

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2008-404-008352**

BETWEEN THE COMMERCE COMMISSION  
Plaintiff

AND AIR NEW ZEALAND LIMITED & ORS  
Defendants

**CIV 2009-404-001554**

AND BETWEEN AIR NEW ZEALAND LIMITED & ORS  
Plaintiffs

AND THE COMMERCE COMMISSION  
Defendant

Hearing: 6 November 2009

Counsel: J C Dixon and L Farmer for the Commerce Commission  
D J Cooper and S J P Ladd for Air New Zealand Limited  
R Sussock in attendance for Messrs Elmsly and Gregg

Judgment: 10 December 2009 at 3 p.m.

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**JUDGMENT OF POTTER J  
On joinder application**

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In accordance with r 11.5 High Court Rules  
I direct the Registrar to endorse this judgment  
with a delivery time of 3 p.m. on 10 December 2009.

Solicitors: Meredith Connell, P O Box 2213, Auckland 1140  
Bell Gully, P O Box 4199, Auckland 1140  
Wilson Harle, P O Box 4539, Shortland Street, Auckland 1140  
Gilbert Walker, P O Box 1010, Shortland Street, Auckland 1140  
LeeSalmonLong, P O Box 2026, Shortland Street, Auckland 1140

## **Introduction**

[1] In these proceedings the Commerce Commission alleges breaches of s 27 of the Commerce Act 1986 (“the Act”), either directly or under s 30 of the Act. It is alleged that during the period December 1998 to February 2006 the first defendant Air New Zealand Limited (“Air NZ”) and other airlines were participants in an arrangement or understanding (cartel) relating to the imposition of fuel charges on air cargo services around the world.

[2] The Commission has applied to join Salvatore Sanfilippo as a seventh defendant to the proceeding. The application was filed on 30 July 2009. Mr Sanfilippo was served on 12 September 2009 in California with the Commission’s joinder application, but he has not yet filed an appearance.

[3] Air NZ opposes the joinder application. While accepting the Court’s jurisdiction to order joinder, it submits the Court should exercise its discretion against granting joinder essentially on three grounds:

- a) The draft amended statement of claim does not provide proper particulars of the allegations against Mr Sanfilippo especially as the allegations are of being a party to a conspiracy;
- b) The claims against Mr Sanfilippo are untenable in that they fail to identify any factual or legal basis for personal liability of Mr Sanfilippo as an employee of Air NZ;
- c) There is a likelihood the claim against Mr Sanfilippo is statute barred.

## **Jurisdiction**

[4] Rule 4.56 of the High Court Rules provides:

- (1) A Judge may, at any stage of a proceeding, order that –  
...

- (b) the name of a person be added as a plaintiff or defendant because –
  - (i) the person ought to have been joined; or
  - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
- (2) An order does not require an application and may be made on terms the court considers just.

...

### **Submissions for the Commerce Commission**

[5] The Commission submits this is a straightforward joinder application under r 4.56 which qualifies under both (b)(i) and (ii). The Commission submits:

- a) A plaintiff seeking joinder of an additional defendant is in the most favoured position. Once jurisdiction is established joinder is usual: *McGechan on Procedure* para HR4.56.11; *Westfield Freezing Co Limited v Sayer & Co Limited* [1972] NZLR 137, 148 (CA).

The Commission referred also to *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135, 138 (CA):

The purpose of joinder rules is to secure the determination of all disputes relating to the same subject matter without the delay and expense of separate proceedings. The general test is whether the proposed party will be directly affected by any order which may be made in the proceedings and the general rule is that it is for the plaintiff to decide who he or she will sue and for any person named as defendant to take striking out proceedings if it is considered by them that there is no arguable cause of action.

- b) If a separate proceeding could be brought, as is the case here, joinder is necessary for the efficient dispatch of the proceeding: *Bridgeway Projects Limited v Webb & Ors* HC AK CP 453/02 7 July 2003, Randerson J at [8].

- c) The Court's discretion under r 4.56(b)(ii) is wide and broader than the interests of any existing party: *Knight v Attorney-General* HC WN CP 566/92 29 October 1992, Master Williams QC.
- d) None of the five other employees of Air NZ named as defendants in the proceedings has applied to strike out or sever the claim.
- e) Mr Sanfilippo can move to strike out the proceeding against him if he considers that he has no arguable cause of action: *Auckland Regional Services Trust v Lark* at 138.
- f) There can be no prejudice to Air NZ by the joinder of Mr Sanfilippo and none is alleged.
- g) No substantive steps have been taken by Air NZ in the proceeding; no statement of defence has been filed.
- h) The proposed amended statement of claim alleges breaches of ss 27 and 30 of the Act. The pleading is clear in relation to Mr Sanfilippo and discloses a tenable cause of action. The allegations against him are essentially the same as those against other Air NZ Cargo Managers named as defendants. Assertions that the claim could be better particularised are not a basis for joinder to be withheld: *Churchill Group Holdings Limited v Aral Property Holdings Limited & Ors* HC AK CIV 2001-404-2302 7 April 2005, Willams J at [15]-[17].
- i) The Commission accepts the need to particularise the claims and will respond if particulars are formally sought by Air NZ. Eight of the other airlines who are defendants in separate proceedings have sought and been provided by the Commission with further particulars.

- j) Any limitation issue can be pleaded by Mr Sanfilippo as an affirmative defence and if necessary his position can be protected in the conditions of joinder.
- k) Particulars will shed no light on the issue of whether the claim is statute barred. They relate to conduct, not when the conduct was discovered or could reasonably have been discovered by the Commerce Commission (which is the subject of an affidavit filed in support of the application by David Peddie sworn 13 August 2009). Mr Peddie's affidavit explains why Mr Sanfilippo was not initially named as a defendant, the explanation being essentially that the Commission's investigations regarding Mr Sanfilippo were continuing as at December 2008.
- l) The matters raised by Air NZ as the basis for opposing the application are properly for consideration following joinder, not on the joinder application.

### **Submissions for Air NZ**

[6] Air NZ submits:

- a) The Court's power under r 4.56 is discretionary. In this case the following factors favour the discretion being exercised against the joinder of Mr Sanfilippo.
- b) The cause of action against Mr Sanfilippo alleges that he is personally a party to a conspiracy but it is "remarkably under-particularised" and does not comply with r.5.26(b) which requires that there be provided sufficient particulars of "time, place, amounts, names of persons, nature and dates of instruments and other circumstances to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action".

- c) Although the claims are brought under ss 27 and 30 of the Act, the allegations are “in the nature of fraud”. Because of the nature of the claims, alleging breaches of ss 27 and 30 and conspiracy against Mr Sanfilippo, particular pleading is required. In *Securitibank Limited v Rutherford* HC AK A355/81 10 October 1983, Barker J said at 11:

Another important principle is that where misconduct is imputed against any party, those allegations against him must be stated with especial particularity and care.

- d) The Commission has declined Air NZ’s request to provide proper particulars and to provide an amended draft pleading which includes particularised allegations against Mr Sanfilippo. (See the letter dated 17 September 2009 from Meredith Connell to Bell Gully, in reply to Bell Gully’s letter of 15 September 2009 setting out particulars required.)
- e) Any liability of Mr Sanfilippo (and the other individual defendants) must be as accessories under s 80(1)(c)-(f) of the Act but there is no pleading to this effect. Rather it appears that the Commission has simply transferred pleadings in relation to other airlines to the pleadings against Air NZ, which is inappropriate because in this proceeding, individuals as well as Air NZ are charged.
- f) The Commission is in the privileged position of having extensive evidence and information including that obtained through the exercise of its powers under s 98 of the Act and has no excuse for failing properly to particularise its claim against Mr Sanfilippo.
- g) Particularised pleadings and joinder are related issues: *NZI Ltd v Hinton, Hill & Coles Limited* (1996) 9 PRNZ 615. The Court must scrutinise the applicant’s proposed statement of claim in considering the exercise of its discretion to grant joinder.
- h) There is a real likelihood that the claim against Mr Sanfilippo is statute barred under s 80(5) of the Act.

- i) Given the inadequacy of the pleadings against Mr Sanfilippo and the failure of the pleading to disclose a logical or tenable cause of action against Mr Sanfilippo (or the other individual defendants), the joinder application should be either dismissed or alternatively granted on terms that require the Commission to file an amended statement of claim which is properly particularised.

## **Discussion**

[7] Leaving aside the matter of limitation issues to which I shall refer shortly. I essentially accept the submissions of the Commission.

[8] I accept that the draft first amended statement of claim, annexed to the affidavit of Mr Peddie filed in support of the joinder application, discloses a tenable cause of action against Mr Sanfilippo named as seventh defendant who is described in paragraph 8 as employed by Air NZ initially as a sales staff member and from March 2001 as its Cargo Sales Manager for the Americas.

[9] In paragraph 43 it is alleged that Mr Sanfilippo, together with the third, fourth fifth and sixth defendants, from on or about January 2000 to February 2006 implemented Air NZ's conduct set forth in paragraphs 21-42 under the heading "The Overarching Fuel Surcharge Understanding". Particulars (albeit brief) of the seventh defendant's conduct are given in paragraph 43(g). Four causes of action allege various breaches by the defendants of s 27 of the Commerce Act either directly or via s 30.

[10] In paragraphs 101-109 there are allegations concerning the implementation of the United States (IATA) Agreement in relation to the imposition of a fuel surcharge on the provision of Air Cargo between the United States and overseas destinations. There are particulars, again brief, of the allegations against Mr Sanfilippo in paragraph 103(c), (d) and (e) and again in paragraph 105(f), (g) and (h) in relation to implementation of the United States (Lufthansa) Agreement. Breaches of s 27 and 30 are alleged against Air NZ and Mr Sanfilippo.

[11] There are similar pleadings alleging breaches of s 27 and s 30 by Air NZ and other defendants including Mr Sanfilippo in relation to the Security Surcharge Agreement in paragraphs 120-124. It is alleged that the individual defendants implemented the conduct alleged against Air NZ and brief particulars are given in paragraph 124(c) of the alleged conduct of the seventh defendant. (I note that the seventh defendant is not referred to in the introduction to paragraph 124.)

[12] The claims against Mr Sanfilippo are insufficiently particularised. The Commission acknowledges that. It says it will respond to a formal application for particulars. I made timetable orders at [1]b) of my minute dated 9 November 2009 for the other individuals named as defendants to give notice requiring further particulars by 4 December 2009 and the Commission to respond by 9 February 2009. Given that Air NZ has already written to the Commission seeking further particulars, it should be possible for Air NZ to give formal notice requiring further particulars by 18 December 2009 and for the Commission to respond by 9 February 2009 as it is required to do in relation to other notices requiring further particulars given by other individual defendants. I make timetable orders accordingly. I consider this is the appropriate process for the issue of particulars to be resolved, rather than on a joinder application.

### **Limitation issues**

[13] Section 80(5) of the Commerce Act 1986 provides:

- (5) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. However, no proceedings under this section may be commenced ten years or more after the matter giving rise to the contravention.

[14] Section 80 relates to the power of the Court to order pecuniary penalties against any person found to be in contravention of the Act in any of the ways set forth in s 80(1). Pecuniary penalties are part of the relief sought in the draft amended statement of claim against Mr Sanfilippo. The Commission also seeks declarations that his conduct contravened s 27 of the Act.



[15] It is well established that an additional defendant will not be added in existing proceedings where there is a limitation defence: *Ketteman v Hansel Properties* [1987] 1 AC 189 (HL); *NZI Insurance Limited v Hinton Hill & Coles Limited [joinder]* (1996) 9 PRNZ 615.

[16] Air NZ submits there is a real likelihood that the claim against Mr Sanfilippo is statute barred under s 80(5). It complains that the inadequacy of the particulars provided by the Commission prevents it from determining whether or not this is so.

[17] The Commission submits that any limitation defence can be pleaded affirmatively by Mr Sanfilippo in response to the pleadings in the amended statement of claim. That defence will then be determined as part of the substantive proceeding, when all relevant evidence will be before the Court.

[18] Air NZ initially expressed some concern that upon joinder of Mr Sanfilippo the Commission might seek to back-date the end of the limitation period as it affects him, to the commencement of the original proceedings on 15 December 2008. The Commission does not seek to do this, as it has acknowledged in a memorandum filed subsequent to the hearing on 11 November 2009. The House of Lords rejected the “relation back” proposition in *Ketteman*. Lord Keith said at 200:

A cause of action is necessarily a cause of action against a particular defendant, and the bringing of the action which is referred to must be the bringing of the action against that defendant in respect of that cause of action. ... In my opinion there are no good grounds in principle or in reason for the view that an action is brought against an additional defendant at any earlier time than the date upon which the defendant is joined as a party in accordance with the rules of court.

[19] However, at the hearing of the joinder application, debate developed as to when the limitation period as it would relate to Mr Sanfilippo, if joined, would end. This was prompted by Air NZ’s submission that the Commission’s claim under s 80 may be statute barred under s 80(5). I sought further submissions from the parties on this issue and memoranda were filed by the Commission on 11 November 2009 and 24 November 2009 and by Air NZ on 18 November 2009.

[20] The Commission contends that the limitation period would end on 30 July 2009, when the Commission filed:

- a) Application for joinder of Mr Sanfilippo as a defendant;
- b) Notice of proceeding;
- c) Amended statement of claim which named Mr Sanfilippo as seventh defendant;
- d) Statement of issues.

[21] Air NZ contends that the proceeding against Mr Sanfilippo will be commenced only when the Court makes an order joining him as a defendant.

[22] The date upon which the limitation period ends may become relevant when it can be determined after full inquiry and on the basis of all relevant evidence, when the alleged contraventions by Mr Sanfilippo were “discovered or ought reasonably to have been discovered” in terms of s 80(5). Section 80(5) is expressed in the passive voice. In discussion at the hearing and in the subsequent memoranda filed by the parties it has been assumed by counsel for both parties that the relevant discovery is that of the Commission. That must be correct since it is the Commission that is authorised by s 80(1) to make application to the Court for pecuniary penalties and it is the Commission that is vested by the Act with powers including to search and to obtain information and documents. (Refer, by way of comparison, to the discussion in the recent judgment of the Supreme Court in *Commerce Commission v Carter Holt Harvey Limited* [2009] NZSC 120 at [4]-[7] and [16]-[21] in relation to the application of the limitation period in s 43(5) of the Fair Trading Act 1986.)

[23] The only evidence about discovery in relation to the alleged contraventions by Mr Sanfilippo is in the affidavit of Mr Peddie filed in support of the Commission’s application for joinder. Relevantly to the limitation issue he says that the investigation of the cartel conduct was initiated by a leniency application

received on 16 December 2005, following which the Commission initiated an extensive investigation which is continuing. He further states:

- 3.4 In addition to fuel surcharge information, however, between April 2006 and November 2006, the Commission obtained information from the leniency applicant and other sources indicating possible contact between it and the first respondent (Air NZ), including some contact between Mr Sanfilippo in the United States and staff of the leniency applicant regarding freight rates and also technical issues. Those discussions were not concerned with the fuel surcharge itself.
- 3.5 The first time that the Commission became aware that there were collusive arrangements in the United States regarding fuel surcharges that might have applied on routes from the United States to New Zealand was in December 2006, when – following the execution of a search warrant at Air New Zealand’s Auckland and Auckland Airport Cargo premises – the Commission obtained documents that indicated contact and which further led the Commission to suspect anti-competitive behaviour with regard to fuel surcharges by the First Respondent and Mr Sanfilippo (along with others) on those routes. The documents also indicated contact between Mr Sanfilippo and other airlines regarding another surcharge, referred to as the security surcharge or War Risk Insurance, imposed following the terrorist attacks of September 2001, which led the Commission to suspect anti-competitive behaviour with regard to security surcharges by the First Respondent and Mr Sanfilippo within the United States related to those routes.
- 3.6 From May 2007 the Commission endeavoured to interview Mr Sanfilippo, initially on a voluntary basis and then, at Mr Sanfilippo’s request, pursuant to its powers under s 98(c) of the Commerce Act 1986. Mr Sanfilippo attended an interview with the Commission in New Zealand under s 98(c) of the Commerce Act on 19 December 2007. In that interview Mr Sanfilippo denied participation in anti-competitive conduct, and specifically denied having contact with other airlines regarding surcharges.
- 4.1 Proceedings were filed in respect of the Fifth to Sixth Respondents on 15 December 2008. At that time investigations into Mr Sanfilippo were continuing so no proceedings were filed against him.
- 5.1 During the period December 2008 to May 2009 the Commission continued to engage with a co-operating witness who implicated Mr Sanfilippo, which led the Commission to conclude on 6 May 2009 that there was sufficient evidence of Mr Sanfilippo’s culpability in respect of the First Respondent’s imposition of fuel and security surcharges on air cargo transported between New Zealand and the United States to make an application for joinder to this proceeding, and that his presence before the court would be necessary to adjudicate on and settle all questions involved in the proceeding.
- 5.2 In particular, evidence obtained by the Commission indicates that Mr Sanfilippo was a party to the specific understanding by the First

Respondent and other airlines regarding the imposition of fuel and security surcharges on air cargo transported from the United States to New Zealand. Specifically, Mr Sanfilippo in his capacity as the First Respondent's Regional Manager for Cargo for the Americas from on or about March 2001 was actively engaged in collusive discussions and/or communications with a number of the First Respondent's competitors, including Korean Air Lines, Qantas, Lufthansa and Polar Air.

- 5.3 Mr Sanfilippo reported the outcomes of his discussions to the First Respondent's head office in Auckland and the First Respondent's Regional offices around the world as to competitor information regarding surcharges. Email chains ending on 2 October 2001 and 6 September 2002 between Mr Sanfilippo and Murray Gregg, the First Respondent's New Zealand based Cargo Sales Manager at that time, are attached marked 'A' and 'B'. Those emails disclose discussions between Mr Sanfilippo and staff of other airlines in the United States in relation to security and fuel surcharges respectively and were obtained by the Commission on 7 December 2006 following the execution of a search warrant at Air New Zealand's Auckland and Auckland Airport Cargo premises.
- 5.4 The First Respondent carried the highest volumes of air cargo to and from the United States and New Zealand during the relevant period of any airline. The First Respondent's implementation of the cartel conduct would likely have been significantly less effective without the involvement of Mr Sanfilippo as the First Respondent's Regional Manager for Cargo from the Americas.

[24] To his affidavit Mr Peddie annexes a first amended statement of claim which he says, "... the Commission proposes to file if leave is granted to join Mr Sanfilippo as seventh defendant".

[25] On the basis of Mr Peddie's evidence, the first time the Commission became aware of information that suggested anti-competitive behaviour with regard to fuel surcharges by Air NZ and Mr Sanfilippo on routes between the United States and New Zealand was "in December 2006". The Commission submits this is the critical date for limitation issues but the evidence does not answer the question when the alleged contraventions ought reasonably to have been discovered.

[26] Air NZ refers to masses of information it provided to the Commission during 2006, and states that the lack of particulars provided by the Commission prevents it undertaking a proper analysis of the evidence on this important issue. By way of example, counsel identified that particularised dates in respect of the generalised particulars in paragraph 43(g) of the draft first amended statement of claim that Mr

Sanfilippo “exchanged fuel surcharge information with other airlines”, would enable Air NZ to check when and how often this is alleged to have occurred.

[27] Clearly the issue as to when the alleged contravention or contraventions by Mr Sanfilippo ought reasonably to have been discovered by the Commission in terms of s 80(5) of the Act, cannot be resolved on the basis of the limited information in Mr Peddie’s affidavit and the generalised particulars in the draft first amended statement of claim. While the Court will not order joinder when a claim is clearly statute barred, it is inappropriate to decline joinder when a limitation issue is at large. The proper course in such a situation is for the limitation issue to be determined at the substantive hearing, or as a preliminary issue, following an affirmative defence raised by the defendant in response to the allegations in the statement of claim. As Rodney Hansen J said in *Thompson v Good Shepherd Convent Trust* (2000) 14 PRNZ 684 at 688:

The judgments of the Court of Appeal in *S v G* and *W v A-G* make clear that in cases of this nature, where the limitation issues call for findings of fact in discretionary assessments, it is preferable that a final determination of Limitation Act defences await the substantive hearing.

[28] Accordingly in the circumstances of this case the determination of any limitation defence available to Mr Sanfilippo under s 80(5) of the Act should await determination at the substantive hearing.

[29] It follows that a determination as to when time ceases to run for limitation purposes is not necessary to a decision on the joinder application. That aspect may, or may not, become critical depending on the relevant facts as they are ultimately found to be. For that reason I consider any determination as to when time ceases to run for limitation purposes is best left for determination once all relevant evidence is before the Court. The determination, if required, can then be made by the Court when seized of all relevant evidence and in the context of the overall circumstances as they are found to be.

[30] However, the date upon which the joinder order is made may well become critical to a final determination in relation to any limitation defence pleaded by Mr Sanfilippo.

[31] I consider there is considerable doubt that the position taken by the Commission in its memorandum filed 11 November 2009 that it commenced proceedings against Mr Sanfilippo for the purposes of s 80(5) when it filed the first amended statement of claim which named him as seventh defendant, or alternatively, when it filed the joinder application, both of which occurred on 30 July 2009, is correct.

[32] There seems to be no dispute that the Commission could have commenced separate proceedings against Mr Sanfilippo, thereby causing time to stop running for limitation purposes, but this is not the course it adopted. It elected instead to file an application for joinder and in terms of r 4.56 joinder requires an order of the Court. The Court has to be satisfied that the person ought to have been joined or the person's presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding.

[33] I think the preferable view is that advanced by Air NZ in its memorandum filed 18 November 2009 relying on *Ketteman* and *McLauchlan v MEL Network Limited* HC AK CIV 1998-404-253, 9 December 2004 where, having discussed the decision of the House of Lords in *Ketteman*, this Court said at [60]-[61]:

I cannot accept [the plaintiff's] submission. It does not accord with a logical interpretation of the statutory provisions referred to above, and *Outfox* and the other cases referred to by counsel are no authority to the contrary. Nor to my mind does it accord with common-sense. An application for joinder does not make the subject of the application, a plaintiff or defendant in the proceedings. That requires a Court order. In my view, it is not logical to suggest that time should stop running in relation to potential causes of action against a proposed defendant prior to the date when the defendant becomes a party to the proceedings, which requires an order of the Court.

In terms of r 106(1) of the High Court Rules for the action to be brought (proceeding to be commenced), requires the filing of the statement of claim. Therefore my conclusion is, that in relation to a party joined to a proceeding, the limitation period stops running or expires, at the date upon which an amended statement of claim is filed following an order for joinder.

[34] If that proves to be the correct determination in the circumstances of this case (and I express no concluded view because I believe the determination must be made when the Court is in possession of full evidence and information, which it is not now), then the first amended statement of claim filed on 30 July 2009 has no status

beyond that of a draft: *Kirkland v Jaco's Timber Co Ltd* HC DUN CP 45/97 1 May 1998, Master Venning. The position would be that the Commission has filed two draft amended statements of claim in relation to its joinder application – that filed on 30 July 2009 and that attached to the affidavit of Mr Peddie filed on 17 August 2009 which he describes (correctly in my view), as an amended pleading the Commission proposes to file if leave is granted to join Mr Sanfilippo pursuant to the joinder application.

[35] Because the date of joinder may become critical in relation to any limitation defence raised by Mr Sanfilippo, I consider that the interests of justice will be served by the order for joinder I propose to make, being made as at the date of hearing, 6 November 2009. Neither party should be advantaged or prejudiced by the date of the order for joinder being deferred while I received and considered subsequent to the hearing, memoranda from counsel on the limitation issues which arose during the hearing, but which ultimately have not been necessary to nor form part of my determination on the joinder application.

### **Conclusion and orders**

[36] I am satisfied that the presence of Mr Sanfilippo before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding.

[37] Pursuant to r 4.56(1), I order that he be joined as the seventh defendant.

[38] Pursuant to r 4.56(2), I order that the joinder be on the following terms:

- a) The joinder order is deemed to have been made on 6 November 2009;
- b) The amended statement of claim to be filed following the joinder order shall be deemed to be filed on the date which is the same number of working days after 6 November 2009 as elapse between the date of this judgment and the filing by the Commission of an amended statement of claim in the form of the draft attached to the affidavit of Mr Peddie dated 13 August 2009. (By way of example if the

amended statement of claim is filed three working days after the date of this judgment then the deemed date of filing will be 11 November 2009.)

[39] There will be timetable orders as set out in [12].

[40] I will receive memoranda as to costs if costs cannot be agreed by the parties.