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UK Courts to Decide If Employees Must Pay Price Fixing Penalties Imposed on Corporation

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Ongoing private litigation in the English courts will address whether a corporation that, through its employees, violated UK antitrust law may recover from those employees the penalties imposed on the corporation. This litigation involving price fixing of dairy products by Safeway is attracting much interest. If the corporation succeeds in recovering antitrust penalties and costs from the responsible officers and employees, that will change the future dynamic between employees and the corporations that employ them. Engaging in unlawful conduct will put employees at greater individual risk, as they may be held financially accountable for those fines even if their employment has ceased, and the post-conduct interests of the employees and their corporations will diverge.

Background to the Dispute

In 2007, the Office of Fair Trading (OFT), the UK's primary antitrust enforcement agency, charged several large supermarkets and dairy processors with price fixing. The OFT has since settled with many of the parties, but continues to investigate two of the supermarkets (Tesco and Morrisons, which owns Safeway Stores). Safeway has admitted antitrust laws were infringed and could face a penalty of between £10.5 million and £16.5 million.

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Safeway initiated private litigation in the High Court against 11 former employees, including some directors, whom Safeway views as having participated in or facilitated the price fixing practices. Safeway seeks to recover from the employees the penalty and Safeway's associated legal costs. The High Court ruled that Safeway's claim would be permitted to proceed to trial, and on March 2, 2010 gave the employees leave to appeal.

The former employees sought to end the claim before trial by applying for summary judgment or strike out of the claim. The employees argued that:

- The Safeway Stores committed an unlawful act and cannot therefore maintain an action for an indemnity against liability that results from the act. (The principle of ex turpi causa non oritur actio is that one cannot bring a legal action based on one's own wrongful conduct.)
- The claim is fundamentally inconsistent with the UK Competition Act 1998 on which the OFT's investigation is based. The Competition Act is addressed to companies, not individuals.

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Corporation's Defense of its Own Wrongful Conduct

In January, the High Court decided that, although Safeway's unlawful acts were sufficiently serious to consider the ex turpi causa defense (the imminent antitrust penalty being akin to a fine), these acts could not necessarily be said to have been committed by the corporation. For the competition law infringements to be attributed to Safeway, its liability had to be "personal or 'primary' or direct" and could not be through vicarious liability or "the general principles of the law of agency." This might require that a former employee have been the "directing mind and will" of the company. The court also stated that Safeway's defense to ex turpi causa – that it was victim of the acts of the former employees – was in itself sufficient to give the corporation a sufficient prospect of success to allow it to proceed to trial.

In its judgment, the High Court noted that it appeared that the real targets of the claim are the former employees' insurance policies, not their individuals' assets. If successful, this could mark a shift towards penalties imposed by the OFT ultimately being paid by insurers or former employees rather than the infringing companies.

UK Competition Regime

The former employees argued that the provisions of the Competition Act are addressed to companies, not individuals. Accordingly, they argued, the High Court may not apply the Competition Act to individuals indirectly. They argued that if an officer or employee involved in a cartel is to be sanctioned, this must be done by way of the Enterprise Act 2002, which introduced the "cartel offense" expressly to sanction individuals rather than companies. They also argued that this is an area intended for the legislature and that to remove the penalties from the companies would remove the "punishment, deterrence and reversal of unjust enrichment" effects for which they existed.

The High Court was not receptive to these arguments. The High Court decided that well-established common law duties owed by employees to companies were not intended to be affected by the competition law regime in question and that the case would "simply involve the application of existing law to the particular facts of this case."

Next Steps and Comment

The March 2, 2010 ruling allows the former employees to appeal the decision. Their appeal will be heard by the Court of Appeal later this year.

If the Court of Appeal affirms the High Court ruling, the case could proceed to trial. This case provides the first practical example of whether and in what circumstances an employee may be liable for penalties imposed on its employer by the OFT under the Competition Act. A key issue for trial appears to be whether the evidence shows that Safeway did in fact have personal or primary liability for the antitrust infringements and in what circumstances employees can be found to be the directing mind and will of a company.

In its judgment, the High Court noted that it appeared that the real targets of the claim are the former employees' insurance policies, not their individuals' assets. If successful, this could mark a shift towards penalties imposed by the OFT ultimately being paid by insurers or former employees (where the relevant insurance does not provide cover), rather than the infringing companies.

While this type of action is new to the UK, it is not without precedent elsewhere. In the United States, for example, there is some precedent for a company to bring a claim against employees whose misconduct caused it to incur antitrust fines and penalties. Such actions, however, are rare and face the same general challenges that Safeway will need to overcome at trial.

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