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I. INTRODUCTION

This paper examines the application of the deliberate concealment doctrine (as contained in the UK Limitation Act 1980) to damages claims based on alleged cartel activity (“cartel claims”) brought in the English High Court. The nature and scope of the cartel claims that have been brought to date indicate that the issue of whether, and to what extent, a claimant’s action is brought “in time” raises novel, interesting, and complex legal questions. It therefore seems likely that this important battleground is destined to be the subject of a great deal of further litigation in the near future.

It is perhaps instinctive to assume that because a claimant is usually unaware that he has a claim prior to the announcement of an infringement decision, time ought to run from the date of the infringement decision.² However, as explained below, the position under English law is that, unless certain elements are evident (e.g., fraud, mistake, or deliberate concealment), time starts to run from the date that the cause of action accrues. Cartel claims normally concern the level of any overcharge arising from the alleged cartel and, as such, time will normally begin to run from the date of the sale of the good or service.³ As some such sales may have taken place long before the expiry of the relevant limitation period, one of the key questions in cartel claims is often whether that limitation period has been postponed due to deliberate concealment by the defendant of a fact relevant to the claimant’s action.

Section I of this paper examines the law and policy underlying the deliberate concealment doctrine, and Sections II and III highlight some of the key questions surrounding the respective elements of “deliberate” and “concealment” in the context of cartel claims.

II. LAW AND POLICY OF DELIBERATE CONCEALMENT

The underlying purpose of the UK Limitation Act 1980 (the “Act”) is to spare a defendant the injustice of having to face a stale claim. Defendants typically find it more challenging to evidence and rebut claims that are brought long after the cause of action has accrued and, as a result, such cases are usually more difficult to try. In addition, the principle of legal certainty dictates that a defendant should not be left wondering indefinitely whether—and, if so, when—a claim might be brought. It is therefore in the public interest for a person with a good cause of action to pursue it within a reasonable period.⁴

In England, a claimant must bring his action within the relevant limitation period identified in the Act. Section 2 of the Act states that an action founded in tort (e.g., a cartel

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² *cf.* the European Commission’s White Paper on damages actions for breach of the European Commission antitrust rules.

³ *See* Cases C295 – 298/04 Vincenzo Manfredi v Lloyd Adriatico [2006] ECR I-6619.

⁴ *See* *Cave v Robinson* [2002] UKHL 18 and *Sheldon v R.H.M. Outhwaite* [1996] 1 AC 102).

claim, which under English law is a tortious claim for breach of statutory duty) shall not be brought after the expiration of six years from the date on which the cause of action accrued.⁵ However, it is plain from the wording of the Act that the intention is to suspend or postpone this limitation period until such time as the claimant knows or ought to have known that he has a claim. For example, time will not begin to run for the purposes of the Act if a fact relevant to the claimant's action has been deliberately concealed from him by the defendant.⁶ Time will only begin to run when the claimant has discovered the concealment or could, with reasonable diligence, have discovered it.⁷

The concept of deliberate concealment comprises two distinct elements: (1) there must be "deliberate" conduct; and (2) there must be concealment. Certain aspects of each of these elements are dealt with in turn.

III. DELIBERATE

The leading English case on the application of deliberate concealment in the context of the Act is the House of Lords' judgment in *Cave v Robinson*⁸ ("*Cave*"). In *Cave*, the House of Lords held that deliberate concealment required intentional or active wrongdoing. This was to be distinguished from situations where the defendant's concealment was negligent or inadvertent, which would not suffice to suspend or postpone the limitation period. As the House of Lords put it, "a man cannot sensibly be said to conceal or fail to disclose something of which he is ignorant ... it is only where the defendant is aware of his own deliberate wrongdoing that it is appropriate to penalize him for failing to disclose it." The House of Lords therefore held that a defendant should be deprived of the limitation defense in two instances: (1) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (2) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time.

Where a claim concerns "hardcore" cartel activity (e.g., secret and intentional price-fixing or market sharing), it will often be clear that the defendant's actions involve deliberately concealing the conduct from the claimant. This is because the participants of a hardcore cartel will often take active steps to conceal their conduct (hardcore cartels are by their nature secret) and/or participants are typically aware of their deliberate or intentional wrongdoing. Accordingly, there is, in the normal course, considerable scope for applying the deliberate concealment doctrine to many cartel cases, so as to delay the commencement of the limitation period.

It is, however, much less clear whether the deliberate concealment doctrine applies to the situation where the defendant's conduct is not "hardcore" (e.g., where it was the result of negligence and/or ignorance). Take, for example, the situation where an employee of Company A attends a trade association meeting alongside employees from competitors. The infringement decision holds that some of the discussions at the trade association meetings amounted to an unlawful concerted practice; however, the precise effect on trade is, at best, unclear. Company

⁵ By contrast, a "follow-on" claim brought in the UK Competition Appeal Tribunal has a limitation period of 2 years from the date the decision is final and non-appealable.

⁶ See section 32 of the Act.

⁷ Similarly, if concealment occurs after accrual of the cause of action, the limitation period is restarted after discovery of the concealment (see *Sheldon v R.H.M. Outhwaite* [1996] 1 AC 102).

⁸ *Cave v Robinson* [2002] UKHL 18.

A's employee and his superiors, through ignorance and/or negligence, were not aware that their attendance at such meetings amounted to unlawful behavior and, accordingly, took no steps to conceal (or disclose out of the ordinary course) their attendance.

In this circumstance, it is more difficult to satisfy the test set out in *Cave* (i.e., it is not clear that Company A or its employees took active steps to conceal their breach of duty after they became aware of it (or prior to that date) and their actions may not sensibly be described as deliberate or intentional wrongdoing). Accordingly, although an English court may be intrinsically hesitant to allow defendants a limitation defense in this circumstance, on a strict reading of *Cave*, it could be, absent further clarification, differentiation, or nuance, that the English High Court (in the first instance) has little alternative. In practice, the facts of a case may muddy the distinction between “deliberate concealment” and “negligent or ignorant concealment” and, given that potentially significant damages may ride on the outcome, complex inquiry may be required to reach a definitive view. However, contrary to the established maxim *ignorantia juris non excusat*, ignorance of the law may, it seems, sometimes be an excuse.

IV. CONCEALMENT

Section 32(1)(b) of the Act states that the period of limitation shall not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it. Accordingly, the Act foresees subjective and objective discovery tests applied in the alternative.

The question of whether the claimant has actually discovered the concealment (i.e., the subjective test) is, of course, a factual question to be determined on a case-by-case basis. Accordingly, disclosure requests on this subject are to be expected and will likely shed light on whether subjective discovery has occurred.

Objective discovery (i.e., whether the claimant could with reasonable diligence have discovered the concealment) is, however, more complex. It seems unlikely that the English courts would require a claimant to take “exceptional” measures to discover any concealment.⁹ However, it is likely that the English courts will require a claimant to demonstrate that it took all reasonable steps to discover any concealment (i.e., that it took those steps that any reasonable claimant in his position would be expected to take). In practice, such steps may include monitoring: (1) the press releases of the relevant competition authorities including, in particular, those releases concerning unannounced investigations in their industry and/or the adoption of a statement of objection or similar; (2) press releases issued by their principal suppliers in relation to cartel investigations; (3) the annual reports and accounts of their principal suppliers (as some accounting practices require the company to disclose that it is under investigation); and (4) relevant news reports or industry commentary. Although such press releases and public documents do not evidence the existence of an infringement, they may be sufficient to indicate to a claimant that it has a potential claim and therefore expose any concealment. The better view may therefore be that claimants cannot rely on the deliberate concealment doctrine after the date on which the existence of an investigation is communicated publicly.

V. CONCLUSION

⁹ See *Paragon Finance Plc v D.B. Thakarar & Co. (A Firm)* [1999] 1 All E.R. 400 and, by analogy, *UCB Home Loans Corp. v Carr* [2000] Lloyd's Rep PN 754, 757).

As explained above, limitation periods are likely to be an important battleground in cartel claims and, given its effect of postponing the commencement of the limitation period, the question of deliberate concealment is likely to play a key role. Although a number of fundamental issues remain open, the decision in *Cave* provides strong support for the view that deliberate concealment requires an element of intentional/active concealment or deliberate wrongdoing (i.e., negligent or ignorant conduct will not suffice), which suggests that the relevant limitation period will only be postponed in “hardcore” cartels and not in those cases where the cartelists were negligent or ignorant of the effect of their conduct. In addition, it seems more likely than not that a claimant cannot rely on the deliberate concealment doctrine after the existence of the investigation has been made public.