Your time starts, now: when the two-year clock for an action for damages arising from an infringement of competition law starts

The two-year time limit for bringing a damages claim before the UK Competition Appeal Tribunal ("**CAT**") based on a competition law infringement decision, is not postponed by appeals against the penalty alone, according to the UK Court of Appeal in its judgment of 22 May 2009 in *BCL Old Co & Others v BASF SE & Others*.[1]

In so finding, the Court of Appeal upheld the arguments put forward by this firm in its defence of BASF's interests.

Background

On 21 November 2001 the EC Commission (the "**Commission**"), following its investigation into the now infamous "vitamins cartel", issued a decision finding that the parties to the cartel, including BASF AG, now BASF SE, and certain of its subsidiaries (together "**BASF**") had infringed Article 81 EC Treaty (the "**Decision**"). The Decision also imposed a substantial fine of €855 million on those involved, including €296.16 million on BASF.

In January 2002, BASF appealed to the European Court of First Instance ("**CFI**") against the level of the fine imposed on it by the Decision. BASF did not, however, appeal the Commission's findings of infringement in the Decision. By judgment on 15 March 2006 the CFI reduced the amount of the original fine that had been levied on BASF.

A person who has suffered loss as a result of an infringement of EC or UK competition law may bring a damages claim before the CAT and to do this the applicant need rely only on a decision by UK competition authority or the Commission establishing the infringement in question. In the event that a Commission decision is appealed then, pursuant to CAT Rules 2003, rule 31 and s47A Competition Act 1998 (the "**CA**"), a claim for damages is postponed until after the determination of the appeal. Once the appeal has been determined a claim for damages must be made within a period of two years from the date of the determination. If a decision is not appealed, then a damages claim must be lodged within two years of the date after which the decision can no longer be appealed.

On the basis of the Decision, BCL Old Co and certain others (together "**BCL**") made a damages claim against BASF to the CAT. The claim was made on 13 March 2008 which was just under two years after the judgment of the CFI on BASF's appeal on the level of the fine imposed by the Decision, but more than two years after the date on which appeals against the Decision could no longer be made.

BASF argued that the claim against it was time-barred under the CAT Rules 2003 , rule 31 and s47A CA. BASF's argument was that an appeal to the CFI on the level of a fine alone did not stop the clock for a damages claim. The clock would only have been stopped if BASF had also appealed the Commission's findings of infringement in the Decision. In a preliminary judgment on 25 September 2008, the CAT rejected BASF's argument. BASF appealed the CAT's judgment to the Court of Appeal.

The question for the Court of Appeal was whether an appeal to the CFI solely in relation to a fine imposed by a decision, comprised an appeal for the purpose of the statutory provisions thereby having the effect of postponing the period within which a claim for damages must be made to the CAT, or whether only an appeal against the findings of infringement has such a postponing effect.

The Court of Appeal's judgment

Upon interpreting the relevant statutory provisions, the Court of Appeal found that, based on the plain and ordinary meaning of the statutory language, section 47A CA refers only to infringement decisions. More specifically it held that, had the drafts-man intended penalty decisions to affect the period for bringing damages claims, clear language would have been used to that effect.

The Court therefore agreed with BASF's argument that the relevant decision for the purposes of making a damages claim was the infringement decision alone. No appeal against that decision was instituted by BASF therefore the starting date for the two-year time limit was the end of the two months and 10 days period from 21 November 2001 within which BASF could have appealed against the infringement decision. This period ended in January 2002 at which point the two-year period for bringing a damages claim commenced. This period ended in early 2004 therefore BCL's claim, made in March 2008, was well and truly time-barred. The appeal against the penalty was irrelevant.

Central to this finding was the distinction drawn by the Court of Appeal between a decision finding an infringement of competition law and a decision as to the imposition of a penalty, which were found to be two separate decisions, despite the normal practice of the competition authorities to deal with both aspects in a single decision document.

The Court of Appeal also addressed the CAT's principal concern which had contributed to its now overturned finding that the relevant statutory provisions relating to the bringing of damages claims refer to decisions as a whole, so that penalty, as well as infringement, appeals postpone the application of the two-year time limit. The CAT was concerned that, to the extent an appeal against a penalty raises issues concerning the gravity, duration and scope of the infringement, it may prevent a decision becoming definitive and therefore a reliable basis for a damages claim.

The Court of Appeal found these concerns insufficient to justify a departure from the plain and ordinary meaning of the statutory language so as to treat s47A CA as encompassing penalty, as well as infringement, decisions. A decision establishing an infringement will be binding on the CAT, unless it is itself the subject of an appeal, irrespective of what might be said about the infringement in the context of an appeal

against the penalty. Furthermore, the CAT's concerns were overstated, not least because where a pending appeal against penalties does have serious implications for a damages claim, the CAT can stay the claim pending determination of the penalty appeal, or even grant an application for an extension of the two-year time limit for making the damages claim.

Implications

This is a very welcome clarification of the law. In practice it ought to assist in lending certainty to the time period when the defendant can put past misdemeanours behind him and "close the door" without having to make continued provision for damages claims.

It is also good news for would be claimants who will not now have to wait to bring a damages claim until after the CFI has determined any appeal to it by the defendant on the level of any fine that has been imposed on the defendant by the Commission.

Furthermore, would-be claimants should note that even if an application to the CAT for damages is out of time, all may not be lost, as under the CAT Rules, rule 19(2)(a), the CAT may grant an extension of time for the making of such claims.

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