

Recovering antitrust fines and costs from directors – Safeway appeals to UK Supreme Court

On 12 January 2011, Safeway announced its intention to appeal to the Supreme Court against a ruling by the Court of Appeal rejecting Safeway's move to sue its directors and employees to recover competition fines payable to the UK competition regulator, the Office of Fair Trading ("OFT").

In 2008, Safeway commenced proceedings in the High Court against a number of its employees. It argued that these employees were responsible for Safeway's involvement in cartel conduct in the dairy sector and sought to hold them liable for the £5.7 million fine Safeway had agreed to pay the OFT in order to achieve early resolution of the OFT's investigation into this conduct. The employees objected to the proceedings, but in January 2010, the High Court decided to allow them to go ahead.

The employees appealed this decision to the Court of Appeal, which issued its judgment on 21 December 2010. In its judgment, the Court of Appeal overturned the High Court decision and held that, as a matter of public policy, a company may not recover competition law fines and the costs of a competition law investigation from the employees or directors involved in the infringement. The fine and investigation costs were the responsibility of the company alone.

The Court applied the maxim that a claimant can not recover damages for the consequences of its own wrongful acts. It held that the wrongful acts in question were attributable to Safeway, as it was made personally liable for the cartel conduct concerned – it was not made vicariously liable for the acts of its employees. The OFT may impose fines only on businesses that have

breached competition law and therefore only the relevant business is liable for the penalty. The Court also stated that competition law policy, in particular in relation to deterrence, would be undermined if companies were able to pass on their liability for competition law infringements to their employees.

The Court of Appeal accepted that the case concerned a "*novel point of law suitable for determination by the Supreme Court*" but denied Safeway permission to appeal.

Safeway has now indicated that it intends to seek permission to appeal to the Supreme Court because it believes that an important principle of law is at stake which is in the public interest.

Since October 2009, when it came into being, the Supreme Court has received a number of applications to review cases raising competition law issues, but it has not accepted any applications as yet. If it were to agree to review the case, it remains to be seen whether it would confirm the Court of Appeal's judgement or find in favour of Safeway. This would be an eagerly awaited judgement – if Safeway were to succeed in its appeal (although its prospects of success seem slim, given the views expressed by the Court of Appeal), the ruling would raise the prospect of a new form of individual risk for directors and employees of companies that are found to have infringed the competition rules.

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