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United Kingdom: Competition Appeals – Speak Now or Forever Hold Your Peace?

Matthew O'Regan · Friday, March 20th, 2015

It is not uncommon, where a multi-party infringement of competition law has been established and sanctioned by a competition authority for some, but not all, of the addressees of the authority's decision to appeal that decision. Those appeals can be against the finding of infringement, whether in whole or part, and/or the penalty imposed. Where those appeals are successful, non-appealing parties may then wish to themselves challenge the finding of infringement and/or the penalty, availing of the judgments already handed down in favour of their co-cartellists or co-infringers of competition law.

In a series of judgments, concerning decisions by the Office of Fair Trading ("**OFT**") in *Tobacco* and *Construction*, the English courts have been steadfast in rebutting such attempts, made long after the time period for an appeal against the original decision has expired, to challenge findings of infringement or to recover the penalties imposed on them. In doing so, they have emphasised the need for certainty and finality in competition cases, even though this may potentially result in a harsh outcome for the individual companies involved.

Competition appeals under English law

An appeal against an OFT (now Competition and Markets Authority ("**CMA**")) decision finding an infringement of either the Chapter I or Chapter II prohibitions of the Competition Act 1998 ("**CA98**") must be brought within two months of the earlier of notification or publication of the decision: Competition Appeal Tribunal Rules 2003 ("**CAT Rules**"), r.8(1). The CAT may extend this period only in 'exceptional circumstances': CAT Rules, r.8(2). Appeals may be brought on points of law and/or fact, and may be made against both findings of infringement and the imposition and/or amount of penalties imposed by the OFT (or CMA): CA98, s.46.

Possibility (1) – appeal 'out of time' to the CAT: *Somerfield and Gallaher v OFT*

In *Somerfield and Gallaher v OFT (Tobacco II)* [2015], the Court of Appeal had to consider the meaning of 'exceptional circumstances' in CAT Rules, r. 8(2).

In *Tobacco* (2010), the OFT had found that ten retailers (including Somerfield) and two manufacturers (including Gallaher) had entered into a series of bilateral agreements concerning the retail pricing of tobacco products. Each agreement was in substantially the same form and required the retailer to maintain a 'pricing relativity' between the prices charged for a particular

manufacturer's brand and certain brands of other manufacturers. Significant penalties were imposed, including on Somerfield (£4 m) and Gallaher (£50 m). During the OFT's administrative proceedings, a number of undertakings, including Somerfield and Gallaher, voluntarily entered into so-called 'early resolution agreements' ("**ERAs**") with the OFT, in which they admitted the allegations contained in the OFT's Statement of Objections, in return for a significantly reduced penalty. (ERAs are similar to settlements entered into with the European Commission under EU competition law.)

Neither Somerfield nor Gallaher appealed the OFT's decision. However, a number of undertakings did so and were successful; amongst the appellants was a retailer, ASDA, which had also entered into an ERA. In *Imperial Tobacco v OFT (Tobacco I)* [2011], the OFT was forced to concede that there was no evidence to support the theory of harm upon which its findings of infringement were based. Accordingly (as discussed here) the CAT upheld the appeals and set aside the OFT's decision insofar as it concerned the six appellants.

The OFT's (now abandoned) theory of harm underpinning its Tobacco decision was common to each of the 20 bilateral agreements condemned by the OFT. This included those agreements to which Somerfield and/or Gallaher were party and had admitted (as it turned out wrongly) infringed the CA98. Unsurprisingly, following *Tobacco I*, Somerfield and Gallaher proceeded to apply to the CAT for permission to extend the time for them to appeal against the OFT's decision, pursuant to CAT Rules, r.8(2). The CAT granted permission; the OFT appealed to the Court of Appeal.

The Court of Appeal upheld the OFT's appeal: the OFT's abandonment of its case in *Tobacco I* did not constitute exceptional circumstances permitting Somerfield and Gallaher to bring a late appeal against the OFT's infringement decision: that was merely a consequence of litigation in which the OFT had been unsuccessful.

The Court of Appeal emphasised the need for legal finality and certainty in competition cases. In its view, Somerfield and Gallaher had "voluntarily" taken a "commercial view" to admit that they had committed an infringement of the Chapter I prohibition and to enter into the ERAs with the OFT. In any event, entry into an ERA did not prevent them subsequently appealing the OFT's decision.

Somerfield and Gallaher could have appealed the OFT's *Tobacco* decision and had the same opportunity as other parties to evaluate that decision, but had "chose[n] not to appeal with their eyes open" and had done so "no doubt for good commercial and other reasons". Whilst the ultimate outcome was "unfortunate, even messy" and "unsatisfactory", and the admissions made by them (in the ERAs) of infringements were not established in subsequent litigation, this did not constitute exceptional circumstances. Further, the OFT's admissions in Tobacco I did not require it to withdraw its decision against non-appellants, including Somerfield and Gallaher.

Possibility (2) – recovery of the penalty under principles of restitution: L*indum and others v OFT*

In *Lindum v OFT* [2014], three groups of construction companies (Lindum, Interserve and Willmott Dixon) sought to recover penalties imposed on them in *Construction* (2009).

Construction was (and remains) the OFT's longest decision under the CA98, finding that 103 undertakings had participated in 199 separate infringements of bid-rigging and cover-pricing activities. Unsurprisingly, numerous undertakings appealed to the CAT. However, Lindum,

Interserve and Willmott Dixon did not appeal and paid the penalties imposed on them, although Lindum did so only in part. In a number of separate judgments by differently constituted tribunals, the CAT upheld these appeals and reduced the penalties imposed by the OFT (see, e.g. *Kier v OFT* [2011] and *Crest Nicholson v OFT* [2011]). In those judgments, the CAT held that the fining methodology used by the OFT in that case was incorrect and that the OFT has misinterpreted and misapplied its own fining guidelines. As a result, the penalties imposed by the OFT were disproportionate and excessive; the CAT therefore reduced very substantially these penalties. One CAT judgment was further appealed to the Court of Appeal, leading to a further reduction: *Interclass v OFT* [2012]. The OFT did not appeal any of the CAT's judgments.

The fining methodology impugned by the CAT in its judgments had been applied generically by the OFT, including to calculate the fines imposed by it on Lindum, Interserve and Willmott Dixon. Following the CAT's judgments, they requested the OFT to revise the fines imposed on them, taking account of the correct methodology identified by the CAT. Unsurprisingly, the OFT refused to do so.

Following the OFT's refusal, the three groups each brought proceedings in the High Court to recover the penalties, relying on the common law doctrine of restitution, under which a party that has been unjustly enriched at the expense of another cannot retain that benefit. (They did not seek extensions of time to bring appeals in the CAT, which would likely have been unsuccessful, given the extreme difficulty in demonstrating the 'exceptional circumstances' required for a late appeal to be brought.) They claimed that the penalties had been unlawfully exacted by the OFT as it had erred in law in relying on the generic calculation methodology, which the CAT had struck down. On this basis, they asserted that the OFT had been unjustly enriched by the sum of the penalties paid to it, which it therefore had to repay.

The High Court rejected the challenge. The law of restitution requires a public authority to repay a sum (such as a tax, levy or charge) only if the sum has been unlawfully exacted by it and the repayment is limited to the difference between that sum and a sum that may lawfully be levied or charged: see *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] and *Waikato Regional Airport v Attorney General of New Zealand* [2004].

The Court considered that the only permissible means of challenging an OFT decision under the CA98, whether as to a finding of infringement or as to the amount of any penalty imposed, was a statutory appeal to the CAT pursuant to CA98, s.46. As the three claimants had not brought such an appeal, the OFT's decision was final and binding upon them. This was not altered by the fact that other addressees of that decision had successfully appealed to the CAT, in Kier and other cases: those appeals were limited to the positions of those appealing parties. Therefore, the OFT had lawfully imposed the penalties under CA98, s.36 and had not acted unlawfully in receiving, or requiring, payment of the penalties imposed on the three claimants. Consequently, no question of unlawful exaction of the penalties or unjust enrichment arose. In these circumstances, not only was the OFT not obliged to consider making repayment, it had no power to do so: by imposing the (unchallenged) penalty under CA98, s.36 it had become *functus officio*.

Possibility (3) – judicial review: *R (Gallaher and Somerfield) v CMA*

Having been refused permission to bring an appeal before the CAT, Somerfield and Gallaher sought another route to recover payment of the penalties imposed on them by the OFT. One other addressee of the Tobacco decision had also entered into an ERA and subsequently chose not to

appeal to the CAT, TM Retail. After the CAT judgment in *Imperial Tobacco (Tobacco I)*, it transpired (via an announcement on the OFT's website) that the OFT had paid to TM Retail a sum equal to the penalty imposed on it plus a contribution to its costs. It transpired that the OFT had, prior to the conclusion of TM Retail's ERA, given assurances that it would receive the benefit of a successful appeal by another party before the CAT.

The OFT refused to extend these assurances to either Somerfield or Gallaher, who then brought judicial review proceedings against the OFT, on grounds of equal treatment, legitimate expectation and discrimination. They did not succeed.

In *R(Gallaher and Somerfield) v CMA* [2015], the High Court found that the OFT should not have given the assurance to TM Retail. The assurance was contrary to the principles of finality and legal certainty (as confirmed subsequently by the High Court in *Lindum*) and the principle set out by the European Court of Justice in *AssiDomän Kraft Products (Woodpulp II)* [1999] (and applied by the UK Supreme Court in *Deutsche Bahn v Morgan Crucible* [2014]) that an appeal by some addressees of a European Commission infringement decision has no effect on the position of non-appellants, who become bound by an infringement decision should they elect not to appeal and cannot subsequently seek the re-examination of that decision. Indeed, the CAT was highly critical of the OFT, finding that the "matter was badly mishandled" and had not been thought through properly by its officials.

However, the Court then went on to hold that, the assurance having been given, albeit inadvertently, the OFT's duties of fairness and equality required it to extend its benefit to all other parties with which it was also negotiating, in parallel, ERAs. This was the case even though those other parties, including Gallaher and Somerfield, had not themselves requested such an assurance. By not doing so, the OFT had acted unfairly.

Despite this unfairness, Somerfield and Gallaher were unsuccessful. The Court held that they could not benefit from the OFT's mistakes. They had no entitlement to repayment of the penalty. The sole means of seeking repayment was to appeal the decision before the CAT, which they had chosen not to do. Not having appealed, the decision (and the penalty imposed by it) became binding. Therefore, it would be contrary to the public interest to make repayment from general public funds in order to confer on them the financial benefit (wrongly) conferred on TM Retail: to have order the CMA to make repayment would simply have perpetuated the OFT's initial mistake.

The Court of Appeal has subsequently granted permission to appeal.

Concluding remarks

The Courts' message across these judgments is consistent and clear. First, the only means of challenging a finding of infringement of the CA98 and/or the penalty imposed for such infringement is an appeal to the CAT (see *Lindum* and *R(Gallaher and Somerfield)*). Second, either appeal within the applicable time limit (of two months from the date of the decision) or lose your right to appeal, even if subsequent events might cast doubt upon the correctness of the finding of infringement or the amount of the penalty. Third, only in exceptional circumstances will the two month period for an appeal be extended: this is a very high standard to meet and must relate to the original decision not to appeal, not subsequent events and is not met where subsequent litigation by others before the CAT undermines either the finding of infringement (see *Somerfield and Gallaher*) or the amount of the penalty (see *Lindum*).

This outcome is perhaps undeniably harsh upon the individual parties concerned: they are left with having paid substantial fines for infringements that the OFT conceded were unsupported by evidence (in *Tobacco*) or were found to have been very substantially over-calculated (in *Construction*). However, the Courts are clear of the need for finality and certainty and for parties to be bound to the choices that they freely make in both administrative and appellate proceedings.

The circumstances in *Tobacco* are particularly unfortunate. *Tobacco* concerned a series of bilateral agreements of the same structure and the CAT annulled the findings of infringement against some the co-contractors of both Gallaher and Somerfield. Gallaher and Somerfield therefore remain bound by findings of infringement (and to pay substantial penalties) relating to agreements that the OFT conceded it could not sustain against their co-contractors. However, as the Court of Appeal observed, they had chosen – no doubt for sound commercial reasons – not to avail themselves of their right of appeal under CA98, s.46. These reasons could include wishing to avoid further legal costs or management disruption, an assessment that an appeal would fail or – where admissions have been made in an ERA – protecting the significant reduction in penalty already afforded to them for early settlement of the administrative proceedings (which may be lost as a result of an appeal).

Parties under investigation by the CMA must think very carefully before entering into an administrative settlement, in particular as to the admissions that they are willing to make and the reasons for doing so. Whilst there can be savings (in both penalties and costs) in, and commercial drivers in favour of, settling, even where the CMA's case is weak, this may also have consequences that become apparent only some time later. If an infringement decision is then adopted, they must again think very carefully about whether or not to appeal. That choice will become binding.

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