Neutral Citation Number: [2009] EWCA Civ 434

Case No: C1/2008/2606

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(Mr Justice Barling, Ms Ann Kelly and Mr Michael Davey)
[2008] CAT 24

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2009

Before :

LORD JUSTICE WALLER
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE LLOYD
and
LORD JUSTICE RICHARDS

- -

Between :

(1) BCL Old Co Limited	
(2) DFL Old Co Limited	
(3) PFF Old Co Limited	**Claimants/**
(4) Deans Food Limited	**Respondents**
- and -	
(1) BASF SE (formerly BASF AG)	
(2) BASF PLC	**Defendants/**
(3) Frank Wright Limited	**Appellants**

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- -

Mark Brealey QC (instructed by **Mayer Brown International LLP**) for the **Appellants**
Aidan Robertson QC (instructed by **Taylor Vinters**) for the **Respondents**

Hearing date : 22 April 2009

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Judgment

Lord Justice Richards :

1. Section 47A of the Competition Act 1998 ("the 1998 Act") enables a person who has suffered loss as a result of the infringement of EC or UK competition rules to bring a claim before the Competition Appeal Tribunal ("the tribunal") in reliance on a decision of the EC or UK competition authority establishing the infringement in question. There is a two year time limit for bringing such a claim. An appeal against the decision postpones the date from which time runs for that purpose. The issue in this case is whether the date is postponed where there is an appeal against penalty but not against the finding of infringement. The answer depends on a short point of construction of section 47A, though the section itself is far from short.

2. The case arises out of an investigation by the European Commission into a cartel in respect of vitamins for use in animal feedstuffs, culminating in "Commission Decision of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 – Vitamins)" ("the Decision"). The Decision was summarised in a short press release issued by the Commission on the same date but a full version was not generally available until 10 January 2003, when it was published in the Official Journal of the European Communities.

3. The operative part of the Decision included the following:

> "*Article 1*
>
> 1. The following undertakings have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement:
>
> ...
>
> (b) BASF AG by participating in agreements affecting the Community and EEA markets for vitamins A, E, B1, B2, B5, C, D3, H, beta-carotene and carotinoids ….
>
> *Article 2*
>
> The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, in so far as they have not already done so ….
>
> *Article 3*
>
> For the infringements referred to in Article 1, the following fines are imposed on the following undertakings:
>
> …
>
> (b) BASF AG …."

4. BASF brought an application to the Court of First Instance of the European Communities ("the CFI"), claiming that the court should "annul or substantially reduce the fine imposed on BASF pursuant to Article 3(b) of the Decision". Notice of

the application was published in the Official Journal on 4 May 2002. By judgment of 15 March 2006 in Case T-15/02 *BASF AG v Commission* [2006] ECR II-497, the CFI reduced the fine imposed on BASF.

5. On 13 March 2008, that is just under two years after the date of the CFI's judgment, the claimants in these proceedings (the respondents to the present appeal) brought a claim in the tribunal under section 47A of the 1998 Act against BASF and two of its associated companies, relying on the Decision and alleging that they had suffered loss and damage as a result of the infringement of Article 81(1) by BASF. They had previously brought claims under section 47A against two other companies found by the Commission to have participated in the cartel, but those claims were withdrawn on agreed terms.

6. In their defence to the claim, BASF and its associated companies argued that the claim against them was time-barred. On a preliminary issue, the tribunal rejected that argument. Permission to appeal against the tribunal's decision was granted by Jacob LJ.

The relevant legislation

7. Section 47A reads as follows:

> "47A.(1) This section applies to –
>
> (a) any claim for damages, or
> (b) any other claim for a sum of money,
>
> which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.
>
> (2) In this section 'relevant prohibition' means any of the following -
>
> (a) the Chapter I prohibition;
> (b) the Chapter II prohibition;
> (c) the prohibition in Article 81(1) of the Treaty;
> (d) the prohibition in Article 82 of the Treaty …
>
> (3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.
>
> (4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.
>
> (5) But no claim may be made in such proceedings –
>
> (a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are –

(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;
(b) a decision of the OFT that the prohibition in Article 81(1) of Article 82 of the Treaty has been infringed;
(c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;
(d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;
(e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.

(7) The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in subsection (6)(a), (b) or (c) may not be brought without permission are –

(a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46 or section 47;
(b) in the case of a decision of the OFT which is the subject of an appeal mentioned in paragraph (a), the period following the decision of the Tribunal on the appeal during which a further appeal may be made under section 49;
(c) in the case of a decision of the Tribunal mentioned in subsection (6)(c), the period during which a further appeal may be made under section 49;
(d) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal;

and, where any appeal mentioned in paragraph (a), (b), (c) or (d) is made, the period specified in that paragraph includes the period before the appeal is determined.

(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are -

(a) the period during which proceedings against the decision or finding may be instituted in the European Court; or
(b) if any such proceedings are instituted, the period before those proceedings are determined.

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.

(10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim."

8. In the present case the claim is brought under subsection (4) in reliance on a decision of the European Commission within subsection (6)(a). The relevant subsection for determining the period during which a claim cannot be brought without permission is therefore subsection (8). For the purposes of construction, however, that subsection has to be read with the rest of the section.

9. The time limit for making a claim is contained in rule 31 of the Competition Appeal Tribunal Rules 2003 ("the Tribunal Rules"):

"31.(1) A claim for damages must be made within a period of two years beginning with the relevant date.

(2) The relevant date for the purposes of paragraph (1) is the later of the following -

(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;
(b) the date on which the cause of action accrued.

(3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph 2(a) after taking into account any observations of a proposed defendant …."

Thus the rule refers back to section 47A(7) and (8), and it is by this route that the running of time in the present case depends upon the correct construction of section 47A(8).

10. I should also mention that by rule 19(2)(i), as part of its general case management powers, the tribunal has power to extend any time limit, so that failure to apply within the two year time limit laid down by rule 31 is not necessarily fatal to the bringing of a claim under section 47A.

11. The tribunal considered that only limited assistance was to be obtained from other sections of the 1998 Act. In my judgment, however, it is important to place section

47A in its wider statutory context. I therefore refer below to certain other provisions of the 1998 Act, all falling within Part 1 of the Act.

12. Chapter I is concerned with agreements. Section 2 prohibits agreements which may affect trade within the United Kingdom and which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom; and by section 2(8), that prohibition is referred to in the Act as "the Chapter I prohibition".

13. Chapter II is concerned with abuse of dominant position. Section 18 prohibits conduct which amounts to the abuse of a dominant position in a market if it may affect trade within the United Kingdom; and by section 18(4), that prohibition is referred to in the Act as "the Chapter II prohibition".

14. Chapter III contains provisions relating to investigation and enforcement. Section 31 provides that if as a result of an investigation the OFT proposes to make a decision, it must give written notice and the opportunity to make representations. "Decision" is defined for this purpose by section 31(2):

> "31. … (2) For the purposes of this section and sections 31A and 31B 'decision' means a decision of the OFT -
>
> (a) that the Chapter I prohibition has been infringed;
> (b) that the Chapter II prohibition has been infringed;
> (c) that the prohibition in Article 81(1) has been infringed; or
> (d) that the prohibition in Article 82 has been infringed."

15. Separate provision is made in section 36 concerning the imposition of penalties:

> "36.(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 81(1), the OFT may require an undertaking which is a party to the agreement to pay the OFT a penalty in respect of the infringement.
>
> (2) On making a decision that conduct has infringed the Chapter II prohibition or that it has infringed the prohibition in Article 82, the OFT may require the undertaking concerned to pay the OFT a penalty in respect of the infringement …."

16. The distinction between decisions that there has been an infringement and decisions imposing a penalty is picked up in section 46, concerning appealable decisions:

> "46.(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section 'decision' means a decision of the OFT –

(a) as to whether the Chapter I prohibition has been infringed;
(b) as to whether the prohibition in Article 81(1) has been infringed,
(c) as to whether the Chapter II prohibition has been infringed,
(d) as to whether the prohibition in Article 82 has been infringed,

…

(i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty.

and includes a direction under section 32, 33 or 35 and such other decision under this Part as may be prescribed.

(4) Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal under this section does not suspend the effect of the decision to which the appeal relates …."

17. Section 47 underlines the distinction between decisions as to infringement and decisions as to penalty by providing that third parties with a sufficient interest may appeal against the former but not against the latter.

18. That is followed by section 47A itself, which I have already set out.

19. The final provision I should mention is section 49, concerning further appeals. It provides:

"49.(1) An appeal lies to the appropriate court –

(a) from a decision of the Tribunal as to the amount of a penalty under section 36;
(b) from a decision of the Tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A … or as to the amount of any such damages or other sum; and
(c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47 …."

The time limit issue

20. The case advanced by Mr Brealey QC for BASF is straightforward. He submits that the relevant "decision" in this case was the decision by the Commission, in article 1(1)(b) of the Decision of 21 November 2001, that BASF had infringed the prohibition in Article 81(1). By rule 31 of the Tribunal Rules, a claim for damages in reliance on that decision had to be brought within two years of the end of the period specified in section 47A(8) of the 1998 Act. That period was the period in section 47A(8)(a), namely the period during which proceedings against the decision might be instituted by BASF in the European Court (which was in fact a period of 2 months 10 days from the date of the decision). No such proceedings against the decision were

instituted by BASF, so that the further period in section 47A(8)(b) did not apply. The proceedings brought by BASF against the imposition of the penalty imposed by article 3(b) of the Commission's Decision were irrelevant and had no effect on the running of time, since they were not proceedings against the decision that BASF had infringed the prohibition in Article 81(1). Accordingly, time began to run in early February 2002 and the claim was brought well outside the two year time limit.

21. In my judgment the analysis put forward by Mr Brealey is correct. Central to it is the distinction between a decision that a relevant prohibition has been infringed and a decision as to the imposition of a penalty. Section 47A is concerned with the former, not the latter. That is clear from the wording of the section itself and is supported by consideration of the wider statutory context.

22. By section 47A(5)(a), no claim can be made until "a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed". That wording focuses on decisions as to infringement, and specific types of decision as to infringement are then listed in subsection (6). It is plain that the references to "a decision" in subsection (7) and (8) are to be read in the same way, as referring to decisions as to infringement. The link is expressed, first, in section 47A(5)(b), which provides that no claim can be made otherwise than with the permission of the tribunal during any period specified in subsection (7) or (8) "which relates to that decision" (i.e. to a decision mentioned in subsection (6) establishing that the relevant prohibition in question has been infringed). The link is reinforced by the opening words of subsection (7), which refer to the periods during which proceedings in respect of a claim made in reliance on "a decision mentioned in subsection (6)(a), (b) or (c)" may not be brought. Subsection (8) has to be read consonantly with subsection (7) and, although it does not say so in terms, it is plainly dealing with the periods during which proceedings in respect of a claim made in reliance of a decision or finding mentioned in subsection (6)(d) or (e) may be brought, namely a decision or finding by the Commission as to infringement of one of the Treaties.

23. The same distinction between infringement decisions and penalty decisions can be seen in other sections to which I have referred above, in particular sections 31, 36, 46, 47 and 49. That gives added significance to the fact that section 47A refers by its wording only to infringement decisions. The natural reading is that, as elsewhere in the statute, the reference is to infringement decisions as opposed to penalty decisions. If the draftsman had intended penalty decisions to come into play for the purpose of determining the periods during which permission is required for the making of claims under the section, or to treat an infringement decision and a penalty decision as a composite decision for that purpose, he would have had to use clear language to that effect. (This point is not affected by the fact that section 47A was added to the 1998 Act by the Enterprise Act 2002 and that the provisions empowering the OFT to find infringements of Articles 81 and 82 of the EC Treaty were added later still, in 2004. The essential distinction between infringement decisions and penalty decisions was contained within the statute as originally enacted, and the later provisions were dovetailed into the existing structure.)

24. In the present case the Commission issued a single "Decision" containing, in separate articles, its findings as to infringement (article 1) and the fines imposed in respect of those infringements (article 3). It is the Commission's normal, if not universal, practice to deal with both aspects in a single decision document. In substance,

however, the decision that an undertaking has infringed the relevant prohibition is distinct from the decision imposing a penalty on that undertaking for the infringement. That is illustrated by a point arising in the Decision itself. In relation to Sumitomo Chemical Co Ltd and Sumika Fine Chemicals Ltd, two of the undertakings investigated, findings of infringement were made in article 1 of the Decision but, because the relevant limitation period had expired, no fines were imposed in article 3. In rejecting an argument by the two companies that the expiry of the limitation period meant that any infringement by them could not be the subject of a decision, the Commission stated (at paragraph 651):

> "The rules on limitation periods concern exclusively the imposition of fines or penalties. They have no bearing on the entitlement of the Commission to investigate cartel cases and to adopt, as appropriate, prohibition decisions."

On subsequent applications by Sumitomo and Sumika to annul the Decision in so far as it concerned them, the CFI upheld the Commission on the effect of the limitation period whilst allowing the applications on other grounds: Cases T-22/02 and T-23/02, *Sumitomo Chemical Co Ltd v European Commission* [2005] ECR II-4065.

25. It is therefore consistent with the position under Community law, and is in any event the correct approach under the 1998 Act, to treat the finding of infringement in article 1 of the Decision as "a decision of the European Commission that the prohibition in Article 81(1) … of the Treaty has been infringed" (section 47A(6)(d)), distinct from the decision as to fine set out in article 3 of the Decision. BASF did not bring proceedings in the CFI against the decision that the prohibition in Article 81(1) had been infringed. Its application for annulment related solely to the fine. It follows that the application for annulment did not have the effect, under section 47A(8), of extending the period during which proceedings in respect of the claim might not be brought without permission, and that the period ended on the last date when proceedings against the infringement decision could have been brought. That was therefore the "relevant date" from which time began to run for the purposes of the two year time limit under rule 31 of the Tribunal Rules.

26. In reaching a contrary conclusion, the tribunal stated that the decision referred to in rule 31 and section 47A "is not, in our view, to be taken to be limited to any particular section(s) of the Commission's decision adopted on 21 November 2001. Those provisions are to be interpreted as referring to that decision as a whole" (paragraph 35) In the tribunal's view, that accorded with the plain and ordinary meaning of the statutory provisions. For the reasons I have given, I respectfully take a different view as to the plain and ordinary meaning of the statutory language. But the tribunal also took into account a range of other considerations concerning the imputed statutory purpose or wider considerations of policy. In particular, it stated at paragraph 34 of its judgment that the purpose of the statutory provisions is to prevent claims being brought without permission "before the decision relied on has become definitive, in the sense that all appeals against that decision, which may bear upon issues relevant to the determination of a monetary claim before the Tribunal, have been determined"; and it observed that an appeal as to penalty might raise issues concerning, for example, the gravity, duration and scope of the infringement, which would be relevant not just to penalty but also to liability in damages. Mr Robertson QC, for the respondents, sought to underline this point by referring to the "front-loaded" nature of

claims under section 47A and to the delay before a full, definitive version of a Commission decision (as opposed to a short press summary) is available.

27. For my part, I do not think that the tribunal's concerns could justify a departure from what I regard as the plain and ordinary meaning of the statutory language, so as to treat section 47A as encompassing decisions penalty decisions as well as infringement decisions. But it also seems to me that those concerns are overstated.

28. First, section 47A(9) provides that in determining a claim under the section the tribunal "is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed". Whatever the precise meaning and effect of that provision (Mr Brealey drew a contrast, by reference to sections 57 and 57A, between a finding of an *infringement* and the detailed findings of *fact* in an infringement decision), it casts light on the statutory purpose of the provisions concerning the timing of a claim. The purpose is that *the decision which is to bind the tribunal* should be definitive before a claim can be brought without permission. My construction of section 47A is consistent with that purpose. A decision establishing an infringement, unless itself the subject of an appeal, will be binding on the tribunal irrespective of what may be said about the infringement in the context of an appeal against penalty.

29. Mr Robertson submitted that, since the CFI can raise points of its own motion concerning the validity of a decision (see *BASF AG and Others v Commission of the European Communities* [1992] ECR II-00315, paragraphs 30-31), it might be possible for an infringement decision to be called into question in an appeal against penalty even in the absence of a direct challenge to the infringement decision itself. It is far from clear that the CFI has or would use such a power to invalidate a decision that was not before it; but in any event the extremely remote possibility of an infringement decision being invalidated in that way does not in my view provide a good reason for interpreting section 47A in the way favoured by the tribunal.

30. Further, if in a particular case a pending appeal against penalty does have serious implications for a claim under section 47A, the tribunal can stay the claim pending determination of the penalty appeal or even, in an extreme case, entertain an application for extension of the time limit for making the claim in the first place. I doubt whether, in policy terms, this is open to any greater objection than denying claimants the right to bring claims without the permission of the tribunal in circumstances where they wish to rely on an unappealed infringement decision but there is a pending appeal against penalty.

31. Mr Robertson's point about the delay before a full version of the Commission's decision is available does not assist his case. The same delay will arise even if there is no appeal at all, yet time will still have run from the date when the time for an appeal expired. In practice, moreover, the delay is unlikely seriously to impede the bringing of a claim within the time limit: in the present case there remained a period of about a year between publication of the Decision in the Official Journal and the expiry of the time limit. If, however, there is insufficient time within which to prepare the claim, an extension of the time limit can be sought.

32. The tribunal relied on earlier decisions of its own in *Emerson Electric Co and Others v Morgan Crucible Company Plc and Others* [2007] CAT 28 ("*Emerson I*"), [2007]

CAT 30 ("*Emerson II*") and [2008] CAT 8 ("*Emerson III*"). Those cases concerned claims under section 47A in circumstances where the Commission had found an infringement and some, but not all, of the addressees had applied to annul the decision. In *Emerson I* it was held that, where *any* of the addressees of a Commission decision had brought proceedings in the European Court, the permission of the tribunal was required for the bringing of a claim under section 47A even against an addressee which had not itself brought such proceedings. In *Emerson II*, the tribunal granted permission for a claim to be brought against an addressee which had *not* applied to annul the decision. In Emerson *III*, the tribunal refused permission for claims to be brought against addressees which *had* applied to annul the decision. In those cases the tribunal was considering a different point under section 47A, and it is not necessary (and, in the absence of argument on the issue, would be inappropriate) to express any view on the correctness of the approach adopted. In so far as the tribunal expressed views on the effect that an appeal against penalty might have on liability or quantum in a claim under section 47A, I have covered the point already: it does not affect my conclusion on the correct construction of the section.

33. I do not think it necessary to refer to other aspects of the tribunal's reasoning or to other points made by Mr Robertson in support of the tribunal's conclusion. Ultimately one comes back to the language of section 47A. None of the matters relied on by the tribunal or put forward by Mr Robertson provides a compelling reason for departing from what I regard as the natural reading of the section.

Conclusion

34. For the reasons given, I would reverse the tribunal's decision and would hold that the claim in this case is time-barred and can proceed only if the tribunal grants an extension of time.

Lord Justice Lloyd :

35. I agree.

Lord Justice Waller :

36. I also agree.