Neutral citation [2008] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A 2EB

17 October 2008

Before:

THE HONOURABLE MR JUSTICE BARLING (President)
ADAM SCOTT TD
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) EMERSON ELECTRIC Co.
(2) VALEO S.A.
(3) ROBERT BOSCH GmbH
(4) VISTEON CORPORATION
(5) ROCKWELL AUTOMATION Inc.

Claimants

-v-

(1) MORGAN CRUCIBLE COMPANY PLC

Defendant

(2) SCHUNK GmbH
(3) SCHUNK KOHLENSTOFFTECHNIK GmbH
(4) SGL CARBON AG
(5) LE CARBONE LORRAINE S.A.

Proposed Defendants

Mr. Derek Spitz (instructed by Crowell & Moring) and Ms. Jane Wessel of Crowell & Moring appeared for the claimants.

Mr. Matthew Weiniger of Herbert Smith appeared for Schunk GmBH and Schunk Kohlenstofftechnik.

Mr. Mark Hoskins (instructed by Freshfields) appeared for SGL Carbon AG.

Mr. Daniel Beard (instructed by Ross & Co.) appeared for Le Carbone Lorraine SA

JUDGMENT (Costs)

I. INTRODUCTION

1. In a judgment dated 28 April 2008 the Tribunal refused two applications by the claimants, made pursuant to section 47A(5)(b) of the Act and rule 31(3) of the Rules, for permission to make a "follow-on" claim for damages against the proposed defendants before the end of the period referred to in section 47A(8)(b) and rule 31(2)(a) ([2008] CAT 8, [2008] Comp AR 118: the "Permission Judgment"). The claimants' proposed follow-on claim was based on a decision in December 2003 by the European Commission finding that various undertakings, including the proposed defendants, had participated in a series of agreements and concerted practices within the meaning of Article 81(1) EC on the market for carbon and graphite-based products for electrical and mechanical applications. The Permission Judgment sets out the background to the applications in some detail and we do not repeat that background here. In this judgment we use the same abbreviations as are used in the Permission Judgment.

2. On 19 May 2008, applications were filed by each of the proposed defendants for an order that their costs occasioned by the applications be paid by the claimants, to be assessed if not agreed. The proposed defendants all indicated that their applications for costs were made without prejudice to their position that the Tribunal did not have jurisdiction to hear any damages claim against them, and should not be understood as submission to the jurisdiction of the Tribunal. On 2 June 2008, the claimants filed written submissions in opposition to the cost applications. SGL filed a reply to the claimants' submissions on 5 June 2008. The parties have agreed that these applications can be determined without a further hearing.

II. THE PARTIES' SUBMISSIONS

Schunk

3. Schunk submits that as a result of the claimants' application for permission it has incurred costs by having to review and consider the case documents, including the CFI appeals and the other parties' submissions, to prepare three sets of written observations including exhibits, and a list of issues, and to appear at a case management conference and a two day hearing.

4. Schunk contends that it is entitled to recover its costs, all of which have been incurred because the claimants attempted prematurely to commence proceedings against it. Had the claimants not made their application to commence the claim Schunk would not have been required to defend its position. Accordingly the claimants should be liable on a joint and several basis for all of the costs incurred by Schunk.

5. Schunk points out that the Tribunal has a wide discretion to award costs pursuant to rule 55 of the Rules and submits that it should be awarded its costs despite the fact that it is not a formal party to the existing proceedings against Morgan Crucible. In support of this proposition Schunk cites *Umbro Holdings Ltd v Office of Fair Trading* [2005] CAT 26, [2005] Comp AR 1232 ("*Umbro: costs*") in which Sports World International plc ("SWI"), whose initial application to intervene in the substantive case was refused, was awarded some of the costs it had incurred during the proceedings despite the fact that it was not a party but "some kind of informal observer" (see paragraph [36]).

6. Applying the above analysis to the present case, Schunk submits that whilst it is not a formal party to the proceedings it is an observer by virtue of rule 31(3) of the Rules and an "interested person" in the proceedings, at least in relation to the claimants' application for permission to bring a claim against the proposed defendants. By analogy with the analysis made by the Tribunal in *Umbro: costs* Schunk is a party for the purposes of rule 55(2) of the Rules, which is to be interpreted widely.

7. Schunk submits that the conduct of the claimants justifies a costs order to compensate Schunk for the costs it has incurred, all of which are "of or incidental to" the proceedings, which is the test in section 51 of the Supreme Court Act 1981 that the Tribunal has adopted in other cases, in particular *Umbro: costs*, at paragraph [37].

8. According to Schunk, although the question of the circumstances in which permission would be given had not been considered before, under rule 31(3) of the Rules, permission would be the exception rather than the rule. Further, in Schunk's submission, the claimants advanced no evidence of prejudice to them in awaiting the outcome of the CFI appeal.

9. Schunk further submits that the claimants knew the implications that the result of the CFI appeals could have on the domestic proceedings before the Tribunal but nevertheless made the application to commence a claim against the proposed defendants. In doing so they were disregarding the overriding consideration of whether justice could properly be done whilst the final determination of the CFI appeals was still pending.

10. In the circumstances, in determining the quantum of costs to be granted, the Tribunal should take into consideration the claimants' conduct and the fact that the Tribunal ultimately agreed with the basic proposition of Schunk, and rejected the claimants' premature claim.

11. Schunk advances an alternative submission should the Tribunal reject its primary application under rule 55(2). Schunk applies under rule 35 of the Rules, to become a party for the purposes of costs only. Schunk submits that the Tribunal has the power to join Schunk, for the purposes of costs only, as a defendant in the existing substantive proceedings. In Schunk's submission, the Tribunal should order the claimants to pay Schunk's costs under rule 55(2) and then, given that joinder under rule 35 would be made for the purposes of costs only, unjoin Schunk, once payment of the costs award has been made in full.

12. In support of its position, Schunk submits that the Tribunal should interpret rule 35 in a manner that is consistent with the Civil Procedure Rules ("CPR"). In particular, CPR rule 48.2(1)(a) makes specific provision for persons to be added to the proceedings for the purposes of costs only.

SGL

13. SGL supports the submissions enunciated by Schunk. SGL too refers to *Umbro: costs* and argues that its position is stronger than that of SWI because, unlike SWI, SGL was exercising a right to make observations recognised by rule 31(3) of the Rules: if SGL has a right to make such observations, there must be a power on the part of the Tribunal to enable SGL to become a party to the proceedings for the limited purposes of recovering the costs of exercising that right.

14. SGL submits that if the Tribunal were to hold that rule 55 did not permit a costs order to be made in favour of a successful rule 31(3) proposed defendant, this would constitute a serious lacuna in the Rules. Not only would a successful rule 31(3) proposed defendant be left substantially out of pocket in the absence of any parallel proceedings against other defendants, but the Tribunal would have no means of sanctioning the bringing of unmeritorious applications for permission or egregious conduct by applicants. In SGL's submission, the Tribunal should adopt an interpretation of the Rules that ensures that a just and fair result is achieved: see *BCL Old CO Ltd & Ors v Aventis SA & Ors* [2005] CAT 1, [2005] Comp AR 470 ("*BCL: limitation*"), at paragraph [42].

15. Should the Tribunal reject SGL's principal submission, SGL, like Schunk, applies under rule 35 of the Rules, to become a party to the proceedings for the purposes of costs only.

Carbone Lorraine

16. Carbone Lorraine adopts the submissions of both Schunk and SGL, and submits that it is a principle recognised generally in the cost rules in English law that it is contrary to justice and fairness that a person should be able to impose costs on others by way of legal proceedings with impunity: it was clearly right and proper for the proposed defendants to make observations in relation to the proposed claims.

The claimants

17. In the claimants' submission rule 55 contemplates a situation where there are "proceedings" pending between those making the costs application and the respondents to that application, so that both are parties to such proceedings. The claimants argue that the Tribunal has no jurisdiction under rule 55 of the Rules to make an order for costs in favour of a person who is not a party to the proceedings before it. The term "another" in rule 55(2) refers back to the word "party" and does not apply to another "person" as suggested by the proposed defendants. In that regard the claimants refer to CPR 44.3(1) which also refers to costs payable "by one party to another" and in which context there is no doubt that "another" refers to another party.

18. The claimants therefore submit that the proposed defendants cannot pursue an application for costs directly under rule 55. In relation to the claimants' applications for permission there were and are no such "proceedings" to which the proposed defendants are parties. They are not parties to the proceedings between the claimants and Morgan Crucible. Nor have they been participants in those proceedings. There are no extant proceedings in which they have been or are involved. The proposed defendants' observations on permission are not a stage in any "proceedings" and were not made in relation to any "proceedings" least of all the proceedings between the claimants and Morgan Crucible.

19. The claimants further submit that even if there were some mechanism by which a costs order could be made in favour of a non-party, it would not be appropriate for an order for costs to be made in this case. They rely on four reasons.

20. First, the claimants' applications under rule 31(3) were the first such applications to be brought before the Tribunal in a damages action under section 47A of the Act. The applications were considered necessary in light of the additional uncertainty as to the application of the time limit for bringing a claim in circumstances where some, but not all, of the addressees of the Commission Decision that founded the claim had appealed the Decision to the CFI. The claimants did not have the benefit of any guidance on the exercise of the Tribunal's discretion under rule 31(3). The only judgment in which the Tribunal had considered costs orders in the context of a damages action was *BCL Old CO Ltd & Ors v Aventis SA & Ors* [2005] CAT 2, [2005] Comp AR 485 ("*BCL: security for costs*") and so the claimants were in "virgin territory" (see paragraph [33]).

21. Secondly, it was entirely reasonable for the claimants to have sought to distinguish appeals which are primarily directed at the level of the fines assessed by the Commission from those directed at liability itself, and to contend that appeals which do not seek to overturn the substantive finding of liability by the Commission do not jeopardise the jurisdictional basis for a follow-on damages action.

22. Thirdly, it was reasonable for the claimants to have sought to commence proceedings as a means of protecting themselves from the prejudice caused by the passage of time and

prospect of still further substantial delays before the European appeals process is finally determined.

23. Fourthly, the proposed defendants chose to make substantial observations to the Tribunal in relation to the rule 31(3) applications. They were not required to do so, since they were not parties to the proceedings. According to the claimants, a distinction should be drawn between adversarial proceedings between parties to proceedings and the right conferred on proposed defendants to make observations before the Tribunal decides upon applications for permission to commence proceedings.

24. The claimants submit that, even if the Tribunal were to reject the grounds on which the claimants oppose the applications for costs, any award for costs in favour of the proposed defendants should be limited to the costs of their observations on the question of permission in response to the claimants' application under rule 31(3).

25. The claimants further submit that it would not be appropriate or just for any costs award to include any of the substantial costs incurred in relation to the application of the Regulation on jurisdiction, or to the order in which the issues of permission and jurisdiction should be decided by the Tribunal. The Tribunal found in favour of the claimants in that challenges to jurisdiction should properly be raised only after service of the claim form: see paragraph [49] of the Permission Judgment.

26. Furthermore, the claimants submit that the costs which they have incurred in responding to the proposed defendants' position on jurisdiction should be set off against any costs awarded to the proposed defendants in relation to the rule 31(3) applications. In the event that the Tribunal were to determine that it has jurisdiction to make a costs order in favour of the proposed defendants and that it would be appropriate to do so, the claimants make a conditional cross-application for their costs incurred in responding to extraneous issues arising from the jurisdictional arguments interposed in the permission applications by the proposed defendants.

III. THE TRIBUNAL'S CONCLUSIONS

Issues to be decided

27. There are two main issues:

    (1) Does rule 55 of the Rules enable the Tribunal to make a costs order as between an unsuccessful applicant for permission pursuant to section 47A(5)(b) of the Act and rule 31(3) and a proposed defendant who has made observations in opposition to such an application?

    (2) If so, what if any order or orders should be made in the present case?

The first issue: jurisdiction to award costs

28. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Rules. Rule 55 provides as follows:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session, or the Supreme Court of Northern Ireland
>
> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President, a chairman or the Registrar or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session.
>
> …"

29. Rule 3 provides:

> "Unless the context otherwise requires-
>
> (a) Parts I and V of these rules apply to *all proceedings before the Tribunal*…" (emphasis added)

Rule 55 is contained in Part V of the Rules.

30. The Rules contain no definition of "party" or "proceedings". Although we agree with the claimants that "another" in rule 55(2) refers to another party, we do not consider that that term or the term "proceedings" in that provision bear the limited meanings attributed to them by the claimants.

31. It is worth bearing in mind the statutory context in which the claimants' applications for permission arose. Section 47A(5)(b) of the Act provides that "otherwise than with the permission of the Tribunal" it is not possible for a follow-on claim to be made while an appeal against the underlying infringement decision is still possible or is pending. Rule 31(3) provides:

> "(3) The Tribunal may give its permission for a claim to be made before the end of the [relevant] period … *after taking into account any observations of a proposed defendant*." (emphasis added)

32. Therefore in an application for permission, which is a creature of statute, a proposed defendant is given express standing to respond to such an application; and when the Tribunal determines the application it is required to take account of any observations made by a proposed defendant. When a claimant makes an application it must be taken to be aware of this.

33. It seems to us that both in principle and in the light of the wording of the rules 3 and 55 an application for permission represents "proceedings" for the purposes of those rules. It would be very strange if such an application were not to constitute "proceedings before the Tribunal" for the purposes of rule 3, as that would leave the application in limbo as regards very fundamental and important matters dealt with in Parts I and V of the rules. Nor is it feasible that the word "proceedings" in rule 55 is being used in a different sense from its use in rule 3.

34. On this basis both the person seeking permission and the proposed defendant are parties to the proceedings in question for the purposes of *inter alia* rule 55. There is nothing about the context of a permission application which "requires" rule 55 to be disapplied to such an application (to apply the test in the preamble to rule 3).

35. The Tribunal has emphasised on a number of occasions that rule 55 confers a wide discretion designed to enable the Tribunal to deal with cases justly (see for example

Umbro: costs (above), at paragraph [36], *Celesio AG v Office of Fair Trading* (costs) [2006] CAT 20, [2007] Comp AR 269, at paragraph [18], and *Independent Water Company Limited v Water Services Regulation Authority* (costs) [2007] CAT 21, [2007] Comp AR 885, at paragraph [30]).

36. We can see no reason in principle why a proposed defendant who has exercised his statutory right to be heard and has successfully resisted a permission application should be denied the right to apply to recover some or all of the costs incurred in making those observations to the Tribunal. It seems to us that such a situation would be unfair. It would result in a real risk of injustice. As the Tribunal observed in *BCL: limitation* (above), at paragraph [42]:

> "the Tribunal, in our view, should be extremely slow to adopt a construction of the Tribunal's Rules which gives rise to a risk of injustice or procedural difficulty unless such a construction was the only possible construction of the Tribunal's Rules".

37. Accordingly the Tribunal has the power under rule 55(2) to make an order for costs as between an applicant for permission and a proposed defendant.

38. This interpretation produces much the same result as obtains in the High Court by virtue of section 51 of the Supreme Court Act 1981 which provides:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in…the High Court…shall be in the discretion of the court.
>
> (2)….
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

39. Thus, it has not been doubted that in a claim for judicial review under CPR rule 54 the Administrative Court has power to make a costs order at the permission stage. Rather the question has been in what circumstances the court should exercise that power in favour of a successful proposed defendant, and in particular whether the costs to be awarded should generally be restricted to costs incurred in preparing the mandatory acknowledgment of service/summary grounds of resistance or whether they should also include the costs of the proposed defendant in attending an oral permission hearing.

40. Since there is jurisdiction to make a costs order in favour of the proposed defendants if appropriate, we do not need to consider their alternative application under rule 35, namely that they be made parties to the claimants' proceedings against Morgan Crucible for the sole purpose of obtaining an award of costs. We therefore turn to the second main issue, namely whether an order for costs should be made here, and if so what order.

The second issue: what (if any) order for costs should be made in this case?

41. As already mentioned the discretion given to the Tribunal under rule 55(2) is very wide in that it may "make any order it thinks fit". In relation to the amount of any order the Tribunal "may take account of the conduct of all parties in relation to the proceedings."

42. It is worth noting that, unlike the position in judicial review where an applicant who wishes to begin proceedings has no option but to apply for permission to do so, in a damages claim of the present kind there is no such requirement – a claimant can simply wait for any appeal against the infringement decision to be determined and then commence proceedings as of right. Moreover, the claimant also has the ability to begin a damages action at any time in the ordinary courts. Therefore an application for permission to commence a claim "early" is an optional course of action for a claimant. It is also clear from the way in which both section 47A(5)(b) of the Act and rule 31 of the Tribunal Rules are framed that commencement of a follow-on claim while an appeal is still possible or is pending is the exception rather than the norm (Permission Judgment, at paragraph [77]). In *Emerson Electric Co & Ors v Morgan Crucible Company Plc* [2007] CAT 30, [2008] Comp AR 37 ("*Emerson: rule 31(3) and rule 40*") permission was granted in the context of the Tribunal's concern about Morgan Crucible's attitude to the question of the undertaking to preserve the documents and its negative approach to pre-action disclosure" together with "a previous history of destruction of documents by Morgan Crucible" (see paragraph [17] of that judgment).

43. It is also important to bear in mind that a follow-on claim, unlike the infringement decision which is being relied upon by the claimant, is by its nature private civil litigation: the claimant is seeking compensation for its alleged losses. The fact that such private litigation may help indirectly to reinforce public enforcement of the competition

rules should not in our view affect our approach to the resolution of cost issues between the parties.

44. The Tribunal has stated on several occasions that in the interests of dealing with individual cases justly it is important to retain flexibility in its approach to the exercise of its discretion in relation to costs, and to avoid general principles evolving into rigid rules. There is no automatic rule that costs should follow the event (see *BCL: security for costs*, at paragraph [37]). However, it is entirely consistent with this and with the width of the discretion enshrined in rule 55, that the starting point for the exercise of that discretion in a case such as the present should be that costs follow the event. This has long been the approach of the courts of England and Wales in private law litigation (see for example *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600, at paragraph [7] per Lord Phillips of Worth Matravers, Master of the Rolls (as he then was), and it is currently reflected in CPR rule 44.3(2)(a). However the CPR makes clear that the court can make a different order (see CPR rule 44.3(2)(b)), and there are exceptions to the general approach. In all cases costs are subject to the court's overriding discretion in section 51 of the Supreme Court Act 1981 as reflected in CPR rule 44.3(1).

45. To say that the starting point in a case such as this is that costs should follow the event is very far from creating an expectation that it will be the finishing point. The need to deal with the matter justly means that all relevant circumstances of each case will need to be considered. Such circumstances are too many and varied (depending on the particular case) to attempt to list; they may in an appropriate case include the conduct of the parties before and/or during the hearing, and the extent to which particular issues have been won or lost; for example it may be relevant that the party who has succeeded overall has argued other points on which he has not been successful or which have not proved decisive. Such matters might affect the Tribunal's approach to costs.

46. Here the claimants by their application have in effect imposed certain costs on the proposed defendants who have exercised their statutory right to make observations in opposition to the application. In the event the claimants were unsuccessful in that their application was refused. In opposing the proposed defendants' application for costs the claimants make the submissions summarised at paragraphs [17] to [26] above.

47. As to the argument that the claimants were in the dark as to the way in which the Tribunal would approach its discretion both to grant permission under rule 31(3) and to deal with the costs of such an application, we see little force in this. As we have already said, the clear effect of the governing legislation is that a section 47A claim will not normally be brought until the underlying infringement decision upon which the claim is based has become definitive, and the commencement of proceedings before then with permission of the Tribunal will be an exception to the norm. Further, it has been clear since at least the date of the Tribunal's judgment in *Emerson: rule 31(3) and rule 40* that an important purpose of the rule 31(3) permission procedure is to enable a claimant to seek to minimise the prejudice which he or she may suffer if required to wait until the decision is definitive (see paragraph [18] of that judgment; see also paragraph [80] of the Permission Judgment). In the present case the claimants did not satisfy the Tribunal that any particular prejudice was likely to occur, and certainly not such as would outweigh the risk implicit in allowing proceedings to be commenced on the basis of a decision which was still under appeal (see paragraphs [83] *et seq.* of the Permission Judgment). As to costs, the Tribunal made clear in *BCL: security for costs* (above) that costs in damages claims were in the discretion of the Tribunal. We can see no reason to penalise a successful party or favour an unsuccessful party simply because the process or application in question is the first of its kind.

48. As to the reasonableness of the claimants' argument that appeals substantially directed against fines imposed by the Commission were to be distinguished (for the purposes of granting permission under rule 31(3) of the Rules) from appeals against the existence of an infringement, it is true that the Tribunal did not suggest that the argument was unreasonable. But that is nothing to the point. An argument does not have to be unreasonable to be unsuccessful. Although they may have the effect of concentrating minds in advance of bringing or defending a claim or application, ordinary costs awards are not intended to be penal but to compensate a litigant for the costs he or she has incurred in successfully opposing another party's position. This is not to say that unreasonableness cannot affect costs issues; clearly it can; but the reasonableness of an unsuccessful argument is not ordinarily sufficient to defeat a costs award which would otherwise be made.

49. In relation to the claimants' concern to protect themselves against the prejudice caused by the further passage of time until the appeal process in the European Court was exhausted, we have already referred to the fact that in the Tribunal's view no sufficient prejudice was established (see Permission Judgment, at paragraph [83]).

50. Nor in our view is there any merit in the claimants' argument that, as the proposed defendants were not obliged to make observations, the permission application was not adversarial in nature and it would be unfair to penalise the claimants in costs for what was in essence the proposed defendants' own choice to participate. This is really a re-run under another guise of the submission that the proposed defendants are not "parties" and the application was not "proceedings". If choosing to oppose an application were a bar to that person, if successful, being awarded costs the results would be rather far-reaching.

51. The claimants make a better point in relation to the proposed defendants' reliance upon jurisdiction and the order in which various issues should be decided. In relation to these points, and contrary to the position taken by the proposed defendants, the Tribunal held that it was only after permission had been given and the damages claim had been commenced that the issue of jurisdiction would arise, and that accordingly it was unnecessary to determine certain detailed issues which had been argued before the Tribunal (see paragraphs [47] to [49] of the Permission Judgment). A substantial proportion of the written and oral submissions, and a correspondingly substantial amount of time and costs were devoted to the questions of jurisdiction and the correct order in which issues should be determined.

52. In all the circumstances we have decided that it is appropriate to make an order for costs under rule 55 in favour of the proposed defendants, who were successful in opposing the claimants' applications for permission. However we consider that the proportion of costs to which the proposed defendants are to be entitled should reflect the matters set out in the previous paragraph. A 50 per cent discount would in our view be fair. Accordingly we propose to make an order or orders under rule 55 to the effect that the claimants pay to the proposed defendants sums representing 50 per cent of the latters' costs of and incidental to the applications for permission, such costs to be subject to a detailed assessment if not agreed.

53. We note that the claimants have applied conditionally for a cross-order for their costs of dealing with the proposed defendants' arguments as to jurisdiction etc. However we do not consider that such a cross-order is appropriate. The order we have proposed serves the justice of the case by requiring that the parties who were successful overall receive their costs less a significant discount in respect of unsuccessful and/or unnecessary arguments deployed in response to the claimants' applications.

54. For the sake of completeness we should also record that following the parties' written submissions on costs the claimants' solicitors wrote to the Tribunal referring to the attitude of the proposed defendants to pre-action disclosure and to the preservation of documents, which they considered to be relevant to the costs issue. However, the Tribunal had already considered the conduct of both sides in relation to retention and disclosure of documents when determining the applications for permission; its view is set out at paragraphs [83] to [84] of the Permission Judgment. In the correspondence referred to above the claimants appear to be seeking to re-open those matters. To the extent that the claimants' complaint as to preservation of documents relates to the proposed defendants' reaction to requests made *after* the Permission Judgment was handed down, this is not in our view relevant to the costs issue with which we are now dealing.

55. Finally, while their outcome does not affect the applications before us, we note that on 8 October 2008 the CFI dismissed the appeals brought by the proposed defendants in Cases T-68/04, T-69/04 and T-73/04.

56. The Tribunal invites the parties to agree the wording of the draft order consequential upon this judgment within 21 days. In default of such agreement, each party should, within a further period of 7 days, file its own proposed order. Following that, the Tribunal will make an order or orders under rule 55 so as to give effect to the decision set out in this judgment.

The Honourable Mr Justice Barling Adam Scott Vindelyn Smith-Hillman

Charles Dhanowa Date: 17 October 2008
Registrar