

UK PRIVATE ACTIONS UPDATE

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AGENDA

- CAT update:
 - Can non-addressee subsidiaries be sued?
 - What findings can be relied on in Decision?
 - Limitation: nightmare on Bloomsbury Place?
- High Court update:
 - Subsidiary liability – *Toshiba Carrier*
 - Timing of the *Masterfoods* stay
 - Access to information/disclosure
- Group claims
- Damages

CAT- jurisdiction: personal/subject matter

- **Can non-addressees be sued?**
 - ‘No’ see Mersen (UK) v Emerson [2011] CAT 4 (but on appeal)
 - Effect is UK non-addressee subsidiaries unavailable as ‘anchor’ defendants in CAT
- **What findings can be relied on in Decision?**
 - Enron v EWS [2011] EWCA Civ 2
 - Even if there are relevant findings of fact there must be an express finding of infringement to bring a claim.

CAT - Limitation

- R.31(1) -2 years from “the relevant date” (ie date of “final” decision).
- Uncertainty over when decision “final”.
 - Only appeals against infringement ‘stop the clock’
BCL v BASF [2009] EWCA Civ 434
(Dividing line between infringement and penalty appeal not always clear-cut.)
 - Does infringement appeal by one addressee ‘stop the clock’ against all addressees (or only against those appealing)?
Emerson I [2007] CAT 28 – ‘yes’
Deutsche Bahn [2011] CAT 16 – ‘no’ (on appeal)
 - Possibility of extension of 2 year period?
Emerson I (supra) – ‘yes’
BCL v BASF [2010] EWCA Civ 1258 – ‘no’
(BCL’s appeal to Sup Ct fixed for 9/7/12)
- Nb need to apply for permission to sue (on notice) pre final decision creates uncertainty for claimants who want to be sure jurisdiction seised.

High Court – Anchor Defendants

- When can a UK subsidiary be used as an ‘anchor’ defendant to join foreign parent?
 - Provimi – arguably liable for ‘innocent’ acts of implementation of cartel as part of undertaking
 - Cooper Tire (CA) Provimi arguable, but contrary also arguable (and would probably need a reference) but no need to decide because ‘implementation’ alleged covered ‘knowing’ implementation of cartel.
 - Toshiba Carrier [2011] EWHC 2665 (Ch)
 - Chancellor followed Cooper Tire. ‘knowing’ implementation alleged; no need to decide Provimi point until after trial on ‘knowledge’.
 - Permission to appeal granted 31/1/12 (Toulson & Kitchen LJJ).

Timing of Masterfoods stay

- Claims lodged during investigation by competition authority:
 - Emerald (Air Cargo); Nokia (LCDs)
 - Contrast: Servier (24/1/12) – Art 15 of Reg 1/2003 request for information as to potential scope of overlap between claim and Commission investigations.
- Decision published but appeals ongoing:
 - depends on facts of case, but see approach in National Grid [2009] EWHC 1326 (Ch): Immediate stay not warranted. (Appeals since determined)

Access to Information/Disclosure (I)

- Case C-360/09 Pfleiderer, judgment of 14 June 2011
 - Access to “leniency documents” on the BKA case file sought by damages claimant.
 - CJEU – Access to leniency documents not precluded by Reg 1/2003. National Court must determine conditions for access under national law by weighing the interests protected by European Union law.
- This weighing exercise being considered by High Court in National Grid
 - At High Court’s Invitation Commission made written observations Nov 2011 (since published):
 - Corporate statement not subject to *inter partes* disclosure
 - Other documents referring to it (eg. Decision) are in principle disclosable
 - Policy is cooperation should not put person in a worse position re private actions – generally “augurs” against disclosure
 - National Court must have regard to equivalence/effectiveness
 - Before ordering disclosure (inspection) are there other sources of information that are equally effective?
- Note: German Court in Pfleiderer has conducted the weighing exercise and it is understood came down against disclosure.

Access to Information/Disclosure (2)

- Case T-437/08 CDC Hydrogene Peroxide Cartel Damage Claims v Commission (15.12.11)
 - CDC SPV established to bring assigned claims in Germany on behalf of persons alleged to have suffered damage as a result of the HP Cartel.
 - Requested access to statement of contents (SC) of Commission's Case File under FOI Reg 1049/2001.
 - GCt held neither commercial interests or Commission's investigation justified non-disclosure of SC. (contrast actual documents in the file)
- Coogan v Mulcaire [2011] 2 WLR 1401 (Ch) – Scope for use of CPR 18 RFIs in relation to covert wrongdoing. If request otherwise legitimate issue is whether privilege vs self incrimination engaged?
- Settlements – e.g. Nokia LCDs N obtained agreement to use documents disclosed in US proceedings, subject to confidentiality provisions which allowed the information to be used if 'best efforts' to protect confidential made. N obtained confidentiality order (17/1/12) in High Court to serve PoC with this info.

Group Actions

- Potentially enable claims to be brought which might not be cost effective by themselves.
- Debate over opt-out representative/class actions (with controls) vs opt-in mechanisms presently available. Outcome of that debate awaited.
- Assignment of claims to SPVs?
 - effective in other jurisdictions (CDC; Equilib)
 - not tested in UK
 - contrary to English public policy?

Damages

- Remedies normally a matter for National law (in the UK principles of breach of statutory duty apply) subject to EU equivalence and effectiveness
- If national law provides no remedy how far does effectiveness go? C-295/04 Manfredi - must be “*open to any individual to claim damages for loss caused to him by a contract or conduct liable to distort competition.*”
- Indirect purchaser claims
 - German Supreme Court in Kohler (28 June 2011) referred to Manfredi in permitting such claims.
 - Some signs English courts would reach this conclusion even without reference to Manfredi (no direct decision to date)
- ‘Umbrella’ claims? Claimed in a number of ongoing cases.
- Exemplary damages?
 - Only required in EU law to satisfy equivalence. Being claimed in a number of standalone cases and also in one case in the CAT: see Albion [2010] CAT 30 (December 2010)

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