Neutral Citation Number: [2015] EWHC 1676 (Ch)

Case No: HC-12-B02085
Consolidated with Case No HC-12-F03701

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane,
London, WC2A 2LL

Date: 16/06/2015

Before :

MRS JUSTICE ROSE

- -

Between :

~~W.H. NEWSON HOLDING LIMITED AND OTHERS~~ ~~**Claimant**~~

~~- and -~~
(1) IMI PLC
(2) IMI KYNOCH LIMITED
First and Second Defendants / Part 20 Claimants

- and -
(10) DELTA LIMITED (formerly DELTA PLC)
(11) DELTA ENGINEERING HOLDINGS LIMITED
Part 20 Defendants

Paul Harris QC and Rob Williams (instructed by Pinsent Masons LLP) for the Part 20 Claimants
Brian Kennelly and Tom Coates (instructed by Addleshaw Goddard LLP) for the Part 20 Defendants

Hearing date: 6 May 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE ROSE

Mrs Justice Rose DBE :

1. On 18 December 2014 I ordered that a preliminary issue be determined between the Part 20 Claimants ('IMI') and the 10th and 11th Part 20 Defendants ('Delta') in these proceedings. That issue was defined as:

> "Whether section 1(4) of the Civil Liability (Contribution) Act 1978 precludes Delta from relying on any part of its defence to IMI's Part 20 claim, and in particular whether Delta is permitted to argue that the Claimants' claim was time barred for the reasons set out in paragraph 18 of Delta's Amended Defence dated 16 October 2014."

2. These proceedings concern liability for damages arising from a cartel relating to copper fittings. That cartel was the subject of a decision of the European Commission dated 20 September 2006 in Case COMP/F1/38121 - *Fittings*. The Commission found that a large number of manufacturers of copper fittings, including IMI and Delta, had operated a price-fixing cartel over many years in breach of Article 101 TFEU. The cartel was found by the Commission to have lasted from 31 December 1988 until 1 April 2004. On 21 May 2012 23 companies within the Travis Perkins group brought an action for damages against IMI and one other cartel participant, Legris Industries SA ('the Main Claim'). Travis Perkins is active in the building sector and had bought many copper fittings from cartel members during the operation of the cartel. Travis Perkins claimed damages under a number of heads against IMI and Legris. They alleged that the cartel members had agreed on price increases and allocated customers amongst themselves; they had agreed collusive tendering and exchanged confidential information on commercial strategies and sales volumes. It was further alleged that the effect of the cartel was, amongst other things, unlawfully to inflate prices leading to overcharges as compared with the competitive price. Travis Perkins alleged that they had suffered loss and damage as a result of the cartel and that IMI and Legris were each jointly and severally liable for the loss and damage caused. The total amount of overcharge damages claimed, with interest, was over £390 million.

3. IMI served a Defence on 14 February 2014 in which it denied that there was any recoverable loss suffered by the claimants. The penultimate paragraph of the Defence stated:

> "37. In any event, the claim is time barred, the causes of action having accrued at the latest at the end of the pleaded Cartel Period, namely 1 April 2004"

4. Travis Perkins served a Reply to IMI's Defence on 12 March 2014 in which they said:

> "17. Paragraph 37 is denied. IMI and the other Cartelists deliberately concealed the Cartel and the facts relating to it from (among others) the Claimants (see Recital 745 [of the Commission Decision]. The earliest date on which the Claimants could with reasonable diligence have discovered the concealment, and sufficient facts to plead a right of action, was the date on which the Summary Decision was published in the

> Official Journal of the European Union, namely 27 October 2007, alternatively the date of the European Commission press release announcing the Decision, namely 20 September 2006. Accordingly, pursuant to section 32 of the Limitation Act 1980, the period of limitation runs from that date and the claims were brought in time."

5. Section 32 of the Limitation Act 1980 provides as follows:

> "**32 Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) …. 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 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.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

6. Section 10(1) of the Limitation Act provides that where under section 1 of the Civil Liability (Contribution) Act 1978 ('the 1978 Act'), any person becomes entitled to a right to recover a contribution in respect of any damages from another person, the action to recover the contribution by virtue of that right must be brought within two years of the date on which that right accrued. Section 10(4) provides that where a case is settled by the payment of damages, whether liability is admitted or not, the two years starts to run from the date on which the amount of damages is agreed between the Part 20 claimant and the claimant in the main action.

7. In July 2012 IMI brought Part 20 proceedings against 23 other cartel members who were all addressees of the Commission decision ('the Part 20 Claim'). In the Particulars of the Part 20 Claim, at paragraph 9, IMI asserted that it will deny the claims made by Travis Perkins but that to the extent that IMI may be held liable to Travis Perkins as alleged or at all on the basis of the infringement, the Part 20 Defendants were jointly and severally liable to Travis Perkins with IMI for the loss and damage caused. IMI accordingly claimed a contribution or indemnity from each of the Part 20 Defendants pursuant to section 1(1) of the 1978 Act.

8. Delta's Amended Defence to the Part 20 Claim was served on 5 May 2014 and amended on 16 October 2014. Delta admitted the Commission's infringement decision, though it challenged the period for which it was a party to the cartel. Delta

denied that there had been any overcharge but admitted that Delta was jointly and severally liable for any damage caused by the infringement. Delta raised various defences on causation including alleging that Travis Perkins had passed on any overcharge to its own customers and had in fact made money from the cartel rather than lost money.

9. Delta pleaded the limitation period point at paragraph 18 of its Amended Defence which said:

> "18. Further as to the first two sentences of paragraph 9, and as particularised below, it is averred that the Claimants' claim is time barred since the Claimants fail to satisfy the conditions of section 32(1)(b) of the Limitation Act 1980 as alleged, namely that prior to 12 May or 17 September 2006;
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> 18.1 that they were unaware of, and could not with reasonable diligence have discovered, certain facts without which the cause of action against the Defendants would have been incomplete;
>
> 18.2 that such facts were being concealed from them by the Defendants; and
>
> 18.3 that any such concealment by the Defendants was deliberate.
>
> PARTICULARS
>
> (1) the Claimants were aware or could with reasonable diligence have become aware of the fact of price-coordination by at least Delta and IMI from 1988 for the reasons set out in the witness statement of David Pearce dated 5 September 2014.
>
> (2) Delta did not conceal that fact from the Claimants but supplied it or permitted it to be supplied to the Claimants for the reasons set out in the witness statement of David Pearce dated 5 September 2014.
>
> (3) The Claimants were also aware or could with reasonable diligence have become aware of the fact of price-coordination by at least IMI and/or Delta on the basis of the following publicly available information which the Claimants had or could with reasonable diligence have obtained.
>
> [(a) – (e) *particulars of Commission press releases and references to the investigation in IMI's and Delta's annual reports*)]
>
> (4) On the basis of the above, the Claimants were aware or could with reasonable diligence have become aware of the fact that such price-coordination between at least Delta and IMI had the object or effect of distorting competition, an effect on trade

> between Member States and could properly have pleaded damage as a result."

10. The Delta employee David Pearce referred to there described in his witness statement how Delta had introduced a lead-free solder ring fitting in 1988 and decided to take market share from IMI by pricing this product competitively. This destabilised the market place leading to a price war which led ultimately to the formation of the cartel. Mr Pearce described his contacts with Travis Perkins as a major customer of Delta. He recounts that after the cartel had formed, when he told Travis Perkins that Delta was about to increase its prices, he would reassure his contact at Travis Perkins that IMI would follow with a similar increase shortly after Delta 'to restore the status quo in list price differentials' between Delta and IMI. He says: 'It was crystal clear to me that wholesalers knew that Delta was coordinating its price increases with its competitors'.

11. In the course of the case management of these proceedings, IMI had the opportunity to amend their own defence in the main action to incorporate Delta's assertions. IMI decided not to do so.

12. Legris settled Travis Perkins' claim against it at an early stage and dropped out of the Main Claim at that point. Most of the Part 20 Defendants have also dropped out of the proceedings. IMI reached a settlement of the Main Claim with Travis Perkins in December 2014. The terms of that settlement are confidential but IMI assert that the sum paid to Travis Perkins represented a very substantial discount from what Travis Perkins had claimed. For practical purposes, the only remaining claim is that of IMI seeking a contribution from Delta in the Part 20 claim.

13. Section 1 of the 1978 Act provides as follows:

> "**1. Entitlement to contribution**
>
> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
>
> (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

> (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
>
> (5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.
>
> (6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales."

14. It is common ground between the parties that the effect of section 1(3) is that Delta cannot rely, as a defence to the Part 20 claim, on an assertion that Travis Perkins' claim against them, Delta, was time barred. It is also common ground that IMI will have to prove, in order to get a contribution from Delta, that Delta would (ignoring any limitation point) have been liable to Travis Perkins for the loss and damage. The question is whether Delta can defend the Part 20 claim by asserting that Travis Perkins' claim against IMI was time barred. This depends on what is covered by the final proviso of section 1(4) "provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established". Does the 'factual basis of the claim against' IMI include Travis Perkins' assertion that the cartel was concealed, in which case the court must assume that it could have been established or is it open to Delta to say that IMI had a complete defence to Travis Perkins' claim because Travis Perkins knew or could reasonably have known about the cartel at an early date?

15. Both parties refer to two main sources of assistance in construing section 1(4), the Law Commission's Report on Contribution (Law Com. No. 79, 9 March 2977) and the decision of Chadwick J in *Arab Monetary Fund v Hashim and others* (judgment of 28 May 1993, unreported) ('*Hashim*'). The Law Commission Report referred to the problem of a defendant who settled the plaintiff's claim against him before judgment and then sought to recover contribution from the other defendant. According to the law as it then stood, if a defendant settled a claim and then sought a contribution from another party, the defendant would have to prove in those contribution proceedings that he was a tortfeasor. If it turned out that the accident had been solely caused by

the other party, the claim for contribution would have to be dismissed. The report went on: (footnotes omitted)

> "45. In our working paper we suggested that it was unsatisfactory to require the "settling" defendant to prove his own liability as a tortfeasor in order to entitle him to contribution from the other. It is convenient to repeat here the three points that we made. The first is that it means turning all the usual conventions of civil litigation upside down; D1 (the settling defendant) has to call evidence that is in the possession of the plaintiff in order to establish his own liability in tort, and D2 (the other defendant) then calls Dl's witnesses in order to raise a doubt as to Dl's liability. The second is that if the result of the contribution proceedings … was that the liability of D2 was established but that the liability of D1 was not, the person who made the compromise, D1, would get no contribution towards the £10,000 although he was not in fact to blame, and D2 who really was to blame would have to pay nothing at all. The third reason is that defendants might be deterred from compromising claims in which liability was in doubt if their right of contribution was thereby put at risk. … [I]t would be very unfortunate if a defendant was obliged to fight a case to judgment in order to protect his contribution rights. We attached particular importance to the third point and made the provisional recommendation that a person who had compromised a claim made against him so as to benefit some other possible defendant should have the right to claim a contribution from the other defendant provided that the other could be shown to be liable; we added that it should not be an answer to such claim that the person who settled the claim would not have been held liable if the action against him had been tried."

16. The Law Commission then discussed various objections that were raised following the publication of their provisional recommendations to that effect. They concluded on this point:

> "55. We accordingly recommend that the defendant who compromises a claim against him should be entitled to claim a contribution from any wrongdoer against whom liability can be proved. However, this recommendation needs to be qualified.
>
> 56. It is important that the compromise should not be a sham but should be genuine. … We want to exclude the collusive or otherwise corrupt or dishonest compromise but do not consider that it would be appropriate to attempt to provide a detailed definition of what should amount to a *bona fide* compromise; this is something which should present no difficulty to the courts. We accordingly recommend that contribution should be recoverable by a person who has made a *bona fide* compromise of a claim against him for damages.

> 57. We should conclude our discussion of the *bona fide* compromise by mentioning that our recommendations on this topic take roughly the same line as section 22 of the Irish Civil Liability Act 1961 and that this section does not seem to have given rise to any difficulties or been the subject of criticism in the Republic of Ireland."

17. The judgment in *Hashim* was one of many skirmishes in proceedings brought by the Arab Monetary Fund ('the Fund') against a number of defendants including Dr Hashim and the First National Bank of Chicago ('the Bank'). The Fund claimed in the main action that monies had been misappropriated by Dr Hashim during his period in office as Director General of the Fund. The Fund also claimed against the Bank as defendants in tort and as constructive trustees of the monies paid into accounts that Dr Hashim held at the Bank. The Bank's defence against the Fund included the assertion that in so far as the Fund's claim was based on constructive trust or breach of trust, the alleged trust could only exist, if at all, under Swiss law but no trust can exist under Swiss law because Swiss law does not recognise the concept of trust. The Bank settled the Fund's claim for about $13.5 million and claimed an indemnity against Dr Hashim.

18. Dr Hashim wished to defend the contribution claim by asserting that the entitlement of the Bank to be indemnified on the grounds that both he and the Bank would have been liable to the Fund was a question governed by Swiss law. Under Swiss law there was no entitlement to an indemnity. He argued that although the court is required by section 1(4) to assume that the facts upon which the Fund's claim against the Bank was based could have been established, it is not required to make any further assumption. In particular it was not required to assume that all facts pleaded by the Bank by way of defence in the main action would have been successfully controverted by the Fund. The effect of this was, Dr Hashim submitted, that the court ought not to assume that the Bank would have failed to establish facts upon which it relied 'to support a collateral defence in the main action'.

19. Chadwick J referred to the passages of the Law Commission's Report that I have set out above. He concluded that the purpose of section 1(4) was 'to avoid, or at least to limit, the need for an investigation in contribution proceedings into the question whether the defendant in the main action who has made a payment in bona fide settlement of the plaintiff's claim was, in truth, liable to the plaintiff'. He noted that the proviso to section 1(4) was intended at the least to preserve the right of the Part 20 defendant to defend contribution proceedings on the basis that the defendant in the main action would not have been liable to the plaintiff even if the factual basis of the plaintiff's claim against him has been established. As to what that factual basis was, Chadwick J considered that it was necessary to have regard 'principally if not exclusively' to the terms of the pleadings. He referred to rules of Court which require that the statement of claim must contain a statement in summary form of the material facts on which the plaintiff relies for his claim: 'Prima facie, therefore, the factual basis of the plaintiff's claim will include, and will include only, the material facts pleaded in the statement of claim'. The assumption that the court is required to make is that those facts would have been established. This means that if the defence asserts facts which are inconsistent with a material fact alleged in the statement of claim, the court must assume that that inconsistent fact would not have been established.

20. Chadwick J recognised that a more difficult question arises where the defence makes allegations of fact which are not inconsistent with the facts alleged in the statement of claim; that is 'where the defence takes the form of confession and avoidance'. In so far as those allegations in the defence are not admitted by way of reply, the persuasive burden of proof in relation to those facts will rest on the defendant and it will be up to him to establish those facts at the trial of the action. The question was whether in a situation 'where it is for the defendant to establish some facts upon which he relies for his defence, can it be said that the negation of that fact forms part of the "factual basis of the claim against him"?'. He answered that question in the negative. The language of the statutory assumption does not include facts which do not form any part of the plaintiff's case against the defendant and which are not facts which the plaintiff would need to establish in order to succeed against the defendant. The court should not assume that the defendant 'would fail to establish the factual basis of any collateral defence'. It was not, therefore, only questions of law that were left out of the assumption in favour of the defendant. Where the Part 20 defendant asserts that the defendant in the main action had a collateral defence to the plaintiff's claim, it will be necessary for the court hearing the contribution proceedings to investigate the allegations of fact which are said to support that collateral defence. In the case before him, Chadwick J held that Dr Hashim was entitled to rely in the contribution proceedings on allegations of fact found in the Bank's defence in the main action but only so far as those allegations are not inconsistent with the material allegations of fact on which the plaintiff had relied on its statement of claim.

21. Chadwick J then turned to the question whether propositions of foreign law advanced in the main action are to be treated as part of the factual basis of the plaintiff's claim in the main action. He noted that no issue of foreign law had been raised in the statement of claim. The Bank's defence had raised the contention that Swiss law was the governing law. If matters 'had stopped there' he said, those propositions would not have been regarded as part of the factual basis of the plaintiff's claim. But matters had not stopped there because in its reply, the plaintiff in the main action had set out propositions of Swiss law on which the plaintiff intended to rely. The burden of establishing those propositions would have fallen on the plaintiff. The judge recognised that this raised the 'nice question' whether if the plaintiff had made an affirmative case in answer to the plea of double actionability, the facts which the plaintiff asserted would be within the scope of the assumption which the court was required to make because the court could not investigate inconsistent propositions advanced by the Bank in answer to that claim. However, Chadwick J did not have to resolve that question because of section 1(6) of the 1978 Act. That section provides that where the court is deciding whether the Part 20 claimant or the Part 20 defendant would have been liable to the plaintiff in the main action it must treat as 'immaterial' the assertion that an issue in that action would be determined by foreign law. When applying section 1(4), therefore, propositions of foreign law that the plaintiff had advanced or would have needed to advance in order to establish his claim against the defendant in the main action are not properly to be regarded as part of the factual basis of the claim against that person.

22. *Hashim* was considered in the judgment of Cranston J in *BRB (Residuary) Ltd v Connex South Eastern Ltd* [2008] EWHC 1172 (QB) ('*BRB*'). BRB had settled a claim in negligence brought by the widow of a railwayman Mr Dines who had died from mesothelioma contracted as a result of many years working on the railways.

Following the privatisation of the railways, the railwayman's employment transferred to Connex South Eastern Ltd ('Connex'). Connex then became liable in law for the breach of common law and statutory duties owed by the railways to Mr Dines. In most cases Connex was then entitled to an indemnity for such liability under a deed of indemnity between them. BRB took on the conduct of the many cases brought against Connex on the basis of its indemnity. As a result of what Cranston J referred to as "a quirk in the wording of the deed of indemnity" BRB was not in fact liable as a matter of law to indemnify Connex in Mr Dines' case. Mr Dines' widow sued BRB but the proper defendant, as his employer, was Connex. BRB did not initially appreciate the quirk of drafting and allowed judgment to be entered against it. The flaw in the drafting of the indemnity then came to light. BRB nevertheless paid damages to Mr Dines' widow and sought an indemnity from Connex. Connex resisted the contribution claim on the basis that BRB had never been liable to Mrs Dines at all. Cranston J made it clear that the issue in that case was whether Connex could escape liability on the basis that BRB (D1) was not liable to Mrs Dines, not on the basis that Connex (D2) was not liable to the widow. Cranston J said that it was clear from the legislation that although D2 cannot argue that D1 was not liable on the facts, D2 can defend the contribution claim by demonstrating that the legal basis of the claim against D1 had not been established.

23. Cranston J held as follows:

> "13. … Thus D2 could resist a claim in contribution on the ground that D1 would not have been liable to the claimant in the main action, notwithstanding that the factual basis of the claim against him could have been established by the claimant in that action, not only in circumstances in which the factual basis of the claimant's claim gave rise to no liability in law, but also in circumstances in which D1 had a collateral defence to the claimant's claim arising out of facts which it would have been for D1, and not the claimant in the main action, to establish. …
>
> 14. … the result of the *Arab Monetary Fund* case is that the court in contribution proceedings must go further to investigate allegations of fact which are said to support a collateral defence. This could lead to a lengthening of the inquiry, which may be contrary to one of the policy aims implicit in the Law Commission's recommendations, to avoid having to go into aspects of the viability of the claim in the main action. However, *Arab Monetary Fund* is authoritative, and D2 has the benefit of a collateral defence by which D1 could have avoided liability to the claimant in the main action. D2 is entitled to rely on allegations of fact contained in D1's defence in the main action, although only in so far as they are not inconsistent with the material allegations of fact upon which the claimant in the main action relied on in its statement of claim."

24. Cranston J rejected Connex's submission that BRB had no liability to pay damages to Mrs Dines. The judgment entered against BRB by consent was conclusive evidence as between the parties that BRB was so liable even if the judgment 'was writ in sand'.

The requirements of section 1(1) of the 1978 Act were therefore satisfied. He then considered whether the requirements of section 1(4) were also satisfied. Had BRB had a collateral defence by which it could have avoided liability to Mrs Dines? The judge looked at the particulars of claim which, of course, made no mention of any of the issues that subsequently arose between Connex and BRB. BRB had not raised the issues in its defence either so the judge could conclude that no collateral defence to liability was raised on the pleadings. If BRB had wished to raise the point it would have had to plead the facts relating to the transfers of liability on privatisation - this would have been a defence but it would not have been a defence on the existing pleadings because it had not in fact been raised by BRB as against Mrs Dines. Cranston J referred to the fact that Chadwick J in *Hashim* stressed the need to look at the pleadings and concluded:

> "For this reason, in the particular circumstances of this case the factual basis of Mrs Dines' claim gave BRB no collateral defence. Thus BRB can claim a contribution from Connex under section 1(4) of that Act, as well as section 1(1)"

25. In *BRB v Connex* Cranston J thus regarded *Hashim* as authority for the proposition that the Part 20 defendant can resist a claim in contribution not only in circumstances in which the factual basis of the claim in the main action gives rise to no liability in law but also in circumstances where the Part 20 claimant had a collateral defence to the claim arising out of facts which it would have been for the Part 20 claimant and not the claimant in the main action to establish. However in the case before him, Connex were liable to make a contribution in any event under section 1(1) of the 1978 Act and since the 'collateral defence' asserted by Connex did not appear anywhere in the pleadings in the action between Mrs Dines and BRB there was no difficulty presented by the proviso at the end of section 1(4). He did not therefore have to consider the position which would have arisen if, say, BRB had pleaded that it was not liable to Mrs Dines on the basis of the transfer of liabilities in the privatisation but Mrs Dines had been able to point in her Reply to some factual assertion which, if true, meant that BRB's liability had not in the particular circumstances been transferred to Connex. Would the court then have had to assume that what Mrs Dines had pleaded in her Reply was true because of the assumption in section 1(4) or would BRB's assertion have constituted a 'collateral defence' and therefore not come within the assumption?

26. In the present case the 'nice question' identified by Chadwick J has arisen because Travis Perkins have made an affirmative answer in their Reply to the defence of limitation raised by IMI in the defence. They have pleaded that they can defeat the limitation defence by proving that the cartel was concealed and that they could not reasonably have found out about it until the Commission's decision was published. The difficulty of applying the principle described by Chadwick and Cranston JJ is illustrated by the fact that both IMI and Delta regard the cases as authority supporting their directly opposing views. The problem lies in knowing when a defence raised is a 'collateral defence' – a term not used in the legislative provisions but used by Chadwick J to describe a defence which is not based on a point of law but is based on factual assertions which are not to be assumed against the defendant in accordance with section 1(4). Mr Harris QC for IMI argued that a collateral defence in the main claim is one where, at the trial of the action, the success or failure of the defence

would depend on facts being found which it was the defendant's task to prove. In the present case, although it would be for IMI to show (i) the date on which the cause of action accrued and (ii) that proceedings had not been launched within the limitation period applicable to that cause of action, those two points were not in contention here. It is accepted on all sides that the accrual of the cause of action occurred no later than the date when the cartel came to an end and the parties accept that date as being the date found in the Decision: 1 April 2004. It is also not in contention that the relevant period of six years had expired before the main claim was launched. What is in contention is whether Travis Perkins could have established that it did not know, and could not reasonably have known, about the cartel before September 2006. As matters stand on the pleadings in the main claim, that is an assertion that rests uncontroverted by IMI because IMI decided not to amend its pleading to assert as against Travis Perkins the allegations that are set out in paragraph 18 of Delta's Amended Defence to the Part 20 proceedings. Mr Harris therefore argues that in so far as a 'collateral defence' is one where the success or failure of the defence depends on the defendant, that is not the case here.

27. Mr Harris also relies on the speech of Lord Scott of Foscote in *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18 at paragraph 60 where he said:

> "A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, nonetheless, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult."

28. Mr Kennelly appearing for Delta submits that limitation is a 'collateral defence' for this purpose. The defence is not inconsistent with the facts pleaded in Travis Perkins' claim but only with those pleaded in the Reply. The facts pleaded in the Reply do not have to be assumed to be established – if that were the case then there would only be a 'collateral defence' if the claimant in the main proceedings failed for some reason to respond to allegations made in the defence. He also relies on those parts of the judgments in *Hashim* and *BRB* which suggest that the court should look only at the particulars of claim in the main action to find facts that are assumed in the Part 20 claimant's favour in the contribution proceedings or even only at those passages in the particulars which set out the basic elements of the cause of action on which the main action is based.

29. I have found this very difficult. As regards the submission that the court may look only at the particulars of claim and not to the subsequent pleadings to identify the facts covered by the assumption, it is clear that that would lead to very arbitrary results. The ability of the Part 20 defendant to rely on a particular defence would then depend on whether the claimant's lawyer in the main action had drafted the particulars to anticipate expected defences by refuting them in the particulars of claim or had limited the particulars to the bare bones of the claim and left any refutation of

the likely real meat of the dispute to be dealt with in reply. This may be a matter of drafting style or litigation tactics if the claimant considers it is in his interest to get his retaliation in first. To muddy the waters further, a claimant has the third option of amending the particulars of claim after the defence to add in material refuting allegations raised in the defence.

30. If the test is that a defence is 'collateral' if it involves something other than a refutation of the elements that go to make up the cause of action in the main action, then there will be many cases in which the Part 20 claimant will not be able to rely on section 1(4). For example, particulars of claim in the main action may plead a breach of contract, leaving the defence to raise reliance on an apparently effective exclusion clause in the contract prompting the claimant then to plead in its reply that the exclusion clause does not operate on the particular facts of the case. If there is no real dispute as to the facts of breach, the bona fide compromise will largely depend on the parties' assessment of the strength of their respective cases as to whether the exclusion clause applied or not in the light of the claimant's assertions. If Mr Kennelly is right, then that issue is a 'collateral defence', either because it is pleaded by the claimant in the reply rather than in the particulars of claim, or because it is not a refutation of the primary facts on which the cause of action is based. That would in turn mean that the Part 20 defendant is entitled to litigate the issue in contribution proceedings, because the protection of the assumption in section 1(4) would be lost. This would, it appears to me, undermine the third and most important purpose which the Law Commission regarded as being served by the provision, namely defendants being deterred from compromising claims in which liability was in doubt because their right of contribution is thereby put at risk.

31. In my judgment Mr Kennelly's contentions cannot be right. I prefer the submission of Mr Harris which is that the kind of defence that could properly be described as a collateral defence is one where the burden of establishing the facts that would determine that issue would be on the defendant in the main action. To ascertain whether this is the position as regards any particular issue one must look at the totality of the pleaded case as the pleadings stand at the date of settlement. That interpretation would also mean that the application of section 1(4) would avoid the first pitfall which the Law Commission regarded as undesirable whereby IMI would have to call evidence from Travis Perkins' employees as to the state of their knowledge of the existence of the cartel in order to establish its own liability to Travis Perkins in its contribution proceedings against Delta.

32. In the present case there are no facts pleaded by IMI in its defence in the main action that would have been in contention at any trial of the issue, had the pleadings remained at the state they were at the moment of settlement. The burden of succeeding on the limitation point would have fallen on Travis Perkins and not on IMI because it would have been up to Travis Perkins to adduce evidence to show that they could not reasonably have found out about the cartel earlier than six years prior to the issue of the Main Claim. IMI could have chosen to incorporate Delta's allegations in its pleading, just as BRB could have chosen to raise the point that Mrs Dines had sued the wrong defendant in the *BRB* case. As it is, the allegations made by Delta to the effect that Travis Perkins were not entitled to rely on the extension of the limitation period in section 32 of the Limitation Act were not raised by IMI on the pleadings. I referred earlier to the conclusion of Chadwick J in *Hashim* where he stated that:

> "[t]he language in which the statutory hypothesis has been enacted … does not bring within the assumption which the Court is required to make facts which do not form part of the plaintiff's case against the defendant and which are not facts which the plaintiff would need to establish in order to succeed against the defendant."

33. Applying that to the instant case, on the state of the pleadings it would have been for Travis Perkins to establish the facts that supported their reliance on section 32 of the Limitation Act – that allegation clearly formed part of Travis Perkins' case against IMI and were facts that Travis Perkins would need to establish.

34. The answer to the preliminary issue is therefore that section 1(4) of the Civil Liability (Contribution) Act 1978 does preclude Delta from arguing that Travis Perkins' claim was time barred for the reasons set out in paragraph 18 of Delta's Amended Defence dated 16 October 2014.