

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 cartelists (BCL, BASF)

United Kingdom, Procedures, Limitation period/Prescription, Cartel, Price fixing, Competence, Pharmaceutical

Court of Appeal for England and Wales, 12 November 2010, Case n° C1/2008/2606, Bcl Old Co Limited a. o. v. BASF SE (Formerly BASF AG) a. o., [2010] EWCA Civ 1258

<http://www.bailii.org/ew/cases/EWCA...>

Frances Murphy, Stephen Brown, Tom Bainbridge, Matt Evans, e-Competitions, N° 33652, www.concurrences.com

On 12 November 2010, the Court of Appeal for England and Wales ruled that the UK Competition Appeal Tribunal (CAT) does not have discretion to extend the time period within which follow-on actions for damages may be commenced. The Court of Appeal's judgment provides important clarification of the scope of the CAT's discretion to extend the time limit for lodging a private claim for damages against a company found to have infringed EU or UK competition law.

In BCL Old Co Limited v BASF [2010], the Court dismissed an appeal by BCL for an extension of time in which to bring a follow-on action for damages against members of a cartel found by the European Commission to have infringed EU competition rules in the market for certain vitamins. The judgment is clear that the CAT does not have discretion under its Rules of procedure to extend the limitation period. Accordingly, the time limit for bringing follow-on claims for damages will be two years from the later of either the date of a decision finding an infringement or a final appeal upholding an infringement decision. This certainty is to be welcomed by both claimants and defendants.

I. Background

The Court of Appeal's judgment is the latest in a long-running litigation saga, arising from an effort by BCL to obtain compensation from BASF for damage BCL says it suffered as a result of BASF's involvement in a price-fixing and market-sharing cartel for certain vitamins. In January 2002, the European Commission adopted a formal decision fining BASF and others for involvement in the cartel. BASF appealed the level of fine it was required to pay, but did not appeal the infringement decision itself. Judgment in that appeal was delivered by the General Court on 15 March 2006.

BCL lodged its claim against BASF on 12 March 2008. BASF argued that the action was out of time, since it should have been lodged within two years of the date of the liability decision of the European Commission, not within two years from the date of the judgment of the General Court, since BASF had not appealed liability, only the fine. The CAT rejected

BASF's argument and decided that BCL was in time. According to the CAT, the two-year limitation period began on the date that BASF's time to appeal the General Court's decision had expired, without distinction between appeals on liability or the fine.

BASF appealed, and in May 2009, the Court of Appeal held that BCL's appeal was out of time. The Court concluded that an appeal against an infringement decision would stop the clock for the commencement of a follow-on action, whereas an appeal against the level of a fine would not.

However, the Court of Appeal also noted the CAT's Rules give the CAT a discretionary power to extend the two-year time limit. In light of this, BCL applied to the CAT for a discretionary extension of the limitation period to allow it to bring a follow-on action for damages. As discussed, the CAT ruled in November 2009 that, while BCL had made a reasonable mistake as to when the limitation period expired, it had not acted reasonably promptly once the window for bringing an action was open. Accordingly the CAT refused to extend the limitation period.

II. Judgment

BCL asked the Court of Appeal to decide whether the CAT's Rules gave the CAT discretion to extend the limitation period for damages actions. If the CAT did not have such power under the Rules, BCL asked the Court to decide whether such a power should be treated as existing by reason of principles of EU law. If the Court found that EU law did confer discretionary power on the CAT, then the Court had to decide whether the CAT had exercised that discretion properly when it refused BCL an extension. The Court of Appeal decided:

The CAT Rules did not contain a general discretionary power for the CAT to extend the limitation period.

The discretion to extend time under the CAT Rules was plainly limited to case management directions and did not create a general power to extend time for initiating proceedings.

A discretionary power should not be treated as existing in EU law. Accordingly, there was no need to consider whether the CAT's refusal to extend time was a proper exercise of a discretion conferred on it under EU law.

III. Conclusion

It remains to be seen whether BCL will seek leave to appeal to the highest court in England, the Supreme Court.

This issue is important to claimants and defendants alike. The Court of Appeal judgment provides certainty concerning the scope of the discretionary powers of the CAT and the limitation period for follow-on actions for damages. Claimants must initiate a damages action within two years from the later of either an infringement decision by an EU or UK competition authority or the outcome of an appeal against such an infringement decision. Defendants are not forever subject to the prospect of private litigation. The certainty the Court of Appeal has delivered to the procedure for follow-on actions for damages is welcome.

NB Regarding this case, see also Charles Baiman, David Smiles, *The English Courts' Speedy overruling of the Court of Appeal: "Intervenor" a pro-defendant judgment on follow-on damages actions (Bo-Dic Co. Ltd. v. BASF) [22 May 2009] e-Competitions, n° 36357*; Frances Murphy, Stephen Brown, Matt Evans, *The UK Competition Appeal Tribunal: A new, uniform rules for follow-on private antitrust actions for damages against cartel participants (BCL v. BASF) [19 November 2009] e-Competitions, n° 33762*

Frances Murphy | Jones Day (London) | fmurphy@jonesday.com
Stephen Brown | Jones Day (London) | stephenbrown@jonesday.com
Tom Bainbridge | Jones Day (London) | tbainbridge@jonesday.com
Matt Evans | Jones Day (London) | mevans@jonesday.com

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