

# Don't delay

## Bringing damages actions in the UK's Competition Appeal Tribunal

by **Kate Botting and Simon Albert\***

In its first antitrust case, the UK Supreme Court has confirmed the deadline for bringing a follow-on action in the CAT.

The case involved a damages claim by BCL against BASF, following on from the European Commission's decision in the vitamins cartel case. The Supreme Court has established that the deadline for bringing a follow-on claim is two years from the point at which the relevant infringement decision – of the European Commission or a UK competition regulator – can no longer be appealed. Appeals against penalty and not against infringement are not relevant to this calculation.

The Supreme Court found that any previous uncertainty surrounding this deadline did not breach European law principles of effectiveness and legal certainty. It also found that, even if the law surrounding the limitation period for follow-on actions had been in breach of these European principles, it would not have prevented BASF from relying on the defence of limitation prior to the uncertainty being resolved.

The practical implication of the Supreme Court judgment is that potential litigants should not delay when submitting a claim for follow-on damages in the CAT.

This case also generated an important decision on the type of damages recoverable in an action for damages based on competition law infringement. Together with that decision and the government's ongoing consultation process to encourage private damages actions, including opt-out class actions, the Supreme Court's ruling will be of interest to all those seeking competition damages in the UK.

### Vitamins cartel

In its decision of 21 November 2001, the European Commission found that 13 vitamins companies (including BASF) had infringed competition law by engaging in a series of cartels aimed at market-sharing and price-fixing within the European Union. BASF appealed against the penalty to the European Court of First Instance (CFI, now the EU General Court) and on 15 March 2006 saw its fine reduced from €296.16m to €236.845m. It did not appeal to the European Court of Justice.

### Compensatory damages

In 2005, a number of vitamin pre-mix and food processing companies brought competition law damages actions in the High Court against Hoffman-La Roche, Sanofi-Aventis and BASF on the basis that they had suffered loss as a result of the vitamins cartel. The companies claimed that they were entitled to exemplary and restitutionary damages, and an account of profits from the cartel members. This raised a novel point: could the victims of antitrust violations claim remedies beyond the normal compensatory damages awarded in tort cases?

In a preliminary hearing in 2007, the High Court said that compensatory damages were in principle available to the claimants and that they were in a position to claim them.

It held that exemplary damages were not available, as the European Commission had already imposed penalties on the vitamin producers. It was not the place of a national court to decide whether the European Commission had sufficiently punished those companies for their infringements. By awarding exemplary damages, the UK courts would risk infringing the EU principle of double jeopardy.

Restitutionary damages were also not available, as they were normally only an option in very exceptional non-proprietary cases – in particular where claimants could prove the defendant's gain from the infringement but their inability to prove financial loss meant that compensatory damages were not an option.

Finally, an account of profits was an inappropriate remedy. This was not just because compensatory damages were available, but also because of the potential number and differing circumstances of claimants that could lay claim to cartel members' profits.

One of the claimants in the High Court case, Devenish, appealed against the court's decision rejecting the availability of restitutionary damages and an account of profits.

On 14 October 2008, the Court of Appeal upheld the High Court's ruling. In particular, it ruled that the UK courts were bound by previous case law (*Stoke-on-Trent CC v Wass* 1998) on the categories of tort attracting gains-based damages. The relevant tort for competition law claims is breach of statutory duty and this did not attract gains-based damages.

### Your two years starts....now

Meanwhile, on 13 March 2008, BCL issued follow-on proceedings against BASF in the CAT, claiming damages for loss suffered as a result of BASF's participation in the vitamins cartel.

BASF argued that BCL's claim was out of time, since it fell outside the two-year limitation period applicable to private follow-on actions. Under the relevant legislation, it argued, the two-year time limit began on the date when an appeal against the infringement decision could no longer be made and when there were no outstanding appeals against the infringement decision.

BASF reasoned that, in its case, the two-year time limit started to run from 31 January 2002, the deadline for appealing against the Commission's 2001 decision on infringement to the CFI. BASF argued that the start of the limitation period would be postponed only if it had appealed against the Commission's *infringement* decision – which it had not done – and that this was clear from the wording of the Competition Act.

The CAT disagreed and declared BCL's application to be in time. However, the CAT's decision was overturned on 22 May 2009 by the Court of Appeal, which upheld BASF's reasoning.

BCL then applied to the Competition Appeal Tribunal for permission to appeal out of time.

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On 19 November 2009, the CAT held that, although it had the discretion to allow a follow-on action to proceed out of time, it would not exercise its discretion in BCL's case. BCL appealed against this decision to the Court of Appeal on the grounds that the CAT should have exercised its discretion in BCL's favour.

On 12 November 2010, the Court of Appeal overturned the CAT's decision holding that, under the relevant legislation, the CAT did not have the discretion to allow a follow-on action to proceed out of time and that therefore BCL's appeal could not be upheld.

### BCL appeal

Despite this second adverse ruling from the Court of Appeal, BCL appealed to the Supreme Court on two further grounds:

(1) the UK statutory limitation period for follow-on actions in the CAT was inconsistent with European legal principles of effectiveness and legal certainty; and (2) the lack of effectiveness and legal certainty surrounding the limitation period meant that a civil party should not be able to rely on the limitation defence.

### Supreme Court

In its judgment, the Supreme Court reiterated the Court of Appeal's finding that "an appeal by [a defendant] against a fine alone is not in any sense a relevant appeal which can postpone the time for a follow-on claim". In fact, Lord Mance referred to this position as "unchallenged and unchallengeable" in English law, irrespective of the level of uncertainty that prevailed prior to the Court of Appeal's first judgment.

The Supreme Court judges unanimously agreed that the limitation period for follow-on actions had not been ineffective and legally uncertain prior to the Court of Appeal's judgment, at the time when BCL was considering its litigation options. The exact commencement of the limitation periods under UK law had always been sufficiently clear, precise and foreseeable.

As a result of this decision, BCL's final appeal has failed and it is now unable to recover any damages from BASF.

### Don't delay

The practical lesson to be learnt from the *BCL v BASF* affair is not to delay in submitting an application for follow-on damages in the CAT.

Only an appeal against a decision finding an *infringement* will stop the two-year limitation period running in a private action for damages. The courts have given a narrow interpretation to the reference in the Competition Act to the start of the limitation period resting on the presence or absence of an appeal against "a decision finding an infringement". It does not apply to an appeal relating solely to the level of a fine imposed by a competition authority. Private actions against an infringer in the CAT must therefore be brought within the two years following the expiry of the deadline for appeal against the *infringement* decision without an appeal having been filed.

The difficult task for potential litigants is determining whether an appeal made by an infringer is actually an appeal against an infringement, or the penalty for the infringement, or both. First, this is not necessarily clear from the published details of the appeal. Second, as the Supreme Court conceded in this case, an appeal against the penalty may actually challenge the infringement, or both.

A further problem arises where the infringer appears from the notification of the appeal published in the Official Journal to be appealing the penalty (for example, arguing that the European Commission erred in its assessment of the duration of the infringement). An appeal of this nature may in fact result in redefinition of the infringement and so could affect the level of damages a potential litigant is likely to receive – for instance, because the litigant may be deemed to have suffered loss for a period of two rather than four years, thereby halving the level of the damages it can claim.

The risks of incorrectly categorising the nature of an appeal are either:

- (1) the appeal is not categorised as an appeal against an infringement finding and a follow-on claim for damages is brought too early (here, the party claiming the damages may have its application rejected and be ordered to pay the infringers' costs of defending the premature application, or the claim may be stayed pending final appeal); or
- (2) the appeal is incorrectly categorised as an appeal against the infringement finding and a follow-on claim for damages is brought after the two-year limitation period for claims expires. In these circumstances, the litigant will not be able to pursue the infringer for damages in the CAT and this one avenue of recourse is closed off to the litigant. However, it may be that the litigant is able to bring a claim against the infringer for breach of statutory duty in the High Court, although the advantages of doing so would have to be weighed against the expense and uncertainty of such actions.

In most cases where there is uncertainty, the preferable course of action may well be to make a claim in the CAT wherever it appears that the appeal in question is against penalty only – relying on a lack of information on the nature of the appeal to argue for suspension of the claim rather than rejection of the application.

### Private actions

BCL no longer has legal redress against BASF in the UK. However, many others are considering similar actions. The UK business secretary has consulted on the government's "overarching objective in seeking to encourage private sector-led challenges to anticompetitive behaviour". A major plank in these reforms is to "establish the [CAT] as a major venue for competition actions in the UK". The two judgments in the *BASF* case have clarified two crucial questions for those bringing private actions before the CAT – when to claim and the types of damages to claim – and have consequently created greater certainty around follow-on damages actions in the Competition Appeal Tribunal.

### References

*BCL Old Co Ltd v BASF plc* [2012] UKSC 45, 24 October 2012. On appeal from [2010] EWCA Civ 1258

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*Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* 19 October 2007, [2007] EWHC 2394 (Ch) and [2008] EWCA Civ 1086

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*BCL v BASF* [2009] EWCA Civ 434