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English Court of Appeal's Judgment in *Cooper Tire and Ors v. Dow Deutschland and Ors*

On July 23, 2010, the English Court of Appeal ("CoA") rejected an appeal brought by Dow Deutschland and others against a 2009 decision of the English High Court concerning the jurisdiction of English courts over damages actions following on from a cartel infringement decision of the European Commission.

The appeal focused on whether a follow-on damages claim filed with the English High Court could be struck out at a preliminary stage on the basis that the only companies domiciled in the United Kingdom were subsidiaries or affiliates of the addressees of a Commission decision (*i.e.*, where the English domiciled companies were not themselves addressees of the Commission decision). The appeal also considered whether proceedings in England should be stayed while concurrent proceedings related to the same Commission decision are concluded.

As explained in greater detail below, the CoA held that an English court should not strike out a follow-on claim at a preliminary stage (*i.e.*, before disclosure – the English term for discovery) where it cannot exclude that the English domiciled subsidiary on which jurisdiction is based has engaged in, or was aware of, the anticompetitive conduct that was the subject of the Commission decision. Accordingly, provided that the claim makes an "arguable" case that the English subsidiary engaged in, or was aware of, anticompetitive conduct, the case may not be dismissed summarily. The CoA's judgment creates a relatively low jurisdictional standard, implying that, if it is subsequently determined that the English domiciled defendant(s) did not engage in anticompetitive conduct and was not aware that other companies within the group engaged in such conduct, the English courts would (1) no longer be able to hold the English defendant(s) liable and (2) likely decline jurisdiction.

In addition, the CoA noted that the High Court was right not to impose a stay on proceedings in England despite the existence of concurrent proceedings in Italy, because the "careful balancing of competing interests carried out by the High Court did not stray outside the reasonable range of options open to it." The CoA was not persuaded that the fact that the Italian court was first seized could act as a form of trump card, describing it as "speculative and imponderable at best." The CoA also held that a judge was entitled to take into account the fact that a decision in the Italian case was not imminent.

Section I below summarizes the background to the follow-on damages actions in

question, Section II outlines the proceedings before the CoA and its judgment, and Section III considers the implications of that judgment.

I. BACKGROUND

In 2006, the European Commission fined 13 companies (the "Addressees") for violating Article 81 EC Treaty (now Article 101 TFEU) in relation to the market for the supply of butadiene rubber ("BR") and emulsion styrene butadiene rubber ("ESBR").[1] In February 2007, most of the Addressees appealed the European Commission's decision to the Court of First Instance (now the General Court).[2]

In July 2007, Enichem commenced proceedings in Milan against 28 tire manufacturers, seeking a declaration from the Tribunal that Enichem had not breached applicable competition rules and that the tire manufacturers had suffered no damage. Enichem's objective for commencing these proceedings seems to have been to utilize the Brussels Regulation (Regulation 44/2001) to ensure that all private actions arising from the Commission's decision are conducted in Italy.[3] Five months later, 26 tire manufacturers issued proceedings before the High Court in London against 23 defendants who were alleged to be part of the cartel. In June 2008, some defendants (notably Dow) requested that the claim be struck out on the basis that the High Court lacked jurisdiction to hear the claim, because the only defendants domiciled in England were not Addressees of the Commission's decision. They also argued that the High Court did not have jurisdiction to hear the case, because the Italian court had been first seized. In the alternative, they requested a stay until the proceedings in Italy had been resolved.

In April 2009, the Tribunal in Milan dismissed Enichem's application in its entirety *inter alia* because the application ran counter to a European Commission decision. This decision has been appealed to the Court of Appeal in Milan.

On October 27, 2009, the English High Court rejected Dow's challenge to its jurisdiction and alternative plea for a stay. In line with the decision of the English High

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1 The Addressees were held guilty of an EEA-wide single and continuous infringement between May 1996 and November 2002 by agreeing price targets for their products, sharing customers by non-aggression agreements, and exchanging sensitive commercial information relating to prices, competitors, and customers.

2 The appeals were heard in October 2009 and judgment is awaited. Of note for this case, the appeals lodged by Dow, and by Eni SpA and Polimeri Europa ApA (collectively, "Enichem") did not dispute the existence of a cartel, but focused in particular on the level of the fine and the responsibility of the parent company for competition violations committed by its subsidiaries.

3 Article 27(2) of the Brussels Regulation provides *inter alia* that where the jurisdiction of the court first seized is established, any other court shall decline jurisdiction in favour of that court. Article 29 of the Brussels where actions come within the exclusive jurisdiction of several courts, any court other than the court first seized shall decline jurisdiction in favour of that court.

Court in *Provimi*,[4] the High Court held that it had jurisdiction over the claims primarily because two of the defendants were English-domiciled subsidiaries of an addressee, even though they were not Addressees themselves (*i.e.*, "Anchor Defendants"). As regards the claim that the Italian court was first seized, the High Court considered (1) the relatedness of the proceedings in Italy and England, (2) the stage that the respective proceedings had reached in England and Italy, and (3) the proximity of the case to each of Italy and England, and held that there was insufficient justification to grant a stay.[5] Dow appealed the High Court's decision to the CoA.

II. PROCEEDINGS BEFORE THE COA AND ITS JUDGMENT

Dow's appeal asserted that:

- *Provimi* had been wrongly decided (*i.e.*, that it was not the law that a subsidiary of an infringer could be liable if it was not a party to, or aware of, the anticompetitive agreements or practices of the infringer) and alternatively, if the point was arguable, that it ought to be referred to the European Court of Justice for an authoritative determination.

- The High Court erred in refusing to stay the proceedings on the basis that: (1) the claim had a more substantial connection with Italy, (2) the Italian court was seized first, and (3) it was inappropriate to take into account the length of time it would take to conclude the proceedings in Italy.

In respect of Dow's first submission (*i.e.*, that *Provimi* had been wrongly decided), the CoA held that the claim lodged by the tire manufacturers:

> "encompass[ed] both the possibility that the Anchor Defendants were parties to or aware of the anti-competitive conduct of their parent company and the other Addressees and the possibility that they were not…[b]ut it is unnecessary to decide it on this application because it is open to the claimants on the pleadings to prove that the Anchor Defendants were parties to (or aware of) the Addressees' anti-competitive conduct. The strength (or otherwise) of any such case cannot be assessed (or indeed usefully particularized) until after disclosure of documents because it is in the nature of anti-competitive arrangements that they are shrouded in secrecy. But the case that the Anchor Defendants were parties to the cartel arrangements or were aware of them when they sold BR and ESBR to the Claimants is not a case that is susceptible to being struck out at the present stage." (Paragraph 43)

In other words, the CoA could not strike out the case at this preliminary stage (*i.e.*, before disclosure), because the court could not yet determine whether the English

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4 Provimi Ltd v Roche Products [2003] EWHC 961 (Comm) [2003] 2 All ER (Comm) 683 ("*Provimi*").

5 The judge decided that the proceedings had no particular center of gravity and that, although there was a greater connection with Italy than with England, such greater connection was not decisive in the case of a Europe-wide conspiracy.

domiciled defendants had engaged in, or were aware that their affiliates had engaged in, anticompetitive conduct. In addition, the COA noted:

> "although one can see that a parent company should be liable for what its subsidiary has done on the basis that a parent company is presumed to be able to exercise (and actually exercise) decisive influence over a subsidiary, it is by no means obvious even in an Article 81 context that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. Nor does the Provimi point sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible or their parent companies rather than to impose a fine on all the entities of the relevant undertaking. If, moreover, liability can extend to any subsidiary company which is part of an undertaking, would such liability accrue to a subsidiary which did not deal in rubber at all, but another product entirely? These and other difficulties have been ventilated by Mr Nicholas Khan in the 2003 volume of European Lawyer page 16 and Mr Brian Kennelly in the May 2010 issue of the CPI Anti-Trust Journal." (Paragraph 45)[6]

The CoA seems to recognize that where any anticompetitive conduct has been effected exclusively by the non-English parent or sister companies of an English-domiciled entity: (1) the English courts would not have jurisdiction, and (2) the English company should be held blameless. Because the English defendant's involvement cannot be determined until disclosure has taken place, however, the CoA agreed with *Provimi* that it was arguably unnecessary *for jurisdictional purposes* to prove any concurrence of wills between two legal entities within one undertaking provided that the claim involves the allegation that the Anchor Defendants were aware of the anticompetitive conduct. On that basis, the CoA held that a reference to the European Court of Justice would be "unnecessarily elaborate and cumbersome."

In respect of Dow's second submission (*i.e.*, that proceedings should be stayed), the CoA held that the High Court's careful balancing of competing interests did not stray outside the reasonable range of options open to it and the CoA was not persuaded by the argument that because the Italian court was first seized, it should have jurisdiction for all claims. More specifically, it held that:

> "we are not persuaded that the fact that the Italian court was first seised of Enichem's claim can operate as a sort of trump card or even as a primary factor where there was as much care and deliberation on the part of Enichem in starting proceedings for negative declaratory relief as there was in the Claimants' decision to make their substantive claim in England… Nor are we persuaded that some combination of events in an inevitably somewhat distant future might put difficulties in the way of the Dow Defendants making a contribution claim against Enichem. That is speculative and imponderable at best and would depend on the Italian court holding that the elaborate conspiracy found by the Commission had not caused anyone any loss at all." (Paragraph 53)

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[6] The issue of the CPI Anti-Trust Journal referred to was organized and edited by Lindsay McSweeney of CPI and Ruchit Patel of Cleary Gottlieb Steen & Hamilton LLP (*See* *https://www.competitionpolicyinternational.com/may-2/*).

In respect of Dow's claim that the length of Italian proceedings should not be taken into account, the CoA held that a judge was entitled to take into account the fact that a decision was not imminent:

> "[t]he fact that it may take different periods of time for similar proceedings to come to a conclusion in different jurisdictions, for whatever reasons, is not a criticism; it is merely a fact of life to which a judge cannot be expected to close his eyes."

III. IMPLICATIONS OF THE COA'S JUDGMENT

As explained above, the CoA's decision held that the High Court has jurisdiction to hear the tire manufacturers' claim on the basis that it could not determine at a preliminary stage (*i.e.*, before disclosure) whether an English domiciled defendant that is not an Addressee of the Commission infringement decision has engaged in, or was aware of, anticompetitive conduct. Accordingly, provided that a claimant advances an "arguable" case that the English domiciled entity participated in, or was aware of, the anticompetitive conduct, the case could not be dismissed summarily. This finding implies that, if it is subsequently determined that the English domiciled defendant(s) did not engage in anticompetitive conduct and was not aware that other companies within the group engaged in such conduct, the English courts would (1) no longer be able to hold the English subsidiary liable and (2) likely decline jurisdiction.

The CoA's judgment also suggests a reluctance to let jurisdictional issues decelerate the overall progress of a follow-on damages action. In addition to its refusal to refer any questions to the ECJ because a reference would be "cumbersome" and "elaborate," and the relatively cursory treatment of the argument that the Italian Court was first seized, the CoA noted that "enthusiastic litigants sometimes forget that jurisdiction applications are supposed to be dealt with swiftly and economically at the beginning of the case."

The CoA's approach in this case provides further support for the view that the English courts are increasingly willing to take a pragmatic approach to jurisdictional questions concerning damages actions following-on from a European Commission decision (*see* *National Grid v. ABB and Ors* [2009] EWHC 1326 (Ch) and *Provimi*). This judgment seems likely to encourage claimants for whom the English High Court is becoming the forum of choice for follow-on damages actions in antitrust cases, at least for the preliminary stages of litigation.

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Please feel free to be in touch with any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

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