



Neutral citation [2005] CAT 1

**IN THE COMPETITION APPEAL
TRIBUNAL**

Case: 1028/5/7/04

Victoria House
Bloomsbury Place
London WC1A 2EB

28 January 2005

Before:

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

BETWEEN:

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

Claimants

-and-

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

Defendants

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

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

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

Mr George Peretz (instructed by DLA Piper Rudnick Gray Cary UK LLP) appeared for the purchaser 2 Sisters Group.

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

JUDGMENT: LIMITATION

I INTRODUCTION

1. This is the Tribunal's judgment on applications by the Defendants to strike out three actions on the grounds that the claims have now passed to third parties by virtue of the sale of the relevant businesses, and the Claimants' counter application to join the purchasers as defendants to the action, so far as necessary.
2. The Claimants in this action claim damages from the Defendants pursuant to section 47A of the Competition Act 1998 (the "1998 Act"). The Defendants are or were manufacturers of a wide range of vitamins in respect of which the Defendants, or companies in their groups, were involved in a long-standing worldwide cartel in respect of vitamins A, E, B1, B2, B5, B6, C, D3, H, Folic acid, Beta Carotene and Carotenoids (the "vitamins cartel").
3. In a Decision dated 21 November 2001, the European Commission imposed fines on the undertakings involved in the vitamins cartel in respect of the breach of Article 81(1) of the EC Treaty (and Article 53(1) of the EEA Treaty). The Decision is addressed to thirteen undertakings, including F. Hoffmann-La Roche AG ("Roche") and Aventis SA (formerly Rhône-Poulenc) ("Aventis"). The First Defendant (Aventis) and Third Defendant (Roche) were addressees of the Decision. The Second Defendant, Rhodia Limited, was a wholly-owned subsidiary of Aventis until 25 June 1998 when Aventis sold 32.8% of its shareholding in Rhodia and it was listed on the Paris and New York stock exchanges. The Fourth Defendant was at all material times a wholly-owned subsidiary of Roche.
4. The Decision imposed fines on the undertakings involved in the vitamins cartel of a total of €855.23 million. Fines of, respectively €462 million and €5.04 million were imposed on Roche and Aventis. Aventis successfully applied to the European Commission for leniency pursuant to the Commission's Notice on the non-imposition or reduction of fines in cartel cases (OJ (1996) C207/4) and obtained complete immunity from fines in respect of its participation in the vitamins cartel in the vitamin A and vitamin E markets. Fines and other penalties have also been imposed *inter alia* by the Department of Justice in the United States in respect of the vitamins cartel.

5. The time for appealing against the Commission's Decision under Article 230 of the EC Treaty to the Court of First Instance has now expired and no appeal has been lodged by the Defendants.
6. The Claimants state that they carried on business throughout the time during which the vitamins cartel was in operation rearing poultry for the supply of chicken meat and eggs to supermarkets and wholesalers. Each of the Claimants state that it bought vitamins for incorporation in poultry feedstuffs in order to rear their poultry, from either the Second Defendant directly or from nutrition companies which had themselves purchased vitamins from the Defendants.
7. The Claimants claim that the Defendants caused each of the Claimants to pay higher prices than would otherwise have been the case for vitamins manufactured and supplied into the United Kingdom by reason of their implementation of, and/or giving effect to the vitamins cartel in the United Kingdom. By reason of their implementation of and/or giving effect to the vitamins cartel in the United Kingdom the Claimants allege that the Defendants acted in breach of a statutory duty imposed under section 2(1) of the European Communities Act 1972 not to infringe Article 81(1) of the EC Treaty and/or Article 53(1) of the EEA Treaty and/or a statutory duty imposed by Article 81(1) of the EC Treaty and/or Article 53(1) of the EEA Treaty.
8. The Claimants, supported by an expert report from Colin Morrell, a partner in KPMG LLP, allege that before and throughout the period of the vitamins cartel they paid higher sums for vitamins than they otherwise would have done. The Claimants also allege that supermarkets and wholesalers exercised buyer power that enabled them to dictate to the Claimants the prices that they were prepared to pay for chicken meat and eggs with the effect that the Claimants were unable to pass on any such increase in vitamin costs to supermarkets through increased prices for chicken or eggs. The Claimants accordingly allege that any such increase in price was borne and absorbed by the Claimants. The Claimants therefore seek damages and interest in respect of those increases from the Defendants.
9. The Defendants have alleged that the Claimants' rights to bring actions for damages against them pursuant to section 47A of the 1998 Act have been assigned to various

other parties each of whom purchased all or part of the Claimants' businesses pursuant to sale and purchase agreements (the "Sale and Purchase Agreements") executed on various dates in 2000 and 2001. The purchasers from the Claimants of the businesses formerly carried on by the Claimants are referred to by the Tribunal for the purposes of this judgment as the "Purchasers". The position is now further complicated as, the Tribunal understands, certain of the Purchasers have now themselves sold on the relevant businesses and/or assets to others.

10. No express reference is made in any of the Sale and Purchase Agreements to a purported assignment of the Claimants' claims against the Defendants pursuant to section 47A of the 1998 Act. The Sale and Purchase Agreements provide that the Claimants sold the Business and the Assets, as defined, to the Purchasers. The Assets were defined to include, essentially, all assets, including "Residual Assets" save for the "Excluded Assets" (the various agreements have slightly different terms and each agreement raises separate points of construction but, for the purposes of this present judgment, it is sufficient to note that each agreement contains a definition of "Excluded Assets"). The Defendants allege that in none of the Sale and Purchase Agreements does the definition of Excluded Assets cover claims of the sort currently before the Tribunal in this action. The Defendants allege, essentially, that the Claimants' claims are a "right owned in connection with the Businesses" and an "asset" of the businesses which have been sold. Accordingly, according to the Defendants, on the true construction of the Sale and Purchase Agreements, the right to bring the Claimants' claims was assigned to the Purchasers.
11. In their written submissions the Defendants further alleged that each of the current claims is a "legal thing in action" which has been statutorily assigned pursuant to section 136 of the Law of Property Act 1925. In particular, it was submitted that "notice in writing" of the assignment of the Claimants' claims for the purposes of that section was given to the Defendants when copies of the Sale and Purchase Agreements was given by the solicitors for the Claimants in these actions to the solicitors of the Defendants in fulfilment of the Claimants' disclosure obligations. The effect of this, in the Defendants' submission, was that the claims can no longer be maintained by the current Claimants. Furthermore, the Defendants' written submissions were to the effect that the Purchasers are now time barred, pursuant to

rule 31 of the Competition Appeal Tribunal Rules 2003 S1 2003/1372 (the “Tribunal’s Rules”) from bringing any claim in their own name, with the result that the Claimants’ claims should be struck out or alternatively that this issue be determined as a preliminary issue.

12. The Claimants on the other hand in their written submissions submit essentially that their claims were not assigned to the Purchasers by the Sale and Purchase Agreements and that, in any event, the Purchasers are estopped by their subsequent conduct from so contending. Even if the Defendants were right that the Claimants’ claims are assigned to the Purchasers it would not follow that the claims should be dismissed but only that they should be put into proper form by joining the assignees (i.e. the Purchasers) as parties to the proceedings. The just and efficient way of proceeding in the Claimants’ submission is to dismiss the Defendants’ applications to determine these matters as preliminary issues and to grant the Claimants’ permission, pursuant to rule 35 of the Tribunal’s Rules, to join the Purchasers as additional defendants to the proceedings so as to ensure that all relevant parties are before the Tribunal.

II PROCEEDINGS BEFORE THE TRIBUNAL

13. A hearing took place on 28 October 2004 to give initial consideration to the Defendants’ applications referred to above and to the application of the Claimants to join the Purchasers to the actions. At that hearing the Tribunal, having read the written submissions lodged with the Tribunal Registry in advance of the hearing, gave its preliminary indication that it appeared to be inappropriate to consider detailed submissions as to the construction of the Sale and Purchase Agreements and questions of estoppel without hearing submissions from the Purchasers or at least giving the Purchasers the opportunity to be present and represented before the Tribunal. The Purchasers were identified as 2 Sisters Premier Division Limited, Broomco (2488) Limited, Broomco (2523) Limited, Broomco (2524) Limited, P D Hook (Hatcheries) Limited and Deans Foods Limited.
14. By letters dated 1 November 2004, the Tribunal wrote to each of the Purchasers informing them of the existence of the current proceedings. The Tribunal indicated that it had been informed that businesses formerly carried out by the Claimants in the

proceedings, or parts thereof, had been sold to the Purchasers by virtue of the Sale and Purchase Agreements; that the Defendants were alleging that the Claimants did not have the rights to bring their claims before the Tribunal as those claims had been assigned to the Purchasers pursuant to the terms of the Sales and Purchase Agreements; and that, accordingly, the Defendants had applied to the Tribunal to strike out the claims or to determine the Claimants' rights to bring the claims as a preliminary issue. The Tribunal also informed the Purchasers that the Claimants had applied for permission to join the Purchasers as Defendants to the proceedings. The Tribunal invited the Purchasers to make submissions as to their respective positions on those applications before a further case management conference and to indicate whether they wished to be heard at that case management conference.

15. In a letter to the Tribunal dated 26 November 2004, P D Hook (Hatcheries) Limited effectively reserved their position on the issue of whether the right to bring the claims had been assigned to it. By virtue of an agreement dated 6 December 2004, Broomco (2524) Limited agreed with the Third Claimants that there had been no intended transfer or assignment of the Third Claimants' rights of action to it as a result of the Sales and Purchase Agreements. If, however, such a transfer or assignment had occurred, it was withdrawn. Similarly, Deans Foods Limited expressly disavowed any claim to be an assignee of any right of action derived from the Claimants.
16. In written submissions to the Tribunal, Broomco (2488) Limited, Broomco (2523) Limited and 2 Sisters Premier Division Limited (the "2 Sisters" purchasers) contend that the Claimants' rights to bring the claims had been assigned to 2 Sisters pursuant to the terms of the Sale and Purchase Agreements. In particular, 2 Sisters rely upon the clause in the Sale and Purchase Agreements providing for the sale of "Residual Assets," and on the fact that the right to bring the claims was not an expressly "Excluded Asset".
17. 2 Sisters further submit that in the event that the assignment was in equity only, the Claimants remain entitled to maintain their claims but, in view of its equitable interest, 2 Sisters should be joined as parties to the proceedings. If, however, there was a legal assignment of the Claimants' rights to bring the claims to 2 Sisters, it is

submitted that no limitation issue arises insofar as the claims were made in time, and that it is those subsisting valid claims which have been assigned to 2 Sisters.

18. 2 Sisters has now made an onward sale of the businesses purchased from the Claimants by Broomco (2488) Limited and Broomco (2523) Limited. In that regard 2 Sisters submitted that the Subsequent Sale Agreements did not involve any assignment of the rights to bring the claims. 2 Sisters emphasised that the Subsequent Sale Agreements specifically listed all assets that were sold and that there was no “Residual Assets” category in the Subsequent Sale Agreements.
19. At the hearing on 8 December 2004 the Defendants accepted that the issues of the construction of the Sale and Purchase Agreements, whether the Purchasers are estopped from asserting that the Claimants’ claims are assigned to them, and whether or not any assignment to the Purchasers is a legal or an equitable assignment should be dealt with at a later stage in the proceedings. The only issue the parties have asked the Tribunal to decide at this stage is whether, on the true interpretation of the Tribunal’s Rules concerning the addition or substitution of parties, it is open to the Tribunal to add the Purchasers as parties after the end of the limitation period for actions under section 47A of the 1998 Act. At the hearing, counsel for the Third and Fourth Defendants, supported by counsel for the First and Second Defendants, accepted that if that point was decided against the Defendants the Purchasers could be joined to the action and the case will proceed on that basis. The question of whether the Purchasers or any of them should be the beneficiary of any damages award can then be left to be decided subsequent to the issues between the Claimants and Defendants.
20. Having heard argument from the Claimants, the Defendants and 2 Sisters the Tribunal ruled that it gave permission for the Claimants to add the Purchasers as additional Defendants to this action. This judgment contains our reasons for that ruling.

III THE TRIBUNAL’S RULES

21. Part 2 of Schedule 4 to the Enterprise Act 2002 provides:

PART 2

TRIBUNAL RULES

General

- 9 In this Schedule "the Tribunal", in relation to any proceedings before it, means the Tribunal as constituted (in accordance with section 14) for the purposes of those proceedings.
- 10 Tribunal rules may make different provision for different kinds of proceedings.

Institution of proceedings

- 11 (1) Tribunal rules may make provision as to the period within which and the manner in which proceedings are to be brought.
- (2) That provision may, in particular-
- (a) provide for time limits for making claims to which section 47A of the 1998 Act applies in proceedings under section 47A or 47B;
 - (b) provide for the Tribunal to extend the period in which any particular proceedings may be brought; and
 - (c) provide for the form, contents, amendment and acknowledgement of the documents by which proceedings are to be instituted.
- (...)

Pre-hearing reviews and preliminary matters

- 16 (1) Tribunal rules may make provision for the carrying out by the Tribunal of a preliminary consideration of proceedings (a "pre-hearing review").
- (2) That provision may include-
- (a) provision enabling such powers to be exercised on a pre-hearing review as may be specified in the rules;
 - (b) provision for security and supplemental provision relating to security.
- (3) For the purposes of sub-paragraph (2)(b)-
- (a) "provision for security" means provision authorising the Tribunal, in specified circumstances, to order a party to the proceedings, if he wishes to continue to participate in them, to pay a deposit not exceeding such sum as may be specified or calculated in a specified manner; and
 - (b) "supplemental provision", in relation to security, means provision as to-
 - (i) the manner in which the amount of a deposit is to be

- determined;
- (ii) the consequences of non-payment of a deposit;
- (iii) the circumstances in which the deposit, or any part of it, may be refunded to the person who paid it or paid to another party to the proceedings.

Conduct of the hearing

17 (1) Tribunal rules may make provision-

- (a) as to the manner in which proceedings are to be conducted, including provision for any hearing to be held in private if the Tribunal considers it appropriate because it is considering information of a kind mentioned in paragraph 1(2);
- (b) as to the persons entitled to appear on behalf of the parties;
- (c) for requiring persons to attend to give evidence and produce documents, and for authorising the administration of oaths to witnesses;
- (d) as to the evidence which may be required or admitted and the extent to which it should be oral or written;
- (e) allowing the Tribunal to fix time limits with respect to any aspect of proceedings and to extend any time limit (before or after its expiry);
- (f) enabling the Tribunal, on the application of any party or on its own initiative, to order-
 - (i) the disclosure between, or the production by, the parties of documents or classes of documents; or
 - (ii) such recovery or inspection of documents as might be ordered by a sheriff;
- (g) for the appointment of experts for the purposes of proceedings;
- (h) for the award of costs or expenses, including allowances payable to persons in connection with attendance before the Tribunal;
- (i) for taxing or otherwise settling any costs or expenses awarded by the Tribunal or for the enforcement of any order awarding costs or expenses.

(...)

24 Tribunal rules may make provision-

- (a) for a person who is not a party to be joined in any proceedings;
- (b) for hearing a person who is not a party where, in any proceedings, it is proposed to make an order or give a direction in relation to that person;
- (c) for proceedings to be consolidated on such terms as the Tribunal thinks appropriate in such circumstances as may be specified.

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

“Time limit for making a claim for damages

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

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

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

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

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

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

Rule 35 of the Tribunal's Rules provides:

“Addition of parties

35. The Tribunal may, after hearing the parties, grant permission for one or more parties to be joined in the proceedings in addition or in substitution to the existing parties.”

IV THE PARTIES' SUBMISSIONS

The Defendants' submissions

23. The Defendants submit that the time limit for making a claim for damages pursuant to section 47A of the 1998 Act before the Tribunal in respect of the vitamins cartel has now expired. Accordingly, if the Purchasers were to seek to commence a fresh action in their own name before the Tribunal they would not be able to do so.

24. The Defendants referred to rule 35 of the Tribunal's Rules which governs the addition or substitution of parties to actions under section 47A of the 1998 Act. The Defendants drew the attention of the Tribunal to the Civil Procedure Rules (“CPR”) which govern the addition or substitution of parties to actions before the High Court

and county courts in England and Wales. In particular, the Defendants referred to CPR rule 19.2 and rule 19.5, which are in the following terms:

“Changes of parties – general

19.2 – (1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).

- (2) The court may order a person to be added as a new party if –
 - (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
 - (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.
- (3) The court may order that any person cease to be a party if it is not desirable for that person to be a party to the proceedings.
- (4) The court may order a new party to be substituted for an existing one if –
 - (a) the existing party’s interest or liability has passed to the new party; and
 - (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings.

(...)

“Special provisions about adding or substituting parties after the end of a relevant limitation period

19.5 – (1) This rule applies to a change of parties after the end of a period of limitation under –

- (a) the Limitation Act 1980;
- (b) the Foreign Limitation Periods Act 1984; or
- (c) any other enactment which allows such a change, or under which such a change is allowed.

- (2) The court may add or substitute a party only if –
 - (a) the relevant limitation period was current when the proceedings were started; and
 - (b) the addition or substitution is necessary.
- (3) The addition or substitution of a party is necessary only if the court is satisfied that –
 - (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

- (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant;
- (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party.

(...)

25. According to the Defendants the CPR rules quoted above contain a general rule on the addition or substitution of parties (rule 19.2) and special provision about adding or substituting parties after the end of a relevant limitation period (rule 19.5). The distinction between rule 19.2 and 19.5 of the CPR, of which, the Defendants' submit, the draftsman of the Tribunal's Rules must have been aware, and the absence of any express provision in the Tribunal's Rules concerning the addition or substitution of parties after the expiry of a limitation period, indicates that the Tribunal was not given the power to add or to substitute parties after the expiry of a limitation period. It simply cannot be the case, according to the Defendants, that the Tribunal Rules give the Tribunal an unfettered discretion to add or substitute parties after the end of the limitation period. The absence of any provision in the Tribunal Rules means that the Tribunal has no discretion to do so at all. Counsel for the Third and Fourth Defendants, who made the primary submissions on behalf of all the Defendants on this point, accepted at the hearing that his submissions, if accepted, resulted in an "oddity" such that "the Tribunal is left with a very extreme position: either it has complete discretion or it has no discretion."
26. The Defendants also submitted that joinder of the Purchasers to the action would make it difficult for the actions to proceed efficiently from a case management point of view. In particular the Defendants submitted that if they were to make offers to settle the current claims or to make a payment into the Tribunal it was not clear who could accept such an offer or payment.
27. It follows, the Defendants' submit, that it is too late for the Purchasers now to be added or substituted as parties to the action and the proceedings should be dismissed.

The Claimants' submissions

28. At the hearing on 8 December 2004 the Claimants renewed their application to join the Purchasers as additional defendants to the action pursuant to rule 35 of the

Tribunal's Rules. The Claimants submitted that joining the Purchasers to the proceedings would have substantial advantages, as:

- (a) it will ensure that all relevant parties are bound by the result of the case and that, if the Defendants lose, they are not at risk of any further claims;
 - (b) it will mean that, even if the Defendants are right in their contention that the claims have been assigned there can be no argument that the proceedings are improperly constituted; and
 - (c) it will avoid the delay and costs that would be incurred by further arguments at this stage in the proceedings about whether the claims have been assigned. If, at the end of the case, the claims have succeeded and there remains any dispute between the Claimants and the Purchasers as to the ownership of any of the claims the dispute can most efficiently and conveniently be decided at that time.
29. The Claimants submitted that the Defendants had not put forward any argument that in justice the Purchasers ought not to be joined in the proceedings. According to the Claimants, the Defendants' submission that, despite the generality of the wording of rule 35 of the Tribunal's Rules, it only applies when the time limit specified in rule 31(1) has not yet expired, is misconceived.
30. The Claimants submit that the contrast that the Defendants seek to make between the Tribunal's Rules and the CPR supports the opposite conclusion to the one for which they argue.
31. Rule 19.2 of the CPR applies except where rule 19.5 applies. By contrast, in the Tribunal's Rules there is only one rule governing the addition or substitution of parties which is not subject to any limitation or exception concerning the scope of its application. Had the draftsman thought it appropriate or necessary to make more restrictive provisions concerning the addition of parties after the end of the limitation period then he would have done so. The Claimants submitted that it would be a "trap for unwary users" of the Tribunal if the plain meaning of the Tribunal's Rules had to

be interpreted by comparison with other rules of procedure made for other courts with the result that rule 35 does not mean what it says but in fact contains an “invisible restriction”. The overwhelming implication from contrasting the Tribunal’s Rules with the CPR is that the authors of the Tribunal’s Rules deliberately chose to give the Tribunal a less trammelled jurisdiction and to make a simple, general rule to cover all circumstances.

32. The Claimants submitted that the question of whether to permit a party to be joined after the expiry of a relevant limitation period is left to the unfettered discretion of the Tribunal. It is in the interests of justice, according to the Claimants, that the Tribunal exercise its discretion in this case by granting the Claimants’ application for permission to join the Purchasers as additional defendants.
33. The Claimants submitted that the reason why there are particular restrictions built in to rule 19.5 of the CPR is because those restrictions are made necessary by the express wording of section 35 of the Limitation Act 1980. Section 35(3) of that Act provides:

“Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

Subsection (4) provides:

“Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

34. The Claimants submitted that section 35 applies only to the High Court or any county court and not to the Tribunal and applies only to time limits under the Limitation Act and not to the special time limit in rule 31 of the Tribunal’s Rules. Accordingly there was no need for the draftsman of the Tribunal’s Rules to make similar provision to that found in rule 19.5 of the CPR.

35. Although the Claimants submitted that it was strictly unnecessary to join Deans Foods Limited and Broomco (2524) Limited, as both of those companies have expressly disavowed any claim to be an assignee of any right of action derived from the Claimants, since the Defendants had submitted that it was necessary to join those parties the simplest course was for those parties too to be joined as Defendants.
36. The Claimants submitted that there was no substance in the Defendants' submission that they do not know who is claiming against them or who to make offers of settlement to. The Purchasers will be joined as further defendants not co-claimants. No Purchaser had indicated that it wished to take an active role in the proceedings at this stage. In those circumstances the same claimants that started the action continue to make the claims against the Defendants and any time the Defendants wished to do so they are free to make an offer of settlement to the Claimants. If the Claimants were to accept that offer the claim would be compromised. There might then be an issue between the Claimants and the Purchasers as to who should keep the benefit of the action but that is not an issue that needs concern the Defendants.
37. The Claimants submitted that importantly the Defendants had not submitted that it would be inappropriate from a case management point of view to join the Purchasers to the action or that if the Tribunal has a discretion to do so there is any reason for the Tribunal not to exercise its discretion to join the Purchasers. The Claimants submitted that that was hardly surprising since the purpose of joining the Purchasers is to protect the Defendants by ensuring that all parties with a possible interest in the claims are brought before the Tribunal.

2 Sisters' Submissions

38. At the hearing on 8 December 2004, 2 Sisters maintained that the appropriate course of action was to join the Purchasers as parties to the proceedings and that no issue of limitation arose.
39. Elaborating upon the submissions made by the Claimants, 2 Sisters contended that the Tribunal's own limitation rules stand as a contrast to Rule 19.2 of the CPR, which must be read against the background of section 35 of the Limitation Act 1980. 2

Sisters submitted that the two year time limit under Rule 31 of the Tribunal's rules is extendable pursuant to Rule 19(2)(i) of the Tribunal Rules. In 2 Sisters' submission, Rule 19(2)(i) applies to claims for damages, such as the current proceedings, by virtue of Rule 30, which gives the Tribunal a discretion, to be exercised judicially, to extend the time limit in appropriate circumstances.

V THE TRIBUNAL'S ANALYSIS

40. We are not persuaded by the Defendants' submissions. We consider that there is no good reason to give rule 35 of the Tribunal's Rules any meaning other than its ordinary and natural meaning. The ordinary and natural meaning of rule 35 of the Tribunal's Rules gives the Tribunal discretion to add or substitute parties to proceedings before it. In our view that rule does not contain hidden and unwritten restrictions that are to be implied into the rule to the effect that, notwithstanding the general terms in which the rule is drafted, on its true construction the Tribunal has no power and no discretion to add or substitute a party after the expiry of the period mentioned in rule 31.

41. We consider that the analogy the Defendants seek to draw with rule 19.5 of the CPR is misconceived. First, the Tribunal's Rules are intended, in our view, to be a coherent self-standing set of procedural rules governing the conduct of proceedings before the Tribunal. The Tribunal's Rules, it seems to us, are both intentionally more simply drafted than the CPR and are drafted in a more general and flexible manner than the procedural rules in the CPR. In particular, the Tribunal's Rules were not drafted, in our view, in such a way that parties to proceedings before the Tribunal must constantly have recourse to the CPR (or, bearing in mind that the Tribunal has United Kingdom jurisdiction, any other set of procedural rules governing litigation before other courts and tribunals in the United Kingdom) in order that the true meaning of the Tribunal's Rules can be discerned. That applies, in particular, to alleged "unwritten exclusions" from the procedures contained in the Tribunal's Rules which are not apparent on the face of the Rules.

42. Secondly, with regard specifically to rule 35, it seems to us that if the Defendants' submissions were correct as to the true construction of rule 35 there would be a real risk that the Tribunal lacked the power in appropriate cases to join parties to proceedings before it. That would result in some circumstances in a real risk of injustice in proceedings before the Tribunal. In particular, in this case, the addition of the Purchasers as defendants to the action in our view is necessary (if the Tribunal has the power to do so) in order to protect the Defendants (see, in particular the judgment of Peter Gibson LJ in *Three Rivers District Council v Bank of England (Governor & Co)* [1995] 3 WLR 650, [1995] 4 All ER 312). The Tribunal, in our view, should be extremely slow to adopt a construction of the Tribunal's Rules which gives rise to a risk of injustice or procedural difficulty unless such a construction was the only possible construction of the Tribunal's Rules. That in our view is not the position.
43. The statutory framework concerning the limitation period for claims pursuant to section 47A of the 1998 Act is entirely different and distinct from that relevant to the Limitation Act 1980. The Enterprise Act 2002 does not contain a provision corresponding to the Limitation Act 1980. The Enterprise Act does not itself contain a limitation period. Schedule 4, Part 2 of the Enterprise Act provides that Tribunal Rules can make provision for time limits. The Tribunal Rules make such provision in rule 31 and provide that claims must be made within 2 years of the period beginning with the "relevant date". Paragraph 24 of Part 2 of Schedule 4 provides for rules to be made for a person not a party to proceedings to be joined. Tribunal Rule 35 made such provision. There is no restriction in this rule as to the time within which parties can be added or substituted. This is in the discretion of the Tribunal after hearing the parties. The addition or substitution of the party must be in respect of the same claim for damages. It would not be appropriate to join a new claimant who had a different damages claim to the existing claimants. In the present application no new claim is being made by the Purchasers. The reason why they are being joined is so that the beneficiary of any award in the present case can be ascertained and so that the Defendants are not at risk of paying the wrong person and then being sued again by the Purchasers.
44. Third, although we accept that it may generally be useful for the Tribunal to consider the procedural rules applicable in other jurisdictions when considering the appropriate

procedure under the Tribunal's Rules and, in that regard, to the CPR in particular, we do not consider that analogies with those rules can or should be taken too far. There are a number of areas of procedure, for example as regards costs, time limits, the nature and content of written pleadings, amendment of pleadings, and disclosure, to give only some examples, where the rules and practice of the Tribunal are deliberately very different to the rules in the CPR.

45. In any event, the Tribunal is a Tribunal exercising jurisdiction throughout the United Kingdom. No submissions were made to us concerning the rules applicable to the addition of parties to actions before courts and tribunals in Scotland or Northern Ireland and we do not consider that, however persuasive the CPR may be on occasion, the presence of a particular restriction in those rules, which apply only to actions before the High Court and county courts in England and Wales, can be decisive of the interpretation to be given to the Tribunal's Rules.
46. In those circumstances, we accept the submission of counsel for the Third and Fourth Defendants that a construction of rule 35 which gave the Tribunal no power at all to add or substitute parties after the end of the period in rule 31 would be "extreme". We have not, however, been persuaded that the contrary position is equally "extreme". The Third and Fourth Defendants submitted that if they were wrong as to the construction of rule 35, the Tribunal would have an "unfettered" discretion to add parties to an action before it, at any time which, in their submission, was a position so extreme that it simply could not be the case. In our view, rule 35 does give the Tribunal discretion to add parties to an action before it after the expiry of the period in rule 31. However, the Tribunal's discretion must be exercised judicially. It would not be an appropriate exercise of that discretion to allow a party to be added after the end of the limitation period without good reason. In those circumstances, we are unable to accept that the position is as extreme as the Third and Fourth Defendants would have us suppose.
47. In this case, if the Tribunal does have the power to add parties to actions after the expiry of the period in rule 31 then no party submitted there was any reason that the Tribunal should exercise its discretion so as not to join the Purchasers as defendants to the action. It is not suggested that the claims were made outside the limitation period.

The Purchasers are being joined as defendants, not claimants. In our view, the overwhelming conclusion to be drawn from the circumstances of this case is that the Purchasers should be joined to the action. In the first place, joining the Purchasers to the action will protect the Defendants. The Purchasers will be bound by the Tribunal's judgment in this case and the Defendants will not be at risk of further claims being made by the Purchasers at a later date in another court. Joining the Purchasers will also mean that the Tribunal will be in a position to decide whether the Claimants or the Purchasers should be the beneficiaries of any award of damages by the Tribunal. Joining the Purchasers now will not result in any inconvenience or delay from a case management point of view. The Purchasers were all asked by the Tribunal to inform the Tribunal of their respective positions with regard to these claims and no Purchaser has indicated that it wishes to take an active part in the proceedings.

48. We are fortified in our view having regard to the terms of rule 19.5 of the CPR. Pursuant to that rule the High Court in England and Wales can add a party to an action after the expiry of a limitation period if to do so is necessary for the determination of the action. It appears to us that in this case it is necessary to join the Purchaser as defendants so as to enable the Claimants' claims to properly be carried on and determined (see in particular, *Three Rivers, supra*). In those circumstances, it appears to us that even under the more restrictive rules provided for by the CPR, it would be appropriate to join the Purchasers to the action before us.
49. For the above reasons we are satisfied that: (a) the Tribunal has discretion pursuant to rule 35 of the Tribunal's Rules to add the Purchasers to the action; and (b) we should exercise our discretion in this case to grant the Claimants permission to add the Purchasers as defendants to this action.

Christopher Bellamy

Andrew Bain

Marion Simmons

Charles Dhanowa
Registrar

[] 2005