

Judgments

CA, CIVIL DIVISION



Case No: C3/2011/2116

Neutral Citation Number: [2011] EWCA Civ 1724

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM COMPETITION APPEAL TRIBUNAL

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Thursday, 15th December 2011

Before:

LADY JUSTICE ARDEN

and

LORD JUSTICE RIMER

Morgan Crucible Company Limited

Applicant

- and -

Emerson Electric Company

Respondent

(DAR Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

Ms Demetriou appeared on behalf of the **Applicant**.

The Respondent did not appear and was not represented.

Judgment

(As Approved by the Court)

Crown Copyright©Lady Justice Arden:

1. I am going to give a short judgment on the application made this morning by Miss Maria Demetriou for an extension of time for an application for permission to appeal against an order of 18 October 2007 of the Competition Appeal Tribunal.
2. I can state the background very simply. Arising out of events which took place, as I gather, in 1988, the Commission in 2003 made a decision finding that there was a cartel of a number of producers including the applicant today, Morgan Crucible Company plc, in relation to the supply of carbon and graphite products. The Commission imposed a very substantial fine of over EUR 101 million. Since that date, follow-on actions have been started by suppliers who use the product of those producers and those proceedings are brought under the Enterprise Act.
3. In 2007 the question arose whether permission was needed for those proceedings to be brought because some of the cartelists - not Morgan Crucible - were appealing the decision to the Court of First Instance and to the Court of Justice of the European Union in Luxembourg. The Competition Appeal Tribunal, in its decision which is reflected in its order of 18 October 2007, held that the two year period for bringing the follow-on proceedings under s.47A of the Competition Act 1998 would commence only when the proceedings

challenging the Commission's decision had come to an end, and it did not consider it material that Morgan Crucible was not one of the appellants against the decision.

4. So there it had ruled that the claims then brought were effectively in time. In other words they were still within the period within which they could be brought. Those are the claims which are in issue here. The lead claimant is Emerson Electric Company ("Emerson Electric").

5. In a later claim brought by Deutsche Bahn, the Competition Appeal Tribunal ("the CAT") has effectively reversed itself from the position which it took in relation to Emerson Electric and it held on 25 May 2011 that the damages claim under s.47A brought by Deutsche Bahn was outside the permitted time period because it was over two years from the time of the decision. The question was whether or not the decision itself was to be construed widely, as it had done with its first decision, or more narrowly, as the CAT had construed it in its second decision, the Deutsche Bahn decision, so that the only element that was critical was the element of the decision as against Morgan Crucible, which was final when time for appealing had expired, rather than the time when the appeals of the other cartelists were disposed of. So there was a different decision. If that decision had been the one taken the first time around in relation to Emerson Electric, then events may have been different.

6. The CAT itself gave permission to appeal to the court against its ruling in the second case. This court is going to hear an appeal brought by Deutsche Bahn early next term. It is important, in the opinion of the CAT, for reasons which are self-evident, that it should be established at this level what is the correct position with regard to follow-on claims and the effective times within which they have to be brought.

7. In those circumstances, Morgan Crucible now seeks permission to appeal against the first CAT decision. That was taken in October 2007, therefore a decision which is over four years old. Miss Maria Demetriou has persuasively put forward grounds for extending time before Rimer LJ and myself this morning. She makes the point that there will be good grounds of defence to the claim brought under s.47A, and speaking for myself I would be prepared to make that assumption and proceed on that basis for the purposes of this application.

8. She then submits that various limited steps have been taken in the proceedings after the CAT1 decision, and that these proceedings should be treated like an application for permission for leave to amend wherein the court would be generous in the grant of permission in order to enable the right issues to be exposed before the court. For myself, I would not find that analogy helpful because inevitably, by seeking permission to appeal out of time, a party is seeking to disturb a ruling which the other party would have been entitled to consider was beyond challenge.

9. I therefore look to the further points. It does, of course, happen from time to time that the court extends time. What the appellant is saying is that very limited steps have been taken in these proceedings in fact, and that the costs could be compensated for by an undertaking for costs by Morgan Crucible, and I would understand that to be on an indemnity basis. But it seems to me that one has to look rather more widely at the question of prejudice than that. The fact of the matter is that, if this permission to appeal was given, Morgan Crucible would hope to show that the proceedings were not brought within time, and that would raise a question of considerable prejudice to the respondents.

10. We have a letter from the respondents. For reasons that I do not understand it was not sent to Miss Demetriou's solicitors. One of the points it makes is that there would be prejudice because proceedings could have been brought in other jurisdictions against Morgan Crucible if they had known there was an appeal on foot. Of course, Miss Demetriou challenges that. She says there would have been no need for that, because the proceedings would certainly have been in time against the other cartelists and it is a principle of European Union law that all cartelists are jointly and severally liable. But she has taken us to the amended points of claim, in which it is pleaded that Morgan Crucible had only a small role to play and was responsible for only a small quantity of the sales that took place and thus, as she is forced to accept, that if forced to defend, Morgan Crucible would wish to be free to raise questions about the level of its joint and several liability, so there is another potential area for prejudice there, and that arises not simply out of the letter but out of the submissions which Miss Demetriou had made to us before reference was made to the letter.

11. As I see it, there is inevitable prejudice in a case such as this where permission is sought to appeal on a point as to effectively whether proceedings were in time. It seems to me that there must inevitably have been a decision, or at least an opportunity for a decision, by Morgan Crucible in October 2007 when it received the first CAT decision as to whether or not to seek permission to appeal. It did not do so, and significantly, Miss Demetriou is not able to give us any explanation as to what happened at that time, other than to say there was a different legal team. If there was a good reason why it did not take the step at that time, no doubt we would have been told.

12. I am of course conscious that this is a very, very substantial claim. It could lead to a substantial liability.

However, there are other public policy factors as well. In my judgment, it is not open to parties to seek to re-open decisions in proceedings which had not been appealed against many years ago, without a very good case, and in my judgment there are no such circumstances that would justify giving an extension of time in this case.

13. Accordingly, I would dismiss the application.

Lord Justice Rimer:

14. So would I.

ORDER: Application refused.