Neutral citation: [2008] CAT 8

IN THE COMPETITION APPEAL TRIBUNAL Case No. 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A 2EB

28 April 2008

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

(2) SCHUNK GmbH
(3) SCHUNK KOHLENSTOFFTECHNIK GmbH
(4) SGL CARBON AG
(5) LE CARBONE LORRAINE S.A.

Proposed Defendants

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

Mr. Matthew Weiniger of Herbert Smith appeared for Schunk GmBH and Schunk Kohlenstofftechnik.

Mr. Mark Hoskins (instructed by Freshfields Bruckhaus Deringer) appeared for SGL Carbon AG.

Mr. Daniel Beard (instructed by Ross & Co.) appeared for Le Carbone Lorraine SA.

Heard at Victoria House on 20 and 21 February 2008

JUDGMENT (Permission)

I. INTRODUCTION

1. We have before us two applications by the claimants for permission to make a claim for damages, one against Schunk GmbH, Schunk Kohlenstofftechnik GmbH, and SGL Carbon AG, and the other against Le Carbone Lorraine S.A. ("Schunk", "SGL" and "Carbone Lorraine" respectively or, together, "the proposed defendants"). The applications for permission are made pursuant to section 47A(5)(b) of the Competition Act 1998 ("the Act") and rule 31(3) of The Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) ("the Rules").

2. On 3 December 2003, the European Commission ("the Commission") adopted Decision 2004/420/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.38.359 — *Electrical and mechanical carbon and graphite products*) (OJ 2004 L 125, p.45; "the Decision"). According to the Commission, various undertakings, including the proposed defendants, participated in a series of agreements and concerted practices within the meaning of Article 81(1) EC on the market for carbon and graphite-based products for electrical and mechanical applications. The Decision is described more fully in paragraphs [10]-[11] and paragraphs [16]-[17] of the Tribunal's judgment in *Emerson v Morgan Crucible* of 17 October 2007 ([2007] CAT 28) (the "Rule 31 judgment").

3. By separate applications, SGL, Schunk and Carbone Lorraine, to each of which the Decision was addressed, brought actions for annulment of that Decision before the Court of First Instance ("the CFI") (Cases T-68/04, T-69/04 and T-73/04 respectively or, together, "the CFI appeals"). The CFI appeals are described in more detail in section II below. In these circumstances, time has not yet begun to run for making a claim for damages under section 47A of the Act, and the claimants require the Tribunal's permission for such a claim to be made whilst appeal proceedings against the Decision are on foot (section 47A(5)(b) of the Act).

4. In summary, the case made by the claimants is that, having granted permission for a damages claim to be made against Morgan Crucible Company plc ("Morgan Crucible") for breach of Article 81(1) EC ([2007] CAT 30), the claims against Morgan Crucible and the proposed defendants are so interrelated, it would be convenient and fair to all of the parties for the claims to proceed and be heard in a single set of proceedings. The claimants' written submissions asserted that the proposed defendants have merely appealed against the level of the fine imposed by the Commission. It follows, according to the claimants, that it would be both expeditious and fair for the Tribunal to grant permission to initiate a claim for damages against the proposed defendants.

5. At this stage, the claimants seek an order granting permission to make their claims against the proposed defendants. The application also indicates the claimants' intention to apply to the Tribunal for appropriate directions as to the procedure to be followed in these proceedings until the end of the period referred to in section 47A(8) of the Act.

6. The proposed defendants observe that it would be inappropriate to grant permission in the present case essentially because, if the CFI were to annul or vary the Decision, the basis of any claim might either fall away or require amendment. It would therefore be needlessly costly and time-consuming for all concerned to permit a damages claim to be made whilst the CFI appeals are pending.

7. For the reasons set out below, the applications for permission to make a claim for damages against each of the proposed defendants are refused.

II. BACKGROUND AND THE CFI APPEALS

8. The relevant background to and history of these proceedings is set out in paragraphs [5]-[42] of the Rule 31 judgment, which is accessible via the Tribunal website and in the United Kingdom Competition Law Reports. We shall confine our account of the background to what is necessary for an understanding of the legal arguments and the decision of the Tribunal.

9. On 20 February 2004, SGL, Schunk and Carbone Lorraine each brought separate actions before the CFI seeking annulment or modification of the Decision. A summary of those actions – Cases T-68/04, T-69/04 and T-73/04 respectively – was published in the Official Journal: OJ 2004 C 106, pp. 71-72. The CFI closed the written procedure on 22 October 2004. An oral hearing before the CFI took place on 27 and 28 February 2008. It is our understanding that judgment in these actions is still pending.

Case T-68/04

10. In support of its action for annulment, SGL pleads that the Commission made various errors in calculating the fine imposed on it, thereby infringing Article 15(2) of Regulation No 17.[1] SGL argues, first, that the basic amount of the fine was incorrectly determined to its detriment. SGL contends that, in determining the fines, the Commission disregarded the upper limit of fines. SGL also argues that the Commission incorrectly assessed the co-operation of SGL, and that it wrongly took into consideration the actual deterrent effect in fixing the amount of the fine. SGL also claims that the Commission failed to take into consideration the applicant's inability to pay when calculating the fine.

11. Accordingly, SGL claims, in so far as material, that the CFI should:

– "annul Commission Decision C(2003) 4457 final of 3 December 2003 in so far as it concerns the applicant;

– in the alternative, reduce appropriately the amount of the fine imposed on the applicant in the contested decision".

Case T-69/04

12. By its application for annulment, Schunk challenges the Commission's findings as to the effects of the proposed defendants' co-ordination attempts on different customer groups, including those to which the claimants belong.

[1] EEC Council: Regulation No 17: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

Schunk argues that certain categories of products and customers were not affected by the arrangements entered into by the proposed defendants. It also challenges the imposition of joint and several liability on Schunk GmbH for the actions of one of its subsidiaries.

13. Schunk claims, in so far as material, that the CFI should:

– "annul the contested decision of the Commission of 3 December 2003 (Case COMP/E-2/38.359 - carbon and graphite-based products for electrical and mechanical applications);

– in the alternative, reduce the amount of the fine imposed on the applicants by that decision".

Case T-73/04

14. In support of its action for annulment, Carbone Lorraine contends that the Commission erred in law in failing correctly to define the relevant product market or to delineate the different categories of products considered in the Decision. By its second plea Carbone Lorraine contends that the infringement had only a limited impact on the relevant markets, in particular because the bareme price setting mechanism did not apply to customers in the automotive and consumer products sectors and could not have been applied due to the buyer power of these customers. Carbone Lorraine also challenges the level of the fine on grounds of proportionality, equal treatment and misapplication of the applicable Leniency Notice.

15. Carbone Lorraine claims, in so far as material, that the CFI should:

– "annul the contested decision of the Commission of 3 December 2003 (Case COMP/E-2/38.359 - carbon and graphite-based products for electrical and mechanical applications);

– in the alternative, reduce the amount of the fine imposed on the applicants by that decision".

16. The Tribunal and the claimants were provided with unofficial translations of the relevant parts of the applications for annulment filed by SGL and Carbone Lorraine before the CFI, subject to confidentiality undertakings. Schunk filed and served a copy of its original notice of application dated 20 February 2004 as well as an English translation. We consider what implications, if any, the CFI appeals have for the present applications at paragraphs 86 to 93 below.

III. THE RELEVANT DOMESTIC LEGAL FRAMEWORK

17. The Tribunal's jurisdiction to hear monetary claims is partly set out in section 47A of the Act, which, in so far as material, provides as follows:

> "**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—
>
> …
>
> (c) the prohibition in Article 81(1) of the 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 —

…

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

…

(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."

18. Commencement of proceedings under section 47A of the Act is governed by rule 31 of the Rules which states as follows:

"**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. ..."

19. The Tribunal's *Guide to Proceedings*[2] provides further guidance on commencing a claim for damages under section 47A of the Act. In so far as material, it reads as follows:

> "**Time for filing a claim for damages**
>
> 6.68 A claim for damages or other monetary claim may be made within a period of two years beginning with the "relevant date". Under Rule 31(2) the "relevant date" is the later of either:
>
> (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; or
>
> (b) the date on which the cause of action accrued.
>
> 6.69 The period in (a) is the date on which an infringement has been established by decision of the OFT or EC Commission. However the period is extended if the decision may still be the subject of an appeal (for instance an appeal to the Tribunal in the case of decisions of the OFT, to the Court of Appeal or the Court of Session in the case of Tribunal decisions, or an application to the CFI or ECJ in the case of decisions of the EC Commission).
>
> 6.70 Only once any appeal process is at an end, including the expiry of the time for seeking permission to appeal further, does the time period for making a claim commence.
>
> 6.72 The period in Rule 31(2)(a) is likely to cover the majority of cases. The period in Rule 31(2)(b) takes into account that in some cases there may be some delay between the relevant decision establishing an infringement and the occurrence of the damage, in which case time only starts to run from the date on which the loss occurred.
>
> 6.73 Section 47A(5)(b) of the 1998 Act and Rule 31(3) permit the Tribunal to grant permission for a claim for damages to be initiated before the relevant period for an appeal against the decision has expired. It may be appropriate in some cases to permit the claim to be commenced in order that preliminary matters can be dealt with. Permission in such cases can only be granted once any proposed defendant has been given the opportunity to submit observations on the request for permission: Rule 31(3)".

[2] The Guide to Proceedings is available from the Tribunal's website: www.catribunal.org.uk. The requirements of the Tribunal's Guide to Proceedings, dated 20 October 2005, constitute a Practice Direction issued by the President pursuant to Rule 68(2) of the Tribunal Rules.

IV. PROCEEDINGS BEFORE THE TRIBUNAL

20. By a claim form dated 9 February 2007 the claimants commenced proceedings against Morgan Crucible under section 47A of the Act.

21. By an application of the same date, the claimants sought permission under rule 31(3) of the Rules to initiate proceedings against SGL and Schunk before the end of the period referred to in section 47A(8) of the Act and rule 31(2)(a) of the Rules. A copy of that application is available on the Tribunal's website.

22. By Order of 13 March 2007 the Tribunal directed that, *inter alia*, the following issues should be heard:

> "(a) whether permission of the Tribunal to initiate a claim for damages against [Morgan Crucible] is required under section 47A(5)(b) and 47A(8) of the Competition Act 1998 and Rule 31(3) of the Rules;
>
> (b) if permission is so required, whether the Tribunal should permit the claim for damages against [Morgan Crucible] to proceed and if so, whether it gives permission under Rule 31(3)".

23. The application for permission against the proposed defendants was therefore adjourned awaiting the Tribunal's decision on the issues arising in the claim for damages against Morgan Crucible.

24. Following oral hearings on 26 June and 26 September 2007, in its Rule 31 judgment the Tribunal held that, because of the ongoing CFI appeals, time for making the claim for damages against Morgan Crucible had not begun to run. Accordingly, the Tribunal found that the claimants required permission to bring that claim (see paragraphs [73] and [135] of the Rule 31 judgment).

25. In the Tribunal's judgment of 16 November 2007 ([2007] CAT 30) the Tribunal granted permission to the claimants to make a claim for damages against Morgan Crucible. Crucial to our decision in that case was the concern that, if permission had not been granted under rule 31(3) of the Rules, there would have been an enhanced risk to the claimants that documents in Morgan Crucible's possession would not be available at trial. This was particularly so given Morgan Crucible's track record regarding destruction of documents and

its negative approach to pre-action disclosure. We also found that Morgan Crucible had failed to articulate the precise knock-on effect the CFI appeals might have on a claim for damages brought against it. Morgan Crucible's submissions appeared to us to be more pertinent to whether proceedings against it should be stayed pending the determination of the CFI appeals rather than to whether permission should be given for the claim to be made against Morgan Crucible.

26. In a second application dated 11 October 2007 the claimants sought permission under rule 31(3) to initiate proceedings against Carbone Lorraine before the end of the period referred to in rule 31(2)(a) of the Rules. That application is in substantially the same terms as the one filed in relation to SGL and Schunk, save for it also sought permission to add Carbone Lorraine as the fifth proposed defendant and to amend the claim form accordingly.

27. At a case management conference held on 13 December 2007 the Tribunal directed, *inter alia*, that the claimants, and each proposed defendant, if so advised, file and serve a list of the issues which they each consider require to be determined. On 11 January 2008 lists of issues were filed by the claimants and SGL and Schunk respectively. Those lists have not been agreed.

28. The claimants' list of issues was as follows:

> "**A. Permission**
>
> 1) Should the Tribunal first decide whether to give permission to the claimants to bring their claims against the Proposed Defendants pursuant to s.47A(5)(b) and s.47A(8) of the 1998 Act and rule 31(3) of the Tribunal Rules before considering whether it has jurisdiction to consider the claims against the Proposed Defendants?
>
> 2) Should the Tribunal give permission to the claimants to add Le Carbone Lorraine as the fifth proposed defendant and to amend the claim form accordingly?

3) Should the Tribunal exercise its discretion under s.47A(5)(b) and s.47A(8) of the 1998 Act and rule 31(3) of the Tribunal Rules to give permission to the claimants to bring their claims against the proposed defendants?

B. Jurisdiction

1) Would the Tribunal have jurisdiction to consider the claims against the proposed defendants under Article 2 of Regulation 44/2001?

2) If not, would the Tribunal have jurisdiction to consider the claims against the proposed defendants under Article 5(3) of Regulation 44/2001?

3) If not, would the Tribunal have jurisdiction to consider the claims against the proposed defendants under Article 6(1) of Regulation 44/2001?"

29. The list of issues prepared by SGL and Schunk was as follows:

"1) Should the Tribunal give permission to the Claimants to add Le Carbone Lorraine S.A. as the fifth proposed defendant and to amend the claim form accordingly?

2) Would the Tribunal have jurisdiction to consider the claims against the Proposed Defendants under Article 2 of Regulation 44/2001?

3) If not, would the Tribunal have jurisdiction to consider the claims against the Proposed Defendants under Article 5(3) of Regulation 44/2001?

4) If not, would the Tribunal have jurisdiction to consider the claims against the Proposed Defendants under Article 6(1) of Regulation 44/2001 where, at the time when proceedings are commenced against the Proposed Defendants (not being domiciled in the United Kingdom), the claim against the original Defendant domiciled in the United Kingdom has already been disposed of (whether by judgment or compromise)?

5) If not, for the purposes of Article 6(1) of Regulation 44/2001, are proceedings commenced against the Proposed Defendants in respect of a claim under s.47A of the Competition Act 1998 ("the 1998 Act") when an application for permission to bring such a claim is made pursuant to s.47A(5)(b) of the 1998 Act and rule 31(3) of the Tribunal Rules or when such permission is granted?

6) If the latter, should the legal effect of the settlement agreement between the Proposed claimants and Morgan Crucible Company Plc be determined as a preliminary issue prior to deciding whether permission be granted to any of the Proposed claimants to bring claims against any of the Proposed Defendants pursuant to s.47(A)(5)(b) of the 1998 Act and rule 31(3) of the Tribunal Rules?

7) If not, should the Tribunal exercise its discretion under s.47(A)(5)(b) and s.47A(8) of the 1998 Act and rule 31(3) of the Tribunal Rules to

give permission to the Claimants to bring claims against the Proposed Defendants?"

30. We note that the second issue raised by the claimants for our consideration is an application for permission under rule 35 to join Carbone Lorraine as an additional proposed defendant. As noted above, Carbone Lorraine has brought an action for annulment of the Decision and is therefore in the same position as Schunk and SGL, whereupon it is necessary for us to decide whether permission should be given for a claim to be made against each of the proposed defendants under section 47A(5)(b) of the Act and rule 31(3) of the Rules. In any event, Carbone Lorraine does not object to being included as a proposed defendant for the purposes of the present applications.

V. THE ORDER IN WHICH THE ISSUES SHOULD BE DECIDED

31. In their written and oral submissions, counsel for the proposed defendants emphasised the potential importance and implications of the order in which matters pertaining to the issues outlined above are decided. At the hearing we therefore heard argument *de bene esse* on all of the issues on which each of the parties wished to make submissions or observations.

The claimants' submissions

32. The claimants submit that permission should be dealt with before the question of jurisdiction under the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, p. 1) ("Regulation No 44/2001" or "the Regulation"). According to the claimants, it is premature to deal with jurisdiction before the claim is formally commenced. In their submission, rule 31(3) does not contemplate that a proposed defendant should be able to make submissions on the viability of the claim prior to permission being granted for those proceedings to be commenced. The claimants further submit that, until permission has been granted under rule 31(3), the proposed defendants are not formal parties to the proceedings and as such have no right to be heard, except as provided for by rule 31(3) by way of observations on the permission application.

33. The claimants submit that it is useful to note that rule 11 of the Civil Procedure Rules ("CPR") provides that it is only after service of the claim form upon the defendant and the filing of a notice of intention to defend the claim that the defendant may bring an application under Part 11 CPR to challenge the exercise by the court of jurisdiction. The claimants submit that, by analogy, in proceedings before this Tribunal it is only after a claim has been served upon a defendant that it will be in a position to raise any challenges it might consider appropriate under Regulation No 44/2001.

34. The claimants further submit that it is not for the proposed defendants to dictate which issues should be taken by those already party to the proceedings against Morgan Crucible or the manner in which those issues should be addressed.

SGL's observations

35. SGL observes that it would be inappropriate to determine the issue of permission before the issue of jurisdiction as to do so may run the risk that SGL will be considered to have inadvertently submitted to the jurisdiction of the Tribunal. Submission to jurisdiction is recognised by Article 24 of the Regulation which states:

> "Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22".

36. As regards the application of Article 24, SGL refers to Briggs & Rees, *Civil Jurisdiction and Judgments* (4th ed, LLP) at paragraph 2.68 which states:

> "As long as the plea to the jurisdiction is made at the first opportunity, neither concurrently entering a defence upon the merits, nor taking procedural steps, such as applying for an extension of time to make the jurisdictional challenge, or seeking discovery of documents in order to demonstrate the facts which show the court not to have jurisdiction, in the course of the adjudication upon the jurisdictional plea, will prejudice the position of the defendant. *By contrast, taking further voluntary steps, not themselves consistent with the intention to challenge jurisdiction, in relation to the claim on the merits will forfeit the protection of Article 24*" (emphasis added by SGL).

37. According to SGL, the procedure established by rule 31(3) creates a potential pitfall for a proposed defendant in respect of inadvertent submission to jurisdiction in the context of conflict of laws. This is because a proposed defendant may make submissions that relate to the substance of the damages action as would be the case, for example, when making submissions as to the effect that a judgment of the CFI might have on any potential liability of a proposed defendant. SGL observes that rule 31(3) effectively assumes that the Tribunal has international jurisdiction to hear the proposed claim.

38. SGL further observes that the order in which the Tribunal decides the issues raised by the claimants' applications will affect whether it is capable of having jurisdiction pursuant to Article 6(1) of Regulation No 44/2001. An argument which the proposed defendants would like to make in these proceedings is said to be in "the gift of the Tribunal": if the Tribunal decides, as a matter of case management, to deal with the question of permission *vis-à-vis* the proposed defendants *after* the existing claim against Morgan Crucible has been disposed of, the Tribunal will not have jurisdiction to consider the claims against the proposed defendants under Article 6(1) of Regulation 44/2001. This, SGL observes, is because, at the time when proceedings are commenced against the proposed defendants (not being domiciled in the United Kingdom), the claim against the original defendant domiciled in the United Kingdom, namely Morgan Crucible, will have already been disposed of (whether by judgment on the preliminary issue relating to the settlement agreement between the claimants and Morgan Crucible or compromise) (cf. Case C-103/05 *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827). Should the Tribunal decide the permission issue *before* the action against Morgan Crucible is determined, SGL may lose the chance to challenge the Tribunal's jurisdiction under Article 6(1).

39. In light of the foregoing, SGL observes that the Tribunal should order that the question whether the claimants (save for Bosch) have already settled their claims against Morgan Crucible should be determined as a preliminary issue, and that the present applications be stayed pending the determination of that preliminary issue. If the Tribunal does not have jurisdiction under Regulation

No 44/2001 to hear the proposed claims against SGL then it could not grant permission to bring such claims under rule 31(3).

Schunk's observations

40. Schunk largely supports and adopts SGL's observations in relation to the order in which the issues should be addressed, save in respect of an additional jurisdictional issue specific to Schunk which relates to the existence of jurisdiction clauses in the contracts of sale between the claimants and itself.

Carbone Lorraine's observations

41. Carbone Lorraine can see merit in the approach suggested by SGL in its observations, namely that jurisdiction should be dealt with prior to a consideration of permission, since it avoids the risk of inadvertent submission to jurisdiction. Alternatively, Carbone Lorraine observes that the Tribunal may wish to consider the jurisdiction issue as part of the consideration of whether or not to grant permission. If, on the other hand, the Tribunal is not minded to consider the issue of jurisdiction prior to or as part of the assessment of permission, Carbone Lorraine notes that the consideration of jurisdiction as a free standing matter after permission would appear premature at this stage and out of line with the procedure set out in the Tribunal's *Guide to Proceedings*. In those circumstances, the issue of jurisdiction should be held over to be raised – as appropriate – in any acknowledgements of service filed by the then defendants. That is the corollary of the claimants' reference to CPR 11.

The Tribunal's analysis

42. In our judgment, the order in which the issues should be addressed is clear on the face of the relevant legislation. Section 47A(5)(b) of the Act and rule 31(3) of the Rules permit the Tribunal to grant permission for a claim for damages to be initiated before the relevant period for an appeal against the decision has expired. At the point of making an application for permission to make a claim for damages, there is, self-evidently, no issued claim against the proposed defendants. Indeed, in its observations of 3 December 2007, Schunk

acknowledged that it would perhaps be premature to consider whether the Tribunal has jurisdiction to hear the claimants' action for damages when the action has yet to be commenced. A rule 31(3) application does not have the same status as an issued claim form. It follows that the proposed defendants are not parties to any current proceedings before the Tribunal; rather they are entitled to make observations on the issue of permission to make a claim for damages as interested persons.

43. Rule 31(3) provides for an opportunity for a proposed defendant to make any observations it so wishes. A proposed defendant is not obliged to make observations, but the Tribunal may give its permission under rule 31 "after taking into account any observations" it makes. In general, having regard to Article 24 of Regulation No 44/2001 we consider that a proposed defendant, simply by making observations on the antecedent issue of permission in relation to a proposed claim, is not thereby a defendant entering an appearance in an existing claim. Nor do we consider that making such observations *automatically* constitutes submission to jurisdiction of the Tribunal. We note that, in any event, all of the proposed defendants have expressly stated that nothing they have said or done for the purposes of these applications should be understood as them so submitting.

44. Rule 31(3) enables a proposed defendant, if so advised, to make observations on whether the Tribunal should grant permission for a claim to be made before the end of the period referred to in rule 31(2)(a). Those observations will normally be limited to addressing the question whether the Tribunal should grant permission for a claim to be made before the exhaustion of any appeals process pending against the infringement decision on which the claim is based. The question whether, by making those observations, a proposed defendant has entered an appearance in the sense of Article 24 of the Regulation is governed by the procedural rules of the relevant court or tribunal. In our judgment, there is nothing in rule 31(3) which requires the proposed defendant to make 'submissions' on the merits of what is (at that stage) still a proposed claim; indeed this may be one of the reasons why the rule expressly uses the more neutral term 'observations'.

45. Whether a proposed defendant, in fact, submits to the jurisdiction will naturally depend on the nature and type of arguments it seeks to advance as part of those observations. The particular observations which the proposed defendant wishes to make are, naturally, a matter of its own concern. We accept that if a proposed defendant contests the case, not only on the jurisdiction, but also on the merits of the claim, it may, depending on the circumstances, be taken to have submitted to the jurisdiction, because it is then asking the Tribunal to decide in its favour on the merits. But, it does not follow that participating in the rule 31(3) process inherently requires a proposed defendant, who wishes to contest jurisdiction, to make observations on the merits of the proposed claim or that it will inevitably forfeit the protection of Article 24 of the Regulation. This is because the essential question is whether permission should be given for the claim to be made before the end of the period specified in section 47A(8) of the Act.

46. In this case, the proposed defendants challenged the jurisdiction of the Tribunal at the same time as presenting their respective observations on the question of permission. Even if a proposed defendant chooses to make observations that address the merits of the proposed claim, this would not, in itself, constitute submission to jurisdiction whilst it is still maintaining its jurisdictional objections (Case 150/80 *Elefanten Schuh GmbH -v- Pierre Jacqmain* [1981] ECR 171; *Harada Ltd. (t/a Chequepoint) v Turner* [2003] EWCA Civ 1695).

47. The issues that are to be decided once a claim for damages has been made, such as jurisdiction, are separate from the issues which are relevant to whether or not the Tribunal grants permission. If and when the Tribunal grants permission for a claim for damages to be made, the claim form would be served on the relevant party. The relevant process for service of a claim is set out at paragraphs 7.16 to 7.21 of the Tribunal's *Guide to Proceedings*. The question of jurisdiction may then be properly raised in the light of the indications given by a proposed defendant in the forms of acknowledgement of service filed by them as to the extent to which they intend to defend the claim, or contest the jurisdiction.

48. SGL observes that it would be an appropriate exercise of the Tribunal's discretion not to decide the question of permission until after the legal effect of the settlement agreement between the claimants and Morgan Crucible has been determined (whether by judgment or settlement). The determination of the effects of that settlement agreement, says SGL, could be very significant for the Tribunal's jurisdiction to hear the proposed claims and its consideration of the applications for permission (see paragraph [38] above). In our judgment, it is not appropriate for a proposed defendant, who is not a party to the existing claim for damages in *Emerson Electric Co. & Ors v Morgan Crucible*, to make observations on matters of case management in those proceedings.

49. We consider that the first issue that falls to be decided by the Tribunal is whether it should grant permission to the claimants to bring their claims for damages against the proposed defendants pursuant to section 47A(5)(b) of the Act and rule 31(3) of the Rules. It is only in the event that we grant permission for a claim to be made (or a claim is made after the end of the period specified in section 47A(8) of the Act), that the question of jurisdiction may arise. We have therefore not found it necessary either to set out, or to consider in this judgment, the issues on jurisdiction to which we have been referred. Those issues are set out in the transcripts of the hearing, which are available on the Tribunal's website.

VI. THE PERMISSION ISSUE

The claimants' submissions

50. The claimants submit that the Tribunal has a duty to deal with these applications in the form that it arises at the appropriate time, and within a reasonable time. The claimants note that the rule 31 application against SGL and Schunk has already been pending for a year.

51. The claimants submit that they should be entitled to pursue their claims, particularly where liability has already been established, with reasonable expedition. They rely on the significant period of some 20 years which has

elapsed since the infringement began. Any further delay would, in the claimants' submission, compound the prejudice they have already suffered. At the hearing, counsel for the claimants stated that the primary point in relation to permission was the impact of delay on the state of evidence, in particular for the purposes of the claimants establishing causation and quantum. By the time the CFI appeals are eventually and finally determined, there is an increased risk that the evidence would no longer be available. Furthermore, with the passage of time oral evidence becomes less reliable.

52. The claimants submit that it is clear from the Decision (and in particular paragraphs 192, 225, 227, 235 and 242[3]) that the existing claim against Morgan Crucible and the proposed claims against SGL, Schunk and Carbone Lorraine are substantially similar and closely connected and it would therefore be convenient and fair to all of the parties for the claimants' claims against them to be heard together in a single proceeding.

53. According to the claimants, the purpose of the statutory scheme permitting follow-on actions would be too easily open to frustration if the implication of a cartelist bringing an appeal against the extent of a fine would be to delay indefinitely the bringing of a follow-on action.

54. The claimants submit that to mitigate the prejudice that would be suffered by them in the event of these applications being denied, they would have to pursue their claims against Morgan Crucible on the basis of joint liability for all losses incurred, including those arising from purchases from the proposed defendants. Such proceedings would be less efficient than if the proposed defendants were also parties to the claim and it would be to the detriment of not only the claimants but also Morgan Crucible. Furthermore, in those circumstances, the claimants submit that Morgan Crucible would doubtless pursue an action for contribution against the proposed defendants which would result in a multiplicity of actions with a concomitant increase in the costs involved and loss of procedural efficiency. If the action proceeded against Morgan Crucible as the only defendant, it would be necessary to obtain third

[3] These paragraphs are set out in the rule 31 application against SGL and Schunk, which is available on the Tribunal's website.

party disclosure and evidence from the proposed defendants leading to greater expense than if the proposed defendants were parties to the proceedings.

55. The claimants submit that the proposed defendants would not be prejudiced by the claim being made against them now. As a party to the proceedings they would be in a position to advance their own case as to damages and other relevant issues, whereas if these applications were denied they would be confined to raising issues that might be relevant in the context of a contribution action against them by Morgan Crucible.

56. The claimants note that it appears to be common ground among the claimants and proposed defendants that a significant consideration in deciding whether an application under rule 31(3) should be granted is whether the substance of the appeal taken by the proposed defendant is directed at the substantive finding of liability by the relevant authority. According to the claimants the relevant question is to ask whether the grounds and the nature of the CFI appeals are such as to provide a barrier to the Tribunal granting permission in circumstances where case management directions can be utilised to regulate the conduct of the case going forward.

57. According to the claimants, none of the proposed defendants would have been in a position to challenge the substantive findings of the Commission as to their participation in the illegal cartel. In that regard, the claimants refer to paragraph 65 of the Decision, which states that "Carbone Lorraine, Schunk … and SGL said in their reply that they did not substantially contest the facts upon which the Commission based its Statement of Objections". The claimants submit that the determination of the issues raised by the CFI appeals will not affect the fundamental finding of liability upon which the claimants' proposed claims are based.

SGL's observations

58. Subject to SGL's primary observation, outlined in paragraphs [35]-[39] above, SGL's fallback observation was that it would be premature (being potentially a significant waste of time, money and effort) for the Tribunal to consider a

claim for liability against a number of defendants on a joint and several basis when, depending on the outcome of the CFI appeals, certain of those defendants may be found not to have participated in the cartel, or the CFI may make factual or legal findings that would impact on the matters to be decided by the Tribunal.

59. The fact that the emphasis of SGL's appeal is on the reduction of the fine does not detract from the fact that there is a formal claim for annulment of the Decision. According to SGL, the purpose of the statutory scheme is that the granting of permission to bring claims under section 47A of the Act whilst appeals to the CFI are pending should be the exception rather than the rule. It would therefore be inappropriate to speculate as to the prospects of success and possible outcome of the appeal. This is particularly so where there are related appeals by Schunk and Carbone Lorraine, both of which relate to liability.

60. SGL further observes that if the appeals by Schunk and Carbone Lorraine are successful, it could absolve them from any liability in relation to the claimants. Given that the proposed claimants are seeking to bring claims against the proposed defendants on a joint and several basis, it would not be appropriate for the Tribunal to undertake any consideration in respect of losses arising as a result of sales by those proposed defendants to the claimants.

61. SGL filed a witness statement from Ms. Branka Koren who is employed by SGL as Legal Counsel. Ms. Koren states that, to the best of her knowledge and belief derived from sales records of SGL which she or her colleagues have reviewed, the only sales of carbon and graphite products to any of the proposed claimants was to Bosch, but these sales were not in the UK. Ms. Koren also refers to the settlement of a US damages action involving the proposed claimants and SGL.

62. As regards the claimants' arguments, SGL observes that, in terms of financial losses, the claimants' position in respect of delay will be covered by any award of interest. In terms of evidence, the fact that such a long period has already elapsed means that any further delay is likely to be of minimal impact.

SGL also observes that the arguments relating to third party disclosure and contribution are made on a false premise. SGL observes that it would be wasteful and inappropriate for the Tribunal to allow an investigation to quantify any losses which might have been occasioned by sales to the claimants by the proposed defendants unless and until the liability of the latter has been definitively determined.

63. Finally, SGL observes that, contrary to the claimants' contention, the proposed defendants would be prejudiced by granting permission: requiring SGL to expend considerable time and effort in preparing for a trial on quantum when it and/or any of the other proposed defendants may ultimately not be liable for the losses claimed would constitute a significant prejudice. The Tribunal should neither facilitate nor encourage speculative litigation.

Schunk's observations

64. Schunk agrees with SGL and observes that it would be premature for the Tribunal to consider a claim for damages against it pending the outcome of the CFI appeals. Schunk observes that even if the Decision is not annulled, its notice of application invites the CFI to make legal and/or factual findings which are highly relevant to the proposed claim currently before the Tribunal. Before the CFI, Schunk is challenging the Commission's failure to consider sufficiently the effects of the proposed defendants' co-ordination. In particular Schunk argues that it would not have been possible for there to have been any adverse effect of the attempted co-ordination as regards the first category of customers (mentioned in paragraph 40 of the Decision) which includes the claimants. By way of illustration, Schunk refers to paragraph 82 of its unofficial translated notice of application, which provides:

> "[…] the bareme (a tool of the cartel members to co-ordinate prices), mentioned several times in the Commission's decision … only referred to industrial and railway customers as well as customers of mechanical carbon products (customers from the sealing, pump and compressor industry). It did not refer to the products that were intended for customers in the areas of automobile technology and the consumer goods industry. Co-ordination was not possible in these areas because the products were constructed in accordance with individual specifications and, in addition, the buyers were able to exercise superior buyer power. Accordingly, the prices in these

> business areas dropped steadily, and in some cases they dropped dramatically".

65. This, says Schunk, is a central issue to be determined by its CFI appeal. Schunk filed a witness statement by Mr. Matthias Mohr, an in-house German lawyer, who stated that, based on his own knowledge obtained while working in the industry and internet documentation, the claimants fall into the first category of customers which consists of automobile suppliers and producers of consumer products, also known as original equipment manufacturers.

66. Schunk further observes that it is clear from the purpose of the legislative scheme that permission should only be given in circumstances where the outcome of the appeal has no potential impact on the proceedings before the Tribunal. According to Schunk, the claimants' approach would subvert the legislative scheme, since it would mean that it is only in very limited circumstances (an appeal which challenges the entirety of an infringement decision) that permission should be refused. The claimants' approach also ignores the fact that Schunk is seeking annulment of the Decision; whether or not Schunk obtains the annulment is immaterial since it is inappropriate for the Tribunal to come to a view as to the merits of any appeal before the CFI. At the hearing, Schunk noted that if its appeal were successful, the CFI has essentially three options: first, it may annul the decision in part; second, it may annul the decision in so far as it makes a finding of infringement against Schunk; or third, it may annul that part of the Decision that finds that these claimants were affected by Schunk's behaviour. Whichever one of those options is taken, Schunk observes that the Tribunal will be bound to abide by the CFI's judgment.

67. Schunk also observes that the claimants seem to conflate the notion of liability for an infringement with liability for damages to the claimants. Given that Schunk maintains that there was evidence on the Commission's file demonstrating that the infringement did not extend to the category of customers, which includes the claimants, it is quite possible that the outcome of its appeal is that the CFI partially annuls the Decision, so that Schunk

remains liable for an infringement which is narrow in scope and upon which these claimants cannot found a follow-on action for damages.

68. According to Schunk there are a number of problems with the claimants' argument that, because they are able to proceed against Morgan Crucible, it is fair and convenient for them to be permitted to proceed against the proposed defendants. First, this argument is at odds with the finding of the Tribunal that the views of the other proposed defendants were irrelevant to the application for permission in respect of Morgan Crucible. Second, the Tribunal granted permission to proceed against Morgan Crucible on grounds which are not relevant to the permission application against Schunk. Third, whilst the claimants now argue that they should be able to proceed against Morgan Crucible and all the proposed defendants, this argument is at odds with the claimants' conduct in relation to Carbone Lorraine: it was only after an action in the US was dismissed in respect of non-US losses that the claimants filed an application for permission to make a claim for damages against Carbone Lorraine before the Tribunal. Fourth, the delay complained of by the claimants, whilst unfortunate, is common to most infringement decisions which are the subject to an appeal to the CFI. Moreover, if delay alone were the basis for a grant of permission then in effect the default position under the legislative scheme would be reversed. Fifth, Schunk observes that the claimants' arguments based on the inefficiency of refusing permission ignore the inconvenience to Schunk of participating in proceedings which may not be necessary. Sixth, Schunk observes that it would suffer prejudice if permission were to be granted, notably the cost of proceedings which, if the appeal before the CFI is successful, may turn out to be wasted costs.

Carbone Lorraine's observations

69. Carbone Lorraine observes, first, that in deciding whether a monetary claim should be made in circumstances like these the Tribunal needs to be convinced by the claimants that there are good reasons why the exception to the general rule contained in rule 31 applies in the particular case. Carbone Lorraine submits that it is not sufficient simply to complain that follow-on actions may take a long time to resolve and that that delay may make the life of a would-be

claimant harder. This is the nature of the right which has been conferred under the legislation: a follow-on claimant gets the benefit of relying upon an administrative decision but the trade off is that it has to wait until that administrative decision is definitive – final and irrevocable – before it can bring a claim.

70. Carbone Lorraine observes that the general rule is that a party cannot bring a monetary claim until after the appeals process is finished. Getting permission to bring a claim early is the exception. It is somewhat perverse to say that not granting the exceptional permission as the claimants request is prejudicial to them. The degree of prejudice should be assessed by comparison to the situation which would obtain if the ordinary, general rule applied and that, when measured against this comparator, there is no prejudice to the claimants. Carbone Lorraine further observes that the Tribunal has not been presented with any evidence of prejudice. Carbone Lorraine notes that the claimants are large, well-resourced companies who could be expected to take appropriate steps to address any concerns they might have about the availability of evidence. In the present case, they have not taken such steps.

71. Carbone Lorraine observes that, until the CFI appeals, and any subsequent appeals to the European Court of Justice ("the ECJ"), have been concluded, there is no sure foundation for the proposed claims. According to Carbone Lorraine, the claimants will not, in any event, be able to have their claims determined until those processes are complete and substantive steps in these proceedings are going to be entirely inappropriate given the pending appeals.

72. Carbone Lorraine observes that it is a flawed suggestion by the claimants that permission should be granted because permission has been granted against Morgan Crucible. The comparison is not a good one since Carbone Lorraine appealed the Decision whereas Morgan Crucible did not.

73. Further, Carbone Lorraine observes that the claimants raise a false procedural comparison by their suggestion that they will be able to pursue a joint liability claim against Morgan Crucible to cover the liability of Carbone Lorraine. Carbone Lorraine observes that this would circumvent the basic principles of

the statutory scheme. Carbone Lorraine observes that the claimants cannot obtain from Morgan Crucible damages they claim are attributable to Carbone Lorraine if Carbone Lorraine is found not liable by reason of the CFI appeal.

74. Carbone Lorraine doubts that the distinction drawn by the claimants between appeals against an infringement decision which challenge the existence of the infringement and appeals as to the level of fine. In any event Carbone Lorraine has appealed against both the fine and the substance of the Decision. Carbone Lorraine has sought, in particular, annulment of the Decision on the basis that the bareme price setting mechanism did not apply to customers in the automotive and consumer product sectors and that any discussions that occurred could not have an effect on competition in respect of those customers. Were Carbone Lorraine to prevail on this matter or in its application for annulment more generally, Carbone Lorraine observes that there would be no prior finding of infringement on which the claimants could base a follow-on action for damages under section 47A of the Act.

The Tribunal's analysis

75. The issue currently before us is whether the claimants should be granted permission to bring a claim for damages against the proposed defendants pursuant to section 47A(5) of the Act and rule 31(3) of the Rules.

76. Section 47A(5) of the Act provides that monetary claims can only be brought before the Tribunal where two conditions are satisfied: first, there must have been a finding of infringement by a relevant competition authority (the relevant decisions are set out in section 47A(6) of the Act) and second, unless the Tribunal grants permission, a claim can only be made after any relevant appeals process is exhausted.

77. It follows that, in general, a claimant is entitled to bring a follow-on action for damages before the Tribunal where either the decision is unchallenged and the period for bringing an appeal has expired or once any appeal(s) has been decided. In those circumstances the liability of the defendant has been definitively determined. The fact that the Act and the Rules require the

Tribunal's permission to make a claim where there are proceedings pending before the CFI (and, ultimately, the ECJ), confirms that the bringing of a monetary claim under section 47A whilst an appeal is pending is the exception rather than the rule.

78. Where a claimant seeks to bring a claim before the expiry of the relevant period set out in section 47A(8) of the Act, it must seek the permission of the Tribunal to bring the claim. In deciding whether to grant permission, the Tribunal will have regard to all the relevant circumstances, including the observations made by a proposed defendant (see rule 31(3) of the Rules). Each case will inevitably depend on its own circumstances.

79. In our judgment, the principles to be applied are these. First, given that this is a matter that is a precursor to the commencement of a claim, the overriding consideration is whether granting permission enables a case to be dealt with justly. In determining claims for damages, rule 44 of the Rules expressly provides that the Tribunal shall use its powers "with a view to ensuring that the case is dealt with justly".

80. Second, it is legitimate, where permission is sought, to consider the nature and extent of particular prejudice that either party will suffer as a result of granting permission. That is because, for example, the greater the degree of prejudice a would-be claimant is likely to suffer pending the outcome of any appeal(s), the greater will be the risk of injustice if permission is refused.

81. We note that the claimants are concerned about the prospect of further delay in bringing an action for damages against the proposed defendants. The claimants submit that it would be in the interests of justice for the claims against the proposed defendants to be heard at the same time as the one already commenced against Morgan Crucible. However, the real question which in our view needs answering is whether, if a monetary claim cannot be brought before the Tribunal until the final determination of the European proceedings, justice could not properly be done. It is incumbent on prospective claimants to establish that this is the case.

82. In that regard, the claimants put the impact of delay on the state of the evidence in respect of matters such as causation and quantum at the forefront of their argument in favour of granting permission. They also emphasised that the cartels were, by their very nature, secret; and they drew attention to the prejudice caused by the passage of time on oral evidence. Apart from the delay complained of, the claimants also emphasised that, because they have already been granted permission to make a claim for damages against Morgan Crucible, it would be convenient and fair for permission to be granted for them to proceed against the proposed defendants. The claimants refer to the difficulties that might arise if the Tribunal were to refuse permission, and in particular the likelihood that Morgan Crucible would seek contribution from the proposed defendants and the need for third party disclosure. The claimants also submit that it would be less efficient to pursue their claims against Morgan Crucible on the basis of joint liability for all losses including those arising from purchases from the proposed defendants. The claimants further submit that the proposed defendants would not be prejudiced by granting permission.

83. On the material before the Tribunal, the claimants have failed to satisfy us that they are likely to suffer particular prejudice if permission is refused and if the proposed claim does not proceed until the conclusion of the CFI appeals. The various concerns expressed by the claimants about delay are likely to exist in any follow-on action: it is only possible to follow an infringement decision once any appeals process has been exhausted and the relevant decision is definitive. In *Morgan Crucible* [2007] CAT 30, the claimants were legitimately concerned about the disclosure and retention of documents (see paragraphs [8]-[14] and [16]-[17]). Whereas there was substantial evidence of particular prejudice in the case of *Morgan Crucible*, the claimants have not established that the evidential difficulties of proof in respect of the losses allegedly caused by these proposed defendants are any different from those which normally arise.

84. It also emerged at the hearing that the approach that the claimants took to seeking documents from the proposed defendants through pre-action

disclosure was less than satisfactory. Moreover, once the claim form and permission application had been lodged with the Tribunal, unlike the approach taken in relation to Morgan Crucible, the claimants did not pursue the matter of retention and disclosure of relevant documents with the proposed defendants. Nor did the claimants seek an appropriate solicitor's undertaking on behalf of each of the proposed defendants to preserve relevant documents. The claimants' approach does not support their assertion that they would suffer particular prejudice if permission were to be refused.

85. Further, the various procedural advantages which may or may not accrue from proceeding against the proposed defendants at the same time as Morgan Crucible do not take into account that: (a) the proposed defendants have appealed against the Decision and, as discussed below, (b) the potential impact of the CFI appeals on the proposed proceedings before the Tribunal. We do not consider that the fact that the Tribunal has granted permission to make a monetary claim against Morgan Crucible (on grounds which are not directly relevant to the present applications) is relevant to the question presently before us, namely whether we should grant permission against the proposed defendants.

86. Third, in considering whether to grant permission, the nature and ambit of the appeal, or appeals, against the decision on which a proposed claimant seeks to rely may, in certain cases, be significant. Where an appeal seeks to set aside a decision, in whole or in part, or challenges findings in a decision which are germane to the nature and extent of a finding of infringement or the loss caused by that infringement, granting permission carries a greater risk of injustice and inefficiency, particularly if the decision were to be annulled or its scope significantly curtailed.

87. All of the proposed defendants submit that it would be inappropriate to grant permission in the present case because, if the CFI were to annul the Decision in its entirety or in respect of each or one proposed defendant, the basis of any claim for damages against them or one of them would fall away. Having carefully considered the proposed defendants' applications for annulment, we

consider it would not be appropriate in this case for the Tribunal to grant permission pending the determination of these CFI appeals. We note, first of all, that in the form of order sought from the CFI, each of the proposed defendants is seeking not only a reduction in the fine but also the annulment of the Decision, either in its entirety or in so far as it applies to that proposed defendant. In this regard, the likelihood or otherwise of the proposed defendants actually obtaining annulment is irrelevant to our decision since that is solely a matter for the CFI and, ultimately, for the ECJ (as the case may be).

88. The claimants' submissions sought to draw a clear distinction between: (a) appeals challenging the substantive findings of the Commission which may well need to be determined before any follow-on action can be brought, and (b) appeals which merely challenge the level of the fine, which should not constitute a bar to the Tribunal granting permission. The Tribunal does not consider that it is possible to draw such a bright line between different appeals against an infringement decision. Each individual case will need to be considered on its particular facts. There may, of course, be cases in which it is appropriate for the Tribunal to grant permission whilst an appeal is pending where the interests of justice so require. The permission given to the claimants to commence a claim for damages against Morgan Crucible is an example of such a case.

89. There is, however, no general rule that permission should be given to initiate a damages claim whenever an appeal against an infringement decision is only as to the level of the fine. In some cases the issues raised by an appeal against the imposition and/or level of the fine may pertain to the nature and extent of an infringement which might be central to the nature and extent of how (and by how much) the infringement adversely affects a proposed claimant.

90. In this case, the CFI appeals appear to be primarily concerned with the imposition and/or level of the fine imposed by the Commission. On the materials before us, however, we accept that the actions brought by Schunk and Carbone Lorraine are challenging the inferences to be drawn from the evidence before the Commission and the scope of the infringement found by

the Commission. By way of an example, we note that both companies are challenging whether the Commission was correct to find that the proposed defendants co-ordinated their behaviour with respect to the customer group to which the claimants belong. In these circumstances, the ambit of the prior findings of infringement on which the claimants base their follow-on action and the extent of their alleged losses could differ from those originally found by the Commission.

91. Whilst SGL is not appealing against the Decision on the same grounds as Schunk and Carbone Lorraine, not only is the Tribunal unable to make any finding in respect of such losses until the European proceedings have been determined, but also, work undertaken in assessing the quantum of any losses may be wasted. This is particularly important in a case where, as here, the claimants contend that all of the proposed defendants, including SGL, are jointly and severally liable for all losses arising as a result of sales by Schunk and Carbone Lorraine to the claimants. It follows that, notwithstanding the scope of SGL's appeal, it is not sufficiently clear at this stage what, if any, implications the CFI appeals brought by Schunk and Carbone Lorraine might have on the proposed proceedings before this Tribunal.

92. Furthermore, at the hearing the claimants accepted that if the CFI were to uphold the Commission's finding of infringement in the Schunk appeal, but partially annul the findings made in the Decision, this would be relevant to the process of quantification of damages against all the proposed defendants. Moreover, in those circumstances the Tribunal would be bound by the CFI's judgment (section 47A(9) of the Act). In the absence of any compelling reasons, we consider the Tribunal should be relatively slow to permit the commencement of follow-on actions when the scope and basis of matters on which those actions are founded is subject to legal challenge.

93. The claimants refer to the fact that SGL, Schunk and Carbone Lorraine stated in their reply to the Commission's statement of objections that they did not substantially contest the facts upon which the Commission based its statement of objections. We note that, first, paragraph 65 of the Decision states that the

facts are not "substantially" contested, which is not the same as an undisputed factual matrix. Second, not challenging the essential facts of a case does not prevent a challenge to the application of the law to those facts. We consider that some of the issues raised in the CFI appeals directly challenge the inferences to be drawn from those facts and the evidence contained in the Commission's file. Until the proceedings instituted in the European Court[4] are determined, there is no sure foundation for these proposed claims.

94. For the reasons given in section V above, we do not consider that, in this particular case, it is appropriate to take into account jurisdiction issues when deciding whether to grant permission under section 47A(5) of the Act and rule 31(3) of the Rules.

95. We note that our decision does not bar the claimants from making their proposed claims. Rather it simply means that the conclusion of the European proceedings is the appropriate juncture for commencing a follow-on action for damages against these proposed defendants before this Tribunal. Furthermore, the claimants are entitled to bring an action for damages without relying on the Decision. However, such a stand-alone action cannot be pursued before this Tribunal; at present, it would instead have to be brought before the ordinary courts.

96. Whilst, as the Tribunal's *Guide to Proceedings* indicates, it may be appropriate in some cases to permit the claim to be commenced so that preliminary matters can be dealt with, the claimants have not satisfied us that granting permission would secure the just, expeditious and economical conduct of these proceedings.

VII. CONCLUSION

97. It follows from all the foregoing considerations that the applications for permission are refused.

[4] As defined in section 59(1) of the Act.

98. Having come to that conclusion, we find it unnecessary to express any views on the question of the Tribunal's jurisdiction.

Marion Simmons Adam Scott Vindelyn Smith-Hillman

Charles Dhanowa 28 April 2008
Registrar