PTA Template 269C1 - First Appeal

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2026-000058; CA2026-000006** [redacted]

SANCHES, VIEGAS AND ORS –v– CUTRALE JNR AND ANOR

CA-2026-000058

ORDER made by the Rt. Hon. Lord Justice Foxton

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal against HHJ Pelling KC's determination that the applicants' Brazilian competition law claims were time-barred.

Decision: REFUSED.

Reasons

The proposed appeal seeks to challenge the Judge's conclusions on Brazilian law relating to the limitation of actions. The Judge heard evidence from the experts, and while foreign law has been described as a question of fact of a peculiar kind when it comes to appeals, the Court of Appeal will not lightly interfere with the conclusions reached by a first instance judge by reference to an unfamiliar system of law on the basis of expert evidence.

The applicants' task is made all the more challenging because it is premised on previous decisions of the STJ (the highest Brazilian court) being wrong, it being suggested that the STJ would come to a different decision were the matter to reach it again with the benefit of the arguments advanced before the Judge. I am not persuaded that any of the propose grounds establish an arguable basis for overcoming what is rightly accepted to be a "high hurdle".

Ground 1(a): Did the Judge overlook Article 489 of the CPC and the conclusions to be drawn from it?

1. A number of decisions of the STJ, beginning with *Teles*, reached the conclusion that the competition claims brought in this action were standalone claims rather than "follow on" claims (a classification of significance for limitation purposes). The applicants submit that in reaching those decisions, the STJ failed to address arguments relied upon in the English proceedings, and it was said that that failure rendered the decisions of little weight when considering what the STJ would decide if faced with the arguments advanced before the Judge. Article 489 of the CPC is relied upon as supporting the assertion that although the STJ subsequent to *Teles* had heard arguments which referred to these materials (as the applicants' expert accepted), the decisions could not be said to have taken those arguments into account because the relevant matters were not specifically referred to.

2. It was common ground that these arguments were raised in decisions subsequent to *Teles*, especially in *Neto* and *Fabbri*. The Judge was fully entitled to conclude that the failure of the STJ to depart from *Teles* to date, despite receiving argument on the matters relied upon before him, made it improbable that the STJ would not decide the case in the same way as previously were it to be faced (once again) with the same arguments.

3. The Judge specifically addressed the significance of the absence of any express comment in the relevant STJ decisions, noting that motions for clarification filed with the STJ after the *Neto* decision were rejected, with the STJ saying "it is widely accepted by this Court that a judge is not obliged to address all of the arguments put forward by a party if there is a valid reason for not doing so" ([92]). I note that the motion for clarification in *Concremix* was rejected for similar reasons ("the fact that the appellate decision did not address each of the appellant's arguments individually does not constitute an omission, particularly given that the legal reasoning adopted is sufficient to uphold the judgment").

4. The Judge was entitled to rely on the decisions of the STJ itself when rejecting the clarification requests that the court was not obliged to address all the arguments put forward by a party if there is a valid reason for not doing so. It is, with respect, wholly unrealistic in those circumstances to criticise the Judge for not concluding that Brazilian law was in fact different in this respect to the STJ's statement, and to deduce that the STJ decisions reflected an absence of consideration of the relevant points, notwithstanding the STJ's express statement to the contrary. In these circumstances, the Judge's decision to treat the consistent line of STJ decisions as the best evidence of Brazilian law is not undermined by the absence of any reference to Article 489, because the STJ did not believe itself obliged to address every point it had considered in its judgments, which itself makes the inference the applicants seek to draw from the terms of the judgment untenable.

5. Nor can the Judge realistically be criticised for failing to conclude that the STJ had "failed to give any adequate consideration" to arguments before it when motions for reconsideration premised on a similar basis and made to the STJ had been rejected, the STJ having confirmed, at least in *Neto*, that "the judgment contains no omissions".

6. As for Article 489, the material filed for the appeal shows that the Judge was taken to this in closing but the Article only requires the court to address arguments that could undermine the conclusion reached by the judge against whom the appeal is brought. Whether an argument has this character is in essence a judgmental exercise. The more obvious conclusion to draw from the STJ's failure to refer to a particular argument is that the court did not believe it undermined the judge's conclusion.

Ground 1(b): did the Judge misunderstand the appellant's case about CADE's final decision of 6 March 2018?

7. It is clear that the Judge used the expression "condemnatory" decision to mean a decision of a kind which means that the proceedings which follow are in the nature of follow-on rather than standalone proceedings. At [98] he explained he was using the term to describe a decision which makes "findings concerning the existence of an alleged cartel that can then be used by a claimant as the basis for claiming damages."

8. This was true when summarising the applicants' case ([41]), the respondents' case ([51]-[52]) and the effect of the Brazilian case law ([54], [62], [81], [94], [98], [99]. It is apparent from [62], [81], [94] and [99] that the translation of Brazilian court decisions from which the Judge was working used the term "condemnatory" decision when explaining why the CADE Final Decision was not a decision of such a kind as to generate a follow-on claim. The Judge was tracking the language of the STJ which was concerned with the same CADE decision as in issue in this case, and using the language in the translations of those judgments to signify the type of decision capable of generating a follow-on claim.

9. Rather than misunderstanding the applicant's case, the Judge specifically addressed the applicants' claim as to the significance of the approval of a TCC (a "cease and desist" agreement) and so he clearly understood that the applicants' case was that a decision to approve the conclusion of a TCC was capable of generating a follow-on action. The Judge addresses that argument at [64], and noted it had been run before and repeatedly rejected by the STJ (e.g. [74]-[75], [77]-[79], [81], [83]-[85] and in numerous other passages).

10. With respect, the suggestion that the Judge mischaracterised the applicant's case and failed to understand or address its case that approval of a TCC involved sufficient recognition of wrongful conduct by CADE to make subsequent proceedings a follow-on claim is hopeless. The Judge addressed that argument at length, showed how it had been advanced on numerous occasions before the Brazilian courts and rejected, for which reason the Judge concluded that, on the evidence before him, the STJ would not reach a different conclusion were the issue to come before it again.

11. The fact that the alleged misunderstanding was not raised after circulation of the draft judgment, or by way of an application for permission to appeal before the Judge, but only at this stage is noteworthy.

Ground 1(c): did the Judge wrongly proceed on the basis that, in relevant respects, the Brazilian and UK/US law on follow-on damages were the same or similar?

12. The applicants point to [105] of the judgment as the best example of this criticism. If so, that does not take them very far. In that paragraph, the Judge identified what he saw as the key distinction between standalone and follow-on claims. He noted that the distinction drawn in the Brazilian courts reflected a common sense distinction between those two types of claim ([104]). In [105] he identifies as his basis for rejecting Professor Frazão's evidence that it was contrary to three Brazilian court decisions (*Teles*, *Fabbri* and *Neto*) and "because there is no principled reason for such an approach" He noted that what he had concluded to be the correct approach "is not merely that adopted by the STJ in the numerous cases it has decided referred to above and is jurisprudentially principled but in fact reflects the relevant academic writing". In this regard he referred to an article cited by a Brazilian law judge in *Teles* written by a Brazilian law academic (Mr Maggi) which explained the differences in ways which the judge said would be familiar to UK/English competition law practitioners.

13. It is not arguable that this comment involves the Judge ascertaining the content of Brazilian law on the basis that English/EU and Brazilian competition law were the same. The passage only cites Brazilian law sources, with the Judge making a passing comment that what he regarded as the common sense distinction drawn would be familiar to lawyers in other jurisdictions. In circumstances in which the applicants' case involved holding that there had been a fundamental and sustained error in STJ jurisprudence, that was a legitimate observation, but it went no further than that.

14. Indeed at [160] the Judge made it clear that he was not willing to proceed on the basis that Brazilian law was likely to be the same as English law. The appellants themselves occasionally commented on the similarity of some Brazilian legal rules to their English equivalents (e.g. Day 1 page 101) and observed that the Brazilian cases "may have taken some inspiration from the European position" (Day 1 page 114).

Ground 1(d): Did the Judge err in stating that the TCC was "ultimately the only document that matters"?

15. This statement was made by the Judge at [131]. It was not his starting off point, but reflected the conclusions which the analysis in the preceding paragraphs had led him to. Nor did it purport to be a statement of Brazilian law (as asserted in the applicants' skeleton) but a conclusion as to where the Judge's earlier analysis of Brazilian law had left the case.

16. The Judge had concluded that the effect of the STJ decisions was that the CADE Final Decision was not a decision which permitted a follow-on damages claim to be brought, nor did *the fact* rather than the terms of the TCC have that effect. That left the issue of whether the TCC could be said to meet that test by containing admissions of wrongdoing.

17. The Judge had clearly not "overlooked (a) the STJ case law" (the decision is replete with references to it). While the STJ might repeatedly have emphasised the importance of the CADE Final Decision, as the Judge noted, the STJ had nonetheless repeatedly found that it was not the type of decision which could support a follow-on damages claim.

Ground 1(e): Did the Judge misunderstand and place too much weight on the post-*Teles* case law?

18. This largely repeats aspects of Ground 1(a), to the effect that the Judge should not have treated the subsequent cases as adding anything to *Teles* because the issues before the court were insufficiently examined. However, for a judge concerned to predict how the highest Brazilian court would determine an issue of Brazilian law, the fact that that court had not simply one but eight times reached the same conclusion was obviously a powerful piece of evidence. Further, the post-*Teles* judgments were of obvious significance because they continued to provide the same answer, even when faced with new or different arguments by those seeking to escape the consequences of the *Teles* decision. The Judge makes these points at [123].

19. This argument does not have a realistic prospect of success.

Ground 2: The Judge's assessment of the "continuing damages" issue?

20. The applicants pleaded various heads of loss (Master POC, [64]) including reduced sales, reduced prices received, to the extent not covered by those reduced production and reduced profits, as well as a reduced value in land, reduced value of shares and "harm of the type" sounding in modern damages. There appears to have been no suggestion that these different types of pleaded loss were susceptible to different limitation regimes.

21. The applicants' case was that for loss classified as "continuous damage", time did not start to run until the damage ceased, and that, for that reason, time had yet to start running in respect of the loss claims. That argument relied on the evidence of Professor Frazão who placed particular reliance on the *Telemar Norte* decision of 2015 (which was not a competition case). In her own evidence, Professor Frazão distinguished between permanent damage and successive and periodic damage, where there was "the renewal of the limitation period every day". She suggested that "the cartel is a permanent infraction, that is it involves neutralising the conditions for competition for some time, and that's why the conduct is permanent and the damage is permanent too…". Professor Frazão's opinion was offered as a general theory of limitation in all cartel claims ("as the cartel constitutes a continuous offence, the three-year limitation period can only commence from the conclusion of the conduct"). Professor Didier's evidence was that each contract entered into represented separate damage for which time began to run when it was concluded.

22. It is clear that this part of the case was presented to the Judge and argued as a dispute about Brazilian law and it is not realistically arguable that the Judge was not entitled to prefer Professor Didier's evidence on that issue for the reasons the Judge gave:

    (a) Professor Didier's approach had consistently been adopted by the STJ, as Professor Frazão accepted (see *Teles*, *Jotto* and *Manzoni*) .

    (b) The Judge was referred to no competition law case in which any claimant had sought to rely on the *Telemar Norte Leste* case, still less where it had been applied by the court. As the Judge noted, that was particularly noteworthy because the judge who decided *Telemar Norte Leste* was Andrighi J who was judge rapporteur in *Fabbri* and *Neto* and the panel that voted to adopt Andrighi J's judgment in

Telemar Norte Leste included Cueva J who had dissented in each of those cases.

(c) Professor Frazão's evidence, whereby time would never expire in cartel cases for so long as the cartel continued regardless of any individual claimant's knowledge is, with respect, very surprising, and the more so when limitation issues in cartel cases have clearly been such an ongoing topic in Brazilian law.

(d) So far as the suggestion that the Judge overlooked the *Concremix* case is concerned, the Judge dealt with this at [98] and [106], observing that there was no dispute that it was a "follow on" case. As the Judge makes clear at [99] that case rejected the contention that in a "follow on" case, parts of the claim might nonetheless be time-barred by reason of knowledge preceding the publication of the CADE final decision, because in a "follow-on" action, "full compensation for damage is permitted, including for those that occurred before the three-year period preceding the filing of the claim". That finding cannot assist the applicants in the light of the Judge's conclusion that this was not a "follow-on" claim.

Information for or directions to the parties

Court of Appeal Mediation Scheme (CAMS)

Where permission has been granted or the application adjourned:

a) Does the case fall within the Automatic Referral Scheme (see below)? Yes/No (delete as appropriate)

Automatic Referral Scheme categories:

- All cases involving a litigant in person (other than immigration and family appeals)
- Personal injury and clinical negligence cases;
- All other professional negligence cases;
- Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.
- EAT Appeals
- Residential landlord and tenant appeals

b) If yes, is there any reason not to refer to CAMS mediation under the Automatic Referral Scheme? Yes/No (delete as appropriate)

c) If yes, please give reason:

d) Cases outside the Automatic Referral Scheme: Do you wish to make a recommendation for mediation? Yes/No (delete as appropriate)

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)
b) any expedition

Signed: BY THE COURT
Date: 2nd MARACH 2026

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **CA-2026-000058 and CA-2026-000061**