10th Sir Jeremy Lever Lecture

Competition Law in the Supreme Court: The First 15 Years

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1. My choice of topic this evening – competition law in the UK Supreme Court - may strike some of you as rather parochial. Luxembourg is traditionally where the exciting action happens in this area of law. And after all, who better than Sir Jeremy, in whose honour I am speaking, to personify the European heritage of our competition rules. Let me explain my thinking. First, the Supreme Court is marking its 15th anniversary this year. Although still an infant by comparison to its predecessor, the Court has notched up some 1100 cases and is now firmly established as part of the UK's legal and constitutional landscape. It seems a suitable moment to look back and consider its contribution to competition law.[1]
2. Second, Sir Jeremy was a consummate apex court litigator. In addition to his many outings in the European courts, he was a regular before the House of Lords. By my count, he appeared before their Lordships some five times. I had the privilege of acting as his junior in one of those cases; as I recall, it was a horrendously complex pharmaceuticals dispute.[2] Third, competition law was perhaps the field where domestic and EU law were most intimately intertwined; the UK's withdrawal from the EU therefore may, or may not, herald a fundamental reorientation. There are few signs of material divergence so far and plenty of good reasons for close coordination. But there is no ignoring the significance of the fact that we now operate beyond the umbrella of the EU competition regime. The UK's highest court may well be called upon to answer questions that previously would have been settled in Luxembourg. I hope it will be instructive, therefore, to consider how the Court has dealt with similar issues in the past.

Common Law

3. There have so far been about ten Supreme Court cases which squarely concern competition law. Whether you think that is a little or a lot rather depends on your perspective. From a historical standpoint, it is surely a lot. The common law was traditionally reluctant to interfere with businesses' commercial behaviour. And it must

[1] I am very grateful to my judicial assistant Sam Dayan for his invaluable help in preparing this lecture.
[2] *R. v Licensing Authority Ex p. Smith Kline & French Laboratories Ltd (No.1)* [1990] 1 A.C. 64.

be said that our predecessor institution the House of Lords did not cover itself in glory when it came to protecting the consumer against the inherent tendency of businesses to form cartels. This was not through ignorance of that inherent tendency. After all, Adam Smith's famous quote that "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices" dates back to 1776.

4. It is true that the relevant passages in the first edition of *The Wealth of Nations* went on to say that it was impossible to prevent such meetings by any law which was consistent with liberty and justice. Adam Smith's point was rather that the law should not facilitate such meetings by passing laws that require members of the same trade to get together to respond to some form of regulation imposed on them by the Government. That is an important warning just as relevant today with increasing calls for regulation of the digital sector and to encourage manufacturers and retailers to adopt more environmentally friendly working practices. Be that as it may, a Victorian commitment to laissez-faire economics ensured that competition law remained largely undeveloped until the piecemeal emergence of the post-war statutory framework.[3]

5. If I may be permitted a brief historical detour, there are four cases from the late 19th and early 20th century which together neatly illustrate the judicial reticence of the period. First and perhaps most infamously is the House of Lords decision in *Mogul Steamship v McGregor*.[4] The defendants in that case were steamship owners who had formed themselves into what they called a conference, but what the claimant termed a conspiracy. Its purpose was to control the lucrative China tea trade. Today it would straightforwardly be considered a cartel – it regulated prices, allocated markets, and boycotted agents who transacted with non-members. When the claimant tried to compete, it was quickly driven out of the market by the defendants' devastating predatory pricing.

6. The Appellate Committee of the House of Lords was invited to label the defendants' conduct as a tortious conspiracy to injure. It declined in forthright terms. Their Lordships decried the suggestion that in a free country the courts could tell traders how to carry on their business. The injury the claimant suffered was simply the reverse of the conference members' growing their trade, and that was something they were undoubtedly entitled to do. As Atiyah later noted, the judges all seemed to assume that the English experience of free trade proved that cartels are inherently unstable and therefore don't threaten the public interest.[5] One wonders what they would made of the fact that the organisation concerned, the Far Eastern Freight Conference, continued to operate right up until October 2008, when it was dissolved following the EU's repeal of the block exemption for liner shipping conferences.[6]

[3] Andrew Scott, 'The Evolution of Competition Law in the United Kingdom' LSE Law, Society and Economy Working Papers 9/2009.
[4] *Mogul Steamship Co. Ltd v McGregor Gow & Co.* [1892] AC 2.
[5] P. S. Atiyah, The Legacy of Holmes through English Eyes, 63 B.U. L. REV. 341 (1983).
[6] Regulation No. 4056/86.

7. Sitting as members of the Judicial Committee of the Privy Council, their Lordships exported their conservative economic instincts across the globe. In a series of remarkable decisions, the Board construed competition legislation in New Zealand, Australia and Canada in a way which effectively emasculated it, often against the views of the local courts.

8. The New Zealand example is particularly stark. The New Zealand Parliament passed legislation in 1910 criminalising any conspiracy to monopolise the demand or supply of goods which was contrary to the public interest. The government brought a prosecution against a group of flour millers who had formed a joint distribution company to control prices and distribution. The millers conceded this amounted to monopolisation. So the only question was whether it was contrary to the public interest. The majority in the New Zealand Court of Appeal thought that it clearly was; allowing millers to control flour prices and production was inherently prejudicial to the public. In a truly Delphic decision, the Privy Council in 1927 allowed the appeal.[7] Even by the succinct standards of the Privy Council in that era, the judgment is almost entirely lacking in reasoning. A case note in the Cambridge Law Journal in a 1928 issue remarked that "*it is noteworthy that his Lordship's statement of the facts occupies the major part of the report, while his ruling is only a few lines*".[8] That might be regarded as sharp criticism in those days where academics were a good deal more deferential to the senior courts than they are today.

9. The decision is best remembered for Viscount Finlay's dictum that: "*It is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy*". That apparent commitment to neutrality was of course not neutral at all since it advantaged incumbent businesses, as the outcome of the case shows. The Crown could not hope to satisfy the burden of proof without a theory of economic harm. In the words of one commentator, the effective practical life of the Act "was brought to an inglorious end" by the decision.[9]

10. The Privy Council gave similarly restrictive interpretations to Australian legislation in *Adelaide Steamship*.[10] Inspired by the United States' Sherman Act, the Australian legislature had enacted a law in 1906 targeting anti-competitive agreements. A test case arose when local coal companies formed an association to raise and maintain the price of coal. This was intended to bring an end to years of "cut-throat competition" which had brought some of the collieries to the brink of collapse. The association entered into an agreement with shipping companies to further control prices.

11. Interpreting the statute in light of *Mogul Steamship*, the Board decided that the Australian legislature had not intended to prohibit all contracts in restraint of trade. There had to be some accompanying "sinister intention" to harm the public. The

[7] *Crown Milling Company Limited And Others v The King* [1927] AC 394.
[8] [1928] CLJ 275. Rex Adhar, 'The Pre-Modern Period of Competition Law', The Evolution of Competition Law in New Zealand (Oxford, 2020).
[9] Consumer Law in New Zealand (Palmerston North, Dunmore Press 1982) 90.
[10] *Attorney General of the Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781.

public had no interest in coal companies carrying on their business at a loss, with the accompanying risk of insolvencies and redundancies. The court therefore reached the surprising conclusion that a "mere intention to raise prices" did not prove an intention to harm society at large.

12. The Canadian appeal *United Shoe Machinery Company*[11] decided in 1909 evidenced a similar attitude. A monopolist held a crucial patented technology for the manufacture of shoes. It would only lease its machines under the condition that they could not be used in conjunction with machinery made by anyone else. The tying clause was found to be void as a restraint of trade by a special jury of local Quebec businessmen. That decision was upheld by Canada's highest court only be to be overturned by the Privy Council. The Board was unimpressed by the argument that the Shoe Company enjoyed a practical monopoly of the manufacture of shoemaking machinery. Provided that they did not act unlawfully, traders were entitled to conduct their business howsoever they saw fit. If there really was an oppressive monopoly, that was an issue that could, the Board said, be "safely left to the ingenuity and enterprise of the Canadian people"; the answer lay in legislation or improved competition but not in litigation.

13. That statement was put to the test a few years later when the Canadian Parliament enacted a series of legislative measures intended to combat cartels and profiteering. A statutory commerce board was established. This board was charged with restraining combinations of producers operating contrary to the public interest and preventing the hoarding of key goods. The Privy Council declared the statutes to be ultra vires the federal Parliament.[12] Although strictly the case turned on a point of constitutional law, it is possible to detect more than a degree of scepticism in the judgment about the underlying merits of the legislation.

14. Those few cases offer a snapshot of prevailing judicial attitudes in the House of Lords at the turn of the 20th century. Two main points stand out. First, cartels were generally viewed benignly – they had a positive and stabilising role to play in the economy. Second, the court was reluctant to engage with contemporaneous developments in economic thinking. One would be hard pressed to tell from the judgments that there was an ongoing revolution in how economists thought about competition.

15. It is interesting to note the divergent paths that the UK and the United States took from this point. At the same time that *Mogul Steamship* was slowly winding its way through the English courts, the US legislature was busy passing the Sherman Act. Anchored by the Sherman and Clayton Acts, American federal antitrust law gradually developed over the 20th century in common law style with the steady accretion of judicial precedents.[13] Of course rival theoretical doctrines waxed and waned, but a

[11] *United Shoe Machinery Co. of Canada v. Brunet* [1909] A.C. 330.

[12] *Board of Commerce* [1922] 1 AC 191. The Privy Council upheld the validity of the successor legislation: *Proprietary Articles Trade Association v Attorney General for Canada* [1931] AC 310.

[13] Alden F. Abbott, 'A Brief Overview of American Antitrust Law' The Competition Law & Policy Guest Lecture Programme'– Paper (L) 01/05.

cohesive body of law built up with the US Supreme Court in the driving seat. By contrast, in the UK there was little judicial innovation and competition law only really developed once the statutory framework was put in place. Even then, the initial array of domestic law instruments was so mechanical and legalistic that there was little meaningful appellate litigation.

Restraint of Trade

16. What we now call "vertical restraints" fared a little better at common law. The common law doctrine of restraint of trade pitted two cherished common law values against each other. On the one hand, the principle of freedom of contract. On the other, the freedom for all of us to work – both in the interests of self-sufficiency and for our common prosperity.[14] The common law initially adopted the position that any restriction on the right of an ex-employee or of the seller of a business to work or trade elsewhere was void.[15] That approach was tempered over the 17th, 18th and 19th centuries with the moderating attitude culminating in the *Nordenfelt*[16] decision in 1894. Restrictions would now be upheld where they were found to be reasonable by reference to the interests of the parties and the public. Observing these developments, the English legal scholar Sir Frederick Pollock memorably observed that the history of the doctrine is a "*singular example of the common law, without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in deference to the changed considerations of society and the requirements of modern commerce*".[17]

17. The restraint of trade doctrine continues to evolve 100 years later. It had not troubled the highest court for 45 years only for three cases to then arise in short succession before the Supreme Court starting in 2019. I'll just mention the first, *Tillman v Egon Zehnder* concerned non-compete undertakings given by a senior recruitment executive to her former employer.[18] Importantly, this included a 12-month undertaking not to hold a shareholding in any company that competed with the employer. Lord Wilson undertook a magisterial survey of the authorities stretching across half a millennium. He concluded that the court should adopt a "*broad, practical, rule of reason approach*" when applying the doctrine. The covenant fell comfortably within the doctrine's scope and was clearly unreasonable.

18. The Court ultimately accepted however that the offending part of the covenant could be severed. It endorsed the so-called "blue pencil" test: can the unenforceable provision be removed without adding to or modifying the remaining wording? If so, then provided the remaining terms are supported by consideration and the removal

[14] *Tillman v Egon Zehnder Ltd* [2019] UKSC 32 at [22].
[15] *Dyer's case*, 2 Hen 5, f 5, pl 26, 1414.
[16] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.
[17] F Pollock, *Principles of Contract* (Stevens & Sons Ltd, 10th ed, 1936) 391-2.
[18] *Tillman v Egon Zehnder Ltd* [2019] UKSC 32. See also *Peninsula Securities Ltd v Dunnes Stores Ltd (Bangor)* [2020] UKSC 36 and *Harcus Sinclair LLP and another v Your Lawyers Ltd* [2021] UKSC 32.

does not generate any major change in the overall effect of the employment restraints, severance is permissible.

19. The case is a powerful illustration of the contribution an apex court can make to legal development. Restraint of trade cases rarely make it to the appellate level, as they tend to be highly fact-specific and typically concern time-limited obligations which expire before the case can reach the upper tiers of the judiciary.[19] The Supreme Court seized the opportunity in *Tillman* to examine thoroughly and rationalise the large body of lower court authority that had built up. The decision provides much-needed guidance for trial judges and, one hopes helps to ensure consistency in the application of the doctrine.

20. As a judge in the Irish High Court[20] pointed out, the Supreme Court had the benefit of the carefully reasoned judgments in the courts' below, two days' of argument and a few months to write the judgment; "*such luxury is not available to trial court judges who must decide in short order whether a former employee is entitled to take up a job which he might otherwise lose, or an employer is to be exposed to a risk of irremediable damage if the former employee is allowed to go to work for a competitor.*"

Expertise and deference

21. Jumping forward to the present day, the competition landscape has of course thankfully been radically transformed. It is now universally accepted that some form of state regulation is required, and an intricate tapestry of national and supra-national rules has emerged. It is with that legislative regime that almost all the Supreme Court decisions over the 15 years of its existence are concerned.

22. A defining feature of the modern UK landscape is the body which is now known as the Competition and Markets Authority (CMA) but which many of those present will have known by other names from when we started out as very junior barristers in the 1980s. Clearly it is an expert regulator with highly specialised functions. One of the perennial issues the courts, and particularly the CAT, grapple with is to gauge the appropriate level of deference that should be shown to the CMA's decisions. As with any administrative decision-maker, the correct intensity of review depends on the context. Where, for example, the CMA's jurisdiction depends on the interpretation of the statutory language, that is a question of law on which the CMA's view is not entitled to any particular deference. However, provided the CMA has applied the right test to the facts of a case, its expert judgment will generally be entitled to considerable respect. But the dividing line between those two approaches is difficult to draw.

23. This is illustrated by the *Eurotunnel* case in 2015.[21] That case turned on whether there was a "relevant merger situation" within the meaning of section 22 of the

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[19] Desmond Ryan, 'Restating Restraint of Trade: The Implications of the Supreme Court's Judgment in *Tillman v Egon Zehnder Ltd*', Industrial Law Journal, Volume 49, Issue 4, December 2020, 595–608.
[20] *Ryanair DAC v Bellew* [2019] IEHC 907 [146].
[21] *Groupe Eurotunnel SA v Competition Commission* [2015] UKSC 75.

Enterprise Act 2002. The crucial question was what exactly Groupe Eurotunnel SE, the operator of the Channel Tunnel, had acquired when it bought almost all the assets of SeaFrance SA - that was the liquidated operator of a ferry service between Dover and Calais. Had it acquired an enterprise or had it acquired merely the bare assets of a defunct enterprise? The CMA's merger jurisdiction was only engaged if it had acquired an "enterprise" within the meaning of the Act. Notwithstanding a seven-month hiatus in operations, the CMA concluded that there had been sufficient economic continuity. The liquidator had continuously maintained the company's assets so that operations could quickly be restarted upon acquisition. There remained the "embers of an enterprise" capable of transfer. The CMA therefore held that it did have jurisdiction. That decision was upheld on appeal to the CAT in *Eurotunnel II*.[22]

24. The Court of Appeal allowed an appeal by Eurotunnel and decided that the CMA's conclusion was irrational on the facts. It grounded its analysis on the fact that SeaFrance's employees had all been dismissed as part of the liquidation. Accordingly, it held that all that had been acquired by Eurotunnel were the vessels – there was no enterprise left to acquire and hence no merger situation.

25. The Supreme Court disagreed with the Court of Appeal, overturned its decision and reinstated the CAT's decision. Under French law, there were significant financial incentives for an acquirer of the vessels to re-employ the former workers. The dismissals may have severed the legal connection between company and employees, but the *economic* connection persisted. The Court held that the CMA was entitled to regard that connection as a weighty indicator of the economic continuity of the business. The Supreme Court held that the Authority's economic evaluation could not be discarded by a court unless it was irrational. There was no basis on which the Court of Appeal could properly overturn the CMA's expert economic judgment. The *Eurotunnel* case is therefore striking for the Supreme Court's forceful endorsement of the CMA's focus on the economic realities of the relevant transactions and not just their legal form.

26. Just as questions arise as to the appropriate deference to show the CMA, similar questions arise in appellate courts as to the appropriate intensity of review when considering decisions of the CAT. The CAT is a specialist tribunal which forms part of the court system. Its ever-expanding portfolio of work reflects the reality that modern competition law places a premium on a solid understanding of economic evidence and argument.

27. The question of relative institutional expertise arose in a particularly pronounced way in *Telefonica*.[23] That case concerned Ofcom's resolution of a dispute concerning charges payable by network mobile operators to BT. Even by the already excruciating standards of telecommunication competition cases, the facts are interminable. So I will spare you the details, but what is interesting for our purposes is that the Court of Appeal considered Ofcom's determination to involve the exercise of its regulatory

[22] *Eurotunnel II* [2015] CAT 1.
[23] *Telefonica O2 UK Ltd v British Telecommunications Plc* [2014] UKSC 42.

rather than its adjudicatory functions. Accordingly, its decision as to how to balance competing economic factors was entitled to respect. The Supreme Court determined that Ofcom had in fact performed a *mixture* of regulatory and adjudicatory functions. That mattered when it came to deciding whether the CAT was right to have overturned Ofcom's decision. Ofcom's reasoning assumed that that the burden was on BT to show why its proposed new charges would result in consumer benefits.

28. The Supreme Court held that the Court of Appeal had erred by applying a test to the effect that, unless Ofcom was wrong in principle, the CAT should not have interfered with its decision. The Supreme Court noted that the CAT heard the appeal by way of rehearing on the merits and was entitled to reach its own view about the anti-competitive effects of restricting prices changes. The CAT's decision involved an "economic judgment by an expert tribunal" which had considered substantial amounts of evidence. Appellate courts above the CAT could only interfere with its decision on a point of law.

29. Having sat as a Chair in the CAT for a number of years, I am acutely aware of the technicality and complexity of its caseload. It is not simply that the substantive content of the cases is challenging but also their procedural management. Anyone who glances at the procedural history section in a CAT decision should realise the enormity of its endeavour.

30. One of the other distinguishing features of the CAT is its costs regime. By contrast to the default position under the Civil Procedure Rules that the loser pays the winner's costs, the CAT's rules confer a discretion on a tribunal to make any order that it thinks fit.[24] This ensures that the relevant panel of the CAT can calibrate a costs order to do justice in the particular proceedings before it. That is particularly important given the range of appeals the CAT hears, stemming from a variety of different statutory regimes.

31. In *Flynn Pharma*[25] in 2022 the question arose as to what special considerations apply when a public authority reasonably brings proceedings in the public interest but loses the case. The CMA contended that the default position should be that it should not be ordered to pay costs on appeals which it lost. It relied on a then recent Court of Appeal decision that a different regulator, Ofcom, should not be ordered to pay costs when acting exclusively in its regulatory capacity. The CAT largely rejected that contention and held that the CMA should pay a proportion of the successful appellants' £8 million of costs. It considered that the CMA was in a materially different position from Ofcom. In particular, the CMA has considerable discretion as to how to carry out its statutory duties and can choose which enforcement actions to bring. On appeal by the CMA, the Court of Appeal disagreed with the CAT and set aside the costs order. The Court of Appeal considered that, when a regulator exercises

[24] The Competition Appeal Tribunal Rules, r.104(2).
[25] *Competition and Markets Authority v Flynn Pharma Ltd and another* [2022] UKSC 14.

its functions in the public interest, the default position is that no costs should be made against it.

32. I wrote the Supreme Court's judgment on appeal from the Court of Appeal. We allowed the appeal. We held that there was no general principle protecting public bodies from an adverse costs order in that way. Rather, what is required is that the court or tribunal considering costs should consider whether an adverse costs order would have a "chilling effect" on a public body's functions; that is, whether the public body might be discouraged in the future from standing by its decisions if costs orders were routinely made against it on those occasions where it turns out that the regulator's decision was flawed in some way.

33. Where we differed from the Court of Appeal was that we thought it was the CAT which was best placed to take a view as to the plausibility of any alleged chilling effect. The tribunal had carefully weighed up the relevant factors before making the costs order. We also took comfort from the terms of the CMA's funding arrangement with HM Treasury. That permits the CMA to offset litigation costs against penalty income. As its income from fines over the year dwarfs any litigation costs it may be ordered to pay on any cases it loses, it was difficult to see how satisfying a costs order would imperil or dampen its enthusiasm for its enforcement activities.

Consistency and the CMA

34. Enforcement of competition rules is also fertile ground for public law challenges. As a public body with wide-ranging powers and the ability to impose significant fines, the CMA's conduct is closely scrutinised by those it investigates. Cases often involve consideration of principles extending far beyond this area of law. As might be expected, one of the most significant in recent years concerned the principle of equal treatment.

35. *Gallagher v CMA* in 2018 was perhaps the last gasp of the ill-fated (from the CMA's point of view) tobacco alleged price-fixing case. It raised the question of how far the enforcement authority's commitment to equal treatment extends.[26] The CMA's predecessor, the OFT, had entered into early resolution agreements (ERAs) with several parties against whom it had made an infraction decision alleging price-fixing in the tobacco market. During the ERA negotiations, one of the parties, TMR, asked the OFT what would happen if the infringement decision was later successfully appealed by one of the other parties to the investigation who had not entered into an ERA and if that appeal resulted in the whole decision being set aside by the CAT. They were assured by the OFT that if the principles established in any appeal undermined the decision against TMR, the OFT would apply the same principles to it and would withdraw its decision against them. It was clear that this assurance was given by mistake.

[26] *R (Gallaher Group Ltd and other) v Competition and Markets Authority* [2018] UKSC 25.

36. There duly was a challenge by the other tobacco companies who did not enter into ERAs and I presided over that in the CAT for many weeks. As many of you will recall, the OFT's case crashed and burned by Day 26 of the hearing and we set aside the decision. The OFT was ordered to repay the penalty it had imposed on the tobacco companies which had appealed the infringement decision. It also refunded TMR's fine in light of the particular assurances provided to that company. Predictably, the other parties who had entered into ERAs, who had not appealed but who had not received a similar assurance clamoured to also have their penalties repaid. Did the principle of equal treatment apply to require that those parties be treated in the same way as the successful appellants and TMR?

37. The Supreme Court was quick to find that the OFT did owe a general duty to offer equal treatment to those subject to the investigation. To treat them otherwise than equally would be irrational. However, the real and more difficult question was how that duty translated into concrete rights and remedies in public law. The Court found that "simple unfairness" did not constitute a free-standing ground of challenge. The case therefore fell to be determined by reference to well-established principles of irrationality and legitimate expectation. The OFT had undoubtedly been wrong to give the assurance – it conflicted with the purpose of ERAs, which is to provide legal finality, and was inconsistent with the OFT's policy of non-discrimination. However, the mistake having been made, that did not mean the OFT was obliged to replicate the mistake in favour of other respondents and repay all parties to ERAs. Two wrongs didn't make a right.

Private Actions

38. One of the most striking developments in European competition law over the past 20 years has been the growth in private actions for damages. The current surge in private claims, particularly in the UK, is the product of a long history of legislative and judicial encouragement. It may help to briefly set the scene to the Supreme Court cases we will come onto. The Court of Justice in Luxembourg had made clear by the early 1970s that Articles 85 and 86 of the EC Treaty, the precursors to Articles 101 and 102 TFEU, had direct effect and could be relied on by private individuals in their domestic courts.[27] That early judicial marker notwithstanding, activity in the domestic sphere remained muted for decades. The difficulties of running a private competition case are well-known: the need for complex documentary and economic evidence, the years of preparation and exorbitant costs.

39. In the UK, Lord Diplock was the one of the first to recognise the role of private actions in the landmark case of *Garden Cottage Foods v Milk Marketing Board*.[28] The issue arose in the context of an application for an interlocutory injunction to restrain an alleged breach of Article 86. Their Lordships were all agreed that a private individual could sue to prevent an infraction of Article 86. But the real question was what remedies were they entitled to? If damages were on offer, then an injunction

[27] Case 127/73 *BRT v SABAM* [1974] ECR 51.
[28] *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130.

would be inappropriate. Lord Wilberforce in the minority trenchantly applied domestic principles of statutory interpretation to Article 86 and concluded its wording did not require that the Member States confer a right to a remedy in damages. Lord Diplock and the majority disagreed. They considered it to be a deeply regressive step to invent a new cause of action whose only remedy was an injunction to prevent future loss without compensation for past loss. That would herald a return to the dark days before the fusion of equity and common law in 1875. Far better to classify it as equivalent to a breach of statutory duty.

40. It was not until the latter half of the 1990s that the European Commission made a concerted effort to encourage private actions. Building off the expansive 2001 ECJ ruling in *Courage v Crehan*, the 2003 decentralisation regulation[29] removed the Commission's exclusive privilege to apply the Article 81(3) exemption. It also abandoned the system of notification and authorisation of restrictive agreements. Add to this the later 2014 Damages Directive and private actions have become a plausible mechanism for redress.[30]

41. Private actions raise a whole host of difficult legal questions that are still being worked through. *Sainsbury's v Mastercard* is of course the magnum opus - heard before the Supreme Court over a very unusual four full days. The appeal concerned follow-on actions brought by various retailers against Mastercard and Visa in the wake of the Commission's decision that their fee arrangements breached Article 101. The most eagerly awaited aspect of the decision was its consideration of the issue of whether the retailers had passed on to their own customers the unlawful fees that they had had to pay to the credit card network owners. Pass-on is notoriously difficult to evidence and often requires the use of sophisticated economic models. The issue was particularly acute in *Mastercard* given the time periods and amounts involved. The Supreme Court found that the burden of proof was on Visa and Mastercard to plead and prove that the retailers had mitigated their loss through pass-on. It would impose an "insurmountable burden" if the claimants had to show the exact loss of profit they had suffered.

42. The Court though recognised that the compensatory principle demanded neither under- nor over-compensation. When assessing pass-on, there is no greater requirement for precision where the defendant bears the burden of proof than the claimant. The common-law is used to taking a pragmatic approach to issues of proof. In Lord Shaw's memorable phrase, fair compensation can be achieved by "the exercise of a sound imagination and the practice of the broad axe".[31] Given the sheer complexity of the facts, calculation of pass-on would inevitably be a matter of estimation.

[29] Regulation 1/2003 OJ L 1, 4 January 2023.
[30] Directive 2014/104/EU OJ L 349, 5. December 2014.
[31] *Watson, Laidlaw, & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18.

Class Actions

43. A special subset of private enforcement is collective proceedings. Sometimes breaches of competition law will involve large numbers of people each losing a small amount. The disparity between the costs of bringing a claim and the amount recoverable means that, unless their claims can be aggregated, private enforcement is illusory. In the UK, the 2002 Enterprise Act was intended to address this by permitting designated bodies to bring claims on behalf groups of customers. The legislation was a failure. The sole representative action was brought by the consumer organisation Which? against retailer JJB Sports for fixing the prices of replica football shirts; despite very wide media coverage, only a desultory 130 claimants signed-up to the action, each of whom was awarded £20. Albeit this low number partly reflected that JBB had gone on a charm offensive and, according to an item on the BBC News at the time, had offered a free England away shirt and a mug to anyone who could produce a relevant shirt and agree not to join the action.[32]

44. In response, the Government made sweeping changes in the Consumer Rights Act 2015. For the first time, opt-out claims could be brought directly by a victim of a competition law breach. The changes were much debated, with many people warning of the dangers of importing the excesses of the 'US class action system'. The final legislation was intended to reflect a balance between ensuring effective redress and avoiding meritless litigation which benefits no-one but lawyers – it being assumed that the latter is a bad thing. The gateway to bringing collective proceedings is a collective proceedings order (CPO). CPOs constitute one of the key safeguards provided for in the legislation; they ensure close judicial oversight of collective proceedings and prevent their misuse.

45. The Supreme Court considered the new regime for the first time in its blockbuster 2020 *Merricks* decision.[33] Mr Walter Merricks CBE, a former financial ombudsman, brought a claim against Mastercard on behalf of 46.2 million claimants for some £14 billion. This is a rather extreme example of the possible gulf between individual and class recovery - the expected recovery per individual was only £300, so absent collective proceedings, private enforcement was impossible. The CAT refused Mr Merricks a CPO because, broadly, the claims were not suitable for an aggregate award of damages and the proposed distribution of any award did not adhere to compensatory principles.

46. The majority judgment in the Supreme Court offered a comprehensive analysis of the regime. Collective proceedings were described as a special form of civil procedure designed to provide access to justice where ordinary procedural rules would not adequately vindicate private rights. This starting point underlaid the Court's two key holdings. First, the requirement in the legislation that claims be "suitable" for collective proceedings is a relative concept; the question can only be answered by

[32] BBC News, 'JBB offers free football shirts' (February 2007) http://news.bbc.co.uk/1/hi/programmes/working_lunch/6356451.stm.
[33] *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51.

comparison to bringing individual proceedings. The challenges the CAT had identified would affect individual litigants just as much, only with the added burden of navigating them on their own.

47. Second, claims should not be stopped merely because quantification of loss will be challenging. The common law has never let forensic difficulties of quantification negate an individual's right to damages. Judges are used to dealing with incomplete evidence. Again, the principle of the "broad axe" is relevant. An interesting aspect of the case was that the novelty of the legislation meant there was little relevant domestic case-law. All of the courts and tribunals found the considerable Canadian jurisprudence relating to a similar but distinct regime to be persuasive.

48. The CAT went on to certify Mr Merricks in its first ever CPO. There has since been a flurry of further certifications as the CAT begins to apply the principles set out in *Merricks*.

49. Of course, looming in the background of any discussion of collective proceedings is the question of funding. Hopeful class representatives must show that they have adequate funding in place to meet not only their costs but also any adverse costs order made against them. As raising funds from thousands of claimants will usually be impractical, third-party funding is often the only option. This is complicated by the common law's traditional prohibition on maintenance and champerty, and the complex statutory overlay which has arisen around it. The statutory regime fell to be considered by the Supreme Court in *PACCAR*[34], which involved the same trucks follow-on action, albeit this time with the two would-be class representatives on the same side.

50. The appeal turned on whether their funding arrangements were a "damages-based agreement" within the meaning of the relevant legislation. The majority concluded that they were; notwithstanding that the funder's involvement was limited to providing financing, they could be considered to have provided "claims management services". I dissented; in my view the provision of financial assistance was only included if it was given by someone who was providing claims management services within the ordinary meaning of the term. Pure litigation funding on its own was not enough. Last month the Lord Chancellor announced that the Government will introduce legislation specifically to reverse the effect of the majority's decision.[35]

Conclusion

51. I hope that is a fairly representative slice of the Supreme Court's competition decisions from the past 15 years. Standing back, what can we see? I won't pretend there is any golden thread binding them all neatly together. Given the diversity of subject-matter, it would be surprising if there were. But a few themes stand out. First, the Supreme Court is acutely aware of the number of different actors in this space and

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[34] *R. (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28.

[35] New law to make justice more accessible for innocent people wronged by powerful companies - GOV.UK (www.gov.uk)

their respective competences. The judgments all recognise the expertise of both the CMA and the CAT and are commendably self-reflective regarding the proper role for an apex court. The Court is clearly determined to appropriately calibrate its interventions into this dynamic and complex area of law. The contrast with the 19th and 20th century case-law could not be starker.

52. Second, there are almost no grand judgments considering the substance of articles 101 and 102. Most of the decisions concern the supporting competition infrastructure without directly straying into the heart of the two prohibitions. Given the CJEU's privileged role in this area, that is unsurprising. Of course, we no longer have the option of referring tricky questions to the CJEU; all questions must now be answered domestically.

53. A whole new legal architecture has been erected to facilitate that process. The Retained EU Law (Revocation and Reform) Act 2023 has established a reference procedure whereby a lower court or tribunal which is bound by a point of assimilated case law can refer the issue to the Court of Appeal or the Supreme Court. The higher courts then play a similar role to that once performed by the CJEU and decide the point of law before remitting the case back down. It will be the Supreme Court which is ultimately responsible for interpretation of competition legislation.

54. Devolution aside, references are rarely used domestically and so the ins and outs of the procedure are still being worked out. For our part, the Supreme Court is scheduled to enact a shiny new set of rules this autumn (the first refresh since the Court's creation) which make special provision for references. Our draft rules are currently out for consultation and so anyone looking for something to occupy themselves with on their journey back to London, or indeed for bedtime reading more generally, we would welcome your thoughts.

55. Whatever the answer, there is no doubt the Supreme Court will continue to be closely involved with the development of competition law. That is a challenge my colleagues and I look forward to meeting.