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**No Restitutionary Remedy for the Victims of
the Vitamins Cartel: The Decision of the
English Court of Appeal in *Devenish
Nutrition Ltd v Sanofi-Aventis SA (France)***

Stephen Wisking
Herbert Smith LLP

No Restitutionary Remedy for the Victims of the Vitamins Cartel: The Decision of the English Court of Appeal in *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)*

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I. INTRODUCTION

In October 2008 the English Court of Appeal held that restitutionary remedies (such as an account of the defendants' profits) are generally not available to victims of cartels and that compensatory remedies (damages for the loss suffered) are an adequate means of redress.

The case, *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors*,¹ concerns a “follow-on” claim arising from the European Commission's vitamin cartel decision of 2001. In that decision, the Commission found that various vitamin manufacturers had been in breach of Article 81 of the EC Treaty having been involved in eight different worldwide cartels, each relating to sales quota allocations and agreements in relation to prices. The Commission initially imposed fines totaling EURO 855 million. However, this figure was subsequently reduced by just under EURO 60 million following a successful appeal by BASF.

The Claimants in the High Court action had purchased, directly or indirectly, vitamins from one or more of the manufacturers fined by the Commission during the

* Stephen Wisking is a Partner in the London office of Herbert Smith LLP where he specializes in all areas of competition law both in the EU and UK.

¹*Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors* [2008] EWCA Civ 1086

period in which the breaches took place. The High Court was asked to consider, as a preliminary issue, whether exemplary (punitive) damages or restitutionary remedies, such as an account of the profits of the infringing parties, were available as an alternative to a claim for compensatory damages.

These claims were raised because of perceived difficulties of proving compensatory damages. In particular, it appeared that Devenish as a direct purchaser faced claims by the defendants that it had passed on some or all of any overcharge to its own customers. In addition, Devenish was seeking damages for lost sales (as a result of the overcharge raising the prices of its own products) which it said would be difficult to quantify.

II. THE HIGH COURT DECISION

The High Court delivered its decision in October 2007. Mr. Justice Lewison concluded that the claimants were not entitled to either exemplary damages or restitutionary remedies; it was common ground that the claimants would be entitled to compensatory damages (i.e. in respect of harm actually suffered).

The High Court found that the imposition of fines by the Commission precluded the award of exemplary damages under the principle of double jeopardy, as both serve the purpose of punishing and deterring anticompetitive behavior (even if fines have been reduced or commuted through a leniency program). Inflicting a further punishment would also “run counter” to the decision of the Commission, and therefore offend Article 16 of the Modernisation Regulation (1/2003/EC).

Lewison J found, based on earlier precedent, that a restitutionary remedy, in particular an account of profits, was not an available remedy in antitrust cases. He also considered that there were practical problems in awarding restitutionary damages. Devenish appealed this issue to the Court of Appeal.

Importantly, Lewison J did not think that the difficulties of calculating damages on a compensatory basis would be insuperable:

I am not therefore persuaded that evidential difficulties of exact proof are insuperable difficulties to effective compensation as a matter of domestic law. Nor am I persuaded that the usual techniques by which the courts award damages in domestic cases are inadequate to produce a fair result.²

III. THE COURT OF APPEAL DECISION

The Court of Appeal unanimously dismissed the appeal. The leading judgment was given by Lady Justice Arden.

A. Previous Authority

The Court of Appeal first held that it was bound by previous authority to the effect that a restitutionary remedy was not available for a non-proprietary tort such as breach of statutory duty (the cause of action relied upon by the claimants).

It was common ground that restitutionary damages could have been awarded for a proprietary tort. This reflects the position in past cases where the courts have in exceptional circumstances awarded damages (known as user damages) by reference to the fair value of a right of which the claimant has been wrongly deprived by the defendant, and these awards have been made even if the claimant would not himself have sought to use that right and so incurred no loss (e.g. cases concerning trespass to land or

² *Id.* at 32

property). However, there was no question that Devenish had been deprived of a proprietary right.

Devenish relied upon the case of *Attorney-General v Blake*³ in which a restitutionary remedy was awarded for breach of contract which did not involve deprivation of property.

Blake was a former member of the Secret Intelligence Service who had agreed not to divulge any official information gained as a result of his employment. He was convicted of disclosing valuable secret information to the Soviet Union and sentenced to imprisonment. He escaped and lived in Moscow and wrote an autobiography using information obtained in the course of his employment. The information in the book was no longer confidential and no loss was suffered due to its disclosure. The Attorney-General successfully brought an action for breach of Blake's fiduciary obligations and was awarded damages reflecting all the monies that had been or were to be paid to him from his publisher. The making of the restitutionary award did not depend on whether a property right had been infringed or whether the award was compensatory for loss or not. Rather the issue was whether damages alone would be a sufficient remedy for the wrong. However, *Blake* did not address whether this principle applied to non-proprietary torts in general, or breach of statutory duty in particular, nor did it address an earlier Court of Appeal decision (*Stoke on Trent v Wass*).⁴ In that case the Court had decided not to award restitutionary damages for a non-proprietary tort.

³ *Attorney-General v Blake* [2001] AC 268

⁴ *Stoke on Trent v Wass* [1988] 1WLR 1405

As a result, the majority of the Court of Appeal (Arden LJ and Tuckey LJ) found that *Wass* had not been overruled by *Blake* and that the principle in *Blake* did not necessarily extend to non-proprietary torts. By contrast, Longmore LJ found that *Blake* had overruled *Wass* and that it was open to a court to award restitutionary damages for non-proprietary torts.

B. Application of Blake to the Facts in the Case

Although the decision seems to turn on the question of the applicability of earlier precedent, the Court of Appeal went on to find that even if *Blake* were applicable there would need to be exceptional circumstances of the kind found in *Blake* before a restitutionary remedy would be awarded. The Court of Appeal found that this condition was not satisfied principally because, on the facts assumed for the purposes of the preliminary issues hearing, compensatory damages would be an adequate remedy for Devenish.

In *Blake* it was stated that the court should have regard to all the circumstances when deciding whether to make a restitutionary award. In particular, a useful general guide was whether the claimant had a legitimate interest in preventing the defendant's profit-making activity and therefore depriving the defendant of its profit.

Each of the members of the Court of Appeal approached the question of whether there were exceptional circumstances differently.

Arden LJ considered that the practical difficulties that had been raised by Lewison J (at first instance) were not necessarily a bar to a restitutionary award and there

was policy support for such an award. Also Devenish would have the "legitimate interest" described in *Blake*. However, Arden LJ found that an account of profits should only be available where it was necessary to do justice in the case and an account of profits was not an appropriate remedy where compensatory damages were, in principle, an adequate remedy. Such damages *could* be inadequate where there were difficulties of proof which were not the claimant's responsibility. However, Devenish had produced an expert report which had estimated some of the damages claimed by Devenish and there was no suggestion that that there were insuperable difficulties of proof. Moreover, it would be unfair to give Devenish a restitutionary award to avoid the consequences of having passed on the overcharge. Nor would such a remedy be available where the difficulties of proof arose from the claimant's failure to keep effective records.

Longmore LJ also agreed that an account of profits should not be awarded. He did not think it fair that Devenish should receive profits from the defendants where the overcharge had been passed on. He also did not consider that difficulties of proof or the possible inadequacy of damages (in relation to lost sales) were relevant. Nor did he think that cartels were exceptional in the sense intended by *Blake*. If they were exceptional, then claimants would be able to claim an account of profits in all cartel cases. It was also not possible to see a principled basis on which the court could award a portion of the defendants' profits; it was an all-or-nothing claim (this raised the difficulty of how the court would deal with multiple claimants). He also did not think it was for the Courts to support an account of profits in cartel cases in order to advance a policy of deterring

cartels.

Tuckey LJ considered that compensatory damages were an adequate remedy and noted that Devenish's expert had been able to calculate the amount of the overcharge. If Devenish had not suffered a loss because the overcharge had been passed on, then this was not a reason for saying that damages were not an adequate remedy, indeed an account of profits would give Devenish a windfall in those circumstances. He also considered that Devenish did not face difficulties of proof.

C. The Community Law Issue

The Court found that Community law did not prevent nor did it require a restitutionary award to meet the principle of effectiveness. The Court also declined an invitation to refer the issue to the European Court of Justice at least while the domestic appeal process had not been exhausted.

IV. CONCLUSIONS

Claimants in antitrust cases in the English Courts should not expect special treatment.

The Court of Appeal's decision makes it clear that an account of profits in a cartel case will only be available in very exceptional circumstances (for example, difficulties of proof of damages which are not the fault of the claimant). It will be rare for an account to be necessary to do justice in the case as the courts will approach the calculation and proof of compensatory damages on a pragmatic basis. The Court, in line with the *European Commission's White Paper on Private Enforcement*, confirmed

compensatory damages as the default basis of recovery in cartel damages cases.

Moreover, while there was a difference of views as to the whether such an account of profits gave rise to particular problems where there were multiple claimants, the Court did not clearly set out how such issues could be resolved.

Notwithstanding the existence of a cartel, the Court clearly considered that it would be unfair for a claimant to recover (through an account of profits) an amount which exceeded its actual losses, because it had been able to pass on at least some of those losses to its customers. It would seem that it was wary of any approach that would result in a claimant gaining a windfall to the possible disadvantage of indirect purchasers.

The Court was also clearly unwilling to advance an anti-cartel policy agenda on its own initiative, particularly when this issue was under consideration by a number of policy makers.

Devenish is seeking permission to appeal to the House of Lords.