GHERSON
THE LITIGATION REPORT
Summer 2008

A Move to Private Enforcement in Competition Law

Nick Ractliff, Associate, looks at competition law reforms that open the door to private enforcement

In the United Kingdom enforcement of anti-competitive practices (eg price fixing and market sharing) is performed by:-

• Public Enforcement – through Office of Fair Trading (OFT) investigations often resulting in record level fines; or

• Private Enforcement – through a civil claim for damages.

The reality is that, similar to other EU countries, the onus for enforcement falls on the public authority. The difficulty is that the high profile cases absorb the public authority's resources to the extent that some meritorious cases escape investigation.

There is very little, if any, private enforcement through the civil court process. The Competition Appeals Tribunal allows "specified bodies" to bring claims on behalf of consumers but only after an OFT finding of anti-competitive behaviour.

Accordingly, both the OFT and the EU are looking to encourage private enforcement through civil claims as an additional deterrent to anti-competitive practices and increase compliance.

The problem in the United Kingdom is that there is little incentive to bring a civil claim because:-

• The potential claimants are either individuals or small businesses;

• The "loser pays" costs rules;

• The reward is limited to single (compensatory) damages; and

• There is no effective group litigation mechanism for collective redress.

For example, the OFT has recently found that dairy producers and supermarkets were colluding to fix the milk price at an estimated cost to customers of £270 million. However, the loss to each customer was so small that it provides no incentive for civil claims.

...producers and supermarkets were colluding to fix the price of milk at an estimated cost to customers of £270 million

The measures for reform being considered by the OFT to encourage civil claims and private enforcement include:-

• representative actions where a body makes a claim on behalf of a group of consumers and businesses;

• an "opt-out" system whereby the claims brought on behalf of a "class" of persons includes and binds all persons within that class except those who specifically "opt-out";

• using conditional fees with a more than 100% uplift if successful;

• encouraging the use of third party funding; and

• capping the claimants' costs liability if unsuccessful.

A careful balance will have to be struck between the implementation of such measures and the risk of large businesses finding that they have no alternative but to settle because of litigation costs and the unlikely recovery of those costs even if the defence is successful.

Whatever happens reform is on its way and Competition Law is another area where the use of class actions and third party funding is likely to improve and increase access to the civil justice system.

Index

forward>>

JK Rowling Seeks an Invisibility Cloak

Sebastien Bisley, Associate, explains how JK Rowling has set a precedent

The Court of Appeal recently handed down a significant verdict in a privacy claim by David Murray, the infant son of JK Rowling and her husband - Murray v Big Pictures (UK) Limited. Since the decisions in *Campbell* and *Van Hannover* the law of privacy has been beating a steady march forward through the English courts, and the decision of the Court of Appeal in this case represents yet another development.

The facts

In 2004 Big Pictures (UK) Ltd ("Big Pictures") took a photograph of JK Rowling and her husband together with their then 20 month old son, David Murray, in his buggy on an Edinburgh street. The photograph was published in the Sunday Express magazine. David, through his parents, issued proceedings against Express Newspapers Plc ("Express Newspapers"), the owners of Sunday Express, and against Big Pictures. Express Newspapers settled with the Murrays, leaving Big Pictures as the sole defendant to David's claim.

The case brought in David's name asserted an infringement of his right to respect for his privacy, contrary to Article 8 of the European Convention on Human Rights. The claim also proceeded under the Data Protection Act 1998. It was, said Mr Justice Patten at first instance, "*seen by the Claimant's parents as something of a test case designed to establish the rights of persons in the public eye (such as the Claimant's mother) to protection from intrusion into parts of their private life even when they consist of activities conducted in a public place*".

The High Court decision

When proceedings were issued, Big Pictures applied for summary dismissal on the basis that the claim, as stated, could not succeed. At first instance Mr Justice Patten said that "*the reality of the case is that the Claimant's parents seek through their son to establish a right to personal privacy for themselves and their children when engaged in ordinary family activities wherever conducted*".

although JK Rowling is a public figure, the Court held that David had a *"right to respect for his privacy distinct from that of his parents"*

The judge took the view that the law did not allow JK Rowling and her family "*to cut out a press-free zone for their children in respect of absolutely everything they choose to do…. There remains, I believe, an area of routine activity which when conducted in a public place carries no guarantee of privacy*".

The Court of Appeal

The Court of Appeal did not agree that David Murray's parents were attempting to mark out a press-free zone for themselves and their family. It stressed that David was the claimant: although JK Rowling is a public figure, the Court held that her son had a "*right to respect for his privacy distinct from that of his parents*". That right entitled him to a reasonable respect for his privacy. Accordingly, the Court of Appeal reversed Mr Justice Patten's decision to strike out the proceedings.

It was key to the Court of Appeal's decision that JK Rowling and her husband had consistently taken steps to protect their children from the publicity. It may be that parents who have not taken those steps will not obtain similar recognition of their children's rights from the courts. The Murray decision is of interest both because it establishes a right of privacy for children separate to the rights of their parents, and because it recognises that "*the law should indeed offer protection from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child*".

Removal of an Administrator

The Board of a company in financial trouble now have the power to appoint an administrator without seeking the approval of the court. Unsurprisingly there is a view that this procedure is open to abuse. This is because it allows the Board to appoint a "friendly" administrator to protect or look after its interests rather than those of the creditors.

If this happens, and as Gherson experienced recently in the publicised Administration of Global Trader Europe Limited, and they are able to coordinate sufficient support amongst themselves, the creditors have the power to replace and so influence the appointment an administrator. In that administration, our client was able to co-ordinate sufficient support from other creditors that we were able to use the threat of the removal and the replacement of the company appointed Administrator to negotiate an agreement to a joint appointment with an Administrator nominated by the creditors.

A Strong Decision In Cyprus And Brave Words In Moscow

Jim Sharkey, Partner, reviews Russia's current stand on criminal investigations

Those in Russia who face a criminal investigation and then trial without a jury know one thing only too well: conviction is a near certainty.

Although the acquittal rate in jury trials in Russia is around 17%, such trials account for no more than a few hundred of the total of over one million criminal trials which take place there every year. In criminal hearings which take place in front of a judge without a jury, the acquittal rate is less than 4%.

Increasingly, it is said that judges see themselves as employees of the Russian State paid to defend its interests. The outlook for any criminal defendant in Russia is indeed bleak. It is especially bleak for those in whose cases the State takes a particular interest.

Recent Developments

The Russian State has grown expert in manipulating criminal investigations and both criminal and civil trials to achieve a variety of strategic, economic and political ambitions, not least being the defeat of the oligarchs and the effective re-nationalisation of key industries.

Russia is promising to deal with the country's alarming levels of corruption and specific official references have been made to the unlawful pressure placed on judges

Two recent developments have underlined this unwelcome and damaging aspect of modern Russia.

• In the first, which involved Gherson as an adviser to the successful respondent, a court in Cyprus has rejected out of hand the evidence brought by the Russian prosecutors in support of an extradition request. The judgment is entirely unequivocal; that prosecution was judged to be politically motivated.

• In the second, a senior Russian judge has given evidence in court and declared publicly that pressure is exerted on judges by those in power to influence the result of court cases.

The Kartashov decision

The case before the Nicosia District Court in Cyprus related to an attempt by the Russian Federation to extradite Vladislav Kartashov, a former manager of a company associated with the Yukos Group.

It is now widely accepted that Yukos was broken up and sold and its senior directors, including its founder Mikhail Khodorkovsky, imprisoned as part of a politically motivated attack. This attack was carefully orchestrated both to remove Khodorkovsky as a critic of Putin and to re-nationalise a major part of the oil industry in Russia.

The Cypriot judge rejected an application to extradite Kartashov on a variety of charges including tax evasion. He held that this was yet another politically motivated prosecution in the Yukos saga. That decision follows others made previously in London and in Switzerland.

The Court's View

The judge was scathing of the prosecution case. Whilst he felt that witnesses called on behalf of Kartashov were credible and truthful, those called on behalf of the Russian Federation (many of whom were from the General Prosecutor's Office) were deemed to be without substance, relying instead on generalities.

The judge felt that they showed contempt for Kartashov's witnesses and for earlier decisions made by the courts of other countries.

Yelena Valyavina

A libel case was brought in Russia by Valeriy Boyev, a former presidential adviser, against a popular television and radio journalist who had suggested that Boyev applied pressure on the Supreme Arbitration Court in Moscow to influence its decisions.

When the matter came to trial, Yelena Valyavina, First Deputy Chairwoman of the Supreme Arbitration Court, testified that Boyev had threatened to derail her career in 2005 if she did not reverse a ruling handed down against the Federal Property Fund. When the defendant's lawyers announced that they were calling the chairman of three other arbitration boards, Boyev dropped his charges and the case collapsed.

It is unprecedented for a figure as highly ranked as Valyavina to announce publicly that a senior official in the presidential administration had tried to pressurise the court.

What of the future?

Russia is promising to deal with the country's alarming levels of corruption and specific official references have been made to the unlawful pressure placed on judges. However, unless it acts as promised, we are likely to see more applications for asylum and the rejection of extradition requests within the UK and European court systems.

Why a Shareholders' Agreement?

We have considerable experience of acting in shareholder disputes. Many of those disputes, particularly in joint venture arrangements are avoidable and occur because the parties have not regulated their relationship by investing in a shareholders' agreement.

Because it is governed by the law of contract even a simple shareholders' agreement may protect a party's investment, especially if it is a minority interest, by addressing such issues as:-

• Management control of the company by stipulating that certain types of decisions may only be taken up with a specific level of shareholder approval;

• The rights of certain shareholders to remove or appoint directors;

•The circumstances where a shareholder may require the other shareholders to purchase his shares or is able to acquire their shares;

• How the shares are to be valued in those circumstances;

• A shareholder's entitlement to receive information, particularly of a financial nature, in addition to that he or she is entitled to receive pursuant to the Companies Act; and

• The voting and dividend rights attached to specific shares.

A shareholders' agreement will not always prevent a dispute, however it will restrict the chances of it happening and narrow the potential areas of conflict between the shareholders.

Shareholder disputes have a reputation for being costly. The short term expense of a shareholders' agreement could therefore result in a long term saving.

When Grandma Goes to Court

A good example of why a lawyer should avoid asking a witness a question without being prepared for the answer was recently reported from a trial in Mississippi.

At that trial, the prosecuting attorney called his first witness. She was an elderly grandmother. He approached her and asked, "Mrs Jones do you know me?" She responded, "Why, yes, I do know you Mr Williams. I have known you since you were a boy, and frankly, you have been a big disappointment to me. You lie, you cheat on your wife, and you manipulate people and talk about them behind their back. You think you're a big shot when you haven't the brains to realise you are never going to amount to anything more than a two-bit paper pusher. Yes, I know you."

Shocked and not knowing what else to do, the attorney pointed across the court and asked, "Mrs Jones do you know the defence attorney?"

She replied "Why yes, I do. I have known Mr Bradley since he was a youngster, too. He is lazy, bigoted, and he has a drinking problem. He can not build a normal relationship with anyone, and his law practice is one of the worst in the entire state. Not to mention he cheated on his wife with three different women. One of them was your wife. Yes, I know him."

At this point, the judge asked both attorneys to approach the bench and, in a very quiet voice, said, "If either of you idiots asks her if she knows me I will send you both to the electric chair."

Libel Tourism Comes to London

A panel of experts, who convened in London recently for World Press Freedom day, identified "libel tourism" as one of the growing threats to freedom of speech.

This is the practice of shopping around for libel laws and courts that "overwhelmingly" favour the Claimant.

If the laws in the country where the libel is published are lax, the Claimant may consider looking at using laws from another country where the libel has been disseminated.

The law against libel, which places the burden of proof on the Defendant, and the reputable court system makes the UK an attractive venue for Claimant's wanting to silence their critics.

Unlike some jurisdictions there are no plans in the UK to alter the laws, so it will remain attractive and considered as "the Libel Capital of the World".

However, other jurisdictions , like New York, are addressing libel tourism by not recognising foreign libel judgments unless the foreign defamation law offers similar freedom of speech protection.

The Legal Stuff

Contact Us

NEIL@GHERSON.COM
or
JIM@GHERSON.COM

1 GREAT CUMBERLAND PLACE
LONDON W1H 7AL

TEL: 020 7724 4488
FAX: 020 7724 4888

WWW.GHERSON.COM