26 May 2010

PRESS SUMMARY

OB (by his mother and litigation friend) (FC) (Respondent) v Aventis Pasteur SA (Appellant) [2010] UKSC 23
On an appeal from [2007] EWCA Civ 939

JUSTICES: Lord Hope (Deputy President), Lord Saville, Lord Rodger, Lord Walker, Lady Hale

BACKGROUND TO THE APPEAL

The Respondent was vaccinated on 3 November 1992 with a vaccine ("the Product") manufactured in France by a French company, now known as Aventis Pasteur SA ("APSA"). On 18 September 1992 APSA sent a consignment of the vaccine, including the Product, to its then wholly-owned subsidiary, Aventis Pasteur MSD Ltd ("APMSD"), in England. APMSD acted as a United Kingdom distributor for APSA's products. APMSD received the consignment on 22 September 1992 and sold part of it, including the Product, on an unknown date. The Product was eventually used to vaccinate the Respondent.

On 1 August 2001 the Respondent began proceedings under section 2 of the Consumer Protection Act 1987 ("CPA") against APMSD, alleging that the Product was defective and had caused him brain damage. On 16 October 2002 the Respondent issued separate proceedings against APSA also under section 2 of the CPA. Relying on section 11(3) of the Limitation Act 1980 ("the LA") and Article 11 of Council Directive 85/374/EEC of 25 July 1985 ("the Directive"), APSA defended this action on the basis that it had been raised more than ten years after APSA had put the Product into circulation, which APSA alleged was 22 September 1992 at the latest. Broadly, Article 11 provides that there is a ten-year time-limit for initiating proceedings against the producer (as defined in the Directive) of a product.

Faced with this defence, the Respondent sought an order that APSA be substituted as a defendant in place of APMSD in the proceedings against APMSD, relying on section 35(5)(b) and (6)(a) of the LA. These provisions allow a new party to be substituted for a party whose name was given in any claim made in the original action in mistake. APSA contended that, in so far as English law permitted such substitution after the expiry of the time-limit, it was inconsistent with Article 11. The High Court made a preliminary reference to the European Court of Justice ("ECJ"). So far as the power to substitute one producer for another as defendant was concerned, the House of Lords (to which the case eventually came) could not reach a unanimous view as to the effect of the ECJ's judgment. The House of Lords therefore referred the question back to the ECJ. The answer returned by the ECJ is now clear: once ten years have passed since a producer put a product into circulation, that producer cannot be sued unless proceedings have been taken against it within the ten-year period. The Respondent now accepts that he cannot use section 35 of the LA as a basis for substituting APSA for APMSD as the defendant in the present proceedings.

The Respondent submits, however, that in its judgment the ECJ indicated a different basis on which he can actually make the desired substitution, namely, that in proceedings instituted within the ten-year period against the wholly-owned subsidiary of the producer, that producer can be substituted for that subsidiary if the domestic court finds that the putting into circulation of the product in question was,

in fact, determined by that producer. The dispute between the parties therefore turns on the interpretation of that part of the ECJ's judgment.

JUDGMENT

The Supreme Court unanimously allowed the appeal and set aside paragraph 1 of the order of Teare J dated 20 October 2006 substituting APSA for APMSD in the present action. Lord Rodger gave the judgment of the Court.

REASONS FOR THE JUDGMENT

- There is nothing to suggest that, when providing the additional guidance which is the subject of the dispute in the present case, the ECJ was intending to depart from the principled approach which it had formulated earlier in its judgment, namely, that Article 11 precluded national legislation being applied in a way which permitted a producer to be sued after the expiry of the ten-year limitation period as defendant in proceedings brought within that period against another person (**para 17**).

- In venturing to give the additional guidance, the ECJ was following the lead of the Advocate General. The Advocate General had given some thought to how Article 11 should be applied in a case like the present, where APSA transferred the Product to a distributor, APMSD, which was its wholly-owned subsidiary. In doing so, the Advocate General had referred back to the ECJ's judgment on the first reference where the ECJ had held that "a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed" (**paras 18-20**).

- The ECJ, in its judgment following the first reference, had rejected an approach that was based on the formal legal relationship between the parent manufacturing producer and the subsidiary distributor. The national court had to look at all the links between the two entities and decide on that basis whether they were so close that, for the purposes of Article 11, the concept of the manufacturing producer (which would apply to APSA) really included the distributor (in this case, APMSD). In that event, even if the Product were transferred from one to the other, this would not mean that it had been taken out of the manufacturing process operated by the producer (**para 22**).

- The Advocate General made use of that part of the ECJ's analysis from the first reference to show when a distribution subsidiary could be so closely involved with the parent producer that they could, in effect, be regarded as one for the purposes of Article 11 (so that suing the subsidiary would be tantamount to suing the parent). In concrete terms, if that were the position in this case, by suing APMSD within the ten-year period, the Respondent would also have sued APSA within that period. So the Article 11 time-bar would not bite and the Respondent could, if he wished, substitute APSA for APMSD as defendant in the present action (**para 23**).

- It is with this background in mind that the ECJ gave its additional guidance in the second reference. There is nothing to suggest that, in giving that guidance, it was intending to depart in any way from the analysis in its first reference (**para 27**). Certainly, to judge from the Advocate General's analysis, the only way in which the principle that had just been laid down in relation to the substitution of APSA for APMSD could be maintained and yet APSA could be substituted for APMSD would be if, by suing APMSD, the Respondent had in effect sued APSA (**para 28**).

- The ECJ was therefore indicating, in giving its guidance, that the domestic court was to consider, in accordance with domestic rules of proof, whether the manufacturer, APSA, was in fact controlling APMSD and determining when it put the Product into circulation. The fact that APSA was a wholly-owned subsidiary was simply 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 would have to be taken into account. If APSA was indeed in a position to decide when the Product was distributed, then APMSD would be integrated into the manufacturing process and would be so tightly controlled by APSA that proceedings against APMSD could properly be regarded as proceedings against the parent company, APSA. Hence, the manufacturing company could be substituted for the subsidiary (**para 34**).

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html