



Neutral citation [2010] CAT 6

IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House
Bloomsbury Place
London WC1A 2EB

12 February 2010

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 OLD CO 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 COSTS

1. On 19 November 2009 the Tribunal dismissed applications by the BCL and Grampian Claimants to extend time for lodging their claims: [2009] CAT 29. Further details of the applications and the antecedent preliminary issue proceedings which had found that the claims were time barred under section 47A of the Competition Act 1998 (“section 47A”) are set out in that ruling and we adopt the same terminology for the purpose of this ruling.
2. The BCL Claim was filed at the Tribunal on 12 March 2008. The defence, filed on 23 April 2008, raised the argument that the BCL Claim was time barred and also put the Claimants to proof of their claim for damages. On 16 May 2008 the Tribunal ordered that the time bar point be heard as a preliminary issue. In a judgment handed down on 25 September 2008 the Tribunal held that on the proper construction of section 47A, the claim had been brought in time: [2008] CAT 24. The Court of Appeal granted the BASF Defendants permission to appeal on 4 December 2008 and on 13 January 2009 the Tribunal ordered that further proceedings in the BCL Claim be stayed until 14 days from the handing down of judgment by the Court of Appeal. On 22 May 2009 the Court of Appeal allowed the BASF Defendants’ appeal ([2009] EWCA Civ 434). Following the lifting of the stay in the Tribunal proceedings, the BCL Claimants applied for an extension of time for lodging their claim which, as noted above, was dismissed by the Tribunal on 19 November 2009.
3. The Grampian Claim was filed on 14 May 2008, that is after the defence in the BCL Claim had been lodged and shortly before the order for the hearing of the preliminary issue in the BCL Claim was made. The Grampian Claim clearly raised the identical time bar point. Following correspondence between the parties, the Tribunal ordered that the time for serving defences be extended until 14 days after the handing down of the Tribunal’s judgment on the preliminary issue in the BCL claim. The defences were therefore filed on 8 October 2008. All the Grampian Defendants pleaded the time bar point, anticipating that the Defendants in the BCL Claim might decide to challenge the Tribunal’s preliminary ruling. When the Court of Appeal granted permission to appeal in the BCL Claim, the Tribunal made an order on 23 January 2009 that the proceedings in the Grampian Claim be stayed until 14 days from the handing down of the Court of Appeal’s judgment. Following the lifting of that stay, the Grampian Claimants also

applied for an extension of time, which was also dismissed by the Tribunal on 19 November 2009.

4. The Tribunal now has before it applications by the BASF Defendants, the Aventis Defendants and the Roche Defendants for their costs of the proceedings. In respect of the BCL Claim, the relevant costs can be divided into three categories: the initial costs incurred before the identification of the preliminary issue; the costs incurred in arguing the preliminary issue before the Tribunal; and the costs of opposing the application for the extension of time. The costs in respect of the Grampian Claim relate to the costs incurred by all three sets of Defendants in the period before the proceedings were stayed in January 2009 and then in opposing the application to extend time.
5. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Tribunal Rules. That rule confers on the Tribunal a discretion to make any order it thinks fit. In determining how much a party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
6. As noted by the Tribunal in *Merger Action Group v Secretary of State* [2009] CAT 19, rule 55 covers all the kinds of proceedings which come before the Tribunal and the discretion afforded under rule 55(2) and (3) is necessarily wide. While the Tribunal has on many occasions been called upon to determine applications for costs in its appellate jurisdictions (under the Competition Act 1998, Enterprise Act 2002 and Communications Act 2003), there is limited jurisprudence in relation to claims for damages under section 47A. There is also a dearth of authority on the award of costs in respect of follow-on damages actions brought before the High Court.
7. In *Emerson Electric v Morgan Crucible* [2008] CAT 28 the Tribunal reaffirmed (at paragraph 44) that in the interests of dealing with individual cases justly "it is important to retain flexibility in [the Tribunal's] approach to the exercise of its discretion in relation to costs, and to avoid general principles evolving into rigid rules." The Tribunal noted that while there is no automatic rule that costs should follow the event, "it is entirely consistent with this and with the width of the discretion enshrined in rule 55, that the starting point for the exercise of that discretion in a case such as the present

should be that costs follow the event.” However the Tribunal concluded (paragraph 45):

“To say that the starting point in a case such as this is that costs should follow the event is very far from creating an expectation that it will be the finishing point. The need to deal with the matter justly means that all relevant circumstances of each case will need to be considered...”

In *Emerson* the Tribunal considered the issue of costs following an unsuccessful application by the claimants for permission to bring proceedings against the proposed defendants under section 47A before the appeal process against the relevant decision had been concluded in the European courts. The claimants were ordered to pay the proposed defendants’ costs, although the costs were reduced by 50 percent to reflect the fact that a substantial proportion of the written and oral submissions were devoted to jurisdictional points pursued by the defendants that were unnecessary for the Tribunal to determine.

Costs of the applications to extend time in both the BCL and Grampian Claims

8. We start from the position that the Defendants were wholly successful in opposing the applications for an extension of time in both the BCL and Grampian Claims. The Tribunal dismissed both applications, albeit on slightly different grounds. The starting point for the exercise of our discretion is therefore that costs follow the event. Taking account of all relevant circumstances, in our judgment there are no factors here which militate against an order that the Claimants pay the Defendants their costs. The decision of the Tribunal in *BCL (Security for costs)* [2005] CAT 2 does not assist the Claimants. That judgment, which also concerned a follow-on claim for losses arising from the vitamins cartels, considered an application made by the defendants at the outset of proceedings for security for costs. The question addressed by the Tribunal was whether it was sufficiently likely that the claimants would at the end of the day be held liable to pay the costs of the defendants as to justify ordering them to put up security for those costs. It was held that there was no reason to suppose that the claimants were at risk of having to pay the defendants’ costs and so it was not appropriate to order security for costs. Here we are not engaged in trying to predict whether the Claimants will be successful because the proceedings are now concluded. We do not regard the *BCL (Security for costs)* ruling as authority for a general

proposition that defendants in follow-on damages claims can never recover their costs in defending such proceedings.

9. The Grampian Claimants submit that they acted reasonably in seeking an extension of time once the Court of Appeal's construction of section 47A held that their claims were time barred. Their application was certainly understandable, particularly given the reference by Richards LJ to the power of the Tribunal to extend any time limit so that that Court's construction of section 47A was "not necessarily fatal to the bringing of a claim under section 47A" (paragraph [10] of his judgment). But this is not enough, in our judgment, to deprive the Defendants of their costs. We agree with the observations of the Tribunal in *Emerson (costs)* at paragraph 48:

"An argument does not have to be unreasonable to be unsuccessful. Although they may have the effect of concentrating minds in advance of bringing or defending a claim or application, ordinary costs awards are not intended to be penal but to compensate a litigant for the costs he or she has incurred in successfully opposing another party's position. This is not to say that unreasonableness cannot affect costs issues; clearly it can; but the reasonableness of an unsuccessful argument is not ordinarily sufficient to defeat a costs award which would otherwise be made."

10. We do not accept the Grampian Claimants' submission that the applications under rule 19 have resulted in a clarification of the law so as to warrant a neutral costs order. The judgment of the Tribunal was essentially concerned with whether, as a matter of fact, there was a good reason for an extension of time and, only if the Claimants succeeded on that basis, whether, as a matter of discretion, an extension should be granted (see [2009] CAT 29, paragraph 19). Before the Tribunal they failed on both heads.
11. Further, we do not agree with the Grampian Claimants' contention that the award of costs in this case would frustrate the objectives of the Competition Act. As set out by the Tribunal in *Emerson (costs)* above, ordinary costs awards are not intended to be penal but to compensate a successful litigant for the costs reasonably incurred. Awarding costs to the successful party in what are private civil law proceedings under section 47A should not lead to a "chilling effect" on future claims before the Tribunal.
12. The BCL Claimants submitted that it would be unjust to allow cartelists to recover costs incurred in defending themselves against a party claiming on *prima facie* credible grounds to have suffered loss as a result of that cartel activity. We do not consider that

this argument can succeed in the context of the application to extend time. The fact that they were cartel members does not mean, in our judgment, that the Defendants lose their entitlement to recover their costs when the Claimants fail to persuade the Tribunal to exercise its discretion in their favour. We address in paragraph 17 below the further argument by the BCL Claimants to the effect that the costs incurred in the application for extension of time (where the Defendants were successful) should in effect be set off against the costs incurred when the Tribunal determined the preliminary issue (where the Claimants were successful).

13. In our unanimous judgment, therefore, the Defendants should be awarded their reasonable costs in successfully opposing the applications for an extension of time in both the BCL and Grampian claims. The amount of costs should be subject to detailed assessment, if not agreed between the parties.
14. We have not assessed the quantum of costs recoverable by the Defendants ourselves but we consider it is appropriate to make the following observations. First, the Tribunal echoes the surprise expressed by the Grampian Claimants in their letter dated 1 February 2010, where they say that they are “absolutely staggered” by the costs incurred by each of the Defendants in responding to what were relatively straightforward applications to extend time. The costs estimated for the period between the Court of Appeal’s judgment in May 2009 on the BCL preliminary issue and the Tribunal’s rejection of the extension of time application in November 2009 are about £217,900 for the Grampian Defendants (including the BASF Defendants) and about £63,800 in the BCL Claim. The hearing of the applications took one day and the skeletons and witness statements lodged by the parties did not extend beyond about a dozen pages each. However, the costs incurred have been estimated at about £280,000.
15. The Tribunal asked the Grampian Defendants for their submissions on the question whether it was appropriate for each group to be separately represented at the hearing of the application. Although this is ultimately a matter for the Costs Judge, the Tribunal considers that the submissions made by all the Defendants at the hearing of the application could have been put forward by any one of the three very experienced counsel who in fact appeared. But the Tribunal does not accept that the Grampian Defendants should have limited their opposition to the application to refuting the point

of principle on which the Grampian Claimants say they rely, namely that it was just in this case to extend time because the Claimants had made a reasonable mistake as to the operation of the limitation period. The Defendants were entitled to file the evidence they relied on as relevant to the exercise of the Tribunal's discretion under rule 19 of the Tribunal's Rules.

Costs incurred in initial response to the claims and the preliminary issue before the Tribunal

16. The question of the costs of the preliminary issue concerns only the BASF Defendants. On allowing the Defendants' appeal on the preliminary issue, the Court of Appeal ordered that the BCL Claimants pay the Defendants' costs of the appeal to the Court of Appeal but reserved the costs of the proceedings before the Tribunal to a future decision of the Tribunal.
17. The BCL Claimants submit that there should be no order as to costs as they were successful before the Tribunal on the preliminary issue but unsuccessful on the application for an extension of time. The costs of these two hearings, they say, should be broadly equivalent and cancel each other out. We do not consider that that is the right way to approach this. The fact that the BCL Claimants succeeded on the preliminary point before the Tribunal is not a relevant factor, given that the Court of Appeal decided that the Tribunal's judgment was wrong. Rather we have approached this by considering what would have been the appropriate costs order for the Tribunal to make, if it had correctly decided in September 2008 that the claims were time barred.
18. We have already noted the lack of authority in respect of costs awards in follow-on claims. In this regard, the comment of the Tribunal in *The Institute Of Independent Insurance Brokers v The Director General Of Fair Trading (Costs)* [2002] CAT 2 (paragraph 48) is, in our judgment, particularly relevant:

“In this new jurisdiction it seems to us that we should not, at this early stage, seek to formulate rigid rules on the question of costs, but should proceed on a case by case basis, retaining flexibility to meet circumstances as they arise. By analogy with the overriding objective in civil proceedings, our principal aim must be to deal with cases justly.”
19. That comment was made in the context of an application for costs made against the regulator, but we consider that it is also relevant here, despite the *inter partes* nature of

these claims. Although the BASF Defendants' interpretation of section 47A prevailed, the Tribunal's unanimous conclusion is that the just result is for each side to bear their own costs incurred in arguing the preliminary issue before the Tribunal. The preliminary issue has clarified an important issue regarding the proper construction of section 47A and rule 31(2) of the Tribunal Rules. The Claimants referred us to the Tribunal's earlier rulings on costs in cases where the claim has been found to be inadmissible: see *Independent Water Company Limited v Water Services Regulation Authority* [2007] CAT 21 and *Aquavitae (UK) Ltd v Director General of Water Services* [2003] CAT 23. In those cases no order for costs was held to be the fair result where the Tribunal considered that it had not been inevitable or self-evident at the time that the claim was brought that it would fail on a preliminary point. In our judgment, the same principle applies here.

20. Finally, the Defendants in both the BCL and Grampian Claims seek the costs incurred in preparing their defences to the claims. We do not accept the criticism levelled by the Claimants against the Defendants for having pleaded in full to the claims rather than limiting their defences to the preliminary point. However, in the event the Tribunal was not called upon to decide the various issues raised either in the claim forms or the defences, outside of the points covered by the preliminary issue. We therefore conclude that each party should bear their own costs of the initial stages of the proceedings.

Conclusions

21. For the foregoing reasons, the Tribunal unanimously orders that:
 - (a) In the BCL Claim (Case 1098/5/7/08), the claimants pay to the defendants their costs of and occasioned by the hearing of the claimants' application to extend time for lodging the claim, such costs to be assessed by a Costs Judge of the Senior Courts Costs Office if not agreed pursuant to rule 55(3) of the Tribunal Rules;
 - (b) In the Grampian Claim (Case 1101/5/7/08), the claimants pay to the defendants their costs of and occasioned by the hearing of the claimants'

application to extend time for lodging the claim, such costs to be assessed by a Costs Judge of the Senior Courts Costs Office if not agreed pursuant to rule 55(3) of the Tribunal Rules;

(c) There be no order as to other costs incurred in these proceedings;

(d) There be liberty to apply.

Vivien Rose

Antony Lewis

Arthur Pryor

Charles Dhanowa
Registrar

Date: 12 February 2010