HOUSE OF LORDS SESSION 2007–08
[2008] UKHL 34

on appeal from: [2007] EWCA Civ 939

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

OB (by his mother and litigation friend) (FC) (Respondent) v Aventis Pasteur SA (Appellants)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond

Counsel

Appellants:
George Leggatt QC
Prashant Popat QC
(Arnold Porter (UK) LLP)

Respondents:
Simeon Maskrey QC
Hugh Preston
(Freeth Cartwright LLP)

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LORD HOFFMANN

My Lords,

1. Council Directive 85/374/EEC (the "product liability directive") provides in article 1 that "the producer shall be liable for damage caused by a defect in his product". Liability is strict: by article 4, all that the injured person need prove is "the damage, the defect and the causal relationship between defect and damage". The primary meaning of "the producer" is the manufacturer, but there circumstances in which someone else can be deemed to be the producer. For example, a supplier may be treated as the producer "unless he informs the injured person, within a reasonable time, of the identity of the producer": see article 3.

2. Article 10 provides for a limitation period of three years from the date on which the plaintiff became aware, or should reasonably have become aware, of the damage. But article 11 contains an additional, "long-stop" period:

> "Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer."

3. The United Kingdom gave effect to the liability provisions of the Directive in the Consumer Protection Act 1987. Part I declared in section 1(1) that its purpose was to make "such provision as is necessary in order to comply with the product liability Directive". It gave effect to the limitation provisions of articles 10 and 11 of the Directive by amending the Limitation Act 1980: see section 6(6) and Schedule 1. The Schedule added a new section 11A to the 1980 Act, which contained the 10 year period in subsection (3) and the three year period in subsection (4).

4. Section 35 of the 1980 Act contains a general provision which prohibits the substitution of a new party after the expiry of the limitation period. By way of exception (see subsection (5)(b) and 6(a)), rules of court may give a power to substitute a party with effect from the commencement of the original action if —

> "the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name".

5. Rule 19.5(3)(a) of the CPR confers such a power. The court has a discretion; even if the condition for the exercise of the power is satisfied, the court will take into account that the effect of the order will be to deprive the defendant of a limitation period and allow a substitution only if it considers that the justice of the case requires it.

6. In *Horne-Roberts v SmithKline Beecham plc* [2002] 1 WLR 1662 the Court of Appeal considered whether, as a matter of construction of the 1980 Act, the power of substitution under the rules made pursuant to section 35 (5)(b) and 6(a) applied to the new ten year limitation period in section 11A(3). It decided that it did. But the Court did not consider whether, as a matter of European law, such a power was consistent with the provisions of article 11 of the product liability Directive.

7. It is this point which has arisen in the proceedings before the House. Declan O'Byrne was vaccinated on 3 November 1992 with a HIB vaccine. He alleges that it was defective and caused damage to his brain. On 2 November 2000, well within the 10 year period, he commenced proceedings against Aventis Pasteur MSD Limited ("APMSD"), a United Kingdom company, alleging it to have been the

producer. That was a mistake. The producer was its French parent company, Aventis Pasteur SA ("APSA"). APMSD was only the United Kingdom distributor, which had sold the vaccine to the Department of Health for use in the medical centre where Declan was vaccinated.

8. On 16 October 2002, the claimant commenced new proceedings against APSA and applied under rule 19.5(3)(a) for APSA to be substituted as a defendant in place of APMSD in the first action. The defendants said that although Declan had not been vaccinated until 3 November 1992, the vaccine had been put into circulation within the meaning of article 11 by the sale and delivery by APSA to its UK distributor more than 10 years before 16 October 2002 and the claim was therefore statute-barred. They also said that the power to substitute a new defendant was inconsistent with article 11. Judge Brunning, before whom the application came, referred three questions for a preliminary ruling by the Court of Justice:

> "1. On a true interpretation of article 11 of the Council Directive, when a product is supplied pursuant to a contract of sale by a French manufacturer to its wholly owned English subsidiary, and then by the English company to another entity, is the product put into circulation:
>
> (a) when it leaves the French company; or
>
> (b) when it reaches the English company; or
>
> (c) when it leaves the English company; or
>
> (d) when it reaches the entity receiving the product from the English company?
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> 2. Where proceedings asserting rights conferred on the claimant pursuant to the Council Directive in respect of an allegedly defective product are instituted against one company (A) in the mistaken belief that A was the producer of the product when in fact the producer of the product was not A but another company (B), is it permissible for a Member State under its national laws to confer a discretionary power on its courts to treat such proceedings as 'proceedings against the producer' within the meaning of article 11 of the Council Directive?
>
> 3. Does article 11 of the Council Directive, correctly interpreted, permit a Member State to confer a

> discretionary power on a court to allow B to be substituted for A as a defendant to proceedings of the kind referred to in question 2 above ("the relevant proceedings") in circumstances where:
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> (a) the period of 10 years referred to in article 11 has expired;
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> (b) the relevant proceedings were instituted against A before the 10 year period expired; and
>
> (c) no proceedings were instituted against B before the expiry of the 10 year period in respect of the product which caused the damage alleged by the claimant?"

9. We are not concerned in this appeal with question 1 and everyone agrees that questions 2 and 3 are different formulations of the same question. The issue concerns the meaning of the words "instituted proceedings against the producer" in article 11. If the claimant has instituted proceedings against someone whom he describes as the producer, but has mistakenly named someone who was not the producer, is it consistent with article 11 for the court to be able to say that the proceedings shall count as having been instituted against the real producer and amended accordingly?

10. The nature of the issue appears clearly enough from the written observations submitted by the Commission, the Republic of Italy, the claimant and the respondent. The Commission said unequivocally in para 55:

> "Article 11…aims at establishing a time limit on the exposure of manufacturers to product liability claims based on strict liability. It flows from that provision that the victim may not bring an action against the producer claiming the producer is strictly liable once that limit has elapsed. The Directive does not seem to permit national courts or national legal orders to disregard that time limit in cases where proceedings were instituted within the deadline against a company other than the producer. Such disregard for the time limit would undermine the balance struck by the Directive between the respective interests of users and producers."

11. The Commission went on, however, to consider the possibility that the supplier might have been deemed to be the producer under article 3 because it had not informed the claimant of the identity of the producer within a reasonable time. In that case, the first proceedings would have been instituted against the producer within the meaning of the Directive.

12. The Italian Republic took a similar line, saying that in general, an action started by mistake against someone else could not be turned into an action against the producer after the 10 year period had expired. But once a supplier who was deemed to be the producer under article 3 had been sued within the 10 year period, it was open to the court to add or substitute the actual producer at any time thereafter. The requirements of article 11 had been met.

13. The respondent likewise argued that article 11 did not allow a substitution merely on the ground that the original defendant was mistakenly thought to have been the producer. Their argument concentrated on the words "the producer" in the phrase "instituted proceedings against the producer". To allow a substitution would, they said, read the term "the producer" to mean "someone who was believed…to be the producer". That would be an illegitimate extension of the definition of the producer in article 3.

14. The claimants, on the other hand, in their argument on the meaning of the same phrase, concentrated rather on the words "instituted proceedings against…" To say that you had to sue the producer and that article 3 laid down an exhaustive and limited definition of the producer was, in their submission, to miss the point. The claimants did not suggest that you could sue anyone other than the producer as defined in article 3 or that you did not have to sue him within the 10 year period. The real question was, what counted as suing the producer? If you sued someone whom you described as the producer but made a mistake as to his name, could that count as proceedings instituted against the producer? If it could, then there could be no objection to allowing you to amend the proceedings to correct the name. For example, if you named Universal Pharmaceuticals (Products) Ltd as defendant, alleging that it manufactured a defective drug, but the actual manufacturer was its sister company Universal Pharmaceuticals (Manufacturing) Ltd, both of them having recently changed their names in a company reorganisation, it would be a highly technical system of civil procedure which did not allow you to correct the mistake. The solution suggested by the Commission would not necessarily be an

answer since Universal Pharmaceuticals (Products) Ltd may have been neither supplier nor manufacturer but simply a member of same group. It would have been obvious to everyone in the group that the claimant was intending to sue whichever company was the producer and therefore, one would have thought, it would have been a suitable case in which to exercise the discretion to treat the proceedings as having been commenced against the producer.

15. The Advocate General (Geelhoed) accepted the view of the Commission and the Republic of Italy and proposed that question 2 be answered:

> "Where proceedings asserting rights conferred on the claimant pursuant to Directive 85/374/EEC in respect of an allegedly defective product are instituted against a supplier within the 10-year period laid down in article 11 of the Directive in the mistaken belief that the supplier was the producer of the product when in fact the producer was another company within the same group of companies to which both the supplier and the producer belong, the provisions of Directive 85/374/EEC, and in particular articles 3(3) and 11, permit the court seised to treat such proceedings as proceedings against the producer within the meaning of article 11 when the supplier knew the identity of the producer and was in a position to inform the claimant thereof in a reasonable time and in any event before the expiry of that 10-year period." ([2006] 1 WLR 1606, para 67)

16. The Court, however, did not accept this advice. In paras 33 and 34 of its judgment it said:

> "33. By its second and third questions, which it is appropriate to examine together, the referring court asks essentially whether, when an action is brought against a company mistakenly considered to be the producer of a product, whereas, in reality, it was manufactured by another company, it is open to the national courts to view such an action as being brought against that production company and to substitute the latter, as defendant to the action, for the company initially proceeded against.

> 34. In that regard it must be observed that the Directive does not determine the procedural mechanisms which it is appropriate to apply when a victim brings an action for liability for defective products and makes an error as to the identity of the producer. It is therefore, as a rule, for national procedural law to determine the conditions in accordance with which one party may be substituted for another in the context of such an action."

17. If the Court had stopped there, the answer would have been clear enough. As the parties had made clear in their written submissions, the effect of section 35 of the 1980 Act, as interpreted in *Horne-Roberts v SmithKline Beecham plc* [2002] 1 WLR 1662, was that in a case like this, national procedural law permitted the substitution of the correct name of the producer for a wrong name which had been used by mistake. The Court however went on:

> "35. However, it must be observed that the class of persons liable against whom an injured person is entitled to bring an action under the system of liability laid down by the Directive is defined in articles 1 and 3 of the Directive: *Skov Æg v Bilka Lavprisvarehus A/S* (Case C-402/03) [2006] ECR I-00199, para 32. Since the Directive seeks to achieve a complete harmonisation in the matters it regulates, its determination in those provisions of the class of persons liable must be regarded as exhaustive: the *Skov* case, para 33.
>
> 36 The liability imposed by the Directive is attributed by articles 1 and 3(1) thereof to the producer, who is defined, in particular, as the manufacturer of a finished product.
>
> 37 It is only in the cases exhaustively listed that other persons can be considered to be a producer, namely, any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer (article 3(1) of the Directive), any person who imports a product into the Community (article 3(2)) and the supplier who, where the producer of the product cannot be identified, does not inform the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product (article 3(3)).

> 38 A national court, when it examines the conditions governing the substitution of one party for another in a particular dispute, must ensure that due regard is had to the personal scope of the Directive, as established by article 3 thereof.
>
> 39 Therefore the reply to the second and third questions must be that, when an action is brought against a company mistakenly considered to be the producer of a product whereas, in reality, the product was manufactured by another company, it is as a rule for national law to determine the conditions in accordance with which one party may be substituted for another in the context of such an action. A national court examining the conditions governing such a substitution must, however, ensure that due regard is had to the personal scope of the Directive, as determined by articles 1 and 3 thereof."

18. The dispute between the parties is over the extent to which paragraphs 35 to 38, and the "however" sentence in the answer to the questions, qualify the effect of paragraph 34. The appellants say that the Court of Justice was adopting the same position as the Advocate-General, namely, that no substitution was possible unless someone deemed by article 3 to be the producer had been named as defendant in the original proceedings. Otherwise, they say, the paragraphs would be meaningless. It did not need the Court of Justice to tell us that only the producer or someone deemed to be the producer is liable under the Directive.

19. In my opinion, if the Court of Justice had intended to give the answer proposed by the Advocate General, it would have said so. It knew exactly why the referring court had asked the question and what the Court of Appeal had decided in *Horne-Roberts v SmithKline Beecham plc* [2002] 1 WLR 1662. If it thought that the discretionary power exercised in that case was inconsistent with article 11 of the Directive, it would have made that clear. Instead, it made no reference to article 11 and said only that the national court must ensure that *due regard is had* to the limited scope of article 3 ("doit cependant veiller à respecter le champ d'application ratione personae de la directive", "hat… jedoch darauf zu achten daß der persönliche Anwendungsbereich der Richtlinie…beachtet wird.")

20. In my opinion, what the Court of Justice was saying was that in some circumstances, proceedings which are obviously intended to be proceedings against the producer but which use the wrong name can properly be treated by national procedural law as having been proceedings against the producer. But the national court must take care that the proceedings can plausibly be regarded as having been proceedings against the producer. If it simply used any existing proceedings as a pretext for enabling the producer to be joined after the 10 year period had expired, it would not be having due regard to the limited scope of article 3. But there is no suggestion in the judgment that the exercise of the power under section 35 of the 1980 Act would exceed these bounds.

21. Mr Leggatt QC, who appeared for the appellant, said that if your Lordships were in doubt about the effect of the judgment, they should make a further reference to the Court of Justice. It is particularly unfortunate for the claimant in this case, who has been trying for over seven years to litigate the question of whether he is entitled to any compensation, that there should be further delay before the case can be decided and, speaking for myself, I would not regard the effect of the judgment as doubtful. But since I understand that all of your Lordships do not share this view, a reference will have to be made. It may be that the Court of Justice will be able to shorten the proceedings by giving a summary reasoned order under article 104.3 of its Rules of Procedure, but that is a matter for the Court to decide. I would therefore invite the parties to submit a form of words for a reference and adjourn the proceedings generally until the answer has been received.

LORD HOPE OF CRAIGHEAD

My Lords,

22. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry. I take the same view about the effect of paragraphs 34 to 38 of the judgment of the Court of Justice, and of the "however" sentence in the answer to the questions, as Lord Hoffmann. But Lord Rodger has shown that the contrary view is not beyond reasonable argument. I see no escape therefore from the conclusion that there must be a further reference. I would make the order that Lord Hoffmann proposes.

LORD RODGER OF EARLSFERRY

My Lords,

23. The only issue for the House is whether the correct interpretation of paras 34 to 38 of the judgment of the Court of Justice on the reference by Judge Brunning is so obvious as to leave no scope for any reasonable doubt as to its application in the present proceedings: *Srl CILFIT v Ministry of Health* (Case C-283/81), [1982] ECR I-03415, para 16. Another way of putting the same point is to ask whether the meaning of those paragraphs is "clear beyond the bounds of reasonable argument": *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2007] 3 WLR 922, 938, para 31, per Lord Bingham of Cornhill.

24. My noble and learned friend, Lord Hoffmann, has said that he would not regard the effect of the judgment as doubtful. Perhaps because of the excellence of the submissions for both parties, while envying Lord Hoffmann his lack of doubt, I cannot share it. I readily accept that, for the reasons he gives, his interpretation of the judgment may well be correct. But I cannot exclude the real possibility that, as Mr Leggatt argued, the Court of Justice was expressing the view that, while procedural matters were for the domestic court, it had to ensure that the personal scope of the Directive, as determined by article 3, was respected (veiller à ce que le champ d'application ratione personae de la directive, tel que déterminé par l'article 3 de celle-ci, est respecté). In other words, the Court may have been saying that there is nothing in the Directive to prevent substitution of the actual producer after the expiry of the ten-year period, provided that, within the ten-year period, the proceedings have been initiated against someone who is within the scope, ratione personae, of the Directive as defined in article 3. The point is not beyond reasonable argument.

25. In these circumstances I am driven to the conclusion that a further reference must be made to the Court of Justice. I therefore concur in the course of action proposed by Lord Hoffmann.

LORD WALKER OF GESTINGTHORPE

My Lords,

26. I am in full agreement with the opinion of my noble and learned friend Lord Hoffmann, which I have had the advantage of reading in draft. I would make the order that Lord Hoffmann proposes.

BARONESS HALE OF RICHMOND

27. For the reasons given by my noble and learned friend, Lord Hoffmann, I agree that to allow substitution of APSA for APMSD as defendant in this case would be consistent with the answers given by the European Court of Justice to the questions referred by Judge Brunning. It would also be the just result in the circumstances. Section 35 of the Limitation Act 1980 and rule 19.5(3) of the Civil Procedure Rules would not permit substitution if it would be unjust to the person substituted. But the matter cannot be regarded as completely beyond doubt. So it must be referred a second time. In view of the time which has already elapsed, it is to be hoped that the Court will be able to deal with the matter by summary order under article 104.3 of its Rules of Procedure.