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15:00 h. Round table : National Judicial Experiences on Private Enforcement on Competition Law after *Courage* and *Manfredi* Judgments

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NATIONAL JUDICIAL EXPERIENCES ON PRIVATE ENFORCEMENT ON COMPETITION LAW AFTER *COURAGE* AND *MANFREDI* JUDGMENTS

The Hon. Sir Gerald Barling[1]

The UK courts established that damages are available for breaches of what are now Articles 101 and 102 TFEU almost 30 years ago,[2] long before the well-known statements in *Courage*.[3] As far as the domestic competition rules are concerned, a right to claim damages is not expressly provided for by the Competition Act 1998 but there is no doubt that the jurisdiction exists.

UK law recognises two principal procedural avenues for seeking to recover damages for loss caused by a competition law infringement: (i) a stand-alone action in the High Court of England & Wales (Court of Session in Scotland; High Court in Northern Ireland); or (ii) a so-called 'follow-on' action in the Competition Appeal Tribunal ("**CAT"**) or the High Court.[4]

Stand-alone actions

In some respects, a stand-alone action may be more attractive to damages claimants than making a complaint to the national enforcement authority, the Office of Fair Trading (**OFT**) or one of the sectoral regulators. Not only does it allow the claimant to seek to frame the infringement in the manner most suitable for the alleged loss but the High Court has also shown itself willing to grant interim relief and is able to deal with the cases more quickly than investigations by the OFT (a mere ten months from start to finish in one recent case[5]).

Section 16 of the Enterprise Act 2002 makes provision for the Lord Chancellor to make regulations for the transfer of stand-alone actions to the CAT. Thus far, no such regulations have been made.

Follow-on actions

Follow-on actions can be commenced before the CAT under section 47A of the Competition Act 1998 (or section 47B, see below) but may also be brought in the Chancery Division of the High Court. These rely on a decision of either the European Commission or one of the UK competition authorities finding an infringement of Article 101 or 102 TFEU, or the Chapter I or II prohibitions under the Competition Act.

This procedure relieves the burden on the claimant of establishing the infringement but the CAT is bound by the findings made in the infringement decision.[6] The issues are therefore limited to causation and quantum. It may be, however, that the decision of the regulatory body does not

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1 The Hon Mr Justice Barling is President of the UK Competition Appeal Tribunal and a Justice of the Chancery Division of the High Court of England and Wales. The views expressed in this lecture are strictly personal, and should not be construed as reflecting the opinion of the Competition Appeal Tribunal or any other court or institution.

2 See for example *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130.

3 Case C-453/99 *Crehan v Courage Ltd and Others* [2001] ECR I-6297, at [26].

4 Brought under either section 47A or 47B of the Competition Act 1998

5 *Purple Parking Ltd & Anor v Heathrow Airport Ltd* [2011] EWHC 987 (Ch). By contrast, the investigations by the OFT in *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited*, Case No. 1178/5/7/11, a follow-on damages claim currently pending before the CAT, lasted more than four years.

6 See section 47A(9) of the Competition Act 1998.

address certain aspects of the infringer's actions. In those instances, the claimant may not be able to claim for the full extent of its losses in the CAT, even where the wider infringement could be established.[7]

The Court of Appeal (Lloyd LJ) has observed that it is "*somewhat anomalous that the specialist tribunal is entrusted with the decision as to infringement or no on an appeal from a regulator, but is not allowed to touch that question in a claim for damages.*"[8] Jacob LJ has gone further: the "*'split' jurisdiction of regulator for infringement, tribunal for causation and assessment of damages ... needs ... reconsideration*."[9]

Collective actions

Section 47B of the Competition Act 1998 provides that certain 'specified bodies' may bring a follow-on claim for damages before the CAT on behalf of a number of named, individual consumers. At present only one body, the generalist consumer organisation Which?, has been specified for the purposes of section 47B. To date, Which? has brought only one claim under section 47B.[10] That landmark case was, however, settled in 2008, and made clear the limitations of the procedure.[11]

Welcome though it is, there are a number of issues with section 47B: (i) it is opt-in only; (ii) it is limited to individuals, thus excluding small and medium-sized enterprises (**SMEs**); (iii) currently only one body can bring actions under it; and (iv) it is follow-on only, relying on a public authority to make a finding of infringement first.

English civil procedure recognises five basic mechanisms for multi-party litigation in addition to section 47B: (i) test cases; (ii) consolidation of multiple actions; (iii) single trial of multiple actions; (iv) group litigation orders; and (v) representative actions.

Although in the context of a competition-law representative action, it has been suggested that a group litigation order might have been the appropriate form of proceeding,[12] in practice none of the available procedures is suited to litigation involving numerous consumer claimants who each have a very small claim, such as the Which? case. Group litigation order cases are centrally managed but

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7 Helen Davies QC, *Competition Litigation: Practical thoughts in developing times*, [2011] Comp Law 274, 279.

8 *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, at [143].

9 *Ibid.*, at [149]. At [150] Jacob LJ continued: "*In this context it must be remembered that the party claiming damages is not a party to the proceedings before the regulator. Facts about causation and damages, which will normally include an investigation into whether and if so how the infringing conduct affected that particular party, are not necessarily a part of the regulator's inquiry. If one is not careful there could be an injustice: findings made by the regulator on incomplete evidence followed by an impossibility of attacking them later*."

10 *The Consumers' Association v JJB Sports PLC* (case no. 1078/7/9/07).

11 It was estimated that some two million consumers were affected by the breach of the Chapter I prohibition of the 1998 Act in that case. It was ultimately settled by Which? for the sum of £20 per football shirt for those consumers who had signed up to the action (by that point some 600 had done so), and who could produce proof of purchase and were willing to sign a statement of truth. This case typifies the shortcomings of an opt-in system of redress in claims of this nature: some 600 people benefited from the settlement but that represents less than 0.1 per cent. of the two million consumers thought to have been affected and cannot be said to be much of a deterrent.

12 *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch), [2009] 3 WLR 1200.

the procedure is 'opt-in' in nature, so that all claimants must be identified and be parties to the proceedings. This is not practical where there are eg hundreds or thousands of victims.

The passing-on defence

One of the issues for a claimant in a multi-layered supply chain is to show that the loss rested with him and was not passed on. In a straightforward price-fixing cartel the direct purchaser's *prima facie* loss may not be hard to assess, at least in theory: if he purchased a million blodgets, his damage amounts to a million times the overcharge by the cartellist, plus interest. The loss will necessarily be calculated differently where some, or all, of the overcharge is passed on. An indirect purchaser, however, has paid the price demanded by his own supplier, which may or may not include the overcharge, or a part thereof, so the indirect purchaser must overcome this in order to establish his loss.[13] Of course, the fact of passing on a charge may itself cause recoverable loss to the claimant in terms of diminished sales and profit.

As to whether the passing-on defence is a defence under English law or merely an instance of the claimant having failed to establish his loss, see Arden LJ's judgment in *Devenish*.[14]

Types of damages available at English law

English law regards competition law infringements as tortious breaches of statutory duty. The general rule is that damages in non-proprietary torts are compensatory in nature. Nourse LJ held in *Wass* that the "*general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages*."[15]

In *Devenish*, a case relating to the European Commission's *Vitamins* cartel decision,[16] the claimant sought to establish the principle that, "*in an action for breach of statutory duty the court can in appropriate circumstances make a restitutionary award, that is, a sum of money assessed by reference to the gain which the wrongdoer has made as a result of the wrong, in place of compensatory damages, that is, damages which compensate the claimant for loss suffered as a result of the wrongdoing*."[17] The Court of Appeal held, however, that a restitutionary award could only be in an anti-trust case where it is necessary to do justice in that case.[18] Arden LJ held that

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13 If the cartellist is faced only with a direct purchaser, he will argue that passing-on took place, resulting in no loss. If the only claimant is an indirect purchaser, the infringer must argue either that the overcharge was not passed on to the claimant by a purchaser earlier in the chain or, alternatively, that the claimant himself passed it on. Further issues may well arise where the claimants in the same case comprise both direct and indirect purchasers.

14 See *Devenish Nutrition Limited v Sanofi-Aventis Sa (France) & Ors* [2008] EWCA Civ 1086, at [115].

15 *Stoke-on-Trent City Council v Wass* [1988] 1 WLR 1406

16 Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 – Vitamins) (2003) OJ L 6/1.

17 *Devenish*, *supra*, per Arden LJ at [1].

18 *Ibid.*, at [104]. At first instance, ([2007] EHWC 2394 (Ch)) Lewison J held at [108]: "... *even where a restitutionary award is available, it is generally awarded where an award of more traditionally based compensatory damages would be inadequate to compensate the claimant ... Yet in the present case,* [the claimant's expert] *says that the measure of restitutionary damages is the same as the measure of compensatory damages. If that is so, then ... compensatory damages would be an adequate remedy*."

whilst EU law does not preclude the making of a restitutionary award, it does not require it either – the principle of effectiveness is satisfied by the availability of a compensatory award.[19] Tuckey LJ stated held: "*If Devenish has suffered a loss it is recoverable as damages, but if it has not I do not see how this can be a reason for saying that damages are an inadequate remedy; they are adequate for anyone who has suffered a loss. An account of profits of the kind advanced would give Devenish a windfall. I can see no justification for this*."[20]

Exemplary damages are also available in principle but there is no reported competition case in the UK in which they have yet been awarded. The CAT currently has two cases pending in which claimants are seeking exemplary awards.

Reform proposals

Very recently (April 2012) the UK government published its consultation document "Private actions in Competition Law: a consultation on options for reform".[21] The proposals contained in the consultation are potentially of very great significance to the UK competition regime. In particular, the Government proposes to establish the CAT as a major venue for competition actions in the UK by:[22]

- Allowing stand-alone claims to be transferred from the High Court to the CAT[23];
- allowing stand-alone competition claims (including claims for injunctive relief at both interim and final stages) to be commenced directly in the CAT[24];
- Providing a more effective collective actions regime, by introducing a full opt-out procedure for collective actions in competition cases, available only in the CAT, in both stand-alone and follow-on claims ;
- Introducing a fast-track route for competition claims by SMEs;[25]
- Considering whether to introduce, in cartel cases, a rebuttable presumption that a cartel has affected prices by a fixed percentage, transferring the burden of proof to the defendant[26];
- Leaving the passing-on defence unchanged.[27]

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19 *Ibid.*, at [130] and [135].

20 *Ibid.*, at [158].

21 Consultation document accessible at: http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf; accessed 26 May 2012.

22 See section 4 of the BIS consultation document.

23 Paras [4.16-4.18].

24 Paras [4.19-4.21].

25 Paras [4.24-4.35].

26 Paras [4.40-4.43].

27 Paras [4.44-4.49] – legislation at EU level considered more appropriate.