



COMPETITION APPEAL TRIBUNAL

Binding Effect of the Administrative Decision and Jurisdiction of the Civil Court

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Bridget Lucas KC

Chair, UK Competition Appeal Tribunal (CAT)



Private enforcement of civil claims

- A person who has suffered loss or damage may bring civil proceedings in the High Court or CAT
- In respect of an infringement decision (follow-on claim) or alleged infringement (standalone claim) of Chapter I or Chapter II prohibition (CA 1998, section 47A; tort of breach of statutory duty).



Findings of Fact by CMA

- Unless the Court directs otherwise, a finding of the CMA made in the course of an investigation which is relevant to an issue in a private enforcement action is binding on the parties if:
 - the time for appeal has expired and no appeal has been brought; or
 - the finding has been confirmed on appeal by the CAT (section 58 CA 1998).
- This applies to:
 - a clearly identifiable finding of fact; and
 - not to passages in a decision from which a finding of fact might arguably be inferred. (See *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWHC 599 (Comm)).



Findings of Infringement

- If a claim is brought in respect of an “infringement decision”, the Court or the Tribunal is bound by the decision once it has become final (CA 1998, Section 58A).
- A decision becomes “final”;
 - When the time limit for appealing expires without an appeal being brought;
 - Where an appeal has been brought, when the appeal and any further appeal has been decided or ended; or the time for appealing has expired without any appeal being brought.
- Two issues:
 - What constitutes a “decision”, so as to be binding on the parties?
 - What should the Court do in relation to claims brought before the decision is “final”?



What is “a decision”? BritNed

- There is an ambiguity in the term: a wide and a narrow meaning. It is the narrow meaning that applies.
- A Commission Decision consists of three parts:
 - The decision part: binding on addressees and (if final) on the Court (breach of Article 16 to come to a finding inconsistent with it);
 - A recital constituting part of the essential basis for the decision: also binding.
 - A recital not constituting part of the essential basis for a decision: not binding.
 - Where there is no question of a conflict of decisions (Article 16(1)), the decision of the Commission is admissible evidence, which may well be highly persuasive, but as a matter of law, is only part of the evidence which the court will take into account.
 - Citing *Crehan v Inntrepreneur Pub Co [2007] 1 AC 333*, per Lord Hoffmann [69]



Binding Effect: “Trucks”

- In Case 39824, the European Commission found that Ds had participated in an infringement of Article 101 TFEU.
- The Decision was adopted in accordance with the settlement procedure.
- Cs brought follow-on claims in CAT. *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] EWCA Civ 1475.
- Cs pleaded certain facts set out in recitals to the Decision, which Ds had admitted as part of the settlement procedure. Ds sought to deny or not admit those recitals.
- Preliminary issue: which, if any, of the recitals could be contested in the follow-on claims.



Trucks: CAT Decision (1)

- Article 16: prevents national courts from taking decisions that run counter to a Decision of the Commission. This affects:
 - Operative part of the Decision: binding in follow-on proceedings.
 - Findings in a recital that were an aid to interpretation of the operative part of the Decision, or constituted the “essential basis” or provided the “necessary support” for the operative part of the Decision: binding in follow-on proceedings.
- An essential fact is a fact covered by article 16 and binding in the sense that if the National Court was to reject that fact, it would be in breach of article 16. The party is therefore precluded from contradicting that fact in its pleaded case.
- A non-essential fact is recorded in the Decision but could properly be rejected by the national court without putting the court in breach of article 16. A party in subsequent proceedings is not precluded from denying or not admitting it.
- *“the question being addressed is what in the recitals is necessary to interpret the above determinations in the operative part or provides an essential basis or necessary support for these elements, such that a contradictory finding by the Tribunal would be inconsistent with those determinations as so interpreted. In some respects that question falls to be answered by reading “several recitals together and they do not always have to be read literally”. Royal Mail Group Ltd v DAF Trucks Ltd [2020] CAT 7 at [75].*



Trucks: CAT Decision (2)

- Even in relation to the “non-essential” facts, did the procedural doctrine of “abuse of process” preclude Ds from denying or not admitting them?
- The *Bairstow* test:
 - if the parties to later proceedings were not parties to or privies of those who were parties to earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if
 - (i) it would be manifestly unfair to a party in the later proceedings for the same issues to be relitigated; or
 - (ii) to permit such relitigation would bring the administration of justice into disrepute.
- CAT concluded both limbs of the Bairstow test were satisfied.



Trucks: CAT Decision (3)

- It is an abuse of process (although not a breach of article 16) for a defendant simply to deny or not admit non-essential facts set out in a recital relied on by a claimant.
- it is not an abuse to:
 - put forward a case or evidence inconsistent with a recital where the claimants do not object
 - put forward a contrary position to a finding in the Decision on the basis that it does not accurately reflect the underlying document referred to by it.
 - seek to advance facts inconsistent with a recital if new evidence is relied upon which was not reasonable available to the defendant at the time of the proceedings before the Commission
 - plead in response to a different or more detailed case than is set out in the recital, as long as it is done in a way that that is not a denial of a recital
- It is for the defendant to set out the reasons why it should be permitted to put forward a positive case contrary to a finding in a recital.



Trucks: Principal Issues on Appeal

1. Is the application of English common law doctrine of abuse of process precluded by a rule of EU law?
2. If the answer is no, was the CAT right to hold that the doctrine was engaged when Ds sought to contest the truth of facts they had admitted as recorded in the decision?



Trucks: Boundaries of the Appeal

- Concerned only the binding nature of facts recorded as being accepted in a decision following the settlement procedure. Not suggested it would be an abuse of process to contest non-essential findings outside the context of the formal settlement procedure, and in contested investigations.
- Defendants cannot say that they accept for the purposes of the settlement procedure that they have committed an infringement of the competition rules without also admitting the facts set out in that Decision.
- Motive for admissions is irrelevant.
- Admissions are not made for the limited purposes of the settlement procedure.



Trucks: Is the English doctrine of abuse of process precluded by a rule of EU law?

- Article 16:
 - D submissions:
 - Non-essential facts are not binding: open to national court to reach a different view. Article 16 therefore positively requires the national court to permit Ds to deny or not admit such facts.
 - To allow English law to determine which parts of a Commission decision are binding and which are not, risks a lack of uniformity.
 - Rejected by CA.
 - Article 16 says nothing about how national courts should approach non-essential facts.
 - Any lack of uniformity is due to a lack of harmonisation in how member states should handle follow on claims.



Trucks: Is the English doctrine of abuse of process precluded by a rule of EU law?

- Breach of rights to defend (Article 47; 48 European Charter of Fundamental Rights).
 - Ds submissions: it is an infringement of the right to the presumption of innocence for the non-essential facts in the Decision to be binding when they cannot be challenged on appeal.
 - Rejected by CA:
 - *“the defendants ... did not acknowledge that there was anything even a little strange in them insisting on their right to be presumed innocent of having engaged in unlawful conduct, even though they freely admitted to engaging in precisely that unlawful conduct and accepted an infringement decision in respect of that conduct. It does, however, strike me as odd.”*
 - Ds acknowledged that their rights to defend themselves have been respected.



Trucks: Is the English doctrine of abuse of process precluded by a rule of EU law?

- Duty of sincere co-operation Article 4(3) TFEU.
- Ds' submissions:
 - By enhancing the effect of recitals as admissions in civil enforcement proceedings, Ds will be deterred from using the settlement procedure.
- Rejected by CA;
 - For every statement to the effect that the settlement procedure is an important weapon in the competition enforcement armoury, one can find a corresponding statement that the directly effective right of a cartel victim to claim damages in the national court strengthens the working of the competition rules. And actions for damages make a significant contribution to the maintenance of effective competition.



Was it an “abuse of process” for Ds to seek to go behind admissions?

- CA considered CAT applied the correct test: Situations in which it will be an abuse to litigate an issue which has not previously been decided between the same parties will be “entirely exceptional” or “rare”. However:

“... the CAT was entirely justified in deciding that it would create great unfairness to the claimants to have to prove facts that the defendants have already admitted in the settlement proceedings regardless of the distinction between essential and non-essential facts” [107]

“... there would be manifest unfairness to the claimants and ... the administration of justice would be brought into disrepute if the [Ds] were entitled, in the follow-on proceedings, to contest the admissions they had freely made in the settlement process. The [Ds] made their admissions with the benefit of procedural rights and with full knowledge of their potential future significance ... The admissions were made to secure a 10% reduction in the fine ... and the benefit of a shorter decision than would have resulted from a contested procedure”. [[145] Per Sir Geoffrey Vos C



Pending Appeals/ Stay of Proceedings (1)

- *Wm Morrison Supermarkets plc v MasterCard Incorporated* [2013] EWHC 1071
 - Commission adopted an infringement decision, which was appealed to ECJ. No infringement decision had been made in relation to the UK arrangements. The claim consisted of both follow-on and standalone claims.
 - Ds applied for a stay of proceedings until determination of the ECJ Appeal.
 - Application dismissed:
 - Ds to file Defences and prepare for CMC.
 - In the overall scheme of things the expense was relatively modest;
 - The conduct complained of began in 1992, and there was a pressing need to proceed.
 - Even if the decision was annulled, there was an appreciable chance that the UK claims would continue. The risk of wasted costs being incurred by D was not compellingly high.
 - If there was an immediate stay and the appeal was dismissed, Cs would suffer prejudice of considerable delay.



Pending Appeals/ Stay of Proceedings (2)

- *Infederation Ltd v Google Inc* [2013] EWHC 2295 (Ch).
 - Google sought a stay in a stand-alone action alleging abuse of dominant position, on the basis that it had offered commitments in response to European Commission preliminary findings that certain of its business practices might be considered abusive. It would be disproportionate to embark on a disclosure exercise until the Commission's position was clarified.
- Application refused:
 - (i) no objection as a matter of EU law for national proceedings to continue to a point short of an actual decision or judgment;
 - (ii) it was in the discretion of the court to determine what steps short of trial should be taken;
 - (iii) that discretion was to be exercised having regard to the overriding objective, and the requirement to avoid a decision counter to that of the Commission or EU Courts;
 - (iv) it would normally be appropriate to require D to plead a defence;



Pending Appeals/ Stay of Proceedings (3)

- (v) whether further steps should be taken will depend on all the circumstances, including
 - (a) whether the proceedings were follow-on proceedings, or parallel to a Commission investigation, and standalone;
 - (b) whether it is possible to reach a view from the status of the EU proceedings as to the likelihood of the English action progressing to trial (e.g. if the Commission has reached a decision finding an infringement and the appeals are only as to the duration of the infringement; or as regards the liability of the parent company for the conduct of its subsidiaries);
 - (c) what stage the proceedings at EU level have reached and thus how long the delay until a trial of the action in England is likely to be;
 - (d) how much time has elapsed since the occurrence or commencement of the events covered by the allegations; and thus how far such further delay may affect the availability and credibility of the evidence;
 - (e) Whether it will be unduly burdensome to the defendants to take such steps at the same time as they are contesting the EU proceedings;
 - (f) Whether it is practicable to control the burden and costs of those steps by effective case management.