COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 69/AM/Dec01

In the matter between:

Astral Foods Limited	**Applicant**
and	
Competition Commission	**Respondent**
Mike's Chicken (Pty) Ltd	**1st Intervenor**
Daybreak Farms (Pty) Ltd	**2nd Intervenor**
Midway Chix (Pty) Ltd	**3rd Intervenor**

Decision and Reasons

Introduction

1. This decision concerns two applications regarding a dispute between the parties as to the proper interpretation of a Tribunal order. Both applications were brought in terms of section 66(1) of the Competition Act which provides for the Tribunal to vary or rescind a previous order in certain circumstances. The first application is brought on behalf of the merged company, Astral Foods Limited and a second, counter application, is brought by the intervening parties, Mike's Chicken (Pty) Ltd, Daybreak Farms (Pty) Ltd and Midway Chix (Pty) Ltd.

Background

2. On 16 April 2002 the Competition Tribunal, on consideration in terms of section 16(1)(a) of the Act, conditionally approved an intermediate merger between

Astral Foods Limited and National Chick Limited (Natchix). Although there were other conditions attached to the merger it is only those that relate to the broiler industry that are the subject of the present dispute. The conditions pertaining to the broiler industry were as follows:

*1. **Astral**[1] must supply any **independent customer**[2] on the following basis*:

1.1 Subject to sub-paragraphs 1.3 and 1.4 below, in terms of a standard form contract approved by the Competition Commission.

1.2 In the case of any disease or other form of force majeure, Astral must reduce its supply to all customers, including entities within the Astral group, pro rata to their ordinary volumes purchased

1.3 In the event that an independent customer does not wish to enter into the standard contract with Astral, then Astral must supply that customer in accordance with the principles set out in sub-paragraph 1.4 below, except for those that relate to notice periods.

1.4 Astral may not discriminate in its conditions of supply between entities in its own group and its independent customers for equivalent transactions. In particular it may not discriminate between them in relation to price, discounts or rebates offered. The determination of prices remains in the discretion of Astral. Astral may not impose any condition on an independent customer that requires them to purchase exclusively from Astral. The parties to the agreement must each be required to give notice to the other if they do not wish to renew the contract. The length of this period must be the same for both parties and must be reasonable having regard to the nature of the industry. The contracts must be of a five-year duration.

2. The conditions set out in clause 1 above shall apply for five years from date of this order.

3. The Commission's discretion in approving the standard form contract is limited to ensuring that it complies with the principles set out in sub-paragraph 1.4 above.

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1 Defined in the order as: **"Astral"**, unless the context indicates otherwise, means Astral Foods Limited or any firm controlled by Astral Foods Ltd within the meaning of section 12(2) of the Act.

2 Defined in the order as: "**Independent customer",** means any firm which, at the date of this order was a customer of National Chick Limited ("Natchix") and/or Ross Poultry Breeders (Pty) Ltd and that is not controlled by Astral.

i. Following the merger Daybreak Farms (Pty) Ltd ("Daybreak") and Mike's Chicken (Pty) Ltd ("Mikes") alleged that their existing, pre-merger contracts with Astral Foods Limited ("Astral") were rendered null and void by the Tribunal's order. As a result both customers have reduced their orders steadily since May 2002 to levels below the required minimum or fixed quantities, as agreed to in their respective contracts with Astral. [3]

ii. Astral disagrees with their view. It asserts that Daybreak and Mikes continue to be bound by their existing contracts and has asked the Tribunal to vary its order to cure the ambiguity that allegedly exists and which, they aver, is being exploited by the intervening parties to renege, for commercial reasons, on perfectly valid contracts. In reaction to this Daybreak, Mikes and their joint venture Midway Chix (Pty) Ltd ("Midway") applied to the Tribunal for leave to intervene, which was granted.[4] They subsequently also brought a counter application asking that the Tribunal's April 2002 order be varied in terms of section 66 (1) of the Act.

3. The third Panel Member, Ms. C Qunta, has since left the Tribunal, and both parties agreed that the remaining two Tribunal Members, who had heard the merger application on 19 and 20 March 2002, could hear these applications. [5]

The applications

4. Astral avers that the Tribunal's order is unclear and thus ambiguous as to the status of existing supply contracts between Natchix and its independent customers which were entered into before the merger. According to them the Tribunal did not indicate in its order whether existing long-term customers are included in the definition of "independent customers" or what the status of existing long-term contracts post the merger would be. This makes it impossible to determine which of the terms in the existing contracts remain applicable and binding. In terms of

3 The Daybreak Agreement was effective from 1 March 1999 and the Mikes Agreement was effective from October 1993. Both agreements continue for indefinite periods.

4 The intervention application is reported in our decision Astral Foods Limited v National Chick Limited Tribunal Case No 69/AM/Dec01 dated 20 February 2003.

5 Although the Competition Commission is a respondent it has not filed papers in these proceedings.

section 66(1) of the Act it, therefore, seeks a variation of the order, as set out below, so as to clarify what Astral believes the Tribunal's intention to have been. Alternatively, it seeks a declaratory order that will remove the misunderstanding on the part of the customers of Natchix:

Varying the Order of this Honourable Tribunal by the insertion of a further paragraph 1.5, under section 1 of this Order, headed "Astral must supply any independent customer on the following basis", to the following effect:

1. "***1.5***

   1.5.1 Existing contracts with independent customers are unaffected by this Order, subject to amendments required to ensure consistency with sub-paragraph 1.4 of the Tribunal Order, such amendments pertaining to price, discounts or rebates, exclusive purchasing obligations, notice periods and the length of the contract;

   1.5.2 Independent customers who have concluded supply contracts must be afforded an opportunity to enter into the standard form contract approved by the Competition Commission;

   1.5.3 In the event any independent customer with an existing contract concluding a standard form contract, neither the volume of chicks ordered in terms of the existing contract, nor the notice periods specified therein, can be varied in the standard contract."

2. *Declaring that:*

   1) *Existing contracts with independent customers are unaffected by this Order, subject to amendments required to ensure consistency with sub-paragraph 1.4 of the Tribunal Order, such amendments pertaining to price, discounts or rebates, exclusive purchasing obligations, notice periods and the length of the contract;*

   2) *Independent customers who have concluded supply contracts are to be afforded an opportunity to enter into the standard form contract approved by the Competition Commission;*

   3) *In the event of any independent customer with an existing contract concluding a standard form contract, neither the volume chicks oredered in terms of the existing contract, nor the notice periods*

specified therein, can be varied in the standard contract;

4) *In the event of an independent customer with an existing contract not concluding the standard contract, the existing contract remains of full force and effect as per paragraph 3.1 above.*[6]

5. The intervenors not only opposed this application for variation, but also filed their own counter application in terms of section 66(1) of the Act. They argue that the Tribunal clearly intended to cancel existing contracts between Natchix and its customers and that any future contracts entered into between Natchix and these customers should be regulated in accordance with the conditions as set out in its order. One such condition, they allege, is that the new agreements may not oblige customers to purchase minimum or fixed quantities. Insofar as this is not clear in the order they request that it be amended along the following lines:

    1. *Declaring that the phrase "independent customer" in the order granted by the Tribunal on 2 April 2002 in this matter includes a customer who prior to the merger between Astral Foods Limited ("Astral") and National Chicks Limited ("Natchix") was party to a minimum-quantity or fixed-quantity supply agreement with Natchix.*

    2. *Alternatively, varying the order of the Tribunal to include within the definition of the phrase "independent customer" in the order granted by the Tribunal on 2 April 2002 in this matter a customer who prior to the merger was party to a minimum-quantity or fixed-quantity supply agreement with Natchix.*

    3. *Declaring that in terms of the order issued by the Tribunal on 2 April 2002 all contracts between independent customers and Natchix were cancelled as at the date of the merger.*

    4. *Alternatively, varying the order of the Tribunal by the insertion of a paragraph 1 stating: "All existing contracts between Natchix and independent customers are hereby cancelled".*

    5. *Varying paragraph 1.4 of the conditions imposed by the Tribunal on 2 April 2002 by the insertion of the phrase "or that requires them to purchase specified minimum or fixed quantities from Natchix" after the sentence "Astral may not impose any condition on an independent customer that requires them to purchase exclusively from Astral".*

6 The amendment proposed by Astral was subject to considerable criticism by the intervenors' counsel, so much so, that at the hearing in reply they conceded the difficulties and asked us to remedy their concerns with declaratory relief only.

Discussion

6. Both variation applications have been brought in terms of section 66(1) of the Competition Act, which states that:

   The Competition Tribunal, or the Appeal Court, acting of its own accord or on application of a person affected by a decision or order may vary or rescind its decision or order –

   (a) …
(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
(c) …

7. The Tribunal therefore has the power to vary its order in the circumstances as set out in section 66(1).

8. The general principle followed by our courts is that a final order, correctly expressing the true decision of the court, cannot be altered because it becomes *functus officio*. In the Firestone case,[7] which was confirmed by the Constitutional Court in The ANC v The UDM and others,[8] Trollip JA set out the approach a court should take to an application for the variation of its order.[9] As a general principle he held that the court would follow a conservative approach because finality in litigation should be preserved and not be eroded.

9. It is a limited inquiry and the basic rule that the court follows is to ascertain the court's intention, primarily, from the language of the order. If the meaning of the order is clear and unambiguous, no extrinsic fact or evidence is admissable to contradict, vary, qualify or supplement it. It is decisive and cannot be restricted or extended by anything else in the judgement. But, if any uncertainty in its meaning emerges, the extrinsic circumstances surrounding or leading up to the court's granting of the order may be investigated and taken into account in order to clarify it. In doing so the order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. [10] Only if it still leaves the matter unclear and ambiguous would the court go to the record to cure the ambiguity.

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7 Firestone South Africa (Pty) Ltd v Genticuro 1977 (4) SA 298 (A)
8 Constitutional Court of South Africa, Case No: CCT 43/02
9 Although Trollip JA also considered the circumstances in which a court may vary its order we need not consider that since the circumstances in which we may vary an order are set out in section 66(1).
10 See Van Winsen, Cilliers, Loots: *The Civil Practice of the Supreme Court of South Africa*, page 689

10. We will follow this approach in relation to the present variation applications.

11. Two issues arise from these applications. Firstly, is the Tribunal's order ambiguous with regard to the meaning of independent customers and, secondly, is the order ambiguous because the Tribunal's intention regarding the status of Astral's existing long-term supply agreements with independent customers, post the merger, is not clear? In relation to the second question an issue of law also arises, namely what is the juristic effect of conditions imposed upon parties to a merger?

The definition of an independent customer

12. Astral contends that the Tribunal's order does not make any reference to existing long-term contracts with independent customers and is, therefore, ambiguous and not clear. It has therefore proposed the inclusion of a paragraph 1.5 to specifically address existing long-term contacts with independent customers. In the alternative they seek a ruling in the form of a declaratory order that will remove any misunderstanding on this aspect.

13. We do not agree with Astral's contentions - nowhere does the distinction appear in the language of the order. It is to be noted that the Tribunal uses the word 'any' in various instances in its order, two of which concern the current applications. The word 'any' is extremely wide.[11]

14. The Tribunal, in the first instance, defines an independent customer as "*any firm which, at the date of this order was a customer of National Chick Limited ("Natchix") and/or Ross Poultry Breeders (Pty) Ltd and that is not controlled by Astral*", (emphasis added). It is clear that the Tribunal meant the term to include any customer, who was a customer at the date of the order and that the only class of customer excluded from the definition would be those who were customers at the date of the order, but were controlled by Astral. Thus 'independence' is determined not by reference to any distinction between existing customers on the basis of whether they were bound by ongoing agreements or not, but whether they were independent of the control of Astral.

15. Moreover, in paragraph 1 of the order the Tribunal indicates whom Astral must supply, using the word 'any' when referring to independent customers: "*Astral must supply any independent customer on the following basis…"* (emphasis added). Again its relevance in this context is to attract the inference that what was sought to be included was not a specific kind of independent customer but all of

11 See Hayne & Co v Kaffrarian Steam Mill Co Ltd 1914 AD 371, where Innes, JA defines any as: *"In its natural and ordinary sense, any – unless restricted by the context – is an indefinite term that includes all of the things to which it relates. A qualification applied to any of a certain class must necessarily affect each and all of the class."* Furthermore, in Tompson v Kama; Stilwell v Kama 1917 AD 217 it was found that any can be equivalent to "every".

them that qualified as an independent customer on the date of the order, i.e. all existing independent customers. There is no further indication that a limited or restricted interpretation must be given to the kind of independent customers, i.e. whether they had existing agreements or were supplied on an ad hoc basis. All must be supplied according to the principles set out in paragraph 1.4 of the order.

16. We thus find that there is nothing in the order that supports Astral's contentions. The definition of independent customer as defined in the order must, therefore, be read in accordance with its plain meaning which meaning is perfectly clear. For the same reason, it is unnecessary for us to consider the intervenors' application to vary or clarify the definition of 'independent customer' in their counter–application.

17. The second issue raised in the applications is whether it was the Tribunal's intention to cancel the long-term, supply agreements of existing customers post the merger, and even if it was, if the conditions could have that effect

The effect of the conditional approval on existing long-term supply agreements

18. The order does not specifically address long-term supply agreements that existed before the merger. Does this mean that existing agreements are rendered void? No, says Astral, and sets out three reasons in support of its argument that the Tribunal could not have intended to make an order, which would have such an effect:

- *The voiding of the existing contracts with independent customers would have had significant financial consequences for Astral. It would not have gone through with the merger, or otherwise would have paid a considerably reduced purchase price for Natchix, had the contracts with existing customers not survived the conditional approval of the merger.*

- *The Tribunal would have warned the merging parties, as well as independent customers had it intended to void the existing long-term supply contracts, because unilateral action of that nature would have been contrary to the requirements of procedural fairness and the principles of natural justice.*

- *The immediate termination of the agreements on*

> *the day that the merger was approved would have had potentially deleterious consequences for independent customers whom the Tribunal wanted to protect by its order. In fact the standard agreement had to be approved by the Commission before it could be presented to customers indicating that the contractual relationships with existing customers were not immediately disrupted.*

19. The intervenors disagree. They argue that a new regime of contracting or supply had been put into place as a result of the conditions imposed by the Tribunal, in other words, that the order was not intended to merely modify existing supply relationships. They aver the order could have read, but doesn't, that existing contracts will be amended to bring them into compliance with the standard set of terms. Moreover, they aver that the old contracts cannot continue simultaneously with the new.

20. The intervenors also assert that Astral had, by proposing conditions of its own, accepted the fact that conditions could be imposed. Astral never raised any concerns during the merger hearing that the imposition of conditions might force them to reconsider the merger. Moreover Astral informed the Tribunal that: "… we're happy that it's (the conditions) buttressed by any order that the Tribunal seeks to make".[12] Finally, the Tribunal's sole intention, according to them, was to put in place a uniform contractual dispensation that would apply equally to all customers in future and not to ensure that existing supplies to independent customers continued as before.

21. The order does not shed any light on the status of long-term supply agreements post the merger, nor is the language of the order clear on what the Tribunal's intentions were. To find clarity we will consider the Tribunal's reasons. If no clear answer can be found, we'll step back further in history, to search the record of the hearing.

22. The Tribunal concluded in its reasons that the merger raised competition concerns and that it needed to impose conditions specifically in order to lower the risk of foreclosure, which was very real in the short term because of structural problems in the upstream market. The concern of those participants at the hearing who represented the industry was not that they would be held to an oppressive contract by the merged firm but that, on the contrary, the merged firm with its own broiler outlets would self deal and not supply them. It was told that Cobb, Ross' main rival in the upstream market needed at least 5 years to fully enter the South

12 Transcript of 20 March 2002, page 43

African market.[13] However, nowhere in its reasons does it specifically mention or address the status of existing long-term contracts post the merger or is it possible to derive what the Tribunal had in mind. There was simply no necessity to do this.

23. Existing customers who were supplied in terms of valid contracts were, per definition, not foreclosed. In the event that their contract expired or was terminated and they were then faced with the threat of foreclosure, they could then have availed themselves, in the same way that any other ad hoc customer would avail itself, of the protection extended by the conditions imposed by the Tribunal on Astral. But until they were denied supply by Astral the existing contract holders had no need of the protection of the conditions – they were protected by the terms of their existing supply contracts. At no stage during the merger proceedings was it ever suggested that the existing contracts were anti-competitive and should thus be vitiated by the insertion of an appropriate condition. It was rather suggested that the structural changes wrought by the merger would permit Astral to favour downstream customers within its own stable over 'independent' customers, that is customers outside of the Astral stable. This was the purpose of the conditions that were imposed.

24. In the record of the merger proceedings we find a passage where the presiding member briefly referred to the status of existing customers at page 65 of the transcript of 20 March 2002:

> "*It's just to say that our reach does not extend beyond ensuring that you have a supplier of day-old chicks and that the transaction does not foreclose that. … I presume that they (*referring to Astral*) have arrangements with existing customers and it would simply be some sort of alteration in that arrangement to ensure that those customers did not have any reason to fear that their supply would be foreclosed*." [14]

25. From the above it is clear that the Tribunal did not think that it had the power to render void any pre-merger supply contracts, nor did it intend for its conditions to have such far-reaching consequences because it refers to its "reach" as not extending beyond the prevention of foreclosure. It merely envisaged that those clauses in existing contracts that did not comply with the Tribunal's intention to prevent foreclosure should not be enforced or exercised in a manner contrary to the principles set out in paragraph 1.4.

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13 The Tribunal explains, at page 11 of its reasons, why it imposed each of the conditions

14 Note that the intervenors in the present application were not intervenors during the merger proceedings and thus their present concerns were not raised at the time nor does it appear from the record that the merging parties raised them in any pertinent fashion.

The juristic nature of the condition attached to a merger

26. One of the issues that we must consider in this case is the juristic nature of a condition attached to the approval of a merger. Firstly does the Tribunal have the power to require, as a condition to the approval of a merger, that the merged firm void all or part of an existing agreement? Secondly, if it has such a power, does the imposition of the condition mean that the contract is ipso facto voided if the merger is implemented as the intervenors suggest?

27. In our view we have the power to impose such a condition to the approval of a merger, but it does not have the effect of invalidating the contract. We say this because the Act distinguishes between the Tribunal' functions in prohibited practice cases, where we have an express power to void anticompetitive contractual terms, and merger cases where we do not.

28. Section 58 insofar as is relevant states:

"*58(1) In addition to its other powers in terms of this Act, the Competition Tribunal may –*

make an appropriate order in relation to a prohibited practice , including –

……

(vi) declaring the whole or part of an agreement to be void.
(Our emphasis)

29. This section must also be read with section 65(1) of the Act, which states:

> "Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void."

30. Thus section 58 gives the Tribunal the power and section 65 deals with the juristic effect of the exercise of that power.

31. No such explicit power is given to the Tribunal in relation to its orders in respect of merger adjudication. Indeed the only explicit power to void agreements in the context of merger adjudication is section 60(1) which states:

> *"If a merger is implemented contrary to Chapter 3, the Competition Tribunal may-*
>
> *(a) -------*

(b) declare void any provision of any agreement to which the merger was subject.

32. In contrast, the section from which the Tribunal acquires its powers to impose conditions on mergers is silent on this point. Section 16(2) states that:

> *Upon receiving a referral of a large merger and recommendation from the Competition Commission in terms of section 14A(1), or request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A, and the recommendation or request, as the case may be, and within the prescribed time –*
>
> *(a) approve the merger*
> *(b) approve the merger subject to any conditions; or*
> *(c) prohibit implementation of the merger.*

33. The intervenors argue nevertheless, that the power given to the Tribunal in this respect is very wide, and would include power to void an agreement.

34. Whilst we would agree with the intervenors that the Tribunal has wide powers to impose conditions upon the approval of a merger, including a provision requiring the cancellation of all or part of an agreement, it is on the nature of the juristic effect of the condition, on which we differ.

35. In approving a merger subject to conditions the Tribunal is not imposing analogous relief to that in a prohibited practice case, where its function is to eradicate a prohibited practice. In the merger scenario, what the Tribunal does is to indicate whether or not it will approve a merger that has yet to be implemented. If the merger is approved subject to conditions the parties are not bound to implement the merger – indeed the conditions may be such as to make its implementation unattractive.[15]

36. What then is the legal status of contract A, if the Tribunal had stated that the merger would only be approved if contract A was terminated, and the parties implement the merger without terminating the contract? Has it become void purely by operation of some act of implementation by the parties to the merger? The answer is that the contract remains valid at common law; however, what may happen is that the merging parties will be in breach of the merger conditions and liable for the remedies for such breach under the Act, which include the prospect that the merger approval may be revoked.[16] It is for this reason not necessary for

15 The parties are not without a remedy, as the Act gives them the right to appeal the imposition of the condition, see section 17(2)(b).
16 See section 15 of the Act read with section 16(3).

the Tribunal to hear all the parties to the agreement, as the merging parties suggest we must, as the decision to cancel the agreement remains the election of the merging parties. It is for the merged firm if it wishes to implement the merger to negotiate with the other contracting party.[17]

37. The situation is no different from the one in this case where the Tribunal has ordered the merged firm to provide a standard contract to its independent customers. The Tribunal by so doing has not created the contract. It has only imposed an obligation, that if the merger is implemented, the merged firm provides it. If it does not, no contract comes into existence by virtue of the conditions - nevertheless the firm is in default of its merger obligations. Similarly a condition, even expressly, to cancel an agreement, does not have the effect, post implementation, of doing so – it merely means that the merged firm has breached the conditions for approval.

38. In the present case there was indeed no express requirement in the order that the merged firm' cancel its existing contracts. But to the extent that there may be an implied one, which we do not concede, it still would not have invalidated the existing contracts for the reasons we have outlined.

Duration and notice periods

39. The order states in the second half of paragraph 1.4 that:

> *The parties to the agreement must be required to give notice to the other if they do not wish to renew the contract. The length of this period must be the same for both parties and must be reasonable having regard to the nature of the industry.* ***The contracts must be of a five-year duration*** (emphasis added).

40. The Tribunal then again repeats in par.2 of the order that:

> *The conditions set out in clause 1 above shall apply for 5 years from date of this order.*

41. Paragraph 1.4 addresses specific antitrust concerns, which the Tribunal identified may potentially flow from the merger. These relate to discrimination on conditions of supply, price, discounts or rebates, exclusivity and renewal of contracts. The Tribunal sought to address these concerns by requiring that standard agreements be drawn up that comply with the principles set out in 4.1 and which standard agreements had to be effective for 5 years.

17 The situation would be different in a prohibited practice case where if the relief sought is to void terms of an agreement, all the parities to that agreement would need to be heard. See Commission v York Timbers et al, Tribunal Case No: 100/CR/Dec00

42. Paragraph 2 relates to the five years which Cobb, a competitor of Ross, indicated it will need to become an alternative source for independent breeders in the South African market.[18] The Tribunal mentioned in its reasons that the merger only poses short-term structural problems and that if, in five years, a new entrant has established itself in the market, the order would be superfluous because the foreclosure concerns would be cured. No other reason was put forward for imposing the 5 years period.

43. However, one gets conflicting results when one applies both conditions. For example, if a standard agreement is entered into in 2005, 3 years after the date of the order, it must, according to paragraph 1.4, run for 5 years until 2010. This will mean that the parties will be tied to the agreement three years after the conditions of the Tribunal order have expired in 2007, as set out in par 2. Clearly this was not the intention of the Tribunal. It wanted to facilitate the entry of Cobb into the market, not prescribe the length of the standard supply agreements, a term of the contract which is usually negotiated between parties and which takes into account the specific needs and future plans of each customer.

44. We must, therefore, conclude that the Tribunal made an obvious drafting error when it included the last sentence in par 1.4. We find that to cure this ambiguity, the order must be varied by the deletion of the last sentence of paragraph 1.4.

Minimum or fixed quantities of supply

45. The Tribunal order is clear and no ambiguity exists with regard to minimum or fixed quantities of supply. We find no reference to minimum quantity or fixed quantity of supply in the Tribunal order. In fact the intervenors acknowledge this in their answering affidavit by saying that it is 'implicit' in the conditions that Astral may not include in the new contract a clause which has the effect of requiring customers to purchase minimum or fixed quantities.[19]

46. We find the order to be clear on this.

Order

47. In view of the fact that the reference to the five years period in paragraph 1.4 is confusing we are persuaded that the Order is ambiguous and that the ambiguity will be cured by its deletion. In order to make the status of contracts that were in existence at the time of the Order clear, we do not need to amend the Order, but it

18 The evidence was that although Cobb was already in the market, supplying through outlets it controls, it was not yet supplying independent broilers, but had indicated an intention to do so.
19 Par 24, page 8 of the answering affidavit in Astral's application.

will suffice to add two declaratory orders as well, given the dispute between the parties.

48. We make the following order:

    1) Varying the Order of the Tribunal dated 2 April 2002, (the "Order") by deleting in paragraph 1.4 the words: *" The contracts must be of a five year duration."*

    2) Declaring that the validity of any contract that was in existence with an independent customer, at the time of the Order, remains unaffected by the Order,

    3) Declaring that to the extent that any provision in any existing contract with an independent customer, is inconsistent with the principles in paragraph 1.4 of the Order, as amended by this order, that such inconsistency does not invalidate those terms of the contract, but will if enforced by Astral Foods Limited and/or National Chick Limited constitute a breach of the conditions attached to the approval of the merger.

Costs

49. Although Astral has been ultimately successful in having its interpretation of the Order's effect on existing long term contracts vindicated, its proposed amendments were not accepted and as the intervenors needed to devote much of their attention to the proposed amendments we believe that the fairest solution is that each party must pay its own legal costs.

18 July 2003

N. Manoim **Date**

Concurring: D. Lewis