**Michaelmas Term**
**[2012] UKSC 45**
*On appeal from: [2010] EWCA Civ 1258*

# JUDGMENT

# BCL Old Co Limited and others (Appellants) *v* BASF plc and others (Respondents)

**before**

**Lord Phillips**
**Lord Walker**
**Lord Mance**
**Lord Clarke**
**Lord Wilson**

## JUDGMENT GIVEN ON

## 24 October 2012

**Heard on 9 and 10 July 2012**

| *Appellant* | *Respondent* |
| --- | --- |
| Christopher Vajda QC | Mark Brealey QC |
| Laura Elizabeth John | Sarah Ford |
| (Instructed by Taylor Vinters) | (Instructed by Mayer Brown International LLP) |

**LORD MANCE (with whom Lord Phillips, Lord Walker, Lord Clarke and Lord Wilson agree)**

*Introduction*

1. The first issue on this appeal is whether a statutory limitation period, which would otherwise bar the claim of the four appellants against the three respondents for damages for participation in an unlawful cartel, failed to comply with the European legal principles of effectiveness and legal certainty. If it was, the second issue is what if any effect that has on the application of that limitation period as between parties to civil litigation, in which it has now been held that the limitation period applies as a matter of domestic law to bar the claim. I will refer to the appellants and the respondents respectively as BCL and BASF.

2. The cartel related to the supply of vitamins within the European Union. By Commission Decision COMP/E-1/37.512 of 21 November 2001, the European Commission found that the cartel infringed Article 81 of the EC Treaty (now TFEU 101) and imposed fines accordingly. Members of the cartel had until 31 January 2002 to appeal against the Commission's decisions. In the event, on 31 January 2002, only BASF appealed, and BASF only appealed against the fine levied. Notice of its appeal was published in the Official Journal on 4 May 2002 (C109/49). The Commission's Decision to which the appeal related was only published in the Official Journal of the European Communities on 10 January 2003. The Court of First Instance on 15 March 2006 reduced the fine imposed on BASF. The deadline for any further appeal by BASF to the European Court of Justice expired on 25 May 2006 without any further appeal being lodged.

3. Under the Limitation Act 1980, section 2, BCL had six years to bring an action for tort in the High Court, running or "almost certainly" running (as Mr Vajda QC for BCL accepted in the notice of appeal and his oral submissions) from 21 November 2001. However, on 20 June 2003 section 47A of the Competition Act 1998, as inserted by section 18(1) of the Enterprise Act 2002, came into force, giving BCL the alternative possibility of a claim for damages in proceedings brought before the Competition Appeal Tribunal. The possibility was exercisable under certain conditions, the effect of which, as now conclusively established by the Court of Appeal, is that the time for bringing such a claim expired on 31 January 2004, two years after the time allowed for appeal against the Commission's decision on infringement, without any possibility of extension. No High Court proceedings were brought, but proceedings were in January 2004 issued in the Tribunal against other cartel members. The first intimation by BCL to

BASF of any intended claim was on 21 November 2006, and proceedings were not issued in the Tribunal by BCL against BASF until 12 March 2008. BASF responded by contending that the claim was time-barred.

4. Reversing the Tribunal, the Court of Appeal held on 22 May 2009 that the claim was time-barred and could proceed, if at all, only with an extension of time, [2009] EWCA Civ 434. The Tribunal on 19 November 2009 assumed that it had power to grant an extension, but declined to do so on the merits, [2009] CAT 29. The Court of Appeal held on 12 November 2010 that the Tribunal had no power to extend time under United Kingdom law: *BCL Old Co Ltd v BASF SE (No 2)* [2010] EWCA Civ 1258, [2011] Bus LR 428. It held further that European law did not override the United Kingdom time bar or require a power to extend to be treated as existing. On this basis, the merits of any application for an extension, if there had been such a power, became irrelevant. With the Supreme Court's permission, BCL now appeals to the Supreme Court against the Court of Appeal's decision of 12 November 2010, but solely on the issue of European law.

*The UK legislative scheme*

5. The detailed legislative scheme is for convenience set out in the Annex to this judgment. For immediate purposes, it is sufficient to draw attention to the following features. First, BCL's right to claim damages in proceedings before the Tribunal under subsection (5) of section 47A did not arise until a decision (in this case by the Commission) had "established that the relevant prohibition in question has been infringed". Then it was, under subsection (8), postponed, though subject to a discretion in the Tribunal, during any period during which proceedings against the Commission decision might be instituted in the European Court of Justice and, if any such proceedings were instituted, during the period before those proceedings were determined. Second, by virtue of Rule 31 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) made under the Act, any such claim for damages required to be made within two years of the later of the end of that period or the date on which the cause of action accrued.

*The issues in greater detail*

6. BCL's main submission in the Tribunal and the Court of Appeal was that the limitation period for its claim against BASF in the Tribunal only began to run on 25 May 2006; that is, two years after the end of the period during which BASF could have lodged a further appeal in relation to the fine imposed on it. This submission was based on the proposition that the "decision [which] has established that the relevant prohibition has been infringed", to which subsections (5) and (6) of section 47A of the Act refer and against which subsection (8) contemplates that

proceedings might be brought in the European Court, embraced not merely the Commission's decision that there had been an infringement but also its decision as to the penalty to be imposed for the infringement.

7. The Tribunal (Barling J, Ann Kelly and Michael Davey) on 25 September 2008 accepted this submission: [2008] CAT 24. It considered that other sections of the Act offered little assistance and that findings on penalty could be relevant to the nature and extent of any infringement. On 22 May 2009 the Court of Appeal (Waller, Lloyd and Richards LJJ) [2009] EWCA Civ 434 in a judgment given by Richards LJ took a different view of "the plain and ordinary meaning of the statutory language" and "the natural reading of the section" (paras 26-28 and 33). It regarded this as drawing a "clear" distinction between decisions as to infringement and as to penalty. It considered that the Tribunal's concerns as to any overlap between decisions on infringement and penalty were "over-stated", and did not consider that they could in any event justify a departure from the section's natural meaning. No further appeal followed. The distinction between decisions on infringement and penalty decisions has been taken up and applied more recently by the Court of Appeal in its judgment in *Deutsche Bahn AG v Morgan Crucible Co plc* [2012] EWCA Civ 1055, to which the Supreme Court was referred, without submissions, after the oral hearing of this appeal.

8. On the basis of Richards LJ's remarks on 22 May 2009, the existence of a power to extend time was conceded by BASF for the purposes of the applications decided by the Tribunal on 19 November 2009, [2009] CAT 29. The Tribunal (Vivien Rose QC, The Hon Anthony Lewis and Dr Arthur Pryor CB) therefore assumed that it had power under rules 19 and 44 to extend the time limit under rule 31. But reservations were made as to the right to challenge the existence of any such power in the Court of Appeal. When the matter came before the Court of Appeal (Maurice Kay V-P, Lloyd and Sullivan LJJ) on 12 November 2010, [2010] EWCA Civ 1258, the challenge to the existence of any power to extend time succeeded and no further appeal was permitted. Whether BCL would have been better off if the challenge had failed would have depended upon whether it could have disturbed the Tribunal's conclusion that it was not in any event appropriate to exercise any power to extend.

9. BCL's submission now is that the operation of the two-year limitation period (in particular as regards its commencement) and the lack of any power to extend the limitation period were legally uncertain matters, which rendered it "excessively difficult" for BCL to pursue its claim against BASF in time. BCL point out that, where a specialist tribunal like the Competition Appeal Tribunal exists, the principle of effectiveness applies to proceedings before that tribunal, even if recourse to the ordinary courts remains available: Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483, para 51. Mr Brealey QC for BASF does not take issue with this. To explain why BCL did not in fact bring

proceedings against BASF in January 2004 at the same time as proceedings were brought against other cartel members, BCL refers to a paragraph in a witness statement by its solicitor, Mr Edward Perrott, stating:

> "17 We considered bringing 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."

In the Court of Appeal on 12 November 2010, Lloyd LJ observed, with justification, at para 56, that

> "It seems unlikely that the advice was in fact that they could not bring proceedings against BASF at that time. For Counsel to have said that he or she would have had to have ignored the words 'otherwise than with the permission of the Tribunal' in section 47A(5)(b), the words 'without permission' in section 47A(7) and (8), and rule 31(3)."

The exiguous account given by BCL of its thinking and of the advice received (from counsel not instructed on the present appeal) makes it difficult to say more, even assuming it to be relevant to try to do so.

*The European principles of effectiveness and legal certainty*

10. The principles of effectiveness and legal certainty on which Mr Christopher Vajda QC for BCL relies are well-recognised. Mr Vajda referred in particular to Case C-453/99 *Courage Ltd v Crehan* [2002] QB 507, [2001] ECR I-6297, Case C-445/06 *Danske Slagterier v Germany* [2009] ECR I-2119 and Case C-456/08 *Commission v Ireland* [2010] ECR I-859 as well as the pithy statement by Advocate General Sharpston in Case C-512/08 *European Commission v France*, para 50.

11. In *Courage Ltd v Crehan* the question was whether a publican who was party to a standard form of exclusive purchase obligation lease which infringed the then Article 85 (the precursor to Article 81) could claim damages against the brewery imposing the obligation or was precluded by virtue of the domestic law maxim *ex turpi causa non oritur actio*. The European Court held that Article 85 precluded any rule of national law which barred such a claim on the sole ground that the claimant was a party to the unlawful agreement (though the application of

such a rule could be appropriate in a case where the claimant bore "significant responsibility for the distortion of competition": para 31). It was (para 29) for national courts

> "to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)…"

12. In *Danske Slagterier* Danish pig exporters, Danske Slagterier, brought an action against the Federal Republic for breach of European law in imposing certain import restrictions. The German courts held the cause of action to have become time-barred after three years, applying by analogy the limitation period applicable under the German Civil Code BGB paragraph 852 to tort claims. The Court of Justice's judgment records (para 30) that

> "… Danske Slagterier has bemoaned the lack of clarity in the legal position in Germany as to the national limitation rule applicable to claims seeking reparation on account of State liability for breach of Community law, stating that this question has not yet been dealt with by any legislative measure or any decision of the highest court, while academic legal writers are also divided on the issue as several legal bases are possible. In its view, application, for the first time and by analogy, of the time-limit laid down in Paragraph 852 of the BGB to actions for damages against a State for breach of Community law would infringe the principles of legal certainty and legal clarity as well as the principles of effectiveness and equivalence."

The Court regarded a three-year limitation period as reasonable (para 32), but said that:

> "33. …. in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty."

Significantly for the present case, it continued:

> "34. It is for the national court, taking account of all the features of the legal and factual situation at the time material to the main proceedings, to determine, in light of the principle of effectiveness, whether the application by analogy of the time-limit laid down in Paragraph 852(1) of the BGB to claims for reparation of loss or damage caused as a result of the breach of Community law by the Member State concerned was sufficiently foreseeable for individuals."

It is to be noted that *Danske Slagterier* was a case brought against the Federal Republic. Any infringement of the principle of effectiveness could therefore be visited directly on the other party to the proceedings, by in particular refusing to allow it to rely upon the time limit or, in appropriate circumstances, awarding damages against it for any loss flowing from any enforcement of the time limit.

13. *Commission v Ireland* arose from a challenge to the award to Celtic Roads Group ("CRG") of a contract for the construction of the Dundalk Western Bypass by the Irish National Roads Authority ("NRA"), a statutory body with the overall responsibility for the planning and supervision of works for the construction and maintenance of national roads. SIAC Construction Ltd ("SIAC"), a member of a rival consortium (EuroLink), was informed on 14 October 2003 that the NRA had decided to designate CRG as the preferred tenderer, in terms indicating that this meant that the NRA would be proceeding with discussions with CRG, but that, if they broke down, it might still enter into discussions with EuroLink. However, on 9 December 2003 the NRA decided to award the contract to CRG, and on 5 February 2004 it signed a contract with CRG accordingly. Proceedings were commenced by SIAC on 8 April 2004, on the basis that their time for bringing an action started to run on 5 February 2004. But the proceedings were dismissed by the Irish High Court on 16 July 2004, as out of time under Order 84A(4) of the Court's Rules. Order 84A(4) provided:

> "An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period."

The Irish High Court held that any action had to be brought no later than three months from 14 October 2003.

14. The Commission pursued a complaint against Ireland on the ground that it had in two respects breached the Council Directives regulating the award of public works contracts and the remedies required thereby, notably Directive 89/665/EEC, as amended by Directive 92/50/EEC, and Directive 93/37/EEC, as amended by Directive 97/52/EC. First, the NRA had failed to notify SIAC promptly and in good time before contracting with CRG of its decision to award the contract to CRG, to enable SIAC to mount its challenge. Secondly, and materially for present purposes, Ireland was in breach

> "by maintaining in force Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument No 374 of 1998, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined."

The Court held that both these alleged heads of infringement were established.

15. With regard to the second head, the Court reiterated that national limitation periods are as such permissible, but applied the principles of effectiveness and legal certainty in holding that the period prescribed by Order 84A(4) infringed European law. It did this in a series of paragraphs which it is necessary to set out in full, because the language of the English version differs somewhat between paragraphs, with the result that each side has selected the formulation best suiting its case and maintained that it is clear that this reflects the true principle. If, perish the thought, any real uncertainty exists about what the Court of Justice meant, Mr Vajda submits that the question should, under the *CILFIT* criteria, be sent to Luxembourg to achieve clarity (see Case C-283/81 *Srl CILFIT v Ministry of Health* [1982] ECR 3415).

16. The relevant paragraphs read as follows:

> "53 On the other hand, national limitation periods, including the detailed rules for their application, should not in themselves be such as to render virtually impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law (*Lämmerzahl*, paragraph 52).
>
> 54 Order 84A(4) of the RSC provides that 'an application for the review of a decision to award or the award of a public contract' must be made within a specified period.

55 However, as occurred in the dispute which gave rise to the High Court's judgment of 16 July 2004, the Irish courts may interpret that provision as applying not only to the final decision to award a public contract but also to interim decisions taken by a contracting authority during the course of that public procurement procedure. If the final decision to award a contract is taken after expiry of the period laid down for challenging the relevant interim decision, the possibility cannot be excluded that an interested candidate or tenderer might find itself out of time and thus prevented from bringing an action challenging the award of the contract in question.

56 According to the Court's settled case-law, the application of a national limitation period must not lead to the exercise of the right to review of decisions to award public contracts being deprived of its practical effectiveness (see, to that effect, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 72; Case C-327/00 *Santex* [2003] ECR I-1877, paragraphs 51 and 57; and *Lämmerzahl*, paragraph 52).

57 As observed by the Advocate General in point 51 of her Opinion, only if it is clear beyond doubt from the national legislation that even preparatory acts or interim decisions of contracting authorities at issue in public procurement cases start the limitation period running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively within the meaning of Article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred.

58 Accordingly, it is not compatible with the requirements of Article 1(1) of that directive if the scope of the period laid down in Order 84A(4) of the RSC is extended to cover the review of interim decisions taken by contracting authorities in public procurement procedures without that being clearly expressed in the wording thereof.

59 Ireland disagrees with this finding, contending that the application of such a period for challenging interim decisions corresponds to the objectives of Directive 89/665, in particular the requirement of rapid action.

60 It is true that Article 1(1) of Directive 89/665 requires Member States to ensure that decisions taken by contracting authorities may

be reviewed effectively and as rapidly as possible. In order to attain the objective of rapidity pursued by that directive, Member States may impose limitation periods for actions in order to require traders to challenge promptly preliminary measures or interim decisions taken in public procurement procedures (see, to that effect, *Universale-Bau and Others*, paragraphs 75 to 79; Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraphs 30 and 36 to 39; and *Lämmerzahl*, paragraphs 50 and 51).

61 However, the objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to create a legal situation that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (see, to that effect, Case C-361/88 *Commission v Germany* [1991] ECR 1-2567, paragraph 24, and Case C-221/94 *Commission v Luxembourg* [l996] ECR 1-5669, paragraph 22).

62 The abovementioned objective of rapidity does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of ensuring effective review proceedings laid down in Article 1(1) of Directive 89/665.

63 The extension of the limitation period under Order 84A(4) of the RSC to interim decisions taken by contracting authorities in public procurement procedures in a manner which deprives the parties concerned of their right of review satisfies neither the requirements of legal certainty nor the objective of effective review. Interested parties must be informed of the application of limitation periods to interim decisions with sufficient clarity to enable them effectively to bring proceedings within the periods laid down. The failure to provide such information cannot be justified on grounds of procedural rapidity.

64 Ireland submits that the Irish courts interpret and apply Order 84A(4) of the RSC in conformity with the requirements of Directive 89/665. This argument refers to the significant role played by case-law in common-law countries such as Ireland.

> 65 It should be noted in this regard that, according to the Court's settled case-law, although the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be reproduced in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient, it is nevertheless necessary that that legal context be sufficiently clear and precise as to enable the parties concerned to be fully informed of their rights and, if necessary, avail themselves of those rights before the national courts (judgment of 29 October 2009 in Case C-474/08 *Commission v Belgium*, paragraph 19 and case-law cited).
>
> 66 Order 84A(4) of the RSC, however, does not satisfy those requirements inasmuch as it allows national courts to apply, by analogy, the limitation period which it provides for challenges to public contract award decisions to challenges to interim decisions taken by contracting authorities in the course of those procurement procedures, in respect of which no express provision was made by the legislature for that limitation period to apply. The resulting legal situation is not sufficiently clear and precise to exclude the risk that concerned candidates and tenderers may be deprived of their right to challenge decisions in public procurement matters handed down by a national court on the basis of its own interpretation of that provision.
>
> 67 It follows that the first part of the second head of claim is well founded."

17. Resuming the effect of these cases: in *Courage Ltd v Crehan* the European Court was concerned with an English law rule which rendered recourse impossible, but pointed out that it was also impermissible for a rule of law to render the exercise of European legal rights "excessively difficult". In *Danske Slagterier* the Court was concerned with the latter situation, and held it to apply where it was not ascertainable "with a reasonable degree of certainty" or not "sufficiently foreseeable" whether a limitation period applied. The same test, whether a national rule renders it "impossible or excessively difficult" to exercise European rights is stated and restated in paragraphs 53 and 62 in *Commission v Ireland*. In paragraphs 61, 65 and 66 the Court joins this with references to the need for Member States to create a legal situation which is "sufficiently, precise, clear and foreseeable" or "sufficiently clear and precise" to enable individuals to ascertain and avail themselves of their rights, and (in that case) to exclude the risk of their being deprived of the right to challenge a public procurement decision by a decision "handed down by a national court on the basis of its own interpretation" of its Rules. In paragraph 58 the Court summarised its conclusion in *Commission v Ireland* as being that it was not compatible with the Directive if the scope of the

period laid down in Order 84A(4) was "extended to cover the review of interim decisions ….. without that being clearly expressed in the wording thereof".

18. All these statements of principle in *Commission v Ireland* appear readily reconcilable. The requirement is that the true effect or interpretation should be sufficiently foreseeable or clear. Clarity was especially important and was emphasized in the context of *Commission v Ireland* because Order 84A(4) *on its face* allowed review within three months of *either* the decision to award *or* the award of a public contract. It would have been hard to anticipate, without clear warning, that time for a challenge to the latter would run from the former. Under the equivalent English Rule of Court, which was in effectively identical terms to the Irish, it had been established at the highest level by May 2002 that a challenge to a grant of planning permission could be made within three months of the grant, and need not be brought within three months of any earlier resolution conditionally authorizing the grant: *R (Burkett) v Hammersmith and Fulham LBC* [2002] UKHL 23, [2002] 1 WLR 1593, per Lord Slynn para 5 and Lord Steyn para 42. The English courts would not have taken the same limiting view of Order 84A(4) as the Irish High Court did. Where a rule like Order 84A(4) points on its face to a course being open to a litigant, it is necessary for it to be made clear if a contrary result is intended.

19. Less easily reconcilable in paragraph 57 of the English text is the endorsement by the Court of Advocate General Kokott's statement that "only if it is clear beyond doubt from the national legislation that even preparatory acts or interim decisions …. start the limitation period running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively … and to avoid their challenges being statute-barred". In its own terms, and without any supporting reference in the Advocate General's opinion or the Court's judgment, it appears more an explanation of the effect of the established test in the particular circumstances of *Commission v Ireland* than a statement of a new legal test. That is consistent with what is said in paragraph 18 above about the obvious need, in the light of the apparent meaning of Order 84A(4), to make it clear if time for all complaints was in fact intended to run from the date of any preparatory act or interim decision. But paragraph 57 has been relied upon by Mr Vajda for BCL as establishing, or explaining, the relevant test as being whether the commencement and operation of the limitation period, as held by the Court of Appeal, were "clear beyond doubt". Mr Vajda points out that in *Commission v Ireland*, in contrast to *Danske Slagterier*, the Court of Justice had to determine for itself whether the principles of effectiveness and legal certainty had been infringed, and he submits that this was the test it applied.

20. Other language versions do not appear to me to lend real support to Mr Vajda's case on this point. In the French, the equivalent words to the English "only

if it is clear beyond doubt from the national legislation that ….” are “ce n’est que lorsqu’il ressort clairement de la législation nationale que ….”; in the German, they are “nur …. wenn aus den nationalen Rechtsvorschriften klar hervorgeht, dass ….”; in the Dutch, they are “zijn slechts wanneer uit de nationale wettelijke regeling duidelijk blijkt dat ….”, and in the Portugese, they are “só se resultar claramente da legislação nacional que ….” These versions all emphasise the need for clarity, nothing more, without reference to excluding doubt. The Spanish version “sólo cuando resulte inequívocamente posible de la legislación nacional que ….” uses a word “inequívocamente” with the sense of “unequivocally”, but this is attached to the word “posible”. The Italian reads “solo laddove dalla normativa nazionale risulti in maniera inequivoca che …..”, and on its face therefore endorses a need for an “unequivocal” provision. But the general tenor of these other language versions is that clarity was to be expected if Order 84A(4) was to be understood (contrary to its natural meaning) as barring claims which were not made within three months of any relevant preliminary act or interim decision. That, in the particular context, was understandable, for reasons already explained, but it does not mean that the Court of Justice was in paragraph 57 substituting a new test for that expressed in previous case-law or elsewhere in its same judgment.

21. If “clarity beyond doubt” were the appropriate general test, then any doubt – presumably, any reasonably arguable question – about the running of the limitation period or, more generally, about the way in which national law implements European law would infringe the principles of effectiveness and legal certainty. That is, unless and until a court - presumably the final appellate court - had resolved the doubt, one way or the other. The wide-ranging significance of such a principle for national law barely needs mention. There could also be implications for European law. Any point of European law, which was open to doubt under the relevant Union instrument and which, when an issue arose in proceedings, would require a reference to the Court of Justice under the *CILFIT* criteria, might also be said to involve a breach of the European legal principles of effectiveness and legal certainty. Be that as it may be, it is hard to envisage that the European Court envisaged anything of this sort in paragraph 57 of its judgment in *Commission v Ireland.*

22. Nor did Advocate General Sharpston consider that the European Court had done so. In her opinion in *Commission v France*, para 50, she said this:

> “50. It is true that the Court has consistently held that the right of individuals to rely on directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty. (34) It is likewise established that, in order to guarantee legal certainty, Member States must create a legal situation that is

sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations. (35)"

Her endnote 35 referred in support of the second sentence to paragraph 61 in *Commission v Ireland* and the case-law cited there.

23. When considering what test may be appropriate, some relevance might be suggested to attach to the relief available for any infringement of the principles of effectiveness and legal certainty. If the only remedy is against the State for introducing a law which is uncertain in its impact, that might make it easier to accept a broader principle of certainty than if the remedy is, as claimed by the present appeal, against the other party to civil litigation. But that approach is of no assistance to BCL on this appeal, in which the State is not involved. Mr Vajda's case is that a party in BASF's shoes can establish its right to rely on a time bar under national law, by a decision which BCL can no longer challenge as a matter of national law, and yet fail because the State had not left it "clear beyond doubt" what the legal position regarding limitation was at the time when the limitation period was (as now established) running. If that were the European legal position (which I do not believe it is: see paragraphs 44 to 47 below), it might militate in favour of a narrow view of the principle of legal certainty. For present purposes, however, I shall ignore any such argument in favour of a narrower principle of effectiveness and legal certainty, but at the same time ignore the fact that BASF is distinct from and may not be answerable for any failings of the State.

24. On this basis, the considerations which I have so far identified lead me to conclude that the English language text of paragraph 57 should not be taken literally or read out of context. The Court cannot have intended to substitute a new test for the well-established test of "excessive difficulty" which applies where the legal position was not "sufficiently clear and precise", ascertainable "with a reasonable degree of certainty" or "reasonably foreseeable". The European Court of Justice's judgment in *Commission v Ireland* must be read as a whole. So read, I do not consider that there is any doubt about the appropriate test or any need to refer a question to the Court of Justice on it. I add that, as will appear, even if one were to adopt a simple test of "clarity", it would not change the outcome of this appeal. In reality, however, any distinction between on the one hand "clarity" and on the other "sufficient" or "reasonable" clarity is elusive. At the high point of his submissions, Mr Vajda was in effect arguing for absolute certainty, beyond any doubt, as a test. But, as Oliver Wendell Holmes once said, "Certainty generally is illusion, and repose is not the destiny of man". The true test is more flexible and more reflective of the real world.

25. Mr Brealey QC for BASF also referred to decisions of the European Court of Human Rights on the concepts of right of access to a court, rules "prescribed by

law” and legal certainty. It is not necessary for the opinion which I have formed to rely on the reasoning in these decisions. But I agree that they are of interest, in showing how that Court understands concepts which one would expect to parallel those adopted in Luxembourg regarding legal effectiveness and certainty. In *Stubbings v United Kingdom* (1996) 23 EHRR 213, the Court of Human Rights accepted as unproblematic a decision of the House of Lords (*Stubbings v Webb* [1993] AC 498) overruling the Court of Appeal on a difficult limitation point and interpreting the fixed six-year time limit under section 2 of the Limitation Act 1980 as applicable to deliberate assaults including rape and indecent assault committed against a child. (The difficulty is evidenced by the fact that, 15 years later, the House departed from this decision and held instead in *A v Hoare* [2008] AC 844 that deliberate torts fell within the flexible knowledge-based rule in section 11.)

26. In *Sunday Times v United Kingdom* (1979) 2 EHRR 245 the newspaper submitted that the English law of contempt was too vague and uncertain, and its extension by some members of the House of Lords to public “prejudgement” of the outcome of proceedings “novel”, to the extent that it was not reasonably foreseeable or therefore “prescribed by law” within Article 10 of the Convention. The Court of Human Rights said that:

> “49. In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable.
>
> Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”

In the upshot the submission of uncertainty was rejected, with the Court saying:

> "52. …. To sum up, the Court does not consider that the applicants were without an indication that was adequate in the circumstances of the existence of the 'prejudgment principle'. Even if the Court does have certain doubts concerning the precision with which that principle was formulated at the relevant time, it considers that the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of the draft article might fall foul of the principle."

27. The further cases of *Vogt v Germany* (1995) 21 EHRR 205 and *Sahin v Turkey* (2005) 44 EHRR 99 contain statements by the Court of Human Rights confirming that the mere fact that a legal provision is capable of more than one construction does not mean "that it does not meet the requirement implied in the notion 'prescribed by law'" (*Vogt*, para 48) or "that it fails to meet the requirement of 'foreseeability' for the purposes of the Convention" (*Sahin*, para 91).

28. In my opinion, the approach of the Court of Human Rights confirms the view which I consider that the Court of Justice would take in relation to suggestions that the existence of arguable doubt or of a need for interpretation is of itself sufficient to render national law insufficiently foreseeable or to make it excessively difficult for the subjects of the law to know their position.

*Was the commencement of the limitation period sufficiently foreseeable?*

29. Taking the statutory provisions by themselves, I have no doubt about the answer to the question whether the commencement of the two-year limitation period was sufficiently foreseeable. The Court of Appeal's analysis was impeccable and it was in my opinion well-justified in speaking of "the plain and ordinary meaning of the statutory language" and of the legal position as "clear".

30. The Competition Act uses throughout clear language, speaking repeatedly of "a decision …. that the [or a] prohibition has been infringed": see e.g. sections 31, 32, 36, 46 and 47A. Such a decision is explicitly distinguished in section 36(1) from a requirement imposed by the OFT on "an undertaking which is a party to the agreement to pay the OFT a penalty in respect of the infringement" and in section 46(3)(i) from "a decision …. as to the imposition of any penalty under section 36 or as to the amount of any such penalty". On a correct reading, an appeal to the Court of First Instance (now the General Court) will take issue with either or both of the decisions on infringement and on penalty. It is a question of analysis which it does. If an appeal which is nominally directed only against the penalty levied in fact takes issue with the existence or nature of the infringement, it may involve an appeal against infringement as well penalty. In the present case, it is accepted that

BASF's appeal was against, and only against, the fine imposed on it. Mr Vajda showed us the summary of the nature of BASF's appeal published in the Official Journal on 4 May 2002 (which was not apparently put before the Court of Appeal), and suggested that it left unclear the actual nature of the appeal. But he confirmed that he did not seek to raise any new suggestion to the effect that BCL had been misled on that score, and also that he did not challenge the finding of fact made by the Tribunal on 19 November 2009 that (para 29) BCL "knew that BASF was not challenging the finding of infringement in its appeal to the Court of First Instance". The Official Journal summary was relied upon simply as forensic support for BCL's case that the line between decisions on infringement and penalty can be unclear – with the implication that it could not have been envisaged with any certainty that the Competition Act and Rules drew such a line. On this, I would disagree. The Act and Rules were and are to my mind clear in drawing that precise distinction. Whatever the issues that might arise in particular cases as to whether there had been an appeal against liability as well as penalty, there is no suggestion in the present case that BASF did in fact appeal against liability or that BCL was misled into thinking that it had.

31. I am also unimpressed by BCL's reliance on the fact that it did not itself commence legal proceedings either in the High Court or before the Tribunal within what has been established to have been the available limitation period. An individual party's conduct cannot serve as an assay of the clarity or otherwise of statutory provisions. In any event, the account of the relevant thinking and of the advice which is said to have led to it is so exiguous and to some extent puzzling that I could not attach to it any real significance in this context.

32. But Mr Vajda also points to a number of Tribunal decisions, some of which he submits reached conclusions or pointed in an opposite sense to those now established as correct. The first is *Emerson Electric Co v Morgan Crucible Company plc* [2007] CAT 28, which followed from a Commission decision dated 3 December 2003 establishing an infringement involving six concerns. Three of the concerns (SGL Carbon AG, Schunk GmbH and Schunk Kohlenstofftechnik GmbH and Le Carbone Lorraine SA - "SGL", "Schunk" and "Carbone") lodged appeals with the Court of First Instance, seeking annulment of the Decision and/or cancellation or reduction of the fine imposed. Morgan Crucible, the whistle-blower which had been granted immunity from any fine, lodged no appeal. On 9 February 2007 Emerson, an alleged victim of the cartel, made a claim for damages against Morgan Crucible in the Tribunal at a time when the appeals by the other cartel members were still outstanding. The Tribunal (Marion Simmons QC, Adam Scott TD and Vindelyn Smith-Hillman) held on 17 October 2007 that the two-year limitation period under section 47A(8)(b) had not yet commenced, because (para 64):

> "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."

It also said (paras 70-71) that the word "decision" in section 47A(8) could not be read in a "restrictive" sense as referring to "that part of [it] which is the subject of the appeal to the [European Court]", rather than to the whole of the Commission's decision.

33. The proceedings against Morgan Crucible were, on this basis, premature, unless Tribunal permission could be obtained for their early pursuit under section 47A(5)(b). But the Tribunal also considered, on an opposite hypothesis and assuming the two-year limitation period to have expired, whether the Tribunal had power to extend the time for commencement of proceedings. It expressed the view obiter that it did, under Rule 19(2)(i).

34. The Tribunal decision of 28 April 2008 recites ([2008] CAT 8, para 4) that permission was then granted to the Emerson claimants under section 47A(5)(b) to bring premature proceedings against Morgan Crucible. Permission was also sought to bring such proceedings against SGL, Schunk and Carbone. It was submitted that their outstanding appeals were, in fact, merely against the level of the fines imposed. The Tribunal in its decision of 28 April 2008 proceeded on the basis that the appeals "appear to be primarily concerned with the imposition and/or level of the fine imposed by the Commission" (para 90) and that the facts upon which the Commission had based its statement of objections (the original complaint regarding the existence of a cartel) were "substantially" uncontested (para 93). But it noted that there were challenges to the scope of the infringement found by the Commission which could affect the damages claims (paras 90-91) and considered it impossible to draw a bright line between different appeals against an infringement decision, saying that each case must depend on its facts (para 88). On the facts before it, it refused permission to the Emerson claimants to bring early proceedings against SGL, Schunk and Carbone. At a later date, 17 October 2008, the Tribunal (with Barling J in the chair instead of Marion Simmons QC, who had in the meantime sadly died) ordered that the Emerson claimants should pay 50% of the defendants' costs incurred by the claimants' unsuccessful applications: [2008] CAT 28.

35. On 25 September 2008 the present case came before the Tribunal in a different composition consisting of Barling J, Ann Kelly and Michael Davey [2008] CAT 24 for determination of the issue whether the two-year period for commencement of BCL's claim had begun to run at the end of January 2002 (the last date for an appeal by BASF against the Commission's decision that it had

infringed Article 81) or whether its commencement was postponed until BASF's appeal against the fine imposed on it was determined on 15 March 2006. In the former case the claim brought by BCL against BASF on 12 March 2008 was out of time, in the latter case it was in time. The Tribunal took the latter view, pointing again to the possibility that an appeal on the level of fine might be relevant to and determined by the nature and extent of the infringement being penalized (paras 34-37). It found reinforcement for its view in the previous Tribunal decisions in *Emerson Electric*.

36. On 22 May 2009 the Court of Appeal reversed the Tribunal's decision of 25 September 2008: paragraphs 4 and 7 above. On 12 November 2010 the Court of Appeal held that the Tribunal did not have the power to extend time for the commencement of proceedings which had been assumed by the Tribunal when it refused on the facts to exercise any such power on 19 November 2009: paragraphs 4 and 8 above.

37. The domestic legal position resulting from the course of events outlined in paragraphs 32 to 36 is now unchallenged and unchallengeable. But it took time and a process of appeals to reach this position. Does that mean that English law lacked the requisite legal certainty, that its requirements or effect were not "sufficiently foreseeable" or that it was "excessively difficult" for BCL to take advantage of the possibility of making a claim for damages against BASF? The first point to note is that the line of decisions which I have identified began on 17 October 2007 with the first *Emerson* decision by the CAT. By then the two-year period for a claim for damages before the Tribunal was long expired (on 31 January 2004). There remained just over a month of the six-year period for the bringing of a High Court claim for damages, a course which BCL do not in fact appear at any stage to have contemplated. There is no suggestion that BCL considered or relied upon the first *Emerson Electric* decision in the period between 17 October and 21 November 2007.

38. Nor could they sensibly have done so. The Tribunal in *Emerson Electric* was not directly addressing the present issue, which is whether the "decision" of the Commission referred to in section 47A(8) includes both its decision on infringement and any decision on fine. Further, the Tribunal's decision, on the point which it had to decide, was, in the Court's view, erroneous and at the very least obviously vulnerable to challenge on appeal. The word "any" has and can have no such general significance as the Tribunal appears to have attached to it. Either the decision establishing that the relevant prohibition has been infringed refers to the particular proposed defendant (so that an appeal by another concern against the finding of infringement is irrelevant) or it refers to all concerns implicated in the alleged infringement (in which case an appeal by one may postpone the time for a follow-on claim for damages against another who has not appealed). The Court of Appeal in *Deutsche Bahn AG v Morgan Crucible Co plc*

[2012] EWCA Civ 1055, after close consideration of these alternative analyses, came down firmly in favour of the latter. The Supreme Court, as noted in paragraph 7 above, has not heard submissions on this conclusion. It was not relevant to do so. What is unchallenged and unchallengeable is that an appeal by an involved concern against a fine alone is not in any sense a relevant appeal which can postpone the time for a follow-on claim against that (or any other) concern which has not appealed against the finding of infringement made against it.

39. The Tribunal decisions considered in paragraphs 32 to 38 above were irrelevant to BCL's actual conduct. But do they demonstrate objectively the existence of such uncertainty in English law as to infringe the relevant European legal principles? Clearly, it is unfortunate if Competition Appeal Tribunals arrive at conclusions on the commencement of a limitation period and on the power to grant an extension of time which are held erroneous on appeal to the Court of Appeal. But an appellate system is there to remedy error and to establish the correct legal position. I do not accept that its ordinary operation is the hallmark of a lack of legal certainty or effectiveness. The language and effect of the Competition Act were subsequently, and rightly, held by the Court of Appeal to be clear. The *Emerson Electric* and *BCL* Tribunals gave the words "any" and "decision" significance which they could not bear. They also failed to interpret section 47A in the context of the statute and its other sections read as a whole. It was by any standard readily foreseeable that an opposite view would be taken on appeal. The Tribunal decisions do not in my view lead to a conclusion that English law was insufficiently certain or that it made the bringing of a claim in time excessively difficult. At the very least, the risks of not bringing proceedings against BASF by 31 January 2004 were or should have been evident.

40. These conclusions are sufficient to resolve the present appeal so far as it relates to the alleged uncertainty of the starting date of the two-year limitation period. But I add that it was also open to BCL to issue Tribunal proceedings, and, if they were held to be premature, to request the Tribunal's permission for their early commencement under section 47A(8)(b). Mr Vajda pointed in this connection to the costs order made against the *Emerson* claimants on 17 October 2008 following their unsuccessful application to begin early proceedings against SGL, Schunk and Carbone. But that was long after the expiry of all limitation periods in the present case. The reality is that, if BCL had in January 2004 taken the steps to protect its position which one would have expected, it would not have confined itself to an application to bring early proceedings under section 47A(8)(b), but would have maintained that the two-year period for proceedings against BASF had begun in January 2002, and would, if necessary, have pursued that point to the Court of Appeal, where it would have won upon it.

*Was the lack of any power to extend sufficiently foreseeable?*

41. Again, I have no doubt that it was. Part II of the Competition Appeal Tribunal Rules deals with appeals to the Tribunal. Within Part II, Rule 19 headed "Directions" is the first in a block of rules headed "Case management". Its entire subject matter is directed to the management of proceedings which are on foot and being pursued. In that context it is plain that it says nothing about the commencement of proceedings. The reference to "directions …. as to the abridgement or extension of any time limits, whether or not expired" says nothing to indicate that it could cover time limits for the commencement of proceedings. The fact that it refers to abridgement as well as extension of time does however underline the implausibility of its suggested application to time limits for commencing the proceedings in which Rule 19 allowed directions to be given. Abridgement occurs in the course of proceedings. It is inconceivable that the time for commencement of proceedings could be abridged.

42. Just as, if not more, significantly, the topic of commencement of proceedings is in Part II covered in another block of rules, of which Rule 8(2) expressly permits the extension of the time limit for appeal proceedings in circumstances shown to the Tribunal to be "exceptional". Part IV headed "Claims for damages" incorporates by reference Rule 19 by virtue of both Rule 30 and Rule 44, which is the first of another block of rules headed "Case management". Rule 44 makes no mention of Rule 8. Rule 30 makes expressly clear that Rule 8 is not applicable to Part IV claims for damages, and there is no equivalent power to extend in Part IV. Accordingly, it is plain that the Secretary of State in making the Rules deliberately decided that there should be no power to extend time for the commencement of claims for damages in, as opposed to appeals to, the Tribunal. The Tribunal's contrary view was first expressed in *Emerson Electric* on 17 October 2007. It was understandably asserted to be correct by BCL before the Court of Appeal in April/May 2009, and Richards LJ's judgment adopts that assumption, which was in turn adopted by the Tribunal in *BCL* on 19 November 2009. But, when the point was argued, the Court of Appeal held the contrary, noting the points which I have already made, and various other points. In my opinion, it is impossible to suggest that this interpretation of the Rules was not sufficiently foreseeable or clear. Again, the fact that a Tribunal arrives at an erroneous conclusion which is corrected on appeal cannot mean that the law is uncertain to a point making it "excessively difficult" to take advantage of its provisions. Again, it is not and could not be suggested that the Tribunal's decision of 17 October 2007 was instrumental in any course of action which BCL actually did or did not take.

43. For these reasons, I reject BCL's case that the English legal position regarding the commencement of the relevant two-year period for a claim for damages under section 47A and Rule 31 of the Competition Appeal Tribunal Rules

and regarding the possibility of seeking an extension of time were insufficiently foreseeable or clear and made it "excessively difficult" for BCL to commence and pursue such a claim in time. In my view, the contrary is the case. Absolute certainty is not the test, but it was eminently and sufficiently foreseeable that the English legal position would be established on both points to the effect which the Court of Appeal held. I would, if necessary, also go further and, in company with the Court of Appeal, describe the legal position as clear on a careful reading of the relevant Act and Rules. It is for the domestic court to determine whether, in the particular legal and factual situation, the principles of effectiveness and legal certainty were satisfied: *Danske Slagterier*, para 34, cited in paragraph 12 above. In my view, they were here. There is therefore no basis for any reference to the Court of Justice on this aspect. BCL's appeal in these circumstances fails and must be dismissed.

*Appropriate relief where the principles of effectiveness and legal certainty are breached*

44. It is unnecessary, in the light of the above, to decide what relief might have been appropriate, had the conclusion been that the principles of effectiveness and/or legal certainty had in any respect been breached. However, I shall briefly address this subject. If the effect of a statute made by Parliament and of a statutory instrument made by the Secretary of State under statute is unclear in a way which breaches the European legal principle of effectiveness or legal certainty, the State is in breach of its European legal obligations, and liable accordingly, as *Commission v Ireland* illustrates. It is quite another matter to suggest that another party to civil litigation is deprived of the right to rely upon legal provisions which, once construed in a manner resolving any uncertainty, are shown to exist for their benefit. That the party sued was a member of a cartel infringing Article 81 does not alter its *prima facie* entitlement to rely upon any limitation period contained in the relevant legislation. Limitation periods are periods of repose intended to benefit those who are liable as well as the entirely innocent. Otherwise, they would have no point, and it would always be necessary to try every case.

45. I find it impossible to think that European law requires the setting aside as between civil parties of a limitation defence, which a defendant, who is independent of the State, has successfully established under domestic law, on the ground that its existence or scope under domestic law was uncertain until the court decision establishing it. For a successful party other than the State to be deprived in this way of the fruits of victory on limitation would mean that there was little point in raising the limitation defence in the first place. No-one would then ever know with clarity what the true legal position was. The national limitation period would be deprived of effectiveness and national law of legal certainty.

46. Some confirmation that this is not the European legal position is, I think, also provided by the nature of the proceedings and the decision in *Commission v Ireland* itself. The Commission there brought proceedings against Ireland because of the application of a limitation provision of previously uncertain effect in proceedings between SIAC and the NRA, a statutory body. The complaint was not that the Irish courts acted contrary to European law in giving effect to the limitation provision. But it should have been, were it the European legal position that legal uncertainty invalidates a limitation period as between parties to civil litigation, as Mr Vajda contends. The judgment did not proceed on that basis either. Rather, it, like the complaint, accepted the validity as between the parties of the limitation provision in the sense determined by the Irish High Court. But it declared the Irish State to be in breach of the Directives dealing with public works and remedies "by maintaining in force Order 84A(4) of the Rules of the Superior Courts …. in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined". The limitation provision was, in short, treated as valid between the parties, but the State was in breach for maintaining it in force in uncertain terms.

47. On this basis, if (contrary to my view) BCL were to have any complaint, it would lie against the United Kingdom, and not affect BASF's right to rely upon the limitation period to which it has established its entitlement in the Court of Appeal in the present proceedings. While it does not arise, I would, if necessary, have regarded this point as sufficiently free of any reasonable doubt to be *acte clair* and inappropriate for reference to the Court of Justice.

*Conclusion*

48. For these reasons, I would dismiss BCL's appeal.

ANNEX

1. Part I of the Competition Act 1998 prohibits by section 2 agreements between undertakings or decisions or concerted practices of undertakings which affect trade and have as their object or effect the prevention, restriction or distortion of competition within the UK ("the Chapter I prohibition") while section 18 prohibits abuse of dominant position ("the Chapter II prohibition"). Under section 25, contained in Chapter III of Part I of the Act, the Office of Fair Trading ("OFT") was given power to investigate any such agreement as was mentioned in section 2, as well as any agreement which may affect trade between European Community Member States and have as its object or effect the prevention, restriction or distortion of competition within the Community, while section 31 defines a decision made as a result of any such investigation as meaning a decision of the OFT that a Chapter I or II prohibition or the prohibition in Article 81(1) or 82 "has been infringed". The Act continues:

> "32(1) If the OFT has made a decision that an agreement infringes the Chapter I prohibition or that it infringes the prohibition in Article 81(1), it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.
>
> ….
>
> 36(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 81(1), the OFT may require an undertaking which is a party to the agreement to pay the OFT a penalty in respect of the infringement."

Chapter IV, containing sections 45 to 49 of the Act, includes section 46 permitting any "party to an agreement in respect of which the OFT has made a decision" to appeal to the Tribunal against, or with respect to, the decision, and defines "decision" as follows:

> "(3) In this section 'decision' means a decision of the OFT-
>
> (a) as to whether the Chapter I prohibition has been infringed,
>
> (b) as to whether the prohibition in Article 81(1) has been infringed,

(c) as to whether the Chapter II prohibition has been infringed,

(d) as to whether the prohibition in Article 82 has been infringed,

(e) cancelling a block or parallel exemption,

(f) withdrawing the benefit of a regulation of the Commission pursuant to Article 29(2) of the EC Competition Regulation,

(g) not releasing commitments pursuant to a request made under section 31A(4)(b)(i),

(h) releasing commitments under section 31A(4)(b)(ii),

(i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,

and includes a direction under section 32, 33 or 35 and such other decisions under this Part as may be prescribed."

2. Section 47A of the Competition Act 1998 applies, by virtue of subsection (1), to any claim for damages "as a result of the infringement of a relevant prohibition". Subsection (3) then disapplies any limitation period that would apply in court proceedings, while subsection (4) provides for a claim to which section 47A applies to be made in proceedings brought before the Tribunal, subject to this time limit:

"(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."

3. Subsection (6) lists various categories of decision by the OFT, the Tribunal or the European Commission that a specified "prohibition …. has been infringed" (or, in one case involving the Commission, "a finding made"). The relevant provision for present purposes is in subsection (6)(d): "a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed". Subsections (7) and (8) identify various periods during which one or more appeals may be made in relation to the various categories of decision listed in subsection (6), and during which any claim for damages under section 47A depends accordingly, under subsection (5)(b), on the Tribunal's permission for its pursuit. Subsection (8) is presently relevant:

> "(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."

Subsection (9) provides that, in determining any claim under section 47A "the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed".

4. The Competition Appeal Tribunal Rules 2003, which came into force under, and on the same day (20 June 2003) as, section 47A of, the Competition Act 1998 read:

> **PART IV**
>
> **CLAIMS FOR DAMAGES**
>
> **Application of rules to claims for damages**
>
> 30. The rules applicable to proceedings under sections 47 A and 47B of the 1998 Act (claims for damages) are those set out in this Part, and in Part I, Part II (except for rules 8 to 16) and Part V of these rules. ….

> **COMMENCEMENT OF PROCEEDINGS**
>
> **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.
>
> ……
>
> **CASE MANAGEMENT**
>
> **Case management generally**
>
> 44. (1) In determining claims for damages the Tribunal shall actively exercise the Tribunal's powers set out in rules 17 …., 18…., 19 (Directions) ….”

5. Rule 19 appears in Part II of the Rules headed “Appeals” and dealing with appeals to the Tribunal. The initial block of Rules in Part II is headed “Commencing Appeal Proceedings”, and it commences with rule 8(1). Rule 8(1) requires any appeal to be made within two months of notification or publication of the disputed decision and Rule 8(2) continues:

> “The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional.”

Rule 19 is the first in a block of rules headed “Case Management”. It 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 -

(a) as to the manner in which the proceedings are to be conducted, including any time limits to be observed in the conduct of the oral hearing;

(b) that the parties file a reply, rejoinder or other additional pleadings or particulars;

(c) for the preparation and exchange of skeleton arguments;

(d) requiring persons to attend and give evidence or to produce documents;

(e) as to the evidence which may be required or admitted in proceedings before the Tribunal and the extent to which it shall be oral or written;

(f) as to the submission in advance of a hearing of any witness statements or expert reports;

(g) as to the examination or cross-examination of witnesses;

(h) as to the fixing of time limits with respect to any aspect of the proceedings;

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

(j) to enable a disputed decision to be referred back in whole or in part to the person by whom it was taken;

(k) for the disclosure between, or the production by, the parties of documents or classes of documents;

(l) for the appointment and instruction of experts, whether by the Tribunal or by the parties and the manner in which expert evidence is to be given;

(m) for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the Tribunal; and

(n) for hearing a person who is not a party where, in any proceedings, it is proposed to make an order or give a direction in relation to that person.

(3) The Tribunal may, in particular, of its own initiative-

(a) put questions to the parties;

(b) invite the parties to make written or oral submissions on certain aspects of the proceedings;

(c) ask the parties or third parties for information or particulars;

(d) ask for documents or any papers relating to the case to be produced;

(e) summon the parties' representatives or the parties in person to meetings."