

Hot Tubs and Expert Witnesses:

Latest developments in the practice of the Competition Appeals Tribunal



Gordon Moir

gordon.moir@shepwedd.com

Annemaree McDonough

annemaree.mcdonough@shepwedd.com

Expert witnesses are a key part of almost every case before the Competition Appeals Tribunal (the CAT) and a number of recent cases illustrate the CAT's developing practice in this area including the use by the CAT of hot tubs of expert witnesses. This article explores the CAT's developing practice with regard to expert witnesses and what it means for courts and participants.

Expert witnesses are a key part of almost every case before the CAT. Indeed when one looks at the timetables of many cases before the CAT it is the expert evidence of economists and less so other experts, that tends to take up a majority of hearing time. A number of recent cases in the CAT show that the CAT is in the process of developing its practise to try and deal with the profusion of expert witnesses and the time pressures that accompany this.

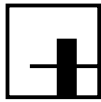
The use by the CAT of hot tubs for expert witnesses is a new development. A hot tub refers to the mechanism by which expert witness evidence is taken concurrently with the relevant tribunal taking the lead in questioning the experts, usually with counsel then having the opportunity to ask supplementary questions of the expert called by the other side. Hot tubs seek to identify areas where experts are in agreement and to flag up those where there is disagreement.

A recent report by the Civil Justice Council (CJC) identifies that, while hot tubbing has been used in various courts since the Jackson reforms, it has not necessarily revolutionised litigation practice, but that where it has been used, judges have generally found it useful. The report also reveals that there are a number of variations

on the way that concurrent expert evidence is taken. The CJC's report recommends not only amendment to the civil practice guidance on concurrent expert evidence but also a series of educational measures for courts, judges, barristers and witnesses.

The CAT has recently utilised a hot tub for expert witnesses in *British Telecommunications Plc v Ofcom* in respect of BT's appeal against Ofcom's decision to lift the wholesale offer requirement for Sky Sports 1 and 2 from BskyB. The CAT's chairman proposed a hot tub on two particular issues and this was agreed to by the parties. The relevant parts of the transcript are redacted so we await the judgement to understand how effective the hot tub was in cutting through the issues. Similarly in *Socrates Training Limited v The Law Society of England and Wales*, hot tubbing was proposed by the CAT and was utilised.

Perhaps more interestingly, in its recent judgment in *British Telecommunications Plc v Ofcom* and others the CAT in a postscript to its judgment made a plea for litigants to seriously consider the way in which expert evidence is utilised in a case. The Tribunal stated at the end of the case that "a number of disputes arose over inconsequential matters but which nevertheless



generated a considerable volume of evidence (both written and oral)."¹ The Tribunal went on to say that "on the question of the dispute over inconsequential matters, we consider that the appeal could have been considerably more focused had the parties and the experts sought to identify the **material** disputes and, for non-material disputes simply agreed to disagree." The Tribunal then referenced the discussion on expert evidence in *R (British American Tobacco and others) v Secretary of State for Health* [2016]EWHC 1169 at paragraphs 635-645.

In that judicial review, Justice Green indicated that "it was the primary responsibility of the parties to reduce to the **absolute minimum** the number and scope of evidential disputes".² He went on to lay out a series of procedural steps that he thought would have been necessary in the case at hand including early joint interaction of experts, creation of a list of areas of agreement and disagreement and a classification of areas of disagreement as material or immaterial as well as a summary of what the court needed to decide in respect of the expert evidence to resolve the case.

Whilst the CAT acknowledged that not all of the measures identified by Justice Green would be appropriate to telecoms cases in the Tribunal, they clearly signalled that parties need to more effectively utilise their use of expert witnesses in future cases.

The CAT said it was the parties responsibility to utilise all sensible measures to narrow the core dispute between the parties as regards expert evidence. "The court indicated that whilst this would require more time to be spent pre-trial, this preparatory work would save time at trial and should also reduce the length of time the CAT spent in preparing its judgment. The CAT also indicated

that putting forward a more focused case was also likely to make a party's case more compelling and reduce their costs.

What is clear from this judgment is that the CAT expects real action from parties to do away with the multiple rounds of expert reports which have been seen in some CAT cases. It is also likely that the CAT will suggest hot tubbing in more cases as a further way of breaking through the logjam of expert evidence.

These developments in the CAT's thinking on expert witnesses therefore need to be factored into parties' litigation strategies in the CAT. The developments will no doubt require greater preparation by both advocates and, clients in choosing and working with their expert witness. Questions to ask yourself include:

- Will your expert be able to hold their own in a hot tub with the other sides expert?
- Is your expert prepared to meet with the other side and identify areas of agreement and disagreement and can they identify what truly are the material areas of disagreement to the case in hand?
- What are the key expert issues for your case and how material they are to the outcome?

These are just a few of the issues that need to be factored into your thinking, and will in our view require greater time in pre-trial preparation.

If you would like to discuss any of these issues and how you can deal with these developments in the CAT please do not hesitate to contact [Gordon Moir](#) or [Annemaree McDonough](#).

¹British Telecommunications Plc v Office of Communications & others [2016] CAT 22, at paragraph 651

²R (British American Tobacco and others) v Secretary of State for Health [2016]EWHC 1169 at para 634