



Damages claims in the UK Competition Appeal Tribunal

ALL APPEALS HAVE TO BE COMPLETED BEFORE THE TIME LIMIT FOR BRINGING CLAIMS STARTS TO RUN

THE RULING IN *BCL OLD CO LIMITED AND OTHERS V BASF AND OTHERS*

The time limit for bringing damages claims before the UK Competition Appeal Tribunal does not start to run until all appeals against the underlying infringement decision have been determined. This applies whether the appeal is against the substance of the infringement decision or merely against the level of the fine imposed. It also applies to damages claims against all addressees of the infringement decision, even if they have not all filed appeals.

The damages claim brought by BCL arose as a result of the well-publicised vitamins cartels of the 1990s. The European Commission's decision found that a number of undertakings, including entities in the BASF group, had participated in price-fixing and market-sharing arrangements for many years. BASF lodged an appeal with the Court of First Instance of the European Communities (CFI) seeking the annulment of the Commission decision or a substantial reduction in the fine. By a judgment of 15 March 2006, the CFI reduced the level of BASF's fine.

The claimants were all indirect purchasers of vitamins from BASF. In 2004, they brought claims for damages in the Competition Appeal Tribunal (CAT) against other addressees of the Commission's decision. Those proceedings were withdrawn on agreed terms by orders of the CAT dated 11 February 2005 and 24 November 2005. On 13 March 2008, the claimants brought an action for damages in the CAT against BASF.

In its defence, BASF argued that the claimants' claim was time-barred and the CAT agreed to hear this point as a preliminary issue.

The time-limit for bringing follow-on claims in the CAT

Under section 47A of the Competition Act (CA) 1998, a person who has suffered loss or damage as a result of an infringement of competition law may make a claim for damages in proceedings brought before the CAT. Proceedings may be brought as of right where either the Office of Fair Trading (OFT) or the Commission

has adopted a decision finding that either UK or EU competition law has been infringed. If there is no such infringement decision, the CAT's permission is required before claims can be brought.

However, by virtue of section 47A(8) CA 1998, no proceedings may be brought without the CAT's permission until the expiry of the period for appealing against a Commission decision or, if an appeal is lodged, until those proceedings have been determined, including, if relevant, the determination of any appeal to the European Court of Justice.

BASF argued that the filing of its appeal against the Commission decision did not delay the start of the two-year period for bringing the claim since the appeal was only in respect of the fine imposed and did not include an appeal against the finding of an infringement. The claimants, by contrast, argued that *any* appeal against the decision is sufficient to delay the start of the two-year time limit for bringing a claim.

The CAT found for the claimants. It held that the purpose of the provisions determining when time starts running is to prevent claims for damages being brought without permission before the decision relied upon has become definitive, in the sense that *all* appeals against that decision which may bear upon issues relevant to the determination of a monetary claim before the CAT have been determined. In particular, the CAT noted that the findings made by a competition authority in deciding to impose, and in calculating the level of, a penalty may well be relevant to, and be determined by, the nature and extent of the infringement which is being penalised.

Implications of the judgment

The BASF judgment appears to complete the clarification of the rules on the running of time for bringing damages claims in the CAT that began with the judgment in *Emerson Electric Co and others v Morgan Crucible Company plc and others*. In that ruling, the CAT clarified that the delay in the start of the running of time that is caused by lodging an appeal against a Commission infringement decision applies not just in relation to claims for damages against appellants, but also to claims for damages against infringers that have not appealed. This ruling was welcome as, had the CAT ruled differently, the result could have been to encourage the bringing of follow-on claims only against whistle-blowers or immunity recipients, who typically do not appeal Commission infringement decisions – and the effect could have been to undermine the Commission’s leniency programme.

The BASF ruling clarifies that this delay in the running of time applies irrespective of the scope of the appeal in question. Claimants can therefore assume that CAT proceedings will have to wait in most cases until appeal proceedings in Luxembourg (for example) have run their course. They will not be at risk of time bar in the meantime.

The CAT pointed out, however, that it remains open to claimants to come before the CAT and argue that permission should be granted to bring their follow-on claims before final determination of the appeal. This was what happened in *Emerson*. In those proceedings, permission was granted to bring proceedings against the whistle-blower before the appeals by the other infringers had been determined because the whistle-blower had a history of destroying documents. Allowing proceedings against the whistle-blower to commence facilitated the preservation of documents. Permission was, however, refused in relation to the other infringers.

In response to the suggestion that this interpretation would cause unnecessary delay in the filing of follow-on claims, the CAT in *BASF* also pointed out that claimants are, in any event, entitled to bring actions for damages before the ordinary courts at any stage, with or without the benefit of an infringement decision. Although this is clearly correct, it seems likely that the ordinary courts will take a similar approach to allowing follow-on claims

to proceed pending the determination of European appeals. In other words, those proceedings are likely to be stayed at some stage pending the determination of the Luxembourg appeals.

The result of these rulings is that it is likely to be many years after the adoption of an infringement decision before follow-on claims are brought or determined. This will postpone for cartelists the ability to ‘close the door’ on past misconduct and require assessment of potential exposure to damages for longer than might otherwise have been the case.

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