IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1028/5/7/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28 October, 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)
MARION SIMMONS QC
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

BCL OLD CO LIMITED & ORS — Claimants

and

AVENTIS S.A. & ORS — Defendants

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

Mr Brian Kennelly (instructed by Ashurst) appeared for the First and Second Defendants.

Mr Mark Hoskins (instructed by Freshfields Bruckhaus Deringer) appeared for the Third and Fourth Defendants.

Transcript of the Shorthand notes of
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HEARING: STRIKE OUT APPLICATION/PRELIMINARY ISSUE

THE PRESIDENT: Good morning ladies and gentlemen. We are grateful to the parties for the skeletons that we have received and we have read the arguments and we have read the materials provided. It may be helpful if we indicate the provisional view that is beginning to form in our mind subject to further argument as necessary, which is broadly as follows. At least at present we are somewhat unpersuaded by the defendant's submission that the provision of the agreements here in question amounts to notice for the purposes of s.136 of the Law of Property Act. It seems to us that in the circumstances where the claimants provide the agreements to the defendants but at the same time contend that there is no assignment it is somewhat difficult to say that the provision of the agreements amounts to notice for the purposes of that section. The purpose of such notice seems to us to be principally so that the debtor should clearly know whom to pay and from whom it can obtain a discharge. Far from the defendants knowing that this is in fact the case the claimants are continuing to assert that it is they who have the right to the claim, and the provision of the agreements does not seem to us to have been an effective notice for the purposes of the section.

It would follow, if that is right so far, as we understand it –and I am sure you will correct us if we are wrong – that if there has been an assignment the assignment would be an equitable rather than an legal assignment. In those circumstances the *Three Rivers* Judgment would seem to us to suggest that the right course is that the assignees should be joined in the action commenced by the assignor. If it is right that it is an equitable assignment, it would also seem from the authorities, and subject to any further submissions that no limitation issue arises from the non-joinder of the assignees.

It also seems to us that, where as here there is a dispute as to whether there has been an assignment, the right course in any event may be for the purchasers to be joined so that all parties are before the Tribunal and the matter can then be decided as between the claimants and the purchasers. We also observe from the authorities that where the assignor or the assignee expressly disavows any claim then it may be that there is no purpose in joining them.

As regards Daylay, however, it does appear at the moment that the subsequent agreement between the parties does not yet seem to have fully satisfied the defendants, so that may be an issue we need to go into to some extent. However, the claimants do seem to be suggesting in any event that all the purchasers, including Deans, be joined, so we may not need to go into that issue after all. Our present view – subject to further argument – is that it is inappropriate to go too far

today and, in particular, to consider the construction of the agreements without hearing submissions from the purchasers, in particular on the factual matrix question and other issues.

That is a preliminary indication. There may be a certain amount in there that you may wish to have time to reflect about. We are rather in your hands as to what course you would invite us to take. We can either rise for a few minutes to give you a chance to consider what we have just said, or we can proceed with the submissions according to the timetable we set out in our recent letter, moulding those submissions around the remarks we have just made.

So, if I may, perhaps I might go round the table and ask for a first reaction. Mr. Hoskins, you seem to have got to your feet first.

MR. HOSKINS: I am sorry, Sir, eager as ever. Rather than simply launching into detailed submissions it seems to me sensible if we could have some time. I can take instructions and we can then come back and hopefully indicate what we would like to do and make suggestions as to how it should be done. I think that is probably going to be a more efficient way to do it.

THE PRESIDENT: Yes, thank you. Mr. Kennelly, good morning?

MR. KENNELLY: Good morning, Sir. I agree. We would like some moments to take instructions and reflect on what you just said.

THE PRESIDENT: Very well. Mr. Leggatt is that all right, with you?

MR. LEGGATT: Certainly, Sir.

THE PRESIDENT: We will rise until a quarter to eleven in any event, and if you want more time signal to us.

(Short break)

THE PRESIDENT: Yes, Mr. Hoskins?

MR. HOSKINS: Sir, if I can take a number of points as first of all rising after the preliminary indication you have just given. The first is this, as to the question of whether it is possible to have a legal assignment when there is doubt, or a potential conflict as between the assignor and assignee as to when there has been an assignment, we do not intend – unless the Tribunal wishes it – to argue the point out today, because it seems to us that if the purchasers are going to take part in this process we should do it then. But what we would like to flag up is that we do and will argue that it is possible to have a legal assignment even in the sort of situation that we are in now and that I have described. If I could flag up why we say that by developing it? We say that is

expressly envisaged by s.136 of the Law of Property Act 1925. If you want to look at that quickly, it is in our authorities' bundle at tab 1.

THE PRESIDENT: Yes.

MR. HOSKINS: All the substantive arguments have focused on the first part of s.136, which is the effect of a legal assignment, but the final part of subsection (1) we say actually covers the case in point. It says that provided the debtor has notice –

> "(a) that the assignment is disputed by the assignor ….
>
> "…he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action in to court…"

Now, what that envisages, we will argue, is that you can have a case of doubt as to whether there has been an assignment, but nonetheless you can still have a legal assignment. But the point is, and the reason why we do not think it is necessary to argue it today is that the mechanism for deciding whether there had been a legal assignment in those circumstances is to have the other party interposed. So I want to keep alive the legal point, but what it does suggest is that the purchasers should be given notice because they are the people who may contest the position with the claimants.

THE PRESIDENT: Yes.

MR. HOSKINS: So I want to keep that alive. The second point that I would like to keep alive without developing is the limitation point and, again, if I can just deal with it very briefly. The Tribunal clearly has power (under rule 35 of the Rules) to join parties in addition, or in substitution to the existing parties. However, pursuant to rule 31(1) there is a limitation – a claim for damages must be made in a period of two years beginning with the relevant date, and that limitation period has expired so that if the purchasers – the purchasers of the businesses were now to seek to commence their own action in the Tribunal they would clearly be time barred.

If this were a High Court action the situation would fall under CPR 19.5, which lays down special provisions for adding or substituting parties after the end of a relevant limitation period, and our argument will be that, given that the CPR makes specific provision for adding or substituting parties after a limitation has expired and given that in contrast, the Tribunal rules have no such provision, then it is not possible to add a party after the limitation period has expired. Again, I do not need to develop it, if I could simply flag it up.

MISS SIMMONS: Can I just ask you, do you say that if it is an equitable assignment as well as

a statutory assignment? Well, you do not have to answer now, but there may be a difference?

MR. HOSKINS: I absolutely agree, I have not come prepared to argue the point out but I wanted to flag up that the point be there, but clearly there will be a number of issues that would have to be argued around that point. I just wanted to keep the point alive.

THE PRESIDENT: What is in our head at the moment, I think, is that if it is an equitable assignment it may be very debatable as to whether the limitation period has expired, but that is a point which, as you say, you keep open and we can revisit it as necessary later on.

MR. HOSKINS: None of this changes the point that if the purchasers are now to be invited to take part these points are better argued when they are in because they may well have a view as well.

THE PRESIDENT: Yes.

MR. HOSKINS: The third point arising out of the preliminary issues relates to the Daylay /DFF agreement which was made earlier this month. We have made written submissions on that. We have said it depends which view of the law you take as to when notice can be served. If notice can be served after the commencement of proceedings then that, properly construed may well be a legal assignment. However, to take the other perspective which one sees in some of the cases, if notice served after commencement of proceedings is not effective for a statutory assignment, then we say it should take effect as an equitable assignment.

The point, we would say, is if the purchasers of the businesses are to be invited to join, that should include Deans, as the purchasers of the DalayDFF business and, indeed, I do not think – as you, Sir, have pointed out – it should be a problem, because in the draft order put forward by the claimants, they were in fact proposing precisely that situation, i.e. that all the purchasers be joined, including Deans and it would seem to us to be sensible again because there is an issue there that has to be argued out.

There is, if you like in a sense, a substantive point in terms of procedure, but if I can turn to look at procedural issues more directly.

THE PRESIDENT: Yes.

MR. HOSKINS: What we would suggest is that rather than there being any order that the purchasers should be joined today, what should happen is that another date for hearing should be fixed and the purchasers should be given notice of that hearing and invited to attend.

There are a number of reasons why I say they should not be joined now. First, if it transpires at the end of this debate that there was in fact a legal assignment, and not an equitable assignment, then the current claimants will not have the right to sue. The purchasers may have a putative right to sue subject to any limitation point, and that will need to be resolved, and unless and until that limitation point is resolved it does not seem sensible to actually join them as parties.

MISS SIMMONS: Except the limitation point could only be resolved between them and you, they would have to be a party.

MR. HOSKINS: The next point I want to make is in terms of if one invites them on that basis then, because of what has happened and the difficulty the Tribunal would face in joining them today, on what basis would they be joined? The normal situation is that a party who was considered to be a necessary party to the action would be invited to become a party to the action as co-claimant, and it is only if they refuse they would come in as co-defendants. The problem is that it appears from the claimant's skeleton that none of the purchasers, save for Deans, have actually been approached to find out what their position is. So it would be unfortunate we would submit, because naturally if they do want to come in and if they are proper parties, and if there is not a limitation point it would seem that they should come in as co-claimants. It would seem unfortunate if it was anticipated and they came in on the wrong basis. Simply as a procedural mechanism it seems sensible to give them notice of a hearing at which these points will be debated. Hopefully, and indeed it may be thought sensible, they will be invited to indicate in advance by way of a skeleton what their position is, and then all these issues can be resolved at the hearing.

Of course, if for example they do not respond to a request to attend the hearing and do not indicate any willingness to take part, then we know that having been informed about the issue they should be joined as co-defendants. That is why we think joinder today would be premature – it is far more sensible to give them notice and to let the matters be resolved before deciding what is to happen.

Can I deal with some practical issues which arise ----

THE PRESIDENT: Hang on. Because you say, among other things, we do not quite yet know whether if they are to be joined they should be co-claimants or co-defendants.

MR. HOSKINS: Sir, absolutely. Yes, that is one of the points.

THE PRESIDENT: Yes.

MR. HOSKINS: There are a number of practical points that arise, not so much about giving notice of the purchasers, but about the potential joinder of the purchasers and I would like to raise at least the ones I have thought of now ----

THE PRESIDENT: Yes, please do.

MR. HOSKINS: -- because I think obviously we are all aware that there is a trial date set for this action, and if there is to be a resolution of the issue of who has the right to sue and whether other parties can join, etc. obviously that may impact on the timing.

THE PRESIDENT: It may impact on the trial date, yes.

MR. HOSKINS: So we should all be clear about what is at stake, if you like, procedurally. I have already covered a number of the points. There is the limitation issue which will have to be resolved. There is whether they should come in as claimants or defendants which will have to be resolved. The third point is when should the right to sue issue be resolved. I say that because the claimants' suggestion in the draft order that was produced a few days ago and in the skeleton was that the purchasers should be joined and then the matter should be parked until trial. Now, we would very strongly oppose that for the following reasons.

Let us assume that the purchasers are joined to the proceedings (obviously I will save my arguments as to whether that was necessary), in effect our interest in the substantive issue of who has the right to claim falls away because what it becomes is a matter to be resolved between the claimants and the purchasers as to who has the right to sue or who has the right to the fruits of the action – I say that because it was an equitable assignment, and it would be the purchasers who would be picking up any damages at the end of the day, not the claimants. If we lose on damages and have to pay damages it does not matter who we pay it to as long as we are discharged, so we fall out of the picture in a sense at that stage. The only interest we then retain is as to when the right to sue issue is going to be resolved? Is it now, or is it, for example, at trial or after trial? As I indicated, we say it should be now. The difficulty we have at the moment is that except in relation to Deans, the claimants have not made any attempt to find out what stance the purchasers will take – no doubt out of fear of what they might find because it may not be very happy news for the purchasers. But it is possible that purchasers will want to argue that there has been a legal assignment, therefore they are the only ones who have a rightful claim and/or that there has been an equitable assignment, which means that they will have a right to the fruits of the action.

If that is the case and that is the position they wish to take, and if they are joined as parties, having heard argument on that, the position of the purchasers may obviously have very important practical implications for the conduct of the action – I am thinking of the timetable towards the trial. For example, if the purchasers believe that they hold the right to sue, or entitlement to damages, they may wish to play a full part in the proceedings by which I mean being separately represented, having counsel making submissions on all the issues. That is a perfectly possible scenario. In our submission, that is a very unattractive scenario and that is why the question of the right to sue should be ascertained as quickly as possible, because if one resolves it immediately it will very likely avoid the need for any unnecessary multiplicity of parties. The reality is that if the Tribunal finds that there has been a legal assignment then the claimants will drop out because, under the Statute, they no longer have the right to sue; and if there has been an equitable assignment it is very unlikely that the claimants will want to play a full part in the proceedings, given that they will not be entitled to any of the damages at the end of the day.

As I have said, I do not want to give away the point, but it seems to us at the moment, it is difficult to see that we would actually have any positive part that we would need to play, necessarily, in that proceeding – I suppose subject to simply they were not joined first, we may want to argue for legal assignment.

THE PRESIDENT: Just help me, Mr. Hoskins, so that I have it absolutely clear in my head. As you have just been saying the purchasers are joined to an extent your interest falls away and it is a battle between the claimants and the purchasers. The point that you are making, the whole issue the defendants themselves have raised is in your favour, is it, if there is an assignment, and it is an assignment of the kind that brings into play the limitation period with the consequence that the correct claimant is out of time and that is the end of the action. Those are the circumstances in which your point succeeds and is important to you as the defendants?

MR. HOSKINS: Sir, yes. I think I probably put it too high, and I have probably confused myself by talking about whether the issue arises before or after joinder because, of course, I have submitted that the issue of joinder itself should not be determined until the assignment and construction issues have been determined in which I anticipate we will want to play a role for precisely the point, Sir, that you raise.

THE PRESIDENT: The key to your position is the limitation point, effectively?

MR. HOSKINS: The first point will be: was there a statutory assignment? If the answer to that is "yes", then the purchasers may or may not choose to carry on the action. Speaking practically, if the go to the bother of attending the hearing and arguing that there has been a legal assignment, one would assume that they would want to step into the shoes of the claimants.

THE PRESIDENT: But they may not, they may just simply ----

MR. HOSKINS: They may not, exactly, I do not know, and then the limitation point will come in.

MISS SIMMONS: And they may just take over the proceedings as they have been set up by the present claimants, so we do not know what the position is yet.

MR. HOSKINS: Precisely.

MISS SIMMONS: And so until they come, if we go on in your way and ask them if they will come here, rather than joining them first, and if they do come, and as long as that is within the next fortnight, we then can consider the points you are now raising.

MR. HOSKINS: Precisely.

MISS SIMMONS: The points you are now raising really are not for consideration now because it is purely hypothetical and surmise.

MR. HOSKINS: The reason why I am making these points, and it is probably labouring the point too much, is to say that we need to this quickly, not slowly as the claimants have suggested.

MISS SIMMONS: I think it arises mainly because if we go down the line that they should come here before they are joined, because then everybody must consider exactly what is going to happen and, having considered what is going to happen, we can then sort it out.

MR. HOSKINS: Precisely.

MISS SIMMONS: Your points are good points and they need to be considered with everybody here.

MR. HOSKINS: I agree, as I say, I am making the point in far too laborious a way, which is just to try and convince the Tribunal that these points need to be dealt with quickly not slowly. That is probably the way I should have put it. Sir, I think those are all the points we need to make at the moment in relation to the preliminary observations of the Tribunal, unless you have any further questions for me at the moment?

THE PRESIDENT: No, thank you.

MR. HOSKINS: Thank you very much. Mr. Kennelly?

MR. KENNELLY: Sir, I have nothing to add to that.

THE PRESIDENT: That is your position too?

MR. KENNELLY: Mr. Hoskins speaks entirely for our position, Sir.

THE PRESIDENT: Thank you very much, yes. Yes, Mr. Leggatt?

MR. LEGGATT: Sir, I do not oppose the suggestion that the defendants have made that it would be appropriate to invite the purchasers to attend or to state their position without, at this stage, joining them to the proceedings, and to review the matter at a further hearing at which they have the opportunity to attend and make whatever submissions they wish to make.

THE PRESIDENT: Yes.

MR. LEGGATT: And at that hearing to decide whether it is appropriate to join them as parties.

THE PRESIDENT: And how do you see this invitation to the purchasers actually taking shape in practical terms? Is this something that the claimants do, or something that the Tribunal does?

MR. LEGGATT: I think perhaps it is something that the claimants should undertake to do within a very short period of time, and obviously we would copy other parties and the Tribunal in doing so. It might be the most convenient course if we, having proposed their joinder, we should communicate now with the purchasers, apart from Deans, of course, who have already been approached, and inform them of what the position is and whatever date is set for hearing ----

THE PRESIDENT: Is there any particular reason why the purchasers, other than Deans, have not been approached yet?

MR. LEGGATT: No particular reason. Sir, I think the reason really was uncertainty as to the way forward for these proceedings, and then when it was thought to join the purchasers it was then thought better to see the outcome of today's hearing before going off and contacting them in advance of it. It has obviously been recognised that if today the Tribunal were minded that the purchaser should be involved in one form or another, then the immediate next step must be to do that.

MISS SIMMONS: My mind is going back to the Commercial Court, and I think it was in the derivatives actions – you know what I mean?

MR. LEGGATT: The swaps action.

MISS SIMMONS: Yes, the swaps action, that the question of who should be joined in various actions and how you could mix the classes and all of that was dealt with, I think, by Mr. Justice Hobhouse, as he then was, and he, as the court, wrote to the various possible parties using one of the firms of solicitors as the secretary and post box – if I can put it that way.

MR. LEGGATT: Yes.

MISS SIMMONS: So that a letter which came partly from the direction of the court and the person who received it knew that there was some court instigation of all of this, and it had been proved. I do not know if that happens with some of the other group litigation out of the Commercial Court, and I do not know if you have some experience of that, but there is that question that it might be better if there is something that it is the court asking as well as the party asking.

MR. LEGGATT: Yes. I do not have any personal experience of it, but I can see the benefit of it, even if it is only a short communication from the court to indicate that ----

MISS SIMMONS: It would be helpful to the court.

MR. LEGGATT: It would be helpful, and then that does not preclude claimants from sending perhaps a fuller communication as well, setting out more the background.

THE PRESIDENT: It may be appropriate – I am thinking aloud because we are devising procedures as we go along, this is a slightly more hands-on jurisdiction than some – for the Registrar on behalf of the Tribunal to write to the parties setting out very briefly the Tribunal's view that the assignee should be heard and should be present, which letter can then be sent on by the claimants in particular to the other potential participants, making it clear that you are following up a request from the Tribunal as well as having the conduct of your own litigation, and adding such considerations as you want to add.

MR. LEGGATT: That, if I may say so, would be very helpful if the Tribunal were able to do that. It would seem an excellent way of dealing with the matter.

THE PRESIDENT: I think we all feel that we ought to have everybody here to sort it all out basically, and if everybody is here then I am sure a sensible way of sorting out can be found.

MR. LEGGATT: It is our application to join the purchasers so we must write to them anyway, but if the Tribunal were able also to give that communication as well that would make it clear that the Tribunal desire that they should attend to make their position known.

MISS SIMMONS: There is the question of costs because normally you do not ask a party, or a person to attend a court without the cost position actually being dealt with through the idea that they are joined as a party and therefore, either if they have been wrongly joined - payment, or whoever joined them pays, and vice versa, and that is why normally you join them before you get to this stage, and I am not sure how that is going to be dealt with in the correspondence, because if they are only being invited to come then they can say "I do not want to come, because who is going to pay my costs? I have to get lawyers etc. I knew nothing about this; I am not interested."

Alternatively "What are these people doing going off and making claims that should not have been made?

MR. LEGGATT: What I would suggest is that they may say that, they would be entitled to say that but if they chose not to come they would not because they would then forfeit the opportunity to make submissions, and they might be joined in which case they would become parties. The Tribunal cannot, and should not, force them to attend; it is giving them the opportunity to do so. If, on the other hand, they do choose to attend and make submissions, although they are a non-party – I have to research the position – I would anticipate that there is one means or another by which orders for costs could be made in their favour if that were thought appropriate. They should recover costs at some stage, certainly if they were joined, there would be no difficulty about that.

THE PRESIDENT: If they were – to put it neutrally – unnecessarily brought along, then it would seem to us that either the defendants or the claimants, or in some proportion ----

MR. LEGGATT: Exactly.

THE PRESIDENT: Their costs should be met.

MR. LEGGATT: Yes.

THE PRESIDENT: By "their costs" I mean really their full costs.

MR. LEGGATT: Indeed.

THE PRESIDENT: I am sure everyone has borne that in mind, the point having been taken in the first place, but obviously we would not want to put bystanders in the position of having to incur costs – irrecoverable costs because of the way these particular proceedings have proceeded up to now. So everybody should clearly understand that if the purchasers are invited to come, and they do come, and it later turns out that that was an unnecessary exercise ----

MR. LEGGATT: Somebody will be paying for it.

THE PRESIDENT: Somebody will have to pay for it.

MR. LEGGATT: Yes.

MISS SIMMONS: And should that be included in the letter that the Registrar writes?

THE PRESIDENT: Again I think we are somewhat thinking aloud between ourselves, I would have thought some indication to that effect, or a re-statement of the indication that I have just given, probably should be signalled to the purchasers.

MR. LEGGATT: Certainly as to the potential for orders to be made, as to what orders are appropriate.

THE PRESIDENT: As to what orders are appropriate we could not decide but a statement to the effect that, if it turned out at the end of the day their presence on the next occasion was unnecessary, after full submission and argument, the Tribunal takes the view that appropriate orders for costs should be made – or words to that effect.

MR. LEGGATT: We certainly see the sense of that. Sir, I do not know if it is useful to develop anything else at this stage – probably not unless the Tribunal would find it helpful. I can make it clear that we will submit that there is no limitation or difficulty about joining the purchasers as parties, but I can make those submissions at the time.

THE PRESIDENT: Your position has been made clear, thank you.

MR. LEGGATT: We would say that that would be the case even if it had been in the High Court, because they would be necessary parties, but in this Tribunal there is no such restriction and the Tribunal has an unfettered power under Rule 35 to add parties where it thinks it appropriate to do so.

As for Dalay and Deans, the agreement and the position there, we do not consider it necessary to join Deans as a party, but as a point has been taken about that we do not see the point in having an unnecessary argument about it, and so we would propose to treat Deans in the same way as all the other purchasers, even though they have already made their position clear.

THE PRESIDENT: Yes. What about Mr. Hoskin's point that one way or another we should try and sort all this out as soon as possible, and certainly before the trial rather than parking to the end.

MR. LEGGATT: I certainly share his approach that it ought to be sorted out as soon as possible in the sense that the position should be clarified as to whether the purchasers are going to be joined to the action or not. Whether it is sensible to decide issues as to whether there has been an assignment or not before the trial or after would be something, I would suggest, which could only itself be sorted out once we know what their position is. It may, for example, turn out that there are no real issues – that is one possibility.

THE PRESIDENT: It may do.

MR. LEGGATT: It might turn out that there is an issue but that only one party wants actively to pursue the proceedings so that Mr. Hoskins' concern about having too many people there is not a real one, and that the best time to decide the issue would be after the Tribunal have first decided whether there is a good claim, and then if the only question is who the money goes to it might be

a sensible course to leave that issue until the end. But I would respectfully submit that the best time to decide the order of the timetable is when we know exactly what position the purchasers do take, and when we see what the issues are which the Tribunal is going to have to decide. But we would certainly favour expedition in going forward to the next directions' hearing, subject obviously to it being necessary allow the purchasers a little time to take their advice and to decide for themselves what position they wish to take.

THE PRESIDENT: The next hearing we have fixed in this matter I think is 7th December, and that it would seem ----

MISS SIMMONS: I just wonder if we are going down the road of inviting them to come before they are joined then – I do not know if our timetable allows it – whether we could have a hearing slightly earlier than then because otherwise we are getting very near in time to the hearing date and what was going through my mind was that the one thing that we might have to decide is the limitation point ----

MR. LEGGATT: Yes, because if there was a limitation objection to them being joined.

MISS SIMMONS: And also if the limitation point means that they ought to have come in originally and there was no cause of action until they came in – if time had not stopped – then that is okay. If it is an equitable assignment, and I am not sure on the limitation point on the statute, if it is an equitable assignment my reading of the law at the moment – subject to what everybody says – is that the limitation period stops when the proceedings started in that cause of action. It stays in the assignor at all times, but actually it is only a procedural point.

MR. LEGGATT: Exactly.

MISS SIMMONS: But I am not sure what the s.136, and the transfer, whether that makes a difference or not, so that seems to me to be something that would not be sorted out. If the answer is that there is no limitation point, then there is not a problem to sort out whether there has been an assignment – probably, unless they wanted to take the action over.

MR. LEGGATT: Yes.

MISS SIMMONS: But if, on the other hand, that was not the case and limitation is a real problem, then it may be that one does not know whether there has been an assignment, because you cannot do it hypothetically.

MR. LEGGATT: I understand that.

MISS SIMMONS: So may be that is something that needs just to be thought about.

MR. LEGGATT: Yes, it does. It may be possible ----

MISS SIMMONS: It might all sort itself out.

MR. LEGGATT: -- for the Tribunal to decide the limitation point without deciding whether there has been assignment.

MISS SIMMONS: But it has a knock-on effect.

MR. LEGGATT: But I certainly understand the point you are making.

(The Tribunal confer)

THE PRESIDENT: Mr. Leggatt, for practical reasons and in order to give the purchasers a sufficient opportunity to consider what, coming out of the blue, may be a slightly complicated position, we ought to try to maintain the 7th December – I do not think it is really practical to try to slip something in earlier. But if the necessary letters can be written as soon as possible, no doubt some kind of dialogue can commence, and it may very well be behind the scenes all the various parties can make some progress in sorting out the situation and it may be that when we get back on 7th December the issues have narrowed, gone away, or otherwise crystallised so that we can, within that framework, press on.

MR. LEGGATT: Yes, and certainly we, for our part, will make every effort to crystallise the issues and to take matters forward with the purchasers before that time.

MISS SIMMONS: What I am wondering, and I am not sure that we can sit here and work it out, is that if certain points need to be decided, such as the limitation point, and if that was possible to do on the 7th, or before Christmas, that would be quite important to do for the purposes of the date of the hearing. If all that happens on 7th is that everybody comes along to discuss what is going to happen, then we have another ----

MR. LEGGATT: Yes, indeed. We would certainly very much hope that the 7th could be a hearing where any issues that need to be decided could be decided but with obviously everybody who wishes to be heard present. The Tribunal will then decide the question of limitation – if it needed to be decided to enable the matter to go forth – at the hearing on that day.

THE PRESIDENT: I think our aim would be – we may not achieve it, but let us have it as an aim – to decide everything that needs to be decided , or at least to have it argued, on the 7th so that we do not let matters slip.

MISS SIMMONS: Would a possibility be that what was done today while everybody was here was to make a list of all the points that need to be decided on the 7th so that that can go into the letter that

is written to the purchasers so that they know exactly what to focus on and what is going to happen on 7th and so everybody's mind is directed at the right points.

MR. LEGGATT: We will certainly quite happily indicate what we consider the issues to be, but what ultimately turn out to be issues does in part depend on the attitude which the purchasers adopt. For example, if they were to take the view that there has not been an assignment that would be one thing. If they wished to argue that there had that would make things rather different. We are certainly happy to provide a list of what we see as possible issues.

MISS SIMMONS: Would a possibility - I am only thinking aloud – would a half way house be that in the order today, because it might not be appropriate to include that in the first letter, that there is some information given to the Tribunal after three or four weeks as to where the parties have got to with the purchasers, and what appears now to be the issue so that we can give some directions in relation to that? What I am trying to avoid is everybody turns up on 7th saying "I am terribly sorry, we have done our best but in fact we cannot really get there."

MR. HOSKINS: Can I just make some points at this stage. I am sorry to interrupt but it seems to me it is important, there are some points I wish to make that impact on this in terms of how it is dealt with. In terms of how the notification should work, we would suggest that the Tribunal should write the letter which is to go and should attach the Notice of Application and the skeleton arguments and either the Tribunal can do that or it can use the claimants' solicitors as a post box, but we are nervous about having the claimants write a letter to the purchasers because they may have an interest – obviously there are other ways around that but it seems to be far more sensible that the Tribunal, if it is willing to, takes charge of that because it could do so in a neutral manner.

We agree that the letter should make clear that the purchasers may be joined in any event, but what is important we say, with respect, to understand is that the purchasers are not being directed to attend, they are being informed of the issues in these proceedings and being invited, if they wish, to make observations and/or to participate. That deals with the costs' point because there is no question of them having to incur costs against their will. It is purely their choice of whether they wish to then take part or not and then there will not be a problem with costs because either they will come out on the winning side, the losing side or not. It is an invitation, it is not a summons - the point being that if they choose not to attend, as Mr. Leggatt as already said, that is their choice and we deal with that, we hear the arguments from the parties who have chosen to make arguments and, if there is an equitable assignment and they have to be joined as defendant,

then so be it, but they do not take any part in the proceedings. So that is what I wanted to say about the letter, it should come from the Tribunal, it is an invitation and not a summons, but it should make clear that they may be joined in any event, even if they do not wish to play a part, but they will not be required as such to play a part necessarily.

The next point is how do we move this forward? The difficulty is that we do not know what position the purchasers are going to take and then there is the question of how many hearings are we going to have? Do we have one hearing to find out what the position of the purchasers is, followed by then another hearing if necessary, or do we try and manage it so that this is just one hearing. It seems to us that because of the urgency of this matter it is far more appropriate to try and have one hearing at which all the issues are dealt with. So what one could have is the Tribunal letter, as I have indicated, but asking by letter that they indicate either whether they wish to take any part, because that is not a very heavy cost burden if the answer is "no", or else they can simply not reply and then we will take it as a "no". If they do want to take part to indicate in a preliminary view, perhaps what position they wish to take, and they will have had the skeleton arguments in the way I have suggested, so at least they can give us an early indication.

The question then is when would the hearing take place at which all the issues are debated, because that is what we suggest, there should be one hearing at which all these issues are thrashed out – assignment, limitation, construction, everything. We submit there is a problem with leaving it to 7th December, and the problem is this. On the current timetable for trial disclosure was to take place by 21st September 2004 and so that date has passed. We are to serve our witness statements of fact by 9th November 2004 and any further statements of facts for the claimant are to come on 23rd November 2004. Again, this is a potential problem but it is important that I raise it because a problem that may arise is if the purchasers are to play a part in the proceedings it may well be that disclosure issues at the very least arise and I say that for this reason. It is not simply an idle imagination. In the Taylor Vinters' of 20th September 2004, which is the covering letter to the provision of the list of documents they indicated to Freshfields that some documents within a particular category were not in the claimants' possession or custody because they had been passed on to the purchasers. There is no reason not to suppose that that is incorrect. Now that indicates therefore that there are at least some documents in the hands of the purchasers which are relevant. If the purchasers then become joined as parties to the action then clearly a disclosure exercise will have to take place, even if it is just for them to say "We do not have anything". I am

not trying to create problems, but I think what this does show is that this matter has to be sorted out sooner rather than later, because the longer it is left the more likely the fact that the trial is going to be seriously compromised.

If, for example, it is left over to 7th December, we would be faced with the situation that currently we are due to serve witness statements of fact without knowing whether we have had all the disclosure, and that does not seem to be a very economic or efficient way of dealing with the matter.

THE PRESIDENT: It is 21st February that the trial is set for at the moment, is that right?

MR. HOSKINS: It is, yes.

MISS SIMMONS: Are the claimants saying they have no power to get these documents?

MR. HOSKINS: I am quoting from the letter; we have not followed this up yet. It may be something we need to follow up at some stage, but that is the letter as was sent to us. It was in the covering letter to the disclosure list saying that it was not in their possession or custody, and they certainly have not indicated to us that they have tried to get them and not got them. In fact, there is nothing in the purchase agreements. For example, one would often see in the sort of situation where a business is sold and documents are transferred as part of the business that the vendor would retain the power to require assistance, co-operation of documents if litigation of this sort arose, but there is no such provision.

THE PRESIDENT: What do you suggest, Mr. Hoskins?

MR. HOSKINS: The suggestion is that we need to get these issues determined as quickly as possible or the timetable has to be adjusted for trial because with all due respect it just does not seem sensible to have witness statements of fact being provided when there may well be disclosure. I do not know how much disclosure there is going to be, but it seems there is going to be some.

MISS SIMMONS: One could subpoena the documents.

MR. HOSKINS: It is possible, yes. That is obviously one of the things we have been considering, whether we need to go out and ask for that to happen, but the point is if they are joined as parties you would have to expressly exclude the normal disclosure process, or there is going to have to be a disclosure process, that is my point. So something has to give in a sense, either we have to deal with this very quickly or we have to look at ----

THE PRESIDENT: Surely at the moment there is no reason why you should not pursue disclosure of those documents, whether they are joined as parties or not, either by asking us to make an order or by asking the claimants to get hold of them or by some other means.

MR. HOSKINS: If we want them that is correct, Sir. The question is if they are joined as parties the normal disclosure exercise will be foregone, and it is left to us to decide whether we wish to apply or not, and that may well be the course it is taking.

MISS SIMMONS: But that may cause a timetable problem anyway, and there are six weeks between now and then, and if this had not happened you would be wanting those documents and you would be going off and either pressing the claimants to get them under whatever power they have to get them or otherwise treating them as a witness and getting the documents under subpoena.

MR. HOSKINS: Madam, yes, if we choose to do that. As I say, we have not made a decision yet as to whether we wish to do that or not, but the point is if they are joined as parties the normal situation would be that they would be required to give disclosure and the difference between the situations that we put forward to you is whether the onus is put on us to decide whether we want documents or not for making applications for disclosure from third parties or whether, if they are joined as parties, that is to happen in the natural course of events.

MISS SIMMONS: It is not going to be a very attractive argument, is it, in seven weeks' time, or whenever, to say "Wait a minute, now we want the documents from you" and therefore the timetable has to go. In fact if they are only being joined because of some other point and seven weeks have gone by when those documents could have been produced under a different route.

MR. HOSKINS: Assume that we do not ask for third party disclosure and assume that they are joined at some stage, my point is that the Tribunal then has to decide whether those persons who have been joined as parties and who apparently hold relevant documents should be excused from the normal disclosure exercise. The Tribunal may decide to do that because of the tight timetable, but it would be an unusual step for the Tribunal to take. Indeed, the disclosure may help us, it may help the claimants, it may help the purchasers. If the purchasers are joined as parties it may well be they insist on being able to provide the documents they have.

THE PRESIDENT: My first reaction is disclosure is not necessarily automatic, even in our, as it were, civil jurisdiction. It is rather up to you, the defendants, to decide what classes of documents you really wish to get hold of.

MR. HOSKINS: Sir, I accept that, but it is also the case that the purchasers, if they are joined, may wish to produce documents, and may wish to put in their own witness statements.

MISS SIMMONS: I think that is a different matter from the question of whether you want those documents. If they want to put them in then one would have to consider their application. My feeling at the moment is you have to make a decision about it and it should not be dependent on whether or not they are joined. One should not wait until that question ----

MR. HOSKINS: If that is the Tribunal's view I would leave it like this ----

MISS SIMMONS: That is my feeling at the moment.

MR. HOSKINS: Yes, I am sorry. If that is part of the Tribunal's feeling no adverse inference can and should be drawn by our decision whether or not to make those disclosure applications. So, for example, if at trial we are cross-examining and a witness says "Oh, we think we had those documents, but we do not have them any more", it cannot be said by whoever we are opposing – whether it be the claimants or purchasers - "Ah, you did not ask for them", because the onus is on the party who wishes to put forward and rely on evidence to produce the documents, not on us to go chasing them. That is a marker we would like to put down.

MISS SIMMONS: At the moment they are not a party.

MR. HOSKINS: I accept, I am trying to be helpful – it may not sound like it.

THE PRESIDENT: What I think, Mr. Hoskins, because I think we have to give a reasonable time to the purchasers despite the need to press on with the action as far as possible, my own feeling would be the best thing is to hold the date for 7th December for the relevant letters to be written to the purchasers and for myself I think that the Tribunal should certainly write a letter and that it would be useful for the purchasers to have the applications and skeleton arguments that have been made in this case. Thereafter, all correspondence that is not "without prejudice" correspondence should be copied into the Registry and, as matters unfold, it may either be that it is all going to be resolved pretty quickly, or it is going to be very complicated and probably after not too long we shall know which way the wind is blowing. If it emerges from the correspondence that it is highly desirable to do something before 7th December, and you wish to ask us to make a special effort to determine various issues earlier than envisaged and it is practical to do so both from our point of view and the purchaser's point of view, then I think you should write in and ask us to do what we can to meet your concerns, but just at the moment I do not think we can say we are going to decide

anything any earlier than 7th December without seeing, to some extent, how matters are going to unfold.

MR. HOSKINS: In a sense the points I am making are not really points on behalf of the Roche defendants as such, I am simply trying to -----

THE PRESIDENT: You are trying to be helpful and help us to see all possible outcomes.

MR. HOSKINS: Precisely.

THE PRESIDENT: At some point we may have to consider the exact timing of the trial date, but let us hold it for the time being and see how things go. I think that is the right approach.

MR. HOSKINS: I am happy with that, Sir.

MISS SIMMONS: And the preparation for the hearing should not stop.

THE PRESIDENT: No, the timetable we have already laid down should ----

MISS SIMMONS: One should not assume that these people are going to be joined, or not joined, or whatever. One should just continue in the way that one would have done had this issue not arisen?

MR. HOSKINS: That was my understanding, that we will serve our witness statements.

THE PRESIDENT: Yes, just carry on.

MISS SIMMONS: Any disclosure and any applications for disclosure should be made.

MR. HOSKINS: Certainly.

THE PRESIDENT: Thank you. Anything to add to that, Mr. Kennelly?

MR. KENNELLY: Once again Mr. Hoskins helpfully summarises our position as well. We should stress that although we are just adopting what he is saying we also have great concerns about the timetable because we are in the middle of our preparation and there may well be further documents and witness statements from the purchasers that will endanger the trial date.

THE PRESIDENT: Yes. Mr. Leggatt?

MR. LEGGATT: There is nothing I wish to add.

THE PRESIDENT: Thank you. Well it may be that that is as far as we can usefully take things here today.

MR. HOSKINS: Can I just put down one marker, which is the question of costs in relation to this issue? I do not again anticipate you will want to deal with it today, however I want to keep it at the forefront of people's minds. The Tribunal, I am sure, is aware from the correspondence that we have been pushing for this issue of the right to sue to come to a head for a very long time. It was first raised by Ashurst in April this year, and you remember that not having had a satisfactory

response Freshfields raised it at the Case Management Conference which took place in July, and an order was made that the agreement should be provided by 30th July. In fact, the last agreement was not received towards the end of August and in the meantime we have been pressing, pressing, saying "Please tell us what your position is" and letters we have had back have simply said "We have the right to sue". In those circumstances we say whatever happens in a sense, at the end of this we will be looking for our costs, and we would like that to be dealt with on 7th December. I say that because I would like time to be left for it, if possible, on 7th December.

THE PRESIDENT: We will cross all those bridges a bit later on, I think, Mr. Hoskins. Good, thank you very much. I think, for our part, what we shall probably do is to ask the Registry to prepare the necessary letter and send a draft of the Tribunal's letter to the existing parties for comment before we actually send them anything. Thank you very much.

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