HENDERSON CHAMBERS

PRODUCT LIABILITY ALERTER

OB in the Supreme Court

The Supreme Court has handed down its Judgment in *OB v Aventis Pasteur SA* [2010] UKSC 23. **Prashant Popat QC**, the Chairman of Chambers' Product Liability Group, is instructed on behalf of Aventis.

Background: The claim in the national courts arises out of a vaccine administered to the Claimant on 3rd November 1992. The Claimant alleges that the vaccine was defective within the meaning of the Consumer Protection Act 1987 ('CPA') and caused him injury.

The Directive: The CPA implements Council Directive 85/374/EEC of 25 July 1985 concerning liability for defective products ("the Directive"). Two provisions of the Directive are of particular relevance in this case. Firstly, Article 3 limits the categories of persons that can be liable under the Directive. The Directive imposes strict liability upon the 'producer' of a product. Article 3 defines the 'producer' as the manufacturer of the product (Art 3(1)). Article 3(3) provides that where the producer cannot be identified the supplier is to be treated as the producer unless he informs the injured party of the identity of the producer within a reasonable time. Secondly, Article 11 introduces a temporal scope to the Directive. Article 11 provides for a ten year long stop which requires Member States to implement a provision so that an injured persons rights "*shall be extinguished upon the expiry of the 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.*"

The Limitation Act 1980: Section 11A of the Limitation Act was added by the CPA in order to give effect to the time limits required by the Directive. Section 11A(3) provides that *"An action to which this section applies shall not be brought after the expiration of the period of ten years from the relevant time …"* Pursuant to section 35 of the Limitation Act, rules of court may allow a new claim involving the addition or substitution of a new party to be made in the course of any action after the expiry of "*any time limit under this Act*" if specified conditions are met. In Horne-Roberts v SmithKline Beecham Plc [2002] 1 WLR 1662, the Court of Appeal held that the 10 year period inserted into the Limitation Act at section 11A is a "*time limit under this Act*" within the meaning of section 35, so that section 35 applies to an application to substitute a new party as a defendant after the expiry of the 10 year period.

Rules of court made under section 35 of the Limitation Act are contained in CPR r.19.5. Where the court has power under section 35 and CPR r.19.5 to order substitution of a new party, it is in the discretion of the court whether to make such an order.

The problem in OB: The claim was commenced on 1 November 2000. The Defendant to the claim was Aventis Pasteur MSD Limited ("APMSD"). APMSD is a wholly owned subsidiary of Aventis Pasteur SA ("APSA"). In its Defence APMSD pointed out that it was merely the distributor of the vaccine administered to the Claimant and not the manufacturer. In answer to a subsequent request by the Claimant's solicitors to confirm whether APMSD was the manufacturer of the vaccine, APMSD's solicitor's identified the manufacturer of the vaccine as APSA. The Claimant did not immediately apply to substitute APSA for APMSD but rather sought to amend its claim against APMSD and/or to add APSA as a defendant (which order was set aside). However, on 10 March 2003 the Claimant's solicitors issued an application to substitute APSA in place of APMSD. It was common ground between the parties that, at the time when the application was issued, the 10 year time limit provided for by Article 11 of the Directive had expired. This gave rise to the question of whether the Directive permits substitution after the expiry of the 10 year period in circumstances where proceedings were instituted during the 10 year period but against a party that is not a 'producer' within the meaning of Article 3?

The First ECJ Judgment: The High Court referred two questions to the ECJ as to the correct interpretation of Article 11 and the circumstances in which substitution after the expiration of the ten year period is permissible. The answer provided by the ECJ was unclear, save that it was for national law to determine the conditions in which one party may be substituted for another in such an action but that national courts must have regard to the personal scope of the Directive [Case C-127/04 [2006] ECR I-1313].

The Second ECJ Judgment: Following the first ECJ Judgment, the High Court ordered the substitution of APSA, an order upheld by the Court of Appeal. . The House of Lords agreed with APSA's submissions that a second reference to the ECJ was necessary in order to resolve the issues in the case and referred the following question to the ECJ:

'Is it consistent with [Directive 85/374] for the laws of a Member State to allow substitution of a new defendant to a claim brought under [that] directive after the 10-year period for enforcing rights under Article 11 of the directive has expired in circumstances where the only person named as a defendant in proceedings instituted during the 10-year period was someone who does not fall within Article 3 of the directive?'

In its judgment on this second reference (*Aventis Pasteur SA v OB* (Case C-358/08)), the ECJ held that a 'producer' could not be substituted as the defendant after the expiry of the ten year period if proceedings were not instigated within that period against a person who is a producer within the meaning of Article 3. It matters not if an injured person wrongfully attributes the status of producer to a person or genuinely intended to sue the producer but in fact sued the wrong person (paragraph 48).

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In additional guidance, the ECJ said that if proceedings were instigated within the relevant period against a wholly owned subsidiary of the 'producer', the 'producer' may be able to be substituted after the expiry of the ten year period (paragraphs 50-53). Further, a supplier would be treated as a 'producer' unless it informs the injured person of the identity of the supplier promptly and of its own initiative. Whether the supplier did so will be a matter of fact for the national court to determine. Therefore, if proceedings were instituted against a supplier within the ten year period who failed to inform the injured person of the manufacturers identity, this could be treated as if proceedings had been instituted 'against a producer' (paragraphs 54-58).

The Supreme Court decision: In light of the ECJ's second judgment, the Claimant could not use section 35 of the Limitation Act 1980 as a basis for substituting APSA for APMSD as the defendant.

The Claimant therefore relied entirely on the additional guidance in the second ECJ judgment, and argued that, as APMSD was a wholly owned subsidiary of APSA, APSA had determined that the product should be put into circulation by transferring it to its wholly owned subsidiary and had then so transferred it. Lord Rodger, giving the Court's judgment, rejected that argument. It was internally incoherent. If APSA put the product into circulation when it supplied the product to APMSD, then that can only be because the two companies are to be regarded as having operated quite distinctly, so that it was taken out of the manufacturing process by APSA on transfer to APMSD.

The Supreme Court's approach was to construe the reference to APMSD being a wholly owned subsidiary of APSA as directing attention to factors which may point to a close connection between the two companies. The real mischief that the ECJ had been contemplating was where, to all outward appearances, a supplier had decided to put a product into circulation. The domestic court had to consider whether, despite appearances, it was, in fact, the manufacturing parent company which had determined that the product should be put into circulation.

Accordingly, the domestic court had to consider, in accordance with the domestic rules of proof, whether APSA (as manufacturer) was in fact controlling APMSD and determining when it put the product into circulation. The fact that one was a wholly owned subsidiary was not sufficient on its own to justify substitution after the expiry of the ten-year period. It was only one, by no means decisive, factor to be taken into account by the domestic court when assessing how closely the subsidiary was involved with its parent's business as a producer. All the circumstances had to be taken into account. In the circumstances of the present case it was not open to the High Court to order substitution and the subsisting order for substitution was discharged.

This decision of the Supreme Court provides some clarity on an area that had been left decidedly uncertain by the ECJ. The inquiry into the closeness of the relationship between parent manufacturers and supplier subsidiaries is the sort of satellite litigation that personal injury claimants would wish to avoid. One of the practical consequences of this judgment may well be that Claimants will issue en masse against group companies within the chain, pending enquiries as to the liable party.

A further question which arises from the guidance given by the ECJ is the validity of sections 2(3)(b) and (c) of the CPA, which suggest that the party sued does not have to identify the person who supplied to him unless asked. The ECJ's guidance suggests that there is a positive obligation on the person sued to identify that he is not the producer and to identify the person who supplied the product to him.

Noel Dilworth is the Secretary of the Chambers Product Liability Group

Henderson Chambers
2 Harcourt Buildings, Temple
London EC4Y 9DB

T 020 7583 9020 **F** 020 7583 2686
E clerks@hendersonchambers.co.uk
DX 1039 Chancery Lane
www.hendersonchambers.co.uk