



Neutral Citation Number: [2024] EWHC 2609 (Comm)

Case No: CL-2019-000603

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/10/2024

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

**FLAVIO DE CARVALHO PINTO VIEGAS AND
OTHERS**

Claimants

- and -

**(1) ROSANA FALCIONI CUTRALE AS THE
REPRESENTATIVE OF MR JOSÉ LUIS
CUTRALE (deceased)**

(2) MR JOSÉ LUIS CUTRALE (Jnr)

Defendants

**David Went, Juliet Wells and Jonathan Worboys (instructed by Pogust Goodhead LLP) for the
Claimant;**

**Brian Kennelly KC, Paul Luckhurst, Sean Butler And Tom Watret (instructed by
Linklaters LLP) for the Defendants**

Hearing date: 2 October 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties
or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the hearing of an application by the defendants for an order that the limitation issues that arise be determined by separate trial ahead of the trial of all other issues. The claimants oppose that application and argue that I should direct the trial of both the limitation issues and all common liability issues in a single trial with all causation and loss related issues being determined at a subsequent trial.
2. I have decided that I should accede to the defendants' application and direct the trial of the relevant limitation issues ahead of the trial of all other issues for the reasons set out below. The parties are agreed as to the issues that must be determined on the assumption that I was persuaded to make this order. There was a dispute as to one of the issues identified by the claimants but that was abandoned by the claimants (correctly) in the course of the hearing.
3. The claimants have an application to amend what I refer to hereafter as the master Particulars of Claim but it was agreed at the start of the hearing that in the event I directed trial of the preliminary issue sought by the defendants, the hearing of that application would be adjourned to be determined either at the same time or immediately following final judgment in the preliminary issue. In essence, the parties agreed to this course because, on the defendants' case, the proposed amendments are not realistically arguable because they assert claims that are statute barred according to the laws of Brazil applying the principles that will be decided following trial of the limitation preliminary issue. By the same token, if the claimants are correct in the case they advance on limitation then no part of the claim (whether as currently pleaded or as proposed to be pleaded) will be statute barred. It was agreed by the defendants that they would not seek to rely on any delay between the date of this hearing and delivery of judgment on the preliminary issue as a basis for resisting the application to amend.

Background

4. This claim is a delictual claim for damages alleged to have been caused to over 1500 claimants by breaches by the defendants of the requirements of Brazilian competition law. The claimants farm or farmed oranges (or are the successors to those who farmed oranges) in Brazil. The claimants allege that the defendants, together with others, participated in a cartel by which the defendants and other cartel members were allegedly able to drive down the purchase price of oranges and/or increase the production and logistics costs that had to be borne by orange farmers. As currently pleaded the cartel is alleged to have operated between 1999 and 2006.
5. There are two separate claims which were issued respectively in late September and late November 2019, that is between 13 and 20 years after the conduct complained of is alleged to have occurred. The parties have so far exchanged master pleadings which focus on the generic issues that arise. Individual Particulars of Claim have not so far been served. That of itself will be a substantial undertaking given the numbers of claimants and the likely different causation and loss issues that will arise. Determination of when that task should be undertaken has been put off in the interests of saving costs until the preliminary issue application now before me has been determined. The claimants' current pleaded case is set out in the master Particulars of Claim served on 16 September 2022. The defendants served a master Defence on 8 December 2022 and the claimants served a master Reply on 17 February 2023.
6. The parties are agreed that (i) the claim is governed by Brazilian law; (ii) limitation is governed by Art. 206 of Brazil's Civil Code and (iii) a three-year limitation period applies to the claimants' claims. The limitation dispute concerns when time started to run for the purposes of the agreed limitation period. Both parties have filed and served expert Brazilian law evidence addressing that question.
7. The defendants contend that the currently pleaded claims (and the claims for which permission to amend is sought) are all statute barred as a matter of Brazilian law. The claimants maintain that on a proper understanding of Brazilian law that is not so. On the claimants' case the nature of the test that has to be applied involves a fact intensive enquiry and so impacts on the question whether the limitation issues can or should be tried in the manner contended for by the defendants.
8. As is common ground, there are a large number of common liability issues that will have to be resolved assuming this claim is to continue. These include those identified by Mr Evans in paragraph 18 of his 24th witness statement as being:
 - a. Whether the cartel existed, what the nature of the collusion between the participants was, and how this was carried into effect;
 - b. The duration of the cartel (including whether it extended beyond the Admitted Cartel Period);
 - c. Whether the Defendants, Sucocítrico Cutrale Ltda (the company of which the Defendants were officers and shareholders), and others participated in the cartel and if so for how long;

d. The scope, nature and effect of (i) the Cease and Desist Agreements entered into by the Defendants, and (ii) the CADE Final Decision, relative to the conduct investigated by CADE (for example, whether they conclusively established or otherwise evidence actionable conduct by the Defendants at least during the Admitted Cartel Period);

e. The outcome and relevance of other official investigations into the Defendants' conduct, including (i) criminal proceedings brought against the First Defendant by the Prosecutor's Office of the State of São Paulo, and (ii) an inquiry by the São Paulo Parliamentary Committee of Investigation into the Citriculture Cartel;

f. Whether the Claimants can rely, for the purposes of the present proceedings, on various provisions of Brazilian law which establish the legal effect of confessions, or which are relevant to the liability of officers and shareholders of limited liability companies for harms perpetrated by those companies."

It is common ground that "... *limitation is one of the issues that arises as between the parties and a key point in dispute.*" – see paragraph 18 of Mr Evans' 24th witness statement. The defendants estimate (and I don't understand the claimants to disagree) that if the issues identified by Mr Evans in paragraph 18 of his statement are to be resolved together with the issue of limitation in one trial (as the claimants contend should happen), that trial will last a minimum of 12 weeks. Such a trial will involve a massive disclosure exercise, with most documents being in Portuguese and thus requiring translation, evidence from a significant number of witnesses of fact, many and perhaps most of whom live and work outside England and Wales and for many of whom Portuguese will be their only language, thus requiring extensive interpretation expert support both in preparing the statements of such witnesses and at trial. In addition substantial expert economic evidence will probably be required. Such a trial will be a massive undertaking as both parties accept, that will expose the parties to costs of many millions of pounds as well as consuming a significant amount of public resource.

9. Notwithstanding these considerations, Mr Evans contends that the only appropriate course is to direct limitation and the common liability issues to be resolved together because (he submits) limitation "... *is not the sole or even decisive issue that arises in the claims.*" Whilst plainly limitation is not the sole issue between the parties, I do not accept that it will not be decisive. It will be decisive as to the outcome of the claims if the defendants are correct and if the claimants succeed it will resolve finally what is a substantial issue in the claims namely whether the claims are statute barred. Thus if that issue could be tried fairly as a preliminary issue ahead of a trial of all the other generic liability issues, very substantial savings of time and costs will result. Put another way, if such an issue could be tried as a preliminary issue but was not, both parties would expend substantial sums on issues which in the result would be academic if the defendants' limitation defence is upheld. Even if the claimants succeed, the costs of the exercise will not have been wasted – for the limitation issue will have been decided finally between the parties.

10. The claimants maintain however that the liability issues have to be determined at the same time as limitation because those issues are relevant to deciding whether and if so when time started running for limitation purposes. In reality that is the dispute between the parties that matters on this application. There are other discretionary points relied on as well as supporting the conclusion that the order sought by the defendants is inappropriate but the evidential issue is likely to be critical to the outcome of the application because of the implications for the parties and the public in terms of time, costs and resources that a single trial on the liability and limitation issues entails.

Applicable Principles

11. The court is empowered to direct the trial of any issue by CPR r.3.1(2)(j). Whilst such applications must be approached with caution because

“...that which appeared to be capable of discrete determination is often found later to be inextricably linked to issues whether of fact or law or both which cannot safely and satisfactorily be summarily determined...”; and “... where the issues are of both novelty and importance, the prospect of appeals is real; and a bifurcated process may result...”

so that in consequence a direction for trial of a preliminary issue may become a source of delay and expense – see *Wentworth Sons v Lomas* [2017] EWHC 3158 (Ch); [2018] 2 BCLC 696 *per* Hildyard J at [29] – [31], as Hildyard J stated at [34]:

“... the caution required should not be such as to oust the use and utility of preliminary issues where, on the best judgment that can be made at the time, their direction appears appropriate. Especially, as it seems to me, where there are limitation or other time bars potentially in issue, the purposes of the time bar may only really be fulfilled by early determination of its application; and/or where there are points of law which it does appear could, if determined, determine the case, with considerable saving of time and cost, the machinery available is salutary.”

This tension has led to the formulation of 10 non-exclusive tests generally applied when deciding whether to direct trial of preliminary issues, which were summarised by Hildyard J in *Steele* at [32] as being:

“(1) Would the determination of the preliminary issue dispose of the case or at least one aspect of it?

(2) Would the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself?

(3) Where, as here, the preliminary issue was one of law the court should ask itself how much effort would be involved in identifying the relevant facts.

- (4) If the preliminary issue was one of law to what extent was it to be determined on agreed facts?
- (5) Where the facts were not agreed the court should ask itself to what extent that impinged on the value of a preliminary issue.
- (6) Would determination of the preliminary issue unreasonably fetter the parties or the court in achieving a just result?
- (7) Was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial?
- (8) The court should ask itself to what extent the determination of the preliminary issue may turn out to be irrelevant.
- (9) Was there a risk that the determination of the preliminary issue could lead to an application for the pleadings to be amended so as to avoid the consequences of the determination?
- (10) Taking into account the previous points, was it just to order a preliminary issue?"

In most cases only some of these tests will be applicable and in some cases there will be special considerations not within the scope of these tests that will be material or even decisive.

The Nature of the Limitation Issue

12. Before turning to the parties' respective limitation cases, it is necessary for me to set out in outline how the Brazilian competition authorities addressed the alleged cartel. It is necessary that I do this because whilst both parties are agreed that documentation and/or publicised steps taken by the Brazilian competition authorities are capable of triggering the running of time in relation to the claimants' claims, they disagree as to which events have that effect. I should add that whilst both parties accept that actual knowledge by a claimant of what a claimant is required to know before time starts to run as a matter of Brazilian law is one way by which the running of time is triggered, both parties are also agreed that inferred, assumed or deemed knowledge (or what in English law would be referred to as constructive knowledge) is also sufficient.
13. The parties are agreed that steps taken by the competition authorities that are published or publicised may support an allegation of inferred or assumed knowledge. They disagree as to which steps have that effect. It is that issue that the Brazilian expert evidence focusses on. Before turning to that, I should make clear that nothing I say in this judgment is, or is intended to be, or should be read as being, even a provisional indication of which of the rival contentions is to be preferred. That is the issue for trial. The purpose of considering the material at all at this stage is to test whether the claimants are correct when they submit that limitation cannot be resolved without also resolving all or most of the common liability issues in the claim.
14. The alleged cartel was investigated by the Brazilian competition authorities (referred to in these proceedings as SDE and CADE) between 1999 and 2018. In early 2006, CADE

conducted dawn raids (known as “Operation Fanta”) and expanded its investigation to include a large number of individuals including the Defendants. In late 2016-summer 2017, the alleged cartel members entered into agreements with CADE known as “TCCs” by which those concerned reached a compromise with the competition authorities concerning the unlawful activity alleged to have occurred between 1999 and 2006. In March 2018, CADE published a final decision “*homologating*” the TCCs and concluding its role in relation to the alleged cartel (the “**Final Decision**”). The claimants’ case is that time did not start to run until then.

15. The defendants’ case concerning limitation is relatively straightforward. Their pleaded case is that time began to run either (a) on the date of execution of the relevant orange purchase contracts alleged to be affected by the alleged cartel, being the date the alleged violation occurred; or (b) in January-February 2006 when Operation Fanta was widely publicised and when SDE published administrative proceedings, by which the claimants are to be treated as having acquired sufficient knowledge of the alleged breach of Brazilian competition law to start time running with the result that any cause of action in relation to the alleged conduct was time-barred by no later than February 2009. This analysis is supported by an expert report from Professor Beneti. In relation to (b) above, his evidence is that knowledge is presumed from the date of constructive unequivocal knowledge of a potential violation, damage of the claimants’ rights, and the identity of the alleged infringer. In support of his evidence that on the facts this time has long since passed he relies on a number of decisions of the Brazilian Superior Court of Justice (“**STJ**”) in relation to this particular alleged cartel. It is not necessary that I refer to them all. He maintains however that the effect of those cases is that they establish that the relevant unequivocal knowledge existed, at the latest from the date of publication of the initiation of the administrative process in the Official Gazette on 24 February 2006. Of the various cases he relies on, the most clearly pertinent is the decision of the STJ in *Ramos*, where it was held that a claim issued on 5 March 2021 was barred because once Operation Fanta and CADE’s administrative proceedings were widely publicised, that was enough to give the claimant “*unequivocal knowledge*” and for time to start running.
16. The claimants’ case does not involve any subjective enquiry as to the actual knowledge of individual claimants or the detailed facts of the alleged infringement to address limitation. Rather it depends on their suggestion (supported by the report of the expert of Brazilian law relied on by them) that time ran from CADE’s Final Decision on 6 March 2018. It also depends upon whether the TCCs record or constitute a confession by the defendants to participating in the alleged cartel and if they do, whether the CADE Final Decision recorded or established cartel conduct during the alleged cartel period, whether by approving the TCCs or otherwise. The claimants’ case is that if this is a correct analysis of the effect of the CADE Final Decision then its publication would commence time running to the exclusion of other prior trigger events.
17. The defendants submit that consideration of the claimants’ case will inevitably involve an objective assessment of the effect of the documents on which the claimants rely when considered by reference to the relevant provisions of Brazilian law since resolution of the limitation issue depends upon knowledge deemed to have been acquired by the claimants as a result of published or publicised decisions. The claimants maintain that this is wrong; that it is only possible to understand the effect of a TCC by evaluating the nature of the conduct the subject of the underlying CADE investigation.

That, they maintain can only be achieved by a factual enquiry that depends upon what may emerge from documents contained in the CADE files, which by definition are not and never have been available to the public and which is regarded as strictly confidential by CADE. If correct this must mean that the cases relied on by the defendants were wrongly decided. It is difficult to see how such material could be obtained other than by consent from an organ of a foreign sovereign state or how an order from an English court requiring such disclosure could be enforced. I asked about that point in the course of the hearing but counsel was unable to assist beyond telling me that in the past the CAT had made orders directed to CADE requiring disclosure. That does not assist me to resolve the issue I am now concerned with.

18. In my judgment the notion that any of this leads to the conclusion that there should be an initial trial of the limitation and all general liability issues together should be rejected. The question that arises is not concerned with each claimant's actual knowledge but with whether and if so when each claimant it to be treated as a matter of Brazilian limitation law as having become unequivocally aware that of a potential competition law violation, of damage of the claimant's rights as a result, and the identity of the alleged infringer. As the claimants' own expert says at paragraph 19 of his report, whether a claimant should have had knowledge of the right to bring a claim is to be determined "... based on objective good faith and the average individual standard [i.e. average levels of skill, diligence and awareness of a median man]..."
19. The claimants' case that time started to run no earlier than when they could have obtained knowledge of the CADE Final Decision, does not require the determination of anything other than the meaning and effect of the CADE decision and, possibly, the TCCs and when it or they entered the public domain. It cannot sensibly require the resolution of all the general liability issues that arise because the key questions that matter concern the constructive knowledge that is to be imputed to the claimants and that depends on what entered the public domain and when. None of the Brazilian court decisions on which even the claimants rely have involved the sorts of investigation that the claimants submit are required which itself is a substantial indicator that this approach is wrong. Such an approach would deprive a limitation defence based on constructive knowledge of much of its practical utility in saving time and (in this case enormous) cost and ignores the point that it is difficult for constructive knowledge to depend on an enquiry as to the effect of materials that by definition could not be available to those alleged to have the supposed constructive knowledge.

Application of the Steele Criteria to these Claims

20. Against that background, I turn to the criteria identified earlier as relevant to determining whether trial of a preliminary issue ought to be ordered. As I have explained ordering trial of the limitation issues that arise as a preliminary issue will dispose of this claim if the defendants are successful and will or will probably resolve finally the limitation issues between the parties if the claimants are successful.
21. If the defendants were to succeed, that would greatly reduce the cost and time that will have to be devoted to these claims because, if the defendants succeed, that will be the end of the claim and if the claimants succeed it will remove a major issue between the parties at no significant incrementally increased cost.

22. Taking this claim to trial on both the general liability and limitation issues will expose both the claimants and defendants to costs that are likely to be measured in millions and perhaps tens of millions of pounds, it will require a trial of (at least) twelve weeks duration which has serious implications not merely for the parties to this litigation but to other court users. If the claimants succeed that will shorten any subsequent trial. In relation to the factual material relevant to the limitation issue, as things currently stand it will require access to the publicly available material upon which each side relies, some expert evidence and perhaps some very limited disclosure. The material that will be required will be vanishingly small when compared to the exercise that will have to be carried out for a trial of the general liability issues. The trial of the limitation issue will take between 3 and 4 days at most. If permission to appeal was obtained any appeal would probably be disposed of in a day or less. If there was a trial of both the liability and limitation issues in a single trial, not merely might much of the cost of that process be entirely wasted if the limitation defence succeeded, but any appeal following such a trial might have that effect as well.
23. The principal additional consideration to be borne in mind concerns the impact of delay. I do not minimise the impact that delay may have in a case such as this. The claimants rely on the fact that many years have passed since the events with which the claim is concerned and many of the claimants are elderly and some sadly have died already. It is likely that some delay will result from a trial of the limitation issues although in my view it will be less than a year, ignoring the impact of any appeal. At the hearing of this application, it was said that the aim was for there to be a preliminary issues trial in June 2025. I consider that entirely feasible given the scope of the enquiry and the material that will be relevant to determination of the issues that arise. If the trial was to take place then, I consider it likely that there could be a judgment by the end of July 2025. Delay cannot be viewed in isolation from the other issues that arise – that is the probability that the trial will either determine these claims or at least a major issue in them and that if the defendants succeed there will be enormous saving in costs and time that would otherwise be entirely wasted. I take account of the fact that at least some of the delay that has occurred is the result of challenges to jurisdiction and other procedural issues. However, that is to be expected in group litigation of this size and complexity. Overall there is a balancing exercise to be carried out concerning these factors and in my judgment the effect of that exercise in the circumstances of this case I have considered so far points towards directing trial of the limitation issues between the parties as a preliminary issue.
24. It is necessary to ask whether determination of the application may lead to an application to amend. So far as that is concerned there is already an application for permission to amend. However, if the defendants' case on limitation is correct then that application will fail. If there was no trial of the preliminary issue proposed by the defendants, the application for permission to amend would be made anyway. Determining the preliminary issue proposed by the defendants will not become irrelevant for the reasons I have explained already – limitation is a live issue of importance between the parties that will have to be determined in any event. It is difficult to see how determining the preliminary issue will result in an unfair outcome – on the defendants' case the claim is statute barred and ought not to proceed further and it would be unjust to a high degree to them if it did; if the claimants are successful no injustice will result because the claim will continue with the limitation issue resolved.

25. In my judgement therefore, for these reasons, I consider that there should be a trial of the issues of limitation as a preliminary issue ahead of any other issues that arise. As agreed between the parties, the hand down of this judgment will be listed with a time estimate of one hour. I encourage the parties to attempt to agree the necessary directions that should follow.