

PIGGYBACKING TIPS: LESSONS FROM THE SECTION 47A CASE-LAW

*Brian Kennelly and Tristan Jones*¹

INTRODUCTION

It is now 6 years since the Competition Act 1998 (CA 1998) was amended to enable victims of anti-competitive behaviour to 'piggyback' on infringement findings to recover their loss in the Competition Appeal Tribunal (CAT). Section 47A was intended to reduce the legal costs incurred in recovering this loss, and to enable such claims to be heard by the specialist competition tribunal.²

In the intervening years, and notwithstanding some judicial encouragement (see the comments of the former President of the CAT in *BCL Old Co Limited, DFL Old Co Limited and PFF Old Co Limited v Aventis SA, Rhodia Limited, F Hoffman-La Roche AG and Roche Products Limited (BCL (No 1))* regarding applications for security for costs against s 47A claimants)³ only 10 such cases have been brought. It is perhaps a reflection of parties' reluctance to fund test cases in this area that six of those have settled.⁴ The other four are ongoing.⁵ The closest that the

¹ Barristers, Blackstone Chambers.

² White Paper, *Productivity and Enterprise: A World Class Competition Regime*, Cm 5233 (DTI, 2001), at paras 8.6–8.8.

³ (Case No 1028/5/7/04), CMC transcript (8 December 2004), at p 40 and the judgment at [2005] CAT 2, [2005] CompAR 485.

⁴ *BCL*, *ibid*; *Deans Foods Limited v Roche Products Limited, F Hoffman-La Roche AG, Aventis SA* (Case No 1029/5/7/04); *Healthcare at Home Ltd v Genzyme Ltd* (Case No 1060/5/7/06) [2006] CAT 30, [2007] CompAR 500; *ME Burgess, JF Burgess and SJ Burgess (trading as JF Burgess & Sons) v W Austin & Sons (Stevenage) Limited and Harwood Park Crematorium Limited* (Case No 1088/5/7/07); *Freightliner Limited, Freightliner Heavy Haul Limited v English Welsh & Scottish Railway Limited* (Case No 1105/5/7/08); *NJ and DM Wilson v Lancing College Limited* (Case No 1108/5/7/08).

⁵ *Emerson Electric Co and Others v Morgan Crucible Company plc* (Case No 1077/5/7/07) [2007] CAT 28, [2008] CompAR 9; *BCL Old Co Ltd and Others v BASF SE and Others* (Case No 1098/5/7/08) [2008] CAT 24, [2008] CompAR 210, *Grampian Country Foods Groups Ltd* (Case No 1101/5/7/08); *Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited* (Case No 1106/5/7/08) [2009] CAT 7.

CAT has come to awarding s 47A damages is the interim payment order made in *Healthcare at Home Ltd v Genzyme Ltd*, which was swiftly followed by a settlement.⁶

However, notwithstanding the evident attractions of compromise, parties have not managed to avoid the courtroom entirely. Judgment has recently been given by the Court of Appeal in two s 47A cases. Both cases overturn decisions of the CAT, and are likely to have wide implications for future follow-on actions. This article identifies key themes from the case-law, and also highlights some of the outstanding issues which, in the authors' view, are likely to require further consideration.

SECTION 47A

Section 47A of the CA 1998 provides as follows:

'47A Monetary claims before Tribunal

- (1) This section applies to—
 - (a) any claim for damages, or
 - (b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

- (2) In this section "relevant prohibition" means any of the following—
 - (a) the Chapter I prohibition;
 - (b) the Chapter II prohibition;
 - (c) the prohibition in Article 81(1) of the Treaty;
 - (d) the prohibition in Article 82 of the Treaty;
 - (e) the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community;
 - (f) the prohibition in Article 66(7) of that Treaty.
- (3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

⁶ [2006] CAT 29, [2007] CompAR 474. See the Order of the CAT of 11 January 2007.

- (4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.
- (5) But no claim may be made in such proceedings—
- (a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and
 - (b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.
- (6) The decisions which may be relied on for the purposes of proceedings under this section are—
- (a) decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;
 - (b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;
 - (c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;
 - (d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or
 - (e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.
- (7) The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in subsection (6)(a), (b) or (c) may not be brought without permission are—
- (a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46 or section 47;
 - (b) in the case of a decision of the OFT which is the subject of an appeal mentioned in paragraph (a), the period following the decision of the Tribunal on the appeal during which a further appeal may be made under section 49 ...;
 - (c) in the case of a decision of the Tribunal mentioned in subsection (6)(c), the period during which a further appeal may be made under section 49 ...;
 - (d) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal;

and, where any appeal mentioned in paragraph (a), (b), (c) or (d) is made, the period specified in that paragraph includes the period before the appeal is determined.

- (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.
- (9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.
- (10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim.⁷

Section 47A must be read alongside r 31 of the Competition Appeal Tribunal Rules 2003,⁷ which states:

‘Time limit for making a claim for damages

Section 31:

- (1) A claim for damages must be made within a period of two years beginning with the relevant date.
- (2) The relevant date for the purposes of paragraph (1) is the later of the following —
 - (a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;
 - (b) the date on which the cause of action accrued.
- (3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant.
- (4) No claim for damages may be made if, were the claim to be made in proceedings

⁷ SI 2003/1372.

brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A.’

Section 47A does not create any new cause of action. Rather, it establishes a new route for pursuing a claim for damages or ‘any other claim for a sum of money’ which a person may otherwise make in civil proceedings. This drafting arguably leaves the door open to claims framed in terms of restitution or unjust enrichment.

Section 47A(6) sets out the particular decisions which may be relied on in order to bring proceedings under this section. By virtue of s 54 of the CA 1998, the reference to the Office of Fair Trading (OFT) includes the other sectoral regulators. Of the cases brought to date, two piggybacked on decisions of the Office of Rail Regulation (ORR),⁸ one on an OFT decision,⁹ two on decisions of the CAT (on appeal from the OFT),¹⁰ and five on European Commission (the Commission) decisions.¹¹

Under s 47A(7)–(8), unless the claimant obtains the permission of the CAT, it may not bring proceedings during the period when the relevant decision may be, or is being, appealed against. Once the period for bringing an appeal has ended (or, if applicable, once the appeal has been determined) a claim may be brought. Under r 31, the 2-year time limit will start to run from that moment.

At the heart of follow-on claims is s 47A(9), which states that, in determining a s 47A claim, the CAT is bound by the decision which establishes that the prohibition in question has been infringed.

THE COURT OF APPEAL DECISION IN *BCL* (NO 2)

The first recent Court of Appeal decision is *BCL Old Co Ltd and Others v BASF SE and Others* (*BCL* (No 2)),¹² which arose from the Commission’s vitamins cartel decision of 21 November 2001.¹³ The question was whether BASF’s appeal to the Court of First Instance (CFI), which was against remedy decision only, served to postpone the commencement of the 2-year limitation period for follow-on claims under s 47A and r 31.

⁸ *Freightliner Ltd*, see n 4, above; *Enron Coal Services Ltd* see n 5, above.

⁹ *NJ and DM Wilson*, see n 4, above.

¹⁰ *Healthcare at Home*, see n 4, above; *ME Burgess* see n 4, above.

¹¹ *BCL Old Co Ltd and Others v BASF SE and Others* see n 5, above; Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 – Vitamins) (2003) OJ L 6/1, and Commission Decision 2004/420/EC of 3 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.38.359 – *Electrical and mechanical carbon and graphite products*) (2004) OJ L 125/45.

¹² [2009] EWCA (Civ) 434 [2009] All ER (D) 212 (May).

¹³ *Vitamins* see n 11, above.

In considering this question, the CAT placed considerable emphasis on its findings in the earlier case of *Emerson Electric Co (Emerson I)*.¹⁴ *Emerson I* arose out of follow-on claims made in reliance on a Commission Decision of 3 December 2003.¹⁵ Certain addressees of that decision, but not Morgan Crucible, brought actions for annulment of the decision before the CFI. The question before the CAT was whether, while those appeals were pending, permission was required under s 47A(5) to bring a follow-on claim against Morgan Crucible, even though it was not one of the parties appealing against the infringement decision. The question was whether the appeal by the other addressees was an appeal against the relevant 'decision' within the meaning of s 47A(8). The CAT said:

'70. . . . The Emerson Claimants submit that since any annulment of the Decision would have no effect on the Decision in relation to Morgan Crucible, it follows that the reference to 'decision' in section 47A(8) of the 1998 Act is a reference not to the whole of the decision of the European Commission but instead refers only to that part of the decision which is the subject of the appeal to the EC.

71. In our judgment the word 'decision' in section 47A(8) of the 1998 Act cannot be given such a restrictive meaning. ...'

The CAT in *Emerson I* therefore decided that there had been an appeal against a 'decision' within s 47A(8), and that permission was therefore required to bring a claim against Morgan Crucible. The flip side of this is of course that the 2-year limitation period would not start to run until the appeal had been resolved, even though Morgan Crucible had not itself appealed against the Commission's decision.

In *BCL No 2*, the operative part of the Commission's decision had stated, at Art 1(1)(b), that BASF had committed an infringement by participating in agreements affecting the Community and EEA markets for various vitamins, beta-carotene and carotinoids. Article 3 of the operative part of the Decision imposed a fine on BASF. BASF appealed against the fine to the CFI. The CFI gave its judgment, reducing the fine, on 15 March 2006.¹⁶ Just under 2 years after the CFI's judgment, the claimants brought a follow-on claim in the CAT, relying on the Commission's 2001 decision: *BCL Old Co Ltd and Others v BASF SE and Others*.¹⁷ The defendants argued that the claim was time-barred. The question of whether or not the appeal, against remedy only, had postponed the commencement of the limitation period depended upon whether the reference to a 'decision' in s 47A(8) was meant to include decisions on liability only, or whether it also includes decisions on remedy.

¹⁴ See n 5, above.

¹⁵ *Electrical and mechanical carbon and graphite products* see n 11, above.

¹⁶ *BASF AG v Commission* (Case T-15/02) [2006] ECR II-497.

¹⁷ See n 5, above.

The CAT cited extensively from *Emerson I* as authority for the proposition that the reference to a 'decision' in s 47A(8) is not a reference simply to that part of the decision which was appealed (para 39). The CAT held that the intention of s 47A(5), (7) and (8) is to prevent claims for damages being brought in the CAT without permission before all appeals which may bear upon issues relevant to a monetary claim have been determined (para 34). This, in the CAT's view, meant that the limitation period would not start to run until appeals against penalty had been determined. Again, it gave a broad reading to the word 'decision'.

The Court of Appeal overturned the CAT's decision, and the case is authority for the principle that the start of the 2-year time limitation period is only delayed if an appeal is made against the liability decision. It is not delayed by an appeal against remedy alone.

Richards LJ, with whom Lloyd and Waller LJJs agreed, held that the relevant 'decision' for the purposes of s 47A was the infringement decision at Art 1(1)(b) of the Commission's decision of 21 November 2001.¹⁸ The fine imposed at Art 3 of the Commission's decision was not a 'decision' within the meaning of s 47A, and an appeal against it would consequently not delay the start of the 2-year limit for bringing a follow-on claim. Richards LJ stated, at para [21]:

'Central to [the analysis] is the distinction between a decision that a relevant prohibition has been infringed and a decision as to the imposition of a penalty. Section 47A is concerned with the former, not the latter. That is clear from the wording of the section itself and is supported by consideration of the wider statutory context.'

The Court of Appeal also pointed out that even where the time limit has expired, the CAT has a discretion under r 19(2)(i) to extend any time limit, so that a failure to apply within the 2-year limit is not necessarily fatal to the bringing of a claim.

THE COURT OF APPEAL DECISION IN EWSR

The second recent Court of Appeal case is *English, Welsh and Scottish Railway Ltd v Enron Coal Services Ltd (in liquidation) (EWSR)*.¹⁹ This case followed on from an infringement decision of the ORR dated 17 November 2006, made against the railway company. The issue, on a strike out application, was what infringement findings the ORR had in fact made. In particular, the parties disagreed as to whether or not there was a finding that the railway had overcharged Enron Coal Services Ltd for coal haulage.

¹⁸ See n 13, above.

¹⁹ [2009] EWCA Civ 647, [2009] All ER (D) 26 (Jul).

The CAT held that it was 'at the very least arguable' that the railway should have offered lower prices, and that the failure to do so 'arguably' constituted an element of the infringement found in the ORR decision. It held that this part of the claim was therefore not bound to fail and should not be struck out.²⁰

However, the CAT was also of the view that the infringement identified in the ORR decision occurred between May 2000 and November 2000, whereas Enron Coal Services Ltd was seeking damages for a period which stretched from the summer of 1999 to 31 March 2001. The CAT accepted in principle that damages may be awarded in respect of the period after November 2000. It held, however, that damages could not be awarded in relation to the period before May 2000 because:

'Considering section 47A as a whole, loss or damage alleged to have been occasioned prior to May 2000 cannot be said to 'result' from price discrimination which occurred in a carefully defined period between May and November 2000.' (para [45])

The CAT therefore struck out those parts of the claim which related to the period before May 2000.

The Court of Appeal read the ORR's decision very differently, and its judgment, overturning the decision of the CAT, can be explained on the grounds that the ORR decision did not in fact contain any finding that the railway had overcharged Enron Coal Services Ltd for coal haulage. However, the case is likely to be of broader importance for other follow-on claims, for two reasons.

First, the Court of Appeal was critical of the CAT's approach to the strike out application. Referring to the CAT's view that the decision 'arguably' included a finding that there was an overcharge, and that this issue should therefore go to trial, Patten LJ said at para [60]:

'But nothing can change between the [strike out] hearing and the trial as to how to interpret the ORR's decision. The task for the Tribunal remains the same: i.e. to identify the findings of infringement and award damages for any loss or damage which they have caused. On applications to strike out which turn on points of law or similarly limited issues that do not depend on evidence or require the resolution of any disputes of fact, the decision-making tribunal has nothing to gain from a trial. It will be faced with having to make the same decision on the same material. The Tribunal should not therefore have allowed the [...] claims to survive merely on the basis that they were arguable. It should have decided whether it was clear from the Decision that a finding of infringement had been made which covered the pleaded claims.'

²⁰ See n 5, above, at para [42].

Secondly, the Court of Appeal commented on the general structure of s 47A. Patten LJ said of follow-on claims, at para [31]:

‘For there to be such a claim (and, with it, the jurisdiction of the Tribunal to adjudicate upon it) the regulator must have made a decision of the kind described in s.47A(6). The use of the word “decision” makes it clear that s.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition. It is not open to a claimant such as ECSL to seek to recover damages through the medium of s.47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the Tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of s.47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue. We were not referred to any procedure for seeking clarification of any points of uncertainty from the decision-maker. The Tribunal ought therefore, in my judgment, to be astute to recognise and reject cases where there is no clearly identifiable finding of infringement and where they are in effect being asked to make their own judgment on that issue.’

LIMITATION PERIODS

The Court of Appeal’s two judgments have clarified the law on limitation periods in some respects. In other respects, however, the rules are arguably now somewhat less clear than before.

What is clear, in light of *BCL (No 2)*, is that the start of the 2-year limitation period will not be delayed by an appeal against remedy alone. The appeal must be against the infringement finding itself. One potential difficulty with this distinction is a practical one, since it is not always so straightforward to categorise an appeal as being against remedy or liability. For example, the Commission decision which led to the *Emerson* litigation,²¹ found an infringement and imposed a penalty. The appeals were framed as actions for annulment, and alternatively, for a reduction in the fine.²² In fact, however, the substantive arguments run on appeal were very heavily directed at remedy: see, for example, the description of the appeal at para [10] of *Emerson Electric Co and Others v Morgan Crucible Company plc and Others (Emerson III)*.²³ Parties may therefore need to consider carefully the terms of a particular appeal to determine whether or not it amounts to an appeal against the infringement decision.

²¹ See n 15, above.

²² See, eg, *SGL Carbon v Commission* (Case T-68/04) (2008) OJ C 301/30.

²³ (Case No 1077/5/7/07) [2008] CAT 8, [2008] CompAR 118.

The Court of Appeal in *BCL (No 2)* also made clear that the CAT may extend the limitation period, even if the application to extend is made after the limitation period has expired. Furthermore, there appears to be no reason to doubt the CAT's conclusion in *Emerson I* that the parties cannot extend the limitation period by agreement (paras [103]–[107]).

What is less certain is whether it is still good law that an appeal against an infringement by one company will delay the start of the limitation period for all companies which were found to have committed an infringement, even those which do not appeal against the finding. This was the view of the CAT in *Emerson I*. It will be recalled that, in reaching that conclusion, the CAT rejected the claimants' submission that the reference to a 'decision' in s 47A(8) is a reference not to the whole of the decision, but only to that part which is the subject of appeal.

The CAT's view is arguably now open to question in light of the narrow interpretation of the word 'decision' in both *BCL (No 2)* and in *EWSR*. It might be said that the start of limitation is delayed only where there has been an appeal against the particular infringement decision in respect of which follow-on proceedings are brought.

It may be prudent, in light of this uncertainty, for claimants to bring actions before the expiry of the 2-year limitation period on the assumption that the expiry of that period is not delayed by an appeal by a party other than the proposed defendant. It may also be sensible to simultaneously make an application for permission to bring those proceedings early in the event that the CAT determines that *Emerson I* remains good law.

THE PERIOD IN RESPECT OF WHICH DAMAGES MAY BE CLAIMED

Another issue which is now uncertain is the period of time in respect of which the CAT is able to award damages under s 47A.

The starting point is the *Healthcare at Home* case, in which the CAT held that it may award damages not just for the period covered by the infringement decision, but also for a period of time after that decision. The OFT had found that Genzyme had abused its dominant position in the 'upstream' market for the supply of drugs for the treatment of Gaucher disease by pricing its drug in a way which excluded other providers from the 'downstream' market for the supply of home delivery and homecare services. The OFT's decision was that this abuse lasted from May 2001 to 27 March 2003. Its decision on liability was upheld on appeal to the CAT in *Genzyme Ltd v The Office of Fair Trading*.²⁴

²⁴ (Case No 1016/1/1/03) [2004] CAT 4, [2004] CompAR 358.

The CAT gave its judgment on remedy on 29 September 2005 in *Genzyme Ltd v The Office of Fair Trading (Genzyme)*.²⁵ It found that, ‘the effects of a serious infringement of the Chapter II prohibition in fact continued for over 4 years, since March 2001’ (para [224]). The CAT concluded that it had jurisdiction to make a direction with a view to terminating Genzyme’s infringement (para [238]), and it directed that Genzyme must offer the drug to healthcare providers at a discount of at least 20% off the prevailing NHS List Price.²⁶

In the s 47A follow-on claim, *Healthcare at Home Ltd v Genzyme Ltd*,²⁷ the claimant sought damages for a period from May 2001 and stretching beyond the end of March 2003. The CAT found that Healthcare at Home was not restricted to claiming damages for the period up to the end of March 2003, and that it could also claim for damage suffered after that date. There are two principal limbs to the CAT’s reasoning.

The first limb is its reading of s 47A. Section 47A(1) states that s 47A applies to a person who has suffered damage as a result of an infringement. Since an infringement persists for the whole period while the conduct is not modified, it follows that a person may suffer damage both up to and after the OFT’s decision. The CAT held, therefore, that ‘section 47A does not restrict the claim that can be made in proceedings before the Tribunal to the period during which the OFT or the Tribunal have held that the prohibition has been infringed’ (*Healthcare at Home*, at para [59]).

On one view, this analysis is still supported by a literal reading of s 47A. In order to seek follow-on damages, a claimant simply needs a decision ‘that the relevant prohibition in question has been infringed’. It is arguable that it matters not whether the infringement is ongoing.

However, it may be said that this sits somewhat uncomfortably with the narrow reading of the word ‘decision’ in *BCL (No 2)*. The focus in that case is very heavily on the infringement which has actually been identified in the decision. Furthermore, the CAT may encounter serious factual difficulties in concluding that a defendant’s conduct has not changed since the infringement decision, or that the same conduct necessarily amounts an infringement after the period considered in the decision. Facts and circumstances may change, and a s 47A defendant may argue that, in looking outside the period of the infringement in the decision, the CAT is effectively making its own judgment on infringement – which the Court of Appeal explicitly warned against in *EWSR*.

This brings us to the second limb of the CAT’s reasoning in *Healthcare at Home*, namely its reliance on the fact that the CAT had anyway found, in its remedy decision in *Genzyme*, that the infringement was ongoing. That finding had led to the imposition of a direction to bring

²⁵ *Genzyme Ltd v Office of Fair Trading supported by Healthcare at Home Ltd* (Case No 1016/1/1/03) [2005] CAT 32, [2006] CompAR 195.

²⁶ See the Order of the CAT of 29 September 2005.

²⁷ [2006] CAT 29, [2007] CompAR 474.

the infringement to an end (*Healthcare at Home* para [60]). It might be said that this second approach, relying on the findings in a remedy decision, is incompatible with the analysis in *BCL (No 2)*, since the Court of Appeal in that case stressed that s 47A is concerned only with decisions on liability, not decisions on remedy.

On the other hand, there is something distinctly unattractive about a system in which the CAT might make a decision that an infringement was ongoing (albeit in the context of a decision on penalty), but then be forced to shut its eyes to that finding in any follow-on claim. One solution may be to interpret the reference to a 'decision' in s 47A(6)(c) to mean any decision that there has been an infringement, whether that decision is reached in the context of an appeal on liability or an appeal on penalty. This is not necessarily incompatible with the view that s 47A(7) and (8) are concerned only with appeals against liability findings.

The other case in which the CAT has allowed claimants to pursue a claim for damages after the period covered by the infringement finding is the *EWSR* case. The issue was not considered by the Court of Appeal in that case, which decided it on different grounds (see above). The period of infringement in the ORR decision in *EWSR* was May to November 2000.

The CAT in *EWSR* appears to refer to two possible grounds on which damages could be awarded for the period outside the infringement decision. First, it suggests that damages may be awarded for the period post-dating the decision on the basis that there was an overcharge 'for all periods from 1 May 2000 onwards' (para [44]). This appears to endorse the broad approach adopted in *Healthcare at Home*, suggesting that the CAT is entitled to start with an infringement decision and then conclude on the facts that the infringement continued beyond the period contained in the decision.

However, the CAT then went on to strike out those parts of the claim which related to loss or damage occasioned prior to May 2000 on the grounds that they could not 'result from' the infringement, which had occurred in the period May to November 2000 (para [45]). This is arguably a second test, different to that which the CAT applied in relation to the period after November 2000. If the proper approach is the first one identified above, so that the CAT is able to conclude on the facts that a particular infringement post-dated the period considered in an infringement decision, then it is difficult to see why, in principle, it could not also decide on the facts that the infringement pre-dated that period, and award damages accordingly. On the other hand, if the question is simply whether the damage results from the infringement during the period covered by the decision, then the CAT should not make findings that the infringement continued after that period. In short, it is arguable the CAT has given no persuasive reason why, as a matter of principle, it should treat the period before the infringement decision any differently to the period after that decision.

FINDINGS WHICH BIND THE CAT

Under s 47A(9), the CAT is bound by the decision which establishes that the prohibition in question has been infringed. This raises the question of which precise findings in the decision

bind the CAT. This question was raised in *BCL (No 1)* in the CAT but that case was settled before trial. This is the final area in which there is now uncertainty.

It is clear from *BCL (No 2)* that the CAT is not bound by any findings in the remedy decision. However, what is not clear is how far the CAT is bound by findings of fact in an infringement decision, as opposed to being bound only by the simple finding that there has been an infringement. This distinction was referred to, but not resolved, by the Court of Appeal in *BCL (No 2)*, at para [28].

On the one hand, the purpose of s 47A is arguably to obviate the need for a trial of issues which the regulator has already ruled on (see *EWSR* para [31]). This may suggest that the CAT should be bound by the factual findings contained in the regulator's decision.

However, such an approach leads to practical difficulties. First, what should an undertaking do if it accepts that it has committed an infringement but disputes the precise facts or extent of the infringement contained in the regulator's decision? As there is no mechanism to appeal against particular factual findings, the only way to avoid being bound by those findings in follow-on claims would be for the undertaking to appeal against liability.

Secondly, if the undertaking were to appeal against remedy alone, there would be a real risk of inconsistencies arising, since the same factual findings may be relevant to both liability and remedy. The CAT may therefore reach different factual findings on the remedy appeal, but then find itself bound by the factual findings contained in the original decision for the purposes of the follow-on claim. This was a particular concern of the CAT in *BCL (No 2)* (para [34]).

There are therefore strong reasons for preferring the view that the CAT is bound only by the infringement finding itself. This approach also gains some support from the comments of Patten LJ at para [31] of *EWSR* that, 's.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition'.

However, this would plainly narrow the scope of s 47A considerably and have serious implications for the development of private enforcement of competition law in the UK. It is also unclear precisely by what the CAT would actually be bound. What would it mean for the CAT to be bound by the finding of infringement, but not by any particular factual finding? To take an extreme example: if an undertaking accepted that it had committed an infringement in respect of Product A, but not Product B, should it be able to argue as a matter of 'fact' in follow-on proceedings that it had not committed any infringement in respect of Product B? If so, the purpose of s 47A would arguably be undermined.

Pending clarification of these matters, it may be advisable for parties to adopt a cautious approach. In particular, undertakings which are found to have committed an infringement may be well-advised to appeal against the liability finding if it contains factual allegations which they intend to contest in any follow-on claims.

COMPETITION LAW JOURNAL**Consultant Editor**

Sir Christopher Bellamy QC
Senior Consultant, Linklaters

Editors

Ben Rayment
Barrister
Monckton Chambers
1 Raymond Buildings
Gray's Inn
London WC1R 5BP
brayment@monckton.com

Christopher Brown
Barrister
Matrix Chambers
Griffin Building
Gray's Inn
London WC1R 5LN
christopherbrown@matrixlaw.co.uk

David Bailey
Solicitor, New York Attorney,
Referendaire
Competition Appeal Tribunal
Victoria House, Bloomsbury Place
London WC1A 2EB
david.bailey@kcl.ac.uk

Advisory Board

Daniel Beard, Monckton Chambers
Margaret Bloom, King's College London
Kevin Coates, EC Commission
Charles Dhanowa OBE, Registrar, Competition
Appeal Tribunal
Peter Freeman, Chairman of the
Competition Commission
Josh Holmes, Monckton Chambers

Katharine Holmes, Reed Smith
Sir Jeremy Lever QC, Monckton Chambers
Ian Rose, Salans
Gunnar Niels, OXERA
Tom Usher, SJ Berwin
Professor Richard Whish, King's College
London
Peter Willis, Dundas & Wilson

SUBSCRIPTION RATES

2009 UK annual subscription £220, 2009 overseas annual subscription £240

PUBLISHERS

Jordan Publishing Limited
21 St Thomas Street
Bristol BS1 6JS
DX 78161 Bristol
Tel +44 (0)117 923 0600
Fax +44 (0)117 925 0486
Email complawjournal@jordanpublishing.co.uk
Website www.jordanpublishing.co.uk

© 2009 Jordan Publishing Limited ISSN: 1476-9085 Citation: [2009] Comp Law
All rights reserved. Reproduction, transmission or reduction by any process in whole or in part of this publication is expressly prohibited without prior consent. Any opinions expressed are those of the individual authors, and not necessarily those of the Editors, Advisory Board Members or Publisher.

Printed in the UK by Antony Rowe Limited, Chippenham, Wiltshire.