UK COMPETITION LAW UPDATE

Court of Appeal Rejects Restitutionary Award in Follow-on Damages Action

London
October 27, 2008

A recent judgment of the Court of Appeal of England and Wales has confirmed the findings of a lower court that restitutionary awards are not available in actions for infringement of competition law, and that compensatory damages are the normal remedy. Significantly, the court further held that, even if restitution were to be available, it would not have ordered it in the circumstances of the case, as the harm flowing to purchasers of products that have been the subject of a cartel may be adequately compensated through damages.

I. JUDGMENT

The case concerns a series of follow-on damages claims before the High Court stemming from the 2001 decision of the European Commission in the *Vitamins* cartel.[1] Claims were brought by direct purchasers (animal feedstuff producers) and indirect purchasers (poultry producers) of vitamins that had been incorporated into animal feedstuffs. The claimants sought damages for loss suffered or restitution in the amount of the overcharge (*i.e.*, the difference between the unlawful price charged and the price that would have been charged in the absence of the infringement). The High Court ordered the determination, as a preliminary issue, of whether the claimants would be entitled to restitution (also known as an account of profits) or exemplary damages.

The High Court held that it could not award restitution in the antitrust context because it was not available as a remedy in respect of the tort (breach of statutory duty, a 'non-proprietary' tort that addresses wrongs other than interference with property rights) on which actions for competition law infringements are based.[2] The High Court further held that, even if it could make such an award, it would not do so because

[1] Case No. C.37.512 – *Vitamins*, Commission decision of November 21, 2001 (2003 OJ L 6/1).

[2] *Devenish Nutrition Ltd. & Ors. v. Sanofi-Aventis S.A. (France) & Ors.* [2007] EWHC 2394 (Ch).

© Cleary Gottlieb Steen & Hamilton LLP, 2008. All rights reserved.

This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice.

compensatory damages would likely provide an adequate remedy. (The court also held that exemplary damages were not available in the context of a follow-on action: see Recent Developments in Follow-on Cartel Damages Claims, CGSH U.K. Competition Law Update, November 6, 2007. This issue did not form part of the appeal.)

Following an appeal by Devenish Nutrition Limited as to whether restitution would be available, the Court of Appeal upheld the judgment of the High Court, confirming that restitution was not available as a remedy and that, even if it were available, the court would not grant restitution in this instance.[3]

The Court of Appeal considered Attorney General v. Blake [2001] AC 268, a prior case in the House of Lords on which the claimants relied. In Blake, it was held that, while compensatory damages were the normal remedy, "in exceptional circumstances" restitution could be ordered where compensatory damages would be inadequate. In reaching this conclusion, the House of Lords had held that, while restitution had previously been available only in respect of torts dealing with interference of property, the remedy should also be available for other types of actions (in that case, breach of contract) whenever there were exceptional circumstances to justify the award.

This reasoning suggested that it may be possible for the court to extend the availability of restitution to the non-proprietary tort of breach of statutory duty, on which actions for competition law infringements are based. However, the Court of Appeal further held that one of its own prior judgments[4] had expressly held that restitution was available only in respect of proprietary torts, while another[5] had held that restitution was not available as a remedy for breach of statutory duty. As the House of Lords in Blake concerned breach of contract rather than non-proprietary torts, the Court of Appeal was bound by these prior judgments and therefore held that restitution was not available as a potential remedy for actions for infringement of competition rules.

The Court of Appeal nonetheless went on to consider, in the event that it were wrong and that restitution were available as a potential remedy, whether it would award restitution to the claimants in this instance. The court concluded that it would not have awarded restitution. While the court recognised that recent recommendations from the Office of Fair Trading[6] had suggested that courts might award restitutionary damages in certain circumstances, the Court of Appeal held that

---

3 *Devenish Nutrition Ltd. v. Sanofi-Aventis S.A. (France) & Ors.* [2008] EWCA Civ 1086.

4 *Stoke on Trent City Council v. Wass* [1988] 1 WLR 1406.

5 *Halifax Building Society v. Thomas* [1996] Ch 217.

6 OFT discussion paper, "*Private actions in competition law: effective redress for consumers and business*", November 26, 2007.

such an award would be appropriate only where necessary to do justice, and that compensation would be an adequate remedy in this instance.

To the extent that the claimants had suffered loss, they were entitled to compensation. Moreover, the type of loss – an overcharge – was one that was capable of quantification, and indeed one claimant had already quantified the amount of overcharge for certain vitamins. Evidence suggested that the loss had been passed on to indirect purchasers – something which the court noted, if proven, would prevent an award of compensatory damages and would likely mean that claims by indirect purchasers may be less likely. However, this did not provide a basis for making a restitutionary award, as the court was not "in the business of transferring monetary gains from one undeserving recipient to another". It should be noted, however, that the 'passing-on defence' was not an issue before the Court of Appeal (although the court did appear to proceed on the assumption that the defence would be available).

The only argument which the Court of Appeal regarded as having any merit in favour of restitution in the context of damages actions following on from a cartel was deterrence. However, the court held that this factor could not be determinative because it would arise in all instances of a breach of competition rules – something that went far beyond the exceptional nature of the remedies envisioned in Blake – and it would also need to be borne in mind that public enforcement would already have resulted in some kind of deterrence in all follow-on actions.

Finally, the Court of Appeal also held that, in its view, Community law did not require a restitutionary award in domestic law as a remedy for breach of competition law. Referring to the Manfredi judgment of the European Court of Justice,[7] the court held that restitution was not required in order to ensure equivalence between domestic and Community remedies because, even if such awards were to be available in the antitrust context, they would be granted only in exceptional circumstances which did not arise here. Similarly, the court held that restitution was not required to ensure the effectiveness of Community law, as the Court of Justice in Manfredi had held that, at a minimum, claimants were entitled to compensation for actual loss, lost profit, and interest, all of which would be available under a compensatory damages award.

II. COMMENT

The judgment provides a welcome clarification as to the scope of potential liability for defendants in competition damages actions before the English courts. In denying restitution and determining that compensation is an appropriate

[7] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi & Ors v. Lloyd Adriatico Assicurazioni SpA & Ors* [2006] ECR I-6619.

remedy, the Court of Appeal has sent a clear signal that private antitrust actions are about providing compensation, and that issues such as deterrence and removing an illegal gain are public matters for competition authorities. By focusing on compensation, the judgment also removes the risk of double liability to direct purchases for restitution and to indirect purchasers for compensation, although the 'passing on defense' as such has yet to be fully considered by the courts.

* * *

For additional information, please do not hesitate to contact Stephan Barthelmess, Brian Byrne, Christopher Cook, Maurits Dolmans, Francisco-Enrique González-Díaz, Nicholas Levy, Laurent Legein, Jan Meyers, James Modrall, Till Müller-Ibold, Robbert Snelders, Romano Subiotto, John Temple Lang, Dirk Vandermeersch, or Antoine Winckler of the Firm's Brussels office (+32 2 287 2000); Mario Siragusa or Giuseppe Scassellati-Sforzolini in Rome (+39 06 69 52 21); Dirk Schroeder or Romina Polley in Cologne (+49 221 800 400); François Brunet in Paris (+33 1 40 74 68 00); Shaun Goodman in London (+44 20 7614 2200)

CLEARY GOTTLIEB STEEN & HAMILTON LLP

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS
12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

MOSCOW
Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE
Theodor-Heuss-Ring 9
50668 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME
Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN
Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax