



CASE NOTE:

Cartel Damages in England: Exemplary Damages Rejected

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CARTEL DAMAGES IN ENGLAND: EXEMPLARY DAMAGES REJECTED

By

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INTRODUCTION

In *Devenish and others v Sanofi-Aventis and others*, the English High Court recently held that exemplary damages are not available to claimants bringing actions against cartelists that have already been fined by the European Commission, even if their fine has been commuted due to an immunity or leniency application. Compensatory damages remain available and are the appropriate remedy.

THE BACKGROUND

The *Devenish* litigation, consisting of five separate but concurrent claims issued in the High Court in 2005, arose as a result of the well-publicized vitamins cartels of the 1990s. The European Commission found that a number of undertakings, including the three main defendants in *Devenish*, had participated in price-fixing and market-sharing arrangements for many years. One of the defendants, Sanofi-Aventis, had been the whistle-blower and the other defendants (F. Hoffmann-La Roche and BASF) had both had their fines significantly reduced as a result of cooperation under the Commission's leniency program.

The claimants were all purchasers of vitamins, either directly or indirectly (in the form of animal feedstuffs containing the vitamins) from one or more of the defendants.

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Two claimants were selected as representative of all claims, one a direct purchaser and the other an indirect purchaser (purchasing vitamins supplied by the three defendant undertakings indirectly as part of animal feedstuffs for poultry). The indirect purchasers then sold chickens and chicken products to supermarkets and others.

The claimants alleged specifically that the defendants' wrongful actions (i.e. cartel activities) had been carried out in the knowledge of and in willful disregard of the claimants' rights, in a calculating fashion and/or with the expectation of profiting from them by amounts which exceeded the amounts that would be payable by way of damages to the claimants.

The claimants claimed (in addition, or as an alternative, to compensatory damages):

- that the defendants' actions "are properly such as to evoke a sense of outrage" and that exemplary damages should be awarded;
- that they were entitled to restitutionary relief; and
- that they had a right to an account of profits.

The court was asked to determine as a preliminary issue whether these three particular remedies were available and it held that they were not. In the note that follows, we focus only on the ruling regarding exemplary damages.

THE JUDGMENT

The court held that exemplary damages were not available in this case because otherwise the principle that (put broadly) prohibits the same person from being sanctioned more than once for the same unlawful conduct would be infringed. This principle of *ne bis in idem* would be infringed if the Court awarded exemplary damages because that remedy has the same aims (deterrence and punishment) as the Commission

finer (which related to the same conduct and subject matter, and had been levied on the same parties).

In addition, the court accepted that an award of exemplary damages would “run counter” to a Commission decision fining the defendants. An award of exemplary damages would essentially be concluding that the Commission’s fines were inadequate. Such second-guessing of the Commission by a national court is not permitted by Article 16 of Regulation 1/2003.

The result was that the court found that there are rules of Community law that prevent the award of exemplary damages by a national court where the Commission has imposed fines on cartelists (even where those fines were zero because of the application of the Commission’s leniency notice).

The court also indicated that, even if it were wrong on that point, domestic English law was such that the fact that a defendant had already been fined would be a powerful (albeit not conclusive) factor against the award of exemplary damages. Taken together with the practical difficulties of allocating exemplary damages among potentially numerous claimants, this would mean a claim for exemplary damages would be unlikely to succeed as a matter of domestic English law alone. In this case, it would not succeed.

IMPLICATIONS OF THE JUDGMENT

The judgment has broad implications for those bringing and defending cartel damages cases. It is a measure of good news for defendants in such cases, which perhaps stands in contrast to the impetus at the Commission and national regulatory level to seek

to increase the deterrent effect of private damages enforcement in the antitrust arena. The court takes a clear line indicating that compensation is the appropriate manner of redress in such cases.

The ruling that, in cases where the Commission has completed an investigation, Community rules preclude the granting of exemplary damages is of particular interest. These rules ought, therefore, to prevent the award of exemplary damages in other national courts of the EU—and it will be interesting to see if the *Devenish* precedent is of persuasive value in countries outside the UK.

It remains to be seen whether a claimant would be able to obtain exemplary damages where no Commission decision had been adopted or if, following on from a Commission decision, the action for cartel damages was based on a breach of national competition law.

Looking to the future, it also remains to be seen whether the European Commission will seek to (and take the view that it can) derogate from the European Community rules prohibiting exemplary damages to create new legislation on this subject through its private enforcement initiative. It is understood that a White Paper on this and other private enforcement issues is likely to be published during the early part of next year.