ICLN Newsletter July 2023

By Jens Munk Plum (Denmark)

Recent developments in Action for damages in Greenland

**High court judgment on the importance of proving loss in action for damages**

*The High Court of Greenland issued a judgment on 25 May 2022 in a case related to price exchange between two contracors, in which it found two contractors liable for infringement but, nonetheless, awarded no damages as Greenland's Self-Government had proven no loss.*

The case has its origin in a tender from 2008 related to the expansion of the airport in the Greenlandic city of Kangerlussuaq with Greenland's Self-Government as the contracting authority. Two contractors had submitted bids and one of them was awarded the contract. After the award of contract, in 2012, the two contractors were both convicted of exchanging prices prior to the tender. Following the criminal legal proceedings, Greenland's Self-Government filed a claim before the courts of 9 million Danish kroner for follow-on damages claiming this to be the surcharge.

The High Court found with reference to the criminal legal proceedings, unsurprisingly, that the contractors were liable for damages.

The High Court then turned to the prerequisite of a loss as for awarding damages. The High Court noted that this required Greenland's Self-Government to have been charged a higher price than otherwise as a result of the coordination between the contractors. The High Court initially noted that Greenland's Self-Government bore the burden of proof in this respect.

For the purpose of ascertaining a loss, an independent expert witness had been appointed to assess whether the price for the contracted work exceeded the ordinary market price. The independent expert witness had submitted numerous reports, containing different calculations, which the High Court found to be thorough. Furthermore, the High Court found the independent expert witness to be competent and experienced within the field required and that the independent expert witness had been impartial. One error in the calculations made no difference in this respect.

The independent expert witness had in his reports and during his testimony before the court declared his assessment to be that the paid to price the awarded contractor was within ordinary market price. The actual price calculated by the independent expert differed by approximately 15 %, but in this respect, the independent expert witness had accounted for the risks in his calculations and that the actual price was still within an ordinary market price in his overall assessment. The independent expert witness had also, on the parties' request, performed different supplementary calculations based on differing facts.

On this basis, the High Court did not find reason to set aside the independent expert witness' assessment.

Furthermore, the High Court found that it was necessary, as for the assessment of whether the price was to be considered market conform, to take into account the extraordinary market conditions in the city of Kangerlussuaq at the time of the tender.

In conclusion, the High Court found that Greenland's Self-Government had not documented that the price paid to the winning contractor had been above market price. Therefore, no surcharge was paid as a result of the infringement, and Greenland's Self-Government was awarded no damages.

The case is noteworthy, in so far that no damages was awarded despite the court finding the contractors liable. Usually with regard to price fixing of this manner, it is reasonable to operate with a presumption of loss (which is also stipulated under the EU's damages directive), but the case highlights that this presumption can be rebutted. However, the case should also be viewed in light of the extended procedure with the independent expert witness. Only rarely will the court go into as much detail about the submitted reports, as was the case, and the High Court's decision to find no loss proven was largely a result of finding the reports qualified and trustworthy.

**Judgment on calculation of damages in case of refusal to supply**

*The Court of Greenland issued a judgment on 9 November 2022 in an action for damages case related to refusal to supply. The court found the dominant undertaking liable and went on to calculate damages as the profits obtained by the claimant following the dominant undertakings ceasing of its refusal to supply.*

The case related to a decision from November 2016, where the Competition Appeals Tribunal found a telecommunications provider to have infringed competition law, as it had refused to supply other telecommunications providers, including the claimant, with a specific connection on the public telecommunications network and to a SIP-trunk-product.

Referring to the decision from the tribunal, the court held that the telecommunications provider was liable for damages. Notably, the court found that, despite the decision from the tribunal only explicitly relating to the period between October 2014 until May 2016, the telecommunications provider was liable for damages from already September 2013, as the behaviour, which had been found unlawful by the tribunal, was already in effect at this time.

Turning to the calculation of damages, the claimant divided its claim in three parts with the most substantial being the claim for direct loss of profits.

The claimant had calculated this part of the claim as the profits obtained in the years following the telecommunications provider having ceased refusing to supply. This was to be the profits lost during the years when the telecommunications provider had refused to supply. The court found that this part of the claim, despite the insecurities inherent in this hypothetical method of calculation, was sufficiently documented and awarded the full claimed amount. The method as such is in line with the European Commission's *Practical guide quantifying harm in actions for damages based on breaches of article 101 or 102* in relation to exclusionary practices.

The case provides interesting insight as to a possible manner of calculating damages in case of refusal to supply. However, the judgment might still be seen as based on the specific circumstances of the case and the documentation put forth.