Learning from the latest Trucks cartel judgment: a conversation between BCLP and Erso Capital

Summary:

BCLP has been at the forefront of competition litigation ever since the seminal National Grid Gas Insulated Switch Gear claim issued in 2008. More recently, there has been significant interest in its successful trucks cartel follow-on claims for Royal Mail and BT, with judgment in favour of those claimants published in February 2023.

This was not a funded action for a wide consumer class – the type of claim which is consistently hitting the legal headlines - but there are some key learning points from the 300 page judgment which are relevant to all types of action in the Competition Appeal Tribunal, and to large scale commercial litigation more generally.

Sarah Breckenridge, of litigation funder Erso Capital, sat down with Andrew Leitch, a BCLP senior associate on the claims, to discuss where the judgment takes us and what litigants, lawyers and funders can learn from it.

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Transcript

Sarah: Congratulations again on the success for BT and Royal Mail - not least because this the first trucks cartel follow-on claim to reach trial in the CAT. Both claimants have succeeded in establishing and recovering the overcharge (plus interest) on trucks purchased during the cartel period. What are your overall views on how the case went?

Andrew: Needless to say, the BCLP team and our clients are very happy with the result. This was a case in which the defendants took every conceivable point in seeking to defeat, or at least slow down, the claim. For example, we saw off an attempt to apply German law (and ergo German limitation rules) to the claim. There was also an attempt to bring in a supplier mitigation argument (following *Sainsbury's v MasterCard)* in which the defendants argued that the claimants may have mitigated their losses by negotiating down prices from other suppliers in response to the overcharge suffered on trucks.

We also ended up in the Court of Appeal on two important issues. The first was over which recitals in the Commission's decision were binding. The second was whether it would be an abuse of process for the defendants to put in issue matters which they had already admitted to the Commission (in exchange for a discount on their fines and the publication of a short form settlement decision, which contains much less by way of the gory details on the operation of the cartel which claimants find useful in damages actions). The Court of Appeal found in our favour that that was indeed an abuse of process. So in addition to a really good outcome at trial, we had some pretty major, and legally important, interim victories along the way.

Sarah: The judgment contains various comments about the defendants' lack of evidence or information about their involvement in the cartel over a 14 year period. Are there lessons in the judgment for defendants to cartel claims?

Andrew: This certainly played a big role at trial. It is very risky for defendants not to have a positive narrative for their conduct which can be presented at trial, especially in circumstances where there is a Commission decision or other regulatory findings which establish wrongdoing. Negative inferences will inevitably be drawn as a result of a defendant's silence, and there is well established case law to that effect.

I suspect that, in this case, the defendants simply did not have a good excuse for operating a 14 year EEA-wide price fixing cartel, and therefore there wasn't really a positive narrative available for them to put forward. In other cases, however, there may be circumstances where there is an infringement finding made against a defendant in a competition authority or regulatory decision, but there is a positive narrative that can be drawn as to why that conduct was engaged in, and why it could not possibly have impacted the claimant.

Sarah: Can you talk to us about what happened here in terms of the mitigation arguments raised by the defendants? The CAT has made an interesting determination in relation to pass-on. Is the position clearer now?

Andrew: Yes, the CAT's determination in this case is very useful indeed for future cases. The mitigation arguments consisted of "Resale Pass-On" (the claimants allegedly passing-on the cartel overcharges when selling cartelised trucks into the second hand truck market), and "Supply Pass-On" (the claimants allegedly passing-on overcharges to customers by increasing the prices of their various products and services, including postage stamps for Royal Mail and telephone call charges for BT).

The Tribunal held that both arguments failed on the facts, and therefore the claimants' damages were not reduced on account of the defendants' pass-on/mitigation arguments.

For future cases, the most important aspect is likely to be the four "*non-exhaustive*" and "*potentially relevant*" factors which the Tribunal took into account in finding there to be no Supply Pass-On. They are summarised at paragraph 702 of the judgment, but in brief they are (i) knowledge of the overcharge; (ii) size of the overcharge relative to the claimant's overall costs and revenue; (ii) the relationship between the cartelised product and the product through which pass-on is alleged to have occurred; and (iv) whether there are claims by identifiable purchasers from the claimants.

The position is certainly now clearer – claimants who have not sold the cartelised product down the supply chain (and instead used the cartelised product within their business but sold unrelated products or services) will be in a stronger position, legally, to seek to rebut pass-on arguments than those that have sold the cartelised product on, or incorporated it into a product and then sold that product on.

Sarah: The judgment identifies some issues with the defendants' economic expert – both on his long association with the defendant and also on his economic arguments. The CAT has also recently been critical of economic arguments in the *Meta* case and has asked the claimant to revisit them before

progressing with the CPO application. Are there wider lessons to be learnt about the role of the expert in litigation and in obtaining a CPO?

Andrew: The issues arising in *Royal Mail* and in *Meta* were very different, even though they both concerned expert evidence. In competition damages actions, expert evidence is always of paramount importance. It is therefore vital for the experts to stress test complex arguments and ensure that they are bringing forward a robust methodology for assessing the issues in the case. However, given the historic and long running nature of many of the competition infringements that feature in damages claims, the experts are often working with imperfect and incomplete data, and data availability issues can severely hamper the sorts of analyses that experts would ideally like to employ. Therefore, the experts will have to make do with what is available.

It also means that experts on both sides are likely to come in for some criticism as, in complex litigation with a multitude of arguments being pursued, the Tribunal is unlikely to fully endorse an expert's approach on every issue.

In *Meta*, the Tribunal ultimately decided that the class rep's expert's methodology did not meet the standard required. However, the big issue in *Royal Mail* was that the defendants' expert had advised the defendants during the Commission's investigation procedure and had been involved in formulating defence arguments in the context of that investigation, in an advisory role that does not come with the same duties of independence as does being an appointed expert in litigation before the Tribunal.

The defendants did not disclose the fact of its expert's instruction in that capacity at the time of expert appointments, doing so only at a later stage in a footnote in his expert report. The defendants' expert had also had access to information from the defendants that had not been provided to the claimants. All of this, the claimants argued, and the Tribunal agreed, compromised his independence.

The big learning point is that if you are a defendant, you need to be cautious about instructing the same expert in litigation (as an independent, testifying expert) that was instructed in an advisory capacity during a competition authority or regulatory investigation.

Sarah: As you've just mentioned, in cartel claims the Tribunal is being invited to make decisions over historic, notoriously complex, issues where there may be an absence of evidence, not least because of the passage of time. That inevitably leads to a "broad axe" approach in some areas. Can you comment on the reality of a trial in the CAT and how best to prepare a claim (and clients) for understanding that sometimes the CAT will need to make decisions in this inexact way?

Andrew: The reality is that the expert evidence in competition cases is extremely detailed and complex, given that you are often modelling to re-run an entire market over an extended period of time. The Tribunal generally has not discouraged parties from going into that level of detail when litigating competition damages actions, and has instead facilitated it with wide-ranging disclosure orders it has granted in the claims before it (the Royal Mail claim included).

However, the Tribunal ultimately making a determination on the basis of the "broad axe" does not render the detailed expert work redundant. The Tribunal assessed the complex evidence before it in coming to its decision and found for the defendants' expert on some modelling decisions, and for the

claimants' expert on others. Therefore, short of the Tribunal running its own economic models with its own chosen inputs, which is obviously unrealistic, the "broad axe" determination is a practical way through.

The complex economic work was what guided the Tribunal's decision on where to drop the "broad axe". My advice to other claimants preparing claims is not to be misled by the Tribunal's ultimate determination in *Royal Mail* being stated in less complex terms than the evidence itself was presented. Complex expert evidence will still be required in these cases going forward, just as it was in this case. Turn up to trial with only high level, "broad axe" analysis at your peril.

Sarah: the claimants, BT and Royal Mail, had different approaches to interest but it is notable that Royal Mail was able to obtain compound interest on its claim. What is your view on the appropriate interest strategy from the outset and the level of evidence and work needed to sustain such claims?

Andrew: This is really a cost/benefit analysis that needs to be undertaken at the beginning of the case. Whilst compound interest can lead to significantly higher damages than simple interest, that depends on a number of factors, including the interest rates at which the claimant borrowed money, and the overall value of the claim. If a claimant is to claim for compound interest, it will need to plead and prove it like any other head of loss (contrary to simple interest, which is generally granted automatically).

Royal Mail had to provide significant disclosure in relation to its borrowing and its returns on short term investments. It also submitted a detailed factual witness statement from its group CFO, three expert reports and contribution to a joint expert statement from its financing losses expert, and cross examination of experts on this issue at trial. Therefore, significant cost and effort is required to pursue a compound interest claim, but if the claimant is willing to pursue it and budget allows, there can be significant returns available – Royal Mail's compound interest award was higher than its principal overcharge damage award.

I think the big takeaway from this case are the positive comments made by the Tribunal regarding compound interest being a given in commercial litigation, and it being surprising that more claimants do not claim for compound interest. I actually wrote a short piece on this with my colleague India Fahy for anyone that is interested in some brief further reading on this (https://www.bclplaw.com/en-US/events-insights-news/financing-losses-and-interest-simple-pleasures-or-compounding-the-misery.html).

Sarah: The number of claims issued in the CAT has grown significantly, not least funded, opt-out claims, which seem to be getting increasing attention. Whilst there are some fundamental differences in the composition of collective claims and the claim you ran for Royal Mail and BT, do you have any observations about the development of follow-on and standalone actions in the CAT more generally? Where do you see this sector headed in the future?

Andrew: With a bit of a lag, competition litigation trends have largely followed the public enforcement trends set by the European Commission, CMA and other competition authorities. The public enforcement priorities were previously focused on industrial manufacturing, and therefore a significant amount of litigation followed. Trucks was perhaps at the tail end of that period. What followed was a pivot towards Big Tech companies, and increased abuse of dominance enforcement as

opposed to cartel decisions. This has married up with the bringing into force of the collective actions regime in the UK, which has facilitated opt-out class actions by consumers against those Big Tech companies and other allegedly dominant companies. As the collective actions regime develops and continues to find its feet, I expect the competition litigation sector to increasingly move towards opt-out actions as the main form of redress against competition infringers.

I think it is likely that the UK competition litigation landscape will look ever more like the US antitrust litigation landscape – inevitable class actions filed hastily following news of a competition authority or regulatory investigation, with big corporates occasionally opting-out of class actions (where the claim is pursued on behalf of a corporate class) to pursue their own claims with a view to obtaining higher recoveries. So lots of opportunities to come for competition litigators and litigation funders alike!

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