Neutral citation [2005] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1028/5/7/04

Victoria House
Bloomsbury Place
London WC1A 2EB

28 January 2005

Before:

Sir Christopher Bellamy (President)
Professor Andrew Bain
Marion Simmons QC

BETWEEN:

(1) BCL OLD CO LIMITED
(2) DFL OLD CO LIMITED
(3) PPF OLD CO LIMITED

Claimants

-and-

(1) AVENTIS SA
(2) RHODIA LIMITED
(3) F HOFFMAN-LA-ROCHE AG
(4) ROCHE PRODUCTS LIMITED

Defendants

Mr George Leggatt QC and Mr Aidan Robertson (instructed by Taylor Vinters) appeared for the Claimants.

Mr Brian Kennelly (instructed by Ashurst) appeared for the Defendants Aventis SA and Rhodia Limited.

Mr Mark Hoskins (instructed by Freshfields Bruckhaus Deringer) appeared for the Defendants Hoffman-La-Roche and Roche Products Limited.

Heard at Victoria House, Bloomsbury Place, London on 8 December 2004

JUDGMENT: SECURITY FOR COSTS

I INTRODUCTION

1. This judgment deals with two applications for security for costs made by the Defendants against the Claimants, which were heard by the Tribunal on 8 December 2004.

2. The Claimants in this action claim damages from the Defendants pursuant to section 47A of the Competition Act 1998 (the "1998 Act"). The Defendants are or were manufacturers of a wide range of vitamins in respect of which the Defendants, or companies in their groups, were involved in a long-standing worldwide cartel in respect of vitamins A, E, B1, B2, B5, B6, C, D3, H, Folic acid, Beta Carotene and Carotenoids (the "vitamins cartel"). The claim was lodged with the Tribunal on 30 January 2004. The main hearing is due to commence on 21 February 2005.

3. In a Decision dated 21 November 2001, the European Commission imposed fines on the undertakings involved in the vitamins cartel in respect of the breach of Article 81(1) of the EC Treaty (and Article 53(1) of the EEA Treaty). The Decision of the European Commission is addressed to thirteen undertakings, including F. Hoffmann-La Roche AG ("Roche") and Aventis SA (formerly Rhône-Poulenc) ("Aventis"). The First and Third Defendants (Aventis and Roche respectively) were addressees of the Decision. The Second Defendant, Rhodia Limited ("Rhodia"), was a wholly-owned subsidiary of Aventis until 25 June 1998 when Aventis sold 32.8% of its shareholding in Rhodia and it was listed on the Paris and New York stock exchanges. The Fourth Defendant was at all material times a wholly-owned subsidiary of Roche.

4. The Decision of the European Commission imposed fines on the undertakings involved in the vitamins cartel of a total of €855.23 million of which fines respectively €462 million and €5.04 million were imposed on Roche and Aventis. Aventis successfully applied to the European Commission for leniency pursuant to the Commission's Notice on the non-imposition or reduction of fines in cartel cases (OJ (1996) C207/4) and obtained complete immunity from fines in respect of its participation in the vitamins cartel in the vitamin A and vitamin E markets. Fines and other penalties have also been imposed *inter alia* by the Department of Justice in the United States in respect of the vitamins cartel.

5. Under Section 47A of the 1998 Act a person who has suffered loss or damage as a result of a relevant prohibition may make any claim for damages, or any other claim for a sum of money, in proceedings brought before the Tribunal. The decisions which may be relied on for the purpose of such proceedings include a decision of the European Commission that Article 81 of the EC Treaty has been infringed: section 47A (6)(d). Under section 47A(9), in determining any such claim the Tribunal is bound by the decision which establishes that the prohibition in question has been infringed, i.e. in this case the Decision of the European Commission of 21 November 2001.

6. The time for appealing against the European Commission's Decision under Article 230 of the EC Treaty to the Court of First Instance has now expired and no appeal has been lodged by the Defendants. The Commission's finding that Roche and Aventis infringed Article 81(1) of the EC Treaty is thus binding on the Tribunal.

7. The Claimants state that they carried on business throughout the time during which the vitamins cartel was in operation rearing poultry for the supply of chicken meat and eggs to supermarkets and wholesalers. Each of the Claimants states that it bought vitamins for incorporation in poultry feedstuffs in order to rear their poultry, from either the Second Defendant directly or from nutrition companies which had themselves purchased vitamins from the Defendants.

8. The Claimants claim that the Defendants caused each of the Claimants to pay higher prices than would otherwise have been the case for vitamins manufactured and supplied into the United Kingdom by reason of their implementation of, and/or giving effect to the vitamins cartel in the United Kingdom. By reason of their implementation of and/or giving effect to the vitamins cartel in the United Kingdom the Claimants allege that the Defendants acted in breach of a statutory duty imposed under section 2(1) of the European Communities Act 1972 not to infringe Article 81(1) of the EC Treaty and/or Article 53(1) of the EEA Treaty and/or a statutory duty imposed by Article 81(1) of the EC Treaty and/or Article 53(1) of the EEA Treaty (Since the hearing of this application the Claimants have also sought to add a claim based on restitution.).

9. The Claimants allege, supported by an expert report from Colin Morrell, a partner in KPMG LLP, that before and throughout the period of the vitamins cartel they paid higher sums for vitamins than they otherwise would have done. The Claimants also allege that supermarkets and wholesalers exercised buyer power that enabled them to dictate to the Claimants the prices that they were prepared to pay for chicken meat and eggs with the effect that the Claimants were unable to pass on any such increase in vitamin costs to supermarkets through increased prices for chicken or eggs. The Claimants accordingly allege that any such increase in price was borne and absorbed by the Claimants. The Claimants therefore seek damages and interest in respect of those increases from the Defendants.

10. The amount of the claims in pounds sterling are estimated by the Claimants to be as follows:

	First and Second Defendants		Third and Fourth Defendants	
	Principal	Interest	Principal	Interest
First claimant	84,738	61,614	552,214	342,788
Second claimant	143,912	95,282	11,940	7,910
Third claimant	42,014	28,606	96,547	67,180
TOTAL	270,664	185,502	660,701	417,878

11. The First Claimant was previously named Buxted Chicken Limited, the Second Claimant was previously named Daylay Foods Limited, and the Third Claimant was previously named Premier Fresh Foods Limited. The assets of the Claimants were sold to various purchasers between January 2000 and May 2001. The companies themselves were not sold and they remain non-trading subsidiaries of HMTF Poultry Limited, the ultimate holding company of which is Premier Foods plc. Premier Foods plc is a public company which is listed on the London Stock Exchange.

II THE APPLICATIONS BEFORE THE TRIBUNAL

12. There are before the Tribunal two applications for security for costs under Rule 45 of the Competition Appeal Tribunal Rules 2003 S1/2003/1372 ("the Tribunal's Rules").

13. The First and Second Defendants (Aventis and Rhodia) seek a parent company guarantee for, or payment into the Tribunal of, £195,000, for all Claimants, in aggregate, in respect of security for the First and Second Defendants costs to be provided by 21 December 2004. The grounds of the application are that the Claimants are companies and there is reason to believe that they will be unable to pay the First and Second Defendants' costs if ordered to do so. The application is limited to the provision of security for the First and Second Defendants' costs up to the 7th December 2004.

14. The application by the Third and Fourth Defendants (the Roche companies) is for the Claimants to provide security for the Third and Fourth Defendants' costs of these proceedings in the amount of £250,000 by way of parent company guarantee, in the form set out in the Annex to the application, within 5 working days of the Tribunal's order and for the proceedings to be stayed without further order if security is not provided in accordance with the Tribunal's order. The main ground of the application is that the Claimants are shell companies which have no assets, and are therefore companies in respect of which there is reason to believe that they will be unable to pay the Defendants' costs if ordered to do so.

15. The requests for security for costs were initially raised in correspondence by the Defendants in April 2004. In anticipation of a Case Management Conference fixed for 26 July 2004 at which an application for security for costs was to be considered, the Claimants provided from their ultimate parent company (Premier Foods plc) an undertaking to meet up to £30,000 in respect of the First and Second Defendants' costs and a further £30,000 in respect of the Third and Fourth Defendants' costs. That undertaking was provided in consideration of the Defendants forbearing from applying for security for costs from the Claimants until the date of the second Case Management Conference (8 December 2004).

III THE TRIBUNAL'S RULES

16. Rule 45 of the Tribunal's Rules provides:

45 Security for costs

(1) A defendant to a claim for damages may by request under this rule seek security for his costs of the proceedings.

(2) A request for security for costs must be supported by written evidence.

(3) Where the Tribunal makes an order for security for costs, it shall—

(a) determine the amount of security; and

(b) direct—

(i) the manner in which, and

(ii) the time within which

the security must be given.

(4) The Tribunal may make an order for security for costs under this rule if—

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) one or more of the conditions in paragraph 5 applies.

(5) The conditions are—

(a) the claimant is an individual—

(i) who is ordinarily resident out of the jurisdiction; and

(ii) is not a person against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention or the Regulation, as defined by section 1(1) of the Civil Jurisdiction and Judgements Act 1982;

(b) the claimant is a company or other incorporated body—

(i) which is ordinarily resident out of the jurisdiction; and
(ii) is not a body against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention or the Regulation;

(c) the claimant is an undertaking (whether or not it is an incorporated body, and whether or not it is incorporated inside or outside the United Kingdom) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than under section 47B of the 1998 Act, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

17. Rule 55 of the Tribunal's Rules provides that:

55 Costs

1) For the purposes of these rules "costs" means costs and expenses recoverable before the Supreme Court of England and Wales, the Court of Session or the Supreme Court of Northern Ireland.

(2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.

(3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under [paragraph (2)] or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session.

(4) Unless the Tribunal otherwise directs, an order made pursuant to [paragraph (2) or a direction made pursuant to paragraph (3)] may be made in the decision, if the parties so consent, or immediately following delivery of the decision.

(5) The power to award costs pursuant to paragraphs (1) to (3) includes the power to direct any party to pay to the Tribunal such sum as may be appropriate in reimbursement of any costs incurred by the Tribunal in connection with the summoning or citation of witnesses or the instruction of experts on the Tribunal's behalf. Any sum due as a result of such a direction may be recovered by the Tribunal as a civil debt due to the Tribunal.

IV THE PARTIES' SUBMISSIONS

The Defendants' Submissions

18. The First and Second Defendants (Aventis and Rhodia) rely on the following matters in support of their application for security for their costs incurred up to 7 December 2004:

a) The Claimants are non-trading "shell companies";

b) The Claimants have no fixed assets and no turnover;

c) The Claimants are owned by HMTF Poultry Limited which appears to act as a non-trading holding company;

d) The Claimants sold their assets and business not later than May 2001;

e) The Claimants have no apparent funds with which to meet the First and Second Defendants' costs;

f) The Claimants have already acknowledged the necessity of security by way of a parent company undertaking ;

g) The First and Second Defendants anticipate that the costs incurred by them up to and including 7 December 2004 amount to around £229,500.

19. The Third and Fourth defendants (the Roche companies) rely on the following matters in support of their application for security for costs, which relates to the period until the start of the trial on 21 February 2005.

a) The Claimants are shell companies which do not have any assets against which the Defendants could enforce an order for costs. The Financial Statements for the year ended 31 December 2003 appear to show that the Claimants have no material assets other than inter-company indebtedness.

b) The Claimants' ultimate parent company is a FTSE 250 listed company. Its interim results dated 10/09/2004 suggest that for the six months to 3 July 2004 it had turnover of £425.8 million and operating profit of £31.2 million.

c) The Third and Fourth Defendants have incurred costs of over £400,000 in defending these proceedings and are likely to incur costs of at least £500,000 by the time the matter comes to trial in February 2005.

d) The Third and Fourth Defendants deny that any loss or damage has been suffered by those present at the Claimants' level of the market (namely purchasers of pre-mixes, rather than of the products that were the subject of the Commission's Decision) – and they deny that the Claimants in particular (to the extent that any of them still own any right to sue) have suffered and/or proved any alleged loss or damage.

e) The Claimants have put forward no valid reason for refusing to provide security in the amount requested. The amount of costs incurred by the Defendants is not relevant to the question of the provision of security but to the assessment of the amount of security to be provided. It is not accepted by the Third and Fourth Defendants that the costs incurred by them to date are disproportionate to the amount of the claim.

f) This is the sort of case in which it is important that security is granted. Where a substantial parent company is litigating through potentially insolvent subsidiaries that would not be able to meet ultimate liabilities for costs, the parent company should not be entitled to insulation from potential costs liability.

g) The security for costs sought is half of the anticipated costs which the Third and Fourth Defendants will incur in respect of these proceedings.

The Claimants' Submissions

20. The Claimants accept that the condition set out at Rule 45(5)(c) of the Tribunal's Rules applies to them. Notwithstanding that in their written skeleton argument the Claimants recognised that the Tribunal may regard it as appropriate to order that some additional security should be provided in respect of the period from the Case Management Conference of 8 December 2004 to the end of the trial, at the hearing of the application for security for costs the Claimants submitted that the question for the Tribunal was whether it is just in all the circumstances of the case to make an order for security and if so, in what amount. However, they also submitted that they do not object to providing security in principle.

21. The Claimants resist the Defendants' applications for security for costs for the following reasons:

a) These proceedings relate only to quantum, liability having already been established by the Decision of the European Commission. The Claimants accept that there is a legitimate dispute over quantum but it is unlikely that the result will be that the Claimants have suffered no loss whatever;

b) The Defendants have made no payments to settle under Rule 43 of the Tribunal Rules and accordingly the Claimants submit that a costs order in favour of the Defendants for all the costs is an unlikely outcome;

c) ADR is contemplated and these proceedings may be compromised before trial, in which circumstances the future costs claimed in the current application by the Third and Fourth Defendants will not be incurred;

d) The costs incurred by the Defendants and in particular the Third and Fourth Defendants are wholly disproportionate in the context of the amounts claimed;

e) The Defendants have chosen to be represented by two different firms of City Solicitors in this case and it would be unreasonable for security for costs to be calculated upon both firms' fees. Any security for costs ordered should be on the basis of a single set of defence costs, it being up to the two sets of Defendants to choose how to allocate any sum ordered as between themselves;

f) The level of costs being incurred by the Third and Fourth Defendants is influenced by the Third and Fourth Defendants perception, as recorded in their Solicitors letter to the Claimants solicitors dated 22 November 2004, that "There are important issues of principle at stake (some of which are novel), and you are well aware of our clients' potential exposure to future claims in the UK and elsewhere in Europe if encouragement were to be given to those in the Claimants' position. In the circumstances our clients are entitled to seek to defend themselves properly";

g) Seeking an order for security for costs in cases such as the present one, is a weapon in the Defendant's armoury and could deter litigants, unless they have very large claims, from bringing their claims before the Tribunal because it simply will not be cost-effective to do so. Accordingly this Tribunal should consider the question of access to justice in deciding whether security for costs should be ordered. If it should be ordered, it should be moderate and reasonable in amount. In the present case the Claimants do not object to providing security in principle but submit that the amount of £60,000 which has already been provided was an appropriate sum to cover the period up to 7th December 2004 and that a further sum of £60,000 would be appropriate for the remaining period of this litigation making a total of £120,000 of security in all.

22. In response to the Claimants' oral submissions, the Third and Fourth Defendants submitted

a) That unless the Claimants first prove that higher charges were "passed on" to them and then only if the Defendants do not succeed in establishing the "passing on defence" will the Claimants be able to prove any loss. This is because the Defendants submit that the Claimants passed on any overcharge to

their customers and accordingly suffered no loss by any overcharge made to them. They also submit that the Claimants will not be able to establish that any overpayment was passed onto them by those who supplied them where such intermediate suppliers existed between the Defendants and the Claimants.

b) It is not appropriate for the Claimants to refer to one particular method of settlement (i.e. under Rule 43) and then invite the Tribunal to draw an adverse inference from it. The Tribunal should not know of or take into account offers to settle when deciding an application for security for costs.

c) It is an irrelevant consideration on a security for costs application that the matter may settle before trial.

d) It is not accepted that the costs are disproportionate to the amount claimed having regard to the complex issues which require to be decided.

e) The costs incurred by the Claimants of around £200,000 to date show that the amount of security for costs sought by the Defendants is entirely reasonable.

f) The two sets of Defendants are competitors and it is entirely appropriate for them to be separately represented.

g) The Third and Fourth Defendants have limited the amount of security for costs sought to £250,000 notwithstanding that they estimate incurring costs of £500,000. The Claimants' submission that the Third and Fourth Defendants costs are disproportionate and excessive is a red herring.

h) The parent company being a FTSE 250 listed company is in a position to give a guarantee in respect of security for costs and accordingly there is no suggestion of denying access to justice to these Claimants.

i) When considering an application for security for costs in a damages action under section 47A the Tribunal should not take into account the fact that the Defendants are wrongdoers having been found to have infringed Article 81 of

the Treaty since the rule in relation to security for costs is expressly applicable to, and only applies in respect of, such damages actions.

23. The First and Second Defendants adopted the submissions made by the Third and Fourth Defendants in so far as they applied to the First and Second Defendants application, which is limited to security for costs up to 7th December 2004 and does not cover future preparation, or the trial.

V THE TRIBUNAL'S ANALYSIS

24. This is the first case in which this Tribunal has had to consider its jurisdiction to order security for costs against a Claimant in proceedings brought under Section 47A. Under Rule 45(4) the Tribunal may make an order for costs if

> "(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) one or more of the conditions set out in paragraph 5 applies".

25. It is accepted that Rule 45(4)(b) is satisfied, in that there is reason to believe that the Claimants, who are now dormant companies, would be unable to pay the defendant's costs if advised to do so, notwithstanding that the Claimants are subsidiaries of a major public company: see Rule 45 (5)(c).

26. However, it remains a pre-requisite to making an order that the Tribunal is satisfied, having regard to all the circumstances of the case, that it is just to make such an order: Rule 45(4)(a). Although the Claimants have in their submissions recognised that the Tribunal may regard it as appropriate to order that some additional security should be provided, the Claimants have not approached this application by admitting that it is just in all the circumstances to make an order. The Tribunal must therefore consider whether it is satisfied, having regard to all the circumstances, that it is just to order the Claimants to provide security for costs. If the Tribunal is so satisfied then it must determine the amount of the security and direct the manner in which and the time within which the security must be given: Rule 45(3). It is important to keep these various steps separate. We therefore consider first the question of whether security for costs should be ordered at all.

27. When considering whether it is just to order security for costs the Tribunal must have regard to all the circumstances. In our judgment the circumstances to which this Tribunal will have regard include:

(a) Whether it appears that the application is made in order to stifle a genuine claim, or would have that effect whether or not that is the intention behind the Defendant's application;
(b) The stage of the proceedings at which the application is made and the amount of costs which the Claimant has incurred to the date of the application;
(c) The Claimant's financial position, whether it is impecunious and if so why it is impecunious and particularly, whether the impecuniosity can be attributed to the Defendant's infringement;
(d) The likely outcome of the proceedings and the relative strengths of the parties' cases, if that can be discerned without prolonged examination or voluminous evidence;
(e) Any admissions by the Defendant, open offers or the like, but the Defendant should not be adversely affected in seeking security because it had attempted to resolve the matter using alternative dispute resolution; and
(f) The provisions of Rule 55 of the Tribunal's Rules as to orders for costs.

28. More generally, the Tribunal notes that this specialised jurisdiction under section 47A has been created by Parliament with a view to facilitating claims for damages or restitution on the part of those who have suffered loss as a result of infringements of domestic or European competition law.

29. In the present case, it has not been submitted to us that any order for security for costs in this case was intended to or would have the effect of stifling the claim. However the Defendants have indicated in correspondence to which we have referred above that some of the principles at stake in this litigation are novel, that they are relevant to the defendants potential exposure to other future claims and that in the circumstances the Defendants are entitled to seek to defend themselves properly.

30. It is not suggested to us that the Claimants would be unable to provide security for costs if it was ordered. This is not surprising because the ultimate holding company of the Claimants is a FTSE 250 listed company.

31. It is also not suggested to us that the reason for the Claimants' impecuniosity is attributable to the Defendants' wrongful conduct. Nor has it been suggested to us that the application is made at an inappropriate stage. As we have referred to above, the parties agreed that the application for security for costs should be dealt with at the Case Management Conference of 8 December 2004.

32. It was submitted to us that offers or payments into court should not form part of our consideration as to the appropriateness of an order for security for costs. The parties have told us that no payment into court has been made. We have not been provided with any other information concerning offers and the Defendants made it clear to us that we should not be apprised of any offers that had or had not been made. We consider that although such evidence may be relevant to this Tribunal's consideration in other cases, in the present case on the material before us this is not a relevant consideration.

33. However, an important matter for consideration in the present case is the likely outcome of the proceedings and the relative strengths of the parties' cases. We note that this is the first case to be decided under section 47A of the Competition Act 1998. We are therefore dealing here with virgin territory. The Defendants' liability is prima facie established as a result of the Commission's decision, from which there has been no appeal. The Defendants, however, rely on what is known as the "passing on defence", which is that the Claimants have suffered no loss, either because any higher prices resulting from the cartel (which is not admitted) were absorbed by the first line purchasers who then sold on at normal prices to the Claimants, or because the Claimants themselves passed on any higher prices they may have paid to sub-purchasers. However, the questions of whether the defendants are entitled to raise the "passing on defence" (either upstream or downstream), what is the effect of any such defence, and who bears the burden of proof, are novel and important issues both in this case and for future cases. Those questions are not only relevant to actions in the

United Kingdom: courts in other European jurisdictions may also be interested in how this Tribunal decides that issue. The Third and Fourth Defendants have alluded to this aspect in their letter to the Claimants' solicitors of 22 November 2004. These issues are as yet undecided in the United Kingdom nor, as far as we know, definitively decided in any other European jurisdiction. In addition in this case there are important evidential matters to be resolved, such as whether the buying power of supermarkets prevented any "passing on", even if the "passing on defence" is available.

34. The Claimants and the Defendants in this action are pioneers. The Claimants bring this claim and the Defendants defend it without the benefit of any previous decision in their favour on the passing on defence. As the Defendants have indicated in the letter referred to above, it is important to them for this issue to be decided since they are at risk of future litigation by other potential claimants. Once the issue is decided in the current proceedings then the parties to future litigation would be in a better position to assess the strength of the quantum claim; the potential claimant would know the legal parameters for its quantum claim, and the potential defendant would be in a better position to assess the strength of the quantum being claimed against it. At this stage, however, it is unclear whether the Defendants have any defence to this action, and if so what is the extent of any such defence.

35. The present Claimants did not have the benefit of knowing whether or not the passing on defence is or may be a good defence when they commenced these proceedings. Nor is it yet decided whether it is for the Claimants to negative that defence, or for the Defendants to establish it.

36. We also bear in mind that under Rule 55(2) of the Tribunal Rules

> "(2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings."

37. That power, which is the foundation of the Tribunal's power to award costs at the end of the proceedings, is discretionary. There is no automatic rule that "costs follow the

event". Since this is the first case under Section 47A, the Tribunal has not yet had to consider, and indeed is not in a position to consider, how the jurisdiction to award costs under Rule 55(2) is to be exercised in Section 47A cases. We consider it premature to consider that matter at this stage of the proceedings, not least because of the variety of possible outcomes that could be envisaged. It seems to us that we should not, without strong reasons, pre-empt at this stage the question of whether and to what extent, the Defendants, if successful, would be entitled to costs at the end of the day. That question would need to be fully argued when all the facts have been found.

38. Whether or not the passing on defence is available to defendants will in future be an important consideration to potential claimants when they are considering whether or not to issue proceedings.

39. However, one question relevant to security of costs in the present case seems to us to be which of the parties should take the financial risk on these various issues. In the circumstances of this case and having regard to the submissions of the parties, we do not consider that the financial risk should be taken by the Claimants, as far as security for costs is concerned.

40. It was submitted to us by the Defendants that this Tribunal's jurisdiction to order security for costs under Rule 45 applies only to damages claims under section 47A and, accordingly, must be available in principle to a party who has been found to infringe the competition rules. We accept that submission. However the question which the Tribunal must consider on a security for costs application in any particular case is the risk of the Defendant securing a costs order in its favour, and then being exposed to an impecunious Claimant not being in a position to comply with the terms of that order. In cases under section 47A not involving a possible passing on defence that will not be the position since the Claimant will be entitled to an order of damages. The issue before the Tribunal will only be as to quantum. The Defendants will not, in those circumstances, normally be entitled to costs, subject to special factors such as to payments into court, or unreasonable or vexatious conduct in the part of the Claimants. No such considerations arise in the present case.

41. There may be cases where the Defendants can show that the claim for damages is plainly vexatious or very unlikely to succeed. In those circumstances the Defendants may be able to satisfy the Tribunal that a costs order in its favour would be a likely outcome and that it would be just to make an order for security for costs. Again, this consideration does not apply here. Although the Defendants put the amount of the damage in issue, it could not be reasonably suggested that, apart from the passing on defence, the Claimants have suffered no loss.

42. Bearing the foregoing in mind, we are not satisfied, having regard to all the circumstances of this case, that it is just to make an order for security for costs in favour of the Defendants.

43. The essential reason is that, at this stage of the proceedings, we are unable to be satisfied that there is a substantial likelihood that the Defendants may in due course benefit from a costs order in their favour. On the contrary, the Claimants' have, at first sight, a good claim, and the only reason for awarding costs against the Claimants would be if it were established that, in law, "passing on" was a good defence, that the defence applied to the facts of this case, and that in those circumstances the Claimants' damages were properly to be reduced to nil or a very low figure. Moreover, the Tribunal has not yet decided how its ultimate jurisdiction to award costs under Rule 55(2) is likely to be exercised. In these circumstances we consider it just that at this stage of the proceedings the possible risk as to costs should be borne by the Defendants, who are before the Tribunal as infringers of a public law prohibition, rather than by the Claimants in whose favour liability is, at least prima facie, established.

44. However in the event that the Tribunal had considered it just to make an order for security for costs it would then have had to determine the amount as well as the manner in which and time within which the security must be given.

45. Under Rule 45(3) this Tribunal has a discretion as to the amount to be ordered and must exercise that discretion on a judicial basis. In exercising that discretion this Tribunal will determine the amount of security it considers to be just having regard to all the circumstances. Where the Claimant is impecunious the Tribunal will not fix a

sum which the Claimant cannot pay and which may therefore have the effect of stifling a genuine claim. Any amount ordered should not be illusory or oppressive but should reflect a proper evaluation of the Defendants' likely exposure to costs.

46. We have not been provided by the Defendants with sufficient material upon which we can make such an evaluation. Although the Claimants have indicated that they have incurred costs of £200,000 up to the case management conference of 8 December 2004, of which £130,000 is for lawyers and £70,000 is for experts, we have not found this indication of assistance because the sum of £130,000 includes the costs of various applications which have been made to us and on which we are being invited to make distinct costs orders. The Claimants submitted that the appropriate amount to be ordered which they termed as "moderate and reasonable" was £120,000 to include the £60,000 already provided which related to the costs to date. However, no breakdown was provided to us of these sums. The Third and Fourth Defendants are seeking £250,000 to include the trial in addition to the £30,000 already provided. The First and Second Defendants were seeking security for costs only up to the date of this case management conference in the sum of £195,000 and they submitted that the costs already incurred by them were in the region of £229,500. However, we have not been provided with any breakdown of either the Claimants or the Defendants costs to date or a detailed breakdown of their estimate of future costs.

47. On the information so far provided to us as outlined above, had we been satisfied that it was just to make a security for costs order we would have had difficulty in evaluating the proper amount to order, without a proper breakdown of the costs incurred and anticipated. A security for costs application should be supported by such evidence.

48. Finally we note that the Third and Fourth Defendants draft order for security for costs attached to their applications provide that if the security is not given within 5 working days of the Tribunal order the action should be stayed without further order. The Tribunal is of the view that subject to the submissions made in any particular case, we are likely to follow the practice in the High Court where it has been found not to be usually convenient or appropriate to order an automatic stay of the proceedings pending the provision of the security. We would follow this practice so that the

preparation of the case for trial was not delayed or disrupted. Instead we would normally give the claimant a reasonable time within which to provide the security and the other party liberty to apply to the Tribunal in the event of default.

Christopher Bellamy	Andrew Bain	Marion Simmons

Charles Dhanowa
Registrar [ ] 2005