Neutral citation [2008] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1098/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

17 October 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(The President)
ANN KELLY
MICHAEL DAVEY

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Claimants

-v-

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

Defendants

RULING ON REQUEST FOR PERMISSION TO APPEAL

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1. In this ruling the Tribunal uses the same abbreviations as are used in the judgment dated 25 September 2008 in which the Tribunal decided a preliminary issue as to whether the Claimants' claim for damages under section 47A of the 1998 Act is time-barred ([2008] CAT 24) ("the Judgment").

2. In the Judgment the Tribunal unanimously decided that "the relevant date" under rule 31(2) of the Tribunal Rules for the purposes of the Claimants' claim fell on the expiry of the period during which an appeal against the relevant judgment of the CFI could have been instituted in the ECJ, with the result that the Claimants' claim was not time-barred by that rule. This was because, as the Tribunal stated in paragraph [35] of the Judgment, in the present case the "decision" referred to in the relevant provisions, and in particular rule 31(2)(a) of the Tribunal Rules and subsections 47A(5), 47A(6)(d) and 47A(8) of the 1998 Act, was not to be taken to be limited to any particular section(s) of the Commission's decision adopted on 21 November 2001 which was the basis of the Claimants' follow-on action for damages. Those provisions were to be interpreted as referring to that decision of the Commission as a whole.

3. By their solicitors' letter to the Tribunal dated 3 October 2008 the Defendants have applied for permission to appeal to the Court of Appeal pursuant to section 49 of the 1998 Act and rule 58 of the Tribunal Rules, on the grounds stated in the letter. The Claimants' solicitors have written a letter to the Tribunal dated 6 October 2008 indicating their clients' opposition to the grant of permission to appeal, for the reasons set out in the Judgment. Rule 59(2) of the Tribunal Rules provides that where a request for permission is made in writing, the Tribunal shall decide whether to grant such permission on consideration of the party's request and, unless it considers that special circumstances render a hearing desirable, in the absence of the parties. Neither party has sought a hearing in relation to the request for permission and in the Tribunal's view a hearing is not desirable.

4. Appeals against decisions of the Tribunal under section 47A of the 1998 Act can be brought under section 49 of that Act, which provides so far as relevant:

> "**49 Further appeals**
>
> (1) An appeal lies to the appropriate court —
>
> (a) …
>
> (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 included in proceedings under section 47B (other than a decision on costs or expenses) or as to the amount of any such damages or other sum; and
>
> …
>
> (2) An appeal under this section —
>
> (a) may be brought by a party to the proceedings before the Tribunal…
>
> (b) requires the permission of the Tribunal or the appropriate court.
>
> (3) In this section "the appropriate court" means the Court of Appeal…"

5. Part 52 of the Civil Procedure Rules ("CPR") applies to appeals from the Tribunal sitting in England and Wales to the Court of Appeal. Rule 52.3(6) of the CPR states:

> "Permission to appeal may be given only where–
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

6. Therefore the Tribunal has a discretion whether to grant permission to appeal where one or both of these conditions are satisfied.

7. The Defendants seek permission under both conditions of CPR 52.3(6).

8. First, they argue that an appeal would have a realistic prospect of success in that the Court of Appeal could realistically construe the word "decision" in section 47A(5), (6) and (8) in the same way as in, for example, section 49 of the 1998 Act. The court of Appeal could also construe the decision of the Commission as comprising a bundle of individual decisions as opposed to one decision containing several articles.

9. The Defendants' points were forcefully argued before us, both in written submissions and at the hearing, but in the event the Tribunal unanimously reached a firm conclusion that they were not correct for the reasons set out in the Judgment. We do not consider that the Defendants have crossed the threshold in CPR 52.3(6)(a).

10. The second point made by the Defendants relates to CPR 52.3(6)(b). The Judgment is said to raise a point of law of public importance, namely when precisely can a claimant bring an action for damages founded on a decision of the EC Commission or a domestic competition authority. In this connection the Defendants stress the importance of limitation periods to the administration of justice, and submit that beyond the mere construction of the 1998 Act there are policy issues involved as to the balance between the benefits of waiting until all findings of fact have become definitive, and the delay which may be caused to the claimant in commencing the claim for damages.

11. Without suggesting that the issue dealt with in the Judgment is unimportant, we consider that the Defendants exaggerate its overall impact. If a claimant considers that significant prejudice will occur by waiting until all appeals against the underlying decision of the competition authority have been resolved then, as the Tribunal pointed out in paragraphs [37] and [41] of the Judgment, it is open to the claimant to apply for permission (under section 47A(5)(b) of the 1998 Act and rule 31(3) of the Tribunal Rules) to commence proceedings in advance of the start of the relevant two year period. We note, in this regard, that permission was granted to the claimants in *Emerson Electric Co & Ors v Morgan Crucible Company Plc* (rule 31(3) and rule 40) [2007] CAT 30, [2008] Comp AR 37. Thus where the interests of justice require it is open to the Tribunal to mitigate or even alleviate the possible prejudice to a claimant which the Defendants submit is to be weighed in the balance against the benefits of certainty derived from the Tribunal's conclusion in this matter. For these reasons we are of the view that there is no compelling reason for an appeal to be heard.

12. We also note that in their skeleton argument for the hearing of the preliminary issue the Claimants indicated that if they were unsuccessful on that issue they would seek an extension of time under rule 19(2)(i) of the Tribunal Rules. In the event the Tribunal did not need to deal with such an application by the Claimants.

13. For these reasons the Tribunal unanimously refuses the Defendants' request for permission to appeal.

14. If so advised, a further application for permission to appeal may be made to the Court of Appeal within 14 days pursuant to CPR 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling, together with copies of the Defendants' solicitors' letter of 3 October 2008 requesting permission to appeal and the Claimants' solicitors' letter of 6 October 2008 opposing the request, should be placed before the Court of Appeal.

The President Ann Kelly Michael Davey

Charles Dhanowa
Registrar

Date: 17 October 2008