JONES DAY

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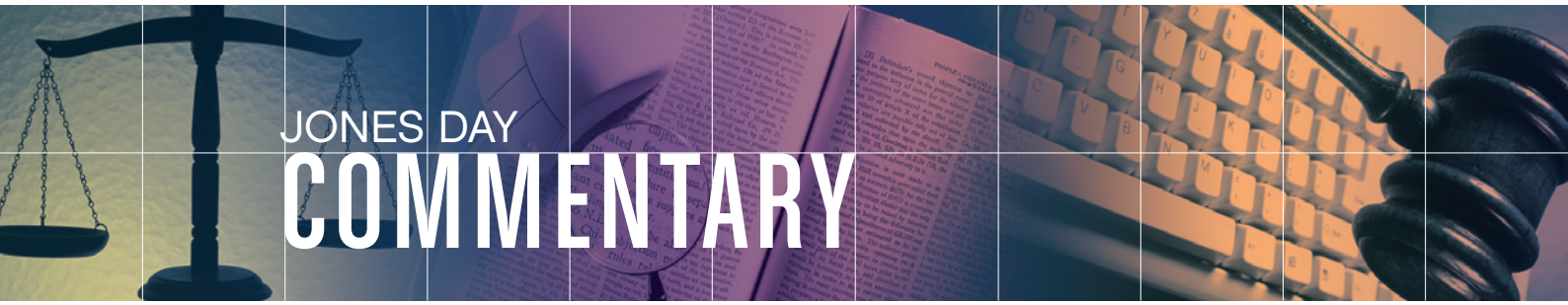

DAMAGES IN PRIVATE CARTEL ACTIONS: THE POSITION IN ENGLAND

Competition authorities in Europe have sought to encourage private law actions against cartelists as part of effective antitrust law enforcement. In its White Paper of April this year, the Commission stated that:

> to date in practice victims of EC antitrust infringements only rarely obtain reparation… The amount of compensation that these victims are foregoing is in the range of several billion euros a year[1].

In on-going High Court litigation in England, some of the victims of the vitamins cartels of the 1990s have sought to recover exemplary damages and/or restitutionary awards (as described below) in an attempt to recover an amount in excess of the amount they lost. This would inevitably make such claims more attractive to victims. However, on 14 October 2008, the Court of Appeal in England upheld a decision from last year that only compensatory damages are available to cartel victims. This is a setback for private antitrust plaintiffs in the UK, which generally is one of the most attractive EU jurisdictions in which to bring a private cartel action.

BACKGROUND TO THE COURT OF APPEAL'S DECISION

In October 2007, in a judgment of Mr Justice Lewison in the High Court in England[2], it was held that only compensatory damages were available to cartel victims who, in reliance upon a Commission decision, brought private law claims. Exemplary damages and restitutionary awards were not available.

The claimants concerned were victims of the vitamins cartels of the 1990s. The defendants were companies in the Aventis, Hoffman-La Roche and BASF groups of companies. With the exception of Aventis, which had obtained leniency for whistleblowing, the cartelists had paid very substantial fines to the European Commission.

1 White Paper on Damages actions for breach of the EC antitrust rules, paragraph 1.1.
2 *Devenish Nutrition Limited & Others -v- Sanofi-Aventis SA* (France) [2007] EWHC 2394 (Ch).

One claimant, Devenish Nutrition Limited, appealed the High Court's decision that a restitutionary award was unavailable. In its judgment of 14 October 2008[3], the Court of Appeal dismissed the appeal, holding that (i) it was bound by the previous Court of Appeal decision in *Wass*[4] that a restitutionary award was not available to the victim of a non-proprietary tort and (ii) in any event, compensatory damages were an adequate remedy.

In so holding, the Court of Appeal addressed two issues that have been the subject of legal debate in this area. First, Lord Justice Tuckey indicated that the "pass-on" defence should be available to defendants where the claimant had mitigated its loss by passing on all or part of the illegal overcharge to its own downstream customers. Second, Lady Justice Arden, who reviewed the authorities in relation to restitutionary awards, indicated that in principle an account of profits (a form of restitutionary award) should be available as a remedy in tort in exceptional circumstances, as it is in contract, in order to give coherence to the court's range of remedial responses. The House of Lords would have to overrule the Court of Appeal's decision in *Wass* in order for that to happen.

WHY SUE IN ENGLAND?

The claimants were companies domiciled in England and the Republic of Ireland. The defendant companies were domiciled variously in England, France, Germany and Switzerland. Cartels give rise to joint and several liability, with each cartelist being responsible for the losses of each and every victim, since each cartelist was party to the same offending agreement or practice. Consequently, under EC law the claimants were entitled to sue in any jurisdiction where one of the cartelists was domiciled and then to join the others as necessary parties.

In England, breach of Article 81 of the EC Treaty is a statutory tort, and a claim in this respect can be brought in reliance upon the European Commission decision which establishes liability.

At the outset of the proceedings, bringing claims in England would have seemed attractive to the claimants. The Commission had found in November 2001 that the defendants had seriously breached Article 81, which prohibits cartels. It was therefore uncontroversial that compensatory damages would be available subject to proof of damage and loss. Compensatory damages would be assessed so as to put the claimant in the position it would have been in but for the illegal cartel and the claimant would therefore recover the illegal overcharge, with damages adjusted to take account of such things as taxation.

A number of the features that the Commission White Paper identified as being desirable in order to encourage private law actions by the victims of cartels already exist under English procedure. The general principle in the English courts is that the loser pays the successful parties' costs, as well as its own (i.e. there is cost shifting). Therefore, provided the claimants recovered some damages, they should also recover their costs.

Simple interest is also payable on any damages awarded, in the case of tort, from the date of damage. For cartels dating back to the early 1990s, the interest could amount to as much as the principal amount claimed.

But the claimants wanted more and also claimed exemplary damages (not available in the countries of mainland Europe) and a restitutionary award. Later they also sought an amendment to claim compound interest on their losses, but this entitlement has not been adjudicated.

EXEMPLARY DAMAGES

Exemplary damages (also known as punitive damages) are awarded in addition to damages that fully compensate the victim. They are intended to punish and deter and are available in a number of circumstances, including where the defendant's wrongful actions have been carried out in wilful disregard of the claimant's rights, with the expectation of profiting by more than any damages payable to the claimant, and where the defendant's actions are such as to evoke a sense of outrage[5]. The award is discretionary.

The High Court held that exemplary damages were not available to the cartel victims and that decision was not

3 *Devenish Nutrition Limited -v- Sanofi-Aventis & Others* [2008] EWCA Civ 1086.
4 *Stoke on Trent City Council -v- W J Wass Ltd* [1988] 1 WLR 1406.
5 *Rookes -v- Barnard* [1964] 1 AC 1129.

appealed. Essentially, the judge reasoned that the cartelists had already been punished once for their wrong and that it would offend both English common law principles and the Community principle of "*non bis in idem*"[6] if they were punished again. This would amount to double jeopardy and would be unfair.

While it was true that Aventis had been granted leniency for whistleblowing, which reduced its fine to zero, it was more important to encourage whistleblowers than to punish cartelists, and the national court should not undermine the leniency policy by an award of exemplary damages.

Furthermore, under the EC Modernisation Regulation, national courts cannot adopt a decision running counter to a decision of the Commission. If the national courts were to award a fine against a party already fined by the Commission, the national courts would by implication be deciding that the Commission fine had been insufficient. This would be inconsistent with the Modernisation Regulation.

A claimant is, of course, entitled to bring allegations of illegal cartel activity whether or not there has been a Commission or National Competition Authority investigation. In those circumstances the claimant would have to prove the existence of the cartel. In the absence of regulatory fines, this then raises the question of whether exemplary damages might be available.

RESTITUTIONARY AWARDS

A restitutionary award is calculated by reference to the defendant's gain rather than the claimant's loss and may amount to more than that loss, particularly where the claimant has passed on all or part of the cartel overcharge. It will also therefore give rise to a different Disclosure/Discovery exercise which may be more burdensome to the defendant.

This is a difficult area of law and one that is complicated both by the variety of labels that have been attached to different restitutionary awards and by the lively academic debate as to the parameters of such awards. In the vitamins litigation, restitutionary awards were distilled down to "user damages" (damages assessed by reference to the fair price for what had been taken from the claimant) and "an account of profits" (an account of the unlawful profits made by the defendant together with an order that these unlawful profits once assessed are paid to the claimant).

The High Court held that the vitamins claimants were not entitled to either of these restitutionary awards. The applicable principle had been decided by the Court of Appeal in *Wass*, which held that a restitutionary award was not available for a non-proprietary tort. In other words, unless the tort complained of involved the wrongful appropriation or invasion of a proprietary right—such as a real estate or intellectual property right—no such award could be made. The decision in *Wass* was binding on the High Court at first instance and the Court of Appeal.

However, in the line of authorities proceeding from the House of Lords case of *Attorney General -v- Blake*[7], it had been held that an account of profits would be available for a breach of contract in exceptional circumstances where compensatory damages were not an adequate remedy. A central feature of each of these cases had been that the claimant had suffered no measurable financial loss even though it had sustained a wrong. The authorities indicate that "exceptional circumstances" include such things as (i) doing the thing a defendant has expressly contracted not to do, (ii) repeated breach and (iii) being in a position of quasi-fiduciary.

In the vitamins case, Lady Justice Arden stated that in order to achieve coherence of remedies, an account of profits should also be available in exceptional circumstances in tort, irrespective of whether the tort was proprietary. She was, however, bound by the decision in *Wass* and therefore unable to extend the law in that direction.

Further, it was decided that given the fundamental Community law principle of effectiveness, there was nothing in Community law that required the English court to grant a restitutionary remedy to cartel victims. A compensatory remedy would be sufficient to provide an effective remedy for breach of Community law.

6 Literally, in Latin, "not twice for the same".
7 [2001] A.C. 268.

IS THIS AN ENCOURAGING DEVELOPMENT FOR CLAIMANTS?

It remains to be seen whether an appropriate case will reach the House of Lords and whether they will overturn *Wass*. Even were they to do so, this may be of little encouragement to cartel victims bringing follow-on claims through the courts.

An essential principle of English law is that the courts will award damages so as to compensate a defendant's loss. It is to be awarded an amount of money that will, so far as possible, place it in the position it would have been in had it not sustained the wrong. The Court of Appeal was unanimous in Devenish's appeal that compensatory damages were an adequate remedy and that the appellant could not satisfy the exceptional circumstances test set out in *Blake*.

This was unsurprising. Devenish had apprehended that the court would find that damages were an adequate remedy and, in circumstances where it had passed on the overcharge to its own customers, that it would have suffered no financial loss. It therefore argued that damages, which could be nil, were not an adequate remedy. This argument was rejected by the court. There is a clear difference between the situation where damages cannot be assessed—and an account of profits may therefore be an appropriate remedy—and one where a claimant, albeit that it has suffered a wrong, has been able to mitigate its loss to nil. In the end, the argument was given short shrift by Lord Justice Tuckey, who said:

> If Devenish [the appellant] 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. As Longmore LJ says the law is not in the business of transferring money gains from one undeserving recipient to another[8].

The methods available for calculating illegal cartel overcharges are well established. Further, while it is possible that the proof available will be insufficient to establish the exact measure of loss with precision, that in itself will not prevent the courts from arriving at a sum for the purposes of doing justice. Consequently it is unlikely that many victims of cartels will be able to argue that compensatory damages are not an adequate remedy. Lady Justice Arden did, however, state that she considered it to be "at least arguable that the court should order an account of profits where the evidential difficulties were not the claimant's responsibility"[9].

CONCLUDING REMARKS

In summary, despite this setback, England may well remain an attractive forum for cartel claims.

- Cost shifting, where liability has already been established by the Commission, means the defendants should ultimately pay the claimants' costs[10].
- A damages award may include interest.
- The parties appoint their own experts as opposed to having to rely on an expert instructed by the court, as occurs in some other European jurisdictions.
- Disclosure rules favour broader discovery than elsewhere in Europe.
- The limitation period for torts is longer than in some European countries.

However, it appears that damages will be recoverable only on the compensatory basis, which is consistent with other European jurisdictions. If a claimant has passed on all or part of the cartel overcharge, that is likely to be treated as mitigation and will not be recoverable. A claimant would therefore face the potentially complex exercise of having to calculate the level of any pass-on.

8 Judgment paragraph 157.
9 Judgment paragraph 105.
10 Under the "Part 36" regime in the Supreme Court's Civil Procedure Rules, a claimant may make a without prejudice offer to settle at any stage in the proceedings. If it is not accepted by the defendant and at trial the claimant obtains a judgment "more advantageous" than its offer, the court may, on being informed of the offer and at its discretion, award (i) interest on damages and on costs at up to 10 percent above base and (ii) may also award costs to be assessed upon the indemnity basis, which means that all of the claimant's legal costs and disbursements are recoverable except those the defendant is able to show were incurred unreasonably. A defendant may also make a Part 36 offer. If the claimant were to reject it and then win at trial but not obtain a judgment more advantageous than the defendant's offer, the court can order the claimant to pay the defendant's legal costs incurred from 21 days after the offer was made, including the costs of trial.

LAWYER CONTACT

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