IN THE COMPETITION APPEAL TRIBUNAL Case No 1098/5/7/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7th July 2008

Before:
THE HON. SIR GERALD BARLING
(The President)

ANN KELLY
MICHAEL DAVEY

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BCL OLD CO LIMITED
(2) DFL OLD CO LIMITED
(3) PFF OLD CO LIMITED
(4) DEANS FOOD LIMITED Claimants

- v -

(1) BASF SE (formerly BASF AG)
(2) BASF PLC
(3) FRANK WRIGHT LIMITED Defendants

Transcribed from Tape by
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

Mr. Aidan Robertson (instructed by Taylor Vinters) appeared for the Claimants.

Mr. Mark Brealey QC and Mr. Stephen Brown (instructed by Mayer Brown LLP) appeared for the Defendants

---

HEARING

MR. BREALEY: Good morning, Sir, members of the Tribunal. I appear with Mr. Brown for the defendants and, as the Tribunal knows, Mr. Robertson appears on behalf of the claimants, BCL and Deans Foods. As you, Sir, and the Tribunal will also know this is the hearing of a preliminary issue as to whether the claimants' claim for damages is time barred. As the Tribunal will know from the skeleton arguments, if I can cut to the issue quite quickly, the main difference between the parties is whether BASF's appeal to the CFI (the Court of First Instance), its appeal to annul or reduce the fine suspended time for bringing the claim. So did its appeal to the Court of First Instance in Luxembourg which was solely related for the annulment of the reduction of the fine, did that suspend time for bringing the claim.

If it does suspend time the claimants' claim for damages is within time by about two days, and if it does not suspend time the claim is out of time, and that is the issue. Again, as the Tribunal know, in essence we submit that the EC Commission's decision to fine BASF – so that decision is not a relevant decision; is not a relevant decision and consequently the appeal by my clients, BASF against that decision did not suspend time. So the decision to fine was not a relevant decision. We submit that that interpretation of the Act is correct and is supported by the clear wording of the Act, and this morning I would like to concentrate on the wording of the Act. I would ask the Tribunal to start with a clean sheet of paper, as it were, untainted by some of the statements made by the Tribunal in the *Emerson* judgments. So I would like to take the Tribunal through it afresh and have a look at the Act and the Tribunal's Rules because we say our interpretation is supported by the clear meaning of the Act. After I have gone through that I will just mention two policy considerations which we say support our interpretations. But again, as the Tribunal will know, those effectively are relevant if the Act is clear. In other words the Tribunal's duty is to interpret the Act, apply the Act, apply the clear meaning of the Act untainted by the niceties of whether it is better for one party or another.

Could I start please with the wording of the Act, but before we do that go to Rule 31 of the Tribunal's Rules, which are at tab 14. Commencement of proceedings:

> "31 (1) A claim for damages must be made within a period of two years beginning with the relevant date."

So there are essentially two issues that one has to sort out. One is the relevant date and the second is the relevant decision. What is the relevant date and what is the relevant decision. The relevant date we see in Rule 31(2):

> "(2) The relevant date for the purpose of paragraph (1) is the later of the following" and what we are concerned with in "(a)" and one can underline it:
>
> > "(a) the end of the period specified in section 47A … (8) of the 1998 Act in relation to the decision on the basis of which the claim is made."

So one can highlight the words "the end of the period specified in section 47A (8) of the 1998 Act in relation to the decision on the basis of which the claim is made." And I emphasise the words also "in relation to the decision on the basis of which the claim is made". Again we are looking at relevant dates and relevant decision.

Reference is made to subsection 8, but before we come to subsection 8 if I can set out the purpose of subsection 8 and the time limits. Subsection 8 provides for a time period where the claimant does not need permission to bring the claim, thus time starts to run from the date when the claimant no longer needs permission to bring a claim. In other words, he, she or it can bring the claim as of right. When you can bring the claim as of right then time starts to run. That is the purpose of relevant date and relevant decision. Do you need permission to bring the claim. If you do time is not running it is suspended. If you can bring the claim as of right time is running.

So we see that s.31 refers to subsection 8, but in order to get a sense of what subsection 8 is all about I would like to go to s.47A and have a look at that as a whole, and that is in tab 12 of the bundle. I do apologise but I am going to be referring to other parts of the Act. Just to flag up what I want to do, I would like to have a look at s.47A as a whole, because we submit that our interpretation is supported by 47A but also it is further supported by the wording in the rest of the Act.

So s.47A is the provision in the Act which allows claimants to bring damages claims in this forum before this Tribunal. So 47A(1):

> "This section applies to –
>
> (a) any claim for damages …
>
> Which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition …"

And those are important words: "who has suffered loss or damage as a result of the infringement of a relevant prohibition" because we shall see those words "relevant prohibition crop up time and time again "… may make in civil proceedings brought in any part of the United Kingdom", and "in this section 'relevant prohibition' means any of the following" and then we see the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 81(1) which is the one we are concerned with, and then the prohibition in Article 82, section and then the prohibition in the Coal and Steel and the prohibition in 66/67 of the Treaty. That is a Coal and Steel Treaty as well. It refers to 'the prohibition'. Then, subsection (4),

> "A claim to which this section applies may be brought in proceedings before the Tribunal".

Then, subsection (5),

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

I would ask the Tribunal to underline the words 'that decision' or 'that' because that is, we say, a flaw in the claimant's skeleton. They do not have regard to the word 'that'. Then,

"The decisions which may be relied on for the purpose of the proceedings under this section are . . . [then the decision of the Oft] The Chapter I prohibition has been infringed; a decision of the OFT that the prohibition in Article 81(1) has been infringed; a decision of the Tribunal that the Chapter I prohibition has been infringed"

We shall come onto that a bit later on.

"A decision of the European Commission for the prohibition under Article 81(1) has been infringed".

So, again, references to the prohibition in Article 81 has been infringed. Just stopping there, summarising these sections, subsections (1) and (2) apply to any claim for damages which a person who has suffered loss as a result of the infringement of the prohibition in Article 81(1) of the Treaty may make in civil proceedings. So, we are looking at the loss suffered as a result of the infringement of the prohibition in Article 81.

Then, summarising subsections (4) and (6), no claim may be made in proceedings before the Tribunal until a decision of the European Commission has established that the prohibition in Article 81 has been infringed. So, until the decision by the European Commission that the Treaty has been infringed, one cannot bring an action for damages, and then otherwise than with the permission of the Tribunal during any period specified in subsection (8) which related to that decision.

Then we get to subsection (8), which is the subsection referred to in Rule 31.

"The periods during which proceedings in respect of a claim made in reliance on a decision may not be bring without permission [so, you need permission], (a) the period during which proceedings against the decision of finding may be instituted in the European Court [so, as the Tribunal knows, the decision is adopted on 21st November, and you have two months and ten days in which to appeal, and during that time time is suspended, and if appeal is made against that decision] and (b) if any such proceedings are instituted, the period before those proceedings are determined".

So, while those proceedings are continuing, time is suspended.

THE PRESIDENT: In that period of course no-one will know - the claimants will not know - what the appeal is going to be against. So, it stands to reason, does it not, that in that period it does not matter. You get the benefit of that period whatever happens.

MR. BREALEY: Yes. Whatever happens, whether it is an appeal against fine, an appeal against -- During that period, if there is complete silence -- if there is radio silence you get the benefit of that two months and ten days if it is the UK.

THE PRESIDENT: What would happen if someone put in an appeal after a month only against a fine? I suppose it is a matter of construction of (a) then as to whether you still get the two-month period before time starts?

MR. BREALEY: You are right, Sir. I suppose you have got to read (b) with (a) so that you get your two months and ten days, but if you appeal against the fine -- No. Thinking aloud, you may appeal against the fine and have second thoughts.

THE PRESIDENT: You still have another month in which to put in an amended ----

MR. BREALEY: You might have another month, but I am not sure whether the CFI would allow you to do that.

THE PRESIDENT: They might do.

MR. BREALEY: They probably do allow you amend during the time limit.

THE PRESIDENT: You would probably get the benefit.

MR. BREALEY: You would probably get the benefit, even though you do know -- or you are pretty certain that it is only an appeal against a fine.

So, just to recap – no proceedings can be brought at all in the Tribunal until the EC Commission has adopted a decision that the prohibition in Article 81 has been infringed, and permission is needed if the claim is brought within two months and ten days subject to what you, Sir, have just said to me.

The real issue now is: What is a relevant decision? We know the relevant date. The relevant date is in subsection (8) It is the end of the period in which you can commence proceedings. So, that is (8)(a) - assuming that you get the benefit of the extra month if you put your appeal in within the month. We know the relevant date is in (b) - if you do appeal, then it is when that appeal is determined. The key issue in this preliminary issue is: What is the relevant decision? The answer to that, in my submission, is that you first look at subsection (8). You know that subsection (8) has to be read with subsection (5)(b). So, subsection (8) and subsection (5)(b) must be read together. Why? Because subsection (5)(b) says,

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

So, (5) and (8) have to be read together. Subsection (5)(b) refers to 'that decision'. That is why I emphasise the words 'that decision'. What is that decision? That decision refers back to subsection (5)(a). ""But no claim may be made in such proceedings until a decision ----" What is that decision? That is described in subsection (6). We look at subsection (6) and that is a decision of the European Commission that the probation in Article 81(1) has been infringed. So, you look at (8) and (5)(b) together. (5)(b) refers to 'that decision'. We are looking at the time periods there. (5)(b) goes back to 5(a) and 5(a) refers to (6). So, we know that the decision in (8) is referring to a decision that Article 81 has been infringed.

If I could just turn to the claimant's skeleton at Tab 2, it starts at para. 23. This is within their first submission which they say both parties in this case ----

THE PRESIDENT: Can you tell me which paragraph, please?

MR. BREALEY: Paragraph 4, p4 is the claimants' submission, the clear wording of the limitation rules under the CAT Rules and the Act. So the Tribunal is faced with two parties coming to this Tribunal both saying that the Act is clearly in their favour. We go on over the page to paras. 22 and 23 where one sees the claimants saying that in subsection 8 "any decision", so "decision" means any decision and it encompasses essentially everything – the decision to fine, the decision that the prohibition has been infringed. Paragraphs 31 and 32 say:

> "31 On BASF's interpretation it would involve giving a meaning to the phrase 'proceedings against the decision' which is contrary to its normal plain meaning. If it had been intended that the time period in section 47A(8) only referred to proceedings against a finding of infringement, and not to other types of proceedings (such as an application to annul or reduce a fine), the Act would have so provided."
>
> 32 Indeed, the references to which BASF refer where the draftsman did specifically refer to 'infringement' and 'infringed' demonstrate that where the draftsman intended specifically to refer to infringement, he did so. The draftsman did not do so in section 47A(8) precisely because 'proceedings against the decision' was intended to refer to all types of proceedings against a decision."

In my submission, although the claimants are correct to say that the Act provided so, we say it did, because when one looks at (8) as they say it goes back to 5(b), that decision, 5(b) goes back to 5(a) – the decision mentioned in subsection (6) and when one looks at subsection (6) it is the decision by the European Commission, the prohibition in Article 81(1) has been infringed.

In my respectful submission the claimants are correct when they say the Act distinguishes between a decision to fine and a decision that the prohibition has been infringed. The paragraphs of the skeleton I have just read out are clearly based on the claimants accepting that

there is a distinction between a decision to fine and a decision that the Article 81(1) prohibition has been infringed. We will see in a few minutes that the Act does do that. There is a clear distinction in the Act between decisions to fine and a decision that the prohibition is being infringed. But what we cannot accept that the claimants are correct is when they say that s.47A clearly shows that "decision" in subsection (8) refers to any decision.

If I could then go to the language in the rest of the Act I would like to show the Tribunal that the Act does distinguish quite clearly between a decision that prohibition has been infringed and a decision to fine. When one finds in the Act s.47A, a decision that the relevant prohibition in question has been infringed, we know exactly what is meant by that.

We could start with s.2, which is the prohibition. Here we see s.2 but it is headed "The Prohibition". So again, picking up the language in s.47A, "The relevant prohibition". If I could ask the Tribunal to go to s.31, this is "Decisions following an investigation".

> "If as a result of an investigation, the OFT proposes to make a decision, the OFT must –
>
> (a) give written notice"

And then:

> "(2) For the purposes of this section … "decision" means a decision of the OFT –
>
> (a) that the Chapter I prohibition has been infringed."

Again, we get a reference to a decision that the Chapter 1 prohibition has been infringed.

THE PRESIDENT: Then "2(c) that the prohibition in Article 81(1) had been infringed."

MR. BREALEY: Sorry, "that the prohibition in Article 81(1) has been infringed."

Section 32 under "Enforcement", these are "Directions in relation to agreements".

> "If the [OFT] has made a decision that an agreement infringes the Chapter I prohibition [or that it infringes the prohibition in Article 81(1)], [it] may give to such person or persons as [it] considers appropriate such directions as [it] considers appropriate to bring the infringement to an end".

So again there is a reference to an infringement of the Chapter I prohibition, and there was a reference to a remedy to rectify that prohibition, so the remedy is tied in with the prohibition of 81(1) has been infringed.

Then s.36 is important, this deals with penalties. Again:

> "(1) On making a decision that an agreement has infringed the Chapter I prohibition [or that infringed the prohibition in 81(1)] the [OFT] may require an undertaking which is a party to the agreement to pay [the OFT] a penalty in respect of the infringement".

So the decision to require a party to pay a penalty is dependent on the very words we see in s.47A a decision that the agreement has infringed the Chapter I prohibition or the prohibition in Article 81(1). So we start seeing a clear distinction between a decision that the prohibition in Article 81(1) has been infringed, and a decision to fine somebody.

Then we come to s.46 – appealable decisions. Section 46 lists a type of decision which can be appealed to this Tribunal.

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

Then we see subsection 3 contain a bundle of decisions. (b) is a decision that the prohibition in 81(1) has been infringed, again picking up the wording of s.47A. Then (i) at the bottom:

> "A decision after the imposition of any penalty under s.36 or as to the amount of any such penalty".

So clearly the Act is envisaging two types of decision relevant to this preliminary issue, a decision that the prohibition has been infringed, and a decision to impose a penalty. Third party appeals, s.47, continues that theme in s.46 in the sense that a third party with sufficient interest can appeal a decision that the prohibition has been infringed, and a third party seemingly with sufficient interest cannot appeal a decision to fine. Again, a distinction is being made between decision prohibitions being infringed and a decision to fine.

Then we skip over s.47A, which we have already referred to and go to s.49, which is further appeals to the Court of Appeal. Again, we see the language in that being used to make a distinction between a decision that the prohibition has been infringed and a fine. So further appeals, an appeal lies to the appropriate court – s.49 – and we know from subsection (iii) the appropriate court is the Court of Appeal.

"An appeal lies to the appropriate court from a decision of the Tribunal as to the amount of a penalty under s.36."

That is a decision as to the amount of a penalty – that is (a), and then "(c) on a point of law arising from any other decision of the Tribunal on an appeal under s.46." It is a bit tortuous but we know that the penalty in s.46 was in (i). For example, the prohibition in Article 81 was (b). So again a clear distinction being made, and we know that the relevant decision in s.47A(6) we see in (c):

> " a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter 1 prohibition … or the prohibition in Article 81(1) … has been infringed."

So again, if one looks at the wording there with what can be appealed, that decision by the Tribunal, that 81(1) has been infringed, can be appealed to the Court of Appeal on a point of

law, but the decision as to the amount of the penalty and the appeal to the Court of Appeal in any event.

So coming back full circle on the plain meaning of this Act we submit that the relevant decision is the decision that the prohibition has been infringed and it does not mean a decision as to the amount of the penalty. If there is one difference between the claimants and the defendants here it is that the claimants have missed out the word "that" in subsection 5(b), which gives subsection 8 its sense, it refers back to subsection 5(a) which in turn refers to subsection 6, and subsection 6 we know is the decision that the prohibition has been infringed.

I asked the court to start with a clean sheet of paper on this issue, because obviously the claimants rely on the *Emerson* judgment, the recent judgment of 28th April this year, and I make two short points on the *Emerson* judgments. First, this issue – the one that I have just spent the last 35 minutes on – this issue as to the proper interpretation of s.47A was not argued at all. It was simply not part of any argument that was made to the Tribunal. The cartelists accepted that there was permission and spent their time trying to make permission as difficult as possible - not that they were trying to make it as difficult as possible but we know that there was no argument on this, although it is probably true, from para.3 of the Tribunal's judgment.

THE PRESIDENT: Which one are we looking at?

MR. BREALEY: It is 28th April tab 3.

THE PRESIDENT: Was it not argued in the first one?

MR. BREALEY: Paragraph 3 of the latter judgment ----

THE PRESIDENT: Sorry. Do not let me take you out of your course. Show me para. 3 first.

MR. BREALEY: Paragraph 3 of the last one - 28th April, 2008 -- There we see,

> "SGL, Schunk and Carbone Lorraine, to each of which the decision was addressed, brought actions for annulment . . . The CFI appeals are described in more detail in s.II below. In these circumstances, time has not yet begun to run for making a claim for damages under s.47A of the Act and the claimants require the Tribunal's permission for such a claim to be made whilst appeal proceedings against the decision are on foot".

The whole of this judgment is concerned with whether permission should, or should not, be granted.

THE PRESIDENT: Yes. I think that is absolutely right.

MR. BREALEY: The second point I would like to make on *Emerson* - and one sees this from para. 87 - is that although some of the arguments seem to be on the fines, all three defendants were seeking to annul the whole decision. So, it seems that if successful, the whole decision would

fall away. That may be why they were solely concerned whether permission should be granted. So, para. 87 at the bottom,

"Having carefully considered the proposed defendants' applications for annulment, we consider it would not be appropriate in this case for the Tribunal to grant permission pending the determination of these CFI appeals. We note, first of all, that in the form of order sought from the CFI, each of the proposed defendants is seeking not only a reduction in the fine, but also the annulment of the decision, either in its entirety or insofar as it applies to that proposed defendant".

So, again, we accept that if there is an appeal against the whole of the decision, which includes with it that the prohibition has been infringed, then time is suspended. So, not only was it not argued, but any comments or statements made by the Tribunal as to the niceties of what should happen were strictly *obitur*.

THE PRESIDENT: They seem to have started off from where they left of, as it were, in *Emerson (1)* where it does appear to have bee argued.

MR. BREALEY: In *Emerson (1)* really the issue there was: Can you sue one defendant when the other two defendants have appealed? So, in my submission, it was not argued in the way that we have argued it today. All that was happening there was that Morgan Crucible, who did not appeal, was faced with a claim for damages and the others had appealed to the CFI. Morgan Crucible had been given leniency, and obviously they were not going to appeal. The question was whether you needed permission to bring a claim against Morgan Crucible - a person who had not appealed - when the others were appealing. But, the appeal was still on liability. So, technically ----

THE PRESIDENT: It was still said that you did need permission because time had not started running, notwithstanding that this person had not appealed.

MR. BREALEY: That issue is not before the Tribunal today - the correctness or otherwise of whether if you have two cartelists and one appeals and the other does, whether the appeal by one cartelist on liability suspends time for everybody.

THE PRESIDENT: I agree that it is not before the Tribunal in that form, but they had to go through the same process, did they not, of deciding what s.47(a)(8) meant, and whether it meant the whole global decision or whether it meant you could salami-slice the infringement from the fines -- They seem to look at that at any rate.

MR. BREALEY: They looked at it, but not in the sense that we are looking at it today, in my submission.

THE PRESIDENT: Not in the same context exactly, no. The ratio of *Emerson (1*) is if you have got various cartelists and some appeal and some do not. Do you need permission to go against

those who have not appealed? The effect of the Tribunal's decision in *Emerson (1)* -- Essentially, if you look at s.47(a) it is made in general terms. It does not actually say in subsection (8) if there is an appeal by the person you are suing ----

THE PRESIDENT: Morgan Crucible had not appealed anything ----

MR. BREALEY: -- because they got leniency.

THE PRESIDENT: So, you say the difference here is that someone had appealed -- Did it matter whether the others had appealed against infringement or fines? Would it have mattered in that case? If they had only appealed against fines ----

MR. BREALEY: If it only appealed against fines, they would have been out of time.

THE PRESIDENT: So, in other words, the Tribunal would have decided differently as regards Morgan Crucible, you say in your submission.

MR. BREALEY: I think the dates are that the decision was 2003 in *Emerson*. The claim for damages, I think ----

THE PRESIDENT: I am not so much worrying about the date as much as -- They found that time had not started running. The Tribunal found that actually time had not started running against Morgan Crucible even though they had not appealed. Therefore permission was needed against them, which was granted.

MR. BREALEY: Which was granted in Emerson.

THE PRESIDENT: The reason that time had not started running against them was because other people had made appeals. I am just interested to know whether it was the nature of those other appeals that mattered - in other words, was it the fact? I mean, as far as the Tribunal was concerned, really the relevant passage are paras. 62 through to 73 - those ten paragraphs - where they look at the meaning of the word 'decision' and they look at what it is that starts time running under subsection (8).

MR. BREALEY: At para. 64, Sir, where the Tribunal emphasises 'any' -- the sense of 'any' is any proceedings brought by another cartelist who was a liability.

THE PRESIDENT: You say it does matter. Your point is just as good there. In other words, had those others not brought proceedings against the infringement - the challenge to the infringement -- Had they all clearly only appealed against fines, then time would have started running against Morgan Crucible.

MR. BREALEY: Yes. That is absolutely right, Sir. But, what the Tribunal was concerned with was that when it referred to 'any' proceedings, it was, well, any proceedings brought by the cartelists. 'Any' can mean by anyone, or regardless of whatever decision - whether it is a decision to fine or infringement. What the Tribunal was concerned with here is that because the others had appealed, you may sue for damages and then find out the whole decision,

including the decision on liability has been annulled. So, the ground has been swept away from the claimant's feet. That is not the case with fines.

So, those are my two points on *Emerson*. The first is that the issue that we are presently concerned with is not argued at all, and, secondly, it is clearly distinguishable because the Tribunal at least conclude at para. 87 of its third judgment that there were appeals concerning liability, and that even if you have one appeal on liability - which there clearly was - then that suspends time. Then we do get into other issues as to who is bound -- But that is not the sense of the Act. What the Tribunal held in *Emerson (1)* was that any appeal on liability suspends time.

THE PRESIDENT: You take a view on what it says in the OJ summary?

MR. BREALEY: To a certain extent this brings me on to the two policy considerations of why BASF's interpretation is correct. However, you, Sir, are right in that if one is looking for a bright line -- If one is looking for some degree of certainty as to whether you can bring a claim as of right or with permission, you look at the OJ and you see, well, it is limited to an application to annul the fine or substantially reduce it. That is the end. If you read those words, it is a one-liner, and that is a bright line. Then the claimant knows whether he or she or it needs permission, or not.

On the two policy arguments, again, if I could just refer the Tribunal to the claimant's skeleton -- Ironically, both parties are making the same point - but in support of their own interpretation. Here, the claimants are saying that it would require the claimants to try to work out the implications of an application for annulment or reduction of a fine from the brief formal summary of the application published in the Official Journal.

> "The notice is all that is available on the European Court's website ... it would require claimants to request permission to view the court's file to try to work out what as being argued".

In my submission, that is a powerful argument as to why the claimants are incorrect, because we have a bright line on our interpretation: Has there been an appeal against liability or not? Has there been an appeal against a file or not? If decision in subsection (8) means any decision, that is exactly the process the claimants have got to go through in order to get permission. The Tribunal has held, "Well, it is the exception, not the rule, that the claimants will get permission" They have got to get these documents mainly in a different language. It is not readily accessible.

That leads me to the next submission on policy, which is essentially my final point. The first policy submission concerns the practicalities of the claimant's interpretation and our interpretation. The second policy consideration, which in my submission supports our

interpretation, is the length of time. The claimant's current interpretation - I say 'current interpretation; because it obviously was not their interpretation when they brought their previous proceedings against the cartelists - leads to an extension of time -- a delay essentially -- It is a delay. So, if one looks at the facts of the case, the Commission decision is dated 21st November, 2001. That relates to acts in the early 1990s - so, sales of these vitamins took place in the early 1990s. You are already looking at about ten years by the time you get to the Commission decision. Then you have your two months and ten days in which to appeal. BASF did appeal, as we know, on fine. That was on 31st January, 2002. Shortly before the two year deadline the claimant brought its claim for damages against the other cartelists. This is para. 7 of their skeleton. Paragraph 7 of their skeleton says,

> "The claimants have already brought damages claims before the Tribunal under s.47(a) against other members of the Vitamins Cartel, namely Roche and Aventis to recover losses caused by their involvement. Those claims were withdrawn on agreed terms".

In footnote 1: "the terms of the agreements are, of course, confidential."

A summary of those are in an article, and if one reads that article one sees that the claim for damages were lodged with the Tribunal it appears one or two days before the two year deadline had passed. Then, we waited another two years after the CFI's judgment. But the policy point that I would like to make is that if the claimants are correct they should have sought permission from the Tribunal when they brought those claims against Roche and Aventis because they say that the decision to fine suspends time and therefore if there is a suspension of time they cannot bring it as of right, and therefore they need permission.

So not only did they not seek permission but generally it means that there will be a delay in which victims of cartels, and I appreciate my client has been a party to it, but there will be a delay in which victims of cartels can bring actions for damages in this Tribunal because if one looks at the time between the Commission decision, November 2001 and the CFI judgment on the fine, that is four and a half years, March 2006. So we are left with a position where claimants, if there is one person – just one person – seeking annulment of a fine, one is going to have potentially a four and a half year delay in which you could bring your claim as of right. If you need permission one is going to be faced with what is the extent to which it impacts, you need access to the CFI documents. When one looks at those two policy considerations and puts it against what, in my submission, is the plain meaning of the Act, there is only one logical conclusion and that is that they are out of time.

THE PRESIDENT: Are there circumstances in which an appeal against a fine could be on grounds which might impact on the kind of issues that the Tribunal would be looking at in a claim

under s.47A? In other words, could someone only appeal against a fine on the basis of infringement whether it was for a shorter time, or did not cover so many goods, such as scope of goods or something of that kind? (a) is that right? Could it impact on the extent of the damages claimed under s.47A and, if it could, would that be a policy reason going the other way?

MR. BREALEY: I have two answers to that. First, as I said, if the Act is clear the niceties of whether or not there may be some findings is neither here nor there. If the Act says in clear terms it is the prohibition that is infringed, it is not the task of the Tribunal to say "I am going to interpret that to include everything else because there may be some issues of fact which may be relevant", so that is the first point. I have three points, but that is the first. The second point is that the instances where that will occur are pretty remote. A decision fine could, but probably will not have, carrying with it issues relating to liability. So if you are looking for a steer as to are you going to have a four and a half year delay for a fine decision to be heard against cartelists wanting to bring actions, certainly that is not a compelling reason.

THE PRESIDENT: You agree it can?

MR. BREALEY: I agree it can, but my third reason, besides it being clear, and secondly, remote, the third reason is that the Act does not say anything about findings of fact. In my submission, it is because the parties agreed it I think in *Emerson*, it got slightly hung up on issues of fact and whether it can impact on the action for damages. So for instance if one looks at s.47A(9) it says:

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

That is bound by the decision that the prohibition has been infringed. So that is saying that the Tribunal is bound. We will come on to what it does to a court of law in a minute, but that is all it says about the impact of the decision on the Tribunal. This Tribunal is bound by a decision which states the prohibition in question has been infringed. Compare that to s.58 and 58A of the Act, 58 and 58A. First if we could have a look at 58A we see a similar provision to 47A(9):

> "(1) This section applies to proceedings before the court in which damages … claimed in respect of an infringement of –
>
> (a) the Chapter I prohibition".

So in such proceedings the court is bound by the decision, so that is a decision that the Chapter I prohibition has been infringed or that the Article 81 prohibition has been infringed. That is a similar statement as to 47A(9).

THE PRESIDENT: 38A(2).

MR. BREALEY: Is bound. Then we have a provision in 58 relating to findings of fact. The court directs the OFT's finding which is relevant to an issue arising in Part 1 is binding on the parties. My answer to this issue of fact finding is that the Act has left it to the Tribunal to work out the extent to which it feels that it is bound by findings of fact. It may say that the critical facts which make up the decision that the prohibition has been infringed is binding, but ancillary facts are not binding because they were not necessarily wholly in issue. So the answer to your question, Sir, will a decision contain findings which may be relevant, I cannot rule that out. I cannot on a crystal ball gaze, and I cannot put my hand on my heart and say "No Court of First Instance can make a statement which is not relevant", as I say if the Act is clear, which I say it is, it is irrelevant. The chances of that happening on a fining decision is remote, and the third reason in my answer to your question, Sir, is that the Act does not contain a similar section as s.58 as it does for the Tribunal. It has s.58 findings of fact for the court but it does not have a similar provision for the Tribunal.

THE PRESIDENT: That is with the OFT, is there something in the regulation dealing with the Commission's findings, because I suppose we are in a slightly different ball game here, are we not? Is it regulation 1?

MR. BREALEY: What, 1 2003?

THE PRESIDENT: Yes. Article 16 I think.

MR. BREALEY: (After a pause) They cannot take decisions which are counter to a decision adopted by the Commission, well I agree with that. You cannot have the Commission saying that BASF has infringed Article 81 and the Tribunal or the OFT saying it has not.

THE PRESIDENT: Just thinking of it in very simple terms. The reason the consent behind needing permission before time starts running is because while there is an appeal running something can change which can render everything that has happened up until then a waste of time and money.

MR. BREALEY: One has to be careful about that, Sir, with respect . Yes, but from our perspective something happening which would undermine the decision that the prohibition has been infringed.

THE PRESIDENT: Yes, well that is the next stage. You do not want to be in the position where you say "Oh goodness me, if only we had waited." The question then is what can affect it? It does seem to me that one sees quite a lot of times examples of appeals against fines where they say: "We admit we did it but it did not last as long as they said", or "We dropped out sooner", things which can be of great importance when you are looking at how much damages, as it were, people may be responsible for.

MR. BREALEY: There is usually a different Article, I think there was in this case, which first of all one says is an infringement, and the other says how long it is for, and the other is defined.

THE PRESIDENT: Which falls into your category of relevant decision? Does the length of the infringement fall into liability or the fine?

MR. BREALEY: The length of the infringement must I accept be part of the decision on the prohibition – it could be either.

THE PRESIDENT: It could be either. You could think you were only going to appeal against the fine, but your ground – or one of them – could be "They said we were in there for rather too long". I suppose you could, in those circumstances challenge the infringement – "We will challenge the infringement but only as to the length", or people might say "We are only challenging the fine because of the infringement". It is a bit of a grey area.

MR. BREALEY: Well, I am not sure. I think if one looks at the decision itself, which is at Tab 6. On the typed pages, it is 116 to 117. From our interpretation it is Article 1 which is subsection (6) in s.47A. Article 1 says,

"The following undertakings have infringed Article 81(1) of the Treaty ----"

So, if you appeal that you are impugning the subsection (6) decision. If you go over the page to duration, that is part of Article 1. So, Article 1(1) talks about, "The following undertakings are infringed --" and Article 1(2) gives the duration. If one is seeking to undermine the duration so that you have been found guilty of infringing Article 81 for ten years and it is only one day, that would seem to suggest that you are impugning the decision that Article 81 has been infringed.

THE PRESIDENT: If you only appealed against the fine on that ground, would that be inadmissible as an appeal? If you said, "We only appeal against the fine ----"

MR. BREALEY: You would not. You would be appealing them both, which is maybe what happened in Emerson - because you would be appealing the decision that you have infringed - so you have not infringed it for the last five years - and you would also be appealing the fine which is based on that decision. You would have to appeal the decision which says that you infringed the prohibition in order to get home on the fine.

THE PRESIDENT: So, if appealing duration ----

MR. BREALEY: If appealing duration ----

THE PRESIDENT: To lay the groundwork for a reduction in fine ----

MR. BREALEY: Because - to adopt the language of the Act - you are appealing against a decision, "The relevant prohibition question has been infringed". (After a pause): A decision that Article 81(1) has been infringed, I probably would accept, carries with it weight. Obviously this is the key policy against the BASF submission on interpretation. This is what the Tribunal

in Emerson (3) to say, "Well, there is no bright line". But, again, I come back to the three responses to this ----

THE PRESIDENT: The plain meaning of the statute ----

MR. BREALEY: The plain meaning of that -- So, these niceties ----

THE PRESIDENT: It does not matter.

MR. BREALEY: It does not matter if that decision in subsection (5) means that the prohibition has been infringed and one accepts that the Act is drawing a distinction between 'the prohibition has been infringed' and 'a decision to fine', which it clearly does, it does not matter.

Secondly, it is exaggerated because the instances where a fine is going to impact on the factual findings behind the decision is fairly remote. So, one's instinctive reaction is to say, "Well, if you are just appealing on the fine, and the Act is looking at, 'The prohibition has been infringed', is that really going to make any difference?

Thirdly, the Act appears to leave it to the Tribunal to work out what to do on findings of fact. It does not say (as it does in s.58), "The court, unless it otherwise directs --" or, "The parties are bound by the findings".

It may be that one can perhaps have the same problem when it comes to a liability finding. As night follows day, there are going to be many cases before this Tribunal where one party is going to say, "Well, that finding of fact in the Commission decision on liability is not binding on me". We did not properly argue it. It was not central to the finding of liability. It was an off-the-cuff statement by the Commission. Whatever scenario is going to happen, it will have to work out, even on liability, what findings are going to be relevant findings - whether it feels that they are binding findings, and probably realistically the Tribunal is going to regard many findings as binding -- But, there will be instances where the Tribunal may feel that it is not bound by a finding of fact in a Commission decision.

THE PRESIDENT: It may be bound by the results of those findings, but not by the findings themselves.

MR. BREALEY: Yes. Then, if one looks at *res judicata* books, they are littered with instances where not all findings of fact in a judgment are binding. Findings of fact which are critical to a decision often are binding.

THE PRESIDENT: Would that apply here, would you say, if it was critical to the Commission's decision?

MR. BREALEY: On the liability? Probably yes. Without tying my hands for future references -- For example, market definition, or something. So, those three submissions -- The global submission on that is that the Tribunal should not be too hung up when it comes to limitation periods to findings of fact.

Plus - and I can give a fourth reason why the Tribunal should not be too hung up on it - all we are talking about here is time running. One has the decision. The company has appealed the fine. We know that time is starting to run. If the company says there are issues of fact in the fining appeal which are relevant, then the company can adduce that and ask for a stay of proceedings. So, if there is a vice, it can be cured of a discretion of the Tribunal. That is exactly what happened in Emerson (2), albeit not in relation to a stay and time running. But, in Emerson (2), para. 57, where Morgan Crucible said, "Well, there has been a knock-on effect" -- This the 16th November judgment.

THE PRESIDENT: We have not got that one.

MR. BREALEY: I think it was taken out because that one was in rather than Emerson (3). It was just a mistake. So, (2) went out and (3) came in. The reference is para. 17 of Emerson (2) where, again, if one remembers that it was concerned with permission -- You needed permission to sue Morgan Crucible.

> "Morgan Crucible suggested that the EC proceedings may have a knock-on effect on the outcome of the UK proceedings and for this reason we should not grant permission. However, since Morgan Crucible has not provided any particulars in support of this general submission, it is not one upon which we can give much weight".

So, if one transposes that sentiment into an appeal against fine and the company says, "Well, I've appealed against fine. Although time is running, please stay", well, then, if there is a general submission it may carry not much weight; if there is something in it, the court in its discretion may say, "Well I am going to stay proceedings". But, that does leave intact the ability of claimants to bring their actions for damages in due time to get the money that they suffered. Facts going back to 1990 -- So, we are now eighteen years -- In my submission it is consistent with the meaning of s.47A.

Those are my submissions, Sir.

THE PRESIDENT: Mr. Robertson?

MR. ROBERTSON: Sir, members of the Tribunal, I am going to divide our submissions into four parts. Firstly, I will explain the claimant's construction of the limitation period under s.47A(8), starting from the beginning. Secondly, I will set out our response to the defendant's case advanced in their skeleton and this morning. Thirdly, I will just very briefly deal with the position in relation to, "What if we are wrong and the defendants are right?" - application for extension of time in which to bring this claim. My learned friend has not touched upon that orally this morning, but it is in his skeleton and therefore I want to respond to it Then, fourthly, a few words by way of concluding remarks.

To start off with the claimant's case on how we interpret the rules -- The defendant's position is essentially that one looks at 47A(8) read with various other provisions of the Act, particularly subsections (5) and (6) of s.47A. I think it is helpful if we go back to how this section came to be included in the Act in the first place. It was inserted into the Act with effect from 20th June, 2003. The date is important for reasons which I will explain a little later. But, the section was inserted via the Enterprise Act 2002. I think the best way to follow this is to pick up our skeleton, which is to be found in the main bundle at Tab 2, p.17. This is our first submission. I refer at para. 15 to the commencement in June 2003. Now, s.47A was inserted by s.18(1) of the 2002 Enterprise Act. Just for your note - I do not think we need to turn that up now - that is to be found at Tab 13, p.199 of this bundle.

S.47A(3), which is to be found at Tab 12, p.190, disapplies ordinary limitation rules to s.47A monetary claims before the Tribunal. It says there:

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

And the reference there to claims made in civil proceedings, and there is a reference to subsection (1) which says:

> "This section applies to –
>
> (a) any claim for damages or
>
> (b) any other claim for a sum of money
>
> Which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom."

So you disapply the limitation rules that are applicable in which ever jurisdiction you are bringing this claim. Then you look for the limitation rules, and you find those in the Competition Appeal Tribunal Rules 2003. Now, we have already been to the basic provision which is at rule 31 (tab 14, p.215). This is the time limit in rule 31 with which we are concerned. The authority for that rule is to be found in para.11 of Part 2 of Schedule 4 of the Enterprise Act, so it is the Enterprise Act which gives the Secretary of State to make the rules under which these claims are brought. So that is the statutory authority for rule 31. The statutory authority is not to be found anywhere in the Competition Act 1998, it is to be found in the Enterprise Act 2002. Again for your note, you do not need to turn it up, that provision of the Enterprise Act is to be found at tab 13, p.205. Rule 31 is, we say, a very simple provision. It essentially says in para.1 that a claim for damages must be made within a period of two years beginning with the relevant date, so subsection 2 answers the question: "What is the relevant date?" and it is either the end of the period specified in s.47A(7), that is for domestic claims

brought on the back of domestic decisions, or 47A(8) which is claims brought on the back of European decisions, that is rule 2A. The alternative is rule 2B, which is the date on which the cause of action accrued, and it is the later of those two dates. In this particular case, the cause of action would have ceased accruing in 1999, that is the date on which the cartel was brought to an end. Therefore the later of the two dates is going to be that specified in 2A.

Then in rule 31(3) we see:

> "The Tribunal may give its permission for a claim to be made before the end of the period referred to in para.(2)(a) after taking into account any observations of a proposed defendant."

So that is the permission granting power. So just looking at the wording of the rule it identifies that the starting point is the relevant date, you have two years in which to bring your claim, and you identify the relevant date by looking at the end of the relevant period specified in 47A(7) or 47A(8) depending on whether you have a UK prohibition decision or an EC prohibition decision.

It does not refer you to any other part of the 1988 Act, it is just identifying a point in time at which a two year period starts running. So if we turn back to s.47A(8) (tab 12, p.191) this then refers to: "The periods during which proceedings in respect of a claim made in reliance on a decision …" the reference there to finding, there is only a reference to findings under the ECSE Treaty, it was pointed out in my learned friend's skeleton, so we do not need to worry about the meaning of the word "finding".

> "The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are –
>
> > (a) the period during which proceedings against the decision or finding may be instituted in the European Court; and

This is our case:

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

So just looking at, as we are directed to by rule 31(2), what we are looking for is the period during which proceedings against the decision may be instituted in the European Court. We know the proceedings against the decision – I will show you the decision in a few moments – were brought and that is why this claim was not brought at an earlier date because we waited until those proceedings were determined before bringing this claim. So rule 31 is just simply requiring you to locate a particular date in accordance with subsection 8 and that date is the end of the period specified in subsection 8. Rule 31 does not direct you to go trawling through

the rest of the Act or indeed through the rest of subsection 47A to try and qualify what is meant by "the decision". That is why we say that you can interpret this rule in accordance with its plain and obvious meaning. In this case, there is absolutely no issue between us that if we are right on that interpretation then we brought this claim within the two year period as we are entitled to do.

My learned friend makes a point about us getting in only a day or two before the end of that period. Bear in mind, of course, that the two year period is, as limitation periods go, quite short. If we were bringing a claim in the High Court normally the limitation period is six years from the date on which the cause of action accrues. Here, because we are in a separate special statutory regime, you are told "Wait until things are definitively settled, either at Commission level, or await the outcome of proceedings in the European Court and once they are definitive then you have comparatively to get your skates on and bring your claim within two years". Bear in mind also that a claim in this Tribunal requires you to do a lot more up front than a claim in the High Court – one has to serve all one's witness evidence and support one's claim at the time one puts in one's claim, and although those documents have not been reproduced here in this bundle there are several witness statements appended to our statement of claim in this case fully setting out insofar as we are able to our claim against these defendants. So that is why we say that you can interpret this limitation period by reference to Rule 31 and, in this case, s.47A(8) and that is an end of it, you are not sent off on a trawl through the rest of the Act to try and interpret what the limitation period is, it is plainly and clearly set out.

Turning to my learned friend's case, essentially he says we have misread the reference to "the decision" in 47A(8) and in fact it is a special type of decision. It is, as he says, a decision only that the prohibition in Article 81 has been infringed. As I will explain, we say that approach is too technical. It is inconsistent with the Tribunal's previous judgments in *Emerson (1)* and particularly *Emerson (3)* and I will take you to the relevant parts of those judgments. Obviously they were decided in the context of applications for permission, but what the Tribunal said there, its reasoning, is equally applicable to the question facing the Tribunal today. Thirdly, we also say that my learned friend's case is contrary to the policy of the Act. Now, my learned friend says that the reference, and this is para.22 of his skeleton – as developed this morning – the reference to "decision" in 47A(8) a decision of the European Commission means only a decision that there has been an infringement of a relevant prohibition, it is not intended to refer to a decision by the Commission as to whether to impose a fine or as to the level of any such fine. It says because they have brought proceedings only against the level of fine, not against the prohibition decision itself that the time period in

47A(8) suspending the period for bringing proceedings was not triggered by their application to the Court of First Instance.

We say that is not a distinction one can draw. First, let us look at the decision itself, which is to be found at tab 6. We need to turn to the end of this very lengthy document at p.116. I think it helps to understand how the decision works. You see there (about two-thirds of the way down the right hand column) "HAS ADOPTED THIS DECISION" then what follows is the legally operative part of this document. This is the formal decision addressed to the various members of the Vitamins Cartel.

Our case is that what then follows in the following five Articles comprises "the decision". It is expressed in the singular here, it is not a series of separate decisions. There is not a decision relating to infringement. Yes, there is Article 1 of the decision setting out in para.1 the undertakings which have infringed. Paragraph 2, the duration of those infringements, and we see – just to note – in the right hand column of p.117 (half way down) "BASF" and the duration of its infringements, and then it lists 10 vitamins and other types of food supplements, so it has been found to have participated in 10 individual cartels, the vitamin A cartel, the vitamin E cartel and so on for those periods. You will see, in fact, they only get fined for eight of those because for vitamin B1 and for vitamin H where their infringements came to an end respectively in June '94 and April '94 there is no fine imposed when we get to that part of the decision because they are outside the relevant limitation period for the imposition of a fine. In other words, by the time this was uncovered they had already successfully benefited from limitation periods which limit the Commission's jurisdiction to impose fines. That is Article 1.

Turning over we see Article 2 of the decision requiring infringements to be brought to an end to the extent they have not been, and a direction not to engage in similar behaviour to like effect.

Then Article 3 we see the fines imposed, half way down on the right hand side we see BASF fines imposed for eight infringements. Turning over the page, Article 4, the requirement to pay within three months, and then Article 5, the addressee of the decision, in other words which legal entity within the particular group is the subject of this decision? That then being the entity being the addressee of the decision has the right to appeal the decision. We see at the bottom there BASF is mentioned and they are the first defendant in this case.

If we look at this decision it is a single decision consisting of five Articles. It is not five separate decisions, it is not even two separate decisions. It is not a fining decision and an infringement decision, it is a single decision. My learned friend says that effectively different parts of the decision have different legal effect. If that is the case why stop at separating out, as it were, Article 3, the fining part of the decision and saying that an appeal against that has

different consequences for limitation here compared to an appeal against, say, Article 1 of the decision. On the logic of my learned friend's argument going back to the list that I took you to at Article 1, para.2, when I took you through each of the 10 infringements committed by BASF, these 10 separate cartels, on my learned friend's analysis each one of those is a separate infringement decision because these were found to be 10 separate cartels. On my learned friend's analysis one questions what would happen if BASF, say, had appealed against participation in the vitamin A cartel so they have that wrong, but did not appeal against the vitamin E cartel. Or, in relation to the vitamin E cartel appealed only against fine but not against liability. Does it mean then that you have separate limitation periods running for the vitamin A and vitamin E cartels where in the case of vitamin A there is an appeal against infringement, which my learned friend accepts does mean that limitation period does not run, but in relation to vitamin E the only appeal is against fine but not infringement, then time does start running.

On his case you are going to have one set of proceedings with an earlier limitation period because there is only an appeal against fine, and another later set of proceedings where there is an appeal against infringement. We say that just cannot be what was intended when the limitation period was set under 47A(8), it would make no sense to have this salami-slicing approach, as the President said earlier this morning it would make no sense at all to have the salami-slicing approach to infringement and then just appeals against fines. So if it does not make any sense to salami-slice up the different cartels that BASF participated in, it equally does not make any sense to salami-slice the decision and say that somehow Article 3 is to be treated as separated from the remaining four Articles of the decision.

So in summary, there is only one decision as is stated in terms here. It consists of five Articles and what BASF have done is to have brought proceedings in respect of that decision.

My learned friend also took you to various provisions of the Act where he said the language of the 1998 Act makes a distinction between a decision finding infringement and a decision imposing a penalty. Now, we say it does not make any sense to interpret the limitation period introduced in 2003 by reference to either existing provisions of the 1998 Act, or provisions which were brought in after the 2003 amendment. I will explain this point. My learned friend did not explain this when he drew your attention to those provisions of the Act which make this distinction between prohibition and penalty. If I start with the provisions of the Act that my learned friend took you to, I think the best starting point is s.31 which is headed "Decisions following an investigation", and my learned friend drew your attention to the wording in subsection 2: "The prohibition in Article 81 has been infringed." He said "There you see the

Act consistently treats infringement as separate from the consequence of the infringement, the potential imposition of a penalty."

The first point to notice here is that wherever my learned friend drew your attention to the OFT exercising powers in relation to Article 81 it cannot assist in the interpretation of the limitation period under 47A(8) because the references to Article 81 were only introduced after 47A(8) indeed, 47 as a whole, was introduced by the Enterprise Act. The 47A regime was introduced in June 2003, the OFT was given powers to apply Article 81 in 2004, nearly a year later – it came into effect on 1st May 2004, it was part of the modernisation regime. You can see that in the note to s.31 in the Butterworths Competition Law Handbook where the provision is in square brackets, it says "It was substituted by the Competition Act 1998 and other enactments, amendment regulations 2004", and that was modernisation of the UK regime to reflect the modernisation of the EU regime.

So as my learned friend took you through sections 31, 32, 36 and referred you to Article 81, those are provisions which can have no relevance to the interpretation of Article 47A(8) because they post-date 47A(8).

THE PRESIDENT: Just give me that list again – which are the list of sections post-date?

MR. ROBERTSON: Well probably the best thing is if we just go through them, because the second point I am going to make is even those where there is not a post-dating issue it still does not help him because it is just a bad point. The ones that my learned friend took you to were 31 then 32 – I am working from the Twelfth edition of the Competition Law Handbook and I think the Tribunal probably has the thirteenth.

THE PRESIDENT: We have. So writing my notes, the same applies to s.32.

MR. ROBERTSON: Section 32 and in relation to s.36 again it is infringement of the prohibition of Article 81. The next section my learned friend took you to was s.46, appealable decisions.

THE PRESIDENT: Is that different?

MR. ROBERTSON: Again, it is the same point. The reference is there to Article 81, all post-date.

THE PRESIDENT: That post-dates.

MR. ROBERTSON: The final reference is to s.46 – the list of appealable decisions to the Tribunal.

THE PRESIDENT: He referred to sections 47 and 49 as well.

MR. ROBERTSON: That is correct. 47 this point does not arise, nor does it arise in relation to s.49: "Further appeals". The reason why it does not arise is that those two sections were also inserted by the Enterprise Act.

THE PRESIDENT: Yes, so they came in at the same time?

MR. ROBERTSON: Yes, they came in at the same time. But 31, 32, 36 and 46, all the references there to Article 81 they post-date this provision.

THE PRESIDENT: You are going to knock down 47 and 49 on the ground?

MR. ROBERTSON: Actually for all of them, insofar as they only relate to the domestic prohibition it does not assist referring to how the 1998 Act deals with identifying prohibitions on conduct and agreements, and then the consequences of that in identifying what a limitation period is for bringing a claim under s.47A. The provisions that were not brought in in 2004 were in the Act, I think I am right in saying, largely their original form with effect from when the Act came into force in March 2000. I think there were some changes, but I do not think they are relevant ones for these purposes. So the structure of the Act as regards domestic prohibitions is largely as it is now.

But that does not tell you anything about the way in which the Enterprise Act set up this separate self-standing regime for bringing these claims under s.47A. It was a separate self-standing regime grounded in the Enterprise Act. Rule 31 owes its existence -- its statutory authority is the Enterprise Act - not the 1998 Act. So, this was a separate self-standing regime.

THE PRESIDENT: With effect from 2003.

MR. ROBERTSON: Yes. It was a separate self-standing regime. There is no reason why interpreting that regime, as brought in in 2003, that you somehow have to shoehorn it into the powers under which the Oft investigates suspected anti-competitive agreements or abuses of dominant position under the 1998 Act. It is dealing with an entirely different issue. It is dealing with the issue of monetary claims before the Tribunal. So, it really does not give you any assistance in understanding what s.47A(8) means to look at how the Act structures the Oft's exercise of its decision-making powers -- its investigatory and decision-making powers under the 1998 Act.

That then brings me to the second of the points, which is essentially what is the purpose of approach to interpreting this legislation? We have said that on the plain meaning of the words, adopting the normal approach to legislation, it is plainly as we say it is, and my learned friend's interpretation relies upon other either provisions of legislation which post-date it, or for those ones which do pre-date it, it is a separate different regime governing the Oft's investigatory and decision-making powers, and there is no reason why that should tell you anything about the separate statutory regime under S47A for bringing monetary claims before the Tribunal, introduced by the Enterprise Act 2002.

Now, moving on, as it were, to the purpose of interpretation, we say that this Tribunal actually will get a considerable degree of assistance from the Tribunal's judgments in *Emerson (1)* and *Emerson (3)* which are at Tabs 2 and 3 of the bundle of authorities. Now, we have looked at these this morning. I just want to show you a bit more detail. First, starting with *Emerson (1)* -- - This is a decision which has not been explored in the skeleton arguments before the

Tribunal. *Emerson (1)* is best picked up at p.17, para. 52. "Issue 1: Has time begun to run for the purpose of bringing a monetary claim under s.47A?" This is just really to show you what was in issue. At para. 52 you see,

> "The Emerson claimants' primary submission is that the time limit in Rule 31 has begun to run for the purpose of bringing a claim for damages under s.47A of the 1998 Act.. Accordingly, the Emerson claimant submit that they permission of the Tribunal is not required in order to initiate a claim ----"

You then turn to the Tribunal's analysis which starts at p.19, para. 62.

> "The first issue requires us to decide the true meaning of ss.47A(5)(b) and 47A(8) of the 1998 Act and how these provisions apply to the particular circumstances of the case before us".

Then the particular circumstances of that case -- "-- apply in circumstances where the UK proceedings are brought against an addressee of the Decision who is not a party to the EC proceedings?"

Turning over the page,

> "We consider that the first question to ask is what is the ordinary or plain meaning of sub-sections 5(5) and (8), having regard to general principles of Community law and the overall structure and purpose of the Act.

Then, at para. 64,

> "We consider that the phrase 'if any such [EC=] proceedings are instituted' in sub-section (8) clearly indicates that as long as 'any' proceedings have been brought in the European Court, permission of the Tribunal is required to bring a monetary claim under s.47A".

So, the Tribunal in Emerson (1) was clearly taking the view for which we argue in this case. Then you see my learned friend's case then being put by the Emerson claimants on p.21, para. 70.

> "The Emerson claimants submit that since any annulment of the Decision would have no effect on the decision in relation to Morgan Crucible, it follows that the reference to decision in s.47A(8) of the 1998 Act is a reference not to the whole of the decision of the European Commission but instead refers only to that part of the decision which is the subject of the appeal to the EC".

So, in other words you can, as it were, salami-slice. At para. 71,

> "In our judgment the word 'decision' in s.47A(8) of the 1998 Act cannot be given such a restrictive meaning ----"

I add there 'the restrictive meaning for which my learned friend contends'.

That is really an end of the Tribunal's consideration in *Emerson (1).*

The point is explored -- the underlying policy, I should say, is explored in much more detail in *Emerson (3)* which is at Tab 3. If we could pick that up at p.1? Paragraphs 1 and 2 outline the proceedings. Paragraph 3,

> "By separate applications, SGL, Schunk, and Carbone Lorraine [those are the proposed defendants in the case], to each of which the decision was addressed, brought actions for annulment of that decision before the Court of First Instance. ... In these circumstances, time has not yet begun to run for making a claim for damages under s.47A of the Act, and the claimants require the Tribunal's permission for such a claim to be made whilst appeal proceedings against the decision are on foot".

THE PRESIDENT: That appears to be just taking for granted what has already been decided.

MR. ROBERTSON: Yes. Then, over the page, at para. 4, in the middle of that paragraph,

> "The claimants written submissions asserted that the proposed defendants have merely appealed against the level of fine imposed by the Commission".

At para. 6,

> "The proposed defendants observe that it would be inappropriate to grant permission in the present case essentially because, if the CFI were to annul or vary the decision, the basis of any claim might either fall away or require amendment. It would therefore be needlessly costly and time-consuming for all concerned to permit a damages claim to be made whilst the CFI appeals are pending".

Then, just looking over the page at p.3, para. 10, this outlines SGL's claim to the CFI. Now, I highlight SGL out of the three proposed defendants here because it is quite similar in fact to the basis of the BASF appeals and CFI in this case.

> "In support of its action for annulment, SGL pleads that the Commission made various errors in calculating the fine imposed on it, thereby infringing Article 15(2) of Regulation 17. SGL argues, first, that the basic amount of the fine as incorrectly determined to its detriment. SGL contends that, in determining the fines, the Commission disregarded the upper limit of fines. SGL also argues that the Commission incorrectly assessed the co-operation of SGL, and that it wrongly took into consideration the actual deterrent effect in fixing the amount of the fine. SGL also claims that the Commission failed to take into consideration the applicant's inability to pay when calculating the fine".

Now, there is nothing there raised by SGL that goes to disputing that it is infringed. It is appealing because the fine is too high, it says. That is the position that BASF say that they were in.

Now, if one turns over a couple of pages, to p.5, para. 16 ----

MR. BREALEY: Rather than do this in reply, can we just see the other two applications rather than me having to do this in reply?

MR. ROBERTSON: Absolutely. The other two applications are at paras. 12 and 14. You will see that they challenge their finding as to effect ----

THE PRESIDENT: Different customer groups. Yes.

MR. ROBERTSON: At para.13 they say that the decision should be annulled; alternatively, the fine reduced. So, they are going further than SGL. Similarly, Carbone Lorraine goes further than SGL. The challenge is product market definition. There are challenges of fact. There is also challenge to the level of fine.

THE PRESIDENT: So, two were sort of seeking annulment of the whole decision; alternatively the fine. SGL was ----

MR. ROBERTSON: SGL was more limited.

THE PRESIDENT: It was just the fine, yes.

MR. ROBERTSON: And limited in a way which, as I say, is analogous to BASF in this case.

THE PRESIDENT: Yes.

MR. ROBERTSON: Can I just draw your attention quickly to p.5, para. 16? You will see there that the Tribunal were provided with unofficial translations of the relevant parts of the applications for annulment filed by two of the proposed defendants. That is just to point out that, of course, applications for annulment are not public documents.

THE PRESIDENT: You cannot see the pleadings without, presumably, someone's permission, including the application.

MR. ROBERTSON: Yes. You cannot see the pleadings. Even if you get hold of them from the Registry, if the case is not in English then you are going to have to get them, as appears to be the case here, unofficially translated.

THE PRESIDENT: There will be a summary, will there not?

MR. ROBERTSON: Yes. I am going to take the Tribunal to the summary that was published in this particular case because that is what we had to go on. I will explain when I come to the end why we did not apply for permission against BASF at the same time as we went against Aventis and Roche. But, returning to this, you will see that what the Tribunal say is,

> "We consider what implications, if any, the CFI appeals have for the present applications at paras. 86 to 93 below ----"

Actually, the Tribunal pick it up on p.25 of the judgment. Their analysis begins at para. 75. There you see,

"The issue currently before us is whether the claimants should be granted permission to bring a claim for damages against the proposed defendants pursuant to s.47A(5) of the Act and Rule 31(3) of the Rules".

This is obviously before the limitation period has started running. That is why it is a different context to this case, but the reasoning assists. At para. 76,

"S.47(5) of the Act provides that monetary claims can only be brought before the Tribunal where two conditions are satisfied: first, there must have been a finding of infringement by a relevant competition authority . . . and second, unless the Tribunal grants permission, a claim can only be made after any relevant appeals process is exhausted".

THE PRESIDENT: I suppose 'relevant' is the word there which Mr. Brealey would rely upon.

MR. ROBERTSON: Yes. Yes. But, we will see that what they have in mind is not an appeal against a finding of infringement - it is proceedings against the decision, including proceedings for annulment of the fine. We will see why the Tribunal explains its reasoning -- why it thinks that is good policy.

Paragraph 77, "It follows that, in general, a claimant is entitled to bring a follow-on action for damages before the Tribunal where either the decision is unchallenged and the period for bringing an appeal has expired or once any appeal(s) has been decided. In those circumstances the liability of the defendant has been definitively determined".

We say that the reference there to definitive determination of liability includes all things which are relevant to liability and an appeal against fine may include things which are relevant to liability. So, you have really got to wait for the outcome of the appeal process so that the Tribunal knows where it is.

If we then turn over two pages to p.27, para. 83,

"On the material before the Tribunal, the claimants have failed to satisfy us that they are likely to suffer particular prejudice if permission is refused and if the proposed claim does not proceed until the conclusion of the CFI appeals. The various concerns expressed by the claimants about delay are likely to exist in any follow-on action: it is only possible to follow an infringement decision once any appeals process has been exhausted and the relevant decision is definitive".

Again, the Tribunal is emphasising the need to have a definitive decision. We say you do not have a definitive decision until the outcome of any appeals against fine have been dealt with and there is no further appeal to be brought.

Turning the page to para. 86,

> "Third, in considering whether to grant permission, the nature and ambit of the appeal, or appeals, against the decision on which a proposed claimant seeks to rely may, in certain cases, be significant. Where an appeal seeks to set aside a decision, in whole or in part, or challenges findings in a decision which are germane to the nature and extent of a finding of infringement or the loss caused by that infringement, granting permission carries a greater risk of injustice and inefficiency, particularly if the decision were to be annulled or its scope significantly curtailed".

So, again, those are the Tribunal's identifying factors which go to their discretion as to whether to allow a claim to be brought before the conclusion of the appeals process in the CFI.

Paragraph 87 records,

> "All of the proposed defendants submit that it would be inappropriate to grant permission in the present case because, if the CFI were to annul the decision in its entirety or in respect of each or one proposed defendant, the basis of any claim for damages against them or one of them would fall away. Having carefully considered the proposed defendants' applications for annulment, we consider it would not be appropriate in this case for the Tribunal to grant permission pending the determination of these CFI appeals. We note, first of all, that in the form of order sought from the CFI, each of the proposed defendants is seeking not only a reduction in the fine but also the annulment of the decision, either in its entirety or insofar as it applies to that proposed defendant. In this regard, the likelihood or otherwise of the proposed defendants actually obtaining annulment is irrelevant to our decision since that is solely a matter for the CFI and, ultimately for the ECHJ (as the case may be)".

Paragraph 88,

> "The claimants' submissions sought to draw a clear distinction between: (a) appeals challenging the substantive findings of the Commission which may well need to be determined before any follow-on action can be brought, and (b) appeals which merely challenge the level of the fine, which should not constitute a bar to the Tribunal granting permission. The Tribunal does not consider that it is possible to draw such a bright line between different appals against an infringement decision. Each individual case will need to be considered on its particular facts. There may, of course, be cases in which it is appropriate for the Tribunal to grant permission whilst an appeal is pending where the interests of justice so require. The permission given to the claimants to commence a claim for damages against Morgan Crucible is an example of such a case".

So, again, they are emphasising that you cannot draw a bright line between a root and a branch attack on a decision, on the one hand, and an appeal just against level of fine. What the Tribunal is saying there is that you cannot draw a bright line. That is wrong if the defendants are right, because it is exactly that bright line for which they are arguing.

Paragraph 89 is important.

> "There is, however, no general rule that permission should be given to initiate a damages claim whenever an appeal against an infringement decision is only as to the level of the fine. In some cases the issues raised by an appeal against the imposition and/or level of the fine may pertain to the nature and extent of an infringement which might be central to the nature and extent of how (and by how much) the infringement adversely affects a proposed claimant".

So, the Tribunal is explaining in terms the policy in para. 89 that says that you do not draw a distinction between challenges against infringement and challenges against the level of the fine. It is wrong to draw such a distinction because a challenge to the level of the fine only may nevertheless have an important consequence for the liability of the defendant in a subsequent follow-on action under s.47A.

Now, it does not matter the extent to which BASF - their particular claim in this case - might have had an effect on their liability. We are not talking about that. We are talking about whether one should read into s.47A(8) a bright line that says that the decision is only a decision as to infringement, and it is only proceedings against a decision as to infringement to the European Court which prevent time starting to run. What the Tribunal is saying here is that it would not make sense to impose such a restrictive interpretation because you can have challenges to the level of fine which have an important consequence for liability. So, there is no reason -- In fact, there is a very good reason not to draw such a bright line.

They go on at para. 90 to say,

> "In this case, the CFI appeals appear to be primarily concerned with the imposition and/or level of the fine imposed by the Commission. On the materials before us, however, we accept that the actions brought Schunk and Carbone Lorraine are challenging the inferences to be drawn from the evidence before the Commission and the scope of the infringement found by the Commission".

Now, we have seen that, as my learned friend asked me to take you to the scope of their challenges in that case. That is what they were doing. But, they then move on to SGL,

> "Whilst SGL is not appealing against the decision on the same grounds as Schunk and Carbone Lorraine, not only is the Tribunal unable to make any finding in respect

of losses until the European proceedings have been determined, but also, work undertaken in assessing the quantum of any losses may be wasted".

In other words, what is the point of starting on a case where important issues may be affected by the outcome of proceedings in the European Court?

I go back to what I said earlier in relation to the way in which you put a claim in under s.47A -- how it is different to a High Court claim. It is front loaded under s.47A. You have to put in your evidence in support of your claim, when you put in your claim under s.47A. That is why in this case the Tribunal just does have a claim form. You have particulars of claim from us, and you have also got several supporting witness statements setting out our claim as we understand it.

Now, because that is the procedure under s.47A there is a very good reason why you do not set that two year period for bringing that claim running until things are settled -- once the dust -- once things are settled conclusively and definitively by the court because you may end up, as the Tribunal indicated at para. 91, wasting money, resources pursuing part of a claim, putting it in as part of your claim under s.47A when it turns out that in the European Court the challenge to the fine has led to you having to go back and revise your claim to take account of that judgment. Bear in mind, as this case indicates, that the proceedings in the European Court take some time. It is unusual to get a CFI judgment within two years. So, on my learned friend's interpretation, your two year time period for bringing the claim under s.47A(8) begins even as they are appealing their fine, and your two year period may well come to a conclusion before the CFI has handed down judgment on their appeal against the fine. So, you will not know -- you cannot even do as we have done in this case, wait until the very end of the two year period before putting in the claim. You probably will not be able to do that. You may say, "Oh, hang on! We've got to revise things because the CFI, on their appeal against a fine, has actually said some pretty important things which affect the way in which we now want to present our claim".

THE PRESIDENT: I suppose Mr. Brealey's answer to that would be, "Well, if it is that kind of case where that could happen, we probably can discover that by then, and he had the stay".

MR. ROBERTSON: I think our reaction to that would be, "How?" because all we have got to go on is the summary notice of application in the Official Journal. The proceedings are not public documents. We do not know what the court is going to say. Why on earth switch around the obvious structure of the procedure under s.47A(8) and require us to put in a claim until we can actually definitively know where we are? Much the better solution is the one actually provided for the Act, where you can go before the out come of proceedings provided you get the Tribunal's permission to do so. If you can say to the Tribunal, "Listen, there's no point in

waiting for the outcome before the CFI because it is going to have no conceivable relevance to this case ----" So, that is the answer to my learned friend's point.

Just concluding on Emerson (3), that was para. 91. Paragraph 92 is relevant to how you construe s.47A(8) as well.

> "Furthermore, at the hearing the claimants accepted that if the CFI were to uphold the Commission's finding of infringement in the Schunk appeal, but partially annul the findings made in the disclosure, this would be relevant to the process of quantification of damages against all the proposed defendants. Moreover, in those circumstances the Tribunal would be bound by the CFI's judgment in (s.47A(9) of the Act)".

Now, s.47A(9). We have only just touched on it so far. That is an important part of the s.47A procedure. If I can just ask the Tribunal to turn this up in the other bundle at Tab 12, p.191.

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

The question you were exploring with my learned friend was: To what extent is the Tribunal bound? My learned friend was saying, "Well, we may need to explore that". However, we say it does not matter so much by what the Tribunal is bound by, but that the Tribunal is bound. Now, if the Tribunal is bound by the decision it makes sense for the Tribunal to be bound by the definitive decision, i.e. the decision once it has withstood or been altered by scrutiny of the European Court.

THE PRESIDENT: It does go on to say, "-- which establishes that the prohibition in question has been infringed". So, I suppose Mr. Brealey would rely upon that as saying that is the important bit and the other bits do not matter.

MR. ROBERTSON: The point we make is that that is very much a scope for debate as to the extent to which the Tribunal is bound. Judging from Mr. Brealey's comments, that may be a debate we are having later on in this case, provided we get permission to go ahead. The point is not so much the scope of what the Tribunal is bound by, it is the fact that the Tribunal is bound. Therefore, as a matter of policy one would have thought that it makes sense for the appeals process which conclusively determines the scope of the finding, the decision by the European Commission to be conclusively determined, so the Tribunal knows what its starting point is – there may be debate about that starting point but it knows what it is looking at, the decision subject to the final judgment in the European Court. Otherwise, on my learned friend's contention, you are starting off on the basis of being bound by a decision which is still contingent on the outcome of an appeal.

THE PRESIDENT: Which he says is still contingent in respect of bits that do not matter for this purpose?

MR. ROBERTSON: Well we may well have to have that argument, but the point I am making is not which part of the decision in tab 6 here applies. It is what does the Tribunal take as its starting document? In our submission it makes sense for the Tribunal to have as its starting document for these claims ----

THE PRESIDENT: The definitive one.

MR. ROBERTSON: The definitive. So you can say "Right, the European Court has said that certain paragraphs are to be taken out or re-written or to be understood in a certain way, but you know where you are and, as I said earlier, that is important when you are bringing a claim, because when you are bringing a claim you have to front load, you need to know what it is you are entitled to claim. It does not make any sense to have an interpretation of limitation period which sets time running while the decision is still contingent on the outcome of an appeal. There is no good reason for limiting that just to the decision on the finding of infringement when, as the Tribunal observe in *Emerson (3)* it is not just findings of infringement which have an impact on the scope of liability, it is also the decision as to the level of fine, and the reasons why you fine someone at a particular level.

That is really a point that is made, again para.93 of *Emerson (3)* where the Tribunal says at the end of para. 93:

> "We consider that some of the issues raised in the CFI appeals directly challenge the inferences to be drawn from those facts and the evidence contained in the Commission's file. Until the proceedings instituted in the European Court are determined, there is no sure foundation for these proposed claims."

And again it is the policy of having a sure foundation for bringing a s.47A claim, that if certain things are still in issue, even if they are still in issue because they have only been raised in the context of a challenge to a fine, they are still in issue, they do not have that final, sure foundation upon which a claimant has then got two years in which to formulate and bring their claim.

So at para.95 the Tribunal say:

> "We note that our decision does not bar the claimants from making their proposed claims. Rather it simply means that the conclusion of the European proceedings is the appropriate juncture for commencing a follow-on action for damages against these proposed defendants before this Tribunal."

They also observed that of course they are not shut out from bringing claims in another forum, they could have started their claim in the High Court. In the High Court you have the six year

limitation period which, under s.32 of the Limitation Act 1980 would start from the point at which the claimants could, with reasonable diligence, have discovered the facts and matters which enabled them to know that they had a claim they could bring for breach of Article 81. Obviously the normal grounds for bringing an action are when the cause of action accrues, here of course this was a secret cartel concealed from us, concealed from everyone, so the cause of action did not start running, or could not have been discovered until the cartel was uncovered – there is obviously a debate as to when that was, it was certainly revealed fully in the Commission's decision which was announced in November 2001, so the six year period, presumably, would start running from November 2001. Therefore the limitation period, although I just remind myself that the actual decision itself was not published until January 2003. There was a long period where the only thing that one had was a press release summarising the findings, so it may well be that one argues that the limitation period in court – the six year period – did not start running until publication of the decision in 2003.

THE PRESIDENT: It may still be running.

MR. ROBERTSON: It may still be running, but that is the High Court, that is a different procedure. Here we have a statutory procedure introduced under the Enterprise Act, to make life easier for claimants by allowing you to bring a claim that is relatively short, the limitation period is two years once you know what the sure foundation is for brining your claim, once you have a definitive decision no longer subject to any appeals.

So we say *Emerson (3)* is an important judgment of the Tribunal, and the policy clearly assists the interpretation for which we contend.

THE PRESIDENT: Just pausing there, how are we getting on – just keeping an eye on the clock. You have a few more minutes, presumably, have you?

MR. ROBERTSON: I have a few more minutes on policy. (After a pause) I think I can be finished in five minutes.

THE PRESIDENT: I think if you were going to be longer, if you wanted to finish it rather than come back after lunch we could probably sit until a quarter past one. If you felt you could be finished by about then, without wanting to rush you – we are quite happy to come back after lunch.

MR. BREALEY: I think I will be about 10 minutes maximum in reply. I commit to five.

THE PRESIDENT: The maths looks good!

MR. ROBERTSON: We said before we came in we would try not to do a Federer and Nadal.

THE PRESIDENT: Okay, shall we see where we get to.

MR. ROBERTSON: The policy of the Act we say is quite simple, I have already referred you to it, which is essentially that it is intended to make life easier for claimants and, on my learned

friend's interpretation, you end up with the salami-slicing approach where you have to try and work out what it is that you are attacking by reference only to the published summary notice of application.

If I can just take the Tribunal to that notice, it is at tab 8 of the bundle, this is the version that is actually published in the official journal. As you will see there, it starts in the right hand column and runs over the page to half way down the left hand column, so these are very short notices.

THE PRESIDENT: Annul or substantially reduce the fine.

MR. ROBERTSON: Then you see the grounds and main arguments set out at the bottom. It seems to be a fairly root and branch attack on the decision because it says:

> "Whilst the statements of objections stated that there was a single cartel, comprising collusive arrangements with regard to various vitamins, the contested Decision in contrast stated for the first time that the arrangements with regard to each vitamin constituted 'distinct' infringements… The Commission has thus breached the principle according to which a Decision cannot rely on legal or factual objections that are materially different from those contained in a statement of objections."

THE PRESIDENT: That would normally be a ground for attacking the whole decision.

MR. ROBERTSON: Yes, if that is right then the decision must be quashed and the case must be put again on the basis of distinct infringements to BASF in a further statement of objections.

THE PRESIDENT: But instead of which they chose to rely upon it as a ground for quashing arguably the whole of the fine, or alternatively part of it.

MR. ROBERTSON: And as we are reading that in the official journal what are we supposed to make of that? It does look as the decision as regards BASF could be completely contingent. If there is a subsequent statement of objections who knows what they are going to say and who knows what is going to come out second time around. So why should we be required to start bringing our s.47A claim until we know what the situation finally is in front of the CFI? It does not make any sense, and until you get the court judgment that is the only public document, you see. That is the only document that is published in all languages in the official journal. As I say, it does not make any sense to have a rule that requires you to try and work out from a summary notice of application such as this, what it is that they are actually challenging, whether in fact they are challenging infringement even though they have only expressed it as an application to have the fine annulled. So there are very good reasons why 47A(8) is not to be restrictively interpreted as the defendants argue.

Now, I said I wanted to make a couple of comment about the position – what if we are wrong and the Tribunal does adopt the interpretation for which my learned friend contends? As they

point out in their skeleton we are then left having to fall back on an application to the Tribunal for discretionary extension of time.

THE PRESIDENT: You say you do not want to do that at this stage?

MR. ROBERTSON: No, we say we do not want to do it. We think it would be premature for the Tribunal to consider that application at this stage because I suspect given that that would be, we say, a departure from *Emerson* and particularly *Emerson (3)* it would make sense to digest what the Tribunal has to say for its reasons for rejecting it. But if the Tribunal does not want to go down that route then very briefly to set out why we say there should be an extension of time. My learned friend points to two cases in his skeleton *Aldi* and *Stuart* where he says "Come on, you should have brought your case at the same time as you brought proceedings against Aventis and Roche, and what you are doing is, in essence, abusing the process of the Tribunal. You were keeping a claim up your sleeve that you could have brought at that time." The point is that the *Aldi* and *Stuart* cases on abuse of process have no application here, because they are talking about situations where a claimant keeps a further claim up their sleeve and then by bringing it against the self-same defendant later on requires the defendant to go back and start litigating the case all over again. There are two reasons why that does not apply here. One is they are not the same defendant. Secondly, the starting point as to breach is established by the decision. All we are concerned about in this case against BASF is what vitamins did they supply directly or indirectly to us and what loss did that cause us, and what loss did that cause us? It has nothing to do with Aventis or Roche.

THE PRESIDENT: I think, Mr. Robertson, off the top of my head, without having yet consulted my colleagues, that if we are looking at an application for an extension of time, if we are in that position it is probably not appropriate in the light of the material we have got at the moment and that would be something that if we found against you we would probably need to have some further written submissions, possibly another short hearing, I do not know.

MR. ROBERTSON: Sir, those were our submissions as to why it should not be dealt with now and should be put off until the outcome of the judgment if it is necessary to consider it then. If the Tribunal is with us on that point then I think that really brings me to my concluding remarks which are that this claim was designed to be as simple and straight forward as possible. This claim is only against BASF, it is only for compensation, we are not, dare I say it, over-egging our claim by putting in claims for restitution or aggravated damages. It is a simple compensatory claim for the loss they caused us as a result of their admitted breach of Article 81 over a very long period indeed. It is a simple claim and we say there are simple limitation rules that apply to it.

Unless I can assist the Tribunal further those are our submissions.

THE PRESIDENT: Thank you very much. I will not hold you to your 10 minutes, but we might have to break for lunch! (Laughter)

MR. BREALEY: Three short points. First, in reply to Mr. Robertson's submission where he said that it does not refer – this is rule 31 of the Tribunal's Rules – the first submission he made, it does not refer to any other provision than subsection (8). So in other words essentially what he is submitting is subsection (8) is a descriptive provision and so there is no need to have regard to the rest of the section, that was his first submission. I wrote down the words: "It is simply to locate a particular date", that was his description of subsection 8, "It is simply to locate a particular date. You do not have to …" and I wrote down the words "… have to trawl through the reset of the section".

THE PRESIDENT: I am sorry they do not. (Laughter)

MR. BREALEY: I do not know whether you might have written down it was a bad point, but my submission is ----

THE PRESIDENT: I am not saying! (Laughter)

MR. BREALEY: -- it is a bad point, and for this reason, rule 31 refers to a relevant date, subsection (8) refers to the decision, but if that is all you have, those two provisions – rule 31 and subsection (8) and read them, you would not be very much the wiser, because your first question would be: what decision are we talking about? Rule 31 says the decision on which the claim is made, but where does that take one? It is quite clear from s.47A that it is a particular type of decision and it is only by looking at s.47A as a whole that one finds out what the relevant decision is, it is a decision by the European Commission that a prohibition has been infringed. One has to go beyond subsection (8) in order to put more flesh on the bones, just looking at those two in isolation does not take the reader very far at all, and that is in addition to the commonsense submission, which is subsection 8 is not read in a vacuum. As I submitted earlier on, one has to read it together with subsection (5). However, to say that it is simply there to locate a particular date, the real vice in that submission -- the flaw in that submission is that it does not tell the reader what is the relevant decision.

THE PRESIDENT: It is the decision you have to rely upon to make your claim. I mean, you do get the word 'reliance'.

MR. BREALEY: Absolutely. We get that from Rule 31.

THE PRESIDENT: You get that from (8) as well.

MR. BREALEY: From (8) as well. But, then what is that decision that one is going to rely on? Is it any old decision that is going to be appealed to the European Court? No. Obviously not. We have got to see what that decision means, and we have got to look at s.47A(1), (2), (3), (4), (5) and (6). So, to say that you look at it in isolation is wrong.

That is in reply to the first point.

The second point I would like to reply to is the pre- and post-Enterprise Act. Again, in my submission, this is a bad point. My submissions on consistency apply with equal force as if these proceedings were an Oft decision. So, one can go through the Act and ask oneself the question, "Well, what does s.47 mean when it refers to the Oft? Although the EC part was inserted after the Enterprise Act, obviously that was put in for consistency. But, the proper interpretation does not depend on EC law, on the infringement of Article 81. It equally applies - BASF's submission on this appeal against fine - as if this was an Oft decision. What happened was that there was the 1990 Act with the relevant decisions. We had s.46 and s.47 which quite clearly refer to a bundle of decisions. There is a decision that the prohibition has been infringed. There is a decision to impose a penalty. That is s.46. So, when the draughtsman of the Enterprise Act inserted the monetary claim before the Tribunal it carried through the same language. Time started to run when there has been a decision that the prohibition has been infringed. That can be the Chapter I prohibition. So, it dove-tailed into the existing text, and it is wholly consistent. Then we get the Article 81 insertion a few months later, and, in turn, that is also made consistent with domestic law.

However, the notion that BASF's interpretation is flawed because the Oft got jurisdiction some months later to apply Article 81 fundamentally misses the point. My submission applies with equal force as if this was purely domestic proceedings, and the Oft had fined my client for breach of s.2 and then fined it.

The last point on this - and, again, it is important - is that s.49 is the appeal to the Court of Appeal. Again, a Tribunal's decision can take two forms. So, this Tribunal can make two decisions: it can make a decision as to the amount of penalty, and it can make a decision that the Chapter I prohibition, Article 81 has been infringed. It is only by divorcing those two decisions that you can make any sense of s.49.

Those are the first two points on the statutory construction. I simply repeat the submission that I made - that if that is the plain meaning of the Act. The niceties of who suffers a little bit here and who suffers a little bit there is neither here, nor there.

The third point I would just like to emphasise is that para. 52 of *Emerson (1)*, which Mr. Robertson referred to, clearly shows that the arguments being addressed there concerned appeals by any party. That was the context in which the Tribunal was examining it and then applied in *Emerson (3)* - that the argument advanced by Morgan Crucible was, "Well, because they have appealed, then ----" What the Tribunal said was that, "Because the others have appealed, you need permission against Morgan Crucible". That is the context in which

the *Emerson* cases were being examined - any party, any proceedings. It did not squarely address the issue of statutory interpretation that we have been involved in this morning. Those are my three points.

THE PRESIDENT: Thank you very much indeed, both of you.

_____