Neutral citation [2009] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1098/5/7/08
1101/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

19 November 2009

Before:

VIVIEN ROSE
(Chairman)
THE HON ANTONY LEWIS
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Claimants

-v-

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

Defendants

(1) GRAMPIAN COUNTRY FOOD GROUP LIMITED
(2) GRAMPIAN COUNTRY FEEDS LIMITED
(3) MARSHALL FOOD GROUP LIMITED
(4) CYMRU COUNTRY CHICKENS LIMITED
(5) FAVOR PARKER LIMITED

Claimants

-v-

(1) SANOFI-AVENTIS SA
(2) RHODIA LIMITED
(3) F.HOFFMAN-LA ROCHE AG
(4) ROCHE PRODUCTS LIMITED
(5) BASF SE
(6) BASF PLC
(7) FRANK WRIGHT LIMITED

Defendants

RULING ON APPLICATION TO EXTEND TIME

APPEARANCES

Mr. Aidan Robertson QC (instructed by Taylor Vinters) appeared for the Claimants BCL Old Co Limited and Others and (instructed by Maclay Murray & Spens LLP) for the Claimants Grampian Country Food Group Limited and Others.

Mr. Mark Brealey QC (instructed by Mayer Brown International LLP) appeared for the Defendants BASF SE, BASF PLC and Frank Wright Limited.

Mr. Thomas De La Mare (instructed by Ashurst LLP) appeared for the Defendants Sanofi-Aventis SA and Rhodia Limited.

Mr. Mark Hoskins QC (instructed by Freshfields Bruckhaus Deringer LLP) appeared for F.Hoffmann-La Roche AG and Roche Products Limited.

1. The Tribunal has before it applications by the claimants in both these actions to extend time for lodging their claims. Those applications are opposed by the defendants to the respective claims. We shall refer to the claim numbered 1098/5/7/08 as "the BCL Claim" and to the claim numbered 1101/5/7/08 as "the Grampian Claim". We shall refer to the Defendants as follows:

   (a) The 1st, 2nd and 3rd Defendants in the BCL claim who are also the 5th, 6th and 7th Defendants in the Grampian claim as "the BASF Defendants";

   (b) The 1st and 2nd Defendants in the Grampian claim as "the Aventis Defendants"; and

   (c) The 3rd and 4th Defendants in the Grampian claim as "the Roche Defendants".

2. The BCL and Grampian claims are brought under section 47A of the Competition Act 1998 (as amended) ("the 1998 Act"). Under that section, a person who has suffered loss as a result of an infringement of the competition rules can bring a claim for damages before the Tribunal. In accordance with section 47A(5), no claim can be brought under the section unless there has been a decision by a domestic competition authority or by the EC Commission establishing that an infringement has taken place. The claimant does not itself bear the burden of proving the infringement since the Tribunal is bound, when determining the claim for damages, by the findings in the infringement decision.

3. The infringement which the claimants allege has caused them loss is the operation of a series of cartels among producers of certain vitamins. The cartels were investigated and condemned by the European Commission in Case COMP/E-1/37.512 *Vitamins* OJ 2003 L6/1 ("the Decision"). The Commission found that a number of undertakings had infringed Article 81(1) of the EC Treaty by participating in agreements affecting the markets for, amongst other products, vitamins A, E and B2. For the purpose of this application it is not contested that the BASF, Aventis and Roche Defendants all form part of undertakings which were found to have participated in some of those illegal

agreements. The vitamin A and vitamin E cartels operated, as the Decision found, between September 1989 and February 1999. The vitamin B2 cartel operated from January 1991 to September 1995. The Decision was adopted by the Commission on 21 November 2001. On that day, the Commission issued a Press Release (IP/01/1625) listing the companies which had been fined and describing, in trenchant terms, the conduct which had been uncovered. The Decision was published in the Official Journal of the European Communities over a year later, in January 2003.

4. In February 2004 the first three claimants in the BCL claim brought an action under section 47A against the Roche Defendants and the Aventis Defendants (Case No. 1028/5/7/04) and the fourth claimant in the BCL claim brought an action against the Roche Defendants and Aventis SA (Case No. 1029/5/7/04). Both these claims were for damages arising out the vitamins cartels. There were various interlocutory matters dealt with but the claims were withdrawn towards the end of 2005 when the cases settled on terms that have not been disclosed.

5. Section 47A of the 1998 Act, inserted by section 18(1) of the Enterprise Act 2002 ("the 2002 Act") 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;

…

(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."

6. 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. ..."

7. The effect of these provisions is that a claimant who wishes to rely on a European Commission infringement decision to bring an action under section 47A has a window

of two years in which to do so. That window opens on the date on which (broadly speaking) the appeal process in the European Courts has been exhausted and closes two years later. This is qualified by two considerations. First, section 47A of the 1998 Act came into force only on 20 June 2003 so no claim could be brought under it before that date. Secondly, once there has been a decision that an infringement has taken place, it is possible for a claimant to bring a claim before the opening of the two year window if the Tribunal grants permission under section 47A(5)(b) and Rule 31(3).

8. It is common ground that the relevant time limit for an addressee to appeal to the Court of First Instance against this Decision was two months and 10 days after the Decision was adopted. If no appeals had been brought, the two year window allowed under section 47A would thus have opened on 20 June 2003 (being the date on which section 47A came into effect) and closed on 31 January 2004 (being two years and 10 days after the adoption of the Decision). In fact BASF lodged an appeal against the Decision on 31 January 2002. That appeal did not challenge the Commission's finding of an infringement by BASF but was limited to challenging the amount of the fine that the Commission had imposed. Judgment in that appeal was handed down by the Court of First Instance on 15 March 2006. BASF then had, under the relevant Community law rules, two months and 10 days in which to lodge a further appeal to the European Court of Justice. They decided not to do so. If the BASF appeal to the Court of First Instance counted as proceedings instituted against the Decision for the purposes of section 47A(8)(b), then the two year window for bringing claims under section 47A would not open until those proceedings had been determined and it was clear there was going to be no further appeal to the Court of Justice. That was not until 25 May 2006 (that is two months and 10 days after the Court of First Instance's judgment). The window would, in those circumstances, open on 25 May 2006 and close two years later on 25 May 2008.

9. The BCL claim was lodged on 12 March 2008. The Grampian claim was lodged on 14 May 2008. The Tribunal ordered the question of whether the BCL claim had been brought within the limitation period allowed by section 47A to be tried as a preliminary issue and handed down its judgment on that issue on 25 September 2008 ([2008] CAT 24). The Tribunal held that the BASF appeal was relevant for the purposes of section 47A(8)(b) and that the two year window for bringing claims against BASF opened only

once that appeal had been determined. This meant that the window had not closed by the time the BCL claim was lodged.

10. That Tribunal ruling had to be read together with the Tribunal's earlier decision in *Emerson Electric Co v Morgan Crucible* [2007] CAT 28 ("*Emerson Electric*"). In that case the Tribunal decided that if *any* proceedings against a decision are on foot in the European Courts, the two year window does not open for claims against any of the addressees of the decision, even as against an addressee who has not brought an appeal itself. The combination of the Tribunal's ruling on the preliminary issue on the BCL claim and the Tribunal's decision in *Emerson Electric* meant that the BCL and Grampian claims were within the statutory time limit vis-à-vis all the defendants.

11. The BASF Defendants sought permission to appeal against the Tribunal's preliminary ruling in the BCL claim. The Tribunal refused permission on the grounds that the appeal had no real prospect of success and that there was no other compelling reason for the appeal to be heard: [2008] CAT 29. However, the Court of Appeal granted permission and allowed the appeal: [2009] EWCA Civ 434. The Court of Appeal drew a distinction between decisions on infringement and decisions on penalty. Richards LJ, with whom the other members of the Court agreed, held that the plain and ordinary meaning of the statutory language was that it was only challenges on liability that were relevant for the purpose of section 47A(8)(b). Since BASF's appeal was limited to challenging the fine, it did not have the effect of extending the period during which proceedings in respect of the claim might not be brought without permission.

12. The effect of this was that whereas according to the Tribunal's preliminary ruling, the two year window had not opened until 25 May 2006 when the time for appealing against the Court of First Instance's judgment ran out, in fact the window had, by that date, long been closed and not only as against BASF but as against any addressee of the Decision.

13. In the Court of Appeal judgment, Richards LJ noted that the Tribunal had power under Rule 19(2)(i) of the Tribunal Rules to extend any time limit so that the failure to apply within the two year time limit laid down by Rule 31 was "not necessarily fatal to the bringing of a claim under section 47A" (see [2009] EWCA Civ 434, at paragraph [10]).

The Defendants conceded for the purposes of these applications that the Tribunal has power to extend time under Rule 19(2)(i) of the Tribunal Rules, though some of them at least reserve the right to challenge the existence of that power if this case goes further. For the purpose of the present applications, the Tribunal has therefore assumed that it has power to extend the time limit in Rule 31. The Tribunal which has considered these applications to extend time is a differently constituted panel from the panel which delivered the preliminary ruling in the BCL claim.

14. The relevant Tribunal Rules relating to the extension of time in this case are Rules 44 and 19(2)(i). Rule 44 provides:

> **"Case management generally**
>
> 44. - (1) In determining claims for damages the Tribunal shall actively exercise the Tribunal's powers set out in rules .... 19 (Directions) .... with a view to ensuring that the case is dealt with justly.
>
> (2) Dealing with a case justly includes, so far as is practicable -
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate -
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases."

15. Rule 19 provides:

> **Directions**
>
> 19. - (1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.

(2) The Tribunal may give directions –

....

(i) as to the abridgement or extension of any time limits, whether or not expired;"

16. It was not clear to us whether the parties here were arguing that the test set out in Rule 19(1), namely that the Tribunal's powers should be exercised to secure the just, expeditious and economical conduct of the proceedings, was materially different from the test in Rule 44, namely that the power should be exercised to ensure that the case is dealt with "justly" as defined by Rule 44(2)(a) – (e). In our judgment, nothing turns on any such difference when applying either provision to the facts of this case.

17. The parties disagreed as to whether the claimants had to show that the circumstances justifying an extension of time were exceptional. The power on which the claimants rely is an entirely general power applying to a variety of time limits whether set in the Rules or by the Tribunal in exercise of its case management powers. The test to be applied by the Tribunal is not necessarily the same in every circumstance where the power is used. Mr Robertson QC acting for the BCL and Grampian claimants drew our attention to the fact that the power to extend time for the start of an appeal under Rule 8 of the Tribunal Rules provides that the Tribunal must be satisfied that the circumstances are exceptional. We do not accept the claimants' argument that the absence of the reference to exceptional circumstances in Rule 19(2)(i) means that the Tribunal should be more ready to grant extensions of time to bring claims under section 47A. On the contrary, we consider that it indicates, at the least, that extending time so as to allow a claim to be brought after the expiry of the limitation period is a serious matter.

18. The Defendants referred to the public policy considerations that underlie the setting of limitation periods. These are that stale claims should not be litigated; that claimants should be encouraged to pursue litigation diligently and that there should be finality for past wrongs. One cannot press the analogy between the limitation period in section 47A and the general six year limitation period operating for tortious claims too far. As we have explained, the two year window of opportunity under section 47A may expire well before the six year period for tort claims expires, if no appeal is brought against a finding of infringement. Conversely, the window may open only after the six year limitation period has expired, in a case where an appeal against the finding of

infringement is pursued right up to the Court of Justice in Luxembourg. But we accept the general point that limitation periods are set by statute for sound policy reasons and Mr Robertson's assertion that there is no presumption against the grant of an extension of time to bring a claim sets the threshold too low.

19. Mr Brealey QC on behalf of the BASF Defendants in both claims referred us to *The "Al Tabith" and "Alanfushi"* [1995] 2 Lloyd's Reports 336. That case concerned an application to extend the two year limitation period allowed by section 8 of the Maritime Conventions Act 1911 for bringing a claim in respect of damage to a vessel caused by another vessel. It was not disputed that the test to be applied was the same test as is applied by the courts when considering whether to extend the time for service of a writ. That test, the Court of Appeal held, was a two stage test. At stage one, the court must consider whether good reason for an extension has been demonstrated by the claimant; essentially a question of fact. If, and only if, the plaintiff succeeds in establishing a good reason does the court proceed to stage two, which is a discretionary exercise involving value judgments including, where appropriate, having regard to the balance of hardship. In our judgment that two stage test is the appropriate way to approach the question before us: we must first consider whether the claimants have shown that there was a good reason for not having issued their proceedings in time and only if we find that there was such a good reason should we then assess other factors relevant to our discretion, including the prejudice on either side of the balance.

20. Mr Robertson argued that the reason why the BCL claimants and the Grampian claimants only lodged their claims in March and May 2008 was that they interpreted section 47A as meaning that the claim was not barred until May 2008 and that prior to the judgment of the Court of Appeal in November 2009, this was "a self evidently reasonable mistake" (Transcript, 22 October 2009, pages 15-16). He relied, unsurprisingly, on the fact that the Tribunal had made the same mistake in its preliminary ruling and had been sufficiently confident of its interpretation to refuse the BCL claimants permission to appeal.

21. So far as the BCL claimants are concerned, we have seen evidence from Mr Perrott who is a partner in Taylor Vinters, the firm of solicitors with conduct of the matter on behalf of the claimants. He refers to the proceedings that were brought in 2004 in the

Tribunal by the BCL claimants against the Roche Defendants and the Aventis Defendants (see paragraph [4] above). At the time his firm were contemplating commencing that action, they calculated the time for bringing an action under section 47A against those defendants as expiring on 31 January 2004 (this was before the Tribunal's judgment in *Emerson Electric*). Mr Perrott says that they considered whether to bring a claim against BASF at that point:

> "it was discussed with Counsel and the conclusion from these discussions was that we were precluded from bringing the claims until the BASF appeal, about which we knew little, had been decided by the European Court".

22. He says further that the claims against the Roche and Aventis Defendants needed enormous efforts to bring together the necessary material, given that his firm only accepted instructions in the matter in late 2003.

23. It appears that none of the Defendants to the two cases brought in February 2004 by the BCL Claimants took any point about the fact that the claims had been lodged after 31 January 2004 or that the claims against the Roche and Aventis Defendants were being pursued when the appeal by BASF was pending before the Court of First Instance. No applications were made when those proceedings were lodged either to extend time under Rule 19(2)(i) or for permission to bring the claims under Rule 31(3). The Tribunal did not raise any question of limitation of its own motion. Indeed, Mr De La Mare on behalf of the Aventis Defendants pointed out to us that one of the rulings of the Tribunal in the earlier claim concerned an application by the claimants to add further defendants to the proceedings. The parties made their submissions in that application on the basis that the time limit for bringing proceedings arising out of the vitamins cartel has expired so that the main issue for the Tribunal to decide was whether its discretion to allow the addition of parties still applied despite the expiry of the limitation period.

24. Mr Brealey asserted that the BCL claimants had failed to identify properly in their evidence what precisely was the interpretation of the law that led to them deciding not to bring proceedings against the BASF Defendants in 2004. He also referred us to two cases on the question of whether a mistake can be a "good reason" for the purposes of the first stage of the two stage test set out earlier. In *The "Al Tabith"* (cited earlier) the would-be claimant's solicitor made a simple error when noting down the extended

deadline that had been agreed with the potential defendant. He marked on his file that his client had until 20 March to bring the claim when in fact the potential defendant had agreed only to an extension until 20 February. Rose LJ stated that "mistakes on the part of those representing the plaintiffs as to when the limitation period expired is the sort of fault or carelessness which is unlikely to give rise to a good reason". Hirst LJ also held that there was no good reason for an extension and that any discretionary considerations such as the balance of hardship did not arise. The second case was *Baker v Bowketts Cakes Ltd*. [1966] 1 WLR 861. In that case the plaintiffs attempted to serve a writ by post a few days before it expired but made a mistake about the address. Lord Denning MR said that "If the plaintiff delays until the very last minute, he has only himself to thank" if he then fails to effect service (at page 855 paragraph B).

25. The BASF Defendants sought to draw from these cases a general principle that where the failure to take the necessary steps within the time allowed arises from a mistake, then that can never be a "good reason". We consider that that is stating the matter too broadly. The nature of the mistake is relevant in our judgment and what happened here, as explained by Mr Perrott, was very different from what happened in *The "Al Tabith"* or in *Baker v Bowketts Cakes*. Here the BCL claimants acted on legal advice which was based on one interpretation of the legal position. That interpretation was certainly not an untenable one and there was nothing that happened in the earlier proceedings in 2004 to clarify for the benefit of these or other potential claimants how section 47A and Rule 31 are intended to work. Although we now know that from the Court of Appeal's judgment in May 2009 that, on the proper interpretation of these provisions, the time limit expired at the end of January 2004, it would not be fair to class the BCL claimants' conduct as being the result of fault or carelessness as was the case in *The "Al Tabith"* or in *Baker v Bowketts Cakes*. We therefore hold that the BCL claimants have satisfied the first stage of the test and shown that there was a "legally excusable lapse responsible for the delay" to adopt a phrase used by Russell LJ in *The "Al Tabith"*, namely that at the time that the limitation period expired on 31 January 2004, they thought that the two year window for bringing proceedings against BASF had not yet opened.

26. Mr Brealey argued that given the uncertainty about the law, the BCL claimants should have protected their position by applying for permission from the Tribunal to bring

proceedings before the BASF appeal was concluded. The Court in *The "Al Tabith"* stressed that "a valid explanation for the failure to issue a protective writ was imperative" (per Hirst LJ). But the situation here is very different. It was open to the owners of the Al Tabith to start proceedings at any time after the collision. In our case the statute is very clear that "no claim may be made" under section 47A until (so the BCL claimants thought) the BASF appeal was disposed of. Here it was not simply a question of the BCL claimants thinking that they had plenty of time in which to bring their claim; they thought that the statute prevented them from bringing their claim against the BASF Defendants. We do not know what the Defendants' or the Tribunal's attitude to a request for protective permission to bring proceedings before 31 January 2004 would have been. But it would not be fair to penalise the BCL claimants for failing to include the BASF Defendants in their 2004 claims against the Roche and Aventis Defendants.

27. As far as the Grampian claimants are concerned, we have seen no explanation as to why they did not bring their claim against the Roche, Aventis and BASF Defendants before the expiry of the limitation period. As Mr De La Mare put it, we do not know whether and when the Grampian Claimants' corporate mind specifically addressed this situation. Mr Robertson invites us in effect to infer from the fact that they lodged their claim in May 2008 that they too must have interpreted the law in the way that the Tribunal interpreted it in the preliminary ruling and in *Emerson Electric*. But the question why did they issue proceedings in May 2008 is different from the question why did they not issue proceedings before January 2004. The answer to the first question is no doubt that they thought that on one interpretation of the law the claim might be in time as against all these defendants. But we have seen no evidence as to whether they turned their minds to the possibility of bringing proceedings before January 2004 other than the fact that they were involved in discussions within the poultry industry in 1999 about potential claims against the parties to the vitamins cartels. The Tribunal is not prepared to infer from the mere fact that the Grampian claim was lodged in May 2008 that the failure to lodge proceedings within time in January 2004 was the result of a reasonable misinterpretation of the effect of section 47A. We therefore find unanimously that the Grampian claimants have failed to establish that there was a good reason why they did not lodge their claim in time.

The exercise of the Tribunal's discretion

28. In relation to the BCL claimants, we now turn to consider whether they pass the second stage of the test described in *The "Al Tabith"*. It is clear from that case that when the court is considering the extent of the claimant's delay, an explanation is required of the whole period during which the claimant could have brought, but failed to bring, proceedings and not just of the last few weeks or months. It is not enough, therefore, for Mr Robertson to argue that if the claimants had been correct in their interpretation of section 47A, it would not have been open to the defendants to complain about delay. *The "Al Tabith"* makes it clear that such complaints are highly relevant in an application to extend time.

29. The Tribunal has concluded unanimously that the BCL claimants should have taken at least some steps to establish and pursue their claim during the period when they wrongly thought that they were precluded by section 47A from actually starting proceedings. As we noted earlier, it would be going too far to say that the BCL claimants should have sought the Tribunal's permission to bring their claim against BASF despite BASF's appeal to the Court of First Instance. But they should at least have alerted BASF to the fact that they intended to lodge a claim once the two year window opened, particularly since they knew that BASF was not challenging the finding of infringement in its appeal to the Court of First Instance. The BCL Claimants are not of course responsible for the fact that the Court of First Instance took over four years to determine the BASF appeal. But they were aware that the years since the end of the cartel activity on which they based their claim were slipping past. They must also have been aware in 2004 and 2005 that other direct and indirect purchasers were bringing claims in the High Court for damages arising out of the vitamins cartels. Despite this there was no contact between the BCL claimants and BASF until the letter before action was sent on 16 November 2006.

30. We find further that the BCL Claimants did not act reasonably promptly once they thought the two year window had opened. Following the handing down of the Court of First Instance's judgment, on 15 May 2006 it took until 16 November 2006 for the claimants to write to BASF alleging that they had suffered loss arising from the cartels and asking for disclosure of information. Not all that six month period can be

explained by the need to see if a further appeal to the Court of Justice was going to be pursued. After that letter before action there was some correspondence between the parties about disclosure. That ended with a letter received by Taylor Vinters on 4 July 2007 saying that BASF would provide no further information and that any claim for damages would be vigorously defended. There was no response to this from the BCL claimants until a letter on 27 February 2008 and proceedings were finally lodged on 12 March 2008. There has been no explanation as to what was happening between 4 July 2007 and 12 March 2008. We note that in *The "Al Tabith"*, Hirst LJ regarded a delay of nearly four months between the agreement to grant an extension of time and the submission of a detailed claim by the plaintiffs as significant particularly since the solicitor had himself had the information from his clients for some time. Here eight months were allowed to elapse after BASF made it clear that negotiations (such as they were) were at an end. If the BCL claimants had brought their claim promptly after they thought the window under section 47A had opened they would have had a better claim to the Tribunal's indulgence. As it is, there has been substantial delay which is not attributable to their misapprehension as to the law.

31. On the issue of prejudice, BASF put forward the evidence of Dr Dirk Elvermann, Legal Counsel of BASF SE, that much of the documentation on which they would want to rely in defending the claim had been destroyed in accordance with a document retention policy introduced in 2004. He was careful to make clear in his second witness statement that the documents were not destroyed in conscious reliance on the closing of the section 47A window. That must be right given that in 2004 the period for bringing an action for damages in the High Court had not yet expired. He was also keen to stress that there had been no "wilful destruction of relevant documents" but that it was "simply due to the passage of time". We share the BCL claimants' surprise that BASF did not protect from destruction all documents relating to potential damages claims at least until the expiry of the general limitation period which – for some potential claimants – would have run from the date the Decision was adopted. We also note that BASF did not mention in their correspondence with Taylor Vinters in 2006 and 2007 that documents had already been destroyed. In the circumstances we do not place weight on the alleged prejudice to the BASF Defendants because of the destruction of documents in 2004.

32. The BCL claimants argue that the prejudice they suffer if time is not extended is that they lose their ability to claim compensation for the losses they say they suffered as a result of the cartel. Mr Robertson did not concede that the six year limitation period for bringing an action in the High Court had expired by March or May 2008 but accepted that he would have an uphill struggle in arguing that the limitation period began any later than 21 November 2001 when the Commission adopted the Decision. But we agree with the Defendants that this prejudice is part and parcel of the application of the relevant rules and not an additional factor to weigh in the balance.

33. We also agree with the Defendants that the fact that they were parties to an egregious contravention of the competition rules is not relevant for the purpose of the present applications. That fact underpins the rights conferred by section 47A enabling claimants to rely on the Commission's infringement decision instead of having to establish the infringement themselves. In *The "Al Tabith"* the fact that the plaintiffs had an open and shut case on liability was not considered relevant and, as Mr Hoskins QC said on behalf of the Roche Defendants, "Even "dirty dogs" eventually can sleep at night" (Transcript, page 55).

34. If we had held that the Grampian claimants had established a good reason for not having lodged their claim before 31 January 2004, we would have exercised our discretion against extending time. They did nothing to alert the potential defendants to their intention to bring a claim until 7 May 2008, a few days before the claim was lodged. Their letter before action gave the defendants two days in which to respond. We have been provided with no evidence about why these claimants failed to prepare their claim during the period since the Commission adopted its decision, even if they had thought that they had until mid May 2008 actually to lodge proceedings, particularly since they also must have been aware that the BASF appeal did not challenge the finding of liability. There are no grounds here on which the Tribunal could properly exercise its discretion to extend time.

35. The Tribunal therefore dismisses the applications by the BCL and Grampian claimants.

Vivien Rose Antony Lewis Arthur Pryor

Charles Dhanowa
Registrar Date: 19 November 2009