Neutral citation [2008] CAT 24

Case Number: 1098/5/7/08

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

25 September 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

JUDGMENT ON THE PRELIMINARY ISSUE

APPEARANCES

Mr. Aidan Robertson (instructed by Taylor Vinters) appeared for the Claimants.

Mr. Mark Brealey QC and Mr. Stephen Brown (instructed by Mayer Brown LLP) appeared for the Defendants.

I. INTRODUCTION

1. The Claimants have lodged a claim for damages with the Tribunal pursuant to section 47A of the Competition Act 1998 (as amended) ("the 1998 Act"). Under section 47A of the 1998 Act, a person who has suffered loss or damage as a result of an infringement of a relevant prohibition may make a claim for damages or a claim for a sum of money in proceedings brought before the Tribunal.

2. The claim arises from a decision of the Commission of the European Communities ("the Commission") in Case COMP/E-1/37.512 – *Vitamins*, OJ L 6/1 10.1.2003, adopted on 21 November 2001 ("the Decision") relating to proceedings under Article 81 of the Treaty establishing the European Community ("the EC Treaty"). At Article 1 of the Decision, the Commission found that the first defendant (then BASF AG, now BASF SE, hereafter "BASF"), together with a number of other undertakings, had participated in a cartel in respect of the sale of vitamins ("the Cartel Products"), thereby infringing Article 81(1) of the EC Treaty and Article 53(1) of the Agreement on the European Economic Area. By Article 2 of the Decision, the undertakings concerned were required to bring the infringement to an end immediately in so far as they had not already done so. In respect of the infringement referred to in Article 1, substantial fines were imposed on the addressees of the Decision.

3. By application lodged at the Court of First Instance of the European Communities ("the CFI") on 31 January 2002, BASF brought an action for annulment or substantial reduction of the fine imposed upon it by the Decision. By judgment of 15 March 2006 in Case T-15/02 *BASF AG v Commission* [2006] ECR II-497, the CFI reduced the fines imposed on BASF. BASF did not appeal the judgment of the CFI to the European Court of Justice ("the ECJ").

4. The Claimants contend that, as indirect purchasers of the Cartel Products who bought at prices that were higher than would otherwise have been the case, they have suffered monetary loss and damage as a result of the infringement of Article 81(1) of the EC Treaty by BASF. The Claimants also submit that BASF implemented and/or gave effect to the cartel in the United Kingdom through its associated companies, the

second and third defendants. The three defendants are hereafter referred to collectively as "the Defendants", save where it is necessary to refer individually to BASF.

5. The Claimants previously brought proceedings under section 47A of the 1998 Act before the Tribunal in reliance upon the Decision against two other participants in the cartel: Aventis SA and F. Hoffmann-La Roche AG. Those claims were subsequently withdrawn on agreed terms by orders of the Tribunal dated 11 February 2005 and 24 November 2005.

6. In their defence, the Defendants argue that the Claimants' claim is time-barred. By Order of the President dated 16 May 2008, it was ordered that this question be heard as a preliminary issue. The hearing of the preliminary issue took place on 7 July 2008.

II. RELEVANT STATUTORY FRAMEWORK

7. Section 47A of the 1998 Act, inserted by section 18(1) of the Enterprise Act 2002 ("the 2002 Act"), allows for claims for damages or sums of money to be brought before the Tribunal in certain circumstances. It provides, so far as material, as follows:

> **"47A Monetary claims before Tribunal**
>
> (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—
>
> …
>
> (c) the prohibition in Article 81(1) 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 —

> …
>
> (d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or
>
> (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.

…

(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; and
>
> (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. The rules referred to in section 47A(4) are the Competition Appeal Tribunal Rules 2003 (SI 2003, No. 1372), adopted pursuant to Part 2 of Schedule 4 to the 2002 Act ("the Tribunal Rules"). Rule 31 of the Tribunal Rules provides, so far as relevant, as follows:

"**Time limit for making a claim for damages**

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. ...”

III. THE PRELIMINARY ISSUE

9. Rule 31 requires a claim under section 47A to be made within a two-year period beginning with “the relevant date”. This date is defined in rule 31(2) by reference to (in this case, which concerns a decision of the Commission) sub-section 47A(8). By virtue of this provision, “the relevant date” falls at the expiry of the time for appealing to the CFI against a Commission decision or, if any such appeal is lodged, at the time when the appeal proceedings (including, if applicable, any subsequent appeal to the ECJ) are determined.

10. The preliminary issue concerns when “the relevant date” fell in the present case.

11. The Defendants contend that on a proper interpretation of rule 31(1), when read together with section 47A and other provisions of the 1998 Act, “the relevant date” in the present case was the date when the possibility of an appeal by BASF against the infringement aspect of the Decision expired i.e. a date in January 2002. They submit that BASF’s appeal to the CFI did not delay the start of the two-year period for bringing the claim since that appeal was only in respect of the fine imposed upon BASF and did not include any appeal against the finding of an infringement. Accordingly, the Defendants say, the Claimants’ claim became time-barred in January 2004.

12. The Claimants, on the other hand, contend that “the relevant date” did not fall (and, therefore, the two-year period for bringing their claim under section 47A did not begin) until the appeal proceedings brought by BASF in the CFI were determined, namely 15 March 2006, with the result that the claim was within time, having been commenced on 13 March 2008. The Claimants argue that any appeal against the Decision is sufficient to delay “the relevant date” (and, therefore, the start of the two-year period) and that the fact that BASF challenged only the part of the Decision which relates to the fine imposed upon it is irrelevant.

IV. THE EMERSON JUDGMENTS

13. We were referred by the parties, both in written and oral submissions, to the Tribunal's judgments in *Emerson Electric Co. and others v Morgan Crucible Company plc and others* [2007] CAT 28 ("Emerson I") and *Emerson Electric Co. and others v Morgan Crucible Company plc and others* [2008] CAT 8 ("Emerson III").

14. Both judgments arose out of claims made under section 47A of the 1998 Act in reliance on the decision of the Commission dated 3 December 2003 in Case COMP/E-2/38.359 – *Electrical and mechanical carbon and graphite products*, OJ L 125/45, 28.4.2004, in which the Commission had found that the addressees of the decision had infringed Article 81(1) of the EC Treaty by participating in a worldwide cartel. Only certain addressees brought actions for annulment of the decision before the CFI, and one of the questions before the Tribunal was whether permission was required under subsection 47A(5) of the 1998 Act to bring a section 47A claim against a defendant, Morgan Crucible Company plc ("Morgan Crucible"), who was an addressee of the same Commission decision but who had not sought to challenge that decision before the CFI. The outcome depended upon whether subsection 47A(8)(b) applied in such circumstances.

15. In *Emerson I*, the Tribunal decided that subsection 47A(8) was applicable and, therefore, permission was required to bring a claim against a defendant in circumstances where the defendant had not appealed against a relevant infringement decision but its co-cartelists had. The Tribunal subsequently granted permission to the claimants for a damages claim to be made against Morgan Crucible (*Emerson Electric Co. and others v Morgan Crucible Company plc and others* [2007] CAT 30).

16. In *Emerson III*, the Tribunal considered whether, having granted permission for a damages claim to be made against Morgan Crucible, permission should be granted to allow the claimants to bring section 47A claims against some of the other addressees of the decision (i.e. those companies who had challenged the decision before the CFI, whose judgment on those appeals was still pending). For the reasons set out in its judgment, the Tribunal refused permission.

V. THE ARGUMENTS OF THE PARTIES

17. Mr. Brealey QC, for the Defendants, argued that the preliminary issue turns upon the construction of subsection 47A(8)(a), and that the term "the decision" in that provision is a reference to a decision (in this case, by the Commission) that there has been an infringement of a relevant prohibition – here Article 81(1) of the EC Treaty. On its true construction, the provision is not referring to a decision by the Commission to impose a fine.

18. It was submitted that in order properly to construe the provision one should look at section 47A as a whole and also in the wider context of the 1998 Act. Subsection 47A(8) sets out the periods during which a claim under section 47A cannot be made without the permission of the Tribunal. This subsection has to be read with subsection 47A(5)(b), which provides that no claim may be made "otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to *that decision*" (emphasis added). The words "that decision" refer to subsection 47A(5)(a), which in turn refers to "a decision mentioned in subsection (6)." The relevant decision for the purposes of the present section 47A proceedings referred to in subsection (6) is identified in sub-paragraph (d) of that subsection: "a decision of the European Commission that the prohibition in Article 81(1) […] of the Treaty *has been infringed…*" (emphasis added). Mr. Brealey submitted that the decision referred to in subsection 47A(8) is therefore a decision that the prohibition in Article 81(1) has been infringed, and not a decision relating to the imposition of a fine or penalty. The meaning of the provision was clear and in those circumstances one did not need to concern oneself with policy questions in order to interpret it.

19. Further, this interpretation was, he argued, supported by the distinction drawn in other sections of the 1998 Act between a decision that a prohibition has been infringed and a decision to impose a fine, in particular sections 2 (agreements preventing, restricting or distorting competition), 31 (decisions following an investigation), 32 (directions in relation to agreements), 36 (penalties), 46 (appealable decisions), 47 (third party appeals) and 49 (further appeals).

20. The Defendants submit, therefore, that, in these circumstances, the proper interpretation of "decision" in section 47A(8) is a decision that the prohibition in Article 81(1) has been infringed and not a decision imposing a penalty. This interpretation leads them to the conclusion that the appeal brought by BASF before the CFI to annul or substantially reduce the fine imposed by the Commission in the Decision did not suspend time for the purposes of rule 31 and the Claimants' claim is time-barred as a result.

21. As far as concerned the *Emerson* judgments, Mr. Brealey submitted that the present issue was not argued before the Tribunal in those cases. In *Emerson I* the issue was entirely different. There the Tribunal was concerned with the question as to whether permission was required to bring a claim against a defendant in circumstances where the defendant had not appealed against a relevant infringement decision but its co-cartelists had, and the judgment of the CFI in their appeals was still pending. Thus, the issue in *Emerson I* related to the effect of the proposed defendant not being a *party* to the CFI appeal. However, the issue before us in these proceedings concerns the significance of which part of the decision is being appealed. In *Emerson III* the parties and the Tribunal all proceeded on the assumption that the two-year period for bringing a section 47A claim had not yet commenced because the judgment of the CFI in the appeals brought by the proposed defendants was still pending, and therefore that permission of the Tribunal was required in order for the claimants to be allowed to bring a section 47A claim for damages against the proposed defendants. The issue raised in the current proceedings simply did not arise.

22. Mr. Brealey further submitted that, in any event, in their appeals to the CFI the proposed defendants in *Emerson III* had sought to annul *the whole* of the Commission decision on which the claimants sought to rely, and were not concerned exclusively with the level of fine. In the present case, by contrast, BASF had merely sought to challenge the part of the Decision relating to the fine imposed on it by the Commission.

23. Moreover, Mr. Brealey submitted that the approach he advocated had a number of benefits, including the fact that where the appeal to the CFI was only against a fine imposed, the two-year period would be running notwithstanding that the appeal was

as yet unresolved. Claimants would, therefore, be able to bring their claims for damages before this Tribunal without delay and as of right. He contrasted the effect of the approach espoused by the Claimants which, he submitted, would lead to a substantial delay during which victims of cartels could not bring actions for damages except with the permission of the Tribunal. In this respect, he referred us to the fact that the Decision, while dated 21 November 2001, refers to acts which took place as far back as the late 1980s.

24. Finally, Mr. Brealey argued that the Defendants' approach produced certainty for claimants as a result of the notice that is published in the Official Journal of the European Communities ("the OJ") following the lodging of an appeal. This notice sets out whether an appeal relates to the infringement part of a Commission decision or is limited to a challenge to the fine imposed, and will enable them to know whether time has started running or not.

25. Although he conceded that there may be instances where a judgment of the CFI or ECJ (as the case may be), in an appeal purely in relation to a fine, may have an impact on the factual circumstances underlying the decision, and, thereby, affect the issues to be determined in proceedings under section 47A, these would only be in remote cases. He further submitted that, in such circumstances, it would be open to the parties to ask the Tribunal to stay the damages action pending the judgment of the CFI or ECJ.

26. In response, Mr. Robertson for the Claimants argued that rule 31 of the Tribunal Rules refers only to section 47A(7) and 47A(8) of the 1998 Act. It is not, therefore, necessary to consider the other subsections of that section, let alone the wider statutory context of the 1998 Act. Many of the provisions referred to by the Defendants as drawing a distinction between infringement decisions on the one hand and those imposing a fine on the other were enacted after the 2002 Act, which introduced section 47A into the 1998 Act, came into force in June 2003. The provisions in those sections which refer to the exercise by the Office of Fair Trading ("OFT") of powers pursuant to Article 81 of the Treaty were only added following the coming into force of Regulation 1/2003 (OJ L 1/1, 4.1.2003) on 1 May 2004 by virtue of the changes to the 1998 Act set out in the Competition Act 1998 and other enactments (Amendment) Regulations 2004 (SI 2004, No. 1261). Given that these

provisions post-date the initial introduction of section 47A by the 2002 Act, they cannot serve as an aid to its interpretation. Moreover, the Claimants argue that, in any event, the regime introduced by the 2003 Act via section 47A of the 1998 Act was meant to serve as a self-standing regime and, as such, cannot rely on other provisions, either pre-existing or introduced subsequently, for its proper interpretation.

27. In support of his contention that it was not appropriate to divide the Decision into an infringement part and a separate part dealing with fines, Mr. Robertson referred us to the Decision itself. Internally, the Decision refers to itself at all times in the singular; the operative part of it contains five articles; it is not a series of separate decisions, even though issues involving infringement and duration are dealt with in Article 1, whereas the fines imposed on the relevant undertakings are set out in Article 3.

28. We were also taken by Mr. Robertson to the published notice in the OJ of BASF's appeal against the Decision (OJ C 109/49, 4.5.2002). This brief notice is the only document published in all official languages of the European Union in the OJ. The written pleadings in an appeal are not published at all and are not available to third parties such as the Claimants without the main parties' consent. The published notice records BASF's application that the CFI should "annul or substantially reduce the fine imposed on BASF pursuant to Article 3(b) of the Decision". It also sets out, again in summary form, the pleas in law and main arguments of BASF. The Claimants submit that it would not make sense if the Tribunal Rules and statutory scheme adopted in the 1998 Act required potential claimants to try and work out from a summary notice of this kind published in the OJ the exact grounds and scope of challenge against a decision of the Commission.

29. Mr. Robertson also pointed out that the limitation period of two years set out in rule 31(1) of the Tribunal Rules is shorter than that provided in the Limitation Act 1980. In cases founded on tort, the limitation period set out in that Act is six years from the date on which the cause of action accrued. In addition, the claim process as laid down in the Tribunal Rules is front-loaded and requires a number of steps to be followed at the outset when filing a claim form over and above the steps required in the ordinary courts when lodging a claim form (see, in this regard, Part 16 of the Civil Procedure Rules). Rule 32(4)(b), for example, requires that "as far practicable a copy of all

essential documents on which the claimant relies" be annexed to the claim form. This requirement is more onerous than that provided for in proceedings before the High Court. Given these factors, it is reasonable to conclude that the decision which forms the basis of the claim under section 47A should be definitive, in the sense that it cannot be subject to further appeal or affected by any existing appeal. Only in these circumstances can a claimant know for certain the basis of liability of the defendant and also the potential quantification of its damages, as required by rule 32(3)(c) of the Tribunal Rules.

VI. THE TRIBUNAL'S CONCLUSIONS

30. Despite the skilful arguments deployed by Mr. Brealey, we are unanimously of the view that, in the present case, "the relevant date" within the meaning of rule 31(1) fell on the expiry of the period during which an appeal against the judgment of the CFI could have been instituted in the ECJ (i.e. within two months from the notification of the decision appealed against), and that, therefore, the Claimants' claim is not out of time.

31. The effect of section 47A is to enable a person who has suffered loss as a result of an infringement of the EC or UK competition rules to rely upon a relevant decision of the EC or UK competition authority establishing the infringement in question, rather than having to establish the infringement independently. This is achieved by subsection 47A(9), which provides that the Tribunal is bound by "any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed".

32. The reference in rule 31 to subsection 47A(8) is to identify the date at which the two-year period allowed for bringing a claim for damages under section 47A begins to run. Once that period has expired, a claim may only be pursued under section 47A if the Tribunal grants an extension of time pursuant to rule 19(2)(i) of the Tribunal Rules.

33. In considering the meaning and effect of any part of section 47A, in our view the proper approach is to consider the section as a whole, rather than to look at individual subsections in isolation; the section represents a complete code for the monetary

claims to which it applies; for example, it is only by reading subsection (6) that one is able to know the kind of decision that may be relied upon for the purposes of the particular claim before the Tribunal. It may well be that in an appropriate case the section can also be looked at in the wider context of the 1998 Act of which it is part: it does, of course, cross-refer to other sections of the 1998 Act for certain purposes. This said, in our view, there is limited assistance to be obtained from other sections of the 1998 Act in relation to the issue currently before the Tribunal. Those other sections to which we were referred address different circumstances from those with which we are concerned. It appears to us that, notwithstanding the submissions of Mr. Brealey, the fact that, for example, it was necessary to enact a separate section with respect to the penalties the OFT may impose following a finding of an infringement (section 36 of the 1998 Act), does not throw much light upon the meaning of "decision" in subsections (5), (6) or (8) of section 47A, which are solely concerned with the circumstances in which a person who has suffered loss or damage may bring proceedings in the Tribunal following a decision establishing an infringement of a relevant prohibition.

34. The purpose of subsections 47A(5), (7) and (8) is to prevent claims for damages being brought in the Tribunal without permission before the decision relied upon 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. The findings made by a competition authority in deciding to impose, and in calculating the level of, a penalty may well be relevant to, and be determined by, the nature and extent of the infringement which is being penalised. For example, the gravity, duration and scope of the infringement – both geographical and in terms of the range of products covered – may well be factors relevant, not only to the size of the penalty imposed, but also to liability in damages. Equally, if, in deciding an appeal against the imposition and/or amount of a penalty, the European Court were to find that the scope of the cartel was in fact substantially limited, this might not only be a mitigating circumstance as to the amount of any fine, but could also be relevant to damages liability for the purposes of section 47A. The European Court, for example, in deciding such an appeal, may also find that the products purchased by a potential claimant were not, in fact, covered by the cartel in question (see *Emerson III*, paragraph [90]).

35. For these reasons, we are not convinced that the cases where an appeal brought against the imposition and/or amount of a penalty could have a material impact on matters relevant to claims under section 47A, particularly as regards the quantum of damages suffered by a victim of an infringement, will be as rare or remote as the Defendants suggest. Be that as it may, in the present case the "decision" referred to in the relevant provisions, and, in particular, rule 31(2)(a) and subsections 47A(5), 47A(6)(d) and 47A(8) 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. This seems to us to accord with the plain and ordinary meaning of those provisions, and there is nothing in them which requires a more restrictive interpretation. The Decision is, in ordinary terms, an infringement decision: it undoubtedly establishes the infringement which is to be relied upon by the Claimants under section 47A.

36. We also note that rule 32(3) requires the claim form in a claim for damages under section 47A to contain *inter alia*: "a concise statement of the relevant facts, identifying any relevant findings in the decision on the basis of which the claim for damages is being made". Rule 32(4) requires there to be annexed to the claim form "a copy of the decision on the basis of which the claim for damages is being made." Although it is not possible to interpret primary legislation by reference to subordinate rules, it is worth noting that "any relevant findings in the decision" can hardly be intended to be artificially limited to findings made in a particular part of the overall decision. Similarly, the reference to "a copy of the decision" appears to be to the overall decision rather than to any distinct part of it. We note in this context that decisions of competition authorities may, in certain cases, leave the assessment of issues related to the extent of any participation in cartel activity (a factor which can be relevant in damages claims) until the section in the decision which specifically considers the penalties to be imposed on undertakings.

37. Moreover, issues of transparency and legal certainty would be likely to arise on the Defendants' approach to interpreting the legislation. Even if, on the basis of the brief notice published in the OJ, a claimant might be in a position to identify cases in which an appeal is solely related to annulment or reduction of a fine, it will often be difficult for the claimant to form a clear view as to whether the points raised therein are likely

to have an impact on the kind of issues that will arise in a claim for damages under section 47A. The difficulties faced by a claimant in these circumstances were discussed by the Tribunal in *Emerson III*, at paragraph [89]. As already mentioned, a potential claimant does not have the right to see the written pleadings in the appeal. In these circumstances, it is only when the final judgment of the CFI or ECJ, as the case may be, is available that a claimant will be in a position to determine the extent to which the finding of infringement appealed against is definitive (whether in the context of an action for annulment of the entire decision or in respect of the imposition or level of a fine). In our view, it is no answer to this to say that, in cases where there is doubt as to the effect of an appeal against a fine, a stay of the damages claim can be granted by the Tribunal. This argument assumes that the Defendants' restrictive interpretation is correct. The real point is that to start a damages claim under section 47A as of right, there must be in place a definitive decision. If the status of the decision is still in doubt, even if only in certain respects, then the claim is not yet properly founded. On this basis, interpreting the provisions in question in the way proposed by the Claimants has the merit of avoiding the risks associated with proceeding with a claim as of right in reliance upon a decision which is still liable to be changed on appeal. In such a case there is, of course, always the possibility of persuading the Tribunal to grant permission under section 47A(5) to bring the claim at that stage.

38. We are further reinforced in the view we take by the judgments of the Tribunal in *Emerson I* and *III*. Whilst it is correct that the issue in *Emerson I* concerned a possible section 47A claim for damages against an addressee of a Commission decision who had not appealed against that decision, the Tribunal's reasoning applies equally to the present case. The Tribunal stated:

> "62. The first issue requires us to decide the true meaning of sections 47A(5)(b) and 47A(8) of the 1998 Act and how these provisions apply to the particular circumstances of the case presently before us. Does section 47A(8) apply in circumstances where the UK proceedings are brought against an addressee of the Decision who is not party to the EC proceedings?
>
> 63. We consider that the first question to ask is what is the ordinary or plain meaning of sub-sections (5) and (8), having due regard to general principles of Community law and the overall structure and purpose of the 1998 Act.

64. Section 47A(5)(b) and 47A(8)(b), read with section 47A(8)(a), provide that where "any such proceedings" (i.e. the EC proceedings) may be, or have been, instituted in the European Court, then a claim for damages under that provision may only be brought with the permission of the Tribunal. We consider that the phrase "if any such [EC] proceedings are instituted" in subsection (8) clearly indicates that as long as "any" proceedings have been brought in the European Court, permission of the Tribunal is required to bring a monetary claim under section 47A.

65. We consider this to be so where the proceedings in the European Court have been brought by any one or more of the addressees of the decision in question or, indeed, by a third party for whom the decision is of direct and individual concern within the meaning of Article 230(4) of the EC Treaty.

66. In our judgment, whilst EC proceedings against the Decision are on foot, the Emerson Claimants require permission to commence UK proceedings before the Tribunal, even when brought against an addressee of the Decision, such as Morgan Crucible, who has not instituted EC proceedings.

67. The plain construction of section 47A means that time has not yet begun to run…

68. We consider that the plain meaning of the provisions of section 47A of the 1998 Act, set out above, secures the just, expeditious and economical conduct of proceedings before the Tribunal…

70. […] The Emerson Claimants submit that since any annulment of the Decision would have no effect on the Decision in relation to Morgan Crucible, it follows that the reference to "decision" in section 47A(8) of the 1998 Act is a reference not to the whole of the decision of the European Commission but instead refers only to that part of the decision which is the subject of the appeal to the EC.

71. In our judgment the word "decision" in section 47A(8) of the 1998 Act cannot be given such a restrictive meaning…"

39. Thus the fact that the other addressees' appeals to the CFI were pending was sufficient to suspend the start of the two-year period so far as Morgan Crucible (who had not appealed) was concerned. The Tribunal's reasoning was not dependent upon whether those appeals might or might not affect the findings relied upon in the proposed claim against Morgan Crucible. The Tribunal expressly rejected the argument that, since the other addressees' appeals were said to be incapable of affecting the Commission decision in relation to Morgan Crucible, the reference to "decision" in subsection 47A(8) should be taken as applying only to that part of the decision which was appealed. (See paragraphs 70-71 of the judgment, above.) We consider, therefore, that the *Emerson I* judgment is *a fortiori* the present case, where BASF was itself an appellant in the CFI.

40. It is hardly surprising, given the Tribunal's interpretation of the relevant legislation in *Emerson I*, that in *Emerson III* the Tribunal proceeded on the basis that subsection 47A(8) applied to the case before it, and that permission for the claims to be brought against the proposed defendants was required. For in that case the proposed defendants were appellants before the CFI. Although that judgment is dealing with the issue of permission rather than the question which arises in the present case, it is nevertheless instructive as highlighting the risk to which we have adverted that the determination of an appeal which is wholly or mainly against a penalty may have a knock-on effect on findings which go to the questions of extent of liability or quantum of damages in a section 47A claim. (See paragraphs [86]-[93] of the judgment.)

41. While it is correct, as Mr. Brealey pointed out during the hearing, that the conclusion we have reached may lead to delay in certain circumstances, the *quid pro quo* for claimants in being required to wait until any appeal against the decision has been determined is that the infringement relied upon by the claimant (and binding upon the Tribunal) is then finally established and, therefore, issues of proof before this Tribunal will be rendered less onerous than before the ordinary courts. There is also, in our judgment, less chance of a potential claimant suffering prejudice in having to wait for a final decision, rather than being required to decipher, from the brief notice published in the OJ (referred to in paragraph [37] above), whether an appeal relates solely to the annulment or reduction of a fine. As already mentioned, it is still open to claimants to come before the Tribunal and argue that permission should be granted to bring their claim before final determination of an appeal. While the cases where such permission is judged appropriate are likely to be exceptional, the Tribunal will not hesitate to grant it where the interests of justice so require. Claimants are in any event entitled to bring actions for damages before the ordinary courts at any stage, with or without the benefit of reliance on an infringement decision.

VII. CONCLUSION

42. For the reasons given above, the Tribunal unanimously finds that "the relevant date" under rule 31(2) for the purposes of the Claimants' claim for damages under section 47A of the 1998 Act fell on the expiry of the period during which an appeal against the judgment of the CFI could have been instituted in the ECJ, with the result that the claim is not time-barred by that rule.

The President	Ann Kelly	Michael Davey

Charles Dhanowa
Registrar

Date: 25 September 2008