



24 October 2012

PRESS SUMMARY

**BCL Old Co Limited and others (Appellants) v BASF plc and others (Respondents) [2012]
UKSC 45**

On appeal from [2010] EWCA Civ 1258

JUSTICES: Lord Phillips, Lord Walker, Lord Mance, Lord Clarke and Lord Wilson.

BACKGROUND TO THE APPEALS

The three respondents were part of a vitamins cartel which the European Commission found by Commission Decision COMP/E-1/37.512 of 21 November 2001 had infringed Article 81 of the EC Treaty (now Article 101 TFEU). Accordingly, the Commission imposed fines on the cartelists who were given until 31 January 2002 to appeal against; (a) the infringement decision; and/or (b) the fine. Only BASF exercised that right of appeal and they did so only in respect of the amount of the fine; no appeal was made against the Commission's decision that an infringement had occurred. On 15 March 2006 the Court of First Instance (CFI) reduced the amount of the fine and the deadline for any further appeal expired shortly afterwards (on 25 May 2006) without any further appeal being lodged.

Section 47A of the Competition Act 1998 (“**the 1998 Act**”) provides that following an infringement finding by the Commission, any person who has suffered loss as a result of that infringement may bring a follow-on claim for damages. On 12 March 2008 the four appellants sought to bring such claims against the respondents before the UK Competition Appeal Tribunal (CAT). The respondents argued that the appellants were precluded from doing so on the grounds that the two-year limitation period for the bringing of such claims had expired with the result that the claims were time-barred. The respondents contended that the limitation period started running on the date on which BASF's time for appealing against the Commission's *infringement* decision expired (31 January 2002) with the result that the limitation period expired two years later (31 January 2004) and the proposed claims were therefore time-barred. The appellants rejected this interpretation contending instead that the limitation period commenced on the date on which BASF's time for appealing the CFI's decision on the level of the *fine* expired (25 May 2006) with the result that the limitation period expired on 25 May 2008 and the proposed claims were in time.

The CAT held that the appellants' interpretation was correct and that the proposed follow-on damages claims had been brought in time. The Court of Appeal (CA) granted the respondents permission to appeal and allowed the appeal holding that the plain and ordinary meaning of the statutory language drew a clear distinction between infringement decisions and penalty decisions. Only infringement decisions were of relevance in determining when the limitation period started to run. The CA further held that the CAT had no power to extend the time in which follow-on damages claims could be brought and EU law did not override the UK time bar or require that a power to extend time be held to exist.

The appellants appealed to the Supreme Court on the grounds that the operation of the two-year limitation period caused legal uncertainty and thus made it excessively difficult for the appellants to pursue follow-on damages claims against the respondents in time in breach of EU law.

JUDGMENT

The Supreme Court of the United Kingdom

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The Supreme Court unanimously dismisses the appeal. There is no failure to comply with the European legal principles of effectiveness and legal certainty; the statutory limitation period is sufficiently clear, precise and foreseeable as to allow individuals to ascertain their rights and obligations and to exercise those rights without excessive difficulty. The judgment of the Court is given by Lord Mance.

REASONS FOR THE JUDGMENT

- National limitation periods are permissible under EU law but they should not operate so as to render practically impossible or excessively difficult the exercise of EU law rights [15]; whether or not they do so is a matter for the national courts to determine in light of the European principles of effectiveness and legal certainty [12].
- EU law does not require that the interpretation or true effect of a statutory limitation period be clear beyond doubt [20-22]. The true test is more flexible and does not impose a requirement for absolute clarity. Instead what is required is that national law is sufficiently clear, precise and foreseeable as to enable individuals to ascertain their rights and obligations and exercise those rights without excessive difficulty [23-24]. Section 47A of the 1998 Act satisfies that test as it is sufficiently clear, precise and foreseeable as to enable individuals to ascertain when the limitation period commences.
- In this case, the statutory limitation period commenced following the expiry of the time within which the respondents could appeal against the Commission's infringement decision; it did not commence following the expiry of the time within which the respondents could appeal against the CFI's decision as to the level of the fine [29]. The Competition Act 1998 repeatedly distinguishes between infringement decisions on the one hand and penalty decisions on the other, making clear that only infringement decisions are of relevance in determining the date upon which a limitation period commences: see e.g. sections 31, 32, 36, 46 and 47A [30]. Given that BASF did not appeal against the Commission's infringement decision it was sufficiently clear that the two-year limitation period started on 31 January 2002 following the expiry of the time for appealing against the Commission's infringement decision.
- As the operation of the statutory time limit is sufficiently clear, precise and foreseeable the statute did not render it excessively difficult for the appellants to exercise their EU law rights. Consequently, EU law does not require that a power to extend time be treated as existing. Indeed, it is clear that the Secretary of State in making the CAT rules deliberately decided that there should be no power to extend time for the commencement of damages claims [42].
- Had the Court found that the statutory limitation period failed to comply with the European principles of effectiveness and legal certainty then the United Kingdom would have been in breach of its obligations under EU law and State liability would have arisen. However, even in such circumstances the appellants could not have brought follow-on damages claims against the respondents as EU law does not require the setting aside as between civil parties of a limitation defence, successfully established under domestic law, on the grounds that its effect would have been insufficiently clear, precise and foreseeable prior to the court decision establishing it [44-47].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html

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