



SLAUGHTER AND MAY

Competition Litigation in the UK

JANUARY 2012

Detail from Sea Hook by Trevor Bell

"They explore every alternative, going deeper than most firms; you get the best possible representation and no stone is left unturned."

CHAMBERS UK, 2011

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1. Background

- 1.1 This publication provides a general overview of the development and practice of competition litigation in the UK, together with details of Slaughter and May's experience and capability in this growing area.
- 1.2 The principle that breaches of competition law can give rise to claims for damages and other relief before the English courts has been clear at least since the decision of the House of Lords in *Garden Cottage Foods v. Milk Marketing Board* in 1983¹. However, it is only with more recent policy and legislative developments that private enforcement of competition law in the UK has come to be widely perceived as a credible complement to public enforcement by the competition regulators.
- 1.3 In particular, the enhancements to third party rights to enforce competition law, introduced by the Enterprise Act 2002 ("the Enterprise Act"), are viewed as having facilitated a greater level of private enforcement, relative both to the position at common law and to the position in some other EU Member States. The Enterprise Act introduced a specialist tribunal (the Competition Appeal Tribunal ("the CAT")) to hear claims for damages on a "follow-on" basis from a prior finding of infringement by the competition authorities in the UK or Brussels, and allowed for representative actions to be brought by consumer organisations claiming damages on behalf of groups of consumers.
- 1.4 Other factors have been at work to increase the attractiveness of private enforcement before the English courts as a means of recourse for those who consider themselves to be victims of a breach of the competition rules. The English courts have interpreted their jurisdiction to award damages expansively, so as in certain circumstances to allow claimants to recover damages for loss suffered outside England and Wales. At the same time, the primary competition authority in the UK (the Office of Fair Trading ("the OFT")) has developed a set of priority principles for assessing which cases warrant expenditure of scarce public resources. These principles take into account the ability of the complainant to seek redress through private enforcement of the competition rules. As a result, absent wider public policy considerations, those affected by competition law breaches increasingly find that private enforcement may be the only effective means of redress available to them.
- 1.5 Recent developments suggest that the momentum building behind private enforcement can only gather pace. Both the OFT and the European Commission (the "Commission") have been very active in developing policy in this area of law and have both put forward a number of recommendations and proposals to enhance the effectiveness of private enforcement for breaches of competition law.² Where relevant, this publication makes reference to the Commission's and the OFT's publications in this area.
- 1.6 This publication deals with litigation before the CAT, whose jurisdiction extends to the United Kingdom as a whole, and in the court system of England and Wales. It should be noted that separate court systems exist in Scotland and Northern Ireland.

¹ *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130.

² The Commission's publications on this area of law include its Green Paper on "Damages actions for breach of EC antitrust rules" in December 2005 (com (2005) 672 Final) and its White Paper on the same topic in April 2008 (com (2008) 165 Final). It was anticipated at the time that these publications would be followed by the publication of the Commission's draft Directive on damages for breach of competition law; however, this draft was withdrawn at the start of October 2009, just days before its expected publication. More recently, the Commission has conducted a public consultation on collective redress during February to April 2011 (see Section 3 below) and, in June 2011, also published for consultation a draft guidance paper on quantifying harm in actions for damages based on breaches of Articles 101 or 102.

At the UK level, the OFT has also produced a number of publications on this area, including a Discussion Paper, "Private Actions in Competition Law: Effective Redress for Consumers and Business", in April 2007, and a number of Recommendations on how best to facilitate the case management of private actions, "Private actions in competition law: effective redress for consumers and business – Recommendations from the Office of Fair Trading", in November 2007. More recently, the OFT has also published its Response to the Commission's White Paper in July 2008 and its "Quick Guide To Private Litigation In Competition Cases" in March 2010.

2. Actionable Competition Law Breaches

- 2.1 Private legal actions brought before the English courts claiming damages and/or other relief (e.g. injunctions/ declarations) for breaches of competition law are generally framed as a tortious action for breach of one of the following statutory prohibitions³:
- the prohibition on anti-competitive agreements (including cartels) contained in Article 101 of the Treaty on the functioning of the European Union (“TFEU”) (ex-Article 81 of the EC Treaty) and the UK’s domestic equivalent in Section 2 of the Competition Act 1998 (“the Competition Act”) (commonly referred to as the “Chapter I prohibition”); and/or
 - the prohibition on the abuse of a dominant position contained in Article 102 TFEU (ex-Article 82 of the EC Treaty) and the UK’s domestic equivalent in Section 18 of the Competition Act (commonly referred to as the “Chapter II prohibition”).
- 2.2 The relevant provisions of the TFEU have direct effect and are therefore directly applicable, meaning that claims based on these provisions can be brought before an English court. In practice, claims relating to anti-competitive agreements or the abuse of a dominant position are often based on both the relevant EU and UK provisions. Under Section 60 of the Competition Act, the English courts are obliged to act with a view to ensuring consistency in the application of the relevant EU and UK provisions and are also obliged in certain circumstances to respect precedent at the European level under the provisions of Council Regulation (EC) 1/2003 (“Regulation 1/2003”).⁴

THE PROHIBITION ON ANTI-COMPETITIVE AGREEMENTS

- 2.3 Article 101(1) TFEU prohibits any agreement or concerted practice between two or more undertakings that:
- (i) has the object or effect of preventing, restricting or distorting competition; and
 - (ii) may affect trade between EU Member States.
- 2.4 The Chapter I prohibition of the Competition Act is based on Article 101 and contains an equivalent prohibition for agreements that may affect trade within the UK.
- 2.5 Some examples of the types of restriction that may be caught by the prohibitions in Article 101 and/or Chapter I include the following:
- price-fixing or market-sharing cartel agreements;

³ It has also been suggested that such claims may be more correctly framed as being ‘unjust enrichment’ claims. However, at present, the prevailing view would characterise them as claims relating to a breach of statutory duty.

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU (ex-Articles 81 and 82 of the EC Treaty) (OJ 2003 L1/1). See Section 3 below for further information.

- agreements to limit production or sales;
- bid-rigging activities;
- resale price maintenance;
- exclusivity agreements;
- intra-EU export bans;
- territorial restrictions (e.g. restrictions on the places/customers in which/to whom a distributor may sell); and
- agreements to exchange commercially sensitive information.

THE PROHIBITION ON THE ABUSE OF A DOMINANT POSITION

- 2.6 Article 102 TFEU prohibits the abuse, by one or more undertakings, of a dominant position within the common market or a substantial part of it, in so far as it may affect trade between EU Member States.
- 2.7 The Chapter II prohibition of the Competition Act is based on Article 102 and contains an equivalent prohibition for the abuse of a dominant position that may affect trade within the UK.
- 2.8 In order to decide whether a company has a dominant position, it is first necessary to define the relevant market by reference to both its product and geographic scope. A company will be found to have a dominant position within a market if it has the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers. This analysis of the existence of dominance takes into account factors such as the market share of the company and its competitors, the presence of barriers to entry and expansion in the market and the market position of the company's customers (i.e. countervailing buyer power).
- 2.9 Once dominance is established, it is then necessary for the regulator to show an abuse. To this end, there are two broad categories of abuse:
- (i) exclusionary abuses (i.e. conduct designed to exclude a dominant company's competitors from the relevant market); and
 - (ii) exploitative abuses (i.e. conduct designed to exploit a dominant company's customers).

2.10 Some examples of the types of conduct that may be regarded as abusive include the following:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions (e.g. excessive pricing);
- discriminatory treatment (i.e. offering different terms without objective justification to equivalent customers or offering the same terms without objective justification to different customers);
- predatory pricing (e.g. offering prices below cost with a view to eliminating a competitor from the market);
- exclusivity provisions;
- loyalty rebates;
- tying or bundling; and
- refusals to supply (e.g. refusing to supply an existing customer, refusing to grant access to an essential facility or refusing to supply information needed for interoperability).

2.11 These EU and UK rules are considered in greater detail in the Slaughter and May publications, “An Overview of the EU Competition Rules” and “An Overview of the UK Competition Rules”, respectively.

3. Claims in the High Court and CAT

- 3.1 In terms of standing to bring competition law claims, to the extent that the English courts have jurisdiction to hear a claim, any person or undertaking that has suffered loss or damage as a result of an infringement of UK and/or EU competition law may bring a claim for damages or other relief (e.g. injunctive relief/declarations) before the Chancery Division of the High Court.⁵ Any such claim may be brought on a “standalone” basis where there is no prior infringement decision by the Commission, or on a “follow-on” basis where there is such a decision. Alternatively, where a prior finding by the Commission or by a UK competition authority of an infringement exists and where the redress sought is limited to a claim for damages (or other claim for a sum of money), any such person may instead bring the claim before the CAT (on a “follow-on” basis). A prior finding of infringement also gives rise to the possibility of claims for damages being brought before the CAT by the Consumers' Association (now trading as “Which?”), or other bodies that may be specified in the future, on behalf of individually named consumers (so-called “representative” actions).
- 3.2 This section considers each of these different fora for bringing a claim in turn.

HIGH COURT CLAIMS

- 3.3 An action before the High Court will often be the only avenue available to a litigant. This is the case, in particular, if there is no prior infringement decision of a competition authority and/or if the relief sought goes wider than a pure claim for damages (or other claim for a sum of money), e.g. if urgent injunctive relief is required.
- 3.4 “Follow-on” actions may also be brought in the High Court, based on a pre-existing decision of the Commission, since Article 16 of Regulation 1/2003 provides that an English court cannot take a position that runs contrary to a decision already taken by the Commission. Hence, in a “follow-on” action, the claimant does not need to establish that the defendant has infringed the relevant competition law. The claimant can rely on the decision of the Commission to that effect and thus only needs to show causation and loss as a result.
- 3.5 Where a decision has yet to be taken by the Commission in proceedings it has initiated regarding an agreement or practice that is subject to challenge before the English courts, Article 16 further provides that the English courts must avoid delivering a potentially conflicting decision. This may require the court to stay its own proceedings until such time as the Commission has reached a decision.
- 3.6 With regard to decisions of the UK competition authorities, the Competition Act requires the English courts to be bound by both:
- (i) “findings of fact” made by the OFT during an investigation, and which have not been appealed (or where an appeal has failed), unless the court expressly directs otherwise.⁶ This requirement applies to

⁵ The Judges in the Chancery Division have undertaken specialist training in examining claims involving competition law issues. As a result, competition law cases are now typically allocated to this Division with the intention that it will over time develop a specialist understanding of competition law cases.

⁶ Section 58 of the Competition Act.

any finding of fact made during the course of an investigation, and not just the facts relied upon by the authority to prove the infringement⁷; and

- (ii) findings of infringement of the Chapter I or II prohibitions or Article 101 or 102 made by the OFT (or CAT) after the coming into force of the Enterprise Act where the time period for appealing the relevant decision has expired.⁸

- 3.7 Decisions by the OFT and by the Commission in relation to matters falling outside the scope of these provisions (e.g. previous decisions regarding the way in which a market operates) do not, however, bind the courts in subsequent disputes where such matters need to be determined. For example, in *Crehan v. Inntrepreneur Pub Company*⁹ the House of Lords adopted a relatively restrictive interpretation of Article 16 of Regulation 1/2003, concluding that a Commission decision is binding on an English court only when the case before that court involves the very same “agreements, decisions or practices” as were the subject of the Commission’s decision. If the English court is considering a dispute involving different parties, the Commission’s decision will not be binding on the court even if the conduct at issue relates to the same product and geographic market and is in broadly similar form. However, the related decision will be admissible as evidence and may well be regarded by the court as highly persuasive, as indeed the House of Lords recognised in *Crehan*.
- 3.8 In addition, there are other avenues by which the views of the OFT and/or the Commission may be made known to a court considering a “standalone” competition claim. Any party whose statement of case raises or deals with an issue relating to the application of Article 101 or 102, or the Chapter I or II prohibitions, must serve a copy of the statement of case on the OFT and/or the Commission at the same time that it is served on other parties to the claim. Under Regulation 1/2003, the OFT and/or the Commission may then decide to submit written observations on the case to the court, and may also make oral representations with the court’s permission. To date, the OFT’s policy has been to intervene only in appeal cases and where there is a risk that the court may not be aware of any broader policy issues. The Commission’s policy is also to intervene only in appeal proceedings; it is not, however, known to have pro-actively intervened in any proceedings before the courts of England and Wales to date.¹⁰
- 3.9 The Court may decide to seek advice from the European Court of Justice where the case involves the interpretation of the TFEU or an act of the Commission, by requesting a preliminary ruling under Article 267 TFEU (ex-Article 234 of the EC Treaty).

⁷ In the recent case of *Enron v. EWS*, the Court of Appeal made clear that not every statement in an authority’s decision necessarily constitutes a “finding of fact”. Rather, a party seeking to rely on a “finding of fact” is required to show that the authority made a “clearly identifiable finding of fact to a given effect”. In assessing whether a “finding of fact” does exist, statements must be considered in the context in which they are made. As Jacob LJ noted, “[i]t is not good enough for a party claiming damages in a follow-on claim to root around in the decision of the regulator to find stray phrases or sentences and say ‘look, here is a finding of fact, you cannot deny it.’” See *Enron Coal Services (In Liquidation) v. English Welsh and Scottish Railway* [2011] EWCA Civ 2.

⁸ Sections 47A and 58A of the Competition Act.

⁹ *Crehan v. Inntrepreneur Pub Company* [2006] UKHL 38.

¹⁰ The European Commission has, however, in the recent *National Grid* case provided written observations to the English court following a request from the court for the Commission to make known its views on the discoverability of leniency documents (see further Section 4 below).

CAT ACTIONS

3.10 Section 47A of the Competition Act allows for “follow-on” actions to be brought before the CAT to recover damages (or to bring any other claim for a sum of money) suffered as a result of an infringement of EU or UK competition law, provided that there is a prior decision of the OFT, Commission or CAT finding that an infringement has taken place.¹¹ The right to bring such a “follow-on” action in respect of previous decisions of the Commission is not limited to decisions that relate to the UK or to parties resident in the UK. The first actions under Section 47A were brought in 2004¹² following the Commission’s vitamins cartel decision¹³. These have been followed by a number of subsequent actions brought following both OFT and Commission infringement decisions¹⁴.

3.11 Under the Competition Act, as is the case with the High Court, the CAT is bound by prior “findings of fact” of the OFT.¹⁵

HIGH COURT VS. CAT

3.12 Deciding which court is the most effective forum in which to initiate a claimant’s action will depend in part on the type of action being brought and the type of relief sought. Key considerations in this regard include the following:

- (i) *Limitation period*: As noted further below, the limitation period for bringing actions before the High Court and CAT differ. The standard limitation period for bringing a High Court action based on tort is six years from the date on which the cause of action accrued. Damages actions before the CAT, however, must generally be brought within two years of the “relevant date” (i.e. the date on which the period for appealing an infringement decision expires with no appeal having been lodged; or the date on which any appeal arising from the infringement decision has been determined; or, if later, the date on which

¹¹ In July 2009, the Court of Appeal clarified that such an action must be based on an express infringement finding: a claimant cannot rely on a finding of fact made by a competition authority that could arguably amount to an infringement as the basis of their claim. *English Welsh and Scottish Railway Limited v. Enron Coal Services Limited* [2009] EWCA Civ 647.

¹² Case no. 1029/5/7/04, *Deans Foods Limited v. (1) Roche Products Limited (2) F Hoffman-La Roche AG (3) Aventis SA*, registered on 26/02/2004; and Case no. 1028/5/7/04 (1) *BCL Old Co Limited (2) DFL Old Co Limited (3) PFF Old Co Limited v. (1) Aventis SA (2) Rhodia Limited (3) F Hoffman-La Roche AG (4) Roche Products Limited*, registered on 26/02/2004.

¹³ Case COMP/37.512 *Vitamins*, Commission decision of 21/11/2001 (OJ 2003 L6/1).

¹⁴ Subsequent actions include: Case no. 1060/5/7/06, *Healthcare at Home v. Genzyme Limited*, registered on 05/04/2006, following the OFT’s abuse of dominance decision in relation to Genzyme; Case no. 1077/5/7/07, *Emerson Electric Co and others v. Morgan Crucible Company plc and others*, registered on 09/02/2007, following the Commission’s cartel decision relating to carbon and graphite products; Case no. 1078/7/9/07, *The Consumers Association v. JJB Sports plc*, registered on 05/03/2007, following the OFT’s cartel decision relating to replica football shirts; Case no. 1088/5/7/07, *JJ Burgess and Sons v. W. Austin and Sons (Stevenage) Limited and Harwood Park Crematorium Limited*, registered on 03/08/2007, following the OFT’s abuse of dominance decision in relation to Austin/Harwood Park; and Cases 1098/5/7/08, *BCL Old Co Limited, DFL Old Co Limited, PFF Old Co Limited and Deans Foods Limited v. BASF SE, BASF plc and Frank Wright Limited*, registered on 13/03/2008, and 1101/5/7/08, *Grampian Country Food Group Ltd, Grampian County Feed Limited, Marshall Food Group Limited, Cymru Country Chickens Limited and Favour Parker Limited v. Sanofi-Aventis SA, Rhodia Limited, F. Hoffman-La Roche AG, Roche Products Limited, BASF plc and Frank Wright*, registered on 14/05/2008, following the Commission’s vitamins cartel decision.

¹⁵ In *Enron v. EWS*, the Court of Appeal confirmed that the CAT is bound in the same way as the High Court by the requirements of Section 58 of the Competition Act, unless it uses its discretion to expressly state otherwise in its judgment.

the cause of action accrued). For example, where a claimant is slow to bring its action, it may find that the limitation period for a cause of action has expired before the High Court, while it may still remain possible to initiate proceedings before the CAT instead.

- (ii) *Follow-on actions*: Private damages actions before the CAT can be brought only on a “follow-on” basis. To the extent that a claimant wishes to bring a claim for damages that relate to conduct beyond that covered by the authority’s infringement decision (e.g. where the OFT has decided in its decision to focus on a shorter time period or only a particular geographic area), the claimant will therefore need to bring their claim before the High Court.
- (iii) *Available relief*: To the extent that a claimant is seeking declaratory or injunctive relief, the action must be brought before the High Court. The CAT has jurisdiction to hear claims only for damages (or other sums of money) (see Section 5 below).

COLLECTIVE REDRESS

- 3.13 One widely acknowledged deterrent to private litigation is that it may not be cost-effective for an individual consumer to bring an action for damages, especially if the loss suffered by that one consumer is very small. With this in mind, UK law allows a “specified body” to bring a damages action on behalf of named consumers before the CAT under Section 47B of the Competition Act. A specified body must meet certain criteria designed to ensure its independence, impartiality, integrity and ability to represent the interests of consumers. To date, Which? is the only body specified for the purposes of Section 47B. In March 2007, the first such representative action under section 47B was brought by Which?¹⁶ on behalf of some 130 individual consumers against JJB Sports plc. The claim related to losses suffered by consumers as a result of JJB’s involvement in a cartel to fix the prices of replica football kits in 2000 and 2001, following the OFT’s infringement decision of August 2003.¹⁷ However, no judgment was ultimately delivered in this case: on 9 January 2008, JJB announced that it had agreed to settle the case. The CAT subsequently issued an order on 14 January 2008 that the claim be withdrawn. JJB was also ordered to pay Which?’s costs.
- 3.14 There is currently no provision allowing representative actions to be brought on behalf of businesses, or as “standalone” actions on behalf of businesses or “consumers at large”. However, the OFT has previously raised the possibility of encouraging the use of representative actions in competition law cases in several ways, including allowing representative actions to be brought on behalf of “consumers at large” (rather than the current requirement to bring an action on behalf of named consumers only), allowing “standalone” actions and allowing representative actions to be brought by specified bodies on behalf of businesses, especially small and medium-sized enterprises. In its February – April 2011 consultation on collective redress (see further below), the Commission also expresses its desire for a movement towards a coherent approach to European

¹⁶ Case no. 1078/7/9/07, *The Consumers Association v. JJB Sports Plc*, registered on 05/03/2007.

¹⁷ Case no. CA98/06/2003, *Price-fixing of Replica Football Kit*, decision of the OFT of 01/08/2003.

collective redress against the background of, amongst other things, differing national rules for determining legal standing.

- 3.15 Where there are multiple claimants to the same cause of action, the UK courts' Civil Procedure Rules allow for the use of "Group Litigation Orders" ("GLO"s).¹⁸ This procedure has not yet been used in a competition law case, but it has been used in other types of cases giving rise to multiple consumer claims (e.g. product liability cases).
- 3.16 Alternatively, representative actions may be brought before the High Court in accordance with Rule 19.6 of the Civil Procedure Rules. In summary, Rule 19.6 allows a claimant to bring an action on behalf of others (as their representative), as well as itself, where these parties have the same interest in the claim. In the recent case of *Emerald Supplies v. British Airways*¹⁹, the Court of Appeal clarified the scope of this Rule, confirming that such representative actions may only be brought where the claimants have "*the same interest*". In their original pleadings before the High Court, the claimants (importers of cut flowers that used air freight services provided by British Airways and other airlines) purported to act as representatives of other groups of consumers of freighted goods as well, being direct or indirect purchasers of air freight services for which prices were inflated by agreements or concerted practices in violation of EU competition law. The High Court, however, struck out the representative part of their claim on the basis that they did not fall within the scope of Rule 19.6. Upon appeal, the Court of Appeal confirmed the High Court's decision, emphasising that the fundamental requirement for a representative action is that those that are represented have the *same* interest in it and that this interest must be the same at all stages of the case and not just at the point of judgment. In this case, the parties' interests differed due to, amongst other things, the fact that some were direct purchasers and others indirect purchasers, meaning that while the passing-on defence²⁰ might benefit some, it might harm the claims of others.²¹
- 3.17 Recent policy review in this area at the European level includes the Commission's public consultation on collective redress, held from 4 February to 30 April 2011 and preceded by a Joint Information Note of Vice-Presidents Joaquín Almunia and Viviane Reding and Commissioner John Dalli, on the need for a coherent European approach to collective redress. The purpose of this consultation was, among other things, to identify common legal principles on collective redress in the EU and to explore different possible forms of collective redress that might better protect the rights of EU citizens and businesses by improving the enforcement of EU legislation.

¹⁸ A Group Litigation Order means an order made under Rule 19.11 of the Civil Procedure Rules to provide for the unified case management of claims which give rise to common or related issues of fact or law (i.e. so that judgment may be delivered on such claims as part of the same process).

¹⁹ *Emerald Supplies Limited and Another v. British Airways Plc* [2010] ECA Civ 1284, judgment of 18 November 2010.

²⁰ See paragraph 6.7 below for further details of the passing-on defence.

²¹ The Court of Appeal did not consider whether a GLO would have been more appropriate in this case (as suggested by the High Court's prior judgment).

4. Jurisdiction and Applicable Law

- 4.1 The issue of whether a UK court has jurisdiction to hear a claim is determined by reference to the general rules contained in the Jurisdiction Regulation²², Lugano Convention²³ or common law conflict of laws rules, as appropriate.²⁴ Under the Jurisdiction Regulation, the default position is that the case should be brought in the jurisdiction in which the defendant is domiciled. Thus, the starting point is that an English company can always be sued before the English courts. However, actions may also be brought in a jurisdiction where the harmful event (tort) occurred or, if the action is being brought by a consumer, in the jurisdiction where the consumer is domiciled. Where there are multiple defendants domiciled in different jurisdictions, it is possible to bring all actions in the same jurisdiction where the claims are “*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments*”²⁵.
- 4.2 The rules on jurisdiction are somewhat complex to apply, but can provide considerable flexibility for an English court to take jurisdiction, especially in cases involving multiple defendants based in different EU Member States. For example, in the *Provimi*²⁶ case, the High Court found that it had jurisdiction to hear damages claims following on from the Commission’s vitamins cartel case,²⁷ even though some of the defendants were domiciled outside the UK and one of the claimants was a German company which purchased vitamins in Germany. The Court concluded in *Provimi* that it has jurisdiction to hear claims against foreign members of a cartel where the claims against them are so closely connected to those against an English member that it is expedient to hear them together to avoid the risk of separate hearings producing conflicting judgments.
- 4.3 More recently, in *Cooper Tire*, the Court of Appeal established that the English courts have jurisdiction to hear EU-wide cartel damages claims where the pleadings allege (or at least allow for the possibility) that an English-domiciled subsidiary of a cartel member implemented the cartel and was either aware, or party to, the anti-competitive practice in question, thus acting as an “anchor” so that the claims against the subsidiary’s parent company (and other cartel members with no English subsidiaries) could be joined to these proceedings.²⁸ In the *Toshiba Carrier* case, the High Court then subsequently applied the approach adopted in *Cooper Tire* and *Provimi*, dismissing an application by the defendants (who were subsidiaries of the addressees of the European Commission’s 2003 infringement decision in relation to the industrial copper tubes cartel, but were not

²² Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12/1).

²³ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Lugano (30 October 2007) the “2007 Lugano Convention”. The 2007 Lugano Convention has replaced the 1988 Lugano Convention and governs issues of jurisdiction and enforcement of judgments as between the European Union Member States and the European Free Trade Association countries other than Liechtenstein (namely Iceland, Switzerland and Norway).

²⁴ A UK Court will apply the Jurisdiction Regulation to determine whether it has jurisdiction over persons (including legal entities) domiciled in an EU Member State; the Lugano Convention will apply to determine jurisdiction over persons domiciled in EFTA states (Iceland, Liechtenstein, Norway and Switzerland); and English common law conflict of laws rules will be applied by the English courts to determine jurisdiction over persons domiciled in any other countries. This publication is focussed on the Jurisdiction Regulation as that is likely to be most relevant to damages actions for breaches of EU competition law, but the Lugano and common law regimes have broad similarities and will often lead to the same result.

²⁵ Article 6(1) of Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12/1).

²⁶ *Provimi Ltd v. Aventis Animal Nutrition SA* [2003] EWHC 961.

²⁷ See footnote 13 above.

²⁸ *Cooper Tire & Rubber Company Europe Ltd and others v. Dow Deutschland Inc and others* [2010] EWCA Civ 864.

otherwise mentioned in the decision) to strike out an action for damages brought by a number of companies who had allegedly suffered harm as a result of the cartel.²⁹

- 4.4 However, there are limitations on the ability of English courts to take jurisdiction over claims involving non-English companies. In *SanDisk Corporation v. Koninklijke Philips Electronics NV*³⁰, for example, the court decided that it did not have jurisdiction to hear the claim since no immediate damage had been caused to SanDisk in England and none of the abuses of a dominant position complained of had originated in England. Accordingly there needs to be some form of connection to England and Wales before the English court will take jurisdiction.
- 4.5 More recently, in *Emerson Electric v. Morgan Crucible*³¹ the CAT, adopting a position that appears incompatible with that of the Court of Appeal in *Cooper Tire*, struck out a claim for damages against the UK subsidiary of Le Carbone, an addressee of the Commission's 2003 infringement decision in the carbon and graphite products cartel. In doing so, the CAT held that because the UK subsidiary itself was not mentioned in the Commission's cartel decision, there was no infringement decision within the meaning of Section 47A of the Competition Act on which the claimants could base their claims against the UK subsidiary. The UK subsidiary was not mentioned as an infringer or referred to anywhere in the operative part of the Commission's decision. On the basis of this ruling, therefore, it may not be possible for claimants simply to include as a defendant in a damages claim before the English courts the UK subsidiary of the foreign addressee of a Commission's infringement decision unless that UK subsidiary has also been found by the Commission to violate EU competition law – this is significant where claimants may wish to bring private damages actions against a UK-based company as well as, or rather than, against a foreign company due to ease of process and enforcement of any judgment in their favour before the English courts.
- 4.6 If an English court takes jurisdiction, it must then decide which law should be applied in multi-jurisdictional cases. It will not necessarily follow that English law will apply where the English courts have taken jurisdiction. Different rules will apply depending on whether the events that give rise to the damage occurred prior to or from 11 January 2009.
- 4.7 Where the events that give rise to the damage occurred prior to 11 January 2009, under English law's "conflict of laws" rules, the applicable law will be that of the country in which the events constituting the tort (i.e. the infringement of competition law) occur. Where events have taken place in more than one country, the court will apply the law of the country in which the most significant elements of the events occurred.
- 4.8 Where the events that give rise to the damage occur on or after 11 January 2009, the English courts will apply Regulation 864/2007 (known as "Rome II")³² to determine the law applicable to most non-contractual

²⁹ *Toshiba Carrier UK Ltd & Others v. KME Yorkshire Ltd & Others* [2011] EWHC 2665 (Ch).

³⁰ [2007] EWHC 332 (Ch).

³¹ Case no. 1077/5/7/07, *Emerson Electric Co and others v. Morgan Crucible and others* [2011] CAT 4, judgment of 21 March 2011.

³² Regulation (EC) No 864/2007 of 11 July 2007. Rome II will be applied in all EU Member States (except Denmark) to determine the governing law applicable to most non-contractual obligations.

obligations. Article 4 of Rome II lays down a general rule that the law applicable to a tort should be the law of the country in which the damage occurs, irrespective of where the event giving rise to the damage occurred. Article 6 specifies where the damage occurs in the context of competition claims. Rome II contains specific provisions dealing with the choice of law in cases of “unfair competition” and “restrictions of competition”:

- (i) Where the market of only one country is, or is likely to be, affected by the “restriction of competition” then the law applicable to any non-contractual obligations arising out of that restriction will be the law of that country;³³
- (ii) Where the markets of more than one country are affected, the position is considerably more complex and less certain. In those circumstances, Rome II provides that the claimant who sues in the court of the defendant’s country of domicile may choose to base his or her claim on the law of that country if the market in that country is “amongst those directly and substantially affected by the restriction on competition”.³⁴ Beyond this (i.e. where more than one market is affected and the claimant does not sue in the court of the country in which the defendant is domiciled), Rome II provides no assistance as to which law should govern the claim. These uncertainties will need to be addressed by the courts of EU Member States and the European Court as the issues arise in future cases. However, it is notable that Rome II has taken a step towards claimants having the right, in claims for damages caused by anti-competitive practices, to elect the governing law on which to base their claim (at least provided that there is an impact on the market of the chosen governing law’s country) and the case law might well develop further in that direction.

STANDARD OF PROOF

4.9 The relevant standard under English law is the civil standard of the “*balance of probabilities*” which is lower than the test applied under criminal law.³⁵

LIMITATION PERIODS

4.10 The standard limitation period for bringing a High Court action based on tort is six years from the date on which the cause of action accrued.³⁶ However, there is an exception in cases where the defendant deliberately conceals a fact relevant to the claimant’s right of action. In such cases, the limitation period does not start

³³ Article 6(3)(a), Rome II.

³⁴ Article 6(3)(b), Rome II. It is not clear from a literal interpretation of Article 6(3)(b) if the claimant who sued in the defendant’s country of domicile could alternately elect to base his or her claim on the court of another country (i.e. other than that of the defendant’s domicile) in whose market is affected by the restriction to competition.

³⁵ In criminal trials before the English courts, the jury will be directed that in order to reach a guilty verdict the prosecution must make them “*sure of guilt, which is the same as proving the case beyond reasonable doubt*”.

³⁶ Section 2 of the Limitation Act 1980.

to run until the claimant discovers the concealment, or could with reasonable diligence discover it.³⁷ As concealment is an inherent part of a cartel, it is likely that this exception will apply so as to delay the start of the limitation period for a cartel damages action.

- 4.11 Damages actions before the CAT must generally be brought within two years of the “relevant date”. The “relevant date” is the date on which the period for appealing the competition authority’s infringement decision expires with no appeal having been lodged, or the date on which any appeal arising from the infringement decision has been determined or, if later, the date on which the cause of action accrued.
- 4.12 In *Emerson Electric Co and others v. Morgan Crucible Company plc and others*³⁸, the CAT concluded that where an infringement decision is addressed to a number of parties (as is the case with a cartel) and one or more of the parties appeal the competition authority’s decision, a damages action may not be brought against any of the infringing parties before the determination of all appeals against the infringement decision, unless the permission of the CAT is obtained. In *Emerson*, the CAT granted permission for a claim to be brought against a party that had not appealed the decision, but denied permission for similar actions to be brought against certain parties that had appealed; however, the granting of permission in this case was based on very specific concerns about the defendant’s attitude towards document preservation and pre-action disclosure and, as such, suggests that the CAT would not necessarily grant permission as a matter of course.
- 4.13 This timing issue has, however, been complicated by the CAT’s judgment (on appeal to the Court of Appeal) in *Deutsche Bahn*, in which the CAT changed its position, instead concluding that the relevant time period begins to run from the expiry of the date for the defendant in question to bring an appeal (such that this time limit is not affected by the fact that other addresses of the infringement decision in question may have lodged appeals).³⁹ The case before the CAT was therefore stayed pending the outcome of the appeal.
- 4.14 In addition, in the *BCL v. BASF* case, the Court of Appeal further clarified that, for the purposes of suspending this two year period, any pending appeals must challenge the substance of the infringement finding itself, and not just the penalty imposed.⁴⁰
- 4.15 Although it was previously thought (including by the CAT itself) that the CAT might have discretion under its procedural rules to extend these time limits, the Court of Appeal concluded otherwise in *BCL v. BASF*, confirming that there is no provision in the CAT’s procedural rules under which the CAT can extend these time limits. Furthermore, the Court of Appeal did not believe that there were any principles of EU law, such as certainty, effectiveness or legitimate expectations, that entitled the claimants in that case to an extension of time for bringing their claim.

³⁷ *Ibid.*

³⁸ See footnote 31 above.

³⁹ *Deutsche Bahn and other v. Morgan Crucible and others* [2011] CAT 16.

⁴⁰ *BCL Old Co Ltd & Others v. BASF SE & Others* [2010] EWCA Civ 1258.

5. Procedure Before English Courts

- 5.1 A flowchart illustrating the key stages in actions before the English courts forms Annex 1. The length of any litigation before the English courts will depend on a combination of factors such as the volume of evidence, the number of parties, the complexity of the issues, the likely length of trial and whether or not the court decides to order that certain points be dealt with as preliminary issues. Large commercial cases can sometimes be dealt with in less than 18 months from issue of the claim form, with others generally taking two to three years before judgment is issued (absent an order for expedition).
- 5.2 The procedure adopted by both the High Court and the CAT in competition cases largely reflects that applied in all litigation. This section focuses on the key issues of evidence likely to arise in competition cases, including the rules on disclosure that differentiate the English courts from their civil law counterparts elsewhere in the EU. It also discusses issues related to rights of appeal from either tribunal.

DISCLOSURE BETWEEN THE PARTIES

- 5.3 The High Court has long-established disclosure procedures, requiring parties to a claim to disclose to each other at any stage of the proceedings all documents which are or have been in their control and which are material to the issues in the proceedings (with the exception of those documents that are considered privileged). "Documents" for this purpose is broadly defined and includes: letters, memoranda, drafts, diaries, manuscript notes, tapes, video cassettes, computer disks, emails, microfilm documents that are stored on servers and back-up systems, electronic documents that have been deleted and "metadata".
- 5.4 The CAT may at any time, on the request of a party or upon its own initiative, give directions for the disclosure between the parties of documents or classes of documents. In contrast to the position before the High Court, disclosure is not an automatic part of proceedings before the CAT. Before ordering disclosure, the CAT must be satisfied that the disclosure sought is necessary, relevant and proportionate to determine the issues before it.⁴¹
- 5.5 In England there is no oral discovery, and therefore no depositions such as exist in US procedure.

DISCLOSURE BY THIRD PARTIES (INCLUDING COMPETITION AUTHORITIES)

- 5.6 The High Court's procedural rules provide for third party disclosure once proceedings have commenced. The court may make such an order only where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and where disclosure is necessary in order to dispose fairly of the claim or to save costs. The CAT's procedural rules give the CAT considerable flexibility to ask third parties to produce documents or papers relating to the case.⁴²
- 5.7 Issues related to third party disclosure orders in competition litigation cases have arisen most frequently in relation to leniency statements made by a company to the Commission or the OFT in return for full

⁴¹ Case no. 1008/2/1/02, *Claymore Dairies and Arla Foods UK PLC v. OFT*, registered on 06/11/2002.

⁴² Rule 19 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003/1372).

immunity from civil fines or a reduction in the fines that might otherwise have been imposed upon them for infringement of the competition rules.

- 5.8 Most recently, the Court of Justice has considered the position regarding access to the file in respect of leniency documents in the *Pfleiderer* case, a case which highlights the tension between public and private enforcement.⁴³ On a reference from the Bonn court in Germany, the Court of Justice was asked to consider whether the Bonn court's decision to require the German competition authority to grant a private damages claimant access to documents within the authority's file (including materials provided by a leniency applicant) that were necessary for the purposes of substantiating its claim was compatible with EU law.
- 5.9 The Court of Justice held that EU law did not automatically preclude the disclosure of a leniency applicant's submission in subsequent court proceedings where such disclosure is required by national law. However, rather than adopting a definitive line, the court instead concluded that it was for each EU Member State to determine its own rules to be applied to such requests, balancing concerns over disclosure undermining the effectiveness of leniency regimes against the need to ensure that it is not unduly difficult for parties to bring damages actions to recover losses arising from competition law violations.
- 5.10 Following the ruling in *Pfleiderer*, the High Court had to consider the same issue in the *National Grid* case, involving a follow-on damages action brought by National Grid following the Commission's investigation and decision relating to an alleged cartel in the market for Gas Insulated Switchgear ("GIS") projects. National Grid, alleging loss flowing from inflated prices, sought disclosure of several documents to which the court acknowledged it would be entitled under English disclosure rules, absent a supervening provision of EU law. Faced with difficulty in obtaining documents directly from two defendants (Alstom and Areva) by virtue of a French blocking statute, National Grid sought disclosure of their responses and other documents submitted to the Commission from the other defendants (ABB and Siemens) (which ABB and Siemens had obtained via access to the Commission's file).
- 5.11 ABB and Siemens argued that such disclosure would jeopardise the ongoing investigation of the GIS cartel and would impair future investigations generally, as parties would be less willing to submit documents to the Commission. The judge rejected these arguments, however, on the basis that the requested disclosure was to parties to English court proceedings (as opposed to the public at large) within a confidentiality ring, and therefore granted National Grid's first request. National Grid then asked the court to request copies from the Commission of Alstom's and Areva's responses to the Commission's Statement of Objections. The court agreed to make such a request, provided documents received would be kept within a confidentiality ring.
- 5.12 In the final part of its application, National Grid sought disclosure of the confidential version of the Commission's decision (containing information obtained from leniency material) directly from defendants and disclosure from ABB of documents relating to its successful leniency application. This part of the application was adjourned by the court in order to seek observations from the European Commission as to whether this is an issue to be determined by the English court, and if so, what factors should be taken into account (and the relative weight to be given to each factor) by a national court when exercising its discretion.

⁴³ Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, judgment of 14 June 2011.

- 5.13 The European Commission submitted its observations on these issues to court in advance of the adjourned hearing which took place in November 2011, and has subsequently published this submission. In summary, the European Commission argues that disclosure of leniency documents should only be granted where the documents are relevant to establish the claimant's damages claim and the relevant information cannot be obtained from an alternative source. It further argues that the whistleblower evidence, in particular the "oral statement", should be the source of last resort.
- 5.14 The judgment of the English court in relation to National Grid's application is expected to be handed down in early 2012.
- 5.15 In parallel, similar issues are being played out in a recent reference to the European Court of Justice from Austria's cartel court, seeking guidance on a damage claimant's demand to access to information gathered by the Austrian Competition Authority in the course of an investigation into a print-chemicals cartel.⁴⁴
- 5.16 Verband Druck & Medientechnik, a printers' association, is preparing to sue cartel members for damages and has started separate proceedings to gain disclosure of files, including documents relating to leniency. Under current Austrian law, disclosure of cartel files is not permitted if the parties concerned do not consent, even in exceptional circumstances. The cartel court is asking the ECJ whether, following *Pfleiderer*, national law which restricts disclosure of such documents without consent of cartel members is incompatible with EU law. The issue is whether the national law in Austria represents a valid exercise of Member State discretion as posited in *Pfleiderer*, or whether it is to be viewed as rendering a court unable to balance the interests for and against disclosure on a 'case by case' basis as *Pfleiderer* requires.
- 5.17 The Commission has also consistently sought in previous cases to limit the production of confidential documents (such as corporate statements made by parties under its leniency programme) in private litigation proceedings in other jurisdictions such as the US. For example, the Director General of the Commission's antitrust department, Alexander Italianer, wrote to a court in New York to advise a judge not to allow the disclosure of a confidential version of the Commission's infringement decision issued in its air cargo cartel investigation in civil damages proceedings brought before the New York court⁴⁵, emphasising that "*the Commission's long-established policy is that the corporate statements specifically prepared for submission under the [Commission's] leniency programme are given protection against disclosure both during and after its investigation*".
- 5.18 At the UK level, the OFT has also previously made clear that it will resist applications for disclosure of documents relating to a leniency application in order to avoid the undermining of its leniency policy. The OFT is nonetheless bound to disclose information where ordered to do so by a court or the CAT.⁴⁶ Umbro was

⁴⁴ ECJ reference: C-536/11, *Donau Chemie and others*.

⁴⁵ Case 1:06-md-01775-JG-VVP, *In re Air Cargo Shipping Services Antitrust Litigation*.

⁴⁶ Paragraph 8.49, OFT Publication "Leniency and no-action: OFT's guidance note on the handling of applications", December 2008 (OFT803).

ordered to disclose certain documents relating to its leniency application to the other parties in the *Replica Football Shirts*⁴⁷ case.

- 5.19 A competition authority's decision, once published, will expressly rely on certain pieces of evidence (including those put forward by leniency applicants) and so bring this information into the public domain. Damages claims may therefore be brought against leniency applicants based on the competition authority's infringement decision. It follows that to the extent that the competition authorities and the defendant can resist production of a leniency statement, this is likely merely to postpone the date upon which at least some of this evidence becomes available to potential claimants.

ADMISSION OF EXPERT EVIDENCE

- 5.20 Expert evidence, in particular the economic evidence necessary to prove or disprove an infringement, and the evidence of forensic accountants on the appropriate quantum of damages, is key to competition law cases. Such evidence is admissible if it is provided by a suitably qualified expert on a matter which lies within the scope of their expertise. The permission of the CAT or High Court is required to call an expert or submit evidence such as an expert's written report, and both tribunals will restrict expert evidence to that which is reasonably required to help resolve the proceedings. Where both parties appoint experts, the court may require the experts to establish the areas of agreement and disagreement between them. Experts have an overriding duty, above any obligation to the person instructing or paying them, to assist the court on matters within their expertise.

RIGHTS OF AUDIENCE

- 5.21 In the High Court, barristers have full rights of audience. Some solicitors have "higher rights of audience", that is, they have rights of audience in the higher courts, including the High Court.
- 5.22 In proceedings before the CAT, a party may be represented by a qualified lawyer having a right of audience before a court in the UK, or by any other person allowed by the CAT to appear on his behalf. Solicitors as well as barristers have full rights of audience in front of the CAT. Non-UK lawyers may be granted permission to appear, although in the *Emerson* case⁴⁸ the CAT required the US lawyer to appear with an English barrister to avoid difficulties arising from the US lawyer's inability to give enforceable undertakings to the tribunal, for instance in relation to disclosure obligations.

⁴⁷ Case no. 1019/1/1/03, *Umbro Holdings Ltd v. OFT*, registered on 01/10/2003.

⁴⁸ See footnote 31 above.

RIGHTS OF APPEAL

- 5.23 Appeals may be made by a party from High Court decisions on points of law or against findings of fact, but permission to lodge an appeal must first be obtained from either the High Court or the Court of Appeal. A further appeal lies to the Supreme Court, but permission is required from the Supreme Court itself.
- 5.24 A party to proceedings before the CAT can appeal decisions of the CAT to the Court of Appeal. Before bringing an appeal, permission must be obtained from either the CAT or the Court of Appeal. A further appeal may lie to the Supreme Court, again with the permission of that court.

6. Available Relief and Costs

- 6.1 This section considers the various forms of relief that may be available to those affected by competition law infringements, together with certain issues relating to costs. However, it ought to be noted that many cases settle before reaching trial.
- 6.2 The following forms of relief are in theory available:
- (i) declaratory relief, e.g. a declaration that exclusivity provisions in an agreement (or, to the extent that the restrictions cannot be severed from the remainder, the entire agreement) are void and unenforceable;
 - (ii) damages for any loss suffered as a result of the infringement, e.g. to compensate a customer for the higher prices that it has paid as a result of cartel activity; and/or
 - (iii) injunctive relief, e.g. to compel access to a piece of infrastructure that can be regarded as an essential facility.
- 6.3 As mentioned above, to the extent that a claimant is seeking declaratory or injunctive relief, the action must be brought before the High Court. The CAT has jurisdiction to hear only claims for damages (or other sums of money).

DAMAGES

- 6.4 The appropriate measure of damages available under English law to those affected by an infringement of competition law has been the subject of considerable debate. Should damages beyond mere compensatory damages, such as exemplary damages designed to punish a wrongdoer, be available to a claimant? Should a defendant be able to assert that the claimant has “passed-on” the loss suffered to its customers and to that extent mitigated its loss? The law on this subject has been clarified to some extent by the recent judgments of both the High Court and the Court of Appeal in *Devenish*.⁴⁹
- 6.5 There is broad agreement that compensatory damages are available for breaches of EU or UK competition law and that those damages ought to be calculated by reference to what is necessary to restore the victim to the position in which he would otherwise have been had the infringement not occurred.⁵⁰
- 6.6 This principle is somewhat easier to express than to apply in practice (for example in unfair or excessive pricing cases where, in order to secure a remedy, the court is in effect required to set a particular “fair” reference price), but the judgments of both of the High Court and the Court of Appeal in *Devenish* appear

⁴⁹ *Devenish Nutrition Limited and others v. Sanofi-Aventis SA and others* [2007] EWHC 2394 (Ch); *Devenish Nutrition Limited v. Sanofi-Aventis SA (France) & others* [2008] EWCA Civ 1086.

⁵⁰ Most recently, in June 2011 the Commission published for consultation its draft Guidance Paper on quantifying harm in competition law damages actions, the aim of which is to offer non-binding assistance to courts and parties involved in private damages actions. The draft Guidance Paper not only provides insights to the harm often caused by competition law infringements (e.g. price rises, market exclusion etc.) but also provides guidance on the main methods and techniques that are available to quantify such harm. These methods vary in terms of the underlying assumptions and the variety and detail of data required. The consultation period for this draft Guidance Paper expired on 30 September 2011.

to confirm that the English courts will approach the exercise with a large degree of pragmatism and without insisting upon an exact account of the claimant's loss of profits.⁵¹

- 6.7 It would seem to follow from the nature of compensatory damages that, where the defendant can show that the claimant has avoided or mitigated its loss by "passing-on" the loss (for example, in a chain of purchasers in which prices have been increased down the chain), the defendant may be able to claim a complete defence or a reduction in the damages otherwise payable. Whilst not directly addressed in *Devenish*, both the High Court and the Court of Appeal proceeded on the basis that the passing-on defence is available as a matter of English law.
- 6.8 Whilst the position regarding compensatory damages appears relatively clear-cut, the availability of exemplary damages in competition claims has been the subject of some debate. Following the High Court decision in *Devenish* (the availability of exemplary damages was not appealed to the Court of Appeal), the position would appear to be as follows:
- (i) exemplary damages are in theory available for infringements of the competition rules where it is necessary to punish and deter the defendant;
 - (ii) but the award of exemplary damages is discretionary and the courts must exercise their discretion with caution;
 - (iii) in cases where there are multiple claimants, especially if some of those affected by the infringement are not among the claimants, the difficulty of apportioning any exemplary damages among the claimants and between the claimants and others means that the courts are less likely to exercise their discretion in favour of an award of exemplary damages; and
 - (iv) where fines have already been imposed upon a defendant (or would have been imposed were it not for a successful leniency application) by an EU or UK competition authority, exemplary damages will not be awarded because to do so would breach the principle that a wrongdoer ought not to be punished twice for the same wrong and, in the case of decisions of the Commission, would run contrary to the obligation on national courts not to take decisions that conflict with Commission decisions, as expressed in Article 16 of Regulation 1/2003.
- 6.9 *Devenish* also considered the availability of restitutionary damages, namely damages assessed by reference to the infringing party's gain rather than the victim's loss, to a party claiming damages for a competition law infringement. The conclusion reached was that as a matter of law such damages are not available in competition law cases. The same conclusion was reached in relation to a claim for an account of profits, that is, a requirement by the infringer to surrender the profits made. Whilst it may be possible to argue that the CAT should not be bound by the principles established in the *Devenish* case, since its powers to award damages or any other sum of money arise from statute, in the *Albion Water* case the CAT concluded that the

⁵¹ In relation to the period of loss that may be covered by the damages claim, the CAT has also made it clear that such period need not necessarily be limited to the period covered by the infringement decision; where the infringement extends beyond this period, the claimant may nevertheless be able to recover damages for that period as well. See: *Healthcare At Home v. Genzyme* [2006] CAT 29.

wording of section 47A makes clear that the heads of damages available in a “follow-on” claim before the CAT are intended to be the same as the heads of damage available in the High Court, at least where the claimant has suffered loss or damage as a result of the infringement.⁵² That said, in the *Albion Water* case the CAT went on to conclude that the claimant’s claim for exemplary damages should not be struck out (as was the case in *Devenish*), noting that exemplary damages may in principle be available where a defendant has been the subject of an infringement decision but a fine has not been imposed (or is unlikely to be imposed), such that there is no risk of double-counting or duplication of penalty.

6.10 Contrary to the law following *Devenish*, however, the OFT has proposed that the Courts should have discretion to award damages on a restitutionary basis. The OFT views this as a key factor in securing the viability of representative actions, especially where the size of the damages suffered by individual claimants is small and so may not be an adequate incentive for them to participate in the action.

INTERIM AWARDS

6.11 Both the High Court and the CAT can make interim awards of damages; that is, payments on account of damages which a defendant may be held liable to pay. The interim payment must not be more than a reasonable proportion of the likely amount of the final judgment.

6.12 The CAT may only do so once the defendant has filed its defence and in circumstances where, if the claim were heard, the claimant would obtain judgment for “substantial” damages. The CAT has already made one interim award of £2 million.⁵³

6.13 The High Court’s procedural rules contain detailed provisions on when an interim payment of damages may be made, for example where the defendant has admitted liability or where the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money.⁵⁴

DECLARATORY RELIEF (AVAILABLE IN THE HIGH COURT ONLY)

6.14 The High Court is able to make binding declarations whether or not any other remedy is sought. In many cases, the claimant will request a declaration that, for example, the anti-competitive provisions of an agreement (or the whole agreement if it is not possible to sever the anti-competitive provisions) are void and unenforceable.

⁵² *Albion Water Limited v. Dŵr Cymru Cyfyngedig* [2011] CAT 18.

⁵³ *Healthcare at Home Limited v. Genzyme* [2006] CAT 29. £2 million represented 70% of Healthcare’s implied loss of revenue due to the actions of Genzyme.

⁵⁴ Part 25 of the Civil Procedure Rules.

INJUNCTIVE RELIEF (AVAILABLE IN THE HIGH COURT ONLY)

- 6.15 The High Court may grant injunctions either as a final remedy or as an interim measure. In previous competition law cases, applicants have requested a wide variety of injunctions, such as an injunction to require a mobile telephone operator to activate connections with an Internet protocol-based voice network⁵⁵, and an injunction to prevent a pharmaceutical company from ceasing to supply certain wholesalers.⁵⁶ More recently, the High Court handed down a judgment upholding a claim that Heathrow Airport Limited had breached the Chapter II prohibition of the Competition Act 1998 in relation to the provision by it of access to the forecourts at Heathrow Airport Terminals 1 and 3. The High Court made an order forbidding the anti-competitive conduct, namely the exclusion of the claimants from the forecourts.⁵⁷
- 6.16 Where an interim injunction has been requested, the court will consider whether there is a serious question to be tried, whether damages are an inadequate remedy (the position of both the applicant and the respondent are considered), and whether the balance of convenience is in favour of granting the order. Usually, in order to obtain an interim injunction, an applicant will need to give a cross-undertaking to compensate the respondent for any loss they suffer as a result of the grant of the injunction, if it should prove at the trial that the injunction was wrongly granted.
- 6.17 In addition, the court will also have regard to the applicant's urgency in seeking any such relief. For example, in the *Pfizer* case, the applicant's lack of urgency (where the applicants instead first focussed their efforts on their complaints to the OFT), was considered a "powerful factor" in the refusal of their application for an interim injunction restraining Pfizer from terminating its supply agreements with the applicants in accordance with proposals published some months before the proposed termination.

INTEREST

- 6.18 In the High Court interest is awarded from the date the infringement occurred up to the date of judgment, and at the judgment rate if applicable after the judgment. The level and amount of interest are in the court's discretion. In practice, simple interest is generally awarded at base rate plus 1%.
- 6.19 The CAT has the power to award interest on awards of damages for any part of the period between the date on which the cause of action arose and either the date of any sum paid before the date of the award or the date of the award itself. The rate of interest cannot exceed the judgment debt rate, which is currently set at 8% per annum. However, the CAT has yet to make a final damages award and so its practice on the award of interest is not yet known. In addition, when considering interim awards, to date it has declined to award interest.⁵⁸ Some indication may, however, be drawn from its treatment of interest applied to penalties

⁵⁵ *Software Cellular Network Limited v. T-Mobile (UK) Limited* (Chancery Division, 17 July 2007).

⁵⁶ *AAH Pharmaceuticals Limited v. Pfizer Limited* [2007] EWHC 565.

⁵⁷ *Purple Parking Ltd & Meteor Parking Limited v. Heathrow Airport Ltd* [2011] EWHC 987 (Ch) (15 April 2011).

⁵⁸ No interest was awarded as part of the £2 million interim award in *Healthcare v. Genzyme* (see footnote 53 above).

imposed by the OFT, where the CAT has usually awarded interest at base rate plus 1% when upholding such penalties on appeal.

SETTLEMENT

- 6.20 There are many options available for resolving disputes without going to court, including mediation, adjudication and arbitration. Indeed, court rules in the UK require potential claimants to inform a potential defendant before they commence an action to help facilitate early resolution.
- 6.21 In addition, even where court proceedings are initiated, generally speaking, there is a tendency for private damages claims that are based on competition law breaches to settle. In this regard, the English courts encourage parties to engage actively in genuine attempts to settle cases before litigation and before trial. For example, once a claim for damages has been commenced in the CAT, a defendant may make a payment to settle the claim either in whole or in part by serving a notice on the claimant and on the CAT.⁵⁹ If the claimant refuses the offer and subsequently receives judgment for an amount of damages below that offered by the defendant, the claimant will be required to pay the defendant's costs from the date of its offer onwards. This is without prejudice to any other means by which a party can attempt to settle a dispute, which the CAT may take into account when considering the issue of costs.
- 6.22 Similarly, in High Court proceedings parties can make an offer to settle in accordance with Part 36 of the Civil Procedure Rules, and a number of costs consequences may flow from such an offer, depending on whether or not the offer is accepted or bettered.⁶⁰ A Part 36 offer can also be made before the commencement of proceedings. Part 36 does not, however, prevent a party from making an offer to settle at any stage of the proceedings in whatever way it wants (i.e. not specifically pursuant to Part 36), and the court must have regard to any payment into court or admissible offer to settle that is drawn to its attention.

COSTS

- 6.23 In High Court proceedings, the general rule is that costs "follow the event", that is, the successful party can recover from the losing party the costs (or the majority of the costs) it has incurred. Whilst there exists some discretion to adjust the balance of payment of costs (for instance, where the successful party can be shown unreasonably to have refused to engage in mediation), this is exceptional.

⁵⁹ Rule 43 of the Competition Appeal Tribunal Rules 2003.

⁶⁰ Where a defendant has made a Part 36 offer and the claimant accepts the offer in writing, the claimant is entitled to the costs of the proceedings up to the date on which notice of acceptance was served (CPR 36.10). However, where a claimant does not accept the defendant's Part 36 offer and then fails to obtain judgment against the defendant more advantageous than the Part 36 offer, the defendant is entitled to his costs from the date when the Part 36 offer expired. A claimant can also make a Part 36 offer to settle a claim and there are similar costs consequences where a defendant does not accept such an offer.

6.24 The CAT has the discretion (at any stage in proceedings) to make such an order as it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings. There is no specific rule that costs are awarded on a “loser pays” principle and the CAT may take into account the conduct of all the parties in relation to the proceedings in determining costs. In its Discussion Paper and Recommendations, the OFT proposes the enhanced use of cost-capping orders to cap the parties’ base costs for the purpose of liability for costs as between the parties. As noted above, the parties’ conduct in any settlement discussions can also be taken into account by the CAT when assessing costs orders.

CONTINGENCY FEES AND CONDITIONAL FEE ARRANGEMENTS

6.25 In the UK, “contingency fees” providing for the lawyers representing a claimant to receive a proportion of the damages awarded are currently not permitted.⁶¹ It is possible, however, to have “conditional fee arrangements” (or “CFA”s) whereby the lawyers agree to receive no fees or reduced fees if the case is lost but normal fees or higher than normal fees (including up to a 100% “success fee” uplift) if the case is won. CFAs of this type are available to fund High Court actions and may be used by both claimants and defendants. The use of such CFAs is also expressly permitted in proceedings before the CAT.⁶²

6.26 In January 2010, Lord Justice Jackson published his final report following his review of civil litigation costs in the UK. The report included many far-reaching recommendations, including in relation to the availability of contingency fees and CFAs. In particular, the report recommended that CFAs should remain available but that success fees should cease to be recoverable from the party that loses the proceedings and should be capped at 25% of the damages awarded.⁶³ In addition, the report recommended that contingency fees should be allowed, subject to a reasonable cap (and regulation of the terms of such agreements to protect clients’ interests).

6.27 The Government plans to implement almost all of the report’s recommendations “as soon as Parliamentary time allows”. To this end, a bill was introduced in Parliament in June 2011 that includes provisions to abolish the recoverability of CFA success fees from the losing party in litigation proceedings, meaning that in the future, any success fee will be paid by the CFA-funded party, providing them with a financial incentive to control the costs which are incurred on their behalf.

6.28 In the private sector, interest in third party funding (where businesses offer litigation funding in return for a percentage of the damages) has been fuelled by predictions of a surge in private actions before the English courts based on competition law. The Financial Services Authority has recently given its approval to certain brokers, such as Harbour Litigation Funding Limited and Calunius Capital LLP, to offer third party funding in support of private litigation and an increasing number of cases are now funded in this way.

⁶¹ In contrast, the use of contingency fees to help fund litigation proceedings is widespread in the US.

⁶² Rule 65 of the Competition Appeal Tribunal Rules 2003.

⁶³ Under the current CFA regime, consistent with the general rule applied in proceedings before the High Court that costs “follow the event”, the successful party can also recover the success fee element of the CFA costs that it has incurred.

7. Our Capability and Experience

AN INTEGRATED APPROACH

- 7.1 Slaughter and May has for many years provided a nationally and internationally recognised service across the range of contentious competition law work. Our team of specialist competition lawyers based in London and Brussels has extensive experience in appeals against decisions of competition authorities. This has encompassed the full range of inquiries by the Office of Fair Trading, the Competition Commission and the European Commission under the cartel, abuse of dominance, State aid and merger control laws.
- 7.2 In addition, our Dispute Resolution practice has an enviable track record in handling the whole range of statutory, regulatory and ad-hoc investigations carried out by regulators and the civil proceedings, including class actions, to which such investigations give rise.
- 7.3 Building upon this experience, we have developed the Firm's Competition Litigation Group, consisting of cross-disciplinary specialists from the firm's Competition and Dispute Resolution practices. These specialists work closely together on competition disputes, forming a formidable, integrated team of experts able to deal with all aspects of a case innovatively, seamlessly and efficiently, in order to deliver first class litigation and dispute resolution skills, as well as cutting edge competition law and economics expertise.

AN INTERNATIONAL RESOURCE

- 7.4 It is clear that there will also be an increasing need for the highest quality expertise in jurisdictions outside the UK. We can provide this through our close relationships with the specialist competition and litigation practices of other leading firms in European and other jurisdictions, including the US.
- 7.5 Our objective is to ensure that we are able to provide our clients with first class legal advice and seamless case management worldwide. We place quality of advice and in-depth knowledge of the relevant jurisdiction at the heart of our international strategy. We believe these are best provided by lawyers at the top of their profession in their respective countries and that such lawyers are found in the independent law firms which comprise our "Best Friends" network.⁶⁴
- 7.6 We draw on these longstanding relationships to gather the individuals who can provide the optimum legal expertise required, working together as an integrated team. Our relationships are not, however, exclusive and allow us to work with the client's existing legal advisers if preferred.

⁶⁴ See also the Best Friends' publication, "Competition Litigation", prepared collectively by Slaughter and May, Bonelli Erede Pappalardo, Bredin Prat, De Brauw Blackstone Westbroek, Hengeler Mueller and Uría Menéndez.

A LEADING ROLE, WORKING WITH OTHER ADVISERS

7.7 We are used to presenting complex legal and economic arguments, taking advantage of solicitors' rights of audience in many judicial fora, where early involvement in and familiarity with the case makes for the most compelling presentation of the arguments as well as cost-effectiveness. However, we are equally happy to work with Counsel where the client wishes or it is otherwise felt appropriate, as will often be the case in High Court litigation. The team enjoys good relations with all the leading members of the competition bar. Where the case demands, we also work closely with the leading economists who may be required to act as advisers or expert witnesses. Our understanding of the role and disciplines of such specialists mean that we naturally tend to play a key role in the directional management of the case.

MAKING A DIFFERENCE

7.8 We believe that clients acknowledge the added value they can get from a service which brings together a top competition practice and a heavyweight litigation team. In summary, we believe our strength lies in our offering:

- experience in litigious competition law matters;
- ability to handle large-scale litigation, including cross-border cases; and
- access to the most knowledgeable firms in each jurisdiction.

SOME RECENT RELEVANT EXPERIENCE

7.9 Many of our cases remain confidential. The following are therefore some examples only of our extensive recent experience in the handling of:

High profile Article 101/Chapter I cartel cases

- Advising **British Airways** in relation to the Commission investigation of alleged cartel activity involving airlines and cargo operators providing air freight services, and the OFT's civil and criminal investigation of alleged cartel activity in passenger fuel surcharges.
- Advising **Coats** in relation to the Commission's investigation of the thread market where Coats was fined €18 million after receiving a 50% reduction for leniency. Advising Coats in relation to the Commission's investigation of fasteners where Coats has been fined €120 million and is appealing most of the decision. Acting for Coats in their appeals before both the CFI (now the General Court) and ECJ on the Commission's decision to fine Coats €30 million. The CFI reduced the fine to €20 million.

- Advising **Fuji Electric** in relation to the Commission's investigation into an alleged cartel in the Gas Insulated Switchgear (GIS) sector, a case involving one of the largest sets of fines (approximately €750 million) imposed on a single cartel. Acting for Fuji in its appeal before the General Court, which resulted in a reduction of Fuji's fine from €2.4 million to €2.2 million.
- Advising **JCB** on appeals lodged by it before the CFI and ECJ against a Commission decision imposing on it a fine of €39.6 million in respect of its distribution arrangements for construction and earth moving equipment. The CFI annulled three of the Commission's five elements of the infringement, reduced the amount of the fine imposed to €30 million and ordered the Commission to pay 25% of JCB's costs. The ECJ largely upheld the CFI decision, increasing the fine only marginally back up to €30.84 million.
- Advising **Japan Tobacco (Gallaher)** on the OFT's investigation into the retail pricing of tobacco products. Gallaher entered into an early resolution agreement with the OFT and received a substantial reduction in the fine payable.

Article 102/Chapter II cases

- Acting for **Google** in relation to its ongoing investigation by the European Commission.
- Acting for **Ericsson** in its Article 102 complaint to the Commission requesting that it investigate and stop alleged anti-competitive conduct by Qualcomm in relation to the licensing, including on fair, reasonable and non-discriminatory terms of Qualcomm's essential patents for 3G mobile technology.
- Acting for **Unilever** in proceedings before the European courts and advising on proceedings before national courts in relation to claims arising from distribution practices in the markets for impulse ice cream.
- Acting for **Ordnance Survey** in the successful defence of the interim stage of proceedings under the Chapter II prohibition.
- Acting for **Yale** in its defence of a claim for damages based on alleged Article 102/Chapter II infringements, which settled on terms favourable to Yale.
- Acting for **United Utilities** in relation to a Chapter II investigation by Ofgem, resulting in a no infringement finding.

7.10 Our experience also finds expression in our ground-breaking approach to public law issues in the field of mergers, judicial review and analogous proceedings. For example:

- Advising **MyTravel Group plc** on its claim to the CFI for an award of damages against the Commission for the unlawful prohibition of its 1999 bid to acquire First Choice Holidays PLC. We represented the company in the original merger case and the appeal against the prohibition decision, which was annulled by the CFI in June 2002.

- Representing **Bertelsmann** on its successful joint appeal with Sony Corporation of America to the ECJ following the CFI's annulment of the European Commission's unconditional clearance of the Sony BMG recorded music joint venture.
- Advising **Royal Mail** in relation to a judicial review by the Consumer Council for Postal Services ("Postwatch") of the Postal Services Commission ("Postcomm") in relation to its licence requirements, and in the quashing in the High Court of a Postcomm fine for breach of a licence condition in connection with the offering of zonal access.
- Advising **Capital Meters Limited** in its role as intervener in support of the Gas and Electricity Markets Authority (Ofgem) in National Grid's appeal to the CAT against Ofgem's decision that National Grid had abused its dominant position in the market for the provision of domestic-sized gas meters in Great Britain in breach of Chapter II of the Competition Act 1998 and its imposition of a record £42 million fine.

7.11 We are accustomed to handling cases involving a multiplicity of claims and a multiplicity of claimants, which will often be relevant in claims based on competition law. We also have considerable experience of advising clients who are part of, or are considering joining, Group Litigation Orders. Our experience includes:

- Acting for **British Airways** in class actions arising out of a European Commission investigation into alleged cartel activity involving a number of airlines and cargo operators worldwide active in the provision of air freight services.
- Acting for **RAC** and its directors in defending various class actions brought by classes of members of the RAC before the English and US Courts arising from a corporate reconstruction which effected the disposal of RAC Motoring Services Limited. All actions were dismissed or withdrawn and our clients received a contribution to their legal costs.
- We were heavily involved in the drafting of the first GLO to be made by the Chancery Division (the Advance Corporation Tax GLO), and represented two of the lead claimants in that GLO in obtaining successful judgments from the House of Lords (**Deutsche Morgan Grenfell Group plc** and **Sempra Metals Limited**).
- Advising **Coats** in relation to class actions arising out of the fasteners cartel case.

CONTACT DETAILS

For further details of our competition litigation services please contact your usual Slaughter and May client partner or any one of the following:

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Annex 1

KEY STAGES IN ENGLISH LITIGATION

Pre-action

Pre-action communications (Claimant sends letter of claim and Defendant responds; parties exchange information; settlement options explored)

Claimant issues Claim Form

Statements of Case

Defendant acknowledges service and files Defence (and any Counterclaim)

Claimant serves Reply (and Defence to any Counterclaim)

Pre-Trial

Case Management Conference – directions hearing before a Judge. Directions will be set through to Trial

Disclosure of Documents – both parties disclose material documents

Exchange of Witness Statements

Exchange of Expert Reports

Trial (Parties present their case orally at Court; witnesses and experts will be cross-examined)

Post-Trial

Judgment and Order for Costs

Appeal (it may be possible to appeal on points of law to the Court of Appeal and thereafter to the House of Lords – but no automatic right to appeal)

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