



Competition Law Association

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Ligue Internationale du Droit de la Concurrence
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Competition Litigation in the UK – update on the previous year's key developments

Speakers: Robert O'Donoghue QC, Brick Court Chambers
Ben Rayment, Monckton Chambers

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Venue: Herbert Smith Freehills LLP

Jurisdiction of English Courts (Robert O'Donoghue QC)

In the recent decision of *Iiyama UK Limited v Samsung Electronics*, the Court of Appeal adopted a claimant-friendly approach at the interlocutory stage in cartel follow-on cases and showed a willingness to uphold the jurisdiction of the English courts in a case where the cartelists' supply chains were located outside the EU. Striking out a case by reason that English and EU law are not applicable was said to require a full examination of the facts and could only be done after the disclosure process.

Another surprising element was the focus on the place where the loss was suffered, rather than the place of the most significant element of the tort, i.e. the place of the restriction of the competition. On this basis it could be argued that the judgment deprives the principle that a cartel must have "qualified effects" within EU territory of any real meaning. The court's reasoning was that once the effects of the worldwide cartel were foreseeable, it must have also been intended that the elevated prices would affect prices in Europe, and that they were therefore also immediate. The defendants' argument that the amalgamation of these three elements robbed the immediacy requirement of any real meaning did not convince the court.

A discussion of another 2018 decision, *Vattenfall v Prysmian*, also highlighted a claimant-friendly approach. The case gave further force to the decision in *Provimi* that each part of the cartelists' undertaking was liable to being sued in private law follow-on damages claims. The Prysmian UK entities' activities in the context of the infringement had been minor: £8,000 of direct supplies of the equipment, indirect supply of accessories and overlapping directors with the main infringing entities were sufficient to amount to direct implementation of the cartel. The activities of another defendant, the UK entity of NKT, were even more minor, in that they had virtually nothing to do with the cartel activity.

Finally, in the abuse of dominance case C-27/17 AB 'flyLAL-Lithuanian Airlines, Ben Rayment noted the observations of the Advocate General in regard to the Art 7(2) RBR were particularly interesting. He expressed "strong reservations" about the ruling in C-532/13 Hydrogen Peroxide v Evonik Degussa. In his opinion, it came too close to equating the 'place where the harmful event occurred' with the place where the victim suffered the greatest financial consequences, i.e. the place of its registered office. This "completely reverse[d]" the general rule in the Brussels Regulation that jurisdiction is to be for the courts in the defendant's place of domicile. It is possible that we will see a greater judicial focus on the question where an overcharge loss occurs.

High Court vs Competition Appeal Tribunal (Ben Rayment)

It was acknowledged that there has been an element of competition between the High Court and the CAT, in terms of which of the two is the preferable forum for bringing competition claims. Originally, the CAT's appeal was hampered in that it was the forum for follow-on damages claims only, but this shortcoming has been rectified – the differences in jurisdiction between the CAT and the High Court are diminishing.



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A lot of claims are still being brought in the High Court, which has a specialist list for competition cases. That balance has been affected by the Court of Appeal's judgment in *Sainsbury's v MasterCard*, where at [357] it was said that competition claims should, under "normal circumstances", be brought in the CAT. While "normal circumstances" is somewhat open to interpretation, one view is that all competition claims should be transferred, save those in which the competition issues cannot be separated from other issues. This comment at the end of a long judgment may be ignoring the provisions of CPR Practice Direction 30. Ben Rayment's view was that there should not necessarily be a presumption that all competition claims must be brought in the CAT.

Both the fast track procedure and collective proceedings orders are unique to the CAT. The first case under the fast-track procedure was *Socrates Training v The Law Society*; it went to trial within 6 months, but the overall timetable was significantly longer than this (the reason for this being that there is no fixed amount of time within which a judgment must be made). This means that apart from the CAT's expert wing members the advantages of the fast track over expedition in the High Court are mostly limited to cost capping.

Cost Management (Ben Rayment)

In the High Court, the cost management regime is not applicable to claims over £10M. This is a concern, as competition law needs to work effectively for smaller businesses. The case of *CIP Properties v Galliford* highlights that judges have an unfettered discretion to apply cost management rules to any type of claim. Similarly, the CAT has confirmed that its case management powers under rule 104 are sufficiently wide to encompass cost management.

There is a tension in the Overriding Objective of the CPR, which states that cases must be dealt with at proportionate cost on the one hand having regard to the value of the claim, and with regard to the complexity of the issues on the other. This conflict was brought to the fore in *Red & White Services v Anslow*, in which the claimant, a small local bus operator, alleged abuse of dominance in regard to a bus station in Wales on the part of Stagecoach and the Landlord of the bus station.

The budget of the parties was a contentious issue at the CMC: Stagecoach's proposed budget amounted to £1.4M, whereas the claimant proposed only £288,000. While the amount in dispute was comparatively low at approximately £80,000 to £150,000, the claim was relatively complex, as it involved quasi-public law issues, expert evidence and the parties were at risk of reputational damage that was difficult to quantify. The judge accepted the arguments the defendants had made in regard to the complexity of the case and that the value of the case could not be reduced to the amount of the damages claimed and approved a total budget of £1M (when incurred and budgeted costs were added together). Ben Rayment concluded that cost budgeting remained a very subjective process, and that the outcome may have been different under a different judge (and that it may have also been different had the claim been brought in the CAT).

Follow-On Actions (Robert O'Donoghue QC)

Follow-on damages claims are beginning to fall more into line with commercial litigation on applicable law, jurisdiction and quantum. An apt analogy may be that they are a sub-species of commercial litigation in a similar way to civil fraud cases.

The approaches different judges take in regard to the issue of presence or absence of evidence in the context of a secret activity are still varied. However, there has been some common ground in the recognition that: (i) the asymmetry of information between the parties requires careful balancing; and (ii) parties may be required to commit to a common econometric methodology at an early stage. The latter can be very difficult for claimants; especially in cases where they have to commit to a model pre-disclosure, as they do not have the luxury of knowing what data is required (which defendants have).



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Judges have shown an overwhelming preference for staged disclosure. While the starting point remains the value of the claim, Birss J made an interesting point in *Vodafone v Infineon* that it may not always be worthwhile or proportionate to improve the accuracy of a quantum estimate.

In regard to economic evidence at trial, Robert O'Donoghue QC noted that even "techy" judges continued to struggle with econometrics, and some prefer "real life facts of the markets in which [the econometric evidence] operates". This was especially relevant when judges come to challenge the assumptions on which economic models are based. Hot-tubbing of economist experts is also on the rise, particularly in the CAT, which limits experts' availability for cross-examination and leaves the evaluation of the evidence entirely in the hands of the judge, who may or may not have had time to prepare. The regulators' hot-tub experts will receive parity of time to all defendants' experts, which may incentivise defendants to nominate a single joint expert.

When it comes to putting cartelists' witnesses on the stand, this may not be advisable or necessary when most of a defendant's case is based on an economic model. In the *BritNed* case on the other hand, such evidence was necessary, as the defendants relied on the argument that those responsible for price setting were unaware of the cartel and uninfluenced by the cartelists. One also has to bear in mind that witnesses can be unpredictable at times, and language barriers for foreign witnesses should be carefully considered.

The Damages Directive and Disclosure (Ben Rayment)

The claimants in various follow-on claims against the addressees of the Commission's Decision in the Trucks case have made an application for disclosure, which will be heard on 16 July 2018. The Commission has sent a letter to the court, making its position in relation to disclosure under the Damages Directive known. It noted that it was concerned about making all documents on the its administrative file in the Trucks case available to the claimants, as it may not be consistent with the spirit of the Damages Directive (in particular, Recital 22).

The question whether and if so, to what extent, the new Practice Direction for disclosure in competition cases has changed the position markedly remains open.

Collective Actions (Ben Rayment)

The CPO mechanism, despite the first two cases failing, remains alive; currently, the claimant UK Truck Claims Limited is launching a new attempt, which will be determined later this year. It is pleaded on an opt-out, or in the alternative, opt-in basis.

The *Merricks v MasterCard* case raised some general issues for CPOs, in regards to the issue of pass-on, a key consideration was that the class was made-up of final consumers, and there was no downstream pass-on. There were, however, plenty of issues in regards to upstream pass-on, in circumstances where the product in question covered a large number of sectors of the economy. The CAT was therefore not satisfied that the different characteristics and pass-on rates could be extracted from the available data. A further difficulty was the absence of a contemplated mechanism for distributing the aggregate damages to the members of the class, as there was no way of identifying individual loss.

Pass-on was also briefly dealt with in *Sainsbury's v MasterCard*. In its judgment, the CAT found a direct causal link between overcharge and the increase in downstream prices. The Court of Appeal was not entirely clear on the type of evidence that would establish this causal link stating at [332] that it could be a combination of empirical fact evidence and economic opinion evidence. In effect, the Court of Appeal did not comment on the narrow test that had been laid down by the CAT in this regard. This is likely to be revisited in the future.