

Disclosure of leniency materials refused but foreign implementation evidence allowed

09/10/2017 (EU/Competition)

On 4 October 2017, Rose J heard an application for specific disclosure in the foam cartel damages action. The Defendants, Recticel, had been found by the European Commission to have participated in a price-fixing cartel relating to the sale of flexible polyurethane foam for five years. The Claimants, who used to trade under several brand names including Silentnight, manufactured mattresses using foam purchased from Recticel and are pursuing Recticel for follow-on damages.

Standard disclosure having already taken place, the Claimants applied for specific disclosure of Recticel's leniency materials. In particular, they sought to inspect draft speaking notes created by the lawyers who gave Recticel's oral corporate leniency statements to the European Commission. The Claimants also sought documents relating to the implementation of the cartel in three countries proximate to the UK. The Defendants contended that the leniency statements should not be disclosed on the grounds of public interest in the protection of leniency materials under the principles in Case C-360/09 *Pfleiderer* and that, in any event, they were covered by legal professional privilege.

Rose J refused to order that the leniency materials should be disclosed. She held that the 2006 leniency regime had been set up to prevent those types of statements falling into the hands of third parties, reflecting the Commission's view (which was before the court in the form of letters from the Commission to the parties) that to disclose them undermined the leniency programme to the detriment of public interest. Further, Rose J found that the refusal of disclosure would not make it impossible for the claimants to pursue their claim. By contrast with the decision of Roth J in *National Grid* [2012] ECC 12, Rose J did not find it necessary herself to inspect the leniency documents in order to reach her conclusion. As a result of her decision on this point, Rose J did not consider whether the decisions were also covered by legal professional privilege.

However, Rose J ordered that documents relating to the implementation of the cartel in France, Belgium and the Netherlands were relevant and should be disclosed. Even though the Claimants had only purchased foam in the UK, Rose J found that the extent to which it could be shown that price co-ordination was implemented in the neighbouring countries could cast light on whether, or to what extent, Recticel had implemented price co-ordination in the UK. She further suggested that the evidence might also be useful to counteract any proffered alternative explanations for price increases.

Aidan Robertson QC and Sarah Love represented the Claimants, Silentnight, instructed by Clyde & Co.

Daniel Jowell QC and Emily MacKenzie represented the Defendants, Recticel, instructed by Allen & Overy LLP.

RELATED BARRISTERS

- Daniel Jowell QC
- Sarah Love
- Emily MacKenzie
- Aidan Robertson QC