



Neutral citation [2024] CAT 42

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1415/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 June 2024

Before:

ANDREW LENON K.C.
(Chair)
PROFESSOR ANTHONY NEUBERGER
PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

- (1) THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE**
- (2) THE NATIONAL HEALTH SERVICES BUSINESS AUTHORITY**
- (3) THE WELSH MINISTERS**
- (4) SWANSEA BAY UNIVERSITY HEALTH BOARD**
- (5) CWM TAF MORGANNWG UNIVERSITY HEALTH BOARD**
- (6) ANEURIN BEVAN UNIVERSITY HEALTH BOARD**
- (7) HYWEL DDA UNIVERSITY HEALTH BOARD**
- (8) BETSI CADWALADR UNIVERSITY HEALTH BOARD**
- (9) POWYS TEACHING HEALTH BOARD**
- (10) CARDIFF & VALE UNIVERSITY HEALTH BOARD**

Claimants

- v -

- (1) LUNDBECK LIMITED**
- (2) H. LUNDBECK A/S**
- (3) GENERICS (U.K.) LIMITED**
- (4) MERCK KGAA**
- (5) ARROW GENERICS LIMITED**
- (6) ARROW GROUP APS**

(7) RESOLUTION CHEMICALS LIMITED
(8) XELLIA PHARMACEUTICALS APS
(9) ALPHARMA LLC
~~(10) A.L. INDUSTRIER AS~~
(11) SUN PHARMACEUTICAL INDUSTRIES LIMITED
(12) SUN PHARMA UK LIMITED

Defendants

JUDGMENT (PRELIMINARY ISSUE – LIMITATION)

APPEARANCES

George Peretz K.C. and David Drake (instructed by Peters & Peters Solicitors LLP) appeared on behalf of the Claimants.

Sarah Ford K.C., Tim Johnston and Paul Luckhurst (instructed by Cleary Gottlieb Steen & Hamilton LLP on behalf of the First and Second Defendants; Skadden, Arps, Slate, Meagher & Flom (UK) LLP on behalf of the Third Defendant; Dentons UK and Middle East LLP on behalf of the Fourth Defendant; Macfarlanes LLP on behalf of the Fifth and Sixth Defendants; Clifford Chance LLP on behalf of the Eighth and Ninth Defendants; and Pinsent Masons LLP on behalf of the Eleventh and Twelfth Defendants) appeared on behalf of the First to Sixth Defendants, Eighth, Ninth, Eleventh and Twelfth Defendants.

Derek Spitz (instructed by CMS) appeared on behalf of the Seventh Defendant.

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A. INTRODUCTION

1. This judgment follows the trial of a preliminary issue as to whether the claim in these proceedings is time-barred.
2. The issue turns on which limitation period is to be applied to the claim and arises in the following circumstances. The Claimants brought stand-alone proceedings in the High Court claiming damages for breaches of Article 101 of the Treaty on the Functioning of the European Union (“Article 101”). The proceedings were transferred to the Tribunal before Particulars of Claim had been served. Following the transfer, and pursuant to a specific provision in the Transfer Order, the Claimants filed a Claim Form in the Tribunal. The Defendants contend that the relevant limitation period is the period applicable to High Court proceedings pursuant to the Limitation Act 1980 (“LA 1980”). If so, it is common ground that the claim is time-barred. The Claimants, on the other hand, contend that the relevant period is the period applicable pursuant to the Competition Appeal Tribunal Rules 2015 (“the 2015 Rules”) to claims made under section 47A of the Competition Act 1998 (“CA 1998”). If so, subject to an estoppel argument advanced by the Defendants, it is common ground that the claim is not time-barred and may proceed.

B. LEGAL BACKGROUND

(1) Stand-alone claims and follow-on claims

3. A party which has been the victim of an infringement of competition law and suffered loss as a result may bring a claim to establish the breach of statutory duty and recover damages for the breach. Such a claim is commonly referred to as a stand-alone claim to distinguish it from a follow-on claim. A follow-on claim is a claim, also for damages for breach of statutory duty, that “follows on” from a decision of a regulator that there has been an infringement of competition law. Once it has become final, the decision of the regulator is binding on the court or Tribunal pursuant to section 58A of the CA 1998 so that a claimant does not need to establish the infringement and need only prove that it has suffered loss caused by the infringement.

4. Prior to the coming into force of the Consumer Rights Act 2015 (“the 2015 Act”) on 1 October 2015, the Tribunal had jurisdiction to hear follow-on claims pursuant to section 47A of the CA 1998 but it did not have jurisdiction to hear stand-alone claims. The 2015 Act amended section 47A so as to confer jurisdiction on the Tribunal to hear both stand-alone and follow-on claims. The High Court always had jurisdiction to hear both stand-alone and follow-on claims.
5. In parallel with this legislative change, and also with effect from 1 October 2015, the Section 16 Enterprise Act 2002 Regulations 2015 (“the 2015 Regulations”) have enabled the High Court to transfer to the Tribunal for its determination so much of any proceedings before the court as relates to an “infringement issue”. “Infringement issue” is defined in subsection 16(6) of the Enterprise Act 2002 (“the 2002 Act”) (so far as relevant) as:

“any question relating to whether or not an infringement of the Chapter I prohibition [...] has been or is being committed”.

(2) Limitation Act 1980

6. It is common ground that the proceedings brought in the High Court were subject to the provisions of the LA 1980. The Defendants relied on section 2 which provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued and section 9 which imposes the same time limit on actions to recover any sum recoverable by statute.
7. The Claimants originally relied on section 32 of the LA 1980 which provides for an extension of the limitation period in respect of a claim where the defendant has deliberately concealed any fact relevant to the claimant’s right of action:

“(1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

- (a) the action is based upon the fraud of the defendant; or
- (b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or
- (c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.”

8. The application of this provision to competition damages cases was considered by the Court of Appeal in *Gemalto Holding BV and others v Infineon Technologies AG and others*¹. The Court of Appeal held that:

8.1 time runs, for the purposes of section 32(1)(b), from the point at which (as per Vos LJ):

“The claimant recognises that it has a worthwhile claim, and that a worthwhile claim arises when a reasonable person could have a reasonable belief that (in a case of this kind) there had been a cartel.” [45]

8.2 the claimant knew enough – in that case – to hold an objectively reasonable belief that there had been an unlawful cartel in which the defendants had participated at the time that the relevant Statement of Objections had been published [55]:

“It is, in my judgment, obvious that, once the regulator publicises the fact that it believes, subject to defences, that there is a prima facie case that certain persons have participated in an unlawful cartel, a claimant knows that it has a worthwhile claim.” [58]

9. As set out below, the Claimants now concede that the High Court proceedings were brought more than six years after they had sufficient knowledge for the purposes of section 32(1)(b) with the consequence that the High Court proceedings were time-barred by the time they were started. The Claimants contend, however, that following the transfer, a claim was made in the Tribunal within the limitation period applicable to the Tribunal proceedings and that the fact that the proceedings were out of time in the High Court is irrelevant.

(3) The Tribunal Rules

(a) Rule 30

10. Rule 30 of the 2015 Rules (“Rule 30”) is in a section of the Rules headed “COMMENCEMENT OF PROCEEDINGS” and is itself headed “Manner of

¹ [2022] EWCA Civ 782, [2023] Ch. 169.

commencing proceedings under section 47A of the 1988 Act”. Rule 30 provides that:

“a claim under section 47A of the 1998 Act (proceedings before the Tribunal: claims for damages etc.) shall be made by filing a claim form”

and goes on to specify the information which must be contained in the Claim Form and certain procedural requirements to be satisfied when filing the Claim Form.

(b) Rule 119

11. The limitation rules relevant to these proceedings are contained in transitional provisions enacted in parallel with the legislative changes referred to above. Rule 119 of the 2015 Rules (“Rule 119”) provides that Rules 31(1) to (3) of the Competition Appeal Tribunal Rules 2003 (“the 2003 Rules”) continue to apply to claims made on or after 1 October 2015, subject to the two conditions set out in Rule 119(3):

“Savings

119. —(1) Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (“the 2003 Rules”) as if they had not been revoked.

(2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in—

- (a) proceedings under section 47A of the 1998 Act, or
- (b) collective proceedings.

(3) A claim falls within this paragraph if—

- (a) it is a claim to which section 47A of the 1998 Act applies; and
- (b) the claim arose before 1st October 2015.”

(c) Rule 31

12. Rule 31 of the 2003 Rules (“Rule 31”) is set out under the heading “COMMENCEMENT OF PROCEEDINGS” and provides as follows:

“Time limit for making a claim for damages

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

(2) The relevant date for the purposes of paragraph (1) is the later of the following—

- (a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;
- (b) the date on which the cause of action accrued.

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

- 13. It was common ground that the “relevant date” for the purposes of Rule 31 was 25 March 2021, being the date on which the Defendants’ appeal against the European Commission infringement decision, referred to below at [21], was dismissed by the European Court of Justice. The Claimants, therefore, had until 25 March 2023 in which to make a claim before the Tribunal within the time limit set by Rule 31.
- 14. Where Rule 31 applies, it displaces, in accordance with section 39 of the LA 1980, the limitation period which would otherwise be applicable. As Vos LJ held in *DSG Retail v Mastercard Inc* [2020] Bus LR 1360 at [54]:

“[T]he words of rule 31(1) and (2) provide for present purposes that “a claim for damages must be made within” two years of the final determination of the competition authority. That is, as the claimants submit, a new limitation period in respect of a new way of bringing follow-on claims through the Tribunal.”

(4) Sainsbury’s v Mastercard

- 15. The judgment of Barling J in *Sainsbury’s Supermarkets Ltd v Mastercard Inc and others*² (“*Sainsbury’s*”) considered the application of Rule 119 and Rule 31 to proceedings transferred to the Tribunal from the High Court. Whether or not Barling J’s reasoning applies to this case is, as set out later in this judgment, in dispute. Barling J had proposed the transfer following the, then recent, expansion of the Tribunal’s jurisdiction to include stand-alone proceedings. The

² [2015] EWHC 3472 (Ch).

parties' solicitors (the point was not argued by counsel at a hearing) had asked for guidance about the possible impact of Rule 119 on the claim and in particular as to whether the effect of Rule 119 would be that the Tribunal would only have jurisdiction in relation to that portion of the claim for which the cause of action arose less than two years prior to the commencement of the proceedings.

16. Barling J held that Rule 119 did not apply to the transferred proceedings. His reasoning was as follows:

“27. Whatever the precise ambit of Rule 119, in my view it could have no application to proceedings such as the present if they were transferred in whole or in part to the CAT pursuant to section 16 of the 2002 Act. The present proceedings have been commenced in the High Court. Therefore what would be transferred to the CAT in such a case would be all or part of an existing claim, whereas it is in my view clear that Rule 119 is only dealing with claims originating in the CAT.

28. Rule 119(1) makes reference to proceedings “commenced before the Tribunal before 1st October 2015”. That part of the rule is obviously not relevant to the present proceedings.

29. Similarly with Rule 119(2). It has the effect of applying Rule 31(1) to (3) of the 2003 Rules “for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in [...] proceedings under section 47A of the 1998 Act ...”. That has no application here for at least the following reasons. First, the present claim is not a claim “made on or after” that date. Second, it is in my view not a claim “*madein proceedings under section 47A of the 1998 Act*” within Rule 119(2). New Section 47A concerns “the right to make a claim in proceedings under this section” (see subsection 47A(5)). That is not an apt description of the present claim, which was made, not in proceedings under that section, but in the High Court under the latter's own jurisdiction, which is not dependent on New (or Old) Section 47A. Third, it is clear from the wording of Rule 31 of the 2003 Rules that that rule too applies only to claims originating in the CAT. Thus: “*The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a)...*” (Rule 31(3)), and “*No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings....*” (Rule 31(4)). (original italics)

30. Therefore, regardless of whether Rule 119 (and Rule 31 of the 2003 Rules) applies only to follow-on (and not to stand-alone) claims, which the claimant's solicitors say is the subject of current debate, it would have no application to the present proceedings if they were transferred in whole or in part to the CAT under section 16. I can see no grounds on which it could reasonably be argued that a different limitation period would apply by reason of a transfer in circumstances such as the present.”

C. THE FACTUAL BACKGROUND

17. On 19 June 2013, the European Commission issued a final Decision in Case AT.39226 *Lundbeck v Commission* which found that the Defendants had committed infringements of Article 101 arising out of agreements made between the Defendants in 2002 and 2003 which had restricted or distorted competition in the market for the generic drug citalopram. In August 2013, the Defendants applied to annul the Decision.
18. On 4 July 2014, the Claimants wrote to various Defendants under the CPR Practice Direction on Pre-Action Conduct indicating an intention to commence a follow-on claim in the High Court in the event that the application to annul was unsuccessful.
19. On 8 September 2016, the General Court dismissed the applications to annul the Decision. The Defendants then appealed to the European Court of Justice. On 11 May 2017, the Claimants wrote to various Defendants again indicating that they intended to commence a follow-on claim in the event that the appeal to the European Court of Justice was unsuccessful.
20. On 19 June 2019, the Claimants filed a stand-alone claim in the High Court claiming damages for the infringements. At the time the Claim Form was issued, there were appeals pending before the European Court of Justice which had been brought by each of the Defendants against the dismissal by the General Court of the EU of their applications to annul the Decision. The parties repeatedly agreed that Particulars of Claim would not be filed or served until the judgment of the European Court of Justice had been issued.
21. On 25 March 2021, the European Court of Justice dismissed appeals by each of the Defendant undertakings against the General Court's decision. At that point, pursuant to section 58A of the CA 1998, the Decision became final and the findings of infringement contained in it became binding.

22. On 20 May 2021, the Claimants' then solicitors wrote to the Defendants proposing that the proceedings be transferred to the Tribunal. The Claimants' letter explained as follows:

“The claim form in the Proceedings was issued on 19 June 2019 with brief details of the claim. Particulars were not served due to a sequential series of ‘standstill agreements’ between our clients and yours, it being the common interest to await a final decision of the Court of Justice before proceeding (as this would determine the scope and nature of the claim). Now that the Court of Justice has issued its final decisions, we consider that it is in the interests of all parties for the Proceedings to be transferred to the Competition Appeal Tribunal (the “CAT”).”

23. On 4 June 2021, the Defendants' solicitors sought further information on the proposed transfer of the proceedings to the CAT. The letter made clear that the Defendants' rights were reserved in respect of the proposal and that the letter did not constitute, on behalf of any of those Defendants, “any admission [...] including as to any defence or argument based on limitation”.

24. On 9 June 2021, the Claimants' then solicitors wrote to explain their proposed approach:

“As the email of 20 May 2021 and our proposed draft order make clear, the aim is not to file and serve particulars and only then transfer to the CAT. That would involve unnecessary duplication (and a degree of otiose work by both parties).”

25. On 18 June 2021, the Defendants wrote back stating that they were prepared to agree to the transfer in principle and that they were content, following the transfer of the proceedings, for the Claimants to file a Tribunal Claim Form in lieu of High Court Particulars of Claim, once again subject to reservation of their rights as regards all defences, including limitation.

26. By order of Deputy Master Linwood made on 2 July 2021 (“the Transfer Order”), the High Court proceedings were transferred by consent to the Tribunal. The Transfer Order included the following provisions:

“TRANSFER

2. The Claimants shall serve the High Court Claim Form within 7 days of receipt of a sealed copy of this Order, at which point these Proceedings shall be transferred to the Competition Appeal Tribunal (the “CAT”) pursuant to section 16(4) of the Enterprise Act 2002.

[...]

6. The requirements for the Claimants to file Particulars of Claim in the High Court and for the Defendants to file Acknowledgements of Service in the High Court are hereby dispensed with.

7. The Claimants shall in due course instead file a claim form with the CAT in accordance with rule 30 of the CAT Rules. The Claimants shall also apply to serve the claim form referred to in this paragraph out of the jurisdiction and to effect service of such claim form on any Defendants out of the jurisdiction in accordance with rule 31 of the CAT Rules. This Order shall not be deemed to involve submission to the jurisdiction or acceptance of service by any Defendant for these purposes.

[...]

9. For the avoidance of doubt:

(1) Neither this Order giving effect to the said transfer, nor the transfer itself, is intended to alter, limit or exclude in any respect any element of the Claimants' Claim as constituted in this Court prior to the transfer taking effect. If and to the extent that any element of the Claimants' Claim as constituted in this Court prior to the transfer taking effect is not capable of falling within the jurisdiction of the CAT on a transfer, or would be altered, limited or excluded by this Order or the transfer, it is not subject to this Order and remains within the jurisdiction of this Court.

(2) Neither this Order giving effect to the said transfer, nor the transfer itself, is intended to alter, limit or exclude in any respect any element of the Defendants' accrued rights in respect of defence to the Claimants' Claim as constituted in this Court prior to the transfer taking effect, including, but not limited to, applicable law, process for service, jurisdiction, liability (including as to any defence or argument based on limitation, time bar, laches, delay, or related issue), or the existence of a duty of care, or otherwise howsoever in relation to the Claim."

27. On 4 August 2021, the Claimants wrote to the Registrar of the Tribunal enclosing a copy of the Transfer Order and the High Court Claim Form (which had been served prior to transfer) explaining that it was the Claimants' intention *"to file a claim form with the CAT in accordance with the Tribunal rules, Rule 30 (this replacing the need to serve full particulars in the High Court only to transfer the case in near-parallel)."*
28. On 20 October 2022, following correspondence between the parties, the Claimants' then solicitors wrote to explain that they were going to make an application to add Ranbaxy (UK) Limited to the claim as a further Defendant. Their letter explained: *"[i]f we were going to start the proceedings from scratch in the CAT then we would not need permission to add Ranbaxy."* On 31 January

2023, the Claimants wrote to the Tribunal with an application for permission (with consent) to add Sun Pharma UK Limited (formerly Ranbaxy (UK) Limited). The draft order enclosed with the application provided: *“the legal representatives of Sun Pharma UK Limited... (‘SPUL’), formerly known as Ranbaxy (U.K.) Limited, having confirmed... that... SPUL has agreed to be joined as a defendant to these proceedings.”* The reference to “these proceedings” must have been to the transferred proceedings as they were prior to the filing of the Claim Form in the Tribunal.

29. On 28 February 2023, the Claimants filed the Claim Form in the Tribunal setting out the details of their claim. The Tribunal claim number (1415/5/7/21 (T)) includes a ‘T’ in brackets denoting that it was transferred from the High Court. The Claim Form was headed “IN THE COMPETITION APPEAL TRIBUNAL AND IN THE MATTER OF SECTION 47A OF THE COMPETITION ACT 1998”. The Claim Form stated that *“these proceedings were originally issued in the High Court of England and Wales before being transferred to this Tribunal”*. In relation to limitation, the Claim Form stated that the relevant period, pursuant to section 47A of the CA 1998 and Rule 31, was two years from the date of the dismissal of the Claimants’ appeals to the European Court of Justice.

30. On 14 March 2023, the Tribunal made an order adding Sun Pharma UK Limited as a Defendant and extending time for the service of defences. The third recital provided as follows:

“AND UPON the Consent Order of Deputy Master Linwood dated 2 July 2021 transferring these proceedings from the Chancery Division of the High Court of Justice of England and Wales to the Competition Appeal Tribunal.”

31. On 17 March 2023, the Claimants filed an amended Claim Form.

32. On 5 June 2023, the Defendants wrote to the Claimants suggesting that limitation should be determined as a preliminary issue. On 9 June 2023, the Claimants responded, setting out their understanding of the limitation position at that time:

“It remained open to our client to issue fresh proceedings in the CAT up to 25 March 2023 but, instead, we agreed with all defendants that the proceedings would be transferred to the CAT. The Transfer Order sealed on 9 July 2021,

and CPR PD 30, make clear that the CAT will deal with the Claim from that date. The Claim was registered with the CAT, and assigned the case number set out above, on 10 August 2021. The CAT Rules applied from transfer (see too sections 15 and 16 of the Enterprise Act 2002).”

33. On 16 June 2023, the Defendants’ solicitors responded and drew the Claimants’ attention to the judgment in *Sainsbury’s*. On 17 August 2023, the Claimants filed their Reply which maintained that the claim was in time under the Tribunal Rules and in the alternative reserved the right to rely on section 32 of the LA 1980, which extends time in cases of deliberate concealment.
34. On 29 September 2023, at the first CMC, the Tribunal granted the Defendants’ application for limitation to be heard as a preliminary issue and gave directions for disclosure in respect of issues under the LA 1980.
35. On 26 October 2023, the Claimants filed their Amended Reply giving details of their case that the Claim Form had been filed in time under the LA 1980.
36. On 25 January 2024, the day before the date on which the Claimants’ disclosure was due in relation to the LA 1980 issues, the Claimants’ then solicitors notified the Defendants that the Claimants no longer sought to contest the Defendants’ case on those issues. The Claimants’ position was now that, by filing the Claim Form in the Tribunal within two-years of 25 March 2021, the claim was made within the applicable two year limitation period under the Tribunal Rules and was therefore not time barred.
37. The Defendants’ solicitors’ response to this changed position, in their letter of 1 March 2024, was that, on the correct construction of the Tribunal Rules, the Claim Form could not rescue an out-of-time claim and bring it back into time. They contended in the alternative that the Claimants were contractually estopped from asserting that the effect of the transfer was to render the claim in time.

D. THE ISSUES

38. The following two issues fall to be determined:

- 38.1 On a true construction of Rules 30 and 119(2) and (3) of the 2015 Rules and Rule 31 of the 2003 Rules, is the claim in these proceedings one to which the period specified in Rule 31(1) to (3) of the 2003 Rules (“the Rule 31 Period”), within which a claim for damages must be made, applies?
- 38.2 If the answer to the question above is “yes”, are the Claimants contractually estopped from relying on Rules 31 and 119 in support of their case that the claim is not time-barred?

E. THE FIRST ISSUE

(1) The Parties’ submissions

39. The Defendants submitted, in summary, as follows.

39.1 Whether or not the limitation provisions in Rule 31(1) to (3) apply at all depends on whether the claim meets the condition in Rule 119(2) that the claim was “made ... in proceedings under section 47(A) of the 1998 Act.” The transferred claim was not “made ... in proceedings under section 47(A)” as it was made in the High Court, when proceedings were issued there under the High Court’s jurisdiction.

39.2 Furthermore, Rule 31 only applies to claims which are made in the Tribunal. As is evident from the headings to Rule 30, a claim is made when it is commenced or initiated. The Claimants’ claim was not made in the Tribunal; it was commenced, and thus ‘made’, in the High Court. A transfer is the continuation of an existing set of proceedings in another forum and not the making of a claim.

39.3 The Defendants’ construction of Rule 119 and Rule 31 is supported by Barling J’s holding in *Sainsbury’s* that these Rules could have no application to a claim that was transferred into the Tribunal: it was not “made” in the Tribunal.

39.4 The Claimants could have issued new proceedings when they filed the Tribunal Claim Form but they did not do so. The current proceedings were, and were understood by the parties to be, the continuation of High Court proceedings which would be, and subsequently were, transferred to the Tribunal, as is clear from the correspondence and court documents referred to above, including the Transfer Order itself, the premise of which must have been that the claim being transferred had been ‘made’ already. The Claimants' case requires the Tribunal to disregard the parties' previous conduct and everything which has gone before including the Claimants' email of 20 May 2021, the Application Notice of 2 July 2021, the Transfer Order, the Claimants' letter of 20 October 2022, the application dated 31 January 2023 to add Sun Pharma UK Limited to the proceedings before the filing of the Claim Form, the reference to the transfer of proceedings in the Claim Form, the Tribunal's order of 14 March 2023 and the fact that the claim number in this case denotes that it was transferred from the High Court.

39.5 The reason why the Claimants filed the Tribunal Claim Form was not because they were ‘making’ a claim, but because, after numerous extensions of time for service of the Particulars of Claim, it was agreed to transfer the proceedings to the specialist jurisdiction of the Tribunal, whose procedure provides for a Claim Form rather than Particulars of Claim. The need to file a Claim Form instead of Particulars of Claim was recorded at paragraph 6 of the Transfer Order itself and the preparation and filing of the Tribunal Claim Form was a procedural step which the Claimants are attempting to invest with a serendipitous significance which it does not have.

39.6 If the Claimants' case as to the consequences of filing Particulars under the heading of a “Claim Form” in the Tribunal were correct, the effect of a transfer – for the purposes of limitation – would depend arbitrarily on whether or not the Claimant had filed and served Particulars of Claim in the High Court.

39.7 Moreover, if the Claimants' case were correct, there would be a real possibility that the transfer of a claim to the Tribunal could operate to the detriment of claimants and render out of time a claim that was previously in time in the High Court. This would be the case if a claim were issued in the High Court shortly before the expiry of the LA 1980 limitation period but outside the two year Rule 31 period. On transfer, a claim made in time in the High Court would become time-barred because Rule 31 would now become the operative limitation provision.

39.8 The effect of the Claimants' approach would be to deprive the Defendants of an accrued limitation defence, contrary to paragraph 9(2) of the Transfer Order. This Tribunal has rightly declined to accord an interpretation to the transitional provisions on limitation which has the effect of overriding accrued limitation rights: see *Merricks v Mastercard* [2023] CAT 15 at [31]-[32] and [39].

40. The Claimants' submissions were, in summary, as follows:

40.1 The short answer to the Defendants' case on limitation is that, by filing the Claim Form in the Tribunal in accordance with Rule 30, the Claimants made a claim within the Rule 31 period. It follows that the claim is not time-barred.

40.2 The fact that the Claimants brought High Court proceedings in relation to the infringements at issue on 19 July 2019 is irrelevant to the analysis. Nothing prevents a claimant whose claim is time-barred under the LA 1980 from commencing proceedings for that same claim under section 47A if the specific limitation rules relevant to the section 47A claim in the Tribunal are complied with.

40.3 The Claimants were at all times between 25 March 2021 and 25 March 2023 entitled to file a free-standing Claim Form in the Tribunal, as the Defendants accept. The Claim Form that was filed is no different from the Claim Form that could have been filed as the first step in separate, self-

standing proceedings. The fact that the Defendants may not, subjectively, have seen it in that way cannot alter what the Claim Form, objectively, is, and in particular cannot alter its consequences in terms of limitation.

40.4 *Sainsbury's* did not concern a case in which a Claim Form was filed in the Tribunal. The proceedings in that case were not “*made on or after 1st October 2015 in ... proceedings under [CA98 s 47A]*” because the claim was “*made, not in proceedings under [CA98 s 47A], but in the High Court*”, and was made (in the High Court) before 1st October 2015, and therefore “*not a claim ‘made on or after’ that date*”.

40.5 Further or alternatively, the construction of Rule 119(2) of the 2015 Rules applied by Barling J was incorrect. The fact of transfer to the Tribunal of proceedings in respect of a claim to which section 47A applies means that, from the point of transfer, the proceedings become “*a claim [that is being] made ... in ... proceedings under [CA98 s 47A]*”, engaging Rule 119(2) so that the Rule 31 period is capable of applying to proceedings transferred after 1 October 2015. Barling J’s holding that Rule 31 “*applies only to claims originating in the CAT*” was also incorrect. Barling J cited Rule 31(3) in support of this conclusion but Rule 31(3) can apply to any claim that is being pursued in the Tribunal. It is not limited to a claim first pursued in the Tribunal.

(2) The Tribunal’s decision

41. As both parties recognised, the issue as to whether the claim in these proceedings is time-barred turns on the correct interpretation of the words “made a claim” in Rule 119 and Rule 31.

42. The appropriate starting point for considering what is meant by “making a claim” for the purposes of the 2015 Rules is Rule 30 since this Rule prescribes the steps needed to be taken in order to “make” a claim under section 47A. As noted above, the Rule stipulates that a claim under section 47A of the 1998 Act “shall be made by filing a claim form” and goes on to specify the information which must be contained in the Claim Form and the other requirements to be

satisfied when filing the Claim Form. The natural corollary of the description in Rule 30 of the steps to be taken in order to make a claim is that, if those steps are taken, a claim will be made for the purposes of the Rules, including Rules 119 and 31 which refer to making a claim.

43. In order to succeed with their case that, despite the filing of the Claim Form within the Rule 31 period, the claim is nevertheless time-barred, the Defendants would have to establish that the references in Rules 31 and 119 to the making of a claim are to be read restrictively so as to exclude the filing of a Claim Form done as the continuation of proceedings transferred from the High Court.
44. The headings to Rule 30 “*COMMENCEMENT OF PROCEEDINGS*” and “*Manner of commencing proceedings*” provide some support for a restrictive construction. We were referred to paragraph 19.7 of *Bennion on Statutory Interpretation*, 8th Edition according to which:

“A heading is part of an Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief guide to the material to which it relates and that it may not be entirely accurate.”

And in relation to delegated legislation:

“As with Acts, when interpreting delegated legislation the significance to be attached to each component should be determined according to its function. ... Headings may be referred to in interpreting delegated legislation, but it is important to bear in mind that the function of a heading is merely to serve as a brief guide to the material to which it relates and may not be comprehensive.”

45. It was submitted on behalf of the Defendants that the headings in Rule 30 are informative and clearly indicate that references to “making a claim” mean “commencing proceedings” rather than continuing transferred proceedings. It was further submitted that the wording of Rule 119 is consistent with this construction in so far as the Rule treats “commencing proceedings” in Rule 119(1) and “made a claim” in Rule 119(2) synonymously.
46. Whilst some limited weight is to be given to the references in the headings of Rules 30 and Rule 31 and in the body of Rule 119 to “commencement”, “commencing” and “commenced”, the use of these words does not, in our view, mean that a Claimant who files a Claim Form in accordance with Rule 30 has

failed to make a claim for the purposes of the Rules. Plainly the filing of the Claim Form will in most cases be at the commencement or initiation of proceedings. It does not, in our view, follow that “commencement” is to be read in an exclusionary sense so as to deprive the filing of a Claim Form, in proceedings that have previously been transferred from the High Court, of the significance which this step would otherwise have for the purposes of the Tribunal Rules. No cogent reason was put forward by the Defendants as to why the filing of a Claim Form in transferred proceedings should be treated differently from the filing of a Claim Form unconnected to a transfer. Moreover the filing of the Claim Form in proceedings transferred from the High Court is the commencement of proceedings in the Tribunal; it is the necessary first step in a different jurisdiction, sufficient to set in train a process, in that jurisdiction, that leads to a decision establishing a legal liability.

47. We accept that the decision in *Sainsbury’s* provides some apparent support for the Defendants’ case in so far as Barling J held that Rule 119 had no application to the transferred proceedings in that case on the grounds that the proceedings were “made” in the High Court, not in the Tribunal and that Rule 31 only applies to claims “originating” in the Tribunal. *Sainsbury’s* is, however, clearly distinguishable from the present case. The issue in *Sainsbury’s* was whether proceedings brought within the LA 1980 limitation period in the High Court would be frustrated by being rendered time-barred as a result of the transfer of proceedings to the Tribunal and the potential application of Rules 119 and 31 to claims under section 47A arising more than two years before the transfer and hence outside the Rule 31 period. Barling J held that the Rules did not apply in that case so the limitation position was not affected by that transfer.
48. *Sainsbury’s* was not concerned with a case such as the present one in which proceedings were transferred and a Claim Form filed in the Tribunal within the Rule 31 period. In so far as Barling J held that Rule 31 only applies to claims “originating” in the Tribunal, there is no reason to assume that Barling J had such a case in mind. We do not read his judgment as excluding from the category of proceedings “originating” in the Tribunal proceedings in which a claim form has been filed there. We do not consider that *Sainsbury’s* was incorrectly decided.

49. The fact that the filing of the Claim Form was envisaged in the Transfer Order as being by way of substitution for the Particulars of Claim in the High Court, and more generally the fact that the parties appear from the correspondence and court documents referred to above to have understood the filing of the Claim Form to be a continuation of transferred proceedings rather than as the making of a free-standing claim, do not affect the legal consequences of the filing as regards limitation periods, which are contained in the Rules themselves. We accept the Claimants' submission that, in the interests of legal certainty, rules on limitation should be construed objectively and the question of whether the filing of a Claim Form has successfully interrupted the running of time should not turn on a state of affairs extraneous to the form itself or on the parties' understanding.
50. We do not accept the Defendants' submission that the Claimants' construction of Rule 31 would have arbitrary consequences depending on whether Particulars of Claim had been served in the High Court prior to the transfer. If Particulars of Claim had already been served, there would be no need for a separate Claim Form in the Tribunal and no issue would arise as to the application of Rule 31. It would be open to the Claimant to file a separate Claim Form in the Tribunal, if needed, in order to ensure that the claim was not time-barred or to obtain a waiver of the limitation defence. The fact of the first set of proceedings would not render the Claim Form or the second set of proceedings a nullity even if the claimant in the position of making two separate claims in the same matter would be at risk of having one or other of those proceedings struck out for abuse of process. In the Tribunal's view, it would be arbitrary and anomalous if, as the Defendants submitted, the filing of a Claim Form by reference to proceedings transferred from the High Court would have no effect on the running of time for limitation purposes whereas an identical Claim Form filed on the same day but without reference to the transferred proceedings would stop time running. It would mean that a purely procedural choice being exercised for convenience as to the nature and standing of otherwise substantively identical filings would provide a complete defence to a claim which either no party had intended or one party had intended but had allowed the other to do.

51. The Defendants’ argument that the Claimants’ construction of Rule 31 would potentially prejudice claimants in that a claim brought within time in the High Court might become time-barred as the result of the transfer and the consequential application of Rules 119 and Rule 31, to the exclusion of the LA 1980 period, is misconceived. If no Claim Form is filed in the Tribunal, Rules 119 and 31 would not apply. The relevant limitation period would continue to be the LA 1980 period, in accordance with the decision in *Sainsbury’s*.
52. In summary, the Tribunal considers that, notwithstanding the various contrary arguments advanced by the Defendants, the claim in these proceedings is one to which the Rule 31 period applies and the proceedings are therefore not time-barred.

F. THE SECOND ISSUE

(1) Legal Framework

53. Turning to the second issue, the following principles were not in dispute.

53.1 Contractual estoppel arises when contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist. The effect of such “contractual estoppel” is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract: see *Chitty on Contracts*, 35th Edition at [7- 029].

53.2 Parties may even bind themselves as regards the accuracy of a statement that they both know to be false; see Aikens LJ in *Springwell Navigation Corp v JP Morgan Chase Bank & Ors*.³

³ [2010] EWCA Civ 1221.

53.3 A consent order such as the Transfer Order is capable in principle of giving rise to a contractual estoppel: see *National Westminster Bank v De Kment*⁴ at [5].

53.4 It is possible to alter the applicable limitation period by contract: see *Ofulue v Bossert*⁵ at [55].

(2) The Parties' submissions

54. The Defendants submitted, in summary, as follows:

54.1 If (contrary to the Defendants' primary case) the proper construction of Rules 31 and 119 is that the Claimants "*made*" a new claim, the true construction of paragraph 9(2) of the Transfer Order is that the parties agreed that the transfer would not undermine the Defendants' accrued limitation rights. Insofar as is necessary, the Claimants further agreed with the Defendants that the Claimants would "*instead*" file a Claim Form in the Tribunal as a substitute for the requirement to file Particulars of Claim in the High Court.

54.2 The Claimants are therefore estopped from making assertions which are inconsistent with the terms of the parties' agreement. In particular, the Claimants are estopped from claiming that the Defendants' accrued rights in respect of their limitation defence in the High Court proceedings are defeated by reason of the transfer of the proceedings to the Tribunal. The Claimants are further estopped from claiming that the effect of filing the Claim Form in the Tribunal was to make a claim within the meaning of Rule 30 of the Tribunal Rules 2015 rather than simply to perform the function of Particulars of Claim in setting out the Claimants' pleaded case.

54.3 If the Claimants had wished to rely on a limitation regime that by definition does not apply to claims in the High Court, they should have made that clear on the face of the contract.

⁴ [2016] EWHC 3875 (Comm).

⁵ [2009] 1 AC 990, [2009] 2 WLR 749.

54.4 Although contractual estoppel does not require unconscionability, it would be unconscionable and inequitable for the Claimants to be allowed to disavow the contractual position set out in the Transfer Order.

55. The Claimants submitted, in summary, as follows:

55.1 The Transfer Order does not give rise to any relevant contractual estoppel. The “*accrued rights*” referred to in paragraph 9(2) did not include any rights in relation to the Rule 31 period. Any limitation defence that the Defendants might have wanted to assert was always liable to be defeated by the filing of a Claim Form with the Tribunal prior to 25 March 2023. The Defendants’ “*accrued right*” to assert a limitation defence was, at the time of the Transfer Order, forum-dependent and (therefore) defeasible by filing such a Claim Form.

55.2 Moreover, paragraph 9(2) is concerned with the effect of the Transfer Order and the transfer which occurred shortly thereafter. The Claimants’ primary argument is concerned not with the effect of these steps, but of later steps, namely the effect of the filing of the Claim Form and Amended Claim Form with the Tribunal. Accordingly, the words of paragraph 9(2) are simply not engaged by the Claimants’ case.

55.3 If paragraph 9(2) were to have the effect for which the Defendants contend, its effect would be to deprive the Claimants of valuable rights. This would require clear words; see the citation from *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [23] per Moore-Bick LJ. in *Bahamas Oil Refining International Ltd v Owners of the Cape Bari Tankers*⁶ (“*The Cape Bari*”) per Lord Clarke at [33]:

“The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract

⁶ [2016] UKPC 20.

make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be.”

Paragraph 9(2) does not come close to meeting this requirement.

(3) The Tribunal’s decision

56. The second issue essentially turns on whether the case now advanced by the Claimants is inconsistent with the parties’ agreement contained in the Transfer Order that “neither the transfer nor the Transfer Order would alter limit or exclude the Defendants’ accrued rights in respect of defence to the Claimants’ Claim as constituted in this Court prior to the transfer taking effect”.

57. Part of the relevant background to the construction of the Transfer Order is the fact that (as the Defendants accept) at the time the Transfer Order was made in July 2021 and for nearly two years afterwards it was open to the Claimants to bring a valid claim within the Rule 31 period by filing a Claim Form in the Tribunal. The Defendants had no “accrued right” to defeat a prospective claim made within the Rule 31 period. The “accrued right” that the Defendants had in relation to limitation was a right to defeat the existing claim “as constituted in this Court” (i.e. in the High Court) on the basis that the LA 1980 limitation period had expired.

58. Against that background, there is, in the Tribunal’s view, no sustainable basis for construing the “accrued rights” referred to in paragraph 9(2) as including a right to defeat a future claim brought within the Rule 31 period. The proposition derived from *Merricks v Mastercard* [2023] CAT 15 that the transitional provisions should, if possible, be construed so as not to take away accrued limitation rights is irrelevant given that, at the time of the transfer, the Defendants did not have any accrued rights to defeat a claim that might in future be made within Rule 31 (as subsequently happened).

59. Moreover, in order to succeed with their estoppel argument, the Defendants would need to establish that there is an inconsistency between the Claimants’ reliance on the Rule 31 period and their agreement that neither the Transfer Order nor the transfer itself would affect the Defendants’ accrued rights. There is no such inconsistency since the Claimants’ reliance on the Rule 31 period does not entail an

assertion that the Transfer Order or the transfer had any effect on accrued rights. The Claimants' reliance on the Rule 31 period is independent of the Transfer Order and the transfer.

60. Contrary to the Defendants' case, paragraphs 6 and 7 of the Transfer Order, which provide for the Claimants to file a Claim Form in the Tribunal in accordance with Rule 30 instead of Particulars of Claim, do not, on their correct construction, amount to an agreement that the Claim Form would have no function other than that of Particulars of Claim in the High Court and, inferentially, no impact on limitation. These paragraphs do not purport to say what the legal effect of filing the Claim Form would be or to suggest that the legal effect of doing so would be other than that of making a claim for the purposes of the Rules, including Rule 31. They do not debar the Claimants from asserting their rights to issue a Claim Form before the Tribunal and take advantage of its limitation provisions (which rights were extant at the time of the transfer).
61. The Tribunal accepts the Claimants' submission that the effect of the Defendants' construction of paragraph 9(2) would be that the Claimants were agreeing to give up the right to bring a claim within the Rule 31 period and that clear wording would have been needed to make such an intention clear; see *The Cape Bari*, cited above, and *First Tower Trustees Ltd v CDS Superstores International) Ltd*⁷ as per Leggatt LJ at [94]. There is no clear wording that the Claimants were giving up the right to bring a claim within the Rule 31 period. Paragraph 9(2), like Paragraph 9(1), appears to be "boilerplate" drafting the purpose of which was to ensure that the transfer and Transfer Order did not affect the parties' substantive rights. There was no conceivable reason why the Claimants would have agreed to give up their prospective right to bring a claim within the Rule 31 period and there is nothing in the Transfer Order to suggest that this was intended.
62. It follows that the answer to the second issue is that the Claimants are not contractually estopped from relying on Rules 31 and 119 in support of their case that the claim is not time-barred.

⁷ [2018] EWCA Civ 1396.

G. OVERALL CONCLUSIONS

63. The Defendants' case that the Claimants' claim is time-barred is dismissed.

Andrew Lenon KC
Chair

Professor Anthony
Neuberger

Paul Lomas

Charles Dhanowa O.B.E., K.C. (*Hon*)

Date: 21 June 2024