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ADVISORY

August 2010

“Italian Torpedo” Fails to Sink Rubber Cartel Litigation in English Courts

On 23 July 2010, the English Court of Appeal (CA) held that an action for damages brought against the Dow group for alleged participation in a rubber cartel could be heard in England, despite the fact that Dow had sought to join existing related proceedings in Italy.¹ In its judgment, the CA casts serious doubt on the principle established by the English High Court in *Provimi* that a subsidiary company can be held liable for competition law infringements committed by its parent, notwithstanding the fact that the subsidiary company in question was not involved in the infringements. The judgment also makes it clear that the English courts will resist attempts to delay proceedings in England (e.g., by the use of procedures such as an “Italian torpedo”) and that they are unlikely to view the commencement of proceedings in other European jurisdictions as a form of “trump card” that automatically bars the bringing of proceedings in England unless it involves precisely the same parties and cause of action.

Background

On 29 November 2006, the European Commission (Commission) announced that it had fined six groups of companies a total of €519 million for participating in a cartel to fix prices and share customers for certain types of synthetic rubber, in violation of Article 81(1) of the EC Treaty (now Article 101(1) of the Treaty on the Functioning of the European Union).² The synthetic rubbers Butadiene Rubber (BR) and Emulsion Styrene Butadiene Rubber (ESBR) are used primarily for the production of tyres. The Commission found that companies belonging to the Eni, Bayer, Shell, Dow, Unipetrol, and Trade-Stomil groups operated the cartel from at least 1996 to 2002. None of the addressees of the Commission’s decision are domiciled in England, but members of their respective groups are domiciled there.

1 *Cooper Tire & Rubber Company Europe Ltd & Ors v Dow Deutschland Inc & Ors* ([2010] EWCA Civ 864). Judgment available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2010/864.html>.

2 Commission Press Release IP/06/1647, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1647&format=HTML&aged=0&language=EN&guiLanguage=en>.

In February 2007, all of the addressees of the Commission’s decision, with the exception of Bayer, lodged appeals with the Court of First Instance (now the General Court). The appeals were heard in October 2009 and a judgment is awaited.

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After receiving letters before action from lawyers acting for various tyre manufacturers in July 2007, Eni commenced proceedings against the tyre manufacturers in Italy seeking a declaration from the court that the cartel did not exist, or that even if it did, it had no effect on the prices for BR and ESBR respectively. Eni launched this ‘Italian torpedo’ against 28 defendants, in the Pirelli, Michelin, Continental, Goodyear, Bridgestone, and Cooper groups (Italian Proceedings).³ An Italian torpedo is a pre-emptive action brought by an undertaking who is likely to be sued for an infringement. By launching a ‘torpedo’ in a jurisdiction where the court process is notoriously slow (such as Italy) the undertaking in question aims to ensure that the Italian court is seised with jurisdiction to hear the issue—meaning that all other Member States in the European Union must stay any subsequent infringement proceedings between the same parties, until the slow Italian litigation procedure has run its course.⁴

In reply, in December 2007, the tyre manufacturers launched a claim for damages against 23 companies in the Bayer, Shell, Dow, Unipetrol, and Trade-Stomil groups before the English courts (English Proceedings). Only two of the 23 defendants listed in the English Proceedings are domiciled in England (one member of the Shell group and one member of the Bayer group), neither of whom was an addressee of the Commission’s decision. Eni was not included as a defendant to the English Proceedings. The claims against Shell were subsequently settled, leaving claims against Bayer, Dow, Unipetrol, and Trade-Stomil.

In May 2008, the Dow group intervened in the Italian Proceedings and adopted the claims made by Eni. In June 2008, Dow then challenged the jurisdiction of the English court, in the English Proceedings, and, in the alternative, applied to stay the English Proceedings until the Italian Proceedings were resolved (Dow Application). In July 2008, the claimants in the English Proceedings commenced further proceedings against Dow Chemical Company Limited, a subsidiary of the Dow group that is domiciled in

England but that was not an addressee of the Commission’s decision. In September 2008, Dow Chemical Company Limited also intervened in the Italian Proceedings.

In July 2009, the High Court dismissed the Dow Application and concluded that the English courts did have jurisdiction to hear the claims and that there was no sufficient justification for a stay of the English Proceedings.⁵ Dow appealed this decision of the High Court to the CA.

Decision of the Court of Appeal

In its judgment, the CA analysed the reasoning of the High Court in dismissing the Dow Application. The High Court’s decision focused on two particular provisions of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation), namely Article 6(1) and Article 28.

Article 6(1) of the Brussels Regulation explains that, where a person is one of a number of defendants, he can be sued in the courts of the state where any one of them is domiciled so long as the claims are “*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*” Article 28 of the Brussels Regulation provides that “*where related actions are pending in the courts of different Member States, any court other than the first court seised may stay its proceedings.*”

Article 6(1). The CA noted that for the purposes of Article 6(1) there must be a “real issue” between the claimants and one of the ‘anchor defendants’.⁶ An anchor defendant will ‘anchor’ an action to a particular jurisdiction by virtue of the fact it is domiciled there. The anchor defendants in this case are companies in the Shell and Bayer groups that were included as defendants to the English Proceedings and that are actually domiciled in England, and Dow Chemical Company Limited (Anchor Defendants). However, none of these English domiciled subsidiary companies had been addressees of the Commission’s fining decision in November 2006.

³ In April 2009, the Italian Proceedings were dismissed in their entirety. However, an appeal has been lodged and a judgment is not expected until 2014. The Italian Proceedings are therefore ongoing.

⁴ This obligation on other Member States to stay any subsequent infringement proceedings between the same parties is set out in Article 27 of the of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation).

⁵ *Cooper Tire & Rubber Company Limited and others v Shell Chemicals UK Limited and others*, [2009] EWHC 2609 (Comm), judgment of 27 October 2009. Available at: <http://www.bailii.org/ew/cases/EWHC/Comm/2009/2609.html>.

⁶ At paragraph 28.

Before the High Court, Dow had argued that, as the Anchor Defendants were not addressees of the Commission's decision, the claimants had no "real issue" against them. However, following the reasoning in *Provimi*⁷, the High Court rejected this argument stating that as the claimants had demonstrated that the Anchor Defendants had sold BR and ESR within the jurisdiction during the relevant period, there was therefore an "arguable case" that they had implemented the illegal price fixing agreements. As a result, the High Court found that there was a valid claim against the Anchor Defendants and that such claims were so closely connected to the claims against the non-UK domiciled defendant companies that it was expedient to hear them together in the English courts.

Before the CA, Dow claimed that the High Court had erred in its reasoning when following *Provimi* that it was arguable that a subsidiary company of an infringer could be liable even if it was not party to, or aware of, the anti-competitive practices. In any event, Dow claimed that, even if this point was arguable, the question should be referred to the European Court of Justice (ECJ).

In analysing these arguments, the CA considered whether the scope of the claim issued by the claimants against Dow was limited to a claim that the Anchor Defendants were subsidiaries of the undertakings that committed the infringement (in which case, according to the principles in *Provimi* the Anchor Defendants would be liable for the infringements committed), or whether the claim was wider and encompassed the possibility that the Anchor Defendants were parties to, or were aware of, the illegal agreements. The CA explained that only if the particulars of claim were confined to an allegation that the Anchor Defendants were subsidiaries of the undertakings that committed the infringement would the principle under *Provimi* need to be considered (i.e., the principle that a subsidiary company can be liable for the infringements of its parents).

The CA agreed with the claimants that the claim did encompass the possibility that the Anchor Defendants were parties to, or were aware of, the illegal agreements. As a result, it was not necessary to address the principle

in *Provimi*. The CA therefore concluded that the claimants' case was not capable of being struck out, and that the "*Provimi* point" did not arise.⁸ However, whilst the CA did not have cause to address in any great detail the principle established in the *Provimi* judgment, it did express some doubt as to its logic. The CA stated that "[a]lthough one can see that a parent company should be liable for what its subsidiary has done on the basis that a parent company is presumed to be able to exercise (and actually exercise) decisive influence over a subsidiary, it is by no means obvious even in an Article [101] context that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. Nor does the *Provimi* point sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible or their parent companies rather than to impose a fine on all the entities of the relevant undertaking. If, moreover, liability can extend to any subsidiary company which is part of an undertaking, would such liability accrue to a subsidiary which did not deal in rubber at all, but another product entirely?"⁹ The CA judgment also expressly states that had it been necessary to address *Provimi* in its judgment, it would have been inclined to make a reference to the ECJ.¹⁰

Ultimately, the CA found that the claimants' case against the Anchor Defendants was sufficiently closely connected to the claims against the non-UK domiciled Dow group companies to make it expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, and that therefore the English courts have jurisdiction to hear the claims pursuant to Article 6(1) of the Brussels Regulation.¹¹ The CA therefore dismissed this part of Dow's appeal.

Article 28. The High Court had chosen to exercise its discretion under Article 28 of the Brussels Regulation not to grant a stay, in particular noting that: the proceedings were now more advanced in England than in Italy; there was no court which could be said to be the centre of gravity in what was a Europe-wide conspiracy; and proceedings would be continuing against two companies in England who

⁸ At paragraph 43.

⁹ At paragraph 45.

¹⁰ At paragraph 46.

¹¹ At paragraph 44.

⁷ *Provimi v Aventis* [2003] EWHC 961 (Comm).

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had submitted to the jurisdiction (Stomil and Unipetrol have accepted the jurisdiction of the English courts). In its appeal, Dow claimed that the High Court had erred in its reasoning not to grant a stay under Article 28.

In agreeing with the analysis of the High Court, the CA stated “[t]his was a carefully considered balancing exercise and we are far from persuaded that [the High Court] either erred in law or came to a decision outside the reasonable range of options open.... We are certainly not persuaded that the fact that the Italian court was first seised of [Eni’s] claim can operate as a sort of trump card or even as a primary factor where there was as much care and deliberation on the part of [Eni] in starting proceedings for negative declaratory relief as there was in the Claimants’ decision to make their substantive claim in England.”¹² The CA therefore also dismissed this part of the appeal.

Comment

The welcome judgment of the CA casts serious doubt on the principle established in *Provimi* that an uninvolved subsidiary company can be liable for competition law infringements committed by its parent, thus bringing any follow-on damages action within the jurisdiction of the English court. Moreover, the statements of the CA appear to make it clear that the next time *Provimi* is pleaded in the English courts, the issue is likely to be referred to the ECJ. With the popularity of the English courts as a forum for pursuing follow-on actions, such a reference will only be a matter of time. However, the CA equally makes it clear that the English courts will resist “Italian torpedoes” seeking to delay proceedings in England and are unlikely to view the commencement of proceedings in other European jurisdictions as an automatic bar to bringing proceedings in England unless the claims in question are made by and against precisely the same corporate entities.¹³

In light of the CA’s decision, potential defendants to follow-on actions who do not wish to be pulled into the ‘long-arm’ jurisdiction of the English courts should: (i)

attack the pleadings of the claimants if there is no properly pleaded allegation of involvement by a UK company in the infringement; (ii) be prepared to go to the ECJ if there is no such UK company involvement; and (iii) if filing “torpedoes”, do so quickly and ensure that all relevant UK companies are included in the foreign action.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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¹² At paragraph 53.

¹³ Article 27 of the Brussels Regulation provides that where proceedings involving the same cause of action against the same parties are brought in different Member States, courts other than the court first seised must stay proceedings until such time as the jurisdiction of the first court is established. The CA did not consider the application of Article 27 in this case because the companies in the Dow group were first parties in the English Proceedings before they became parties in the Italian Proceedings.

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