

Neutral Citation Number: [2012] EWCA Civ 1055

Case No: C3/2011/1995

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL**  
**MR MARCUS SMITH QC (Chairman)**  
**CAT 1173/5/7/10**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/07/2012

**Before :**

**LORD JUSTICE MUMMERY**  
**LORD JUSTICE EHERTON**  
and  
**LORD JUSTICE SULLIVAN**

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**Between :**

<b>DEUTSCHE BAHN AG &amp; ORS</b>	<b><u>Appellants</u></b>
<b>- and -</b>	
<b>MORGAN CRUCIBLE COMPANY PLC &amp; ORS</b>	<b><u>Respondent</u></b>

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**MR JON TURNER QC and MR ROB WILLIAMS** (instructed by Hansfield & Co LLP) for  
the Appellants

**MR MARK BREALEY QC and MISS MARIE DEMETRIOU QC** (instructed by Clifford  
Chance LLP) for the Respondents

Hearing date: 27<sup>th</sup> January 2012

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**Judgment**

## Lord Justice Mummery:

### The issue

1. This appeal from the Competition Appeal Tribunal (the Tribunal) is about time limits. The question is whether the Tribunal erred in law in holding, in its judgment of 25 May 2011, that 14 February 2004 was the date from which the applicable two year limitation period began to run for the appellants' claims against the respondent for breaches of competition law and that the claims were accordingly out of time.
2. The limitation point was successfully taken by the respondent in "follow-on" proceedings against it in the Tribunal under s. 47A of the Competition Act 1998 (the 1998 Act). It turns on the construction of that section, in particular on what is meant by the references in it to the "decision" of the regulatory body on which the claims for damages are based.
3. Claims for damages may be brought in the Tribunal based on findings of infringement of competition law made in a prior "decision" of a regulatory body. In this case that was a decision of the European Commission (the Commission) that "a relevant prohibition has been infringed": s. 47A(6)(d). In other circumstances the decision on infringement could be that of, for example, the Office of Fair Trading (OFT). In the instant case findings of a price-fixing cartel were made in a "Commission Decision", as the relevant document is headed. The Commission Decision is addressed to various undertakings involved in the unlawful cartel. The respondent is one of the seven undertakings addressed as having been involved in the cartel.
4. The normal limitation periods in the ordinary courts for breaches of statutory duty do not apply to follow-on proceedings in the Tribunal. A shorter limitation period of two years is prescribed. The nature of follow-on claims and the inter-relationship of the respective jurisdictions of the Tribunal and of the ordinary courts were explained by Lloyd LJ in *Enron Coal Services Ltd v. English Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2 at [8] (*Enron 2*), following the interpretation placed by the Court of Appeal on s.47A in *Enron Coal Services Limited v. English Welsh and Scottish Railway Limited* [2009] EWCA Civ 647 at [30] (*Enron 1*):-

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

the issues of causation and quantification of loss to be decided by the Tribunal.”

5. The claims brought in the Tribunal by the appellants Deutsche Bahn AG and others (the claimants) are based on findings that a relevant prohibition of competition law has been infringed. The limitation point arises from the circumstance that one of the defendants, the respondent Morgan Crucible Company plc (Morgan), did not challenge the findings of infringement by appealing from the Commission Decision to the General Court. The other defendants did appeal from the findings of infringement, as well as from the penalties imposed on them. Their appeals failed. The claimants then brought follow-on claims in the Tribunal against Morgan and the other defendants. Morgan took the point, on a strike out application, that the claims against it were time-barred. Its submission, in a sentence, was that, because it had not appealed to the General Court against the findings that competition law had been infringed, the limitation period for claims against it began to run from a much earlier date than the limitation period for claims against the defendants, which had appealed.
6. The agreed consequence of the appeal by the other defendants was that the start date for the running of the limitation period for the claims against them was deferred until after the completion of the process of their appeals. The claimants’ response to Morgan’s strike out application was that the limitation position was no different in the case of their follow-on claims against Morgan.
7. The general effect of the limitation provisions (see below for the statutory wording) is that an appeal from a Commission Decision to the General Court defers, until after the completion of the appeal process, the date that triggers the two year limitation period for follow-on claims. This appeal is about how the limitation provisions operate when multiple addressees respond differently to the Commission Decision, as when one of the addressee undertakings (Morgan in this case) does not appeal from the decision on infringement, while the other undertakings do. More precisely, does the limitation period for making a follow-on claim against a non-appealing undertaking begin to run (a) from the expiration of *its* time for appealing to the General Court; or (b) from the expiration of the appeal process initiated by the other undertakings?
8. In short, the defendant Morgan says that, as the limitation period for follow-on claims against it began to run from the earlier date when its time for appealing expired, the claims against it should have been commenced without the claimants waiting on the result of the appeals by the other defendants, and that the claims against it are out of time.
9. The claimants disagree. They say that the limitation period for all their follow-on claims, including the claims against Morgan, only began to run after the appeals brought by the other defendants were finally over and there was no possibility of further appeals. Their claims against all of the defendants, including Morgan, were therefore in time.
10. The legal arguments here and in the Tribunal concentrated on the construction of the 1998 Act and specifically on the meaning of “decision” in s. 47A, the damages claims being based on a “decision” that competition law has been infringed.

11. In its judgment accepting Morgan's construction of s.47A, the Tribunal carefully considered the reasoning and conclusion in an earlier ruling of a differently constituted Tribunal before departing from it. Seeing how much may turn on the outcome of the appeal for this and other cases, it is not surprising that this short point of construction attracted wide-ranging arguments and in-depth analysis of the section. The object, scheme and wording of the section were analysed. Judgments of the English courts and of the Court of Justice were cited and examined for the light that they might throw on the operation of s.47A.
12. As indicated by the conflicting decisions of the Tribunal on this point, it is not immediately obvious how the limitation provisions in s. 47A should be construed and applied. Sensible things have been said by both sides on that topic. I am conscious that this is a relatively novel and developing area of unfamiliar and complex law with EU input and impact. Since the hearing of this appeal this court (differently constituted, save for me) has heard another appeal from the judgment of the Tribunal on a different point arising from the same Commission Decision: *Emerson Electric v. Mersen UK* [2011] CAT 4 (*Emerson 4*). The approach of this non-expert judge on both appeals will be cautious and respectful of the carefully reasoned judgments of the Tribunal which has the relevant specialist experience.
13. Some preliminary comments on the limitation point will set the scene for a fuller account of the background facts, the legal framework, the Tribunal's judgment and the rival submissions on the appeal.

### **Preliminary comments**

14. The Commission's findings that competition law has been infringed related to the operation of a cartel involving the undertakings to which the Commission Decision was addressed. Morgan, having reported the cartel to the competition authorities, escaped a fine and decided not to appeal from the Commission Decision. The other six cartelists were fined very heavily. A number of them appealed to the General Court against both penalties and infringement and lost. Attempts by two of the cartelists to appeal further against penalties to the Court of Justice also failed.
15. It is agreed that, in the case of the undertakings that appealed to the Court of First Instance, the two year limitation period began to run from the date when their time for appealing from the decision of the General Court to the Court of Justice expired. The dispute is whether the limitation period for damages claims against Morgan also began to run from that date, as the claimants contend; or whether, as Morgan contends, it had started to run from the earlier date when the time had expired for Morgan to appeal against the Commission Decision to the General Court.
16. A significant strand in the threads of Morgan's argument on the construction of s. 47A is that the claims against it were based on the Commission Decision addressed to it as a particular individual undertaking. As Morgan did not appeal, the Commission Decision, as against it, became definitive and final and would not be affected by the subsequent fate of appeals by the other undertakings.
17. A disconcerting aspect of Morgan's argument is that, in other circumstances, Morgan would no doubt strenuously argue for a different construction. It is difficult to believe that Morgan would maintain the stance that an appeal from the Commission's

decision on what was found to be a single and continuous infringement by a cartel of undertakings would be irrelevant to the claims against it, if (a) the other undertakings had succeeded in their infringement appeals; and (b) the General had set aside the Commission Decision *in toto* on the ground that there had been no price-fixing cartel and there had been no infringements of competition law in fact or in law.

18. The consequences of Morgan's construction are surprising. If, as it argues, the success of appeals by the other undertakings is irrelevant to the trigger date for the running of the limitation period for claims against it, that would mean that, even if there were no claims for damages against those co-cartelists which had successfully appealed, the claimants could pursue claims against Morgan for full damages based on the Commission Decision unappealed by it. In such a case Morgan would appear to have no defence to liability for the single and continuous infringement by all the undertakings to which the Commission Decision was addressed. The issues of causation and quantum of loss would then be determined by the Tribunal in the proceedings against Morgan alone.
19. Scarcely less disconcerting are the Tribunal's divergent decisions on the effect of the limitation provisions in s.47A. The absence of binding authority and its departure from the reasoning in *Emerson Electric Co v. Morgan Crucible Plc* [2007] CAT 28 (*Emerson I*) were the grounds on which the Tribunal granted permission to appeal to this court against its order striking out the claims against Morgan, as they were not brought within the two year time limit laid down in Rule 31 of the Competition Appeal Tribunal Rules 2003 (the 2003 Rules) read with s.47A (6), (7) and (8).
20. I note in passing that the Tribunal did not accept the Claimants' alternative contention that Morgan's strike out application was an abuse of process. The Tribunal made various findings on that issue. As none of those matters is the subject of an appeal or a cross appeal, I say no more about them.
21. I turn next to the factual background, with particular emphasis on the key dates in the agreed chronology.

### **Background facts: key dates**

22. On 3 December 2003 the European Commission decided Case No C.38.359- "Electrical and mechanical carbon and graphite products." The document headed "Commission Decision" was addressed to seven "suppliers of electrical and mechanical carbon and graphite products." It contained findings that a relevant prohibition has been infringed. The Commission Decision was addressed to Morgan and other named undertakings, which had together "participated in a single and continuous infringement" by operating a price-fixing cartel from 1988 to 1999 in breach of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 81(1) of the EC Treaty) prohibiting, as incompatible with the internal market, all agreements, decisions and concerted practices between undertakings directly or indirectly fixing purchase or selling prices; and, from 1 January 1994, in breach of Article 53 (1) of the Agreement on the European Economic Area (the EEA Treaty).
23. The Commission Decision was drafted in the form of 363 numbered recitals followed by Article 1 of the *dispositif* adopting the Decision. It referred to infringements by the

named addressees “by participating, for the periods indicated, in a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products.”

24. The essence of the infringements was joint behaviour by more than one undertaking, so that each undertaking participating in the common unlawful enterprise may be jointly responsible, for the whole period of its adherence to the common enterprise, for the acts of the other participants: see [227] of the Decision. The facts found by the Commission about the activities of one cartel member may be equally relevant to establishing the scope of responsibility of another cartel member in respect of the infringement as a whole. Many of the findings of fact relied on by the Commission as demonstrating the infringements are common facts, which establish the liability of all the parties: see [219]-[223] of the Decision.
25. The Commission imposed fines, as detailed in Article 2. They totalled EUR 101.44m and were imposed on 6 addressees of the Decision. Morgan benefited from a fine reduction of 100%, as it was the recipient of leniency under the Commission’s 1996 Leniency Notice for being the first undertaking to report the cartel. Morgan decided not to appeal to the General Court. Its time for appealing expired on 13 February 2004. Morgan’s case is that the two year limitation period for a follow-on claim against it began to run from that date and accordingly expired on 13 February 2006. The claimants did not institute any proceedings against it in the Tribunal before that expiry date.
26. A number of other undertakings appealed to the General Court against both the findings of infringement and the penalties imposed. On 8 October 2008 those appeals were dismissed. The time for appealing from the General Court to the Court of Justice expired on 18 December 2008. The claimants’ case is that the two year limitation period for follow-on claims against *all* the defendants, including Morgan, began to run from that date and would not expire until 18 December 2010.
27. On 12 November 2009, the Court of Justice dismissed further appeals by two of the undertakings (SGL and Mersen) against the penalties imposed.
28. On 15 December 2010, just three days before the expiration of the limitation period on 18 December 2010, the claimants filed follow-on claims in the Tribunal against six of the cartel members, including Morgan. The seventh cartel member (C.Conradty Nurnberg GmbH) is no longer trading and was not joined.
29. The claims are for losses suffered in consequence of the activities of the cartel. The claimants are transport undertakings, which purchased products subject to the cartel during its currency. Their claim includes damages for the additional amounts paid to the cartel members for carbon products over and above a competitive price (“cartel overcharge”).
30. Under Rule 40 of the 2003 Rules Morgan then applied to strike out the claims against it on the ground that they were not brought against it within the time limit laid down by Rule 31. It contended that the time limit had expired on 13 February 2006, being at the end of two years after the expiration of the time for it to appeal to the General Court from the Commission Decision. On that view the proceedings against Morgan were about four years and ten months out of time.

31. The Tribunal accepted Morgan's construction of s.47A. It rejected the claimants' contention that the claims were brought in time, which was put on the basis that the period within which they could be brought did not expire until 18 December 2010, that being at the end of two years after the expiration of the time for appeals by the other defendants to the Court of Justice from the decision of the General Court.

### **Legal framework: s.47A and 2003 Rules**

32. Section 47A ("Monetary claims before Tribunal"), which was inserted in Part 2 of the 1998 Act by s. 18 of the Enterprise Act 2002, applies to any claim for damages 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: subsection (1). The cause of action is in private law. It is founded on the tort of breach of statutory duty.
33. The right to make a claim in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim: subsection (10). Ordinary proceedings for breach of statutory duty can be brought in the High Court, in which the normal limitation period would apply.
34. The "relevant prohibition" is defined as including the infringements of Article 101(1) found by the Commission in this case: see subsection (2).
35. The claim for damages may, subject to the provisions of the 1998 Act and the Tribunal rules, be made in proceedings brought before the Tribunal: see subsection (4). No claim may be made in such proceedings "until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed" and "otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision": see subsection (5). A distinction is thus drawn between a claim which may be made as of right and a claim which may be made with the permission of the Tribunal.
36. The decisions which may be relied on for the purposes of proceedings under section 47A include "a decision of the European Commission that the prohibition in Article [101(1)] of the Treaty has been infringed": see subsection (6)(d).
37. In determining a claim to which s.47A applies the Tribunal is bound by the decision of the Commission establishing that the prohibition in question has been infringed: see subsection (9). The findings in the Commission Decision thus determine the facts and the scope of the infringements, which are binding on the Tribunal, as well as on the addressees, and preclude it from investigating factual issues relating to liability: see *Enron 2* at [50]. That means that the Tribunal cannot find facts that run counter to the Decision adopted by the Commission.
38. It is not disputed that, putting limitation considerations on one side, the Tribunal has jurisdiction in this case to determine the claimants' follow-on claims based on the Commission Decision. It is agreed that the Tribunal's jurisdiction is limited to questions of causation and quantum, but does not include issues of infringement or liability: findings of infringement have already been made in the Commission Decision, subject only to appeal to the General Court and from there to the Court of Justice.

39. The provisions in subsection (8)(a) and (b) are important. They relate to the period during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought as of right but require the permission of the Tribunal. The relevant period is that during which proceedings against “the decision or finding” of the Commission may be instituted in the European Court; and, if any such proceedings are instituted, the period before those proceedings are determined. Thus, a follow- on claim for damages cannot be brought, save with the permission of the Tribunal, until any and all appeals against the Commission Decision in question have been resolved.
40. As for the duration of the limitation period for the claims that may be made in civil proceedings, the Limitation Act 1980 is disapplied to claims in the Tribunal, as distinct from claims in the High Court by ordinary action for breach of statutory duty: see subsection (3).
41. A two year time limit is laid down in Rule 31 of the 2003 Rules (“Time limit for making a claim for damages”). A claim for damages in the Tribunal must be made within a period of two years beginning with the “relevant date”: Rule 31(1). The “relevant date” is the later of (a) the end of the period specified in s. 47A(7) or (8) in the 1998 Act in relation to the decision on the basis of which the claim is made; and (b) the date on which the cause of action accrued: see Rule 31(2) of the 2003 Rules. In this case the “relevant date” is the end of the period specified in section 47A(8) of the 1998 Act in relation to “the decision” of the Commission on the basis of which the claim is made. The period does not end until after the appeal process is finally over.
42. The claimants did not proceed immediately with damages claims against Morgan in the Tribunal on the basis that the appeals by the other defendants to the General Court against infringement and penalty interrupted the running of the two year period. As the Tribunal noted, the crucial point of difference between the parties is on the meaning of “decision” in s. 47A(6)(d) and in (8)(a) respectively in the context of the Commission Decision on which the damages claims are based.
43. The argument advanced by Morgan and adopted by the Tribunal was that “decision” should be construed as referring to a discrete regulatory decision on infringement of competition law taken individually and specifically against Morgan, so that the limitation period began to run when Morgan had no further ability to appeal from the Commission Decision on infringement. On that argument, which the Tribunal described as “the narrow construction”, the proceedings against Morgan were out of time.
44. The contrary argument is that “decision” should be construed by the Tribunal as referring to the Commission’s decision that there had been an infringement of competition law which concerned all the addressees as parties to the infringing cartel agreement equally, so that the limitation period only began to run when none of the addressees could pursue any further appeal against the Commission’s decision on infringement. On that argument the proceedings against Morgan were in time, as they were commenced three days before the two year period running from 18 December 2008 (i.e. the date before which any further appeal from the General Court had to be brought) expired on 18 December 2010. The strike out application should accordingly have been dismissed.

45. So, what was the relevant “decision” on infringement in the Commission Decision? What was the “decision” on infringement appealed by the other undertakings to the General Court? In the context of the operation of the limitation provisions in this case, does “decision” in s.47A(6) and (8) refer to the Commission’s infringement finding or decision as against (a) all named addressees; or (b) only Morgan as a particular party individually addressed.
46. On those questions Morgan emphasises that s.47A refers to the central fact of a decision by an EU institution (the Commission) on infringements of EU competition law with the possibility of appeals from it to other EU institutions (i.e. the General Court and the Court of Justice). Whereas Morgan highlights the EU aspects of the case, the claimants highlight the domestic law aspects, in particular the fact that s. 47A and Rule 31 lay down rules of jurisdiction, procedure and limitation governing proceedings in the Tribunal relating solely to issues of causation and quantification of loss that are outside the competence of decision-making by EU institutions. The domestic character of those matters is confirmed by the fact that the same provisions apply to damages claims in the Tribunal based on a “decision” by the OFT that there have been breaches of competition law.

### **The authorities**

47. The construction of s.47A is not covered by binding authority. A number of English cases and a judgment of the Court of Justice have been cited. They will be discussed in more detail when I deal with the rival submissions and state my conclusions below. Before turning to the judgment of the Tribunal I will briefly introduce the authorities.
48. In *Emerson 1*, which is not binding on the Tribunal or on this court, the Tribunal decided that the relevant period during which any appeal against the decision in question may be brought or is yet to be resolved is that during which there is an outstanding appeal “by any one or more of the addressees of the decision in question, or indeed by a third party...”: see [65] of *Emerson 1*.
49. *BCL Old Co Ltd v. BASF SE* [2009] EWCA Civ 434 (*BCL Old*) is a decision of this court on the construction of s.47A in the context of an appeal against penalties imposed for breaches of competition law and its effect on the running of the limitation period for damages claims in the Tribunal. It was held that an appeal against penalty only did not interrupt the running of time under s.47A(8), because the language of s.47A did not refer to the postponing effect of an appeal against penalty, but only to that effect of an appeal against a “decision” that the relevant Article of the Treaty “has been infringed”: see [22]-[23]. In this case the relevant appeals were against the infringement findings as well as against the penalties imposed.
50. The principal EU authority relied on by Morgan and in the Tribunal judgment is neither a claim for damages nor is it about limitation periods. It was about claims for the repayment of penalties. The claims arose out of challenges in the Court of Justice to fines imposed by the Commission for breaches of competition law. It contains some general statements by the Court of Justice about the individually binding effect and juristic nature of Commission Decisions addressed to multiple undertakings and the principle of legal certainty. For the purposes of this case the other point of interest is in the absence of impact of proceedings successfully brought by some of the undertakings to challenge a Commission Decision in the Court of Justice on the

position of other undertakings that had not challenged the penalties, but had instead paid them, only to seek refunds following the successful challenges by the other undertakings.

51. In Case C-310/97 P *Commission v. AssiDoman Kraft Products & Ors* [1999] ECR I-5363 (*AssiDoman*) the Commission found that 43 undertakings addressed by its decision had infringed competition law by participating in a restrictive agreement, in particular by concerting on prices for bleached sulphate wood pulp. The Commission imposed fines on almost all the addressees. Some of the addressees did not lodge an application for the annulment of the decision and paid the fines, but 26 of the original 43 addressees successfully brought proceedings leading to the annulment of some fines and the reduction of others. Those who had not brought annulment proceedings then asked the Commission to reconsider the position in the light of the judgment of the Court of Justice and to refund the fines paid by them. The Commission refused to refund, pointing out that the payment of the fines was based on a decision that was still good as regards them and was binding on them and the Commission.
52. The General Court held that the Commission was neither obliged nor entitled to refund the fines. In its judgment Case T-227/95 [1997] ECR II-1185 the Court pointed out that the decision of the Commission, although drafted in the form of a single decision, must be treated as “a bundle of individual decisions making a finding or findings of infringement against each of the undertakings to which it is addressed and, where appropriate, imposing a fine.” ([56]). Accordingly, if an addressee decides to bring an action for annulment, the Community judicature has only before it the elements of the decision which relate to that addressee and the unchallenged elements of the decision relating to other addressees do not form part of the subject matter of the dispute which the court is called on to resolve: [59]. The principle of legal certainty featured prominently in the reasoning of the Court.
53. From the judgment of the Court of Justice several passages were cited to support Morgan’s submission that the claims against it were out of time and that the start of the two year limitation period was unaffected by appeals brought by other defendants. The Court of Justice pointed out that, if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the Community judicature related only to those aspects of the decision which concerned that addressee, and that unchallenged aspects concerning other addressees did not form part of the matter to be tried by the Community judicature: see [53].
54. The Court of Justice also stated that it was settled case law that a decision, which has not been challenged by the addressee within the time limit laid down in the Treaty, became definitive as against him (see [57]); that the purpose of having time limits for bringing legal proceedings was to ensure legal certainty by preventing Community Measures which produced legal effects from being called into question indefinitely, as well as on the requirements of good administration of justice and procedural economy (see [61]).
55. The Court of Justice concluded that:-
  - “63. Where a number of similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken legal

action against the decisions concerning them and obtained their annulment, the principle of legal certainty underlying the explanations set forth in paragraphs 57 to 62 above therefore precludes any necessity for the institution which adopted the decision to re-examine, at the request of other addressees, in the light of the grounds of the annulling judgment, the legality of the unchallenged decisions and to determine, on the basis of that examination, whether the fines paid must be refunded.”

56. Morgan sought to apply that analysis to this case. It contended that the Court of Justice had held that a Commission Decision addressed to multiple addressees is “a bundle of decisions” making a finding or findings of infringement “individually” against each of the undertakings; that, if an undertaking does not appeal against the decision addressed to it, that decision becomes definitive and binding on it; and that remains so, even if another party to the restrictive agreement successfully challenges the decision addressed to it and the factual findings of the Commission are held to be wrong.
57. The application of that analysis to s.47A was rejected by the Tribunal in *Emerson I*. It was argued in that case that the reference to “decision” in s.47A(8) was not a reference to the whole of the decision of the European Commission, but referred only to that part of the decision which was the subject of the appeal to the European Court. The Tribunal rejected that submission, stating that the word “decision” in s.47A(8) could not be given such a restricted meaning and that different considerations applied than those applicable in the *AssiDoman* case when considering the scope of s.230 of the Treaty.

### **The Tribunal judgment**

58. In a careful and fully reasoned judgment the Tribunal summarised its conclusion on the construction of s.47A and the meaning of “decision” in it as follows:-
- “41. In short, it is our clear conclusion that “decision” must mean that specific part of the *dispositif* that makes a decision as regards *a particular addressee*. The point can be tested quite easily; suppose a decision addressed to A and to B, finding that party A has infringed Article 101 TFEU, but that party B has not. Clearly, no claim under section 47A can be brought against party B; but, equally, such a claim could be made against party A. Similarly, party A would be entitled to appeal against the decision made against it, but not as regards the decision in relation to party B. Thus, looking at section 47A(8), it seems to us that what is being referred to is a decision *against a particular party*.”
59. After discussion of other submissions, the Tribunal held that it was its unanimous conclusion that the claims against Morgan had not been brought within the time laid down by Rule 31 of the 2003 Rules and that the claims against it should be struck out.

60. In the course of reaching that result the Tribunal explained why it was departing from its earlier decision in *Emerson I*, by which it was not bound. Time thus began to run earlier than it would have done had it followed the decision in *Emerson I*.
61. In correctly noting the frequent use of the term “decision” in the 1998 Act, the Tribunal commented that there was a “central ambiguity” in the term: it could mean the *instrument* in which a decision is made, which it labelled “the wide meaning”; or it could mean the determination of a *specific issue* or the imposition of a specific consequence, which it labelled “the narrow meaning.” An instrument could contain many “decisions” in that narrow sense.
62. The Tribunal then considered whether “decision” was used in the wide sense or in the narrow sense by examining the character of decisions of the Commission and the case law on the 1998 Act. It proceeded on the basis that the 1998 Act should be construed as a whole and that, if possible, the same word should be given the same meaning, observing that it would be anomalous if the term “decision” in the 1998 Act were to have a variable meaning. The Tribunal then said that:-

“ 37. Our unanimous conclusion is that “decision” in section 47A is used in its narrow sense. This is plainly how the Court of Appeal considered the term in *BCL Old Co*. Central to the Court of Appeal’s decision was the distinction between a decision relating to *infringement* and a decision relating to *the imposition of a penalty*. Such a distinction can only be drawn if the term is used in its narrow sense. Suppose, in the case of the 3 December 2003 Decision, all of the addressees had chosen to challenge only the penalties imposed by the decision, and not the question of infringement itself. If the term “decision” in section 47A(8) were used in its wide sense, then it is plain that there would be “proceedings against the decision” inconsistent with the decision of the Court of Appeal in *BCL Old Co*. The decision in *BCL Old Co* only works if the wide meaning of “decision” is abandoned, and the narrow meaning of the terms adopted. On this approach, it is possible to examine the nature of the proceedings against the decision, determine whether or not they relate to infringement or penalty, and so determine whether or not the period defined in section 47A(8)(b) has been triggered.

38. The use of the term “decision” in its narrow sense is also consistent with the decision in *Emerson 4*. As we noted in paragraph 28 above, the Tribunal in *Emerson 4* considered that such decisions as were made in the 3 December 2003 Decision were contained in the operative part, and that the recitals did not contain decisions in the narrow sense. Section 47A(9) states that “the Tribunal is bound by any decision mentioned in subsection (6).” Were “decision” to be given its wide meaning, then not only would the operative part of a decision (in the wide sense) be binding, but so too would each and every recital in that instrument. The Tribunal in *Emerson 4* considered that decisions should be contained in the operative part, and that necessarily requires the term “decision” to be read in its narrow sense.

39. This approach is also consistent with the decision of the Court of Justice in *AssiDoman Kraft Products*. We should point out that we attach a little less weight to this decision than we do to the decisions in *BCL Old Co* and in *Emerson 4*. This is because-naturally-the Court of Justice was considering only one form of instrument, a decision under Article 288 (1) TFEU, whereas the 1998 Act in general, and section 47A in particular, is concerned with decisions not only issued by the Commission, but also by the OFT and this Tribunal (as the decision in *BCL Old Co* makes very clear.) In other words, whilst section 47A refers to Commission decisions, this is not the only type of decision referred to. Nevertheless, the analysis in *AssiDoman Kraft Products* is extremely clear and persuasive in its analysis of what a “decision” is. The point clearly made is that whereas the instrument may, or may not, be labelled or entitled a “Decision”, in reality such an instrument contains a bundle of different decisions, each to different effect and each quite possibly directed to a different person. Although, as we have noted, the term “decision” is an ambiguous one, when one is talking about a legal act, with legal consequences and effects, the narrow meaning of the term is much *more* the natural one.

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

(1) In the first place, for the reasons we have given, it is not consistent either with the approach of the Court of Appeal in *BCL Old Co*, nor with the approach of the Court of Justice in *AssiDoman Kraft Products*.

(2) Secondly, we consider that it represents an entirely unrealistic approach to the construction of the operative part of a decision. Take, by way of example, Article 1 of the 3 December 2003 Decision, quoted in paragraph 24 above. The natural construction of Article 1 is that it contains seven discrete decisions, namely that each of the addressees there listed infringed what is now Article 101(1) TFEU for the periods there stated. *A fortiori*, it is an unnatural reading to suggest that the six separate fines imposed on seven distinct companies (Schunk and Schunk Kohlenstofftechnik were given a single fine, for which they were jointly and severally liable) comprise only one decision. This is consistent with notions of personal responsibility.”

63. The Tribunal also considered the claimants' submission that a court will seek to avoid a construction that produces an absurd, unworkable or inconvenient result, but concluded that the construction of s.47A was clear and did not give rise to an outcome that could be described as inconvenient, still less unworkable or absurd.
64. The Tribunal said that, if an addressee elected not to appeal, it was difficult to see why s.47A proceedings should be put off until all the other addressees of the decision have had their appeals determined: see [46].
65. In considering the objections raised by the claimants to the construction advanced by Morgan, the Tribunal noted that it was common ground that the defendants' liability was joint and several and that there may well be a temptation to claimants to bring a claim as of right against the non-appealing leniency defendant alone seeking to recover all the losses caused by the cartel. The Tribunal considered that the exposure of the non-appealing defendant should not be overstated in view of the discretion of the Tribunal to allow proceedings against the appealing defendants to be commenced (s. 47A(5)(b)); the right of contribution under the Civil Liability (Contribution) Act 1978; and the discretion of the Tribunal to stay proceedings against the non-appealing defendant, so as to enable the appealing addressees to catch up (Rule 19 of the 2003 Rules). Further, the case management powers of the Tribunal were available to deal with possible problems regarding disclosure of documents.
66. As for the possible problems of inconsistency and incoherence, if one defendant declined to appeal from a decision and another successfully appealed, the Tribunal considered that the problem was overstated. In connection with the *AssiDoman* case the Tribunal said:-
- “57. We see no difference between the case of a non-appealing addressee seeking to take the benefit of another addressee's successful appeal in order to avoid a penalty he is exposed to, and the case of a non-appealing addressee seeking to take the benefit of another addressee's successful appeal in order to avoid a section 47A claim.”
67. The position taken by the Tribunal was that it would not be faced with inconsistent or incoherent findings, if the appeal were wholly or partially successful. As regards the non-appealing defendant, the Tribunal would be bound by the findings in the original unappealed decision against the non-appealing defendant. The Tribunal would proceed down twin tracks, one pertaining to the non-appealing defendant and the other pertaining to the defendant who had appealed. Additional costs might be involved, but that was simply the consequence of the Tribunal being bound by a decision falling within s.47A. In terms of the right of contribution the court, in assessing that, would have to take account of a partially successful appeal.

### **Claimants' submissions**

68. The claimants' main ground of appeal is that the Tribunal erred in its construction of “decision” in s. 47A of the 1998 Act. It did so by holding that it refers to the decision of the Commission about infringement of competition law by a particular addressee of the decision, Morgan. Instead, the Tribunal should have construed “decision” as referring to the decision on a “single and continuous infringement” of competition

law. It included the operative part in so far as it set out conclusions on liability, that may concern and be addressed to a number of parties any of whom may issue annulment or appeal proceedings against it for the purposes of s.47A(7) or (8).

69. The excellent submissions of Mr Jon Turner QC on behalf of the claimants began with two principal points.
70. The first was about the character of the Commission's decision on infringement. On its natural and ordinary reading the decision, which was based on a common set of facts, was that there had been a single and continuous infringement by all of the addressees. The decision was that they were all jointly liable for that infringement by participating in an agreement or concerted practice contrary to the Treaty Articles.
71. Mr Turner QC was critical of the distinction drawn by the Tribunal which posed a straightforward, but false, choice between two alternative constructions of "decision" characterised respectively as "the narrow view" and "the wide view" and then opting for "the narrow view." He commented that this analysis did not correctly reflect the "intermediate view" which the claimants had advanced in their case on construction before the Tribunal. The relevant legal "decision", for the purposes of s.47A, was one of a single and continuous infringement concerning all the addressees as cartel parties. There was a single finding of infringement relating to a number of parties. It was contained within the Commission Decision document, in particular its operative part in Article 1. The decision that there was an infringing agreement between the parties addressed, on which civil claims for damages could be based, was separate from the decision of the Commission relating to size of the penalties imposed, which was, in contrast, bound to be individualised according to the amount of the fine imposed on each particular party.
72. The second point was about the practical implications of the construction of s.47A advanced by Morgan and accepted by the Tribunal, by the introduction of significant and unnecessary conceptual difficulties and practical inconvenience into the conduct and determination of damages claims in the Tribunal. The process of determining causation and quantum would be rendered unworkable in all cases where there were a number of parties to the infringement decision of a competition authority, such as the Commission. Mr Turner submitted that the Tribunal's construction had major practical implications for the conduct of follow-on claims before the Tribunal where there are a number of parties, as there will be in a cartel case to the regulatory authority's decision on infringement. The practical effects might be manifested in a number of ways.
73. First, the inevitable effect of the Tribunal's approach is that there would be a "time disconnect" in claims against cartelists jointly liable for the single infringement found in the Commission Decision. The claimants would be required to commence proceedings against the cartelists who did not appeal, only to be met by an application from that defendant for the proceedings to be stayed in order to await developments in the case of the cartelists who were appealing. It did not follow from Morgan's narrow construction that the claims against it as a non-appealing infringer would be decided any sooner than the claims against the appealing infringers.
74. Secondly, that disconnect would create procedural and evidential difficulties in pursuing claims against jointly and severally liable entities separately from one

another. Thus, if the claimants make a claim against one defendant for an overcharge that has been made by another defendant, who is not being proceeded against at that time, documents relating to the purchase in question would not be available.

75. Thirdly, contribution proceedings could not proceed without risk of legal or factual inconsistency. If, for example, the appeal succeeded in part on infringement, the court would have to take that into account in assessing contribution. If the appeal were wholly successful, the right to contribution would be reduced or eliminated.
76. Fourthly, the judgment on appeal would create difficulty in resolving the respective positions of the appealing and non-appealing parties. That would arise, if the appeal were successful and the claimants sought to proceed against the non-appealing cartelists on the basis of joint liability for overcharging by the appealing cartelists. It could even lead to the non-appealing party being held jointly liable for all the activities of a cartel, even though the outcome of the appeal was that the findings of infringement by the appealing cartelists were annulled. The Tribunal might thus be placed in the difficult position of applying the Commission's findings even where they conflicted with the subsequent findings of the European Court.
77. Mr Turner submitted that the need for an application for a stay of proceedings against a non-appealing defendant and the practical inconveniences and difficulties, which would arise in the absence of a stay, could be avoided by the claimants' construction, which yields a single consistent application of the limitation period for the claims against all the defendants named as addressees of the Commission's decision.
78. In brief, on his approach the natural and ordinary meaning of "decision" in s.47A is that it is a single decision on infringement concerning all the parties to whom the decision is addressed and whom the Commission has found, on the basis of common evidence and interdependent facts, had jointly committed a single and continuous infringement. It is not, as Morgan argues, a case of the Commission finding infringements by particular addressees, such as Morgan, on an individual basis.
79. Mr Turner argued that his approach was consistent both with the references to "decision" in other provisions in the 1998 Act and was not contrary to the authorities cited: *Emerson 1*; *BCL Old*; *Emerson Electric Co v. Morgan Crucible Co PLC* [2001] CAT 4 (*Emerson 4*), and *AssiDoman*.

(1) *BCL Old*

80. Mr Turner submitted that this case is neutral on the point of construction in this case and that the Tribunal was wrong to treat it as supporting the wide construction which it adopted. The Court of Appeal held that a claim for damages for breach of competition law was time barred in circumstances where the appeal was against penalty, not against the decision on infringement. The court concluded that the appeal against penalty did not have the effect of postponing the start date of the two year period for a claim for damages under s. 47A. For the purposes of s. 47A(8), an appeal only against a penalty imposed in the decision of the Commission did not interrupt the time for the bringing of a claim for damages based on the decision finding that the relevant prohibition "has been infringed." The court had regard to the wider statutory context in which separate provisions dealt with the imposition of penalties and findings of infringement of a relevant prohibition. Section 47A was concerned with

the latter, not with the former. The Court stated that the Commission had issued a single “Decision” document containing in separate articles its findings as to infringement and the fines imposed in respect of those infringement. Though contained in one document, the infringement decision and the penalty decision were distinct decisions.

81. Richards LJ in giving the lead judgment noted s.47A(9) as throwing light on the statutory purpose of the provisions concerning the timing of a claim. He said:-

“28. ...The purpose is that *the decision which is to bind the tribunal* should be definitive before a claim can be brought without permission. A decision establishing an infringement, unless itself the subject of an appeal, will be binding on the tribunal irrespective of what may be said about the infringement in the context of an appeal against penalty.”

82. The court also noted that the earlier decision of the Tribunal in *Emerson I* was concerned with a case in which some of the addressees of a decision of the Commission finding infringements had applied to annul the decision and that the Tribunal had held that where any of the addressees had brought proceedings in the European Court the permission of the Tribunal was required for the bringing of a claim under s.47A even against the addressee who had not applied to annul the decision. The court expressed no view on the correctness of that approach. As the Court of Appeal made clear in [32] it was addressing a different point under s.47A than the one that arose in *Emerson I* and in the present case on which it specifically stated that it was expressing no view.

(2)*Emerson 4*

83. Mr Turner submitted that *Emerson 4* is also neutral on the present point on the construction of s.47A. In that case the Tribunal decided that, in identifying to whom a decision is addressed, the relevant decision is contained in the *dispositif* only, and not in the recitals to the decision. That is not inconsistent with the claimants’ submissions, as Article 1 of the *dispositif* of the Decision does contain an infringement decision addressed to each of the cartelists and thus all the defendants in these proceedings.

(3)*AssiDoman*

84. I have already discussed this case in some detail above.
85. In that case the Court of Justice allowed appeals against penalty by 26 out of 43 parties to a cartel. The applicants, who had not appealed, argued unsuccessfully that the Commission was required to reconsider the fines imposed on them. The Court of Justice in rejecting the applicants’ argument described the decision of the Commission as being “treated as a bundle of individual decisions against each of the undertakings to which it was addressed and where appropriate imposing a fine.” The Court emphasised that it was important to ensure legal certainty by preventing Community measures which produce legal effects from being called into question indefinitely. It was also in accordance with the requirements of good administration of justice and procedural economy. That case was only concerned with the vertical relationship between each cartelist and the Commission. It was a decision on EU

administrative law and the public law imposition and enforcement of individualised fines for breaches of competition law

86. The Tribunal referred to this case as containing an “extremely clear and persuasive analysis of what a “decision” is.” It also commented that there was no difference between a non-appealing addressee seeking to take the benefit of another’s successful appeal to avoid a penalty and to avoid a s.47A claim: see [57]. Mr Turner accepted that the Tribunal had placed less weight on this decision recognising that the Court of Justice was only dealing with one form of decision, that of the Commission, whereas s.47A is also concerned with decisions made by the OFT. Mr Turner submitted that the case had no bearing on the construction of s.47A in the context of claims for damages in the Tribunal for breaches of competition law. It did not follow from that decision that the same interpretation of the word “decision” should be applied to the different context of a private damages claim involving the joint liability of the cartelists for each other’s activities. Such claims are subject to limitation rules set, within recognised EU limits relating to non discrimination and effective remedies, by domestic law and not by EU law.

### **Morgan’s submissions**

87. Morgan seeks to uphold the Tribunal’s judgment that, for the reasons given by it, the relevant decision for the purposes of Article 47A(6)(d) was the individual decision addressed by the Commission to Morgan as a particular party, whereby the Commission found that Morgan had infringed Article 101(1) of the TFEU. The legal effect of Morgan not appealing against the individual infringement decision addressed to it was that that decision became definitive and binding on it and on the Tribunal, whatever the result might be of appeals by other undertakings against the decision made against them.
88. It follows that the time limit within which the claimants were required to file their claim against Morgan was two years from the cut-off date of 14 February 2004 i.e. 14 February 2006. The claimants did not file their claim for damages against Morgan and the other undertakings until 15 December 2010. That was nearly five years outside the time limit laid down by Rule 31(1) and (2)(a) and s.47A(8) for making a claim against Morgan.
89. The excellent submissions of Mr Mark Brealey QC on behalf of Morgan dealt with the nature of the s.47A claim for damages, the factual context of the claim and the reasons why the Tribunal was correct to strike out the claims against Morgan. The main arguments may be summarised as follows.
90. In the first place, it is clear that, as a matter of EU law, when the Commission finds that several parties to an agreement have breached Article 101, the Commission addresses separate decisions to each individual infringing party. A bundle of separate decisions making a finding of infringement against each of the undertakings may be included in one instrument called a Decision, but there is no one single decision that the undertakings have infringed the prohibition. EU law requires that “decision” in s. 47A is given that EU law meaning.
91. Mr Brealey relied on *AssiDoman* as supporting the individual decision analysis to the construction of s.47A with the legal consequence that, if an undertaking does not

appeal against the decision addressed to it, that decision becomes definitive and binding as against it whatever the outcome of appeals by other undertakings. The concept of a “decision” by the Commission which could be appealed to the General Court and the Court of Justice was governed by EU law as laid down by the Court of Justice in *AssiDoman*. It did not have a different meaning simply because it appeared in s.47A, which expressly incorporated reference to the EU judicial process, as in s.47A(8). It was a fundamental principle of EU law that national courts were precluded from taking any decision that would conflict with a binding Commission decision. It was not open to the Tribunal, in determining a follow- on claim against a non-appealing addressee of a Commission decision, to disapply that decision simply on the ground that another addressee has successfully appealed against the decision addressed to it.

92. In the second place, the notion of an individual decision addressed to separate undertakings has been held by the Court of Justice to have important legal consequences. Thus, if an undertaking does not appeal the decision to impose a fine addressed to it, that decision becomes definitive against the undertaking that does not appeal: it is binding upon it, even if another party to an offending agreement successfully challenges the decision to impose a fine addressed to it and the court holds that the Commission’s factual findings were wrong: that was clear from *AssiDoman*.
93. In the third place, the concept of a bundle of individual decisions addressed to separate infringing parties is consistent with the OFT’s application of the 1998 Act. When the OFT finds that an agreement infringes the domestic equivalent of Article 101 TFEU a bundle of individual decisions is addressed to the separate undertakings involved. An infringement decision is individual in nature and, if not appealed, is not affected by a successful appeal against another individual decision.
94. In the fourth place, the notion of individual decisions addressed to separate undertakings is consistent with the purpose of s.47A, which is to preclude a follow-on claim against an addressee based on an infringement decision as against that addressee until that decision becomes definitive.
95. In the fifth place, the concept of an individual infringement decision is consistent with the cause of action that gives rise to the liability to pay damages. The cause of action relied on in the civil proceedings is a breach of statutory duty by the individual undertaking (Morgan) of *its* individual duty owed to the claimants. Infringement of Article 101 TFEU is an infringement of the claimants’ directly effective right giving rise to a cause of action in civil proceedings. The relevant “decision” for the purposes of s.47A must be one which reflects the personal liability for breach of the correlative statutory duty not to infringe the right.
96. In the sixth place, there is nothing inconvenient or unworkable in the Tribunal’s construction of “decision”. A claimant may only wish to claim damages against the one undertaking to the cartel that has not appealed: it may be the only undertaking that is good for the damages, or it may be the only undertaking from which the claimant has made purchases. It would be unfair to prevent the claimant from proceeding sooner rather than later, perhaps being kept waiting for years, while other undertakings exhausted appeals that had no relevance to the claim against the undertaking that had not appealed.

## Discussion and conclusion

97. It is common ground that (a) the appeal turns on the construction of s.47A(6)(d) and (8); (b) the objective and scheme of the subsections and their wording are central to construction; (c) there is no binding authority on the point; and (d) regard must be had to the practical consequences of the differing interpretations.
98. At the end of the multitude of competing arguments I have reached the conclusion that two main factors determine the disputed construction of s. 47A. I will concentrate on (a) the domestic procedural law context of the statutory provisions and (b) a careful reading of the detailed drafting of the critical subsections.

### *(1)Objective and scheme of s. 47A*

99. I make the following general comments.
100. First, s.47A is a provision of domestic law, not of EU law. It is in the 1998 Act, not in an EU Treaty, Directive or Regulation.
101. Secondly, the section relates to private law claims in civil proceedings for the recovery of damages for the infringement of a right. It does not relate to the imposition of penalties and fines to punish breaches of EU public law.
102. Thirdly, the section deals with purely domestic law enforcement matters of the jurisdiction of the Tribunal, its procedure and the limitation period for bringing proceedings before it. The determination of all those matters is outside the competence of the EU institutions.
103. Fourthly, the link between s.47A and EU law, EU institutions and their decisions is specific and limited. In determining claims brought before it the Tribunal is bound by the findings of infringement of competition law made in the Commission Decision. There also has to be a consequential adjustment to the commencement of the limitation period for bringing claims to take account of appeals brought in the EU Courts against the decision of the Commission on infringement. However, the questions of causation and quantum are for decision by the Tribunal under domestic law and in accordance with its procedures, including limitation periods. The operation of s. 47A on those matters is neither governed nor concluded by EU law.
104. Fifthly, comparisons of the limitation period under s.47A with the operation of the normal limitation provisions found in the Limitation Act 1980 are of little value. In general, legislation setting limitation periods for initiating private law civil claims is concerned with that aspect of justice served by requiring people with good claims to pursue them with reasonable expedition. The legislation has to strike a balance between, on the one hand, the tendency of limitation provisions to produce injustice by eliminating good claims on time grounds rather than by adjudication on their merits; and, on the other hand, requiring claimants to get on with their cases, good or bad, as the passage of time may itself tend to prejudice a fair trial and effective resistance to the claim: with the passing of time memories fade and tracing witnesses and tracking down documents become more difficult.

105. The objective and scheme of s.47A are different. The two year period only applies to claims brought in the Tribunal. It does not apply to proceedings for breach of statutory duty brought in the ordinary courts in competition cases. The period only impacts on certain aspects of the claims. Liability for infringement has already been established in the Commission Decision and is binding on the parties and the Tribunal. Only issues of causation and quantum are left to be determined by the Tribunal. The limitation period and the jurisdiction of the Tribunal have nothing to do with the fines and penalties imposed by the Commission, which are entirely matters for the European Courts and are governed by EU law and procedure.
106. Sixthly, the relevance of these general comments on limitation is that, in my view, it reinforces the domestic law context of s.47A. Its purpose and scheme is not primarily about the normal limitation policy of barring and extinguishing stale claims. It is more about the allocation and distribution of judicial business within the system of domestic courts and specialist tribunals by allowing, presumably for reasons of convenience and case management, monetary claims for breaches of competition law to be brought, in specified circumstances, in the specialist Tribunal, instead of by ordinary action in a court of law. Section 47A lays down the limits of the Tribunal's jurisdiction to determine such claims by providing for a detailed procedural regime, including Rules, governing such claims in the Tribunal.
107. Of course, as I have explained, those limits have to take account of the fact that jurisdiction is limited to cases in which liability has already been determined by another body, which is not a tribunal or court at all, namely the Commission. That creates potential complications because the findings of the Commission in its Decision are subject to appeal not to an English Court, but to the General Court and even beyond to the Court of Justice. Provision therefore had to be made in s.47A and in the Rules for the possibility that the Commission Decision might not actually be final or binding as regards civil claims for damages in the Tribunal, because it might be partially or completely set aside on appeal. That would have a knock-on effect on the time limits for bringing monetary claims in the Tribunal based on findings in the Commission Decision.
108. In the light of those factors I see no reason why the construction of s.47A should be governed or concluded, as Mr Brealey QC contends that it should be, by particular reference to EU law on the nature of a decision of the Commission imposing penalties. Penalties fall completely outside the jurisdiction of the Tribunal and exclusively within the jurisdiction of the EU Courts. Issues of the causation and quantification of loss in follow-on claims fall outside the jurisdiction of the EU institutions and exclusively within the jurisdiction of the Tribunal.

*(2) Natural and ordinary meaning of s. 47A*

109. The actual wording of s.47A(6)(d) and (8) is critical. It requires the closest attention to be paid to it when determining what is the "decision" to which it refers.
110. The main point is that the operative subsections do not refer in terms to a "decision" that a particular party or addressee has infringed competition law. They refer quite generally in (6)(d) to a decision that a relevant prohibition *has been infringed*. That is the decision which is also referred to in subsection (8). The reference in both subsections is thus to a decision that there has been an infringement and that an

infringement situation exists, not to a decision against, or as regards, a particular party or particular addressee of the Commission Decision.

111. That approach to identifying the relevant “decision” is logical. The first decision to be made by the regulatory body is whether or not the relevant prohibition has been infringed. That is the base decision. If the prohibition has not been infringed, that is the end of the matter. There would be no infringement situation that could give rise to potential liabilities of particular parties or undertakings. There would be no need to inquire further into what undertakings were legally responsible for the infringement and to which the Commission Decision would be addressed.
112. That analysis fits in with the effect of the appeal process on deferring the trigger date for the limitation period. The appeal by the undertakings against infringement is an appeal against the basic decision that the relevant prohibition has been infringed. The result of a successful appeal might be that no infringement situation existed at all. It is not correct to describe an appeal against that infringement decision as an appeal against a decision addressed to a particular party. It is an appeal directed to the decision that an infringement situation exists because a relevant prohibition has been infringed. The appeal is not simply against the decision against a particular party or a particular addressee. The addressing of the decision on infringement to a particular undertaking is a secondary matter involving the allocation of responsibility consequential on a logically prior decision that the prohibition has been infringed and that an infringement situation exists.
113. It follows that I am unable to agree with the conclusion of the Tribunal in [41] of its judgment that the decision referred to in s.47A “must mean that specific part of the *dispositif* that makes a decision as regards a *particular addressee*” and that, looking at s.47A(8), “ what is being referred to is a decision *against a particular party.*” In my judgment, what is referred to in that subsection, read with subsection (6)(d), is a decision of the Commission that the Treaty provision “has been infringed” and that an infringement situation exists. The responsibility or liability of particular parties does not feature in that decision.
114. The imposition of the penalties and an appeal against the amount of the penalties is different again. The respective amounts of the fines imposed on particular addressees are necessarily decided on the basis of the circumstances of the individual parties involved in the infringement situation which has been found to exist in consequence of the decision that an infringement situation exists.
115. The relevant appeal to the General Court was against the decision that there had been an infringement, not against the addressing of that decision to the particular undertakings. Appealing against the imposition of a penalty or its amount was not relevant to the bringing of civil proceedings in the Tribunal for damages.
116. The reasoning in the judgment of the Tribunal does not adequately reflect the different stages in the process of the regulatory body’s decision-making. In my judgment, the “decision” referred to in s.47A(6)(d) and (8) is the decision that the prohibition has been infringed and that refers not to the particular individual addressee but to the prior decision that there is a single and continuous infringement based on common evidence and interdependent facts. That analysis is consistent with the way in which the word “decision” is used in other parts of the 1998 Act, such as s.46,

which refers to a decision of the OFT in a sense of a single decision on the fact of infringement with respect to an unlawful agreement, which decision is then notified or addressed to individual parties.

*(3) Authorities*

117. As already noted it is common ground that there is no binding authority on this point in either the national courts or in the Court of Justice. I agree with Mr Turner's analysis of the authorities and his criticisms of the way in which they have been overplayed by Morgan in its submissions and by the Tribunal in its judgment.

*(4) Practical consequences*

118. The practical consequences of the differing interpretations are not unimportant in construing s.47A. National courts are entitled to proceed on the reasonable assumption that the limitation provisions were intended to operate in a sensible way and not to create avoidable injustice, practical difficulty and inconvenience.

119. What would be the point of bringing a claim for damages against an undertaking in the position of Morgan, while the prior question whether there has been an infringement of a prohibition was still being litigated on appeal by the other undertakings in the General Court? It would be more sensible and practical to postpone any proceedings until the final decision on that question was known, so that all questions of causation, quantum and contribution could be resolved at the same time, even if that involved delay.

**Result**

120. With great respect to the specialist experience of the Tribunal, I am unable, for the reasons given above, to agree with its conclusion that the claims against Morgan brought in the Tribunal under s.47A for damages for infringement of competition law was brought out of time.

121. I would allow the appeal so that the claimants can proceed in the Tribunal with their claims against Morgan, as well as the other defendants.

**Lord Justice Etherton:**

122. I agree.

**Lord Justice Sullivan:**

123. I also agree.