Case No: 1999/578

Neutral Citation No. [2004] EWHC 166 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th February 2004

Before :

THE HONOURABLE MR JUSTICE COOKE

- -

Between :

BIM KEMI AB	**Claimant**
- and -	
BLACKBURN CHEMICALS LIMITED	**Defendant**

- -
- -

Andrew Onslow, Q.C. and Mark Hoskins (instructed by **Jeffrey Green Russell, Solicitors, London**) for the Claimant
Alastair Wilson Q.C. and Jonathan D C Turner (instructed by **Taylors, Solicitors, Blackburn**) for the Defendant

Hearing dates : 2nd and 3rd February 2004

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Judgment

Mr Justice Cooke:

Introduction

1. This action has a substantial history to which it is necessary to refer in the context of the application which I have to determine. The application is made by the original counterclaiming defendant (Blackburn) seeking to strike out various parts of the defence to Blackburn's Statement of Case on assessment of damages on that Counterclaim. The original claimant and defendant to Counterclaim (Bim) seeks to rely upon a defence under Article 81 (previously Article 85) of the Treaty of Rome (the EC Treaty), in circumstances where the substance of that defence had been previously put forward by Blackburn, as a defence to Bim's original claim, but where that issue was stayed pending the resolution of other issues by the Courts.

2. As a result of a Judgment by Langley J handed down on 30th January 2002 and that of the Court of Appeal on 13th February 2003, the following issues have been determined:

   i) A contract was made between Blackburn and Bim in October 1994 in the terms of a fax dated 20th December 1993 (the 1994 Agreement).

   ii) By its actions, Bim repudiated the 1994 Agreement and that repudiation was accepted by Blackburn on 22nd December 1998 as bringing the 1994 Agreement to an end.

   iii) Bim was in breach of the 1994 Agreement by reason of its sales of various products after binding itself to Blackburn to accept only Blackburn's products

for sale on an exclusive basis. In consequence, Blackburn was entitled to damages in respect of those breaches and Bim's repudiation of the 1994 Agreement, subject to proof of loss.

iv) Bim had not by the end of 1996 obtained 20% of the available market referred to in the fax under the heading "Territories" (on the proper construction of that fax) and was therefore not entitled to continuing exclusive sales rights in Denmark, Norway or Finland. (The consequence of this was that Blackburn was free to make its own sales directly in those countries).

3. The 1994 Agreement which was the subject of this dispute, as encapsulated in the fax, contained the following paragraphs:-

> "Territories
>
> (1) Blackburn Chemicals Ltd will have exclusive sales rights in Great Britain and Eire.
>
> (2) Bim Kemi AB will have exclusive sales right in Sweden. Bim Kemi will also have exclusive sales rights in Denmark, Norway and Finland for a 3 year period, this may then be continued subject to their attaining 20% of the available market, in any agreed product range.
>
> (3) With regard to markets outside the exclusive regions, each partner can sell the partners product(s) only on account by account basis with the specific accord of the technology owner after furnishing information on each account, including name of company, product, potential volume, targeted volume, product price and competition. Such information must be updated by customer and by product on a regular six monthly basis.
>
> Information Exchange Technical
>
> If the non-technology owning partner discovers, or becomes aware of any application to product knowledge relating to the partners products included in this agreement, then such information should be disclosed to the technology owning partner immediately.

Term of the Agreement

…….

(2) Under normal circumstances in severance of the agreement, the non technology owning partner, agrees to a three year manufacturing exclusion from the product type/application. …….

Product Exclusivity

(1) The partners agree that they will source and sell only their partner's products:

i.e. BCL will only source lint control products from Bim Kemi

Bim Kemi will only source antifoams from BCL."

4. Langley J described the dispute in the following way:

> "……..At the heart of the present disputes is the question of what, if any, terms were agreed between the two companies to govern their relationship. Matters came to a head in December 1998 when Blackburn refused to supply Bim and Bim's Finnish subsidiary Cellkem Oy ("Cellkem") with any further deliveries of Blackburn's product known as BS 470. Bim issued proceedings in July 1999 claiming two years loss of profit on sales of BS 470 on the basis that under an agreement allegedly made in 1994 on the terms of a fax from Blackburn to Bim dated 20 December 1993 ("the December 1993 fax") Blackburn was obliged to give a year's notice from the anniversary of the agreement before it could terminate supplies of BS 470 to Bim. Blackburn denies that any such agreement was made and also asserts that even if it was made Bim was in repudiatory breach of it because Bim wrongfully sold its own (or Cellkem's products in Scandinavia. Blackburn also makes claims for damages against Bim under both the 1994 Agreement (if any) and an earlier written Agreement made in 1984."

5. About three months before the date fixed for the trial, Blackburn sought to make amendments to its defence to plead that if Bim had obtained 20% of the available market, so that it retained its exclusive sales' rights in Finland after three years, there was a breach of Article 81 of the EC Treaty and the whole of the 1994 Agreement was thereby rendered invalid. Finland was apparently the main market for the only product

supplied under the 1994 Agreement. Bim objected to that amendment because of the lateness of it, because it raised wider issues and because those issues could not be fairly determined at the scheduled trial. Blackburn maintained that, as the plea was one of illegality, the Court had to consider it whether pleaded or not and that it was better that it should be pleaded out. Despite Bim's objection Langley J gave permission to Blackburn to amend its Defence and Counterclaim and to plead and serve a Rejoinder and Reply to Defence to Counterclaim which included this plea, but excluded the issues from the imminent trial. He gave Bim permission to make consequential amendments in the light of Blackburn's amendment, subject to the paragraph of the order in which he ordered a stay in the following terms:

> "All further proceedings in respect of the pleas that the Agreement alleged by the claimant to have been made between the parties in 1994 was, if made, void under Article 85 of the Treaty of Rome or under the Restrictive Trade Practices Act 1976 shall be stayed until after the Trial of all other issues or further Order. "

6. The Article 81 plea which had been advanced by Blackburn is to be found in paragraph 6E of the Re-Re-Re-Re-Amended Defence and Counterclaim, following a plea in relation to the Restrictive Trade Practices Act. Paragraph 6E reads as follows:

> "Further or in the further alternative if (which is denied) the claimant or its subsidiary Cellkem achieved a 20% share of the market for Antifoaming agents in Finland or in Scandinavia, the exclusive supply and sourcing obligations and restrictions on re-sale outside allotted territories of the alleged Agreement (if made) were void under Article 85(2) of the Treaty of Rome, in that it was an agreement between competing undertakings ….. which was liable to affect trade between member states of the EC (namely the UK, Sweden and Finland) to a not insignificant extent and which had as its object or effects the prevention, restriction or distortion of competition within the common market by restricting competition between the said undertakings in the supply of antifoaming agents, alternatively silicone based antifoaming agents in Finland or Scandinavia; and the remainder of the alleged Agreement, if made, was thereby invalidated ……."

7. In its skeleton argument addressing the question of permission to amend Blackburn stressed the connection to the existing proceedings in relation to investigation of market share because the Court had to determine whether or not Bim had achieved 20% of the available market in the context of the existing dispute. Bim argued that the EC Treaty point raised difficult and substantial issues of law, fact and expert opinion and had much wider implications than the proposed plea. Bim also said that the pleading was inadequate for the lack of particularity. Both accepted that there were issues which would have to be developed and Langley J allowed the amendment but postponed any consideration of it so that the existing trial arrangements would not be jeopardised.

8. When Bim came to plead to the other amendments made, not being bound to plead to the new Paragraph 6E issue, it included the following:

> "The claimant does not plead to paragraph ….. 6E of the Defence. All proceedings arising from the allegations made in this paragraph have been stayed by the Order of Langley J dated 5th October 2001. If the ….. [1994] Agreement was invalid for the reasons given by the defendant, the claimant reserves the right:
>
> (i) to contend that the 1984 Agreement was also invalid:
>
> (ii) to claim damages from the defendant for breach of Article 85(81) of the Treaty of Rome."

9. Self evidently Bim did not accept the validity of the Article 81 plea raised by Blackburn since it proceeded with its claim. In his witness statement, Bim's solicitor says that Bim had not taken specialist advice and literally had no case on the issue at that stage. Inevitably however, notwithstanding the pressures of preparation for the hearing on other issues (and as Bim's own amendment shows) there would have to be some consideration of this plea, since Bim would not wish to press on with what might turn out to be a futile claim. Bim made no positive case since it did not need to

do so, but as appears from Mr Price's evidence and as accepted by Blackburn, its stance was that if Blackburn was right in its assertions as to the invalidity of the 1994 Agreement because of the EC Treaty, then Blackburn's own Counterclaims would also fail. Had it ever pleaded to Blackburn's case on this point, that, at least, would have been said. Blackburn would at all times have accepted that its own claims fell with that argument. Success as to the invalidity of the Agreement would affect all claims under the Agreement in whichever direction they flowed and might have other "knock on" effects as Bim's paragraph 6E indicated. Nonetheless, it is also clear that Bim's primary stance was to maintain the validity of the Agreement and to pursue its claim, as it duly did.

10. By the end of the trial if not well before, Bim's case was that it had achieved 20% of the silicone based antifoam agents' market in Finland and that this was the relevant market for the purposes of the 1994 Agreement. It could not and did not say that it had achieved 20% of the antifoam market, so that the 20% issue became one of construction of the 1994 Agreement, (on the meaning of "available market") as opposed to an issue of fact. The Judgment records that it was not in dispute that Bim had achieved 20% of the silicone based antifoam market in Finland. Langley J held that there was an agreement on the terms of the fax, that Blackburn had wrongfully terminated it, although Bim had also breached its obligations and was liable in damages on Blackburn's counterclaim. He held that it was the silicone based antifoam market that mattered for market penetration and that Bim had attained the contractual requirement for exclusivity.

11. Following the trial, an Order was drawn up and sealed which contained various declarations enshrining the Judge's decision, which became the subject of an appeal. For present purposes the important parts of the Order are as follows:

> "The Court tried all issues in the action other than (i) the competition laws issue raised by paragraph 6D – E of the Re-Re-Re-Re-Amended Defence and Counterclaim and (ii) issues of loss and damage and made the following Declarations Orders and directions …….
>
> The above declarations are made without prejudice to [Blackburn's] case presently stated in paragraphs 6D – E of the Re-Re-Re-Re-Amended Defence and Counterclaim that the 1994 Agreement or part thereof was void ……."

12. Directions were then given by the Judge following submissions by the parties. Blackburn said that the competition law issues should be determined next and Bim said that the competition case needed to be pleaded out, bearing in mind the lack of particularisation in paragraph 6E of Blackburn's pleading. Blackburn accepted that, although it had succeeded in its counterclaim, the Court was bound to take notice of the fact that the basis of that counterclaim was put in issue by the competition law points, so that judgment could not be given on it. As the Judge had found that the relevant 20% market share had been attained, paragraph 6E of Blackburn's pleading was triggered. The Judge made the following directions with regard to the issues which remained to be tried:

> "11.1 Quantum issues are to be tried after the competition issues. As to the competition issues:
>
> 11.2 [Blackburn] will serve a particularised statement of case by 4.30pm pm 30th April 2002.
>
> 11.3[Bim] will serve a particularised statement of case in response by 4.30pm 31st May 2002……."

13. Blackburn applied for permission to the Court of Appeal to appeal against the decision of Langley J but, in compliance with the directions given, served its

Statement of Case on competition law issues on 30th April 2002. Between paragraphs 12 and 32 of that document, Blackburn set out its case that the 1994 Agreement constituted an agreement between undertakings within the meaning of Article 81 and asserted that 10 different provisions of the 1994 Agreement had the object of preventing, restricting or distorting competition between Blackburn and Bim in the development, manufacture, acquisition and supply of antifoams and lint control products.

14. It was alleged that there was a market for silicone based antifoams and a separate market for oil based antifoams or alternatively that silicone based and oil based antifoaming agents together constituted a separate market from other antifoams and water based antifoams in particular. It was also alleged that Finland was a separate relevant geographic market for silicone and oil based antifoams or alternatively that the European economic area was such a relevant separate geographic market. The Statement of Case went on to set out the parties' market shares in relation to each of those markets and then did likewise in relation to water based antifoams for the UK and the European economic area which were again alleged, as alternatives, to be separate relevant geographic markets. In addition a case was made about lint control products in relation to the UK and the European economic area which were again alleged on an alternative basis to be separate relevant geographic markets for those goods. None of this case, as put forward, was expressed to be in any way conditional upon the point raised in paragraph 6E of the Re-Re-Re-Re-Amended Defence and Counterclaim, namely that Bim had achieved a 20% share of the market for antifoaming agents or silicone based antifoaming agents in Finland or Scandinavia.

15. There followed a sequence of correspondence between the parties in which Bim objected to this Statement of Case as going well beyond that originally pleaded in the Defence. A Solicitors' letter of 24th May 2002 pointed out the new areas of dispute that had been raised, but did not object on the basis that the case was no longer predicated on the achievement of 20% of the relevant market. There was never any agreement between the parties as to the status of this document as, once permission to appeal was granted by the Court of Appeal, the parties sensibly agreed to "adjourn the competition issues until after the appeal". Thus Bim never put in its pleading on these issues.

16. Two Orders were made by the Court of Appeal on different dates. First, on the 13th February 2003, all three members of that Court made an order holding "that Bim was in repudiatory breach of contract as at December 1998 and Blackburn was entitled to accept that repudiation by refusing to sell further quantities of BS 470 to Bim". There was an Order for repayment out of a sum paid into Court but questions of costs and other matters arising out of the Judgment were adjourned for further consideration with provision for the parties to file and serve skeleton arguments in relation to them.

17. Following submission of those further skeleton arguments and oral argument addressed to a two member Court, that two member Court then made a further Order on 24th June 2003 to the effect set out in paragraph 2 of this Judgment, thus subsuming the earlier Order.

18. Between the two Orders of the Court of Appeal, Bim's Petition for permission to appeal to the House of Lords was dismissed. Immediately following that, on 28th May 2003 Blackburn's Solicitors wrote a letter to Bim's Solicitors formally withdrawing the Statement of Case previously advanced on competition law issues and stating that

Blackburn considered that the Court was functus officio regarding the competition issues and that it did not rely upon paragraphs 6D and 6E of the Re-Re-Re-Re-Amended Defence and Counterclaim.

19. Thus, when the matter came back before the Court of Appeal on 24th June, the position was that Blackburn had abandoned any arguments on the competition law issues and Bim had no positive pleaded case in relation to them – its only relevant statement being paragraph 6E of its Re-amended Points of Reply and Defence to Counterclaim where it said that it was not pleading to paragraph 6E of Blackburn's pleading but reserved its position on 2 particular ramifications of any finding of invalidity, as set out earlier in this Judgment.

20. There was discussion between the parties before the Court of Appeal's second Order about Bim's ability to raise an Article 81 argument, now that Blackburn no longer needed or wished to do so. As it had succeeded on appeal in showing that Bim was in repudiation (whereas Langley J had found that Blackburn was in repudiation), had succeeded on its Counterclaim and had a finding that Bim had not by the end of 1996 obtained 20% of the relevant market referred to in the fax, the issue raised in paragraph 6E of its Re-Re-Re-Re-Amended Defence and Counterclaim did not arise and it was content with the validity of the agreement. It had also abandoned the wider case in its Statement of Case on competition law issues. By contrast, Bim, which had now lost on appeal, having previously contended that the 1994 Agreement was valid in all respects, now wished to raise the illegality plea in order to defend itself from Blackburn's Counterclaim, which was all that remained of the litigation.

21. The Court of Appeal expressly did not determine whether or not Bim could raise this defence. Paragraph 10 of its second Order reads as follows:

> "Nothing in the form of this Order shall prevent [Bim] from arguing that the 1994 Agreement is void for illegality and/or that [Blackburn] is precluded from recovering damages by reason of [Blackburns] pleaded case that the 1994 Agreement was void for illegality, that nothing in this paragraph shall prevent [Blackburn] from arguing that [Bim] is no longer entitled to raise such an argument".

Cause of Action Estoppel

22. Blackburn contended that Bim was estopped from relying upon an Article 81 defence by reason of the decision of Langley J and the Court of Appeal. The principle set out in Henderson v Henderson (1843) 3 Hare 100 at page 114 –115 is firmly established:

> "….. where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belongs to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

23. The underlying purpose of the principle is the same as that of issue estoppel and cause of action estoppel, properly so called. They are designed to bring finality to litigation and avoid the oppression of subjecting a party to successive actions. As Lord Millett explained the position in Johnson v Gore Wood & Co [2002] 2 AC59, the principle in Henderson is essentially a principle ancillary to the defences of res judicata, cause of action estoppel and issue estoppel which is necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.

24. It will be noted that there is an exception to the principle in "special circumstances" or "special cases", both of which are to be distinguished from matters which could have been brought forward but were not, whether from negligence, inadvertence or accident. In Arnold v Natwest Bank plc [1991] 2 AC 93 Lord Keith at page 105 commented upon cause of action estoppel, which he regarded as extending to the Henderson principle and, by reference to Yat Tung Investment Co Ltd v Dao Heng Bank Limited [1995] AC 581, drew attention to the concept of reasonable diligence in bringing forward available defences. Special circumstances were reserved in case justice should be found to require the non-application of the rule.

25. The decision of Jacob J in Coflexip SA v Stolt Offshore MS Limited [2003] EWHC 1892 rejects the notion that there has been any change in the law of cause of action estoppel by the Gore Wood decision to which I have already referred. In Coflexip as in Poulton v Adjustable Cover and Boiler Block Co (1908) 25 RPC529, the plaintiff succeeded in an action for infringement of a patent at trial and an inquiry was ordered as to damages. Subsequent to this, however, either the defendant or third party had later obtained a revocation of the patent. Nonetheless damages were awarded in each case because the defendant was bound by the previous decision.

26. It was said by Mr Alastair Wilson, Q.C., Counsel for Blackburn that the only exceptions to the rule of cause of action estoppel, whether in its pure form or its extended Henderson form, arose where fraud or collusion led to the judgment or where, with reasonable diligence, a point could not have been taken on the earlier occasion (see Arnold at p 109). He said that, here, the decisions of the Court of Appeal concluded the issues against Bim, who had never raised any Article 81 defence and that this was a defence which it could at any time have taken, but chose

not to do so. Once the Court of Appeal decided that Bim was in repudiation and that Bim had not achieved 20% of the relevant market, Blackburn's Article 81 plea in paragraph 6E of its pleading disappeared and, in the absence of any plea to similar effect on Bim's part against Blackburn's counterclaim, that counterclaim succeeded and the only live issue was damages. The Henderson principle meant that Bim could not raise in any assessment of damages an Article 81 point which it had not asserted by way of defence to liability, even if that point had not been expressly decided against it by the Court.

27. Whether or not there has been any relaxation of the absolute rule for pure cause of action estoppel where it was previously thought that only fraud or collusion would defeat the estoppel, the earlier authorities establish that "special circumstances" or "special cases" can constitute an exception where the Henderson rule is concerned, as they do for issue estoppel. That appears from Henderson itself and more recently from Arnold at page 105, by reference to Yat Tung, where "special circumstances" are said to create an exception to the rule which is in itself confined to cases where reasonable diligence would have caused the matter to be raised earlier. In Barrow v Bankside [1996] 1 WLR 257 the point again appears clearly in the judgment of the Master of the Rolls at pages 260 and 263, whilst that and other decisions began to equate the test to that of abuse of process.

28. That process came to fruition in the Johnson v Gore Wood decision, where it was said that the Henderson principle, as it has now developed, is distinct from cause of action estoppel and issue estoppel, although it has much in common with them and that the notion of "special circumstances" which would alleviate the rigour of the application

of the rule has now been subsumed into the need to find an abuse of process before the principle applies at all. Lord Bingham at p 31 said

> "…. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current reemphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decisions or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the Court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a part is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice. ……."

29. The other members of the House of Lords all agreed with Lord Bingham, including Lord Millet who stressed the burden on the party advancing the estoppel to establish that there was an abuse of process by the other party Whilst such abuse is not capable of exact definition, it can be seen in conduct which involves unjust harassment of another party and manifest unfairness to him or in conduct which, if allowed would bring the process of the administration of justice into disrepute in the eyes of right thinking members of society.

30. The Orders of the Court of Appeal left open the issue for argument as to the availability of the Article 81 plea to Bim, whilst the decision of Langley J made provision for argument on the point as raised by Blackburn, by requiring pleadings to be served. Both Courts made declarations without entering judgment, because of points which remained unresolved.

i) In their first order, the Court of Appeal reserved the position on matters other than the express declaration which they did make. This order has to be read in the light of the second order and cannot amount to a final conclusion of the issues in the action.

ii) In the second Order of the Court of Appeal, the availability of the Article 81 point to Bim was expressly left open for later determination.

iii) Both Court of Appeal Orders reflected decisions in the matters appealed from Langley J, which did not include competition law issues. The Court did not decide any issues which Langley J did not decide.

31. Both the stay Order and the Order made after trial by Langley J reserved the Article 81 point raised in the defence of Blackburn to the claim made against it. Although there never was any Article 81 issue raised by Bim in respect of Blackburn's counterclaim, all knew that, if Blackburn succeeded on the issue, the point was available to Bim and would be taken by Bim so that the counterclaim would also fail. Indeed the Court could not decide otherwise if deciding that Article 81 invalidated the 1994 Agreement.

31. Bim did not raise Article 81 as an independent defence to liability prior to the trial, but had not had cause to plead their case in relation to Blackburn's reliance on it. Blackburn went on to plead a much wider case than paragraph 6E of the Re Re Re Re Amended Defence and Counterclaim in its Statement of Case on competition law issues, in purported compliance with the directions given by Langley J, so that, by the time that the Court of Appeal made its decision on the appeal, Blackburn's case was no longer predicated on a finding of 20% of the relevant market. The Court of Appeal decision did not therefore render that pleading otiose, by virtue of its finding that 20 % was not achieved, but, having won on appeal, Blackburn had no need of this additional defence.

32. It is right to say that the point reserved was always the Article 81 defence raised by Blackburn. The position is illustrated by positing Blackburn's abandonment of the Article 81 defence prior to the trial before Langley J. There would then have been no extant pleaded issue to be determined on Article 81 at all. As actually occurred, Bim ran its case on the basis that the 1994 Agreement was valid, its only expressed points on Article 81 being that if Blackburn should succeed in establishing a defence on that basis, there would be other repercussions in relation to the 1984 Agreement and an

alternative claim by Bim, whilst it was well understood that Blackburn's counterclaim would also fail.

32. 33. As Blackburn were not slow to point out in argument, Bim had every opportunity to take an illegality defence, had it wished to do so, even if consideration of it would have been stayed to be heard with Blackburn's argument. If properly advised, it ought to have considered the point when bringing its claim in the first place but must necessarily have considered it when Blackburn brought its Counterclaim and cannot but have applied its collective mind to the subject when Blackburn specifically took the Article 81 point. Notwithstanding Mr Price's evidence, it must be taken to have eschewed raising such a defence itself, unless Blackburn succeeded in it. There is of course an obvious reason for this which is that it wished to pursue its claim and any plea of illegality by Bim would destroy its own claim against Blackburn. Therefore it chose not to take any such point.

33. 34. Furthermore Blackburn says, with some justification, given its attitude towards these proceedings and its contention that there was never any valid agreement at all, albeit for other reasons (the point on which it failed at the first instance and in the Court of Appeal), that if Bim had at any point put forward a positive case under Article 81, Blackburn would have admitted it with the result that all claims under the Agreement would have disappeared (unless there was room for tainting some provisions, but not the agreement as a whole which may be thought unlikely). Blackburn would have been more than happy for proceedings to be brought to an end in this manner because their case was that there never was any valid agreement at all. Blackburn argued that it was Bim's maintenance of its claim under an alleged valid agreement which ensured the continuance of proceedings with all the concomitant

costs when Blackburn would have happily foregone its Counterclaim if no claim was pursued against it. Yet Bim might have brought alternative claims as it suggested in its amended pleading so that the action would not necessarily have ceased.

34. 35. On the face of it, the Judgment given by Langley J, in which he accepted the validity of Blackburn's Counterclaim, whilst holding it to be in repudiation, concluded the question of Bim's defence to that Counterclaim, subject only to appeal and the success of Blackburn's Article 81 argument by way of defence to Bim's claim.

35. 36. It can be said that if the Article 81 defence could have been taken with reasonable diligence on the part of Bim, that was a point which Bim was bound to bring forward by reference to that Counterclaim and that it could not rely on the possibility of Blackburn running such a point and succeeding in it, so as to bring to nought both its claim and the Counterclaim. Without a plea of its own by way of defence to the Counterclaim, that Counterclaim was concluded unless Blackburn made good its illegality plea, which it could at any stage have abandoned, as it ultimately did.

36. 37. Nonetheless, the issue which confronts the Court is not simply as to what has already been decided but whether it is open to Bim to run an Article 81 defence to the assessment of damages in all the circumstances. It is accepted by Blackburn that this is a Henderson situation or an abuse of process case which, for the reasons already given, are now to be treated as virtually the same. Can it be said that Bim's conduct is unjust harassment of Blackburn or that it would be unfair for Blackburn now to face this defence or that Bim's conduct in putting forward this defence to the claim for damages is such as to bring the process of the administration of justice into disrepute?

37. 38. Blackburn contends that it is now much too late for Bim to take an illegality argument of this kind, having previously abjured it throughout the course of the proceedings. If the illegality point had been taken at any stage by Bim prior to the decision in the Court of Appeal, Blackburn would have accepted that the Agreement was unenforceable for that reason.

38. 39. It must not however be forgotten that the Article 81 point was a late entry into the proceedings as a defence for Blackburn. Had Blackburn pleaded the point at an earlier stage, rather than resorting to it shortly before trial, it would have been the subject of a pleading by Bim to the effect set out in paragraph 9 of this Judgment an issue to be determined at the trial and with its corresponding impact on both the claim and the counterclaim. In those circumstances Bim would have had an available defence to the counterclaim should Blackburn's defence under Article 81 have succeeded in relation to Bim's claim. The evidence on the point would have been heard and the Court would have decided the issue one way or the other. It was only because of the lateness of Blackburn's plea that Bim was deprived of this benefit.

39. 40. Although Bim must have directed its mind to the Article 81 point when it was raised by Blackburn, if not before, there can be little doubt that Bim's attention was focused upon fighting the action as currently constituted, whilst putting to one side the Article 81 issues raised by Blackburn's new defence. It is only the unusual sequence of events, resulting from the form of case management adopted by the Court as a result of the late plea by Blackburn, that has given rise to Bim's potential exposure. Whilst this does not, in my judgment, put this case into the same category as Barrow v Bankside where estoppel could not apply at all, because of the conditionality of any case of Bim's on Article 81, there is a clear analogy to be drawn.

40. 41. There is also to be taken into account the conduct of Blackburn in these circumstances. No doubt, parties often ignore available defences under Article 81 and the like because of the potential repercussions of taking such a point. An admission that the 1994 Agreement is prohibited under Article 81 could give rise to penal sanctions from the European Commission. Whereas Blackburn had been happy to defend Bim's claim on other bases until comparatively late on, it then chose to throw in this "nuclear" defence (as Bim described it) which would have the effect of negating all claims and counterclaims as they currently stood, if successful. Its counterclaim prior to abandonment of one aspect of it shortly before this hearing, is said to have been of the order of £8M, whereas, following the abandonment of that point, it is said to be worth about £4-5M. It can be seen that this defence is one which a party is unlikely to raise whilst it considers it has strong prospects of successfully defending the claim on a different basis and pursuing its own claim.

41. 42. The Statement of Case on the competition law issues which Blackburn put forward was a substantial document going well beyond the original limited plea in paragraph 6E of its Re-Re-Re-Re-Amended Defence and Counterclaim. Although it is now contended for Blackburn that this document was invalid, was not a pleading and had no standing , it represented the case Blackburn then wished to advance and to which Bim was expected to plead. That pleading was signed by Counsel and contained the appropriate statement of truth required of pleadings. It was advanced as a seriously arguable case on the part of Blackburn and it is not now said by Blackburn (and it would not lie in its mouth to do so) that the point is unarguable. On the contrary, it appears to be highly arguable. Although entirely understandable, the position is that, having lost at first instance, Blackburn put in a very full and detailed submission relying upon Article 81, affirming its belief in the truth of its case,

whereas as soon as it succeeded in the Court of Appeal and permission to the House of Lords was refused, it abandoned that case in its entirety. Although it can be said that the Court of Appeal decision rendered this additional defence unnecessary for Blackburn, it might well have needed it had the matter gone to the House of Lords. It was not until it was secure on this point that Blackburn withdrew that case so as to deprive Bim of any argument that the issues which it then wished to raise by way of defence to the claim for damages were still extant in the proceedings.

42. 43. When these matters are taken into account, in my judgement, there can be nothing unfair to Blackburn in allowing Bim to pursue the very points which Blackburn itself would have wished to pursue had the boot been on the other foot. These were issues which Blackburn was prepared to run and it cannot be harassment of Blackburn for it to be met with the same points which it thought sufficiently arguable to pursue itself and of which it insisted that the Court must take account, after determining other issues.

43. 44. There is no evidence before the Court that, if Bim had raised Article 81 as a possible defence and said that the 1994 Agreement was invalid on that basis, Blackburn would have accepted the position and the proceedings would have come to a halt. Whilst that assertion has some force to it, for the reasons given above, Bim might have maintained an alternative claim as indicated in its amended pleading and, in any event, that in itself does not make it unfair for Bim now to take the point. This is a piece of litigation which both parties have fought strenuously, taking such points as appeared to benefit them at the time. In my judgement, the late plea by Blackburn, resulting in a stay of its defence on the Article 81 issue placed Bim at a disadvantage because it could not be heard at the same time as the other issues with consequent

effect on all claims and counterclaims if successful. There can then be nothing unfair to Blackburn in the point now being taken by Bim in circumstances where they could have availed themselves of the point at trial, without positively taking it, if Blackburn had not come forward with the argument at such a late stage.

44. 45. Nor in my judgment would any right thinking member of society, having been told of the course of events which I have recited, consider that the process of justice was brought into disrepute by Bim's reliance upon the illegality defence. Observing the parties' tactical manoeuvrings and their successes and failures, such a person would be likely to give a wry smile and consider, in all the circumstances, this was a fair course of action for Bim to adopt and what was sauce for the goose was also sauce for the gander.

45. 46. Whether the matter is viewed in the context of "special circumstances" or " abuse of process" the conclusion is the same. Bim should not now be shut out from arguing what it otherwise would have argued had Blackburn not raised its Article 81 defence so late.

46. 47. When regard is had to the nature of the plea itself, this view is fortified.

Illegality

47. 48. Article 81 (formerly Article 85) of the EC Treaty has three sub-paragraphs which provide respectively for the prohibition of agreements and concerted practices having the anti-competitive effects specified, for the automatic voidness of such agreements and for the Commission to grant exemptions from the prohibitions if certain conditions are satisfied. It is accepted by Blackburn, who could scarcely do

otherwise, that the Article 81 argument now raised by Bim in its defence to the damages claim, is arguable. The effect of Article 81 is that agreements which affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market are prohibited and are automatically void. Agreements which share markets or sources of supply or limit or control production, markets, technical development or investment fall within the category described. It is thus possible, when looking at an agreement to see whether, on its face, it appears to infringe Article 81(1), although the Commission may declare those provisions inapplicable in the case of an agreement which contributes to or improves the production or distribution of goods or promotes technical or economic progress whilst allowing consumers a fair share of the resultant benefit, if the agreement does not impose restrictions which are not indispensable to the attaining of those objectives and does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

48. 49. At the present time, only the Commission can grant exemption from Article 81(1) if it applies. In addition however there are thresholds to be passed before Article 81(1) does apply. From the earliest days, the European Court has required that the effect on inter-state trade and competition must be appreciable, although that threshold is set low. The principles established in the cases have been embodied in the Commission's Notice on Agreements of Minor Importance which states the Commission's view that agreements will not be caught by Article 81(1) if the market share of the firms concerned does not exceed 5% in the case of vertical agreements (e.g. between manufacturer and dealer) and 10% in the case of horizontal agreements (e.g. between manufacturers). National Courts are however free to find that agreements where these thresholds are exceeded fall outside Article 81 altogether (see

Delimitis v Henniger Brau AG [1991] ECR 1- 935 and Langnese-Iglo v Commission [1995] ECR II – 1533).

49. 50. Equally a Court can decide that a restrictive practice in an agreement which is generally pro-competetive does not offend Article 81 (see Remia v Commission (1985) EC R 2545, Pronuptia v Schilgallis [1986] ECR 353 and Oakdale v National Westminster Bank [1997] ECC 130).

50. 51. The percentage market shares set out in Blackburn's Statement of Case on competition law issues which were broadly accepted by Bim in its Statement of Case on assessment of damages are, however, for the most part, of a different order to the 5% or 10% referred to. On the face of the 1994 Agreement and these market figures, there is a strong prima facie case for breach of Article 81. The anti-competitive effect of the provisions of the agreement are obvious and, if a restrictive clause is to fall outside Article 81 it must be essential or necessary to render an overall pro-competitive agreement operable. This may require an investigation of the facts, but there can be little doubt that the effect of the 1994 Agreement, as found by the Court of Appeal, was to keep one of Blackburn's competitors off the Finnish market (see paragraphs 2, 29, 30, 38, 83, 106 and 107).

51. 52. It is accepted by Blackburn that an agreement which is contrary to Article 81 is an illegal contract for the purposes of the English law of illegality of contracts, as established by the Court of Appeal decision in Gibbs Mew v Gemmell [1999] ECC 97. Article 81 not only makes the agreement automatically void but contains a prohibition and is a penal provision.

52. 53. Counsel for Blackburn maintained however that in circumstances such as the present where Bim had not pleaded an Article 81 defence and should not now be permitted to do so by reason of estoppel, the Court was not bound to take notice of illegality of this kind unless the agreement was ex-facie "manifestly illegal". For this purpose he relied upon appellate decisions such as North Western Salt v Electrolytic Alkali Company [1914] AC461 and Bank of India v Transcontinental [1982] 1 LLR 427. In those cases the Court was faced with an argument as to illegality in circumstances where the point had not been taken, or not properly been taken before. The Courts focused on the concept of "manifest illegality" in saying that where a transaction is on its face manifestly illegal, the Court must refuse to enforce it, whether the point is pleaded or not and whether either party raised the point or not. Where however a transaction is not on its face manifestly illegal the ordinary rule applies that only evidence relevant to a pleaded allegation is admissible. Viscount Haldane in North Western Salt said:

> "It is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleading so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated facts, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand if the action really rests on a contract which on the face of it ought not to enforced, then as I have already said, the Court ought to dismiss the claim irrespective of whether the pleadings of the defendant raised the question of illegality."

53. 54. For the reasons already given, the 1994 Agreement was prima facie illegal on the face of the pleadings, before any plea of illegality was raised, because of the anti-competitive nature of the provisions in it. Nonetheless, investigation would be

required of the object and effect of the 1994 Agreement on competition in the market in question and the effect on trade between member states. Investigation of the market and the competitors would be needed. An investigation of facts therefore takes the case outside the "manifestly illegal" category.

54. 55. Mr Andrew Onslow, Q.C., for Bim contended that the test was not whether the Court could see whether the 1994 Agreement was manifestly illegal but whether there was a sustainable argument, raised by the party against whom the estoppel was said to operate, that there was such illegality. He relied on Kok Hoong v Leong Cheong Kweng Mines Limited [1964] AC 993 and Westacre Investments Inc v Jugoimport [2000] 1 QB 288 as showing that a balancing exercise had to be done by the Court, weighing up the need for finality against the need for the Court not to enforce an illegal contract. These decisions, it is said are the relevant decision, when considering an estoppel since the Court is concerning itself with whether or not sufficient material will be put before it to determine the illegality point, when such a point has not previously been taken. In my judgment, Bim is right in saying that these authorities supply the appropriate test for estoppel cases, not the North Western Salt type of case where it has already been decided that there is or can be no such there is no plea but no questions of estoppel arises.

55. 56. In Kok Hoong Viscount Radcliffe looked at statutory illegality and stated at page 1016 that the test to apply "is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the Court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise." Examples were then given of the laws of gaming, usury and bankruptcy.

General social policy does require a denial of legal validity to certain transactions, whether for the protection of a party to it or the protection of others and in such cases there is no room for the application of the principle that a man may disclaim a statutory provision enacted for his personal benefit.

56. 57. In Westacre the Court of Appeal had to consider an argument of illegality in the context of enforcement of an arbitration award, where the arbitrators had expressly considered the question of illegality in that award. All three members of the Court of Appeal, whilst differing upon the result, accepted that the Court had to see whether the public policy of finality in litigation or arbitration was overridden by some more important public policy based upon the unenforceability of illegal contracts. Waller LJ accepted the proposition that where illegality is raised and at least where the evidence of illegality is so strong that if not answered it would be decisive of the case, the Court would not allow reliance upon the principle in Henderson to prevent the point being ventilated. Thus illegality, if raised, could provide the special circumstances in which an estoppel would not provide a defence. The strength of the case advanced was also a relevant factor, and the Court would have to look at the nature of the illegality to see whether there was some underlying social policy which overrode the public policy of finality in litigation (as expressed by Neill LJ in E.D. & F. Man (Sugar) Limited v Yani Haryanto (No. 2) [1992] LLR 429). Whilst the other two Lord Justices disagreed as to the result they both agreed that the nature and seriousness of the alleged illegality should be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality.

57. 58. It does not seem to me that these decisions raise a new concept of "super illegality" in relation to particular classes of offence (such as importation of drugs, slave trading, child prostitution or bribery), Neill LJ in Haryanto and Viscount Radcliffe in Kok Hoong relied however upon the principles of public policy which underlay a particular illegality in the context of overriding an estoppel. In my judgment, once it is recognised that a Statute is both prohibitory and penal in character with underlying public policy considerations extending to the protection of the public or society at large, the balance swings in favour of the Court determining the question of illegality as opposed to precluding the party wishing to raise it by reason of his prior failure to do so at an earlier stage.

58. 59. It is plain that an Article 81 defence strikes at the very root of the dealings between the parties and is not a plea which is lightly made because of the repercussions it might have. Article 81 is for the protection, not of the parties concerned, but of the public at large because of their interest in anti-competitive practices. This Statute has a clear underlying social policy which is why the Court of Appeal held in Gibbs Mew that a contract which breached its provisions was illegal for the purposes of the English law of illegality of contracts. In the present case this is reinforced by the fact that Blackburn itself first raised the point, saying that it was a point of such importance that the Court had to take note of it, whether pleaded or not. Even where that is not the case, the policy considerations which underlie the Statute incorporating the EC Treaty are of public importance and require the Court's attention if a party seeks to put before it the relevant material. Moreover it does not lie well in the mouth of the party who originally put forward the issue to contend otherwise, particularly when the case is prima facie a strong one.

59. 60. Blackburn relied on Van Schinjndl v SPF [1995] ECR 1-4705 where a competition defence was raised in the Dutch Court of Cassation whose rules of procedure did not provide for an investigation of such matters since it was concerned only with points of law. The European Court decided that it was for the domestic legal system of each member state to designate the Courts and Tribunals having jurisdiction and to lay down procedural rules governing actions for safeguarding rights which individuals derived from community law and that therefore since the point had not been raised in the Court below for a determination of fact, the Court of Cassation did not need to consider the point when raised for the first time before it. The ECJ stated that community law did not require national Courts to raise of their own motion an issue concerning the breach of provisions of community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves. The principle being that, in a civil suit was that it was for the parties to take the initiative and the Court to act of its own motion only in exceptional cases where public interest required such intervention. To that extent the decision is consistent with the English authorities upon which both parties have relied but gives no assistance to the Court in determining whether, in accordance with its own procedures it is appropriate allow a party to raise the illegality issue. It is at that point that the Henderson principal comes into play, as does the test in Kok Hoong and Westacre.

Conclusion

60. 61. Where a party asserts that the other's case should be struck out by reason of an estoppel on the Henderson principle, the burden is on that party to establish that the estoppel should operate. As formulated in the more recent decisions, this requires the

party concerned to establish that the advancement of the plea in question is an abuse of process. For the reasons given in this Judgement, I conclude that there is no abuse of process on the part of Bim in advancing the plea which Blackburn itself wished to advance and which would, in any other circumstances, have enured to Bim's benefit if it was a successful plea. Whilst the decisions of the Court of Appeal, in finding for Blackburn, had the effect of rendering Blackburn's defence (which contained the Article 81 point) otiose, so that on the face of the pleadings there was no available defence to Bim on Blackburn's counterclaim, this occurred by reason of Blackburn's late plea and the consequent effect on limit on the issues determined at the trial. It does not matter for present purposes whether this is seen as "special circumstances" or as conduct which does not constitute an abuse of process. The result is the same and Bim are free to take the Article 81 point.

61. 62. Moreover, the very nature of the plea in itself appears to me to be one which a party should be allowed to raise even if an estoppel would otherwise operate since it raises an issue of which the Court should take cognisance. Where there is a strong prima facie case under Article 81, the Court cannot simply ignore the matter once it has been brought to its attention and there remains the possibility of dealing with it on the basis of full argument and evidence.

62. 63. Blackburn's application must therefore be dismissed so that Bim's defence to Blackburn's Statement of Case on damages can be advanced.

63. 64. I will hear the parties on any consequent Orders to be made, including costs, whilst provisionally concluding that the costs of this application must follow the result.