TWO WRONGS DON'T MAKE A RIGHT: THE HIGH COURT'S DECISION IN *GALLAHER AND SOMERFIELD*

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The High Court's decision last month in R *(Gallaher and Somerfield) v Competition and Markets Authority* [2015] EWHC 84 (Admin) considered the way in which the OFT conducted its 'Early Resolution' settlement negotiations with parties who were subject to its tobacco investigation. The judgment of Collins J (and the outcome of the appeal to the Court of Appeal) may have important implications for the approach of regulators including the CMA to settlement negotiations with regulated entities.

The background

The OFT's tobacco investigation

As long ago as 2003, the Office of Fair Trading (OFT) commenced an investigation under Chapter I of the Competition Act 1998 into certain allegedly anti-competitive practices involving tobacco manufacturers and retailers. The conduct alleged involved both (i) "vertical" arrangements whereby retailers would apply so-called "pricing relativities" between competing brands as required by their manufacturers, and (ii) the horizontal exchanges of information about future retail pricing intentions by some of the parties involved.

Following the April 2008 publication of a Statement of Objections (SO) addressed to two manufactures (including Gallaher) and eleven retailers (including Somerfield), the OFT entered into "Early Resolution Agreements" (ERAs) with Gallaher and Somerfield (the Claimants), whereby (broadly) each party agreed to admit the infringements set out in the SO in exchange for a substantial discount in the penalty which the OFT would otherwise have imposed. Importantly, the ERAs also provided that, if the settling party subsequently appealed against the OFT's final decision to the Competition Appeal Tribunal (CAT), then the OFT reserved the right to increase the penalty imposed on that party, and would require the relevant party to pay the costs of the appeal regardless of its outcome.

Gallaher was the only tobacco manufacturer to enter into such an ERA. As well as Somerfield, four other retailers also settled the proceedings by way of ERAs.

On 15 April 2010, the OFT issued its final decision, finding that there had been an infringement of the Chapter I Prohibition, and naming as addressees both of the Claimants, as well as all but one of the other addressees of the SO.

Appeals to the CAT

A number of parties (including one party, Asda, which had entered into an ERA) exercised their right of appeal to the CAT against the OFT's final infringement decision. However, neither of the Claimants did so.

When the appeals came before the CAT in September 2011, and in the midst of an extensive hearing, the OFT's case (in Collins J's words) *"effectively collapsed"*. The OFT sought to raise an alternative case but this was rejected by the CAT. In the result, the OFT's infringement decision was overturned vis-à-vis the parties who had appealed to the CAT, and the OFT decided not to issue a further decision on the conduct in question.

The Claimants' appeals to the CAT and their judicial review claims

In circumstances where the Claimants had paid substantial penalties following the issue of the infringement decision, and where the appealing parties' (some of whom were counterparties to the agreements the subject of the infringement decision) appeals had succeeded in the CAT, it is perhaps unsurprising that the Claimants themselves then sought to appeal to the CAT against the infringement decision.

However, by September 2011, the two-month period for an appeal against the OFT's infringement decision had long since expired. The CAT nonetheless granted permission to appeal out time, on the grounds that the collapse of the infringement decision comprised an 'exceptional circumstance' for the purposes of Rule 8(2) of the CAT's Rules. The OFT appealed to the Court of Appeal from the ruling of the CAT on this point.

In the meantime, the Claimants commenced judicial review proceedings which were stayed pending the final determination of the Claimant's out of time appeals in the CAT. The judicial review proceedings would have been unnecessary had the Court of Appeal upheld the CAT's decision to extend time but, in April 2014, the Court of Appeal allowed the OFT's appeal against that decision. In doing so, the Court of Appeal relied on the principles of finality and legal certainty deriving from European and domestic competition jurisprudence to the effect that parties who failed to appeal infringement decisions should not be permitted to take advantage of decisions favourable to those who did appeal: see Case C-310/97P *AssiDoman Kraft Products v Commission* (known as *"Wood Pulp II")* and *Lindum Construction Co Ltd v OFT* [2014] EWHC 1613 (Ch).

Assurances

The Claimant's judicial review claims relied, however, upon a statement

of August 2013 published on the OFT's website which stated that it had reimbursed another ERA party (referred to as "TMR") a sum representing the penalty it paid as well as a contribution to its costs, on the basis that the OFT had given *"particular assurances"* to TMR about *"the effect of any successful appeal brought by another party"*. Having considered the precise exchanges between TMR and the OFT, Collins J was satisfied that TMR had been given a clear assurance that it would receive the benefit of a successful appeal by another party. The Claimants subsequently asked the OFT for equivalent reimbursements of the penalty payments which they had made, but the OFT rejected their requests.

The decision of Collins J: had the OFT breached principles of fairness, and were the Claimants entitled to repayment?

The Claimants put their case in respect of the assurances in a number of ways, including by reference to equal treatment, legitimate expectation and unlawful discrimination. However, Collins J preferred to approach the matter by reference to the more general concept of fairness (§43).

In that regard, Collins J was critical of the OFT's decision to give an assurance to TMR that was incompatible with the principles of finality and legal certainty derived from the *Wood Pulp II* jurisprudence (§37). He rejected the CMA's contention that the Claimants were not in a comparable situation to TMR because they had not asked for an assurance about the consequences of a third party appeal, holding that the "don't ask, don't get" principle could not override public law duties of fairness and equality (§41). The Judge concluded that the OFT's willingness to give such an assurance to parties in the context of ERA negotiations should have been made known to all parties (§44).

The key question, however, concerned the consequences of the OFT's inadvertent mistake in offering the assurance to TMR: did it require that the Claimants should be repaid a sum equivalent to the penalty they had paid (§44)? The CMA submitted that a mistake which led to a financial benefit to a particular person should not be replicated by equivalent payments to others (relying on the decision in *Customs and Excise Commissioners v National Westminster Bank* [2003] STC 1072 in the context of overpaid VAT). Although the facts of that case were very different, the fact remained that the decision to give an assurance to TMR was a mistaken one, which failed to have regard to the "highly material" matters of finality and legal certainty (§49). Moreover, the Claimants' penalties had been paid into the consolidated fund, engaging the interests of the general community just as in the case of taxation; those interests demanded that there should not be a repayment of sums in the absence of an entitlement to such repayments. In those circumstances, it was appropriate to apply the principle that *"as a general rule a mistake should not*

be replicated where public funds are concerned". That principle provided an objective justification for the OFT's refusal to make a payment to the Claimants (§50).

Analysis

Lessons learned

It should be remembered that the settlement procedure adopted in this case was at that stage very new and that the OFT was seeking to establish how best to pursue settlement negotiations with parties who were the subject of its Competition Act investigations.

Two wrongs don't make a right

For the Claimants, Collins J's decision will have been deeply disappointing; despite finding that the OFT breached the requirements of fairness, the Claimants did not get the pay-out they were seeking. It is important to remember, however, that such a payment would have represented a windfall: it has now been conclusively determined, over a series of judgments, that the principles of finality and legal certainty mean that a party will not be permitted to reap the rewards of a successful appeal made by another party. This seems unfair to the Claimant in this case, given that another party had reaped those very rewards. However, as Collins J noted (§51), the Claimants had decided with the benefit of expert advice that it was in their interests to enter into an ERA, in full knowledge of the *Wood Pulp II* approach and its implications for their decision not to appeal the OFT's decision. The fact that the OFT mistakenly made a payment to TMR was not, in itself, a reason to extend that mistake to the Claimants, particularly given the involvement of public money. It follows that parties who are subject to a Competition Act investigation by the CMA in the future should be very wary of the consequences of a failure to appeal a decision, both at the stage of entering into any early settlement agreement, and when considering whether to appeal against the final decision notwithstanding any prior settlement.

Permission to appeal to the Court of Appeal has since been granted. There are therefore likely to be further advances on Collins J's analysis of the impact of the mistaken approach taken by the OFT on its duties to others seeking to benefit from the same mistaken approach. There is certainly scope for debate about Collins J's application of the principle from the *National Westminster Bank* case, and the suggestion that, where public funds are concerned, *"there should not be repayments of sums unless there is an entitlement to such repayments"* (§50) which seems (on its face) to beg the question.

Daniel Beard QC and Brendan McGurk (instructed by CMA Legal) acted for the Defendant.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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