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COMPETITION LAW DAMAGES

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“We needed a team able to understand the needs and limitations of an SME, fighting to overcome the combined forces of an abusive monopolist and the industry regulator.

Shepherd and Wedderburn consistently outperformed the opposition and provided unfailing and flexible support throughout the twists and turns of the case such that we maintained the confidence to pursue the fight despite every effort to force us to concede.

Shepherd and Wedderburn exceeded our expectations and I willingly recommend them...”

Dr Jeremy Bryan, Executive Chairman at Albion Water

Should you be thinking about a competition law damages action?

The number of companies pursuing damages for competition law infringements is increasing. Yet, with the estimate of potential losses in the EU amounting to billions of euros, the number of such cases is still far from representative.

However, with new legislation in place to facilitate competition damages claims at both UK and EU level and with the possibility of funding arrangements to limit the cost exposure to those raising a claim, there is certainly an incentive for companies to consider whether they might have a claim.

What are competition damages actions?

Competition damages actions are claims whereby individuals and companies can seek redress for loss suffered as a result of an infringement of competition law by a third party. For example, victims of a cartel for the higher prices they had to pay for goods or services as a result of the cartel. Similarly, losses suffered as a consequence of a dominant company abusing its position may also be recoverable.

Competition damages actions can take the form of "follow-on" cases, "stand-alone" cases or a combination of the two.

Follow-on cases are claims for damages where the infringement of competition law has already been established by a competition authority (notably the Competition and Markets Authority (CMA), the European Commission (EC), and some sector regulators). In this type of claim, the party seeking damages does not need to prove that there was an infringement of competition law but rather that the infringement (already established by the authority) has caused them harm.

Stand-alone cases are those where an infringement has not been established by a competition authority. Therefore, the party seeking damages must first establish the breach of competition law before showing that the infringement caused them harm.

Parties can choose to raise their claims, either, in the specialist Competition Appeal Tribunal (CAT) or the ordinary courts, meaning the English High Court or the Scottish Court of Session.

The limitation periods (the period within which a claim can be brought) for competition damages cases can allow claims to be brought a number of years after the competition law breach. For example, in the English courts claims can be brought up to six years from the date on which the cause of action accrued. Recent attempts to extend the limitation period (in claims against Visa and Mastercard) to allow for recovery of damages in respect of behaviour of more than six years from when the cause of action accrued have been unsuccessful in the Court of Appeal. This is an important reminder for potential claimants to take legal advice as early as possible if they suspect they may have been the victim of anti-competitive behaviour.

As noted above, both the UK Government and the European Commission have taken significant steps towards making it easier for companies and individuals to pursue competition law damages actions. The UK's Consumer Rights Act 2015 has enabled the CAT to hear both follow-on and stand-alone cases, altered the CAT's limitation period to bring it into line with the English and Scottish courts, introduced a streamlined procedure for certain cases and allows for class actions on an opt-out basis, so called "opt-out actions". At the EU level, the Directive on Antitrust Damages aims to ensure an effective right to competition damages across all Member States.

Examples of our competition damages actions

Air Cargo Cartel

In 2010, the European Commission announced its decision against a number of airlines following its investigation into allegations that a number of airlines had agreed the prices of various surcharges applied to charges for air cargo services.

Five claims have been brought against British Airways in the English High Court seeking damages of over £3bn. British Airways has issued contribution claims against 23 other airlines. The proceedings are being hotly contested. One of the actions, a claim by 64,697 Chinese companies, has recently been struck out by the High Court. In addition, the Court of Appeal has stricken out claims based on economic torts which has restricted the scope of the damages that will be available to the claimants in these cases.

Albion Water v Dwr Cymru

The CAT held that Dwr Cymru had abused its dominant position in relation to the supply of non-potable water to Albion Water.

Albion Water brought an action for damages against Dwr Cymru seeking compensatory damages, exemplary damages and interest.

Dwr Cymru was ordered to pay a total of £2.5m (plus costs) in compensation to Albion for loss of profit and opportunity - the highest-ever damages award made by the CAT.

"The communication is so good that I tend to think of the lawyers as internal legal counsel rather than an external resource."

Chambers and Partners

"Shepherd and Wedderburn is recommended for its 'proficiency in both private litigation and in dealing with Competition and Markets Authority inquiries'"

Legal 500

“We found them to be knowledgeable in their specific field and we value the firm for its expertise and contacts.”

Legal 500

Funding a claim

Clearly, the costs to pursue a complex litigation will be a key factor for businesses when considering the merits of pursuing a damages action. We believe that costs, however, should not be an obstacle. There are many ways to fund competition damages actions which can significantly reduce exposure to costs. Options range from the traditional private client retainer to third party funding as well as getting a group of potential claimants together in a joint or parallel action or via a trade body. In some instances, the way in which you fund your litigation can offload risk onto the law firm or a third party in return for a share of the potential damages. To help illustrate this, we have set out below a brief overview of the types of funding that are most common when bringing a competition damages claim.

Third party funding

Third party funding typically involves a commercial funder agreeing to pay some or all of a claimant's legal fees (and disbursements including Counsel) in return for a fee. This fee is usually a proportion of the proceeds recovered as part of the litigation process whether by judgment or settlement. If the claim is unsuccessful then the funder loses its investment and is not entitled to receive any payment from you.

After the event insurance

The usual rule in disputes is that the loser pays the costs (or a proportion of those costs) of the winner. This means that in complex cases the incidence of costs can be a big issue and, indeed, can determine whether a case should be pursued.

After the Event Insurance ('ATE') is a form of legal expenses insurance which is taken out after a legal dispute has arisen. An ATE insurance policy insures you against your potential liability in the event you lose the case. An ATE policy typically covers your own disbursements, including Counsels' fees, and the other side's costs (subject to a maximum limit). ATE (and funding), if disclosed, can also be used as a tactical weapon to encourage settlement as the other side will know that an insurer has conducted an independent analysis of the merits of the case and decided it was strong enough to cover.

Our experience: why us?

We have considerable experience of acting for clients in competition litigations and have developed relationships with highly regarded counsel, economists and forensic accountants (each of whom could be key to a successful damages action).

We successfully represented Albion Water in its multi-million pound competition damages action in the CAT using an innovative fee arrangement to take on an incumbent and regulator with much deeper pockets than our client's - entering a bespoke agreement with a litigation funder. For our ground breaking work on this case, the Lawyer Awards recognised us as Competition Law Team of the Year (2014). We are also, currently defending SAS in the English High Court against claims flowing from the European Commission's cartel infringement decision in the air cargo sector.

Our specialist competition litigation team also has experience of representing clients on complex competition law actions in the UK, Europe and beyond. As well as pursuing follow on actions, we are experienced in identifying abuses of competition law and working with our clients to consider progressing stand alone actions. For a number of clients, we have successfully established monitoring programmes as part of which we provide early notification to General Counsels of potentially relevant infringement decisions. This maximises the time that they have to make critical business decisions as to whether to pursue a damages action.

Some examples of our experience include:

- Currently acting for SAS defending the Air Cargo Cartel litigation in the English High Court.
- Successfully representing Dahabshiil in its application for an interim injunction in the Chancery Division of the English High Court preventing Barclays Bank plc from terminating banking services on the basis that such termination would breach competition law, in particular an abuse of dominance.
- We acted for Lothian Buses in successfully securing interim orders from the Court of Session against Edinburgh Airport in relation to the airport's plans to award an exclusive right to run a bus service between the airport and Edinburgh city centre.
- Successfully representing John Lewis in relation to a CMA investigation into the pricing of sports bras. The CMA closed the case following a statement of objections and an oral hearing.
- Acting for John Lewis on an application for judicial review in the CAT of a decision related to the OFT's decision to accept undertakings in lieu of a reference to the Competition Commission to investigate the market for extended warranties on domestic electrical goods in June 2012, pursuant to section 154 of the Enterprise Act 2002.
- Acting for Bowmer and Kirkland in its successful appeal before the CAT against the OFT's penalty imposed following the OFT's investigation into the construction industry resulting in the penalty being reduced by 80%.
- Successfully acting for a large telecommunications operator in relation to an OFT (as was) market investigation into the supply of information and communications technology to the public sector. The OFT closed its investigation and did not make a referral to the CAT following our client's (and the other companies') responses to the investigation.
- Advising a large global telecommunications operator on four separate case assessments in relation to its concerns about abuse of a dominant position in a number of European telecommunications markets. This work is on-going.
- Our lawyers have also been involved in other litigation in the CAT and the High Court concerning cartels in carbon and graphite products, industrial copper tubes and multilateral interchange fees. The case on the carbon and graphite products cartel was one of the first follow on actions to be brought in the UK

If you think your business may have been affected by a competition law infringement and you would like to discuss a potential claim with us, or if you would like to be notified of competition law infringements affecting your business sector, please contact a member of our competition litigation team.

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