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The UK Court of Appeal rules out shifting of antitrust liability onto employees (Safeway Stores, Twigger)

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UK Court of Appeal (Civil Division), 21 December 2010, Safeway Stores Ltd & Others v. Twigger & Others

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An attempt by a UK supermarket retailer to shift the burden of a £16.45 million fine for an antitrust infringement onto its former employees was recently defeated in the UK Court of Appeal (Court). This case has raised a novel, but significant question for English law as to extent of the public policy rule of ex turpi cause. The Court found that as a matter of law, a company (and not its employees) is personally responsible for an infringement competition law and this prevents a company from later relying on the illegality against third parties. The judgment rules out the ability of companies to limit their antitrust risk exposure through employee indemnities.

I. Background to the Case

Following a two year investigation by the Office of Fair Trading (OFT) into price fixing by UK supermarkets in the dairy sector, in December 2007, Safeway (now owned by Morrisons) entered into an early resolution settlement with the OFT [1]. Under the terms of that settlement, Safeway admitted an infringement of the Chapter One prohibition of the Competition Act 1998 and was fined £16.45 million. Safeway subsequently launched proceedings against 11 former employees/directors (including the former Chairman) to indemnify the supermarket against the OFT's fine.

In January 2010, the High Court rejected an attempt by the former employees to strike out the claim - thus allowing the case to pursue to a full trial with the prospect of employee liability for Safeway's antitrust infringement [2]. The Court of Appeal heard argument in November 2010 and handed down their unanimous judgment shortly before year-end.

II. The Court of Appeal's judgment

In the leading judgment by Lord Justice Longmore, he summarised the "short but not easy question" for the Court to be whether "an undertaking such as Safeway infringes provisions of the Competition Act 1998 relating to anti-competitive activity and is duly penalised by the Office of Fair Trading, can that undertaking recover the amount of such penalties from its directors or employees who were themselves responsible for the infringement".

The Court reviewed in some detail the jurisprudence on ex turpi causa - whose origins in English law date from at least 1775. It was though its modern application as a rule against recovery for damages by a claimant for consequences of his own criminal act as laid down in Gray v Thames Trains Ltd [3] in 2009 that was the main basis of the Court's assessment.

Flaux J in his High Court judgment had already considered that behaviour contrary to the Competition Act 1998 was sufficiently illegal or unlawful so as to trigger the rules of ex turpi causa. His assessment was unchallenged before the Court.

Safeway argued that as a corporate entity, it can only act through its human agents i.e. its employees and directors. Therefore, Safeway itself was not "personally" liable (particularly as the board of directors never sanctioned such conduct) and ex turpi causa should not apply. The Court though considered Safeway misunderstood the notion of "personally" liable for the purposes of the Competition Act 1998. Only undertakings can be at fault and therefore liability rests with the undertaking. As succinctly put by Longmore LJ "the undertaking cannot say that it was not personally at fault in order to defeat the application of the maxim".

In January 2011, Safeway (Morrisons) announced that it would seek leave to appeal to the Supreme Court.

III. Significance

Unlike the position at the EU level and across many Member States, personal liability for antitrust infringement in the UK is not an unknown concept. The current legislative framework already allows for two significant ways in which individuals responsible for antitrust infringements can be held personally liable.

The "cartel offence" under Section 188 of the Enterprise Act 2002 makes it a criminal offence for individuals to engage dishonestly in cartels. If found guilty by a court, such individuals can be imprisoned for up to five years and face an unlimited fine. Additionally, company directors of companies who breach competition law may be subject to competition disqualification orders, which will prevent them from being involved in the management of a company for up to 15 years. However, both of these forms of personal liability are still in their infancy and not without teething problems. To date there has only been one successful criminal prosecution (Marine Hoses) and in 2010, we witnessed the spectacular collapse of the British Airways executives trial (R-v- George, Crawley, Burns and Burnett). Other criminal investigations are ongoing relating to commercial vehicle manufacturers and in the automotive and agricultural sectors. Likewise the OFT's use of its powers regarding disqualification orders has been limited. It remains to be seen whether following a consultation process in 2009/2010, the OFT will make increased use of this potentially important enforcement tool.

Therefore, this case should be viewed against that context of an enhanced push by the OFT towards personal liability. However, this does not mean that the principles of the common law should be overridden to allow undertakings to shift liability to employees. The Competition Act framework was designed to hold companies to account - and piercing the corporate veil in the manner Safeway sought appears to be a step too far for English law at present. Companies thus should not hope that if they are found to have acted illegally they will be able to shift the burden of a fine onto employees. The Court of Appeal's judgment therefore reinforces the message to companies that the only effective way to mitigate antitrust liability is to have an effective compliance programme with ongoing vigilance by the company of its employees' activities. Early detection and potential leniency/immunity applications thus remain the key ways to limit antitrust liability.

NB Regarding this case, see also Matthieu Cyrus, A UK Court of Appeal strikes out a firm's claim to recover the amount of a fine imposed by the OFT for breach of the Competition Act 1998 from former directors and employees as a matter of public policy (Safeway Stores, Twigger and others), 21 December 2010, e-Competitions, n° 33576.

[1] See Andreas Stephan, The UK OFT employs a form of direct settlement and agrees over € 155 M penalties in dairies cartel case (Asda, Dairy Crest, Safeway, Sainsbury's a.o.), 7 December 2007, e-Competitions, n° 15533.

[2] The High Court judgment is the subject of a number of separate comments. See Simon Barnes, The English High

Court opens the way for companies to pursue private damages actions against employees and directors who are involved in competition law infringements (Safeway Stores & Ors/Twigger & Ors), 15 January 2010, e-Competitions, n° 30444, Socrates Ioannou, The UK High Court leaves a supermarket chain, found guilty of price fixing by the OFT, move one step closer to trial in its action against former employees and directors in order to obtain indemnity for the penalty incurred (Safeway - Dairy products), 15 January 2010, e-Competitions, n° 31644 and Suzanne Innes-Stubb, Ian Reynolds, The English High Court sees a way through public policy objections to the recovery of cartel fines from company executives (Safeway Stores), 15 January 2010, e-Competitions, n° 30714.

[3] [2009] 1 AC 1339.

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