ALERT MEMORANDUM

Le Patourel v BT – Key Takeaways from the CAT's Judgment in the First Competition Collective Action to Reach Trial

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Background

On 19 December 2024, the UK Competition Appeal Tribunal (the "**CAT**") handed down its first judgment following trial of an opt-out collective competition claim in *Justin Le Patourel v BT Group Plc and British Telecommunications Plc* ("**BT**") [2024] CAT 76. The CAT found that BT had not abused its dominant position in the relevant market for standalone fixed voice services ("**SFV Services**") and, therefore, dismissed the claim in its entirety. The CAT subsequently refused permission to appeal on 11 February 2025. The CAT's judgment provides important guidance on applying the legal test for establishing excessive pricing and the CAT's approach to quantum of damages.

This case was a collective action against two defendants, BT Group Plc and British Telecommunications Plc. The claim sought over £1 billion in damages in respect of approximately 3.7 million affected customers (the "**Class**"). The Class Representative (the "**CR**") argued that BT abused its dominant position in SFV Services through the imposition of unfair prices. Justin Le Patourel was appointed as CR pursuant to a Collective Proceedings Order on 19 October 2021.

The Class consisted of two distinct groups: (i) Voice Only Customers ("**VOCs**") who buy SFV Services from BT, but do not buy a broadband service from either BT or any other provider; and (ii) Split Purchase Customers ("**SPCs**") who have broadband in addition to SFV Services, but under a separate contract to that in respect of SFV Services. Neither group has "bundles" (*i.e.*, telephone and broadband services provided together by the same supplier under one contract).

This claim arose following Ofcom's (the UK telecoms sector regulator) 2017 market review in respect of SFV Services. Ofcom set out several considerations regarding BT's pricing in the SFV Services market in its provisional findings of February 2017. It subsequently accepted BT's voluntary undertakings in October 2017 which sought to assuage Ofcom's concerns through a £7 per month decrease in landline rental charges. Given this, Ofcom did not reach any final findings regarding BT's prices.

In January 2021, former Ofcom official Justin Le Patourel applied to the CAT to bring an opt-out damages claim under the UK competition collective proceedings regime. The CR's claim alleged that BT had charged excessive and unfair prices for SFV Services, abusing its dominant position in this market. In September 2021, the claim was certified by the CAT as an opt-out proceeding, making it one of the first standalone claims to be certified as a collective proceeding. The CAT heard the substantive eight-week trial from January to March 2024 which was the first such trial under the competition collective action regime.

The Class claimed damages on an aggregated basis, by reference to the difference between prices charged by BT and a "competitive benchmark" for the provision of SFV Services. Damages were claimed for the following periods: (i) for residential VOCs, between 1 October 2015 and 1 April 2018; and (ii) for SPCs and for business VOCs, between 1 October 2015 and the date of the CAT's final determination of their claims or settlement. The relevant period for residential VOCs ended earlier based on BT's voluntary agreement with Ofcom to lower its telephone rental price for VOCs by £7 per month as from 1 April 2018.

The CAT dismissed the claim in full, concluding that, while BT had charged excessive prices relative to a notional competitive benchmark, they nonetheless had a reasonable relation to the economic value of the relevant services and, as such, were not unfair. Therefore, the CAT found that BT was not liable to pay any damages as it had not abused its dominant position in the relevant market.

The CAT's judgment clarifies the application of the legal test for establishing excessive pricing and serves as a useful guide for the UK competition collective actions regime going forward.

Abuse of dominance

The CAT applied the *United Brands* two-limb test for excessive pricing. The two-limb test considers firstly whether the price was excessive compared to the competitive benchmark (determined by reference to all direct and indirect costs and a reasonable margin); and if so, the second limb then requires consideration as to whether the price was unfair.

The CAT undertook a detailed examination of the methodologies and evidence for calculating the competitive benchmark advanced by both parties (as they differed in opinion as to the proper method), ultimately reaching its own conclusion on the question of how to calculate the competitive benchmark after noting issues with both parties' methodologies.

A contributing factor to the competitive benchmark was the reasonable margin that BT could make on SFV Services. BT argued that its reasonable margin should be 20-25% while the CR argued that it should be 10% at most. The CAT held that 13.5% was a reasonable margin for BT to make on the facts. The CAT held that an excessive price of 20% or more over the competitive benchmark was significant and found that BT's annual excess was 25% to 49.9% compared to the competitive benchmark, although this was still lower than the CR's alleged excess of 83%. As such, the CAT held that BT's pricing was excessive.

The CAT then applied the second limb of the *United Brands* test – whether the price was unfair. This turned on the issue of whether BT's price and the economic value of SFV Services bore some reasonable relation to one another. If this question is answered in the negative, it is a strong indicator of unfairness and, therefore, abuse.

The CAT clarified that cost and economic value are distinct concepts, and a price that is greater than the competitive benchmark may not necessarily be unfair where the company increases the economic value of the relevant product or service through the provision of "distinctive value". These questions are ultimately a matter of the CAT's discretion.

The CAT held that BT did offer SFV Services customers distinctive value and, as such, it found that the price charged did bear a reasonable relation to the economic value of the SFV Services even though it was excessive. Specifically, BT was found to provide distinctive value because:

BT provided its SFV Services customers with additional services such as UK-based call centres, Call Protect services barring scam callers, and a fault-fix guarantee; BT's overall brand value; and since customers are free to switch providers, there is no captive market (because customers who elect not to

switch have chosen to stay with BT due to their subjective preference for BT's brand). Therefore, this simplifies confirming that the price bears a reasonable relation to the economic value of the product or service as customers could switch otherwise.

The CAT factored in various others issues in reaching a conclusion on whether the price charged was unfair. The first was that weight attributed to the excess in the unfairness analysis decreased due to the fact that the CAT found excessiveness to be substantially lower than what was alleged by the CR. The CAT also noted that as the fairness assessment turned on a comparison with the price in the context of workable competition as opposed to perfect competition, the CR's argument that there would be no excess profit in workable competition was not realistic.

The CAT also considered whether BT had any exploitative or anti-competitive intent, noting that a finding of abuse does not necessarily follow from a finding of such intent. The CAT held that in this case BT had not purposefully targeted SFV Services customers.

The CAT found that while the price was excessive, it was not unfair, either in itself, or as against any comparators and, therefore, the second limb of the *United Brands* test was not satisfied. The CAT accordingly found that BT had not abused its dominant position in this market.

Economic expert evidence

Overall the CAT noted that it found the economic expert evidence very helpful in resolving the key economic issues, however, it did comment that the experts' methodologies varied substantially in several disputed areas, in particular regarding the method for calculating the competitive benchmark.

The CAT's solution to the methodological variation was to "blend" the different economic models' outcomes, accounting for any potential defects in each expert's reasoning, to produce its own outcome. Additionally, the CAT asked each side to prepare alternative analyses using different numbers to assist its determination of whether BT's pricing was excessive.

Materiality of Ofcom's provisional findings and BT's prior voluntary undertakings

The CAT attached some limited weight to Ofcom's provisional findings and its acceptance of BT's voluntary undertakings in reaching its decision to certify the claim to proceed to trial.

Notably, the CAT asserted, both at certification and again at trial, that its attribution of weight to these factors at the certification stage did not bind it to the Ofcom reports or to attribute any weight to them at trial.

It is a very fact-specific question for the CAT to determine how much weight, if any, it should attach to relevant findings of other tribunals or regulatory bodies. The CAT's judgment sets out several factors it considered in its decision of whether and if so, how it would attribute weight to such relevant findings of other regulatory bodies. These include whether the available evidence at trial is more comprehensive than the evidence underpinning the relevant regulatory finding.

In the present case, the CAT held that Ofcom's provisional findings should not be attributed with material weight and were not evidence supportive of a finding of unfair pricing. They noted that part of the focus of the Ofcom investigation was to safeguard vulnerable consumers as opposed to upholding the competition law principles at the centre of the trial.

Quantum

As the CAT determined the issue of liability in BT's favour, it was not necessary to reach a decision regarding the issues on quantum. Nonetheless, as these issues were argued fully, the CAT expressed its views on them.

The CAT agreed with the CR's argument that the relevant loss per customer was the difference between the price for any given month, less the competitive benchmark. BT argued that this would overcompensate the Class because in the counterfactual where it had charged lawful prices these could still be higher than the competitive benchmark provided there was no significant excess. The CAT would have rejected this argument, as it was open to BT to charge more than the competitive

benchmark without this price being excessive, on the basis of its decision in *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6. The CAT in the present case also identified a further difficulty with BT's argument that it had not adduced any evidence regarding its actions in the counterfactual rendering it impossible for the CAT to make any assumptions about what BT would have done in the counterfactual.

The CR also claimed for inflation in addition to the claim for compound interest. This was based on an argument that in the counterfactual SFV Services customers would have *spent* some of the overcharge (separately from the argument supporting a claim for compound interest that class members would have invested or paid down debt using the overcharge) and that inflation means the cost of purchasing the equivalent goods or services today is greater than during the period in which the infringement would have occurred. As such, the CR argued full compensation was only possible if the level of damages also accounted for inflation. The CAT found that the claim for damages should not be uprated for inflation. This was on the basis that:

1. there is no authority to support this;
2. the general principle that "full compensation" is "not a mandate for uprating damages for inflation" and simply describes the requirement that successful claimants should be put in the same position they would have been in had the tort or breach of contract not occurred; and
3. the CAT's reference to "extra expenditure" in *Merricks v MasterCard* [2021] CAT 28 should not be read to support the CR's contention that damages should be uprated by inflation but, taken in its context, the CAT was merely illustrating that it did not follow that the Class would have saved all of the extra money available to them.

The CAT found that compound interest would not have been payable as the CR's case did not conform to the strict evidential requirements for an award of compound interest set out in *Sempra Metals v IRC* [2008] 1 AC 561, as applied by the CAT in *Merricks v MasterCard* [2021] CAT 28. The CAT found that in collective proceedings, the mere fact that damages are assessed on an aggregate basis does not mean there can be claims for compound interest which are not specifically evidenced in some way. The CR's expert's argument that an award was appropriate using the examples of the interest payable on a savings account or due on credit cards as more reflective of real-world lending and borrowing did not satisfy the evidential requirements of *Sempra Metals* as it was a submission "which could be made in virtually any case". As such, the CAT commented that it would have only made an award of simple interest at 2% above the Bank of England base rate and not compound interest, albeit noting that failure to award compound interest meant that the Class would not be fully compensated as the final award would not account for the substantial presence of compound interest in reality.

Costs and permission to appeal

On 13 February 2025, the CAT published a reasoned order considering BT's application for costs and the CR's application for permission to appeal. BT argued that the CR should be liable for 100% of BT's costs while the CR argued that it should be liable for no more than 50% of BT's costs. In determining the costs, the CAT attached weight to each party's relative success on the issues that occupied a significant proportion of the trial and submissions. The CAT therefore held that BT should recover 85% of its costs to reflect that while BT had ultimately won at trial, it had nonetheless lost on issues such as market definition and partially lost as regards the first limb of the *United Brands* test. BT sought to recover 70% of its costs by way of interim payment, which the CAT agreed was reasonable given this is the percentage the CAT ordered in respect of the CR's costs at certification.

The CAT considered that the CR's grounds of appeal lacked a real prospect of success on the basis that the grounds either merely restated the CR's original case at trial or simply disagreed with the CAT's findings on the evidence in a "complex and highly fact-sensitive" case. The CAT rejected the CR's attempt to characterise these disagreements as "indicating perversity or irrationality" on the CAT's part such that they constituted an appealable decision under s.49(1A) of the Competition Act 1998. As such, none of the grounds of appeal had a real prospect of success and the CAT accordingly declined to grant the CR permission to appeal.

Takeaways

Future litigants should remain cognisant of the following points coming out of the CAT's judgment:

1. *Weighting of prior non-binding regulatory findings*

This judgment highlights that while previous, non-binding regulatory findings may carry weight, in particular at the certification stage, they are not certain to be followed once the evidence is tested at trial. In this case, the CAT did not attribute significant weight to Ofcom's provisional findings, preferring instead to reach its own conclusions after a fresh review of all the evidence available to it. In fact, the CAT had significantly more detailed evidence available to it than Ofcom had at the time of its investigation.

2. *Orthodox application of the excessive pricing framework in collective actions*

The CAT applied the orthodox *United Brands* legal framework for assessing excessive prices for the first time in a large consumer case, noting that the test's application had until now largely been confined to the pharmaceuticals sector. This case, therefore, serves as a useful guide to how the CAT will likely approach the assessment of excessive pricing in future cases.

In doing so, the CAT set a relatively low bar for demonstrating excessive pricing, namely an excess of 20% above the competitive benchmark price, when compared to excesses found in the CMA's pharmaceuticals cases – for example, these ranged from 900% to 2,500% in *Hg Capital LLP v CMA* [2023] CAT 52.

Nonetheless, claimants will continue to need to confront the second limb of the *United Brands* test, namely that excessive prices are also unfair. In this case, the CAT's willingness to consider intangible factors, such as value adds and distinctive brand value, in its assessment of whether the economic value of BT's SFV Services justified the excess above the competitive benchmark price made it easier for BT to justify an excess. Specifically, despite finding that BT had "*significantly and persistently*" exceeded the competitive benchmark price by 25% to 49.9% throughout the infringement period, the CAT held that the excess bore a reasonable relation to the economic value of BT's SFV Services. This was based in part of evidence of customers switching away from BT, implying that those who stayed with BT were not a captive market and instead attributed subjective value to BT's brand.

3. *Implications for the broader collective actions regime*

At first blush, this result may be viewed as a setback for collective actions generally given no damages were ultimately paid out to class members and the funders will bear a significant costs liability. However, the CAT's decision turned on the CR's failure to prove BT's liability; a risk inherent to all standalone actions, whether individual or collective, and indeed litigation in general.

The judgment does show, however, that the CAT will form its own view on questions of liability, even where other tribunals or regulatory bodies have previously opined on the same conduct. Claimants in other standalone or 'hybrid' collective actions with cases underpinned by the prior findings of other tribunals or regulatory bodies will need to establish the merits of their case on liability by reference to the totality of the evidence, rather than being overly dependent on non-binding findings of other tribunals or regulatory bodies made in the context of separate investigations not assessing competition law objectives.

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