



Follow-on damages litigation in competition cases

RECENT DECISIONS MAKE CLAIMANTS' PROGRESS EASIER IN ENGLAND

Claimants seeking to recover alleged losses arising from infringements of EC competition law will be able to progress follow-on damages litigation in England, even if appeals are pending against European Commission decisions finding infringement, following the recent ruling in *National Grid v ABB*. Parties may be required to finalise pleadings, and possibly give some disclosure, but no trial can take place while there are pending appeals.

On a similar note, the Court of Appeal has ruled in *BCL v BASF* that if an appeal relates to a fine only, a claimant will not need permission to bring a damages claim in the Competition Appeal Tribunal.

Claimants may progress High Court follow-on damages claims

Where the European Commission has found an infringement of EC competition law, any party that has suffered loss as a result of that infringement has a right to damages.

In England, follow-on actions may be brought in the Competition Appeal Tribunal (CAT) (under section 47A of the Competition Act 1998) or in the High Court. The CAT is a specialist competition tribunal with a specific statutory jurisdiction to hear certain competition damages claims.

Until recently, it had been thought that claims could not be progressed in the CAT without its specific permission if there was an appeal pending against the relevant Commission decision to the Court of First Instance (CFI) or by way of further appeal to the European Court of Justice (ECJ). This view was based on the CAT's ruling in *Emerson Electric Co v Morgan Crucible* [2007] CAT 28 (*Emerson I*). The CAT drew no distinction between appeals on the substance of the infringement and appeals against the size of the fine. The CAT's approach was based primarily on the desire to avoid wasted time and costs that may result if claims had to be amended (or abandoned) following the outcome of appeals to the CFI or ECJ. The consequence of *Emerson I* was that claimants started to issue proceedings in the High Court, rather than waiting to litigate in the CAT, because there is no equivalent 'permission' requirement in High Court litigation.

The High Court has taken a somewhat different approach. In *National Grid Electricity Transmissions v ABB and others* [2009] EWHC 1326 (Ch) (the NGET proceedings), litigation arose from the Commission Decision in January 2007 finding a cartel in the gas-insulated switchgear market.

In 2008, the claimant issued proceedings in the High Court against companies in four corporate groups, three of which have appeals to the CFI pending.

The defendants sought to have the High Court proceedings stayed (ie suspended) with immediate effect. All the parties agreed that, because of the risk of any court ruling running counter to a decision of the Commission, no trial of the action should take place before all CFI/ECJ appeals had been finally determined. However, there was a dispute over whether the proceedings should be stayed with immediate effect or whether the litigation should be allowed to progress. The defendants contended that the stay should be immediate to avoid the risk of potentially wasted time and costs.

In a judgment last Friday (12 June 2009), the High Court decided not to order an immediate stay, but to let the case progress to close of written pleadings. It also ruled that it would be premature to decide that no disclosure should take place before the resolution of the appeals to the CFI/ECJ. The parties were therefore ordered to meet to try to agree the scope of appropriate disclosure at this stage. If the outcome of any CFI/ECJ appeal meant that costs had been wasted by the defendants, the claimants could be held liable for those costs. The Court accepted

(as the parties had agreed) that the matter could not go to trial while there were pending CFI/ECJ appeals, but it did not take any position at this stage on when it would be appropriate to suspend further progress in the proceedings.

CAT proceedings may be progressed if the CFI/ECJ appeal is against fine only

BCL Old Co Ltd and others v BASF SE and others [2009] EWCA Civ 434 has established that, if CFI or ECJ appeals relate exclusively to the size of a fine, as opposed to the annulment of an infringement decision, no permission is required to bring a claim for damages before the CAT.

The proceedings arose out of the Commission Decision of November 2001, which found that BASF and others had participated in the vitamins cartels of the 1990s. BASF brought an appeal against the Decision in the CFI, claiming that the CFI should substantially reduce the fine imposed on it. It did not, however, seek to challenge any of the infringement findings. In March 2006, the CFI handed down its judgment, reducing the fine imposed on BASF.

Proceedings before the CAT were issued in March 2008. The claimants apparently believed that this accorded with the statutory two-year time limit that runs from final determination of the outcome of appeals against the relevant Commission decision. BASF, however, argued that the claim was time barred and should have been brought earlier because an appeal against a fine is not an appeal against an infringement decision. It argued that the statute should be construed as referring only to appeals against infringement decisions.

The CAT had rejected BASF's argument and held that there was no relevant distinction between appeals against infringements and appeals against penalties. However, the Court of Appeal disagreed. Appeals against penalty findings did not stop time running for the purposes of the two-year limitation period in section 47A. Only appeals against infringements did so. The Court of Appeal acknowledged that there may be some instances in which an appeal against a penalty would have implications for a follow-on damages claim and noted that the CAT had the power in such cases to stay a claim pending the decision of a penalty appeal. In 'an extreme

case' the CAT could also extend the time limit for making a claim. It remains to be seen whether the CAT will regard *BCL v BASF* as 'extreme'.

The implications of the recent judgments

Emerson I appeared to signal to claimants that follow-on damages litigation should not be started until after all appeals against the relevant Commission decision had been resolved. The NGET proceedings and *BCL v BASF* send a different message. Although permission is needed to start proceedings in the CAT while an appeal against a Commission infringement finding is on foot, this is not the case if the appeal relates only to a fine. Those subject to Commission decisions and contemplating appeals should therefore keep this in mind in determining the scope of any appeal against the relevant decision.

Perhaps more significantly, the NGET proceedings establish that, by issuing proceedings in the High Court (rather than the CAT), claimants can avoid any delay to the start of their claims that might otherwise be caused by appeals against Commission decisions. Although follow-on damages actions will not go to trial while appeals are pending before the CFI or ECJ, claims in the High Court will be allowed to progress at least through written pleadings and, possibly, further. It therefore appears more likely now that infringing companies will face early claims in the High Court, even if there are appeals to the CFI or ECJ.

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