Neutral citation [2010] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1098/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

12 February 2010

Before:

VIVIEN ROSE
(Chairman)
THE HON ANTONY LEWIS
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BCL OLD CO LIMITED
(2) DFL OLDCO LIMITED
(3) PFF OLD CO LIMITED
(4) DEANS FOOD LIMITED **Claimants**

-v-

(1) BASF SE (formerly BASF AG)
(2) BASF PLC
(3) FRANK WRIGHT LIMITED

Defendants

RULING ON PERMISSION TO APPEAL

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1. In its Ruling handed down on 19 November 2009 ([2009] CAT 29) ("the Ruling") the Tribunal refused the Claimants' applications to extend time to lodge proceedings seeking damages pursuant to section 47A of the Competition Act 1998 ("section 47A"). In this ruling we use the same abbreviations as were used in the earlier Ruling and we refer to that Ruling for a description of the background to these claims.

2. The Claimants have applied for permission to appeal against the Ruling and the Defendants oppose that application. An appeal lies under section 49(1)(b) of the Competition Act 1998 from a decision of the Tribunal as to the award of damages in respect of a claim made under section 47A. According to CPR rule 52.3(6) which applies in this case, permission may be granted only if the Tribunal considers that the appeal would have a real prospect of success or where there is some other compelling reason why the appeal should be heard. Therefore the Tribunal has a discretion whether to grant permission to appeal where one or both of these conditions are satisfied.

3. The Claimants advance five grounds of appeal in a letter from their solicitors dated 21 December 2009. The first and second grounds challenge the test adopted by the Tribunal and the way that test was applied. The Claimants submit that the Tribunal erred in relying on *The "Al Tabith"* because that decision related to a different kind of proceedings. The Tribunal should have applied the requirements in the Tribunal Rules that the Tribunal has regard to all the circumstances of the case and exercises its discretion so as to secure the just disposal of the proceedings. If the Tribunal had wanted to have regard to practice in other courts then we should, the Claimants say, "have had regard to more recent practice and decisions in other areas…" such as Part II of the Limitation Act 1980 and the principles applicable in judicial review proceedings.

4. In this case there was no real distinction between applying the two stage test in *The "Al Tabith"* and applying a more general test of "having regard to all the circumstances of the case". *The "Al Tabith"* enunciates what is at base a common sense approach to the exercise of a general discretion whether to extend the time allowed for taking a certain procedural step: first look at whether there was a good reason why the applicant did not comply with the time limit set by the rules and then, if there was a good reason,

consider where the balance of prejudice lies as between the parties of allowing the applicant belatedly to take that step. The Claimants did not draw the Tribunal's attention to any cases showing "more recent practice and decision" either in their written submissions or during the oral hearing of their application. The circumstances which the Claimants now highlight as relevant are all points that we considered in arriving at our determination. The Ruling also makes clear that the Tribunal, in assessing the prejudice caused to the Defendants, placed no weight on the Defendants' evidence concerning the destruction of documents since 2004: see paragraph 31 of the Ruling.

5. The Claimants make a more specific point namely that in applying *The "Al Tabith"*, the Tribunal looked at the question of delay over the whole period during which the Claimants could have brought but failed to bring their proceedings. Thus in *The "Al Tabith"* the Court of Appeal considered the plaintiffs' delays not just in the one month which elapsed between the expiry of the agreed extension of time and the date on which proceedings were served but throughout the period during which the plaintiffs could have brought their claim after the collision took place. The earlier period was regarded as relevant, even though if the plaintiffs had brought their claim one month earlier, the defendant could not have complained about the earlier post-collision delays.

6. The analogy between this case and *The "Al Tabith"* is not exact because in the BCL Claim, the period between the date on which the limitation period in fact expired and the date on which the claim was lodged was the period between January 2004 and March 2008. We applied *The "Al Tabith"* judgment by looking at the way the Claimants had pursued their claim both during the period before they thought the two year window had opened (that is before 25 May 2006) and during the period when on the Claimants' interpretation of the law, the window would have been open (that is between 25 May 2006 and 12 March 2008). We found that the Claimants were at fault during both those periods in failing to take steps to pursue the claim promptly. We do not consider that it assists the Claimants to say that these delays would not have precluded them bringing their claim if the two year window had in fact only expired on 25 May 2008.

7. The third ground relied on by the BCL Claimants is that the operation of the limitation period in this case interferes with the Claimants' rights to access to the court, contrary to Article 6 of the European Convention on Human Rights, and with their property rights in their monetary claim, contrary to Article 1 Protocol 1 ECHR. Article 1 Protocol 1 provides that:

> "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

8. This was not a point argued before us. We do not accept that it is arguable that the fact that the Tribunal and the Court of Appeal differed over the proper construction of section 47A means that the effect of that provision is so uncertain that compliance with the limitation period thereby imposed is not a condition "provided for by law" for the purposes of Article 1 Protocol 1. In any event the Claimants have not been prejudiced by that uncertainty because the Tribunal held that the mistake that they made in construing the legislation was a reasonable one so that the first stage of *The "Al Tabith"* test was satisfied.

9. The fourth ground is also a point that was not argued before us, namely that the Claimants' loss of the right to bring their action for damages is a breach of the EU law principle of effectiveness. We agree with the BASF Defendants that this point has already been decided against the Claimants by the Court of Justice in Case 33/76 *Rewe* [1976] ECR 1989. That case concerned the limitation periods imposed by the German and Dutch Governments in respect of claims against those Governments for the reimbursement of charges imposed contrary to EU law. According to the Opinion of Advocate General Warner, in the German case the time limit for making a claim was one month or, in certain circumstances, one year. In the Dutch case the time limit for seeking reimbursement was 30 days. The Court held that the imposition and enforcement of these time limits was not inconsistent with the direct effect of the relevant Treaty provisions. The Court said that the rights conferred by Community law must be exercised before national courts in accordance with the conditions laid down by national courts and these conditions include the fixing of reasonable time limits for bringing a claim. This was subject to two exceptions – first, the conditions to which claims enforcing Community rights are subject must not be less favourable than

conditions attached to equivalent domestic rights and secondly, the conditions must not make it "impossible in practice to exercise the rights which the national courts are obliged to protect" (see paragraph [5] of the judgment). Neither of those exceptions applies here. The time limits imposed by section 47A for follow-on claims under Articles 101 and 102 TFEU are the same as for the domestic equivalents under the Competition Act 1998. That section did not make it impossible for the Claimants to bring their claim since they had a two year window within which to do so. We do not accept that the principle of effectiveness means that a discretion to extend time must be exercised in the Claimants' favour in this case, regardless of the other factors present militating against allowing the claims to proceed.

10. Finally the Claimants argue that the Ruling was a perverse exercise of the Tribunal's discretion. In the Ruling it is clear that the Tribunal considered the points on which the Claimants rely and explained the countervailing reasons why the Tribunal exercised its discretion against the Claimants.

11. We unanimously hold that there is no prospect of success on the third, fourth and fifth grounds and we refuse permission for that reason. As regards the first and second grounds, we bear in mind that the Defendants have reserved their position, in the event that this case is argued on appeal, on the question whether there is in fact a discretion under rule 19 to extend time for lodging a claim brought under section 47A. We have therefore considered whether this appeal should be allowed to go forward so that the Court of Appeal has an opportunity to determine whether the discretion exists and, if so, what test the Tribunal should apply when exercising it. Although this is a point of law which may have some chance of success, we have concluded that we should exercise our discretion to refuse permission. The Claimants may, if so advised, renew their application for permission to the Court of Appeal within 14 days pursuant to CPR 52.3(3) and paragraph 21.10 of the practice direction on appeals. That Court is better placed to decide whether to entertain the appeal, given that the situation in which the Claimants found themselves is unlikely to recur, now that the opening and closing of the two year window under section 47A has been clarified.

12. Should any such application to the Court of Appeal be made, a copy of this ruling together with copies of the Claimants' letter of 21 December 2009 requesting

permission to appeal and the Defendants' skeleton dated 11 January 2010 should be placed before the Court of Appeal.

Vivien Rose Antony Lewis Arthur Pryor

Charles Dhanowa
Registrar Date: 12 February 2010