participate in our regular training sessions and seminars. In my last annual statement I expressed the hope that those members who had not yet sat on an appeal would shortly have an opportunity to do so. All but a very small number of the members of the panel have now sat or are currently sitting as members of a tribunal.

Staff and resources

With the anticipated increase in the Tribunal's workload created by the new jurisdiction of the Tribunal following the entry into force of the Enterprise Act 2002, the Tribunal felt the need to recruit a further legal secretary, bringing their total number to three. As at 31 March 2003, the Tribunal had a staff of nine. I am extremely grateful to all of them for their hard work. There are plans to increase the numbers of administrative staff in the Registry over the coming year.

The future

With its new responsibilities and resources, the Tribunal can look forward to the future with confidence.



Sir Christopher Bellamy
President

Judgments of the Competition Commission Appeal Tribunals

in the year ended 31 March 2003

| Judgment | Date | Subject matter | Tribunal |
|--|---------------------|--|---|
| 1. BetterCare Group Limited v DGFT [2002] CAT 7 | 1 August 2002 | Held that in pursuing its duty to provide residential care by contractual arrangements with the private sector, an NHS trust may be acting as an undertaking for the purposes of the CA98 | President Michael Davey David Summers |
| 2. Freeserve.com PLC v DGT [2002] CAT 8 | 11 November 2002 | Held that the decision to close the Director's file on Freeserve's complaints that BT was abusing its position in connection with the supply of broadband services was an appealable decision | President John Pickering Arthur Pryor |
| 3. Freeserve.com PLC v DGT [2002] CAT 9 | 13 November 2002 | Held that the Director would be given a short extension of time for service of the defence | President John Pickering Arthur Pryor |
| 4. Hasbro UK Limited v DGFT [2003] CAT 1 | 24 January 2003 | Held, Hasbro's request to extend the time for the filing of their notice of appeal against the Director's decision in respect of RPM agreements with their distributors would be dismissed. The fact that there was another ongoing investigation, which Hasbro argued prevented them from 'putting their best foot forward' in the instant appeal, did not constitute exceptional circumstances for the purposes of rule 6(3) | President Antony Lewis Vindelyn Smith-Hillman |
| 5. Hasbro UK Limited v DGFT [2003] CAT 2 | 24 January 2003 | On Hasbro's request to withdraw their appeal in relation to the Director's decision regarding their agreements with their distributors: Held, Hasbro should bear the costs of their unsuccessful request for an extension of time for filing their notice of appeal (see [2003] CAT 1 above). However, in the 'unusual circumstances' there would be no order for costs on the rest of the appeal as the Tribunal accepted that Hasbro were in some difficulty in deciding whether or not to appeal this decision without having seen the Director's decision concerning Hasbro, Argos and Littlewoods | President Antony Lewis Vindelyn Smith-Hillman |
| 6. Claymore Dairies Limited and Express Dairies PLC v DGFT [2003] CAT 3 | 18 March 2003 | On admissibility and location of the proceedings. Held, the appeal was admissible and the proceedings were before a tribunal in Scotland | President Peter Clayton Peter Grant-Hutchison |
| 7. Aquavitae (UK) Limited v Director General of Water Services [2003] CAT 4 | 21 March 2003 | Held, the Tribunal would not make an order for disclosure of certain documents pursued by the applicant on the Director's assurance to disclose voluntarily such documents in his possession which might assist Aquavitae or undermine his own case on the issue of whether he had made an appealable decision | President Sheila Hewitt Graham Zellick |

Competition Commission Appeal Tribunals – overall activity

in the year ended 31 March 2003

| | |
|---|----|
| Appeals received | 6 |
| of which section 46 Competition Act 1998 | 2 |
| section 47 Competition Act 1998 | 4 |
| Applications for interim relief | 0 |
| Applications to intervene | 5 |
| Case management conferences held | 8 |
| Judgments | 8 |
| of which Judgments disposing of the appeal | 3 |
| Judgments disposing of preliminary issue | 4 |
| Judgments on procedural and interlocutory matters | 1 |
| Orders made | 11 |

Competition Commission Appeal Tribunals – activity by case

year to 31 March 2003

| Case | Date lodged | Application to intervene | Case management conference | Number of main hearings (sitting days in brackets) ¹ | Number of judgments ² | Date of judgment disposing of the matter | Duration of appeal |
|--|----------------------|--------------------------|----------------------------|---|----------------------------------|--|-------------------------------------|
| 1006/2/1/01 BetterCare Group Limited v DGFT | 25 November 2001 | 2 | 0 | 1 (1) | 1 | 01 August 2002 | 8 months and 1 week |
| 1007/2/3/02 Freeserve.com PLC v DGT | 09 September 2002 | 1 | 2 | 3 (4) | 2 | – | Ongoing at 31 March 2003 |
| 1008/2/1/02 Claymore Dairies Limited & Express Dairies PLC v DGFT | 06 November 2002 | 1 | 2 | 1 (1) | 2 | 18 March 2003 | 4 months and 2 weeks |
| 1009/1/1/02 Aberdeen Journals Limited v DGFT | 18 November 2002 | 1 | 1 | 1 (1) | 0 | – | Ongoing at 31 March 2003 |
| 1010/1/1/03 Hasbro UK Limited v DGFT | 29 January 2003 | 0 | 0 | 2 (2) | 2 | 03 March 2003 | Application withdrawn 1 month |
| 1011/2/1/03 Claymore Dairies Limited & Express Dairies PLC v DGFT | 06 February 2003 | 1 | 1 | 0 | 0 | – | Ongoing at 31 March 2003 |
| 1012/2/3/03 Aquavitae (UK) Limited v DGWS | 20 February 2003 | 1 | 1 | 1 (1) | 1 | – | Ongoing at 31 March 2003 |
| Total | | 7 | 8 | 8 (9) | 8 | | |

¹Excludes days limited to formal handing down of judgments.²Including judgments on interlocutory issues and final judgments.

Membership of the Competition Commission Appeal Tribunals

Sir Christopher Bellamy was appointed President of the Competition Appeal Tribunals in December 1999. After qualifying as a barrister, he practised mainly in the fields of competition law, EC law and public law. He was appointed QC in 1986. From 1992 to 1999 he was a judge of the Court of First Instance of the European Communities. He is also authorized to sit as a High Court judge, a judge of the Employment Appeal Tribunal, and a Recorder of the Crown Court.

Professor Andrew Bain OBE is an honorary professor at Glasgow University and Chairman of the Trustees of Scottish Enterprise Pension Scheme. He has held full professorships in economics at the universities of Glasgow, Strathclyde and Stirling, was for six years Group Economic Adviser at Midland Bank, and has also worked as an economic consultant. Previous public appointments include membership of the committee to Review the Functioning of Financial Institutions (the Wilson Committee on the City), the Secretary of State for Scotland's Panel of Economic Consultants and the Board of Scottish Enterprise.

Michael Blair QC is a practising barrister with chambers in Gray's Inn and the Chairman of the Doctors' and Dentists' Pay Review Body. Until 2000 he was General Counsel to the Financial Services Authority. He served on the Bar Council for nine years (including as Treasurer for four) and was employed as a civil servant in the Lord Chancellor's Department for 20 years. He is a past Chairman of the Bar Association for Commerce, Finance and Industry.

Peter Clayton is a fellow of the Institute of Chartered Accountants in England and Wales. He has held senior financial positions in major FTSE 100 companies such as Group General Manager Finance of General Accident plc and Group Financial Controller of Forte plc. He was also Secretary of the Technical Committee of The Hundred Group of Finance Directors.

Barry David Colgate is a non-executive director of The Michael Shanly Group. He has been Chairman of Harrington Food Group Ltd and used to be Group Director of Planning/Legal and Business Adviser in Ranks Hovis McDougall. He is a fellow of the Institute of Chartered Secretaries and Administrators. He was a member of the Restrictive Practices Court.

Michael Davey is a solicitor of the Supreme Court of Northern Ireland. He has been Chief Executive of the Law Society of Northern Ireland and Chairman of its Statutory Legal Aid Committee. He has extensive experience of private commercial practice. He is a Chairman of Industrial Tribunals and of Social Security Appeal Tribunals.

Peter Grant-Hutchison is a Scottish advocate. He is a part-time Chairman of the Social Security Appeal Tribunals and the Disability Appeal Tribunals and a part-time Immigration Adjudicator.

Professor Peter Grinyer is Emeritus Professor of Economics at the University of St Andrews, where he was also Vice-Principal, and is a visiting professor at Imperial College, London. He was, for some years, a visiting professor of New York University and has also held a chair at the City University. For eight years he was a member of the Scottish Legal Aid Board and has been non-executive director of a number of companies including McIlroy Coates and John Brown plc. He is a member of the editorial boards of several journals on managerial economics and strategy.

Sheila Iffat Hewitt is on the board of the Legal Services Commission and a member of the Radio Authority. She is a JP, a member of the General Medical Council and a member of the Immigration Appeals Tribunal. She is an associate of the Chartered Institute of Bankers.

Ann Marguerita Kelly was Chairman of the West Berkshire Priority Care Service NHS Trust and a member of the Police Complaints Authority. She is a Deputy Electoral Commissioner, an independent member of the Ministry of Defence Police Committee, a lay member of the Compliance Board of the Law Society and a lay member of their Adjudication Panel. She is a fellow of the Chartered Management Institute.

The Honourable Antony Lewis is a barrister and Chairman of Powys Health Care NHS Trust. He was formerly Chairman of the Powys Family Health Service Authority. He has been a lecturer in law at University College, Cardiff and a JP. He is involved in numerous charitable organizations, for example as a trustee of the Buttle Trust, the Community Foundation in Wales and the Merthyr Charitable Trust. He chairs the Institute of Rural Health and the Rural Health Forum.

Membership of the Competition Commission Appeal Tribunals

Graham Mather is a solicitor and President of the European Policy Forum, an independent international research institute. He has been visiting fellow of Nuffield College, Oxford, and a reporting panel member of the Monopolies and Mergers Commission, now the Competition Commission. He has also been General Director of the Institute of Economic Affairs and Head of the Policy Unit of the Institute of Directors. He was MEP for Hampshire North and Oxford from 1994 to 1999. He is an adviser to Tudor Investment Corporation and a Director of Greenham Common Trust.

Professor John Pickering is an economic and business consultant and visiting professor at the University of Southampton. Former appointments have included: Dean, Vice-Principal and Professor of Industrial Economics at UMIST, Deputy Vice-Chancellor of the University of Portsmouth and Professor of Business Strategy at the University of Bath School of Management. He has served for nine years as a member of the Monopolies and Mergers Commission. He has also held various external positions of responsibility as Church Commissioner and director of several companies.

Richard Prosser OBE is Managing Director of Hurley Hall Farms, Chairman of Aluminium Products, Director of Meadow Quality Livestock and a non-executive director of Blythe Mill. He was until recently a reporting panel member of the Competition Commission and has served on a considerable number of inquiries.

Dr Arthur John Pryor CB is an independent consultant working on competition policy issues and government affairs. He is a former civil servant, and was Head of Competition Policy at the Department of Trade and Industry until his retirement in 1996. During his career in the civil service his senior positions included Director General of British National Space Centre and DTI Regional Director for the West Midlands.

Patricia S Quigley ws is a solicitor and accredited solicitor-mediator. She worked for Lothian Regional Council and firms in Glasgow and Edinburgh before setting up her own practice in 1986. She has been a voluntary legal adviser with the Citizens Advice Bureau, NALGO representative and Chairman of Social Security Appeals Tribunal. She holds part-time positions as an immigration adjudicator and ad hoc reporter to the Law Society of Scotland. She is a member of the International Association of Refugee Law Judges and the Society of Writers to the Signet.

Adam Scott TD is a senior research fellow at the University of St Andrews where his interests include regulation of utilities, team working and scenario planning. He has also worked in these fields for various private and public sector organizations. After qualifying at the Bar with an intellectual property background, he worked mainly in the telecommunications industry, being corporate planner in the creation and privatization of British Telecommunications plc, then heading BT's international affairs and latterly its apparatus business. He is a fellow of the Institution of Electrical Engineers.

Vindelyn Smith-Hillman is a senior economics lecturer at University College of Northampton having previously been a lecturer with the Open University and the Jamaica Institute of Management. She was a senior economist at the Bank of Jamaica in Kingston and is a listed assistant examiner with Cambridge and London Examining Boards and an occasional commentator on economic events for BBC Northampton Radio.

Professor Paul Stoneman is Professor of Economics at University of Warwick. He has been an ESRC senior research fellow, a visiting professor at Stanford University and a visiting fellow at Nuffield College, Oxford. He has held many external positions of responsibility and has been on various editorial boards. He is or has been an external examiner for several academic institutions. He has published extensively.

David Lewis Summers is a publishing and media consultant and a JP. He is a non-executive director of the Royal Society of Medicine Press and of Wilmington Group plc. He also serves on The Lord Chancellor's Advisory Sub-Committee for Kent. He used to be Managing Director of Butterworths, the publishers and was formerly a member of the Restrictive Practices Court.

Professor Graham Zellick is Vice-Chancellor of the University of London, a barrister and Master of the Bench of the Middle Temple, and an associate member of chambers in Gray's Inn. He was formerly Principal of Queen Mary and Westfield College and Dean of its Faculty of Laws and Editor of *Public Law and European Human Rights Reports*. He is a companion of the Chartered Management Institute, an academician of the Academy of Social Sciences and an honorary fellow of Gonville and Caius College, Cambridge and the Society for Advanced Legal Studies. He is also a member of the Criminal Injuries Compensation Appeals Panel and an Electoral Commissioner.

Competition Appeal Tribunal

New Court
48 Carey Street
London
WC2A 3BZ

Tel: 0207 271 0395

Fax: 0207 271 0281

email: info@catribunal.co.uk

Web site: www.catribunal.org.uk