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The UK Competition Appeal Tribunal clarifies timing rules for follow-on private antitrust actions for damages against cartel participants (BCL, BASF)

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UK Competition Appeal Tribunal, 19 November 2009, Case n°1098/5/7/08, 1101/5/7/08, BCL Old Co & Others v BASF & Others

Frances Murphy, Stephen Brown, Matt Evans, e-Competitions, N° 33762, www.concurrences.com

On 19 November 2009, the UK Competition Appeal Tribunal ("CAT") confirmed the test it will apply when assessing whether to extend the time limit by which claimants may commence follow-on actions for damages before the CAT once there has been a finding of a breach of UK or EU competition law. The outcome of this new judgment is that potential claimants will more diligently pursue their claims and not rely on the CAT exercising its discretion to extend the limitation period.

Earlier this year, a judgment of the UK Court of Appeal, *BCL Old Co & Others v BASF & Others*, clarified the time limits for bringing follow-on actions for damages [1]. In that case BASF had appealed the CAT's decision that a follow-on action for damages brought by BCL Old Co. and Grampian against BASF and others for their participation in the 'vitamins cartel' was not time-barred. The Court of Appeal ruled that the two-year time limit for commencing follow-on actions before the CAT is suspended pending an appeal against the finding of a competition law infringement, but will not be suspended pending an appeal against the amount of fine imposed. Despite this, the Court of Appeal noted that the CAT does have power under its rules to extend any time limit. Accordingly, a failure to bring an action for damages before the CAT within the two year time limit laid down by CAT Rule 31 was "not necessarily fatal."

I. The CAT's Judgment

In the light of the earlier BASF judgment, the claimants returned to the CAT to persuade it to use its discretion to extend the usual two-year time limit, so that the claimants could seek damages from BASF and others for their involvement in the vitamins cartel.

In its 19 November 2009 judgment, the CAT clarifies the circumstances in which it should exercise its discretion, under CAT Rule 19(2)(i), to extend the time limits that govern when follow on actions for damages must be commenced. The CAT notes in its judgment that "to allow a claim to be brought after the expiry of the limitation period is a serious matter." To assess whether or not discretion ought to be exercised in this case, the CAT followed the two-part test established by the Court of Appeal in a 1995 maritime law case (*The "Al Tabith"* and *"Alanfushi"* case).

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This two-part test is: the claimant must demonstrate that there was a legally excusable lapse responsible for the delay, and the claimant must explain the steps it took throughout the period during which it could have brought, but failed to bring, proceedings, following which the CAT will consider the balance of hardship between the claimant and defendant in reaching its decision.

The CAT found that the Grampian claimants could not satisfy the first part of the test, because they failed to establish that there was a good reason they had not lodged their claim in time. In the absence of supporting evidence, the CAT refused to infer that Grampian's failure to lodge proceedings within time was the result of a reasonable misinterpretation of the law as regards time limits. Accordingly the Grampian claimants are confirmed as being out of time.

In contrast, the CAT found that the BCL claimants satisfied the first part of the two-part test. The BCL claimants were able to demonstrate that they had relied on their counsel's opinion that they were precluded at the time from bringing a claim because the two-year window had commenced pending BASF's appeal of the fine (the issue that the UK Court of Appeals later decided the other way).

However, the CAT concluded that the BCL claimants did not pass the second part of the test. It criticized the BCL claimants for not having taken any steps to pursue their claim during the period when they wrongly thought that they were precluded from actually starting proceedings before the CAT. For example, the CAT suggested that the BCL claimants could have alerted BASF to the fact that they intended to lodge a claim once the two-year window opened. At the very least, this would have been likely to serve as a warning to BASF to preserve any relevant documents that might be sought during the disclosure proceedings in any subsequent litigation. Instead, notwithstanding the fact that during 2004 and 2005 other purchasers were bringing claims in the High Court for damages arising out of the vitamins cartels, there was no contact between the BCL claimants and BASF. Furthermore, the CAT held that the BCL claimants did not act reasonably promptly once they thought the two year window had opened, but instead waited a further six months before contacting BASF. The CAT then considered arguments on prejudice. Somewhat ironically, in view of the CAT's disapproval of the BCL claimants' failure to contact BASF at an early stage, BASF stated that much of the documentation on which it would want to rely in defending the claim had been destroyed in accordance with a document retention policy introduced in 2004. The BCL claimants argued that they would lose their ability to claim compensation for the losses they claimed to have suffered as a result of the cartel. Not surprisingly, these arguments were not well received by the CAT. It pointed out that this was part and parcel of the application of the relevant rules and not an additional factor to weigh in the balance.

Since the BCL claimants did not satisfy the requirements of both parts of the test, the CAT refused to exercise its discretion to extend the time period for bringing a follow on action for damages. Accordingly the BCL claimants are confirmed as being out of time.

II. Implications

The CAT's ruling reinforces the lessons learned from the Court of Appeal's judgment in this dispute. The two-year time limit for commencing follow-on actions for damages before the CAT is suspended pending the outcome of an appeal against the finding of a competition law infringement, but will not be suspended pending the outcome of an appeal only against the amount of fine imposed. The CAT will not lightly exercise its discretion to allow a claim to be brought after the expiry of the limitation period. The CAT will exercise its discretion only in extenuating circumstances. It is to be anticipated that would be claimants will rarely satisfy the two-part test followed by the CAT in its judgment.

(While at their previous firm, Frances Murphy and Stephen Brown advised BASF on the plain reading of the CAT Rules that was accepted by the Court of Appeal as the correct interpretation.)

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NB Regarding this case, see also Frances Murphy, Stephen Brown, Tom Bainbridge, Matt Evans, The UK Court of Appeal holds that the UK Competition Appeal Tribunal has no discretion to extend limitations period for follow-on actions against alleged cartels (BCL, BASF), 12 November 2010, e-Competitions, n° 33652

[1] See Charles Hamman, David Simoes, The English Court of Appeal overturns Competition Appeal Tribunal's pre-defendant judgment on follow-on damages actions (Bcl Old Co. Ltd / BASF.), 22 May 2009, e-Competitions, n° 21510.

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| <p>Frances Murphy Jones Day (London) fmurphy@jonesday.com Stephen Brown Jones Day (London) stephenbrown@jonesday.com Matt Evans Jones Day (London) mevans@jonesday.com</p> |
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