



Cartel damages actions

THE RULING OF THE ENGLISH COURT OF APPEAL IN *DEVENISH NUTRITION LIMITED V SANOFI-AVENTIS SA AND OTHERS*

Restitutory remedies are not available in cartel damages actions. Compensatory damages are an adequate and appropriate remedy. This is the outcome of today's Court of Appeal ruling in *Devenish Nutrition Limited v Sanofi-Aventis SA and others*.

The litigation

The Devenish litigation consists of five separate but concurrent claims issued in the High Court in 2005. The proceedings arose as a result of the well-publicised vitamins cartels of the 1990s. The European Commission's decision found that a number of undertakings, including the three main defendants in *Devenish*, had participated in price-fixing and market-sharing arrangements for many years. One of the defendants, Sanofi-Aventis, had been the whistleblower and the other defendants (F Hoffmann-La Roche and BASF) had had their fines significantly reduced as a result of co-operation under the Commission's leniency programme.

The claimants were all purchasers of vitamins, either directly or indirectly (in the form of animal feedstuffs containing the vitamins) from one or more of the defendants. Two claimants were selected as representative of all claims, one a direct purchaser and the other an indirect purchaser (purchasing vitamins supplied by the three defendant undertakings indirectly as part of animal feedstuffs for feeding to poultry). The indirect purchaser then sold on chickens and chicken products to supermarkets and others.

The claimants alleged specifically that the defendants' wrongful actions (ie cartel activities) had been carried out in the knowledge of and in wilful disregard of the claimants' rights, in a calculating fashion and/or with

the expectation of profiting from them by amounts exceeding the amounts that would be payable by way of damages to the claimants.

The claimants claimed (in addition, or as an alternative to compensatory damages):

- that the defendants' actions were 'properly such as to evoke a sense of outrage' and that exemplary damages should be awarded;
- restitutionary relief; and
- that they had a right to an account of profits.

The court was asked to determine as a preliminary issue whether these three particular remedies were available.

The High Court ruling

In October 2007, the High Court held that none of these remedies was available (see *Devenish Nutrition Limited & Ors v Sanofi-Aventis SA & Ors* [2007] EWHC 2394).

Exemplary damages were not available in cartel damages cases because this would infringe the principle that, put broadly, prohibits the same person from being sanctioned more than once for the same unlawful conduct and because an award of exemplary damages would 'run counter' to a Commission decision fining the defendants (prohibited by article 16 of Regulation 1/2003/EC). An award of exemplary damages would essentially be concluding that the Commission's fines were inadequate. This second-guessing of the

Commission by a national court is not permitted. That part of the judgment was not appealed and so is settled law for the time being.

The High Court also found that restitutionary relief and an account of profits were not available. In respect of this part of the judgment, one of the claimants – Devenish Nutrition (the only direct purchaser in the proceedings) – applied for and was granted leave to appeal to the Court of Appeal.

The appeal that has just been decided relates to the issue of the availability of a ‘restitutionary award’, understood as being composed of any amount by which the defendants overcharged the claimant as a result of the cartel. Devenish sought this award on the basis that it would help it avoid the effect of the pass-on defence. As a direct purchaser, it appeared that it may have passed on all or most of any overcharge to its customers, including the other claimants in the proceedings.

The Court of Appeal ruling

All three judges of the Court of Appeal (Lady Justice Arden and Lord Justices Longmore and Tuckey) dismissed Devenish’s appeal, Lady Justice Arden giving the leading judgment.

The court held, on the basis of existing authority, that a restitutionary award is not (yet) generally available under English law in all cases of tort. Unless and until a higher court rules on this point, the clear pre-existing law on restitution must be applied.

Moreover, all three judges held that, even if a restitutionary award were available as a matter of principle in a non-proprietary tort case, the Devenish claim was not an appropriate one in which to award such a remedy. Any such award should be made only in ‘exceptional circumstances’. If, as in the present case, compensatory damages were an adequate remedy, a restitutionary award was not an appropriate remedy in principle. In holding that damages were an adequate remedy, the court rejected the argument that evidential difficulties in making out the compensatory damages claim should lead it to permit alternative relief. All three judges also drew attention to the fact that an award of

the kind proposed by Devenish would, to the extent that Devenish had passed on any overcharge to indirect purchasers, give it an unjustified windfall.

Devenish argued that European Community law compelled the court to grant a restitutionary award. The defendants contended that Community law precluded such an award. Both arguments were rejected. It was held that Community law does not prevent the court from granting a restitutionary award but that, as a matter of English law, such an award would be made only in the ‘exceptional circumstances’ referred to above. The court found that Community law did not compel the court to make a restitutionary award. A restitutionary award was not required to fulfil the fundamental Community law principle of effectiveness.

Implications of the judgment

This judgment has broad implications for those bringing and defending cartel damages claims, emphasising that compensation is the appropriate measure of redress in such cases. In confirming the High Court’s judgment, the ruling should be good news for defendants, in that it limits liability to compensatory damages and prevents duplicative awards at different levels of the supply chain.

The ruling should also deliver some legal certainty in this area. The Court of Appeal has refused Devenish permission to appeal to the House of Lords – but it remains to be seen whether it will petition the House of Lords for permission and so extend the debate.

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