Kluwer Competition Law Blog

United Kingdom: High Court provides guidance on application of limitation periods in damages actions

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The High Court has recently provided guidance on the application of limitation periods in competition damages actions. In *Arcadia v Visa*, it ruled that a substantial part of the claimant's claim, which dated back to 1977, should be struck out for having been brought too late, so reducing the claimed damages by around £500 million. The Court subsequently awarded costs against the claimants on an indemnity basis, ruling that the claim for the period outside of the limitation period (which was held to have started running in 2007) was hopeless and bound to fail.

The Court concluded that, since before 2006 at the latest, the claimants (a group of major retailers) had possessed (or could reasonably diligently have uncovered) sufficient information to adequately plead a claim alleging that the Visa's networks' multilateral interchange fees ("**MIFs**") unlawfully infringed Article 101(1) TFEU, the Chapter I prohibition of the Competition Act 1998 ("**CA 1998**") and equivalent provisions of the Irish Competition Act 2002. This information was, in large part, contained in decisions, notices and press releases issued by the European Commission ("**EC**") and Office of Fair Trading ("**OFT**") relating to their respective investigations into Visa's (and Mastercard's) MIFs.

This is clear warning that potential claimants must not leave it too late in issuing proceedings, particularly where an alleged infringement is ongoing and/or under investigation by a competition authority. If they do pursue 'out of time' claims not only will their claim be struck out in whole or part, they also risk significant costs exposure.

Background

Private damages actions are a critical complement to public enforcement of both national and European Union ("**EU**") competition law. An increasing number of private actions have been In brought in both the High Court and the Competition Appeal Tribunal ("**CAT**") and more can be expected in the future, given the recent adoption of the EU Directive on Antitrust Damages Actions (which harmonises national laws governing such actions)and the forthcoming passing of the Consumer Rights Act (which will, amongst other things, increase the jurisdiction of the CAT and introduce forms of opt-in and opt-out group actions).

One of the most notable features of many private actions to date is the considerable amount of interlocutory challenges and proceedings brought over a whole host of matters including jurisdiction, disclosure and, importantly, compliance with limitation periods and time limits.

Limitation periods and pleading standards in competition cases

In England, actions based upon infringements of UK or EU competition law are based upon the tort of breach of statutory duty. In the High Court, proceedings must be brought within six years of the date on which the cause of action accrued: Limitation Act 1980 (“**LA 1980**”), s.2. This period is extended if the defendant deliberately conceals any fact relevant to the cause of action: LA 1980, s.32(1)(b). (A shorter period of two years applies to damages actions brought in the CAT pursuant to CA 1998 s.47A. This was considered by the Supreme Court in *Deutsche Bahn v Morgan Crucible*, which confirmed that the period starts to run, as against a party to an illegal cartel which does not appeal an EC decision, at the date of that decision and not once any appeals by other parties are finally determined by the EU General Court and Court of Justice.)

In order to succeed in a claim based on UK or EU competition law, the claimant must plead and prove four elements: (1) the defendant is party to an agreement or concerted practice between undertakings; (2) which has as its object or effect the prevention, restriction or distortion of competition and which is appreciable; (3) affects trade between Member States (EU law) or within the United Kingdom (UK law); and (4) which causes loss and damage to the claimant.

Importantly, the claimant must plead the primary facts on which it relies to support each of these four aspects of its claim. That said, it is recognised that, in competition cases, the anti-competitive agreement is often “shrouded in secrecy”, so making it difficult for a claimant to plead detailed facts until either an infringement decision is adopted or disclosure takes place: see *KME Yorkshire v Toshiba Carrier* (2012, CA). However, this latitude does not mean that a claimant can delay commencing proceedings until it has all facts in its possession: once it has sufficient facts to plead its claim, the limitation period will start to run.

The claim in *Arcadia v Visa*

The proceedings were brought by a number of retailers against a number of companies comprising the Visa network, alleging that Visa’s MIFs infringed EU, UK and Irish competition law, leading to the overcharging of retailers for accepting Visa-branded debit and credit cards.

There have been a considerable number of competition investigations concerning MIFs, by the EC and several national competition authorities, including the OFT. These have concerned the MIFs of both Visa and Mastercard. In September 2014, the Court of Justice of the European Union upheld the EC’s decision (of 2007) finding that Mastercard’s MIF infringed Article 101(1) TFEU and did not benefit from exemption under Article 101(3) TFEU. The claimants acknowledged that the 2007 *Mastercard* decision gave them “comfort” to bring the proceedings against Visa, although proceedings were even then not issued until 2013, after the judgment of the General Court in May 2012 upholding that decision.

Visa’s MIFs have been considered on several occasions by the EC. In 2001, the EC adopted a negative clearance decision in respect of certain of Visa’s rules, which identified some of the companies responsible for setting Visa’s rules, including those pertaining to Visa’s MIFs. In 2002, the EC granted an individual exemption to Visa’s cross-border (and some default national) MIFs. It found that the rules concerning these MIFs constituted an agreement between undertakings that restricted by their effect (but not by their object) competition to an appreciable extent in the EEA, thereby infringing Articles 101(1) TFEU and 53(1) EEA. However, an individual exemption was granted until 31 December 2007, as Visa reduced its MIFs to a cost-reflective level. The EC’s

decision was accompanied by a detailed press release, which summarised the key aspects of the decision, including a summary of the relevant Visa rules, the parties involved, why the MIFs infringed competition law and the reduction in the MIFs which justified the exemption.

The OFT had also investigated certain of Visa's (and Mastercard's) MIFs applied in the UK. In 2005, it found that Mastercard's MIFs infringed Chapter I of the CA 1998; in its decision it also referred to Visa's MIFs, including their level. Visa's MIFs were also referred to in Mastercard's subsequent appeal to the CAT, which annulled the OFT's decision in 2006. In 2005, the OFT also announced that it was opening an investigation into Visa's domestic MIFs in the UK; its announcement identified the parties under investigation and indicated the OFT's preliminary intention to adopt an infringement decision. Following the CAT's annulment of the Mastercard decision, the OFT announced it would further investigate the then current (in 2006) MIFs of both Visa and Mastercard, but not their historical MIFs.

The Court's judgment to strike out part of the claim

The High Court considered that the level of information published by the EC (in 2001 and 2002) and the OFT (in 2005 and 2006) was sufficient for the claimants to identify, with the ordinary standards of diligence the appropriate defendants to its claim and why the MIF rules were an anticompetitive agreement, two of the key essential elements of their claim against the defendants for breach of statutory duty. (The claimants were also then aware that the agreements affected inter-state trade and that they had suffered loss and damage from the allegedly excessive MIFs.)

The Court therefore held that a substantial part of the claimants' action was out of time: by bringing their actions only in 2013, they had significantly exceeded the six year limitation period set forth in the LA 1980.

In doing so, the Court rejected arguments that the Visa defendants had deliberately concealed four key facts, so extending the limitation period. The claimants argued that Visa had deliberately concealed: (1) the manner and mechanisms by which the MIFs were set; (2) the precise nature and scope of the MIF arrangements; (3) responsibility of the various defendants for the infringements; and (4) the actual level of the MIFs. The claimants argued that these were secret and concealed, and that these were each essential facts required to plead a complete cause of action. The Court disagreed: these were merely matters of detail and, as regards (3) the claimants were able, with reasonable diligence, to discover the identity of the five defendants so as to plead a prima facie case against each of them. Furthermore, in a price-fixing claim, it is not necessary to plead the precise overcharge (i.e. the loss), since the basis of a pleaded claim is there has been some unlawful overcharge, i.e. an overcharge of more than zero: whilst the precise quantum of loss may be relevant to a decision as to whether it is commercially worthwhile bringing proceedings, it is not necessary in order to plead a claim.

Whilst the claimants may not have had the "whole picture", they possessed sufficient information to bring a claim by no later than 2006, when the OFT published its press release announcing that it would further investigate the MIFs of both Visa and Mastercard.

As the claimants had not brought proceedings until 2013, the application of the six year period imposed by the LA 1980 meant that the claims (which covered a period dating back to 1977) would be struck out in relation to any period before July 2007, being six years before proceedings were brought.

Commentary

Arcadia is a further reminder of the need to comply strictly with time limits: once a potential claimant has sufficient information and facts to satisfy the pleading standard, time will start to run. This is the case even if this information and these facts are incomplete, so making it difficult (whether for the claimants or, increasingly in an age of third party litigation funding, their funders) to take a commercial decision as to whether or not a claim is worth bringing.

In *Arcadia*, it was alleged that there had been a single and continuous infringement of EU and UK competition law since 1977. Where that is the case, *Arcadia* suggests that a claim must be brought within six years of the claimants first having (or being able with reasonable diligence to have) sufficient information to plead their case. In this circumstance, claimants cannot simply allow suspected anti-competitive behaviour to continue whilst they decide whether to bring proceedings. This may change with the entry into force of the EU Directive on Antitrust Damages Actions, Article 10(2) of which provides that a limitation period (which must be at least five years: see Article 10(3)) does not start to run until the infringement has ceased and the claimant knows or can reasonably be expected to know of the infringement, the infringer and that the infringement has caused it harm.

In practice, this is unlikely to matter much in claims based upon secret cartel conduct: there, as has been recognised by the English courts in relation to pleading competition claims (see e.g. *KME Yorkshire v Toshiba Carrier*, where the Court of Appeal held that "*it is in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents to assess fairly the strength or otherwise of an allegation that a defendant was a party to or aware of the proven anti-competitive conduct*") the essential elements of a claim are likely to be unknown to a claimant until a final decision is adopted by the relevant investigating authority. However, it is not inconceivable (as in part in *Arcadia*) that these facts could be contained in an earlier press release, for example announcing that a Statement of Objections has been issued (for recent examples of EC and CMA press releases see here and here) or conceivably at an even earlier stage, for example when the EC announces that it is opening proceedings under Regulation 1/2003 (see e.g. here).

Arcadia is therefore likely to have a greater impact in non-cartel cases, for example where the nature of the allegedly infringing agreements or conduct are well-known or one party wishes to terminate or get out of an agreement (and thereafter seek damages) on the basis that the agreement is anti-competitive.

Concluding remarks

The effect of the *Arcadia* judgment has been to reduce the claimants' claim by some £500m and to expose them to a costs order on an indemnity basis, which is only ordered where a party has behaved unreasonably in bringing a hopeless case and is therefore a significant sanction on the part of the court. Following judgment, the claimants announced an intention to appeal the judgment; however, the Court refused permission to appeal, so the claimants must now apply directly to the Court of Appeal for permission to appeal.

Whilst it is unlikely that we will see, as is routine in the United States, claims being brought as soon as it is known that a competition authority has undertaken a dawn raid (which in the US is largely driven by the plaintiff bar seeking to 'get in early' to maximise their chances of being

appointed as lead plaintiff counsel), an effect of *Arcadia* may be for claimants to issue proceedings at an earlier stage and to then amend or extend their claims later once additional information becomes available, either because an authority has then adopted a final decision or as a result of the disclosure process.

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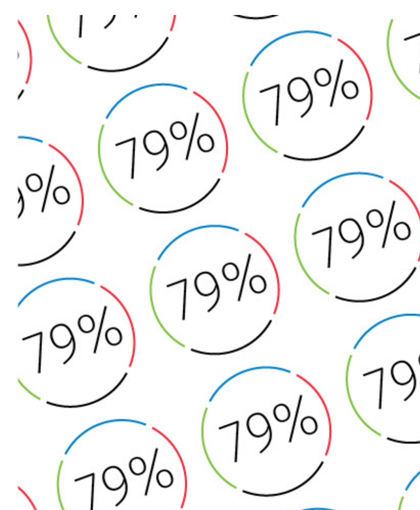

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