

# Perspectives

## BritNed v ABB

The recent Court of Appeal's decision on the appeal of BritNed's claim against ABB is essential reading for claimants and defendants alike. The case involves the first award of damages for anti-competitive conduct in breach of Article 101(1) in the jurisdiction – all other cases having been resolved before judgment.

The Decision surveys a wide range of issues in the competition context, including the proper approach to assessing a competitive price, the controversial indications in the judgment at first instance that the Court should err on the side of under-compensation, the basis for a claim for overcharge, the proper scope of damages, including claims for lost profits, and the recoverability of other benefits which accrue to cartelists, such as 'cartel savings'. Broadly, the Decision affirms that the principles applicable to recovery of damages in competition cases are similar to other claims for damages and provides several useful reference points in a field otherwise starved of case law by early settlement.

### Background

The BritNed Interconnector, which is the subject of the claim, is a 1,000-megawatt capacity electricity submarine cable system connecting the Dutch and UK electricity grids. BritNed alleged that the price it paid ABB for the cable for the BritNed Interconnector was inflated due to the Power Cables cartel which operated from 1999 to 2009. At first instance, BritNed was awarded €11.7m in damages.

Both BritNed and ABB launched appeals against that finding, alleging that the judge had erred in various ways in reaching his conclusion.

### The competitive price

First, the Court looked at the proper approach to the assessment of a competitive price, which is the relevant test for assessing damages. The Court followed and endorsed the approach laid out in *Devenish Nutrition Limited v Sanofi-Aventis SA*<sup>1</sup>, which found that the domestic remedy of compensatory damages, via an action for breach of statutory duty, satisfies the EU principle of effectiveness.

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<sup>1</sup> [2008] EWCA Civ 1086, [2009] Ch 390

The Court did not set out any general rule as to whether damages for lost profits could be available for competition claims, and simply endorsed the judge's conclusion that in this case BritNed had fallen "*far short*" of proving damages for lost profits in the light of the evidence.

The starting point for damages claims is therefore compensation, but the Court emphasized that quantification in competition cases was characterized by uncertainty, and that in those circumstances the familiar "*exercise of a sound imagination and the practice of the broad axe*" was the right approach to follow. In cases where evidence is hard to come by, or there is asymmetry (as is often the case) the Court of Appeal has made it clear that the judge at first instance has discretion to do justice in the particular circumstances.

### **No principle of under-compensation**

Notably, the Court was careful to dismiss any suggestion that there was a principle in a competition damages claim that the judge should "*err on the side of under-compensation*". There are cases where such an approach might be appropriate, but the Court observed that this was not one of them, given the concerted and dishonest worldwide cartel in which ABB participated. The Court explained that the aim should always be to give the right amount of compensation, without erring in either direction – a finding that will be reassuring to claimants in future cases.

### **The basis for overcharge**

At first instance, the judge had preferred the expert evidence of the defendant ABB on overcharge, based principally on a comparison between ABB's margin for the project, and its margins for projects in the post-cartel period. BritNed had challenged the judge's approach in this regard and sought to re-instate the expert evidence of its own expert witness, which found a substantial overcharge by reference to a

broader econometric analysis. When considering whether or not to overturn the judge's conclusion, the Court emphasized the principle of appellate restraint when considering issues of fact, included the assessment of expert opinion. The Court should only interfere where the trial judge has got the question "plainly wrong" and come to a conclusion no reasonable judge could have reached. In this case, as judge's conclusion was fairly open to him, that conclusion was unassailable on appeal.

This is a welcome reminder of the crucial nature of expert evidence at first instance, and it is reasonable to expect a similarly high bar on the standard of review by the Court of Appeal of the findings of fact in future cases.

### **The proper scope of damages**

The Court made two further important findings on principles applicable to the recovery of damages in cartel cases. First, in an allocation cartel such as the Power Cables cartel, where market sharing was at the centre of the infringement, it did not necessarily follow that an uncompetitive price was charged to the customer. The pernicious effect could be in the allocation process, and the concomitant benefit to the cartelists. The Court emphasized that everything depends on a detailed examination of the facts, and the need for Claimants to demonstrate, on the balance of probabilities, that the price they paid was too high. In this case that burden had not been discharged.

### **Cartel savings**

Relatedly, the Court went on to review the judge's finding that BritNed could recover damages for the 'cartel savings' enjoyed by ABB – essentially costs savings derived from not having to compete for contracts – as a head of loss for BritNed. These 'cartel savings' involved no actual loss to BritNed, but the judge had found that this distinction between a benefit to ABB and a

loss to BritNed did not matter and had awarded damages to BritNed in any event.

The Court of Appeal disagreed with this approach. As a matter of fact, there was no evidence of a link between any cartel savings and a price effect in this case. The judge had simply asserted that there was a link, but the Court found it was not open to him to assume this point. Second, and decisively, the judge had expressly found that any such savings had been competed away on the particular facts of this case. In those circumstances, the Court felt that there was no basis for a finding of loss to BritNed, and the damages awarded had to be overturned.

## Conclusion

The principles laid out in this case confirm that competition cases are treated in a similar manner to other claims for damages before the English courts. Nevertheless, there is great value in the detailed judicial guidance from the Court of Appeal on these issues in the competition context, and uncertainty for claimants and defendants alike in litigating private damages actions should be significantly reduced in the future.



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