WH NEWSON HOLDING LIMITED & ORS v IMI PLC & ORS [2013] EWCA CIV 1377

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On 12 November 2013, the Court of Appeal gave judgment in an appeal concerning the scope of the statutory remedy available under s.47A of the Competition Act 1998 in follow-on damages actions. S.47A does not specify the type of claim upon which follow-on actions might be brought. Such claims (being claims alleging a breach of EU law) are ordinarily pursued as breaches of statutory duty. This appeal considered whether s.47A encompassed claims beyond breach of statutory duty, and in this case, conspiracy. The Court of Appeal confirmed that s.47A was not limited to claims for breach of statutory duty but disagreed with Roth J who found that the Appellant could pursue one of their two pleaded claims in conspiracy.

The Facts

The Respondent, IMI Group ("IMI") were, at the time of the infringement, suppliers of copper plumbing tubes. The Appellant, Newson Group ("Newson"), purchased copper plumbing tubes from IMI. By its decision of 3 September 2004 ("the Decision"), the European Commission found that IMI were parties to an international copper plumbing pipe cartel contrary to Article 101 TFEU and fined them nearly €45 million. The Decision did not suggest that IMI had any intention to injure Newson or anyone else in its position. The Court of Appeal set out the salient infringement findings in the Decision relied upon by Newson in support of its pleaded case (which alleged breach of statutory duty and two counts of conspiracy.[1] On conspiracy, it was alleged that the relevant IMI companies participated in (i) a conspiracy to use unlawful means, being the entry into arrangements breaching Article 101 TFEU and (ii) a conspiracy to use unlawful means in agreeing / combining with other IMI companies to effect IMI's participation in arrangements with other cartelists contrary to Article 101 TFEU. IMI sought to strike out the conspiracy claims as being outwith section 47A.[2] Newson alleged that IMI had the requisite intent to injure, and that it could show that intent on the basis of the Commission's findings; alternatively that it was entitled to prove it in the claim.

1 Judgment, para 12.
2 The claims were commenced in the Competition Appeal Tribunal. The application to strike out was transferred to the High Court.

The Judge's findings

Roth J held that s.47A could encompass causes of action beyond breach of statutory duty but concluded that "the determining criterion was the factual nature of the claim, not the cause of action with which it is clothed".[3] It was therefore possible to bring a conspiracy claim under section 47A. The Judge refused to strike out the first conspiracy claim on the basis that the Commission's findings provided sufficient basis for the plea that IMI had the requisite intention to harm. Roth J found that it was 'wholly unrealistic' to regard IMI's purpose of promoting their own economic interests as being divorced from the causation of loss to purchasers even if the gain and loss did not correlate.[4] However, he struck out the second claim in conspiracy which he held was not supported by the findings in the Decision.

The Court of Appeal's conclusions

The Scope of s.47A

As to the purpose of s.47A, the Court of Appeal followed its previous decisions in *Enron Coal Services Ltd v English Welsh and Scottish Railway Ltd* [2009] EWCA Civ 647 ("Enron 1") and *Enron Coal Services Ltd v English Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2 ("Enron 2") and held that a s.47A action had to be based on express infringement findings in the Commission's decision. The CAT's function in such circumstances was limited to determining causation and quantum.[5]

The Court of Appeal nevertheless concluded that Parliament must have intended that s.47A enabled claims to be made on causes of action going beyond breach of statutory duty. The principal reasons given for this conclusion were:

1. The language of s.47A in so far as it applied to "any" claim for damages;[6]
2. The fact that once issues as to liability under s.47A are confined to those decided by the Commission, there is no reason why Parliament should intend there only to be claims for breach of statutory duty;[7]
3. The fact that Parliament is unlikely to have intended to exclude claims that were in fact governed by some foreign law and which, accordingly, do not constitute claims for breach of statutory duty.[8]

3 [2012]EWHC 3680, para 29
4 See paragraph 34 of the Judge's judgment
5 Judgment, paras 18-22.
6 Judgment, para 24
7 Judgment para 25;
8 Judgment, para 23

The ingredients of unlawful means conspiracy

The two claims in conspiracy pleaded by Newson were unlawful means conspiracies and therefore had to show that IMI group (i) agreed to act in the cartel and (ii) did so with intent to injure. The Court found that the necessary agreement was in this case established as a result of the Commission's Decision. The parties, however, disagreed over what intent to injure involved. IMI contended that it must be showed that it entered the cartel with a specific intention to injure Newson. Newson, by contrast, contended that 'intent to injure' was satisfied by the findings in the Decision that IMI intended to cause higher prices and obtain higher margins than would otherwise occur through free competition. Newson argued that it did not matter if IMI were simply indifferent to whether the victims were the direct or the indirect purchasers of tubes. It was sufficient, they contended, that IMI intended to make a profit at the expense of a class of persons to whom the wrongful acts were targeted.[9]

The Decision did not include a finding that IMI had the requisite intent

Arden LJ rejected the judge's analysis of intent to injure, which had been based on the approach of Lord Sumner in *Sorrell v Smith* [1925] AC 700 as set out and endorsed by Lord Nicholls in his analysis in *OBG Ltd v Allan* [2008] AC 1. These authorities dealt with a case in which "The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other."

Arden LJ held that Lord Summer was taking the case where the proven facts excluded every other inference. But, she considered, it did not follow in this case that Newson would inevitably suffer loss: that would not be so if they were able to pass on the price increases to their customers and they might even have made a profit had they been able to raise their prices in advance of having to pay IMI's increased price. Arden LJ therefore held that Newson's contention that it was sufficient that IMI intended to make a profit at the expense of a class of persons to whom the wrongful acts were targeted deprived the requirement of intent to injure of all content. She held that this was "tantamount to saying that it is sufficient that the conspirators must have intended to injure anyone who might suffer loss from their agreement." [10]

As a result, whereas the Court of Appeal agreed that s.47A could encompass claims for conspiracy in principle, absent express findings of an intention to injure the self-same claimants to such actions, there was no basis for either of Newson's pleaded claims in conspiracy which stood struck out.

9 Judgment, para 34.
10 Judgment, para 41

Practical Consequences

The importance of this decision lies in the confirmation that claims beyond breach of statutory duty can be brought under s.47A so long as the factual findings made by the relevant regulator are sufficient to constitute the ingredients to whichever cause of action in damages that follow-on claimants seek to pursue. However, this may be more important in theory than in practice. Conspiracy has so far been the main rival candidate to breach of statutory duty as the basis for a follow on claim. As the Court of Appeal noted, it will ordinarily be rare for a specific finding of intention to injure to be made in a cartel case. This makes Court of Appeal's conclusion that intent to injure could not be inferred important. It is that finding that in practice will, without more, deter follow-on claimants from running conspiracy claims under s.47A. The main significance of the Judgment may be in relation to causes of action under foreign law.

However, two points may be made. First, Newson was a case of intermediate purchases by retailers from manufacturers. It is possible that the analysis of pass on and intent to injure would be different at a different level of the supply chain.

Secondly, there remains the possibility that complainants to a competition authority will push for the authority, particularly domestic regulators, to make wider findings of fact that would support such other causes of action that are thought to offer procedural or substantive advantages. The extent to which such lobbying might now occur and the extent to which, mindful of these possibilities, regulators might be receptive to making wider findings of fact, remains to be seen. But the immediate prospect of a deluge of conspiracy claims seems unlikely.

Paul Harris QC and Rob Williams appeared for IMI Plc & ors.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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