Neutral Citation Number: [2019] EWCA Civ 162

Case No: C3/2017/3539

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Mrs Justice Rose, Dr Catherine Bell CB and Ms Margot Daly
[2017] CAT 23

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2019

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE NEWEY

- -

Between:

(1) BALMORAL TANKS LIMITED	**Appellants**
(2) BALMORAL GROUP HOLDINGS LIMITED	
- and -	
COMPETITION AND MARKETS AUTHORITY	**Respondent**

- -
- -

Mr Robert O'Donoghue QC and Mr Zac Sammour (instructed by **K&L Gates LLP**) for the **Appellants**
Mr Rob Williams (instructed by **CMA Legal**) for the **Respondent**

Hearing date: 29 January 2019

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Approved Judgment

Lord Justice Newey:

1. Cylindrical galvanised steel tanks ("CGSTs") are used for water storage. They are principally employed for fire suppression purposes, serving sprinkler systems. Each tank is built to order to fit the customer's specific needs, but typical volumes for CGSTs are 27-30m³ (often used for schools) and 135m³ (often used for supermarkets).

2. Between 2005 and 2012, CST Industries (UK) Limited ("CST UK"), Franklin Hodge Industries Limited ("Franklin Hodge"), Kondea Water Supplies Limited ("Kondea") and Galglass Limited ("Galglass") were parties to a cartel relating to the supply of CGSTs in the United Kingdom. In a decision dated 19 December 2016 (with the title "Galvanised steel tanks for water storage main cartel infringement"), the respondent, the Competition and Markets Authority ("the CMA"), found as follows (in paragraph 4.2):

> "between 29 April 2005 and 27 November 2012, and in the case of CST UK between 29 April 2005 and 2 May 2012, CST UK, Franklin Hodge, Kondea and Galglass participated in bid-rigging, price-fixing and market-sharing in relation to the supply of CGSTs in the UK. This took the form of an ongoing arrangement for the allocation of specific customers between them and not competing for business from customers allocated to another party. This was combined with an arrangement concerning benchmark levels of pricing and the maximum discounts to be offered to 'preferred' and 'non-preferred' customers, with the intention that each undertaking would win bids from those customers allocated to it and lose bids from customers allocated to its competitors, giving the appearance of competition where there was none."

"These arrangements," the CMA explained, "were agreed and reinforced in regular meetings attended by representatives of the Parties involved, as well as in bilateral exchanges concerning particular bids" (paragraph 1.3). The companies "agreed to allocate customers from as early as April 2005, in such a way that each undertaking would end up with an approximately equal share of CGST sales in the UK" (paragraph 3.12). The CMA thus decided that the companies had "participated in an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of CGSTs in the UK, and thereby infringed the Chapter I prohibition and/or Article 101 [Treaty on the Functioning of the European Union – 'TFEU']" (paragraph 5.1).

3. By the time the CMA issued its decision on the cartel ("the Main Cartel Decision"), those involved had admitted their involvement and agreed to settle. Penalties were imposed on Franklin Hodge and its parent company (£2,015,135); on the economic successor of Kondea, that company having gone into liquidation (£22,248); and on Galglass and its parents (£587,926). CST UK escaped any financial penalty as a result of the CMA's leniency policy, having alerted the CMA to the existence of the cartel in the spring of 2012.

4. The first appellant, Balmoral Tanks Limited ("Balmoral Tanks"), entered the market for the supply of CGSTs in late 2011. Perceiving it to be a threat to their cartel, Franklin Hodge, Kondea and Galglass sought to persuade Balmoral to join it. Their efforts culminated in a meeting at the Appleby Magna Best Western Hotel in Tamworth on 11 July 2012. This was attended by Mr Nigel Snee, the managing director of Franklin Hodge, Mr Clive Dean, the managing director of Kondea, and Mr Allan Joyce, the managing director of Balmoral Tanks. Mr Nicholas Stringer, the managing director of Galglass, was to have been there too, but he was unwell.

5. Mr Joyce resisted the attempts to recruit Balmoral Tanks to the cartel. In the words of the CMA, "Mr Joyce made it clear during the [11 July 2012] meeting that Balmoral was not prepared to take part in the pre-existing customer allocation arrangements; that Balmoral was keen to be seen as a competitor in the sector and would be competing with the other suppliers to win bids for CGSTs" (paragraph 3.97 of the Main Cartel Decision). The CMA concluded that Balmoral Tanks "was not a party to the main cartel infringement, refusing to join the cartel despite facing significant pressure from the other parties to do so" (paragraph 3.97).

6. Despite that conclusion, in a second decision issued on 19 December 2016 (with the title "Galvanised steel tanks for water storage information exchange infringement") ("the Information Exchange Decision"), the CMA found that conduct at the 11 July 2012 meeting had given rise to infringement by Balmoral Tanks as well as Franklin Hodge, Kondea and Galglass of the Chapter I prohibition imposed by section 2 of the Competition Act 1998 ("the 1998 Act") and of article 101 of the TFEU. The CMA considered that these parties had breached the Chapter I prohibition and article 101 of the TFEU "by participating in a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of [CGSTs] in the UK" (paragraph 1.2 of the Information Exchange Decision). The infringement, the CMA said, "took the form of an exchange amongst the Parties of commercially sensitive information regarding their current pricing and future pricing intentions which took place at a meeting on 11 July 2012 (or, in the case of Galglass, following that meeting)" (paragraph 1.2). "Such exchange of information," the CMA observed, "reduced uncertainty as regards the pricing to be adopted by the Parties involved for the supply of CGSTs and thereby had the object of restricting competition" (paragraph 1.2). The CMA decided to impose a penalty of £130,000 on Balmoral Tanks and its parent company, Balmoral Group Holdings Limited ("Balmoral Group"), which is the second appellant.

7. The CMA noted in the Information Exchange Decision that, after the customer allocation arrangements had been confirmed to him, Mr Joyce had remained at the 11 July 2012 meeting "for over an hour, continuing to discuss the size of the market, market share and current pricing and future pricing intentions" (paragraph 3.45). The meeting was covertly recorded by the CMA and then transcribed. The Competition Appeal Tribunal ("the CAT") gave this account of what the CMA drew from the transcript:

> "63. In particular amongst quotations the CMA relies on as evidence of the Information Exchange Infringement they include:

(1) Balmoral sharing its views on what pricing should be for specific tanks and that prices should move upwards … :

> 'AJ [i.e. Mr Joyce] … Reading between the lines, there will be a low price, maybe a proper market price on the 135, anything below £15,000 is stupid. Back up to where it should have been about £17,500, £18000. When we start getting below £15,000 and two big guys are battling over a Tyco at £14,600 and we're losing it at £14,600. It's bonkers.'

At the end of the meeting Mr Joyce explains that he found the discussion to be 'very positive'. Mr Snee then asks Mr Joyce 'So no mark 7 price at this stage, but do you want to try to squeeze the price and get up as quickly as we can?' Mr Joyce responds: 'Yes, like I say the mark 7 would be in, erm, within that band. Pushing that band up, the top end rather than the bottom.'

(2) Mr Joyce volunteered the current prices at which Balmoral Tanks is selling school tanks and 135m³ tanks … :

> 'AJ I will say that price is probably about .... the lowest one we did recently is about £9,500.
>
> NS [i.e. Mr Snee] And that's what we thought. That's. .that's what we thought.
>
> AJ The schools and the 135 are very similar £9,500, £10,500, £15,000 to 17,000.
>
> NS OK.
>
> CD [i.e. Mr Dean] I think £15,000 is far too low.
>
> AJ No, but what I'm trying to say is …
>
> CD £16,000
>
> AJ We're selling at that price, we're now below it, what I'm trying to get to say is you're hitting a level where you say, it's like GRP [i.e. glass reinforced plastic] tanks, we know the price in the market. And I say to somebody, we've been in the game so long, why would we not know the price, quote them this price, quote them that price? If we think we've a 35% market share in GRP you say to Norman that's nearly six out of

> ten orders that we lose. Why do we get upset if we lose one? We don't have it all, we've got to just make sure we're taking our share at the right price. I think with this it's like trying to push and get it stabilised. For me anyway, I get a much, much better feel for the way things are settling out you know.'

(3) The attendees provided each other with information about what their prices would be if asked to quote for a 135m³ tank in the future … :

> 'CD What would you quote a 135 now? Not Arriva but if it just came out now.
>
> AJ Say somewhere between £15,000 and £17,000. I wouldn't say it's always £16,000 as it has been... Some of that will be a reaction that you think what you've been told as well what other people are at now, yeah, erm, so that's why I'm saying we have taken some at a decent price. We have taken some at £15,000...but they haven't all been at £15,000.
>
> CD What if it was just a tender at the moment, I'm just enquiring with an order to place?
>
> AJ A one off tank, I would be surprised if it is less than £16,000. I'd say some of these things you might quote GRP tanks where someone wants a package [?] I actually give them a price for the whole lot rather than individual tank prices then that's a better way of doing it as well they might say you are a bit out on that, you're ok on that [?].
>
> CD If you're trying to do it as a package you should only quote them 1 price, not individual prices.
>
> AJ then you get some buyer "Do it separate", give them a chance to go to other people [?] I mean it does depend on who they are and what they've said to theirs?
>
> CD I just mean an everyday spring comes along, for a 135 tank cos at the moment I'd be quoting similar to...
>
> AJ [finishes CD's sentence]... £17,500.

> CD May be we'll start high. Because if you start at £15,000'.

(4) Discussion about price bands for schools tanks going forward, with Mr Snee indicating that for school tanks the band was £9,500 to £10,500, Mr Dean saying that £9,500 is reasonable with the list price being £10,100: …

> 'NS Cos that's kind of the target price that we were going for for schools in Scotland, was £10,100 but Barry said it in order to beat Balmoral, we're going to have to drop to around £9,900, that's what I've been told, I'm getting you straight.
>
> AJ You see I've seen some at £10,200. I've seen £8,600 which is was a disaster.
>
> NS Yeah we've not done £8,600
>
> AJ I've seen below that £9,200 or £9,000 even that's low. £9,500, £10,500 is a target. If I hear anything from our guys that's anything above that will be exciting or below, that would be a concern …'

(5) Discussion about price bands for 135m³ tanks …

> 'NS … And the 135s? £14,650?
>
> CD NO! [laughing],
>
> AJ I've seen quite a few around about the £15,000 mark, so I'd say £15,000 to the £17,000 mark.
>
> NS OK.
>
> CD Well, I'd have thought a list price would have been £18,000 on a 135. That should be around about £17,000 that's with a ball-valve, with a ball valve should be about £18,000.'

(6) During the Meeting, Mr Dean provided Kondea's price lists showing the strong downward progression of pricing over recent years, with a 135m³ tank selling for £20,000 in January 2011, £21,000 in April 2011 but £19,000 in July 2011.

64. The CMA refers specifically to the discussions about future bids for contracts with Compco … :

> '3.52 Earlier in the meeting, Franklin Hodge asks if Balmoral Tanks has sold any CGSTs to Compco, getting an indication of the level of sales in the market from its competitor. Mr Snee later tells the others that Franklin Hodge intends to bid to win future Compco contracts, telling Mr Joyce that Franklin Hodge will "bid close to but under" what Balmoral Tanks has offered. Mr Snee also gives a price range that Franklin Hodge will quote for school tanks on the future Compco contracts: "I'm going to have to go closer to the £9,500 than £10,500, on schools that's not because I'm trying to drag the price down, it's because I've got to try to open the door."
>
> 3.53 Mr Snee also discusses a recent pre-qualification bid Franklin Hodge has won for Hall & Kay and its intention not to reduce the price agreed with Hall & Kay " … come hell or high water. If someone rings up and says well they're a bit cheaper cos even Hall and Kay have gone through the process of trying to reduce, duck, instead of constantly going to Franklin Hodge. You must now get 3 prices but we have rigidly stuck to the price we agreed and we won't move off that, mainly for credibility reason, that kind of supports the point, I'm not going to move from that."
>
> 3.54 All attendees take an active role in discussing what should be the target price bands for future bids for schools and 135m³ tanks. Mr Snee summarises the position, once it is clear that Balmoral Tanks are not prepared to take part in customer allocation: "... Good. So coming back to where we were then, it's going to be a complicated picture isn't it, on the pricing front, this is like market sharing we going to have to manage it as best we can I suppose, is the conclusion we're coming to."
>
> 3.55 Mr Joyce responds: "We can always pick the phone up and have chat about it see where we are, make it quite clear where the bands are, if you go outside that band, on the low side then I'd like to think it won't be driven by us."'

65. On price bands, the CMA concludes from the Transcript that:

> '3.57 Mr Joyce explains in this exchange what would be "a target" price for school tanks and later in the meeting states "that's why I think you've got to have the bands to work with, to keep as the market price there is a market price for everything give or take. [?]

> if you're feeling a bit hungry you'll go here and if you're feeling a bit flush and you're not under pressure then you might squeeze it up, but if you take everyone low it's a disaster, you've got to have a mixture of jobs [?]." He notes with regard to a price that Mr Snee is proposing to bid for a future contract: "If it's falling out of the bands, that's the concern". Mr Joyce goes on to state that the parties to the information exchange should be aiming for prices at the higher end: "Better near the top of the band than the bottom of the band for sure. [inaudible]. Somehow that's the area the target price."
>
> 3.58 Mr Snee notes towards the end of the discussion: "So in summary then we've got some agreement on bands..." None of the attendees register any dissent to this assertion.'"

8. The CMA observed that "Balmoral Tanks is in fact both providing and actively seeking pricing and strategic information from its competitors that were present at the meeting, and also asking Kondea about CST UK's position" (paragraph 3.60 of the Information Exchange Decision). It also noted (in paragraph 3.62) that, immediately after the meeting, Mr Snee made calls to three of his sales staff in which he:

> "confirms that Balmoral Tanks was not prepared to take part in market sharing or the customer allocation arrangements in place between the parties to the main cartel, feeds back the pricing information obtained from Balmoral and then instructs his staff to revise the Compco bid, so as just to undercut Balmoral but without discounting heavily".

The CMA went on to say (in paragraph 3.66):

> "Later the same day Franklin Hodge submits a revised bid to Compco, which shows the 135m³ tanks … being offered at a revised price of £15,850, as suggested by Mr Snee on his calls … following the discussion with Balmoral Tanks. This job was ultimately won by Balmoral, who submitted a bid of £14,900 (£100 below the lower end of the band discussed for 135m³ tanks) on 13 July 2012."

9. The appellants (together, "Balmoral") were evidently indignant at their treatment by the CMA and appealed to the CAT. The appeal was, however, dismissed. The CAT (Rose J, Dr Catherine Bell CB and Ms Margot Daly) concluded:

> "126. Having ourselves assessed the evidence relied on by the CMA we are entirely satisfied that Balmoral was party to the infringement identified in the Information Exchange Decision. Mr Joyce went to the Meeting knowing or suspecting that the discussion was very likely to trespass into problematic areas and that was confirmed soon after the discussion started when

> he was told that the others were party to a customer sharing arrangement. However reluctantly, Mr Joyce was then drawn into a conversation about pricing with Balmoral's competitors which went well beyond a discussion of general market conditions or historic prices. He must have realised why Mr Snee and Mr Dean were pressing him for Balmoral pricing information and why they were disclosing to him their pricing information. He must have realised when he told them at the start that he trusted them and that they could be frank with each other; when he started noting down the prices for different tanks that they were discussing and when he answered direct questions about how Balmoral would respond to future requests for quotes that the others would rely on this information and that they would hope that he would abide by that information so that prices could stabilise and perhaps increase.
>
> 127. What appears to us from the recording of the Meeting was that Mr Joyce was seeking to reassure Mr Snee and Mr Dean that although Balmoral would not join the Main Cartel, it would charge prices that would not render the continuation by the others of the Cartel entirely impossible. Those hopes that he engendered were not fulfilled and we accept that Franklin Hodge and Kondea realised soon after that the game was up and there was no point, after the Meeting, complaining further to Balmoral about its pricing. Applying the case law which establishes where the line is to be drawn between innocuous discussion and infringement, we are in no doubt that the conduct here was an infringement. We therefore dismiss Balmoral's appeal on liability."

10. Earlier in its judgment, the CAT had said this (in paragraph 86):

> "But in our judgment there were two strands to the Meeting – the continuing attempts to recruit Balmoral to the Main Cartel and the discussion of prices. This was not a situation where Mr Joyce was the passive recipient of information as part of Mr Snee's and Mr Dean's attempts to recruit Balmoral. Mr Joyce provided information himself about Balmoral's prices and at one point in the meeting directly asked Mr Dean to tell him the price that Kondea had quoted for a particular contract."

The CAT also agreed (in paragraphs 87-88) with this conclusion of the CMA:

> "Although Mr Joyce made it clear during the meeting that he did not want to participate in the customer allocation arrangements between the parties, other comments made by Mr Joyce during the meeting show that his objective when discussing prices was for prices to stabilise towards the higher end of the bands being discussed at the meeting. Mr Joyce noted during the meeting that: 'the thing for me is to get it stabilised because if we keep going even lower from my point

> of view as well, we're hitting rock bottom rather quickly'. He then later notes: 'Better near the top of the band than the bottom of the band for sure.' In addition, when asked by Mr Snee if Balmoral Tanks 'want to try to squeeze the price and get up as quickly as you can?', Mr Joyce answered, 'Yes... Pushing that band up, the top end rather than the bottom'. Mr Joyce also said in interview that Balmoral Tanks was trying to avoid a 'price war'."

11. Further, the CAT considered that there was no basis for criticising the penalty that the CMA had imposed on Balmoral. It said (in paragraph 171 of its judgment):

> "It is an appropriate amount given the nature of the infringement, the need to send a clear signal to other undertakings of the dangers of casual discussions about price but also given the very positive effect Balmoral had on this market by its decision to compete vigorously on price and to cooperate with the CMA in its investigation of the Main Cartel."

The legal framework

12. Article 101(1) of the TFEU states:

> "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

13. Section 2 of the 1998 Act, which imposes the "Chapter I prohibition", is modelled on article 101 of the TFEU but concerned with trade within the United Kingdom rather than between Member States. Section 2 provides:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which—
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts …."

14. The list given in section 2(2) of the 1998 Act is identical to that found in article 101 of the TFEU and "exemplifies the sorts of agreement which would infringe section 2(1)" (Whish & Bailey, "Competition Law", 9th ed., at 361). The lists are, however, "merely illustrative and in each case the critical issue is whether the agreement has as its object or effect the restriction of competition" (Whish & Bailey, at 361-362).

15. Section 60 of the 1998 Act seeks to ensure that, so far as possible, questions arising under Part I of the 1998 Act (which includes section 2) in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in European Union law in relation to competition within the EU: see section 60(1). To that end, section 60(2) stipulates that, when the Court determines a question arising under Part I of the Act:

> "it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
>
> (a) the principles applied, and decision reached, by the court in determining that question; and

> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in EU law."

16. Article 101 of the TFEU and section 2 of the 1998 Act both extend to "concerted practices" as well as to "agreements" and "decisions". In Case 48/69 *Imperial Chemical Industries (ICI) Ltd v Commission of the European Communities* [1972] CMLR 557, the Court of Justice ("the CJEU") said (at paragraph 64 of its judgment) that "concerted practice" refers to:

> "a form of co-ordination between undertakings which, without going so far as to amount to an agreement properly so called, knowingly substitutes a practical co-operation between them for the risks of competition".

17. Elaborating on the meaning of "concerted practice", the CJEU said this in Case 40/73 *Cooperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities* [1976] 1 CMLR 295:

> "[173] The criteria of co-ordination and co-operation laid down by the case law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the Common Market, including the choice of the persons and undertakings to which he makes offers or sells.
>
> [174] Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

Accordingly, "the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted" (Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2010] Bus LR 158, at paragraph 35 of the judgment).

18. A single meeting can potentially give rise to a "concerted practice". In the *T-Mobile* case, the CJEU explained as follows:

> "59. … Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single

> occasion between competitors … may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical co-operation between them for competition and the risks that that entails.
>
> 60. … [T]he number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, … the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.
>
> 61. In those circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical co-operation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called on to adduce evidence that that concerted action did not have any effect on their conduct on the market in question."

19. Conduct can potentially be viewed as "single and continuous infringement" rather than being broken down into individual elements. Advocate General Wahl said this on the subject in Case C-413/14 P *Intel Corporation Inc v European Commission* [2017] 5 CMLR 18:

> "AG180. In the case law of the court, the concept of single and continuous infringement has been employed, in particular, in the context of art.101 TFEU to capture several elements of anti-competitive conduct under the umbrella of one single and continuous infringement for the purposes of enforcement. In that regard, the underlying rationale is to ensure effective enforcement in cases where infringements are composed of a complex of anti-competitive practices that can take different forms and even evolve over time.
>
> AG181. In other words, the aim is to avoid the unfortunate enforcement outcome where various agreements and concerted

> practices under art.101 TFEU, which in reality form part of an overall plan to restrict competition, are treated separately. For that reason, recourse to the concept of single and continuous infringement tempers the burden of proof generally weighing on enforcement authorities regarding the need to prove the continuous nature of the anti-competitive practices scrutinised. More particularly, where a complex of agreements and practices have been implemented over a long period of time, it is not unusual that changes in the scope, form and participants to those agreements and/or practices have taken place during the relevant time period. Without the assistance of the concept of single and continuous infringement, the Commission would have to meet a higher evidentiary threshold. It would need to identify and prove the existence of several distinct anti-competitive agreements and/or concerted practices as well as identify the parties involved in each of them separately. Treating the impugned practices separately could also in some cases result in a time-bar of older agreements and/or concerted practices. That would make enforcement less efficient.
>
> AG182. The concept of single and continuous infringement thus constitutes a procedural rule."

20. Where there has been a "single and continuous infringement", "each infringing undertaking is responsible for the overall cartel, even though some did not attend every meeting of the cartel or were not involved in every aspect of its decision-making" (Whish & Bailey, at 108). In Case C-204/00 P etc *Aalborg Portland A/S v Commission of the European Communities* [2005] 4 CMLR 4, the General Court said (at paragraph 83 of its judgment) that, to establish that an undertaking has participated in a "single agreement", it must be shown that the undertaking:

> "intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk".

21. The words "object or effect" in article 101 of the TFEU and section 2 of the 1998 Act are to be read disjunctively. An agreement or "concerted practice" can thus fall foul of the relevant prohibition either because its object is "the prevention, restriction or distortion of competition" or because it has that effect. "[T]here is no need to consider the effects of a concerted practice where its anti-competitive object is established" (*T-Mobile*, at paragraph 30 of the judgment).

22. A decision by the CMA (or the CAT on an appeal from a decision of the CMA) that the Chapter I prohibition or article 101 of the TFEU has been infringed may provide the basis for a follow-on claim for damages. Once such a decision has become final, it is binding on the Court/CAT in a claim in respect of it: see section 58A of the 1998 Act.

23. Similarly, "when national courts rule on agreements, decisions or practices under art.101 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to that decision" (Case T-48/11 *British Airways plc v European Commission* [2016] 4 CMLR 12, at paragraph 39 of the judgment). The fact that national Courts are bound by Commission decisions means that "the meaning of the operative part of that decision must be unambiguous" (*British Airways*, at paragraph 41). The General Court observed in the *British Airways* case (at paragraph 42):

> "In particular, clear wording of the operative part of a decision finding an infringement of the competition rules must allow the national courts to understand the scope of that infringement and to identify the persons liable, in order to be able to draw the necessary inferences as regards claims for damages brought by persons harmed by that infringement."

The grounds of appeal

24. Four grounds of appeal are advanced. In summary, they are to the following effect:

    i) The CAT failed to recognise that the CMA's Information Exchange Decision is inconsistent with its Main Cartel Decision and, the latter having become final, the former cannot stand;

    ii) The CAT adopted an impermissibly strict approach to the test for "object" infringement in the context of information exchanges;

    iii) The CAT failed to undertake necessary analysis on uncertainty reduction; and

    iv) The CAT erred in law in concluding that it was open to the CMA to impose a fine on Balmoral, and only Balmoral, for its role in the information exchange infringement.

25. I shall take these in turn.

Ground (i): Inconsistency

26. Mr Robert O'Donoghue QC, who appeared for Balmoral with Mr Zac Sammour, submitted that the Information Exchange Decision cannot logically sit side-by-side with the Main Cartel Decision. Properly analysed, he said, the conduct of which the CMA found Balmoral guilty in the Information Exchange Decision amounted to involvement in the Main Cartel, but the CMA had expressly stated in the Main Cartel Decision, which has become binding, that Balmoral "was not a party to the main cartel infringement". Mr O'Donoghue argued that the "ostensibly separate infringement" recorded in the Information Exchange Decision was "a wholly artificial distinction when set against the non-infringement by Balmoral found in the [Main Cartel] Decision", noting, among other things, that the two decisions involved the same market, the same participants (bar perhaps CST UK), overlapping periods, information exchange as to prices, and price-fixing. The two decisions, Mr O'Donoghue maintained, cannot sensibly be disentangled, which could leave a civil Court handling a follow-on damages claim in great difficulty. Mr O'Donoghue

invoked the "single and continuous infringement" concept in support of his contentions. The logic of the findings made in the Information Exchange Decision, he said, would imply that Balmoral was engaged in the "single and continuous infringement" that the CMA considered the main cartel to constitute (see paragraphs 4.11 to 4.14 of the Main Cartel Decision). That being so, it is irrelevant that Balmoral did not participate actively in all elements of the main cartel.

27. One oddity about these submissions is that they suggest, not that Balmoral was innocent of any breach of competition law, but that it should have been held to have been complicit in the main cartel. That, however, would have seemed a surprising and unfair result when Balmoral had "refus[ed] to join the cartel despite facing significant pressure from the other parties to do so" (to quote from the Main Cartel Decision). As was pointed out by Mr Rob Williams, who appeared for the CMA, the approach that the CMA adopted meant that Balmoral "was held liable for what it did, no more and no less". That has an obvious appeal.

28. To my mind, the submissions advanced by Mr O'Donoghue are not well-founded. It is true, of course, that the two infringements which the CMA found to have been committed had elements in common, but it was nonetheless appropriate to distinguish between them. Although they each involved anti-competitive behaviour, they were different animals. The main cartel was of a stark kind, with longstanding arrangements for bid-rigging, customer allocation and price-fixing. In contrast, the information exchange involved no more than an exchange of commercially sensitive information which reduced uncertainty as regards pricing. The main cartel and the information exchange can both, doubtless, be said to be related to pricing, but that does not make the information exchange a sub-set of the main cartel or render it right to collapse the former into the latter. There were distinct infringements, with different ingredients. As the CAT found (see paragraph 10 above), there were "two strands" to the 11 July meeting, the "continuing attempts to recruit Balmoral to the Main Cartel" (which were rebuffed) and the "discussion of prices" giving rise to the information exchange infringement.

29. I accept that, were there a follow-on claim for damages, tricky issues could arise. That, however, would surely also have been the case had the CMA treated Balmoral as a party to the main cartel. While "undertakings will be jointly and severally liable in damages for the losses caused by the single overall agreement", "the precise role of an undertaking may … be relevant to contribution" (Whish & Bailey, at 108). The respective roles of Balmoral, CST UK, Franklin Hodge, Kondea and Galglass would still, therefore, have been relevant, and they might have been obscured by a holding that Balmoral had participated in the main cartel. Having the two decisions (the Main Cartel Decision and the Information Exchange Decision) probably makes it easier to discern the undertakings' respective roles and responsibilities. In any case, the fact that problematic points could arise in subsequent civil litigation could not have justified a finding that Balmoral had been a party to the main cartel if that conclusion was not otherwise warranted.

30. Turning to the "single and continuous infringement" point, Balmoral raised this in its notice of appeal to the CAT but it did not feature in either Balmoral's skeleton argument for the hearing before the CAT or its oral opening, with the result (as Mr Williams said) that it dropped off the radar. In the circumstances, the CAT can hardly be criticised for saying nothing about it. At all events, I do not think the "single and

continuous infringement" concept applied as regards Balmoral. Balmoral would have participated in the "single and continuous infringement" constituted by the main cartel only if it had "intended to contribute by its own conduct to the common objectives pursued by all the participants" (see paragraph 20 above). It did not. The parties to the main cartel had the objective of eliminating all competition and dividing the market between them equally. Balmoral did not share that objective and, more specifically, did not subscribe to the cartelists' overall plan of agreeing to share customers, fix prices and rig bids.

31. Mr Williams advanced an alternative argument to the effect that, where the "single and continuous infringement" criteria are met, the relevant authority is entitled to invoke the concept but under no obligation to do so. He pointed out that Balmoral had cited no authority for the proposition that, having found that certain undertakings were party to a "single and continuous infringement", a competition authority is precluded by law from holding another undertaking liable for a less extensive infringement which reflects its own more limited conduct. Relying on the analysis of the Advocate General in the *Intel* case (paragraph 19 above), he submitted that the "single and continuous infringement" concept exists to help with enforcement of the law, not to provide a stick with which to beat the authorities.

32. This argument has a good deal of attraction, but the conclusions I have already arrived at make it unnecessary for me to express a view on its correctness and I think it better not to do so. Whish & Bailey notes (at 106) that the General Court has said that the Commission is bound to find a single overall agreement where it has "objective reasons" for that. The authority cited is Cases T-373/10 etc *Villeroy & Boch Austria GmbH v Commission* EU:T:2013:455, where the General Court said (in rough translation) that the Commission "was required to make such a qualification [i.e. characterisation as a single infringement] if there were objective reasons for concluding in this case the existence of a single offence rather than separate offences" (see paragraph 36 of the judgment). On appeal, however, the CJEU did not express agreement with the General Court's observation, but rather spoke of the Commission being "entitled" to attribute liability in respect of conduct as a whole (see Case C-626/13 P *Villeroy & Boch Austria GmbH v Commission* ECLI:EU:C:2017:54, at paragraph 62 of the judgment).

33. Be that as it may, this ground of appeal fails. Balmoral's arguments imply that the CMA's only option was to hold Balmoral liable for a more serious infringement than it had in fact committed. I agree with Mr Williams that that would be absurd, and I do not consider that to have been the case.

Ground (ii): The legal test

34. The argument here was that the CAT had adopted an impermissibly strict approach to the test for "object" infringement in the context of information exchanges. The CAT, it was said, had come close to taking the (erroneous) position that *any* exchange of pricing information between competitors constitutes an "object" infringement. The true legal position, Balmoral suggested, can be seen from paragraph 33 of the judgment in the *T-Mobile* case in which the CJEU said (echoing what was said in the *"Suiker Unie"* case – see paragraph 17 above):

> "While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market."

(Underlining added.)

35. However, the CAT cited this very paragraph in its own judgment (at paragraph 45). More than that, the CAT explained why it considered the exchange of pricing information that took place at the 11 July meeting to be harmful to competition in the particular context. It said, for example, that, here, "A single indication as to future pricing may therefore affect a material number of bids and a material value of potential work" (paragraph 103 of the judgment), that "the significance of the price exchange information … was not simply in the numbers themselves but as an indication to Mr Snee and Mr Dean (whether or not it was true) that Balmoral was not intending to push prices down" (paragraph 104), that "an exchange of pricing intentions at a single meeting has the potential to affect the prices bid over a significant period into the future" (paragraph 105), that "this is a market in which a one-off exchange of pricing information is an object infringement of the competition rules" (paragraph 106), that "the prices discussed went well beyond generic pricing" (paragraph 109), that "CGSTs are a sufficiently commoditised product for price information to be valuable among competitors" (paragraph 109) and that "the Meeting provided an opportunity for the parties to confirm their understanding of what prices were being charged for particular tanks directly from their competitors and, moreover, to gain a better understanding of what prices their competitors might charge in the future" (paragraph 122).

36. This ground of appeal does not, accordingly, succeed.

Ground (iii): Uncertainty reduction

37. It is, Balmoral contends, impossible to determine whether a particular exchange of information has reduced uncertainty between participants in a given market without (i) identifying the participants' state of knowledge before the exchange, (ii) identifying their state of knowledge afterwards and (iii) comparing the two. The CAT, so Mr O'Donoghue argued, failed to undertake this exercise. In this connection, Mr O'Donoghue noted that Mr Joyce had met Mr Snee, Mr Dean and Mr Stringer on a number of occasions before 11 July 2012 and argued that a single meeting (such as that on 11 July) is less likely to raise concerns than a series of meetings.

38. As, however, is confirmed by the *T-Mobile* case (see paragraph 18 above), a single meeting is capable of giving rise to a "concerted practice", and the CAT has given

reasons for the 11 July 2012 meeting having done so (in particular, in paragraphs 103-106 of its judgment). As for the earlier meetings, the CMA gave details of these in paragraphs 3.13 to 3.25 of the Information Exchange Decision and the CAT referred to them in paragraphs 16 and 17 of its judgment. There is no suggestion that pricing information was exchanged at these meetings in the way that it was on 11 July. In fact, on Balmoral's own case Mr Joyce did not provide *any* information about Balmoral's prices and pricing intentions at the previous meetings.

39. Mr O'Donoghue wisely placed little emphasis on this ground of appeal. I do not accept it.

Ground (iv): Penalty

40. This ground of appeal is founded on the equal treatment principle. This was applied to fines in Joined Cases T-236/01 etc *Tokai Carbon Co Ltd v Commission of the European Communities* [2004] 5 CMLR 28, where the Court of First Instance referred (at paragraph 219) to:

> "the principle of equal treatment, according to which it is prohibited to treat similar situations differently and different situations in the same way unless such treatment is objectively justified".

41. Balmoral's complaint is that it was the only undertaking fined for the information exchange infringement. Franklin Hodge, Kondea and Galglass, which were also involved in the infringement and whose conduct (so Mr O'Donoghue said) was more deserving of censure than Balmoral's, had no penalty imposed on them. The CMA said in paragraph 5.3 of the Information Exchange Decision that it had:

> "not imposed an additional penalty on the Settling Parties in respect of their participation in the information exchange infringement taking into account the particular circumstances of the case".

42. The CAT addressed this point in paragraph 170 of its judgment, where it said:

> "We were initially concerned by the fact that the other participants in the Information Exchange Infringement had not been subject to any fine at all even though the CMA treated that infringement as separate from the Main Cartel. However Mr Williams reminded us that section 36(7A) of the Competition Act provides that in fixing a penalty the CMA must have regard to the need for deterrence on the undertaking concerned and on others. The question for the CMA when considering whether to impose a penalty on Franklin Hodge, Galglass and Kondea for the Information Exchange Infringement was whether it was necessary to impose a fine in addition to the fine imposed by the Main Cartel Decision for the statutory purposes, including deterrence. The CMA was, we accept, entitled to conclude that it could not justify imposing an additional fine on the Main

> Cartel members for their participation in the Information Exchange infringement, applying the statutory test."

43. Mr O'Donoghue argued that the CAT and CMA had ignored both the seriousness of the infringement (despite being required to have regard to it by section 36(7A)(a) of the 1998 Act) and the need to deter, not merely the infringers, but "others" (notwithstanding section 36(7A)(b)). The different treatment of Balmoral, on the one hand, and Franklin Hodge, Kondea and Galglass, on the other, offended the principle of equal treatment.

44. Mr Williams' answer was essentially that Balmoral was not in the same position as Franklin Hodge, Kondea and Galglass. Unlike Balmoral, Franklin Hodge, Kondea and Galglass were having large penalties relative to their size imposed on them (in two cases, in fact, such as to hit the statutory cap at 10% of turnover under section 36(8) of the 1998 Act) for involvement in the main cartel. Those penalties, moreover, were attributable to anti-competitive behaviour over a period that encompassed the 11 July 2012 meeting and, indeed, which included the attempts at that very meeting to recruit Balmoral to the main cartel. The CMA and the CAT had, of course, to have regard to the seriousness of the information exchange infringement and the need to deter others as well as the malefactors, but those were not the only relevant considerations.

45. I find this compelling. I agree with the CAT that the CMA was entitled to conclude that it could not justify imposing an additional fine on Franklin Hodge, Kondea or Galglass. Balmoral was not in the same position as those undertakings and so the decision to fine only it, and not Franklin Hodge, Kondea and Galglass as well, was not inconsistent with the equal treatment principle. It is not the case that similar situations were being treated differently.

Conclusion

46. I would dismiss the appeal.

The Chancellor of the High Court:

47. I agree.