Neutral Citation Number: [2013] EWCA Civ 1377

Case No: A3/2013/0142

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(CHANCERY DIVISION)
ROTH J
[2012] EWHC 3690 (Ch)

Strand, London, WC2A 2LL

Date: 12/11/2013

Before :

LADY JUSTICE ARDEN
LORD JUSTICE PATTEN
and
LORD JUSTICE BEATSON

- -

Between :

W.H. NEWSON HOLDING LIMITED & OTHERS	**Respondents**
- and -	
IMI PLC & OTHERS	**Appellants**

Mr Paul Harris QC & Mr Rob Williams (instructed by **Pinsent Masons LLP**) for the **Appellants**
Mr Thomas de la Mare QC & Mr Tristan Jones (instructed by **Hausfeld & Co LLP**) for the **Respondents**

Hearing date : 24 July 2013

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Approved Judgment

Lady Justice Arden:

1. This appeal concerns the scope of the statutory remedy for loss suffered as a result of a breach of competition law. Section 47A of the Competition Act 1998 ("the 1998 Act") enables companies and individuals to bring claims ("follow on" claims) to recover damages based on a finding of an infringement of competition law by (among others) the European Commission ("the Commission") even after the domestic legislation period for bringing such claims has expired. It does not itself specify the type of claim to which it applies: thus it is said to be "cause of action-neutral". A claimant can use this section to pursue a claim for breach of statutory duty, which is a well-established way of bringing a claim for a breach of EU law: see *Garden Cottage Foods v Milk Marketing* [1984] AC 130. But what this court has not yet considered is whether a claimant can bring a conspiracy claim based on this section.

2. Roth J, in his clear and concise judgment dated 19 December 2012, held that the claims in conspiracy which the respondents ("Newson group") wish to bring against the appellants ("IMI group") in these proceedings, arising out of the Commission's finding of a cartel in its decision dated 3 September 2004 ("the Decision") fell within the scope of section 47A. He went on to decide that one claim in conspiracy could proceed but that another could not because it was not founded in infringement findings in the Decision.

3. In my judgment, for the reasons given below, the judge was right to conclude that section 47A could apply to claims in conspiracy, provided that the cause of action is based on findings of infringement in the Decision, but wrong to conclude that one of the two conspiracy claims met this requirement. My reasons, amplified below, are:

   (1) On its true interpretation section 47A permits a claimant to bring a conspiracy claim provided that all the ingredients of the cause of action can be established by infringement findings in the Commission's decision;

   (2) An essential ingredient of the tort of conspiracy on which Newson group rely (unlawful means conspiracy) is intent to injure; and

   (3) The Commission found that IMI intended to distort competition but not that IMI group had the requisite intent to injure.

4. Before I amplify my reasons, I shall summarise section 47A, the background, and the judge's judgment.

Section 47A of the 1998 Act

5. Section 47A of the 1998 Act "applies to—

   (a) any claim for damages, or

   (b) any other claim for a sum of money,

   which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom."

6. The definition of "relevant prohibition" in Section 47A(2) (2) includes the prohibition in Article 101(1) TFEU.

7. A person may not bring a claim under section 47A until a decision of (among others) the Commission has established that the relevant prohibition in question has been infringed (section 47A(5)).

8. Under section 47A(9) the Competition Appeal Tribunal ("the CAT") is bound in the case of a Commission decision by the infringement findings in that decision.

9. Section 47A(3) provides that any limitation rules that would apply in such proceedings are to be disregarded. However, under the rules of the CAT, a claim under section 47A must be brought within two years of the expiry of the time within which the defendant could appeal against the Commission's finding of a cartel infringement (see the decision of the Supreme Court in *BCL Old Co Ltd v BASF plc* [2010] UKSC 45).

Background

10. IMI group were, at the time of the infringement, suppliers of copper plumbing tubes. Newson group are companies owned by Travis Perkins plc, builders' merchants. They purchased copper plumbing pipes from IMI group. They wish to recover losses which they contend the cartel caused them to incur in making those purchases.

11. On 3 September 2004 the Commission found that IMI group had been parties to an international cartel contrary to Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). IMI group (including companies not party to these proceedings) were fined €44.98 million. In a nutshell, the Commission found that IMI group had entered into a cartel in order to distort competition and thereby to promote their own interests. There was no suggestion of any intention to injure Newson group or indeed any other person in its position.

12. Newson group identify the following infringement findings in the Decision:

> "(a) IMI group and other cartelists were party to an infringement of Article 101 TFEU (ex Article 81 EC) and Article 53 of the European Economic Agreement concerning copper plumbing tubes (recitals 3 and 4);
>
> (b) the cartel consisted of a single, continuous, complex and (in relation to some cartelists) multiform infringement, lasted from 3 June 1998 until 22 March 2001, and covered the geographic market of the European Economic Area (recitals 2 and 17);
>
> (c) in such infringement the cartelists engaged in a common enterprise with a single common and continuing objective (recitals 442 and 445); such enterprise consisted of an agreement upon a "comprehensive plan" by which prices would be fixed for copper tubes, the "common aim" being the control of the European market for the sale of

> plain copper plumbing tubes (recital 452), such "overall plan" being in the nature of an "agreement" (recital 453); this "illicit arrangement" was also a "concerted practice with the object of controlling volumes and prices" (recital 454);
>
> (d) by this comprehensive plan the cartelists stabilised market shares by allocating sales volumes by country, agreed upon and implemented price increases or prices, ensured implementation of the market allocation and price agreements by a monitoring system consisting of a market leader arrangement for various European territories, as well as of the regular exchange of confidential information on commercial strategies, sales volumes and targets, and occasionally prices and rebates (recitals 449 and 450);
>
> (e) the cartelists had a "joint intention", "identical purpose" or "single economic aim" which the Commission variously described at being to refrain from competition, to raise or maintain prices above the competitive level, and to avoid competition (recitals 451, 455, 501 and 504). Indeed:
>
> > "Prices being the main instrument of competition he various collusive arrangements adopted by the producer had the purpose of inflating prices to their benefit and above a level, which would have been determined by free competition." (recital 501)
>
> (f) the cartelists acted "with full knowledge of the illegality of their actions" combining in an "intentional infringement" that was "designed to restrict competition in a major industrial sector" and for this reason took explicit action to conceal their meetings and the cartel and to avoid detection of their anti-competitive agreements and documents (recitals 503 and 603);
>
> (g) the agreements were actually put into effect, leading to coordinated price increases being implemented in the UK (recitals 213, 277, 452 and 483);
>
> (h) IMI group had a "core role" in the infringement, took over the role of market leader in the UK, implemented heavy price increases in the UK, and took an active role in increasing the number of participants in the cartel (recital 490)."

13. Newson group contend that they do not need to rely on any further findings in the Decision to enable them to succeed on the causes of action on which they rely in these proceedings under section 47A. Those causes of action are breach of statutory duty and conspiracy. Their claims were set out in paragraph 24 of their particulars of claim as follows:

> "(a) The defendants, as cartelists, (and each of them) breached the statutory duty imposed by Article 101 TFEU (ex Article 81 EC) and/or s.2(1) of the European Communities Act 197[2].
>
> (b) Further or alternatively, the defendants, as cartelists, (and each of them) participated in a conspiracy to use unlawful means, namely the agreed entry into arrangements contravening Article 101 TFEU (ex Article 81 EC).
>
> (c) Further or alternatively, each company in IMI (and unknown directors or controllers thereof to be particularised upon disclosure herein), including specifically the First and Second Defendants, participated in a conspiracy to use unlawful means when they agreed and/or combined with the other IMI companies named in the Decision to effect IMI's participation in arrangements with the other Cartelists contravening Article 101 TFEU (ex Article 81 EC)."

14. Newson group began their proceedings in the CAT. IMI group sought to strike out the second and third of these claims on the basis that the CAT had no jurisdiction to entertain these claims. With the consent of the parties, the CAT transferred this application to the High Court.

Judgment of the judge

15. As to whether section 47A applied to a cause of action other than for breach of statutory duty, the judge concluded that "the determining criterion is the factual nature of the claim, not the cause of action with which it is clothed" ([29]). It was therefore possible to bring a conspiracy claim under section 47A.

16. Roth J refused to strike out paragraph 24(b) of the particulars of claim. He considered that this conspiracy claim was based on the Commission's findings because IMI group intended to enter the cartel in order to promote their own interests. That would inevitably mean injuring purchasers of products from IMI group. Any other conclusion would be "wholly unrealistic". Thus he concluded that the element of the tort of conspiracy that the conspirators should have intended to harm the claimants was established on the basis of the findings in the Decision.

17. However, the judge ordered paragraph 24(c) to be struck out as this was not substantiated by findings in the Decision and so could not found a claim under section 47A. Newson group have not appealed against the latter ruling.

My reasons

(1) On its true interpretation section 47A permits a claimant to bring a conspiracy claim provided that all the ingredients of the cause of action can be established by infringement findings in the Commission's decision

18. IMI group, for whom Mr Paul Harris QC appears, contend that this court decided 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") that under section 47A the CAT only has jurisdiction to determine issues of quantum and causation. IMI group accept that section 47A is cause of action-neutral but contend that only breach of statutory duty qualifies. Section 47A cannot simply be read literally and acontextually as otherwise claims for damages for personal injury might fall within it. Section 47A provides a benefit to a claimant by extending the limitation period and it would be unfair to subject a defendant to a new claim when the issues of liability were fully investigated at the time of the Commission inquiry.

19. Newson group, for whom Mr Tom de la Mare QC appears, seek to challenge the proposition that the only function of the CAT is to find quantum and causation. They, therefore, contend in certain circumstances that CAT can find additional facts regarding the cause of action. They argue that if the CAT can find facts as to quantum and causation they can equally do so as regards the cause of action.

20. In my judgment, the question whether a claimant can bring a conspiracy claim under section 47A is one of statutory interpretation and it turns on the meaning of the words "any claim for damages" in section 47A(1). The starting point is that these words contain no restriction on the type of cause of action on which a claimant may rely. However, while those words of themselves are cause of action-neutral, they have to be interpreted in the context of section 47A read as a whole.

21. Of particular importance are the decisions of this court in *Enron 1* and *Enron 2*. In *Enron 1*, this court, having examined the structure of section 47A, concluded (on a purposive interpretation) that a section 47A action had to be based on express infringement findings in the Commission's decision. The CAT could not draw inferences or make further findings of infringement. Its function was limited to determining quantum and causation. Thus Patten LJ held:

> "It is not open to a claimant such as ECSL to seek to recover damages through the medium of s.47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the Tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of section 47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue.... The task of the Tribunal […is] to identify the findings of infringement and award damages for any loss or damage which they have caused." (paragraphs 31 and 60)

22. In *Enron 2* , this court followed *Enron 1* and so it is not necessary to cite from it. It follows that whether section 47A extends to other torts or not the ingredients of the cause of action must be grounded in the Commission's infringement findings.

23. In the interpretation of a statute, the court has to try to divine Parliament's purpose as best it can from the admissible material. Often this is a matter of inference from the statutory language and the context. It is clear that there are some good reasons why Parliament would not have wanted to confine section 47A to actions for breach of statutory duty. As Mr de la Mare points out, Parliament is hardly likely to have wanted to exclude claims that were in fact governed by some foreign law and which accordingly do not constitute claims for breach of statutory duty. I agree with him that this is a good reason why section 47A should not be so confined.

24. In addition, I consider it more likely than not that Parliament would wish to avoid being prescriptive as to the type of wrong that had to be invoked. It knows that the courts are responsible for developing the case law for many civil wrongs and that it could not foresee how they might develop this case law in the future. This is supported by the textual indication since the expression "any" claim is clearly consistent with more than one type of claim. Moreover, the downside to the defendant is likely to be slight from this interpretation because he would have been at risk of a claim for breach of statutory duty in any event. Parliament knew that too.

25. Equally, once issues as to liability under section 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. This is the answer to Mr Harris' argument on fairness. The court has to bear in mind that section 47A enables a party to bring an action outside the normal limitation period and that Parliament is likely to have wished to balance this gain to the claimant by imposing suitable limitations on the type of wrong that could be pursued to protect the defendant. However, that has been achieved by section 47A in the manner which this court explained in *Enron 1* and *Enron 2*.

26. Mr de la Mare submits that there are a number of other matters which make it reasonable to infer that Parliament would have wanted section 47A to apply to causes of action other than breach of statutory duty. The national courts may have to stay and thus delay proceedings based on allegations of breach of Article 101 TFEU while a Commission inquiry is under way in order to avoid the risk of inconsistent findings (see Council Regulation (EC) No 1/2003, Article 16). Likewise section 47A(5) above prevents the start of a section 47A action while the Commission inquiry continues.

27. Mr de la Mare also submits that the facts surrounding a cartel are likely to be private and thus it will be difficult for a claimant to know the facts which enable him to bring a claim until after the Commission has made its findings and published its decision.

28. I do not find these submissions add greatly because the ability to bring a claim under section 47A once the Commission has published its decision are undeniably a great advantage to a claimant even if the only claim he can bring is for breach of statutory duty. His work in proving a case will have been done for him.

29. Newson group ambitiously submit that this court has been too restrictive in its decisions in *Enron 1* and *Enron 2*, and that section 47A should essentially be interpreted as facilitating claims. Alternatively, this court was obviously wrong in those cases and so the decisions were per incuriam. Mr de la Mare's submission is on its face inconsistent with Newson group's decision not to appeal the judge's decision

to strike out paragraph 24(c) of the particulars of claim although Mr de la Mare told us that this decision was taken for other reasons.

30. I would reject Newson group's ambitious submission that their cause of action can come within section 47A if it relies on material facts not within the Commission's infringement findings but consistent with it. The contrary is the subject of this court's binding decision in *Enron 1*. Nothing further needs to be said.

31. As an alternative submission, Mr de la Mare takes the case of a claim for breach of warranty given by contract that the defendant would not perform the contract in a way which breached Article 101 TFEU. He submits that it would be odd if the claimant could not bring a claim under section 47A simply because the Commission had made no finding as to the existence of the contractual warranty and its breach. If that is the result, and we do not have to decide that point, the contracting party may be able to bring an action for breach of statutory duty instead.

(2) An essential ingredient of the tort of unlawful means conspiracy is an intent to injure

32. Paragraph 24(b) and (c) of the particulars of claim constitute claims that IMI group were parties to an unlawful means conspiracy. Like the judge, I set out the description of the tort from *Clerk & Lindsell on Torts* at paragraph.24-95:

> "This form of the tort is committed where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage. It is not necessary for the injured party to prove that causing him damage was the main or predominant purpose of the combination but that purpose must be part of the combiners' intentions."

33. So, to establish liability for this tort, Newson group must show that, when IMI group agreed to act in the cartel, it did so with a relevant intent to injure. There is of course no issue about unlawful means in view of the infringement findings. There is considerable debate over the meaning of intent to injure in general, but I can pass over this as the dispute in this case falls within a narrow compass.

34. The parties disagree about what intent to injure relevantly involves. IMI group submit that there must be an agreement to cause harm by unlawful means with intent to injure Newson group. Newson group rely on the "obverse side of the coin" argument. They contend that intent to injure is satisfied by the findings in the Decision that IMI group intended to cause higher prices and obtain higher margins than would otherwise occur through free competition. Newson group argue that it matters not if IMI group were simply indifferent whether the victims were the direct or the indirect purchasers of tubes. On their submission it is sufficient that IMI group intended to make a profit at the expense of a class of persons to whom the wrongful acts were targeted.

35. In some circumstances the court will infer an intent to injure from acts which a conspirator does to promote his own objectives. In accepting the "obverse side of the

coin argument", the judge relied on a passage from the speech of Lord Nicholls in *OBG Ltd v Allan* [2008] AC 1 at 57. In his speech Lord Nicholls held:

> "*Intent to injure*
>
> 164 I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.
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> 165 Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way.
>
> 166 Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must *intend* to injure *the claimant*. This intent must be a cause of the defendant's conduct, in the words of Cooke J in *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354, 360. The majority of the Court of Appeal fell into error on this point in the interlocutory case of *Miller v Bassey* [1994] EMLR 44. Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.
>
> 167 I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. 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. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort. This accords with the approach adopted by Lord Sumner in *Sorrell v Smith* [1925] AC 700, 742:

> 'When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendants' success is the plaintiff's extinction, and they cannot seek the one without ensuing the other.'"

36. I shall consider the application of this passage to the present case under my third reason.

(3) The Commission's findings do not include a finding that IMI group had the requisite intent to injure

37. The Commission made no finding that IMI group had any intent to injure. Following *Enron 1*, it would be impermissible for the CAT to make any such finding. Mr Harris submits that intent to injure is not a relevant question for the Commission because a cartel under EU law does not require any subjective intent. This clearly makes it unlikely that the Commission will make the findings necessary to enable a conspiracy claim to be brought under section 47A, but does not rule out that as a possibility.

38. Essentially what the judge did was to infer intent to injure flowing from the fact that the cartelists intended to benefit their own businesses. He held

> "36. In my judgment, although the Defendants' purpose in entering into the cartel was to promote their own economic interests, it is wholly unrealistic to regard this as divorced from the causation of loss to purchasers of copper plumbing tubes, even if the loss caused to the Claimants might not correspond to the Defendants' gain. On the basis of *OBG*, I consider that this element of the tort can be established on the basis of the finding of infringement in the Decision alone."

39. However, in my judgment, the court cannot draw that inference since it does not necessarily follow. IMI group may have absolutely no intent as regards Newson group. They may have expected Newson group to pass the price increase on. It may well be that all purchasers of copper tubes would have been in the same position, so that they were able to pass the extra prices on.

40. In my judgment, the passage which Lord Nicholls cites from Lord Sumner in *Sorrell v Smith* (see paragraph 35 above), and on which the judge must have relied, does not on analysis support the judge's approach. It uses the word "ensuing" in the sense of a transitive verb (meaning "following"), which is now obsolete. However the sense is clear. Lord Sumner is taking the situation where loss to the plaintiff must follow from the object of the conspiracy. He was taking the case where the proved facts exclude every other inference. As Lord Nicholls puts it, the gain and the loss are inseparably linked. But it does not follow in this case that Newson group would inevitably suffer loss. That would not be so if they were able to pass on the price increases to their customers. They might even have made a profit if they were able to raise their prices in advance of becoming liable to pay price increases to IMI group.

41. Mr de la Mare seeks to meet this difficulty by submitting that it matters not if IMI group were simply indifferent whether the victims were the direct or the indirect purchasers of pipes and that it is sufficient that IMI group intended to make a profit at the expense of a class of persons to whom the wrongful acts were targeted. I would reject this argument. It deprives the requirement of intent to injure of any substantial content. It is tantamount to saying that it is sufficient that the conspirators must have intended to injure anyone who might suffer loss from their agreement. If I might say so, the submission is reminiscent of the circularity of the words in The Gondoliers that "when everyone is somebody, then no-one's anybody".

42. As a further argument, Mr De la Mare submits that it was enough that Newson group paid the higher prices before they passed them on. But that is speculation: Newson group may have raised its prices enough to compensate for this. It does not follow from the fact that Newson group expended cash to pay IMI group's inflated prices that IMI group thereby intended them to make a loss.

43. IMI group submit that the Commission made no finding that the cartel involved an agreement or combination for conspiracy purposes as opposed to an arrangement or concerted practice for competition law purposes. I accept that a cartel need not involve an agreement. The parties, for example, may simply participate in a meeting at which anti-competitive arrangements are agreed without distancing themselves from them. In this case, however, the parties were found to have gone further than this and to have made arrangements, for example as to the allocation of market shares (see the Decision at paragraph 452 and recitals 335 to 340). The crucial point was that, even here, no intent to injure was found.

44. Accordingly, in disagreement with the judge, I would hold that the Commission's findings do not satisfy the requirement for Newson group's conspiracy claim of an intent to injure.

Conclusions

45. In conclusion, if my Lords agree, Newson group succeeds on the interpretation of section 47A: a conspiracy claim may be brought under section 47A if the Commission's infringement findings support it. This may occur only in rare cases. In this case, the infringement findings did not support the intent to injure required for that claim. Accordingly IMI group succeeds on that point, and the appeal must to that extent be allowed.

Lord Justice Patten

46. I agree.

Lord Justice Beatson

47. I also agree.