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Court of Appeal Sets Aside Order for Disclosure of Unredacted Commission Decision and Orders Strike Out of Economic Tort-Based Claims

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On 14 October 2015 the Court of Appeal (CoA) handed down its judgment on appeals against orders made by Peter Smith J arising out of an alleged cartel for airfreight services. First, the CoA said the High Court was not entitled to disclose the Commission's unredacted decision even into a confidentiality ring if the decision contained so called "*Pergan*" material. Second, the CoA struck out claims on economic torts amounting to approximately 60% of the claim. The CoA's reasoning will make it very difficult, if not impossible, for claimants to bring such claims in the future, substantially reducing potential damages in cartel damages claims.

Background

The CoA's judgment concerns appeals against orders made by Peter Smith J in proceedings brought by some 565 claimants against British Airways plc ("BA").

The action brought by the claimants comprises the following: (1) a claim for breach of statutory duties owed to the claimants under Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and/or Article 53 of the Agreement on the European Economic Area based on the European Commission's *Airfreight* Decision;[1] (2) a claim based on the tort of unlawful interference; and (3) a claim based on the tort of conspiracy.

Whilst the claimants have only sued BA, BA has brought CPR Part 20 claims against all of the other addressee airlines as well as against some of the non-addressee airlines.[2]

[1] Commission Decision C(2010)7694 final of 9 November 2010 relating to a procedure under Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on air transport (Case COMP/39.258 – *Airfreight*).

[2] By way of disclosure, Shearman & Sterling represents Cargolux Airlines International SA, one of the Part 20 defendants.

At the time that the orders at issue were made the *Airfreight* Decision had not been published. In fact, the Commission only published the provisional version of the Decision on 8 May 2015.

The Appeals

The CoA addressed the following:

- an appeal against orders directing that an "unredacted" version[3] of the *Airfreight* Decision should be disclosed into a confidentiality ring ("the *Pergan* appeal"); and
- an appeal against an order refusing to strike out claims based on the torts of conspiracy and unlawful interference and instead ordering that such application "should be adjourned until at the earliest after disclosure has taken place" ("the strikeout appeal").

The *Pergan* Appeal

The *Airfreight* Decision contains allusions to infringements by addressee and non-addressee airlines which are not part of the "operative part" of the decision[4] and, hence, cannot be appealed to the EU courts. Pursuant to the judgment of the General Court in *Pergan*,[5] there is an obligation on the Commission not to make those parts of the Decision available.

The CoA held that a national court must give the same "absolute" protection of the presumption of innocence under *Pergan* as is afforded by the Commission. According to the CoA there can be "no doubt" that European law requires a national court, in a damages action, to respect the protections afforded by the decision in *Pergan*.

Even if a national court had the discretion to strike a balance between preserving the *Pergan* protections and requiring disclosure of an unredacted copy of the Decision (which the CoA held was not the case), Peter Smith J had failed to determine where the correct balance lay.

In particular, the CoA found that Peter Smith J had failed "to give due recognition to the nature of the protection afforded by *Pergan* to the presumption of innocence" and "wrongly put in place a regime which was not sufficient to protect the rights which [the Appellants] enjoyed in respect of *Pergan* materials." Permitting disclosure within a confidentiality ring and subject to protective measures is "inconsistent with the approach of the General Court in *Pergan*."[6]

[3] Under the orders, the version of the *Airfreight* Decision to be disclosed into the confidentiality ring would be redacted for legal professional privilege and leniency, but not on the basis of *Pergan* (see below).

[4] Two examples of such materials contained in the *Airfreight* Decision are: (1) findings of, or allusions to, infringement outside the temporal scope of the infringements in the operative part of its decision; and (2) findings of, or allusions to, infringement outside of the geographical scope of the infringements in the operative part of the *Airfreight* Decision.

[5] Case T-474/04 *Pergan Hilfsstoffe fur Industrielle Prozesse GmbH v Commission* ECLI: EU: T: 2007: 306 ("*Pergan*").

[6] In this context the CoA cites para. 80 of the General Court's judgment in Pergan, which, as the CoA observes, states "in categorical terms" that "there is […] no public interest in publishing the disputed information that is capable of prevailing over the applicant's legitimate interest in having such information protected."

The Strikeout Appeal

The strikeout appeal concerns the causes of action based on the so-called "economic torts" of conspiracy and unlawful interference.

In determining the strikeout appeal, the CoA began by considering the question: "why pursue the economic torts at all?" The CoA observed that "competition law claims do not necessarily provide a remedy for the full range of the damage caused by the alleged cartel," noting that in the present case there are both geographic and temporal restrictions on the competition law claim and that approximately 60% of the overall damages sought will not be recoverable (unless the claimants can, as a matter of law, claim it in some other way).

Overturning Peter Smith J's refusal to strike out the claims based on the torts of conspiracy and unlawful interference, the CoA pointed to the "real advantages" in focusing the case on those claims which may be sustainable in law as soon as possible, and eliminating those which can properly, at a preliminary stage, be struck out. Ordering the strike out of the economic tort claims, the CoA noted that, given the potential to "pass on" any alleged price increase down the chain, "[t]he airlines will not know, and no doubt will be indifferent to, where the loss falls," which is "clearly not sufficient" to show requisite intention to harm the claimants.

The CoA noted that if these claims could be advanced, it would have two "undesirable" results. First, it would extend the effect of competition law by allowing the claimants to circumvent the geographic and temporal limitations and, second, it would "dilute the concept of intention and bring it unacceptably and perilously close to a concept of foreseeability."

Implications of the Judgment

The CoA's judgment has a number of likely implications for future damages actions.

The fact that the CoA has held that *Pergan* protection is "absolute" and that a national court is obliged to afford the same protection which is afforded at Community level, adds helpful clarity to parties on the limits of what can be disclosed in a Commission decision.

As regards the CoA's finding that disclosure within a confidentiality ring and subject to protective measures was insufficient to protect the rights enjoyed by Appellants in respect of *Pergan* materials, it should be noted that the Commission's opinion in *William Morrison Supermarkets Plc v Master Card Incorporated & Ors*[7] confirms the need for "adequate protection" for business secrets and other confidential information where a confidential version of a Decision is disclosed to claimants "<u>for example</u> through a confidentiality ring or further redactions of the Decision" (emphasis added). It remains to be seen whether there are other categories of confidential information where a confidentiality ring does not provide adequate protection or whether *Pergan* material is unique in this regard.

The CoA's judgment on the *Pergan* appeal serves as an important reminder that the duty of sincere cooperation under Article 4(3) TEU is binding on all authorities of the Member States, including the national courts. Recognising that Peter Smith J was "understandably frustrated by the length of time which the Commission had taken to produce a non-confidential version of the Commission Decision," the CoA noted that "[d]elay by the Commission, even unconscionable delay, [...] does not relieve the English court of its mutual cooperation obligations under Article 4(3)." Frustrations, understandable or not, should not undermine the "full mutual respect" that duty requires. Referring to Peter Smith J's approach as "misguided," the CoA pointed to the "real risk" that the order providing for disclosure

[7] Commission Opinion C(2014) 3066 final of 5 May 2014.

into the confidentiality ring would conflict with any future decisions by the Commission, which is bound to afford the full *Pergan* protections.

The implications of the strikeout appeal are more far reaching for the present case and for future damages actions.

As regards the present case, by striking out the claims based on the economic torts of conspiracy and unlawful interference, the CoA has removed approximately 60% of the total claim, limiting the potential exposure of BA and the Part 20 defendants substantially.

Whilst the CoA recognises the significant incentives for claimants to pursue economic torts, and reiterates that, in principle, claims could be brought on such a basis, in practice the judgment is a blow for claimants looking to recover losses beyond the geographic and temporal scope of an infringement decision.

The CoA's approach to intention—i.e. the need to show the requisite intention to injure a particular claimant / particular claimants—makes it extremely difficult to advance such a claim, particularly in circumstances where there is the ability to "pass on" any price increase, thus rendering it difficult, if not impossible, to predict where the loss will actually fall. In this context, it should be noted that price-fixing cartels are treated as infringements "by object" and thus it is not necessary for the Commission to consider the "state of mind" or "intention" of the participants in an alleged cartel, accordingly European Commission infringement decisions are unlikely to contain sufficient information for claimants to establish the requisite intention.

The CoA's willingness to strike out the economic tort claims is another blow for claimants. The fact that the CoA expressed that it was "not unhappy" to do so will likely encourage defendants to make similar applications in the future; arguing that it is desirable and in the interests of the expeditious handling of the litigation that the issue should be resolved at an early stage.

In any event, the judgment highlights the difficulty of advancing economic tort claims alongside follow-on damages claims before the English courts and, arguably, makes it more difficult for claimants to pursue such causes of action. It remains to be seen what impact the CoA's ruling will have on future damages actions, where (i) competition law claims will not necessarily be sufficient to the impugned conduct in the various decisions, including regulatory decisions, and the full range of the alleged damage caused, and (ii) geographic scope is likely to be an issue. Claimants will need to assess carefully the strength of any such claims, taking account of the need to show the requisite intention to injure.

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