

Perspectives

BritNed v ABB

The *BritNed v ABB* judgment of 9th October 2018 is the first judgment handed down by an English court in a cartel damages claim. What it says about key issues arising in such claims is therefore of interest to many who are involved in, or contemplating, bringing or defending them.

The claim was brought by BritNed, a joint-venture between the UK's National Grid and the Dutch power transmission operator TenneT. It related to a submarine cabling contract between the UK and the Netherlands, which was constructed in 2009-10. The defendant, ABB, was found by the European Commission to have participated in a high-voltage power cables cartel for ten years, from 1999 to 2009. The BritNed project was specifically identified in the Commission's infringement decision as one of the projects that was discussed as part of the cartel.

Arguments

BritNed claimed three types of loss:

- Overcharge – i.e. that, as a result of the cartel, the price it paid for the project was artificially inflated;

- Lost profit – i.e. that, absent the cartel, it would have installed a 1,320 MW cable instead of a 1,000 MW cable, which would have generated additional revenues and higher profits; and
- Compound interest – i.e. that, as a result of the cartel, it incurred higher capital costs than would have been the case under competitive conditions.

ABB argued in its defence that:

- BritNed had not been overcharged, as the cartel had had no effect on the price of the project at issue;
- BritNed would not have installed the 1,320 MW cable and therefore did not suffer lost profits as a result of the cartel;
- If, however, BritNed was found to have been overcharged, any losses would have been avoided as a result of the operation of a regulatory cap on profits (applicable as a result of the regulatory regime to which BritNed was subject); and
- If BritNed was awarded damages, it should not recover compound interest.

Judgment's key conclusions

The judge, Mr Justice Marcus Smith:

- Found that the claimant (BritNed) had been overcharged €13m by ABB in respect of the submarine cable project that was the subject of the litigation. This overcharge was composed of (a) €7.5m in additional copper costs, due to a “baked-in inefficiency” arising as a result of the operation of the cartel; and (b) a “cartel saving” in respect of ABB’s common costs, amounting to €5.5m;
- Dismissed BritNed’s claim in respect of lost profits;
- Dismissed ABB’s argument that the operation of a regulatory cap on profits meant that BritNed did not suffer loss;
- Awarded BritNed simple, but not compound, interest on its losses.

The €13m damages awarded represent approximately a 5% overcharge on the project price.

Comments

The judgment is the first cartel claim in which damages have been awarded. The level of damages – representing approximately a 5% overcharge – was calculated on the basis of the evidence before the court in relation to the single specific project that was the subject of BritNed’s claim.

The judgment also sheds light on a number of important aspects of cartel damages claims:

First, the [approach to quantifying damages](#). The judgment clarifies that the overcharge to be assessed is the difference between the price agreed between BritNed and ABB and the price that would have been agreed – whether with ABB or another supplier – in the absence of the cartel (para 18). The judgment also confirms that the fact that it is not possible for a claimant to prove the

exact sum of its loss is not a bar to recovery: “[i]n many cases, the assessment of damages will involve an element of estimation and assumption” (para 12). The judgment endorses the “broad axe” or “broad brush” approach, noting that “[t]he court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of its rights” (para 12). This realistic approach to the calculation of damages will be welcomed by claimants.

Second, the [approach to witness evidence](#). The judgment considers in detail the evidence of ABB’s five witnesses of fact, of whom three had been specifically involved in the BritNed tender but only one of whom had participated in the cartel. While the judge was unsurprisingly “minded to treat [the cartelists’s] evidence with a high degree of caution” (para 46), it is interesting that he does not dwell on or draw inferences from ABB’s failure to put forward any other witnesses who participated in (and could therefore have explained the operation of) the cartel. Perhaps also surprising in these circumstances is the judge’s conclusion – notwithstanding that the Commission’s infringement decision specifically identified the BritNed project as having been the subject of discussion by the cartelists, and the judge’s own acknowledgement that the project was “a cartelised bid” (para 30) – that the BritNed tender was “honestly and competently compiled with a view to putting forward a competitive bid” (para 435).

Third, the [approach to documentary evidence](#) (or lack of it). The judge noted that “the documentation regarding the detailed operation of the Cartel was probably always quite sparse, and most of such documentation as did exist has either failed to survive or else is kept under wraps by the European Commission (and is not available to me)” (para 46). Of the latter, he commented that “some appeared to me to be potentially quite important” (para 70). Again, adverse inferences do not appear to have been drawn from the destruction,

withholding or otherwise unavailability of potentially relevant/important documents – and the information asymmetry between claimant and defendant that resulted. In particular, notwithstanding that the judgment noted “significant gaps in the contemporary document record” and indeed that “ABB’s disclosure [...] was an intentionally incomplete record” (para 66), the documents that were available were read at face value. This is perhaps surprising.

The court’s approach to factual (witness and documentary) evidence is important. Plainly, the facts are important. But where gaps arise – perhaps because a cartel has destroyed documents, or failed to put forward all relevant witnesses – the information asymmetry that results can adversely impact on claimants, and be used tactically by defendants, unless adverse inferences are drawn. It will be interesting to see how future judgments develop this approach to the evidential imbalance between claimant and cartel.

Fourth, how the [courts will assess expert economic evidence](#) relating to overcharges. Specifically, in a cartel damages claim the crucial question insofar as overcharge is concerned is: what would the claimant have paid ‘but for’ the cartel? This ‘but for’ world – often referred to by competition lawyers and economists as the ‘counterfactual’ – by definition didn’t exist, and has to be constructed. Expert economists differ as to how they do that. BritNed’s expert used a ‘regression analysis’ (an econometric model) that included, among other things, inputs that were proxies for the cartel’s actual costs. She found an overcharge of 25.4%. ABB’s expert used a ‘margin analysis’ (essentially, an analysis of the cartel’s margin on the contract at issue, compared to its margins (a) on other projects during the cartel period and (b) on other projects in the post-cartel years) based on the cartel’s actual costs. ABB’s expert found that both analyses demonstrated zero overcharge on the BritNed project. The judge preferred

ABB’s approach, noting that “[w]here there is a choice between using actual data and a proxy for that data, the former ought to be preferred, unless there is good reason for not relying on the actual data” (para 414). He analysed in detail the inputs into and parameters of BritNed’s expert’s regression analysis, and ultimately found them not to be reliable given the content of the BritNed claim: for example, the judge considered it inappropriate to use a dataset that included projects other than the BritNed one, and which included underground cables (in circumstances where the claim related to a single submarine cable project). The claimant’s expert’s concerns with using ABB’s actual data – which arose in a cartelised, not a competitive, environment – were dismissed.

However, the judge found two types of overcharge that would not have been caught by ABB’s expert’s analysis. First, that “the effect of the Cartel was to insulate ABB from inefficiencies in its own product” (para 449) – referred to in the judgment as “baked-in inefficiencies”. The judge quantified this overcharge as 15% of the copper content of the cable, being €7.5m. In doing so, he noted BritNed’s expert’s concern that 15% “might be unduly conservative”, but considered this to be appropriate as “a figure based on the limited documents adduced in evidence and which seeks to avoid over-compensation to BritNed” (para 451). This part of the overcharge equates to just under 3% of the contract price for the BritNed cable. The second type of overcharge was referred to in the judgment as “cartel savings”, i.e. that “ABB – and the other cartels – derived cartel savings from their control of the allocation and supply of cable business in the market” (para 457). The judge allocated a proportion of this to the BritNed project, which he quantified as €5.5m for that project (para 458); this equates to just over 2% of the contract price.

Fifth, [the focus on the single affected bid](#) that was the subject of the claim, to the

exclusion of some broader considerations. For example, of ABB's two-decade-long involvement in three global cartels (of which the High Voltage Power Cables cartel was one), the judge "accept[ed] that, as an organisation, ABB would not have participated in cartels generally unless it saw some benefit from this", and "accept[ed] that a rational organisation, and rational people, are not going to engage in illegal cartel behaviour unless they are satisfied that it benefits them" (para 25). The judgment did not, however, expressly weigh up the factual and expert evidence against these general propositions. In addition, the judgment is clear that "general knowledge of the Cartel is nothing to the point" (para 214) and that "[i]t is not ABB's understanding of the Cartel in general that matters, but the extent to which ABB's participation in the Cartel gave it an appreciation of the competitive position in which it stood in relation to the BritNed project" (para 211; emphasis in original).

The judgment also addressed (and rejected) what was referred to as the "regulatory cap issue", namely ABB's argument that the regulatory regime to which BritNed was subject would have meant any losses incurred by BritNed would ultimately have been abated/extinguished as a result of the operation of a cap on BritNed's internal rate of return. This argument was specific to the regulatory regime that applied to BritNed (under Directive 2003/54/EC) and a BritNed-specific exemption from that regime. The judge concluded that BritNed was entitled to recover the full amount of the overcharge notwithstanding the operation of the regulatory cap (para 541).

The judgment also discusses the extent to which compound interest using a weighted average cost of capital can be claimed.

The judgment indicates that because the parents of the BritNed joint venture—National Grid and TenneT—were not co-claimants the cost of equity claim could not be pursued, since the cost of equity was a cost to the shareholders, not to BritNed itself.

Overall, the judgment provides welcome guidance as to how the courts will approach cartel damages claims, and some of the key points are summarised above. But it is important to remember that it is based on an assessment of the specific facts of the BritNed project, and of the witness and documentary evidence that was available to the court. It remains to be seen how the principles and approach in the BritNed judgment – including the approach taken to economic models used to quantify overcharge – would be applied to other cartel damages claims.

Looking ahead

Mr Justice Marcus Smith has given both sides permission to appeal the judgment and has allowed additional time for them to file appeals. Further 'consequential', including the rate of simple interest to be applied to the damages award, and the question of costs, also remain to be determined. There remain other damages claims pending against the High Voltage Power Cables cartellists, as well as numerous other damages claims against other cartels.



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