

## **Follow-on damages claims: The CAT or the High Court?**

### **National Grid v ABB Limited and ors [2009] EWHC 1326**

**Elisa Holmes**

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The recent decision of the Chancellor in National Grid Electricity Transmission PLC v ABB Limited and others [2009] EWHC 1326 (Ch) has made the High Court a more attractive forum for follow-on damages claims, at least in relation to decisions of the European Commission.

#### Background

National Grid issued proceedings on 17 November 2008 following a decision by the European Commission that one or more members of each of the defendants to the follow-on damages action had seriously infringed Article 81 of the EC Treaty and Article 53 of the EEA Agreement. The Commission had reached its decision following an investigation and various applications for leniency. One of the groups of defendants in the damages proceedings (ABB) had received 100% leniency discount.

According to the Commission, the defendants were each involved in the manufacture, sale and installation of Gas Insulated Switchgear

("GIS") and the design, manufacture, sale and installation of systems involving GIS. The Commission found that the relevant agreement included:

- market sharing
- allocation of quotas and maintenance of respective market shares;
- allocation of individual GIS projects to designated producers;
- fixing prices;
- termination of license agreements with non cartel members;
- exchange of sensitive market information.

The Commission concluded that "these kinds of restrictions are, by their very nature, among the worst kinds of infringements of Article 81 of the Treaty and Article 53 of the EEA Agreement" and that "the measures taken to conceal the cartel show that the participants were fully aware nature of the activities [sic]".

A number of the defendants (although not ABB) had appealed against the Commission's decision to the CFI. Any such appeal was likely not to be decided within a year, and any subsequent appeal to the ECJ by a losing party would be likely to take a further two years.

### The Application

The Application before the Chancellor was the defendants' application to stay all further proceedings in the follow-on damages action pending the conclusion of the CFI proceedings and any appeal to the ECJ.

The Chancellor noted the uncontroverted principle that national courts must, avoid giving decisions which would conflict with a decision of the Commission or community courts. Further, the Chancellor explicitly stated that "this court should take all the steps required to ensure that the trial does not come on before all appeals to the CFI and, if brought by any party, to the ECJ have been finally concluded" (paragraph 23 of the Judgment). But the Chancellor rejected the submission made on behalf of one of the defendants that this principle required the national court to abstain from taking any further steps in the proceedings.

The Chancellor held that in exercising the court's discretion, it should have regard to the overriding objective to deal with the follow-on action justly. In this case, he noted that the defendants relied primarily on saving expense, whilst the claimant relied on the need to ensure that it was on equal footing with the defendants and to ensure that the follow-on action was dealt with expeditiously and fairly. He concluded that unless the preparation of the follow-on action continued, the parties would not be on equal footing. This was primarily because the claimant would not know what the relevant issues were or what documents relevant to those issues were available.

On that basis, he ordered that the action should proceed as far as the close of pleadings, and gave a strong indication that it is likely directions as to disclosure should also occur before a stay is ordered. In doing so, the Chancellor was mindful of the fact that the defendants would suffer some prejudice because they would be required to prepare for a trial which might not occur, or at least in relation to which the scope was uncertain. This consideration was, however, outweighed by the delay which would ensue from an immediate stay, primarily as a result of the fact that without a defence, the claimant did not know the issues in relation to which it should prepare, and further, it could not quantify its losses without disclosure of the defendants.

### Comparison with Competition Appeal Tribunal procedure

Of particular interest is the Court's treatment of the Competition Appeal Tribunal's ("CAT's") decision in *Emerson III* [2008] CAT 8. That decision concerned particularly section 47A(1) and (5)-(9) of the Competition Act 1998, the effect of which is that follow-on damages claims may only be brought in the CAT with the CAT's permission at any time before the proceedings before the Commission and on appeal to the European Court have been finally concluded. In the *Emerson* decision, the CAT decided that it would not be appropriate for the Tribunal to grant permission pending the determination of appeals to the CFI.

Although the Chancellor did not "quarrel" with the CAT's decision in *Emerson*, he distinguished it on the basis that the Tribunal was dealing with a different question - whether to allow the claim to be commenced, as opposed to when the existing action should be stayed. In principle, though, this distinction alone seems unpersuasive. If it is in the general interest for proceedings to progress at least as far as full pleadings and disclosure, it is difficult to see why, in similar circumstances (such as undue delay and potential prejudice arising therefrom to the claimant) the same considerations should not result in the Tribunal or a Court granting permission to commence a claim. In any event, the Chancellor explicitly noted that the Competition Act provisions, although providing a hurdle for the bringing of follow-on claims in the CAT, do not prevent such proceedings being issued in the High Court. Indeed, following the decision in *National Grid*, the High Court is likely now to become the more commonly favoured forum, at least in damages claims following on from a decision of the Commission.

Jon Turner QC and Daniel Beard represented National Grid

**For more information on Jon Turner QC, Daniel Beard and Elisa Holmes please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section at [www.monckton.com](http://www.monckton.com).**