

Antitrust decision: Water Tanks Cartel

The Competition and Markets Authority (CMA) has found that five suppliers of steel water tanks breached competition law, imposing fines exceeding £2.7 million.

What does this mean for you?

On 19 December 2016, the CMA issued two infringement decisions in respect of suppliers of galvanised steel tanks. Galvanised steel tanks are used for water storage in larger buildings, such as schools, hospitals and other commercial and public buildings, as well as for the supply in the fire sprinkler systems.

Cartel decision

The CMA found that **Franklin Hodge Industries Ltd, Galglass Ltd, Kondea Water Supplies Ltd and CST Industries (UK) Ltd** had agreed to share the market between them, fix prices and rig bids. **The cartel arrangements took place between 2005 and 2012.** The four businesses agreed prices behind the scenes and gave an impression to their customers that competing bids were submitted. Whereas in fact, the bid prices were agreed in advance, with companies quoting 'winning' price for the customer group allocated to them. According to the information provided by the CMA, these arrangements were agreed and reinforced at regular meetings between the participating companies over a seven-year period, as well as through contacts concerning particular bids.

Franklin Hodge Industries, Galglass and Kondea were issued with fines totalling more than £2.6 million. CST Industries was granted immunity for having brought the cartel to the CMA's attention and for co-operating with the investigation.

Information exchange decision

The CMA found that **Franklin Hodge Industries Ltd, Galglass Ltd, KW Supplies Ltd and Balmoral Tanks Ltd** had held discussions where commercially sensitive information was exchanged. This had the effect of reducing uncertainty about future pricing intentions between the four businesses.

Balmoral Tanks was fined £130,000 participating in unlawful information exchange, but had no involvement in the cartel.

How does this affect you?

Companies who purchased a range of steel tanks from these five companies, either directly or via a contractor during the period 2005 and 2012, may be entitled to claim damages in the UK courts for the 'overcharges' resulting

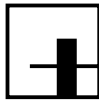
from the cartel or the information exchange. In simple terms, the damages may be calculated as a difference between the price paid and the price that would have prevailed in a non-cartelised market. The fines imposed serve as an indication of the size of the infringement, however, the amount of damages available to the parties harmed by the cartel may in fact be higher. As a ballpark calculation, it is useful to note that economic studies, generally accepted by the competition authorities, find that cartel overcharge may be between 10 - 20%.

New rules for actions for damages

On 1 October 2015, the Consumer Rights Act 2015 entered into force. The Act aims to facilitate actions for damages following competition law infringements and introduces changes in three key areas. First, the Competition Appeal Tribunal (CAT) now has broader jurisdiction and improved procedures. The Act also makes class-actions seemingly easier, as the 'opt-in' regime is replaced by collective actions on an 'opt-out' basis. Lastly, the CMA has been given authority to approve voluntary redress schemes.

Funding a claim

The costs to pursue a complex litigation will be a key factor for businesses and individuals when considering the merits of pursuing a damages action. However, there are many ways to fund competition damages actions which can significantly reduce claimants' 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 an action 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.



SHEPHERD+ WEDDERBURN

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) 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 the claimant.

After the Event Insurance

The usual rule in English and Scottish 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 the claimant against potential liability in the event you lose the case. An ATE policy typically covers claimant's own disbursements, including Counsel's fees, and the

other side's costs (subject to a maximum limit). ATE, 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.

Shepherd and Wedderburn

Shepherd and Wedderburn competition law experts and litigators have experience of competition damages claims. We regularly act not just in the defence of companies but also to pursue individual large claims for companies both in the High Court and in the CAT. Outside of the UK we work with specialist local lawyers to pursue such claims.

We have significant experience in arranging third party funding for clients and have recently secured third party funding for a portfolio of claims across Europe. We do not receive a commission nor do we have a financial stake in arranging such funding. We would be happy to discuss funding options with you as part of our service in protecting your interests and maximising the chances of success where appropriate.

"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 able to give us very fast and business-focused advice."

Chambers and Partners

"They combine their competency with efficiency. They don't over-lawyer a case and they identify the correct route to a solution."

Chambers and Partners



Gordon Downie

Partner

T +44 (0)131 473 5162

M +44 (0)771 863 7298

E gordon.downie@shepwedd.com



Fiona Parker

Senior Associate

T +44 (0)141 566 7220

M +44 (0)791 240 6023

E fiona.parker@shepwedd.com



Joanne McDowall

Senior Associate

T +44 (0)141 566 8565

M +44 (0)779 560 0451

E joanne.mcdowall@shepwedd.com

