

[Economic Insights: The CAT Judgment in *Le Patourel v BT*](#)

Video Transcript

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Hello and welcome to this discussion on *Le Patourel v BT*, this eagerly anticipated first judgment in a class action by the Competition Appeal Tribunal. We are going to focus on the key evidentiary points and consider some takeaways for the other cases in the class action space. I'm delighted to be joined by Charlotte Thomas, a competition barrister at Brick Court Chambers, and Professor Rajesh Bhargava, who is a behavioural economist at Imperial College London.

Charlotte, let's kick off. Can you just give us an overview of the case and maybe try out some key takeaway points we'll want to come back to in more detail.

Charlotte Thomas, Brick Court Chambers

Of course, and thank you so much for having me. So, as you've already indicated, this is a claim by Mr. Justin Le Patourel, who was a class representative, seeking to claim £1.3 billion of damages for a class of allegedly captive customers for a market known as 'standalone fixed voice services'. So essentially landline customers of BT.

And the argument was that customers in this market had faced allegedly high and increasing line rental prices, and this constituted excessive pricing. The tribunal asked itself four questions on liability, all of which, of course, were settled. The first question was the one of market definition. So was there a distinct market consisting of the supply of SFV services, landline services only, as opposed to some wider market, in particular, one including bundles with other types of telephony services that BT offered.

Second, if that was the market, was BT dominant in that market? Both of those questions are answered in the affirmative, and we won't be focusing on them today. We're talking about the excessive pricing test. The final two questions on liability. Then both were concerned with excessive pricing. The first is limb one of that test. Was the price excessive?

So did BT charge prices for its landline services to the relevant customers over the claim period, which were excessive, and then the second leg of the test: were such prices unfair and thereby abusive? And the final matter that the tribunal dealt with was if liability was established in accordance with those questions, what would the quantum be? So, this is a very helpful and interesting judgment.

As you say, it's the first CPO judgment, that we've had. The first CRPO judgment that's come to trial. It's also very helpful to have a judgment on excessive pricing in a market that's not pharmaceuticals. So, we can see how these tests play out in this context. And the judgment

in particular, in relation to that tool and excessive pricing tests that I've just set out, clarifies exactly how those two limbs work.

And in particular where the concept of economic value fits in. So, the tribunal, points out that the first test, the question of excessive pricing can be answered, by looking at three questions. First, the relevant competitive benchmark. Second, what is the excess of the price over the benchmark? And third, whether such excess is significant and persistent? Which is a really key question.

And then second, although it observes that the case law does consider the issue of economic value as relevant to both limbs, it's helpful to look at it in the context of limb two, where the key question is what is the reasonable relationship of the price charged to economic value?

Liam Colley

Great. Thanks, Charlotte. So, I'm just going to kick off with the discussion on the economic evidence. I'm going to just cover, everything up to, well, not everything, but the key points up to and including limb one. And then I'm going to bring in Rajesh, on limb two, where, as you say, the focus was on the economic value question, and that's really where the behavioural economics evidence came in.

Before diving in, unlike the subject of our last videocast, which was the, the Trucks judgment. In this case, I think we can say sort of hats off to the economic experts, who, we understand we're on their feet for a very long time in this case, either in a tub or in cross.

And ultimately, the CAT found their evidence to be generally reliable, even if, at times, as we will hear, it became perhaps a little speculative, as the CAT saw it. On the substance, I would say there were two key, swing factors. The first one relates to this concept of the secular trend. The fact that over time, customers had migrated away from this standalone, fixed voice service to subscribe to dual play bundles with broadband.

And the second question there is what impact did that have on the market definition and market power assessment. And then the second question the CAT confronted, which was had had a huge influence on things, was how much pricing flexibility should a firm be allowed, in the presence of substantial common costs.

So on the first point, on secular trend, BT pointed to, you know, this, strong decline in the number of its customers over time as they migrated to bundle, which is evidence of the fact this product competed in a broader market, including bundles, which would have been fatal to the claimant's market definition case, and to their whole case.

The claimant expert said that, well, this trend was happening anyway and that isn't actually relevant to the SSNIP test for the purposes of, of market definition and actually pointed to the defendant expert's event study as being supportive more of his view that, this wasn't relevant to the market definition question. Because when Ofcom actually intervened with, a substantial price cut for, for part of this market, that didn't actually change the level of switching very much.

The CAT agreed with that. But as we will see, this was something of a Pyrrhic victory for the claimants because the secular trend point came back to bite them when they came to consider limb two. And, and customers perception of the, of the value of BT's product on common costs. There were two issues. How big were the common costs?

And as I touched on, how much flexibility should BT be afforded? So, the claimant expert leveraged BT's regulatory accounting statements, which are actually sort of designed to minimise and almost eradicate common costs. The BT expert carried out her own, bespoke exercise to try and assess the level of common costs almost probabilistically.

Now, the CAT thought that the claimant's approach was more likely to proxy cost causation and ultimately ended up being, about 60% of the costs that the BT expert had claimed. On flexibility, there was a lot of consideration to a lot of the theories put forward and different approaches as to how firms can recover common costs and economists have come up with quite a few.

The CAT's broad axe, fell here more in favour of BT, actually. So, there was a substantial rump of, of common costs, to be recovered. The claimant expert cried foul here and said, well, actually, how does that reconcile with the fact that there were entrants who came in with lower total costs than implied by this analysis?

And doesn't this analysis actually allow BT to recover some of the losses of BT sport, in the price of land lines? But the CAT dismissed those objections and ultimately came out with a finding that prices were 38% above the, the workable competitive benchmark. Which is the test for limb one. That 38% was lower than the 78% that the claims expert had argued for, dramatically lower, but was, significantly and persistently above the competitive threshold and indeed above the a figure that they, came up with for what would be the threshold for whether it was significantly above workable competition of 20%.

So, on that basis, they did find that, limb one had been passed, if you like, by the claimant. So, we turn to limb two where the question then informs to assess whether the prices are unfair and importantly, whether they bear a reasonable relationship to the economic value of the products. So, first of all, here the CAT dismissed the willingness to pay fallacy. The idea that just because customers paid the prices, they must have valued them.

And what it did was to seriously probe why consumers stayed with BT. Now, Rajesh, can you take us through the CAT's thinking on this?

Rajesh Bhargave

Yeah. So, the CAT were thinking from this perspective of, 'Are these consumers being exploited with, of course, these high prices?' and that hinges on first do consumers have choice and how likely are they to switch. And this is where this point about the secular trend, the tendency for consumers to ultimately switch over to bundles and other kinds of products, that ends up favouring BT's position that switching was happening.

And so a lot of the evidence was related to this, the rates of switching, looking at different segments, different types of customers of BT. And then once that's established that some customers do have this option of switching, some are switching. The question is why are the customers actually sticking with BT over this long term, considering the fact that the prices were higher.

And so now then the limb two hinges on what is the economic value of what BT offer for this high price. And this leads to a lot of flexibility and interpretation of, what is the nature of the value of a service, a BT offer, and that gets that the gives what they actually offer product features as well as the brand value, which ends up being a big factor here as well.

That in the end leaves a lot of flexibility of interpretation. The gives, say a specific feature like, on-shoring of customer service. Looking at that from the perspective, the cost to BT is a minor point. It's more about how does the consumer actually perceive that, and is that enough to justify a higher price? The same with the brand.

So a lot of the evidence was focusing on these points is how these aspects of the service are perceived and whether you can really give them credit and say BT can justify the economic value based on these features.

Liam Colley

Yes. And the, the survey evidence that they relied on, that was quite mixed, wasn't it. Can you just, can you talk us through that and how to CAT interpret it and how it sometimes found the expert's interpretation to be reliable and in, in other areas to be speculative?

Rajesh Bhargave, Imperial College London

Yes. So, the context of the survey evidence is they're trying to assess if there really are these gives features that BT offering and brand value. Is that being reflected in actual consumer perceptions? Do they really feel more satisfied or are they more likely to recommend BT to a friend or colleague? And those are two different measures.

They look at satisfaction and Net Promoter Score. The second one. And both of those are mixed. They're not necessarily greatly in favour for BT. But the interpretation of the evidence is really where the murkiness of this is, is looking backwards, looking at some data that were collected in the past on satisfaction Net Promoter Score. There can be flaws in the methods based on who's sampled.

And that ends up being a big question. Is it the target segment of interest here, how they were sampled. So, the mode, whether it was done online or over the phone, these are customers who are using landlines and generally not as internet savvy. And then even how do you interpret a specific number? So, if you have middling, let's say, satisfaction levels or NPS scores, it could be that the reason why the satisfaction is not that high is also because people are paying higher prices.

The question becomes if you offer more economic value but you raise the standards for customers, satisfaction is ultimately a question of how satisfied or how happy you are with service relative to your expectation. So, you have different moving parts, making it difficult to interpret a specific number. I think in the end, the way this is interpreted is there's no, there appears to be there was not sufficient evidence against the possibility of there being economic value.

And if you start with the position that economic value can be claim based on having these gives and brand value, then these kinds of scores don't necessarily disprove that they don't provide evidence against that.

Charlotte Thomas

You mentioned the issue of the target segment. Of course, the class representative by definition was trying to represent a class of all consumers. But there's a hint in the judgment that at one point the case focused more on the issue of vulnerable customers. Do you see anything interesting in the judgment in relation to that segment and the evidence that was provided?

Rajesh Bhargave

Yes, definitely. So this change from and you can see this evolution in the way the case was handled starting, from the beginning, where the vulnerability of the customers who are, a big percentage are elderly consumers. That was an emphasis before this went to trial. And I think that vulnerability of the customers, which was a factor in Ofcom, not being an issue here, that certainly changed the way a lot of this evidence is interpreted as particularly switching and switching looks at how engaged were consumers with information, with price information, and if the perception is that the market here is mostly consists of vulnerable consumers, you might attribute them less agency.

You might say maybe they're not engaging enough with information. But in fact, the evidence was kind of more in favour of the elderly. They have time to look at this information, and they may even be more price sensitive. And the way they're paying is going to post offices and actually engaging with the...

Liam Colley

Being confronted with the price.

Rajesh Bhargave

Yes, exactly. So, then the reliance on viewing elderly as vulnerable really was not, the emphasis in the end, and I think that plays a big role in how the overall, the way this evidence is interpreted about switching in particular.

Liam Colley

And that's very interesting. And then more broadly, when you look at the behavioural evidence, because this was the first case where we had expert evidence from behavioural economists, in your view, how is that evidence evaluated? Were there things in that evidence that you were surprised to see, or was it or broadly in the realms of what you would expect?

Rajesh Bhargave

I think broad, in broad terms, yes. It was within the realm of what is expected. And both sides, there's different arguments that were brought in. This was not a case in which a lot of the more exotic aspects of behavioural economics were brought in the most psychological components related to things like cognitive dissonance. And this was brought in to say, maybe customers were justifying their past choices and rating highly on satisfaction and NPS or information overload.

And even these are not that exotic. These are well-established concepts in behavioural economics, that likely would play a role in something like this case. So that kind of evidence was brought in. But on the spectrum, thinking about how consumers were perceived here. And it goes back to this vulnerability question. You can think about different levels of agency.

So, a highly rational consumer to a consumer who's fully irrational and being influenced by every little factor. This was more in the realm of kind of bounded rational, mostly rational consumers are making their decisions based on price. They have the option to switch, they choose not to switch. And it's quite likely because they preferred the features that are being offered.

I think on the whole, the perspective here was evidence needs to be there, not just speculation. And this came up a lot. It's not about projecting what could have happened or what might happen in the future. This is done in the past. What evidence is there to show how did people behave on the ground? And I think that's actually a big part of the behavioural economics.

Evidence in this case is to go from the high level of just price competition and what the market is doing to really mechanically look at a consumer making a decision. And how do they go about the decision, what information they're receiving. And then, that ultimately influences this outcome.

Liam Colley

Okay. Yes, I'm sure that's we're going to see a lot more of more of this evidence, on these types of cases going forward. So, Charlotte, when we think about other takeaways from this case - has this case clarified the excess pricing test for you?

Charlotte Thomas

I think so, as I said at the start, obviously the two limb test is, well known, but the tribunal's helpful differentiation of the specific questions to be asked. And each level of the test, I think, is, clarifying, even though it hasn't purported to change the law in any way. One takeaway feature from the approach it took to excessive pricing is this 20% figure that you've already mentioned, where the tribunal says we think that's a price that's 20% in excess of the competitive price -

so the cost plus reasonable return price, qualifies as excessive - there's very little or really no justification for the selection of the 20% figure. And so, of course, that's going to be the number that one imagines will be used as a reference point in future cases. And to that extent it will be the starting point. However, it's easy to think of ways in which this case might be distinguished.

And I don't think we're right to say that 20% will be a presumption, but it's certainly going to be the market going forward. The other interesting matters of law in the case, the approach taken to the Ofcom evidence and the authority that the Ofcom decisions have. So, the Ofcom judgment was very important to the CPO stage, where the class representative was able to use it as a justification for why the case is one that ought to be certified and go to trial, and refer to it as evidence at that point.

However, by the time of trial, the sheer quantity of evidence that the tribunal had in front of it, including all the interesting people economics data that we've just heard about, as well as course all the quantum and cost data that the parties and their experts analysed meant that

really, the Ofcom judgments receded into the background in terms of the use that it could provide to the tribunal.

And there are other differences, of course, as well. The tribunal [Ofcom] wasn't asking itself the excessive pricing test. It was concerned with different points, in particular the issue of vulnerable customers. It was asking an ex-ante question instead of an ex-post question. And so for various reasons, although as a matter of law, the tribunal confirmed it's not wrong in principle, it's not inadmissible to look at a previous regulator's decision.

In fact, by the time of trial, it wasn't particularly useful to it. The second interesting point of law that has an economic feature also, is the approach that the tribunal took to quantum. So, having concluded that BT's price was excessive and not unfair, the tribunal only dealt with quantum and the alternative, but what it said was if we had held that BT was pricing abusively, then the quantum analysis would have proceeded by reference to what the workable competitive price would have been in the alternative world.

So, if you remember, the tribunal had used the 20% figure to identify what an excessive price was. And it said, when we ask ourselves what the alternative, or what the counterfactual figure that we should use is, it's not going to be 19% above the competitive price, it's going to be the competitive price. So that's a very large difference for BT between the price that is in fact charged and the amount that it should have to pay in damages.

That is, you may have some economic views on what the implications of that are, but as a matter of law, I think it's potentially difficult. The reasons that the tribunal relies on for that, for that approach are, first of all, saying it's more convenient in a case where follow-on damages are asserted because you don't have to effectively re-conduct the unfair pricing analysis, which is true, but not a legal reason as such.

And the second reason is it relies on a case to do with negligent valuation advice, where the court, to tell us in the in the counterfactual where the you assume that non-negligent valuation advice had been given the damages calculation should proceed by reference to an average of what the negligent answers would have been, rather than the highest possible negligent, non-negligent, valuation that could have been given.

And I think potentially, it could be argued maybe BT will argue this on appeal, I don't know, that that case is distinguishable, and the reason is this. What you're doing when calculating damages in the counterfactual world is asking yourself, 'What would the position be absent the tortious conduct'? And so, in a negligent valuation case, you ask yourself, 'What would the position be had a negligent instead of a non-negligent valuation being given'?

And then it makes sense to ask yourself, 'Well, what did the negligent, what did the non-negligent valuations look like'? And what's the average of those? Whereas where the abuse

in question, the tort is excessive pricing, abusive pricing, it seems to me that you should strip out the conduct which involves stripping out the excessiveness of the pricing and not necessarily asking yourself what would the competitive price be?

So that may be a point of law that could be considered on appeal.

Liam Colley

And just on that, if we remember that the workably competitive threshold that they're using here is a market absent dominance, because in the in the words of Hoffmann-La Roche, you know, the really competitive market is one that hasn't been weakened by the presence of the of the dominant company. And so this could be quite risky for firms to go over this 20% threshold because it isn't it isn't 20% compared to what your competitors in the market that you are dominating are charging.

It's 20% compared to what competitive prices would be if you weren't dominant. So it seems to me this approach to damages is stripping out not just the abuse, but also stripping out dominance. And, you know, if that's if that's the way that we're going to proceed, that seems to have the risk there that that would have a huge chilling effect on the ability of prices of dominant companies to charge prices that reflect the value of what they've brought to the market that has enabled them to become dominant.

So it kind of, undermines the incentives to become dominant in the first place.

Charlotte Thomas

It's a long way to fall If you get it wrong.

Liam Colley

It's a long way to fall. You come down a very long snake, having climbed up the ladders.

Charlotte Thomas

And this is a case, of course, of the tribunal expressly found that BT had no exploitative intent, so it found that its prices were not unfair. And one of the factors that fed into that conclusion was a finding of non-exploitative intent. So had it found unfairness for another reason - intent, of course, isn't necessary - then you could have a company that's not trying to be exploitative,

Charlotte Thomas

that nonetheless gets all of these profits stripped out.

Liam Colley

That's right. And actually, that on the question of regulatory overreach, I think this is where we really do have to be careful because high prices are themselves, not just, a motivator for competition, but they're a motivator for, for entry there, if you like it. The opposite of a barrier to entry. And this is why in the, under the US antitrust law there is no excess pricing abuse because they recognise it. The high prices are the spur to innovation and competition.

And the CAT did touch on this because the claimant had brought forward an argument that actually BT should have even less discretion because it had inherited its dominant position from being an ex-state-owned monopoly. And the CAT recognise that point, but it didn't really seem to influence its thinking. It certainly wasn't the deciding factor, but I do think this is a really important issue when we look at markets characterised by innovation to establish dominance or just, you know, hard fought, competition.

Charlotte Thomas

Conversely, the excessive pricing stage, BT had sought to say that the relevant comparator should be one that takes into account the incentive to enter. And the CAT specifically disapproved that and said it's, the excessive pricing question is very clearly just looking at cost plus the reasonable rate of return, and doesn't look at those kinds of incentives.

Liam Colley

Compared to the average of the workably competitive market and any, taking into account, the reality that there's always going to be dispersion around the average, even absent, the dominant company doesn't come in until limb two. Okay, then I guess a sort of other takeaway... I'm going to come back to you, Rajesh. Do you think this case gives a good guide to how insights from behavioural economics can assist on these other cases that we're going to be seeing and....

Rajesh Bhargave

Yes. Yes, definitely. I think there's, a lot of ways in which especially this kind of exact topic of price unfairness, and it goes back to the limb two distinction and how this is impacted by limb one. So if you have a low hurdle for limb one, then in limb two the expectation is that any evidence of the economic value, what you're offering can lift up that brand, and allow it to, to, charge higher prices.

So the kind of evidence that will be looked at going forward is more, any evidence disproving the economic value of, what the brand offers, including these gives. So I think that's a big aspect of the precedent. These two, there's a sliding scale here. If you set a low hurdle in limb one, limb two has a much higher hurdle. I think that aspect of it, as well as just the the kind of mechanical looking at the consumer's decision, what aspects will be

looked at. Switching rates, in this case, this idea of the secular trend, how that would be interpreted going forward.

Because you can imagine in a lot of other markets there is these ongoing trends of consumers switching away, engaging with all kinds of information, and their exposure to media and notices. Some of this is appearing in this case. So even at the level, what kind of evidence might be looked at going forward? I think this sets a good precedent, especially with pricing related questions.

Liam Colley

And the evidence was very focused on the actual world trying to interpret what consumers had done. On other cases, we're going to be asking quite difficult questions about the counterfactual world. What would consumers do in a different, you know, competitive structure, for example? And, you know, is that is that an area where we can see.

Rajesh Bhargave

Yes. And I think there we're going to see very different kind of evidence. So in this case, because it's about how things happened historically - five, seven, eight years ago - it relied upon data that were collected at that time. If it were more about a hypothetical, what could have happened or what might happen now, then we're going to start seeing a lot more other types of evidence, doing experiments, conjoint analysis, these kinds of measures for today, for today's environment,

as well as relying a lot more on theory, including the more exotic ideas that may come up in this kind of case, like the cognitive dissonance arguments. I think there will be greater receptivity for something like this. But in this case, it's more historical. So just look at the evidence.

Liam Colley

Okay. Well, I certainly agree with that. Okay. Well, thanks very much, both of you. We hope that's given the viewers a good whistle stop tour of some of the issues on this case and some food for thought for future cases. Bye for now.