BRICK COURT
CHAMBERS

B A R R I S T E R S

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Brick Court Chambers: response to DBIS consultation on draft CAT Rules

Introduction

This response is submitted on behalf of those barristers practising at Brick Court Chambers whose practice brings them before the Competition Appeal Tribunal.

We welcome DBIS's consultation document which has clearly been very well thought through by those who have contributed thus far to Sir John Mummery's review. Consequently, our response can be set out briefly to most of the consultation questions.

Q1: Do you agree with the recommended approach to promote the five principles from the Guide to be incorporated into Rule 3 as "Governing Principles"?

- Yes.

Q2: Do you agree that the Governing Principles will help the CAT both in the task of case management generally and in the application of particular Rules?

- Yes.

Q3: Do you agree with the recommended approach on setting target times and timetables for cases?

- Yes, provided there is sufficient flexibility for a target time and timetable to be revisited in light of intervening events.

Q4: Do you agree with the rationale on not setting a time limit for the delivery of a decision?

- Yes. The CAT has a good track record in delivering decisions in a timely manner.

Q5: Are there any arguments for setting a time limit for a delivery of a decision that you consider outweigh those for not doing so?

- No.

Q6: Do you agree with the recommended new provisions for strike out?

- Yes, subject to one comment in answer to Q7.

Q7: Do you consider the Rules address unmeritorious appeals at an early stage, or are there other changes you consider might help to deal with such matters?

- The proposed rule 11(1)(e) limits the CAT's ability to strike out vexatious proceedings to those where the appellant has acted "habitually and persistently" in a vexatious manner. We doubt those words are necessary in view of the requirement to show the proceedings are "vexatious" and might introduce an unnecessarily high threshold for the exercise of this power.

Q8: Do you agree that Sir John's recommendations regarding the introduction of new evidence on appeal is a sensible and proportionate way of addressing Government's concerns about the withholding of evidence? Please explain your answer.

- We do not agree for the following reasons.
- We think it is unreasonable to expect an applicant to identify all 'new' evidence at the time of lodging the Notice of Application. This would be quite a burden in a limited period. The better course would be to allow (as the rules already do) the respondent regulator to flag up a concern that the application is based in some material respect on documents or other 'evidence' that the regulator has not previously seen, and then to raise an issue for determination at an early CMC. We therefore recommend the deletion of proposed rule 9(4)(h).
- As to proposed rule 21(2), we do not think there should be any presumption or inference, that there is something wrong with putting forward evidence that 'was capable of being made available to the respondent' before the decision was taken. We think it is wrong for appellants to limited to having their appeals determined by reference to the material that the regulator happened to gather in during the administrative procedure (which the CAT has ruled is not compliant with Article 6 ECHR). This runs the risk of rendering the procedure before the CAT non-compliant with Article 6 ECHR.
- We do not believe that deliberate withholding of evidence in an attempt to 'game

the system' is a real risk. In our view, clients wish to put their best case forward at the appropriate time.

- What in our experience happens is that the regulator makes requests for information, carries out inspections and (at least in an infringement case) formulates objections to which a response is provided. The final decision may deviate from that and require new 'evidence' in response. Worse are regulatory inquiries where the companies involved often have only a limited idea of what is in the regulator's mind (which often may change during the procedure) and it is only the final decision which defines the issues. At that point, pre-existing material may seem highly relevant.
- Therefore we recommend that the list be balanced by some consideration going to whether the regulator could have asked for evidence but did not.
- In practice, we think this runs a real risk of generating largely unnecessary satellite litigation, the remedy for which is better and more transparent and fair decision-making by the authorities.

Q9: Do you consider that the proposed changes to the Rules address Government concerns in relation to constraining the volume of new evidence by enhancing the CAT's powers?

- We agree that the new Rule 27 on expert evidence reflects existing CAT practice which it is sensible to reflect in the Rules.

Q10: Do you consider the rule as now drafted will give the CAT more flexibility when considering a variety of factors against permitting an amendment to an appeal? Please explain your answer?

- Yes. The removal of the restrictions in 11(3) is consistent with the CAT's case management powers.

Q11: Do you agree the rule will assist the CAT to minimise satellite litigation?

- Yes, provided the Court of Appeal recognise that the CAT has to engage in robust case management without undue appellate interference.

Q12: Do you agree that a Fast track procedure will benefit SMEs and micro businesses, providing them with access to redress? Please explain your answer.

- We are unsure as to whether there is sufficient evidence of the likely demand for this procedure.
- We see no reason not to experiment with it, provided that it does not prioritise such cases at the expense of other litigants' timely access to the CAT.

Q13: Do you agree with the new rules governing the procedure of settlement offers, particularly in relation to multi-defendant cases?

- Yes.

Q14: Do you have any views on the recommended provisions for disclosure in private actions, in particular on disclosure of documents before proceedings? Please explain youranswer.

- It makes sense for the CAT to have equivalent powers in this regard to those available under the CPR.

Q15: Do you have any comments on the proposed approach by allowing the CAT to make an order to transfer the whole or part of the proceedings from the CAT to the appropriate courts?

- We agree with it.

Q16: Do you have any views on the proposed changes in respect of additional parties and additional claims?

- No.

Q17: Do you have any views on the way the proposed rule will implement the power to grant injunctions?

- No.

Q18: Should Government introduce a presumption into the rules that organisations that offer legal services, special purpose vehicles and third party funders should not be able to bring cases?

- This is a policy matter about which we as practising advocates do not express a view.

Q19: What are your views on the proposed certification criteria, in particular the tests on: assessing the strength of the claim and the availability of alternative dispute resolution?

- See answer to Q18.

Q20: Should formal settlement offers be excluded in collective actions?

- See answer to Q18.

Q21: If formal settlement offers are not excluded from collective actions, should there be special provision around the disclosure of information relating to the formal settlement offer, and how would they work?

- See answer to Q18.

Q22: Do you have any other comments on the proposed Rules; in particular do you consider there are other changes that could be made to achieve the objectives set out in the Terms of Reference?

- No.

27th March 2015