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Pleading Competition Law Damages Claims

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Introduction

The purpose of the presentation is to provide an update on some recent judgments addressing the requirements that have to be satisfied to plead competition damage claims.

The position until recently was as set out in *KME v Toshiba*[1]. Essentially, given the asymmetry in information available to the claimants and defendants, claimants were afforded considerable leniency in terms of how much detail they were required to plead.

This led to situations in which claimants' pleadings contained placeholders such as "pending disclosure, the best particulars etc. etc." and defendants' pleadings similarly denying as much as possible, not admitting as much as possible, with both parties holding fire on articulating their arguments until disclosure had been given.

The role of pleadings

Pleadings allow the parties and tribunal to know one the issues that arise in any given case, the respective party's positions, signpost the evidence that it will be required to assemble and allow preparation for trial. Pleadings should identify the way that the alleged infringement is said to have resulted in the loss and damage claimed.

What emerges from the new case law is that it is imperative to set out as best as you are able all the individual facts that you say lead from the infringement to the damage being claimed.

It is clearly that it is no longer appropriate, if it ever was, to simply state that an infringement caused loss. Claimants must articulate specifically how the loss is said to have been caused and how it is proposed to quantify the loss at trial. This is not to say that evidence is required at this stage, but the factual underpinnings and methodology that it is anticipated will be relied upon should be included in order to protect the claim from strike-out.

The terminology used to describe this approach is that the pleading must provide a 'blueprint to trial' – it must be clear from the pleading all the factual elements that each side considers necessary in order for them to succeed at trial.

[1] Toshiba Carrier UK Ltd v KME Yorkshire Ltd [2012] EWCA Civ 1190

Economic theories of harm – causation and quantification challenges

One might imagine establishing causation and quantum in a follow-on cartel case is straightforward: the cartel caused loss and then the economist calculates the quantum of the loss. The issue is that such cases are decided by the regulator by reference to the agreement having the object of infringing competition, and little time is given to the question of effects, let alone how any such effects may have been caused. Settlement decisions are briefer still. Similarly, in abuse cases, the focus is typically on capability to cause harm not actual effects on rivals or customers. The difficulty in establishing causation lies in establishing what exactly went on in order to determine the precise causal links between the infringement and the damage that is said to have been caused.

The CAT now seems to envisage that economists have a central role in the process, following a recent judgment in *Boyle*[2]. The context of the case was that case had already been certified, but the class representative was required to replace its expert witness. The replacement expert economist was required by the CAT to clearly and narrowly identify data to be used to prove causation (e.g. volumes and prices), rather than specifying documentary evidence.

Rose LJ said in *Air Cargo*[3] that it is a good idea to involve experts early to get as much direction as to disclosure as possible. *Boyle* embodies this approach of trying to bring the expert role much earlier into the process. Expert witnesses now seem to be front and centre.

Causation – how do cartels harm direct and indirect purchasers?

If you are a direct purchaser from a cartelist, it may be relatively straightforward to establish a direct causal link. However, cartels may act in different ways, for example a party may purchase a cartelised product within another product. For example, bearings are used in gearboxes, which in turn are used in cars, so the whole supply chain of products are cartelised. Other non-cartelist suppliers may subsequently raise prices, leading to umbrella effects within that market as well as effects with suppliers of closely substitutable products.

In order to address these wide ranging potential anti-competitive effects, economists need to have a deep understanding of the facts of the specific market. This includes understanding how purchasers choose between suppliers, the costs they face in switching suppliers, how suppliers compete to win new customers and retain existing ones, how customers use competition or benchmarking across rivals to secure good prices or other terms and how the cartel affected these processes. This is not just about prices and volumes, perhaps contrary to the CAT's simple message in Boyle.

***NTN v Stellantis*[4]: cost off-setting defences**

After the disclosure stage of proceedings, the defendant sought permission to add a defence on costs mitigation. The argument was that if there had been an overcharge (which was still denied), the claimant would have offset the extra costs through costs controls and costs targets, thereby recouping the overcharge in negotiations with other parties.

There were no pleadings as to the factual effects it was said that the claimants' policies had **such offsetting effects**, and the defendant relied on their mere existence as sufficient to put the burden of proof on the claimants to demonstrate that any increased costs had not been set off. The CAT denied permission to amend on this basis, but an appeal was allowed.

The CoA took the opportunity to set out the test for a sufficient pleading: whether there is a realistic prospect of the plea as it is articulated succeeding at trial, and whether what is said is realistic and proportionate. The burden of proof lies with the defendant and the evidence available must be more than merely arguable.

[2] David Courtney Boyle v Govia Thameslink Railway Limited & Others 1404/7/7/21 ("**Boyle**")
[3] Emerald Supplies Limited v British Airways PLC [2015] EWCA Civ. 1024 ("**Air Cargo**")
[4] Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others v NTN Corporation & Others 1357/5/7/20 (T) (**"Stellantis")**

The CoA stated that the defendants' draft pleading proceeded from the fact of the claimant having the means to offset the overcharge to the conclusion that they did. There were no facts pleaded as to why the defendants considered those policies would have been successful.

The court considered *Sainsburys v Mastercard*[5], in which the Supreme Court had observed that where a defendant has properly pleaded a passing on defence and the burden of proof passed to the claimant. The CoA, however, noted that the Supreme Court had not been considering the adequacy of the pleadings in that case, and that in *Sainsbury's*, there was no doubt that the pleadings were sufficient. The Supreme Court's statement, consequently, had no application at the pleading stage.

Pleading in this case was that there was no overcharge or if there was, it was passed on or mitigated. The Court described the pleadings in *Stellantis* as hypothetical as the defendant didn't set out particulars of how the claimant would have identified the amount of the overcharge so as to be able to offset it or pass it on.

It is important to note that this mitigation argument assumes that Stellantis had the ability to secure price cuts from other suppliers absent the cartel, but choose not to do so, and a secret cartel somehow created an incentive to exercise this ability.

The Court required the defendant to set out in its pleadings how it was that the recognition of the overcharge changed behaviour vs counterfactual. The defendant stated that it could not do this prior to disclosure as it lacked sufficient information. The Court decided that if there was no realistic defence with a basis in fact that the defendants were able to set out (even if they could not without disclosure evidence the pleaded facts) then disclosure should not be permitted: the defendant could not "go fishing" to see what might come up in disclosure.

This judgment sets a high bar for pleading a pass on or cost mitigation defence. Pleadings can be struck out if they don't assert facts setting out economic theory upon which the party relies.

Gormsen

This case emphasised that the assessment of quantum is restrained by the alleged wrong. *Gormsen* pleaded three separate abuses but the expert articulated only only one method to quantify those three abuses. That was insufficient to allow the Tribunal and the parties to understand the scope of the proceedings and to provide the requisite "blueprint" to trial. The court stated that, in order to build logical links between infringement and consequences, it required specifics as to:

- the facts to be proved;
- the factual underpinnings of the proposed methodology;
- the data that is proposed to use specifically to prove methodology; and
- where and how the data will be sourced.

Further, the defendant was required to articulate its methodology and data that it proposed would be used to make its objections to the claimants' proposed methodology.

Take-aways

In pleading their cases, parties need to consider carefully with their experts early in the process the key facts upon which they intend to rely. These won't always be known from the outset, but it is important to articulate much earlier in the proceedings what the parties consider the position (to be likely) to be. A pleading merely that loss was suffered as a result of the existence of a cartel (or that an overcharge was passed on) would now appear to be vulnerable to being struck out.

Economists in the UK must ensure strict adherence to their duties to the court and not to the parties. A sufficient approach to evidence should involve transparency as to the hypothesis, test, methodology, results and conclusions upon which the expert relies, thereby allowing the court to choose between the arguments on the basis of the right facts or, at the very least, the more plausible conclusion.

[5] Sainsbury's Supermarkets Ltd v Visa Europe Services LLC [2020]UKSC24 ("**Sainsbury's**")