Neutral citation [2016] CAT 8

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1250/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

7 June 2016

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N:

(1) BREASLEY PILLOWS LIMITED
(2) COMFORTEX LIMITED
(3) DRURY-ADAMS LIMITED
(4) FIBRELINE LIMITED
(5) G.N.G. FOAM CONVERTERS (LANCS) LIMITED
(6) PLATT & HILL LIMITED

Claimants

- v -

(1) VITA CELLULAR FOAMS (UK) LIMITED
(2) VITA INDUSTRIAL (UK) LIMITED

Defendants

Heard at Victoria House on 7 June 2016

JUDGMENT

APPEARANCES

Mr Adam Aldred (instructed by Addleshaw Goddard LLP) appeared for the Claimants.

Ms Jennifer MacLeod (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Defendants.

1. This is an application for the present proceedings to be made subject to the fast-track procedure pursuant to Rule 58 of the Competition Appeal Tribunal Rules. All references in this judgment hereafter when I refer to a rule are to those Rules.

BACKGROUND

2. The background to the application is as follows. On 29 January 2014, the European Commission (the "Commission") issued a decision finding a cartel in violation of Article 101 of the Treaty on the Functioning of the European Union as regards the supply of flexible polyurethane foam (the "Decision"). Among the uses of that product are so-called comfort foam that is used in upholstered furniture, beds, mattresses, pillows, and so forth.

3. The Decision was addressed to 30 companies which fell into four corporate groups or economic entities, and also an Austrian company which was a joint venture between two of those groups.

4. The Commission's investigation was opened, as is often the case, as a result of a leniency application by one of those entities, Vita. The defendants to this claim are two English companies within the Vita Group, who are themselves addressees of the Decision. For present purposes, it is not necessary to distinguish between them, and I shall refer to them both simply as "Vita". They were found to have participated in the cartel between 26 October 2005 and 30 April 2010. The addressees of the Decision outside the Vita Group who operated in the UK market were found to have participated in the cartel until 27 July 2010, the date when the Commission carried out the first of several dawn raids.

5. The Decision was adopted under the Commission's settlement procedure and therefore is substantially shorter than a decision following fully contested statements of objection. It runs to 105 recital paragraphs before the four substantive articles of the Decision.

6. The essence of the cartel is described in recital paragraph 23:

> "[T]he cartel participants engaged in anticompetitive practices in [sic] direct and indirect price coordination. These covered in particular:
>
> (a) the co-ordination of:
>
> - the timing and magnitude of target price increases, and
>
> - the prices to be charged to certain specific customers; and
>
> (b) at times refraining from poaching each other's customers during periods of price increases." [footnotes omitted]

7. As the first leniency applicant and whistle-blower, Vita was granted immunity and so did not receive any fine. As there were no appeals, the Decision became final for the purpose of s.58(a) of the Competition Act 1998 on 9 April 2014.

THE CLAIM

8. Since the claim arose prior to 1 October 2015, pursuant to Rule 119(2) the two-year limitation period for bringing this claim expired on 9 April 2016. The claim form was issued on 6 April 2016. There are six claimants: they are all English companies and all purchased polyurethane comfort foam from Vita during the period of its participation in the cartel. They bring a claim for damages also in respect of purchases from other members of the cartel, and its wider effects, as I shall briefly explain, on the basis that Vita is jointly and severally liable for all losses caused by the cartel.

9. Vita served its defence on 18 May 2016 and also issued notices under Rule 39 seeking contribution and/or indemnity from companies in the two other groups involved in the cartel that were engaged in selling on the UK market.

10. As Mr. Aldred, appearing for the claimants, emphasises, this is a follow-on case where the claimants rely on the finding of infringement by the Commission. Thus, the issues come under the overall heads of causation and quantum, but it is necessary to look more carefully at the nature of the losses claimed. They come broadly under five heads:

(i) An overcharge on cartel products purchased from Vita and from other former cartelists during the cartel period which, for Vita is up to 30 April 2010 but, as I have explained, for the others to 27 July 2010.

(ii) Higher prices charged by Vita and other former cartelists in what is called the 'run-off' period. As set out in the claim form, the increased prices were the result of:

(a) contracts between the claimants and the defendants and/or other cartelists where such contracts were agreed during the cartel period and continued in effect thereafter;

(b) the period of time required for normal market dynamics to reassert themselves following cartel activity;

(c) the existence of transaction costs inherent in any renegotiation of price; and/or

(d) the fact that innovation would have been suppressed during the cartel period.

As is apparent from the annexes to the claim form, and as was confirmed by Mr. Aldred in his oral submissions, the run-off period is alleged to be one year from the conclusion of the cartel on 27 July 2010.

(iii) An umbrella effect alleged to have applied to prices charged by a non-cartelist, Duflex Foam Ltd ("Duflex"), on sales to five of the six claimants. This is put as follows in the claim form: "During the cartel period Duflex negotiated with the claimants and set its prices by reference to the price levels in the flexible polyurethane foam market, which were themselves distorted by the infringement."

(iv) A volume effect on the basis that the higher cartelised prices caused a decline in the overall volume of sales of goods incorporating cartelised products.

(v) The alleged additional cost suffered by the claimants in financing the overcharge that they had to pay.

11. The Decision, as is usual in the case of cartels, found an infringement by object and so did not have to address the specific effect of the unlawful arrangements. The Decision does state that the respective price increases agreed between participants were "subsequently implemented", but gives no assistance in examining how the prices charged compared with what they would have been in the absence of this anti-competitive behaviour.

12. Vita denies each of the five heads of claim that I have outlined and further takes a particular point regarding Duflex, namely that the majority of purchases by the claimants from Duflex were for on-sale to customers who were under the same ownership as Duflex, so that the prices agreed with Duflex were not set by reference to market prices for polyurethane foam.

THE FAST-TRACK PROCEDURE

13. The Fast-track procedure (the "FTP") was introduced as part of the new regime for private actions on the coming into force of the Consumer Rights Act 2015 on 1 October 2015. As I said at the outset, it is set out in Rule 58. Rule 58(2) declares what is its effect: i.e., first, that the substantive hearing should commence, at the latest, within six months of an order making a claim subject to that procedure; and secondly, that the amount of recoverable costs is to be capped. Then Rule 58(3) states that in deciding whether to make particular proceedings subject to the FTP, the Tribunal shall take into account all matters it thinks fit, including:

> "(a) whether one or more of the parties is an individual or a micro, small or medium-sized enterprise within the meaning of Commission Recommendation No. 361 (EC) of 2003 concerning the definition of micro, small and medium-sized enterprises;
>
> (b) whether the time estimate for the main substantive hearing is three days or less;
>
> (c) the complexity and novelty of the issues involved;
>
> (d) whether any additional claims have been or will be made in accordance with rule 39;
>
> (e) the number of witnesses involved (including expert witnesses, if any);

(f) the scale and nature of the documentary evidence involved;

(g) whether any disclosure is required and, if so, the likely extent of such disclosure; and

(h) the nature of the remedy being sought and, in respect of any claim for damages, the amount of any damages claimed." (footnote omitted)

14. Here, the claimants are all small and medium-sized enterprises ("SMEs"). However, that is only one factor, and it by no means follows that a case brought by one or more SMEs comes within the FTP. It must be suitable to be heard within the FTP, having regard to all relevant considerations.

THE PRESENT CASE

15. It is clear from an examination of the pleadings that a trial here will raise a wide range of factual issues. The parties were asked to identify the likely issues for the purpose of this hearing, and there is not a significant difference between their analyses. Those issues appear to include the following:

(i) whether and in what amount there was an overcharge by reason of the cartel during the cartel period, compared to the prices the cartelists would have charged in a competitive market (the "counterfactual");

(ii) whether Vita continued to charge an inflated price in the period between 30 April 2010 and 27 July 2010 when it ceased to be a participant in the cartel;

(iii) whether there was a run-off period after the end of the cartel during which prices were inflated compared to the counterfactual, and, if so, how long this was, and whether the overcharge may have reduced during the run-off period. As I mentioned, the claimants allege that the run-off period was a year, but that is disputed;

(iv) to what extent the claimants passed through this overcharge to their customers, such that it reduced their loss. It seems to me that this may vary as between the different claimants according to the use which they

made of the polyurethane foam. Some incorporated it into finished products which were sold to retailers. Others converted the foam to size and sold it to manufacturers for use in the production of furniture. One of the claimants, Comfortex Ltd, had a particular part of its business in making products for a niche market in the healthcare sector. The proportion in which different claimants dealt with these different categories of customer may, of course, vary;

(v) whether the prices charged by Duflex were subject to an umbrella effect, and, if so, to what extent. That includes the question whether sales by Duflex to the five claimants who make a claim in this regard were sales at market prices or subject to some particular different arrangement resulting from Duflex's ownership;

(vi) whether there was a volume effect and, if so, to what extent;

(vii) if there was a volume effect, what was the financial consequence in terms of lost profits? That may also vary as between each claimant according to the profitability of their respective businesses;

(viii) whether the claimants have suffered loss by reason of the cost of financing the overcharge. That, again, may vary as between the six claimants.

16. The claimants have said that they wish to call six witnesses of fact, one from each claimant, and have instructed two experts, an economist and an accountant. That does not seem to me unreasonable for a claim such as this. Vita said that it has up to three witnesses of fact and is also likely to have two corresponding experts. It has indeed already instructed an economist.

17. In their application the claimants have submitted that with tight case management the final hearing could be completed within three days - the guideline under Rule 58(3). In the light of the number and complexity of the factual issues that spring out of the claim form, I consider that this was always unrealistic. Subsequently, in their supplementary observations for this hearing,

prepared after seeing the defence, the claimants now submit that "less than eight days" is a more realistic estimate, and Mr. Aldred confirmed that by this he meant a trial of seven to eight days. In my view, it seems likely that a trial would take two weeks, and possibly more if the Rule 39 defendants were allowed to participate in the trial.

18. However, the claimants submit that the three day guideline set out in the Rules applies per claimant, so that for this case 18 days is the effective overall threshold. Mr. Aldred submitted that if only one of the six claimants had sued, the case could be heard in three days under the FTP, and they should not be prejudiced when six of them come together to claim, which is in some ways more efficient even though the overall trial as a result is longer and there are more witnesses of fact.

19. That approach is fundamentally misconceived. The guideline is for the trial of the case. Were it otherwise, by grouping together ten claimants who were victims of a cartel, which is by no means a far-fetched scenario given the size of the market a cartel can affect, it could be said that a trial lasting six weeks would qualify for the FTP. Although three days is not an absolute limit, it should be stated emphatically that a case of such longer duration is not the kind of case that is suitable for the FTP. I do not accept that a claim by only one claimant which sought all the categories of damage encompassed by the present claim, could be compressed into three days, however effective the case management of this Tribunal may be. No doubt there would be fewer factual witnesses and less data to be analysed, but there would still be full expert evidence on both sides covering this wide range of alleged claims.

20. In any event, if several such cases were brought, and if each could, contrary to my present view, be heard in three days, then if they were not heard together the appropriate course would be for one to be tried while all other parallel claims were adjourned to await the outcome, which might then assist in any settlement of those claims.

21. Accordingly, on this ground alone, the application fails.

22. However, it is appropriate to say a little more about the nature of this case. One of the matters identified in Rule 58(3) is disclosure. Some cases need very limited disclosure or none - for example, where a trial can be conducted on the basis of the documents which the parties attach to their witness statements. This is very far from being such a case. The claimants' observations submitted for this hearing set out the documents they would like to request by way of disclosure or further information from Vita. I refer to paragraph 15 of those observations. That includes:

> "- the weight, in KG, of all raw materials (e.g. polyols) used to produce one (1) KG of the final product - to be provided on a monthly basis;
> - the cost in GBP/KG, of raw materials purchased, after any discounts and rebates - to be provided on a monthly basis;
> - the average number of man-hours, and the cost per man-hour, used to produce one (i) KG of the final product - to be provided on a monthly basis;
> - the average number of KWh, and the cost per KWh, used to produce one (1) KG of the final product - to be provided on a monthly basis;
> - information on whether and how the defendants were hedging against the movements in raw material costs and the relevant exchange rates;
> - the way the defendants were calculating the price increases included in the letters sent to the Claimants;
> - the prices in GBP charged to each of the Claimants;
> - sales in weight (KG) to each of the Claimants; and
> - sales in value (GBP) to each of the Claimants, before and after any discounts and rebates."

23. This data or information is sought for each year and, as here specified, sometimes on a monthly basis, between October 2005 and the end of 2015. That is a period of over ten years. The period is long because this was a cartel of almost five years' duration. The claimants are contending, as I have said, for a one year run-off period, and a standard approach to considering the counterfactual is to look at prices after the cartel came to an end.

24. Vita, for its part, will of course seek disclosure or information going, for example, to the question of pass-through, the claimants' dealings with Duflex and the changes in the claimants' sales that are relied on as the basis of the alleged volume effect.

25. For the purpose of determining the present application, I am not addressing the detail of disclosure or further information to be provided. As in any cartel

damages claim, that will require careful management by the Tribunal. This is not an indication that all requests that are made by either side will necessarily be accepted by the Tribunal.

26. I accept what Mr. Aldred said about the importance of tight case management of such actions, and, as he also said, the Tribunal has shown that it will adopt such an intensive approach in order to keep the steps taken and resulting costs proportionate.

27. Nonetheless, what I have described should be sufficient to show that, on any view, the disclosure is of a scale and scope that is well beyond what is commensurate with the FTP. That is so even if the parties may have been engaged in gathering some of this data in the 18 months since the claimants sent a letter before action to Vita's solicitors in December 2014. Experience suggests that each side is likely to press for documents from the other that are not immediately available.

28. In their application the claimants submit that, as a matter of principle, "Cartel follow-on damages cases are cases that the Tribunal should always seek to allocate to the fast-track procedure unless there are compelling reasons not to do so."

29. As this is an early stage in the development of the FTP, it may be helpful if I make clear, as President of this Tribunal, that in my view, that submission is mistaken. The correct approach is set out in the Tribunal's Guide to Proceedings, which states at paragraph 5.146:

> "Given that competition cases generally tend to be heavy, complex and often involve consideration of novel issues, it is unlikely that the Tribunal will designate a case as suitable for the FTP unless it is a clear-cut candidate for such an approach. Generally, such a case is likely to arise or be linked to a scenario where injunctive relief is being sought, or, in the case of a claim for damages, where all the parties are clearly committed to a tightly constrained and exceptionally focused approach to the litigation."

30. Hence, the one case so far directed to be subject to the FTP, *Socrates Training Limited v The Law Society of England and Wales* (Case 1249/5/7/16) was an abuse of dominance claim where the question of quantification of damages has

been split off to be heard later. Hence the relief there sought within the context of the FTP is purely injunctive relief, and the economic expert evidence is limited to the question of market definition and dominance, which in that case is very confined. There are also only two parties. For all those reasons, that case could be heard within three to four days.

31. I do not wish to suggest that damages cases may not be subject to the FTP; indeed, the Guide expressly envisages that possibility. But when one is concerned with damages for a cartel, particularly where it is a cartel of several years' duration, I think it is unlikely to come within the criteria for the FTP notwithstanding that it is a follow-on claim. There may be rare follow-on cases where such a claim could qualify: for example, where claimants were direct purchasers from cartelists and also the end consumer, so that no question of pass-through arises; or perhaps where, in a full decision the competition authority has gone some way to quantify the effect of the cartel on prices in a manner that would effectively bind the Tribunal in the damages action; or, conceivably, where the claimants have carefully circumscribed their claim to the overcharge by cartelists in the cartel period itself. But those examples are clearly very far removed from the present case.

32. It is also notable that there is nothing urgent about this case. I pressed Mr. Aldred about this in argument and he referred to the desire of the claimants to avoid long, drawn-out proceedings. But that does not alter the fact that this is a claim for damages suffered in the period 2005 to 2011. Interest will run on any damages recoverable. And the claimants only issued their claim very close to the end of the two-year limitation period applicable in this Tribunal after the Commission's decision became final in April 2014, although I do recognise that there were discussions in correspondence between the parties' solicitors in late 2014/early 2015, no doubt in an attempt by the claimants to reach a settlement.

33. The fact that a claim is not urgent is not the most relevant factor, but it is not irrelevant when one bears in mind that one of the distinctive features of the FTP is that it is designed to be, as its name indicates, much faster than ordinary

litigation. A substantive trial takes place within six months, and the case therefore effectively jumps the queue.

34. The FTP also brings claimants the benefit of a mandatory cost cap on their potential liability for the defendants' costs: Rule 58(2)(b). In their submissions, the claimants ask rhetorically how a small business that is the victim of a cartel can hope to bring a claim economically if it cannot have the benefit of the FTP. I have some sympathy with the claimants' concern about costs running to several millions of pounds when they quantify their claim at less than the £9.5 million. For this reason, if for no other, issues such as disclosure will require the careful case management to which I have referred, irrespective of the fact that the claim is not dealt with under the FTP. The fact that Vita's solicitors have indicated in correspondence that they are likely to spend £3 million on their defence does not mean that costs of that scale will be regarded as proportionate in the event that Vita should at some stage obtain an order that their costs are recoverable from the claimants.

35. Mr. Aldred referred in his oral submissions to the statement of policy from the Government, which presaged the introduction of the new regime for private actions in the Tribunal. He referred to the statement by the Secretary of State that the reforms have the twin aims of: "increased growth by empowering small businesses to tackle anti-competitive behaviour that is stifling their business" and "promote fairness by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress."[1] Mr. Aldred made the fair point that for small businesses there is a cost, quite apart from legal fees, in its directors or managers having to spend time on prolonged legal proceedings.

36. I, of course, recognise the importance of that policy underlying the new regime introduced by the Consumer Rights Act 2015. But that statement applies to the regime generally, including, for example, the new forms of collective action and what is there described as a "radically enhanced system of ADR". The FTP is not designed to be the remedy for all concerns about costs. Follow-on cartel damages claims may be described as "only about causation and quantum" but

[1] Private Actions in Competition Law: A consultation on options for reform – government response (January 2013), p.3.

they are of considerable complexity in terms of evidence and proof. Accordingly, such claims may have to be advanced by resort to various funding mechanisms such as conditional fees or damages-based agreements. I believe there is now an active market in ATE insurance and a growing market for third party funding for soundly based follow-on claims. It is through such means and not recourse to the FTP that costs problems of bringing these claims have to be addressed.

37. For all these reasons, therefore, the claimants' application is dismissed. However, I should make clear that this decision on the present application is not to be interpreted as a green light towards proceedings of extended duration or as an indication that the Tribunal will not carefully case manage the proceedings, taking account of the burden on the claimants but also, of course, the need to ensure fairness to the defendants.

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MS MACLEOD: Sir, I accept you may not have been hoping to hear from me today.

THE PRESIDENT: I am sure it is a great pleasure to hear from you.

MS MACLEOD: Ordinarily one might not make a costs order in a case management case, but we do submit – and I will be very short on this – that this is an appropriate case for such an order. This was a hearing that was expressly and solely to determine the claimants' application. The claimants have had the opportunity to resile from that application since 18 May, when we indicated in our defence that we were more than ready to submit to a speedy and practical approach to this case and indeed that we would be prepared for significant case management to be exercised over this claim. The claimants have not taken that approach. They maintained this application. It has been rejected in very strong terms by you, Sir, today. As you have said, the three-day assumption was "always unrealistic". The attempt to get around the three days by saying that any case up to 18 days was suitable was "fundamentally misconceived". The

claimants' own applications for disclosure went "well beyond" the fast-track procedure, and there was, in fact, no urgency. In the premises, we maintain, as we have done in our observations and as we have done in correspondence, that this case was always patently inappropriate for the fast-track procedure. It has entailed not insignificant work by Vita and by this Tribunal in response, and we submit that it is appropriate for a costs order to be made in the terms of to be assessed if not agreed.

THE PRESIDENT: Have you got a statement of costs?

MS MACLEOD: I am afraid, Sir, we do not, but I would hope that we could agree that and come back if we could not.

THE PRESIDENT: If I were to make an order, and I have not heard from Mr. Aldred, it would be an appropriate case for summary assessment, clearly. Yes, Mr. Aldred, what do you say about that?

MR. ALDRED: Sir, your judgment is very clear and the claimants are very grateful, and I think a lot of people will read it very closely and find it very useful for working out the parameters of the fast-track procedure. You said in your judgment that the fast-track procedure is at an early stage of development. It was, despite the judgment, the claimants would submit, a case which was not inappropriate to bring. I know your judgment says it was inappropriate for the procedure, but one of the bases upon which they came to this Tribunal was the opportunity to avail themselves of the fast-track procedure, and they are small and medium size enterprises who are trying to bring forward a modest claim for damages in respect of a cartel which these defendants and others perpetrated for five years. The defendants have made their application, but on the basis of a case at an early stage of development, this is the first time the point has been fully argued before the Tribunal. Your guidance has been very helpful. It will help stage the management of this case on a forward moving basis, and we would submit that the appropriate order would be just simply costs in the case.

THE PRESIDENT: Thank you. I appreciate what you say, but I do take the view that this was a misconceived application. I do not think the costs of the defendants, which I do not have before me, should be substantial. If they should prove to be substantial, I will assess them at considerably less than that, but it seems to me that there was a very helpful written submission that was put in, and of course counsel was prepared to argue the case. This is not an occasion where there was any witness evidence, or anything of that sort, or even a court bundle, required. I will order that the defendants' costs of this application are to be paid by the claimants, to be subject to summary assessment, if not agreed. There is no statement of costs in front of me, but I would ask if your solicitors, Ms MacLeod, could submit a statement of costs by 4 pm on Friday, and any comments by the claimants by 4 pm on Wednesday, Mr. Aldred, and then, if they are not agreed I will assess them. I do not think they will be substantial. I appreciate your clients are small and medium sized enterprises. This is, nonetheless a claim for over £9 million. It is not a trivial claim in financial terms. There are, of course, cartel claims that are much greater, but there are also cartel claims that are very much smaller, so I do not think it can quite be regarded as a small action. I am not going to deal with anything else today. I think all Rule 39 defendants either have been, or shortly will be served, because permission to serve out has, I think, been given.

MS MACLEOD: It has been given. We are waiting to hear from the representatives of Carpenter Co. whether they are prepared to submit to service in this jurisdiction.

THE PRESIDENT: I see. I think the next step will be, when they have had a chance to put in their response, that there will be a CMC where we will consider the future progress of the action, including, of course, what to do about the Rule 39 claims and whether all, or in part, they should be heard together, and set a timetable. I have noted what you said about likely time to trial. You have all heard what I have said about the need for close case management.

The Honourable Mr Justice Roth
President of the Competition Appeal Tribunal

Charles Dhanowa O.B.E., Q.C.
(Hon)
Registrar

Date: 7 June 2016