IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1173/5/7/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12 May 2011

Before:

MARCUS SMITH QC
(Chairman)
MARGOT DALY
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

1) 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 FAHRZEUGINSTANDHALTUNG GMBH
12) DB FERNVERKEHR AG
13) DB SCHENKER RAIL (UK) LTD
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 E.P.E.
20) METRO DE MADRID, S.A.
21) NV NEDERLANDSE SPOORWEGEN
22) NEDTRAIN B.V.
23) NEDTRAIN EMATECH B.V.
24) NS REIZIGERS B.V.
25) DB SCHENKER RAIL NEDERLAND N.V.
26) TRENITALIA, S.P.A.
27) RETE FERROVIARIA ITALIANA, S.P.A.
28) NORGES STATSBANER AS
29) EUROMAINT RAIL AB
30) GÖTEBORGS SPÅRVÄGAR AB — **Claimants**

-v-

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

HEARING

APPEARANCES

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

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

THE CHAIRMAN: Mr. Brealey?

MR. BREALEY: Sir, I appear on behalf of Morgan Crucible and Mr. Turner QC and Mr. Williams appear for the claimants who are the respondents to Morgan's Rule 40 application. Sir, there are two main issues in the application. The first is the interpretation; the second is the abuse of process.

Perhaps I can go straight into the interpretation issue, and with that in mind go to the hearing bundle, and I would just like to go to the decision first, please. It is the small bundle and essentially it has the decision and the claim and the skeleton arguments. This is at tab 1, and obviously I am not going to go through the whole recitals, but I just want to emphasise the structure of the decision. We will see this also summarised by the Court of Appeal in its *BCL* case and by the Tribunal in the *Mersen* case, but at p.1 we have the Commission decision of 3 December 2003. This relates to the proceeding under Article 81 regarding the products we know in this case, electrical and mechanical carbon and graphite products. Then what happens is that we have what are called recitals, and we have recitals (1) to (364), which is at p.104. These are the recitals to the decision, recitals (1) to (364), and then we get to p.106, which is called the "*dispositif*" or the operative part, the formal part of the decision, as you know, sir.

Perhaps I could just highlight a couple of paragraphs in the recitals. First of all, the introduction at p.2. We see:

> "This Decision is addressed to the following undertakings, suppliers …"

Then we have the various undertakings who are subject to this decision.

Paragraph (2) sets out in summary form the nature of the infringement of the Treaty, and in broad terms it was a price fixing cartel.

Then in recital (3) we see the Commission setting out the duration of the infringements, and I would ask the Tribunal to note that the duration is not the same for all undertakings. For example, Conradty is from October 1988 to December 1999 but Hoffmann only joined the cartel in September 1994, and left in October 1999 when it was acquired. We see Carbone Lorraine, and it was in the cartel right from the beginning, October 1988, but the Commission says that it left the cartel in June 1999.

So the periods, and this is one aspect of para.41 of the claimant's skeleton argument that the Tribunal has asked questions about, and I will obviously come on to that in a moment, but the important thing to note right from the start is that the various undertakings have different liabilities because of the duration. So, in a nutshell, it was inconceivable that

Hoffmann would be liable either on a joint or several liability for any loss suffered by the claimants in 1990. They simply did not participate in any unlawful agreement.

We see again, just on this duration on p.81, recital (253), that essentially the Commission is there setting out what I have just said, which is that the cartel lasted at least from October 1988 to December 1999, it applies to all members of the cartel with the exception that Carbone left the cartel in June 1999 and Hoffmann at least from 28 September 1994. So that is the actual recital setting out the duration of the infringement.

Then because various submissions have been made about leniency, perhaps I can just go on to recital (319) at p.95 where Morgan, my client, applied for leniency. At (319) we get Morgan applying for leniency under the Leniency Notice.

At (320) we see the Commission saying that Morgan presented quite detailed evidence. Essentially Morgan was the whistleblower. Because it was the whistleblower and it provided such detailed information of the cartel at (321) it got a reduction of the fine of 100 per cent.

Just very quickly going on, at p.98, recital (332), again we see the Commission referring to Hoffmann. It accepts Hoffmann's submission that it did not participate before 1994.

These are the recitals, the reasoning, as it is, behind what appears at p.106, which is, as I say, called the "*dispositif*" or the operative part, and it is split into four Articles. Article 1 concerns infringement, and then it is split into Article 1 (a), (b), (c), (d), (e) and (f). You see that the Articles deal specifically with the individual undertakings and set out the date upon which it participated in the unlawful cartel.

Then we have Article 2, the penalties, the fines. We see there Morgan getting a zero fine because of its leniency application. It is a cease and desist sort of order.

Then we get Article 4, "This Decision is addressed to".

Just flagging up the submissions I am going to make, what we say about this decision is that there are a bundle of individual decisions. Really the key issue between the claimants and Morgan, the defendant, is whether there is in this decision a bundle of individual decisions. So there is a separate decision in relation to Morgan. There is a separate decision in relation to Hoffmann. Although it is in one composite decision there are individual binding decisions.

One of the key issues in this application is to work out what happens, for example, if Hoffmann had appealed its decision and it was annulled – so Hoffmann just comes out of the equation totally – what is the impact on Morgan? We say that if Morgan does not appeal its individual decision it is binding on it, but I will come on to the cases and I will try

and expand on that in a logical way. That is really the key issue in the case, the extent to which the individual decision on Morgan, which is not appealed, remained binding on Morgan and remains binding on the Tribunal.

So that is the nature of the decision. I appreciate the Tribunal have gone through the claim, but can I just set out certain aspects of the claim. That is at tab 2 of the hearing bundle. So we have obviously the listed claimants and the six defendants. Morgan is the first defendant. Just on the introduction at para.1 we see this is a monetary claim, a damages claim essentially:

> "… pursuant to section 47A of the Competition Act 1998 in respect of the loss and damage caused to the Claimants … by reason of breaches of Article 81 …"

We see at para.2:

> "For the purposes of s.47A(6) …"

and we will have a look at the Act in a moment –

> "… the decision relied upon is the decision of the European Commission …"

We quibble if it is a summary, but strictly, from a legal perspective, we say at least that the decision is not the Decision (with a capital "D") for the purposes of s.47, it is the decision (with a little "d") addressed to the individual undertakings, and again we will see how the Court of Appeal has accepted that.

Although it is okay for a summary, technically they are relying on individual decisions (little "ds") addressed to the individual undertakings.

The claimants are then set out at paras.4 to 39, and we do not need to really worry about that.

The defendants are then set out at paras.40 to 47.

The claimants set out certain parts of the decision, starting at para.48, and note at para.49 that there are different durations for the various undertakings. So, for example, they state that Hoffmann participated in the cartel at least from September 1994.

Moving on at 62 we have the appeal proceedings which are obviously relevant to when time starts to run. Paragraphs 64 to 66 one should not lose sight of because this obviously relates to the breach of statutory duty and the cause of action because this remains a tort and one has to identify the cause of action against Morgan, and the cause of action against Morgan is the breach of Morgan's duty to the claimants. The cause of action against Morgan is not for example the breach against Hoffmann to the claimants. The cause of action is because of Morgan's own breach of statutory duty. There is an obligation in Article 81 now 101 of the Treaty, there is an obligation on Morgan and there is a correlative right on the claimants

not to suffer damage because of its breach of statutory duty. So when we come to look at s.47A it is important to bear in mind exactly what is the right that the claimants say has been infringed and what is the duty and who owes the duty.

Then we come on to causation of loss and damage and, to a certain extent, this in question 2 of the Tribunal's questions we see here that what is being claimed in paras. 67 and 68, but particularly para. 70 is what is called an overcharge. So there was a price fixing cartel that prices charged were higher than they should have been. What will have to be determined at trial is the "but for" price, but for the cartel what would the price have been, and the measure of damage will be the overcharge, and that is what the claimants are claiming at para. 70.

Paragraph 73 they plead that there is joint and several liability. Mr. Turner has referred to various text books as a result of the questions. As I understand it, this seems to be accepted in all the competition law text books and in America as well, that there is joint and several liability where there is a cartel or an unlawful agreement. There is joint liability because A and B (Morgan and Hoffmann) have acted together, so there is a joint venture just like a conspiracy, and when there is a conspiracy there is joint liability, the parties have acted together to cause the same damage. There is several liability as I understand it, because there is a duty on the individual person. There is an individual duty on Morgan not to breach Article 81, there is an individual duty on Hoffmann not to breach. So if one looks at a promise to pay, for example, it could be purely a joint promise where there would be a joint liability to fulfil that promise. But on its terms there maybe a joint promise but they have also promised individually and therefore they would be severally liable and that is why, as I understand it, there is joint and several liability. I will come on to contribution later on, but again answering the question as I understand it, it is accepted that in appropriate cases there can be a contribution claim under the 1978 Act against D2. So if the claimants just sue D1, which they are entitled to do, it is not before the Tribunal but there is a case that has just been settled in *Marine Hose* where the claimants, as I understand it, have gone against one defendant and that has been settled, but there is no reason why D1 cannot proceed against the other cartelists. Indeed, that is what has happened in the air cargo price-fixing cases going on in the High Court at the moment, where it has been in the press, British Airways has been found guilty of fixing the price of certain air cargo with other airlines. The claimants have gone against British Airways only and British Airways have brought in the other cartelists for a contribution.

For me there is very little doubt that that is good in principle, that D1 can seek a contribution from D2, although hopefully we are not going to argue today, I just throw it out because it may well be that in these proceedings, in the Tribunal's proceedings, any proceedings would have to be brought in the High Court. The question is: why? Well what is the jurisdiction of the Tribunal to award a contribution? I am just throwing it out because there may be an issue, and I do not want to be on record as saying it is crystal clear that there is a cast iron right to claim the contribution in the Tribunal's proceedings under s. 47A. The reason is s.47A gives a specific power of the Tribunal to award damages, or a monetary claim (s.47A(1)) and we will come on to that in a moment. So if a claimant was to sue, let us assume that the claimant sued Morgan for damages for the cartel, but also for misrepresentation, the Tribunal just would not have jurisdiction as I understand it, to say "I award you damages for the misrepresentation", and because the right under the 1978 Act appears to be a right *sui generis* to claim contribution, a monetary sum, does that fall within s.47A? Does it matter? Is it by the Rules, or whatever? I just throw that open. Yes, in principle a right to contribution ----

THE CHAIRMAN: But not necessarily here.

MR. BREALEY: Not necessarily here. Mr. Turner might discuss it – it may be an agreed position – but he might have submissions to make on that, but I do not think it impacts on the interpretation of the Act but, as I say, I just do not want to be on record saying there is a right to contribution, full stop, in these proceedings.

THE CHAIRMAN: I understand, thank you.

MR. BREALEY: So that is the joint and several liability. Then we come to the quantum very quickly, and we see if one goes to p.28 we see there the nature of the overcharge. The first figure is based on 20 per cent overcharge, the second is on 25 per cent overcharge, then you have compound interest, but that is the nature of the claim they are making against the defendants jointly and severally, what the claimants say they have been overcharged. And they say the overcharge is between 20 and 25 per cent.

If I could ask the Tribunal to put that bundle away, and then pick up the first authorities bundle and just have a look at the Act. When one has read it about ten thousand times it becomes a bit clearer, but I do appreciate that at the first go it is a bit of a nightmare. So, tab.1, s.47A it was introduced, s.47A is in the Competition Act 1998, but it was inserted by the Enterprise Act, so it is not s.47A of the Enterprise Act, it is s.47A of the Competition Act inserted by s.18 of the Enterprise Act. I hope the Tribunal does not mind, but I will just go through it.

THE CHAIRMAN: Please do, Mr. Brealey.

MR. BREALEY: So, s.47A:

> "Monetary claims before Tribunal.
>
> (1) This section applies to —
>
> (a) any claim for damages, or 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".

So, the point to note here is that you do have a right to claim damages before the Tribunal, but it has to be one that you could have brought in civil proceedings, and I think it is accepted, you have got to have a cause of action. So, the defendant has got to have breached a duty owed to the claimant. Then in (2) we see what is referred to as the "relevant prohibition" and we have the Chapter I prohibition which is s.2 which is the restrictive agreements; Chapter II which is the abuse of dominance; the prohibition in Article 81 which is what we are concerned with here, and I do not think we need to concern ourselves with the European Coal and Steel Community. So, those are the relevant prohibitions, 81 is the relevant prohibition in this case.

Then (3) "For the purpose of identifying claims" we ignore the usual six-year time limit. And then, over the page:

> "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".

So, this section (4) is giving the Tribunal the power to hear these cases and a claim may be made subject to provisions of the Tribunal rules. So, obviously, one of the rules is the rules in rule 31, tab.2 which are the limitation period rules, the commencement of the proceedings. So, it may be made before the Tribunal, but bear in mind there are limitation periods. And then we get to subsection (5) which is essentially the section which coins the phrase, "the follow-on actions", because:

> "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".

So that is why it is generally called a "follow-on action", because you just cannot, as you know, sir, go to the Tribunal and say, "I have suffered loss because of a breach". What the Tribunal says is you must identify a decision which establishes liability. So, that is (5)(a) there must be a decision which the damages claims follows on from. And then:

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

So, it is the period specified in (8) which relates to that decision, and basically what that is doing is saying, "If, when we get to (8) dealing with times for appealing, a Commission decision, so, if we just quickly go to (8):

"The periods during which proceedings in respect of a claim made in reliance on a decision or finding ... may not be brought without permission [ie as of right] are (a) the period during which proceedings against the decision ... may be instituted in the European Court".

So, that is the 2 months and 10 days. So, you cannot bring it as of right. There is a Commission decision, you cannot bring your damages claim as of right the day after the adoption of the decision. You have got to at least wait the 2 months and 10 days which is the time limit to go to what is called now the General Court, the old CFI. And then:

"If ... proceedings are instituted [this is (b)] the period before those proceedings are determined",

And that can be a period of years. And just to flag up a quite important point, we say, on the policy, on the purpose, is that — and it is slightly ironic coming from Morgan, one of the cartelists, because its argument is in favour of damages claims — but the argument is as follows, which is that the claimants' arguments, so they are claiming damages, they are actually against early resolution of damages claims. So, if one is looking at objectively as to how victims are going to get their money earlier, their interpretation of the Act is that you will have to wait years to get the money, whereas we say once a decision is binding on an individual addressee, time starts to run and you can go after that addressee. So, we are in this rather weird situation where they are arguing for damages actions to be thrown out in the long grass, and we are saying that they can be and they should be brought much earlier on our interpretation. Regardless of the interests, if one looks at it objectively and, in my respectful submission, our submission is correct, objectively our interpretation does lead to a greater ability for claimants, victims who have suffered an overcharge to at least get some money. And that is what I will refer to a bit later on. But, that is subsection (8). Obviously we have got subsection (6) which refers to:

"the decisions which may be relied on for the purposes of proceedings",

and then we have a decision, this is (d):

"a decision of the European Commission that the prohibition in Article 81(1) [now 101] ... has been infringed"

Lastly is subsection (9) which is quite important.

> "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".

So, normally not only will an addressee of a decision be bound, but here the Act is saying that the Tribunal is bound and because it is a follow-on action the Tribunal is not looking to see whether a cartelist has infringed the Treaty for one year or two years, or for six years or whatever.

I am reminded by Miss Demetriou that subsection (9) merely reflects what the European Court of Justice has said in a case called *Masterfoods*, this is not in the bundle, but Mr. Turner will know it very well, in which the European Court of Justice in *Masterfoods* has said that decisions are binding on addressees and on national courts. This section is saying that a decision is binding on the Tribunal.

So the question, then, having looked at the Act, is — what is the relevant decision? I have already highlighted one steer, which is that one has to look at what is the cause of action, and the relevant decision finding that grounding the cause of action is that addressed against Morgan.

But if I could then go into it in some more detail, asking the question "What is the relevant decision?" When Parliament refers to "the Decision", what does it actually mean? And to do that, maybe if we just keep open the hearing bundle, I would ask for the Tribunal to put it away, but the actual decision itself, and we will need vol.1 of the authorities bundle open as well. So, in the question, "What is the relevant decision in s.47A?", firstly I would like to submit to the Tribunal what is not the relevant decision. So, before we give a positive, I want to give a negative. So, what is not the relevant decision? And what is not the relevant decision is the Decision with its recitals. So, recitals 1-364. The relevant decision, and I will try and narrow it a bit more, but the relevant decision is at least that set out in 106 and 107. What it is not, there is no decision in the recitals. Now, that has recently been decided by the Tribunal in the case of *Emerson Electric v Mersen* which is at tab.11 of the authorities bundle, where the Tribunal, the President, Mr. Justice Barling, held that:

> "The relevant decision must at least be addressed to the undertaking."

The Tribunal got there by applying the principles of Community law, of European law. In a nutshell, what happened was that Carbone SA was an addressee of this decision. Carbone GB was not, but was in the recitals. If one goes to para.10 of the Commission decision:

> "Before dealing with the substance of the Application, we should refer to the content of the Decision, which is a detailed document … A non-confidential version of the Decision was annexed to the original form.
>
> Mr. Beard, who appeared for Carbone GB, described the way in which EU decisions, including Commission decisions in the competition field, are structured. They have a relatively short operative part or *dispositif*, and an often lengthy statement of reasons. The operative part identifies the addressee(s) of the decision."

Essentially what the issue was was whether the claimant could identify Carbone GB in the *dispositif*, and they could not. The defendant relied on the case of *Suiker Unie*, the European Court of Justice case, which is set out in para.22, which is an old case now, 1975, but where the European court noted that there were four parties mentioned as having been involved in unlawful conduct, but the Commission seems to have overlooked one company. It was in the recitals but not in the *dispositif* , and the question was, "Was that an addressee? Was that company bound by the decision?" The European Court of Justice said no.

What we get from this is that any company referred to in the recitals cannot be bound by the decision. The decision is only binding on the companies, the undertakings, in the operative part. When we see, for example, the Commission decision of 3rd December 2003, the claimants cannot simply identify company A, because it is in recital (100), and say, "Aha, that is a decision which establishes an infringement and I want my damages". One has to go to the operative part.

I want to start off with what the decision is not. It is not the whole decision with its recitals. Looking at the *dispositif*, I will give another negative. It is not the whole operative part. We know that because of the Court of Appeal in its 2009 judgment in *BCL*, which is at tab 7. This was the Vitamins cartel. The claimant had brought proceedings against three companies (from memory, maybe two), several cartelists, which had settled, and one of the cartelists, BASF, had appealed only against the penalty. We see this at paras.1, 2 and 3, where BASF was a cartelist and it was being sued under s.47A of the Competition Act. As I say, it had appealed its fine, but it had accepted the finding of infringement.

We see the operative part of the decision, which is very similar to the Carbon decision:

> "Article 1
>
> 1 The following undertakings have infringed Article 81(1) …
>
> (b) BASF AG …"

Then Article 3 deals with the fine, and there was at (b) BASF. As I say, BASF only appealed Article 3(b), it did not appeal Article 1.1(b). So it accepted the finding of infringement against it, and challenged the proportionality of the fine.

The question was whether the appeal against the penalty suspended time. If one goes back to s.47A(8) where:

> "The periods during which proceedings in respect of a claim made in reliance on a decision … may not be brought without permission …"

that is if any such proceedings appearing before those proceedings are determined, what the Tribunal was being asked to do is say, what is the nature of the decision there. What had happened was that in *Emerson* – so in these related proceedings, the *Emerson* case, the Tribunal had held that if there is an appeal against penalty that suspends time, so you cannot bring the claim as of right. That is what the Tribunal held in *Emerson III*.

In *BCL*, the Tribunal agreed with that, but fortunately for BASF the Court of Appeal did not. One sees at para.20 how the case was advanced for BASF, and it was quite straightforward. We set this out in the skeleton, but it is quite important, the analysis that was being put forward and was being accepted by the Court of Appeal that:

> "… [the] 'decision' in this case was the decision by the Commission, in article 1(1)(b) of the Decision of 21 November 2001, that BASF had infringed the prohibition in Article 81(1)."

That is the relevant decision which grounds the – I am not reading from para. 20 now, but summarising – that was the decision which grounds the cause of action. Rule 31 says you have two years. You have then got 2 months and 10 days to wait and then no such proceedings against the decision were instituted, so that the further period in s.47A(8)(b) which takes years, did not apply and therefore accordingly time began to run in early February 2002 and the claim was brought well outside the two year time limit and in my judgment the analysis put forward is correct.

Pausing there, I do rely on the fact that Lord Justice Richards accepted the analysis. It is right, as Mr. Turner will undoubtedly say that is a slightly different case because there the argument was a distinction between a finding as to infringement, and the decision imposing a penalty, so in that case one of the key issues is when one looks at s.47A is there a distinction between a decision as to penalty and a decision as to infringement. The Court of Appeal said on the language of the Act there clearly is, so that does not really take you that much further, save to the extent that in coming to that conclusion the Court of Appeal did reject the argument, the argument was advanced and accepted by the Tribunal, that you

cannot salami slice the decision. What was being argued in this case is that the decision is one composite whole, and when the draftsman of the Act referred to "Decision" it was the composite decision, and the argument was you cannot salami slice the decision into various parts. The Court of Appeal said that was wrong and at least you could salami slice the operative part into at least two, which is a decision as to infringement and the decision as to penalty.

Importantly, in reaching that conclusion it also looked at the purpose of the Act, so what gave it comfort as to its conclusion that you can salami slice the decision and the comfort it gave is at para. 28, because what was being argued at paras. 26 and 27, and it foreshadows an argument that Mr. Turner is making, if you can salami slice a decision that is going to be unworkable, because if you have some people appealing their appeals may have an impact on the facts of the case, and so how is that going to work with the appellants who do not appeal? Surely you have to wait until the very last appeal to work out what all the facts are and then you can happily determine causation and quantum. The claimants were saying that appeals against penalty can have an impact on the facts as found and therefore appeals against penalties will have a direct bearing and therefore you have to wait for the final decision on the penalty, and that is what the President in the Tribunal below held. The Court of Appeal said "No", once you have the infringement decision, which is not appealed, that decision is binding, and that is what Lord Justice Richards said at para. 28. It is binding and the purpose of the Act is to identify a decision which should bind the Tribunal. In other words, one has to try and identify a decision which is definitive because once it is definitive that is it.

Whilst appeals are pending you need permission but once the decision is definitive you can bring your claim as of right. So the Court of Appeal said that the fact there may be findings in penalty decisions which have an impact on the infringement decision, nevertheless those infringement decisions remain binding, they are there, you cannot alter them. If you do not appeal the finding of infringement that finding of infringement is there. That is my second negative - what the decision is not – it is not the whole operative part.

Now I come almost to the crux – at 20 minutes past eleven – of the case, whether you can almost salami slice Article 1 further. We know it is not the whole decision with the recitals, that is *Mersen*. We know it is not the whole of the *dispositif* with the penalty findings, because that is the Court of Appeal in *BCL*. This case is whether you can now narrow down essentially Article 1, and I think Mr. Turner will be submitting that Article 1 is one

broad decision, and I am submitting to the Tribunal no, they are individual decisions. In order to make good that submission we go to the *Kraft* case ----

THE CHAIRMAN: Mr. Brealey, just pausing there. It is implicit, I think, in your submissions that the decision in s.47A should be read consistently throughout that section?

MR. BREALEY: Yes.

THE CHAIRMAN: What then do we make of subsection 9 of 47A which says that the Tribunal is bound by any decision mentioned in subsection 6?

MR. BREALEY: Yes.

THE CHAIRMAN: Is it your case that the Tribunal is simply bound by which ever bit of the *dispositif* are relevant given who the addressee is, and that the Tribunal is not bound by anything that is said in the recitals preceding the *dispositif* for the purposes of, say, subsection 9?

MR. BREALEY: You are technically only bound by the *dispositif*; it is then very murky – I am sorry not to give you a straight answer – as to the extent to which the Tribunal is bound by findings of fact in the recitals. That has been the subject of the CAT and the Court of Appeal in the *Enron* case, and also s.58 of the Act, which I do not think we have here, which talks about the Tribunal and the courts being bound by findings of fact. Technically one is bound by the *dispositif* because the question is: what facts in the reasoning are binding and really the answer is those facts which support the findings of infringement would be binding on the Tribunal, pursuant to s.58.

THE CHAIRMAN: Yes, I see, but the route by which the Tribunal must take account of them is not, on your case, through s.47A(9)?

MR. BREALEY: No, in s.47A(9) it is the decision and the decision is the decision, the finding that an addressee has infringed the competition rules and that decision is found, as far as Morgan is concerned, in Article 1(d).

THE CHAIRMAN: Thank you, that was very helpful.

MR. BREALEY: Just to digress a little, in the *Enron* case in the Court of Appeal, which I think is in the bundle, and the claimants were relying on a paragraph in the decision by the Rail Regulator as supporting a claim for damages and the Court of Appeal said "no", that was not a key basic fact which was underlying the actual decision of discriminatory pricing. So the question then is: can we narrow Decision even more — are we limited to Article 1 or do we go narrower? And in my submission the law on this is quite quite clear, and it is the *Kraft* case at para.18. The claimants in their skeleton argument say, "Well, this is just an ECJ case, it is concerned with public law", but we know from the *Mersen* case that in order

to identify what a Commission decision is, we have got to look at European Union law, the *Suiker Unie* case. But this is the case, and this is, really, this is nothing new, this is well established. This is the *Kraft* case, and if I can essentially start —

THE CHAIRMAN: It is tab.18, is it not, Mr. Brealey?

MR. BREALEY: It is tab.18, I am obliged, sir, and if I could start at p.5398, where we start with the judgment. This was, just to give its context, this was actually an appeal by the Commission against the judgment of the Court of First Instance. And then there were other parties who were essentially the Swedish participants in the Wood pulp cartel. And if we go over the page where we start with the judgment:

> "By application lodged at the Registry ... the Commission ... brought an appeal under Article 49",

and it was essentially contesting part of the judgment of the Court of First Instance, now the General Court. And this was in the light of the famous Wood pulp cartel. And para.3 we see:

> "By the Wood pulp decision, the Commission found that some of the 43 addressees of that decision had infringed Article 85(1) of the EEC Treaty [which became Article 81(1) of the EC Treaty (now Article 101)], in particular by [agreeing] ... prices for ... wood pulp".

And just, again, putting some more context on it, what had happened was that in many instances there had been near simultaneous price increases. So, the market had just kind of gone up automatically. The Commission had found that that was evidence of a price fixing cartel, that all these prices had gone up roughly at the same time. What the European Court in the judgment referred to in para.1 had essentially annulled the decision, because it had held that that evidence of parallel prices was not sufficient to find a concerted practice. There were other explanations for the prices going up in parallel. The market was transparent and they were reacting to each other. So, that is why the European Court annulled the Commission decision on liability. It said that there was insufficient evidence of a concerted practice.

What happened was, as I say, there were 43 addressees. If one looks at Articles 4 and 5, Article 1 of the Wood pulp decision listed the infringement. Article 1(1) of the decision stated that the Swedish addressees had breached the rules; at para.6 in Article 3 of the Wood pulp decision the Commission imposed fines; fines were imposed on 9 of the Swedish addresses. And then we get para.7, those latter undertakings decided not to appeal the Wood pulp decision and they paid the fines which had been imposed upon them.

However, 26 of the original 43 addressees did bring actions for annulment, so — And then we get para.8 as I have just said:

> "By the *Wood pulp* judgment, the Court of Justice annulled Article 1(1) ... of the Wood pulp decision".

So, we had a situation where there was a Commission decision that 43 addressees had been found guilty of price fixing, why, because the price has gone up. The European Court said no, that was insufficient, there was essentially no concerted practice, so annulled the decision, and so the Swedish addressees who had not appealed thought, "Well, hey, if the evidence is not sufficient for the successful appellants, that must mean that I wasn't guilty either, and I'd like my money back. I shouldn't be liable to pay any fines". So, they wrote a letter which one sees at para.10 onwards, to the Commission, saying, "Well, in the light of the *Wood pulp* judgment, if you annul it, it is kind of what is called 'erga omnes', it has general application, and really I should never have been found liable so, please, re-open and give me my money back". The Commission said no, at para.11, and one sees the thrust of it at the bottom of p.5403:

> "As your clients' payment is based on a decision which still stands with regard to them, and which is binding not only on your clients but also on the Commission, your request for reimbursement cannot be granted".

So the Commission was saying the decision was binding on it, binding on the addressees and said "No". So, the companies who had not appealed, the Swedish companies, then challenged that refusal, and that is how it got to the Court of First Instance, now the General Court. And they had two pleas, two, essentially, grounds of appeal which one sees over the page at 5404, para.14:

> "By the first limb, they claimed that the Commission had disregarded the principle of Community law according to which the effect of a judgment annulling an act is to render that act null and void erga omnes",

And then the second limb of the plea, they said, "Well, in any event, the Commission had a duty to re-examine the facts because clearly they said if the evidence was not sufficient for the successful appellants, well, surely it should be sufficient for them, the Commission should re-open the facts and say they were not guilty".

So, the, as we will see in a moment, the Court of First Instance rejected the first limb but accepted the second limb, and we will see that in a moment. There was no appeal then on the first limb. The Commission appealed the second limb and the European Court of Justice agreed with the Commission. So, as we shall see, what ultimately happens is that the

European Court of Justice said to the Swedish non-appellants, "Tough. You are bound by that decision". But how we get to that — so we get the contested judgment, so this is the European Court of Justice referring to the contested judgment, the CFI's judgment at para.17, where the European Court says:

> "The Court of First Instance dismissed the first limb of the plea. It held first of all ... that although drafted and published in the form of a single decision, the Wood pulp 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, as this was also supported by the wording of its operative part".
>
> "19 In paragraph 58, the Court of First Instance stated that, where an addressee did not bring an action ... for annulment of the Wood pulp decision in so far as that decision related to it, that decision continued to be valid and binding on it in all its aspects";
>
> "20 In paragraph 60 of the contested judgment, the Court of First Instance accordingly concluded that the Community judicature can [only] give judgment only on the subject-matter of the dispute referred to it by the parties, so that a decision such as the Wood pulp decision could be annulled only as regards the addresses who had brought an action before the Community judicature".
>
> "21 In paragraph 61, the Court of First Instance accordingly interpreted paragraphs 1 and 2 of the operative part of the *Wood pulp* judgment as annulling Article 1(1) ... of the Wood pulp decision [and it is quite important] only in so far as those provisions concerned the parties who had been successful in their actions before the Court of Justice".

So there are individual decisions, so, if there is A and B, parties to a cartel, and A does not appeal and B does and B is successful, the decision remains binding on A because B's appeal only concerns it. Just pausing there before we go on in this judgment and picking up on these words in para.21, "only in so far as those provisions concerned the parties who had been successful", in the present case, if I can quickly ask the Tribunal just to go to vol.2 of the authorities, to tab.23, this is something that we have set out in our skeleton, this is one of the companies, the defendants in the present action, in our action, which did appeal. So, Morgan did not appeal because it was the leniency applicant, so SGL Carbon did appeal. But when one sees at p.2527, para.25, I think we have got it wrong in our skeleton, but it is para.25, we see the nature of the application. "The applicant claims that the court should

annul the decision in so far as it relates to it". And for the purposes of European Community law, European Union law, that is quite important because the claim for annulment by SGL Carbon is only seeking the annulment of its own decision. It is not seeking the annulment of Article 1 in its entirety.

That was the Court of First Instance dismissing the first limb and it is clear law, it is a matter of Community law, that a composite decision contains a bundle of individual decisions addressed to Morgan, addressed to Hoffmann, addressed to the others. Because the Commission had said, "Notwithstanding it is a bundle of individual decisions you should basically reopen the procedure", that is what the CFI said. The Commission then appealed because it did not want to be obliged to reopen the procedure as regards the nine Swedish companies.

That is why we get the European Court's judgment, and that starts at p.5412, para.49:

> "Essentially, 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 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 a re-examination, the fines paid must be refunded."

The court goes, for example at para.53 at the bottom:

> "Consequently, 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."

Again, none of the appeals in our case ever concern Morgan. That is a critical point in the present application.

> "Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the Community judicature."

Essentially what the court says over the page at paras.56 and 57, the penultimate paragraph:

> "It is settled case law that a decision which has not been challenged by the addressee within the time limit … becomes definitive …"

and I emphasise the word "definitive" –

> "… as against him [or it]."

Essentially what the court says is that it is a principle of legal certainty.

So you do get the situation where, as I said earlier, you have got A and B, the Commission decides that they are both party to a cartel, and A does not appeal and B does, the decision against A remains definitive if A does not appeal, even if B is ultimately successful. That decision is binding on A, and it is binding on the Tribunal.

This is something that, with the greatest respect, Mr. Turner has got to grapple with, and this goes to his para.41, if I can go to para.41 of the skeleton. They say:

> "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 the joint and several liability."

Whether it is difficult or not, the law is that as far as A is concerned, it is liable for a cartel operating until 2008. In my respectful submission, that is as plain as a pikestaff from the application of general principles of European Union law, that A, having not appealed the decision against it, is bound by a decision that it operated a cartel until 2008. If that means that it is the only one liable for the loss, then so be it. The Tribunal cannot do anything else. The Tribunal cannot say, when it comes down and is faced with a claim for damages, "Well, because the European Court has said that B, C and D only had a cartel until 2005, that means that A did not operate a cartel until 2008". That is just simply not open to any court or to any Tribunal. It is an individual decision. The decision against A – here Morgan, or in the *Wood pulp* case the nine Swedish companies – those individual decisions remain binding on A, Morgan, or the Swedish companies. It is just inconceivable that, because two other parties have appealed and got away with it, somehow that challenges the validity of the decision on A, here Morgan. It just simply does not. So the Tribunal is going to have to proceed in the claim for damages against A on the basis that it operated a cartel until 2008.

What the claimants are trying to do is to say, "In this situation A is only liable until 2005". That is contrary to the binding nature of the Commission decision which has not been appealed.

I am trying to think, it is not so odd, because if you have A and B who have been guilty of a breach of contract in the High Court and they have been both held liable and, for example, say they both pay 50 per cent, so they both pay £5 each. So A pays the £5 and decides not to appeal; and B does appeal, even though it is the same breach of contract, the same covenant, the same contract, and loses in the Court of Appeal, goes to the Supreme Court, wins in the Supreme Court now has a judgment in its favour that it was not liable for breach of contract, so B has paid and wants its money back or, if it has not paid, refuses to pay because of the Supreme Court's judgment, A cannot say "Because B has won in the Supreme Court I am not liable." A should have appealed that judgment along with B. The Supreme Court judgment does not impact on the *res judicata* nature of A's judgment against it. So there are obviously instances where in every day life in the courts people who seem to be jointly liable, because one appeals the liability does not end up joint, something happens to it, so that is the process of the binding nature of court judgments or Commission decisions and, as the European Court says in the *Wood pulp Kraft* case legal certainty of decisions which have not been appealed.

THE CHAIRMAN: You will probably be coming to it and I do not want to take you out of order, but will you be addressing the question of whether the party who was made to pay £5 in your example, or addressee 1 in the case of the decision, will have the contribution claim with regard to the losses it has been forced to pay as regards the other addressees or the person who, in the Supreme Court, succeeded in avoiding the £5 fine liability, to recoup a part of its exposure from that party?

MR. BREALEY: If in the Supreme Court, in the example I just gave, A and B are in breach of contract, A does not appeal and B does, and the Supreme Court finds that B is not liable for breach of contract, I am uncertain whether there is any right to contribution if B is not liable at all.

THE CHAIRMAN: What happens if one takes Mr. Turner's variant, in his paragraphs 40 to 41, and the situation where there is a form of liability but it is narrower, different to the liability of addressee 1 in the decision that it chose not to appeal. In that situation you might well have the same damage to engage the 1978 Act, but how is a court – whichever court it might be – to assess the contribution?

MR. BREALEY: In the example of para.41 there would be a right of contribution between A, B, C and D for the period up to 2005, but if the European Court has annulled the decision and B, C and D have been found not guilty of any unlawful conduct for 2006, 7 and 8, the only person who is liable for any loss is A. He does not have any contribution against B, C and D in respect of loss caused by unlawful conduct in 2006, 7 and 8. The Contribution Act would only apply where you are joint tortfeasors and in the circumstance in para. 41 there are no joint tortfeasors for the period 2006, 7, and 8, because the individual decision, for example, against B has said they are not guilty of unlawful conduct, but there would be contribution for the prior period. It would be exactly the same if B, C and D were even more successful and it was not just "he got it until 2005" it was, as in this case, that you got off scot free. That is a more extreme case, so there – it does not have to be an immunity applicant, it could be advised: "Don't bother spending money on appeal, just do not appeal."

THE CHAIRMAN: Yes, it could be a minor player who decides to draw stumps and not ----

MR. BREALEY: It does not appeal, and then B, C and D are successful in their appeals and they get off completely, so the decision – finding them guilty of unlawful conduct, does not exist. In that situation there cannot possibly be any right of contribution by A, that A will seek against B, C and D; B, C and D are not guilty, but the problem is A has still got the decision and it is liable for loss, in that situation it will have to pick up the tab.

THE CHAIRMAN: Let us suppose that A, having been found in this Tribunal liable to pay £X of damages, commences in the High Court contribution proceedings within two years of that decision as it would be able to do. By what route will the High Court be bound by the findings of the European Court of Justice annulling the Commission decision by which it has been found liable? Is there an equivalent of s.47A(9)?

MR. BREALEY: That would be *Masterfoods*. It may be I will have to give the Tribunal *Masterfoods*.

THE CHAIRMAN: Yes.

MR. BREALEY: It is quite clear as a matter of European Community law that if you are an undertaking and you have been found guilty of infringing the competition rules, and you do not appeal, whether it is in the Tribunal, because of subsection 9, or in the High Court, I think it is subsection 58A, I do not think you need *Masterfoods*, it is subsection 58A, the decision is binding, and otherwise it will destroy the integrity of the appeal process in Europe if the national court could say to a company that has been found guilty: "I do not think you are guilty". The correct route is for that company to seek to appeal in

Luxembourg. You cannot not appeal in Luxembourg and then try your hand in the High Court. The decision is binding and that is what the European Court is saying in *Kraft.* You have your chance to appeal, the appeal route is not in the High Court, the appeal route is in Luxembourg.

THE CHAIRMAN: I entirely see that in the context of 47A(9) because that is what the section says, but it might be worth you taking us to s.58A. As you probably know, it is the practice to rise for five minutes mid-morning – would that be an appropriate moment?

MR. BREALEY: Yes.

THE CHAIRMAN: Indeed, I am very grateful. Five minutes in that case.

(Short break)

MR. BREALEY: Sir, just a point on s.47A (9) and then s.58A, it does get slightly nuanced because I had forgotten that s.58A although applies to the court, only refers to decisions under the Competition Act, not the European Commission. But if one goes to tab.10 of the authorities bundle, there was some debate about this in the Court of Appeal in *Enron.* (It is amazing how quickly you forget!) So this was, as I said earlier on, this was a case about what was binding, but if I could just go to paras.48-49 of this, where Lord Justice Lloyd at 48 refers to s.58A. At 49:

> "At first sight it seems odd that no reference is made in section 58A to a decision of the European Commission, but it may be that this is left to be governed by the effect of the *Iberian* case".

The *Iberian* case is mentioned by his Lordship at para.5 of the judgment:

> "In *Iberian UK Ltd v BPB Industries plc* ... Laddie J. held that a decision of the European Commission addressed to a particular undertaking to the effect that the undertaking had committed breaches of article 82 (then 86) [now 102] was binding on the undertaking, and could be relied on by third parties in the national courts, so that the relevant undertaking could not deny that it had committed the infringements found by the Commission to have occurred".

So really section 58A is a bit of a red herring as it does not apply to Commission decisions, but nevertheless the principle remains that as a matter of Community law, European Union law, if an undertaking is subject to a Commission decision and that Commission decision says that it has infringed the competition rules and it has not appealed that decision to the European courts, the European Court in *Masterfoods,* which we are getting copies of, but also the High Court in *Iberian Traders* this is, I will explain, *Iberian* has said that that decision is binding on the undertaking concerned.

THE CHAIRMAN: Well, strictly saying the undertaking cannot deny it has committed infringements, because here we would be dealing with the converse situation of an undertaking having been acquitted in Europe, but nevertheless being subject to contribution proceedings in this jurisdiction and saying, "No, contribution won't run, because I was successful in my appeal to the European Court".

MR. BREALEY: Yes, I see the point that you are making, and I can only answer that by saying that in circumstances where the Commission has said that a company has infringed the Competition Rules, that the European court has held it has not, whether in that circumstance the High Court could say, "I actually disagree with the European Court of Justice, and I am now going to determine whether that company, that successful appellant in Luxembourg, is a tortfeasor, and to the extent that it is a joint tortfeasor it is liable to contribution proceedings". That is not this case, but I would submit that it would be a pretty bold course of action for the High Court to take.

So in circumstances where there is one single company left, because all the others have got off scot free, that single company A has a binding decision on it, the claimant is suing that company A for damages, and company A is trying to seek contribution proceedings from B, C and D, in circumstances where the European court has said that B, C and D are not liable. That is for another day, but I would submit that the High Court simply would not do that.

THE CHAIRMAN: I see the force in that, but the curiosity is that the wording in para.5 of *Enron* and the wording of s.47A(9) are actually rather different, because para.5 is focusing on what the undertaking in question may not do, which is to say it may not deny its infringement, whereas clearly Parliament felt the need to pass something like s.47A(9) in order to ensure that the elements of the decision, whatever that may be, were binding on this Tribunal.

MR. BREALEY: That is essentially what this *Enron* case is about. This *Enron* case is about emphasising to the Tribunal that it is bound by decisions of regulators and bound by decisions of the European Commission, that it should not go around disagreeing with those binding decisions, finding its own infringements. This *Enron* case is about the extent to which the scope of the decision is addressed to company A. When the claimant is suing company A and says, "I am relying on the decision", company A says, "It does not actually mean that, it means something else", that is what this case is about. It is absolutely clear from the Court of Appeal in *Enron* that this Tribunal would be bound by a decision in Mr. Turner's example, para.41, that company A has infringed the competition rules.

Then the extent to which A can seek contribution proceedings, as I say, there may be an issue as to whether it can bring contribution proceedings in the Tribunal in any event. If it

seeks contribution in the High Court in circumstances where the European Court of Justice has said that B, C and D are not liable, whether A could realistically say under the 1978 Act they are joint tortfeasors. A, in that situation, having sought not to appeal, would be liable to pick up the tab.

THE CHAIRMAN: Thank you.

MR. BREALEY: On this salami, this bundle of individual decisions, can I quickly move on to the abuse of process point. It will still be the binding nature of the decisions, but I have got to move into the abuse of process point. It seems to be suggested that in a separate action Morgan was arguing something different. Certainly when you read the *Emerson I* case that would appear to be so. In actual fact, when you look at what was argued, it is not the same. Could I ask the Tribunal to go to another bundle called "Skeleton arguments relevant to abuse", which contains the skeleton arguments of Morgan.

Just to recap, in the present case, Morgan is arguing that the claim is out of time, and it is out of time because time was not suspended because it did not appeal. Appeals by other addressees do not suspend time against Morgan. What is then alleged against Morgan now in the present application is saying, "We are not entitled to run that argument because it is an abuse". What I have done is put together the skeleton arguments that were in the *Emerson* case, because this is not the Deutsche Bahn, this is another set of claimants suing Morgan in respect of the same decision.

These are the skeleton arguments in the *Emerson* litigation against Morgan. At tab 1 we have the claimants' skeleton argument on permission to initiate a claim for damages. If one goes to paras.12 to 17, we will see what the claimants were arguing in that case.

> "12 In the Decision the Commission found that the first defendant and the proposed defendants had together within the other parties participated in an illegal cartel …
>
> 13 Article 230 of the Treaty of Rome provides for the appeal …
>
> 14 This two month period is extended by a further ten days by virtue of Article 102(2) of the CFI Rules of Procedure …
>
> 15 On 20 February 2004, Schunk and SGL each brought separate actions before the Court of First Instance seeking the annulment … of the Decision. The two year period in relation to these addressees referred to in Rule 31 will not begin to run until the CFI Appeals … have been determined …"

as we know. Then 17:

> "The first defendant [Morgan] did not appeal the Decision and it is accordingly not a party to the CFI Appeals. The time within which the first defendant might have appealed the Decision to the CFI has expired. If the expiry of the time period within which to appeal triggered the running of the two year period referred to in Tribunal's rule 31 (…) then the claimants would have had to launch their claim in this Tribunal by 14 February 2006."

The claimants were saying they were out of time because the claim was brought in 2007, but they were arguing that by US settlement, time had been further suspended.

That is how the claimants were bringing the case. They acknowledged that they were out of time and were advancing the same argument as I am advancing to the Tribunal now.

Then at tab 3 we have Morgan Crucible's skeleton in response. At paras.7, 8 and 9, we get Morgan agreeing with the claimants' conclusion. It says:

> "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 (…). Consequently, unless capable of extension, the time limit for bringing a claim expired two years after that date on 14 February 2006."

So agreeing with what the claimants were saying at 14 to 17.

> "Such an interpretation is consistent with the interests of both claimants and defendants. Where a defendant no longer contests the infringement found in the decision, a Claimant should be entitled to proceed with its claim as soon as practicable. Equally a defendant is in principle entitled to have a claim for damages brought against it within a reasonable period."

So there Morgan was again submitting the policy reason, which is that the claimants should be entitled to proceed against a definitive decision as quickly as possible.

Then:

> "The Tribunal treated claims for damages instituted against non-appealing addressees of the European Commission's vitamins cartel decision as brought as of right notwithstanding that another addressee had lodged an appeal."

It is interesting to note that in the very first set of damages claims in the Vitamins saga, the claimants had brought proceedings against two defendants who were cartelists, who had not appealed but others had. BASF, as we saw on penalty, but also just for your note the *Sumitomo* case is at tab 19, and is referred to by the Court of Appeal in *BCL*. This was the Vitamins cartel saga. This was the claimants claiming damages for loss suffered,

overcharged, against various cartelists, and the reason I am drawing the Tribunal's attention to tab 19, the *Sumitomo* case, was that this was an instance where one of the cartelists was bringing an action for annulment of the decision against it, yet the Tribunal in the Vitamins saga still allowed the claimants to bring the claims as of right. The Tribunal did not require the claimants to seek permission, and that is what Morgan essentially was referring to in para. 9, and those claims ultimately settled, so that first round of litigation settled, we do not know the terms. The important point for the abuse of process point is that Morgan is agreeing with the claimants. We then go on because I think this is where the Tribunal, with the greatest respect, may have just incorrectly recorded Morgan's submissions.

If I can go to tab 4, this is another skeleton argument, it is called the Claimant's Reply Skeleton, and at para. 2 we see: "The claimants' submission in relation to permission and the effect of the Tolling Agreement" that is the US settlement agreement, "… may be summarised briefly as follows:

> (a) At a Case Management Conference held on 13 March 2007, Morgan initially asserted that the Tribunal's permission was required under Section 47A(5)(b) and 47A(8) of the Competition Act …"

So that is what happened at the very first CMC, Morgan did say that the claimants needed permission, whereas the claimants themselves were submitting they were out of time. So by the time Morgan drafted its skeleton argument for the next hearing it had accepted that the claimants were out of time as we have just seen, and the claimants now say:

> "Morgan has now, correctly, abandoned this position. It now concedes that the Tribunal's permission is not required to commence a claim against it. Where a defendant has not instituted proceedings against a decision or finding of the European Commission that the prohibition in Article 81(1) of the EC Treaty has been infringed, and the time period for doing so has elapsed, the permission of the Tribunal is not required where a claimant seeks to institute a claim for damages based on that decision or finding. This is so notwithstanding that other potential defendants, who are addressees of the decision in question, have instituted proceedings against that decision. The decision is final and binding against Morgan."

So certainly by this time the parties were in agreement, so 15 June 2007, and we go on because at tab 5, para. 85 – there was lots of argument about the application of the US Tolling Agreement, whether it extended time – this is what Morgan were submitting:

"85 Even if the Tribunal were to find that the claims asserted before this Tribunal are covered by the Tollling Agreement, claimants' claims would be still out of time.

86 The two-year time limit prescribed by the Tribunal Rule 31 for claims brought under section 47A is jurisdictional, not procedural, and therefore the time limit cannot be extended either by the Tribunal or by a private agreement …"

And the last one, if I can go to tab 7, this is a supplemental skeleton, September 2007, para. 4:

"On the first question, Morgan submits that the time limit is jurisdictional, not procedural, and therefore cannot be extended by the Tribunal or by private agreement between the parties. If the time limit cannot be extended, the claims are out of time. Both parties agree that, in the absence of an extension, the deadline for filing the present claims was 14 February 2006 (see the Claimants' skeleton of 17 April 2007 at para. 17) ..."

That is the first one we saw.

"The present claims were not filed at the Registry until 9 February 2007."

So that is how it was being argued, and there were various alternative arguments. This was almost one of the first cases about trying to work out what s.47A means, and Rule 31, and there were various alternatives being advanced by counsel in that case representing Morgan at the time, and just for convenience we should go to the *Emerson I* case, because it forms part of Mr. Turner's abuse point, it is at tab 6. If we go to para.52, p.17. "Issue 1: Has time begun to run for the purpose of bringing a monetary claim under section 47A?" This judgment is October 2007 and so is built on the skeleton arguments that have been advanced to it. It sets out the *Emerson* claimant submissions, and then at para. 60 it sets out Morgan Crucible's submissions where the Tribunal says:

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

That is simply not an accurate recording of what was submitted to the Tribunal. It is undoubtedly the case that if they were wrong on the time limit then they were arguing that no permission should be granted, but that was the stance taken by Morgan at the very first CMC which, as we have seen from the skeletons, was abandoned.

If I could, again with the greatest of respect to the Tribunal in the *Emerson* cases, just highlight what has happened to the Tribunal's analysis in the very first *Emerson* cases, because essentially there is very little left of the judgments in *Emerson*. I think it is important that I just emphasise this. In *Emerson III* the Tribunal ruled that an appeal against the penalty, suspended time, and we have seen that the Court of Appeal in *BCL* said that is incorrect.

In *Emerson I* the Tribunal ruled that it had power to extend the limitation period and that has been held to be incorrect in the Court of Appeal in *BCL* 2010. To the extent that the Tribunal ruled as it did, the Tribunal ruled that any liability appeal suspended time and I would first of all emphasise that it appears contrary to the stance that was taken by the Tribunal in the first round of the *BCL* litigation. It appears contrary to what the agreed position was of the parties in the case before it. We have seen the skeletons where both parties seem to be agreed that it was out of time, and in my submission it is contrary to the proper interpretation and the purpose of the Act which I have been going through this morning. And, in my respectful submission, Morgan has advocated the proper interpretation from almost the beginning, not quite the beginning but almost the beginning, and it is not an abuse and, certainly with the help of the Court of Appeal in both *BCL* cases, really, where the Court of Appeal has said it is not the Decision with a capital "D", Morgan is entitled in any event to change its mind, but in my submission it simply has not, it is, what it was submitting to the Tribunal in *Emerson I* was that the time limit had expired for the reasons I have set out today.

I have hoped I have answered the questions, I think I have answered the questions on the sheet.

THE CHAIRMAN: We are very grateful, Mr. Brealey. Thank you very much. (To Mr. Turner) Yes.

MR. TURNER: Members of the Tribunal, our position is that the Tribunal came to the right conclusion in the ruling it gave in *Emerson I*, a decision to which Morgan Crucible was a party, and a decision against which it did not appeal. Nothing has changed since then in the legal landscape to justify them trying to reopen the point now. The hook that they have is a Court of Appeal case, the *BCL* case decided in 2009, and that was one where the Judge,

Lord Justice Richards, emphasised that he had not heard argument on the point, which he records, and that he was not expressing any view on the matter.

Third, the arguments which you have now heard are thoroughly unmeritorious in any event. The essential question, as both sides have agreed in their exchanges of the written skeletons is whether the word "decision" in s.47A subsection (8) refers in this case to the Commission's decision about the Carbon cartel, the Carbon and Graphite Products cartel, or to what I will describe as a hermetically sealed individual decision taken against Morgan Crucible individually. The Tribunal in 2007 had no hesitation in preferring the former meaning. We say it was clearly right because that meaning is, first, in accordance with the plain and natural construction of the word and the statute; second, it is consistent with the way that the word "decision" is used elsewhere in the very same section; third, it is in accordance with the purposive interpretation of these statutory provisions. These statutory provisions give this Tribunal a particular remit to investigate causation and the amount of loss suffered as a result of the overall cartel activities once the relevant issues of liability have been definitively ascertained and settled; fourth, our interpretation avoids what I will say is an unworkable and impracticable result in terms of judicial operation. So, in short, for all those reasons, on the substance we say there are compelling reasons to prefer what I will call for shorthand, "the wider interpretation".

Now, I propose to organise my submissions as follows, first, if I may, I would detain the Tribunal briefly by looking at the basic legal architecture in a case of this kind. What is the nature of the cause of action? What is a claimant suing on? What harm are the infringers who engage in cartels responsible for as a matter of law, and what is the role and function of this Tribunal in a case under s.47A? Having done that, I will then deal with the arguments that you have heard from Morgan Crucible in support of its strike-out application, and at the same time I will develop our own opposed position. Finally, I will deal with the abuse of process issue.

So, if I can start, then, with the basic legal architecture and ask the Tribunal, please, to pick up the Commission's decision which is the main bundle at tab.1.

THE CHAIRMAN: The slim main bundle.

MR. TURNER: The slim main bundle. If you turn within this to p.71 and look at para.(211) you have there what I hope everyone will agree is a convenient summary of the prohibition which we are concerned about. It was then called Article 81. It is now called Article 101 of the Treaty on the Functioning of the European Union. And in a direct paraphrase from the language of the Article itself, this records:

> "Article 81(1) of the Treaty prohibits [that replaces the language 'The following shall be prohibited'] as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market".

So, what is being outlawed is joint and concerted behaviour of certain types, agreements between undertakings, concerted practices, the essence of the wrong is jointness. It is where cooperation between competitors is being substituted for independent behaviour which they should be using.

So, that is the basic prohibition. What is the nature of the legal right that a private party can rely on in referring to breaches of that prohibition as the basis for a claim in a national court or in this Tribunal? That has been clarified in the fairly recent case of *Manfredi* which you have in the second authorities bundle, if you would be kind enough to take that up, it is at tab.22. If you go within tab.22 to p.6644 you have the beginning sections of the court's judgment. You will see from para.22, which I am not spending much time on, that the case essentially concerned an action for damages against insurance companies which had fixed the prices of car insurance premiums. If you turn on to para.14 you will see that one of the points in the national proceedings was that the investigations which had been carried out by (that is the relevant competition authority, the AGCM) had revealed that the average price of civil liability auto insurance premiums were 20 per cent higher than would have been the case if the competitive conduct of the insurance companies had not been distorted by the concerted practices.

The role of a national court or tribunal where there has been such a breach of the prohibitions is discussed, the main section begins from para.58. If you turn forward you will find para.58 on p.6660. This records that the prohibition, Article 81, creates rights for individuals concerned which the national courts must safeguard. Paragraph 60 refers to the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition. It should be recalled that the full effectiveness of the Article, and in particular the practical effect of the prohibition, would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Paragraph 61:

"It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited …"

Paragraph 62, and this is important:

"In the absence of Community Rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law …"

subject to two conditions –

"… provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)."

Then 63 sets out the conclusions summarising what has just been said.

In relation to the national legal systems and their detailed procedural rules, if you go to para.81, p.6666, you will see there that the national legal systems also have control over limitation periods. It is for them to work out the limitation periods that are to apply, subject to these two principles, these two overriding principles. You must not make it excessively difficult to exercise the right to seek compensation.

Finally, at pars.95 and 96, this is just a statement of what you are seeking to recover, at 95 the court records that you are seeking compensation for loss caused, and that compensation must relate not only to actual loss or out of pocket loss, but also the loss of profit plus interest. At para.96 the court says that total exclusion of loss of profits as a head of damage cannot be accepted in a case of a breach of Community law.

Paragraph 99, finally, they say that if, under the national law system, you award damages on a different basis as well, if you mark the gravity of it with an award of exemplary or punitive damages in national law for a similar type of thing, then the same principle should apply in relation to a claim for a breach under this prohibition.

So *Manfredi*, in short, tells us that when it comes to matters of the kind with which you are concerned in this case, namely issues of limitation, procedural law, the Community law Rules have run their course. You are concerned with principles of national procedural autonomy.

My next question, or point, or point to address is, what are the parties to an unlawful cartel responsible for? We have heard tell that the only relevant decision is a hermetically sealed

individual decision in relation to a particular cartelist. But what is that cartelist responsible for? What is the loss? For that, I would ask you again to turn up the EC decision at tab 1 of the main narrow bundle, and turn in it to p.71, starting at para.(213). This is in the section referring to the application of Article 81 of the Treaty, and the Article 53 of the EEA Agreement. Paragraph (213) says, "The Article prohibits" and it emphasises:

> "… *agreements* between undertakings, decisions by associations of undertakings and *concerted* practices."

It then goes on to refer to when an agreement can be said to exist, (214), and that is where you have a plan "determining the lines mutual action (or abstention) on the market." So mutuality is the essence.

Then (215), and I will take this briskly, referring to concerted practices, which are also mentioned. There is the principle that I referred to in opening at the end of that paragraph, that what is outlawed is co-ordination, which takes place whether you call it an agreement or a concerted practice, where you are substituting co-operation for the risks of competition. At (219), you have the applications of these principles in this case, and you will see that referring back to the facts, which have been described in an earlier section of this document, the Commission finds that those facts demonstrate certain unlawful agreements, which are then outlined in those indents. Those are the ones which are material in this case.

At (223), p.74, you see the principle set out in the second sentence:

> "Moreover, in the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose."

So the agreement, therefore, covers the implementation in pursuit of a common purpose. Then you come to a part of the decision which is particularly important to the arguments beginning at (225):

> "The activities of the cartel formed part of a overall scheme which laid down the lines of cartel members' action in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to distort the normal movement of prices and to restrict competition … The Commission considers that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was in reality a single infringement which manifested itself

in a series of anti-competitive activities throughout the period of operation of the cartel."

So the point there is that the Commission says, "Looking at what has happened over a period of very many years, you should treat this as essentially a single coherent infringement, a continuous infringement.

(226):

"Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. Some participants may have a more dominant role than others. Internal conflicts and rivalries, or even cheating may occur, but that will not prevent the arrangement from constituting an agreement/concerted practice … where there is a single common and continuing objective."

(227):

"The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement."

If we go to (229) over the page under the heading "Application":

"In this case, the Commission considers that the behaviour of Carbone Lorraine, Morgan, Schunk and SGL, all of which regularly participated in most or all of the [various kinds of meetings] listed in Annex 1, as well as in the other contacts described in Chapter IV, during the entire period for which each undertaking is held responsible, constitutes a single and continuous infringement."

In application of the principle that I have mentioned on the previous page at (231), you see that Carbone Lorraine had argued, "We only played a minor part", and the Commission responds:

"As all the illegal activities of the cartel together constitute a single continuous and complex infringement, the fact that Carbone Lorraine played a somewhat less active role in the cartel when it came to mechanical products than when it concerned electrical products, because of its smaller market share for

> mechanical products, does not relieve Carbone Lorraine of its responsibility for the infringement as a whole. The same applies to Carbone Lorraine's claim that it did not participate in the cartel's illegal activity against cutters. It is settled case law that 'an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituents elements of the cartel'."

There it is, that is a particularly important proposition, because it shows that an individual cartelist, let us say Morgan Crucible, is being held liable not merely for its own behaviour which may have resulted in customers being overcharged, let us say, by it, but for the period when it was a party to the cartel for anything that the cartelist did pursuant to the joint enterprise which harmed customers, and for which they are entitled to bring a claim.

With that explanation of the nature of the cause of action, one can turn to the Tribunal's written questions in the letter of 10 May. The first question was:

> "Is the liability for damages under s.47A several, joint and several, or joint?"

The first point is that, and it is common ground, as my friend mentioned this morning, the breach of the European prohibition is treated in English law as a breach of statutory duty, a form of tort. If authority is needed for that, it is referred to in the *Enron* case, the second *Enron* case, I believe, at para.4, tab 10. Would you like to turn that up? It says nothing more than that point.

THE CHAIRMAN: No, I think we can take that.

MR. TURNER: Breach of statutory duty.

As respects whether it is joint or several or joint and several, we have gone to the textbooks, **Clerk and Lindsell**, and a specialist book on Contribution by **Mitchell** in 2003, and with the Tribunal's permission, I will just refer you to some relevant parts of that. We have already given these to my learned friend yesterday. (Same handed) I do not know if you have the same clip as I do, but if you would go within it to the **Mitchell** Book, "The Law of Contribution and Reimbursement", which is the second tab after **Clerk & Lindsell**, and if you would go within that to para. 8.16. p.160. Under the heading which is above para. 8.15: "Compensatory liabilities in tort", the author writes:

> "Here, the term 'joint tortfeasors' will be used to denote parties who are sufficiently connected to one another to justify holding one liable in tort for the damage tortiously caused by another. In Glanville Williams' terminology such

> joint tortfeasors can be distinguished from two other types of tortfeasor: 'several concurrent tortfeasors' and 'several non-concurrent tortfeasors'. Joint tortfeasors are all deemed to be liable for the same damage because one or more of them causes this damage by his tortious actions or omissions, and because they are all connected to one another by one or more types of relational or participatory link. Together, they are deemed to commit a single wrong resulting in a single injury. In contrast, several concurrent tortfeasors are tortfeasors who have each caused the same damage by their tortious actions or omissions, although they are not connected in any of the ways that could lead to a finding of joint tortfeasance. Each commits a different wrong, but their different wrongs cause a single injury."

I have been given an example by my Junior of construction of a wall where the architect mis-specifies the dimensions and then the builder uses the wrong form of cement, the wall falls down, there has been a single injury, but two different forms of wrong, as opposed to what we have in this case which very clearly I will be submitting is obviously joint.

> "Several non-concurrent tortfeasors are tortfeasors who have each caused different damage by their tortuous actions and omissions, possibly, but not necessarily, to the same victim, and who are moreover not connected to one another in any of the ways that could lead to a finding of joint tortfeasance."

In the following paragraph, 8.17, we can skip over the first sentence, it then reads as follows:

> "It is tempting to assume that joint tortfeasors must all be joined as defendants to a single set of proceedings by the victim, because this is the procedural rule which generally applies to parties who owe a single joint liability. However, this is not the case: joint tortfeasors can in fact be sued jointly in a single set of proceedings or separately in different sets of proceedings, and recovery of judgment against one joint tortfeasor does not operate as a bar to further proceedings against the others. This is why the liability of joint tortfeasors is commonly but confusingly said to be 'joint and several'. It also explains Lord Denning MR's observation in *Egger v Viscount Chelmsford* that no tortfeasors can truly be described solely as joint tortfeasors [since they] are always several tortfeasors as well."

In terms of the analytical categorisation, in my submission, when you are dealing with tortfeasors it probably makes no difference whether one says "joint" or "joint and several". If you would turn the page to para. 8.19 there is merely a description of the sorts of linkages that will lead to the characterisation as a matter of English law of there being joint

tortfeasors, joint liability, and picking up the sentence immediately above the indents you will see that it says:

> "It seems that situations of this kind will arise where the defendants are connected by the following sorts of participatory link …"

And the second of those is "where they take concerted action in pursuit of a common design (the test for which is essentially the same as that for the tort of conspiracy)."

That is all I think we need to gather from this book. One can conclude from it, I would hazard and it is not contentious, that it is clear that liability for a breach of Article 101 of the Treaty is joint or, because there is no practical difference in a tort claim, joint and several. So that deals with the first question raised by the Tribunal.

What I would say by way of final comment on it is that in my friend's submissions this morning he drew attention to the fact that you should examine whether the cause of action is a cause of action against Morgan, he laid emphasis on that. Yes, we say, there is a cause of action against Morgan Crucible, but it is not a several cause of action, it is a cause of action against Morgan as a joint tortfeasor, and therefore it is a cause of action against Morgan jointly with the other cartelists.

With that, I pass to the second question raised by the Tribunal which was: "which are the specific losses that s.47A contemplates can be recovered by a claimant? " We have seen that as a matter of Community law, each cartelist is responsible jointly for the activities of the whole cartel for the period of their involvement. My friend says that some of them were involved for different periods from others, that is true. They cannot be held responsible for periods when they were not members of the cartel, but for the periods when they were members of the cartel they are held liable for the activities overall, including as you have seen, for the acts pursuant to the cartel by other people within it.

It follows, we say, that in English law any losses caused by the cartel as a whole can be recovered from any of the cartelists as a joint tortfeasor. So, for example, let us assume that one of the others, Schunk, pursuant to the cartel, has overcharged some of my clients. The resulting damage, the harm suffered by my clients, can be recovered from Morgan Crucible, which was a member of the cartel. Morgan Crucible may not have overcharged the customer itself but its participation sustained and supported the edifice of the cartel and that is why it is responsible for the harm caused by it. That in turn means that Morgan Crucible's liability in a s.47A case depends – must depend – on the facts relating to the cartel as a whole being settled, including who was involved and what they did.

With that, I turn to the Tribunal's third question: "Does one addressee of a decision defined in s.47A (6) have a right of contribution against the other addressees of that decision?" The answer is yes, there is a right of contribution against anyone who is, to use the language of the Civil Liability Contribution Act: "liable in respect of the same damage, whether jointly with him or otherwise."

The other addressees of the decision are liable in respect of the same damage, the harm caused by the cartel, and so contribution can, in principle, be recovered from them. But, and now I just anticipate the point which we must of course come to: what if the goalposts move and the European Court meanwhile confirms, for example, that other people were not party to the cartel at all? What sensible meaning, from the point of view of this Tribunal in the damages case, is to be given to the idea of joint – a joint tort - then? I will return to that. Sir, I note the time, if you will indulge me for five minutes, I may as well finish this part of the submission.

THE CHAIRMAN: Proceed, Mr. Turner, yes.

MR. TURNER: It will be five minutes or so. The Roles and Functions of the Tribunal in Relation to s.47A. This is now turning to your task. You have a statutory jurisdiction to hear claims for damages under s.47A. The Statute is designed to allow the Tribunal to facilitate follow-on claims, because the Tribunal is a convenient forum for outstanding questions of causation and the quantification of losses after infringements have been established by somebody else, by the competition authorities.

You undertake your task against the background that Commission infringement decisions, and the same is true for national authorities as well, will make all of the findings which go to liability, which are essential, who was a party, for how long and the essential nature of the involvement. But, the decisions, as you will see consistently, if you look at almost any European Commission decision, do not generally go as far as to make any detailed findings on questions with which you are going to be concerned, such as causation and quantum of losses suffered by private parties, they stop short of that because it is not part of their responsibility to go into those matters. That is a whole factual area which the Tribunal needs to investigate itself; it takes up the baton. Nor do the infringement decisions, and this is also a thought, generally consider the precise extent to which competitive market prices may have been increased by the overall cartel. It is a very material point, as my friend rightly said, one of the key questions for the Tribunal in one of these cases is: by how much have people been overcharged? For that purpose you have to try to work out what things would have been like had there not been a cartel, and to do that you need yourself to know

about the nature and extent of the cartel so that you can form a decision on the extent to which prices have been increased. To show you that the Commission stopped short of these sort of matters, if you pick up the decision again, please, at tab 1, and go to para. 280 you will see really a statement of the obvious but repeated in many of these decisions – under the heading: "The actual impact of the infringement on the EEA market" they say for their purposes:

> "There is no need to quantify in detail the extent to which prices differed from those which might have been applied in the absence of the anti-competitive arrangements in question."

Finally on the role of the Tribunal, the *Enron* cases. If you would perhaps open the first authorities bundle at tab 8, only going to the key paragraphs within those. The first is at tab 8, that is the 2009 judgment at para. 30 – a key paragraph:

> "the jurisdiction of the Tribunal is therefore limited to determining what are commonly referred to as follow-on claims for damages based on a finding of infringement of ….

- parallel prohibitions on abuse -

> "The existence of such a finding is not only a pre-condition to the making of a claim under s.47A(1). It also operates to determine and define the limits of that claim and the Tribunal's jurisdiction in respect of it."

In other words, it fashions the framework within which you move, it sets the limits. Then in para. 31 immediately below that, halfway down:

> "No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the Tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement."

Our case is that a relevant and definitive finding of infringement will be one therefore which gives you everything you need to undertake your task. That was confirmed, if you go forward to tab 10, to the second *Enron* decision at para. 8, and in the last sentence or so in para. 8 the Court of Appeal is referring to what happens if a claimant chooses to proceed with the case in the Tribunal and says:

> "… 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."

So what the Court of Appeal envisages is that you will not be troubled with questions of the extent of the infringement, who was party and who was not, and matters of that kind. Your task is to accept those parameters and to investigate causation and quantification of loss.

Sir, with your permission, that is a convenient point to pause.

THE CHAIRMAN: Thank you very much, Mr. Turner. We will say 2 o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Brealey.

MR. BREALEY: We have copies of *Masterfoods* and Mr. Turner and I thought if I just spend two minutes, then it gives an opportunity to reply, so that we do not go out of sync. I do not think there is much to disagree on. The ruling which is at the end, and this is again, very quickly on the context, there were parallel proceedings about ice cream freezers in small corner shops, and there was really a dispute between what the national court in Ireland was ruling on and what the European Commission was ruling on. And a reference was made as to what were the duties on the national court when it comes to a Commission decision. The findings of the court start, really, at para.45:

"First of all, the principles governing the division of powers between the Commission and the national courts in the application of Community competition rules should be borne in mind".

And, at 46 the Commission is essentially — here the court is saying the Commission is entrusted to ensure the application of the principles of Articles 85 and 86.

And then, 48:

"Despite that division of powers ... the Commission cannot be bound by a decision given by a national court ... The Commission is therefore entitled to adopt at any time individual decisions ... even where an agreement or practice has already been the subject of a decision by a national court",

so the supremacy of Community law dictates that the Commission should take priority.

Then, para.49, we are dealing with the courts here, and it concerns the duty of cooperation:

"It is also clear from the case-law of the Court that the Member States' duty under Article 5 of the EC Treaty [is] to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law, and to abstain from any measure which could jeopardise the attainment of the

objectives ... is binding on all the authorities of Member States, including, for matters within [the] jurisdiction [of] the courts".

That is very often called the "duty of sincere cooperation" between the courts and the Community, but here the Commission. Then:

"Under the fourth paragraph of Article 189 [these are the old provisions of the Treaty, but it does not matter] a decision adopted by the Commission ... is to be binding in its entirety upon those to whom it is addressed".

So the decision is binding on Morgan, for example. And then, para.51:

"The court has held, in para.47 *Delimitis*, that in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision" —

so, that is where there is a possible decision by the Commission. Paragraph 52:

"It is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance".

And then the ruling at the end of this judgment is the same. But the bottom line is, if there is a Commission decision which says that Morgan is in breach of Article 101, it is not open to Morgan (see para.50) nor the court to say "No, Morgan, you are not bound. You did not breach the competition rules. I am going to take a different view". And so, really, *Masterfoods* applies the same principle as s.47A subsection (9) on the Tribunal.

THE CHAIRMAN: Thank you very much. Mr. Turner.

MR. TURNER: I am obliged. Perhaps before the Tribunal puts that away, I will make some supplementary observations in relation to *Masterfoods*. The first point, at para.51 which Mr. Brealey has taken you to, we see the operative principle which the court is concerned about is legal certainty, not arriving at a situation where two different decision makers come into conflict. And it therefore says where you have a Commission decision and a National court is thinking of arriving in its final determination at a different decision, ought not to do that, ought stay its proceedings. Now, that is not to say, of course, that you cannot commence proceedings without permission. You must not, however, arrive at a final determination in the national proceedings which is at odds with what has been decided in Europe.

The other point is, what has been decided in Europe. It is not the case that one stops at the Commission and says, "Well, that's that", even if that Commission decision is appealed, I, the National court, must treat myself as saddled with it round my neck". If we turn to the last page of this judgment, p.8 of 9, you see the court addressing the question of what happens where somebody has applied to annul the Commission decision. Were that the case, then the National court must decide whether to stay its own proceedings until a definitive decision has been given in the action for annulment or in order to refer a question to the Court for a preliminary ruling.

Paragraph 56 refers to the duty of:

> "... sincere cooperation between the national courts, on the one hand, and [on the other] the Commission and the Community Courts"

together, because they are a coherent scheme. In para.57 you see that:

> "When the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts".

So, what one gathers from that is that the Community law system is one where certain findings which have been made, binding findings by the Commission, may be appealed to the community court and a national court, because of the general principle of legal certainty, must have regard to what is going on in Europe as a whole.

Now, if I may, sir, I have left *Enron* 2011, but if I may return to it for just one point. That is in the first authorities bundle at tab.10. This morning you asked my friend about s.47A(9) concerning decisions being binding. You asked, "Well, does that also relate to the underlying facts, or is there another provision which relates to that?" The answer is given by Lord Justice Lloyd in this case, at para.50. At para.50 he looks at three sections together, s.47A(9) 58 and 58A and tries to work out what the coherent scheme is. And he says, as you will see from halfway down:

> "That is a comprehensible regime because the regulator may make findings which are directly relevant to a decision as to infringement, but it may also make findings of much less direct relevance".

And then he says this:

> "Findings in the former category should be regarded as binding, because to challenge them would be tantamount to challenging the finding of infringement".

If they are essential to the decision itself, then to say that you can challenge those is tantamount to challenging the decision which is said to be binding. Now, just by way of comment, what that means, therefore, is that if the decision is a narrow one, a hermetically sealed decision, there is potential incoherence, lack of legal certainty, because the Tribunal in the same proceedings might be bound by a European Commission decision against, let us say, Morgan Crucible on the one hand and by a later court judgment dealing with precisely the same findings of fact, let us say an appeal by another of the co-cartelists. On the other hand that incoherence is solved, as I will explain, if our wider, and we say natural interpretation of the decision is preferred, which is to say that the national court or Tribunal sees the decision as in its natural meaning the decision which has been made which is addressed to a number of parties, but which finds the common finding of infringement.

With that, can I ask the Tribunal, please, to take up our claim form. I wish to illustrate how we have put our case. That is at tab 2 in the main small bundle. My friend has already taken you to certain provisions of this, so I shall be brief. At para.48, you will see there that for the purpose of our case before the Tribunal, the action for damages, we rely on paras.2 and 219 of the decision, being cited there and effectively paraphrased, a whole range of findings by the Commission about the way the cartel as a whole operated. We rely on those findings.

We then go on at paras.56, p.19, to para.59, to refer to the fact that the findings of infringement set out in the decision and the findings of fact upon which these are based are binding in these proceedings. That is para.56, first sentence, and that reflects what you have just seen in the *Enron* case from Lord Justice Lloyd.

We then refer to certain findings made in the decision on which we will rely concerning the essential facts relating to the activities of the cartel, who was in it, what was found.

If you turn over the page you will see in particular para.58:

> "The Commission further found that the anti-competitive cartel arrangements were implemented and that anti-competitive effects had taken place as a result of each of the restrictions on competition described in the previous paragraph. The Commission further found that:
>
> a. as the Cartel members controlled over 90% of the EEA market, the implementation of their anti-competitive agreements could not fail to significantly restrict competition, given that there was in most cases no alternative source of supply."

Again at 58 c. you will see:

"the option for public transport companies of purchase from other suppliers was fairly theoretical in a situation where the Cartel members controlled over 90% of the market."

In a moment I am going to invite you to imagine what would happen if, as a result of some decision of the European Court, that finding were to be revisited leading to the conclusion that, let us say, only 50 per cent of the market was covered, the impact that that would have and how you, as the Tribunal, could begin to try to work that out.

Moving forward in this document to para.73 – my friend took you to that – that is the plea of joint and several liability.

Paragraphs 74 and following are important to the argument. Those are the paragraphs concerned with our case on the quantum of loss and damage. The point here is to illustrate, as I was saying before the short adjournment, that in this sort of case those things have to be investigated afresh, because they have not been covered by the Commission decision. Moreover, the material that the Tribunal will need to investigate this is largely going to be in the hands of the defendants, the operators of the cartel, who know what they did, rather than the customer who was deceived. That is why in para.74 we say:

"Pending disclosure and/or the provision of further information, the Claimants are unable fully to particularise the extent of their losses, which depend on an examination of the extent to which the Defendants' behaviour distorted market conditions. The relevant documentary and other evidence thereof is in the sphere of the Defendants."

So the assessment necessarily depends on obtaining information from the cartelists to help establish how the overall cartel has distorted market conditions.

Before turning to my friend's specific submissions in support of his construction, I would note, before we leave this document, that the facts which we plead at para.48, if you turn back, those are the ones about the Commission's findings on the overall extent of the cartel as being the foundation of our claim for damages now against Morgan Crucible. Those findings were specifically attacked by another of the cartelists, Schunk, in its appeal to the European Court of First Instance. Could I ask you, please, to take up the second authorities bundle, tab 24. You see from the first page that this was a judgment of the Court of First Instance handed down on 8 October 2008. It was Schunk's appeal against the Commission's decision. You will see on p.2605 at para.78, a statement of what Schunk was asking the court to find. You will see it says:

"Thus, the applicants submit that the Commission was wrong in finding …"

a number of things set out in the indented paragraphs. You will notice, for example, the first indent:

> "the undertakings involved in the cartel had agreed a ban on advertising and on participation in sales exhibitions …"

drawn from para.48, said to have been wrong as a matter of the feature of the cartel. Similarly, if you turn the page, the final indent, also from para.48:

> "the undertakings concerned had operated a highly refined machinery to monitor and enforce their agreements."

These are the sorts of matters that other cartelists may well, in these sorts of cases, take on appeal.

Before leaving this judgment, if you go back in it to p.2588, this will add clarity to what was debated this morning, at para.24 under the "Law – *The application for annulment of the Decision*", you will see that a complaint or a grumble is raised by the court. It says:

> "Although the action brought by the applicants has a double objective, namely, and application for annulment of the Decision, and, in the alternative, an application for the reduction of the amount of the fine, the various complaints of the applicants in their pleadings were none the less raised without distinction."

The applicant said, "You must sort it out".

At para.26 you will see the court refers to the fact that Schunk:

> "… accuse the Commission of having infringed the principle of proportionality and the principle of equal treatment in setting the amount of the fine, which, at first sight, forms part of the application to have the fine reduced. However, the arguments raised in support of that claim contain objections to the infringement found by the Commission and the question therefore arises of the liability of the undertakings at issue, as defined in Article 1 of the Decision. Those objections must therefore be examined in the context of the application for annulment of the Decision in its entirety, including Article 1 thereof."

So what you draw from that, first of all, is that the court is, itself, saying, "Yes, there are differences between attacks on the fine where you take the facts as given but say that it was not so serious as to warrant such a fine", and attacks which, although at first sight appear to be saying, "We deserved a lower fine", say that because they are saying that the Commission has gone wrong on some underlying aspect of infringement, liability. In those sorts of cases you are dealing with a species of attack which is properly thought of as an attack on liability and not going to the fine.

The second point that you draw from this case as a whole, as I have shown it to you is that you can see how another cartelist can mobilise an attack directed at the findings of infringement which go to the very matters which needed to establish the case against the other cartelist. In short, there is a direct collision between our pleading of the relevant facts on the one hand against Morgan Crucible, and Schunk's appeal to the European Court.

With that I turn to Morgan Crucible's arguments. Morgan Crucible's original application to reject our claim you will find at tab 3 of the main bundle. They make essentially four points there.

The first point they make is by way of an attack on the Tribunal's reasoning in 2007, because in 2007 this Tribunal finds that our interpretation is correct, and that is attacked at paras. 19 et seq. An essential point is that they say the Tribunal is wrong to have decided that – and I quote the language of the judgment in that Tribunal – the ordinary plain meaning of subsections (5) and (8) of s.47A was that the word 'decision' means the Commission's decision in relation to the cartel as a whole. That is their first attack which is on the Tribunal's reasoning and which relates to ordinary or plain meaning.

Attack no.2 is in paras. 23 and 24 on what they call a "strictly literal reading" (para 24) of subsection (8) the word "decision" should be given the same meaning as it has in the context of appeals to the European Courts, and for brevity I will call that the "*AssiDomän*" point.

Third – next paragraph – they say that the interpretation of the word "decision" to mean the Commission's decision insofar as it refers to Morgan Crucible alone is consistent with the statutory purpose, which is to ensure that the decision which is to bind the Tribunal should be definitive before a claim can be brought without permission. They say their construction is in favour of that and ours is not.

Fourthly, para. 27, they say, implicitly, also if you look hard at the *BCL* case in the Court of Appeal in 2009, you will see that that court was in fact approaching the case on the basis that they are right that only appeals brought by the defendant in question affect the limitation period.

They have elaborated those four points in their subsequent skeleton; they have added one more and that is that their narrow proposition is supported by what they call the nature of the follow on action created by s.47A. So now I will deal with their points.

I would like to begin where a common lawyer always begins when dealing with a question of statutory interpretation, which is to look to see what is the plain and natural meaning of the words in the Statute. So if you would please open authorities bundle 1 where s.47A is

set out, and perhaps also have our submissions to hand, which are at tab 4 of the main bundle, paras. 27 to 31 – under the heading "Language of the Act".

We say as follows: if you will kindly look at subsections (5) and (6)(d), which are the relevant phrases we are concerned with – focus on 6(d):

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

It refers simply to a decision which establishes that the relevant prohibition has been infringed. That is apt to describe the Commission's decision relating to the cartel agreement which, of course, has a number of parties. It is inherent in agreement cases that there will be a number of parties, and it is also inherent that all the findings on which the infringement decision is based, in relation to each party, will be joint and common findings because it is a joint enterprise. That is the first point, that the natural interpretation is to look at a decision which establishes the infringement, and that is what the Commission's decision does on our interpretation.

Secondly, the decision itself regards itself and talks of itself as a single instrument establishing an infringement, and if you would then turn to the decision itself at tab 1 of the main bundle, plainly you have on the first page the reference to the "Commission Decision" (in the singular). Recital (1) on the second page says: "This Decision [singular] is addressed to the following undertakings" and refers to a Decision being addressed to a group of people.

Then if you turn to the back, to p.106, the operative part, you will see that the capital letters at the top refer to the Commission as having adopted this Decision (singular) Article 1 of which is that a number of undertakings have infringed Article 81. Article 1, which is the infringement finding covers a number of parties. Article 2, which refers to the fines, is separate. We are not saying, of course, that the decision relating to the fines is a part of the decision for present purposes, the fines are always inherently individualised to the party which is fined, but the finding of infringement in Article 1 is a single finding which relates to a number of parties specified in paras. (a) to (f).

THE CHAIRMAN: Well, Mr. Turner, surely it is possible though for the Commission to have found that one of these six parties was not party to the cartel? One could have a decision that A to E had infringed, but F had not.

MR. TURNER: Yes, what one always finds in a decision of this kind, only a decision of infringement - claims to be a decision of infringement - a single decision relating to a number of parties. If, on a hypothetical basis the Commission were to make an

infringement finding against parties A, B and C and a decision in D that another party had not infringed, and leave aside for the moment whether that is a possibility open to it. Then in that case you would still have a single decision of infringement relating to parties A, B and C. There would still be quite plausibly, and quite naturally a decision finding infringements by A, B, and C, and that is, we say, the plain and obvious reading of this provision. Indeed, as I will show you in a moment it was originally described my friend's former legal representatives as "completely plain and obvious as well", but we will come to that in due course. That is the first part of the *dispositif* on p.106. You see also on p.107: "This Decision" (singular) "is addressed to:" - not "individual Decisions are addressed to:" various parties. On p.108 just before the signature of the Commissioner:

"This Decision (singular) shall be enforceable pursuant to Article 256",

so, constantly referring to itself as a single decision concerning an infringement, the cartel relating to the carbon products, but covering a number of parties. Now to those points on natural interpretation we add a third, which is based on reading this provision in context subsection (6). This is foreshadowed at para.32 of our written submissions, where we refer to other provisions in the Competition Act including s.46. So, I do not know if it is necessary for me to refer you to the extract from **Bennion** which merely says that it is an aid to construction, in fact a necessary matter, to view a provision in context by reference to the other surrounding provisions. And, if it is helpful —

THE CHAIRMAN: We will take that as read, I think, Mr. Turner.

MR. TURNER: Yes, and that the same word, if it appears in different places in the same provision, is given the same meaning.

THE CHAIRMAN: Well, as I understood it, Mr. Brealey was accepting that as well, it is just —

MR. TURNER: Yes.

THE CHAIRMAN: — you attach perhaps radically different meanings to that single word.

MR. TURNER: You will find that you have an extract from **Bennion** on it for your note, then. It is s.355 which I believe has been handed to the Tribunal. It is in your bundle. So, if you would return, please, to the Statute, does the Tribunal have in fact, I have noticed it is missing from the authorities bundle, other provisions of the Competition Act.

THE CHAIRMAN: We all have our purple —

MR. TURNER: You have your purple books. And perhaps it is easiest if you use the purple book and if you turn in it to pp.46-47 which is the numbering within the spine of the book and find the relevant parts. The first point, which you do not need the purple book for, you can use the copy in the bundle, is that the word "decision" is used in exactly the same way

in subsection (6)(d) which we are concerned with, as in s.6(b) which is about decisions by the Office of Fair Trading. So, it is used in the same way. Now, it is crystal clear in my submission that in the OFT context the word "decision" means a single decision about the agreement to which there are a number of parties, each of whom can appeal against it, and if you now look at the purple book and look at s.46(1) you will see that it says:

> "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".

Decision is defined at 46(3)B in a way familiar to you because it is the same way it is defined in s.47A. But what it is contemplating is a single decision and the possibility for any party to the agreement appealing against that decision. So, that is how it is dealt with there.

And for completeness, if you look back at s.36(1) which we had referred to also in our written submissions.

THE CHAIRMAN: Sorry, what number was that, Mr. Turner?

MR. TURNER: It is s.36(1) on p.42 of the purple book. That says on making a decision that an agreement has infringed the Chapter I prohibition, or the prohibition in Article 81, the OFT may require an undertaking which is a party to the agreement to pay a penalty. Again, language which is naturally apt to describe a situation where you have a decision about an agreement against which a party, or in respect of which one or more parties may be fined, and as you see from s.46(1) in respect of which one or more parties may appeal. So, we see from this that if you go back to s.47A, 47A(7) which is talking about the limitation periods for, among others, the OFT decisions about Article 81 infringements those, clearly they are our interpretation, and we say that in relation to subsection (8) which uses the same formulation and the same language, it is natural and should be read in the same way. Precisely the same way. And against that background the reference which you see which the Tribunal in 2007 picked up in subsection 47A(8)(b) to "any such proceedings" against a decision, "any such appeal proceedings", just as the Tribunal said, does naturally refer to potential proceedings against the decision by any of the parties to that decision, any such proceedings by any of the parties to the agreement. Now, I am not saying in relation to "any such" that I am placing full weight on that in the way that the Tribunal in 2007 appeared to do from the judgment, but I say that when you walk through the other provisions and you look at the way that "decision" is used in the other sections, it is a compelling picture that this is a plain and simple interpretation of what the decision is against which a number of parties may appeal.

THE CHAIRMAN: I certainly see the force in what you are saying, Mr. Turner, but is it not significant that whenever one introduces in the statute "decision", the first the time the term is used is preceded by "a decision" rather than "the decision", and it does seem to me that there is an ambiguity there as to whether decision can mean decision *quo ad* multiple parties or "decision *quo ad* a single party".

MR. TURNER: Well, sir, if you are referring to subsection (5):

"No claim may be made in such proceedings until a decision mentioned in subsection (6) has laid the ground".

THE CHAIRMAN: I was looking at 46(1) in fact.

MR. TURNER: I am sorry, 46(1).

THE CHAIRMAN: But it is a general point I am making.

MR. TURNER: Well there, with respect, we say no. The fact that the word "a" rather than "the" is used there is entirely consistent with our approach. Any party to an agreement in respect of which the OFT has made "a decision", there one would not say has made "the decision". The sentence as a whole means that a decision has been made against which any of the parties to it may appeal.

THE CHAIRMAN: I certainly see that your submission is consistent. It is just I am not sure that it precludes Mr. Brealey's construction.

MR. TURNER: "Precludes" is —

THE CHAIRMAN: You do not go that far here.

MR. TURNER: Yes. What I am doing is, I have taken you, first, to the plain and natural interpretation, what do you read when you first see that? I have shown you that the Commission decision itself naturally speaks of itself in those terms, but now also the third strand is that when you see the way that the word "Decision" is used in the other parts of this same Act, the Parliamentary draftsman is using this term in a very clear and consistent way from provision to provision. It is used in that way in s.46. The same language travels into s.47A(7). The same formulation is there in s.47A(8). So if you ask me, "Is it clear beyond peradventure?" I say not on that basis alone, but using the aid to construction, which, sir, you are entirely familiar with, it is an irresistible conclusion when combined with the other points I am making.

What about my friend's interpretation? Far from being natural or even, to use their words, strictly literal, it is strained and artificial, because it is not natural to regard the Commission's decision about the carbon cartel as a bundle of hermetically sealed individual decisions. Even if it is necessary to do that for a very particular purpose, which I will come

to which is about legal certainty in the context of bringing an appeal to the European court, which is the only context in which *AssiDomän* principle comes in.

May I turn then to *AssiDomän*, which is really the flagship of my friend's case. This is covered in our skeleton at paras.45 to 48. Our skeleton is at tab 4. I begin by reminding the Tribunal, after the investigation this morning, that as a matter of EC law, *Manfredi*, this Tribunal's jurisdiction and the rules on limitation periods, they are not Community law matters. *Manfredi* tells you that it is for the domestic legal systems to deal with claims for damages and to lay down the detailed procedural rules including on limitation. *AssiDomän* is a case about the treatment of European Commission decisions in the specific context of appeals up to the European courts. My friend has explained the facts. Essentially, one party decides not to appeal, others do, the court's findings then result in a situation where the party who has not appealed says to themselves, "That affects me too, I will ask for the matter to be reopened", and the court says, "No". The dilemma which all of this posed was neatly encapsulated by the Advocate General in his opinion, and may I ask you to pick up tab 18, authorities 1, where you will find *AssiDomän*. Beginning at p.5365 you will see the way that the Advocate General describes the problem before the court.

> "1. *'I prefer injustice to disorder'*. With these blunt words – the absoluteness of which I hasten to repudiate – John-Wolfgang von Goethe took sides in what is probably the most complex dilemma in law as a whole: the tense relationship between the desire for justice and the need for certainty.
>
> 2. The appeal on which the Court of Justice must give judgment on this occasion appears deceptively simple. The issue is whether or not the Commission is under an obligation to cancel penalties whose substantive invalidity can easily be inferred from a judgment of the Court of Justice. As soon as the question is looked at in any detail, the difficult conflict between the two values mentioned above – substantive justice and legal certainty – becomes apparent."

Then in the second column, bottom of the page:

> "The issue here goes far beyond interpretation of the above mentioned provisions and requires general principles of law to be brought into account. Whilst, on the one hand, the principle of legality requires, among other things, that the legal order purge itself of any measures which are tainted by nullity, on the other hand legal certainty, and, more specifically, the principle that definitive administrative measures are unchallengeable, allows the rectification

– at least formally – of such defects, after certain time limits for instituting proceedings have expired."

If you go on to para.40 he carries out his analysis, p.5375:

"As I stated in the introduction, this case clearly reflects the dialectical tension between two ideals central to every system of laws: justice and legal certainty."

If you will indulge me on his footnote:

"In the sphere of political sociology, Machiavelli, in *Il Principe,* wonders whether, for a person exercising power, it is better to be feared than loved, a dilemma which corresponds to what in the legal field may represent the tension between the values of justice and certainty. His conclude is well known: 'as it is difficult to be both at the same time, the safest course is to be feared rather than loved'."

He then goes on, looking at para.42, to say:

"… an action may be brought to secure the annulment of a decision within two months after notification to the applicant or, in the absence thereof, of the day on which it came to the knowledge of the applicant. For the rest, decisions are, until they are withdrawn by the institution itself or annulled by the Court of Justice, binding in their entirety upon those to whom they are addressed."

Over the page at 44, and this is significant:

"The appraisal made by the Court of First Instance having regard to the grounds of annulment, can be divided into three logical parts: in the first the Wood pulp decision is characterised …"

and I lay emphasis on the next phrase –

"… for the purposes of Article 173 …"

for the purposes of that Article. That is the Article concerned with the appeals from the Commission decision:

"… as a set of individual decisions, the assertion that a judgment annulling a collective decision is effect *erga omnes* is rejected and the binding nature of a decision as regards those who have not brought an action against it within the prescribed period is upheld."

Then at paras.57 and 58, I will not read aloud 57, he returns to the question of the importance, the crux, of the matter defending the time limits laid down by the European Court from being undermined if people can simply come round the back door,. He says at 58:

> "The rule is therefore clear: two months after its notification, any decision which has not been contested becomes unchallengeable by its addressee. That general rule is not merely a matter of good procedure; it reflects the legitimate concern of the legal order to apply certain time limits to the bringing of actions against measures of the Administration. Not a trivial concern, since, apart from the important objectives of legal certainty already referred to, it serves no less important aspects of administrative efficiency."

I will be saying that those were the key concerns in that case. As the Advocate General said, that is the context in which that rule that you conceptualise a decision as a bundle of individual decisions was framed, it has not been applied in any different context. The context with which this Tribunal is now concerned is altogether different, the limitation periods which you are faced with, and the *AssiDomän* writ does not run that far.

So the thrust of the case is one that parties should not circumvent the time limit rules. That is not the case here. That is why the Tribunal in *Emerson I* was right to say, because it was faced with this same point, that the context is completely different.

For completeness, if you have tab 6 of that bundle, you have the Tribunal's judgment, and the Tribunal rejects my friend's contention on p.22, para.71. They said:

> "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 …"

That is the adaptation of what was 173 –

> "… and not the question of the true construction of section 47A of the 1998 Act. Accordingly we do not consider that the principles expounded by the Court of Justice to meet different considerations have any application or relevance to the true construction of section 47A of the 1998 Act."

The question for us is not whether Morgan Crucible should have a second opportunity to attack this decision, it is about the Tribunal's orderly process in dealing with follow-on actions. Once you appreciate that, you see that our construction is all the more compelling.

With that, I turn to the third point, which is my friend's argument that its interpretation is supported by what it calls the nature of the follow on action created by s.47A. If you open up my friend's skeleton where this point was introduced, that is at tab 6 of the main bundle, para.17. So their case, as set out there, is that the cause of action against them is definitively established by the Commission's decision against it, and it has not appealed,

and it is not established by what it calls any other decision addressed to a third party. I agree. But what that does is simply beg the question of what the relevant decision here is. Am I talking about the same decision or another decision addressed to another third party? Our case is that the decision addressed to them is the same decision as is addressed to the other cartelists. They refer in this paragraph to the *Emerson Electric* judgment recently handed by the Tribunal for the proposition that the decision insofar as it is addressed to Morgan Crucible is the relevant decision in law. *Emerson Electric* tells you precisely nothing about that question because that was a case about whether the decision – this same decision – relating to all of the addressees – Schunk, SGL, Morgan – also related to somebody who was not an addressee, a subsidiary of one of the companies, Carbone Lorraine. So it does not help on our question at all, which is whether we have a decision addressed to a number of people or not. In describing the decision as being one addressed to them alone and not the other addressees, what they are doing is assuming what they seek to prove.

We do agree, however, that Morgan Crucible is right that you should have regard to the nature of the follow-on action when you are interpreting which of us is correct. When you do that exercise properly you find that it strongly supports our interpretation that the decision is the single decision of the Commission finding there to have been an unlawful agreement to which all of the addressees were a party, one decision.

The *Enron* cases were important because they tell us – I am not going to go back to them now – that the Tribunal's follow-on jurisdiction is its remit to investigate causation and quantification of damage, and to do so against a canvas when all the relevant findings about involvement in the cartel have been definitively made. Those findings of infringement operate – to use the language in *Enron* "to determine and define the limits of the claim". So what constitutes a definitive set of findings of infringement given the nature of the cause of action that we have before us?

We saw this morning that the tort is a joint tort. Morgan Crucible is liable for the harm caused by the cartel as a whole to victims and to the claimants and not just for the harm caused by its own acts, overcharging particular customers and so forth. It follows that for the system of follow-on claims to be workable the Tribunal must have a definitive set of findings relating to the cartel as a whole before it reaches a final determination, and that is when I come back to the example that is at para. 41 in our skeleton, which the Tribunal directed a question about to my friend. If we go back to that – our submission is that my friend's attempt to wrestle with it has not succeeded.

The hypothesis is that you have a Commission decision much like this one which finds a long running cartel that lasts until 2008. One party, A, does not appeal. It does go on appeal at the instance of parties B, C and D. They say: "We were not liable because there is no evidence, or inadequate evidence, for the period after 2005", and the courts uphold that, and then a cartel victim proceeds against everybody in this Tribunal, A, B, C and D. The point that we make is that on their approach is that you are asked to assume both that the cartel operates until 2008 when you are directing the case against Morgan Crucible, and also that it operated only until 2005 when you are thinking about the responsibility of the other parties who are before you at the same time.

There is a point of practical application which is the point really made at the end of para.41 and a point of law to consider. The point of practical application is that it is thoroughly unworkable to imagine that they can be right in their approach if a scenario of this kind were to occur. To vary it slightly, imagine that in this period after 2005 we sue Morgan Crucible for overcharges made to it by Schunk, one of the other cartelists. So at that stage Morgan Crucible says: "We cannot deny that there was a cartel, and we cannot deny that Schunk overcharged you, so I suppose we will have to be liable for that. At the same time, you have a European Court decision which overturns the finding, it says that it was wrong, that there was any overcharge, or indeed perhaps any involvement by Schunk for that same period of time. What is the Tribunal exactly to do with the question posed in para. 41? How can you investigate the questions which you need to decide to fulfil your jurisdictional remit? How do you decide the amount by which there was an overcharge? You are faced with a European Court judgment which tells you that there was none. You are faced with a Commission decision which, according to them, you must also follow, which says that there was, but not by how much. You have to try to investigate that. You have to order disclosure in relation to a matter that the European Court has said does not exist.

THE CHAIRMAN: Well, is not Mr. Brealey's answer - I am sure he will do it more elegantly himself when he comes to reply – but is his answer not simply this, that one proceeds down twin tracks; one has one set of findings and therefore one set of relevant facts as regards, say, Morgan Crucible, and one set of findings different and therefore a different set of relevant facts as regards another addressee, and the Tribunal would have to proceed along two parallel tracks?

MR. TURNER: May I deal with that straight away?

THE CHAIRMAN: Please do.

MR. TURNER: It is wrong in two ways – at least two ways. The first is that it is extraordinary to imagine that the Tribunal would have to engage in double-think in relation to a joint tort, leaving aside their respective contributions at the end of the day. More particularly I come back to the point that you, for your purposes, are going to need to investigate matters that are not covered by the Commission decision – the amount by which prices have been raised in the market, the price level. For that purpose economists may wish to examine the reach of the cartel, did it cover 90 per cent of the market or 50 per cent? Who was doing what? How can you arrive at different investigations of those matters depending upon one position or another? There is no finding that will tell you the answer to that in the Commission decision by how much customers were overcharged. You must arrive at a result, you must do that by investigating the facts. You investigate the facts by reference to the infringements which form the parameters of your jurisdiction and you cannot do that if there are these two competing positions.

THE CHAIRMAN: I can see that it is duplicative and possibly difficult, you are not suggesting it is impossible. What one has to do effectively is have economists dealing with these matters on the basis of two, possibly more, alternatives. So if, for instance, the decision says the cartel spanned 15 years and had a market penetration of 90 per cent, and on appeal the European Court says, "Well, no, it had a duration of five years and a market penetration of 50 per cent", then those two alternative scenarios would have to constitute the parameters within which the factual investigation took place.

MR. TURNER: The first point is that the Commission decision on its own terms, as you have seen, does not give you all the material that you need in order to work out whether prices were elevated by, let us say, either 15 per cent, 20 per cent or 30 per cent. To say that there are certain basic assumptions which start you on your way is not to say that you can arrive at the result basing yourself on the Commission's decision. You have to undergo an investigation, you have to investigate the facts. And if in fact the cartel did not extend to 90 per cent of the market; if in fact there was no monitoring machinery to support it; if in fact large swathes of customers were not overcharged, you will arrive at a different result from the result you would arrive at if the facts were otherwise. And, secondly, to put that more specifically, imagine that — leave aside the economic appraisal, and take the position of an overcharge by Schunk, according to the decision Schunk overcharges customers in 2006. Morgan Crucible is to be held liable for that. By how much has Schunk overcharged customers in 2006? How does one determine what the competitive price is? You may know, taking the Commission's decision, if you have to, that there was said to be

overcharging happening in 2006. The Commission decision does not even say that Schunk was taking part in that, but assumed that it was and that you are inferring that as well. By how much? How can this Tribunal engage on that sort of exercise, particularly when it is, as I say, as the legal point which I would like to come to after the practical point, not the case that you do need to engage in this double think, because our submission is this — as a matter of law there is one decision addressed to the different parties, that decision, if it is appealed to the European Court and the European Court makes findings of fact on central matters which overturn those of the Commission are substituted for those earlier findings, and then you are faced with one coherent set of definitive findings with which to conduct your investigation of quantum and causation.

THE CHAIRMAN: And so, 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 appeals 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.

THE CHAIRMAN: Well, let us suppose the converse situation, let us suppose that on an appeal to the European Court, the European Court makes certain other findings in the context of a decision of infringement which, when one comes to investigate quantum, actually has the effect of dramatically increasing the quantum of the loss as a result of the cartel having operated. Would you say in that context that the addressee that does not appeal the original decision will be suffering the consequences of such a finding?

MR. TURNER: The addressee would have to take the result of the Court of Justice's or the General Court's judgment as to the findings of fact. May I preface that by saying, first of all, where it is an appeal against a Commission's decision, so facts come into the question when you are appealing to the general court as opposed to points of law when you go further up, I suppose that it is theoretical possible, but I am not aware of any case where the

court substitutes findings of fact which not only defeat the application to annul, but make things even worse than the Commission's original findings. I believe that the situation may well not be capable of arising because you will find that an application to annul will either succeed, in which case the applicant does better, or will fail.

THE CHAIRMAN: I see. So it is a binary outcome, there is no middle way.

MR. TURNER: I believe that is the case and I am thinking, because I am unaware (and I will be told if I am wrong) I am unaware of any decision where an applicant has ended up worse off than they were before, but also as a matter of principle based on the way in which the provisions in appeals to the European judicature work. It should not apply as, it should not occur as a problem. That is a matter which can be investigated. But if it were something capable of occurring, I take the point that is made, in that situation, however, you would end up with a situation where the European court has made definitive findings on a matter which is of central relevance to the issues that the Tribunal must take into account. For the moment, I put the primary submission on the basis that it is not a situation that can occur.

THE CHAIRMAN: I certainly can see that it is unlikely, but — and maybe Mr. Brealey can help me with whether it is impossible.

MR. TURNER: Yes, it is certainly, it is an interesting point, it is certainly, I am not sure, it is certainly not one that I have considered in this context. So, this point, to cover it off, is one about legal certainty and coherence. I have not addressed the point relating to contributions. I believe we have canvassed it in discussion, namely that where you have all the parties before you, and you have to arrive at a fair allocation of responsibility for the events of the cartel, the joint enterprise, that that becomes legally incoherent if you must engage in double think in respect of the same damage. And the law abhors incoherence. I would at this stage quote Goethe myself, but I am not sure he said anything stronger than the Advocate General has referred to.

May I then supplement this point about coherence and underline it by reference to support from the cavalry that my friend has provided in the skeleton arguments that they provided us with on Tuesday, because if you would pick up that bundle you will see that Morgan Crucible itself has passionately argued precisely these same issues that, sir, I am canvassing with you in support of the case itself. So, if you pick up those skeletons, these are the skeletons in the small bundle which led to the judgment which was given by the Tribunal in October 2007. Now, a heavy focus in the skeletons, which we have not previously seen, is not on the question which relates to the abuse issue at all. Morgan Crucible made strenuous submissions on the issue whether a claim against it should proceed pending the outcome of

appeals to Europe by other parties. In doing so, it made very strong and clear submissions as to the unworkability, if that were to occur, and if a final determination were to be arrived at. And may I take you, first, to the skeleton from May 2007 at tab.3. This is Morgan Crucible. It is May 2007, p.10. You will see the heading above para.41, "If the time limit has not expired", permission is needed, the claim should be stayed pending the outcome of the appeals. It says do not proceed against us alone. Paragraph 41:

> "If, contrary to the above submissions, the Tribunal decides the Tolling Agreement [extending a limitation period] was effective to extend the time for bringing these proceedings and that the Claimants are in time, it would be just in the circumstances of the present case to grant an immediate stay of the Claim until the appeals by the other addressees of the decision have been determined by the CFI".

That is then developed at para.46. If you turn to the facing page, p.11, their case was this:

> "In the circumstances of this case it would be manifestly unjust and disproportionate if judgment could be entered solely against Morgan before it was possible, due to the pending appeals, to determine the extent of the alleged joint civil liability for which Morgan is said to be responsible and, if so, which defendants were jointly liable to the Claimants. This would be the position if the claim was allowed to proceed to judgment before the appeals have been determined. The injustice would be all the greater [they complained] as even on the Claimant's own case Morgan is liable for less than two per cent of the total purchases in respect of which damages are claimed.
>
> 47 The prejudice to a leniency applicant/defendant such as [themselves] of proceeding to judgment at this stage would also be a seriously counter-productive step for public enforcement in terms of the undermining of the incentives on leniency applicants to come forward to assist the public enforcement authorities",

a point, by the way, which you have seen we have made in our skeleton as well in the footnote.

THE CHAIRMAN: Great minds think alike, Mr. Turner.

MR. TURNER: Well, I am glad to say on both sides!

THE CHAIRMAN: Indeed.

MR. TURNER: The claim alleges that the addressees of the Commission's decision are jointly liable for any damages suffered including exemplary damages. One difficulty with proceeding while the appeals before the CFI are pending is that the CFI's judgment may

have a bearing on the question of the extent of the joint civil liability alleged by the claimants, with the result that the liability can only be reliably ascertained once the appeals have been determined".

At 49:

> "The Claimants themselves recognise in their Application for Permission that the requirement for their proposed claims to be dealt with justly in the present context requires that all claims should proceed against all addressees before the Tribunal together".

At 50:

> "Morgan agrees that given the nature of the claims, there will be common issues of fact and expert evidence that require all defendants to be properly before the Tribunal and that proceeding against Morgan alone would be both unfair and procedurally inefficient".

Now, if you then turn, I will just show you one or two other examples. At tab.5 they pick up the thread again in their skeleton in August 200. At para.5.4, p.3, they said:

> "In the event that the Tribunal determines the time has yet to begin to run on the present claims, and that consequently permission to proceed on the claims is required … the Tribunal should deny permission or stay the action. Allowing the action to proceed against Morgan before the CFI appeals are determined and without the presence of the other co-defendants could lead to an unfair judgment against Morgan,` as well as procedural inefficiencies and higher costs."

That is then developed, unfairness and efficiency, at para.95 beginning on p.26. I am only taking you to the key passages: 95.1:

> "It cannot be excluded that the CFI judgment may result in findings that bear on the issues in the claims before this Tribunal. Claimants have acknowledged in their Application … that 'it would be contrary to the interests of justice and to the principles of the overriding objective if the Claimants were to proceed with their monetary claims against Morgan alone, without the participation of the other major addressees …
>
> 95.2This proceeding raises issues of joint liability. The Claimants allege at para.81 of the Claim, for example, that 'each of the defendants is also jointly (alternatively jointly and severally) responsible for the acts of the [cartel] … If a judgment were entered solely against Morgan before the pending appeals by

Schunk and SGL are determined, Morgan could unjustly be held liable for a disproportionate amount of the judgment.

95.3There will be issues of law and fact common to all defendants; allowing the claims to proceed solely against Morgan would be procedurally inefficient and potentially unfair not only to Morgan but possibly to the other defendants."

That is probably all I need from that.

Tab 6 is a skeleton argument just before the hearing now, September 2007. That is Emerson's. I am going to go straight to tab 7, which is their response, 24 September 2007, paras.28 to 34 under the heading "The Issue of Permission". The first point, which I will return to at para.28, is that they frame the question of whether the Tribunal should grant permission arising only if the Tribunal determines that the time for making the present claims against Morgan has not yet started to run because of other appeals, the issue in this case. You will see in 29 that it says:

"It is of note that at this stage neither party is making such an argument."

Mr. Brealey fairly did say that at an earlier stage he intimated his client had made that argument, and I will come to that in a moment.

The important point for present purposes is in the following paragraphs. If you turn to para.33.1 to 33.3, 33.1 says:

"First, until the appeals of the European Commission Decision are resolved, the issue of liability for those defendants who have challenged the European Commission Decision has not been conclusively determined. If the Tribunal were to proceed to a final judgment against Morgan based on the alleged participation of, and damages resulting from, the other proposed defendants, and if one of the proposed defendants later succeeds in its appeal, Morgan would be left with a judgment based in part on damages for which no liability exists and for which seeking contribution is not an option. Such a result would be manifestly unfair and against the interests of justice.

33.2Second, without the other potential defendants as participants in the proceedings, it will be difficult, if not impossible, to determine the total amount of damage suffered."

I have already adumbrated that point, and you will see the last sentence:

"It would be unfair to proceed to a judgment against Morgan based upon alleged sales from other potential defendants without the benefit of disclosure from the other potential defendants."

33.3 is on contribution:

> "Finally, although a claimant can elect to sue a single defendant on a joint and severally liable basis, the defendant can normally protect itself by bringing the parties said to be jointly liable into the proceeding through a contribution notice (in the Tribunal an 'additional claim' under Rule 38 …) …"

Pausing there, my friend said that you cannot bring a contribution claim in the Tribunal, or might not be able to. You can. As is pointed out here, it is in Rule 38 of the Tribunal's Rules.

THE CHAIRMAN: I will certainly see what it says but that is not really before us today, is it?

MR. TURNER: No, I am merely pointing it out for your note.

THE CHAIRMAN: I am very grateful.

MR. TURNER: Contribution – it is in the Rules at Rule 38, you can bring a contribution claim:

> "In this case, Morgan would have to wait (at the earliest) until the CFI appeals conclude before it could make an additional claim against the other proposed defendants, a particularly unfair result given that the Claimants have alleged that Morgan is only responsible for roughly less than 1% of the overall damages …"

To summarise, you have there a very heavy emphasis in my friend's submissions on issues of fairness, workability and justice. The reason why they said it was neither just nor workable was that the claim against them was inextricably bound up in its facts, in the key facts, with claims against the other cartelists which could not proceed at that time. The claims against the various cartelists were bound up together because of the issues of joint liability, because of the common issues of fact and the expert evidence. They have made the argument before. I make the argument now. It provides another guide to the Tribunal as to how resolve the question of construction before it.

We entirely agree with Morgan that separating claims against each of the cartelists, and as between cartelists, in the manner which follows from its interpretation today as to the statute does result in unworkability. I have said that is a powerful factor in relation to construction. For this proposition, if I may, I would briefly ask the Tribunal to look at **Bennion**, the leading textbook on statutory interpretation. That is in authorities bundle 2, tab 38, (Pause) There are two very short points, within that tab, if you have it, right at the back of authorities bundle 2, at p.971 under the heading: "Avoiding an unworkable or impracticable result" you have the third entry down in italics: "*Unworkable or impracticable result*":

> "Parliament is taken not to intend the carrying out of its enactments to be unworkable, or impracticable, so the court will be slow to find in favour of a construction that leads to these consequences"

If you go forward to p.979 dealing with "Avoiding an inconvenient result", s.314, under the third entry: "*Inconvenience*":

> "The argument from inconvenience is a familiar one to lawyers … (an argument based on inconvenience is of great weight in law). After quoting this ancient maxim, Coke adds some remarks which in relation to statutes go much too far … (not only what is lawful but also what is convenient is to be considered. Nothing that causes inconvenience can be taken as lawful). A modern version is given by Lord Shaw …"

And by "modern" the author refers to something from 1924 – I will pass that over.

> "Where the words of a statute are clear, they must, of course, be followed, but in their Lordships' opinion where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative to be rejected which will introduce uncertainty, friction or confusion in to the working of the system."

I am reminded that the case, which in the interests of time I am not going to take you to, is at tab 39, the 1924 case, and that is the relevant proposition from it. It could be said – I am not sure that my friend has advanced the point in this way, that these difficulties are all surmountable if a claimant commences proceedings against someone such as itself, who is not appealing, and then the proceedings are all stayed pending the determination of the appeals against the infringement decision by others.

There are two points in relation to that. First, you have already seen what my friends' former legal representatives have said about that proposition in strenuous argument to this Tribunal, and we adopt that. It would be a highly inconvenient and undesirable outcome. It would also put the party who was required to bring the case to great expense within that period but for what reason, if the claim was immediately going to be stayed.

There is a second point as well, which arises from the Tribunal's rules. If you have the purple book within it you can identify the Tribunal's rules. I have the relevant rule as rule 32 on p.5436 and you will see from that that the Tribunal at subsection (3) says:

> "The claim form shall contain –

(a) a concise statement of the relevant facts, identifying any relevant findings in the decision on the basis of which the claim for damages is being made.

(b) A concise statement of any contentions of law …"

And then:

"(c) a statement of the amount claimed in damages, supported with evidence of losses incurred and of any calculations which have been undertaken to arrive at the claimed amount."

The claimant therefore who wishes to put forward a case in those circumstances is not easily able to satisfy the requirements of this rule because they are not able to provide a statement of the amount claimed or coherent evidence in circumstances where the basic facts are subject to movement. That is why, in short, we say for this third reason, unworkability, there is an additional reason why our construction is to be preferred.

I turn then to the fourth point which is the purpose of interpretation of the Statute and take this very quickly. My friend argues that the purpose of this subsection is to ensure that the decision which binds the Tribunal is definitive before a claim for damages I brought without permission; it must be definitive.

There are a number of points in response: we rely on what we have in our submissions at paras. 49 to 53 for your note, but I will highlight three points orally. First, that the authority for their proposition is the *BCL* case for 2009. Perhaps I do not need to open it for this point, *BCL* expressly does not decide the very point in this case. Sir, if you need to look at it we can open it – para. 32, Lord Justice Richards says in terms "I have not heard argument on this point, and therefore I express no view about it."

THE CHAIRMAN: You can take that as read, Mr. Turner.

MR. TURNER: The second point: Lord Justice Richards was in fact referring to a distinction between, on the one hand appeals on penalty, which cannot affect the basis for the Tribunal's functions, for your work, and appeals on liability which can. I showed you in the Schunk case, if you recall, the appeal to the European Court of First Instance from the Commission's decision, that the court said that although this appears at first sight to be an appeal against penalty, in fact, it goes to the question of liability and we view it as such. So an appeal against penalty is something which does not affect the underlying infringement, but an appeal against liability does. Therefore, we say that their reference to what Lord Justice Richards was saying, namely, "be careful about matters that can affect the underlying facts and the questions of liability" supports our interpretation rather than his own.

That takes me to his other points made in reliance on this case. He makes one or two further remarks about it. The first was the point that my friend canvassed this morning that decisions on fines can affect the underlying facts just like decisions on infringement, that is covered in our submissions at para.55 and the answer to that is the Schunk point, which I have just referred you to, paras. 24 and 26. If an appeal does place in issue the underlying facts it is properly analysed as one going to the underlying infringement.

The second point is that in the *BCL* and I would ask the Tribunal to turn it up for this point. It is in authorities bundle 1. This is a point that was canvassed by my friend, and which is in his written submissions, and if you look at para. 25 you will see that the Court of Appeal only refers to the question of an appeal by BASF, it did not go on to consider whether any other addressees had brought appeals, and the inference which they draw from that in the written submissions is this, they say that it is no doubt because only an appeal by BASF could affect the limitation period (para.27 of their written application).

We have already made the point that in *BCL* the judges expressly did not decide the point which is now before the Tribunal. So in those circumstances we say it is ambitious for them to say that they implicitly decided the point, but there is beyond that a clear explanation as to why the matter of appeals by any other addressees was not discussed in that paragraph, and that is because there was no possibility that any appeal by another addressee could affect the time limits. There had been one appeal on liability – there were two others on fine – that appeal on liability was so far back that they could not take advantage of the time limit. I am not sure whether I need to develop that, but we have the cases. It will take a few moments to do so, but that is the essential point.

The last point made on *BCL* by my friend which he referred to this morning arises from para.20, and he took you to that paragraph and para.21. And he says in relation to this, that this shows that the judges accept, or Lord Justice Richards accept their interpretation of the word "decision", it is vindicated by the first sentence of para.21 which says, "In my judgment the analysis put forward by Mr. Brealey is correct". Paragraph 20 refers to counsel's submissions, that BASF had not appealed against infringement. Paragraph 21, if you read on past the first sentence, shows that the judge was agreeing with the distinction, the central distinction between decisions on infringement and decisions on penalty. That is a point already dealt with and taken together with what the judge also says at para.32 that he is not deciding the point now before the Tribunal, this cannot be taken as an implicit acceptance that he was doing so.

Finally, I therefore come to abuse of process. And I am taking this last because although it is logically the first point, it is convenient to take it against the background of the position which is now taken by the parties.

At para.25 of their skeleton argument, my friend characterises the abuse argument by saying that essentially our argument is that they are adopting an inconsistent position now with the position that they adopted in 2007, and that we have got that wrong, that now that we see the skeletons that they produced on Tuesday, we can appreciate that they were in fact adopting a consistent approach with what they are saying now, and that the Tribunal in its judgment perhaps put the matter wrongly.

They make two points in response to that. First, it says that there is no inconsistency because its position now is consistent with its primary position in 2007 and the argument which it upheld was an alternative position. But they are not engaging with the point that we were essentially making, which was not that they have swivelled round at all. It was that they were party to the proceedings, to those proceedings in 2007. They did, as you will see in a moment, originally strongly take the position which they have repudiated, but the decision having been made they have not appealed against it, it is binding on them and they are now seeking to reopen it on no firm basis other than the *BCL* judgment and the remarks of Lord Justice Richards. We say you cannot do that. I say that they cannot do that. I will explain why. The key authority is the House of Lords decision in *Arthur Hall* which is at tab.5. If you turn in that to Lord Hoffman's judgment p.701 under the heading "Relitigation in general". He articulates the proposition towards the foot of p.702 by quoting what Lord Diplock said in an earlier decision, *Hunter v Chief Constable of the West Midlands Police*, and he approves it. He refers to, and I am quoting from Lord Diplock's quotation:

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise aver very varied; those which give rise to the instant appeal must surely be unique. It would ... be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the words discretion) to exercise this salutary power.

I, too, would not wish to be taken as saying anything to confine the power within categories, but I agree with the principles upon which Lord Diplock said that the power should be exercised: in cases in which relitigation of an issue previously decided would be 'manifestly unfair' to a party or would bring the administration of justice into disrepute".

So, essentially, the test is a broad one. It is not confined within categories.

THE CHAIRMAN: Surely, though, Mr. Turner, relitigation of an issue requires the same parties? And here one does not have the same parties.

MR. TURNER: No, no. Because in that case, one will have the *res inter alios judicata* principle, you have issue estoppel, but what is said in these cases is that, even where the parties are not identical, there is scope for the abuse of process. If we go to 701 and if you read from the top of p.701:

"The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet* ... and interest *rei publicae*. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The firsts 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 acquite, 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".

So, although one cannot be liberal about it, one is talking about cases where it would be manifestly unfair to allow a party to run the point again; or, secondly, where it would bring the administration of justice into disrepute. And we say that those are essentially the principles that are engaged in this case. What is key to the application of that principle is not inconsistency with the position that they took in 2007, it is the fact that they were a party to those proceedings. They made detailed submissions on the question; they did not appeal the outcome; and now they would be effectively appealing out of time by a side wind in what is, in substance, the very same matter in the very same case. That is the basis on which we put this submission.

THE CHAIRMAN: It is the same issue, but how can it be the same case?

MR. TURNER: It relates to precisely the same cartel. We could, as we point out in the written submissions, have applied to join as co-claimants in the same case. It is a matter of form that we are bringing our case as separate claimants only, but in essence, if this Tribunal decides the matter, it decides it as the same case. That is why the principle is engaged.

THE CHAIRMAN: Are they not separate causes of action?

MR. TURNER: They are separate causes of action in the sense that the duty is owed to different persons, that is true, but in relation to an action concerning the very same cartel and the liability, the joint liability, of the very same cartelists, they are taking a position now which is essentially something that has already been decided by the Tribunal and was not appealed four years ago, or three and a half years ago. That is the way that we put the case.

THE CHAIRMAN: Presumably you would not be going so far as to say that no party could contend that the decision in *Emerson I* was wrong. You are simply saying that Morgan Crucible cannot?

MR. TURNER: Yes, absolutely, bearing in mind this situation.

On that point, if, sir, you open the *Arthur Hall* case, it is worth looking at what Lord Hobhouse said in relation to abuse of process on points of law. That is at p.743C. What he says there is:

> "The 'collateral attack' point is a species (or 'sub-set') of abuse of process. There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case. The law of estoppel *per rem judicatem* (and issue estoppel) define when a party is entitled to do this. Generally there must be an identification of the parties in the instant case with those in the previous case and there are exceptions. So far as questions of law are concerned …"

and we are concerned here with a question of law, the meaning of decision –

> "… absent a decision specifically binding upon the relevant litigant, the doctrine of precedent governs when an earlier legal decision may be challenged in a later case."

In 2007 there was such a decision.

THE CHAIRMAN: Yes, but in relation to a particular cause of action to which your clients are not a party?

MR. TURNER: In relation to claims that were brought by other parties, that is true.

One of two things: one, either the case which they bring today is one which they cannot bring against those other parties because that would be to appeal out of time in a way that

would be monstrous, given that many years have elapsed; or the same position applies to them. If it does apply to them, then that would bring the administration of justice into disrepute because it would be a way of circumventing the time limits on appeal so far as the *Emerson* claimants are concerned.

So far we are concerned, it would be intolerable if they remain as claimants in the case in relation to precisely the same subject matter, yet we cannot bring a claim.

Two opposed views of the law are operating in relation to precisely the same subject matter. I put it no higher than that. That is why we say that there would be an abuse of process in this case.

Before I conclude, may I take you though to the statement of my friend's client's position in 2007, because it is said that the Tribunal misstated their position. Does the Tribunal have a copy of the transcript of the CMC – the case management conference – that took place in 2007?

THE CHAIRMAN: Yes, 13 March 2007. Yes, we have it.

MR. TURNER: We were alerted to this by reference in one of the skeleton arguments that my friend referred to this morning. If you turn to p.7 what you find there is the representative of Morgan Crucible, Mr. Osgood, making submissions to the Tribunal. If you look at line 29 on p.7 you see as follows:

> "What I believe the Rules and the Guide say is that if there is a multi-party case and any one of the parties is taking an appeal against the decision that is to be used to establish liability, the only way a claim can be brought before a final decision on the European Commission's decision – if there is an appeal – is if one comes to this Tribunal and asks permission. I would submit that is as clear as day on the face of the statute and the rules."

That is the way their legal representative put it at that time.

Then on the facing page, p.8, line 33, Mr. Osgood says:

> "It is our respectful submission that the proper way forward here is for the claimants to withdraw the current claim, and to submit a new application to seek permission not only to bring in Schunk and SGL, and we will put Carbone to one side for the moment but that is a very interesting situation, but also permission to bring on Morgan on the basis that the Tribunal does not have jurisdiction without granting permission while an appeal is pending against the European Commission's decision. So that is our submission as to the proper way forward.

I would like to add, if we get into a question of the way forward, why it is our view that the rule should be 'It is everyone or no one', it should be all or nothing."

That is the why the Tribunal in 2007 understandably made the comment that they did in para.60 of their judgment. My friend is absolutely right that subsequently they changed their position and adopted the reverse position. However, that is certainly the strong way in which they put the point in March.

That leads me to two sweep-up points. It is said that we are ironically against early resolution of damages claims, and that our construction means that people to wait patiently for years potentially in order to obtain any money. We say in response, first, that it is necessary, as a matter of common sense, to wait until the factual matrix has been settled in accordance with the principle of legal certainty.

We also refer to the point that both sides have made at different times, that it is in accordance with the policy of the Community that leniency applicants should not be put in a worse position than other cartelists.

The second point: my friend made some play this morning that no decision arises from the recitals of a Commission decision in themselves, and he referred to *Emerson Electric* for that proposition. We agree. That is not our contention, to be clear, and never has been. We say that the decision in its operative part is a single instrument addressed to a number of parties. However, I would add that the operative part, it is trite, is construed by reference to the recitals.

One final point: my friend referred to the fact in the Vitamins case one party had apparently brought its claim without the other side complaining that there were pending appeals and that permission was needed. That is hardly, in my submission, authority for anything. In *Emerson Electric*, similarly, it was pointed out that in the Vitamins case claims had been made against non-addressees, and in the recent decision of the Tribunal that was found not to have been the correct way to proceed.

Sir, unless there is anything further those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Turner. Mr. Brealey?

MR. BREALEY: Thank you, sir. I have got four points, and the first point, if I begin with the submission that one must wait for the appeals because of joint liability. Mr. Turner essentially kicked off with that, and I noted down words along the lines, "no sensible interpretation of 'joint' if one has to wait. If one can proceed against A you wait for the appeals". What I would like to do to show that that is a false point is to actually go back to

the **Mitchell** publication, the Law of Contribution Reimbursement, para.8.17. This is in the context of almost the central point of Mr. Turner's submission that it is all unworkable, one has to wait for all the appeals, otherwise you will not have a proper finding, you will not have a proper basis. When one looks at the first main paragraph, "Returning to the second", we see four lines down:

> "It is tempting to assume that joint tortfeasors must all be joined as defendants to a single set of proceedings by the victim, because this is the procedural rule which generally applies to parties who owe a single joint liability. However …"

and this is quite important –

> "… this is not the case: joint tortfeasors can in fact be sued jointly in a single set of proceedings or separately in different sets of proceedings."

I emphasise the words "or separately in different sets of proceedings …" It is a point, sir, that you raised with Mr. Turner, that it often is the case that joint tortfeasors are sued along different tracks, that the claimant can sue defendant one, and then later on sues defendant two; it may well be because defendant one has gone insolvent and cannot pay the judgment debt, and so one commences a separate action against D2, the joint tortfeasor, but it is quite clear that in that second action there could be separate evidence, different facts, different witness statements, different experts, everything, but everything could be different. The second claim is not necessarily wedded to the first claim or vice-versa, and as soon as one realises that where you have joint tortfeasors, yes, you can bring them all at once, but not necessarily, you can sue one joint tortfeasor today and another one tomorrow, and the law clearly recognises that the two cases will possibly be determined on the basis of separate facts. In my respectful submission that nails down Mr. Turner's point on this, that you have to wait because you just do not know what the facts are. That is the first point.

The second point is that he goes to the previous Morgan skeletons and says: "Morgan agrees that it is unworkable and unjust", but one has to remember what Morgan was submitting there. What it was submitting was in the context of permission and really, at the end of the day, a cartelist will be arguing the same thing whether it is a stay, so time has run out of time and they want a stay, or permission. The cartelist will always be arguing, as I would expect Morgan would: "it is unfair that we are the only one being sued". Morgan is entitled to make that submission to the Tribunal and it is up to the Tribunal to agree or disagree with it, but the submission that it is unfair and you should wait for the others does

not impact on the statutory construction of s.47A. It is undoubtedly the case the same argument will be made whether it is a stay application or permission application.

The third point is ultimately what does "decision" mean? Sometimes Mr. Turner, with the greatest respect, slightly loses sight of that. It is, in s.47A, "decision … that the relevant prohibition in question has been infringed". It is not the overall decision with the recitals, it is the decision that the prohibition has been infringed, that is the decision in subsection (6), the decision that the prohibition has been infringed.

Contrary to his submissions Community law does have an impact on the meaning of "decision" because we know this from what the Tribunal decided in the *Mersen* case where it looked at the *Suiker Unie* and said for it to be a decision there has to be an addressee, you cannot root around in the recitals. It is not just a question of judicial review in Luxembourg as we have seen from *Masterfoods* where you have a Commission decision and the European Court is saying: "That decision is binding", it is not open to the court to say "I am looking at another decision", the High Court or the Tribunal faced with a Commission decision has to look at that decision and ask itself how does the European Community define that decision? We always come back to the *Woodpulp* case, that these are individual decisions, they are a bundle of individual decisions and the individual decision is binding on – in this case – Morgan. On this third point it would be extremely bizarre if you have four cartelists: cartelist A does not appeal and the other three cartelists do, B, C and D, and they succeed in Luxembourg and that means that A is no longer liable to pay any money to any claimant – to pick up the point that you made, sir: is it right that A takes the benefit of B, C and D's successful appeals? In my respectful submission there is absolutely no way that the European Court of Justice would ever interpret the application of Community law in that way, and somehow because it has annulled the decision relating to B, C and D that means automatically that there is no liability on A – it just cannot be the position. So that is the third point: what is meant by a decision that the prohibition has been infringed?

The fourth point is the abuse point and one notes in *Arthur Hall* in p.702 of Lord Hoffmann's judgment where he quotes *Hunter* where:

> "The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique."

At the bottom of p.702 he goes on to say:

> "I, too, would not wish to be taken as saying anything to confine the power within categories. But I agree with the principles upon which Lord Diplock said that the

power should be exercised in cases in which relitigation of an issue previously decided would be 'manifestly unfair' to a party or would bring the administration of justice into disrepute."

So the question one would ask is: is it manifestly unfair to the present claimants for Morgan to make the same points as it did in litigation three years earlier? In my respectful submission it is not. Morgan was sued three years ago. It did ultimately argue that the claim was out of time. It did not appeal for whatever reason but if, three years later, several more claimants come along seeking further compensation it is, in my submission, open to Morgan to say in separate proceedings, a separate cause of action, separate parties, that their claim is time barred, particularly when the law has been clarified even more by the Court of Appeal in *BCL*. The Court of Appeal in *BCL* has clearly held that you do not look at the whole decision, and that is exactly what the Tribunal did in *Emerson I*, it looked at the whole decision, and the Court of Appeal in *BCL* said that is wrong. Nor does seeking to argue that the claim is time barred bring the administration of justice into disrepute. It is an extremely high hurdle to say that a defendant is in some way abusing the process of the court by running a legal argument of this sort and the claimants get nowhere near it in my submission.

Do you have any questions? Those were my points by way of reply.

THE CHAIRMAN: Just one. I put to Mr. Turner the converse situation to an appeal to the European Court being, as it were, beneficial to the non-appealing party. Is it your position on the converse situation of an appeal making things worse that is simply something that, practically speaking, cannot arise?

MR. BREALEY: I would tend to agree with Mr. Turner. It is, at the end of the day, a review of a Commission decision. I cannot go as far as to say it is binary, but it is difficult to think of a situation, certainly, and the reason is that when it is reviewing the infringement decision it is essentially reviewing the lawfulness of the decision. When it is reviewing the penalty it is unlimited jurisdiction and the court can indeed increase the fine as I think it did in the *BASF* case. It can increase the fine which arguably can have some impact, and just thinking aloud, for example if it came to contribution proceedings – this is again for another day – it may impact upon the justice of the contribution between the parties as to who was the ring leader. I can see that that might be up for grabs in an ECJ fining appeal, that the European Court says "No, A was not the ring leader, but B was". On the actual infringement I cannot actually think of an example. The bottom line is the person who does not appeal is bound by the decision and so whether in other appeals their decision makes it worse or whatever,

should be irrelevant to the cartelist who does not appeal; it is stuck with its decision, and that is the essential point that the claimants never really grappled with.

THE CHAIRMAN: Thank you very much. Thank you all very much. We will obviously reserve our judgment and try and hand something down as soon as possible. Thank you.

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