

BCL Old Co Limited & Ors v BASF SE & Ors [2010] EWCA Civ 1258

Competition damages – no discretionary extension of time for follow-on claims

In a judgment delivered on 12 November, the Court of Appeal dismissed an appeal by the Claimants for an extension of time in which to bring follow-on claims for damages against members of a 1990s cartel found by the European Commission in 2001 to have infringed EU competition rules in the market for vitamins A, E and B2.

These claims had already been found by the Court of Appeal to be time-barred ([2009] EWCA Civ 434) and the CAT had refused the Claimants' subsequent request that it use its discretion to lift the time bar in their case ([2009] CAT 29).

This case provides important clarification of the CAT's powers in such circumstances. It indicates that the CAT does not in fact have a power under its Rules to extend time for bringing proceedings under section 47A of the Competition Act 1998 ("s47A"). Consequently, the time limit under Rule 31 for bringing follow-on damages claims, the second anniversary of a Commission decision finding an infringement, or a final appeal upholding an infringement decision, will be determinative.

Background

In 2001, the European Commission fined several vitamin manufacturers for their participation in a worldwide price-fixing and market-sharing cartel, in breach of Article 81 (now 101) of the EU Treaty. The decision was formally adopted in January 2002.

BASF, one of the companies fined by the European Commission, appealed not against the infringement decision itself, but against the level of the fine imposed. Judgment on that appeal was handed down by the Court of First Instance on 15 March 2006. BASF had until 25 May 2006 to lodge a further appeal, to the European Court of Justice, but chose not to do so.

Under s47A once the European Commission has issued a decision finding that an infringement has taken place, a person who has suffered loss as a result of that infringement may bring a "follow-on" claim for damages before the CAT. S47A provides that any application must be made in accordance with the CAT's Rules - Rule 31 states that a claim for damages must be made within a period of two years of the decision, unless it is appealed, in which case time runs from the date on which the appeal process is exhausted.

Facts

BCL lodged s47A claims against BASF on 12 March 2008. BASF submitted that these claims had not been brought within the limitation period, which had expired in 2004, two years after the date of the original Commission decision. Following a preliminary issue hearing, the CAT ruled on 25 September 2008 that the two-year limitation period had begun on the date when BASF's time for appealing the Court of First Instance's decision had expired, namely 25 May 2006, and that the claims were therefore in time.

The CAT refused BASF permission to appeal against this preliminary issue ruling. The Court of Appeal, however, granted permission and allowed the appeal. It subsequently held, on 22 May 2009, that the claims were out of time since on the plain and ordinary meaning of s47A, only challenges to the infringement element of the Commission decision, not challenges to the level of the fine imposed, were relevant to a determination of when the two-year limitation period began to run.

The Court of Appeal also noted, however, that under Rule 19(2)(i) of the CAT Rules, the CAT had the discretionary power to extend the two-year time limit in Rule 31.

The Claimants therefore applied to the CAT for a discretionary extension of the limitation period to allow them to bring their s47A claims. They argued that they should not be precluded from advancing their claims on

account of a self-evidently reasonable mistake - shared by the CAT in the preliminary issue hearing - about when the two-year limitation period actually expired. The CAT refused to extend time on the ground that whilst the Claimants had made a reasonable mistake as to when the limitation period expired, they had not acted reasonably promptly once they thought the window for claiming had opened.

Decision

The Court of Appeal was asked to decide whether, on its true construction, Rule 19(2)(i) gave the CAT power to extend time. If there was no such power, the Claimants invited the Court of Appeal to determine whether such a power should be treated as existing in the present case by reason of EU law principles. Finally, if the Court of Appeal found that there was such a power, it had to decide whether the CAT's refusal to exercise that power in the Claimants' favour was a proper exercise of its discretion, either as a matter of UK or EU law.

The Court of Appeal concluded that, on their true construction, the CAT Rules did not contain a general power to extend time and dis-apply the two year limitation period. Further, the power to extend time under Rule 19(2)(i) was plainly limited in scope to case management directions, not least given its location in the section of Part II of the Rules headed "*Case Management*". In any event, the terms of Rule 19(2)(i) did not read as if they were intended to create a general power to extend time for bringing proceedings, rather than a case management power. The Court of Appeal also rejected the Claimants' arguments that such a power should be treated as existing in this case as a result of the overriding effect of EU law. Consequently, there was no need to consider whether the CAT's refusal to extend time was a proper exercise of its discretion. That was no longer an issue since it concerned the exercise of a discretion that the Court of Appeal held did not exist.

Comments

This is a key decision for both Claimants and Defendants. It creates certainty around the scope of the CAT's general powers to extend the period for bringing otherwise time-barred follow-on damages claims. In short, the CAT has no such power. Expiry of the two year limitation period specified in Rule 31 is therefore a definitive bar to such claims.

Defendants will take comfort in that. They will not now face potentially open-ended litigation surrounding the exercise of a perceived discretion by the CAT to extend time and the prospects of then having to defend the underlying damages claim itself. As the CAT noted when refusing to extend time, "*even 'dirty dogs' eventually can sleep at night*". Claimants will also benefit from the certainty provided by this decision, not least because they will avoid the costly expense of pursuing claims out of time.

It remains to be seen whether BCL will seek permission to appeal to the Supreme Court. For now, however, the judgment ends the uncertainty surrounding the manner in which the CAT will tackle follow-on damages claims brought out of time.

Mayer Brown International LLP acted for BASF in this case.

For further information please contact:

Clare Canning

Partner

Tel: +44 20 3130 3252

Gillian Sproul

Partner

Tel: +44 20 3130 3313

Alexander Weinberg

Senior Associate

Tel: +44 20 3130 3807

Mayer Brown is a leading global law firm serving many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, São Paulo, Washington DC
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai
EUROPE: Berlin, Brussels, Cologne, Frankfurt, London, Paris
TAUIL & CHEQUER ADVOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro
ALLIANCE LAW FIRMS: Spain (Ramón & Cajal); Italy and Eastern Europe (Tonucci & Partners)

Please visit our web site for comprehensive contact information for all Mayer Brown offices. www.mayerbrown.com

© 2010. Mayer Brown LLP, Mayer Brown International LLP, and/or JSM. All rights reserved.

Mayer Brown is a global legal services organization comprising legal practices that are separate entities (the Mayer Brown Practices). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; JSM, a Hong Kong partnership, and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. The Mayer Brown Practices are known as Mayer Brown JSM in Asia. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.