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BritNed appeal clarifies law on cartel damages

The Court of Appeal in *BritNed v ABB* [2019] EWCA Civ 1840 has again had to clarify the principles governing competition damages. It reaffirmed the English High Court's rejection of the claimant's approach to damages but took issue with the trial judge's position that damages should err on the side of under-compensation, rejected his 'cost savings' damages and the way the regulated price cap was to be treated

Background

BritNed v ABB [2018] EWHC 2616 (Ch) is a follow-on damages action based on the European Commission's cartel decision Case AT.39610 - *Power Cables*. The Commission found that ABB was a member of a global cartel tendering for the supply of extra high voltage power cable projects during the period 1999 to 2009. ABB successfully bid to supply a submarine cable to BritNed's electricity interconnection project between the UK and the Netherlands. BritNed sued ABB for alleged overcharges, lost profits and compound interest for damages totalling €180m. The court rejected these claims but nonetheless awarded damages of €13m - €7.5m arising from 'baked-in' inefficiencies on the BritNed project; and €5.5m in 'cost savings' (see November *Casenote*). This was subsequently reduced by 10% to €11m in a supplementary Judgment (*BritNed v ABB* [2018] EWHC 2913 (Ch)) to take account of regulatory issues. The Claimant appealed and failed on all counts while the defendant's cross-appeal challenging 'cost savings' damages succeeded reducing total damages to €6.75m.

No presumption of damage

The Court of Appeal (para 42) agreed with the trial judge that the Damages Directive's 2014/104/EU (Article 7.2) presumption of harm was not useful practically or as piece of legislation:

> We agree that the judge was right to start without any presumption of loss or damage, for the reasons which he gave. We also agree with him that, on the facts of the present case, it is hard to see how such a presumption could have assisted BritNed, given the need for its loss to be quantified and the generous approach adopted by English law to difficulties of proof in such a context.

It is notable that the UK transposition (Competition Act 1998, Schedule 8A) of the Damages Directive does not contain an equivalent to Article 7.2 requiring a presumption of harm or reference to the court taking into account the evidential difficulties of calculating damages in cartel cases. These are seen as already adequately handled by the 'generous' principles of tort damages.

No erring on side of under-compensation

The trial judge endorsed Popplewell J statements in *ASDA Stores v MasterCard* [2017] EWHC 93 (Comm) [para 307] that competition law damages should 'err on the side of under-compensation':

> … where the court is compelled to use a broad brush in the absence of precision in the evidence of the harm suffered by a claimant, it should err on the side of under-compensation so as (a) to reflect the uncertainty as to the loss actually suffered and (b) to give the defendant the benefit of any doubts in the calculation.

The Court of Appeal (para 65) said it was 'unfortunate' that the trial judge found assistance from Popplewell J 'when the anti-competitive conduct in that case was not remotely comparable to the concerted and dishonest worldwide cartel in which ABB participated.' It reiterated that 'the aim of the court should always be to give the right amount of compensation, without erring in either direction.' The courts are to be guided by 'Lord Shaw's time-hallowed "exercise of a sound imagination and the practice of the broad axe", while reminding ourselves of the dangers of using any vivid metaphor to express a legal doctrine'.

Damages for cost savings 'error of law'

ABB won its cross-appeal to strike-out cost savings damages. The Court of Appeal found that the trial

judge had made 'an error of law' (para 235). His approach violated the compensatory principle by looking at the defendant's alleged gains rather than the claimant's loss; that his attempt to translate the purported cost savings into an 'overcharge' was a mere assertion 'not open to the judge', and in any case the judge had expressly found that any cartel savings had been competed away with no effect on the price of the BritNed project. The Court of Appeal is clear that judges must base their decisions on the evidence before them, and that they are to focus exclusively on the loss to the claimant and not the gains to the defendant.

Regulatory Cap Issue

The trial judge initially sought an undertaking from BritNed that should the review of its regulatory price cap result in the damages amount being passed through or down that it would return part of the award to ABB. This one of the more obtuse parts of the High Court judgment which the Court of Appeal felt a need to explain (para 189):

> Although the judge did not say so expressly, his reasoning appears to have been that if damages were ultimately taken into account then any over-compensation to BritNed would eventually be corrected by the regulators. Rather than seek to determine the true effect … in the absence of the regulators, the judge decided that the better course would be for BritNed to undertake, … to calculate what the Regulatory Cap would be on the assumption that damages were included, and if and to the extent that any "Excess Profits" referable to the damages were not in fact payable … then either to use such monies voluntarily in accordance with the Amended Exemption Order [which would require it being invested] or to return them to ABB.

The Court of Appeal was not happy with this aspect of the trial judge's decision which it described as 'rather peculiar' and a 'muddle'. It concluded that the High Court had no authority to bind BritNed to such an undertaking, the analysis rested entirely on 'an hypothetical foundation' and would have given rise to problems of interpretation and enforcement. Moreover, he had not canvassed his solution with the parties. In light of BritNed's refusal to give an undertaking, the trial judge gave a supplementary judgment reducing the damages by 10%. This was seen as superior and the correct way of dealing with the future uncertainties of calculating damages. The Court of Appeal (again) observed that it was unfortunate that trial judge had invoked the principle of under-compensation justifying this reduction when there was 'no such rule and no such need'. However, the Court of Appeal declined to remit 'this issue alone to the judge' viewing the 10% discount imposed in the Supplementary Judgment as about right.

Conclusion

BritNed is the first cartel damages action to be decided by a UK court. Unfortunately it is a further example of the recent tendency of the English High Court to offer muddled and often incorrect statements of the law on competition damages creating unnecessary uncertainty and confusion. There was no basis for awarding 'cost-saving' damages, and a very weak basis for awarding damages in light of the factual findings and evidence before the court.

For further analysis of this case see Cento Veljanovski, November 1998 *Casenote* and January 2019 *Casenote* and the expanded discussions in 'Damages for Bid-rigging - The English High Court's idiosyncratic cost-based approach in BritNed', *JECLAP*, Vol 10, 2019, pp. 109–114; and 'The UK High Court of Justice rejects econometrics analysis in a cartel damage case as being too complex (*BritNed/ABB*), *e-Competitions Bulletin*, Oct. 2019.