Case Nos: HC03C00868
HC03C00869

Neutral Citation Number: [2004] EWHC 1795 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd July 2004

Before :

THE VICE-CHANCELLOR

- -

Between :

PHONOGRAPHIC PERFORMANCE LIMITED	**Claimant**
- and -	
DEPARTMENT OF TRADE AND INDUSTRY **HM ATTORNEY-GENERAL**	**Defendants**

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- -

Mr. David Pannick QC and Mr. Pushpinder Saini (instructed by **Messrs GSC Solicitors**) for the Claimant
Mr. Daniel Alexander QC and Miss Jemima Stratford (instructed by **the Treasury Solicitor**) for the Defendants

Hearing dates : 7th and 8th July 2004

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Judgment

The Vice-Chancellor :

Introduction

1. Ss.67 and 72 Copyright Designs and Patents Act 1988 ("the 1988 Act") provide that certain actions do not constitute an infringement of the copyrights therein mentioned if carried out in accordance with the provisions of those respective sections. S.67 relates to copyright in sound recordings and playing them as part of the activities of a club. S.72 deals with the copyright in a broadcast or cable programme or any sound recording or film included in it and showing or playing it to an audience who have not paid for admission to the place where it is to be seen or heard.

2. By Council Directive 92/100/EEC ("the Rental Directive"), promulgated by the Council of the European Communities on 19th November 1992, it was provided in Article 8.2 that

> "Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such a phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers."

Article 10 entitled Member States to provide for limitations to that right. In particular Article 10.2 provided that

> "....any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films as it provides for in connection with the protection of copyright in literary and artistic works."

Article 15.1 provided that

> "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1st July 1994."

3. The claimant ("PPL") is a company limited by guarantee. Its membership includes over 3,000 record companies carrying on business in the UK. Such members own or are exclusive licensees of the copyright in the sound recordings made by them. The right to play them in public or to authorise others to do so ("the Performing Right") is assigned by the member to PPL if he owns the copyright. In cases where the member is only an exclusive licensee then PPL is appointed the exclusive agent of the member

in respect of the exercise of the Performing Right. The rights so conferred on PPL enable it to grant licences to others and to collect and distribute amongst its members payments received as consideration for such licences. Accordingly both PPL and its members were and are concerned to limit or remove altogether the exemptions from infringement afforded by ss. 67 and 72 of the 1988 Act.

4. Shortly after the promulgation of the Rental Directive PPL commenced a campaign to secure the repeal of ss.67 and 72 on the basis, amongst others, that each of them was a limitation on the right to a single equitable remuneration for which Article 8.2 required the Crown to make legislative provision and neither of them was a limitation on such right permitted by Article 10. The Crown did not agree and so informed PPL. This has remained the position of both PPL and the Crown ever since.

5. The Rental Directive was not implemented by the UK on or before 1st July 1994. The Copyright and Related Rights Regulations 1996 SI 1996/2967, which were intended to do so, were made on 26th November 1996. No alteration was thereby made to either of ss.67 and 72 of the 1988 Act. On the same day PPL made it clear that it did not intend to make either a complaint to the European Commission or an application for judicial review of the Crown's failure to repeal either section.

6. On 22nd May 2001 Directive 2001/29/EC ("the Harmonisation Directive") was promulgated by the European Parliament and the European Commission. By Article 11 there was added to Article 10 of the Rental Directive Article 10.3 which provided that the permitted limitations on the right to a single equitable remuneration should

> "...only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

Accordingly the scope for providing for limitations on the right to a single equitable remuneration was narrowed still further by the three step approach that Article 10.3 required. Member States were required to implement the Harmonisation Directive by 22nd December 2002. In common with most other Member States the UK did not. The relevant regulations, The Copyright and Related Rights Regulations 2003 SI 2003/2498 did not come into force until 31st October 2003.

7. The scope of Article 10 of the Rental Directive has been considered by the Commission both before and after its amendment by the Harmonisation Directive. On 23rd February 1995 the Commission indicated to the UK that it considered that s.67 of the 1988 Act was a limitation permitted by Article 10.2. But on 26th July 2001 the Commission announced that it had instituted infringement proceedings against the UK in the European Court of Justice on the grounds that s.72 of the 1988 Act was inconsistent with Article 8.2 of the Rental Directive and not a limitation permitted by Article 10. That claim is still proceeding, but, as the proceedings are confidential, there is no evidence before me as to the stage it has now reached.

8. On 10th March 2003 PPL instituted proceedings against the Department of Trade and the Attorney-General ("the Crown") for declarations and damages on the footing that the Crown is in breach of its obligation in European Community Law arising under Article 8.2 of the Rental Directive by failing to provide in domestic law for a single equitable remuneration to be paid by the persons and in the circumstances prescribed by ss. 67 and 72 of the 1988 Act. In its defence the Crown contends for a number of reasons that it is not in breach of any obligation whether under Community Law or otherwise. In addition it contends that any cause of action PPL might otherwise have had arose on 1st July 1994, the date by which the UK should have implemented the Rental Directive, was on 10th March 2003 and is now barred by s.2 Limitation Act 1980. In the alternative the Crown contends that PPL's claim is barred by laches, alternatively that it is estopped from advancing it.

9. On 1st December 2003 Lawrence Collins J ordered that there be tried as preliminary issues the question

> "Whether, or the extent to which, the claims made in [these actions] are barred by limitation, and/or whether, or the extent to which, in all the circumstances, the pursuit of those claims constitutes an abuse of process and/or is barred by estoppel and/or laches."

Those are the issues now before me. It is common ground that I must approach them on the assumption that PPL has established the liability of the Crown for which it contends.

10. It is also common ground that the preliminary issues raise three questions, namely (1) whether the failure of the Crown to do what Article 15 of the Rental Directive required, whether by 1st July 1994 or at all, gives rise to a single cause of action accruing on that date with continuing consequential damage or successive causes of action accruing when and as often as further damage in consequence of the continuing failure is sustained by PPL; and if not (2) whether the claims are liable to be struck out as abuses of the process of the court in accordance with the propositions enunciated by Lord Woolf MR in **Clark v Humberside University** [2000] 1 WLR 1988; and if so (3) whether on the facts of this case the claims should be struck out as such an abuse. I will deal with those questions in that order.

One cause of action or several?

11. At the outset it is necessary to consider the nature of PPL's claim. The decisions of the European Court of Justice in **Francovich v Italy** [1991] ECR I-5357 and **Factortame III** [1996] I-1029 have established, and it is not disputed, that a Member State may incur liability to a person under Community law where three conditions are satisfied. They are that (1) the rule of Community law infringed is intended to confer rights on individuals; (2) the breach is sufficiently serious, and in particular that there

was a manifest and grave disregard by the Member State of its discretion; and (3) there is a direct causal link between the breach of the obligation resting on the Member State and the damage sustained by the injured party. As I have already pointed out for the purposes of these preliminary issues I have to assume that all those conditions will be established.

12. The nature of such a claim in English law was considered by Hobhouse LJ in **Factortame V** [1998] 1 CMLR 1353. In that case the Divisional Court concluded that liability had been established and went on to consider whether exemplary damages could and should be awarded. It was in that context that Hobhouse LJ considered (para 173) that the liability was best understood as a breach of statutory duty. In so doing he relied on the dictum to the same effect of Lord Diplock in **Garden Cottage Foods v MMB** [1984] AC 130, 141 and the conclusion of Mann J in **Bourgoin v MAFF** [1986] QB 716, 733 that the duty was imposed by the relevant article and s.2(1) European Communities Act 1972. Transposed to the facts of this case the duty for the breach of which the Crown is sued is that imposed by Article 8.2 of the Rental Directive and s.2(1) European Communities Act 1972.

13. Thus there is no dispute that the claim is one "founded on tort" for which s.2 Limitation Act 1980 prescribes a limitation period of six years "from the date on which the cause of action accrued". **Factortame (No 7):** [2001] 1 WLR 942. Similarly it is clear, and not disputed, that a cause of action accrued on 2nd July 1994 when the date by which the Rental Directive was to be given effect had passed. The issue which divides the parties is whether that is the only cause of action. The Crown contends that it is so that it is now barred by s.2 of the Limitation Act 1980. PPL submits that it is not. It submits that the breach of duty imposed by Article 8.2 is a continuing one and, not being actionable per se, gives rise to a fresh cause of action on each occasion when PPL suffers consequential damage. On that basis PPL claims to be entitled to recover damage sustained within the six years immediately preceding the issue of proceedings on 10th March 2003.

14. The distinction between the two is demonstrated by two recent cases. The first chronologically is **Arkin v Borchard Lines Ltd** [2000] EuLR 232. The case concerned the operation of agreements alleged to infringe Articles 81 and 82 of the EU Treaty. Colman J (p.242) recorded that it was common ground that a cause of action for breach of a statutory duty first arises when the breach causes damage to the claimant. He continued

> "In this connection it is important to recognise that there are different ways in which such a breach may cause damage. Thus, an isolated event amounting to such a breach may cause a chain of damage development commencing when the effects of the breach first affect the claimant, and those [effects] may continue for a long period of time. If that period commences prior to the cut-off date for the purposes of the period of limitation, the claim will prima facie be time-barred notwithstanding that the effects of the breach may continue beyond that date. The position is similar to a claim in tort for negligence.

> By contrast, there may be a continuing or repeated breach of statutory duty, over an extended period, such as an unlawful emission of toxic fumes which continues to affect and injure those exposed to it over the whole period of that breach. In such a case, if the limitation cut-off date occurs during the period, the claimant's cause of action for the damage suffered after the date in question will not be time-barred."

Colman J concluded that the case before him fell into the latter category.

15. The second is **Homburg Houtimport BV v Agrosin Private Ltd.** [2001] 1 Ll.L.R. 437. In that case cargo had been negligently stowed so that damage from condensation occurred during the subsequent voyage. The claimant in respect of that damage only acquired title to the cargo after the voyage had commenced. The defendants contended that no duty of care could be owed to one who was not the owner of the cargo at the time of the negligent act. It was not submitted that the negligent act of stowage constituted a continuing breach only that the fresh damage occurring after the claimants had acquired title to the cargo created new causes of action on which they could sue to recover that damage (see para 95 per Rix LJ). The Court of Appeal held that the cause of action was completed once and for all when, following the negligent stowage, more than insignificant consequential damage was caused to the cargo (see paras 96-98 and 196).

16. This conclusion was upheld in the House of Lords [2003] 1 Ll.L.R.571. Lord Bingham of Cornhill adopted the judgment of Rix LJ on this point as his own (para 40). Lord Steyn also agreed (para 64). Similarly Lord Hoffmann (para 90) concluded that

> "there was a single cause of action which accrued to the persons who owned the cargo at the time when the negligent stowage caused it any significant damage. That cause of action comprised all damage caused by the negligent stowage, even if some of that damage did not manifest itself until after they had parted with ownership."

17. I have also been referred to extracts from three textbooks. In Clerk & Lindsell on Torts 18th (2000) Ed. paras 33-06 and 33-07 the editors deal respectively with cases of a continuing wrong and a tort only actionable on proof of special damage. With regard to the former they express the view that

> "every fresh continuance is a fresh cause of action, and therefore an injured party who sues after the cessation of the wrong may recover for such portions of [the damage] as lies within the period limited."

In the case of the latter they point out that

> "When the tort is actionable only on proof of damage, then there is no cause of action, and time does not begin to run until some damage actually occurs."

18. In McGee Limitation Periods 4th Ed. (2002) the same points are made in paras 5.002 to 5.004. In para 27.040 the author expresses the view that the decision of Colman J in **Arkin v Borchard Lines Ltd** [2000] EuLR 232 demonstrates that the principles to be applied for the purposes of determining the accrual of a cause of action are the same irrespective of whether the action is governed by the Limitation Act 1980 or is an action created by European Legislation, to which the principles of limitation are applied by analogy.

19. The third text book to which I have been referred is McGregor on Damages 17th Ed.(2003). In paragraph 9.021 the author also points out that in the case of a continuing wrong a fresh cause of action arises from time to time for so long as the wrongful state of affairs continues and in the case of a single act not actionable per se the cause of action arises when and as often as consequential damage occurs.

20. All three textbooks refer to the case of **Darley Main Colliery Co. v Mitchell** (1886) 11 App.Cas.127. As Lord Hoffmann pointed out in **Homburg Houtimport BV v Agrosin Private Ltd.** [2003] 1 Ll.L.R. 571, 590 that case was unusual because the cause of the damage, digging coal underground, was not itself a wrongful act but gave rise to a cause of action only in so far as it let down some part of the surface. He added

> "So there was no unifying element in the cause of action such as, in this case, is provided by the negligent stowage. Each letting down of the surface was a separate cause of action. In the present case, all damage caused by the negligent stowage is a single cause of action which is complete once any significant damage has occurred."

21. Counsel for the Crown submitted that the fact that this cause of action has been pigeon-holed as a breach of statutory duty for some purposes, for example the availability of exemplary damages, does not mean that it must be so regarded in other contexts. He suggested that, as in the **Darley Main** case, there was a unifying element in the illegality, as he described it, arising on 2nd July 1994 when the UK failed to do what Article 8.2 of the Rental Directive required it to do. He pointed out that to regard the state of affairs which arose on that day as a continuing breach gives rise to undesirable consequences in that the Crown will remain liable for an indeterminate period for substantial sums which it is unable to quantify or recover from those who have benefited from its failure to do what European Community law required. He submitted that the proper view was that all damage occurring on or after 2nd July 1994 was the consequence of the breach of duty which crystallised on that date.

22. Counsel for the Crown submitted that properly regarded the breach of statutory duty alleged falls within the first of the categories described by Colman J in **Arkin v Borchard Lines Ltd** [2000] EuLR 232, not the second. He pointed out that after 2nd July 1994 nothing further occurred. He suggested by analogy with **Matra Communications SAS v Home Office** [1999] 1 WLR 1646, 1656 that the loss sustained by PPL was the loss of the chance to sue those who would be infringers but for the provisions of ss. 67 and 72 of the 1988 Act and that loss was sustained once and for all on 2nd July 1994.

23. I am unable to accept these submissions. First, the categorisation of the cause of action as the breach of a statutory duty appears to me to be correct for the Crown's obligation arises under statute, namely Article 8.2 of the Rental Directive and s.2(1) European Communities Act 1972. In any event the Crown's obligation is not contractual and must therefore be recognised as being "founded on tort". So regarded it falls within the express words of s.2 Limitation Act 1980. In my view, therefore, the Limitation Act applies directly and not by analogy as suggested in McGee on Limitation Periods para 27.040.

24. Second, it was common ground that the obligation of the UK imposed by Article 8.2 Rental Directive did not cease on 2nd July 1994 when the date by which the obligation was to be performed had passed. No doubt it is true that had the duty been performed on or before 1st July 1994 then there would not have been any breach of duty on or after 2nd July 1994. But the converse is not true, the obligation continued but was not performed. In these circumstances the crystallisation of the breach of duty on 2nd July 1994 cannot be such a unifying element as Lord Hoffmann referred to in respect of the **Darley Main** case and the fact that nothing further occurred after that date is the complaint not an answer to it.

25. Third, I do not agree that all subsequent damage can be attributed to the initial breach. Playing a sound recording as part of the activities of a charitable organisation in, say, 2000 was not an infringement because the Crown had not done by that time what Article 8.2 required; that is to say the relevant breach is that which occurred in 2000 not that which had occurred previously in 1994. PPL was not deprived of a chance in 1994. It was deprived of a right on each subsequent occasion when a sound recording was played in circumstances which, because of the Crown's failure to do what Article 8.2 required, did not constitute an infringement.

26. Fourth, I am unimpressed by the submission regarding the consequences to the Crown if the argument for PPL is accepted. The issue of limitation is predicated on the assumption that liability has been established. That would involve a finding that the Crown "manifestly and gravely" disregarded its obligation. Had the Crown not done so it could have avoided an initial liability and terminated any continuation of it by doing what Article 8.2 required.

27. Fifth, the requirement of the third element of the claim I have summarised in paragraph 11 that there is a direct causal link between the breach of the obligation and the damage sustained by the claimant demonstrates that a claim for what has been

called Francovich damages is not actionable per se. It follows that damage is an essential ingredient of the cause of action and can found a claim as and when it is sustained.

28. For all these reasons I accept the submission for PPL that its claim falls within accepted principles relating to the accrual of causes of action summarised in all three of the textbooks to which I have referred. In my view its claims are not statute-barred because they are both claims in respect of a continuing breach of duty and a cause of action in which damage is an essential ingredient. The loss for which damages may be recovered is limited to that sustained within the six years immediately preceding the issue of proceedings on 10th March 2003 and, if the actions proceed, the particulars of claim should be amended to reflect that fact.

Abuse of the process of the Court – the Law

29. The starting point in relation to this issue is the decision of the Court of Appeal in **Clark v Humberside University** [2000] 1 WLR 1988. In that case a student at the University had failed her final exams. Initially her papers were rejected for plagiarism. Her internal appeal was pyrrhically successful in that the finding of plagiarism was reversed but she was only awarded a zero mark. She sued the University for breach of contract. Her claim was struck out on the ground that the alleged breaches were not justiciable. The claim was amended to allege breaches of the student regulations of the University. The University maintained that the claim should have been brought, if at all, by way of judicial review and within the 3 months allowed for such claims and not by ordinary action. The Court of Appeal agreed that the judge was right to have struck out the claim as originally formulated but allowed the student's appeal and allowed the action to proceed on the amended pleadings.

30. Lord Woolf MR explained the effect of the Civil Procedure Rules on the decision of the House of Lords in **O'Reilly v Mackman** [1983] 2 AC 236. In paragraphs 34 to 38 he said

> "34. The court's approach to what is an abuse of process has to be considered today in the light of the changes brought about by the C.P.R. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the overriding objectives which include ensuring that cases are dealt with expeditiously and fairly: C.P.R., rr. 1.1(2)(d) and 1.3. They should not allow the choice of procedure to achieve procedural advantages. The C.P.R. are, as r. 1.1(1) states, a new procedural code. Parliament recognised that the C.P.R. would fundamentally change the approach to the manner in which litigation would be required to be conducted. That is why the Civil Procedure Act 1997 (section 4(1) and (2)) gives the Lord Chancellor a very wide power to amend, repeal or revoke any enactment to the

> extent he considers necessary or desirable in consequence of the C.P.R.
>
> 35. While in the past, it would not be appropriate to look at delay of a party commencing proceedings other than by judicial review within the limitation period in deciding whether the proceedings are abusive this is no longer the position. While to commence proceedings within a limitation period is not in itself an abuse, delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceeding are abusive. If proceedings of a type which would normally be brought by judicial review are instead brought by bringing an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process can take into account whether there has been unjustified delay in initiating the proceedings.
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> 36. When considering whether proceedings can continue the nature of the claim can be relevant. If the court is required to perform a reviewing role or what is being claimed is a discretionary remedy, whether it be a prerogative remedy or an injunction or a declaration the position is different from when the claim is for damages or a sum of money for breach of contract or a tort irrespective of the procedure adopted. Delay in bringing proceedings for a discretionary remedy has always been a factor which a court could take into account in deciding whether it should grant that remedy. Delay can now be taken into account on an application for summary judgment under C.P.R., Part 24 if its effect means that the claim has no real prospect of success.
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> 37. Similarly if what is being claimed could affect the public generally the approach of the court will be stricter than if the proceedings only affect the immediate parties. It must not be forgotten that a court can extend time to bring proceedings under R.S.C., Ord. 53. The intention of the C.P.R. is to harmonise procedures as far as possible and to avoid barren procedural disputes which generate satellite litigation.
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> 38. Where a student has, as here, a claim in contract, the court will not strike out a claim which could more appropriately be made under Order 53 solely because of the procedure which has been adopted. It may however do so, if it comes to the conclusion that in all the circumstances, including the delay in initiating the proceedings, there has been an abuse of the process of the court under the C.P.R. The same approach will be adopted on an application under Part 24.

31. Sedley and Ward LJJ agreed. In paragraph 17 Sedley LJ recognised that to permit what is in substance a public law challenge to be brought as of right up to six years

later if the relationship happens also to be contractual will circumvent the safeguards contained in CPR Part 53. He added

> "...the CPR now enable the Court to prevent the unfair exploitation of the longer limitation period for civil suits without resorting to a rigid exclusionary rule capable of doing equal and opposite injustice. Just as on a judicial review application the Court may enlarge time if justice so requires, in a civil suit it may now intervene, notwithstanding the currency of the limitation period, if the entirety of circumstances – including of course the availability of judicial review – demonstrates that the Court's processes are being misused, or if it is clear that because of the lapse of time or other circumstances no worthwhile relief can be expected."

32. Counsel for the Crown accepts that the claim of PPL may be brought by ordinary action. But, he submits, the cause of action is sui generis and based on a core allegation that that the UK should have amended the 1988 Act so as to repeal ss.67 and 72. He contends that such a claim is inherently a public law claim which ought to be pursued in proceedings for judicial review. To require such a procedure will enable the court to exercise control over the claims and the periods for which they may be pursued. In those circumstances, he submits the Court has jurisdiction to strike out the action as an abuse of the process of its process.

33. This is disputed by Counsel for PPL. He accepts that the complaint of PPL could have been brought by judicial review. But, he contends, this is a private law claim which PPL is entitled to bring by ordinary action commenced within the limitation period. He relies by way of analogy on **An Bord Bainne Co-Operative Ltd v Milk Marketing Board** [1984] 2 CMLR 585; **Lonrho plc v Tebbit** [1992] 4 AER 280, 287/88; **Boddington v British Transport Police** [1999] 2 AC 143, 172 and **Steed v Home Secretary** [2000] 1 WLR 1169. He maintains that in the absence of any post action conduct of which legitimate complaint may be made, and none is here alleged, the court is not entitled to strike out an action properly commenced within the limitation period.

34. Counsel for PPL relies on the decision of the House of Lords in **Dept of Transport v Chris Smaller (Transport) Ltd** [1989] AC 1197. That case was concerned with an application under the Rules of the Supreme Court then in force to strike out a claim for want of prosecution. The writ was not issued until the end of the relevant six year limitation period and then not served for a further nine months. There were subsequent delays on which the defendant also relied. Lord Griffiths, with whom the other members of the Appellate Committee agreed dealt with pre-action delay on pages 1206/07. He referred to the observation of Kerr LJ in **Westminster City Council v Clifford Culpin and partners** 18th June 1987 Court of Appeal Transcript No 592 of 1987 that it was questionable whether plaintiffs should be allowed the benefit of the full limitation period with virtual impunity where the facts are known and there is no obstacle to the speedy institution and prosecution of claims and continued

> "I see the force of this observation, particularly in a case like the present, when there is no good reason why the action should not have been started much earlier than it was. But limitation periods are set by Parliament and not by the courts....It would, I think, introduce intolerable uncertainty into the litigation process if litigants were at risk of being penalised even if they commenced their actions within the limitation period and thereafter pursued them expeditiously. The effect would be to push people into precipitate litigation for fear that the court might eventually rule that they had not started their action soon enough....The courts must respect the limitation periods set by Parliament; if they are too long then it is for Parliament to reduce them. I therefore commence my assessment of the present regime by concluding that the plaintiff cannot be penalised for any delay that occurs between the accrual of the cause of action and the issue of the writ provided it is issued within the limitation period."

35. Counsel for PPL submits that those considerations remain as true today as in 1989. He contends that if and in so far as the Court of Appeal may have suggested otherwise in **Clark v Humberside University** it was not open to them to do so. The latter submission is not, I think, open to counsel in this court for I am bound by the decision of the Court of Appeal in **Clark.** If and to the extent that the Court of Appeal went further than the decision of the House of Lords in **Smaller** entitled them to go that is a matter for the Court of Appeal or the House of Lords. But I do not think that counsel need go that far. The first sentence in paragraph 35 of the judgment of Lord Woolf contains a clear recognition of the proposition expressed by Lord Griffiths in **Smaller**. The second sentence accepts that it remains the case that it is not an abuse to commence proceedings within a limitation period though delay may be relevant when considering whether such proceedings are abusive for other reasons. The same point is apparent from the reference by Sedley LJ to the "entirety" of the circumstances. Further I do not accept the submission of Counsel for PPL to the effect that only such cases as would have been struck out in accordance with the principles established in **O'Reilly v Mackman** [1983] 2 AC 237 may now be regarded as an abuse of the process. If that had been the intention of Lord Woolf and Sedley LJ in **Clark v Humberside University** it would have been unnecessary for them to make the comments which I have quoted in paragraphs 30 and 31.

36. Each side accepts that this claim could have been brought by an application for judicial review or by ordinary action; they differ in the appropriateness of one type of proceeding over another. In my view it was to just this situation that the judgments of Lord Woolf and Sedley LJ in **Clark** were directed. I conclude that the jurisdiction to which they referred exists where the remedies both of judicial review and of ordinary action are available. The choice of either may be an abuse of the process. How to exercise that jurisdiction will depend on all the relevant circumstances including matters occurring before the proceedings were instituted and which remedy is in the circumstances the more appropriate.

37. Accordingly I would reject the extreme position taken by each party. The claims instituted by PPL may be an abuse of process notwithstanding that the Crown does not rely on any event occurring after their institution. But it cannot be predicated that they are an abuse just because they involve a consideration of the duties of the Crown under European law and might have been brought by an application for judicial review.

Abuse of the process of the Court – the Facts

38. The background to the institution of these proceedings has been set out in exhaustive detail in the evidence of Ms Kennedy for the Crown and Mr Nevrkla for PPL. I do not find it necessary to go into such detail for the relevant milestones can be more simply described.

39. As I have already mentioned the Rental Directive was promulgated on 19th November 1992. In August 1993 the Department of Trade and Industry issued a consultation paper on how the Rental Directive should be implemented. Paragraphs 7 and 8 of the Consultation Paper drew attention to Articles 8.2 and 10 and suggested that the existing exceptions in the UK law, ie ss.67 and 72, would remain. PPL's response dated 26th November 1992, supported by the opinion of specialist leading counsel, suggested that ss. 67 and 72 were not compatible with Articles 8.2 and 10. In January 1994 the DTI published a summary of the responses to the Consultation Paper. On 5th October 1994 there was a meeting between officials of the DTI and representatives of PPL at which the differences between them were discussed but not resolved. On the same day the UK Permanent Representative to the EU wrote to the Commission seeking its opinion as to the compatibility of s.67 and the Rental Directive. On 23rd February 1995 the Commission replied to the effect that in its opinion s.67 was compatible. Evidently the Commission took a different view with regard to s.72 as, eventually on 26th July 2001 it referred the UK to the ECJ for failure to implement the Rental Directive in that respect.

40. In the meantime there was a meeting between the responsible Minister and representatives of PPL on 18th May 1995. They again discussed whether Articles 8.2 and 10 of the Rental Directive were compatible with ss.67 and 72 of the 1988 Act. The summary prepared by PPL shows that the Minister indicated that PPL should assume that s.67 would not be repealed, that in his view s.72 was compatible with the Rental Directive so that he had no power to repeal it and that he was open to discussion whether primary legislation was required. Such discussion continued both in meetings, particularly on 21st July, and by correspondence and with and without specialist leading counsel. No resolution of the underlying issues was achieved.

41. Later in 1995 the Government introduced a Broadcasting Bill. In a letter to the DTI from PPL dated 24th November 1995 PPL indicated that it would pursue its contentions in relation to s.72 in that context and would seek an appropriate amendment by lobbying in the proper quarters. Such activity proved to be equally unsuccessful. In 1996 the focus shifted to the terms of the statutory instrument required to implement the Rental Directive, by then some two years out of time. Further correspondence ensued. On 16th September 1996 a representative of PPL

wrote to the official in the Patent Office with whom much of the previous communication had taken place and indicated that in the absence of an amicable solution and if the issue became a matter of court interpretation PPL would like to disclose the correspondence to assist the court. But in the minutes of a meeting of the directors of PPL held on 26th November 1996 it is recorded that

> "neither a formal complaint to the European Commission nor the commencement of judicial review proceedings in the UK were recommended, since the UK government would be likely to interpret this as an aggressive move and the tactic is likely to be counter-productive.."

42. PPL continued its lobbying activities. Following the General Election in May 1997 the Department for Culture, Media and Sport ("DCMS") became involved. PPL sent submissions to that Department in October 1997 reiterating all its previous arguments together with several opinions of counsel. The Treasury Solicitor was unable to ascertain whether the submission had been answered. Further correspondence between PPL, the Patent Office and DCMS took place in and after February 1998 relating to the statutory licence to which the issues concerning ss. 67 and 72 had some relevance. Further consultation papers and responses took place in 1998 and 1999.

43. The issues appear to have been dormant in the year 2000 but came to life again in May 2001 in relation to the Harmonisation Directive promulgated by the European Commission and Parliament. Correspondence and meetings between PPL, the Patent Office and DCMS took place throughout 2001 and 2002, particularly in respect of s.72. In the course of these communications the possibility of a claim for damages was adverted to in a letter dated 26th July 2002 from PPL to the Parliamentary Under-Secretary at DCMS. The Parliamentary Under-Secretary replied on 2nd September 2002 suggesting that further consultation was required before any final conclusion was reached. Further consultation took place but without either party modifying their positions. The claims were issued without warning on 10th March 2003.

44. The evidence of the negotiations is voluminous. It shows the relative positions of the parties on the contentious issue of whether Articles 8.2 and 10 permitted the UK to retain ss.67 and 72 from as early as 1993 to as late as 2003. Neither side modified its position in that 10 year period. Whilst PPL decided in November 1996 not to pursue an application for judicial review of the Crown's decisions with regard to the implementation of the Rental Directive, there is nothing to suggest that it intended to abandon any claim for compensation it might have.

45. In these circumstances the Crown contends that the proceedings should be struck out, not because of anything which followed their institution but because of all that went before. The Crown accepts that mere delay is not abusive if the proceedings are commenced within the relevant limitation period. Counsel for the Crown suggests that this case is different because the delay was deliberate, has given rise to substantial claims and puts the Crown on horns of a dilemma in that it believes that Articles 8.2 and 10 of the Rental Directive do permit the retention of ss. 67 and 72 but can do nothing to protect itself if it turns out to be wrong. Counsel for the Crown

suggests that the delay has been prejudicial to the Crown in that the evidence as to the quantum of liability has become progressively more difficult to obtain. He contends that the failure of PPL to institute proceedings earlier and the decision taken at the meeting held on 26th November 1996 not to proceed by way of judicial review lulled the Crown into a false sense of security. Indeed he went further and invited me to regard that decision as an abandonment for all time of the right to sue for compensation.

46. These contentions were rejected by counsel for PPL. He submitted that the decision in **Smaller** is inconsistent with any notion that it matters whether the delay was the result of a deliberate decision or oversight. He pointed out that the effect of the Limitation Act is to bar the earlier claims. He suggested that the Crown was no more on the horns of a dilemma than any other litigant against whom a claim has been made on the basis of uncertain legal principles. In the alternative he pointed out that the Crown might have applied for a negative declaration, cf **A-G v Able** [1984] QB 795, but never tried. Further, as he submitted, any evidential problem concerning the quantum of damage would prejudice PPL more than the Crown. He disputed the suggestion that PPL had lulled the Crown into a false sense of security or had in any way led the Crown to believe that it, PPL, had abandoned any private law rights to compensation or had in fact done so.

47. I start with a consideration of the nature of the proceedings. The decision of the Divisional Court in **Factortame V** to which I have referred in paragraph 12 was considered by the Court of Appeal ([1998] Eu.L.R. 456) and the House of Lords ([2000] 1 AC 524), but not with regard to the claim for exemplary damages which had been abandoned. In both those courts there was clear recognition that the effect of **Francovich** and subsequent cases was to subject Member States to an obligation under Community Law to compensate individuals who have sustained consequential loss if they satisfy the conditions identified by the ECJ in those cases. Such an obligation gives rise to a correlative right in one who has suffered such damage. Such a right is not discretionary.

48. Nor in my view can such a right be categorised as a public law right even though the Crown's obligations under Community Law and how to discharge them fall to be considered. As in the context of the Limitation Act, the remedy is for damages for breach of a statutory duty arising under Article 8.2 of the Rental Directive and s. 2(2) European Communities Act. This is recognised by the relief sought in the form of a declaration and damages. Counsel for PPL accepted that a declaration was a discretionary remedy but offered to abandon it if that mattered.

49. Neither party referred me to the provisions of CPR Part 54. Nevertheless it appears to me that though the nature of the proceedings might fall within the definition of a claim for judicial review in Rule 54.1(2)(a) if the claim for a declaration is abandoned it would be excluded by Rule 54.3(2). I do not suggest that the form of the proceedings can govern their substance but, to my mind, this confirms the view that the proceedings are essentially private law proceedings which can and prima facie should be brought by an ordinary claim.

50. I see nothing in the features on which the Crown relied to suggest that the court should regard the continuation of the claims as ordinary actions as an abuse of the process. So to do would be to subject the rights of an individual to a discretion and a time limit much more restrictive than those normally appropriate to a private law claim for breach of statutory duty and would itself constitute a breach of community law.

51. I do not accept the submission that the actions of PPL lulled the Crown into a false sense of security or amounted to any sort of representation that it had abandoned any legal claim it might have. The position of PPL was quite clear throughout. It maintained consistently and with varying degrees of vigour that both ss.67 and 72 were inconsistent with Articles 8.2 and 10 of the Rental Directive and should be repealed. PPL was so understood by the Crown. There is no evidence that the Crown modified its disagreement with the contentions of PPL or otherwise changed its position in reliance on any impression it received as to the attitude of PPL to the institution of proceedings.

52. The delay, the dilemma and consequential problems with regard to evidence of loss are neither more nor less than those faced by any defendant facing ordinary civil proceedings based on uncertain legal principles and brought late but within the relevant limitation period. I can see no reason why all or any such factors should lead to the conclusion that the Crown should be put in a privileged position or the rights of PPL frustrated or denied. For all these reasons I reject the submission that the pursuit of these claims are abuses of the process of the Court.

Conclusion

53. For all these reasons I answer the preliminary issues in each action in the negative.