JUDGMENT OF THE COURT (Second Chamber)

19 April 2007 *

In Case C-282/05 P,

APPEAL pursuant to Article 56 of the Statute of the Court of Justice, brought on 12 July 2005,

Holcim (Deutschland) AG, formerly Alsen AG, established in Hamburg (Germany), represented by P. Niggemann and F. Wiemer, Rechtsanwälte,

applicant,

the other party to the proceedings being:

Commission of the European Communities, represented by R. Lyal, and G. Wilms, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris, J. Makarczyk, L. Bay-Larsen and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2007,

gives the following

Judgment

1 In its appeal, Holcim (Deutschland) AG requests the setting aside of the judgment of the Court of First Instance of the European Communities of 21 April 2005 in Case T-28/03 *Holcim (Deutschland)* v *Commission* [2005] ECR II-1357 ('the judgment under appeal'), in which the Court of First Instance dismissed its action seeking compensation for the damage it claims to have suffered as a result of the charges connected with the provision of a bank guarantee for the purposes of deferring payment of a fine imposed by Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1) ('the Cement decision'), which was subsequently annulled by the judgment of the Court of First Instance of 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, *'Cement'*.

Background

2 The background was set out in paragraphs 1 to 9 of the judgment under appeal, as follows:

'1 The applicant, Alsen AG, which became Holcim (Deutschland) AG, whose registered office is in Hamburg (Germany), manufactures construction materials. Alsen AG came about as a result of the merger in 1997 between Alsen Breitenburg Zement- und Kalkwerke GmbH ("Alsen Breitenburg") and Nordcement AG ("Nordcement").

2 By [the Cement decision], the Commission ordered Alsen Breitenburg and Nordcement to pay fines of EUR 3.841 million and EUR 1.85 million, respectively, for infringement of Article 85 of the EC Treaty (now Article 81 EC).

3 Alsen Breitenburg and Nordcement brought actions for annulment of that decision. Those actions were registered under the references T-45/95 and T-46/95 and were then joined to the actions brought by the other companies to which the Cement decision was addressed.

4 In accordance with the option given by the Commission, Alsen Breitenburg and Nordcement decided to provide bank guarantees, thus avoiding the need to pay the fines immediately. Alsen Breitenburg's bank guarantee was in existence from 3 May 1995 until 2 May 2000 and was arranged by Berenberg Bank, in consideration of an annual commission of 0.45%. Nordcement provided, from 18 April 1995 until 3 May 2000, a bank guarantee arranged by Deutsche Bank, in consideration of an annual commission of 0.375% and a single start-up commission of EUR 15.34. The applicant paid to the banks, for arranging the bank guarantees, a total amount of EUR 139 002.21.

5 By [the *Cement* judgment], the Court of First Instance annulled the Cement decision in so far as the applicant was concerned and ordered the Commission to pay the costs.

6 Pursuant to Article 91 of the Rules of Procedure of the Court of First Instance, and by letter of 28 September 2001, the applicant therefore requested the

defendant to pay, first, the costs of the proceedings (in particular the lawyers' fees, amounting to EUR 545 000) and, second, the charges incurred in providing the bank guarantees.

7 By letter of 24 January 2002, the defendant offered to pay to the applicant part of its lawyers' fees (EUR 130 000), but refused to pay the bank guarantee charges, relying on the case-law on costs within the meaning of Article 91 of the Rules of Procedure.

8 By letter of 5 April 2002, the applicant again requested the applicant to pay it the whole of the lawyers' costs and the bank guarantee charges. For payment of the bank guarantee charges, the applicant relied this time on the second paragraph of Article 288 EC and Article 233 EC and also on the judgment of the Court of First Instance of 10 October 2001 in Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, which had been delivered in the meantime.

9 By an e-mail of 30 May 2002, the defendant offered to pay the lawyers' fees in the amount of EUR 200 000. As regards the bank guarantee charges, it again refused to pay them, taking the view that the possibility of deferring payment of the fine by providing a bank guarantee was a simple option and that the defendant could not therefore be held liable for the charges occasioned where undertakings decided to take advantage of that possibility.'

The action before the Court of First Instance and the judgment under appeal

3 By application lodged at the Registry of the Court of First Instance on 31 January 2003, the applicant claimed that:

— the Commission should be ordered to pay to the applicant the sum of EUR 139 002.21 together with interest at the rate of 5.75% a year for the period from 15 April 2000;

— the Commission should be ordered to pay the costs.

4 The defendant contended that the Court should:

— dismiss the action as inadmissible, in so far as it is based on Article 233 EC;

— dismiss the action in its entirety, in so far as it is based on Article 288 EC:

— as inadmissible, or, in the alternative, as unfounded, in so far as it relates to the bank guarantee charges incurred before 31 January 1998;

— as unfounded for the remainder;

— order the applicant to pay the costs.

5 In its observations, the applicant accordingly claimed that the Court of First Instance should:

— declare the action admissible, in so far as it is based on Article 233 EC;

— in the alternative, interpret the action, in so far as it is based on Article 233 EC, as being an action for annulment or for failure to act;

— order the defendant to pay the costs.

6 By the judgment under appeal, delivered after the parties presented oral argument and answered the questions put by the Court at the hearing on 10 June 2004, the Court of First Instance dismissed the action.

7 In the first place, the Court of First Instance considered that the action was inadmissible in so far as it was based on Article 233 EC.

8 In reaching that conclusion, the Court of First Instance noted that the remedies set out in the EC Treaty available to individuals in order to rely on their rights are exhaustively listed. Since Article 233 EC, concerning the obligations arising from compliance with a judgment of the Court of Justice, does not provide for such a remedy, it cannot be the basis for an independent claim for the reimbursement of bank guarantee charges. Furthermore, the Court refused to interpret the application as constituting the basis of an action for annulment or for failure to act having found that the initial object of the application was to obtain damages (paragraph 46 of the judgment under appeal).

9 In the second place, the Court of First Instance held that, in so far as it was based on Article 288 EC, the action should be dismissed as being in part inadmissible and in part unfounded.

10 The Court took the view, as the defendant invited it to, that the application was partially inadmissible on the ground that the action for damages was time-barred under Article 46 of the Statute of the Court of Justice. The Court pointed out that the limitation period for proceedings in matters arising from non-contractual liability cannot begin until all the requirements governing the obligation to make good the damage are satisfied (paragraph 59 of the judgment under appeal). It considered that in the present case those requirements were met as soon as the bank guarantees were provided since the applicant, being of the view that the Cement decision was illegal, was in a position to invoke the non-contractual liability of the Community (paragraph 63 of the judgment under appeal). Accordingly, the

limitation period was interrupted only when the application was lodged before the Court on 31 January 2003. On the basis of Article 46 of the Statute of the Court of Justice, the Court held that the action for damages was time-barred as regards the bank guarantee charges incurred before 31 January 1998 (paragraph 74 of the judgment under appeal).

11 The Court of First Instance ruled on the substance in relation to the charges incurred after that date. It first of all concerned itself with establishing whether the Commission's conduct amounted to a serious breach of Community law. It pointed out that the Court had itself found the Cement decision to be illegal in the *Cement* judgment. It concluded, however, that that illegality did not amount to a serious breach of Community law. It admittedly accepted that in that case the Commission's discretion was limited and that, in those circumstances, the infringement of Community law could amount to a serious breach (paragraphs 95 to 100 of the judgment under appeal). However, it pointed out that the facts underlying the Cement decision were extremely complex. In those circumstances, the Court held that the breach of Community law in that case was not sufficiently serious (paragraphs 101 to 116 of the judgment under appeal).

12 Next, the Court examined whether a causal link might exist between the Commission's conduct and the damage complained of. It held that that link was not established since the provision of a bank guarantee was the consequence of the applicant's exercising its freedom of choice and not the unlawfulness of the Commission's decision (paragraphs 119 to 131 of the judgment under appeal).

13 The Court of First Instance therefore found it unnecessary to rule on the damage suffered and dismissed the application on the merits.

Procedure before the Court of Justice and the forms of order sought

14 The applicant seeks the same forms of order as those sought at first instance and claims that the Court should:

— set aside the judgment under appeal;

— order the defendant to pay to the applicant the sum of EUR 139 002.21, together with interest at a rate of 5.75% a year for the period from 15 April 2000;

— in the alternative, refer the case back to the Court of First Instance for a fresh decision, having regard to the interpretation of the law given by the Court of Justice;

— order the defendant to pay all the costs.

15 The defendant claims that the Court should:

— dismiss the appeal;

— order the applicant to pay the costs.

The appeal

16 Three pleas in law are put forward in support of the appeal. The first alleges that the Court of First Instance erred in law in considering the action for damages based on Articles 235 EC and 288 EC to be partially time-barred. The second alleges that the Court erred in law by seeking to determine whether there was a sufficiently serious breach of Community law for the purposes of establishing the Community's liability. The third plea alleges that the Court erred in law in holding that no causal link between the illegality of the Cement decision and the constitution of the guarantee charges was established in the particular case.

The first plea in law

Arguments of the parties

17 The application disputes the assessment by the Court of First Instance of the application of the rules on limitation laid down in Article 46 of the Statute of the Court of Justice. It takes the view that the limitation period did not begin until the Court annulled the Cement decision. It bases its reasoning on paragraph 10 of the judgment in Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Commission* [1982] ECR 85, from which it follows that the period of limitation cannot begin until all the requirements governing the obligation to provide compensation for damage are satisfied and in particular before the damage to be made good has materialised.

18 According to the applicant, the annulment of the Cement decision constituted, in the case in point, a condition precedent to an obligation to provide compensation.

19 The applicant takes the view that by providing the bank guarantees it satisfied a legal obligation which only came to an end with the decision to annul. It also considers that the damage is closely linked to the institution of annulment proceedings, since the bank guarantees were provided because of those proceedings and because they had no suspensory effect.

20 It also claims that the Court erred in its reasoning, based on Joined Cases 56/74 to 60/74 *Kurt Kampffmeyer and Others* v *Commission and Council* [1976] ECR 711, in holding that the applicant could have brought infringement proceedings as soon as the bank guarantees were provided. It takes the view that to use the form of action provided for in Article 288 EC in this way would have constituted an abuse of process designed to circumvent the conditions as to admissibility laid down in Article 230 EC in respect of actions for annulment.

21 The applicant considers, finally, that, contrary to what the Court of First Instance held, the damage did not continue in any way but fully materialised when the bank guarantees were provided. It points out that only one contract was entered into with the banks. That contract was also limited *ratione temporis* to the period of the judicial proceedings and the applicable rates of interest were annual. Accordingly, the bank charges relating to those guarantees were not calculated on a daily basis.

22 In the alternative, the applicant submits that the limitation period was interrupted by the institution of annulment proceedings before the Court of First Instance. According to the applicant, the facts of the case were only definitively established in the course of that action and the institution of the application for damages was essentially dependent on the outcome of the annulment proceedings.

23 The defendant for its part takes the view that the Court of First Instance correctly applied the rules on limitation. It contends in particular that the unlawful decision is the act giving rise to liability.

24 It considers that the provision of bank guarantees cannot amount to a legal obligation since it is the direct consequence of the exercise of its freedom of choice by the applicant, which could also have decided to pay the fine. By annulling the Cement decision, the Court of First Instance was thus unable to bring to an end an obligation which did not exist. The annulment is therefore not the act giving rise to liability, which is, on the contrary, the Cement decision itself.

25 The defendant also points out that the applicant was, as the Court of First Instance held, able to bring an action for damages as soon as the guarantees were provided. The defendant takes the view that the Court was right to apply the judgment in *Kampffmeyer and Others* v *Commission and Council*, since the actions under Articles 230 EC and 288 EC were separate.

26 Accordingly, the defendant takes the view that the Court of First Instance did not err in law by holding that the period of limitation began as soon as the bank guarantees were provided.

27 The defendant also bases its contention that the institution of the annulment proceedings did not interrupt the period of limitation on the fact that Article 46 of the Statute of the Court of Justice provides expressly that that period is interrupted by the institution of an action for damages. An action for annulment cannot therefore interrupt that period.

Findings of the Court

28 The first plea in law falls into three parts.

The first part, based on the assessment of the starting point of the limitation period

29 The period of limitation for an action for liability of the Community cannot begin until all the requirements governing an obligation to provide compensation for damage are satisfied and, in particular, until the damage to be made good has materialised. Therefore, where the liability of the Community has its origin in a legislative measure, that period of limitation does not begin until the damaging effects of that measure have arisen.

30 A different solution would call into question the principle of autonomy of actions, by making the procedure for an action for damages depend on the completion of an action for annulment. That solution can be applied to disputes arising from individual measures. In those cases, the period of limitation begins as soon as the decision has produced its effects vis-à-vis the persons concerned by it.

31 In the present case, however, the damaging effects of the Cement decision arose vis-à-vis the applicant's predecessors as soon as they were ordered to pay a fine. Those orders were coupled with the option, made available in order to avoid having to pay the fines immediately, of providing bank guarantees. Contrary to what is submitted by the applicant, the damaging effects of the Cement decision therefore did not arise when the Court of First Instance annulled that decision. It is in fact irrelevant, as regards the starting point of the period of limitation, that the Community's unlawful conduct was established by a ruling of that Court.

32 The applicant's predecessors could, in accordance with the approach adopted by the Court of Justice in paragraph 6 of *Kampffmeyer and Others* v *Commission and Council*, therefore bring an action in order to establish the Community's non-contractual liability as soon as the cause of damage became certain, that is, in the present case, as soon as the bank guarantees were provided. Contrary to what the applicant argues, that would not have constituted an abuse of process, since an action for damages is a separate cause of action from an action for annulment.

33 In paragraph 68 of the judgment under appeal, the Court of First Instance erred in law by holding that the limitation period began to run as soon as the bank guarantees were provided. Whilst the claim for damages could no doubt have been brought as soon as the guarantees were provided, since at that time the damage caused by the contested Commission decision was certain as to the grounds and could be determined as to the scope, the period of limitation could not, for its part, begin until the financial loss had in fact materialised, that is, until the bank guarantee charges had begun to run. However, whatever date is used falls well before that on which the Court gave its ruling in the *Cement* judgment, which the applicant regards as being the starting date of the limitation period. The first part of the first plea in law must be rejected.

The second part, alleging that the damage was ongoing

34 The damage alleged by the applicant comprises sums of money which it was required to pay the banks for providing the guarantees. As is clear from the documents submitted to the Court of First Instance and the proceedings before it, those bank charges were calculated in proportion to the number of days during which the bank guarantees were in force.

35 The amount of the alleged damage therefore increased in proportion to the number of days which elapsed. The applicant is accordingly not justified in submitting that the loss was instantaneous in nature and limited to the provision of the bank guarantees alone. Consequently, the Court of First Instance was correct to hold, in paragraph 69 of the judgment under appeal, that the damage relied on by the applicant was ongoing. The second part of the first plea in law must therefore be rejected.

The third part, alleging interruption of the limitation period

36 Under Article 46 of the Statute of the Court of Justice, the period of limitation is interrupted, in respect of non-contractual liability, if proceedings are instituted before the Court or if, prior to such proceedings, an application is made by the aggrieved party to the relevant institution of the Communities. Since Article 46 of the Statute of the Court of Justice relates to actions against the Communities in

respect of non-contractual liability, the 'proceedings' which fall within that provision, which, moreover, are treated as interrupting the period of limitation, are those which seek to put that liability in issue, in accordance with Article 288(2) EC. An action for annulment cannot therefore be deemed to be 'proceedings' which will interrupt the limitation period or the purposes of Article 46 of the Statute of the Court of Justice. Accordingly, the applicant is not justified in maintaining, by the final part of its first plea in law, that, by holding that the institution of proceedings for annulment did not interrupt the limitation period, the Court of First Instance erred in law.

37 It follows that the first plea must be rejected in its entirety.

The second plea in law

Arguments of the parties

38 The applicant claims that the Court erred in law by seeking to determine whether there was a sufficiently serious breach of Community law as a condition for requiring the Community to provide compensation for damage.

39 It maintains that the criterion of a sufficiently serious breach applies only where a legislative act of the Community is at issue. In the present case, the liability of the Community falls to be considered in the legal context created by the annulment of an individual administrative act. Accordingly, the Court of First Instance did not have to seek to determine whether there was a sufficiently serious breach, since the mere finding of unlawfulness was sufficient to give rise to the obligation to provide compensation for damage.

40 The applicant goes on to state that the criterion of a sufficiently serious breach is required in the context of legislative acts in order to prevent a deluge of cases. Those cases will be less likely to succeed than when individual measures are at issue, as is the case here.

41 In the alternative, the applicant asks the Court to accept that in the present case there was a sufficiently serious breach of Community law. To this end, it relies on the case-law to the effect that there is a sufficiently serious breach where an institution manifestly and gravely disregards the limits of its discretion, a mere infringement being sufficient where that discretion is itself reduced (see Case C-5/94 *Hedley Lomas* [1996] ECR I-2553). The applicant takes the view that the defendant's discretion in the present case was reduced and agrees with the Court of First Instance on this point (see paragraph 100 of the judgment under appeal). Conversely, it considers that the Court of First Instance was wrong to take into account the complexity of the facts and the difficulties in applying Community law for the purposes of ascertaining whether there had been a sufficiently serious breach, since the case-law referred to provides no basis for the judgment under appeal on those grounds.

42 Finally, the applicant claims that the facts of the case as regards the applicant were not complex and that the length of the *Cement* judgment can be explained by the mere fact that the defendant and the Court of First Instance preferred to join a number of related cases rather than make Alsen Breitenburg and Nordcement the subject of a separate judgment.

43 The defendant, for its part, takes the view that the Court of First Instance was correct to seek to determine whether there was a sufficiently serious breach.

44 It contends in particular that the distinction made by the applicant between legislative acts and individual acts is not relevant. According to the case-law of the Court, the nature of a measure is not a decisive criterion for identifying the limits of the institutions' discretion (see Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 40 and 42). It takes the view that, in order to assess the extent of that discretion, the relevant perspective is that of the time when the decision was taken. In those circumstances, it is appropriate to take into account the Commission's specific situation at that time and thus the complexity of the facts in the case. It adds that the lack of complexity of the facts of the case, alleged by the applicant, is a matter which falls outside the scope of the Court's jurisdiction in the context of an appeal.

45 In the alternative, the defendant contends that the assessment of the complexity of the facts cannot be limited only to the applicant's situation in an appeal but must

also take into account all the situations which led to the Commission's adoption of the Cement decision.

Findings of the Court

46 The second plea in law falls into three parts

The first part, alleging that the Court of First Instance was wrong to seek to establish whether there was a sufficiently serious breach of Community law

47 For the non-contractual liability of the Community to arise, a number of conditions must be met, including, where the unlawfulness of a legal measure is at issue, the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. As regards that condition, the decisive criterion for establishing that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (*Bergaderm and Goupil* v *Commission*, paragraphs 43 and 44)

48 The determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question (*Bergaderm and Goupil* v *Commission*, paragraph 46, and Case C-472/00 *Commission* v *Fresh Marine* [2003] ECR I-7541, paragraph 27).

49 Accordingly, the applicant is not justified in submitting that the criterion of a sufficiently serious breach of a rule of law applies only where a legislative act of the Community is at issue and is excluded when, as in the present case, an individual act is at issue. Contrary to what is argued, the Court of First Instance could not limit itself to making a finding of unlawfulness, but had to apply, as it correctly did, the criterion of the existence of a sufficiently serious breach. Therefore, by seeking to determine whether there was a sufficiently serious breach of Community law in the present case, the Court's judgment was not vitiated by an error of law. It follows that the first part of the second plea in law must be rejected.

The second part, based on the criteria used by the Court of First Instance to identify a sufficiently serious breach of Community law

50 The system of rules which the Court of Justice has worked out in relation to the non-contractual liability of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion

available to the author of the act in question (*Bergaderm and Goupil* v *Commission*, paragraph 40, and *Commission* v *Fresh Marine*, paragraph 24).

51 By the judgment under appeal, the Court of First Instance took into account not only the defendant's discretion but also the complexity of the facts and the difficulties in applying Community law in order to establish whether there had been a sufficiently serious breach of Community law. The criteria to which it had recourse to establish the existence of such a breach of Community law are therefore not vitiated by an error of law. The second part of the second plea in law must therefore be rejected.

The third part, seeking a finding from the Court, in the alternative, that the facts of the case were not complex

52 The applicant advances two arguments with a view to showing that the facts were not complex. It maintains, in the first place, that the complexity of the facts established by the Court of First Instance are merely a result of the length of the *Cement* judgment, which is due only to the fact that the Court decided in that judgment to join various related cases, while it could, without difficulty, have ruled separately in relation to Alsen Breitenburg and Nordcement.

53 However, contrary to what is submitted, in the judgment under appeal, the Court of First Instance did not deduce the complexity of the facts from the particularly long

nature of the *Cement* judgment. The Court considered, in paragraph 114 of the judgment under appeal, in the light of all the circumstances of the *Cement* case, that the defendant was faced with complex situations to be regulated. Accordingly, the applicant is not justified in maintaining that the Court of First Instance erred in law by concluding from the length of the *Cement* judgment, a length which can only be explained by the fact of joining several cases, that the facts in the case were complex.

54 As regards, in the second place, the question whether the facts in the case were complex, it must be borne in mind that it is clear from the second subparagraph of Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice that appeals are to be limited to points of law.

55 As pointed out in paragraph 50 of the present judgment, the system of rules which the Court of Justice has worked out requires that account be taken, inter alia, of the degree of complexity of the case which the Community authorities had to deal with. The question whether the facts at issue in an action for damages are of such a complex nature is for the Court of First Instance alone to determine and may be discussed in the context of an appeal only where there has been distortion, which is not alleged in this case. Accordingly, that part of the plea in law is not admissible.

56 Since the third part of the second plea in law is in part unfounded and in part inadmissible, the second plea in law must be rejected in its entirety.

57 It follows that the applicant has not been able to show that the Court of First Instance erred in law by holding that, in the present case, there was not a sufficiently serious breach of Community law, a breach which alone could have given rise to the non-contractual liability of the Community. In the light of the cumulative nature of the conditions governing that liability, that consideration suffices to dismiss the appeal without having to rule on the third plea in law relating to the existence of a causal link between the conduct of which the Community is accused and the alleged damage.

Costs

58 Under Article 69(2) of the Rules of Procedure, which applies to the procedure on appeal by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby rules:

1. The appeal is dismissed.

2. Holcim (Deutschland) AG is ordered to pay the costs.

[Signatures]