Neutral citation: [2007] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A 2EB

17 October 2007

Before:
MARION SIMMONS QC
(Chairman)
ADAM SCOTT TD
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) EMERSON ELECTRIC Co.
(2) VALEO S.A.
(3) ROBERT BOSCH GmbH
(4) VISTEON CORPORATION
(5) ROCKWELL AUTOMATION Inc.

Claimants

-v-

(1) MORGAN CRUCIBLE COMPANY plc

Defendant

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(1) EMERSON ELECTRIC Co.
(2) VALEO S.A.
(3) ROBERT BOSCH GmbH
(4) VISTEON CORPORATION
(5) ROCKWELL AUTOMATION Inc

Proposed Claimants

-v-

(2) SCHUNK GmBH
(3) SCHUNK KOHLENSTOFFTECHNIK GmBH
(4) SGL CARBON AG

Proposed Defendants

Mr. Derek Spitz (instructed by Crowell & Moring) and Ms Jane Wessel of Crowell & Moring appeared for the Claimants.

Mr. Robert Osgood of Sullivan & Cromwell and Mr. Ben Rayment (instructed by Sullivan & Cromwell) appeared for the Defendant.

Heard at Victoria House on 26 June 2007 and 26 September 2007.

JUDGMENT (Rule 31)

CONTENTS

I INTRODUCTION

1. The Claimants have lodged a claim for damages with the Tribunal pursuant to section 47A of the Competition Act 1998 (as amended) ("the 1998 Act"), which we refer to in this judgment as the "UK proceedings".

2. This judgment concerns the following three issues which have arisen in the UK proceedings to date:

   (i) The first issue is whether the time for the purposes of the limit in Rule 31 of *The Competition Appeal Tribunal Rules 2003* (S.I. 2003, No. 1372) ("the Tribunal's Rules") for making a claim for damages pursuant to section 47A of the 1998 Act has begun to run.

   (ii) The second issue is whether it is possible for the parties, by virtue of an agreement between them dated 11 February 2006 (the "Tolling Agreement"), to extend the time period in Rule 31 of the Tribunal's Rules for bringing a claim for damages under section 47A.

   (iii) The third issue is whether the Tribunal may grant an extension of time even after the time limit in Rule 31 has expired by virtue of the power in Rule 19(2)(i) of the Tribunal's Rules.

3. We note that the second and third issues only arise if the time period for commencing the UK proceedings has expired.

II SUMMARY OF THE TRIBUNAL'S CONCLUSIONS

4. For the reasons set out below, we unanimously find that:

   (i) The time for the purposes of the limit in Rule 31 has not yet begun to run.

(ii) If our judgment on the first issue is wrong and time has begun to run, the Tolling Agreement cannot extend the time period prescribed by Rule 31 of the Tribunal's Rules.

(iii) If our judgment on the first issue is wrong and the time period to bring a claim for damages under section 47A expired on 14 February 2006, then the Tribunal has jurisdiction to grant an extension of time by virtue of its power in Rule 19(2)(i) of the Tribunal's Rules.

III BACKGROUND TO THE CLAIM FOR DAMAGES

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.

6. The Claimants in the UK proceedings are direct purchasers of electrical and mechanical carbon and graphic products. Specifically, the Claimants are Emerson Electric Co., Valeo S.A., Robert Bosch GmbH, Visteon Corporation and Rockwell Automation Inc. For convenience, the Tribunal shall refer to these companies collectively in this judgment as the "Emerson Claimants".

7. A claim for damages may be brought before the Tribunal only where it has been established – by either the OFT, those sectoral regulators who enjoy concurrent powers under the 1998 Act, the Tribunal or the European Commission – that an infringement of competition law has occurred. Section 47A(6) of the 1998 Act specifies the infringements of competition law in respect of which a claim may be made and includes a decision of the European Commission that the prohibition in Article 81(1) of the Treaty establishing the European Community (hereinafter the "EC Treaty" or "EC") has been infringed: see section 47A (6)(d) of the 1998 Act.

8. The Emerson Claimants rely on the European Commission Decision of 3 December 2003 (Case No C.38.359 — *Electrical and mechanical carbon and graphite products*) (2004/420/EC) (hereafter the "Decision").

9. Morgan Crucible Company plc ("Morgan Crucible"), Schunk GmbH and Schunk Kohlenstofftechnik GmbH (together "Schunk") and SGL Carbon AG ("SGL") produce electrical and mechanical carbon and graphite products. In the Decision, the European Commission found that these three undertakings had infringed the prohibition in Article 81(1) EC. From October 1988 to December 1999 these three undertakings participated in a worldwide cartel in respect of electrical and mechanical carbon and graphite products (the "carbon and graphite products cartel"). A summary of the infringement is set out in section IV below.

10. In the Decision, the European Commission imposed fines totalling €101.44 million on the undertakings involved in the carbon and graphite products cartel in respect of the breach of Article 81(1) of the EC Treaty (and, from 1 January 1994, Article 53(1) of the Agreement on the European Economic Area ("the EEA Treaty")).

11. The Decision is addressed to six undertakings, including C. Conradty Nürnberg GmbH, Hoffmann & Co. Elektrokohle AG, Le Carbone Lorraine S.A. ("Carbone"), Morgan Crucible, Schunk and SGL (together, the "addressees"). The European Commission published the names of the addressees and the main content of the Decision in the *Official Journal of the European Union*: OJ 2004 L 125, p. 45[1].

12. The Emerson Claimants have brought a claim for damages against the following addressee: Morgan Crucible, who is the Defendant in the present action. The Emerson Claimants also propose to make similar claims against other addressees.

13. Sections 47A(5)(b) and 47A(8) of the 1998 Act provide for the period within which a monetary claim may be brought before the Tribunal. Section 47A(5)(b) provides that, when a claim is made in reliance on a decision or finding of the European Commission, no such claim may be made

[1] A non-confidential version of the full text of the decision can be found on DG COMP's website at http://europa.eu.int/comm/ competition/index_en.html.

in section 47A proceedings otherwise than with the permission of the Tribunal during any period specified in sub-section (8).

14. The periods specified in section 47A(8) are (a) the period during which proceedings against a decision or finding may be instituted in the European Court; and (b) if any such proceedings are instituted, the period before those proceedings are determined. We use the term "EC proceedings" in this judgment to refer to the proceedings mentioned in sub-section (8)(a) and (b).

15. Rule 31 of the Tribunal's Rules makes provision for time limits in respect of damages actions. A claim for damages must be made within a period of two years beginning with the relevant date. The relevant date is the later of the end of the period specified in section 47A(8) of the 1998 Act and the date on which the cause of action accrued.

IV SUMMARY OF THE INFRINGEMENT

16. In the Decision the European Commission condemned the addressees for having participated in a single and continuous infringement of Article 81(1) of the EC Treaty and, from 1 January 1994, Article 53(1) of the EEA Treaty, covering the whole of the EEA territory. The Commission found in particular that they had:

- agreed and occasionally updated a uniform, highly detailed method of calculating prices to customers, covering the main types of electrical and mechanical carbon and graphite products, different types of customers and all EEA countries where demand existed, with a view to arriving at identically or similarly calculated prices for a wide variety of products;
- agreed regular percentage price increases for the main types of electrical and mechanical products and all EEA countries where demand existed, for different types of customers;
- agreed on certain surcharges to customers, on discounts for different types of delivery and on payment conditions;
- agreed account leadership for certain major customers, agreed to freeze market shares in respect of those customers, and regularly exchanged pricing information and agreed specific prices to be offered to those customers;

- agreed a ban on advertising and on participation in sales exhibitions;
- agreed quantity restrictions, price increases or boycotts in respect of re-sellers that offered potential competition;
- agreed price undercutting in respect of competitors; and
- operated a highly refined machinery to monitor and enforce their agreements.

17. Morgan Crucible successfully applied to the European Commission for leniency pursuant to its *Notice on the non-imposition or reduction of fines in cartel cases* (OJ 1996 C 207, p.4; "the Leniency Notice") and obtained complete immunity from fines in respect of its participation in the carbon and graphite products cartel. In that regard, the European Commission observed that, as a result of its leniency statement and various related submissions, Morgan Crucible was the first undertaking to adduce decisive evidence of the existence of the infringement, in accordance with the condition set out in Section B of the Leniency Notice (see recitals 319 to 321 of the Decision).

V THE EC AND US PROCEEDINGS

(a) The EC proceedings before the European Court

18. The period of time allowed for commencing proceedings for annulment of the Decision to the Court of First Instance of the European Communities (hereinafter "the CFI") under Article 230(1) of the EC Treaty expired on 14 February 2004.

19. The Decision has been challenged by SGL, Schunk and Carbone in Cases T-68/04, T-69/04 and T-73/04; the subject-matter of those proceedings brought before the CFI was published in the *Official Journal of the European Union* (OJ 2004 C 106, pp. 71-72). Those actions have yet to be determined.

20. Morgan Crucible did not bring an action for annulment of the Decision.

(b) The US proceedings before the District Court

21. Between 4 November 2002 and 21 April 2003 various purchasers of electrical carbon products, including the Emerson Claimants, (together "the US plaintiffs") filed a class-action suit on behalf of foreign and domestic purchasers of electrical carbon products pursuant to the Sherman Act, 15 U.S.C. § 1; the Clayton Act, 15 U.S.C. §§ 15 and 26; and the Michigan Antitrust Reform Act, Mich. Comp. Laws §§ 445.772.

22. The US plaintiffs' complaint alleged that the defendants, foreign and domestic suppliers of electrical carbon products, had engaged in a price-fixing and market-sharing conspiracy, raising the price of electrical carbon products[2] to customers in the United States and to customers in foreign countries: see *In re Electrical Carbon Products Antitrust Litigation* 447 F.Supp.2d 389 (D.N.J., August 30, 2006). The US plaintiffs sought treble damages, injunctive relief and recovery of lawyers' fees.

23. These civil complaints were filed in various federal courts and transferred to the District Court for the District of New Jersey for co-ordinated proceedings through the Judicial Panel on Multidistrict Litigation (see *In re Electrical Carbon Products Antitrust Litigation* 259 F.Supp.2d 1374 (Jud.Pan.Mult.Lit., April 21, 2003)).

24. On 11 May 2005 the District Court gave preliminary approval of proposed settlements between the US plaintiffs and four defendants: Morgan Crucible, Carbone, SGL and Schunk; each settling defendant included various companies belonging to the same corporate group. The proposed settlement fund for the original settlements was $24.2 million. The District Court

[2] For the purposes of *In re Electrical Carbon Products Antitrust Litigation* 447 F.Supp.2d 389 (D.N.J., 2006), footnote 1: ""Electrical Carbon Products", for purposes of this case, as defined by the "Third Consolidated Amended Complaint", means: "(1) carbon brushes used in consumer products, including fractional horsepower brushes; (2) carbon brushes and current collectors (including pantographs but excluding brush holders and commutators) for automotive and traction-transit applications; (3) carbon brushes used in battery-operated vehicles; and (4) mechanical carbon products for use in pump and compressor industries. The term 'traction-transit applications' includes railroad applications"".

approved forms of notice and authorised dissemination of class notices and proofs of claim to potential members of the class action.

25. Shortly before the date for requesting final exclusion from the class in 2005, 13 entities, including the Emerson Claimants, gave notice of their intention to opt-out of the settlement (the "opt-out plaintiffs").

26. On 23 September 2005, the opt-out plaintiffs filed suit in the Eastern District of Michigan in *Emerson Electric Co. v The Morgan Crucible Company plc*. In December 2005 that case was transferred to the District Court for the District of New Jersey.

27. Before the District Court gave its final approval of the settlements, some of the opt-out plaintiffs, including the Emerson Claimants, re-joined the proposed settlements reached with Morgan Crucible, Schunk, and SGL (i.e. the Defendant and the proposed Defendants in the UK proceedings before the Tribunal). At the same time as re-joining the proposed settlements, the opt-out plaintiffs "entered into agreements with the Morgan, Schunk, and SGL Defendants relating to matters outside the scope of this class action"[3]. One such matter was the Tolling Agreement between the Emerson Claimants and Morgan Crucible dated 11 February 2006.

28. The Emerson Claimants did not enter into a settlement agreement with Carbone.

29. On 30 August 2006 the District Court handed down its judgment *In re Electrical Carbon Products Antitrust Litigation* 447 F.Supp.2d 389 (D.N.J., 2006), giving its reasons for certifying the class of US plaintiffs and for approving the proposed settlement agreements. The District Court held in particular that the proposed settlements between the US plaintiffs and Morgan Crucible, Carbone, Schunk and SGL were fair, reasonable and adequate to the

[3] See *In re Electrical Carbon Products Antitrust Litigation* 447 F.Supp.2d 389 (D.N.J., 2006), at footnote 6.

plaintiffs[4]. The settlement fund totalled $21.9 million, reduced by lawyers' fees and other expenses.

30. Pursuant to the District Court's judgment of 30 August 2006, the Emerson Claimants entered into a settlement agreement with Morgan Crucible, Schunk and SGL. The settlement agreements were entered into on 21 February 2006 and effective from 3 February 2005.

31. In respect of the opt-out plaintiffs' claims against the Carbone defendants, on 9 August 2007 the District Court dismissed, amongst others, those claims arising out of foreign purchases of electrical carbon products: see *Emerson Electric Co. v Le Carbone Lorraine, S.A.*, 500 F.Supp.2d 437, (D.N.J., 2007).

VI THE CLAIM FOR DAMAGES

32. The claim for damages in this case was lodged with the Tribunal Registry on 9 February 2007. We set out below a short summary of the claim form and in particular the nature of the claim and relief sought.

33. The Emerson Claimants state that they and/or their subsidiaries or affiliates are all direct purchasers of electrical and mechanical carbon and graphite products. The Emerson Claimants allegedly purchased substantial quantities of those products from one or more of Morgan Crucible, Schunk and SGL throughout the period during which the carbon and graphite products cartel existed.

34. The Emerson Claimants claim that Morgan Crucible, Schunk and SGL, in conjunction with the other addressees of the Decision, caused each of them to pay higher prices than would otherwise have been the case for carbon and graphite products by reason of their implementation of, and/or giving effect to the carbon and graphite products cartel in the United Kingdom. Accordingly, the Emerson Claimants allege that Morgan Crucible, Schunk and SGL acted in

[4] Within the meaning of Rule 23(e)(1)(C), of the US *Federal Rules of Civil Procedure* 28 United States Code Annotated.

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.

35. The Emerson Claimants claim that they are entitled to recover from Morgan Crucible, Schunk and SGL the excess amounts paid by each claimant to a particular defendant as a result of the carbon and graphite products cartel.

36. The Emerson Claimants also allege that Morgan Crucible, Schunk and SGL are joint tortfeasors and, consequently, each bears responsibility for the whole loss or damages caused by the infringement condemned by the Decision.

37. The Emerson Claimants seek damages against Morgan Crucible, Schunk and SGL, constituted by the difference between the price which they in fact paid for the carbon and graphite products as a consequence of the infringement of Article 81(1) and the price which would have prevailed in the absence of that infringement. At this stage of the UK proceedings the Emerson Claimants submit that it is not possible to determine the precise quantum of the losses and damage suffered by each claimant; additional documentary material and expert economic analysis will be required in that regard.

38. In the alternative to their compensatory claims in damages, the Emerson Claimants claim restitution from Morgan Crucible, Schunk and SGL of all monies paid for the carbon and graphite products to those defendants in excess of the price which would have prevailed in the absence of the infringement.

39. The Emerson Claimants intend, if appropriate, following disclosure and inspection of documents, to seek an award of exemplary damages against Morgan Crucible, Schunk and SGL for an amount to be determined.

VII THE UK PROCEEDINGS BEFORE THE TRIBUNAL

40. The first case management conference was held on 13 March 2007. On the same day, the Tribunal ordered the following matters to be decided at an oral hearing:

> "(a) whether the claimants must request the Tribunal to grant permission for a claim for damages to be initiated against the first defendant under section 47A(5)(b) of the Act and Rule 31(3) of the Rules;
>
> (b) if permission is so required, whether the Tribunal should permit the claim for damages against the first defendant to proceed; and
>
> (c) the construction of section 47A of the Competition Act 1998 in light of the tolling agreement between the claimants and the first defendant dated 11 February 2006"

41. The hearings took place on 26 June 2007 and 26 September 2007. At the hearing on 26 June 2007, which was part heard, the Tribunal decided that it would not be appropriate to give any decision until the United States District Court for the District of New Jersey had given its judgment in *Emerson Electric Co. v Le Carbone Lorraine, S.A.*.

42. As noted in paragraph 31 above, on 9 August 2007 the US District Court handed down its judgment in *Emerson Electric Co. v Le Carbone Lorraine, S.A.* 500 F.Supp.2d 437, (D.N.J., 2007).

VIII RELEVANT STATUTORY FRAMEWORK

43. Section 47A of the 1998 Act was inserted by section 18 of the Enterprise Act 2002 and provides:

> "**47A Monetary claims before Tribunal**
>
> (1) This section applies to-
>
> (a) any claim for damages, or
>
> (b) any other claim for a sum of money,
>
> which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section "relevant prohibition" means any of the following-

(a) the Chapter I prohibition;

(b) the Chapter II prohibition;

(c) the prohibition in Article 81(1) of the Treaty;

(d) the prohibition in Article 82 of the Treaty;

(e) the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community;

(f) the prohibition in Article 66(7) of that Treaty.

(3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings-

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are -

(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;

(b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or

(e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.

(7) The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in subsection

(6)(a), (b) or (c) may not be brought without permission are-

(a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46, section 47 ...;

(b) in the case of a decision of the OFT which is the subject of an appeal mentioned in paragraph (a), the period following the decision of the Tribunal on the appeal during which a further appeal may be made under section 49 or under those Regulations;

(c) in the case of a decision of the Tribunal mentioned in subsection (6)(c), the period during which a further appeal may be made under section 49 or under those Regulations;

(d) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal;

and, where any appeal mentioned in paragraph (a), (b), (c) or (d) is made, the period specified in that paragraph includes the period before the appeal is determined.

(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are-

(a) the period during which proceedings against the decision or finding may be instituted in the European Court; and

(b) if any such proceedings are instituted, the period before those proceedings are determined.

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.

(10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim."

44. In this context "the European Court" means the European Court of Justice and the Court of First Instance of the European Communities: see section 59(1) of the 1998 Act.

45. Section 15 of the Enterprise Act 2002 provides:

> "**15 Tribunal rules**
>
> (1) The Secretary of State may, after consulting the President and such other persons as he considers appropriate, make rules (in this Part referred to as "Tribunal rules") with respect to proceedings before the Tribunal.
>
> (2) Tribunal rules may make provision with respect to matters incidental to or consequential upon appeals provided for by or under any Act to the Court of Appeal or the Court of Session in relation to a decision of the Tribunal.
>
> (3) Tribunal rules may—
>
> …
>
> (c) contain incidental, supplemental, consequential or transitional provision.
>
> (4) The power to make Tribunal rules is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
>
> (5) Part 2 of Schedule 4 (which makes further provision about the rules) has effect, but without prejudice to the generality of subsection (1)."

46. Part 2 of Schedule 4 to the Enterprise Act 2002 provides, so far as material:

> "PART 2
> TRIBUNAL RULES
>
> *General*
>
> 9. In this Schedule "the Tribunal", in relation to any proceedings before it, means the Tribunal as constituted (in accordance with section 14) for the purposes of those proceedings.
>
> 10. Tribunal rules may make different provision for different kinds of proceedings.
>
> *Institution of proceedings*
>
> 11. — (1) Tribunal rules may make provision as to the period within which and the manner in which proceedings are to be brought.
>
> (2) That provision may, in particular—
>
> (a) provide for time limits for making claims to which section 47A of the 1998 Act applies in proceedings under section 47A or 47B;
>
> (b) provide for the Tribunal to extend the period in which any particular proceedings may be brought; and

(c) provide for the form, contents, amendment and acknowledgement of the documents by which proceedings are to be instituted.

…

15. Tribunal rules must ensure that no proceedings are rejected without giving the parties the opportunity to be heard."

47. The Tribunal's Rules applicable to claims for damages under sections 47A of the 1998 Act are principally those set out in Part IV of the Tribunal's Rules. However Parts I and V of the Tribunal's Rules also apply to claims for damages. Under Part II of the Tribunal's Rules the Tribunal's case management powers in Rules 17 to 24 are applicable to claims for damages: see Rules 30 and 44(1).

48. Rule 31 of the Tribunal's Rules provides:

"**Time limit for making a claim for damages**

31. - (1) A claim for damages must be made within a period of two years beginning with the relevant date.

(2) The relevant date for the purposes of paragraph (1) is the later of the following –

(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;

(b) the date on which the cause of action accrued.

(3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant.

(4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A."

IX THE ISSUES WHICH THE TRIBUNAL HAS TO DECIDE

49. The first issue before us is whether, in respect of the time limit contained in Rule 31 of the Tribunal's Rules, time has begun to run. If time for bringing such a claim has not begun to run, then permission is required to bring a claim before the Tribunal for damages, or other sums of money, arising from a

specified infringement of competition law, having regard to section 47A(5)(b) and section 47(8) of the 1998 Act.

50. The first issue is raised because SGL (Case T-68/04), Schunk (Case T-69/04), and Carbone (Case T-73/04) have brought applications before the CFI for annulment of the Decision of the European Commission (see paragraph 19 above). The applicants in these EC proceedings request the CFI to annul the Decision in so far as it concerns the applicant and/or cancel or reduce the fine. We understand from the CFI Registrar that the written procedures in these cases were closed in October 2004 and it is anticipated that a hearing will take place shortly.

51. The second and third issues relate to extension of time. Those issues are raised because if time has started to run under Rule 31 then the UK proceedings are out of time unless either the Tolling Agreement is effective to extend time (the second issue) or unless the Tribunal has jurisdiction to extend time under Rule 19(2)(i) (the third issue).

X ISSUE 1: HAS TIME BEGUN TO RUN FOR THE PURPOSE OF BRINGING A MONETARY CLAIM UNDER SECTION 47A?

(a) Emerson Claimants' submissions

52. The Emerson Claimants' primary submission is that the time limit in Rule 31 has begun to run for the purpose of bringing a claim for damages under section 47A of the 1998 Act. Accordingly, the Emerson Claimants submit that the permission of the Tribunal is not required in order to initiate a claim against Morgan Crucible. In support of this submission, the Emerson Claimants rely on the fact that Morgan Crucible has not instituted EC proceedings against the Decision before the CFI.

53. The Emerson Claimants submit that, whether or not Morgan Crucible is entitled to rely on the EC proceedings instituted by the other addresses of the Decision is not resolved by reference to the provisions of section 47A or the Tribunal's Rules. It is not clear whether the reference in section 47A(8)(b) to

"any such proceedings" refers back to the EC "proceedings" referred to in section 47A(8)(a) and whether the defendant to the UK proceedings before the Tribunal must also be a party to the EC proceedings.

54. The Emerson Claimants also submit that, as a matter of EC law, the Decision is final and binding with respect to Morgan Crucible. In this regard, they refer to settled case-law that a decision adopted by a Community institution which has not been challenged by its addressee within the time-limit laid down by the fifth paragraph of Article 230 of the EC Treaty becomes definitive as against that person: see Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 13.

55. The Emerson Claimants further submit that, if an addressee of a Decision decides to bring an action for annulment, the matter to be decided by the CFI relates only to those aspects of the Decision which concern that addressee. Unchallenged aspects concerning other addressees do not form part of the matter to be decided by the European Court: see Case C-310/97 *Commission v AssiDomän Kraft Products AB and Others* [1999] ECR I-5363, paragraph 53.

56. In the present case, even if the CFI were to annul the Decision with respect to one or more of the addresses who are parties to the EC proceedings, the Emerson Claimants submit that such annulment would have no effect upon the Decision in relation to an addressee in the position of Morgan Crucible who is not a party to the EC proceedings.

57. In the Emerson Claimants' submission, it follows that the EC proceedings will not impact on Morgan Crucible's liability to them. The finding of liability, in the form of the Decision which underpins the claim for damages in this case, is not subject to reconsideration or revision with respect to Morgan Crucible.

58. In these circumstances, the Emerson Claimants submit that there is no need for and it would be inappropriate to imply or read into the statutory scheme a provision which would entitle a non-party to the EC proceedings to insist that a claim based on the Decision cannot be made without the permission of the

Tribunal because other addressees have instituted EC proceedings. It follows that the permission of the Tribunal is not required for the Emerson Claimants to initiate a claim for damages against Morgan Crucible.

59. At the hearing on 26 June 2007 the Emerson Claimants advanced an alternative, secondary submission, (and repeated in their skeleton argument of 17 September 2007) that the time has not begun to run for commencing a claim for damages under section 47A because EC proceedings are on foot.

(b) Morgan Crucible's submissions

60. Morgan Crucible submit that the consequence of section 47A(8) of the 1998 Act and Rule 31 of the Tribunal's Rules is that if there is a multi-party case and any one of the parties is taking an appeal against the decision that is to be used to establish liability, the only way a claim can be brought before a final decision on the European Commission's decision – if there is an application for annulment of that decision – is if the prospective claimants come to this Tribunal and ask for permission.

61. Morgan Crucible submits that it would not be just to grant permission to proceed against it or any of the proposed defendants during the period in which EC proceedings instituted by Schunk and SGL are pending before the CFI. If the Tribunal was not minded to refuse permission at this stage, the question of whether to grant permission against Morgan Crucible should not be entertained without Morgan Crucible (and the Tribunal) having the opportunity to consider the observations of the other proposed defendants with EC proceedings pending before the CFI.

(c) Tribunal's analysis

62. The first issue requires us to decide the true meaning of sections 47A(5)(b) and 47A(8) of the 1998 Act and how these provisions apply to the particular circumstances of the case presently before us. Does section 47A(8) apply in circumstances where the UK proceedings are brought against an addressee of the Decision who is not party to the EC proceedings?

63. We consider that the first question to ask is what is the ordinary or plain meaning of sub-sections (5) and (8), having due regard to general principles of Community law and the overall structure and purpose of the 1998 Act.

64. Section 47A(5)(b) and 47A(8)(b), read with section 47A(8)(a), provide that where "any such proceedings" (i.e. the EC proceedings) may be, or have been, instituted in the European Court, then a claim for damages under that provision may only be brought with the permission of the Tribunal. We consider that the phrase "if any such [EC] proceedings are instituted" in sub-section (8) clearly indicates that as long as "*any*" proceedings have been brought in the European Court, permission of the Tribunal is required to bring a monetary claim under section 47A.

65. We consider this to be so where the proceedings in the European Court have been brought by any one or more of the addressees of the decision in question or, indeed, by a third party for whom the decision is of direct and individual concern within the meaning of Article 230(4) of the EC Treaty.

66. In our judgment, whilst EC proceedings against the Decision are on foot, the Emerson Claimants require permission to commence UK proceedings before the Tribunal, even when brought against an addressee of the Decision, such as Morgan Crucible, who has not instituted EC proceedings.

67. The plain construction of section 47A means that time has not yet begun to run. The Tribunal is given a discretion to give permission for a claim to be made before the end of the period specified in section 47A(8) of the 1998 Act. Such discretion provides a flexible approach which can be exercised in accordance with the particular circumstances of each case, but may only be exercised after taking into account any observations of a proposed defendant (see Rule 31(3) of the Tribunal's Rules).

68. We consider that the plain meaning of the provisions of section 47A of the 1998 Act, set out above, secures the just, expeditious and economical conduct of proceedings before the Tribunal. The Emerson Claimants propose to bring

claims before the Tribunal against a number of the addressees of the Decision. The reason for bringing the UK proceedings was to protect their position in the event that the time limit for making a monetary claim was about to expire.

69. Since there are no Community rules establishing the procedure for bringing a claim for damages following a Decision of the European Commission, it is for the Member States and their domestic legal systems to establish the detailed procedure for bringing such private actions and in so doing Member States must comply with the principle of equivalence and the principle of effectiveness. It was not submitted to us that there had been any failure to comply with these principles in enacting section 47A of the 1998 Act and Rule 31 of the Tribunal's Rules. We see no basis for suggesting that there has been any failure to comply with these principles.

70. It was submitted by the Emerson Claimants that where an addressee of a Commission decision, such as the Defendant, does not commence EC proceedings, then that decision continues, as a matter of Community law, to be valid and binding on that addressee in all its aspects, notwithstanding that other addressees of the Decision successfully appeal against the Decision against them: see Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833, paragraph 13. The Emerson Claimants have also drawn our attention to the further principle of EC law that, where some addressees of an infringement decision bring an action for annulment, the matter to be decided by the European Court relates only to those aspects of the decision which concern those addressees. Unchallenged aspects concerning other addressees do not form part of the matter to be tried by the European Court: see Case C-310/97 P *Commission v AssiDöman Kraft Products AB* [1999] ECR 5363, paragraphs 51-53. The Emerson Claimants submit that since any annulment of the Decision would have no effect on the Decision in relation to Morgan Crucible, it follows that the reference to "decision" in section 47A(8) of the 1998 Act is a reference not to the whole of the decision of the European Commission but instead refers only to that part of the decision which is the subject of the appeal to the EC.

71. In our judgment the word "decision" in section 47A(8) of the 1998 Act cannot be given such a restrictive meaning. When the European Court of Justice stated the principles now relied upon by the Emerson Claimants, it was considering the scope of Article 230 of the EC Treaty and not the question of the true construction of section 47A of the 1998 Act. Accordingly we do not consider that the principles expounded by the Court of Justice to meet different considerations have any application or relevance to the true construction of section 47A of the 1998 Act.

72. Accordingly, the two year period referred to in Rule 31 of the Tribunal's Rules has not yet begun to run.

(d) Tribunal's conclusion on issue 1

73. In our judgment, on the true construction of section 47A of the 1998 Act, the time for making a claim for damages pursuant to section 47A of the 1998 Act has not begun to run.

XI ISSUE 2: IF TIME HAS BEGUN TO RUN, CAN THE PARTIES EXTEND THE TIME LIMIT BY ENTERING INTO THE TOLLING AGREEMENT?

(a) Emerson Claimants' submissions

74. In connection with the settlement of the US proceedings, the Emerson Claimants entered into a Tolling Agreement with Morgan Crucible on 11 February 2006. The Tolling Agreement applies to the Emerson Claimants' "Foreign Claims"[5]. The Emerson Claimants submit that the definition of Foreign Claims clearly contemplates claims based upon the findings contained in the European Commission's Decision. According to the Emerson Claimants, the Tolling Agreement applies to the UK proceedings before the Tribunal.

[5] According to clause 1(b) of the Tolling Agreement "Foreign Claims" "shall mean claims (i) based on allegations of an agreement among competitors with respect to the prices charged for Electrical Carbon Products manufactured and sold to the Plaintiffs by the Morgan Defendants outside of the United States of America during the period between October of 1988 and December of 1999; (ii) arising and asserted exclusively under the laws of jurisdiction(s) located outside the territorial boundaries of the United States of America and (iii) asserted exclusively in the courts of such non-U.S. jurisdiction(s)."

75. The Emerson Claimants submit that the meaning of the Tolling Agreement must be interpreted in light of its context and overall purpose: the Emerson Claimants agreed to opt-in to the settlement of the US class action against, among others, Morgan Crucible on the terms that had been agreed in the settlement agreement which is effective from 3 February 2005. The parties accordingly agreed that the Emerson Claimants would have a further twelve months from 14 February 2006 within which to bring their Foreign Claims in non-US courts. The twelve month tolling period was clearly part of the consideration for the Emerson Claimants to settle their US antitrust claims. A further period of twelve months within which to bring the Foreign Claims was bargained for and agreed between the parties.

76. According to the Emerson Claimants, the effect of paragraph 4 of the Tolling Agreement is to postpone the running of the limitation period prescribed by Rule 31 of the Tribunal's Rules by a period of twelve months or alternatively to preclude Morgan Crucible from relying upon the running of the two year time period. The Emerson Claimants refer in particular to paragraph 4(b) of the Tolling Agreement which states that Morgan Crucible must waive any defence "based on a statute of limitations applied to Foreign Claims during the twelve month tolling period."

77. As to the scope of the Tolling Agreement, the Emerson Claimants submit that the UK proceedings before the Tribunal clearly fall within the definition of "Foreign Claims" covered by that agreement. The Emerson Claimants submit that (a) the claim for damages before the Tribunal relies on a conclusive finding by the European Commission of an infringement of Article 81(1) EC, (b) the claim for damages arise and are "asserted exclusively" under the laws of the EU and of the UK, (c) the cause of action for breach of Article 81(1) EC was never raised in the US proceedings, and (d) the Tribunal constitutes a forum in which a Foreign Claim may be asserted.

78. The Emerson Claimants submit that Morgan Crucible's interpretation of the Tolling Agreement would mean that at the very time when the Tolling

Agreement was concluded, it was empty or ineffective with respect to the bringing of future claims of infringement of Article 81(1) EC.

79. The Emerson Claimants refer to *Chitty on Contracts* (Sweet & Maxwell, 29th ed, 2004), paragraphs 28-107-108. Relying on those passages in *Chitty*, the Emerson Claimants submit that an express or implied agreement not to rely upon a limitation period is valid if supported by consideration and will be given effect to by a court; the Emerson Claimants submit that the Tolling Agreement is such an agreement.

80. As regards the effect of the Tolling Agreement and whether the time period set out in Rule 31 may be extended, the Emerson Claimants note that the question whether a time period operates as a jurisdictional limit (as opposed to a procedural mechanism which may be extended or waived by the parties' consent) depends on the proper construction of the enabling statute and rules of the relevant body.

81. In that regard, the Emerson Claimants refer to the usual response of the law to the expiry of a limitation period, namely that the expiry of the period bars the remedy but leaves the claim itself in existence: McGee *Limitation Periods* (Sweet & Maxwell, 4th ed, 2002), paragraph 2-017. The Emerson Claimants submit that only time bars of a special kind extinguish the claim rather than merely barring the remedy: see *Aries Tanker Corporation v Total Transport Limited* [1977] 1 W.L.R. 185, at 188D-E.

82. The Emerson Claimants accept that the Tribunal may not hear a case that falls outside its jurisdiction under the relevant legislation. The Emerson Claimants submit, however, that it does not follow that the time limit in Rule 31(1) is jurisdictional rather than merely procedural. The relevant primary legislation in this case is paragraph 11 of Part 2 of Schedule 4 to the Enterprise Act 2002. That provision, cited above, is permissive rather than preclusive. It is not directed at limiting the powers of the Tribunal: it does not say that the Tribunal shall not entertain proceedings unless they are commenced within the time period provided in the Tribunal's Rules. It does not purport to extinguish

an entitlement to damages as opposed to stipulating a time period within which to make a claim.

83. Rule 31(1) provides that "a claim for damages must be made within a period of two years beginning with the relevant date". The Emerson Claimants submit that Rule 31(1) does not provide that the Tribunal shall not entertain a claim unless it is commenced within the time period. Nor is this a necessary implication from the wording of Rule 31. According to the Emerson Claimants, it follows that the time limit for bringing the claims under Rule 31 does not operate as a draconian guillotine in the manner suggested by Morgan Crucible. The operative language in Rule 31 is procedural.

84. The Emerson Claimants deny that the Court of Appeal's judgment in *Dedman v British Building and Engineering Appliances Limited* [1974] 1 All E.R. 520, at 524, establishes that time limits in all statutory tribunals are jurisdictional in nature. The time limit at issue in the *Dedman* case applied to industrial tribunals. In *Dedman* the Emerson Claimants point out that Lord Denning MR, who gave the leading judgment, also gave examples of time limits which would not necessarily go to the jurisdiction of a tribunal.

85. The Emerson Claimants further submit that it is clear from the National Industrial Relations Court's decisions in *Westward Circuits Ltd v Read* [1973] 2 All E.R. 1013 and *Secretary of State for Employment v Atkins Auto Laundries Ltd* [1972] 1 All E.R. 987 that the jurisdictional or procedural nature of a time limit is a question of construction.

86. According to the Emerson Claimants, there is a clear difference between the preclusive effect of the enabling legislation that applies to industrial tribunals and the legislation and rules applicable to this Tribunal.

(b) Morgan Crucible's submissions

87. Morgan Crucible submits that the UK proceedings before the Tribunal fall outside the Tolling Agreement for two main reasons, which are:

(i) The claims for damages in the present case arose and were asserted under US antitrust laws and therefore cannot be described as claims "arising and asserted exclusively" under the laws of jurisdictions outside the US. They are therefore not foreign claims within the terms of the Tolling Agreement.

(ii) The UK proceedings are not ones "asserted exclusively" in non-US courts. The same claims were asserted by the Emerson Claimants in the US proceedings.

88. Morgan Crucible submits that the UK proceedings before the Tribunal are not covered by the Tolling Agreement since the time within which the Emerson Claimants could have brought those proceedings was not suspended by that agreement. On that basis, and on the assumption that time began to ran on 14 February 2004 (see paragraph 18 above), the time limit for making a claim for damages under section 47A expired on 14 February 2006. Morgan Crucible therefore submits that the Emerson Claimants' claims are out of time.

89. To demonstrate the non-applicability of the Tolling Agreement, Morgan Crucible refers to the difference in scope between that agreement and the tolling provision contained in a Settlement Agreement and release signed between the opt-out plaintiffs and Schunk following the US proceedings ("Schunk settlement agreement"). Morgan Crucible refers in particular to the different definition of "foreign claims". Unlike the Tolling Agreement, the definition of "foreign claims" in the Schunk settlement agreement does not contain the requirement that foreign claims must be "exclusively asserted" under the non-US antitrust laws and before non-US courts. Morgan Crucible submits that the tolling provision in the Schunk settlement agreement illustrates that the parties to the Tolling Agreement could have, but chose not

to, define foreign claims in a more expansive manner such that the present claims before this Tribunal would fall within the ambit of the Tolling Agreement.

90. Even if the UK proceedings fall within the terms of the Tolling Agreement, Morgan Crucible submits that the Tribunal no longer has jurisdiction to hear the claim. Morgan Crucible submits that a private agreement such as the Tolling Agreement is not capable of extending the time limit for bringing a claim for damages before the Tribunal. Rule 31(1) of the Tribunal's Rules provides that a "claim must be made within a period of two years beginning with the relevant date" (emphasis added) with no possibility of extension.

91. According to Morgan Crucible, as a statutory body, it is axiomatic that the Tribunal may only determine a case falling within its jurisdiction as defined by the relevant legislation and its rules of procedure, including such time limits as may be prescribed. Thus as to the general rule, the House of Lords has held that "it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction": see *Essex County Council v Essex Incorporated Congregational Church Union* [1963] 1 All ER 326, at 330, per Lord Reid.

92. Morgan Crucible submits that the time limits in statutory tribunals go to the jurisdiction of a tribunal. Accordingly, even if the Tolling Agreement had covered the present claims, a private agreement such as this cannot operate to modify the basis of the Tribunal's jurisdiction to entertain them. In support of that submission, Morgan Crucible refers to Butterworths *Law of Limitation* which states at p I 13C "In the Tribunals, limitation is not (as elsewhere) a mere defence barring the remedy; the presentation of a claim within time is fundamental of jurisdiction, and limitation may therefore be raised as an issue by the Tribunal itself, even if neither party takes the point."

93. Morgan Crucible also refers to the Court of Appeal judgment in *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 All ER 520 where it was held that "the time limit is so strict that it goes to the jurisdiction of the tribunal to hear the complaint. By that I mean that, if the complaint is presented to the tribunal just one day late, the tribunal has no jurisdiction to consider it. Even if the employer is ready to waive it and says to the tribunal: "I do not want to take advantage of this man. I will not take any point that he is a day late"; nevertheless the tribunal cannot hear the case. It has no power to extend the time: see *Westward Circuits Ltd v Read* [1973] ICR 301 and *Rogers v Bodfari (Transport) Ltd.* [1973] ICR 325" (see [1974] 1 All ER 520, at 524 per Lord Denning MR).

94. Morgan Crucible submits that the power to prescribe the time limit for making a claim under section 47A before the Tribunal is contained in section 15 and paragraph 11 of Part 2 of Schedule 4 to the Enterprise Act 2002, cited above. Morgan Crucible submits that these statutory provisions rule out the possibility of private parties consenting to an extension of time for commencing proceedings under section 47A; that power is reserved to the Secretary of State and Parliament. For the same reason the power to set time limits for bringing a section 47A claim is not one which the Tribunal can exercise on a case by case basis.

(c) Tribunal's analysis

95. If, contrary to our conclusion on issue one, time began to run for the purpose of making a claim for damages under section 47A, both sides accept that the "relevant date", i.e. the starting date, for the purposes of Rule 31 would be 14 February 2004. The limitation period is two years. The time limit for commencing a claim for damages before the Tribunal would therefore expire on 14 February 2006. In the absence of any mechanism legally available for extending time, the claim for damages in this case would be time-barred because the UK proceedings were not commenced within the relevant limitation period. This does not bar the Emerson Claimants from bringing proceedings in the High Court.

96. On 11 February 2006 the Emerson Claimants entered into the Tolling Agreement with Morgan Crucible. The Tolling Agreement provides that:

> "**4. Tolling of Statute of Limitations Period**. The Morgan Defendants agree that the relevant statutes of limitation which apply to the Plaintiffs' Foreign Claims will be tolled for a period not to exceed twelve (12) months beginning as of the Effective Date, provided, that
>
> (a) nothing in this paragraph 4 shall apply to, revive, or permit the assertion of any claim(s) barred as of the Effective Date by the applicable statute(s) of limitation or by any similar or comparable doctrine, principle, code, statute, regulation, directive, law or rule and further provided, that
>
> (b) nothing in this Agreement shall constitute a waiver of any defense, set off, argument, counterclaim or claim of the Morgan Defendants other than a defense based on a statute of limitations applied to Foreign Claims during the twelve month tolling period; and further provided, that
>
> (c) in the event that Plaintiffs fail to timely perform their obligations under Sections 2 or 3 of this Agreement, all tolling of all relevant statutes of limitations pursuant to this section 4 shall immediately be deemed null and void with retroactive effect to the Effective Date, and any and all tolling pursuant to this Section 4 shall be and shall have been of no equitable or legal effect whatsoever in any jurisdiction wherever located. The period of tolling shall cease as of two (2) business days following entry of an order by the District Court disapproving the MDL Settlement.
>
> (d) For a period beginning on the Effective Date and ending six months thereafter (the "Six-Month Period"), Plaintiffs agree and undertake not to initiate any claim, lawsuit, or administrative or legal proceeding of any kind whatsoever in any tribunal wherever located asserting any Foreign Claims against the Morgan Defendants or the individual defendants, Robin D. Emerson, F. Scott Brown, Jacobus Johan Anton Kroef, and Ian P. Norris, or any of them. Following the Six-Month Period, Plaintiffs agree and undertake to provide the Morgan Defendants with two (2) weeks notice prior to filing or initiating any claim, lawsuit, or administrative or legal proceeding of any kind whatsoever in any tribunal wherever located asserting any Foreign Claim against the Morgan Defendants or the individual Defendants, Robin D. Emerson, F. Scott Brown, Jacobus Johan Anton Kroef and Ian P. Norris or any of them, any such notice to identify jurisdiction in which the indicated action is to be filed."

97. Relying on this twelve-month extension of the limitation period, the Emerson Claimants commenced the UK proceedings before the Tribunal on

9 February 2007 within the time period as purportedly extended by the Tolling Agreement.

98. It is submitted by the Emerson Claimants that the Tolling Agreement extends the time period set out in Rule 31.

99. Morgan Crucible submits that the Tolling Agreement does not extend the time limit for making a claim for damages before the Tribunal.

100. The existence of the Tolling Agreement raises the question whether the period of limitation for bringing a monetary claim set out in Rule 31 of the Tribunal's Rules can be extended by an agreement between the parties.

101. A limitation period, such as the one in Rule 31, seeks to strike a balance between two competing interests: the interests of claimants in having maximum opportunity to pursue their legal claims and the interests of defendants in not having to defend stale proceedings.

102. The power to prescribe the time limits is contained in section 15 and paragraph 11 of Part 2 of Schedule 4 to the Enterprise Act 2002. Paragraph 11(2) provides that the Tribunal's Rules may make provision for time limits for making a claim for damages under section 47A of the 1998 Act and for the Tribunal to extend the period in which any particular proceedings may be brought.

103. Section 15 of the Enterprise Act 2002 provides for the Secretary of State to make rules concerning the limitation period for the purposes of commencing proceedings under section 47A of the 1998 Act. This legislative requirement is not one which, in our judgment, can be circumvented or trumped by agreement between the parties.

104. We consider that the statutory provisions referred to in paragraph 102 above provide the Tribunal with its jurisdiction to hear claims brought under section

47A. The time limit for making a claim for damages is provided for by Rule 31 of the Tribunal's Rules.

105. We do not consider that the authorities or passages from the textbooks cited to us by the Emerson Claimants concerning the Limitation Act 1980 are relevant. Under section 2 of the Limitation Act 1980, the basic period within which a claimant must bring a cause of action for tort is six years from the date when the cause of action accrued. We note that in its judgment on limitation in *BCL Old Co Ltd & Ors v Aventis SA & Ors* [2005] CAT 1 the Tribunal stated that:

> "43. The statutory framework concerning the limitation period for claims pursuant to section 47A of the 1998 Act is entirely different and distinct from that relevant to the Limitation Act 1980. The Enterprise Act 2002 does not contain a provision corresponding to the Limitation Act 1980. The Enterprise Act does not itself contain a limitation period. Schedule 4, Part 2 of the Enterprise Act provides that Tribunal Rules can make provision for time limits. The Tribunal Rules make such provision in Rule 31 and provide that claims for damages must be made within 2 years of the period beginning with the "relevant date"."

106. Rule 31 of the Tribunal's Rules provides a two year period for making a claim for damages under section 47A to the Tribunal. The wording in Rule 31, read with section 47A(8) of the 1998 Act, is clearly mandatory in nature. In our judgment, the true construction of these provisions means that it is not for the parties to take matters into their own hands and extend time. This is reserved by section 47A(8) and Rule 31(3) of the Tribunal's Rules to the Tribunal by virtue of the caveat in those provisions that the Tribunal can give permission to bring proceedings before the Tribunal notwithstanding the fact that EC proceedings against the decision relied upon by the claimant have been instituted and are yet to be determined.

107. In our judgment, it is not open to the parties to try to fix their own limitation period, whether as a response to the circumstances of a particular case or otherwise. Rule 31 does not make the time limit for commencing monetary claims before the Tribunal subject to the possibility of the parties agreeing an

extension of time. Accordingly the true construction of the Tolling Agreement as to whether it extended time in respect of the claims now made in the UK proceedings is not relevant since, even if this was its true construction, that agreement was not effective in law to extend the limitation period. Therefore it is unnecessary for us to consider the true construction of the Tolling Agreement.

108. We also do not find the authorities referred to by the parties considering different statutes and the jurisdiction of other tribunals to be relevant to the question before us. The question before us is the jurisdiction of the Tribunal as provided for by the 1998 Act and the Tribunal's Rules.

(d) Tribunal's conclusion on issue 2

109. If we are wrong on the first issue, we consider that it is not possible for the time limit for making a claim for damages under section 47A to be extended by an agreement between the parties.

XII ISSUE 3: IF TIME HAS EXPIRED, DOES THE TRIBUNAL HAVE JURISDICTION TO EXTEND TIME UNDER RULE 19(2)(i)?

(a) Emerson Claimants' submissions

110. The Emerson Claimants submit that, had the two-year limitation period expired, in any event, the Tribunal has the power, pursuant to Rule 19(2)(i) read in conjunction with Rule 30 of the Tribunal's Rules, to extend the two year time limit under Rule 31. Rule 19(2)(i) permits the Tribunal to give directions "as to the abridgement or extension of <u>any time limits</u> whether or not expired" (emphasis added). The expression "time limits" to which this discretion applies is not limited to those that are fixed by any particular rule and must therefore logically apply to those fixed by Rule 31.

111. In the Emerson Claimants' submission, the enabling legislation (in paragraph 11 of Part 2 of Schedule 4 to the Enterprise Act 2002) always envisaged that the Tribunal's Rules would confer a discretionary power on the Tribunal to

extend the time period for bringing claims under section 47A. Rule 19(2)(i) of the Tribunal's Rules gives effect to that intention.

112. The construction of Rule 31 advocated by Morgan Crucible – that the time limit in that rule is jurisdictional – would be extreme. It is not compelled by the language of Rule 31 but is at odds with the natural meaning of the phrase "any time limits". To suggest that recourse to Rule 19(2)(i) to extend the time period would be to allow the Tribunal to alter its jurisdiction is to misunderstand or invert the scheme of the Tribunal's Rules. The discretionary power to extend any time period does not alter the Tribunal's jurisdiction, it provides for its exercise. Nor can the operation of Rule 19(2) be foreclosed on the assertion that there is no subsisting claim. The Emerson Claimants have commenced their claim against Morgan.

113. The Emerson Claimants refer to paragraph 42 of the Tribunal's judgment in *BCL Old Co Ltd & Ors v Aventis SA & Ors* [2005] CAT 1 (judgment on limitation) where it was said that the Tribunal "should be extremely slow to adopt a construction of the Tribunal's Rules which gives rise to a risk of injustice or procedural difficulty unless such a construction was the only possible construction of the Tribunal's Rules". The Emerson Claimants submit that the interpretation of Rule 31 suggested by Morgan Crucible would raise precisely such difficulties: it would mean that the Emerson Claimants' only option would be to pursue their damages claim against Morgan Crucible in the High Court. The Emerson Claimants submit that this would frustrate the very purpose for which the specialised jurisdiction under section 47A of the 1998 Act has been created: see *BCL Old Co Ltd & Ors v Aventis SA & Ors* [2005] CAT 2 (judgment on security for costs), paragraph 28.

114. The Emerson Claimants referred to Rule 8 of the Tribunal's Rules which govern the time and manner of commencing appeals before the Tribunal. Rule 8(1) sets a two month time limit for lodging a notice of appeal to the Tribunal. Rule 8(2) provides that "the Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional." According to the Emerson Claimants, this limitation would be

unnecessary were it not the case that the Tribunal would, in its absence, have the power to extend the time limit in Rule 8(1) in any circumstances. Indeed, in *Prater Ltd v Office of Fair Trading* [2006] CAT 11, the President of the Tribunal noted that "the Tribunal may extend time pursuant to Rule 8(2) of the Tribunal's Rules. Such an extension of time may be granted even after the time limit has expired: Rule 19(2)(i)" (at paragraph 34).

115. The Emerson Claimants also refer to the Tribunal's judgment on limitation in *BCL Old Co Ltd & Ors v Aventis SA & Ors* [2005] CAT 1 and submit that if, as Morgan Crucible submits, the time limit in Rule 31 is jurisdictional, the Tribunal's conclusion in *BCL* that it had the power to add a new party to an existing damages claim under section 47A would have been unlikely.

116. The Emerson Claimants also note that a number of modern-day employment tribunals have discretionary powers to extend time. As an example, they refer to section 111(2) of the Employment Rights Act 1998. That statutory provision gives the employment tribunal a discretionary power to extend the period within which a claim for unfair dismissal could be brought where it was not reasonably practicable for the claim to be brought within the usual time limit. Similarly, the Emerson Claimants claim that this Tribunal has a very broad discretion to extend any time limits under the Rules "to secure the just, expeditious and economical conduct of the proceedings".

117. The Emerson Claimants also refer to Rule 19(2)(h) which permits the Tribunal to give directions "as to the fixing of time limits with respect to any aspect of the proceedings". A logical reading of the broad language of this rule is that it permits the Tribunal to override the time limit within which a claim must be bought under Rule 31 in circumstances that it considers to be appropriate.

118. To the extent that it may be necessary to do so, the Emerson Claimants submit that this is an appropriate case for the exercise by the Tribunal of its discretion to extend the time limit pursuant to the powers conferred by Rule 19(2)(i) of the Tribunal's Rules. It would be appropriate to give effect to the Tolling Agreement the parties bargained for and concluded.

(b) Morgan Crucible's submissions

119. Morgan Crucible submits that Rule 19(2)(i) is not an 'escape clause' for those who have not complied with the mandatory requirement of Rule 31 for instituting a claim for damages. In particular there is nothing in Rule 19 that allows the Tribunal to vary the time limit within which a claim can be brought and thereby alter the jurisdiction of the Tribunal. As the Emerson Claimants' claims were brought outside the time limit set in the 1998 Act and the Tribunal's Rules and there is no possibility of extension, the Tribunal lacks jurisdiction to hear it.

120. According to Morgan Crucible, Rule 19(1) makes clear that it applies to the "conduct of proceedings"; i.e. proceedings that are already on foot. Rule 19 appears under the heading "case management". Rule 19(2)(i) is one of a number of directions which the Tribunal can make "to secure the just, expeditious and economical conduct" of a case before it: see *Floe Telecom Ltd v Office of Communications* [2006] 4 All ER 688, at 697, per Lord Justice Lloyd.

121. Specifically in respect of section 47A claims, Rule 44 of the Tribunal's Rules makes clear that the Tribunal must "actively exercise" its powers in Rule 19 "in determining claims for damages" (emphasis added by Morgan Crucible). Morgan Crucible submits that the powers in Rule 19 are case management powers aimed at the determination of cases properly before the Tribunal. It follows that Rule 19 has no bearing on the statutory requirements that must be satisfied for validly commencing a claim for damages before the Tribunal.

122. Morgan Crucible also relies on paragraph 11 of Part 2 of Schedule 4 to the Enterprise Act 2002 to support its submission that Rule 19(2)(i) does not provide any basis on which to extend the time limit for making a claim for damages. That paragraph, entitled "Institution of Proceedings", expressly includes the power to specify circumstances in which the period for instituting particular types of proceedings may be extended. Morgan Crucible refers to Rules 8 and 28 of the Tribunal's Rules as examples of rules that provide such

a period pursuant to paragraph 11. By contrast, Rule 31 merely specifies a two-year time limit for making claims for damages under section 47A. No provision was made pursuant to paragraph 11 for the Tribunal to extend the period in which section 47A claims may be commenced. Therefore, Morgan Crucible submits that the only way in which the Tribunal could extend the time limit in such cases would be if the Tribunal's Rules were amended pursuant to paragraph 11 of Part 2 of Schedule 4 to the Enterprise Act 2002.

(c) Tribunal's analysis

123. Paragraph 11(1) of Part 2 of Schedule 4 to the Enterprise Act 2002 provides that the Tribunal's Rules may make provision as to the period within which and the manner in which proceedings are to be brought. Paragraph 11(2)(a) states that the Tribunal's Rules may provide for time limits for making claims for damages under section 47A of the 1998 Act. Paragraph 11(2)(b) states that the Tribunal's Rules may provide for the Tribunal to extend the period in which any particular proceedings may be brought.

124. Rule 19(2)(i) of the Tribunal's Rules provides:

> "CASE MANAGEMENT
>
> **Directions**
>
> 19. – …
>
> (2) The Tribunal may give directions –…
>
> (i) as to the abridgement or extension of any time limits, whether or not expired; …"

125. The question is whether Rule 19(2)(i) gives the Tribunal power to extend the time limit provided in Rule 31 in circumstances where the time limit in Rule 31 would otherwise have expired.

126. Paragraph 11(2)(b) of Part 2 of Schedule 4 to the Enterprise Act 2002 provides that the Tribunal's Rules may provide for the Tribunal to extend the period in which any particular proceedings may be brought. In our judgment, Rule 19(2)(i) of the Tribunal's Rules makes such provision. Rule 19(2)(i) clearly

provides that the Tribunal may give directions as to "extension of *any* time limits, *whether or not expired*" (emphasis added).

127. We reject the submission of Morgan Crucible that Rule 19 is restricted to the conduct of proceedings already on foot and does not apply to preliminary issues which arise out of the lodgement of the claim form with the Tribunal Registry, including whether or not the claim has been validly lodged.

128. In our judgment the words "Case Management" in the overall heading to Rules 19 to 24 encompass all matters arising from the time that a claim is sent to the Tribunal Registry and so becomes within the province of the Tribunal. Accordingly we consider that the heading is consistent with the procedural rules set out below it and does not narrow their scope. Had the heading been more restrictive then we would have needed to consider whether the plain meaning of Rule 19 was somehow limited by the heading. Having regard to the meaning of the heading this question does not arise.

129. Support for our construction is found in *Prater Limited v Office of Fair Trading* [2006] CAT 11 when the President of the Tribunal noted that, in the particular circumstances of that case:

> "34. … the Tribunal may extend time pursuant to Rule 8(2) of the Tribunal's Rules. Such an extension of time may be granted even after the time limit has expired: Rule 19(2)(i). The Tribunal makes it clear that deadlines under the Rules are to be strictly followed and it is only in what are anticipated to be the unique circumstances of the present case that the Tribunal is prepared to make an order under Rule 8(2). It is unlikely that a similar order would be made in future cases."

130. Accordingly the President of the Tribunal in *Prater* relied on Rule 19(2)(i) as generally providing the power to extend the time for commencing proceedings before the Tribunal after a time limit had expired. In the case of commencing appeals pursuant to Rule 8(1) of the Tribunal's Rules, Rule 8(2) contains a limitation as to the circumstances in which that power can be exercised in relation to an appeal.

131. Only once the proceedings have been determined, does Rule 19 no longer apply: see *Office of Communications & Anor v Floe Telecom Ltd* [2006] EWCA Civ 768, paragraph 28, per Lord Justice Lloyd.

132. Rule 44(1) and (2) of the Tribunal's Rules provide that:

> CASE MANAGEMENT
>
> **Case management generally**
>
> **44**. - (1) In determining claims for damages the Tribunal shall actively exercise the Tribunal's powers set out in rules 17 (Consolidation), 18 (Forum), 19 (Directions), 20 (Case management conference etc.), 21 (Timetable for the oral hearing), 22 (Evidence), 23 (Summoning or citing of witnesses) and 24 (Failure to comply with directions) with a view to ensuring that the case is dealt with justly.
>
> (2) Dealing with a case justly includes, so far as is practicable -
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate -
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases."

133. We consider that our construction of Rule 19(2)(i) accords with the overriding objective set out in Rule 44.

(d) Tribunal's conclusion on issue 3

134. If, contrary to our judgment on the first issue, the time for bringing a claim has expired, then the Tribunal has jurisdiction to grant an extension of time by virtue of its power in Rule 19(2)(i) of the Tribunal's Rules.

XIII NEXT STEPS

135. Having regard to our judgment, the next step is for us to consider whether we give the Emerson Claimants permission to bring the UK proceedings. The issue in respect of the settlement agreement arises only if permission to bring these proceedings is granted.

Marion Simmons QC Adam Scott TD Vindelyn Smith-Hillman

Charles Dhanowa 17 October 2007
Registrar