

Two wrongs don't make a right
or
Public law orthodoxy rules again

R (Gallaher Group Ltd and other) (Respondents) v Competition and Markets Authority (Appellant)

Imogen Proud, Barrister, Monckton Chambers

Overview

On 16 May 2018, the Supreme Court handed down judgement in an appeal concerning the way in which the Office of Fair Trading (the "OFT") conducted settlement negotiations under its so-called "Early Resolution Process" ("ER Process") with parties subject to its tobacco investigation. It held that a mistake made to the benefit of one party during settlement negotiations is not required to be replicated to the benefit of other parties. It reached this conclusion, overturning the Court of Appeal's decision, on the basis of traditional principles of public law rationality and legitimate expectation. The Supreme Court rejected the argument that there are distinct legal criteria of "equal treatment" and (substantive) "fairness" amongst the traditional principles of judicial review.

The Facts

Since the events in question, the OFT has been replaced with the Competition and Markets Authority, but the judgment refers throughout to the OFT.

In March 2003, the OFT began an investigation into alleged price-fixing in the tobacco market, contrary to section 2(1) of the Competition Act 1998. On 24 April 2008, it issued a Statement of Objections (the "SO") addressed to 13 parties, including the two respondents. On 15 April 2010 the OFT issued its decision (the "Tobacco Decision") upholding the finding of infringement against both respondents, and all but one of the other parties. Six affected parties appealed to the Competition Appeal Tribunal. The respondents did not appeal since they had reached settlements with the OFT under the ER Process.

The Early Resolution Process

The letters from the OFT accompanying the SOs offered the possibility of obtaining a reduction in applicable financial penalties in exchange for cooperating with the OFT's investigation. Both respondents indicated within the time limit that they wished to enter into without prejudice discussions with the OFT for this purpose. Following negotiations they entered into Early Resolution Agreements ("ERAs"), along with four other parties.

OFT's dealings with TMR

Martin McColl Retail Group Ltd and TM Retail Group Ltd (together "TMR") was another of the parties which entered into an ERA with the OFT. During the course of negotiations, TMR asked about the OFT's likely attitude to those who entered an ERA in the event of a successful appeal by one of the other parties to the investigation. The OFT indicated that, to the extent the principles determined in such an appeal decision were contrary to or otherwise undermined the OFT's decision against TMR, the OFT would apply the same principles to TMR, which would likely mean withdrawing or varying its decision against TMR.

On 12 December 2011, the CAT gave judgment allowing all six appeals ([2011] CAT 41). TMR then wrote to the OFT inviting it to withdraw the OFT's decision as against it, and threatening legal action if it failed to do so. TMR relied upon the OFT's earlier assurances. The OFT agreed that the statements it had made to TMR might have given rise to an understanding on the part of TMR that the OFT would withdraw or vary its decision against TMR in the event of a successful third party appeal. The OFT also considered that there was a real risk that TMR would, as a result of reliance on the OFT's statements, be permitted to appeal the Tobacco Decision out of time to the Competition Appeal Tribunal, and succeed in that appeal.

On 9 August 2012, the OFT reached a settlement agreement with TMR, by which the OFT agreed to pay to TMR an amount equal to the penalty TMR had paid together with a contribution towards interest and legal costs.

The Respondents' response to the CAT judgment

The respondents had each written to the OFT in February 2012 calling upon it to withdraw the Tobacco decision as against them and to refund the penalties they had paid. The OFT refused.

The respondents made applications in July 2012 for permission to appeal the Tobacco Decision out of time. These applications initially succeeded before the Competition Appeal Tribunal, but this was reversed by the Court of Appeal, on the grounds that the test for permission to appeal out of time was not met, since there were no exceptional circumstances.

The Appellants then commenced the proceedings in the High Court which ended with the present appeal to the Supreme Court.

Judgments below

At first instance, Collins J rejected the claims. He accepted that the OFT's powers were "*subject to public law requirements of fairness and equal treatment*". However, the assurance given to TMR had been given in error and "*as a general rule a mistake should not be replicated where public funds are concerned*" (citing with approval *Customs and Excise Comrs v National Westminster Bank plc* [2003] STC 1072 at [66]).

The Court of Appeal took a different view, ordering that the respondents should each be entitled to payment of a sum equal to the penalties they had paid to the OFT, together with an amount in interest and costs. Lord Dyson MR, in the leading judgment, noted it as common ground that "*the OFT must comply with the principle of equal treatment in all steps leading up to the imposition of a penalty*" (citing *Crest Nicholson plc v Office of Fair Trading* [2009] EWHC 1875 (Admin)). The Court held that even though the assurance given to TMR was a mistake, the failure to offer a similar assurance to others in the same position could still constitute unequal treatment depending on the circumstances. The Court of Appeal considered it highly relevant that the OFT had had, as it saw it, an opportunity to withdraw its mistaken assurance to TMR when other parties (Asda and 'Party A') later sought similar assurances.

The Supreme Court's conclusion on the OFT's conduct

The Supreme Court viewed the respondents' potential complaint through the prism of orthodox principles of judicial review: irrationality and legitimate expectation. Having reframed the litigation in this way, the Court was able swiftly to deal with the classification of the OFT's conduct, taking just three paragraphs in the leading judgment of Lord Carnwarth. The Court was sympathetic to the respondents' plight to the extent that "*the respondents no doubt have grounds to complain of [...] administrative failure*" [42], namely not being informed of the assurance given to TMR in 2008. However, "*grounds for administrative complaint do not necessarily add up to a cause of action in law*" [42]. Lord Carnwarth was unpersuaded that the "critical boundary" of unfairness had been crossed by the OFT. He reasoned that the fact of having given mistaken assurances to TMR but not the respondents was a "potentially crucial difference" between those parties with whom the OFT was dealing, and which meant that the subsequent difference in treatment was not irrational [44].

Comment: the meat of the judgment

The most interesting feature of this judgment, and why it is of wider significance beyond cartel investigations, is the Supreme Court's rejection of the opportunity to add "*public law requirements of fairness and equal treatment*" ([19]) to the

gamut of traditional principles of judicial review. This reversed the reasoning of both the High Court and Court of Appeal, which had agreed that the duty was owed by the OFT to those subject to its investigations. The Supreme Court's approach was that *"notwithstanding the degree of common ground on these points, it is important in this court to be clear as to the precise content and attributes of the relevant legal principles, and their practical consequences in terms of remedies"* [23].

The Supreme Court turned first to equal treatment. The judgment is clear that *"[w]hatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law"* [24]. Consistency, whilst desirable, is not an absolute rule. Lord Carnwarth stated that it is *"not necessary [...] to look for some general public law principle of equal treatment"* since, to the extent that a body owes a general duty to offer equal treatment to those with which it deals, it could rather be said that they had in public law terms a legitimate expectation that they would be treated equally [29].

Fairness, similarly, was viewed as a *"fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law"* [31]. Procedural fairness is a well-established principle of public law [33], but substantive fairness is not a distinct legal criterion [41]. Simple unfairness as such is not a ground for judicial review (following *R v Inland Revenue Comrs, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617). "Unfairness amounting to excess or abuse of power" emerged in a series of cases in the 1980s, principally under the influence of Lord Scarman (eg *R v Inland Revenue Commission ex p Preston* [1985] AC 835. However, Lord Carnwarth found it unclear what the concept of unfairness added to the legal reasoning in those cases (or the present case, or more broadly), stating that such problems are "best understood" in terms of conventional grounds of review [37]. Further, it is a misunderstanding, borne of taking out of context the phrase "conspicuous unfairness", to interpret cases like *Unilever* to be elevating unfairness to a free-standing principle of law. In fact, irrationality *"can surely hold its own"* [40].

Lord Sumption, in a concurring judgment, agreed that *"in public law, as in most other areas of law, it is important not unnecessarily to multiply categories"* [50]. The reason for this is the risk of undermining the coherence of the law.

The message to future claimants, in public law actions extending far beyond those against the CMA, is to frame one's complaint squarely within the traditional public law categories. Where there is a temptation to argue on the basis of a principle of equality, consider whether this is "an application of the ordinary requirement of rationality" [50]. Where a decision appears unfair, look for the legitimate expectation of fair treatment [50]. In the end, public law is already capable of addressing the consequences of mistakes made by public authorities; there is not, it seems, a freestanding principle against the non-

replication of mistakes, whether modelled on the law of legitimate expectation or at all. Return to the well-trodden path!

Daniel Beard QC and Brendan McGurk were instructed by CMA Legal for the successful appellant.

The judgment is available [here](#).

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.