



Neutral citation [2011] CAT 16

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1173/5/7/10

Victoria House
Bloomsbury Place
London WC1A 2EB

25 May 2011

Before:

MARCUS SMITH QC
(Chairman)
MARGOT DALY
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

DEUTSCHE BAHN AG
and the other parties listed in Annex 1 to this Judgment

Claimants

- v -

- (1) MORGAN CRUCIBLE COMPANY PLC
- (2) SCHUNK GMBH
- (3) SCHUNK KOHLENSTOFFTECHNIK GMBH
- (4) SGL CARBON SE
- (5) MERSEN SA (FORMERLY LE CARBONE-LORRAINE SA)
- (6) HOFFMANN & CO ELEKTROKOHLE AG

Defendants

Heard at Victoria House on 12 May 2011

JUDGMENT

APPEARANCES

Mr Jon Turner QC and Mr Rob Williams (instructed by Hausfeld & Co LLP) appeared for the Claimants.

Mr Mark Brealey QC and Miss Marie Demetriou (instructed by Clifford Chance LLP) appeared for the First Defendant.

I. INTRODUCTION

1. By a decision of the European Commission (“the Commission”) dated 3 December 2003 in Case No C.38.359 – “Electrical and mechanical carbon and graphite products” (“the 3 December 2003 Decision”), the Commission found that the seven addressees of the 3 December 2003 Decision had participated in a single and continuous infringement of Article 81(1) of the EC Treaty (now Article 101(1) of the Treaty for the Functioning of the European Union, “TFEU”) and, from 1 January 1994, Article 53(1) of the Agreement on the European Economic Area. The seven addressees were as follows:

- (1) C Conradty Nürnberg GmbH (“Conradty”);
- (2) Hoffmann & Co Elektrokohle AG (“Hoffmann”);
- (3) Le Carbone Lorraine SA (“Le Carbone”). Le Carbone is now known as Mersen SA;
- (4) Morgan Crucible Company plc (“Morgan Crucible”);
- (5) Schunk GmbH (“Schunk”) and Schunk Kohlenstofftechnik GmbH (“Schunk Kohlenstofftechnik”), collectively “Schunk”; and
- (6) SGL Carbon AG (“SGL”).

The Commission imposed fines on these addressees totalling €101.44 million.

2. As appears from the title of this action, six of these seven addressees are defendants in the present claim (“the Defendants”). Conradty is not named as a defendant.
3. Morgan Crucible (the First Defendant in these proceedings) applied for leniency in respect of possible cartel activity under the Commission’s 1996 Leniency Notice.¹ For reasons which are explained in Recitals (319) to (321) of the 3 December 2003 Decision, Morgan Crucible benefited from a fine reduction of

¹ Commission “Notice on the non-imposition or reduction of fines in cartel cases”, OJ 1996 C 207, p. 4.

100%, and so a fine of €0 was imposed by Article 2(d) of the 3 December 2003 Decision.

4. Relying upon the 3 December 2003 Decision, the Claimants have commenced a monetary claim against the Defendants pursuant to section 47A of the Competition Act 1998 (“the 1998 Act”).
5. By an application dated 23 February 2011, Morgan Crucible seeks an order pursuant to Rule 40 of the Competition Appeal Tribunal Rules 2003, SI 2003 No 1372 (“the 2003 Rules”), rejecting the claims against it on the ground that they have not been brought within the time limit laid down by Rule 31 of the 2003 Rules.

II. THE RELEVANT STATUTORY PROVISIONS

6. Rule 31 of the 2003 Rules provides as follows:

“(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.”

7. Rule 40 of the 2003 Rules provides as follows:

“(1)The Tribunal may, of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, reject in whole or in part a claim for damages at any stage of the proceedings if –

(a) it considers that there are no reasonable grounds for making the claim;

(b) in the case of proceedings under section 47B of the 1998 Act it considers that the body bringing the proceedings is not entitled to do so, or that an individual on whose behalf the proceedings are brought is not a consumer for the purposes of that section;

(c) it is satisfied that the claimant has habitually and persistently and without any reasonable ground –

(i) instituted vexatious proceedings, whether against the same person or different persons; or

(ii) made vexatious applications in any proceedings; or

(d) the claimant fails to comply with any rule, direction, practice direction or order of the Tribunal.

(2) When the Tribunal rejects a claim it may enter judgment on the claim in whole or in part or make any other consequential order it considers appropriate.”

8. As we have noted, these are claims made under section 47A of the 1998 Act.

This section provides as follows:

“(1) This section applies to –

(a) any claim for damages, or

(b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section “relevant prohibition” means any of the following –

(a) the Chapter I prohibition;

(b) the Chapter II prohibition;

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

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

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

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

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

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

- (5) But no claim may be made in such proceedings –
- (a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and
 - (b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.
- (6) The decisions which may be relied on for the purposes of proceedings under this section are –
- (a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;
 - (b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;
 - (c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;
 - (d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or
 - (e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.
- (7) The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in subsection (6)(a), (b) or (c) may not be brought without permission are –
- (a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46 or section 47;
 - (b) in the case of a decision of the OFT which is the subject of an appeal mentioned in paragraph (a), the period following the decision of the Tribunal on the appeal during which a further appeal may be made under section 49;
 - (c) in the case of a decision of the Tribunal mentioned in subsection (6)(c), the period during which a further appeal may be made under section 49;
 - (d) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the Supreme Court from a decision on the further appeal;
- and, where any appeal mentioned in paragraph (a), (b), (c) or (d) is made, the period specified in that paragraph includes the period before the appeal is determined.
- (8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are –

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

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

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

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

III. AN OVERVIEW OF THE OPERATION OF SECTION 47A OF THE 1998 ACT

9. Section 47A was introduced into the 1998 Act by section 18 of the Enterprise Act 2002. Under section 47A, a claim for damages may be brought before the Tribunal only where a prior decision has established that an infringement of competition law has occurred. The decisions capable of having this effect are listed in section 47A(6). One of the types of decision listed in section 47A(6) is a decision of the Commission that the prohibition in Article 81(1) or Article 82 of the Treaty (now Articles 101(1) and 102 TFEU) has been infringed: section 47A(6)(d) of the 1998 Act. There is no dispute that the 3 December 2003 Decision is a decision falling within section 47A(6)(d).
10. Section 47A(9) provides that “[i]n determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed”. In effect, section 47A creates what has become known as a “follow on” claim, a claim for damages that follows on from an anterior finding of competition law infringement. Where there has been such a finding, it is binding on the Tribunal, whose role it is simply to assess the consequences of that infringement, in terms of causation and loss.
11. The “follow on” nature of a section 47A claim was described by Lloyd LJ in paragraph 8 of the Court of Appeal’s decision in *Enron Coal Services Limited v English, Welsh & Scottish Railway Limited* [2011] EWCA Civ 2:

“The right to bring a follow-on claim before the Tribunal does not affect the right of a party to bring the sort of proceedings in court that were already possible, so a party which considers itself to have been the victim of anti-competitive behaviour, and to have suffered loss as a result, has a choice: it may bring ordinary proceedings in the High Court (I speak only of England, even though the 1998 Act applies throughout the UK), or, if a relevant regulator has held there to have been an infringement, it may bring proceedings in the Tribunal. If it proceeds in court, it can allege, and must prove, whatever infringements it wishes to rely on as having caused loss. If a regulator has found there to have been an infringement, before or during the course of the proceedings, it will have the benefit of section 58 under which it can rely on the regulator’s findings of fact. On the other hand, it may proceed in the Tribunal, in which case it is limited to the infringements found by the regulator, but the question of infringement is concluded by the regulator’s decision, leaving only the issues of causation and quantification of loss to be decided by the Tribunal.”

IV. THE PARTIES’ CONTENTIONS

12. As we have noted, this is Morgan Crucible’s application to have the claim against it struck out on the ground that it has been brought out of time. The Claimants resisted this application. The contentions of Morgan Crucible, represented by Mr Mark Brealey QC, and of the Claimants, represented by Mr Jon Turner QC, may be summarised as follows:

- (1) A claim for damages must be made within a period of two years beginning with the “relevant date”: Rule 31(1) of the 2003 Rules.
- (2) For present purposes, the relevant date is that laid down in Rule 31(2)(a) of the 2003 Rules, which defines the “relevant date” as “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”.
- (3) In this case, the decision in question is the 3 December 2003 Decision. Accordingly, the provision in the 1998 Act identifying the “relevant date” is section 47A(8), and that date is the end of “the period during which proceedings against the decision of finding may be instituted in the European Court” and “if any such proceedings are instituted, the period before those proceedings are determined”. According to section 59(1) of the 1998 Act, “European Court” means the European Court of Justice (now, the Court of Justice of the European Union) and the Court of First Instance of the European Communities (now, the General Court).

So far, this was common ground between the parties.

- (4) The crucial difference between the parties turned on the meaning of “decision”. According to Morgan Crucible, the “decision” referred to in section 47A(8)(a) means a decision concerning a *specific defendant* to the section 47A claim, as opposed to *all the addressees* of the decision serving as the trigger for the follow on claim. The Claimants’ contention was the precise reverse: “decision” referred to a decision concerning *all* addressees of the decision.
- (5) Thus, in this case, Morgan Crucible contended that “decision” means a decision concerning it only, whereas the Claimants contended that a decision referred to a decision concerning all or any addressees of the Decision. In this case, the distinction is an important one:
 - (i) Morgan Crucible did not appeal against the 3 December 2003 Decision at all. Nor did Hoffmann, the Sixth Defendant.
 - (ii) The other Defendants all appealed to the Court of First Instance of the European Communities (now, as we have noted, known as the General Court). This was done by way of three distinct appeals (Schunk and Schunk Kohlenstofftechnik, the Second and Third Defendants, appealed jointly), each essentially claiming that the Court should either annul the 3 December 2003 Decision or substantially reduce the fines imposed. On 8 October 2008, the General Court dismissed these appeals in their entirety:
 - (a) In the case of SGL, the Fourth Defendant, in Case T-68/04 *SGL Carbon AG v Commission* [2008] ECR II-2511;
 - (b) In the case of the Schunk and Schunk Kohlenstofftechnik, the Second and Third Defendants, in Case T-69/04 *Schunk GmbH v Commission* [2008] ECR II-2567;

- (c) In the case of Le Carbone, the Fifth Defendant, in Case T-73/04 *Le Carbone-Lorraine v Commission* [2008] ECR II-2661.
- (iii) SGL (the Fourth Defendant) and Le Carbone (the Fifth Defendant) then appealed the General Court's judgments, in respect of penalty only, to the Court of Justice. On 12 November 2009, the Court of Justice dismissed those appeals:
 - (a) In the case of Le Carbone, the Fifth Defendant, in Case C-554/08 P *Le Carbone-Lorraine SA v Commission* [2009] ECR I-189.
 - (b) In the case of SGL, the Fourth Defendant, in Case C-564/08 P *SGL Carbon AG v Commission* [2009] ECR I-191.

If “decision” means only a decision concerning Morgan Crucible (as Morgan Crucible contended), then the period under section 47A(8)(b) does not arise (because there would be no relevant proceedings against the 3 December 2003 Decision), and the period under section 47A(8)(a) would have expired on 14 February 2004 (when the time for challenging the 3 December 2003 Decision expired). Accordingly, the two year limitation period would have expired on 14 February 2006, rendering the claim against Morgan Crucible time-barred. If, on the other hand, “decision” means a decision concerning *any* of the addressees of the Decision (as the Claimants contended), then section 47A(8)(b) would have been triggered (because there would have been relevant proceedings against the 3 December 2003 Decision), and that period would have expired on 12 November 2009. On this basis, these claims would all be well within the two year limitation period (which would only expire on 12 November 2011).

V. THE TRIBUNAL’S DECISION IN EMERSON ELECTRIC CO V MORGAN CRUCIBLE COMPANY PLC

13. This is not the first time this issue has been before the Tribunal. In *Emerson Electric Co v Morgan Crucible plc* [2007] CAT 28, this issue was raised before, and decided by, the Tribunal. We shall refer to this decision as “*Emerson I*”. In *Emerson I*, as here, the claimants were seeking damages from the defendants pursuant to section 47A of the 1998 Act. The decision serving as the section 47A trigger was the same decision as here, the 3 December 2003 Decision. The case came before the Tribunal at a time when:
- (1) Morgan Crucible’s right to challenge the 3 December 2003 Decision had expired: see paragraphs 18 and 20 of *Emerson I*.
 - (2) The 3 December 2003 Decision had been challenged by the other addressees of the Decision – as described in paragraph 12(5) above – but those challenges had yet to be determined: see paragraph 19 of *Emerson I*.
14. We will need to consider the precise nature of the arguments made by Morgan Crucible in *Emerson I* later on in this Judgment. For present purposes, it only needs to be noted that the Tribunal’s description of Morgan Crucible’s arguments before it does not appear to be entirely complete or accurate when viewed in the light of the submissions in fact made to the Tribunal (which we have been shown).
15. One of the questions addressed by the Tribunal was whether, in circumstances where the section 47A(8)(a) period had expired so far as Morgan Crucible was concerned, this was sufficient to cause time to begin to run under Rule 31 of the 2003 Rules, thus enabling a claim to be brought as of right against Morgan Crucible (but not as against the other addressees, where permission to bring the claim would be required pursuant to Rule 31(3) of the 2003 Rules).
16. The Tribunal decided that where proceedings had been instituted before the European Court (described in *Emerson I* as “EC proceedings”: see paragraph

53), even if by an addressee of the decision other than Morgan Crucible, this was sufficient to prevent a claim being brought as of right, and so sufficient to prevent the limitation clock from starting. It is appropriate to set out the Tribunal's reasoning in full on this point:

- “62. The first issue requires us to decide the true meaning of sections 47A(5)(b) and 47A(8) of the 1998 Act and how these provisions apply to the particular circumstances of the case presently before us. Does section 47A(8) apply in circumstances where the UK proceedings are brought against an addressee of the Decision who is not party to the EC proceedings?”
63. We consider that the first question to ask is what is the ordinary or plain meaning of sub-sections (5) and (8), having due regard to general principles of Community law and the overall structure and purpose of the 1998 Act.
64. Section 47A(5)(b) and 47A(8)(b), read with section 47A(8)(a), provide that where “any such proceedings” (i.e. the EC proceedings) may be, or have been, instituted in the European Court, then a claim for damages under that provision may only be brought with the permission of the Tribunal. We consider that the phrase “if any such [EC] proceedings are instituted” in sub-section (8) clearly indicates that as long as “any” proceedings have been brought in the European Court, permission of the Tribunal is required to bring a monetary claim under section 47A.
65. We consider this to be so where the proceedings in the European Court have been brought by any one or more of the addressees of the decision in question or, indeed, by a third party for whom the decision is of direct and individual concern within the meaning of Article 230(4) of the EC Treaty.
66. In our judgment, whilst EC proceedings against the Decision are on foot, the Emerson Claimants require permission to commence UK proceedings before the Tribunal, even when brought against an addressee of the Decision, such as Morgan Crucible, who has not instituted EC proceedings.
67. The plain construction of section 47A means that time has not yet begun to run. The Tribunal is given a discretion to give permission for a claim to be made before the end of the period specified in section 47A(8) of the 1998 Act. Such discretion provides a flexible approach which can be exercised in accordance with the particular circumstances of each case, but may only be exercised after taking into account any observations of a proposed defendant (see Rule 31(3) of the Tribunal's Rules).
68. We consider that the plain meaning of the provisions of section 47A of the 1998 Act, set out above, secures the just, expeditious and economical conduct of proceedings before the Tribunal. The Emerson Claimants propose to bring claims before the Tribunal against a number of the addressees of the Decision. The reason for bringing the UK proceedings was to protect their position in the event that the time limit for making a monetary claim was about to expire.
69. Since there are no Community rules establishing the procedure for bringing a claim for damages following a Decision of the European Commission, it is for the Member States and their domestic legal systems to establish the

detailed procedure for bringing such private actions and in so doing Member States must comply with the principle of equivalence and the principle of effectiveness. It was not submitted to us that there had been any failure to comply with these principles in enacting section 47A of the 1998 Act and Rule 31 of the Tribunal's Rules. We see no basis for suggesting that there has been any failure to comply with these principles.

70. It was submitted by the Emerson Claimants that where an addressee of a Commission decision, such as the Defendant, does not commence EC proceedings, then that decision continues, as a matter of Community law, to be valid and binding on that addressee in all its aspects, notwithstanding that other addressees of the Decision successfully appeal against the Decision against them: see Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833, paragraph 13. The Emerson Claimants have also drawn our attention to the further principle of EC law that, where some addressees of an infringement decision bring an action for annulment, the matter to be decided by the European Court relates only to those aspects of the decision which concern those addressees. Unchallenged aspects concerning other addressees do not form part of the matter to be tried by the European Court: see Case C-310/97 P *Commission v AssiDöman Kraft Products AB* [1999] ECR 5363, paragraphs 51-53. The Emerson Claimants submit that since any annulment of the Decision would have no effect on the Decision in relation to Morgan Crucible, it follows that the reference to "decision" in section 47A(8) of the 1998 Act is a reference not to the whole of the decision of the European Commission but instead refers only to that part of the decision which is the subject of the appeal to the EC.
71. In our judgment the word "decision" in section 47A(8) of the 1998 Act cannot be given such a restrictive meaning. When the European Court of Justice stated the principles now relied upon by the Emerson Claimants, it was considering the scope of Article 230 of the EC Treaty and not the question of the true construction of section 47A of the 1998 Act. Accordingly we do not consider that the principles expounded by the Court of Justice to meet different considerations have any application to relevance to the true construction of section 47A of the 1998 Act.
72. Accordingly, the two year period referred to in Rule 31 of the Tribunal's Rules has not yet begun to run."

VI. TRIBUNAL'S ANALYSIS

(i) Stare decisis

17. The Claimants, unsurprisingly, placed considerable reliance on the conclusion that was reached in *Emerson I*, and rightly so. Nevertheless, prior decisions of the Tribunal are not binding on the Tribunal,² and whilst entitled to great

² See the passage from *Hansard*, quoted in paragraph 1.5 of the Tribunal's *Guide to Proceedings* (October 2005), where Lord Simon of Highbury (the Minister responsible for ensuring the passage of the Competition Bill in 1997) analogised the Tribunal to the High Court. An earlier decision of the High Court is not binding on another Judge of the High Court: *Re Kay's Settlement* [1939] Ch 329; *R v*

respect, it is necessary (subject to the question of abuse, which we consider in Section VII below) to consider the substance of the question anew.

(ii) Ambiguity in the term “decision”

18. The 1998 Act frequently uses the term “decision”. It is a term used a number of times in section 47A itself, but also elsewhere in the Act (for instance, in section 46 and section 47).

19. There is a central ambiguity in the term “decision”:

(1) It can mean the instrument by which a decision is or decisions are made. As Mr Turner pointed out, the 3 December 2003 Decision:

(i) Is entitled “Commission Decision of 3 December 2003”: page 1 of the Decision;

(ii) States in Recital (1) that “This Decision is addressed to the following undertakings...”;

(iii) States at page 106 of the Decision, after the Recitals, that the Commission “HAS ADOPTED THIS DECISION”.

Clearly, in these and other parts of the 3 December 2003 Decision, the term “decision” is being used to refer to the *instrument*, that is, the document embodying the decision. Indeed, that is precisely how we, in this Judgment, are using the term “3 December 2003 Decision”. In the Judgment, we shall refer to this meaning of the word “decision” as the “wide” meaning.

(2) Alternatively, the term can mean a determination of a specific issue or refer to the imposition of a specific consequence. Here, “decision” means something much narrower than the wide meaning that we have described in the preceding sub-paragraph. An instrument may contain many “decisions” in this narrower sense. As Mr Brealey put it, the 3 December 2003 Decision contains a bundle of individual decisions to

Greater Manchester Coroner, ex parte Tal [1985] QB 67 at 81; *R (Amin) v Secretary of State for the Home Department* [2009] EWHC 1085 (Admin).

separate addressees. In this Judgment, we shall refer to this meaning of the word “decision” as the “narrow” meaning.

20. We consider that much assistance is to be derived in considering whether “decision” is used in the wide or the narrow sense from the law relating to:
- (1) The nature of decisions of the Commission;
 - (2) Other case-law considering the 1998 Act, and in particular section 47A.

We consider these two areas of law in Section VI(iii) and VI(iv) below. Our conclusions on this question of construction are contained in Section VI(v) below.

(iii) The nature of decisions of the Commission

21. Article 288(1) TFEU provides:

“To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.”

22. The term “decision” in Article 288(1) seems to be describing the instrument. Whilst a decision, like a regulation, is “binding in its entirety”, a regulation is intended to have general application, whereas this is not (at least typically) the case with a decision. In particular, where a decision specifies those to whom it is addressed, it is only binding on such addressees.

23. In *Emerson Electric Co v Morgan Crucible Co plc* [2011] CAT 4, which we shall refer to as “*Emerson 4*”,³ a differently constituted Tribunal considered the nature and structure of Commission decisions, such as the present 3 December 2003 Decision. Indeed, the 3 December 2003 Decision was the decision before the Tribunal on this occasion. The Tribunal noted (in paragraph 11) that the 3 December 2003 Decision (as with most Commission decisions) had “a relatively short operative part or *dispositif* and an often lengthy statement of reasons. The operative part identifies the addressee(s) of the decision and, for example, makes a finding of infringement and/or imposes penalties and/or requires the persons to whom the decision is addressed to bring the infringement to [an] end. The statement of reasons, which normally precedes the operative part, contains what are called the recitals to the decision, setting out the factual and legal assessment which the Commission has made in reaching its decision”.
24. In this case, the operative part of the Decision consists of four articles, and comes after 364 paragraphs of recitals. The recitals explain the reasons for the Commission’s findings. Article 1 of the *dispositif* reads:
- “The following undertakings have infringed Article [101(1) TFEU] and – from 1 January 1994 – Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products:
- C Conradt Nürnberg GmbH, from October 1988 to December 1999;
- Hoffmann & Co Elektrokohle AG, from September 1994 to October 1999;
- Le Carbone Lorraine SA, from October 1988 to June 1999;
- Morgan Crucible Company plc, from October 1988 to June 1999;
- Schunk GmbH and Schunk Kohlenstofftechnik GmbH, from October 1988 to December 1999;
- SGL Carbon AG, from October 1988 to December 1999.”
25. Article 2 imposed fines on each of the undertakings listed in Article 1, with the exception of Morgan Crucible, whose fine had been commuted to zero as a

³ There have been a number of decisions in the *Emerson* proceedings. *Emerson 1* was referred to in paragraph 13 above. After *Emerson 1*, there were two further *Emerson* decisions, “*Emerson 2*” [2007] CAT 30 and “*Emerson 3*” [2008] CAT 8. Although we do not refer to *Emerson 2* or *Emerson 3* in this Judgment, to avoid confusion, we are adopting the same numbering as that used by Richards LJ in *BCL Old Co Limited v BASF SE* [2009] EWCA Civ 434 at para 32.

result of the application of the Commission's leniency arrangements. Article 3 required those undertakings to bring to an end the infringements referred to in Article 1, and to refrain from repeating such conduct and from conduct having a similar effect. Article 4 listed the addressees of the 3 December 2003 Decision (the same undertakings as those referred to in Article 1), together with their postal addresses.

26. Thus, the 3 December 2003 Decision – as will be the case with most decisions – has legal force in relation to a defined number of persons: those to whom it is addressed. It follows that where a decision describes different legal consequences to different addressees, the nature of the consequences will vary according to addressee. Thus, in the case of the 3 December 2003 Decision, each of the addressees received a different fine. Moreover, as also occurred in the case of the 3 December 2003 Decision, it is possible for the Commission to find that the period of involvement of the various addressees in the cartel was different.
27. The fact that the same decision can have different consequences depending on addressee is reflected in the fact that *separate* appeals can be commenced against the same decision provided either the decision is addressed to that person or the decision is of direct and individual concern to them: see Article 263 TFEU. This, of course, explains the distinct appeals that were pursued against the 3 December 2003 Decision.
28. In terms of identifying to whom a decision was addressed, the Tribunal regarded as critical the decisions (in the narrow sense of the term) made in the operative part or *dispositif*. Although the Tribunal, in *Emerson 4*, left open the question of whether the recitals in a decision could be used as an aid to construe who the addressees were in the operative part or *dispositif* (see paragraph 62), it is absolutely clear that the Tribunal considered that the decisions made in the 3 December 2003 Decision for the purposes of those section 47A proceedings were contained in the operative part only (see paragraphs 19 and 52). Recitals do not contain decisions in the narrow sense, although they may form part of a decision in the wide sense.

29. Case C-310/97 P *Commission v AssiDomän Kraft Products* [1999] ECR I-5363 concerned a decision of the Commission (the *Wood Pulp* decision) in which the Commission found that some 43 addressees of that decision had infringed Article 85(1) of the EEC Treaty (now Article 101(1) of the TFEU). As a result, fines were imposed on those addressees. Some 26 of these 43 addressees brought actions to annul the decision, and were successful before the Court of Justice. AssiDomän Kraft Products and a number of other parties had not brought proceedings for the annulment of the *Wood Pulp* decision, but nevertheless sought a refund of the fines that had been imposed on them, based upon the successful annulment proceedings that had been brought by others. The Court of Justice (to whom the case was appealed from the Court of First Instance, as it then was) noted (in paragraph 49) that “the appeal raises the question whether, where several similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken legal action and obtained annulment, the institution which has adopted them must, at the request of other addressees, re-examine the legality of the unchallenged decisions in the light of the grounds of the annulling judgment and determine whether, following such re-examination, the fines paid must be refunded”.
30. The Court noted, in paragraph 53, that “if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the Community judicature relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the Community judicature”. The Court observed that “[i]t is settled case law that a decision which has not been challenged by the addressee within the time limit laid down by Article 173 of the Treaty becomes definitive as against him”. Accordingly, the contentions of AssiDomän Kraft Products and the other respondents were rejected. Essentially, the Court regarded the *Wood Pulp* decision as an instrument which, “although drafted and published in the form of a single decision...had to be treated as a bundle of individual decisions making a finding or findings of infringement against each of the undertakings to which it was addressed and,

where appropriate, imposing a fine” (paragraph 18, recording the findings of the Court of First Instance).

31. The decision in *AssiDomän* emphasises that when considering the legal effect of a decision, the crucial point is to identify precisely the determination in question. In short, whilst the instrument may properly be called a decision in the wide sense, it will, in the ordinary course, contain multiple decisions in the narrow sense; it is these decisions (in the narrow sense) which a party affected may (or may not) chose to appeal.

(iv) Other case law considering the 1998 Act

32. In *BCL Old Co Limited v BASF SE* [2009] EWCA Civ 434, the Court of Appeal considered when – for the purposes of section 47A(8) – time began to run. The question was whether the reference in section 47A(8) to “proceedings against the decision” included proceedings challenging the amount of penalty imposed by the Commission’s decision. The Court of Appeal held that section 47A(8) referred only to proceedings brought challenging the Commission’s finding of liability. A challenge simply to the amount of a fine was not – for the purposes of section 47A(8) – “proceedings against the decision”.
33. Central to the Court of Appeal’s conclusion on this point was the distinction drawn between “a decision that a relevant prohibition has been infringed and the decision as to the imposition of a penalty. Section 47A is concerned with the former, and not the latter. This is clear from the wording of the section itself and is supported by consideration of the wider statutory context” (paragraph 21). As regards this wider statutory context, the Court of Appeal stated as follows:

“14. Chapter III [of the 1998 Act] contains provisions relating to investigation and enforcement. Section 31 provides that if as a result of an investigation the OFT proposes to make a decision, it must give written notice and the opportunity to make representations. “Decision” is defined for this purpose by section 31(2):

“31. ...(2) For the purposes of this section and sections 31A and 31B ‘decision’ means a decision of the OFT –

(a) that the Chapter I prohibition has been infringed;

(b) that the Chapter II prohibition has been infringed;

(c) that the prohibition in Article 81(1) has been infringed; or

(d) that the prohibition in Article 82 has been infringed.”

15. Separate provision is made in section 36 concerning the imposition of penalties:

“36.(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 81(1), the OFT may require an undertaking which is a party to the agreement to pay the OFT a penalty in respect of the infringement.

(2) On making a decision that conduct has infringed the Chapter II prohibition or that it has infringed the prohibition in Article 82, the OFT may require the undertaking concerned to pay the OFT a penalty in respect of the infringement...”

16. The distinction between decisions that there has been an infringement and decisions imposing a penalty is picked up in section 46, concerning appealable decisions:

“46.(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.

(2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.

(3) In this section ‘decision’ means a decision of the OFT –

(a) as to whether the Chapter I prohibition has been infringed;

(b) as to whether the prohibition in Article 81(1) has been infringed;

(c) as to whether the Chapter II prohibition has been infringed;

(d) as to whether the prohibition in Article 82 has been infringed,

...

(i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,

and includes a direction under section 32, 33 or 35 and such other decision under this Part as may be prescribed.

(4) Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal under this section does not suspend the effect of the decision to which the appeal relates...”

17. Section 47 underlines the distinction between decisions as to infringement and decisions as to penalty by providing that third parties with a sufficient interest may appeal against the former but not against the latter.

18. That is followed by section 47A itself, which I have already set out. [Set out in paragraph 8 above.]

19. The final provision I should mention is section 49, concerning further appeals. It provides:

“49.(1) An appeal lies to the appropriate court –

(a) from a decision of the Tribunal as to the amount of a penalty under section 36;

(b) from a decision of the Tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A...or as to the amount of any such damages or other sum; and

(c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47...”

34. This is a conclusion that turns on reading “decision” in the 1998 Act as meaning decision in the narrow sense.

(v) Our conclusion on construction

35. We agree with Mr Turner’s submission (based upon *Bennion on Statutory Interpretation*, 5th ed (2008)) that an Act of Parliament needs to be construed as a whole (*Bennion*, Section 355), and that the same word in an Act should (if possible) be given the same meaning (*Bennion*, page 1160).

36. We consider that it would be anomalous were the term “decision” in the 1998 Act to have a variable meaning; and in seeking to resolve the meaning of this term, we have ventured beyond section 47A.

37. Our unanimous conclusion is that “decision” in section 47A is used in its narrow sense. This is plainly how the Court of Appeal considered the term in *BCL Old Co*. Central to the Court of Appeal’s decision was the distinction between a decision relating to *infringement* and a decision relating to *the imposition of a penalty*. Such a distinction can only be drawn if the term is used in its narrow sense. Suppose, in the case of the 3 December 2003 Decision, all of the addressees had chosen to challenge only the penalties imposed by the decision, and not the question of infringement itself. If the term “decision” in section 47A(8) were used in its wide sense, then it is plain that there would be “proceedings against the decision”, inconsistent with the decision of the Court of Appeal in *BCL Old Co*. The decision in *BCL Old Co* only works if the wide

meaning of “decision” is abandoned, and the narrow meaning of the term adopted. On this approach, it is possible to examine the nature of the proceedings against the decision, determine whether or not they relate to infringement or penalty, and so determine whether or not the period defined in section 47A(8)(b) has been triggered.

38. The use of the term “decision” in its narrow sense is also consistent with the decision in *Emerson 4*. As we noted in paragraph 28 above, the Tribunal in *Emerson 4* considered that such decisions as were made in the 3 December 2003 Decision were contained in the operative part, and that recitals did not contain decisions in the narrow sense. Section 47A(9) states that “the Tribunal is bound by any decision mentioned in subsection (6)”. Were “decision” to be given its wide meaning, then not only would the operative part of a decision (in the wide sense) be binding, but so too would each and every recital in that instrument. The Tribunal in *Emerson 4* considered that decisions could be contained in the operative part, and that necessarily requires the term “decision” to be read in its narrow sense.
39. This approach is also consistent with the decision of the Court of Justice in *AssiDomän Kraft Products*. We should point out that we attach a little less weight to this decision than we do to the decisions in *BCL Old Co* and in *Emerson 4*. This is only because – naturally – the Court of Justice was considering only one form of instrument, a decision under Article 288(1) TFEU, whereas the 1998 Act in general, and section 47A in particular, is concerned with decisions not only issued by the Commission, but also by the OFT and this Tribunal (as the decision in *BCL Old Co* makes very clear). In other words, whilst section 47A refers to Commission decisions, this is not the only type of decision referred to. Nevertheless, the analysis in *AssiDomän Kraft Products* is extremely clear and persuasive in its analysis of what a “decision” is. The point clearly made is that whereas an instrument may, or may not, be labelled or entitled a “Decision”, in reality such an instrument contains a bundle of different decisions, each to different effect and each quite possibly directed to a different person. Although, as we have noted, the term “decision” is an

ambiguous one, when one is talking about a legal act, with legal consequences and effects, the narrow meaning of the term is much the more natural one.

40. It is, of course, possible that the term “decision” in section 47A refers, not to the entire instrument (that is, the decision in the wide sense), but to *all* decisions (in the narrow sense) contained in the operative part or *dispositif*, irrespective of addressee. In other words, the *dispositif* is (irrespective of how many individual decisions in the narrow sense it contains) to be regarded as a single decision. Such a conclusion would be sufficient to enable the Claimants successfully to resist Morgan Crucible’s application, and would be consistent with the Tribunal’s decision in *Emerson 4*. However, we consider this approach both inconsistent with authority and unrealistic:

- (1) In the first place, for the reasons we have given, it is not consistent either with the approach of the Court of Appeal in *BCL Old Co*, nor with the approach of the Court of Justice in *AssiDomän Kraft Products*.
- (2) Secondly, we consider that it represents an entirely unrealistic approach to the construction of the operative part of a decision. Take, by way of example, Article 1 of the 3 December 2003 Decision, quoted in paragraph 24 above. The natural construction of Article 1 is that it contains seven discrete decisions, namely that each of the addressees there listed infringed what is now Article 101(1) TFEU for the periods there stated. *A fortiori*, it is an unnatural reading to suggest that the six separate fines imposed upon seven distinct companies (Schunk and Schunk Kohlenstofftechnik were given a single fine, for which they were jointly and severally liable) comprise only one decision. This is consistent with notions of personal responsibility.

41. In short, it is our clear conclusion that “decision” must mean that specific part of the *dispositif* that makes a decision as regards *a particular addressee*. The point can be tested quite easily: suppose a decision addressed to *A* and to *B*, finding that party *A* has infringed Article 101 TFEU, but that party *B* has not. Clearly, no claim under section 47A can be brought against party *B*; but, equally, such a claim could be made against party *A*. Similarly, party *A* would be entitled to appeal

against the decision made against it, but not as regards the decision in relation to party *B*. Thus, looking at section 47A(8), it seems to us that what is being referred to is a decision *against a particular party*.

42. For these reasons, we differ from the conclusion reached in *Emerson I*.

(vi) Construction against inconvenience and absurdity

43. Mr Turner submitted (citing *Bennion*, Sections 312 to 314) that a Court will seek to avoid a construction of an Act that produces an absurd, unworkable or inconvenient result. We agree, although we would observe that if the construction of an Act is unequivocal, then it must be followed, even if the result is absurd, unworkable or inconvenient.

44. Here, we consider the construction of section 47A to be clear. Moreover, we do not consider that this construction gives rise to an outcome that can be described as inconvenient, still less unworkable or absurd. Both parties pointed to factors which, so they suggested, supported their favoured construction. We consider them in the following paragraphs.

Speed in bringing on section 47A proceedings

45. Mr Brealey observed that if the term “decision” was given its wide meaning, then section 47A proceedings against an addressee who was *not* appealing the decision would be delayed until the appeals by the other addressees had been determined, perhaps by years. By contrast, if “decision” was given its narrow meaning, then section 47A proceedings could be commenced as of right against a non-appealing addressee the moment the time for commencing such an appeal had passed.

46. We consider that there is some force in this suggestion. *Prima facie*, justice delayed is justice denied, and if an addressee has elected not to appeal, it is difficult to see why section 47A proceedings should be put off until all the *other* addressees of the decision have had their appeals determined.

47. Mr Turner identified three reasons as to why this apparent advantage was illusory:

- (1) First, basing himself very much on Morgan Crucible's own submissions before the Tribunal in *Emerson I*, Mr Turner noted that it would often be the leniency applicant who would choose not to appeal the decision triggering the section 47A claim, and who would therefore be primarily exposed to a claim, whilst the other addressees pursued their appeals. This, he suggested, was particularly problematic given that liability under section 47A is joint and several.
- (2) Secondly, there might be very real disadvantages in terms of the disclosure of evidence, if a claimant were able (as of right) and required (because of the limitation period) to bring a claim for follow on damages against a non-appealing addressee only.
- (3) Thirdly, he suggested that there was a real risk – if the term “decision” was given its narrow meaning – of follow on claims proceeding against different addressees on different bases. The point was put as follows in the Claimants' submissions of 11 March 2011:

“40. In response to this argument, Morgan can only argue that a non-appealing defendant is necessarily to be held liable on the basis of the Commission's findings, whilst an appealing party may be liable on some different basis (if he is liable at all) if he succeeds in his appeal. However, that argument contemplates that two parties to a cartel may be held jointly and severally liable for the activities of the cartel on the basis of different findings as to what the cartel entailed. That is an unworkable and incoherent basis for follow-on claims before the Tribunal.

41. Take a Commission decision which finds a long-running cartel lasting until 2008, against which party A (the successful immunity applicant) does not appeal. Assume this goes on appeal to the EC Courts at the suit of parties B, C and D (the only other cartelists). Those parties seek a partial annulment of the infringement decision, claiming that there was inadequate evidence of the cartel persisting after 2005, and also claim a reduction in penalty. The EC Courts uphold the appeal. A cartel victim then proceeds with a claim for damages in the CAT against A, B, C and D. On Morgan's approach, the Tribunal must assume both that the cartel operated until 2008, and that it operated only until 2005. It is unclear how it is said that the Tribunal could sensibly investigate causation, loss and damage in relation to the period after 2005, and award compensation on the basis of joint and several liability.”

48. We shall consider these three points in turn below.

A claim against the non-appealing addressee only

49. In Brealey & Green (eds), *Competition Litigation*, 1st edition (2010) it is stated (in paragraph 16.68) that “[t]he rule on joint and several liability is that where damage is caused by joint tortfeasors (where two defendants are each responsible for a joint, tortious venture which injures the claimant) or where several tortfeasors cause the same damage, if one of them is sued it is generally considered liable for the whole damage even though it may only have played a limited part in the relevant events. In competition cases involving cartels, anti-competitive agreements or abuses involving more than one wrongdoer, the defendants will normally be jointly and severally liable for the claimants’ losses. Further, where one of the potential defendants is insolvent, the remaining defendant will be responsible for the entirety of the claimant’s losses”.
50. It was common ground between the parties that the Defendants’ liability in this case was joint and several.
51. Given that a successful leniency applicant is less likely to appeal the decision against him (although, we stress, such a course is by no means precluded) a narrow construction of the term “decision” will expose such an applicant to a section 47A claim brought as of right. Such a party will be the only party against whom such proceedings can be brought as of right when the other addressees of the decision (in the wide sense) are appealing. In such a case, given that the leniency applicant’s liability will be joint and several, there may well be a temptation on claimants to bring a claim against the leniency applicant alone, seeking to recover *all* losses caused by the cartel.
52. Whilst this point has some force, we consider that this exposure of the leniency applicant (or, indeed, any non-appealing addressee) should not be overstated:
- (1) In the first place, whilst claimants will only be able to bring a section 47A claim as of right against the non-appealing addressee, there is a discretion in the Tribunal to allow proceedings against appealing addressees to be commenced: section 47A(5)(b).

- (2) Secondly, even if the non-appealing addressee is the only defendant in the section 47A proceedings, such a defendant would have a right of contribution (in particular, under the Civil Liability (Contribution) Act 1978). This again, was common ground between the parties. Mr Brealey was not prepared to go so far as to accept that contribution proceedings could be brought before this Tribunal, and made this clear in his submissions. Although the point was not argued before us, and we do not seek to decide the point in this Judgment, it nevertheless seems to us likely (as Mr Turner suggested) that contribution proceedings can be brought before the Tribunal pursuant to Rule 38 of the 2003 Rules.
- (3) Thirdly, the Tribunal could always stay the proceedings against the non-appealing addressee so as to enable the appealing addressees to “catch-up”: Rule 19 of the 2003 Rules.

Limited disclosure

53. Generally speaking, a party claiming against a cartelist will have rather less information about the operation of the cartel than the cartelist himself. It is also possible that the non-appealing cartelist will himself have less disclosable information than the other cartelists, who are appealing the decision against them. This may put claimants at a disadvantage, if the running of time compels them to bring a (to them premature) claim against a non-appealing addressee.
54. It is difficult to deal with such a speculative case, and all we would say is that the Tribunal has case management powers (including those identified in paragraph 52 above) to mitigate such problems, in the event that they arise. It is also possible for third party disclosure to be ordered.

Inconsistency

55. We consider that the “problems” described by the Claimants in paragraphs 40 and 41 of their submissions are overstated and are simply the inevitable outcome of the situation where one addressee of a decision declines to appeal that decision, whereas another chooses to appeal, and successfully does so.

56. Take a case where a decision (in the wide sense) holds that *A* and *B* have both infringed Article 101(1) TFEU. *A* chooses not to appeal, whereas *B* appeals and succeeds in annulling the decision as against him. Plainly, no follow on damages claim can be maintained against *B*: there is, quite simply, no decision (as against *B*) establishing *any* infringement. But what is *A*'s position? At the hearing, Mr Turner contended that, even though *A* had not appealed, the effect of *B*'s successful appeal was that no follow on claim was maintainable as against *A*:

The Chairman ...even though Morgan Crucible has not appealed the original Commission decision, it in effect gets the benefit of another addressee's success before the European Court in proceedings before this Tribunal. That is what your submission effectively amounts to.

Mr Turner That is a fair way of summarising it. I prefer not to use the expression "get the benefit" because I see this as very different from the point of view of – in the context of an appeal from a Commission decision, the interests of legal certainty are precisely to stop people like *AssiDomän* from coming round the back door and subverting the time limit for appealing to the court by saying, "Well, they have succeeded. Now give me the benefit of that". It is exactly the reverse in our situation, because in our situation the principle of legal certainty works the other way. You, as the Tribunal, when you are trying a claim for damages, require to have a definitive statement of findings, rather than an incoherent set of findings upon the basis of which to conduct your investigation.

Transcript, 12 May 2011, page 54.

57. We see no difference between the case of a non-appealing addressee seeking to take the benefit of another addressee's successful appeal in order to avoid a penalty he is exposed to, and the case of a non-appealing addressee seeking to take the benefit of another addressee's successful appeal in order to avoid a section 47A claim.
58. What is more, in the case where the addressee who appeals against a decision finding an infringement is wholly successful (i.e. where the decision against him

is completely set aside or annulled) the Tribunal is not faced with an incoherent set of findings. In our example, the only party exposed to a section 47A claim is A, and the decision by which the Tribunal is bound for the purposes of section 47A(9) will be the original (unappealed) decision against A.

59. The position will be different where B's appeal is only partially successful i.e. where the decision against B is set aside in part or annulled in part. In this situation, the Tribunal will not (contrary to the Claimants' submissions) be faced with "incoherent" findings upon which to conduct its investigation, but rather (in this example) *two* equally definitive findings, one of which is applicable as against A (the original decision(s)), whereas the other is applicable as against B (the decision(s) as varied on appeal). In effect, the Tribunal proceeds down twin tracks, one pertaining to A, and the other pertaining to B. Whilst this situation will undoubtedly give rise to additional cost in terms of resolving the various follow on claims, this outcome is simply the consequence of the Tribunal being bound by decisions falling within section 47A(9).
60. We would only add that, in terms of any right of contribution that A might have against B, the court assessing such contribution would have to take full account of B's partially successful appeal.
61. Finally, as regards partial annulments, we would note what is said in Roth & Rose (eds), *European Community Law of Competition*, 6th edition (2008), at paragraph 13.238:

“Powers of partial annulment. The Court of First Instance has power to limit its annulment to only part of a Commission decision. However, in *Italian Flat Glass*, the Court of First Instance held that the finding in the Commission decision of a close, institutionalised cartel in the market had not been proved to the requisite legal standard but that there were some documents on the file which were proof of a more episodic concertation among two or three producers. The Court held that although it could partially annul a Commission decision, it did not have jurisdiction to remake the contested decision. Such a jurisdiction would disturb the institutional balance established by the Treaty and would risk prejudicing the rights of the defence. In such circumstances, therefore, the Court held that it should not carry out a comprehensive reassessment of the evidence before it or draw new conclusions from that evidence. The Court had only to consider whether the conditions for partial annulment of the decision had been fulfilled or whether the whole decision had to fall. The test for partial annulment was whether the scope of the operative part of the decision, read in the light of the grounds for the decision, could be limited *ratione materiae*, *ratione personae* or

ratione temporis in such a way that its effects were restricted but its substance remained unaltered; and whether the undertakings had been given an opportunity of replying effectively to the objections so revised.”

VII. ABUSE OF PROCESS

62. It was contended by the Claimants that Morgan Crucible’s application was an abuse of process. That abuse was said to arise from Morgan Crucible seeking to re-litigate the decision made in *Emerson 1* in these proceedings, in circumstances where it had been a party to the *Emerson 1* proceedings and had not appealed the very same point that had been decided in the *Emerson 1* proceedings. It was further contended that this point was aggravated by the fact that Morgan Crucible had argued one legal case before the Tribunal in *Emerson 1* (namely, that the term “decision” was to be widely read), whereas it was now seeking to argue the precise opposite (namely that the term “decision” was to be narrowly read).

63. This latter point was based upon a summary of Morgan Crucible’s submissions in paragraph 60 of *Emerson 1*. Before us, Morgan Crucible produced the skeleton arguments that were before the Tribunal in *Emerson 1*, and it is evident that – whilst this was Morgan Crucible’s position at a CMC on 13 March 2007 (see pages 7-8 of the transcript of those proceedings) – by the time of substantive argument Morgan Crucible’s position had shifted so as to agree with the stance taken by the claimants in *Emerson 1*. It is sufficient to quote from Morgan Crucible’s skeleton argument of 18 May 2007, which states in paragraph 7:

“Morgan agrees with the Claimants’ conclusion that the two year time limit for bringing a claim against Morgan in the Tribunal stipulated by Rule 31 of the Tribunal’s rules started to run from 14 February 2004 (being two months and ten days after the date of the European Commission’s decision of 3 December 2003). Consequently, unless capable of extension, the time limit for bringing a claim expired two years after the date on 14 February 2006.”

64. The Claimants were, of course, perfectly entitled to rely on the Judgment in *Emerson 1* being an accurate statement of Morgan Crucible’s position, but the

fact is it is not. It is perfectly clear (and Mr Turner accepted) that Morgan Crucible's position has been consistent. Two points follow from this:

- (1) First, it appears that the Tribunal reached its conclusion in *Emerson I* without the benefit of argument from counsel, the question of when time began to run being common ground between the parties.
- (2) Secondly, Morgan Crucible cannot be accused of advancing inconsistent legal submissions.

65. In these circumstances, the Claimants have to contend that where a party is faced with a legal argument in one case brought against it by *B*, which goes against it, then unless it appeals, it will be precluded from raising that point in a later case, brought against it by *C*. We consider this point to be unarguable. The fact is that, although the claims in *Emerson I* and the claims in this case are all triggered by the same decision (in its wide sense, i.e. the 3 December 2003 Decision), each claimant's section 47A claim against Morgan Crucible amounts to a separate cause of action, an element of which is a decision (in the narrow sense) in the 3 December 2003 Decision. We fail to see why a defendant's failure to appeal a point in one cause of action should have any effect on the position it chooses to take in another, completely separate cause of action. Here, the point has all the more force because Morgan Crucible's position has essentially been consistent; but we consider that even if Morgan Crucible had chosen to advance diametrically opposed position in two separate causes of action, it would have been entitled to do so.

66. In *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, Lord Hoffmann stated (at page 701):

“The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The first is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: *autrefois acquit*, *res judicata* and *issue estoppel*. The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of *issue estoppel* to cases in which the parties are not

the same but the circumstances are such as to bring the case within the spirit of the rules.”

67. Here, of course, there is no identity of parties. None of the Claimants here were party to *Emerson I*: there was simply a common defendant, in the form of Morgan Crucible. We therefore fail to see how the first of the two principles articulated by Lord Hoffmann can be engaged. As to the second, were it the case that wherever the Tribunal decides a point (specifically, a point of law), that point is binding on the Tribunal subsequently, this would have the effect of creating a strict rule of precedent over the Tribunal in respect of its own decisions. Of course, it is possible to have a doctrine of precedent framed in such terms, but that does not happen to be the position in the case of the Tribunal. We see nothing contrary to the public interest in having a rule which enables a tribunal to depart from its own, prior holdings.

VIII. CONCLUSION

68. It is our unanimous conclusion that:

- (1) The claims against Morgan Crucible in these proceedings have not been brought within the time limit laid down by Rule 31 of the 2003 Rules.
- (2) Morgan Crucible is entitled to make this application, and it does not amount to an abuse of process.
- (3) Accordingly, Morgan Crucible’s application succeeds, and that the claims against it are struck out.

Marcus Smith QC

Margot Daly

Dermot Glynn

Charles Dhanowa
Registrar

Date: 25 May 2011

ANNEX 1

THE CLAIMANTS IN ADDITION TO DEUTSCHE BAHN AG

- (2) **DB NETZ AG**
- (3) **DB ENERGIE GmbH**
- (4) **DB REGIO AG**
- (5) **S-BAHN BERLIN GmbH**
- (6) **S-BAHN HAMBURG GmbH**
- (7) **DB REGIO NRW GmbH**
- (8) **DB KOMMUNIKATIONSTECHNIK GmbH**
- (9) **DB SCHENKER RAIL DEUTSCHLAND AG**
- (10) **DB BAHNBAU GRUPPE GmbH**
- (11) **DB FAHRZEUGSTANDHALTUNG GmbH**
- (12) **DB FERNVERKEHR AG**
- (13) **DB SCHENKER RAIL (UK) LIMITED**
- (14) **LOADHAUL LIMITED**
- (15) **MAINLINE FREIGHT LIMITED**
- (16) **RAIL EXPRESS SYSTEMS LIMITED**
- (17) **ENGLISH, WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED**
- (18) **EMEF – EMPRESA DE MANUTENÇÃO DE EQUIPAMENTO FERROVIÁRIO SA**
- (19) **CP – COMBOIOS DE PORTUGAL EPE**
- (20) **METRO DE MADRID SA**
- ~~(21) **ANGEL TRAINS LIMITED⁴**~~
- (22) **NV NEDERLANDSE SPOORWEGEN**
- (23) **NEDTRAIN BV**
- (24) **NEDTRAIN EMATECH BV**
- (25) **ES REIZIGERS BV**
- (26) **DB SCHENKER RAIL NEDERLAND NV**
- (27) **TRENITALIA SPA**
- (28) **RETE FERROVARIA ITALIANA SPA**
- (29) **NORGES STATSBANER AS**
- (30) **EUROMAINT RAIL AB**
- (31) **GÖTEBORGS SPÅRVÄGAR AB**

⁴ By an order dated 19 April 2011, the Tribunal gave the Twenty-First Defendant permission to withdraw its claim.