



Case M-110/15, ConstructionTimeAgain Ltd v. the Kingdom of Allegoria

Reference for a preliminary ruling from the Allegorian Supreme Court

1. ConstructionTimeAgain Ltd, incorporated in the Kingdom of Allegoria, manufactures a particular kind of bricks. The bricks display unique energy saving properties and are produced for a fraction of the price of ordinary bricks. Although competition in the EU market for sustainable construction material is fierce, ConstructionTimeAgain Ltd does very well, despite being relatively small. In fact, ever since the introduction of the bricks in 2008, ConstructionTimeAgain Ltd has had trouble meeting the increasing demand for the product across the EU.

2. The Kingdom of Allegoria has been a member of the European Union since 1997. Allegoria is considered a model member state in terms of loyal cooperation. It did not ask for any exceptions in its membership negotiations and embraced the Lisbon Treaty wholeheartedly, the Charter of Fundamental Rights of the European Union (the EU Charter) and all. Allegorian courts are often put forward as the shining example of having struck just the right balance when it comes to adhering to the right and obligation to refer cases to Luxembourg. Allegoria is known to take its international obligations seriously and it has an excellent human rights track record. In latter years, there has hardly been any judgments against Allegoria from Strasbourg.

3. As the manufacturing process of the bricks generates emissions of carbon dioxide, ConstructionTimeAgain Ltd holds a greenhouse gas emissions permit according to the Allegorian Emissions Act, which is the national law implementing Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32). (See Annex I "Mineral industry – Installations for the manufacture of ceramic products by firing".)



4. ConstructionTimeAgain Ltd holds enough allowances to cover its carbon dioxide emissions for year 2011. However, through a series of internal misfortunes, ConstructionTimeAgain Ltd failed to surrender any emissions allowances by 30 April 2012. By an administrative decision of 5 June 2012, the Allegorian Emissions Authority imposed a penalty on ConstructionTimeAgain Ltd in the amount of 500.000 euro, calculated according to Article 16 of Directive 2003/87/EC (the Penalty decision).

5. ConstructionTimeAgain Ltd challenged the Penalty Decision before the Allegorian Environmental Court and argued that the penalty imposed was thoroughly disproportionate, primarily in relation to the nature of the infringement in the sense of Article 49(3) of the EU Charter. ConstructionTimeAgain Ltd pointed to the need to consider that it had, up until this unfortunate mishap, adhered faithfully to the emissions control system, and that the economic consequences would be very serious. Construction-TimeAgain Ltd considered the Penalty Decision to violate its freedom to conduct a business and its rights to property according to Articles 16 and 17 of the EU Charter and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). Allegoria is a signatory to Protocol No. 1 to the ECHR.

6. The Allegorian Environmental Court, which is the court of both first and last instance in cases concerning environmental penalties in Allegoria, was considering making a reference for a preliminary ruling to the Court of Justice of the European Union (the ECJ) regarding the conformity of the fines with the EU charter. However, upon learning of the pending case C-203/12 Billerud, in which the ECJ already had been seized with a request for guidance on the interpretation of Directive 2003/87/EC, the Allegorian Environmental Court decided to await the assessment of the ECJ. In its judgment in C-203/12 Billerud, delivered on 17 October 2013, the ECJ pronounced that Article 16(3) and (4) of Directive 2003/87/EC must be interpreted as meaning that the amount of the lump sum penalty provided for therein may not be varied by a national court on the basis of the principle of proportionality.

7. On 24 October 2013, a week after the ECJ delivered its ruling, the Allegorian Environmental Court dismissed ConstructionTimeAgain Ltd's appeal. In its rather summary ruling, the Allegorian Environmental Court merely concluded that the question of the proportionality of the penalties had been clarified by the ECJ, and that the Allegorian Environmental Court was in no position to make a different assessment regarding the



legality of the sanctions. Furthermore, it was clear that, as a matter of fact, there was no force majeure situation at hand that could have justified a different outcome.

8. As the judgment of the Allegorian Environmental Court was not subject to appeal, the Penalty decision gained legal force and ConstructionTimeAgain Ltd had no option but to pay the penalty fee.

9. BuildingBonanza Ltd, incorporated in the EU member state Balloonina, and a fierce competitor to ConstructionTimeAgain Ltd, was also penalised for not surrendering its allowances on time in similar circumstances as ConstructionTimeAgain Ltd. Unlike ConstructionTimeAgain Ltd, BuildingBonanza Ltd perceived it as futile to challenge the decision nationally. Instead, BuildingBonanza Ltd turned to Strasbourg and submitted a complaint to the European Court of Human Rights (the ECtHR). Balloonina contested the application in substance but did not raise any objection to the admissibility of it according to Article 35(1) of the ECHR; Balloonina concluded that after the judgment in C-203/12 Billerud the penalty would not be revoked by the use of national remedies.

10. In its judgment of 1 June 2014, the ECtHR (the Fifth Chamber), found that the penalty imposed on BuildingBonanza Ltd violated the company's right to property according to Article 1 of Protocol No. 1 to the ECHR, to which Balloonina is a signatory. The ECtHR pointed to the fact that an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. Since BuildingBonanza Ltd was (i) in possession of enough emissions allowances, (ii) no bad faith was demonstrated on its part, (iii) it was a relatively small business that could be forced into bankruptcy by the penalty and (iv) the omission of BuildingBonanza Ltd to surrender the emissions allowances could not be said to have had a negative effect on the protection of the environment, the penalty could not be considered proportionate. The ECtHR underlined that the evaluation of the proportionality of a measure restricting an individual's right cannot be carried out without taking the specific circumstances of that individual into account.



11. The ECtHR referred to earlier case-law on the right to peaceful enjoyment of property and to the obligation to maintain a dynamic and evolutive approach when interpreting the ECHR: “The ECHR must be interpreted in the light of present-day conditions”. The ECtHR underlined that the ECHR must be interpreted and applied in a manner, which renders its rights practical and effective, not theoretical and illusory. There was virtually no reference to recent case-law on the matter. The ECtHR ordered Balloonia to pay just satisfaction in the total amount of 1.000.000 euro, ruling on an equitable basis. The amount included the penalty, interest and legal fees. The judgment became final.

12. When learning of the ECtHR's ruling against Balloonia, and since there was no possibility under Allegorian law to have the fine repaid as it had gained legal force, Construction-TimeAgain Ltd brought an action for damages against the Kingdom of Allegoria claiming that the Allegorian state had violated its rights under the EU charter by act and/or omission. The action was brought before the Allegorian Supreme Court, which, according to Allegorian procedural rules, is the court of first and last instance in actions for damages against the state.

13. Although basing its claim for damages on the EU principle of non-contractual liability of the member states for breaches of EU law, ConstructionTimeAgain Ltd submits that the Allegorian Supreme Court should not uphold the requirement that only a sufficiently serious breach gives rise to liability. ConstructionTimeAgain Ltd argues that (i) the requirement limits the company's rights to effective rights protection under article 47 of the EU charter and article 13 ECHR, (ii) should not apply in actions for reimbursement of charges incompatible with EU law and (iii) a similar requirement is not upheld in the national law of Allegoria with respect to violations of rights under the Allegorian constitution. As for the compensation sought, ConstructionTimeAgain Ltd demands full compensation for the penalty imposed and an additional compensation equivalent to 5 % interest on the amount of the penalty from the date of payment.

14. The Kingdom of Allegoria contests the claim. Allegoria's position is that no organ of the Allegorian state has violated EU law. In any event, a violation has not been sufficiently serious so as to engender liability. Should the Allegorian Supreme Court find a violation of EU law, Allegoria maintains that such a finding should not apply retroactively. Allegoria considers it unjust, should the state be held liable for its loyal adherence to the EU legal



order. Allegoria also underlines that although BuildingBonanza Ltd has been awarded compensation by the ECtHR it would not be beneficial to the internal market as a whole to award damages to ConstructionTimeAgain Ltd. The way to maintain fair competition is not to enlarge the circle of entities who escape penalties, that would only increase the effect of the transgressions instead of eliminating them.

15. The Allegorian Supreme Court decides to stay its proceedings and refer the following questions to the ECJ.

Q1. In circumstances such as the ones at hand, has there been a breach of EU law, and if so, is it attributable to the member state?

Q2. Can the requirement of a sufficiently serious breach, developed in the case-law on non-contractual liability of the member states and EU institutions, be upheld where the action is based on a breach of fundamental rights, and if so, is the condition satisfied in circumstances such as the ones at hand?

Request

If the answer to Q1 is in the affirmative and Q2 in the negative, the Allegorian Supreme Court asks the ECJ to limit the temporal effects of the ruling so that the findings of the ECJ will take effect from the date of the judgment.

16. The reference was received by the Registrar of the ECJ, who has assigned it case number M-110/15. In accordance with Article 23 of the Statute of the Court of Justice of the European Union, the Registrar has notified ConstructionTimeAgain Ltd (as applicant) and the Kingdom of Allegoria (as defendant) and has invited them to submit written observations on questions 1 and 2 as well as the request for limitations of the temporal effects of the judgment. The parties are requested to lodge their observations with the Moot Court by November 30th, 2015.