

The (Fast-Track) Trial of Socrates

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Hot on the heels of its first decision under the new collective proceedings regime, the Competition Appeal Tribunal has just handed down judgment following the first trial held under the “fast-track” procedure introduced as part of the Competition Appeal Tribunal Rules 2015: Socrates Training Limited –v- The Law Society of England and Wales [2017] CAT 10. Whereas, in 399 BC, the City of Athens found the philosopher guilty of “failing to acknowledge the gods that the city acknowledges”, the Tribunal in this case held that the Law Society had, for part of the period covered by the claim, offended against the twin deities of UK competition law -the Chapter I and Chapter II prohibitions - by requiring law firms to purchase certain training courses exclusively from the Law Society, as a condition of membership of an accreditation scheme.

The Judgment will be of interest to all competition law practitioners, but especially to those advising SMEs. And not a hemlock in sight...

References to paragraphs of the Judgment are given below in the form “§x”

The fast-track procedure

The fast-track procedure (**FTP**) was introduced as part of the new regime for private competition law claims on the coming into force of the Consumer Rights Act 2015. As explained in the Government’s 2013 White Paper on *private Actions in Competition law*, the FTP is particularly designed to help small and medium-sized enterprises to obtain access to justice in appropriate cases, reflecting a widely held view that the cost and complexity of competition law claims can act as a deterrent to smaller companies in pursuing their rights, not least in claims for injunctive relief where the possibility of obtaining external litigation funding is (for obvious reasons) limited.

The FTP is enshrined in rule 58 of the Competition Appeal Tribunal Rules 2015, and has the following key features:

- The FTP may be adopted, in principle, for any claim brought under section 47A of the Competition Act 1998. It cannot, however, be used in collective proceedings under the new section 47B: see rule 74(3)(d).
- An order that proceedings be subject (or cease to be subject) to the FTP can be made at any time, either on the application of a party or of the Tribunal’s own initiative: rule 58(1).

- The twin consequences of an order imposing the FTP are that (i) the main substantive hearing will be fixed to take place as soon as practicable, and in any event within six months (rule 58(2)(a)) and (ii) the amount of recoverable costs (for either party) will be “capped” at a level determined by the Tribunal (rule 58(2)(b)).
- The Tribunal has a broad discretion to decide whether to make particular proceedings subject to the FTP, albeit that it must take into account the factors specified in rule 58(3)(a)-(h), which include matters such as the time estimate for the main hearing, the complexity/novelty of the issues involved, and so on.
- Further guidance on the FTP is given at paragraphs 5.139 – 5.149 of the Tribunal’s 2015 *Guide to Proceedings* (the **2015 Guide**). One important provision is that FTP will be “*closely case-managed, in particular as regards the extent of any disclosure and the evidence which the parties can adduce at trial*”; indeed, the 2015 Guide states that there will be no standard disclosure (only specific disclosure) in cases subject to the FTP (see paragraph 5.148).

Socrates represents the first judgment of the Tribunal in fast-track proceedings. Other cases in which parties have sought to utilise the FTP have either settled before the Tribunal has adjudicated on whether a claim is suitable for the FTP (see e.g. *Latif and Waheed v Tesco Stores Limited*), or – in one case (*Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited*) – have been held to be unsuitable for the FTP following a contested application. The judgment in *Socrates* is therefore the first example of what can be achieved where proceedings are allocated to the FTP, and it will no doubt be of substantial wider interest to SMEs and to competition practitioners generally.

The Law Society’s Conveyancing Quality Scheme

Since 2010, the Law Society, the professional body for solicitors in England and Wales, has operated a “Conveyancing Quality Scheme” (**CQS**) for the accreditation of law firms engaged in residential conveyancing. The CQS was introduced, *inter alia*, in the face of growing pressure from mortgage lenders to take steps to reduce the risk of solicitor involvement in mortgage fraud (§28).

Membership of the CQS confers a number of benefits, including the fact that a number of major mortgage providers (such as HSBC and Nationwide) have made CQS membership a pre-condition for a place on their approved “panels” of conveyancing solicitors (§76). In exchange for the benefits afforded by membership, conveyancing firms are required to adhere to a number of quality standards, including, so far as is relevant to the present claim, a requirement for relevant staff members to take training courses in mortgage fraud and

anti-money laundering (**AML**)¹. Critically, the CQS requires that those training courses must be purchased exclusively from the Law Society itself: see the summary of the training requirements at §§63 – 75.

Socrates' complaint

The claimant, Socrates Training Limited (**Socrates**), is an SME that provides online AML training for law firms. It challenged the Law Society's requirement that training in mortgage fraud and AML as part of the CQS must be obtained from the Law Society alone, on the grounds that:

- a. it constituted a form of "tying" or "bundling" of the training courses with the grant of accreditation, and therefore the abuse of a dominant position contrary to the Chapter II prohibition; and
- b. even if the Law Society was not dominant, the terms of membership of the CQS imposing the impugned obligation in any event constituted an anti-competitive agreement contrary to the Chapter I prohibition.

The proceedings

Socrates' claim was issued on 4 April 2016. Following a Case Management Conference on 16 May 2016, the Tribunal allocated the claim to the FTP and gave directions for a split trial, with a three- to four-day hearing on the issue of liability to be held in November 2016, and the issue of quantification of any damages adjourned until after the judgment on liability. In keeping with the indication in the 2015 Guide that FTP cases will be closely case-managed, the Tribunal also gave detailed directions concerning the scope and content of the parties' witness evidence (both factual and expert), and made limited provision for specific disclosure (reflecting the clear position set out in paragraph 5.148 of the 2015 Guide: see above).

Following a further CMC on 21 June 2016, the Tribunal made various further directions for targeted disclosure, and imposed a cap on Socrates' and the Law Society's recoverable costs, in the respective sums of £200,000 and £350,000. The Tribunal gave a reasoned judgment on the level of the costs caps. (By agreement between the parties, the Tribunal subsequently increased the level of the costs caps to £230,000 and £402,500 respectively.)

There followed a pre-trial review at which, inter alia, the Tribunal directed that expert evidence at the trial should be given concurrently, utilising the "hot tub"

¹ Under reg. 21 of the Money Laundering Regulations 2007, there is a statutory obligation on law firms to ensure that their employees receive regular training in how to recognise and deal with transactions and other activities that may be related to money laundering.

procedure that is becoming commonplace in private competition law claims in both the Tribunal and the High Court.

The hearing on liability was heard over 4 days on 8 – 11 November 2016. [Full transcripts](#) of the hearing have been published.

The Judgment

Judgment was handed down on 26 May 2017. The Tribunal (chaired by the President, Mr Justice Roth) found that the Law Society had breached the Chapter I and Chapter II prohibitions from the end of April 2016 (§187). Its reasoning on the various elements of the Chapter I/Chapter II analysis is summarised below (as in the Judgment, the Chapter II prohibition is considered first).

The Chapter II claim

Market definition

Having emphasised at §106 that market definition is “*a means to an end and not an end in itself*” (the “end” in this case being the determination of whether the Law Society at any stage had a dominant position, and also an analysis of anti-competitive effects), the Tribunal went on to consider the position as respects both the upstream market, in which the Law Society supplies the CQS, and the downstream market, in which Socrates and others supply training courses:

- a. The Tribunal accepted the evidence of Socrates’ expert economist that the relevant upstream market comprised the supply of accreditation to conveyancing law firms in England and Wales (§§108, 112). In so doing, the Tribunal rejected a more restrictive “two-sided” market definition advanced by the Law Society’s expert economist (§109).
- b. The Tribunal also considered it “*appropriate*” to define the downstream market (notwithstanding that the Law Society was not alleged to be dominant on that market) in order to have “*a basis on which to consider the degree of anti-competitive effect of the alleged tie*” (§114). It regarded the “critical consideration” to be supply-side substitution. Given the relatively low costs of producing AML training courses, meaning that providers of such training to entities other than law firms (such as accountants) could relatively easily switch to providing training to law firms, the Tribunal accepted the Law Society’s expert evidence that the downstream market encompassed the provision of training to entities such as accountants as well as to law firms. The Tribunal did not consider it necessary to define the precise geographical scope of the downstream market, although it ventured that it should “*probably*” be defined as covering the whole of the United Kingdom (§118).

Dominance

Based on the Tribunal's analysis of the relevant upstream market (see above), the Law Society held a 100% market share, there being no competing accreditation scheme to the CQS. However, the Tribunal noted that while market shares are "*obviously relevant*" to the question of dominance, they are not determinative (§120). In particular, since relatively few solicitors initially signed up to the CQS, the Tribunal considered that the Law Society could not be regarded "*any meaningful sense*" as having market power throughout the entire period since the CQS was introduced. The Tribunal accordingly sought to identify the point at which membership of the CQS became a "*must-have*" product for conveyancing law firms, focusing in particular on the extent to which mortgage lenders required membership of the CQS as a pre-condition for membership of their approved panels (§125). On the evidence, the Tribunal held (on the balance of probabilities) that the Law Society had acquired a dominant position by the end of April 2015, when a major lender (Nationwide) announced that CQS would thereafter be a condition of membership of its panel, increasing the share of overall mortgage lending accounted for by lenders requiring CQS accreditation as a condition to 35% (§129). The Tribunal also rejected, on the evidence, the Law Society's contention that mortgage lenders themselves posed a countervailing competitive constraint so as to preclude a finding of dominance (see §§130 – 136).

Abuse

The form of abuse alleged by Socrates was "tying" or "bundling", two concepts that are often used interchangeably. The essence of the abuse is explained by *Bellamy & Child* (7th ed, 2013) at para 10.123 (quoted in the judgment at §140) as involving a situation where "*the dominant firm is prepared to supply the product in respect of which it holds a dominant position ('the tying product') only if the customer also agrees to buy another product ('the tied product')*". There is no requirement that the defendant also to be dominant in respect of the "tied" product. While section 18(2)(d) of the Competition Act 1998 refers to the tying of products that "*by their nature or according to commercial usage*" have no connection, the EU Courts have held that the concept of tying is not so confined: see Case T-201/04 *Microsoft v Commission*, concerning the tying of Microsoft's Windows operating system along with its Media Player (§§141 – 142).

A necessary element of this form of abuse is that the tying and the tied products must be "*distinct*" (§143). The Tribunal rejected the Law Society's argument that the training courses were integral to the CQS and that the two should therefore not be regarded as distinct, by analogy with the Court of First Instance's decision in *Microsoft*. While a requirement for such training may well be inherent in an accreditation scheme, the products were "*functionally distinct*"; it was common

ground that there was a separate – and competitive - market for the supply of training courses (on which Socrates itself was active); and the Law Society had made its training courses available (at a separate price) as a self-standing product to firms that were not members of the CQS (§§145 – 146).

The second necessary ingredient of an abuse claim based on tying/bundling is that the conduct “*may have an anti-competitive effect*” (§147). By reference to another judgment of Roth J, in *Streetmap.Eu Ltd v Google Inc* [2016] EWHC 253 (Ch) (“*Streetmap*”), it was agreed that the applicable test was whether the impugned conduct was “*reasonably likely to harm the competitive structure of the market*” (§148). In determining that question, Roth J in *Streetmap* had emphasised that evidence as to the actual effect of the conduct is a “*very relevant consideration*” (§149). However, the Tribunal emphasised that demonstration of a potential effect is sufficient (§150).

In *Streetmap*, Roth J had also held (at §98) that where the alleged anti-competitive effect in question was on a distinct market in which Google was not dominant, it was necessary to apply a *de minimis* or “*appreciability*” threshold to the question of that anti-competitive effect in circumstances where the impugned conduct (in that case the development of the “maps” element of Google’s search engine) was pro-competitive on the market on which Google was dominant. The Tribunal considered that the requirement to purchase training courses exclusively from the Law Society was “*certainly not pro-competitive*”, at least after 2014 (§153). It is an open question following *Streetmap* whether the appreciability threshold applies more generally in a two-market cases, even where the impugned conduct is not pro-competitive on the “dominated” market. In the present case, however, that issue was academic, because the Tribunal considered that the impugned aspect of the CQS did indeed have an appreciable (in the sense of “*more than de minimis*”: §154) effect on the downstream market for the provision of training courses.

The Tribunal relied, in this context, on Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* (“*OTOC*”), in which the Court of Justice held that Portuguese regulations requiring chartered accountants to obtain a specified proportion of their professional training exclusively from the relevant national institute were “*likely to distort competition on the market of compulsory training for chartered accountants by affecting the normal play of supply and demand*” (see judgment at §159). The Tribunal held that the *OTOC* case demonstrated that “*the question of effect is not to be assessed simply on the basis of market share of complete foreclosure, but can result from a segmenting of the market and a distortion in the way competition operates affecting one segment*” (§160).

In forming the conclusion that the impugned requirement as to the purchase of training courses was reasonably likely to have an appreciable anti-competitive

effect, the Tribunal relied on a number of factors including the extent of the Law Society's upstream dominance once the CQS had become a "must-have" product, the absence of rival suppliers of accreditation, the lack of any prospect of competitive entry, and the requirement for annual renewal of CQS membership (and with it the continued, albeit intermittent, obligation to purchase the relevant courses from the Law Society): see §§161 – 165.

Objective justification

The Law Society also sought to contend that the requirement to purchase the training courses exclusively from it was objectively justified.

As respects the approach to this issue, it was common ground that it is for the dominant firm to show either that its otherwise abusive conduct was "*objectively necessary*" or that the anti-competitive effects of that conduct were outweighed by efficiencies or advantages, and (in any event) that any restriction of competition was proportionate (in the sense that there was no less restrictive means of achieving the purpose allegedly pursued): §166.

The argument advanced by the Law Society on objective justification was that if the CQS did not contain its mandatory requirements as to the purchase of training courses, the CQS could not retain its value to members and lenders (§167). The Tribunal rejected that submission, including on grounds that the objectives allegedly pursued could be achieved less restrictively by allowing third parties to provide the relevant training courses, with the Law Society itself approving and auditing third party providers to ensure that they provided the requisite standard of training (see §§168 – 175). The Tribunal thus reached essentially the same conclusion as did the CJEU in the *OTOC* case (cited above), namely that "*the objective of guaranteeing the quality of the services... could be achieved by putting into place a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory, reviewable criteria likely to ensure training bodies equal access to the market in question*" (Judgment at §176, citing *OTOC* at §99).

The Chapter I claim

The Chapter I analysis was taken much more briefly, in circumstances in which the parties essentially relied on the submissions advanced in relation to the Chapter II prohibition. The Tribunal held that, once the Law Society had acquired a dominant position, the requirement to purchase the training courses exclusively from the Law Society also contravened the Chapter I prohibition, since that requirement formed part of a series of agreements with individual law firms accredited under the CQS that together gave rise to an appreciable

restriction on competition (§§179-183)². In addition, the Tribunal held that the conditions for an exemption under section 9(1) of the Competition Act 1998 were not satisfied: in particular, the restriction was not “*indispensable to the attainment of the objective pursued*” as required by s. 9(1)(b)(i) of the 1998 Act. In this context, the Tribunal simply referred back to its reasoning on objective justification for the purposes of the Chapter II claim (§§184 – 185).

Comment

Although the Judgment contains a number of substantive points of interest (see below), much of its broader significance comes from its status as a proving ground for the FTP. In that regard, *Socrates* is just as much of a trend-setter as its philosopher counterpart. The following practical points are of particular note:

- *First*, the Judgment demonstrates the Tribunal’s willingness, in appropriate cases, to utilise the FTP, with all its attendant benefits for SMEs in terms of an expedited trial timetable, a mandatory cap on recoverable costs and a tightly controlled approach to disclosure. It is important to bear in mind, however, that the FTP will not become the norm in private competition law claims. The 2015 Guide is clear that the procedure is reserved for “*clear-cut candidate[s]*” (paragraph 5.146). In cartel damages claims of any complexity, for instance, it seems highly unlikely that the FTP will ever be appropriate: see the cautionary ruling of the Tribunal in *Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and another* [2016] CAT 8, in which the Tribunal “*stated emphatically*” that claims involving a hearing of much more than three days are not suitable for the FTP (*Breasley* at §19), and observed that even follow-on damages claims are generally “*unlikely*” to fall within the criteria for the FTP in rule 58 of the 2015 Rules (*ibid* at §31). It is likely that the FTP will most often be utilised for proceedings involving claims for injunctive relief: see the 2015 Guide at paragraph 5.146. That is not to say, however, that the inclusion of a damages claim is a bar to the adoption of the FTP: indeed, in the present case, the Tribunal was prepared to hive off *Socrates*’ damages claim, and use the FTP for the purposes of a speedy trial on issues of liability only.
- *Second*, while the Judgment is in many ways a testament to the virtues of the FTP, it is important to remember that even fast-track claims may well raise complex issues, requiring expert evidence, extensive disclosure (although never standard disclosure) and – as in the present case – a number of interim hearings. The parties should also bear in mind that the expedited nature of the FTP requires parties to make any interim applications as expeditiously as possible: see the Tribunal’s reasoned order refusing to permit the Law Society to rely on certain additional expert

² While it recognised that there might have been a sufficiently appreciable effect on competition (for Chapter I purposes) prior to the point at which the Law Society was held to have become dominant in the relevant upstream market, the Tribunal was not satisfied on the evidence that this was the case here (§182).

opinion evidence. On the other hand, one thing that the FTP does not guarantee is any particular timescale for final judgment (in contrast to the stipulation that a final hearing in a fast-track case will take place within no more than 6 months). In the present case, judgment was not handed down until 6 months after the substantive hearing on liability. The FTP does not purport to – and cannot – reduce pressures on judicial time.

- *Third*, it is noteworthy that in several abuse of dominance cases the High Court has been willing to proceed on the basis of an assumption that the defendant holds a dominant position, and tried the issue of abuse on the basis of that assumption³. In the present case, however, issues of both dominance and abuse were at issue in the substantive hearing. This may be a reflection of the relative uncertainty of the issue of dominance in the present case (as illustrated by the fact that the Law Society successfully established that it was not dominant for some of the period alleged). In appropriate cases in the future, however, the Tribunal may well be inclined to split the issue of dominance from the issue of abuse, and try the latter issue first in accordance with the FTP (just as quantum issues were split off to be tried after determination of liability issues in the present case).
- A *fourth* point of practical importance arises from the Tribunal's decision on costs upon the handing down of the Judgment. Notably, Socrates sought an order that the Law Society should pay its costs on an indemnity basis, including on the grounds that the Law Society had unreasonably rejected a "without prejudice save as to costs" (**WPSATC**) offer made at a relatively early stage in the proceedings, and that - for the purposes of assessing costs on the indemnity basis - the costs cap made earlier in the proceedings should be disapplied. The Tribunal accepted, as a matter of principle, that the cost-capping provisions in rule 58 of the 2015 Rules concern costs assessed on the standard basis. This might be regarded as surprising result: the FTP rules themselves contain no reference to the basis of assessment. However, rule 58(1) clearly provides that the Tribunal may order that proceedings "*cease to be*" subject to the FTP (including the costs-capping provisions) at "*any time*", and that must include the period after handing down of judgment while consequential matters remain at large. Further, as the Tribunal pointed out in its ruling on this issue, it would work injustice if a party had behaved sufficiently unreasonably to justify an indemnity costs award, and yet the existence of the costs cap prevented an award of the costs determined - following a detailed assessment - to be payable on the indemnity basis. However, in the circumstances of this case, the Tribunal did not consider that an indemnity costs award was justified, holding that the Law Society had acted reasonably in defending the case even if it had ultimately been found to have contravened the Chapter I and Chapter II prohibitions. Notably, in this context, the Tribunal suggested in

³ See in particular *Purple Parking Ltd & Anor v Heathrow Airport Limited*; *Arriva The Shires Limited v London Luton Airport Operations Limited*.

its *ex tempore* judgment that it could not take into account matters that pre-dated its initial decision as to the appropriate level of the costs cap, or its subsequent decision to increase the level of the cap, meaning (in this case) that it could not take into account the Law Society's rejection of Socrates' WPSATC offer. If followed in subsequent cases, this approach would raise a very real practical difficulty for lawyers representing parties who wish to make WPSATC offers in fast-track (and hence costs-capped) cases, given the ordinary rule that such offers may only be drawn to the attention of the trial judge after judgment on the substance of the case. Notably, however, the Tribunal also relied on the fact that the WPSATC offer sought more than Socrates obtained in the Judgment, since that offer asked the Law Society to concede that it was dominant for the entire period covered by the claim. That is a more conventional basis on which to consider the relevance of settlement offers when deciding whether to award indemnity costs.

In terms of the Tribunal's substantive decision on liability, a number of points are worth highlighting:

- The Tribunal's finding on dominance illustrates what might be termed the "ambulatory" nature of the concept. In particular, whether an undertaking is dominant at a particular point in time is not merely a question of market shares, but involves consideration of extrinsic market circumstances. While the Law Society had 100% market share in respect of the provision of accreditation to residential conveyancing firms from the moment of the introduction of the CQS, it was only once that accreditation could properly be regarded as a "must have" that the Tribunal was able to make a finding of dominance.
- In relation to the issue of abuse, there remains an important open question as to whether there is any appreciability/*de minimis* threshold in "two market" cases where – as in this case - there are no pro-competitive benefits on the market in which the defendant is found to be dominant. In this commentator's view, it is only a matter of time before Roth J's reasoning in *Streetmap* on this issue is applied to the issue of abuse more generally. Competition law does not concern itself with insignificant restrictions of competition. Since the Tribunal was satisfied as to the appreciability of the effect of the impugned aspects of the CQS on competition, however, this issue did not need to be determined in the present case.

Conclusion

As the other Socrates apocryphally put it, to know thyself is the beginning of wisdom. In the competition law context, at least for those advising SMEs, the beginning of wisdom may be knowledge of the ins and outs of the FTP. These proceedings were a "*clear-cut*" candidate for that procedure. Lawyers faced

with similar cases should not hesitate to invoke the FTP, with all its advantages, in the future.

Socrates was represented by Philip Woolfe and The Law Society was represented by Kassie Smith QC and Imogen Proud.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.