IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1240/5/7/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 April 2016

Before:

THE HON MR. JUSTICE ROTH
(President)
MARGOT DALY
LORD DOHERTY
(Sitting as a Tribunal in England and Wales)

BETWEEN:

DEUTSCHE BAHN AG
& Ors. Claimants

- and -

MASTERCARD INCORPORATED
& Ors. Defendants

AND

Case No. 1244/5/7/15

PEUGEOT CITROEN AUTOMOBILES UK LTD
& Ors. Claimants

- and -

PILKINGTON GROUP LIMITED
& Another. Defendants

- and -

ASAHI GLASS CO LTD
& Ors. Rule 39 Defendants

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H E A R I N G

A P P E A R AN C E S

Mr. Thomas de la Mare QC, Mr. Kieron Beal QC, Mr. Tristan Jones and Mr. Eesvan Krishnan (instructed by Hausfeld) appeared on behalf of the Claimants.

Mr. Mark Hoskins QC and Mr. Matthew Cook (instructed by Jones Day) appeared on behalf of the MasterCard Defendants.

Mr. Adam Johnson and Ms Kim Dietzel (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Pilkington Defendants.

Mr. Mark Hoskins QC and Miss Sarah Ford (instructed by Freshfield Bruckhaus Deringer LLP) appeared on behalf of the Rule 39 Defendants.

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THE PRESIDENT: Yes, Mr. de la Mare.

MR. DE LA MARE: Mr. President, there is a familiar cast before you, I will not go through which parties, the arguments are being presented by myself, Mr. Hoskins and Mr. Johnson. We have agreed that we will go first.

The preliminary issue before us, ultimately we are all agreed, is a pure point of statutory construction. It is quite a long lead up to the point of statutory construction because one has to navigate through the thicket that is the accreted legislation. But, as you know, the central issue is how to apply the transitional limitation provisions in Rule 31 of the 2003 Rules, as preserved, how to apply those rules to claims brought before this Tribunal that we presently assume are governed by foreign applicable law.

On the one hand, my clients and those of Mr. Beal, both of whom are represented by Hausfeld, say that the relevant statutory provisions, properly construed constitute a comprehensive and fully self-contained code which, for limitation purposes, the possible content and structures of foreign limitation periods is entirely irrelevant. By contrast Mr. Hoskins, and those he represents, AGC, the third party in the Pilkington case and MasterCard, the Defendant in those proceedings, and Mr. Johnson, for Pilkington, they contend that the regime created by the Enterprise Act 2002, and the CAT Rules 2003 and 2015 is not fully comprehensive, such that when foreign law applies there is still room for the Foreign Limitation Periods Act, or its equivalent provisions in Scotland and Northern Ireland, to require the application of foreign limitation periods in the alternative to the rules provided by Rule 31.

As you shall see, we have quite a number of answers to this case, but let me set out three recurrent themes you are going to detect in those answers.

The first recurrent theme is that such argument is impossible to reconcile with the natural and clear language of s. 47A and the rules made under it. In this connection you will see that, in particular, and it is helpful to flag the particular provisions we rely on for when we come to the statutory regime, we pin our arguments on the clear language not of s.47A(4) because we say there is no real dispute about that, we pin our argument on the clear language of s.47A(1) or, what was under the old Act, s.47A(4). That is the provision that says, once you have identified the claims that can be made, you may bring such claims subject to limitations contained in the Acts, or rules made under it. That is the signpost, we say, the first signpost, to the fully comprehensive code, and it is supplemented by a number of textual pointers that very strongly direct you to the same conclusion. Those textual pointers include s.15 of the Enterprise Act, that is the rule making power, and the provisions

of Part 2 of Schedule 4, particularly para.11 that deal with the ability to make limitation rules. They contain Rule 119, sub-para. 2 of the 2015 Rules, which is in analogous form to s.47E(1) and (2), both of which say that they supply the relevant prescription and limitation periods. It is also evident in the violence that my learned friend's argument must do to Rule 31 in order to make good his argument, because what I will show you in due course is that his argument effectively entails picking and choosing those parts of the Rule 31 provision that survive his argument and, in particular, he has to accept that Rule 31(3) the permission rule, permission to bring proceedings survives when Rule 31(1) and (2) must fall away in a foreign law case. That is the first theme. We say everything points towards a fully comprehensive code.

The second theme is, if you like, on the terrain of policy because we say it is critical in this case to understand that this section was a very particular section designed to enable the bringing and encourage the bringing, of a very small subset of cases with peculiar characteristics, namely follow-on damages claims.

THE PRESIDENT: By "this section" you mean s.47A?

MR. DE LA MARE: Section 47A in its original form. We say that follow-on only, or 'wait and see' policy is evident in s.47A in its original 2003 form, and in the form of the 2003 Rules which build upon it and which are preserved along with portions of the old s.47A via the 2015 Rules.

Now that we are all agreed we are in a transitional case, we say that old policy of the old Act continues unabated in relation to those proceedings. The new s.47A, when combined with the new limitation rules in s.47E has a different policy, it is a policy of alignment with what you can and cannot do in civil proceedings for the purposes of limitation, and that is a very important distinction to understand. We say once you understand that s.47A is a *lex specialis* for a very narrow category of competition law claims with special characteristics, not least that they are following on upon the work of a regulatory investigator, any broader considerations about the thinking behind the FLPA, etc, fall away because they just do not address the particular concerns that arise in the case of a follow-on damages case.

The third recurrent theme is that of purposive construction and coherence because we say that were you to accept my learned friend's arguments, you would do great violence to the coherence of the regime as originally created in 2003 and there would be all kinds of bizarre and evidently unintended consequences.

First, foreign law limitation, where it expires before there is an infringement decision at all, would debar you from bringing any such follow-on claim at all, even if jurisdiction in the English courts was conferred by the Brussels (Recast) Regulation.

Secondly, where foreign law limitation expires----

THE PRESIDENT: It would debar you from bringing a claim in the Tribunal.

MR. DE LA MARE: In the Tribunal, yes.

THE PRESIDENT: You could have started a claim.

MR. DE LA MARE: Therefore you have been debarred from getting the benefits as intended to be incurred from Tribunal proceedings in contra distinction to the High Court.

Secondly, you would have to fundamentally recast the permission rules for those cases where foreign law limitation expires between the date of the infringement decision and the decision in question becoming final - i.e. being appeals being spent or no longer pursued - because obviously for those rules to make any sense you would be entitled to bring, in all barring an exceptional case, foreign law claims as a matter of fact, because otherwise the consequence of refusal of permission would be to require the cases to become time barred. One would imagine, if that were the scheme, what would happen is precisely what the Act is not intended to do, which is that the Tribunal is obliged to accept a load of cases on a preventative basis to stop limitation running, when the real scheme of the Act is to avoid any such wasteful exercise until such time as you know whether or not the infringement decision is going to stand.

The third paradoxical consequence is, of course, that foreign limitation may be longer than the two years provided for by the CAT Rules. Of course, my learned friends have jumped on the fact that they say in this case that it is shorter. The point cuts both ways. Take a settlement decision as an easy example. Certain decisions are infringement decisions, but of their nature they are not subject to appeal. If you are an English claimant you have two years to challenge those decisions, if you are a foreign law claimant on my learned friends' argument, you will have whatever longer period of limitation foreign law supplies, maybe five years plus knowledge, as in France, or something of that kind.

Lastly, and it is a consequence of the previous steps, you have a bizarre state of affairs where for transitional cases claims governed by foreign law limitation can access collective proceedings because foreign law limitation is supplying the limitation period for a stand-alone claim in circumstances where domestic law limitation does not enable a stand-alone claim to be provided, or does not clearly so provide, and so the claims can then gateway into the collective proceedings enabled by 47B. That would be a very peculiar state of

affairs, that domestic claims cannot be the subject of opt-in or opt-out proceedings, but foreign law claims can.

I will make all those points good, but those types of incoherence go to the very heart of the simple clear straightforward speedy and cheap system of remedial justice that this particular set of provisions was designed to introduce. Indeed, they re-introduce the very substantial complication that we say, looked at in the round, the Act was designed to avoid. That substantial complication is prolonged argument about the application of s.11 and 12 of the Private International Law (Miscellaneous Provisions) Act, the old statutory test, which is notoriously difficult to apply to multi-jurisdiction cartels, and will generate, if my learned friends have their ways, no end of satellite litigation about where the essence of the relevant wrong is.

The statutory provisions shortcut all of that for those cases where infringement has been established.

THE PRESIDENT: So on your approach we have lost this cheap and convenient remedial justice with the new legislation where we are not in the transitional phase, and I think you accept the foreign law limitation will apply.

MR. DE LA MARE: It is not quite as simple as that, but the answer to that is a qualified no or qualified yes, because s.11 and 12 of PILMPA has increasingly been replaced by Rome II. One of the things that is notable about Rome II is that my learned friends focus upon the parts of Rome II that assist them, Article 11(h), and the provision that unless there is a public policy reason to the contrary the applicable law supplies the limitation period, that they ignore Article 6(3)(b), which says that where you sue an anchor defendant the claimant may choose the law of the place of domicile of the anchor defendant as the applicable law. In all bar the exceptional case where one identifies anchor defendants, cartelists, or parts of cartelists' undertakings based in the UK, as the Article 4 Brussels (Recast) Regulation hook for suing, that will mean English law is the applicable law, and there would not be any arguments under ss.11 and 12.

THE PRESIDENT: You will take us to that in due course.

MR. DE LA MARE: Yes, I will. That is the terrain for argument for statutory construction. Let me then very, very briefly deal with the material facts. They are set out more fully at paras.7 to 20 of our skeleton, and in characteristically pithy terms in paras.5 to 6 of Mr. Hoskins' skeleton. I think these are the only real salient facts. First of all, both of these claims are pure follow-on claims. They are claims based exclusively upon the terms, findings, holdings, etc, of the relevant Commission decisions. These are not stand-alone

claims, these are not hybrid claims, they are pure follow-on. In so far as the parallel High Court proceedings had any hybridity about them, any aspects that were stand-alone, they have been trimmed and removed in the claims before the CAT.

Secondly, both claims have unarguably been brought within the two years of the relevant infringement decisions becoming final for all purposes. In MasterCard it is because the appeal was pursued on liability grounds unsuccessfully to the CJEU, and it has been brought within two years of that decision, and in the Pilkington case it is because after the General Court, where there was not an appeal on liability grounds, the appeal to the Court of Justice was only on fine grounds, and therefore the claim was in time, being brought within two years of the General Court's decision.

As to the span of time covered by the cases, the simpler of the two cases before you is the Pilkington case. The reason I say it is the simpler is because the cartel in question operated between March 1998 and March 2003, and, as such, it is a case governed exclusively in terms of identifying the relevant applicable law by the provisions of the Private International Law (Miscellaneous Provisions) Act, and in particular ss.11 to 12 thereof. There is no modified Community law double actionability test to be applied in the Pilkington case. Sections 11 and 12 operate to determine a single law that applies, and about this there is obviously dispute. We say it is English law, the defendants and interested parties say, no, it is French and Swedish law because that is where your corporate groups are located. Alternatively, they say it is the place buying subsidiaries, the Peugeot and Saab companies that bought the car glass, so France, Spain, Slovenia and Sweden and in a small contested part England.

Since all of the facts pre-date 11th January 2009, there is no question in the Pilkington case that Rome II applies to this case. I think it is common ground that Rome II has no application in either case, but in obvious particularity in the Pilkington case. Indeed, we pleaded as much in s.4 of our Reply, bundle A2, tab 4.

THE PRESIDENT: That is true for MasterCard as well, is it not?

MR. DE LA MARE: It is true for MasterCard as well. After the clarification of the pleading there cannot be any doubt about it, but we say in any event once you properly construe the provisions of Rome II in the light of an ECJ case called *Homawoo*, it is absolutely clear that the relevant thing is whether an event causing damage occurs before 11th January, and in MasterCard there is no such event after 11th January.

The complication in MasterCard is that the facts go back to 1992, and that is, therefore, before the date in, I think, January 2006, the date PILMPA came into force.

THE PRESIDENT: I think it is May.

MR. DE LA MARE: 1st May. It is before 1st May 1996, and therefore that first part of the claim is governed by old common law double actionability were the case litigated in civil proceedings. So the question here is additional. If you like, in Pilkington the question is whether s.1.1(a) of the FLPA and s.4 operate to displace or supplement Rule 31 of the CAT Rules for claims governed by foreign law. In MasterCard that question arises after 1st May, but before 1st May 1996 the question is also whether the common law rule of double actionability survives as well as and along with the operation of the FLPA so as to displace the rule provided by Rule 31 of the CAT Rules.

Then, lastly, and you have this point, Sir, in neither case is Rome II directly applicable to the answers in question. Those, I think, unless I am corrected, are the only material facts, and beyond that we need not be concerned with the complications of the case.

Let me now turn to the law, and what I want to do is to go through the general limitation rules first, then I want to go through the special rules on foreign law, and then I will look at the CAT statutes and Rules. What I will try to do, somewhat nervously, given the greater expertise of the members of the Panel, is integrate the analysis of the equivalent Northern Irish provisions at each juncture as we go along, because I know the CAT is particularly concerned to ensure that the answer it gives is a good one for its UK jurisdiction as a whole.

We have summarised the position on Scots law and Northern Irish law in annexes to our skeleton. I should indicate it may be out of an excess of sensitivity, those annexes were settled with the benefit of local counsel. I do not want to be holding myself out as an expert in Scots law and Northern Irish law, I most avowedly am not – even English law is probably open to question (laughter) – but certainly it is not on the compass of something even I would claim. That is the general scope.

Can I therefore start with the Limitation Act, tab 14 of the authorities' bundle? The Limitation Act is split into material parts. Part 1 contains the ordinary time limits for different classes of action. You can see the scope of Part 1 explained in s.1.

> "This Part of the Act gives the ordinary time limits for bringing actions of the various classes mentioned in the following provisions of this Part."

If you pause there, and turn on to the interpretation section, p.44, s. 38(1), you will see that "action" is defined to include: "any proceeding in a court of law, including an ecclesiastical court", fortunately we are not concerned with ecclesiastical breaches of competition law.

The relevant tort rule is in s.2, this is the general rule:

"Any action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

I think we are all agreed that the cause of action will invariably accrue upon the suffering of that as the last of the constituent elements of the cause of action to occur. That is the basic rule, six years from damage in tort.

THE PRESIDENT: You have referred to s.39 in the definition.

MR. DE LA MARE: Section 38.

THE PRESIDENT: We see it says "any proceeding in a court of law", it does not actually say "Tribunal", does it?

MR. DE LA MARE: It does not, no, and that is a point I am going to come to. I do not place too much emphasis on that, but you will see this phrase "proceeding in a court of law" is a significant one, because it is actually used deliberately in s.47E(2) of the Act as reformulated, and in its limitation rules, and it is deliberately echoed in my submission. We are not making the point because I do not think it is necessarily a good one that anything simply labelled the "Tribunal" is not a court, but the point we do make is that the Act plainly contemplates that but for the special provision it makes the limitation rules will not apply because it is not a court.

LORD DOHERTY: Does s.39 have any----

MR. DE LA MARE: It does, my Lord, and I will come to that at the end. The contract rule in similar form is in s.5. Again, it works by reference to accrual but, of course, a contractual claim accrues upon breach, and will operate somewhat differently.

Part 1 is then modulated by the special rules contained in Part 2, for cartels, the rules that is always of relevance is s.32 for postponement of limitation in the case of fraud, concealment or mistake. So the English and Northern Irish approach is to unpack accrual and knowledge, compare and contrast the Scots' approach in s.6 of the PLSA which run the two together and deal with them so as to provide a combined accrual point. So that is what one looks at in a classic cartel case, such as Pilkington. Of course, in MasterCard we have the litigation about whether or not any such defence arises or whether or not the accrual runs under the conventional six-year rule.

Then we come on to the provisions of s.39----

THE PRESIDENT: You say in MasterCard that is an issue, I thought in MasterCard the Claimants' case is that it is Belgian law, is it not?

MR. DE LA MARE: That is right.

THE PRESIDENT: So it is not this on any view, is it?

MR. DE LA MARE: That is right. The Visa litigation has dealt with this point, Arcadia.

THE PRESIDENT: We are not concerned with that.

MR. DE LA MARE: We are not concerned with that, indeed. Then s.39, "Saving for other limitation enactments":

> "This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment."

We say that is a gateway to the special Tribunal Rules that may be contained in our Act and our regime, or in other equivalent regimes, such as the provisions in the order, enabling the Employment Tribunal to deal with employment claims within three months of termination of employment.

It is also a gateway, if one is needed to Rome II, which no doubt constitutes as another enactment, notwithstanding the fact that it is already directly applicable.

The last provision we need to see----

THE PRESIDENT: Is it the gateway to the 1984 Act?

MR. DE LA MARE: It is, yes, where that applies, and what we will see when we look at the Scots provisions is that effectively the FLPA and the Limitation Act are combined in one measure and so one does not need to have this cross reference mechanism because the equivalent is already in the PLSA in s.23A.

The last provision, s41(4) tells you the territorial scope of this legislation except for purposes that do not concern us, it is England only and not Scotland and Northern Ireland.

Let us then stop and look at the Scots position. We have not set out the provisions and we do not have them in the bundles, they can no doubt be supplied if it is helpful, the provisions of s.6 of the PLSA. However, they are summarised in the annex to our skeleton argument, para. 87. I do not think, having compared with my learned friend's skeleton argument, that there is any dispute on this. Effectively, as I already indicated, for present purposes s.2 and s.32 of the Limitation Act are effectively run together. In Northern Ireland, the position supplied by the Limitation (Northern Ireland) Order 1989 is that Article 6 of that order provides a tort rule in terms identical to s.2 of the Limitation Act, and Article 71 provides a knowledge based exception, or fraud based exception to that general rule in terms directly analogous to s.32 of the Limitation Act. So, so far, so identical.

Now, let us look at the position of the interaction of that general regime of English limitation with foreign law, and the starting point has to be the position at English common law before the Foreign Limitation Periods Act in order to understand what that Act is doing.

We have summarised that, again I think it is common ground, at paras. 25 to 26 of our

skeleton argument. The position at English common law was that a rule of double actionability applied. So far as limitation was concerned, a distinction was drawn between limitation rules that were treated as substantive because they effectively extinguished or nullified the cause of action on any claim upon their expiry. The limitation rules were merely procedural bars such that at common law if the foreign limitation period was merely procedural, as many provisions were found to be, that limitation period would not be applied and the only limitation period that would be applied would be the English limitation period for the equivalent tort delict, breach of contract or whatever. This was felt to be unsatisfactory and unjust. There was a mount of judicial criticism of it. The backdrop to the FLPA is, in my submission, very usefully summarised by the authors of **Dicey**, section 7-055 to 7-056, which is in authorities' bundle, 42, and also in **McGee** which is actually fuller about the precise content of the common law rules, authorities bundle, 41, 25, paras.1 to 2. I am not going to ask you to turn those up because I do not think they are substantially disputed.

The concern essentially was that this distinction between substantive and procedural law led to forum shopping because it enabled a party to, say, bring a breach of contract claim that was barred by a procedural bar in, let us say, France, in England if the limitation period in England was larger than that in France. France is a bad example because it used to be ten years. Take a jurisdiction where it is shorter, you could circumvent the shorter limitation period in the foreign law by bringing the claims in England, and, as it happens, in both Scotland and Northern Ireland. In Scotland and Northern Ireland there was an identical rule at common law, and you see the citations in the annex establishing that. That is why there is a near identical legislative response prompted by the Law Commission Reports.

That then takes us to the FLPA, and that you will find in bundle 1 of the authorities, tab 15. The first thing I ask you to note in s.1(1) is this bit of key language:

> "… where in any action or proceedings in a court in England and Wales …"

One sees immediately the chime to the language that you see in s.1 of the Limitation Act, as expanded by the Interpretation Act, s.38. There is nothing express here about reference to tribunals, just as there is not anything in the Limitation Act.

THE PRESIDENT: You accept it would cover the Tribunal if there is no special----

MR. DE LA MARE: But for a special statutory scheme, yes.

THE PRESIDENT: Has that been decided?

MR. DE LA MARE: There has been litigation, I think in the Lands Compensation Tribunal, about how the Limitation Act, but not the FLPA, applies in circumstances where there is no

provision made for time limits. We can supply the case if that would be helpful. As I recall from looking at the case, the position was that there was a rule making power to provide the time limits but it had never been exercised. We have copies in court. It is a case called *Hillingdon London Borough Council v ARC*. To that extent, it is different to the present case in that the rule making power was never exercised. It is also different in this material respect, that when one looks at the legislative basis of the statutory jurisdiction, there is no equivalent to the express provisions in 47A(1) and (4), disapplying expressly all limitation rules and saying claims can be brought so long as in accordance with the rules. It is not, in my submission, an authority that is really in point, because the statutory scheme is different. What it does make good is the point that you cannot say that something is not a court dealing with an action as soon as defined simply by reference to its label. There is no magic in whether or not something is described as a 'Tribunal' or 'Court', you have got to look at the substance of what is going on, and, we say, you have to look at the particularity of the regime in question.

Again, we see this language, and the significance of the language, as you will see, is when one comes to look at s.47E(2), and what the Act tells you about the link over to Acts of Parliament. That is the first point.

The second point is to note that it is an Act intended to apply where a foreign applicable law is chosen in accordance with the rules of private international law applicable by the court. Then effectively you have two rules: first of all, whether foreign applies. Rule 1(a) is that the law of that other country relating to limitation shall apply in respect of that matter. To understand that rule you cannot look at it in isolation from s.4. To understand s.1(a) you also have to look at s.4, so let us turn to that. It tells you, in summary, do not draw the distinctions you used to draw at common law between substance and procedure. It abolishes those distinctions. So the effect of section----

THE PRESIDENT: That is clear from the preamble, is it not, at the very top on the first page.

MR. DE LA MARE: Absolutely right. So read s.1(a) and s.4, and you actually see what the main purpose of this legislation was. It is to abolish the substantive/procedural distinction with the result that, in combination with Rule 1(b), particular conclusions that follow. Let us look at Rule 1(b) first. Rule 1(b) creates a second rule:

> "except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply."

You have got to read that with subsection (2):

"A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

What that rule says, decoded, is double actionability survives as modulated by rule 1(a). That means that forum shopping of the kind that was previously possible is immediately at the end, because whichever is the narrower gateway will debar the claim. If foreign law limitation is narrower than English law you fail at hurdle one; and if English law is narrower, or Scots law or Northern Irish law, as we shall see, is narrower than foreign limitation law, you fail at the second hurdle.

That is how this Act worked with the exception of libel----

THE PRESIDENT: I am just trying to understand what you have just said, "double actionability survives". That particular case is within subsection (2).

MR. DE LA MARE: That is right, and that is because----

THE PRESIDENT: If, for example, you have a claim on a contract governed by foreign law, will double actionability survive?

MR. DE LA MARE: Yes, unless and until the Rome Convention applies - take tort because it is uncomplicated by the Rome Convention of 1980. Take tort, yes, double actionability survives.

THE PRESIDENT: In every case then?

MR. DE LA MARE: In every case. I think that is common ground until the Act comes in, and then double actionability is modulated until the PILMPA. As we shall see, it is the provisions of the PILMPA, s.10, that abolish common law double actionability.

THE PRESIDENT: I see, yes.

MR. DE LA MARE: There are some exceptions to s.1. There is an exception in s.2, and this is the only one that is relevant, where the application of subsection (1) would conflict with public policy.

THE PRESIDENT: Yes.

MR. DE LA MARE: And that gives rise to a situation that still pertains at present. If the foreign law limitation period conflicts with public policy it will not be applied. So if it is racially discriminatory it will not be applied, and we would say, and this is an argument that may arise in due course, if it is incompatible with EU principles of effectiveness it should not be applied because that is contrary to public policy, and a nice illustration of that is the position in relation to Sweden. In Sweden, the limitation periods do not have any knowledge based component, and therefore arguably render it effectively impossible to bring a damages

claim for a concealed cartel, and we would say any such scheme is contrary to EU effectiveness principles, now Article 47 of the Charter, and therefore to be disapplied, and that is one of the debates that may occur downstream if you find against us.

THE PRESIDENT: But that is as a matter of EU principle effectiveness, and if it was a simple case on Swedish law with no EU element, the principle of effectiveness would not govern, would it?

MR. DE LA MARE: Correct, but it is because the tort here is one harmonised by EU law in relation to which EU law makes demands of effectiveness.

THE PRESIDENT: Yes, here it is a competition claim. If it were a claim on an accident in Sweden or something----

MR. DE LA MARE: Completely right, my Lord, the argument of public policy here is context specific, it is not applicable to all----

THE PRESIDENT: So whether you need sections which say it is public policy under section 2, or whether simply the principle of effectiveness you get to the same result.

MR. DE LA MARE: Section 2 is a gateway consistent with the Statute, as opposed to simply ignoring it, to get to the same goals.

THE PRESIDENT: You say it applies here, do you, because the principle of effectiveness comes into play in this case?

MR. DE LA MARE: No, we do not say that point needs to be decided now, I am simply putting a pointer down. It may be an issue that arises in connection with Rome II where Rome II applies to transitional cases, but you do not need to decide that issue because there will be questions of public policy about Rome II applied to transitional cases governed by the follow-on regime, because we say the whole follow-on regime is designed to provide an effective remedy and that philosophy of effectiveness is now demonstrated by Article 10(4) of the Damages Directive that has a similar tone----

THE PRESIDENT: Yes, that may remove much of this debate when it comes into force, but to be clear, you are not saying in the present case that if the foreign law limitation would apply by reason of s.1, s.1 is excluded by the public policy for the purpose of s.2.

MR. DE LA MARE: Not for the purposes of this argument, but if we lose this argument, and we get into arguments about foreign limitation periods that argument will surface at that juncture.

THE PRESIDENT: Sorry, no doubt my mistake, my failing, you have lost me totally. In the present case where it is said that the 1984 Act applies, therefore the foreign law of

limitation applies to your claims, is it your submission if that were to be the position you have an answer under s.2 and public policy displaced that, or do you say "no" -

MR. DE LA MARE: Not in relation to this core issue of statutory construction, no. If you find against me on that issue of statutory construction such that we then have to investigate the foreign applicable laws, if it transpires after the sections 11 and 12 PILMPA exercise, that the applicable law is putatively Sweden, and supplies a Swedish limitation period, the argument will surface at that juncture if the effect of the Swedish limitation period – or any other period – is to make it in practice impossible to assert a claim.

THE PRESIDENT: That is not in this application?

MR. DE LA MARE: Correct.

THE PRESIDENT: Yes, I understand.

MR. DE LA MARE: The last provision that I need to show you in relation to this Act is s. 8, and you will see that this employs a common methodology. It basically says if there is a directly applicable Community instrument in play, and that really means now the Rome I Regulation on contracts, or the Rome II Regulation on tort, then the whole of the FLPA, so far as material, "sections 1, 2 and 4 above shall not apply". Effectively, what that reflects is a hierarchy, and that hierarchy is where the cases fall within the scope of the directly applicable legislation, the Regulations, those Regulations supply the relevant clause. Where it does not you go back to the underlying domestic law that will apply.

So that is the FLPA. The Scots law equivalent is in tab 25 of the same bundle, s.23A, the Prescription and Limitation (Scotland) Act, ("PLSA"). In subsection (1) you have a condensed version of what is contained in sections 1 and 4 of the FLPA. Subsection (2) is an equivalent to s.2, the public policy exception, and subsection (3) is a non-revival provision, this provision would not work to revive claims that would be time barred under the old regime.

Then subsections 4 and 5 is the direct equivalent of s.8 of the FLPA and provides that this regime and, by extension, the whole of the PLSA, shall not apply. Rome I or Rome II applies foreign applicable law and rules not trumped by public policy provisions in Article 16. So, functionally, the position in Scotland is equivalent, subject to this important qualification, the FLPA or foreign applicable law regime is built in to the one Statute, the only Statute that deals with prescription. So effectively, it has brought everything together in one place and, in my submission, that shows in substance what is really going on. There is only one limitation regime, in England it is the FLPA, and the Limitation Act read together; in Scotland it is simply the PLSA. The position in Northern Ireland is, again,

identical to the position in England. The relevant Northern Irish Instrument is at tab 28, the Foreign Limitation Periods (Northern Ireland) Order 1985.

THE PRESIDENT: It has really followed exactly the English approach, has it not?

MR. DE LA MARE: All the provisions are a couple out, so that Article 3 corresponds with s.1, Article 4 corresponds with s.2, and Article 6 corresponds with s.4. The one thing that is out of sequence is the equivalent of s.4, the abolition of procedural substantive distinction, and that is contained right at the front in the interpretation section, in paras. 2(3) and (4), that is where you get the equivalent of s.4.

THE PRESIDENT: But they have two orders, they have not consolidated like the more elegant way the Scots have done it.

MR. DE LA MARE: Exactly. Exactly like the English system they have an order equivalent to the Limitation Act and an order equivalent to the FLPA, the content is identical. I hope that answers the Tribunal's questions about the difference between Scots law and Northern Irish law so far as it arises.

THE PRESIDENT: It may be relevant when we look at s.47.

MR. DE LA MARE: Indeed, I think it is. I think the Scots' position is relevant. The last piece in the applicable law domestic jigsaw, before we get to Rome II is the PILMPA, that is tab 16 of the authorities' bundle. The happy news here is that if you look at s.18(3) first and foremost [Except where otherwise provided] Part III "extends to England and Wales, Scotland and Northern Ireland", so we can stop our paper chase between the parallel provisions. Everything we want is in Part III.

Let us start with Part III, which begins on p.5 and, in particular, at s.9. You see the purpose of Part III is described:

> "The rules in this Part apply for choosing the law (in this Part referred to as '*the applicable law*') to be used for determining issues relating to tort or (for the purposes of the law of Scotland) delict."

So it is a UK-wide conflict of laws rule for tort.

> "(2) The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum.
>
> (3) The rules in this Part do not apply in relation to issues arising in any claim excluded from the operation of this Part by section 13 below.

(4) The applicable law shall be used for determining the issues arising in a claim, including in particular the question of whether or not an actionable tort or delict has occurred."

The first point that you immediately note is that that rule is effectively dispensed with in the scheme of the s.47A approach, which is instead to look parasitically upon the forms of claim that are possible in the High Court. So you are immediately at both English, Scots, Northern Irish law and foreign lawby dint of the Competition Act, whereas this Act is focused instead upon questions of foreign applicable law.

Then (7):

"In this Part as it extends to any country within the United Kingdom, 'the forum' means England and Wales, Scotland or Northern Ireland, as the case may be."

Section 10 then abolishes the common law double actionability rule. We now leave that place that applied between some date in 1980 and May 1996 where you had to meet two gateways, and there is now only one limitation gateway if it is foreign law and it is the limitation gateway, procedural or substantive, supplied by foreign law, and a notorious exception is made in the case of libel. So in libel you still have to meet gateways. So libel is more narrowly available as a tort, a foreign law tort, if you like, in English, Scots and Northern Irish cases. That is s.10.

Sections 11 and 12 are the rules to determine the applicable law in a tort case. You have got the general rule in s.11 and the displacement of the general rule in those cases where you can point to an alternative that is substantially more appropriate for the determination of the disputes in question.

All we need say about that section is that it is notoriously difficult to apply to a multi-jurisdiction, multi-party, long duration infringement of a cartel. I think I am right in saying - I will be corrected if I am wrong - there is no case deciding how that test is to be applied to such a cartel. It is an issue of notorious difficulty. Indeed, one would say that it is that very difficulty in applying a test designed for all torts that led in the Rome II Regulation to the supply of a specific rule in Article 6.3 for claims based upon restrictions of competition. That difficulty in working out the applicable law is obviously highly germane in working out what the statutory purpose is, or the utility is, of deferring the bringing of claims until after an infringement decision is made, because it avoids arguments about those very issues in relation to a narrow category of case where, however one cuts it, the party in question has either breached domestic competition law or EU competition law in a way that supplies jurisdiction against the party that can be sued under the Recast Regulation in the UK.

THE PRESIDENT: Might there not still be issues about measure of damages, remoteness, various substantive law issues, that would be governed by the relevant foreign law, aside from limitation? It solves the limitation issue but there are lots of other substantive law issues where you might have to decide the foreign law.

MR. DE LA MARE: There might be, but in terms of the order of significance of the issues produced by foreign applicable law, limitation is a class of its own.

THE PRESIDENT: Measure of damages might be - the rule on pass-through, for example, for competition claims?

MR. DE LA MARE: The rule on pass-through is one potential example, and it is subject always to arguments about whether or not ultimately the matter is, to a substantial extent, governed by a low risk common denominator supplied by EU law. Your point is a well taken one, Sir, I am not saying that applicable law is necessarily completely irrelevant, but this is important because when you are looking at limitation in this context it arises in connection with the decision as to whether and when to issue a claim.

THE PRESIDENT: I can see limitation is important. I just rather suspect that if you lose the argument here and the foreign law then has to be determined either here or in the High Court, in these cases limitation will not be the only area where there will be arguments about relevance.

MR. DE LA MARE: You may well be right, Sir. Sections 11 and 12 then are the test. We have looked at the extant provisions, so I do not think there is anything else in this Act beyond commencement in s.16 and wider provisions that show you the commencement date is, as Mr. Beal informed me, 1st May 1996. I do not think there is anything else we need to see in relation to this.

The last piece in the jigsaw is Rome II, which you will find in the second bundle of authorities, tab 31. It is a Regulation, and forgive me for making an apple pie point, as such it has horizontal direct effects. It directly affects relations between private individuals. There are only really two provisions that we need look at.

THE PRESIDENT: Has it been transposed, or is it just dealt within the Regulation, there is no domestic statute here?

MR. DE LA MARE: It is just dealt within the Regulation, and that is why the scheme of s.8 of the FLPA is to dis-apply where Rome II applies, and likewise 23A(4) and (5) of the PLSA dis-apply the Scots rule where Rome II applies. It operates in that respect exactly like a Brussels regulation or the Brussels Recast----

THE PRESIDENT: It is much more convenient.

MR. DE LA MARE: Yes. The general rule in torts and delicts is contained in Chapter II starting at Article 4, and you have a general rule there, and that, if you like, crudely put, is the analogue of ss.11 and 12. Unlike ss.11 and 12, it is then supplemented by a series of tort specific special rules. The first one, Article 5, is product liability. The second one, Article 6(1) and 6(2) are torts of unfair competition. That is a familiar concept to a civilian lawyer. There are German, French, Dutch torts of unfair competition. Our nearest analogue is probably economic torts in certain contexts.

For our purposes, the next rule, the distinct rule, is in 6(3), which applies to restrictions of competition. That is obviously Article 101, 102, and their domestic analogues. Here you say in (a):

> "The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected."

That, in itself, may be problematic if a number of markets are affected. So you go on to the second rule:

> "When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised …"

That, in conflicts of laws terms is something radical. It is a claimant's choice of applicable law rule. It is based on suing a defendant who you are entitled to sue as of right under what is now Article 4 of the Recast Regulation, what was Article 2 of the original Brussels Regulation.

In a conventional follow-on damages claim, or indeed in any conventional competition damages claim, as I know you are well aware, Sir, the tendency is to search for a defendant who is domiciled in the jurisdiction and then to sue that defendant either on their own, letting them bring everyone else in under Part 20 proceedings or their CAT analogue, or to sue them in conjunction with other parties, typically other parties who you can bring in as of right under what was Article 6, what is now Article 8 of the Recast Regulation.

In that case, Pilkington is a case in the classical form in that respect. Where and would Rome II apply? It would automatically be the case, when suing the Pilkington Defendants, the applicable law would be English law at our election. That is our reaction. There is a further rule that goes on to make somewhat different provision, where you sue such an anchor defendant in combination with other defendants from other markets. It does not

arise in the Pilkington case because there are no such defendants. The MasterCard case, by contrast, is, on any view, fairly exceptional because it is a case, and I think it is the only case that I am aware of, where effectively a pan-European jurisdiction is based upon a jurisdiction agreement between the parties and that would be very much the exception from the norm.

The reason I draw this to your attention is that, of course, what you cannot do is look at Article 11(h), which we will come on to, in isolation from this Rule, and predict all kinds of conflict between incoherence with the Rome II Regulation and the CAT statutes, because you have to appreciate that the basic rule, if you are suing somebody under Article 4, is that you can choose English law as the law applicable in those circumstances.

THE PRESIDENT: Article 4 of the Recast Brussels you mean?

MR. DE LA MARE: Yes. Then you have the common rules in Chapter 5, and Article 15 – I said 11, that is the equivalent provision in Rome I, I will show you that briefly – Article 15 is the common rule, the scope of the law applicable. The law applicable, using these various general or special rules:

> "under this Regulation shall govern in particular (h) the manner in which an obligation may be extinguished, and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."

That is then qualified by Article 16, overriding mandatory provisions:

> "Nothing in this Regulation shall restrict the application of provisions of the law of the forum in a situation where they are mandatory, irrespective of the law otherwise applicable to the non-contractual obligations."

Then the question will be: if there is such a candidate, does it meet the requirements for being a mandatory provision of that kind.

THE PRESIDENT: Is that something you rely on here, Article 16?

MR. DE LA MARE: No, it is not something we rely upon because we said Rome II is not engaged, but we say that if the problem contemplated by my learned friends were to arise, which it does not, then an issue that will have to be determined in such a case is whether the special limitation regime applied here is a mandatory rule because it is grounded upon considerations about effective remedial protection, etc., so we are back into a public policy argument at that juncture.

Fortunately for you, you do not have to decide that issue because Rome II is not engaged.

THE PRESIDENT: Mandatory rules normally are rather narrowly interpreted, are they not?

MR. DE LA MARE: No doubt, yes, and so one will have to unpack the policy of the special limitation rule and question whether or not, and there will be argument about it by the way, whether or not it is a mandatory provision.

THE PRESIDENT: I think they are expanded on, are they not, the meaning of mandatory rules in Rome I.

MR. DE LA MARE: If one turns back to the previous tab you have Rome 1.

THE PRESIDENT: It came after Rome II.

MR. DE LA MARE: It is odd, but it is not odd when you understand what Rome I does is turn the Rome Convention of----

THE PRESIDENT: I know, but it is just slightly confusing. It is Article 9, is it not?

MR. DE LA MARE: Overriding mandatory provisions?

THE PRESIDENT: Yes.

MR. DE LA MARE: Absolutely right. I was going to show you that, and the equivalent provisions in Article 12, the scope of the law applicable, it is (d), in this list, 12(1)(d): "the various ways of extinguishing obligations, and prescription and limitation of actions." That is the equivalent provision, and so one has broadly the same scope.

THE PRESIDENT: Yes, and I think there is something that mandatory provisions here should be interpreted the same way as in Rome II.

MR. DE LA MARE: I have not fully investigated that argument, but at first sight that seems a pretty reasonable starting point.

THE PRESIDENT: Yes, I think it is in one of the recitals of, I think, Rome I.

MR. DE LA MARE: Yes, thank you.

THE PRESIDENT: It may help to understand what is meant by "mandatory rules" in Article 16 of Rome II to look at Article 9 of Rome I.

MR. DE LA MARE: So that is Rome II. Really, the critical, to use the cliché 'take home' from this is that you cannot look meaningfully at Article 15(h), without also looking at Article 6(3).

The *Homawoo* case is in authorities' 1, tab 9. I can take you to it very quickly, because I do not think the point is disputed. It establishes at paras. 36 to 37 that the equivalent provisions in the Rome II Regulation that govern its temporal field of application mean what they appear to say which is that it only applies to events causing damage, not to the actual damage itself, events causing damage which occur after 11th January 2009.

THE PRESIDENT: That is common ground, is it not?

MR. DE LA MARE: That is common ground. Therefore, Rome II, a later instrument, is being used to construe an earlier statutory scheme, notably the 2003 Rules, to which it does not apply and, as I will come on to submit, that is a fundamentally problematic, indeed, incorrect, exercise. So that is everything before we get into the meat of the case. I am sorry it is a bit long-winded, but it is, I think, necessary, before we get to grapple with s.47A itself. I promise you will be getting some submissions at some point fairly shortly.

The old s.47A is where I think we need to start, that is tab 19.

This was inserted into the Competition Act 1998 by s.18 of the Enterprise Act 2002, with effect from 20th June 2003.

THE PRESIDENT: The reason this extract is printed off here says at the top "In force from April 1st, 2014" is just because it has the substitution of CMA for OFT?

MR. DE LA MARE: That is correct, my Lord.

THE PRESIDENT: But the provisions we are looking at go back to 2003?

MR. DE LA MARE: In substance they are exactly the same provisions all the way back to 2003, that is absolutely right. What I am going to try and do, I hope it is helpful, is point out where the sections are equivalent to the new sections and where the changes are.

Subsection (1):

> "This section applies to –
>
> (a) any claim for damages, or
>
> (b) any other claim for a sum of money,
>
> which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom."

In terms of functional equivalence that is an amalgam of what is now in 47A(2) and (3) of the new provision with a couple of key differences, and a couple of key points of commonality.

The key points of difference are that this section is confined to claims that may be brought in relation to an infringement, and as the balance of the section makes plain, that is an infringement demonstrated and incontrovertibly proved by a final infringement decision.

So in understanding the scope of s.47A(1) in the old format you have to read the balance of the section and it is plain that it is follow-on only.

The point of commonality is that there is language, language upon which my learned friend, Mr. Hoskins, places considerable reliance, appears, in fact, in the old format as well, you get this phrase: "which person may make in civil proceedings brought in any part of the

United Kingdom", and it is that section that you have to read with subsection (3), which is the functional equivalent of what is now s.47A(4), because effectively what is going on is you are being asked this basic question: "Could you bring an action in High Court proceedings once there was an infringement decision? Could you bring an action for damages, or money relief in relation to that setting aside, disapplying or putting out of mind, any limitation rules that may be applied in that context?

Now, what I understand from Mr. Hoskins' skeleton argument to be common ground is does that disapplication at that first stage of limitation rules necessarily embrace foreign limitation periods? He accepts that for that limb 1 stage.

If you like, this first inquiry----

THE PRESIDENT: This is any limitation rules?

MR. DE LA MARE: Any limitation.

THE PRESIDENT: Domestic or foreign?

MR. DE LA MARE: It is. This first stage of inquiry, what I am going to call "limb 1" is all about what forms of claims, limitation aside, are substantively available or possible? You have exactly that same architecture in the old Act, with the added requirement that it be a follow-on claim.

Subsection (2) simply identifies the relevant prohibitions in relation to which there has to be an established infringement, so it is only Chapter I and II, or 101 and 102.

Then you come on to subsection (4), which is the exact functional analogue of s. 47A(1) of the new Act. It is this provision, in my submission, that is the critical provision to establish the comprehensive statutory code I mentioned at the outset.

> "A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) may be made in proceedings brought before the Tribunal."

So, what you have is a two-stage approach. If the claim falls within limb 1 you can bring that claim, subject to any other requirements found in the Act, or in the Tribunal Rules. So you have to look to the Act and the Tribunal Rules at that juncture for any conditions that govern whether or not you can bring the action in question. That is the starting point as to why this is a comprehensive code.

The first condition under the old regime, that reinforces the follow-on nature of these proceedings, is found in 47A(5):

> "But no claim may be made in such proceedings-
>
> (a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed . . ."

So, unless and until there is a decision, you cannot bring any claim at all. Secondly,

> "otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision."

Then subsection (6) identifies the decisions. Sections (7) and (8) identify the periods in which permission is required, and simply put they are periods in which the finality of the infringement decision in question is open to doubt because the decision was subject to an appeal and, as we now know, from the BCL litigation in the Court of Appeal, an appeal only on liability grounds. That is the scheme, and that is the first condition under the Act as to how and whether the claim may or may not be made. We will come back to 7 and 8 when we look at Rule 118, because we will actually see that the transitional rules preserve not just subsection (7) and (8), but necessarily must preserve subsections (5) and (6) for reasons I will explain. That is the old rule.

THE PRESIDENT: That has gone of course?

MR. DE LA MARE: Sorry?

THE PRESIDENT: You were comparing the old s.47A and the new, and this part of it, that has gone?

MR. DE LA MARE: No, it has not, (5), (6), (7) and (8) are preserved by rule 119 for transitional cases.

THE PRESIDENT: For transitional cases.

MR. DE LA MARE: We are a transitional case.

THE PRESIDENT: Yes, I understand that.

MR. DE LA MARE: New cases, for cases where the cause of action arises after 1st October 2015, then all of this has gone. We are not such a case.

Let us look at Rule 31.

THE PRESIDENT: Before you complete this, it might be helpful to look at the old 47A(10), which is now 47A(5), just to complete this.

MR. DE LA MARE: There is a degree of parallelism contemplated. The extent of parallelism has, of course, changed fundamentally, because the CAT used to have special and different rules on limitation. That is unarguable for claims governed by English law, and is now meant to be a broadly parallel jurisdiction with much enlarged powers of transfer between the two.

Before we come on to Rule 31, let us look at the rule making powers, and let us look at the explanatory note in relation to these provisions. Can we go to authorities bundle 2, and start

with the explanatory notes which, of course, are permissible aids to an interpretation of an Act, and there is plenty of case law about that.

THE PRESIDENT: You might need to think about that.

LORD DOHERTY: Permissible for what purpose?

MR. DE LA MARE: For identifying the mischief and purposes and the policy objectives of the legislation in question.

THE PRESIDENT: The legislation generally.

MR. DE LA MARE: For particular provisions, the mischief for which the provision is directed.

THE PRESIDENT: You might need to take us to that, Mr. de la Mare.

MR. DE LA MARE: We have got cases on that which we can provide if necessary. The relative part of the explanatory notes is s.18 Monetary Claims.

THE PRESIDENT: This is which tab?

MR. DE LA MARE: Tab 45. It is addressed to s.18, because s.18 is the provision of the Enterprise Act that inserted s.47A. Then you see in 74 the effect of 47A(1) is described:

> "However, it will be possible to bring such claims in the CAT only where it has been established (by either the OFT or the European Commission) that an infringement of competition law has occurred."

That reinforces the point, it is only following that. That is an important point when we come to consider the transitional provisions.

> "75 The new section 47A(1) and (3) enable the CAT to hear any claims for damages or other sums of money arising from [the infringement]."

Then 77, which is really the most important note:

> "The new section 47A(3) disapplies any limitation periods which would otherwise be applicable to such claims. The limitation periods for claims brought before the Tribunal will be specified in the CAT Rules."

THE PRESIDENT: The first sentence of that is a gloss on the statutory language, is it not?

MR. DE LA MARE: You call it a gloss; it is explaining----

THE PRESIDENT: The statutory language "for the purpose of identifying claims which may be made" - in other words, for the purpose of subsection (1), whereas this just disapplies it in general.

MR. DE LA MARE: In my submission, it is not a gloss of 47A(3) and (4) read together, when you understand that the requirement, once the claims in limb one, is that you can bring it so long as it is compatible with the Acts and rules made under it. It demonstrates that the two are intended to provide an exhaustive regime.

THE PRESIDENT: We have got to take our interpretation from the statute, not to interpret para.77.

MR. DE LA MARE: I am just pointing you to it, in case you think it is useful. Let us look at the rule making power, which starts in tab 43, s.15 of the Enterprise Act. It contains the rule making power:

> "The Secretary of State may, after consulting the President and such other persons as he considers appropriate, make rules …"

Then 15(5):

> "Part 2 of Schedule 4 (which makes further provision about the rules) has effect, but without prejudice to the generality of subsection (1)."

Then in the next tab we have that relevant provision from Schedule 4 of the Enterprise Act, and the material part is rule 11:

> "(1) Tribunal rules may make provision as to the period within which and the manner in which proceedings are to be to brought.
>
> (2) That provision may, in particular …"

THE PRESIDENT: Just pause a moment, you are in tab 44 - is that right?

MR. DE LA MARE: That is right. Rule 11(2):

> "That provision may, in particular -
>
> (a) provide for time limits for making claims to which section 47A of the 1998 Act applies in proceedings under section 47A [that is us] or 47B …"

That is privileged consumer claims.

> "(b) provide for the Tribunal to extend the period in which any particular proceedings may be brought; and
>
> (c) provide for the form, contents, amendment and acknowledgement of the documents …"

So a rule setting out the mandatory requirements of a claim form, for instance.

That is the rule making power pursuant to which rule 31 is made. For rule 31 itself we would need to go to the first authorities bundle, and it is tab 21:

> "Time limit for making a claim for damages
>
> (1) A claim for damages must be made within a period of two years beginning with the relevant date."

That provision only makes sense when read with sub-rule (2):

> "The relevant date for the purposes of paragraph (1) is the later of the following -

(a) the end of the period specified in section 47A(7) or (8) of the Act in relation to the decision on the basis of which the claim is made."

That language, "in relation to the decision on the basis of which the claim is made" is the basis for the claim in the rules having to be a follow-on claim. So there is no potential here, if the rule is looked at in isolation, for there being any kind of stand-alone claim in this period if this is the limitation rule. Then:

(b) [or] the date on which the cause of action accrued."

That tailors for the situation in which there is an infringement, but for whatever reason the infringement produces damage very substantially after it is detected. One can envisage, let us say, some form of abuse of dominance in which it is not until some years later that the damage caused by the abuse manifests itself.

That is the scheme. It is necessarily a follow-on, not least because of the requirements of 47A(5).

Then Rule 31(3) contains the rules expressly contemplated by s.47A(5)(b) as was, the circumstances in which permission may be granted:

"The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant."

So there is an open-textured discretion conferred.

Then sub-para.(4) is a non-revival of dead claims provisions, like the one we saw in the PLSA.

That is the basic scheme of Rule 31. On its face, that, read with 47A(5), is the only material constraint contained in the Act and the rules made under it as to the time in which you may bring a claim. There is no reference to a foreign applicable law. There is no hook for revival of or reference to the FLPA, the Limitation Act, the PLSA, s.23 of PLSA, etc. There is a comprehensive code that contains these provisions.

Let us then look at the new section and Rule 119. That is in tab 18, the preceding tab. The coloured divider is between s.47A and s.47E. Section 47A(1) elevates what was 47A(4) into the first rule in the section.

"A person may make a claim to which this section applies …"

that is limb one -

"… in proceedings before the Tribunal …"

so the same limb one analysis -

"… subject to the provisions of this Act and Tribunal rules."

The same limb two. Then we have a re-cast and wider material scope in subsection (2):

> "This section applies to a claim of a kind specified in subsection (3) …"

Subsection (3) now refers to not only a claim for damages or a sum of money, but also, but only in England and Wales and Northern Ireland, a claim for an injunction -

> "… which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom [identical wording] in respect of an infringement decision …"

That is the same, effectively -

> "… or an alleged infringement of …"

That is where you get into stand-alone, and thus into hybridity, and then exactly the same provisions are identified, Chapter I and Chapter II, 101 and 102.

So the change in material scope affected by this section is to make possible not just follow-on claims but stand-alone claims, but limitation is treated in exactly the same way in sub-rule (4). This is word for word identical except for one passage that I will refer you to:

> "For the purposes of identifying claims which may be made in civil proceedings, any limitation rules …"

all that is the same -

> "… or rules relating to prescription …"

Someone has finally woken up to the need to make express provision for the same situation in Scotland -

> "… that would apply in such proceedings are to be disregarded."

So the only words that have been added are "or rules relating to prescription that would apply to such proceedings are to be disregarded". It is word for word identical apart from that.

Then there is, because it is not follow-on only, no equivalent of what was 47A(5), (6), (7) and (8). They have all gone for claims that are fully governed by this new regime.

As you have already pointed out, Sir, you then go to subsection (5), which is the equivalent to the old subsection (10).

Then for the purposes of follow-on, infringement decisions, and also for the purposes of identifying decisions of binding effect, we have this identified in subsection (6).

So that is the new regime in terms of what claims are possible under 47A, and it is accompanied by a new regime of limitation in 47E, which is behind the divider. Let us have a look at that before looking at the transitional provisions. 47E(1) says as follows:

> "Subsection (2) applies in respect of a claim to which section 47A applies …"

then this -

"… for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if were to be made in -

(a) proceedings under section 47A …"

that is stand-alone claims -

"(b) [or in] collective proceedings."

That is the new s.47B. The words "At the commencement of the proceedings".

THE PRESIDENT: Sorry, section 47A is stand-alone or follow-on, not just stand-alone?

MR. DE LA MARE: That is right.

THE PRESIDENT: I thought you said "stand-alone"?

MR. DE LA MARE: By "stand-alone" I mean non-collective, I am sorry, it is an infelicity, "non-collective proceedings under 47A----

THE PRESIDENT: All proceedings other than collective.

MR. DE LA MARE: Correct. Then (b) collective proceedings, and the relevant words in the collective proceedings provision are "at the commencement of those proceedings" so what that makes plain is that even for collective proceedings the case has to be in time at the start of the intent to commence those proceedings, and then Rules 3 and following provide special rules that effectively toll limitation where you have attempted, as it transpires unsuccessfully, to get the certification of the CAT for the collective proceedings, and what they effectively stop is a party running the risk of incurring a limitation defence by unsuccessfully seeking to start collective proceedings.

The words of importance there are: "For the purposes of determining the limitation or prescriptive period" because that language, again, is another clear pointer to the comprehensive, exhaustive, exclusive nature of this statutory code. It is telling you where to find the only limitation or prescription periods to be applied.

Then you look at subsection (2), (2)(a), those rules are in the case of proceedings in England and Wales the Limitation Act 1980, which applies as if the claim were an action in a court of law. Then in the Scots limb (b) it is the PLSA, as if the claim related to an obligation to which s.6 of this Act applies, i.e. a delict claim, and (c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) order which applies as if the claim were actually in a court established by law.

You have an echoing of the language that you have seen in the Limitation Act and in the FLPA, and that is a clear pointer to the fact that you need this section in order to trigger the application of either regime. The importance of that----

THE PRESIDENT: By "either" regime you mean?

MR. DE LA MARE: Either regime, either the conventional domestic limitation regime, or that part of it that is either in the FLPA, or embedded in the PLSA that deals with foreign law claims.

THE PRESIDENT: How does the FLPA come in? There is no problem about Scotland, because it applies the 1973 Scots' Act, which includes, as you have shown us, by amendment, the foreign law provision, but the Limitation Act does not. It does not say: "The Limitation Act and, insofar as it is applicable, the FLPA", it just says "The Limitation Act".

MR. DE LA MARE: That brings me to s.39, which refers to "other enactments", and the other enactments in that context are the FLPA.

THE PRESIDENT: But it does not apply other enactments, s.39, it just dis-applies the Limitation Act.

MR. DE LA MARE: As we said in our skeleton argument, we think there are two ways that that can be read. One can read it in that way which effectively equates the position in Scotland to the position in England and Northern Ireland, and removes an anomaly that would otherwise arise through s.39, or you can read it as simply saying that the only limitation rules to be provided, irrespective of whether the claim is governed by English law or foreign applicable law, are those supplied by the Limitation Act. Once again it is a point you do not need to decide----

THE PRESIDENT: That cannot be right, can it, because then you would have foreign law applying if the case in the CAT is a Scots' case, but not if it is an English case.

MR. DE LA MARE: I agree.

THE PRESIDENT: And that cannot be right, can it?

MR. DE LA MARE: Which is why we say that the more natural construction is that once you get into the Limitation Act you get into s.39 and *a renvoi* to the FLPA.

THE PRESIDENT: The alternative view, which I think is taken against you is the FLPA, just on its terms, applies.

MR. DE LA MARE: The problem with that argument is----

THE PRESIDENT: Because we have to get to a result, it seems to me, as you acknowledge, it is your primary position, where the application or not of foreign law will be the same whether this is an English case, a Scots' case or a Northern Irish case?

MR. DE LA MARE: Yes. It would take a very strong statutory argument to lead to such an unattractive state of affairs, and it is not one I urge upon you. I readily accept that. The point I am trying to make is simply this. This section is predicated upon the fact that but for

a provision restoring the application of rules that have been dis-applied by s.47A(3) in the Act as now is, those rules will not arise by default. In other words, the effect of s.47A(3) or 47A(4) before it, under the old regime, is conclusively to disapply the limitation periods, the PLSA and all limitation rules caught by it, including the FLPA, as we accept the FLPA is caught in limb 1, unless and until such provisions are revived by other means.

THE PRESIDENT: You say that subsection 2(a) of s. 47E revives the FLPA?

MR. DE LA MARE: We say it revives the Limitation Act and with it the FLPA. That is our primary construction.

THE PRESIDENT: Because of s.39 of the Limitation Act or any other reason?

MR. DE LA MARE: Because of s.39 of the Limitation Act, and because that is consistent with the evident new policy of the new s.47A and the new s.47E, because the policy of the Act has fundamentally shifted. It has shifted from an entirely special set of rules that is completely different to anything under the Limitation Act and the FLPA under the old regime, to a new policy of alignment. That is why you should construe it in that way.

We will come on to my points about purposive construction and unintended consequences, the running of the FLPA in the period governed by the old provisions and the old policy does very substantial violence to its coherence. It was this construction of s.47E (2)(a) of the Limitation Act, and of s.39, it does no violence whatever to the new regime because it is intended exactly to mirror the limitation position that would apply in the High Court or the Court of Session.

The proof of the pudding of that is, of course, s.2(b) because the Scottish provision shows the intention of the section, which is to restore the application of national limitation rules where it is governed by national law, and foreign limitation rules where it is governed by foreign law. So there is no stretch in interpreting 47E(2)(a) to (c) in that way. The real weight or gravamen of this section then becomes what it says about what would happen if there were no such provision.

THE PRESIDENT: You say there is no stretch, 2(a) refers to one stage that is applied under the particular limitation regime prescribed by the Competition Act. You may say logically one would have expected it to bring in the whole of the English limitation regime, but the only way the foreign limitation regime, or the FLPA can come in is through s.39 of the Limitation, there is no other way it can come in, is there?

MR. DE LA MARE: That is right, but that is a hook.

THE PRESIDENT: That is the only hook?

MR. DE LA MARE: Yes.

THE PRESIDENT: But one goes back to s.39, which I think is tab 14, is it?

MR. DE LA MARE: That is right. Just as a reference to "any other enactment" must, as I said earlier, encompass Rome I or Rome II, where they supply a different regime and a different applicable law and law of limitation, subject to the mandatory provisions over rights, we say it refers to any other enactment including the FLPA. That has the effect----

THE PRESIDENT: But it does not apply the FLPA, it dis-applies the Limitation Act –

> "This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by . . ."

the Limitation Act if, in its terms, another enactment governs limitation. So then the question is, does the FLPA govern in its terms limitation on competition proceedings in the CAT? If it does, it has done it throughout.

MR. DE LA MARE: In my submission, it is a hook, but if it is not a hook there is a case for some kind of implied reading in the context of this provision because of the shift of policy, and because of the operation of subsection 2(b) in relation to Scotland.

LORD DOHERTY: Can I just be clear what your position in relation to that is? Is there any particular reason why the reference is to s.6 rather than the----

MR. DE LA MARE: Simply to identify claims in delict.

LORD DOHERTY: But it says more than that, does it not? It says the Act applies as if the claim related to an obligation to which s.6 of that Act applies?

MR. DE LA MARE: In my submission, my Lord, that must bring with it, the interpretation of that section, with the entirety of the PLSA. But if I am wrong in relation to that then one has the same problem in relation to the Scottish legislation that one has in relation to the English legislation, and that is why, in our skeleton argument, we say that the alternative construction of this provision is simply the English limitation rules are applied, and a characterisation test is applied to work out what it is that the foreign law corresponds to in English law terms. That is the alternative interpretation of these sections.

LORD DOHERTY: You see, if s.23(a) applied in a particular case then one could say s.6 did not.

MR. DE LA MARE: I see the argument my Lord makes, and the question is whether you say it is intended to be a narrow reference to only s.6 to the exclusion of every other rule in the PLSA or whether it is intended to be that as the starting point for an analysis of the position through the lens of that rule as then qualified by the further rules that create exceptions, etc. in the PLSA. I say the latter is the natural construction.

In any event, the point about s.2(a) to (c) is this is the only thing that now exists as any even candidate hook to bring back in the FLPA.

THE PRESIDENT: Unless it has been there all along?

MR. DE LA MARE: Unless it has been there all along, which is therefore----

THE PRESIDENT: Which is the Defendants' position, of course.

MR. DE LA MARE: Which is therefore to ignore or qualify the language of s.47A(1) which says that if the claim is in limb 1, i.e. it is a claim you can substantively make, you may make it subject to the provisions of this Act and the Tribunal Rules. So, the Defendants' argument, as I have always accepted, and as I think they accept, is dependent on saying it is not an exhaustive code, and that the pointers in the Act, the fact they are, are really to be ignored, and you are to read it at all times with the FLPA continuing unabated. That is the train of argument.

THE PRESIDENT: That is really what it comes down to, is it not?

MR. DE LA MARE: That is what it comes down to, absolutely. I am seeking to show that point, my Lord. I ask you to note in particular the language of s.47E(1), i.e. the language "for the purposes of determining the limitation or prescriptive period which would apply". That language is again, we say, indicative of an exhaustive code. The reason why I emphasise that is that language is then picked up in the relevant provision of the transitional rules, the 2015 rules (tab 23 authorities 1). The first rule in subsection (1) is a rule for claims that have already been issued.

> "Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 as if they had not been revoked."

Then we have the transitional rules that do apply here. "(2) Rule 31(1) to (3)" – not Rule 31(4) – "of [the CAT rules] 2003 (time limit for making a claim) continue to apply" – I emphasise the word "continue" to apply, not "shall" apply going forward, "continue to apply in respect of a claim which falls within paragraph (3)". Why do they continue to apply? ". . .for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015" in non-collective proceedings under 47A, or in "(b) collective proceedings".

So there is the language of 47E(1) being echoed. You are told that this is the rule, and we say the only rule, setting out limitation or prescription periods applicable to transitional provisions. Then you look at sub-rule 3:

> "A claim falls within this paragraph if-
>
> (a) it is a claim to which section 47A of the 1998 Act applies . . ."

That is a reference to the Act as now is, and there is no dispute that this claim falls within s.47 of the Act as now is, and "(b) the claim arose before 1st October 2015." And that must be arising through accrual of the cause of action, i.e. damage occurring before that date and that, in contraverse, being the case in both claims, so we fall within (3).

Rule 4 then saves 47(7) and (8) of the 1998, they continue as if they had effect before they were substituted by para. 4 of Schedule 8 to the Consumer Rights Act. That is the provision amending the CAT provisions in s.47A.

It is important to see why the draftsman has picked up 47A(7) and (8). The reason it has been picked up, of course, is when you go back to Rule 31, those are the provisions expressly name-checked at Rule 31(2)(a), as identifying the relevant period in relation to which the decision on the basis of which the claim is made must have become final. So, if you go back to 21(2)(a), it is 47A(7) and (8) that are name-checked expressly in that provision.

But the point I was making earlier was that, of necessity, that must also bring with it 47A(5) and (6). Why do I say that? Go back and look at the old s.47A, which is in tab 19. First, let us look at subsection (7): "The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in subsection (6)(a), (b) or (c) may not be brought without permission are . . ." The first thing to note is you have an express cross-reference back to 6(a), (b) or (c) which also must be continued therefore, in order to make sense of the section, and this reference to "may not be brought without permission" are, is necessarily back to subsection 5(b). So the effect of this section must be to say both 6(a) to (c) and 5(b), and when you look at 8 there is exactly the same format. There is a reference in 8 to "in respect of a claim made in reliance on a decision or finding of the European Commission", that is just another way of saying "a matter falling in 6(d)" may not be brought without permission. That must be a reference back to 5(b). In my submission, properly construed this saving must necessarily save not only (7) and (8), it must save (5) and (6) and with it the whole follow-on only architecture of the old regime. This means that in the transitional period if the limitation is being supplied by Rule 31(1) and (2), and that is the "if" – Mr. Hoskins' case is that it is not – so the bits of 31 that he says fall away on his analysis are 31(1) and (2), but not (3). If that is the case then (5), (6) and (7) must have been continued by (4), and that means that effectively, even in relation to a claim governed by foreign law there will be a requirement for there to be an infringement decision, and if you want to bring a claim before the infringement decision becomes final you will need permission under Rule 31(3). Mr. Hoskins' skeleton argument submits that you can apply

in such a case under Rule 31(3) to obtain permission even in relation to a foreign law claim if it is at risk of being debarred on limitation grounds. That is the transitional provisions, and that is why we say the maintenance of (7) and (8) brings with it (5) and (6) as well. But the critical point in 19(2) is this recurrence of the deliberate language of "for the purposes of determining the limitation or prescription period" because it is yet another pointer in exactly the same way as 47E that the Act, and the Act alone, provides the relevant limitation or prescriptive period.

It is fair to say that the case law on Rule 31(3), which is primarily the *Emerson* case at tab 8. It is not probably not terribly helpful to either party in the sense of actually advancing how that discretion may be exercised, but the problem with the old second CAT decision under Rule 31(3) in *Emerson* is, of course, it pre-dated the BCL case law, the proper understanding of when time started running, and so forth, and there was simply no argument about foreign limitation at all, so the issues really are substantially at large. It is fair to say though that there is a view, rightly or wrongly, that that was a discretion that was exercised narrowly, and one can well see why it would be if one was dealing with a regime in relation to which a conventional wait, for the infringement decision to become final and then claim, applies, because the whole purpose of the Act is to encourage parties to 'wait and see', and to generate only the expense for them and for the public purse only as and when there is something that they can see off the back of. The danger of bringing a claim based on an infringement decision before it becomes final is that you incur costs, you start proceedings, and then the decision falls away, and that danger will arise just as much in relation to claims brought on a foreign applicable law, with foreign limitation periods, as it will in relation to an English claim, because it is still a requirement that the claim is based upon a definitive infringement decision.

THE PRESIDENT: So you can manage that danger in the way you manage the case, what work is done under the case, because that danger arises for all the High Court claims.

MR. DE LA MARE: Absolutely, and at the risk of sounding like a sycophant, one of the things that has changed since the early philosophy of this Act, and the modern approach to case management, is one has moved away from a very black letter, or inflexible approach to, or view of the *Masterfoods*' doctrine, towards the more nuanced type of case management approach exemplified by your decision in the *National Grid* case, that is the change. Beforehand the philosophy was somewhat crude. If it is being appealed and the matter is before the Commission you should not really proceed with the national proceedings, you should not take the matter forward. In my submission, that is the philosophy effectively

crudely underlying the follow-on approach. That is why you 'wait and see', you get rid of any prospects of inconsistency between the national proceedings and the infringement decision, and then once you have a definitive infringement decision you proceed to a damages' claim.

I think that is the run-up to the submissions part of the equation, and, Sir, you probably have a feel for some of where I am going already. I think I can take this relatively quickly. Unless there is anything about the legislative regime I can provide further assistance with, what I really want to do is pick up matters from our skeleton argument at para. 56 and following. Like the Defendants, we say there is a two stage approach. We say, and they agree, the first stage is to identify the claims that are in substantive scope. At that stage you dis-apply and disregard all limitation periods. Then there is a second stage at which you identify for those claims that are in substantive scope any rules constraining the ability to advise such claims, and that is where we part company. We say s.47(a)(1) means what it says and the only restrictions are those contained in the Act, and the rules, the old Act, meant what it said in its equivalent provision, and there is no room for jemmying by some form of implication, which is unexplained, how it operates, the operation of the FLPA into this so as to dis-apply Rule 31(1) and (2) of the CAT Rules 2003. They say: "No", you should find some implied limitation upon that plane and express statutory language, to the effect that it is all without prejudice to the operation of the FLPA.

THE PRESIDENT: Do you say s.47A(1) in its terms, applying what you call 'stage 2' excludes the FLPA, which otherwise, as a matter of language, would apply?

MR. DE LA MARE: We say it excludes it because what has happened is that first the Act has told you in express terms to disapply it for the purposes of identifying claims that can be made.

THE PRESIDENT: Yes, that is stage 1.

MR. DE LA MARE: And then it has said once you have such a claim there are only certain places that you can look for conditions as to whether or not that claim can be made, and those places that you may look are the places where limitations are provided by either the Act, or by the rules made under it, and that is telling you, you cannot look anywhere else; you cannot look to any other Statute. That is not a question of implied repeal, or whatever, it is a question of the Act and the legislation setting the parameters of a special statutory jurisdiction, and there was nothing unusual in a case such as this in concluding that a novel statutory jurisdiction has a scope that does not correspond with that which would otherwise ordinarily apply to a civil claim. That point is not even argued in relation to the Limitation

Act. No one is arguing that there is a *sotto voce* saving of the Limitation Act, which has just as much appeal to generality as the FLPA. No one is saying effectively that there are----

THE PRESIDENT: Section 39 of the Limitation Act clearly means that if there is a special limitation period in the----

MR. DE LA MARE: That is a fair point.

THE PRESIDENT: It will apply, so there is no violence to the Limitation Act at all.

MR. DE LA MARE: That is a fair point.

THE PRESIDENT: And that is not found in the FLPA.

MR. DE LA MARE: The point is the dis-application of the Limitation Act comes from s.47A(3), and s.47----

THE PRESIDENT: For stage 1.

MR. DE LA MARE: For stage 1.

THE PRESIDENT: But we are now on stage 2.

MR. DE LA MARE: Yes, the terms of stage 2 are set by 47A(1), which is subject to the provisions of this Act and the Tribunal Rules, and Mr. Hoskins has to read that as saying: "and", for foreign law claims "the Foreign Limitation Periods Act", and that wording is just not there. So he has to argue for some form of implied limitation upon what is, on its face, expressly an exhaustive code. There is no limitation either in the wording of 47A(1), or in the rule making powers that I have showed you. There is no trace of a hint that the legislature thought that you would or should be making special rules for foreign limitation periods, or that there should be a carve out for foreign limitation periods. Indeed, if Mr. Hoskins' construction is correct one would expect para. 11 of Part 2 of Schedule 4 to preclude the making of any rules for limitation in relation to foreign limitation law, because it is off limits, it is governed by the FLPA. There is nothing like that in the section. What it is is a general and comprehensive rule making power when exercised. It has been exercised. Once exercised Rule 31 contains the only limitation rules applicable to these proceedings. That is it. Once Rule 31 falls away after the transitional provisions you have got to look only to s.47E of the Act, which has now put limitation on a statutory as opposed to rule making basis.

That is why we say, look at all the pointers identified at the very beginning of my submissions. The language of s.47A(1) not (4), the language of the rule making power, and the content of the rule, and in particular in the transitional provision there is the language of

Rule 119(2), these are the rules for prescription and limitation, and all of those suggest that this is a comprehensive code.

However you put it, my learned friend cannot escape from the fact that his case to you is an invitation to read into that scheme some form of implied limitation to it in the case of claims governed by foreign limitation. There is no trace of it at all.

That is the point that we are driving at in the first and second points we make in our skeleton argument at paras.60 to 67. Indeed, I think, broadly speaking, the first point we make at 61 through to 63 is agreed, because that is all about limb one, and we are in agreement about limb one.

The genesis of disagreement is at 64 and following. The short answer to Mr. Hoskins' argument is that the language of s.47A provides no hook----

THE PRESIDENT: Yes, I think we have got that point.

MR. DE LA MARE: Let us then turn to policy and purposive interpretation, the third point we make at 68 and following. The policy of the old s.47A is evidently very different to the policy of the new s.47A. We have called them, somewhat ponderously, the "follow-on tolling policy" and the "alignment policy". I take full responsibility for all nomenclatorial crimes, but hope that captures the difference between what is going on. One has to understand the backdrop to the making of s.47A, and the best place to glean is actually in the DTI White Paper that preceded the reforms in question. You will find that in the second authorities bundle at tab 47, the DTI report, "A World Class Competition Regime", Patricia Hewitt's report of 2001, which basically advocated all of the changes that came into the Enterprise Act in 2002, one strand of which was obviously the creation of this new s.47A jurisdiction. That is primarily addressed, if you look at the contents page, the second page of the White Paper, "Real Redress for Harmed Parties" in Chapter 8. This explains the rationale for the introduction of private actions. I am not going to read through it, but I do ask you to read it through. In summary, what the author of the Paper is saying is that there are no cases for enforcement of damages claims being brought at all in the UK. There is anecdotal evidence that settlements in relation to such potential cases may have been made, but there are no cases above the water line. What is needed is something to incentivise the bringing of such claims, so that parties obtain redress, so that such redress constitutes part of the overall deterrent effect of the competition regime, so that you inject what in the jargon is called "Privatised Attorney Generals", and you increase the costs of breaching competition law.

Obviously, in that context, follow-on damages claims are the lowest of low-hanging fruits. If you cannot even bring, and there is not even being brought, a follow-on damages claim, that is indicative of the fact that there is something wrong in the system. The rationale, therefore, of this Act in its original conception was to address that low-hanging fruit and to make it as easy and as cheap and as simple as possible for parties who have been shown, or parties who say they have suffered harm as a result of a demonstrated infringement to bring the claims in question. If you want an analogy, it is a bit like compensation orders in the context of the commission of a financial crime. Once the financial crime is demonstrated there are then provisions to go on and investigate how much compensation parties harmed by that crime should be paid. That is the philosophy of the section and its original conception. That is why it takes a very different approach to limitation to that conventionally adopted in the Limitation Act and elsewhere. That is its rationale.

If there were any doubt about that, and we can have an argument about whether it is permissible in Hansard terms, but I suspect is, in itself, uncontroversial.

THE PRESIDENT: I am not quite clear, what is the point you are trying to make? The original statute, when private actions came before this Tribunal, was limited to follow-on cases, and any other case had to be in the High Court or the Sheriff's Court, or wherever. So it was a limited jurisdiction created for the CAT, and, being a follow-on case, it created this limitation regime that you have shown us. What, beyond that, do we get out of it?

MR. DE LA MARE: The rationale for the special limitation rules applies to cases predicated on a demonstrated infringement contained in an infringement decision. It is a rationale that says the party should be free and required to 'wait and see' if the infringement becomes a final infringement. So this is a constraint on when they can bring the claim - that is why you get the restrictions on the ability to bring the claim before it comes final; and an enabler to bring a claim once it has been shown. It is not a jurisdiction that applies across all torts. It is directed not just to one tort but to a tiny sub-category of torts, those claims that can be based on a follow-on fashion. Of course, those claims, themselves, immediately have a number of special characteristics. The first is that competition abuses, particularly cartels, are particularly difficult to investigate and to ascertain because they are, by nature, secret, collusive, concealed, dishonest. Hence the regulator has special powers to go in and find them and identify them, and can act in a way that an individual cannot be expected to act. So that is the first part of the 'wait and see'.

The second unique feature is that barring considerations of damage all of the conditions of liability are substantively supplied by Articles 101 and 102, either directly or in the Chapter

I and Chapter II provisions indirectly. Therefore, you are not dealing with a tort that may exist in a variegated state across the EU, you are dealing with a tort that is substantially harmonised in which the parties affected, when relying upon a Commission decision, are reliant upon a common regulator to investigate something that is a multi-jurisdiction, multi-party tort. All of those features put together call for and explain the special approach to limitation, without argument adopted domestically, and all of these explain why it makes sense to apply exactly the same rule to a claim that happens to be grounded, or arguably grounded, upon foreign law. All of those policy considerations and effective enforcement that need to rely upon a regulator, a largely harmonised tort, the need to encourage private claims, there were no private claims being brought anywhere else in Europe at this time. The first case to surface - I remember it well, Mr. Hoskins and I and many in the court were involved in it - which surfaced in the High Court was the *Provimi* case that started in, I think, 2002.

THE PRESIDENT: That was before *Arkin*, was it?

MR. DE LA MARE: No, it was not.

THE PRESIDENT: I thought *Arkin* was some time before it, but I cannot recall.

MR. DE LA MARE: Certainly the *Moy Park* case, which was the spin-off from that case was the first case in the CAT. It is not as if these claims are being widely brought anywhere else in Europe. All the problems of enforcement and enforceability have existed generally, which is one of the rationales behind the damages directive.

THE PRESIDENT: Yes, but the DTI in that White Paper was not seeking to set up English courts or this Tribunal as a sort of haven for people from other European countries who are sadly unable to bring their case there.

MR. DE LA MARE: That is not my submission. My submission is that the provisions that were made, and there is nothing in the statutory materials one way or the other to suggest that the question of foreign law was expressly identified and addressed. It was not and that is why you have to address it, Sir, at large.

THE PRESIDENT: I think that is almost certainly right.

MR. DE LA MARE: The point I am making is that when you look at the policy of the Act, the policy of the Act is just as compelling, if not more compelling, in the case of foreign law claims as it is in relation to domestic law claims.

That really leads on to, what would the consequences be if you adopted Mr. Hoskins' approach? What will then happen is that the policy of coherence and 'wait and see' is very substantially traduced. In that context, it is not enough to assume that the question is: is the

claim, in fact, governed by foreign law? If you are going to work out whether this regime is to work as intended, cheap, effective, simple, etc, you have to ask whether there is a risk of foreign law being argued to apply. It is enough to create substantial problems under the regime if there is a real risk that defendants in an appropriate case, or claimants in an appropriate case, will be arguing for the application of a rival law. Once that happens, if foreign law supplies a relevant limitation the result under the regime is chaos. It is a substantial undermining of the 'wait and see' architecture of the Act. You start with a situation where a foreign limitation period expires before the infringement decision is taken. There will be a number of cases where that will occur if the foreign law does not apply a generous approach in knowledge - the Swedish case being an example - or it may be the case where there is an investigation the broad parameters of which are entirely public, but which take a very long time to pursue through to completion, such that time is arguably ticking all the while. That is the first scenario. In those cases those claims, if they are arguably governed by foreign law, are immediately going to produce problems under the Act.

THE PRESIDENT: One can see all that, but there is another policy quite separate from that, which underlies, it may be said, the 1984 Act and the abolition of double-actionability in 1995, which is that if the substantive law of the tort is, say, Belgian, a claimant should not be able to escape what is part of that substantive law, namely the Belgian law of limitation, by not bringing their case in the Belgian courts with whatever problem or not they might encounter that, but by shopping for another forum, namely ours, and getting the benefit of a more generous regime over here.

MR. DE LA MARE: It is always unhelpful to start the analysis with necessarily assuming that what is engaged is forum shopping.

THE PRESIDENT: The whole approach, as you rightly, I think, Mr. de la Mare, explain it to us, underlying the 1984 Act was that there was a lot of criticism of the old position because it encouraged forum shopping. That was the policy there. I appreciate what you say about the policy of the follow-on regime introduced in 2002 with s.47A, but there is also this other policy where the substantive law of your claim is a foreign law.

MR. DE LA MARE: I entirely accept that, and my answer to that, Sir, is that is undoubtedly the general policy of the FLPA applied in general fashion to utterly general conflicts of laws rules. The minute you get into a *lex specialis* that is dealing with a very narrow sub-set of particular claims in relation to which different competing public policy considerations arise, the question is, what prevails, the *lex specialis* or the *lex generalis*?

The problems of forum shopping addressed by the 1984 Act are entirely at large and entirely general in nature, whereas in the context of the present case what is said to be forum shopping is effectively bringing a claim that has been tolled or preserved by reason of the fact that a regulator has decided that you, the wrongdoer, have committed an infringement. That is a very, very different starting point to the kind of inquiry that you undertake under the FLPA. It is a complete policy jump-off point because you are dealing with a category of tort it is difficult to establish in relation to which there is a problem of information such that the claims are being brought in relation to which there are massive risks in bringing such claims. You may not have the information to make an informed assessment of the applicable, for instance, until such time as you have an infringement decision telling you----

THE PRESIDENT: You make a very eloquent case for Belgium to have a special follow-on limitation rule, but if they do not, then I do not know, maybe they do, or maybe they have certain provisions. The question is, should the English tribunal nonetheless be open to those cases when the substantive law is not our law?

MR. DE LA MARE: With respect, the question is, should a regime that is, on its face, open to such claims because it sets out what appears to be an exclusive regime, be distorted by the injection of a different more general rule in circumstances where the general considerations are more than offset by the very specific policy considerations that led to the special rule being applied to English and Welsh cases?

THE PRESIDENT: Yes.

MR. DE LA MARE: That is the question, and it is Mr. Hoskins who bears the burden of doing the violence to the language of the statutory scheme. We say that the consequence of doing so will be to inject all kinds of uncertainty into the operation of this provision. The first example I was giving, and forgive me for giving the example, because I think it is important you have them - you may not agree with them, but let me reiterate them - is that foreign limitation may have expired before there is an infringement decision, which, on Mr. Hoskins' analysis, debars the claim.

The second is that foreign limitation may expire in the period between the infringement decision and any such decision becoming final, in which case one has to substantially re-cast the working of the Rule 31(3) discretion in order to turn it into a means of preservation of the limitation position, which is, in my submission, precisely the opposite of how the CAT is intended to function.

THE PRESIDENT: These are the problems that are addressed on a European basis by the damages directive.

MR. DE LA MARE: That is right, but we have to look at the policy of the Act as it was made in 2003 and as it has been preserved under the transitional provisions.

It is all very well to talk about the problems that may be created. This is a national response in circumstances where there is no such common framework, and yet the obligation to take the case may be mandatory to the application of the jurisdiction roles, and due in particular to the mandatory rule in what is now Article 4 of the Recast Regulation. It may be that suing anywhere else is either impossible or very dangerous.

So the second problem is in relation to foreign limitation expiring in the period in between.

The third problem is foreign limitation is substantially longer than the two years provided by Rules 1 and 2. Mr. Hoskins' argument must, as I have already indicated, cut both ways, to go back to my settlement example.

THE PRESIDENT: That is presumably accepted, if foreign limitation is longer, you get the benefit of it.

MR. HOSKINS: (Without microphone) Sir, I was talking.

THE PRESIDENT: What Mr. de la Mare is saying is that if foreign limitation applies, as you say it can, then it has the consequence not merely that if the foreign limitation period has expired, the claim cannot be brought, but if the foreign limitation period is longer than the one that would apply under the English rule, the rule under the statute, then you can get the benefit of it.

MR. HOSKINS: Absolutely correct, save in so far as the common actionability rule applies, and that is the saving in s.1(2) of the Foreign Limitation Periods Act.

THE PRESIDENT: It cuts both ways.

MR. DE LA MARE: I am grateful for Mr. Hoskins' clarification. That leads to this bizarre position that takes a little bit of getting to. If, therefore, Rule 31(1) and (2) is dis-applied and you have lost, therefore, the limitation rule that is applied to s.47A in its new enlarged form on a transitional basis, you replace a rule of limitation that, on its face, appears to be follow-on only, with a rule of limitation that is not. If foreign law is providing the Limitation Rules, then it must be the case that if the case is governed by foreign law you can bring a stand-alone case in the interim period so long as it is brought with the foreign limitation period. That would be a bizarre consequence.

When you take into account the plain and clear language of the statutory scheme, of the policy behind it, and the equal consistency of that policy with eliminating arguments about

foreign law that may arise wherever there is a risk that foreign law applies so as to remove the necessity for protective proceedings, issuing claims before the infringement decisions become final, case management disputes about that, and stays, and matters of that kind, when you take into account the four consequences, the strange consequences that would flow, the loss of coherence that would flow, in my submission, there is a clear case that the Act should be interpreted precisely as we suggest and the foreign applicable law has no relevance.

The only other two matters I need to address are Mr. Hoskins' case on Rome II and his use of the various statutory materials, which I think I can take relatively briefly.

Consistency with Rome II appears to be a reasonably substantial part of Mr. Hoskins' skeleton argument, paras.21 to 26, and he uses the anticipated inconsistency with Rome II to advance a *Marleasing* interpretation in relation to this legislation and these rules as they apply now, even though Rome II does not apply. There are five points to make in relation to that. The first is simply that since it does not apply it is completely irrelevant.

The second point is that were it to apply one has to embrace the consequences of it, namely that it would also alter the law applicable to the dispute, and it would trigger the special rule contained in Article 6.3(b). You cannot take the pieces of Rome II piecemeal, only the parts you want, and as I have demonstrated that would make a fundamental difference to the analysis of applicable law in the Pilkington case, and in any case based upon a UK anchor defendant, because you would be able to say either claimant choose English law as the applicable law or Scots law as the applicable law. The spectre of massive inconsistency conjured is really, when you look at it, much more modest.

The third point is that Rome II works in any event by sitting on top of the domestic regime. You can see that from s.8 of the FLPA, s.23A of the PLSA. They are all predicated upon the Rome II or Rome I norms having direct application, so as to displace national law where they apply.

That leads to the fourth point. That being so, there is simply no scope for Rome I or Rome II triggering some kind of purposive interpretation obligation so to re-cast the meaning of statutory provisions in cases to which they do not apply. For the cases to which they do apply you just go to those provisions, and, subject to the argument under Article 16 about the special limitation rules being mandatory provisions, if our argument falls away you apply Rome II. It does not work to alter the natural and ordinary meaning of a statutory provision to which the provision does not relate. That is *ICI v Colman*, and that whole line

of case law. There is no reason to use it to alter the meaning of a statutory instrument in a case to which it does not apply.

That is the fourth problem. We are not into the terrain of *Marleasing*. It is an argument which, if it is made good on appropriate facts, becomes an answer in and of itself. You cannot bootstrap that into the present case.

The fifth point is that the primary potential problem with Rome II is in its application to cases in the transitional period because that is the period in which the old follow-on approach with the different limitation rules is applied. After 1st October 2015 when the new s.47E approach comes into force and alignment comes into force, there is no problem. There is nothing inconsistent in any event in applying Rome II in those circumstances.

Lastly, obviously, there is the Article 16 point, which would have to be addressed in a case where Rome II was genuinely in play, but that is not this case.

So Rome II, with the best will in the world, one can see why one tries to reach for it, but it actually has no forensic relevance to this case whatever.

Then the last point, legislative material: Mr. Hoskins seeks to rely upon two forms of legislative material. First of all, there is the Hansard material relating to the new s.47A(4); and secondly, there are Law Commission Report references and Hansard debates in relation to the background of the FLPA.

Let me take the Hansard material in relation to s.47A(4) first. We do not accept there is any proper *Pepper v Hart* basis to refer to that material. There is no ambiguity in s.47A(4). The argument really is in relation to s.47A(1), and all of the rule making powers and the contents of the rules. We are all agreed that the first function, the limb one function, is discharged by 47A(4). That is the first point, there is no *Pepper v Hart* ambiguity.

The second problem with the passage upon which Mr. Hoskins relies is that it is completely irrelevant in any event, because it does not address this question of foreign limitation anywhere. What it is really directed to is the limb one issues. It is not in any way directed to the comprehensiveness of the regime.

THE PRESIDENT: I should tell you, I have not read it - I will see if I am taken to it----

MR. DE LA MARE: I will let Mr. Hoskins make of it what he wishes, but we say the second----

THE PRESIDENT: -- other than the quote in the skeleton.

MR. DE LA MARE: That is all he relies upon, as I understand it. The third reason why it takes one nowhere is in relation to language, which is identical to the language which was in the old 47A in any event. So the idea that this is some new intention being inserted is really difficult to stomach.

That then really leads to the FLPA materials. Of course he can refer to the Law Commission reports and the Law Commission materials, and as you have heard----

THE PRESIDENT: I think it was premised, Mr. de la Mare, I may be wrong, on a belief which turns out to be mistaken that you were relying on s.47A(4) as having a broader effect than in fact you have submitted. You have confined it to applying to limb one, which I think is also Mr. Hoskins' and Mr. Johnson's positions, and you have based your case very much on s.47A(1), but I think all this material was directed to the apprehension that 47A(4) might be prayed in aid as having a broader application.

MR. DE LA MARE: I think that is in part, Sir. I think it is also right, but I will be corrected if I am wrong, to explain the underlying policy of the FLPA. In respect of that, I have accepted that broad general policy. I do not have any argument with that. It is abundantly plain that the policy was to get rid of the old substantive/procedural distinction and to avoid the systemic opportunity for forum shopping on applicable law that that provided for. I do not think there is any dispute between us as to what the general policy is. What that material does not in any way do is illuminate how you are to resolve the situation once you get down to the nitty-gritty of an Act not directed at torts in general but a specific sub-set of torts with all the special features I have already identified.

Unsurprisingly, Law Commission Reports from back in 1980s long before there were euro torts, and long before the doctrine of effectiveness was introduced, and long before we were as interested as we are now in competition damages, do not even begin to grapple with that issue. So my submission in relation to that is, interesting as this historic material is, it does not take matters any further, and the reference to the Hansard materials is, with respect, completely impermissible under *Pepper v Hart*, because again there is no----

THE PRESIDENT: Let us see where we get to with that. You need not traverse this now, you will have a right of reply.

MR. DE LA MARE: I am grateful, my Lord. So, unless there is anything I can assist with further - I am sorry it has taken so long, the legislation----

THE PRESIDENT: You had to take us through the legislation. Thank you very much.

MR. DE LA MARE: I am grateful.

THE PRESIDENT: Yes, Mr. Hoskins?

MR. HOSKINS: Good afternoon, Sir. You are absolutely right, Sir, that there has been a change in the way the case is put, because whilst in the skeleton argument reliance was placed on the wording of s.47A(1) and s.47A(4) - in particular it is said s.47A(4) because it referred to any limitation periods being disregarded - that was not an answer in itself, and clearly that

has changed. That is helpful. I do not make any point. The law is what the law is.

Mr. de la Mare then tilts at certain windmills. The windmills were only there because that is the way the case was put. So I can clean out a lot of what we say. I welcome that it has been clarified. I am glad we managed to persuade Mr. de la Mare that we were right on s.47A(4).

Let me work through how the structure works. Can we go to A1, tab 18?

THE PRESIDENT: That is s.47E?

MR. HOSKINS: That should be s.47A.

THE PRESIDENT: This is new s.47A?

MR. HOSKINS: Exactly, and this is the one that applies to these transitional claims.

"A person may make a claim to which this section applies …"

So let us focus on those words for the moment -

"… in proceedings before the Tribunal …"

and I will come back to "subject to the provisions of this Act and Tribunal rules". That is Mr. de la Mare's new focus.

Then one looks at s.47A(2) to find a definition of a claim to which this section applies:

"This section applies to a claim [first of all] of a kind specified in subsection (3) …"

So damages, money, etc, but importantly for our purposes too:

"… which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom …"

So you get a waterfall of definitions, (1) a claim to which this section applies; (2) it gives you two ingredients to determine a claim to which this section applies, including one which may be made in civil proceedings brought in any part of the United Kingdom. Then you get a further definition of that in s.47A(4):

> "For the purpose of identifying claims which may be made in civil proceedings …"

So there is the language again -

> "… any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded."

So how does that work? First of all, the Tribunal only has jurisdiction to hear claims which could be brought in civil proceedings in any part of the United Kingdom. The effect of the statutory framework is that in considering whether a claim could be brought in civil proceedings in any part of the United Kingdom, you disregard any limitation arguments. That is quite a common circumstance for jurisdictional rules because you do not want, when you are trying to determine whether a particular court or tribunal has got jurisdiction, to

have to then get into substantive arguments - for example, what is the applicable law, what is the limitation provision under that law? Is this particular claim statute-barred or not? So the effect of s.47A(4) is that, quite clearly, for the purpose of identifying claims which may be made in civil proceedings, but only for that reason, you disregard limitation rules. If, having applied that test, the Tribunal does have jurisdiction to hear a claim under s.47A, of course then it has to consider all relevant issues, including the applicable law of the claim, not just for limitation purposes, but generally, what is the applicable law of the claim? If the applicable law is English, Scottish or Northern Irish, then the limitation rules established in Rule 31 of the 2003 Tribunal Rules apply. That happens pursuant to s.47A(1).

If the applicable law is foreign then the limitation rules established by that law will apply, and that is pursuant to the Foreign Limitation Periods Act or Rome II. As far as I understand it, that is now common ground between us. It was not in the skeletons, but it is as a result of Mr. de la Mare's oral submissions.

THE PRESIDENT: I do not think the second part of that is common ground, if the applicable law is foreign.

MR. HOSKINS: I am sorry, I need to be more precise, I meant the effect of s.47A(4)----

THE PRESIDENT: That is common ground.

MR. HOSKINS: -- as I have described it, is common ground. You are absolutely right.

THE PRESIDENT: But not the point you are now making.

MR. HOSKINS: Of course, that is what the case is about. My powers of persuasion may be good, but they are not that good!

Let us go back to s.47A(1), and the words which are now focused on:

"…subject to the provisions of this Act and Tribunal rules …"

Mr. de la Mare's submission is that the Act and Tribunal Rules provide an exhaustive system of law for the resolution of these disputes - "an exhaustive code" was a phrase he used quite often, but that is clearly incorrect. It is clearly not a self-contained system, for example, which excludes all application of foreign law because in the MasterCard case the claimants are actually asserting that Belgian law applies to at least part of their claim in the CAT. So it cannot be that s.47A(1) means that when you are sitting in the CAT you are only looking at answers you can find in the Act, in the Competition Act 1998, or in the Tribunal Rules, it is not exhaustive.

The best, therefore, that Mr. de la Mare's argument can be is that in so far as there is a specific rule set down in the Act or the Tribunal Rules then that might trump a general rule.

That is the highest he can put his case. He has actually put it too high, but that is where he could go.

THE PRESIDENT: Can you just help me. You have made the point that the Claimants were saying Belgian law applies in MasterCard, obviously not for the purpose of limitation but for other purposes. What is it in general terms, what is the particular point on Belgian law where it differs from English law for the purpose of the MasterCard case? Do you know that?

MR. HOSKINS: I am not sufficiently close to it, but I can find out. It is probably a question for the Claimants to ask, why do you want to rely on Belgian law?

THE PRESIDENT: It is formally, but someone might be able to help us.

MR. HOSKINS: I do not know the answer.

THE PRESIDENT: I am just curious as to what it is about Belgian law that actually makes a difference?

MR. BEAL: Sir, if I can assist----

THE PRESIDENT: Yes, Mr. Beal, thank you.

MR. BEAL: The reason why we have pleaded Belgian law is because we are seeking to rely on an infringement of an EU Commission decision which does not ground a cause of action, save through the prism of a national law. So we have to have an applicable law to determine the tortious basis upon which we bring the claim, even in the confines of a follow-on claim before the CAT, because the CAT will still need to look at things such as is there a remedy available for the breach of the Commission decision, what is the nature of the remedy, are damages available, is interest available, etc. Those are issues to which the answer has largely been given by the European Court of Justice in a case called *Manfredi*, which applies a common approach to the fact that, yes, damages are available, yes, interest is available, regardless of which law you are looking at which is the prism through which the Article 101 claim is brought.

That, in a nutshell, is why we have pleaded Belgian law. It is also obviously right that, until the Damages Directive, there is no pan-European approach to the issue of limitation, and so we have to plead a national law for the purposes of our follow-on claim in order to deal with the limitation issue.

THE PRESIDENT: Although you say the limitation is governed not by the foreign law?

MR. BEAL: That is the very issue for this----

THE PRESIDENT: Yes, so you would not have needed, on your case, to plead it for limitation, it is irrelevant on your case, is it not?

MR. BEAL: The issue of limitation, we did not plead it in the CAT Particulars of Claim because we plead to limitation as a defence responsively in a reply. That is what has happened in the High Court.

THE PRESIDENT: So you did not plead Belgian law in your Particulars of Claim?

MR. BEAL: Well, we did, but we did it for the purposes of identifying the causes of action that we were seeking to articulate before the CAT for the purposes of bringing a follow-on claim that is premised on a given system of law.

THE PRESIDENT: Infringement of Article 101 is not, in itself, a cause of action?

MR. BEAL: It would be a cause of action in this country, but it does not cover loss that is necessarily sustained outside the UK.

THE PRESIDENT: I see.

MR. BEAL: So in order to bring within the scope of our claim loss that is suffered not only within the scope of the territorial jurisdiction of the UK, but also in other markets which may well be an issue for debate as to what is the applicable law for a given market. We, applying for example the 1995 Act, have recognised that the applicable law of the tort for the damages claim under Article 101 can be governed by a single law which is Belgian if that is the law of the tort which has the most significant connection with the prohibition of 101 that is being infringed in this case.

THE PRESIDENT: There may be differences then on the nature of the remedy as between Belgian law and some of the laws on which the Defendants rely.

MR. BEAL: Following *Manfredi*, those differences will be slim. I think my learned friend, Mr. de la Mare, is keen to take up the point.

MR. DE LA MARE: (without microphone) … in anticipation of this very point being raised, and in anticipation of potentially losing the point, because one has to have a positive case in any event, if one is to investigate what the applicable law is, as to what the applicable law is. We have to advance, for instance in *Pilkington*, that our positive case is that it is English law, and my learned friend will make his positive case that it is French or Spanish law, which will then formulate the issues for the resolution of that point if you are not with us on our primary point of statutory construction.

THE PRESIDENT: I am trying to think of it for relevance other than to limitation. Yes, thank you. Sorry, Mr. Hoskins.

MR. HOSKINS: No problem at all. Sir, the submission at best the Claimants have to make is that there is a special rule, or set of rules, in the Acts or in the Tribunal Rules which in a sense oust the Foreign Limitation Periods Act. That is clearly not the case, because Rule 31

is a limitation rule. You bring your claim after the infringement has been established and then within two years, subject to the suspensory effect of appeals, etc. It is a limitation rule. The FLPA is not a limitation rule, it is a private international law rule. If we go to the FLPA, it is at tab 15 of the first authorities' bundle. Look at the long title:

> "An Act to provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure."

This Act identifies for private international law purposes, in which law you are to go to to find the limitation rules. It does not, itself, establish any limitation rule, i.e. you must bring the claim within five years, six years, whatever.

There is no equivalent in either the 1998 Acts, or the Tribunal Rules, which deals with that private international law issue, and therefore the mere fact that our limitation period is set down in the rules cannot oust the application of the FLPA. That is the answer, that is why the FLPA has applied all along, because it is quite clear, and it is common ground between us, that you can bring a claim in the CAT, which is governed by foreign law as the applicable law and yet there is no specific private international law code for the Tribunal. Therefore, the general rules of private international law, including the FLPA apply.

The reference to the Hansard material related to the construction of s.47A(4). There is now no longer a dispute between us, therefore there is no need for the Tribunal to go to Hansard material to resolve the interpretation of s.47A(4).

I have already explained , and I think it is actually a complete answer on the construction of 47A, including 47A(1), and I could sit down now, but let us just take it a wee bit further. Our interpretation ensures consistency between s.47A of the 1998 Act, and s.1(1) of the FLPA, because what we are saying is for proceedings before the Tribunal under the 1998 Act, you apply the FLPA. The interpretation proposed by the claimants would, of course, lead to a conflict between this particular regime for foreign damages actions in the CAT and the FLPA, because they say even if a foreign law is applicable to a claim in the CAT it is the English rules in Rule 31 which apply, therefore there is a conflict.

As a matter of general construction we say our interpretation should be applied for two reasons. First, because an interpretation which ensures consistency between statutory provisions is preferable to one which does not. The second point is, as a matter of general interpretive principles, Parliament should not be assumed to have intended to create an exception to the generally applicable rules contained in s.1(1) of the FLPA in the absence of

clear wording to that effect, and there is no such clear wording in s.47A(4) of the Act. So, I have my case on the wording and construction of 47A(4), I have a case based on those general principles of construction.

In relation to Rome II, the Rome II Regulation was adopted on 11th July 2007, that is the date of adoption, it is not when it came into effect, that is when it was adopted. Mr. de la Mare has taken you to the substantive provisions. Article 6(3) establishes the rules to be applied to determine a law applicable to a non-contractual obligation arising out of a restriction of competition, and Article 15 defines the scope of the law which is then applicable under the Rome II Regulation.

Article 15(a) then establishes that the law identified by Rome II must govern any issue of limitation. Again, this is all common ground. It follows from that that if, pursuant to the provisions of the Rome II Regulation, a foreign law is applicable to the claim, then Rome II requires that the provisions of that foreign law governing prescription and limitation must be applied to the claim. Rome II helps you identify the applicable law, and then tells you you must apply the limitation rules of that applicable law.

In cases where Rome II applies, the Claimants' proposed construction of s.47A is inconsistent with Rome II, and they accept that, it is para.83 of their skeleton argument. One of the answers given in the skeleton to that is, inconsistency with Rome II does not matter here because the particular claims which are before us are not covered by Rome II, because Rome II applies in respect of events giving rise to a claim which took place after 11th January 2009.

THE PRESIDENT: Yes, but the interpretation of the statute must be one that will apply to all claims.

MR. HOSKINS: That is what I am going to come to because it is quite a fine point, this particular Rome II point.

It is important to understand what the Claimants' position is in the light of Rome II. What they say is that all claims in the Tribunal, which are based on events which took place before 11th January 2009 are subject to the limitation rules in Rule 31 of the Tribunal Rules. They say for claims which are covered by Rome II the position is different. They have accepted that claims based on events which took place after 11th January 2009 would be subject to the limitation rules under any applicable forum law which is identified by Rome II.

So you have this really uncomfortable bifurcation for a case which is supposed to be based on simplicity. They are saying events before 11th January 2009 – Rule 31; events after 11th January 2009 – applicable law, for limitation.

It is possible in principle, and this goes to the point you just put to me, sir, that you could have a domestic provision which is on the Statute book, and then a piece of the EU legislation is adopted and, as a result of the adoption of the EU legislation you have to interpret the existing domestic law in a different way. That is theoretically possible. I accept, as a matter of law, the adoption of a subsequent piece of EU legislation cannot change the meaning of the domestic legislation for all the years before the EU legislation was adopted. I think that is the point that Mr. de la Mare was trying to make against me, but it is accepted it is right.

MISS DALY: Can I ask you a question? Are you saying that between 2007 July and its enactment there is a shadow that is cast by Rome II?

MR. HOSKINS: No, I just give you that as the date it was adopted. The crucial date is the date it came in – its scope of application is determined by whether events took place before 11th January 2009 or after.

THE PRESIDENT: I am not quite clear what is the relevance of the date of adoption?

MR. HOSKINS: No, I was telling you when it was adopted.

THE PRESIDENT: Right, but it does not affect the argument?

MR. HOSKINS: No, it was intended to be helpful.

THE PRESIDENT: There are lots of things, Mr. Hoskins, which may be interesting, but----

MR. HOSKINS: I am reassured that you think everything I say is of great import. I am slightly sad to have blown that reputation. 11th January 2009 is the really important date.

On the Claimants' approach you get this bifurcation - Rule 31 and then foreign law limitation rules apply. At least our interpretation has the benefit of ensuring a seamless and unchanging interpretation of s.47A(4), you do not have that flip. There is actually a legal argument as to why you should adopt that, and it is because the policy requirements of Rome II, which is that the applicable law should govern limitation is precisely the same as the policy requirement behind the FLPA – foreign law should govern limitation.

You can take Rome II into account and say that, whilst the adoption of Rome II cannot change the interpretation of a domestic statute for the period of the adoption of Rome II, the policy within the FLPA and the policy in Rome II leads to a situation in which you should have the same result for both. You have seen, Mr. de la Mare showed you in the various domestic statutes, where Rome II applies, the FLPA does not. Now Rome II has just come

in and taken the place of the FLPA, they are the same pieces of legislation, and that means the same result as a matter of statutory construction, s.47A should apply.

Mr. de la Mare raised a new point orally, which was I think more a legal interpretation point, a point of practical input. He said under Article 6(3) of Rome II it might be possible to elect the law of the jurisdiction in which they are suing, and he took you to that.

THE PRESIDENT: Yes.

MR. HOSKINS: He said that if they choose English law there will be no conflict with Rule 31. That is not a rule of statutory construction, that is just happenstance. If someone happened to choose English law as the applicable law then there would not be a conflict with Rule 31. That is not how you interpret legislation.

There are a number of points in relation to that. There is not a free choice on a claimant to choose whichever applicable law they want. There are conditions laid down in Article 6(3) of Rome II.

The second point, which leads from that, is, of course, a conflict with Rule 31 may well arise where the claimant is not able to choose English law. That is assuming it would land in the Tribunal.

The third point is choice: Article 6(3) does not mandate. It says you can have a choice in certain circumstances, and as the MasterCard case shows not every claimant who chose English jurisdiction would choose English as the applicable law, and therefore we get this possibility of a conflict with Rule 31.

In relation to purposive interpretation, just because the UK saw fit to have a particular scheme for follow-on actions, it should not be assumed it was going to export and impose this scheme throughout Europe for the benefit of Europe so everyone could come here and take advantage of the Tribunal and the limitation rules. I am sorry, that clearly does not run, but let me be a bit more forensic about why not, rather than just repeating it, to show how ridiculous it is.

First, think about it as a matter of statutory construction. Does our interpretation render s.47A ineffective? The answer is: clearly not, it is effective under our interpretation. If the law applicable to a claim is clearly English, Scottish or Northern Irish, then a claimant is entitled to take account of the 'wait and see' provisions, no problem, and there have been between 20 and 30 s.47A cases brought before the Tribunal in its history. There are other problems with s.47A, but this point has not stopped cases being brought forward to date.

If the law applicable to a claim is clearly foreign, then a claimant will know that the limitation rules of that law will apply to it on our interpretation. Again, not a problem.

If it is unclear what the applicable law is then a claimant has a choice. They can commence proceedings in the High Court. Remember, that is what both these sets of Claimants actually chose to do in this case. They are not waiting and seeing, they went to the High Court. Anyway, a claimant can always bring a claim in the High Court, or they could seek permission from the Tribunal if they wanted to bring a claim after the adoption of a decision but before the appeals had been exhausted. If a claimant came to the Tribunal and said we want to be able to come to the Tribunal but we have this risk because it is unclear what the applicable law is, we would like the Tribunal to grant us permission and then simply to stay the proceedings so that no money is wasted until the appeal process in Luxembourg is resolved. The Tribunal would give that permission.

Mr. de la Mare referred to *Emerson* and said that permission is to be granted sparingly. There are actually very few cases on permission, but what *Emerson* does say is that in considering whether to grant permission or not, the overriding principle to be applied is justice. What is the interests of justice?

So, if there is uncertainty to applicable law, it can be dealt with either by going to the High Court or coming to the Tribunal and asking the Tribunal to act justly, and one can have every faith that it would.

Let us be honest, uncertainty in relation to limitation is not uncommon, it is a daily risk for litigation lawyers and it is managed, for example, by bringing proceedings on a protective basis, if you think that is what needs to be done, and then if needs be, also staying them.

But it is the tail wagging the dog to say that because there might be uncertainty about the applicable law, and therefore there might be uncertainty about limitation, that one should interpret s.47A in a way that dis-applies all the limitation rules that one would find in foreign laws which would be otherwise applicable to the claimant.

THE PRESIDENT: Would that be a sensible point?

MR. HOSKINS: It would. I have almost finished but it has been a long morning.

THE PRESIDENT: How much longer have you got?

MR. HOSKINS: About 10 minutes.

THE PRESIDENT: I think we will come back at five past two.

(Adjourned for a short time)

PM START

THE PRESIDENT: Yes, Mr. Hoskins.

MR. HOSKINS: Good afternoon, Sir. I was dealing with purposive interpretation, and I think really the essence of the Claimants' submission on the purposive interpretation is that in

order to avoid any uncertainty that might arise in relation to the applicable law a single limitation period ought to be applied to all claims in the Tribunal regardless of the law applicable to them, it is a sort of plea to simplicity. If the law is difficult we will cut through it and just have one limitation rule.

Another problem with that is that it contravenes a basic principle of private international law. We see it in the Law Commission Report. Mr. de la Mare has accepted the policy of forum shopping, but it is a little bit more than that. But as a good summary of what is the basic principle of private international law that we are looking at can I ask you to go to bundle A2, tab 34, which is the Law Commission Final Report.

If you go to p.7, can I ask you to read the text at (ii), please? (After a pause) And then also (iv) one gets the forum shopping point. You will see the strong terms in which the principle is put by the Law Commission in (ii):

> "It is generally acknowledged that our system of private international law exists to fulfil foreign rights not to destroy them… It is a stultification of private international law to refuse recognition to foreign rights substantively valid under its *lex causae* unless its recognition will conflict with some rule of public policy so insistent as to override all other considerations."

So that is the Law Commission's summary of the private international law principles.

THE PRESIDENT: These are the criticisms of the existing English approach.

MR. HOSKINS: That is correct, but they criticise them by reference to these private international law principles, which are the ones which underpin then the adoption of the FLPA, so I am relying on this as a description, as a summary of relevant private international law principles.

These issues, unfairness, if you ignore substantive content of an applicable law, forum shopping, apply with real force in competition law claims. Mr. de la Mare prayed in aid this was a special area of competition law, but these are real problems in competition law claims. It is quite clear that these principles are very applicable in the context of competition law and, indeed, follow-on claims.

We say that these objectives, private international objectives, should be taken into account when construing s.47A of the Competition Act, and we say that departure from such a basic principle of private international law would require an overriding public policy interest, and in our submission Mr. de la Mare has not identified one. He has put forward one but we say it is not sufficiently strong to sweep away these principles. We also say a departure from these fundamental private international law principles would require express wording

and we do not see that here. I think that is a point Mr. Johnson is going to come to as well, he certainly made it in writing, so I will not trample on that, but you will understand where that point comes from.

THE PRESIDENT: Yes.

MR. HOSKINS: The final point on specific construction, and I am sorry if I have misunderstood the point, I think Mr. de la Mare made the submission that an unfortunate consequence of our approach, he says, is that you would replace the rule of limitation which is specifically tailored to follow-on actions, i.e. Rule 31, with a general foreign limitation rule. The reason why he said that was unfortunate was, he said, it would follow that a claimant could bring a standalone case. If I have understood that correctly it is clearly wrong because the Tribunal's jurisdiction is not determined by the applicable limitation rules. In fact, we know that from s.47A(4) which expressly says it is territorial jurisdiction, you ignore limitation rules. So that is, if I have understood it, the tail wagging the dog.

The final point I wanted to deal with was Mr. de la Mare made some submissions where he looked at s.47E of the Act as now amended, and started to put forward certain arguments that he said then reflected on s.47A. With respect, I think even Mr. de la Mare accepts, both in his skeleton argument, and in his oral submissions that the interpretation of s.47E itself is not yet clear, it throws up issues and, in my submission, this is just a cul-de-sac that the Tribunal does not need to go down. There is no need to refer to a different albeit related statutory provision which itself has a certain lack of clarity, in order to interpret another provision which, in our submission – you have my submissions on s.47A – is clear. It is just over complicating matters.

Sir, unless there are any questions those are our submissions on the point.

THE PRESIDENT: Thank you very much. Yes, Mr. Johnson?

MR. JOHNSON: If I may, just a few observations dealing with the private international law aspects of this debate and the countervailing policy that you, Sir, have identified already as significant in determining how the relevant provisions are to be construed.

The Claimants advocate a blanket, one size fits all or, as they describe it, *sui generis* approach, to the treatment of foreign limitation periods in cases falling within the CAT follow on jurisdiction. That approach, in effect, involves applying the domestic rule in Rule 31 in all cases, whatever the governing law.

We had a similar approach which involved application of a domestic rule in all cases pre the Foreign Limitation Periods Act 1984. That was not so much a function of the double actionability rule, but rather more a function of the fact that in terms of characterisation,

English law characterised limitation and prescription issues as procedural and, therefore, always, or almost always, falling to be determined by reference to the *lex fori* English law. That meant *de facto* that English limitation periods, or domestic limitation periods were applied in pretty much every case, with some very limited exceptions.

The Law Commission, as we have seen, discredited and rejected that approach as inconsistent with the general trend of private international law at the time, including at the European Union level, because at the time deliberations were ongoing with a view to conclusion of the instrument that became the Rome Convention, which transmuted in due course of time to the Rome I Regulation, and that being, as we know, part of the general trend that led also to the incorporation of the Rome II Regulation dealing with tort and delict. So, the Law Commission's approach, reflecting that general trend, was to say that you cannot take a domestic rule and apply it on a blanket basis, because that affords insufficient weight to the governing law, or *lex causae*, and the proper approach is to apply the governing law or *lex causae* in almost all cases subject to only one important exception, which is that you are to exclude it if the application of that foreign rule of law in any given case results in consequences which are incompatible with the public policy of the forum. Public policy, as we will see in a moment, is construed very narrowly, but that technique, involving primacy of the governing law or *lex causae*, subject to this safety valve of public policy applicable or available in cases of extreme unfairness or injustice, was thought by the Law Commission, and has been thought by many legislators since, to hold a proper balance between the applicability or primacy of the governing law on the one hand and the need in limited and extreme cases to override the effect of an otherwise applicable foreign law if it leads to consequences which the forum might regard as abhorrent or extremely unfair. That is the approach in the 1984 Act as we can see if we look at the terms of the Act, the Foreign Limitation Periods Act 1984 in bundle 1, tab 15. Section 1, as we know is the general rule requiring application of foreign limitation law, but that is then subject to the exception from s.2, which, in the copy of the Act in tab 15, is at p.5, which says in subsection (1):

> "In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict."

Then, s.2(2):

> "The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue

hardship to a person who is, or might be made, a party to the action or proceedings."

So the structure is no blanket exclusion of foreign law, but instead the possibility of exclusion on a limited basis if the rule contravenes public policy. One sees that approach requiring an analysis of the effect of the rule in practical circumstances, in each individual case, carried through in the language of the Scottish Act in s.23A(2), in the Northern Irish Statutory Instrument at Article 4, and one finds wording to similar effect, both in Rome I and in Rome II. So we may turn up Rome II just as a reference point, which is in vol.2 of the authorities' bundle, at tab 31, and the relevant Article is Article 26, headed: "Public policy of the forum":

"The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."

So that is the scheme, the system recommended by the Law Commission over 30 years ago and now carried through both in our domestic law and internationally.

So let us assume that we have, and have always had a scheme under which the 1984 Foreign Limitation Periods Act applies in proceedings in this Tribunal. We then have a sensible and well calibrated scheme which accords primacy to the governing law in any case where conventional choice of law methods result in the application of a foreign law, but which in appropriate individual cases – that is the important point, in individual cases – where the precise application of the rule on the facts of the case leads to a contravention of public policy, a scheme which allows the application of the foreign rule in those extreme cases to be overridden and disregarded, and that scheme speaks very strongly against the idea of the blanket, one size fits all, *sui generis* rather crude approach advocated by the Claimants. It allows the various instruments that we have identified to sit together side by side in harmony, and it also addresses many of the practical problems, in fact, I would suggest all of the practical problems that Mr. de la Mare identifies in his submissions.

Let us assume we have a case in which a claimant seeks to advance a follow-on claim in the Tribunal, where the defendant then seeks to rely on a foreign law limitation period which expired before the two-year CAT rule. That is just the problem case, the high water mark that Mr. de la Mare's submissions identified, I think, in his skeleton argument at para. 71(a). Even within the scheme of the Foreign Limitation Periods Act----

THE PRESIDENT: Just to be clear, this is a case where the foreign law limitation expired before the start of the two years?

MR. JOHNSON: Yes. The claimant can say that you should just disapply the foreign law period. The CAT may, in assessing the public policy test, or applying the public policy test, be persuaded to look at some, or all, of the policy arguments that Mr. de la Mare has identified.

THE PRESIDENT: Dis-apply it as contrary to public policy, you mean?

MR. JOHNSON: Yes.

THE PRESIDENT: Although you have just made the point that that is very narrowly construed.

MR. JOHNSON: Perhaps at this point I can just take the Tribunal to the Law Commission Report, which helpfully gives some examples, and what it does is to identify the fact that the content of the domestic law may be used as a touchstone or indicator of what may be fair in the particular circumstances of the case, but is not overriding and determinative in every case. In the Law Commission Report, which is in the authorities bundle 2, tab 34. We have the discussion of what public policy means in this context, starting at pp. 25 and 26. At the bottom of p.25, in the quotation right at the end there is a reference to a dictum of Lord Parker quoting from **Westlake's Private International Law**, dealing with a contract case; where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced.

Then, at the top of p.26, the well-known dictum of Justice Cardozo in the New York case of *Loucks v Standard Oil*:

> "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home . . .
>
> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

Rather graphic language, but the question then is: what does that mean in the limitation context? The Commission go on at p.30 to address that very point. What they are trying to do is maintain a fair degree of balance between, on the one hand saying that you cannot conclude, simply because a domestic limitation rule is expressed in a particular way, that that represents public policy in the overriding private international law sense, versus on the other hand, according some weight to the fact that embedded within every domestic rule of limitation will be some concept or idea of what the domestic Tribunal and jurisdiction regards as fundamentally fair.

One sees these points developed in paras. 4.44, 4.45, 4.46 and 4.47 which merit some review I would suggest. 4.44, perhaps just to pick up some of the references here.

THE PRESIDENT: Shall we read those to ourselves, would that be helpful?

MR. JOHNSON: That would be most helpful.

THE PRESIDENT: 4.44 to 4.47?

MR. JOHNSON: Yes.

THE PRESIDENT: We will do that now. (After a pause) Yes.

MR. JOHNSON: The points to draw out, we would suggest are as follows: in the middle of 4.45 the indication that by reference to basic principles of our law of limitation the courts can test the application of a foreign law against fundamental principles of justice.

In 4.46, dealing with the case where the foreign law limitation period is either the same as or shorter than the English period, the indication given at the bottom of p.30 and at the top of p.31 that the limitation period in most cases will be given effect, that the mere fact that the length of the period is different in and of itself is unlikely to offend public policy, but one has to look at the circumstances of the case.

Then, in 4.47 the comments made in relation to the obverse scenario, where the foreign limitation period is much longer than the domestic English limitation period, in which case it may be the defendant who seeks to rely on the public policy exception. In all circumstances what is necessary is to look at the application of the rule on the facts of the case. So, going back, if I may, to my example, if a claimant advances a follow-on claim and the defendant relies on a foreign law limitation period which is shorter than the two year capped rule derived from Rule 31, the claimants can say that that contravenes public policy – look at the Foreign Limitation Periods Act 1984, s.2, and the court should disapply it. The CAT may be persuaded to look at some of the broad policy arguments relied on by Mr. de la Mare in support of his broad-brush *sui generis* approach, but it will also be required to look at other circumstances as well. It may say, yes, the foreign law limitation period is shorter than the domestic law limitation period but before that limitation period expired you were well aware and had been for a long time, of facts that enabled you to bring a claim. Consequently, there is no infringement of public policy in the foreign law period being given effect in this jurisdiction.

THE PRESIDENT: Albeit a claim you could not have brought in this Tribunal because of the bar on bringing a claim----

MR. JOHNSON: Partly it raises a case management question, partly I suppose the fact that there was a procedural bar or a logistical bar may itself be something that feeds into the public

policy argument – no reason why not. But the beauty of the approach is that it provides a degree of flexibility, and it deals also with the case where the claimant comes along relying on a very long foreign law limitation period which the defendant may wish to object to on the basis that it is inconsistent with the public policy of the forum.

In any event, rounding all this off, we come back to the question of construction of the domestic statute and the rule. If I may, I would like just to refer to one authority, it is the one referred to in my skeleton, which is the *Cox v Ergo* case in the Supreme Court, which is in bundle 1, tab 11. I rely on this really just for one statement of general principle in the speech of Lord Sumption at p.1393 of the Appeal Cases' reports, para. 27. Just to orientate us around the facts, this was a case where the claimant sought to say that the provisions of the Fatal Accidents Acts 1976, a piece of domestic English legislation, had overriding effect in a case where it was agreed that the governing law of the tort was German law, and that was sought to be relied on because in respect of certain heads of loss it gave a higher level of recovery. So, the question is: is the domestic statute an overriding statute in that sense.

At para. 27, having introduced this topic, Lord Sumption deals with the general approach and says: "Whether an English statute applies extraterritorially . . ." just pausing there, in context what he means is: does it have overriding effect and does it squash the impact of otherwise applicable German law?

> " Whether an English statute applies extraterritorially depends upon its construction. There is, however, a presumption against extraterritorial application which is more or less strong depending on the subject matter."

So, if an English statute is silent, and we are all agreed here that s.47 and Rule 31 are silent, then there is a presumption which is more or less strong, depending on the subject matter, against the idea that it has extra-territorial or overriding effects.

The short submission I make, against the background of my observations----

THE PRESIDENT: Are you sure that by reference to 'extra-territorial' he means 'overriding'? I thought it----

MR. JOHNSON: Looked at in context that is quite clear, because if we go on to paras. 28 and 29, it is clear that the debate is whether the Fatal Accidents Act is to have effect in a manner which overrides the provisions of otherwise applicable German law. So in 28 he separates out the analysis into two parts. In the fourth line he says:

> " The first question is what is the proper law of the relevant liability."

- not an issue in *Cox* because it was agreed on all sides that the proper law of the liability was German, and not an issue in this case because we are all agreed that the relevant

assumption for the purposes of the preliminary issue is that foreign law is the applicable law.

Then, he moves on to the second question, between D and E.

> "The second question is one of extraterritorial application, properly so-called. It is the question posed by section14(3)(a)(i)(4) of the Private International Law (Miscellaneous Provisions) Act 1995, which had its counterpart in the common law, namely whether the choice of law arrived at in accordance with sections 11 and 12 is displaced by some mandatory rule of the forum. This is not a choice of law principle at all, but turns on the overriding rules of policy of the forum."

Then he goes on:

> "In the present case it is common ground that the *lex causae* arrived at on ordinary principles of private international law is not English but German law. There is nothing in the language of the Fatal Accidents Act 1976 to suggest that its provisions were intended to apply irrespective of the choice of law derived from ordinary principles of private international law."

And that is precisely the issue that we are concerned with, looking at the terms of s.47 and Rule 31.

> "Implied extraterritorial effect is certainly possible, and there are a number of examples of it. But in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extraterritorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to any one resorting to an English court regardless of the law that would otherwise apply."

That is the issue that we are concerned with today. Going back to his para. 27 on the question of the strength of the presumption in any individual case, the point that we make is simply this: the presumption against the overriding effect of a domestic statute, if it is a statute dealing with limitation, is overwhelmingly strong given that we already have, in the Foreign Limitation Periods Act, in the equivalent Scots and Northern Irish Statutes, and in Rome I and Rome II, a well-balanced, and sensitively calibrated set of rules for dealing with the proper treatment of foreign limitation periods, and that, in our submission, is really the beginning and the end of it.

THE PRESIDENT: The issue there was whether the Fatal Accidents Act applied at all, was it----

MR. JOHNSON: Yes.

THE PRESIDENT: --to the claim?
MR. JOHNSON: Yes.
THE PRESIDENT: Here there is no question but that the Competition Act applies to the claim----
MR. JOHNSON: Yes.
THE PRESIDENT: --so it does have extra-territorial effect.
MR. JOHNSON: Not in the relevant sense. The focus here is on Rule 31, and the precise question----
THE PRESIDENT: That is on limitation, but as a statute----
MR. JOHNSON: Yes.
THE PRESIDENT: --it will apply to foreign claimants who suffer damage as a result of acts committed by foreign defendants abroad.
MR. JOHNSON: I agree.
THE PRESIDENT: So, there is an extra-territorial effect in the statute?
MR. JOHNSON: Yes, quite so, but the precise question that we are seeking to divine an answer to is focused, we would submit, more on the application and extent of Rule 31, looked at in the context of s.47, and the question we are seeking to identify an answer to is whether the effect of Rule 31, looked at in that general context is to override the effect and operation of an otherwise applicable rule of foreign law, and that is just the point that was being looked at in *Cox*, whether a particular rule for the identification of the extent of a particular head of loss was to be determined by reference to German law, the *lex causae*, or by a rule of domestic law, the Fatal Accidents Act.

I quite agree, with all due respect, that the terminology referring to extra-territorial application is a little confusing, it is really talking about what the editors of **Dicey, Morris and Collins** call the 'overriding effect' of a domestic statute, and that is the point that I sought to develop or at least flag in my skeleton argument. The question is whether there is a presumption against a construction of Rule 31 which involves it extending to and overriding the effect of an otherwise applicable foreign law, that is the point being addressed here. Our short submission in connection with that is that given the background and the history, and the very carefully calibrated and balanced set of rules for the treatment of foreign limitation periods, and they are part of our law, but developed extensively and internationally over the course of the last 30 or 40 years, there is a very strong presumption against that construction because it is simply not necessary.

Mr. de la Mare talks about the Defendants' submissions doing violence to the scheme of s.47 and Rule 31 but, with all due respect, his submissions do extreme violence to this carefully balanced and calibrated set of private international rules designed, as I have suggested, to hold a careful and appropriate balance between the proper priority to be given to the governing law on the one hand, and on the other the narrow function of public policy as a safety valve in cases of extreme unfairness.

I should say, just in conclusion, that Mr. de la Mare does not really rely on anything that approaches public policy in the private international law sense. He puts his case in his submissions on various bases, including the submission that it makes sense to apply the same rule to claims governed by foreign law. It may make sense in some respects but the idea that it may "make sense in the broad sense" is no basis for overriding the application of an otherwise applicable rule of foreign law. Similarly, he said that in any case in which there is a risk that foreign law applies, and will give rise to complications, it is appropriate to apply English law.

With respect, the idea that the application of foreign law gives rise to a risk of complication is not a justifiable basis for disregarding foreign law if it is otherwise applicable.

THE PRESIDENT: Lord Sumption gives some examples I think a bit later on in his judgment, at para. 34, of the sort of public policy overriding – they are fairly extreme cases where it would be offensive to our sense of justice.

MR. JOHNSON: Indeed, and those comments echo the observations made many years ago by the Law Commission in their para. 4.45 right at the end. In any event, we would submit, there is a well-developed and sensitively balanced scheme and there is no justification for, in effect, driving a coach and horses through it by applying a 'one size fits all' *sui generis* and rather crude approach.

Sir, unless I can help you any further, those are our submissions.

THE PRESIDENT: Yes, and we have read your helpful skeleton argument, and the attention you draw to other statutes. Thank you very much.

MR. DE LA MARE: Sir, can I start in reply with this question of public policy, because both my learned friends seek to suggest that there is no relevant public policy, other than simplicity for simplicity's sake, underpinning the scheme of the old s.47A. They say – Mr. Hoskins in particular – that if you want to look at the public policy of the FLPA it is contained in the Law Commission Report and it aligns squarely with the private international law policy inherent in Rome I and Rome II. On the other hand, when you look at the scheme of the Act, and what I call the 'wait and see' policy, it is somehow out on its own and in capable of

being any kind of relevant public policy for the purpose of the issues we are engaging with. With respect, that is a strange argument to advance in circumstances where the Damages Directive itself, in Article 10(4) embraces, as a mandatory minimum content of any compliant limitation rule applying after its time, precisely such a 'wait and see' rule. That 'wait and see' rule, in Article 10(4), and the Damages Directive is tab 32 of bundle 2, it is entirely on all fours with the policy of the old s.47A. 10(1) says that Member States shall ensure----

THE PRESIDENT: I appreciate you said we should not be concerned about Rome II because it is irrelevant and does not apply, you say the same about this?

MR. DE LA MARE: Absolutely, this does not apply, but what we are talking about is whether or not there is some public policy, rule, in place sufficient to displace the presumption of unvarnished application of foreign law; that is the issue we are talking about. However, you look at Article 10(4) it is plainly motivated by a consideration that in order to provide effective and sensible access to justice, there needs to be tolling of limitation linked to the conduct of an investigation by a regulatory authority, and links to its decision becoming authoritative.

The policy of that section is exactly the same as the policy of our domestic statute. That much is unarguable. One of the peculiarities of the vagaries as to how our competition law has been amended in relation to limitation, is we start with a policy that only effectively reflects 10(4). We move to a system that leaps back, on my learned friend's analysis, to only foreign applicable law, and now, as and when in the future – not for this case – we have to implement the Directive, we are going to have a hybrid between the two approaches and our current limitation law is going to have to be changed.

The relevance of all of this is, of course, as an answer to my learned friend, Mr. Hoskins' point that whatever public policy you have identified is not sufficient to justify the working of the 1998 Act, as amended, upon the operation of the FLPA, and it is an answer to my learned friend, Mr. Johnson's points, that there is nothing here that amounts to any form of public policy. Au contraire, for precisely the reasons, my learned friend, Mr. Johnson identifies in the Law Commission Report, in the finest traditions of independent advocacy, those considerations will be precisely the matters that feed into analysis of what policy is at issue.

It is conceded by Mr. Johnson that this will occur at least at the second stage in the application of s.2 of the FLPA. But, our case is when you deal with the primary issue of statutory construction before you now, you are dealing with a situation in which the policy,

the *lex generalis* policy of the FLPA is in plain tension with the specific policy of the 1998 Act that there should be a 'wait and see' policy.

In many ways the crystallisation of that, the most important reflection of that, is the old s.47A(5). That says you may not bring a claim at all unless and until there is an infringement decision, point one, and unless you get permission to do so you shall not bring a claim until the permission decision is final. So the 'wait and see' policy of the Act is both mandatory, you have to 'wait and see' up to a certain point, and thereafter permissive.

We say you cannot escape the point that you have got to grapple with the fact that there are two sets of policies, neither of which can be perfectly reconciled. I have made no attempt whatever to suggest that my argument based on s.47A is not some form of inroad into the relevant general entirely open textured policy of the FLPA. It is, but the burden my learned friends simply do not engage with is to look at the optic through the lens of both sets of policy and ask the question: is the natural construction of the Act, which is that the FLPA has nothing to do with it, supported by considerations of policy that explain why in a very narrow category of case, a very singular tort with special characteristics, a tort hard to establish without the benefit of the regulatory investigation, expensive, with no end of opportunity for argument about applicable law, is the 'wait and see' policy in that context an explanation as to why there is a one size fits all rule in that context?

THE PRESIDENT: Left out of all this talk of policy is the fact that the old s.47A was not an exclusive jurisdiction, so there was that approach for claims in the Tribunal. In parallel with all that, there was the ordinary limitation period which would bring in the FLPA on any view applying to claims in the ordinary courts, the High Court, the Scottish court or the Northern Irish court. So one view of what was being done in the old subsections (5), (6) and (7) was to say, we will give private actions to this Tribunal, but at that time only a very limited scope of private action to this Tribunal, we are not applying a legislative policy that you have to 'wait and see' for the infringement because at all times there was no restriction of that sort for claims in the High Court. It was just a creation of a narrow scope for private actions in this particular forum as opposed to the other UK *fora*.

MR. DE LA MARE: Two points in reply to that: it seems to me to be plain beyond argument that the policy of s.47A(5) of the old Act was not to require a party to issue protective proceedings, not to come to court at any particular moment and issue claims on a protective basis, not least since the CAT Rules are considerably more onerous than the High Court Rules about what you need to do to originate and issue a claim. It is a burdensome issue to start a claim, in a way that starting a claim in the High Court is not. That is the first point.

The second point is that the predicate that you can always issue in the High Court, you can always issue protective proceedings, assumes in one's favour immediately against me the very point that this is all about parallelism. In certain circumstances there may be no option but to issue in the High Court. Take the Swedish limitation case as a case in point. There is no way if the narrow construction, no limitation stay for knowledge construction is correct, to issue protective proceedings in the High Court in that Swedish case. The question then is, is the policy of the Act that admits a Swedish style claim into its clutches under limb one, and then says, you should be entitled to wait for the decision in order to bring the claim, is that a permissible policy? I do not accept the premise.

Let us look at the logic of my Lord's point in any event. The logic of that case has to be tested against the actual workload of the CAT as dictated by the Act itself. There are two types of decisions that will generate these follow-on claims. There are domestic infringement decisions by what was the OFT, now the CMA, and there are precious few follow-on claims in relation to those, not least because the OFT or CMA has hung on to precious few of its infringement decisions. The only one that springs to mind prominently is the *Enron* litigation off the back of a decision of the Office of Rail Regulation, which obviously generated all the Court of Appeal case law and a follow-on claim.

THE PRESIDENT: *Cardiff Bus* was of course----

MR. DE LA MARE: *Cardiff Bus*, yes, that is indeed another one. The great bulk - there may be two or three others, but I cannot think of them - will be based on Commission decisions.

Let us just think about the characteristics of Commission decisions. It will be quite normal for a number of the cartelists identified in the Commission decision, indeed possibly all of the cartelists in the Commission decision, to be not principally domiciled in the UK. There may be anchor subsidiaries with a bit of clever *Provimi* type argument combined with *Rubber* in the Court of Appeal, a knowledge type argument, you can fashion an anchor defendant. It is not in any way unusual to have all of the cartelists domiciled in their principal domicile out of the UK. *Vitamins* is a classic example: three cartelists - Roche based in Switzerland, Aventis based in France, BSF based in Germany. The finding of the market affected by the Commission is the entirety of the market in question. Parties may be entirely English domiciled claimants, claiming losses for entirely English originated damages.

Take the *Moy Park* litigation off the back of that *Vitamins* cartel in the CAT. The claimants were a variety of chicken farmers and feed manufacturers from across the United Kingdom. I think the bulk of them came - Mr. Hoskins will remember and Mr. Lawrence will

remember better than I - from Scotland and Northern Ireland. Arguments in such a case can quite properly be made by a cartelist that the significant element of that particular cartel, at least as directed against that particular cartelist, is their implementation of the cartel. So if I am, for the sake of argument, BSF, I can say, "I, BSF, am based in Germany, and everything I did in this cartel which was agreed in smoke and mirrors in various rooms across Europe at various vitamins trade association meetings, the real relevant thing is what I did back in my HQ in Germany in setting the internal pricing for the cartel throughout Europe. I operated transfer pricing in the rest of the subsidiaries. The key thing is the price that I was setting, subject to transfer pricing, that is the amount I was going to accept". That is in Germany.

In a case like that, which looks exactly like English law, because it is English claimants, English domiciled, English damages, a defendant will be able to, and frequently does, mount an argument that applicable law in that case is German law, or in the case of Aventis that it is French law, and so on and so forth.

That is the risk that Mr. Hoskins blithely expects claimants to run. He says there is no problem because in a case where it is clear - it is never going to be clear - that you can issue in England and you can sit back in comfort in reliance upon the CAT rules, but in a case where it is clear that it is France or Germany you should get on and do things consistent with that analysis and decide your rights accordingly, it is never going to be so clear. In any other case you should issue protective proceedings. The net consequence of that argument is that in Commission decisions that frequently have that characteristic - think of *Bearings*, think of all kinds of cartels, all the recent electronic cartels - the only sensible advice a claimant lawyer is going to give in that case is either you issue protective proceedings in the CAT and you incur all of the costs of making a CAT claim form, getting the expert evidence together so far as you can, articulating a case on applicable law, and so on and so forth, and then make an application. There is a mandatory application to be made, incur the cost of that, apply for a stay, have the case stayed. That is option one. Option two, you simply issue protective proceedings in the High Court.

That is the reality, and the question that has to be posed against that reality is: is that consistent in any way with the policy of this legislation? The policy of this legislation was to make it easier for people to bring claims. It was to allow them to wait in comfort until the infringement decision was final to save them and the courts the costs of issuing protective proceedings, and to provide a regime for damages once liability was authoritatively established - a very special category of case.

My submission is that at the end of the day my learned friends' cases do not grapple in any way with that reality. They do not grapple with the consequences this has for the practical workability or utility of this regime. It will simply lead to every single sensible claimant issuing protective proceedings at cost and at expense and with inconvenience to all concerned in the High Court. That is manifestly not the policy of the White Paper. It is manifestly not the policy of the third principle referred to in the Hansard excerpt I showed you. It is manifestly not the policy of s.47A(5) that says you must 'wait and see'. Once you have waited and seen, you can then bring a claim within two years.

That is the overarching argument. That is the terrain of policy which you have to resolve. Let us deal with Mr. Hoskins' more particular points. His first point is, "It cannot be right, as Mr. de la Mare argues, that somehow limb one is exhaustive of issues of limitation, and then all you have to do for limb two is look for other provisions in the Act and strictures in the rules", because that, he says, is never going to supply you everything you need. His example is, you are going to need to work out what the relevant rules on private international law are to work out what the applicable law is for some purpose other than limitation, and the example I think we can all settle on is, let us say, pass-on, what the German or French or Spanish or Swedish law is in relation to pass-on.

The problem with that argument is that it is a bad argument. The reason it is a bad argument is because wherewithal to refer to all of those relevant provisions of public international law, and in particular ss.11 and 12 of the PILMPA in the main period with which we are concerned is provided in the limb one exercise. It is all inherent in asking: is this a claim that you can bring before the High Court in ordinary civil proceedings but for considerations of limitation? In asking that question, you have to ask: is there a claim in Belgian law in relation to this case, etc, applying in the case in point ss.11 and 12 of PILMPA. So everything you need by way of private international law is supplied at limb one. The significance of s.47A(4) is that it puts a cap on that process. It says do all of that one except for one thing, do not look at rules of limitation or prescription.

My learned friend concedes that that stricture captures the FLPA and the foreign rules of applicable limitation that are referred to by the FLPA. He accepts that at limb one. That is a problem for him because at that stage you have a complete reference to all the rules of private international law that you require for the adjudication of the dispute, save for limitation periods. There is no need to go casting around outside the Act for any other basis to do any of these other things, because the Act has already done it for you and then it tells you for the rest, for the procedural restrictions, and in particular for time limits, look at the

provisions by the Act and its regime itself, either by the rules made under s.15 or the new limitation provisions provided in s.47E. So that is a rank bad argument, with respect. Equally bad is the argument----

THE PRESIDENT: Sorry to stop you, but I do not quite follow when you say "all the issues of private international law and foreign law have to be engaged in at limb one.

MR. DE LA MARE: Take pass-on as an example. If I claim, and make a claim under German law that there is no pass-through defence, the----

THE PRESIDENT: Your claim is a claim for damages.

MR. DE LA MARE: A claim for damages either in the original claim or in the reply, and they will all constitute parts of cause of action in the *Letang v Cooper* sense, the relevant facts upon which I rely to found my claim----

THE PRESIDENT: You claim damages, you say you paid this price, you are a retailer, and you say it was a higher price than you would have paid to the wholesaler if there had been no cartel by the manufacturers; or let us say you are a wholesaler claiming from the manufacturers, and you say you paid a higher price, and the wholesaler puts in a defence. The first question is: can you bring the claim at all? You have to ask yourself: is that a claim you can bring? That is limb one, is it not?

MR. DE LA MARE: Yes.

THE PRESIDENT: You do not know what the defence is going to be, but can you make the claim?

MR. DE LA MARE: The shape and content of that claim that is permissible will be a function of the foreign applicable law if the foreign applicable law is applicable.

THE PRESIDENT: Why is pass-through relevant then? You do not know what the defence is going to be. Either the Tribunal has jurisdiction - it does not lose jurisdiction by reason of----

MR. DE LA MARE: We are necessarily talking through as an issue of law rather than an issue of fact.

THE PRESIDENT: Yes.

MR. DE LA MARE: So the question is, is the defence of pass-through available as a matter of law? That is going to be a function of the applicable law, and it is going to be a function of the type of claim that you can bring. You cannot bring a claim in the High Court asserting no pass-through in German law if the relevant principles of applicable law call for an inquiry into German applicable law and show that German law says there is a pass-through defence.

THE PRESIDENT: That is an argument, it is not the claim. You have lost me, I am sorry. Your claim as a wholesaler is that you suffered damages. You have to establish that that is a claim that you could make - if the proper law is Germany, you have to say does German law allow a wholesaler to claim damages as a result of a cartel?

MR. DE LA MARE: Which is part and parcel of the law of causation, and the law of causation is substantive law that is part and parcel of the applicable law supplied by this analysis.

THE PRESIDENT: Whether the manufacturer or producer would be able to assert a pass-through defence does not affect whether you can bring the claim. It might affect whether you are going to succeed, it might affect your quantum, it does not affect whether you have a claim.

MR. DE LA MARE: I am not sure that is necessarily right, Sir. It is part of the constituent elements of----

THE PRESIDENT: Are you saying 47A(1) means that you can only make a claim if you are going to be successful?

MR. DE LA MARE: No. You can only make a claim whose legal parameters are consistent with the applicable law that is dictated by ordinary provisions of the PILMPA. So the PILMPA supplies the applicable law, and the applicable law supplies those legal matters that you can and cannot plead in order to establish a valid claim.

For instance, imagine a national law that prohibited any form of consequential loss, for the sake of argument, I would not be able to bring a claim formulated by reference to that national law that asserted an entitlement to consequential loss inconsistent with the law of the country whose law is applicable. It is shorthand, if you like, for making a claim whose legal parameters are no more or less than you can properly advance in a High Court claim.

The one exception to that, the one area where the substantive rules of the foreign state are not applied, is limitation. Indeed, if my analysis were not right, there would be no need for s.47A(4) to make an exception, as it is accepted it does, for limitation because that would just be a defence, just like pass-through would be a defence. It is all about the legal viability of the claim argued.

That in turn leads to the answer to the second argument advanced by my learned friend. He says that the FLPA in truth is not a limitation period at all, it is a provision setting out the relevant rules of private international law. That argument is a triumph of form over substance. If it is true, how is it that he has conceded, as he plainly has, that s.47A(4) requires you to disapply or disregard foreign limitation rules at limb one, if it is just a mere foreign limitation law? You cannot take the FLPA in isolation from the individual laws to which it makes *renvoi* or reference. It is a means for identifying the relevant laws which

have to be understood together with those relevant laws of limitation. You cannot get out of this trap by simply saying it is just a rule of PIL. It is not.

That leads to my learned friend's difficulty. Once you have got PIL principles in except for the PIL principles applicable to limitation, once the rules provided by the FLPA have been disapplied, as he accepts they are, he has got to find a mechanism by which they are reapplied. His argument is that they are axiomatically reapplied automatically at the limb two stage in every case, so you have a regime of automatic disapplication immediately followed by automatic reapplication.

THE PRESIDENT: You say "automatic disapplication", I thought you were saying it is disapplied under subsection (4) or (3)?

MR. DE LA MARE: Yes, so the Act is saying dis-apply all foreign limitation rules for the purposes of limb one; and then tacitly the Act is saying reapply all the foreign limitation rules.

LORD DOHERTY: If the disapplication is only for a limited purpose, one does not need to search for the re-application.

MR. DE LA MARE: It is true that it is only initially for the purposes of limb one, but that is to ignore the fact that the restoration of it at limb two completely undoes any utility of dis-applying it at limb one in the first place. What is the point of extending the dis-application of the foreign limitation rules if you immediately then reapply them? It does not have any utility. The whole point about limitation rules is that they provide defences, and this is about whether or not a defence can be made. It becomes a completely formalistic exercise where the Act tells you to ignore foreign limitation periods for working out what a claim is, and then you have to ignore all limitation periods and say, "Actually we now have to look at the limitation periods we disregarded and you cannot make a claim". It is totally circular.

THE PRESIDENT: So, in fact, it should say, "For the purpose of this Act any limitation rules or rules relating to a prescription, other than as set out in the Act, should be disregarded"?

MR. DE LA MARE: There should be some carve-out in the wording for foreign limitation rules.

THE PRESIDENT: Any limitation rules other than as set out under the Act or its rules, not just foreign.

MR. DE LA MARE: Yes, that would be another way of doing it, but we have to engage with the way that the Act has done it, and it is applied----

THE PRESIDENT: Forget the foreign ones, you could say the UK ones are disapplied under their own statutes anyway, such as s.39. That is why Limitation Act did not apply under the old s.47A.

MR. DE LA MARE: That would only be when Rome II applies, and obviously in our case it does not apply at all, so that does not work.

THE PRESIDENT: The opening words of subsection (4), "For the purpose of identifying claims which may be made", are redundant. It is just a total disregard on your submission, because that is the effect, you say, of disregarding it at limb one, it is disregarded for ever - is that right?

MR. DE LA MARE: No, it is telling you that what you do is you make an inquiry as to what kind of claims can be brought in the High Court but for the consideration of limitation, and it then goes on thereafter to apply to the claims so identified a *sui generis* set of rules derived from the Act. It is telling you----

THE PRESIDENT: Including the foreign law on pass-through or remedy or interest that would apply under the FLPA, but not the limitation rule that would apply under the FLPA?

MR. DE LA MARE: That is right, because you have been told by subsection (4) to ignore the limitation rules in the limb one exercise.

We accept that the first stage is identification of claim and the place at which the disapplication comes in is at the stage of identification of a claim that can be made. We say you read (1) through to (4) together and what it tells you to do is to ask yourself, can you make this type of claim, if necessary as a matter of the applicable law which ss.11 and 12 will dictate as the applicable law in all of its material legal attributes save for its legal attributes in relation to limitation? If you can, you then proceed to ask whether or not there are any other limitations derived from the Tribunal Rules or from the Acts.

I suppose that might mean that, when you come to look at the issue of pass-through in due course, that may be equally analysable as a jurisdiction issue, but with respect it does not really make any difference. If you get the German law of pass-through wrong, you lose that part of your case. There is much aridity to be had about analysing whether or not points of law before a jurisdiction are an *Anisminic* sense or not. It is just an empty exercise ultimately. If it is an error of law, it is an error of law.

That is our analysis, and the problem Mr. Hoskins has is that he has got to find the hook to get out of that, because there is no need to supplement this provision by reference to anything else. It is functioning and fully self-contained.

What he then says, what he then moves to, is two arguments of principle. First of all, he says that, as a matter of principle, you should construe Acts to be consistent with one another. That is a general canon of construction to be applied with all the relevant canons

of construction that may apply to any particular complex of statutory interpretation. That is undoubtedly one that is in the ring, probably quite high up the ranking.

What we do not accept is his second canon of interpretation, which has been asserted by him and asserted by Mr. Johnson, for which no authority is cited. It is a surprisingly stark assertion that in circumstances where, if you accept my analysis, there is on its express face a comprehensive regime and you need to read into that regime a saving that is not there, he says you must do that wherever to do otherwise would be inconsistent with the regime of the FLPA unless there are some clear words to stop you from so doing. In other words, he is trying to give the FLPA some form of *quasi* entrenched constitutional status, a bit like s.2 of the European Communities Act, or a bit like the Human Rights Act, or a bit like the Act of Union or the Bill of Rights. There is absolutely not a germ of authority in support of that proposition. The case of *Cox* does not begin to come remotely close to establishing that rule. Of course, that approach is, as I have already mentioned, completely self-serving because all it does is focus an exclusive optic upon the policy of the FLPA, whilst ignoring altogether the policy of the Act and the special limitation rules it contains that may require a different approach for foreign claims.

In particular, we emphasise the fact that if you want the embodiment of the policy - the ultimate embodiment of the follow-on only policy - you have to look in particular at s.47A(5) in the old regime, which, as I explained and there was no argument to the contrary, is necessarily saved by Rule 119.

Section 47A(5) just to remind you, tab 19 of the bundle----

THE PRESIDENT: That is saying you cannot bring a claim----

MR. DE LA MARE: You cannot bring a claim.

THE PRESIDENT: -- before an infringement decision is taken.

MR. DE LA MARE: That is the embodiment of the whole 'wait and see' policy. That is what has got to be tested against the FLPA, that is the *lex generalis* to set up against the *lex specialis*, and you do not start that exercise of statutory construction assuming that the general statute wins. It is as simple as that. Instead, you test it by reference to the wording of the Act itself, the clarity of the provision, and then the reasons for the difference between an entirely general policy and an entirely specific policy, which I have explained, the small category of cases, harmonisation, difficulty of proof and the desire to make this an effective remedy. Again, you come back to Article 10(4). That is how you test it. Tested in that way we say it is plain that there is public policy at work here. You do not need to get to the second stage of inquiry, a public policy examination under s.2 of the FLPA in

circumstances where that public policy clash is already arising at the prior level of statutory construction, or where the considerations identified by my learned friend Mr. Johnson from the Law Commission report come into play at that earlier juncture. Looking at the analysis in paras.4.44 and following, it is absolutely plain that a stark 'wait and see' policy of the kind embodied in 47A(5) that brings with it pros and cons is precisely the kind of public policy consideration that may be taken into account in that balancing exercise.

My fifth point: Mr. Hoskins said that somehow we have formally conceded a mismatch between the regulatory regime and Rome II, such that there was, to use the phrase he uses a number of times, some form of bifurcation. You have my first point, that we are not in a case that is even within the scope of Rome II, but I do invite you to carefully read para.83 of our skeleton. We make no such concession. We say that there will be interesting issues raised as to whether or not the policy that I have just been labouring, the policy behind the Act, is sufficient to amount to a mandatory consideration for the purposes of Article 16, and that is not an argument that you have to grapple with today because we are all agreed that Rome II is not in play.

Even were there some form of mismatch, that does not detract from the substance of our point. The substance of our point is that there is a plain 'wait and see' policy. When we are looking simply at matters of domestic law, which is all we are doing, the question you have to answer is whether those considerations of domestic law, the FLPA and its analogues in Scotland and Northern Ireland, require you erode that 'wait and see' policy still further than any putative erosion from Rome II. Our firm answer to that is, no, it does not.

What is obviously impermissible, particularly when you take into account the original genesis of this legislation back in 2003, is to use an instrument, the Rome II Regulation, that was five years in the future and was not even in draft stage to recast your interpretation of that old Act for the purposes of a dispute exclusively regulated by that old Act as preserved by transitional provisions. That is just straightforward bad statutory interpretation.

The next point - and we are near the end, I know you have heard too much of me - is Article 6(3). All I was saying in relation to Article 6(3) is that you have to take it into account when assessing the extent of any potential mismatch between Rome II and our domestic scheme, and that it was not the terrible world that the Defendants were seeking to portray. The scope for conflict was, because of Article 6.3, in the real world very much narrower. That is the only point I rely upon it for.

Follow-on claims for foreign claimants: Mr. Hoskins indicated he did not understand this point. Let me explain again: s.47A in its new form provides in principle a gateway to

follow-on claims and to stand-alone claims. Section 47A in that form, we are all agreed, is now in force. It is that provision pursuant to which this claim is brought. So looking simply at s.47A, one can, subject to questions of limitation, bring a stand-alone case. The only constraint under s.47A, as now in force, upon bringing a stand-alone claim is the constraint contained in Rule 31(1) and 31(2). The stance, for instance, of the Department of Business, Innovation and Skills is that there is a stand-alone time limit, a stand-alone time limit of two years, contained in limb two. That argument is probably a bad argument. You do not need to decide that now. Let us assume, for the sake of argument, that that is not true in that case. If you disapply Rule 31(1) and 31(2), which is a limitation regime by way of rule that only permits a follow-on claim because of the strictures of 31(1) and 31(2), and you replace it for all purposes with foreign limitation, so put an imaginary line through 31(1) and (2) and put a line through (4), because it is not continued by Rule 119(2), all you are left with is (3). In all other respects, there is substantive scope to bring a stand-alone claim, and if that stand-alone claim is in time, as a matter of the foreign limitation that Mr. Hoskins and Mr. Johnson say is in place, there is nothing to stop a pure stand-alone claim being brought. That is the point, and that is the absurdity of this construction that ignores for present purposes the plain 'wait and see' policy. What you cannot do is have it both ways.

The next point I want to make is simply this: there was no attempt to engage with the language in Rule 119(2) in either of my learned friends' submissions. That language on top of the language of 47A(1) is a yet further and in many ways still clearer indication that the transitional rules provided for are the relevant, and the only relevant way to determine the limitation or prescription periods applicable. That is the express language of 119(2), authorities bundle 1, tab 23. That is the language, if you recall, that I said parallels exactly the language of s.47E(1).

Lastly, let me address very briefly my learned friend Mr. Johnson's arguments. As indicated, we think that the Law Commission material that he referred to in argument actually supports our case. On proper analysis, it shows precisely what public policies are engaged and precisely that they are proper ones to be taken into account. The case of *Cox v Ergo* on which he places so much reliance, on the other hand, does not assist him. It is plain that this case is not extra territorial in the sense envisaged by Lord Sumption in that case. That was a case, it should be remembered, of a traffic accident in Germany between parties were at that time domiciled in Germany. The claimant was the wife of a British Armed Services member who was based in Germany. She moved back to the United Kingdom

after the accident. To apply a fatal accident's analysis to supplement the heads of loss recoverable in a case where none of the events in question occurred in that jurisdiction is plainly extra-territorial.

Compare and contrast the type of multi-jurisdictional problem that confronts you with a Commission decision where at least some of the relevant activity is occurring in the United Kingdom. That is not extra-territorial at all. That is a question of applicable law, but it is not extra-territoriality. Go back to my *Moy Park* example. There is nothing extra-territorial in that case where you are claiming damages for the impact on your business for overpaying on vitamins, and thus the losses you suffered in your chicken feed supplement business in Northern Ireland. It is not extra-territorial in the sense contemplated.

The rule of construction that is posited in para.29 of the judgment is, in any event, posited in circumstances where the Act is necessarily quiet on the subject. That is not the premise from which we are starting in this case. We are starting from a premise where the Act is an exclusive code, and it is my learned friends who are seeking to bust that exclusive code by saying there must be some form of implied saving for the FLPA. So it starts from exactly the opposite spectrum. That said, we accept that the sorts of considerations identified in para.29 are the sorts of considerations you will take into account in this exercise of statutory construction. They are precisely the considerations of overarching policy, the 'wait and see' policy versus the policy of the FLPA that we have been arguing about, and they do not begin to provide a mandatory answer to the question at issue. We say you have to test the policy of that special law against the general law, and when you do so, with the clear language of the section, the answer is that these claims are governed only by the limitation period in Rule 31(1) and (2).

Unless there is anything else I can assist you with, those are my submissions.

THE PRESIDENT: No, thank you very much, Mr. de la Mare. We will consider our decision in the usual way, and you will be notified when a judgment is ready for handing down.

Thank you all very much.

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