

Inside out

Mayer Brown's Gillian Sproul (private practice lawyer and partner) and Merlie Calvert (formerly competition counsel at De Beers) talk to CLI

Why did you want to become a competition lawyer?

Sproul: Well, for me, that's an easy answer. It was because it's not just about the law, it's about economics and how businesses work. When you do competition law, you get to know your client very well. You have to get into the detail of your client's business and you get to really understand it, so it's a broader thing than just the law. At the same time, competition law is very satisfying because it's a developing area with lots of new things happening so you're never bored. That's for me anyway.

Calvert: I'm not sure that I'm that different to be honest. I think, personality wise, I'm quite nosy. I think that to be a good competition lawyer, you have to know your client very well, you have to know the ins and outs of their business, whether that's because you're dealing with them from a merger control perspective, so you're in M&A territory, or because they're being investigated and you're defending them. I think that even if you are advising on compliance and distribution, you have to know your client very well and it creates that sort of enduring relationship which is fun. I don't like sort of dipping in and out and not really finding out what happens next. I like that sense of enduring connection rather than the sort of tick box approach, that's you out the way and off the desk, so onto the next one.

If you couldn't be a competition lawyer, what would you do?

Calvert: I wanted to be an astronaut for a long time until my father very helpfully pointed out that I would need to improve at maths, so that put paid to that. I think I would probably have done a couple of things. I would definitely have become a writer – there's part of me that still wants to become a writer – and I would have done something in business, probably running my own show, probably something small, something discrete. Something that would enable me to indulge my creative flair a lot more. So I've dabbled in various things. I had a career break for three years where I explored all sorts of things. It was great fun and very liberating.

Fantastic, what in this country or abroad?

Calvert: Yes in this country. I designed knitted hats – designed and made and sold a few as prototypes. I did all sorts of little bits and pieces. It's actually great fun. It's quite nice to have that sort of time out and consider what you would do. I wrote a couple of books, fiction. Nothing to do with anything I'd ever done before but it's quite fun. I think if I had the freedom to choose again, I probably would have ended up in the same space in some shape or form but perhaps with a bit more scope to indulge everything.

Sproul: I nearly ended up in academia rather than becoming a practising lawyer because I was very interested in a couple of areas. One of them was European law, the other one was employment law. They're not unrelated. But one of the great things about private practice is the people side of things – you get to work with some great people, both clients and



Gillian Sproul

colleagues. But the other thing I think I would try my hand at again – if I went right the way back – might be architecture. I love architecture and design. I nearly went down that route when I was at school but decided not to. If I had gone ahead, I think it would have had the same attraction of working with a team to find solutions, just in a different context.

What are the differences between practising as a competition lawyer in business and practising in private practice?

Calvert: I think that one of the things that strikes me is speed. Things happen much faster in business than they do in private practice, so you're on the spot and you make a decision. You guide the client through whatever you're going to tell them if you've only got 30 seconds to make your point – that's to say, you tell them the answer's yes or no, these are the things you need to rely on or bear in mind, and these are the next steps. The analysis and everything else either follows on, or it's just logged somewhere, but it's very much more about managing expectations, getting people into the right space, winning hearts and minds.

Sproul: But I don't think it's so different in private practice because you have to provide the right service to your clients. These days that doesn't mean sending them 25 pages of closely argued legal points with no conclusion. It means, as Merlie says, telling them the answer so that, if they've only got 30 seconds, they can immediately grasp it. It's a matter of putting your advice in plain English, and structuring and setting it out in a way that they can really understand it. We've moved much more towards that in the last few years than before. Some of the things that we see elsewhere, maybe in other countries, is

much less user friendly, I think, than what we're trying to do here. And I think it's really important that we do provide the right level of service, particularly in these days of recession where competition is fierce. So I don't think you can compromise.

I think one of the things that I had in mind is the difference between having one client and having lots

Calvert: In actual fact, it's probably slightly more challenging working in-house because you get questions on a far broader range of issues than just antitrust law. I remember in my first three weeks of joining De Beers, one of my colleagues (who's still a friend) turned up – it was the first time I'd ever met him – and said "I need to ask you a question about what one can do with dead bodies in the United States". I sort of looked above my door and thought, "Yes, the one thing that's missing from the name tag there is antitrust. What makes you think I would know anything about what to do with a dead body in the United States?" That's a rather extreme example – there were many more – but I think you're mainly dealing with a raft of very different issues.

Sproul: Yes, but I would say that, for me, one benefit of not being in-house and being in private practice instead is that you get variety. So, you know, in any one year you could work in any industry – from sewage to lipstick – because antitrust issues can arise anywhere. You've got to pick up all these different businesses – that's part of the attraction – and get to know them well enough to be able to advise the client in that industry. So that appeals to me: I like that variety.

I gather that you're especially concerned about the particular problems surrounding pricing and online selling. What are the difficulties here?

Sproul: One example is controlling prices. So if you're a manufacturer and you develop a premium product, whatever it is, you want to maintain the reputation of that product. So you don't really want it to be sold as a loss leader or sold very cheaply, as this will damage the brand. Online sellers tend to have scale. Small shops – where people actually go and look at the products before they buy – don't have that advantage, so there's a disparity in the position of the bricks and mortar stores and the online sellers. Online sellers with substantial scale have a massive advantage over ordinary shops. But you know, where would you go if you wanted to look at something you wanted to buy? If you had to actually see the scale of it, feel it and all that kind of thing? You'd go to a physical shop but, these days, would you necessarily buy it in the shop? You might not do so if you thought you could get it more cheaply online.

That was the problem with Jessops, wasn't it?

Sproul: Yes it was, and with HMV and bookshops. They're being undercut by online sellers. And competition authorities are certainly promoting online selling as the best deal for consumers, which is no doubt right from a price perspective. But if you look at it slightly longer term, you wonder where it's all going to end up and whether we'll all be buying things that we don't really know will fit, or will look or feel right, or

will do the job they need to do because you haven't actually had the chance to go and test them out.

Calvert: I think the other danger, from a business perspective, is the incentives, particularly for high-end brand owners, the household IP names of today. Would the incentives for them to continue to innovate – to continue putting their stuff out there – become diminished the more that they can see that their stuff goes into this kind of big discount bin alongside other lower quality stuff? Suddenly it then becomes all about price as opposed to brand. I think it's particularly galling for a lot of brand owners to see what happens to their products as they follow down the distribution chain and end up in discount online stores, with no controls, with none of the right marketing messaging – with nothing really that they've invested in to make their product differentiated. I worry that the more that this goes on, then a lot of these IP rights owners will be less inclined to continue to invest and be different. Because why would you do that if it's all going to end up in some kind of homogenised bargain basement bin? You might as well just go lower quality and sell as much as you can – go Walmart on it rather than high end.

Why do you think there is such hostility among lawyers to the merger of the Office of Fair Trading and the Competition Commission?

Sproul: There are commentators who say that productivity has gone down in both. I don't know whether those comments are true. But that's the process side. From a procedural side, I guess there is the concern that since both the Phase I merger and the Phase II merger will now be dealt with by the same organisation, there will be less independence than before. A file has to be transferred from the OFT to the CC if it goes to a Phase II nowadays but next year they'll be sitting very close to each other. That obviously raises concerns about the new Competition and Markets Authority being judge and jury in its own case. I think that's the central issue. It applies mainly to merger control but also perhaps to market inquiries like the aggregates market inquiry that's happening at the moment, or the audit inquiry. So there wouldn't be that independence of thought happening.

Calvert: The only thing I would add is that we have to suck it and see. I'm not entirely convinced that it's a bad thing to lose that separation. To the extent that we've got continuity of people looking at a particular matter, it may be a good thing, particularly from a client's perspective. There may be less incentive to refer something on. There have been criticisms that, in the past, the OFT has looked at some very technical transactions and said this is all far too complicated for us to get to grips with in four weeks. So therefore we're not going to resolve this and do it all in Phase I, we're just going to take it to the CC and let them deal with it. Losing that entirely distinct mechanism may well mean that we have now got teams who are motivated to get to grips with the issue right from the very outset.

Okay, turning to something else. Are there some cases which are in commercial reality too big – and the companies involved too powerful – for a regulator to deal with? I'm thinking particularly

about the Apple / Samsung battles. If you're dealing with that kind of corporate power, that causes a particular problem, doesn't it?

Sproul: Yes, I think it does. We've seen these types of issues with Microsoft and a couple of others, Intel perhaps. I think the only answer the competition authorities have to that is to co-operate. So the US Department of Justice will do something in the States and the European Commission will do something over here. You may also get the Australian competition authorities, the Japan FTC or the Korean authorities involved, which you have seen in a number of cases. What can happen is that the US goes first and then Europe will follow – or vice versa – and then you may get other cases happening around it. But that's for investigations. When it comes to big court disputes, that's slightly different because the courts don't talk to each other in the same way, and then you get these massively long-lived court cases about antitrust issues which are complex in themselves anyway.

How far can guys like you take notice of political decisions in competition cases? Do you simply tell clients there is a political dimension in a particular case and that there is nothing that you, the lawyers, can do about it or is it something you're expected to deal with?

Sproul: Yes, we would be expected to manage this as far as possible. We've handled these types of cases. Defence, media and banking are the main areas where there is political influence in mergers. The European Commission concedes that if a merger happens in a member state and it's about, for example, a merger of two of their defence contractors, then, yes, that member state can look at it and can block it on national security grounds. In those circumstances, I don't think you just say to the client "This is the issue, over to you". It needs to be part of the overall strategy that you work on with the client. There are things you can do as a lawyer. I'm not sure that lobbying necessarily works these days in the way that it used to but certainly you'd go as far as you could in talking to people and finding out what their concerns were, so that you could address them.

Calvert: I think there's more scope on the regulatory front than there is in the pure antitrust arena, so again it comes back to that relationship between how these problems are being addressed. Is it through regulation or is it through antitrust because I think that, in the pure antitrust arena, it's much harder these days to grapple with some of these market power and structure issues. But then the regulators make a lot of the fact that they're independent and capable of making their own decisions and would not welcome political intervention.

Sproul: Although ultimately any competition authority that is funded by government isn't completely independent because it has to justify its existence to get the funding for next year. So I think there's some political influence at that level and then lobbying may make a difference but at a different level.

Is there anything special in competition terms about the diamond world?

Calvert: I think there is. I think to understand the diamond



Merlie Calvert

industry, you have to understand the natural resource industry and the biggest challenge facing any natural resources company that is of a certain scale is that you can't satisfy everybody. So you may have access to a terrific resource that you've probably sunk billions of dollars into bringing to the surface and then on to sale but there's always going to be somebody unhappy to whom you're saying, "I'm sorry, I don't have enough to sell you" or "I'm not going to be able to satisfy your demands". I think the problem's even more compounded in the diamond industry because diamonds are a product that so many people get very emotional about.

It is also a very old industry. One of the things that was particularly challenging for De Beers – right up until the early to mid-noughties – was the fact that they had typically dealt with great-grandfathers who had passed their business on to the grandfather, and then onto the father and the son. So there was this massive sort of family dynasty connection among a lot of the clients. When it came to the noughties and having to take account of regulation and strategically reviewing and the sort of catching up that a lot of other mining resource companies had gone through, we had to leave a lot of people behind necessarily and that sort of compounded the issue.

But I think that diamonds are very, very interesting. They have a lot of the same ethical issues that you would find in gold, silver and uranium, along with many of the same indigenous mining issues. But I think that they hit the headlines more frequently because they are a product to which people can notably relate. Diamonds are very beautiful. On the one side, you see these amazing sorts of creations that the stars wear at the Oscars and the prices that you see in the high street. Then at the other end of the scale, you see the digging around in the mud. So, yes, it's a fantastic industry and I think pretty unique. I think my role was extraordinarily unusual in many ways and it took me from negotiating with Hollywood over film scripts to dead bodies in the United States and dealing with US class action lawyers.