



Case No: C3/2011/1658

Neutral Citation Number: [2012] EWCA Civ 1559

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
THE HON MR JUSTICE BARLING (President)
Claim No: CAT 1077/5/7/07

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2012

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE MOORE-BICK
and
LADY JUSTICE BLACK

Between :

EMERSON ELECTRIC Co & ORS	<u>Appellants</u>
- and -	
MERSEN UK PORTSLADE LTD (sued as and formerly	<u>Respondent</u>
LE CARBONE (GREAT BRITAIN) LTD)	

MR JON TURNER QC and MS LAURA ELIZABETH JOHN (instructed by Crowell & Moring LLP) for the Appellants

MR DANIEL BEARD QC (instructed by Hogan Lovells International LLP) for the Respondent/6th defendant.

Hearing date: 8th March 2012

Judgment

Lord Justice Mummery:

Follow-on claims in general

1. The claims for damages in this case are brought in the Competition Appeal Tribunal (the Tribunal) under the specialist statutory jurisdiction conferred on it by s.47A of the Competition Act 1998 (the 1998 Act). The so-called “follow-on” monetary proceedings issued on 9 February 2007 are based on established infringements of relevant prohibitions of competition law.
2. The decision of the European Commission (the Commission) in December 2003 found that relevant prohibitions had been infringed. That decision was addressed to named undertakings. They were found to have participated in a single and continuous infringement by the operation of an international cartel contrary to Article 101(1) (ex Article 81(1) EC) of the Treaty on the Functioning of the European Union (TFEU). An unlawful cartel between suppliers of electrical and mechanical carbon and graphite products was in operation over an 11 year period between 1988 and 1999.
3. The Commission imposed very hefty fines, totalling over Euros 100m, on the undertakings to which the decision was addressed by name. Before these proceedings, which could only be brought on the basis of that decision, could effectively get under way there were appeals by various addressees to the General Court (formerly the Court of First Instance) and to the Court of Justice. The appeals, which were unsuccessful, were not finally disposed of until 12 November 2009. Hence the lack of progress in the s.47A proceedings. Interlocutory applications in London then took over from appellate activities in Luxembourg. The latest move is another appeal, this time from an interlocutory order striking out, as a defendant, an entity (the respondent), to which the Commission had not addressed its decision by name.
4. The practical significance of the case is that the Commission has made infringement decisions in this and other cases about the activities of international corporate groups, which commit breaches of competition law in different national jurisdictions through the medium of numerous subsidiary companies. The paramount purpose of conferring a specialist jurisdiction on the Tribunal, which is specifically linked to binding decisions of the Commission on infringement issues, was to satisfy the fundamental EU requirement of providing an effective remedy in national courts for people who have suffered loss and damage as a result of the infringements found by the Commission.
5. In that connection it must be emphasised that this is not a one-off case testing the limits of the Tribunal’s jurisdiction and the validity of its procedural rulings. Several recent appeals from the Tribunal to this court have been against strike out orders made in the course of the Tribunal’s case management of follow-on proceedings. Under Rule 40 of the Competition Appeal Tribunal Rules 2003 (the Rules) the Tribunal has power to reject a claim for damages at any stage of the proceedings, if it considers that there are no reasonable grounds for making the claim. The latest appeals from the Tribunal to this court include a clutch of legal points about the limits of the Tribunal’s jurisdiction; the interpretation and application of the statutory two year limitation period for follow-on proceedings; the joinder of parties to the proceedings; the significance of the distinction between the Commission’s infringement decisions

and its penalty decisions; and the proper exercise by the Tribunal of its discretionary case management powers.

6. This appeal, which is about the jurisdictional limits of the Tribunal and the joinder of parties, is from an order of the Tribunal made on 7 April 2011 striking out the respondent as a defendant to the claims under s.47A. It is fortunately free from the added complication of the time-bar issue which cropped up in other cases.
7. Given the size of the sums involved, the novelty of the jurisdiction and the endless ingenuity of legal practitioners, there will be more appeals on other aspects of follow-on proceedings. This is an opportunity to take interim stock of s.47A claims, which have developed even as this judgment was in preparation. What is the right way to look at this new jurisdiction and the emergent jurisprudence?
8. Caution, as well as a patient and practical intelligence, is highly desirable in s.47A cases. The Tribunal and the courts should steer well clear of “the hazards of commitment” to narrow preconceived attitudes conditioned by domestic law, but they must not be overawed by the panoramic view of a new legal landscape that includes dominating EU legal doctrines, such as the powerful principles of effectiveness and legal certainty. They must not lose sight of the basic elements of fair procedure or of the root principles of the rule of law, though they may be modified in their application to cases originating in the EU context.
9. Thus the Tribunal, like the ordinary civil courts, can only decide cases falling within its jurisdiction, but the precise boundaries of the jurisdiction may be difficult to draw in the case of a competition law jurisdiction that has been split between the binding fact-finding functions of the Commission in the EU and the remedial functions of the Tribunal in the UK. The Tribunal must hear and determine preliminary objections that the case based on the Commission decision is out of time or has been brought by or against the wrong parties. The rulings on such objections may depend on interpretation of the nature and scope of the decision of the Commission as the fact-finding body and not just on the interpretation and application of s.47A and the Rules.
10. A step forward was taken on 24 October 2012 when the Supreme Court handed down judgment in *BCL Old Co Ltd & Ors v. BASF plc & Ors* [2012] UKSC 45; [2012] 1 WLR 2922 (*BCL*). It is the first follow-on case to reach that height. The case deserves close consideration for any light that it may shed on the points argued on this appeal, in particular the procedural law affecting objections raised under s.47A, such as limitation and proper parties, in the wider EU context of the fundamental right to an effective remedy and the need for legal certainty.
11. Lord Mance, with whom the other four Supreme Court Justices agreed, gave the leading judgment in *BCL*. The principal point was whether the two year limitation period in the 1998 Act for s.47A claims was permissible, having regard to the paramount EU principles of effectiveness and legal certainty. The judgment is mainly taken up with a comprehensive review of those EU principles culminating in a decision that their requirements were satisfied and that there was no basis for any reference to the Court of Justice. In this case there are elements of remedial efficacy and legal certainty and the tensions between them in the rival submissions, even though they may not bear as directly on the outcome of this case as they did in *BCL*.

12. Lord Mance's account of the detailed legislative scheme, as conveniently set out in an Annex to his judgment, and of authorities connected with this case is helpful. The authorities include an earlier judgment of the Tribunal in proceedings involving some of the same parties (*Emerson Electric Co v. Morgan Crucible Company plc* [2007] CAT 28) (*Emerson Electric*) (see [32] of *BCL*) and the recent judgment of this court in *Deutsche Bahn AG & Ors v. Morgan Crucible Company plc* [2012] EWCA Civ 255; [2011] CAT 16 (*Deutsche Bahn*) (see [38] of *BCL*), which discussed the judgments of the Tribunal in *Emerson Electric* and of Court of Appeal in *BCL*. The Supreme Court upheld the decision of the Court of Appeal in *BCL* allowing the appeal from the Tribunal and it referred twice to the case of *Deutsche Bahn*. I shall return to these matters later on.

Introduction to the issues and the grounds of appeal

13. The damages claimed in this case are for losses resulting from breaches of relevant prohibitions of competition law committed by the participation of undertakings in the operation of a cartel of undertakings. Follow-on Tribunal proceedings must be based on "a decision" of the Commission establishing that the prohibition in question has been infringed and the decision is binding on the Tribunal: s. 47(9) of the 1998 Act. Although the decision was dated 3 December 2003, only now has the Tribunal arrived at the preliminary stage of deciding whether the respondent, to which the decision was not addressed by name, was properly joined as a defendant to the s.47A proceedings. The joinder was pursuant to an order made by the Tribunal on 19 May 2010 when it granted permission to amend the claims by the addition of further parties.
14. I will refer to the 2003 decision of the Commission as "the Decision" in order to distinguish it from decisions taken by the Commission in other cases. The early "naming of parts" of the Decision is necessary in order to minimise confusion. The Decision, which contains findings that relevant prohibitions of competition law have been infringed, is a very detailed and lengthy document of about 120 pages. It is divided into sections. It is structured as a series of paragraphs of 364 recitals addressed to 6 named "undertakings". The recitals have been referred to at various points in argument as "the findings" and as "the reasoning" and were described in the judgment of the Tribunal as "the legal and factual assessment" which the Commission made in reaching its decision.
15. The 364 recitals are distinct from the very short concluding section of the Decision, which speaks of the Commission having "ADOPTED THIS DECISION." The 4 Articles which follow have been described in argument as "the operative part" (or *dispositif*) identifying the infringements and addressing the Decision to 6 named "undertakings" which have infringed. It fines them and requires them to desist.
16. The respondent, which I will call "Carbone GB", is not named at all in the list of addressees; yet, as a result of the amendment allowed by the Tribunal, it was joined as 6th defendant to the follow-on proceedings along with its parent company, which was named as an addressee of the Decision and which I will call "Carbone SA." Carbone GB's main objections to the claims against it are that, as the Commission made no finding of infringement against it in the operative part of the Decision, or for that matter, in the recital paragraphs, and as it is not even an addressee of the Decision on which the s.47A proceedings are based, it was wrong to have joined it as a defendant. The claims made against it are either totally outside the jurisdiction of the Tribunal,

because, as regards Carbone GB, there is no decision of the Commission on which to base the s.47A claims, or there are no reasonable grounds for making the claims.

17. Carbone GB relies strongly on the structure of the Decision in the TFEU constitutional setting. It is pointed out that under Article 297(2) TFEU, decisions, which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification. Under Article 288 “A decision which specifies those to whom it is addressed shall be binding only on them.” Carbone GB says that, as the Decision was neither addressed to it nor notified to it, it has not taken effect as against it and is not binding on it. In other words, the claims against it under s.47A are without any of the required supporting foundation in the Decision and the Tribunal has no jurisdiction to entertain them.
18. The Tribunal also received detailed submissions on Article 263 TFEU under which a person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them. Much time was spent in the Tribunal in examining the scope of that Article as considered by the General Court in Case T-358/06 *Wegenbouwmaatschappij J Heijmans BV v. Commission* [2008] ECR II-110 (thankfully referred to in short as the *Dutch Bitumen* case). The Tribunal’s detailed analysis of that authority showed that it was consistent with the validity of the general principle that it is the operative part of a Commission decision which produces legal effects regarding findings of infringement. It was held that the entity to which the decision in that case was not addressed lacked standing under Article 263 TFEU.
19. The Tribunal reached a similar conclusion on the validity of the general principle having also examined in detail the decision of the Commission in the case of the *Cartonboard* cartel (OJ 1994 L 243, p1). It was relied on in connection with the argument that, although only parent companies were addressees of that decision, the recitals indicated the possibility of treating individual subsidiary companies as part of the undertakings.
20. In that connection Carbone GB also says that its status as a wholly owned subsidiary of the parent company, Carbone SA, which was specifically named as an addressee, does not convert Carbone GB into an addressee of the Decision or into an undertaking against which the Decision has taken effect. Its subsidiary status within the Carbone SA group does not mean that it is proper to join it as a co-defendant to the s.47A proceedings based on the Decision.
21. It will be apparent from what has been briefly stated and anticipated that two quite different jurisdictions, one exclusively European, the other not exclusively domestic, touch on the issue of joinder of Carbone GB as a co-defendant. The first is that of the Commission, which has jurisdiction to decide whether a relevant prohibition of competition law has been infringed. It is implicit in the Decision that there have been infringements by participation of named addressees in the operation of a secret cartel that there must have been more than one infringing undertaking. The Commission had to decide which undertakings had infringed competition law prohibitions and, in the light of that decision, to reach a conclusion as to which undertakings it should address the Decision to.
22. The second jurisdiction is that of the Tribunal, as defined by s.47A and subject to the Rules, over matters of causation and quantum arising in the monetary claims based on

the Decision. That jurisdiction is exercisable within the general framework of the EU principles and provisions. In the exercise of its jurisdiction the Tribunal granted Carbone GB's application under Rule 40. It refused to grant permission to appeal from the order striking out Carbone GB. Permission was granted by Etherton LJ on 21 October 2011.

23. The main issues on appeal are whether the Tribunal has jurisdiction to hear and determine a follow-on claim against a legal entity to which the Commission has not addressed the Decision by name and, if so, whether, having regard to the contents of the Decision and the limited jurisdiction of the Tribunal under s.47A, there are reasonable grounds for making the claim.
24. It is argued in support of the appeal against the strike out order that the Tribunal erred in law in two main respects. The first ground focuses on the submission that the Commission in fact made a finding that Carbone GB was a party to infringements of relevant prohibitions of competition law. The Tribunal had misread the Decision in holding that the Commission had not found in the reasoning of the Decision that Carbone GB was a party to the infringement of Article 101(1) TFEU, which was the subject matter of the Decision. It is also submitted that, if necessary, statements in the Decision about cartel behaviour by Carbone SA's "UK subsidiary" and local activities could be clarified or explained by making a request to the Commission under Article 15 Regulation 1/2003 to determine whether the Commission was referring to and making findings of infringement about Carbone GB.
25. The second main ground of appeal focuses on the submission that the undertaking which had infringed competition law comprised Carbone GB as well as its parent company Carbone SA. The Tribunal was wrong to hold that the "undertaking", which the Commission had found in the operative part of the Decision had infringed relevant prohibitions of competition law, only comprised Carbone SA as the ultimate parent company in the group. It is submitted that the Tribunal should have held that the Commission may exercise a discretion to address its infringement decisions to one, some or all of the legal persons which comprise the "undertaking" and that the Commission can, for administrative reasons, choose the ultimate parent company as the representative undertaking of a large group.
26. It was argued that in interpreting the operative part of the Decision and ascertaining the legal entities comprised in the undertaking found to have infringed relevant prohibitions, it was appropriate to take into account the reasoning in the Decision. The reasoning in the Decision showed that the Commission had made findings that Carbone GB was party to the infringement and/or formed part of the same undertaking as Carbone SA so as to provide a proper basis for a s.47A claim for damages against Carbone GB.
27. By amendment it is also argued in support of the appeal that the Tribunal itself has jurisdiction under s.47A to investigate whether, as a matter of fact, a legal person was part of the "undertaking" that has been found in the Decision to have infringed competition law.
28. On the other side Carbone GB, in responding to the appeal, seeks to uphold the judgment of the Tribunal for the reasons given by it, coupled with additional grounds set out in the respondent's notice. At the forefront of its response is the contention that

Carbone GB was neither an addressee of the Decision nor was it identified in the operative part of the Decision as having committed an infringement of Article 101(1) TFEU. The consequence is that there is no relevant infringement “decision” of the Commission against Carbone GB. Such a decision is the necessary basis for proceedings against Carbone GB in the Tribunal under s.47A. Without it the Tribunal has no jurisdiction under s.47A

Deutsche Bahn case

29. One further development should be mentioned before I complete the factual background, and examine the Decision, the judgment of the Tribunal and the rival legal arguments.
30. Among the other cases on s.47A that have reached this court via the Tribunal, there should be singled out the case which arose in the different follow-on proceedings based on the same Decision. That, too, was an appeal against a striking out order made by the Tribunal, in that case on a limitation point. That case, in which the lead judgment was also written by me, is *Deutsche Bahn*. Judgments were handed down at the end of July 2012 and permission to appeal to the Supreme Court was refused by this court. The case is mentioned twice by Lord Mance in *BCL* (See [7] and [38]) as having been decided by this court after the oral hearing of the appeal in *BCL* and as having been brought to the attention of the Supreme Court but without any accompanying submissions. This is a suitable opportunity to explain the differences between *BCL*, *Deutsche Bahn* and this case, which have all been heard separately by the Tribunal and by different courts, in an attempt to see the overall picture under s.47A to date.
31. Like *BCL*, *Deutsche Bahn* concerned postponement of the limitation period for follow-on claims in the Tribunal. It turned, in particular, on the critical expression “a decision of the European Commission ...that the [or a] prohibition has been infringed” as in s.47A(6)(d) and reflected in s.47A(8). As Lord Mance comments at [30] in *BCL*, the 1998 Act speaks “repeatedly” in that form of words. Their interpretation was central in *BCL* and *Deutsche Bahn* and is also relevant in this case. In [37] of its judgment in this case the Tribunal stated:-

“In the course of argument Mr Turner [leading counsel for the claimants] reminded the Tribunal that the essential question is whether there is “a decision of the European Commission that ...[Article 101] has been infringed” within the meaning of subsection 47A(6)(d) of the Act. That is undoubtedly correct. In his oral argument Mr Turner made clear that his primary contention was that in the present case the operative part of the Decision, properly understood in the light of the reasoning, contains the finding of infringement necessary to found the Tribunal’s jurisdiction against Carbone GB. However, he reserved the right to argue, if the facts supported it, that even a finding contained in the reasoning alone and not reflected in the operative part, would be sufficient for the purposes of the UK statute. Although he did not put it in these terms, there may be an implication in his reserved argument and also possibly in his main argument, that a finding of the Commission which was

without any legal effect *as a matter of EU law* could nevertheless satisfy the Act and provide the basis for a claim under section 47A.”

32. Both *BCL* and *Deutsche Bahn* required the Tribunal and the appellate courts to analyse the nature of a “decision” made by the Commission, and, in particular, to consider the distinction between a decision on infringement and a decision imposing a penalty and to address the circumstances in which an appeal from the decision of the Commission to the General Court or to the Court of Justice against the findings of infringement or the imposition of a penalty may postpone the date from which time begins to run for the purposes of the two year limitation period for the commencement of follow-on proceedings.
33. The point in *BCL* was that an appeal by an involved undertaking only against penalty, as distinct from an appeal against a finding of infringement, was not, for limitation purposes, a relevant appeal, which could postpone the time for commencing a follow-on claim against an undertaking that has not appealed from the finding of infringement against it.
34. *Deutsche Bahn* was about the circumstances in which an appeal by an addressee from the Decision to the General Court against the findings of infringement in the Decision operated to defer the commencement of the two year limitation period for bringing follow-on claims for infringement against an addressee, which did not appeal against the decision on infringement. The ruling of the Tribunal that such an appeal did not have that postponing effect was reversed by this court, which held that it did have a postponing effect. The focus of the arguments in *Deutsche Bahn* was on the nature of a decision that could be appealed to the General Court or to the Court of Justice: in particular, whether it referred to a single and continuous infringement situation affecting all the addressees of the decision, whether they appealed or not against the findings of infringement; or whether it was a decision against each individual undertaking, so that an undertaking which did not appeal could be bound by it, whatever the result of an appeal by the other addressees.
35. The immediate relevance of *Deutsche Bahn* is that, although this is not a limitation case, it involves consideration of that repeated expression “the decision... that [the prohibition] has been infringed.” The dispute in this case concerns the potential liability of an entity to which the Decision was not addressed by name, and is argued to be part of the same undertaking but which is wholly owned by the entity to which the Decision was addressed by name. In such a case is there “a decision” within the meaning of s.47A(6)(d) of the 1998 Act on which follow-on claims for damages against a non-addressee (Carbone GB) could be based?
36. The practical importance of the point is that the damages claims are based on the Decision in which the Commission found that infringements of relevant prohibitions of competition law have been committed by several large multi-national companies. They were found to have participated in and perpetuated a price-fixing cartel in the UK, in other parts of the EU and in other parts of the world. Those who claim to have suffered loss as a result of the infringements have asserted their right to an effective remedy in the form of an award of compensation by bringing proceedings in the Tribunal, as a specialist national forum with jurisdiction, in specified circumstances, to determine monetary claims based on the Decision.

37. The court is also told by the Respondent that the effect of the strike out order in this case is that the other defendants will contend that Tribunal has no jurisdiction to determine the claims against Carbone SA, the parent company of Carbone GB, or any of the other defendants, which are domiciled in other Member States of the EU (France and Germany) but not the UK. A claim against Carbone GB in the Tribunal is important as it would give it jurisdiction against the non-UK domiciled defendants under the Brussels Convention and Article 6 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
38. Although the ordinary civil courts may have jurisdiction to entertain claims for breaches of competition law in cases where the Tribunal lacks jurisdiction, no such proceedings have so far been commenced. I should emphasise that nothing said in this judgment is intended to decide or even to indicate whether or not ordinary civil proceedings are available in this case. This court heard no argument on that aspect of the overall situation.

The parties, the claims and the proceedings

39. Having explained the context, set the scene and anticipated the issues, I will briefly complete the account of the background facts.
40. First, the claimants. They are collectively called “Emerson” in this judgment. Their claim for damages suffered as a result of infringement of relevant prohibitions of competition law is based on the Decision, with its findings that relevant prohibitions have been infringed.
41. Next, the defendants. Carbone GB is domiciled in the UK. It is named in the proceedings as Mersen UK Portslade Limited. It was formerly called Le Carbone (Great Britain) Limited. In the interests of consistency, it is referred to in this judgment, as it was in the judgment of the Tribunal, as “Carbone GB.”
42. Then, most importantly, the basal Decision. The claims against the defendants are based on the Decision 2004/420/EC (Case No C.38.359-*Electrical and mechanical carbon and graphite products*) adopted by the Commission on 3 December 2003. The Decision, which is binding on the Tribunal and on the parties on the question whether relevant prohibitions have been infringed, was addressed to named “undertakings”. The addressees were found to have participated in a price fixing cartel from 1988 to 1999 in “a single and continuous breach” of Article 81(1) of the EC Treaty, now Article 101 (1) of the TFEU.
43. Carbone SA, the parent company of Carbone GB, was one of the “undertakings” to which the Decision was specifically addressed. It was addressed by the name of Le Carbone Lorraine SA, a global company comprising “a federation of small and medium enterprises” together constituting the Group Carbone Lorraine with headquarters located in Paris. As already stated, the name Carbone GB is absent from the list of named addressees. Its name is not even mentioned in the recitals to or in the operative part of the Decision.
44. It has been held by this court that the jurisdiction of the Tribunal is limited to issues of causation and quantum of loss resulting from the infringement findings in a decision

of the Commission: see *English Welsh and Scottish Railway Ltd v. Enron Coal Services Ltd (Enron 1)* [2009] EWCA Civ 647 at [30]–[31] and *Enron Coal Services (in liquidation) v English Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2 at [142] [148]–[150] (*Enron 2*). The jurisdiction under s.47A does not extend to making findings of fact establishing liability for infringement, as distinct from causation and quantum, or to reach conclusions contrary to those of the Commission in the Decision, which is binding on it and on which the claims within its jurisdiction are based.

The Tribunal judgment

45. In an exemplary judgment ([2011] CAT 4), the Tribunal set out the detailed history of events and procedural steps leading to the strike out application. It summarised the legal framework, the Decision and the rival submissions for and against the strike out application. No useful purpose would be served by another summary of the judgment on those matters. This judgment should be read together with it as the next chapter, perhaps not the final chapter, in this part of the litigation.
46. Instead, the focus will be on the Tribunal’s reasons for the strike out order and then on Emerson’s criticisms of them, as forcefully advanced on their behalf by Mr Jon Turner QC.
47. The Tribunal reached the conclusion in [63] that there was no infringement decision of the Commission within the meaning of s.47A(6)(d) of the 1998 Act on which Emerson can base their monetary claims in the Tribunal against Carbone GB; that there were therefore no reasonable grounds for making those claims within the meaning of Rule 40; and that the claims against Carbone GB must be struck out.
48. In rejecting Emerson’s detailed submissions the Tribunal said:-

“47...The fact that the Commission has a discretion whether to address an infringement decision to one, or some, or all of the legal persons who arguably make up an infringing “undertaking” begs the question whether, when that discretion is exercised by making some but not all such candidates addressees, there can be any legal effects on those who are omitted from the operative part. Neither the recitals in the Cartonboard cartel decision, nor the judgment in *MoDo* on the appeal from it, seem to us to provide the answer to that question for which the claimants contend. Nor do they alter the fact that in that case the decision was addressed to one specific company (the parent) which in the operative part of the decision was the only company in the group found to have infringed, the only company on which fines were imposed, and the only company subjected to the “cease and desist” order. In recital 141 (above), when discussing civil enforcement proceedings in the national courts to recover fines, the Commission clearly envisaged such proceedings being brought only against the addressee. Neither the Commission nor the General Court suggested that any other company in the group was bound by the decision in any way whatsoever. It is difficult to see how such a suggestion could be reconciled with the judgment in the ECJ in *Suiker Unie* or with those of the General Court in *Adriatica* and *Dutch*

Bitumen.”[Those authorities are cited in the concluding part of this judgment].

49. The Tribunal’s reasoning can therefore be stated quite shortly for the purpose of explaining the grounds of this appeal.
50. First, the Tribunal agreed with Carbone GB that there was nothing in the recitals to the Decision that could possibly amount to a finding by the Commission of infringement of Article 101(1) TFEU by Carbone GB. Even if the reference in the recitals to the “UK subsidiary” was shown to be a reference to Carbone GB, that of itself would not amount to a finding that Carbone GB had infringed Article 101(1) TFEU. It might constitute *evidence* on the basis of which the Commission could so find, but that was a different matter. There might be material in the recitals from which it could be inferred that at the material time Carbone GB was part of the same undertaking as Carbone SA, but no determination to that effect appeared in the Decision.
51. Further, the jurisdiction of the Tribunal to resolve issues of causation and quantum of loss arising from an established infringement does not extend to an evaluation of the evidential material or the findings of fact in the Decision, in order to make its own finding of infringement by Carbone GB, which the Commission had not itself clearly made.
52. Secondly, the Tribunal was inclined to hold that the “undertakings” that have been found by the Commission to have infringed Article 101(1) TFEU are addressed in clear terms in the operative part of the Decision. As Carbone GB is not named as an addressee of the Decision in the operative part, there is no relevant finding that a prohibition of competition law had been infringed on which to base a monetary claim against it under s.47A. The relevant decision was that Article 101(1) TFEU had been infringed by the undertaking addressed as Carbone SA.
53. Thirdly, the Tribunal rejected the suggestion that the Commission should be asked for information pursuant to Article 15(1) of Regulation 1/2003 in order to dispel doubts about the nature and scope of the Commission’s findings as to whether the finding of infringement against Carbone SA was limited to that company, or extended to Carbone GB as a wholly owned subsidiary, and whether Carbone GB was part of the “undertaking” condemned by the Decision and which could be separately sued for damages.
54. The Tribunal concluded that recourse to the Commission on those questions was entirely inappropriate and would take the matter no further. The questions were not requests for “information” envisaged by Article 15(1): they involved mixed issues of law, on which the Commission could do no more than express an opinion, and of fact, which the Tribunal had no jurisdiction to evaluate in its limited follow-on role.

Submissions of Emerson

55. Mr Jon Turner QC advanced the following grounds of appeal.

Finding of infringement by Carbone GB in Decision (“the finding point”).

56. The first ground is that the Tribunal had misread the Decision by wrongly holding that the Commission had not found in its reasoning that Carbone GB was a party to and liable for the infringement of Article 101(1) TFEU. Carbone GB was part of the same infringing undertaking as Carbone SA. It was wrong of the Tribunal to proceed on the basis that “undertakings” investigated by the Commission and found to have infringed competition law only included “addressees” of the Decision. A finding of infringement could be made against a legal person, which was not an addressee but had played a relevant part in the cartel and was embraced as part the “undertaking” that was an addressee. The activities of Carbone GB as a local subsidiary had been investigated by the Commission. The references in the recitals to cartel behaviour by Carbone SA’s “UK subsidiary” taking part in local cartel meetings in the UK could be clarified, if required, by information showing that they were references to Carbone GB. The references were not just “evidence” of the basis on which the Commission could have found infringement by Carbone GB: they were findings of fact which were part of the demonstration of infringements of Article 101(1) TFEU that was the subject matter of the Decision.
57. On this ground Mr Turner QC emphasised the generality of the expression “has been infringed” in s.47A and submitted that the scope of an “undertaking” and of what “has been infringed” could be gathered from the recitals. The court must take account of the structure of the 364 recitals of the reasoning preceding the short operative part of the Decision, which must be interpreted in the context of the Decision as a whole.
58. Mr Turner QC criticised the Tribunal for making only a limited review of the structure of the Decision and for not addressing or considering it. In this court he gave an overview of the structure and concentrated on the findings of infringement in Chapter V and the way it is related to Chapter IV which describes the facts, such as contacts and meetings relating to the organisation and activities of the cartel, demonstrating that the undertakings concerned infringed competition law by a single and continuous infringement. Mr Turner QC took the court to particular instances involving an unnamed “UK subsidiary” and the participation of local subsidiaries of cartel members in local meetings during the relevant period. The Tribunal had failed to take such relevant matters into account.
59. If the Tribunal had any doubt about the identity of Carbone SA’s UK subsidiary it could easily obtain the basic factual information from the Commission under Article 15(1) of Regulation 1/2003 which provides:-
- “ In proceedings for the application of Article 81 or Article 82 of the Treaty,[Article 101 or 102 TFEU] courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.”
60. By use of that procedure, which was part of the system of co-operation between EU institutions and national institutions, the Tribunal could obtain further information and opinions explaining or clarifying any factual points of uncertainty. The Tribunal would not be trespassing on the territory of the Commission by making its own

determination of the infringement issue: it would be relying on the Decision on liability, as clarified by the Commission itself.

61. Mr Turner QC submitted that his approach to the interpretation of the Decision and to its clarification was more consistent than the approach of the Tribunal with the fundamental right of a party to an effective remedy under EU law for breach of Article 101(1). The policy of Parliament was that the Tribunal, as a specialist body, should have jurisdiction in the UK to determine cases for infringement of prohibitions of competition law based on decisions of the Commission.

Carbone GB as part of the named parent infringing undertaking Carbone SA (“the undertaking point”)

62. The second main ground is that the Tribunal wrongly held that the Carbone “undertaking” referred to in the operative part of the Decision as having infringed Article 101(1) TFEU only comprised Carbone SA as the ultimate parent company in the group. It had wrongly stopped at the operative parts and the addressees and wrongly equated “undertaking” with “addressee” in the operative part of the Decision. The subject matter of the Commission’s Decision was the activity of “undertakings.” It was necessary to refer to the reasoning in the preceding recitals in order to determine the scope of the Carbone “undertaking” that was found to have infringed prohibitions of competition law. That finding of infringement embraced operating subsidiaries, such as Carbone GB.
63. Mr Turner QC submitted that the Tribunal’s equation of the “undertaking” with the parent company addressee was “a most startling conclusion”, because it contradicted the detailed reasoning of the Commission revealing that Carbone SA had carried on the cartel through a multiplicity of subsidiary companies. The Tribunal should have held that Carbone SA was named by the Commission in its discretion as the undertaking for reasons of administrative convenience. When interpreting the operative part of the Decision, the Tribunal should have taken into account the reasoning of the Decision in the recitals in order to ascertain the legal persons which comprised the infringing undertaking. The Tribunal should have held that Carbone GB was a party to the infringement and/or that it formed part of the same undertaking as Carbone SA and so formed a proper basis for a monetary claim against Carbone GB in the Tribunal under s.47A.

Jurisdiction of Tribunal

64. As to the limits of the jurisdiction of the Tribunal Mr Turner QC contended that it was no bar that the named addressees did not include Carbone GB. By an amendment, for which this court granted permission, it is contended that the Tribunal has jurisdiction under s.47A to investigate whether, as a matter of fact, a legal person was a part of an “undertaking” that has been found in the Commission decision to have infringed competition law. He pointed out the difference between the concept of an “undertaking” used in the Decision and how it was not the same as the concept of an “addressee” as to which the Commission could exercise its discretion as to which entity it should address in its Decision. A subsidiary company could be found to be and act as part of a price fixing undertaking, which was an addressee, without itself being named as an addressee.

Submissions of Carbone GB

65. Mr Daniel Beard QC on behalf of Carbone GB sought to uphold the decision of the Tribunal for the reasons given by it.
66. Having spoken of the importance of the integrity of the Decision, the inter-relation of its recitals and its operative part, the use of the expression “undertaking” in the Decision, the process in the TFEU Articles for specific addressees and notification of binding decisions and the absence of authority for any wide ranging general principle of associated liability, Mr Beard pointed out that, as Carbone GB was not an addressee which had been notified of the Decision, it was not in a position to defend itself, or to challenge the Decision, or to appeal against it. The Decision was simply not binding on it. It was not an undertaking or entity that was named or contemplated by the Commission to be an infringer. Such a situation was contemplated by the TFEU Articles and by the Decision. There was nothing in that outcome that was contrary to the principle of effectiveness.
67. Mr Beard made two trenchant points in support of his submission that there were no valid grounds for setting aside the judgment of the Tribunal striking out the claim against Carbone GB.

No finding in Decision of infringement by Carbone GB

68. First, in response to the grounds of appeal, he submitted that there was nothing in the recitals or reasoning of the Decision to show that Carbone GB was found to have taken part in the infringement of EU competition law or that it was found to have infringed by virtue of being a part of the Carbone SA group undertaking.

Carbone GB not an addressee of Decision

69. Secondly, in reliance on the respondent’s notice, he contended that the Decision is only binding on those to whom it is addressed and that only the operative part of the Decision, which identified the entities to which responsibility and liability for infringements were attributed, was binding. The position in this case was that Carbone GB was not an addressee of the Decision nor was it identified in the operative part of the Decision as having committed an infringement of Article 101 of the TFEU. In those circumstances there is no relevant decision of the Commission which can be relied upon by Emerson for the purposes of bringing a claim against Carbone GB in the Tribunal under s. 47A and the Tribunal has no jurisdiction to hear and determine a claim against Carbone GB.
70. In [52] of its judgment, the Tribunal said that it was inclined to agree with Mr Beard on this point and to hold that there was no relevant decision of the Commission for initiating a claim against Carbone GB under s.47A. However, the Tribunal proceeded to deal with Mr Turner’s submissions on the effect of the recitals.

Article 15

71. Emerson’s reliance on Article 15 was misplaced. Any request to the Commission would be directed to the question “Who did the Commission find liable for infringement of competition law?” That question was outside the scope of Article 15,

which is unavailable for finding out what the Commission had decided in its binding decision.

Discussion and conclusions

72. Beginning with the points on which I would agree with Mr Turner QC, Emerson certainly has a directly effective right under EU law to an effective remedy where the relevant prohibition has been infringed by the operations of a price fixing cartel based on the findings made in the Decision. The key question is against whom is that remedy available?.
73. I also agree with Mr Turner QC that this appeal turns on the proper interpretation of the Decision as cross-referred to in s.47A(6)(d) and (8). On that aspect of the case he correctly points out that, in EU law, the term “undertaking” is broader in scope than the English law notion of a corporate entity: *Provimi Ltd v. Roche Products Ltd* [2003] EWHC 961 (Comm) per Aikens J at [6(8)]. It is an autonomous concept, which can embrace one or more natural or legal persons engaged in an economic activity so that, depending on the circumstances, a parent company and its corporate subsidiaries within the group may be treated together as comprising a single “undertaking” or economic unit in the eyes of EU law.
74. As stated in *Michelin v. Commission* Case T-203/01; [2003] ECR II-4071 at [290]
- “...Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 and 82 EC [Article 101 and 102 TFEU] if the companies concerned do not determine independently their own conduct on the market..”
75. As Mr Turner also points out, Carbone SA is described in the recitals as a “global company” which carries on business from many sites in and outside Europe. In particular, there are references in the recitals to “a UK subsidiary” and to local meetings in the UK.
76. As stated in *Mo Och v. Commission* Case T-352/94; [1998] ECR II-1989 relating to a decision of the Commission under Article 85 EC (now Article 101(1) TFEU addressed to the parent company where more than one company in the group had participated in the infringement (see [95]) :
- “Several companies in the same group, acting under the same management and control, may be considered to be part of the same undertaking. In that regard the Commission has a discretion in determining the level of such a structure to which it is most appropriate to address a decision...”
77. Coming, however, to the crucial point whether the Tribunal was wrong to make the striking out order, I am unable to accept Mr Turner’s submissions. I can and will state as succinctly as I can the reasons for upholding the order.
78. First, I bear in mind the general principle stated at [43] in *Adriatico di Navigazione SpA v. Commission* Case T-61/99; [2000] ECR II-5349:

“...it is in the operative part of a decision that the Commission must indicate the nature and extent of the infringements which it sanctions. It should be noted that, in principle, as regards in particular the scope and nature of the infringements sanctioned, it is the operative part, rather than the statement of reasons, that is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in a decision. As the Court of Justice has already held, for the purpose of determining the persons to whom a decision, which finds that there has been an infringement, applies, only the operative part of the decision must be considered, provided that it is not open to more than one interpretation...” [See also [315] *Coöperatieve Vereniging ‘Suiker Unie’ UA &Ors v. Commission* Cases 40-48/73 etc [1975] ECR 1668.]

79. Secondly, the operative part of the Decision following the detailed recitals identifies specifically by name those undertakings to which the Decision is addressed, against which findings of infringement have been made and on which monetary claims in the Tribunal may be based.
80. Thirdly, the Decision is specifically addressed to the undertaking named as the parent company Carbone SA. It is not addressed to the whole group of companies collectively, which would include Carbone GB, nor is it addressed to individual companies in the Carbone group, such as Carbone GB.
81. Fourthly, even if Carbone GB is regarded as part of the undertaking addressed as Carbone SA, that still does not identify Carbone GB as an infringing party so as to render it liable, as a separate entity, to Emerson for infringement of competition law.
82. I conclude that Carbone GB cannot properly be made a defendant to the claim under s.47A of the 1998 Act. The issue of liability has been clearly and unambiguously determined by the Commission in its Decision in a way that imposes liability to be sued for infringement only on the undertaking named as Carbone SA and not in a way that imposes liability on the separate company known as Carbone GB. If the Commission had intended to impose such liability for infringement, it could and should have either named Carbone GB as an addressee in the operative part of the Decision or defined the addressee undertaking as including not only Carbone SA but also all subsidiary entities owned or controlled by it as being liable for infringements of Article 101(1) TFEU. The Commission did not take that course.
83. The outcome is compatible with the principle of legal certainty, which would be undermined if an entity which was not an addressee of a decision of the Commission could be made liable to proceedings in national courts based on it. The result does not offend the requirements of the principle of effectiveness, since remedies are available: it is only a matter of determining against which entities and in which jurisdictions the remedies are available.
84. As for Article 15 request, I agree with Mr Beard’s submissions and the Tribunal’s conclusions as to why it is not available or appropriate for asking the Commission which entities comprise the undertakings that are bound by the Decision.

Result

85. I would dismiss the appeal. Emerson have not established that the Tribunal was wrong in law to strike out Carbone GB as a defendant in the follow-on proceedings before it.

86. In sum the legal position is that:-

- (1) The Decision is binding on the Tribunal on matters of infringement.
- (2) The name of Carbone GB was not in the list of addressees of the Decision.
- (3) The Decision contained no finding that a relevant prohibition of competition law had been infringed by Carbone GB.
- (4) No request to the Commission for additional information or for an opinion could have resulted in such a finding.
- (5) The Tribunal has no jurisdiction to contradict or amend the Decision by making its own findings of fact on liability or by adding to the list of addressees a name that the Commission did not include in its list.
- (6) The Tribunal had no jurisdiction to determine the s.47A claims against Carbone GB since they were not based on the Decision.
- (7) The fact that Carbone GB was a wholly owned subsidiary of Carbone SA, an addressee undertaking by which a prohibition had been infringed, did not mean that a prohibition in competition law had been infringed by Carbone GB.
- (8) The Tribunal was entitled to strike out the follow-on claims against Carbone GB on the basis that there was no reasonable ground for making them.

Lord Justice Moore-Bick:

87. I agree.

Lady Justice Black:

88. I also agree.