Neutral citation [2019] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1236/5/7/15
1265 and 1268/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

14 February 2019

Before:

THE HON MR JUSTICE ROTH
(President)
PETER ANDERSON
SIMON HOLMES

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) DSG RETAIL LIMITED (2) DIXONS RETAIL GROUP LIMITED
-and-
DIXONS CARPHONE PLC
-and-
EUROPCAR UK LIMITED (and others)

Claimants

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA

Defendants

Heard at Victoria House on 8-9 October 2018

JUDGMENT

APPEARANCES

Mr Meredith Pickford QC and Ms Julianne Kerr Morrison (instructed by Gowling WLG (UK) LLP) on behalf of DSG Retail Ltd, Dixons Retail Group Ltd and Dixons Carphone PLC, the Claimants in Cases 1236/5/7/15 and 1265/5/716

Mr Thomas de la Mare QC and Mr Ajay Ratan (instructed by Eversheds Sutherland International LLP) on behalf of Europcar UK Ltd and the other Claimants in Case 1268/5/7/16

Mr Mark Hoskins QC and Mr Matthew Cook (instructed by Jones Day) on behalf of the Defendants in all three cases.

A. INTRODUCTION

1. On these applications, the Competition Appeal Tribunal ("the CAT") is faced once again with issues of limitation in private actions under the Tribunal Rules over the period of transition to the new legislative regime established by the Consumer Rights Act 2015: cp. *Deutsche Bahn v MasterCard Inc* [2016] CAT 14.

2. By a decision adopted on 19 December 2007 ("the Decision"), the EU Commission ("the Commission") found that the MasterCard payment organisation and the legal entities representing it (i.e., the three Defendants to these claims) infringed art 81 of the Treaty establishing the European Community ("EC Treaty") (now, art 101 of the Treaty on the Functioning of the European Union ("TFEU")) by their arrangements concerning what was termed the "Intra-EEA fallback interchange fee" (the "EEA MIF"). These arrangements were found, in effect, to set a minimum price which merchants had to pay to their acquiring bank ("the Acquiring Bank") for accepting payment cards in the European Economic Area ("EEA") by means of the EEA MIF for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards: Decision, art 1. The EEA MIF applied to virtually all cross-border payment transactions within the EEA. It also applied to domestic card transactions in Member States where no intra-country fallback interchange fee ("Domestic MIF") had been determined and no bilateral interchange fee had been agreed between the relevant domestic Acquiring Bank and the bank issuing the card ("the Issuing Bank"): Decision, recitals (118), (122), and (124).

3. The infringement was found to last from 22 May 1992 until 19 December 2007. MasterCard was ordered to bring the infringement to an end within six months of the date of notification of the Decision (i.e. by 21 June 2008): Decision, art 4. On 12 June 2008, the Commission issued a press release stating that MasterCard had provisionally repealed the EEA MIF with effect from 21 June 2008.

4. The Defendants' application to annul the Decision was dismissed by the General Court on 24 May 2012: Case T-111/08 *MasterCard and others v Commission*

EU:T:2012:260, and a further appeal was dismissed by the Court of Justice of the European Union on 11 September 2014: Case C-382/12P, EU:C:2014:2201.

5. The applications are made in three separate private actions against the same Defendants (to which we will refer collectively as "MasterCard"), brought by the following Claimants:

   (i) DSG Retail Ltd and Dixons Retail Group Ltd, commenced on 11 February 2015 (the "Dixons proceedings");

   (ii) A claim by Dixons Carphone PLC (UK), commenced on 7 September 2016 (the "Dixons Carphone proceedings"); and

   (iii) A claim by Europcar UK Ltd and three other companies in the Europcar group commenced on 9 September 2016 (the "Europcar proceedings").

6. All three actions are follow-on proceedings based on the infringement established by the Decision. Accordingly, they are distinct from the many stand-alone proceedings brought in the High Court alleging breach of UK competition law by reason of the Domestic MIF, and in some cases that the arrangements to establish the Domestic MIF were in themselves a self-standing breach of EU competition law. In the present actions, the Claimants allege that they suffered damages as a result of the Domestic MIF, but that the level of the Domestic MIF resulted from the EEA MIF and was therefore caused by the infringement found by the Decision. The Claimants claim damages over the period from 22 May 1992 up to 21 June 2008, and for any continuing effects of that conduct thereafter (referred to in some of the Particulars of Claim as "Run Off Overcharges").

7. The First and Second Defendants are Delaware corporations having their principal offices in New York. By order of the CAT made in each of the three cases, permission was given to serve the claim on those two Defendants out of the jurisdiction. No such permission was required as regards the Third Defendant, since it is domiciled in Belgium and there is jurisdiction over it

pursuant to Regulation (EU) 1215/2012 (the Re-cast Brussels Regulation). By these applications, MasterCard applied to set aside the order of service out of jurisdiction on the First and Second Defendants and/or for summary judgment in favour of all Defendants as regard part of the claims. Although several grounds are raised in the application in each action, the only ground pursued concerns limitation. MasterCard asserts that there is a limitation defence barring the proceedings so far as they affect the period from 22 May 1992 to 20 June 1997.

8. However, Mr. Pickford QC, who appeared on behalf of the Claimant in the Dixons Carphone proceedings as well as the Claimants in the Dixons proceedings, made clear that the Dixons Carphone action does not cover any losses over that early period. Accordingly, MasterCard does not pursue its application in the Dixons Carphone proceedings.

9. The applications were heard along with an equivalent application in a further private action against the same Defendants brought by Transport for London and others. However, subsequent to the hearing the CAT was informed that the parties to that action had reached a settlement. Accordingly, that application falls away.

B. THE STATUTORY FRAMEWORK

10. To appreciate the issues in these applications, it is necessary to refer in some detail to the relevant legislative provisions from the Competition Act 1998 (before and after amendment) ("CA 1998"), the Competition Appeal Tribunal Rules 2003 ("the 2003 Rules") and the Competition Appeal Tribunal Rules 2015 ("the 2015 Rules"). To avoid lengthy citation from the statutory material in the body of this judgment, fuller quotations are set out in the Appendix. The following account is adapted from that in the *Deutsche Bahn* judgment which was not in dispute.

(a) Competition damages claims

11. Prior to 2003, a private action claiming damages for breach of competition law could be brought only in the civil courts (i.e. in England, the High Court; in

Scotland, the Court of Session; in Northern Ireland, the High Court of Northern Ireland). The Enterprise Act 2002 ("EA 2002") introduced a new sect 47A into the CA 1998, with effect from 20 June 2003, governing claims that may be brought before the CAT.

12. In its original form, sect 47A provided, in material part:

> "(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.
>
> (2) In this section, "relevant prohibition" means any of the following –
>
> (a) the Chapter I prohibition;
>
> (b) the Chapter II prohibition;
>
> (c) the prohibition in Article 81(1) of the Treaty;
>
> (d) the prohibition in Article 82 of the Treaty.
>
> (3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.
>
> (4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.
>
> (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; and
>
> (b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision."

13. The decisions mentioned in sect 47A(6) were a decision of either the Office of Fair Trading or the CAT on appeal or, in respect of European competition law, a decision of the Commission. And the periods mentioned in sect 47A(7)-(8) were the period during which an appeal against the decision may be brought or, if an appeal was brought, the period before that appeal was determined: i.e., effectively the period until the decision became final.

14. Pursuant to sect 15 and Sched 4 EA 2002, the limitation provisions for such claims were set out in rule 31 of the 2003 Rules ("rule 31"), which provided, insofar as material:

> "(1) A claim for damages must be made within a period of two years beginning with the relevant date.
>
> (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 1998 Act in relation to the decision on the basis of which the claim is made;
> >
> > (b) the date on which the cause of action accrued.
>
> (3) 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."
>
> (4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a period of limitation having expired before the commencement of section 47A."

15. The result was that the CAT's jurisdiction in damages claims was (i) confined to follow-on damages; (ii) could not be invoked before the relevant authority had taken a decision that the relevant prohibition had been infringed (an "infringement decision"); and (iii) if the infringement decision was under appeal, could be invoked before the determination of that appeal only with the permission of the CAT. The jurisdiction was subject to a new, special time-limit of two years from the date when the infringement decision became final, but might be precluded by the application of rule 31(4).

16. For proceedings in court in England and Wales, the primary limitation period is six years: Limitation Act 1980, sect 2. However, sect 32 of the Limitation Act 1980 ("sect 32 LA") provides insofar as material:

> "(1) ... where in the case of any action for which a period of limitation is prescribed by this Act, ...
>
> > (b) any fact relevant to the to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
> > …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

17. Accordingly, the original sect 47A and the attendant limitation rule enabled follow-on claims to be held in abeyance until such time as an infringement decision, which is binding on the UK courts and the CAT,[1] became final, but not if bringing such a claim before a court would have been time-barred on 20 June 2003 when sect 47A came into effect.

18. The special, but circumscribed, jurisdiction under sect 47A applied only to the CAT. Sect 47A(10) expressly preserved the right to bring any other proceedings in respect of the claim. Accordingly, there was a parallel jurisdiction for claims for follow-on damages in the courts, which were subject to the ordinary rules on limitation that apply to such actions there. Stand-alone claims could be brought only in the courts.

19. The jurisdictional landscape changed dramatically with the coming into force of the Consumer Rights Act 2015 ("CRA 2015") on 1 October 2015. This substituted a new sect 47A, of which the material provisions are as follows:

> "(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.
>
> (2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—
>
> (a) the Chapter I prohibition,
>
> (b) the Chapter II prohibition,
>
> (c) the prohibition in Article 101(1), or
>
> (d) the prohibition in Article 102.
>
> (3) The claims are—
>
> (a) a claim for damages;
>
> (b) any other claim for a sum of money;

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[1] Pursuant to the original sects 47A(9) and 58A of the CA 1998 and art 16 of Council Regulation (EC) No. 1/2003.

> (c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.
>
> (4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded."

20. Sect 47A(6) defines an "infringement decision" to mean a decision of the Competition and Markets Authority ("CMA"), or the CAT on appeal from the CMA, that the Chapter I or Chapter II prohibition or art 101(1) or art 102 TFEU have been infringed, or a decision of the Commission that art 101(1) or art 102 have been infringed. Sect 47A(5) is analogous to the old sect 47A(10) in preserving the right to bring claims in the courts: see para 18 above.

21. Accordingly, the CAT now has full jurisdiction for competition damages claims, whether follow-on or stand-alone, that is completely parallel to the jurisdiction of the courts.

22. The new sect 47E provides for limitation. For proceedings, other than collective proceedings brought under the new sect 47B, it states as follows:

> "(1) Subsection (2) applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made in—
>
> (a) proceedings under section 47A, or
>
> (b) […].
>
> (2) Where this subsection applies—
>
> (a) in the case of proceedings in England and Wales, the Limitation Act 1980 applies as if the claim were an action in a court of law;
>
> (b) in the case of proceedings in Scotland, the Prescription and Limitation (Scotland) Act 1973 applies as if the claim related to an obligation to which section 6 of that Act applies;
>
> (c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies as if the claim were an action in a court established by law."

23. Accordingly, now that the CAT has a fully parallel jurisdiction with the civil courts, the limitation rule in the CAT replicates that which would apply if the action had been brought in court. Special limitation rules apply to collective proceedings under sect 47B because of their particular complexities, but for such proceedings the CAT has exclusive jurisdiction.

24. However, although the new sect 47A applies to claims whenever arising, the new sect 47E on limitation applies only to claims arising after 1 October 2015: CRA 2015, Sched 8, paras 4(2) and 8(2). Therefore, the proceedings subject to the present applications are governed by the new sect 47A but for neither is limitation determined by sect 47E.

25. The 2015 Rules came into force at the same time as the CRA 2015, i.e. on 1 October 2015. By rule 118(a) of the 2015 Rules, the 2003 Rules were revoked. However, this was subject to transitional provisions in rule 119 of the 2015 Rules ("rule 119") which states:

> "(1) Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (the "2003 Rules") as if they had not been revoked.
>
> (2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) 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-
>
> (a) proceedings under section 47A of the 1998 Act, or
> (b) collective proceedings
>
> (3) A claim falls within this paragraph if –
>
> (a) it is a claim to which section 47A of the 1998 Act applies; and
> (b) the claim arose before 1st October 2015.
>
> (4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015(c) continue to apply to the extent necessary for the purpose of paragraph (2)."

26. As set out above, the Dixons proceedings were commenced prior to 1 October 2015, so pursuant to rule 119(1) those proceedings are governed by the 2003 Rules, including rule 31(1)-(4). The limitation provisions set out in rule 31 therefore apply regarding the claims in those proceedings. In contrast, Europcar proceedings were commenced after 1 October 2015 but the claims in those proceedings arose before that date. Accordingly, for the purpose of limitation, rule 31(1)-(3) of the 2003 Rules continues to apply, by virtue of rule 119(2)-(3). However, rule 31(4) does not apply to the claims in those proceedings. The significance of this will be considered below.

27. MasterCard contends that the Dixons and Europcar actions are time-barred in respect of losses over the period 1992 to 20 June 1997. Although such losses form a relatively small part of the claim since usage of payment cards at that time was very much lower than in more recent years, the interest on any damages over that period would be significant. Moreover, exploring the factual situation which prevailed so many years ago imposes a significant burden of disclosure and as regards evidence generally. If the claims for those periods are clearly out of time, it therefore makes good sense to exclude them summarily at this stage.

28. In the Dixons proceedings, MasterCard submits that the claim for this period is directly barred under rule 31(4) of the 2003 Rules, pursuant to rule 119(1) of the 2015 Rules. For the Europcar proceedings, MasterCard submits that rule 119(2) is to be interpreted so as to have the same effect.

29. The Claimants say that this interpretation of the Rules is incorrect. Properly construed, no part of the actions falls outside of the limitation periods. Alternatively, they submit that if the provisions of the Limitation Act 1980 apply, then they have at least a well arguable case that they satisfy the conditions of sect 32(1)(b) LA and that this is accordingly not an issue that can be resolved on a summary application: it requires disclosure and, potentially, factual witness evidence.

30. There are therefore two issues which arise:

(a) Subject only to sect 32 LA, are the proceedings time-barred in respect of the claims for damages before 20 June 1997?

(b) If yes, do the claimants have an arguable case under sect 32 LA?

C. ARE THE CLAIMS TIME-BARRED UNDER THE RULES?

31. It is common ground between the parties that:

(a) a party who has suffered loss by reason of a breach of art 101 TFEU has a private right of action for damages analogous to a claim for breach of statutory duty;

(b) a cause of action for breach of statutory duty first accrues when the breach causes damage to the claimant;

(c) once an agreement or decision of an association of undertakings that is contrary to art 101(1) has been made, the implementation of the agreement or decision represents a continuing breach or series of breaches of the duty derived from that article;

(d) accordingly, the claim for damages suffered before the cut-off date resulting from a limitation period would be time-barred; but if implementation continued after the cut-off date, the claim in respect of damages suffered thereafter would not be time-barred.

See *Arkin v Borchard Lines Ltd* [2000] UKCLR 494 at 504-505.

32. The foundation of MasterCard's argument is rule 31(4). This is set out above but for convenience we repeat it here:

> "(4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a period of limitation having expired before the commencement of section 47A."

33. MasterCard relies on the principle set out in *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553. There, the plaintiffs claimed on account of personal injuries suffered in an accident on 5 April 1972 with a bus belonging to the defendants. At the date of the accident, the relevant Ordinance of 1948 provided that such an action had to be brought within 12 months, and therefore any action by the plaintiffs in respect of the accident became statute-barred on 5 April 1973. In June 1974, a new statute ("the Act of 1974") came into force which substituted a period of three years for the 12 months previously provided by the Ordinance. The plaintiffs commenced proceedings on 20 March 1975, which was therefore more than 12 months but less than three years after the accident.

The Privy Council held that the Act of 1974 could not be construed as depriving the defendants of the limitation defence which they already possessed under the Ordinance. Giving the judgment of the Privy Council, Lord Brightman stated, at 558:

> "Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past."

After explaining that the question of construction should not depend on whether or not the Act of 1974 was regarded as "procedural", Lord Brightman continued, at 563:

> "In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no 'right' when the period prescribed by the Ordinance of 1948 expired, merely because the Ordinance of 1948 and the Act of 1974 are procedural in character. The plain purpose of the Act of 1974, read with the Ordinance of 1948, was to give and not to deprive; it was to give to a potential defendant, who was not on June 13, 1974, possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken; discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence."

34. Accordingly, Mr. Hoskins QC, for MasterCard, argued that rule 31(4), which is applicable to the Dixons proceedings pursuant to rule 119(1), must be interpreted to mean that the claims arising before 20 June 1997, which would have been time-barred in an action in court when sect 47A came into force, were barred under rule 31(4) and did not benefit from the special limitation period in rule 31(1)-(2).

35. As regards the Europcar proceedings which did not fall within rule 119(1), Mr. Hoskins submitted that rule 119(2)-(3) should be interpreted so as not to deprive MasterCard of its accrued limitation rights that would bar the claims arising before 20 June 1997. He relied, following the approach in *Yew Bon Tew,* on sect 16 of the Interpretation Act 1978, which applies (as do the Rules of the CAT) also in Scotland and Northern Ireland. The relevant part of sect 16 provides:

> "(1) … where an Act repeals an enactment, the repeal does not, unless the contrary intention savings appears, -
>
> …
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment …"

36. Mr Hoskins contended that there is nothing in rule 119(2) which requires interference with MasterCard's accrued limitation rights, and that if the rule had been intended to have the effect of restoring claims which had become time-barred, it would have said so expressly. Addressing the fact that rule 119(2) does not preserve rule 31(4) in respect of such claims, he submitted that there is "a gap" which the CAT could fill by a process of statutory construction.

37. Although Mr Hoskins' argument was forensically attractive, we find it unsustainable. The preservation of rule 31(1)-(3) but not rule 31(4), in the wording of rule 119(2) is clearly deliberate. Mr Hoskins very properly accepted that this is not a case of a drafting error which could be 'rectified' by the court under the principle in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586. Nor does he seek to suggest that a limitation 'right' can be regarded as a human right within the European Convention on Human Rights so as to attract the extended approach to statutory construction in sect 3 of the Human Rights Act 1998. In our judgment, the conclusion is 'unavoidable' that the time-bar imposed by rule 31(4), in circumstances where the limitation period would have expired prior to 20 June 2003, does not apply in the case of proceedings commenced on or after 1 October 2015 which are governed by rule 119(2). Mr Hoskins' submissions were in effect an invitation to incorporate by a process of construction the substance of rule 31(4) as regards proceedings which are governed by rule 119(2). But that would be directly contrary to the language of

rule 119(2) which expressly chose not to incorporate (or "save") rule 31(4). Accordingly, sect 16(1) of the Interpretation Act 1978 does not assist and the case does not fall within the *Yew Bon Tew* principle. It follows that whereas rule 31(4) applies to proceedings commenced before 1 October 2015, it has no application to proceedings commenced thereafter.

38. Turning to the construction of rule 31(4) itself, it follows that if MasterCard's construction of rule 31(4) was correct, this would produce a bizarre result. It would mean that the claims for damages suffered from implementation of the EEA MIF prior to 20 June 1997 would be time- barred in the Dixons proceedings, because those proceedings were commenced on 11 February 2015, but that that the claims for damages suffered from implementation of the EEA MIF prior to 20 June 1997 in the Europcar proceedings would not be time-barred because those proceedings were commenced after 1 October 2015. Therefore, claimants who started proceedings later in time would be free of a potential limitation defence that applied to claimants who started proceedings several months earlier. That is the opposite to the way in which a limitation period normally operates. If this were the true position, we think it would be wholly unsatisfactory and, indeed, unjust. Accordingly, we consider whether rule 31(4) is susceptible to a different interpretation.

39. We have not found this an easy matter to resolve. However, we think it is important to consider carefully the wording of rule 31(4), in the context of the policy underlying the limitation provisions applicable to the new jurisdiction given to the CAT for private actions by the EA 2002. Rule 31(4) distinguishes between a "claim" and "proceedings", and the same distinction is indeed apparent in rule 119. Manifestly, a single proceedings may comprise several claims. As Mr de la Mare QC pointed out, the aim of the statutory change under the EA 2002, which came into effect on 20 June 2003, was to enable the CAT to hear purely follow-on damages actions, i.e. actions where there had been a decision finding infringement of the competition rules by the relevant competition authority. Therefore, a special but curtailed limitation period was introduced for such actions of two years following that decision (or any appeal against it). A potential claimant who had suffered as a result of a competition violation was therefore entitled to wait until an investigation of the matter by

the (UK or EU) competition authority resulted in a final decision establishing the infringement, but then had to start proceedings before the CAT relatively swiftly.

40. Once that is appreciated, we think that the true construction of rule 31(4) becomes clear. As we have observed above, infringement of the competition rules is often of extended duration and amounts to a continuing breach of statutory duty. Thus, as Mr Hoskins and Mr Cook put it in their skeleton argument, "a fresh cause of action is regarded as accruing on each and every day that the continuous tort exists." The follow-on *proceedings* brought after the decision finding infringement will normally seek damages for the losses resulting from that infringement. Those proceedings will therefore comprise a series of claims for each cause of action constituted by each day that the infringement continued. The preclusion of claims imposed by rule 31(4) therefore applies if *proceedings* bringing the claim would have been time-barred before the court, and not simply if *the claim* itself would have been time-barred. Accordingly, if an infringement had come to an end more than six years before the new statutory regime set out in sect 47A came into force, a claimant could not take advantage of the new regime to bring proceedings claiming damages within the special, extended limitation period. On the other hand, where the infringement had come to an end less than six years before sect 47A came into force, a claimant could bring follow-on proceedings after a competition authority decision finding an infringement and those proceedings could cover the whole of that infringement: the claimant was not required to 'carve out' from its proceedings damages for the earlier period of infringement.

41. Similarly, on that basis, rule 119(1) preserves all the 2003 Rules, including rule 31(4), for *proceedings* commenced prior to 1 October 2015. For proceedings commenced on or after 1 October 2015 but with regard to *claims* arising before 1 October 2015, rule 119(2) preserves the special limitation period in rule 31(1) so that a claimant would not suffer from a retrospective curtailment of the limitation period. It was unnecessary to preserve rule 31(4) in such a case since it was inconceivable that there could be a competition authority decision between 1 October 2013 and 30 September 2015 (i.e. within the two year special

limitation period for starting proceedings) relating to an infringement of the competition rules which had ceased prior to 20 June 1997.

42. So interpreted, rule 119(1) – relating to "proceedings", and rule 119(2) – relating to "claims", with the preservation of rule 31(4) under the former but not under the latter, operate in a coherent manner in accordance with their plain wording, and rule 31(4) is consistent with the policy of the regime for purely follow-on actions before the CAT introduced under the original sect 47A.

43. We recognise that this construction of rule 31(4) means that a defendant would in some cases lose the benefit of a limitation defence to part of the action against it, but only when it committed a continuing infringement of competition law that persisted to a time for which it had no limitation defence. This seems to us to be very different from the situation which the Privy Council was addressing in *Yew Bon Tew*. We do not see that a defendant committing such a continuing breach should be able to assume that it would escape liability for the earlier period of its infringement when it had no such protection against the consequences of the subsequent period of infringement. The injustice to which Lord Brightman referred does not, in our respectful view, apply in these very distinct and particular circumstances.

44. We should add that some support for this construction of rule 31(4) can be derived from the observation of Lloyd LJ (with whose judgment Maurice Kay and Sullivan LJJ agreed) in the Court of Appeal in *BCL Old Co Ltd v BASF SE (No 2)* [2010] EWCA Civ 1258 at [32]:

> "Rule 31(4) shuts out a claim if proceedings in a court would be precluded by a limitation period which had expired before section 47A came into force."

However, we would not wish to place too much emphasis on this statement since it was made in a context where the issue before us in the present case did not arise.

45. Accordingly, we find that the claims for damages for the period prior to 20 June 1997 in the Dixons and Europcar proceedings are not time-barred.

D. DO THE CLAIMANTS HAVE AN ARGUABLE CASE UNDER SECTION 32 LA?

46. Given our conclusion that on the correct interpretation of the 2003 and 2015 Rules, the issue regarding sect 32 LA does not arise. However, as it was fully argued before us, it is appropriate to address it.

47. We therefore consider whether the limitation period in respect of claims for the period prior to 20 June 1997 would clearly have expired prior to 20 June 2003 when the original sect 47A came into force. It is common ground that this depends on the application of sect 32 in the circumstances of these claims.

The pleaded claims

48. In order to determine the potential application of sect 32, it is necessary to explain the claims in the two actions in more detail.

49. The determination in the Decision that the Defendants were in breach of art 101 TFEU is binding on the CAT in these proceedings: sect 58A CA 1998. The claim forms in both actions make clear that they are follow-on claims resting on the Decision. The details of the claims follow the factual findings and reasoning of the Decision, to which the Particulars of Claim in both actions cross-refer. The pleadings explain the operation of MIFs within the MasterCard four-party payment system, involving the card-holder, the merchant, the Acquiring Bank and the Issuing Bank. They further explain that, if a cardholder pays a merchant using a credit or debit card, the merchant will receive from its Acquiring Bank the purchase price less the merchant service charge ("MSC") levied by the Acquiring Bank. That MSC is made up of the interchange fee paid by the Acquiring Bank to the Issuing Bank, plus the Acquiring Bank's other costs. The interchange fee is therefore reflected in the MSC paid, in effect, by the merchant.

50. MasterCard is described as a payment organisation that groups several thousand banks that issue Mastercard and/or Maestro branded cards and/or provides acquiring services to merchants. The Particulars of Claim in both actions refer

to the change in the structure of the MasterCard organisation with effect from 25 May 2006, when following an initial public offering the First Defendant, MasterCard Inc, became a publicly traded company. However, in both claims, it is asserted that both before and after this change, MasterCard constituted an association of undertakings within the meaning of art 101(1) TFEU.

51. The Particulars of Claim assert that all banks issuing or accepting MasterCard and Maestro branded cards were subject to the MasterCard network rules. Those rules provide for the payment of an interchange fee between the two banks (Acquiring Bank and Issuing Bank) involved in a card transaction, and that in the absence of an interchange fee agreed bilaterally between the two banks, a “fallback” or “default” interchange fee would apply to the transaction.

52. The EEA MIF is stated to be a set of multilateral interchange fees which apply as the “fallback” fee (a) to cross-border MasterCard and Maestro branded card payments between EEA Member States, where no other interchange fees are set by bilateral arrangements; and (b) to domestic MasterCard and Maestro branded card payments within an EEA Member State, where no other interchange fees are set by bilateral agreements or through a “Domestic MIF” (i.e. domestic multilateral agreements between banks): para 52 of the Dixons Particulars of Claim; para 27(b) of the Europcar Particulars of Claim.

53. The Particulars of Claim in both actions summarise how the EEA MIF was set and applied through the network rules and decisions of MasterCard.

54. The pleadings adopt the reasoning of the Decision as to how the EEA MIF had the effect of appreciably restricting and/or distorting competition contrary to art 101 TFEU. In summary, it is alleged that a common, multilateral interchange fee restricts competition between the Acquiring Banks in respect of the prices charged to merchants for acquiring services (i.e. the MSC) since the Acquiring Banks are subject to a common cost base comprising the MIF. This effect is reinforced by some of the other MasterCard network rules, notably the “honour all cards” rule applied to merchants and the “no acquiring without issuing” rule applied to Acquiring Banks. The claims assert, following recital (410) of the

Decision, that but for the EEA MIFs, the MSCs charged to merchants would have been lower.

55. With regard to cross-border transactions when the EEA MIF applied directly, the effect of this on the MSC charged to the merchant is clear. However, in both proceedings it is further asserted that the EEA MIF also had the effect of increasing the charges to merchants in domestic transactions. The MasterCard rules provided that where no Domestic MIF was agreed, in the absence of a bilaterally agreed interchange fee the EEA MIF would act as a fallback MIF for domestic transactions. On the basis of the Commission's findings, the Claimants allege that the EEA MIF therefore acted as a floor or a benchmark for the setting of the Domestic MIF. In the Particulars of Claim in the Dixons proceedings, it is further alleged that the EEA MIF "is also likely to constitute a de facto floor for the setting of a bilaterally agreed [interchange fee]", on the basis that where there was no Domestic MIF, in the absence of agreeing an interchange fee bilaterally the EEA MIF would automatically apply.

56. In the Dixons proceedings, the Particulars of Claim states at para 83:

> "The EEA MIF is not objectively necessary for the operation of an open payment card scheme such as that operated by MasterCard."

The basis of this is stated to be the conclusion in recital (665) of the Decision, flowing from the analysis at recitals (524)-(648). The pleadings also assert, at para 107, "for the avoidance of doubt" that the levels of EEA MIF implemented under MasterCard's arrangements did not satisfy the conditions for exemption in art 101(3) TFEU. Again, that relies on the findings in the Decision: para 85 of the Particulars of Claim.

57. In the Europcar proceedings, the Particulars of Claim state succinctly, at para 45(e):

> "The EEA MIF set and/or implemented by the Defendants, or any of them, were [sic] not justified and/or exempt pursuant to what is now Article 101(3) TFEU...(recitals 666 to 753)."

58. In both actions, the pleadings further assert, following the Decision, that the restriction or distortion of competition had an appreciable effect on trade between Member States within the meaning of art 101(1) TFEU.

59. The Claimants all contend that, as merchants paying the MSCs to their Acquiring Banks on card transactions, they accordingly suffered loss.

(i) In the Dixons proceedings, the First Claimant, DSG Retail Ltd, claims for losses on transactions in the UK: where there were cross-border transactions as a result of the direct application of the EEA MIF, and where these were domestic transactions as a result of the application of the UK MIF for which the EEA MIF is alleged to have acted as a de facto floor. The Second Claimant, Dixons Retail Group Ltd, claims for losses incurred as a result of the application of the EEA MIF to transactions up to 6 August 2014 (the date of the merger of the Dixons Retail Group with the Carphone Warehouse Group) in the UK, Ireland, Greece, Norway, Denmark, Finland and Sweden, on the basis that the EEA MIF either applied directly in those markets or acted as a de facto floor for the setting of a domestic MIF or bilaterally agreed interchange fees, and that in consequence of the effect on its subsidiaries in those markets Dixons Retail Group Ltd received reduced dividends and/or funds. The Particulars of Claim state that pending disclosure the claimants have little information as to the jurisdictions where the EEA MIF was directly applied, since that information is redacted in recitals (417)-(420) of the Decision. However, of the six countries (other than the UK) in respect of which a claim is made, it is asserted that the EEA MIF applied directly to domestic credit and debit card transactions in Greece. That is based on a Commission document dated 18 December 2007 which gave this information.

(ii) In the Europcar proceedings, the four Claimants are companies within the Europcar group engaged in the business of car rental and they together constitute the UK division of Europcar, servicing demand for rental cars in the UK alone. Accordingly the claim in those proceedings concerns losses allegedly suffered directly by the UK business.

However, that loss is claimed on the basis of an inflated UK MIF and an inflated EEA MIF which was applicable directly to cross-border transactions. Further, in those proceedings it is alleged that the MSCs paid by the Claimants were also higher where their Acquiring Bank was the same as the customer's Issuing Bank, such that no interchange fee was payable in respect of that transaction, because the lack of competition in the acquiring market meant that there was no competitive pressure on the Acquiring Bank to charge lower MSCs.

Section 32 LA

60. Section 32 LA is set out above, but for convenience we repeat the material parts of this provision:

> "(1) ... where in the case of any action for which a period of limitation is prescribed by this Act, ...
>
> (b) any fact relevant to the to the plaintiff's right of action has been deliberately concealed from him by the defendant;
>
> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent...."

61. The Defendants did not suggest that this was not a case involving deliberate concealment of relevant facts. The focus of the argument between the parties was as to whether there were any facts relevant to the Claimants' right of action, within the meaning of sect 32(1)(b), which could not with reasonable diligence have been discovered by them by 20 June 1997. It was common ground that if the relevant facts could have been discovered by that date, then the claims in respect of the period prior to 20 June 1997 would have been barred by limitation at the time when sect 47A came into force.

62. The interpretation of sect 32(1)(b) was considered in a closely analogous context by both the High Court and, on the claimants' appeal, by the Court of Appeal in *Arcadia Group Brands Ltd v Visa Inc* [2014] EWHC 3561 (Comm),

[2015] EWCA Civ 883. Those judgments concerned a number of actions brought by well-known retailers against the companies operating the Visa credit and debit card system alleging infringement of EU and domestic competition law by reason of the imposition of the Visa MIFs. As in the present case, it was alleged that the MIFs led to inflation of the MSCs paid by the claimants to their acquiring banks for processing Visa credit and debit card transactions. The claimants sought damages in respect of MSCs paid from 1977, a period of some 37 years. The defendants applied to strike out, or alternatively for summary judgment in their favour regarding, those parts of the actions alleging infringement of competition law prior to six years before the proceedings were issued in July 2013 and (in one of the cases) October 2013, i.e. prior to July and October 2007.

63. It is important to note that all the proceedings at issue in the *Arcadia* judgments were stand-alone actions. In the first place, although the Visa arrangements provided for an EEA MIF broadly analogous in form to MasterCard's, the Commission did not take a decision finding infringement of art 81(1) EC Treaty (now art 101 TFEU) by the companies constituting the Visa organisation. Instead, in 2002 the Commission adopted a decision granting exemption pursuant to what was then art 81(3) EC Treaty (now art 101(3) TFEU) for a modified version of the Visa EEA MIF arrangements ("the Visa Exemption Decision"). Secondly, the allegations as regards the UK Domestic MIF in those proceedings – which was said to account for 95% of the claims – were advanced on the basis that the adoption of the UK Domestic MIF was a breach of the Chapter I prohibition under the CA 1998. The case advanced concerning the Domestic MIF was therefore based entirely on UK competition law. It was not there alleged, as it is in the present actions, that the level of Domestic MIF was related to the EEA MIF and thus in itself a breach of EU competition law. The Visa Exemption Decision did not apply to the Visa Domestic MIF.

64. Nonetheless counsel for the claimants in *Arcadia* acknowledged that it was the Decision regarding MasterCard of 2007 which gave the claimants sufficient comfort to start their proceedings, although he did not suggest that the Decision disclosed any new facts relevant to their cause of action within the meaning of sect 32(1)(b): judgment of Etherton C in the Court of Appeal at [54].

65. In his judgment at first instance, Simon J referred at [23] to a number of previous cases which throw light on the interpretation of sect 32(1): *Johnson v. Chief Constable of Surrey* (CA, unreported, 23 November 1992); *C v. Mirror Group Newspapers Ltd* [1997] 1 WLR 131 (CA); *Gold v. Mincoff, Science & Gold* [2001] Lloyd's Rep PN 423 (Neuberger J); *AIC Ltd v. ITS Testing Services (UK) Ltd, The 'Kriti Palm'* [2006] EWCA Civ 1601 and *Williams v. Lishman, Sidwell, Campbell & Price Ltd* [2010] EWCA Civ 418. From those judgments he derived seven principles, set out at [24] as follows:

> "(1) Section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly, see Rose LJ in *Johnson*. In this context Neill LJ referred to 'the public interest in finality and the importance of certainty in the law of limitation,' in *C v. MGN* at p.139A.
>
> (2) There is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case. Section 32(1)(b) is concerned with the former, see Rose LJ in *Johnson*.
>
> (3) The section is to be interpreted as referring to 'any fact which the [claimant] has to prove to establish a prima facie case', see Neill LJ in Johnson and in *C v. MGN* at p.138H, and Rix LJ in *The 'Kriti Palm'* at [323].
>
> (4) The claimant must satisfy 'a statement of claim test': in other words, the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie case, see Rose and Russell LJJ in Johnson, and Neill LJ in *C v. MGN* at 137B-C. As Buxton LJ expressed it in *'Kriti Palm'* at [453]:
>
>> "… what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it."
>
> (5) Thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger, see Russell LJ in *Johnson*:
>
>> "Accordingly, whilst I acknowledge that new facts might make the plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the 'right of action' itself. They do not affect 'the right of action,' which was already complete, and consequently in my judgment are not relevant to it."
>
> Nor does the sub-section apply to newly discovered evidence, even where it may significantly add support to the claimant's case, see Rix LJ in the 'Kriti Palm' at [325], nor to facts relevant to the claimant's ability to defeat a possible defence, see Neill LJ in *C v. MGN* at 139A.
>
> (6) As expressed by Rix LJ in The '*Kriti Palm'* at [307], the purpose of s.32(1)(b) is intended to cover the case,

> "where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action (the so-called 'statement of claim' test). It is therefore important to consider the facts relating to an allegation of deliberate concealment vis a vis a claimant's pleaded case."

(7) What a claimant has to know before time starts running against him under s.32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation, see for example Neuberger J in *Gold v Mincoff* at [75] in the different context of s.14A of the 1980 Act, but referring to Johnson and *C v. MGN*."

66. Giving the leading judgment in the Court of Appeal, the Chancellor quoted that passage in the judge's judgment without criticism, and in the present cases no party sought to cast doubt on it. Further, in his judgment the Chancellor stated, at [49]:

> "*Johnson*, the *Mirror Group Newspaper* case and *The Kriti Palm* are clear authority, binding on this court, for the following principles applicable to section 32(1)(b) of the 1980 Act: (1) a "fact relevant to the plaintiff's right of action" within section 32(1)(b) is a fact without which the cause of action is incomplete; (2) facts which merely improve prospects of success are not facts relevant to the claimant's right of action; (3) facts bearing on a matter which is not a necessary ingredient of the cause of action but which may provide a defence are not facts relevant to the claimant's right of action."

67. The Court of Appeal also held that there was no special rule or approach for competition law claims when applying sect 32(1)(b): judgment at [51].

68. As regards the 'statement of claim' test as explained above, Simon J recorded in his judgment at first instance, at [31]:

> "It is common ground that, in order to establish a claim for damages based on Article 101(1) TFEU, [and/or] s.2 of the CA 1998 ... four elements must be shown: (1) an agreement or concerted practice between undertakings, (2) having as its object or effect the prevention or distortion of competition which is (a) appreciable and (b) not objectively necessary, (3) which affects trade between Member States (Article 101), or within the United Kingdom (s.2 of the Competition Act 1998)... and (4) which has caused some loss and damage to the claimant."

69. That statement was recited in the judgment of the Court of Appeal (at [18]), which proceeded on the same basis. The Court rejected the argument that it was also necessary for the claimants to know the facts concerning the right of the defendants to claim an exemption under art 101(3). The Chancellor observed

that such exemption is a matter for the defendants to allege in their defences and on which they bear the onus of proof, and he continued at [58]:

> "Disproof of a right to an exemption is not an ingredient of the appellants' causes of action."

70. The claimants also contended that in the absence of information as to how MIFs were fixed by the respondents and their levels, the appellants were unable to assess prior to the commencement of the proceedings whether or not there had been a restriction of competition or what will be the likely amount of damages. Rejecting this argument, the Chancellor stated:

> "57. ... I have set out critical parts of the particulars of claim bearing on the allegation of unlawful restriction of competition. They include the allegation that the MIFs amounted to some 80% of the MSC; they created a cost element common to all the acquiring banks and thereby set a floor under the MSC; the MIFs should either not have existed or should have been set at zero; and the consequence is that the appellants were overcharged to the full amount of the MIFs and have suffered loss equal to the overcharge. Those allegations about the MIFs are sufficient (in combination with the other allegations in the particulars of claim) to sustain a pleaded case that there has been a restriction of competition. They are also a sufficient allegation of damage to complete a cause of action for breach of statutory duty.
>
> ....
>
> 58. The precise way in which the MIFs were fixed, over and above what is already pleaded in the particulars of claim, is in truth no more than something which goes to the strength of the appellants' claims and the commercial considerations bearing on the advantages and disadvantages of commencing the proceedings. As such, it is not a relevant fact within section 32(1)(b) on the 'statement of claim' test."

71. The question in *Arcadia* was accordingly whether sufficient facts necessary to plead the various essential elements for the claims could with reasonable diligence have been discovered by July/October 2007, in which case the start of the six year limitation period would not be postponed under sect 32(1)(b) beyond those dates. In the absence of such postponement, limitation had expired at the time the proceedings were issued in 2013. The focus of inquiry was therefore on what could with reasonable diligence have been found out in 2007 (but prior to the MasterCard Decision). In deciding that it was clear that the relevant facts could have been discovered, the judge relied, as regards the EU competition law claims, in particular on public communications from the Commission in 2000-2001, the Visa Exemption Decision and the Commission's

accompanying press release of 2002. As regards the UK competition law claims, the judge relied on a decision of the Office of Fair Trading ("OFT") dated 6 September 2005 finding that MasterCard's domestic rules infringed both art 101(1) EU and the Chapter I prohibition, and on the OFT's press release of 19 October 2005 announcing that it had opened a case against Visa concerning its domestic MIF for credit and debit cards.

72. The judgment of Simon J was upheld in the Court of Appeal. But those findings of the basis on which the relevant facts could have been discovered are of no assistance in the present cases where, as noted above, the critical date is 20 June 1997.

73. There was no issue in *Arcadia* as to whether the documents relied on could have been discovered by the claimants with reasonable diligence. By contrast, in the present cases the Defendants rely on this aspect of sect 32(1). The meaning of "reasonable diligence" in sect 32 was addressed by the Court of Appeal in *Paragon Finance v DB Thakerar & Co* [1991] 1 All ER 400, as regards the analogous question of discovery of the defendant's fraud for the purpose of sect 32(1)(a). Millett LJ (with whom the other two members of the Court agreed) said, at 418, that the test was:

> "how a person carrying on business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency."

74. This formulation was further considered recently by the Court of Appeal in *Gresport Finance Ltd v Battaglia* [2018] EWCA Civ 540, where Henderson LJ (with whom McFarlane and Floyd LJJ agreed) said:

> "48. ... It is agreed on both sides that the starting point remains the guidance given by Millett LJ in the *Paragon Finance* case. A further point of some importance was added by Neuberger LJ (as he then was) *in Law Society v Sephton* [2004] EWCA Civ 1627, [2005] QB 1013, at [116], where he endorsed the view of the deputy judge in that case (Michael Briggs QC, as he then was) to the effect that:
>
> > "… it is inherent in section 32 (1) of the 1980 Act, particularly after considering the way in which Millett LJ expressed himself in *Paragon Finance*…, that there must be an assumption that the claimant desires to discover whether or not there has been a fraud. Not making any such assumption would rob the effect of the word "could", as emphasised

> by Millett LJ, of much of its significance. Further, the concept of "reasonable diligence" carries with it, as the judge said, the notion of a desire to know, and, indeed, to investigate."

49. Neuberger LJ added that "one must be very careful about implying words into a statutory provision", but he said that the judge had not been seeking to imply words, or a new concept, into the statutory provision. He was merely "explaining what was involved in the process of deciding whether a claimant, could, with reasonable diligence, have discovered the fraud which it now seeks to plead". I respectfully agree. Another of way of making the same point, as I suggested in argument, might be that the "assumption" referred to by Neuberger LJ is an assumption on the part of the draftsman of section 32(1), because the concept of "reasonable diligence" only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake (as the case may be).

50. It is a question of fact in each case whether the claimant could not with reasonable diligence have discovered the relevant fraud, concealment or mistake. As Webster J aptly said, in *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 3 All ER 193, at 199:

> "I conclude, first of all, that it is impossible to devise a meaning to be put on those words [reasonable diligence] which can be generally applied in all contexts because, as it seems to me, the precise meaning to be given to them must vary with the particular context in which they are to be applied. In the context to which I have to apply them [the mistaken attribution of an old master drawing], in my judgment, I conclude that reasonable diligence means not the doing of everything possible, not necessarily the using of any means at the plaintiff's disposal, not even necessarily the doing of anything at all, but that it means the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase.""

Summary determination

75. The Claimants submitted that the question of the application of sect 32 is unsuitable for summary determination. They rely on the principles governing summary judgment, which it is accepted apply equally to determination of the applications to set aside service on the First and Second Defendants. The principles were set out by Lewison J in his judgment in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], in a formulation that has repeatedly been cited and approved:

"(1) The Court must consider whether the Claimants have a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v. Hillman* [2001] 1 All ER 91, 92.

(2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472 at [8].

(3) The court must avoid conducting a 'mini-trial', without the benefit of disclosure and oral evidence: *Swain v. Hillman* (above) at 95.

(4) The Court should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, Mummery LJ at [17].

(5) In reaching its conclusion, the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v. Hammond* (No. 5) [2001] EWCA Civ 550 at [19].

(6) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the *Easyair* case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].

(7) The overall burden of proof remains on the Defendants, ... to establish, if it can, the negative proposition that the [Claimants have] no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial, see *Apvodedo NV v. Collins* [2008] EWHC 775 (Ch), Henderson J at [32].

(8) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see: *Miles v. Bull* [1969] 1 QB 258 at 266A. In that case Megarry J was satisfied that there were grounds for scrutinising what appeared on its face to be a legitimate transaction; see also *Global Marine Drillships Limited v. Landmark Solicitors LLP* [2011] EWHC 2685 (Ch), Henderson J at [55]-[56]."

76. Mr Pickford argued that determination of whether the Claimants in these cases knew or could have discovered the relevant facts within sect 32(1) requires an exchange of pleadings, disclosure and evidence. We do not agree. No doubt if the Defendants were contending that the Claimants had *actual* knowledge of the relevant facts, which the Claimants disputed, there would have to be disclosure and, potentially, witness evidence. But here the contentions are based entirely on what the Defendants submit that the Claimants *could* with reasonable diligence have discovered. That is a hypothetical question: if the Claimants had used reasonable diligence, interpreting that concept as discussed above, would they have discovered the relevant facts? As to that, the Defendants' argument

is advanced on the basis of documents that were either in the public domain or which reveal information that was in the public domain.

77. The position is therefore analogous to that in *Arcadia* although the documents are of course different. As the party seeking summary determination, the burden is on the Defendants, but if they can show that it is clear that the Claimants could with reasonable diligence have discovered sufficient facts to enable them to plead a statement of claim in 1997, or put another way, that the Claimants have no realistic prospect of showing the contrary, then it is appropriate to decide that question now. As Simon J stated in *Arcadia*, at [109]:

> "The question is suitable for summary disposal since all the matters relevant to the Applications are before the Court. If the Applications are well founded, the limitation issues in the case can be disposed of without the need for a trial of factual issues either as to what other matters the Claimants knew or did not know from time to time, or on the distinct allegations of 'concealment'. Documents which might be disclosed and evidence which might be given have no bearing on the outcome."

Application of the 'statement of claim' test

78. In the present cases, Mr de la Mare advanced the general proposition that the 'statement of claim' test should be applied to the competition claims in a different manner from that upheld in *Arcadia*, because it is to be applied in what he described as "the radically different" legal context of 1997 when, he argued, there was a much more stringent approach taken to competition law pleadings than in 2007. We do not accept that submission. In our judgment, the decision of the Court of Appeal in *Arcadia* applies generally, and cannot be distinguished on the basis of dicta in earlier cases at first instance relating to very different situations. We should add, however, that we do not see that this question makes a difference to the resolution of the issues before us.

79. It is necessary to consider the various facts which it is alleged that the Claimants needed to know and the basis on which the Defendants contend the Claimants could with reasonable diligence have discovered them. In doing so, it is important to bear in mind that a hypothetical statement of claim put forward in 1997 would obviously have looked very different from the Particulars of Claim now served with the benefit of the Decision. But the fact that the current

pleadings can as a result give much more detail, and may indeed appear much stronger, is not a material consideration. The question is only whether a complete cause of action could have been pleaded in 1997. Mr Pickford submitted that this means that the Claimants could with reasonable diligence have discovered "all of the essential factual elements that entitle the claimant to its remedy". We think that fairly encapsulates the legal test.

(1) <u>Decision of an association of undertakings</u>

80. The first element of the cause of action is that the rules providing for the EEA MIF were the result of a decision of an association of undertakings within the meaning of art 101(1) for which the Defendants were responsible.

81. As to this, MasterCard relied on the Report by the Monopolies and Mergers Commission of August 1989 on Credit Card Services (the "1989 MMC Report"). This included the following statements:

> "*The MasterCard trade marks*
>
> 2.40 The owner of the MasterCard trade marks is MCI, a membership corporation organised under the laws of the State of Delaware, USA.... The JCCC[2] is a Principal (Association) member of MCI; it has a non-assignable licence to use the MasterCard trade marks in the United Kingdom in accordance with MCI's Bylaws and Rules. The participating Access banks[3] were previously affiliate members of MCI, having agreements with MCI whereby each confirmed that JCCC acted as agent for all of them, and each undertook to use the trade marks only in a manner agreed between MCI and JCCC. The banks are now also Principal members of MCI.
>
> *The Eurocard trade marks*
>
> 2.41 These trade marks, which appear on the back of the Access MasterCard card, are owned by ECI, a company which has organised an international credit card system, with a head office in Brussels. The JCCC is a licensee of the Eurocard trade marks in the United Kingdom, and so too are the Access banks which had previously been authorised by the JCCC to use those marks. As described in the following paragraph, the licensing and use of the MasterCard and Eurocard trade marks is, in Europe, a joint operation.
>
> *The arrangements between MCI and ECI*

[2] The Joint Credit Card Company Ltd, owned by Lloyds, Midland, NatWest and Royal Bank of Scotland.
[3] The "Access banks" essentially referred to all the UK banks issuing MasterCard and Eurocard payment cards: paras 2.34-2.37 of the MMC Report.

> 2.42 MCI has delegated to the Board of ECI initial licensing authority in relation to MasterCard trade marks in Europe…"
>
> "*The financial arrangements of the Access scheme*
>
> ...
>
> 2.60 The MasterCard and Eurocard systems determine the interchange fees to be paid for international transactions...."

And further, in setting out the views put forward by Lloyds bank:

> "6.327 Domestic interchange fees were a matter of negotiation; those for international transactions were fixed by MasterCard/Eurocard... and had to be accepted (and were not unreasonable). For international transactions it was not practical to envisage the individual negotiation of interchange fees; there had to be uniform levels set centrally by the payments organisation concerned...."

82. MCI as there referred to is the Second Defendant. ECI referred to Eurocard International SA, the predecessor to the Third Defendant. The Second Defendant was not incorporated until 2001 and so is not relevant to these applications.

83. MasterCard further relies on articles published in *The Financial Times* in 1992 and 1994:

- On 15 July 1992: "[Retailers] are beginning to press for a review of the interchange fee system, the fixed charge which the retailer's bank pays to the credit card holder's bank. Interchange fees generate much of the income banks get from their card operations and they are usually set by the international payment systems, Visa International and MasterCard, and so are not subject to negotiation between a bank and its customer."
- On 5 May 1994: "The structure of the industry is built around the two leading worldwide credit card associations, Visa and MasterCard. They are "owned" by the banks that helped to establish them or subsequently joined them when they realised the potential profitability of the market…

  The card associations determine the procedures by which credit card transactions are reconciled between card issuers, in the event of them being unable to reach bilateral agreements.

  The crucial element in this calculation is the so-called issuer reimbursement fee (or interchange). This is an ad valorem amount paid on every transaction by the bank that acquires these from the merchant, to the bank that issued the card…."

84. In response, Mr Pickford argued that these passages do not give details of the way the international MIF was set, or refer specifically to the EEA MIF. The

rules under consideration in the 1989 MMC Report were different from the rules after 1992 and relied on in these proceedings.

85. However, in our view these are matters of detail. The key points are that the Defendants constituted an association of undertakings and that they took decisions which determined the MIFs. As Simon J stated in *Arcadia*, at [97]:

> "It is difficult to see why ... the 'manner' and 'mechanisms' by which the MIFs were set is an essential matter of proof which has to be established in order to found the cause of action."

Moreover, it is well established that a decision by an association of undertakings does not have to be formally binding in order to establish an infringement of art 101 TFEU. As stated in *Bellamy & Child, European Union Law of Competition* (8th edn, 2019) at para 2.114:

> "Where the activities of an association of undertakings produce the results prohibited under Article 101(1), little will turn on an exact analysis of the measures taken. The concept of a 'decision' includes the rules and regulations of the association in question, decisions binding upon the members, codes of conduct and any recommendation:
>
> 'whatever its legal status, if it constitutes the faithful reflection of a resolve on the part of an association of undertakings to coordinate the conduct of its members' on the market in accordance with the terms of the recommendation.'"

86. Further, the newspaper articles show that the general nature of a multilateral interchange fee was well understood.

(2) <u>Causing an appreciable restriction of competition</u>

87. As regards this element, the documents relied on by MasterCard included the Commission Notice on the application of the EC competition rules to cross-border credit transfers, OJ 1995 C251/3, published on 27 September 1995 (the "Commission's 1995 Notice"). This includes the following:

> "Multilateral interchange fees
>
> 40. The Commission considers that a bilateral interchange fee agreement will normally fall outside Article 85 (1). In contrast, a multilateral interchange fee agreement is a restriction of competition falling under Article 85 (1) because it substantially restricts the freedom of banks individually to decide their own pricing policies. The restriction is likely also to have the effect of distorting the behaviour of banks vis-à-vis their

customers. There will be another restriction of competition under Article 85 (1) when there is an agreement or concerted practice between banks to pass on the effect of the interchange fee in the prices they charge their customers.

41. Sufficiently strong inter-system competition could restrain the effects of the interchange fee on the prices charged to customers. In such a situation the restrictive effect of the multilateral interchange fee within the one system might not be appreciable (and so fall outside the scope of Article 85 (1)), provided that the competing systems do not themselves also contain similar multilateral interchange fees.

42. Where there is limited or no inter-system competition, a multilateral interchange fee will normally be considered to have the effect of restricting competition to an appreciable extent, and thus to fall within the prohibition of Article 85 (1).

43. Where agreements on multilateral interchange fees fall within Article 85(1), it is only where they are shown to be actually necessary for the successful implementation of certain forms of cooperation, positive in themselves, that they may be capable of obtaining an exemption under Article 85(3)...."

88. As regards para 41 of the Commission's 1995 Notice, Mr Hoskins points out that it was well-known that Visa, as the main system competing with MasterCard, operated a cross-border MIF under a four-party payment card scheme. *The Financial Times* articles quoted above significantly refer to the two systems without distinction. That was not seriously contested in the hearing before us.

89. MasterCard also sought to rely on a complaint submitted to the Commission by the British Retail Consortium (the "BRC Complaint") on 26 February 1992 contending in some detail that the cross-border MIFs of MasterCard and Visa infringed art 101 and explaining their anti-competitive effect. In response, the Claimants pointed out that the BRC Complaint was not a public document, but they accepted that they would have been aware that the BRC had submitted a complaint. MasterCard further relied on a subsequent complaint submitted to the Commission by EuroCommerce on 22 May 1997, alleging that the arrangement amounted to an anti-competitive cartel 'by object.'

90. We do not think it is necessary to refer to the EuroCommerce complaint which, as Mr Pickford pointed out, was also a confidential document submitted less than a month before the cut-off date for the purpose of applying sect 32. As regards the BRC Complaint, the argument made by Mr Hoskins was that if the BRC could find out the basic information in its complaint, so could have the Claimants with "reasonable diligence". We think there is force in that

submission, although the way the complaint is there developed is in terms of a single rate of MIF that "thwarts the free market by treating as identical transactions arising from cards and systems with varying rates of risk and security", which is somewhat different from the basis of the Decision – and hence these proceedings – in terms of setting a de facto floor for any bilateral interchange fee.

91. However, in our view, it is unnecessary to decide whether the Claimants could have discovered the information contained in the BRC Complaint, although the fact that they would have known that the BRC had made a competition law complaint is significant, as we explain further below. Beyond that, we consider that the Commission's 1995 Notice is sufficient to show that the nature of the arrangement had an anti-competitive effect by restricting competition between banks for the purpose of art 101. It is trite to observe that a reduction of competition is likely to lead to higher prices. The fact that with expert analysis the argument could be elaborated or developed, or that the Claimants did not know the full nature of all the various MIFs set by the MasterCard rules, does not mean that a key *fact* was absent that prevented a completed cause of action for breach of art 101 being advanced. As Simon J observed in *Arcadia*, at [99]:

> "..., this is price-fixing claim. Although the MIF levels may have been concealed, the actual MIF levels are not material to the existence of the claim (although they are potentially relevant to the measure of recoverable damage). The basis of the claim is the existence of <u>any</u> MIF setting the minimum charge since any MIF is characterised as an overcharge forming the basis for recovery. It follows that the actual MIF level is immaterial provided it is more than zero. Again, I accept that it is material to the quantum of the claim and therefore to the commercial sense in bringing proceedings, but such matters are not relevant facts for the purpose of s.32(1)(b)."

92. It is also relevant for the claims that the MIF, like any interchange fee, flowed through to the merchants by its impact on the MSC that they were charged by way of deduction by the Acquiring Banks. But this was well known. The 1989 MMC Report stated, at para 7.82:

> "In negotiating MSCs one of the costs which a merchant acquirer also needs to take into account is the interchange fee payable to foreign card issuers whose cardholders use their cards within the United Kingdom. The levels of these fees [(] a percentage of the amount of the purchase or of the cash withdrawn[)] are determined by the two international payments organisations. For purchases they are 1 per cent both for MasterCard/Eurocard and for Visa."

It was the fact that the MIF was passed on by their Acquiring Bank to the merchants that was the foundation of all the complaints by retailers about the interchange fees, referred to in *The Financial Times* articles. Moreover, as long ago as 19 September 1989*, The Times* reported complaints by British retailers to the then Secretary of State for Trade, about various practices of the card companies including the following:

> "They also want Mr Ridley to abolish a fixed fee charged by banks for sorting out the credit card paperwork with the card issuers.
>
> The so-called interchange fee, levied by the card companies and passed on to the shops by their banks, accounts for about 1 per cent of any sale using a card."

While the description of the basis for the interchange fee there is not very accurate, the fact that it was passed on in full by the banks to the merchants was, and remains, correct.

93. The sufficiency of these facts to constitute the allegation of an appreciable distortion of competition can be seen from the pleading in the Dixons case. The Particulars of Claim includes the following allegations:

> "77.4 The EEA MIF distorts competition in the prices charged by Acquiring Banks to Merchants for acquiring cross-border Credit and Debit card transactions with MasterCard payment cards because it creates an important cost element which constitutes a *de facto* floor for fees charged to Merchants they acquire"
>
> "82. The EEA MIF appreciably restricts competition in the EEA Member States. In particular, Dixons relies on:
>
> > 82.1 the substantial economic impact of the EEA MIF within the EEA;
> >
> > 82.2 the strong position of MasterCard on the relevant markets, in particular due to network effects;
> >
> > 82.3 the fact that the EEA MIF is part of a network of inter-related agreements that together have a reinforced cumulative effect; …"

These allegations sustaining the cause of action could all be advanced on the basis of the facts discussed above.

94. The fact that the pleading alleges further ways in which the EEA MIF distorts competition in cross-border transaction may serve to strengthen the case and thus improve the prospects of success but, as the Court of Appeal made clear in

Arcadia, those are not the criteria for assessing whether there are sufficient facts to constitute a complete cause of action.

(3) Not objectively necessary

95. In *Arcadia* it was accepted by the defendants that a lack of objective necessity was an element which the claimant must show to establish its claim: see paras 68-69 above. No such concession was made in the present applications. On the contrary, MasterCard argued that it was not necessary to plead this negative assertion: that was a matter which a defendant might, but may not, choose to raise in a defence. This issue is important, since the question of objective necessity of a MIF is complex, and the Commission's conclusion, at recital (648) of the Decision, that the EEA MIF was not objectively necessary is based on about 100 paragraphs of analysis as to how the scheme would operate without a MIF. Although such detailed assessment of the evidence obviously would not be required in a pleading, we accept that the Claimants here could not with reasonable diligence be expected to have discovered the basic facts supporting that analysis. We did not understand Mr Hoskins to suggest the contrary. He merely said that if, contrary to his primary submission, it was necessary for a claimant to plead at all to objective justification in its Particulars of Claim, a bare statement to that effect was sufficient without the need for any supporting facts.

96. In *Racecourse Association v Office of Fair Trading* [2005] CAT 29 ("RCA"), the Tribunal (Rimer J, Prof Andrew Bain, Ms Sheila Hewitt) determined an appeal against an OFT decision that the collective sale of media rights on behalf of a large group of racecourses infringed the Chapter 1 prohibition under the CA 1998. The principles applicable to the application of the Chapter 1 prohibition are in all material respects the same as those which apply to art 101. The appellants there argued that the restrictions were objectively necessary, and so did not infringe the prohibition, or alternatively should have been granted an exemption under sect 4 CA 1998. While noting that the legal burden of proof of the infringement lay on the OFT, the Tribunal stated:

> "132. The OFT submitted, however, that this position is qualified in cases in which the decision-maker has to decide whether what appears to be a

> restriction of competition is justified by the particular circumstances of the case. It submitted that, in such cases, whilst the legal burden of proving the infringement of the Chapter I prohibition remains within the decision-maker (here of the OFT), the evidential burden of demonstrating that the apparent restriction on competition is justified falls upon the undertaking advancing such assertion: he who asserts must prove. The OFT submitted that, to the extent that the appellants defend the prima facie anti-competitive effect of the MRA as being "necessary" to achieve a pro-competitive outcome, the evidential burden of showing it lay on them.
>
> 133. We accept this. It cannot be for the OFT to set up and disprove a case founded on the "necessity" argument. If, as the appellants claimed, any apparently anti-competitive effect of the collective dealing between the Courses and ATR was justified by the necessity of such dealing, it was for them to demonstrate it by evidence. Once that evidence was before the OFT, the overall legal burden still remained on the OFT to prove the infringement of the Chapter I prohibition that it was asserting. But unless the Appellants first made out a necessity case on the facts, no such case would arise for consideration."

97. We respectfully agree and adopt that reasoning. Although distinct from the position as regards an exemption, where the legal as well as the evidential burden rests on the party claiming exemption, when considering what facts are needed to constitute a complete cause of action there is no requirement for a claimant to plead a factual basis on which the impugned arrangement was not objectively necessary. Indeed, in our experience many pleaded claims for breach of art 101 do not contain such an averment at all and they are not therefore struck out. We do not accept Mr Pickford's submission that in the absence of such an averment, the Particulars of Claim would be incomplete.

98. This approach derives support from the judgment of Neill LJ in *Johnson v Chief Constable of Surrey*, as set out and followed by the Court of Appeal in *Arcadia*. Etherton C observed in the latter case that it was in *Johnson* that the 'statement of claim' test was first formulated by the Court of Appeal. *Johnson* was a claim for false imprisonment. The claimant had given alibi evidence in support of a Ms Carol Richardson, one of the defendants at the trial of the "Guildford Four" arising out of two bomb explosions in pubs in Guildford, and he alleged that he had been arrested and detained by police before the trial in order to pressure him to resile from his evidence. He did not bring his claim until after the quashing of the convictions of the Guildford Four in 1989, and in reliance on sect 32(1)(b) he argued that key relevant facts were whether the police had reasonable cause to suspect that Ms Richardson was guilty and whether they had concealed from him the fact that her confession was unreliable. The Court of Appeal upheld the

decision that the plaintiff's claim was statute-barred. See *Arcadia* at [31]-[32]. In his judgment, quoted in *Arcadia* at [35], Neill LJ said:

> "In one sense it is true to say that the tort of false imprisonment has two ingredients; the fact of imprisonment and the absence of lawful authority to justify it. It is to be noted that in his speech in *Weldon v. Home Office* [1992] AC 58 at 162 Lord Bridge spoke of the tort as having those two separate ingredients. Indeed at a trial these two aspects of the tort are likely to be investigated. But as I understand the law, the gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious; he establishes a prima facie case if he proves that he was imprisoned by the defendant. The onus is then shifted to the defendant to prove some justification for it. If that be right, one looks at the words in section 32(1)(b), "any fact relevant to the plaintiff's right of action". It seems to me that those words must mean any fact which the plaintiff has to prove to establish a prime facie case."

99. We do not consider that the decision of the Court of First Instance in Case T-328/03 *O2 Germany GmbH v Commission* EU:T:2006:116, on which Mr de la Mare sought to rely, affects the position. That was a case where two telecommunications companies had applied to the Commission for negative clearance of their agreement for sharing infrastructure for 3G mobile telecommunications on the German market. The Court annulled the Commission's decision refusing negative clearance, while granting the agreement limited exemption, on the basis that the Commission had failed to consider whether O2 would have been able to enter the 3G market in the absence of the agreement (such that the agreement did not restrict competition by precluding O2's independent entry). *02 Germany* therefore concerned the validity of a final decision of a competition authority which failed properly to consider objective necessity. We regard that question as very different from the 'statement of claim' test at issue in the present cases. Indeed, in the *RCA* case the Tribunal set aside the OFT's decision on the ground that the arrangements were objectively necessary; that was not inconsistent with its observations on the burden on the appellant to advance the argument.

100. Accordingly, objective necessity is not an element which takes the Claimants within sect 32(1)(b). We would only add that this issue does not appear to have been significant in *Arcadia* in any event, since by 2007 significant factual information was available regarding the question of the necessity for a MIF.

(4) Effect on inter-State trade

101. We did not understand that it was disputed that this would have been discoverable, if not indeed obvious, in 1997. As the Commission's 1995 Notice stated, at para 10:

> "Articles 85 and 85 only apply where there may be an effect on trade between Member States. Cross-border credit transfer systems, precisely because they carry cross-border credit transfers, will be capable of having such an effect."

(5) Loss to the Claimants

102. Again, it seems obvious that if the interchange fees paid by their acquiring banks fed through to the MSCs charged to the Claimants, a higher level of interchange fee resulting from the MIF would affect the MSCs causing them loss. How large that loss might be is clearly very relevant to the commercial decision as to whether to bring proceedings. But provided that there was some loss, the cause of action was complete and further facts going to quantum are not relevant for the 'statement of claim' test.

Reasonable diligence

103. As regards in particular the first two elements discussed above (i.e., decisions by an association of undertakings and the appreciable effect on competition), it was submitted on behalf of the Claimants that even if the relevant facts were discoverable in an objective sense, these specific Claimants could not have been expected to discover them; in other words, the statutory test of reasonable diligence was not satisfied in the particular circumstances of the present cases. Mr Pickford argued that for the purpose of sect 32(1)(b) it was necessary to show that at the material time there was what he called a "trigger point" to justify any action by the particular claimant to investigate whether it had a claim, and further that once so put on notice, the claimant could with reasonable diligence have discovered the relevant facts. Here, the material time is prior to the cut-off date of 20 June 1997 – and no doubt sufficiently before that date so as to have enabled the Claimants to formulate and commence proceedings by that date.

104. In that regard, Dixons relies on the facts that during the 1990s:

(1) the business operated by the existing members of the Dixons retail group was predominantly located in the UK;

(2) the proportion of payments processed by the business using MasterCard-branded payment cards was material, but smaller than the proportion using other payment methods (cash or cheque or – in the case of PC World-brand transactions, a Visa-branded card);

(3) insofar as payments were processed using MasterCard-branded cards, the majority were domestic transactions, and not cross-border transactions to which the EEA MIF directly applied;

(4) Dixons' legal team was small, comprising three or four lawyers with no specialist competition expertise. External lawyers would need to have been instructed to address competition issues.

105. Europcar relies on the facts that as at 20 June 1997:

(1) the four Claimants in the present proceedings were divided as between three wholly separate corporate groups: only the First Claimant was then part of the Europcar group, owned by Europcar International SA; the Second Claimant, then called Alamo Rent-a-Car (UK) Ltd, was part of the US-based Republic Industries group; and the Third and Fourth Claimants, then called Eurodollar (UK) Ltd and Eurodollar International Ltd respectively, were both part of the Eurodollar group of companies;

(2) none of the Claimants had an in-house legal function;

(3) card payments constituted a much lower proportion of sales for the Claimants than at present. The total turnover of the four Claimants in the year ended 31 December 1997 was some £170.5 million whereas the estimated claim for overcharges paid through the MSCs that year was

only £118,710 (a figure which includes MSCs on domestic as well as cross-border transactions) and for previous years it was less.

106. However, in the first place, on the basis of the authorities as explained by the Court of Appeal in *Gresport Finance* (para 74 above), we consider that the concept of "reasonable diligence" is to be applied on the assumption that the claimant is on notice of the need to investigate. Secondly, it is clear from the press articles that British retailers in the 1990s felt that the effect of the cross-border MIFs, as applied to cross-border transactions, were of sufficient concern to provoke complaints to the Trade Secretary and then for the BRC to submit a complaint to the Commission. Counsel for the Claimants realistically accepted that the Claimants can be assumed to have been aware of the reports in *The Financial Times* and *The Times* and, as noted above, that they were aware that the BRC had submitted a complaint to the Commission even if they did not know its details.

107. Accordingly, in applying the concept of "reasonable diligence" there should be attributed to the Claimants a desire to investigate. Turning to the question of what companies in the position of these Claimants could reasonably have found out, assuming that they had "adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency" (to adopt the test set out by Millett LJ in *Paragon Finance*) we recognise that the commercial incentive to investigate a claim was much lower in 1997 than it subsequently became with the much greater use of credit and debit cards. But although any loss suffered by Dixons and Europcar over the period up to 1997 was much smaller than in later years, it was not so insignificant that it can be dismissed as *de minimis*. Moreover, it could have been anticipated that such loss would continue into the future, and the figures produced in the evidence from Europcar show, as anyone would expect, that the use of credit and debit cards for payment was steadily increasing. None of the Claimants could be described as a small business and several were part of international groups. In all the circumstances, we do not regard the lack of in-house expertise in competition law among the Claimants as significant. They all had access to, and the means to pay for, expert external legal advice.

108. We therefore consider that reasonable diligence here would have involved the Claimants, being aware of the general concern among British retailers about the cross-border MIF which had led to the BRC Complaint, and more specifically of the effect of the cross-border MIF in increasing the amount they paid each year by way of MSCs for processing all cross-border payments, instructing their external legal advisors to investigate whether there was a basis for bringing a claim under competition law. And reasonable diligence on the part of their solicitors would clearly have led them to the 1989 MMC Report and the Commission's 1995 Notice. Very possibly it would also have led them to advise their clients to request a copy of the BRC Complaint, which those Claimants who were members of the BRC could no doubt have obtained. But as we have already explained, we do not consider that obtaining a copy of that Complaint was necessary in order for the Claimants to have discovered sufficient "relevant facts."

109. Mr Pickford asked rhetorically why, if the relevant facts could have been discovered with reasonable diligence, none of the many thousands of traders in the UK that accepted payment by MasterCard made a claim before 1997. However, there are many considerations which affect the commercial decision as to whether to start legal proceedings against a powerful defendant, more especially competition law proceedings which are well-known to be complex and expensive. Any claim brought before the Decision would have been a pure stand-alone claim, with the burden of establishing the anti-competitive infringement resting on the claimants. It is notable that in *Arcadia*, although the action there was against Visa, the claimants' counsel frankly acknowledged that the trigger for the proceedings was the decision of the General Court dismissing MasterCard's appeal against the Decision. The fact that the Claimants here similarly wanted the comfort of the Decision and the judgments on appeal, while commercially understandable, does not affect the application of the statutory test under sect 32(1)(b).

Domestic MIFs

110. We therefore find that the test in sect 32(1)(b) is not satisfied as regards the claims concerning cross-border transactions and the EEA MIF. However, as we

explain above, the claims here are significantly broader, since they rely on the Domestic MIF and the fact that the EEA MIF applied as a benchmark for the Domestic MIF. In the Dixons proceedings it is further alleged that in certain countries there was no distinct Domestic MIF and the EEA MIF functioned by default as the MIF for domestic transactions. This is a significant element of the claims, and in the Dixons action (and perhaps also in the Europcar action) it accounts for a majority of the loss.

111. It is notable that none of the material relied on by MasterCard to establish potential knowledge suggests that the EEA MIF affected the charges for domestic transactions. The 1989 MMC Report stated at para 2.60, immediately after the passage quoted at para 81 above:

> "Up to now, domestic interchange fees have not been paid between members of the Access scheme in the United Kingdom...."

Although the Report stated that this situation would change, that anticipated change did not involve the setting of a Domestic MIF. And the BRC Complaint, reflecting the information available to retailers at the time, stated:

> "The Card Scheme Rules do not define the domestic interchange arrangements, which are left to national members to negotiate, but they do prescribe the [international interchange fees]."

There is no suggestion in the BRC Complaint that any domestic arrangements contravened EU competition law.

112. Mr Hoskins very properly accepted that MasterCard could not contend that the Claimants could have discovered by 1997 the facts supporting their allegations regarding the connection between Domestic MIFs and the EEA MIFs. Those allegations are derived from the facts set out (and indeed partially redacted as to the details) in the Decision. In particular, they derive from the provision in the MasterCard rules that the EEA MIF would apply as a "fallback" to domestic transactions where no other interchange fees are defined through either bilateral agreements or a Domestic MIF. Mr Hoskins nonetheless submitted that the allegations regarding Domestic MIFs do not amount to a distinct claim: they are a further form of damage alleged to result from the breach of competition law regarding the EEA MIFs. As to the latter, the cause of action was complete, and

it followed, said Mr Hoskins, that sect 32(1)(b) therefore can have no application.

113. It is clear that "right of action" in sect 32(1)(b) means "cause of action": sect 38(9)(a) LA.

114. In support of the contention that the claim in respect of the Domestic MIFs did not give rise to a distinct cause of action, Mr Hoskins relied on the Court of Appeal judgment in *Aldi Stores Ltd v Holmes Buildings PLC* [2003] EWCA Civ 1882. The appellant ("Holmes") was a design and build contractor which had entered into a contract with a developer ("Laporte") to build two retail stores. Laporte had already entered into agreements for lease of the stores to two major retailers ("B&Q" and "Aldi") and under the building contract Holmes agreed to execute a deed of warranty of proper performance of the building contract to such third parties as Laporte would specify. Laporte duly specified B&Q and Aldi, and Holmes executed the deeds. In tendering for the contract, Holmes relied on the respondent structural engineer ("WSP"). Some years after construction of the stores, cracking occurred in both buildings. When Aldi sued Holmes for breach of warranty, Holmes brought a Part 20 claim alleging negligence and breach of contract against WSP due to WSP's advice, and claiming damages equal to an indemnity against its liability to Aldi. Subsequently, B&Q brought proceedings against Holmes, making similar claims. Holmes sought to amend its Part 20 claim against WSP to claim also damages equal to an indemnity against its liability to B&Q, and similarly in respect of potential liability to another company ("Grantchester") which had sued Holmes as assignee of another deed of warranty in similar terms. WSP argued that an amendment in the Aldi action to add claims for an indemnity in respect of the B&Q and Grantchester claims involved the addition of new claims within sect 35(2) LA, which provided that the addition of a new cause of action constituted a new claim. The amendments should therefore be refused as such a fresh cause of action would be out of time.

115. Rejecting WSP's argument, Dyson LJ said this:

> "26..... In my judgment, the proposed amendments do not introduce new causes of action and therefore do not add new claims against WSP. As I see it, the

amendments do no more than add new heads of loss to those already pleaded. No new duty and no new breach of duty is alleged by the proposed amendments. As Mr Tomlinson QC points out, all that Holmes is proposing by its amendments is to say that as a result of WSP's negligence, it has suffered damage not only in the form of its liability to pay damages to Aldi, but also in the form of its liability to pay damages to B&Q and Grantchester.

27. It is true that in order to prove its loss in respect of its liability to B&Q, Holmes must not only prove breach of duty, but also causation; i.e. that it relied on the advice of WSP to enter into the warranty that it gave to B&Q. But I do not consider that this is enough to show that this is a new cause of action. First, the essential reliance that is pleaded in this case is the reliance on the advice to enter into the building contract. It was because it was a term of the building contract (by clause 2.8.1) and for no other reason that Holmes would grant warranties in favour of such third parties as Laporte might specify that Holmes granted the warranties. Reliance on the advice of WSP to enter into the building contract is already pleaded in the Part 20 claim in the Aldi action. ... the entering into the deeds of warranty flowed, as a matter of causation, from the entering into the building contract. Once the building contract was made, then it was foreseeable that, unless Holmes was to act in breach of its contract with Laporte, then it would execute deeds of warranty in favour of those parties specified by Laporte.

28. The second reason why it seems to me that the submission of Mr Soole [counsel for WSP] must be rejected is that even if it is right to say that, in order to succeed against WSP in relation to the B&Q and Grantchester claims, Holmes must prove a causal link between the advice and the entering into the deeds of warranty, that is not sufficient to show that these are new claims. Take the simple case of a person claiming damages in negligence for personal injury. He pleads various heads of loss. He does not claim loss of earnings. Later, he loses his employment, and he wishes to claim damages for loss of earnings on the footing that he lost his job as result of his injury. I would suggest that nobody would say that the addition of a claim for loss of earnings involved the introduction of a new cause of action. And yet the claimant would have to prove that the loss of earnings was caused by the defendant's negligence. The case of *Stock v London Underground Ltd* (30th July 1999, unreported, Court of Appeal) also illustrates the point well. The claimant claimed £79,000 damages for cosmetic cracking to a building and £25 million for damage to the studio which, it seems, was a part of that building: it was said that the damage had rendered the studio unusable. This court held that there was only one cause of action, even though the nature of the damage in each case was entirely different, the mechanism by which the damage was caused differed and the bulk of the studio claim was a claim for loss of profit. The fact that each item of damage (including its causation) had to be proved separately did not preclude the conclusion that these were claims for separate heads of loss in respect of the same cause of action. So too in the present case, although Holmes would have to prove that its liability to B&Q and Grantchester was caused by WSP's negligence, on the facts of this case it seems to me that it does not follow that these are new causes of action."

116. Hale and Auld LJJ agreed, and Auld LJ stated it was "plain" that the proposed amendment did not amount to a new claim for the purpose of the statute. He added, at [47]:

> "The cause of action of which the proposed amendment simply particularises further damages and/or other relief was, in my view, complete when Holmes entered into the contract with Laporte, obliging it in clause 2.81 to execute a deed of warranty in favour of such third parties as Laporte might specify, warranting proper performance by Holmes to them of its obligations under the contract. In so binding itself Holmes exposed itself, according to its Part 20 claim as originally pleaded, to the risk of considerable financial loss if it was called upon, for whatever reason, to honour any such warranty to whomever Laporte might nominate for the purpose. The exposure flowed from entering into the contract and was potentially very wide and onerous, depending on Laporte's exercise of the power of nomination. B&Q and Grantchester, like Aldi, were so nominated, and Holmes' exposure to them flowed from what it maintained was the ill-advised contract, one that WSP should have advised it not to make (on its case). The nomination in each case flowing from that alleged breach of duty does not, in my view, add some new essential and discrete fact to generate a separate, or, in this context, a new, cause of action against WSP ...."

117. Both sides before us relied on another Court of Appeal decision, *The "Kriti Palm"* [2006] EWCA Civ 1601. This complex case involved a claim by the purchaser ("AIC") of a consignment of gasoline against the company ("ITS") which tested and certified its quality before the fuel was loaded and shipped to New York. By error, ITS used the incorrect method of testing on the fuel and wrongly certified that it met the contract specification. The fuel was resold ex ship and after arrival in New York the sub-purchaser tested a sample and complained to AIC that the fuel quality did not meet the contract specification. ITS then realised that it had used the wrong testing method and carried out a retest using the correct method, which showed that the fuel was not of the specified quality, but this retest (referred to as the "Cooper retests") was not disclosed to AIC at the time and ITS continued to assert that the quality of the fuel met the contractual specification (while acknowledging that the wrong testing method had initially been used). The proceedings were issued more than six years after the Cooper retests, and thus also the issue of the certificate. Therefore the claims in contract or breach of duty were time barred unless the claimant could rely on sect 32(1)(b). In that regard, AIC relied on what it asserted was deliberate concealment of the Cooper retests and their result.

118. The reasoning of the majority of the Court of Appeal on the limitation issue is set out in the judgment of Buxton LJ. He held that ITS was clearly under a duty to reveal to AIC the existence and content of the Cooper retests. As regards sect

32, after referring to the ‘statement of claim’ test derived from *Johnson*, Buxton LJ summarised the argument of ITS as follows:

> “455. ITS attacked the claim that section 32 was satisfied essentially on the basis that throughout the pleader had had available material that enabled him to plead his complaints of breach of contract and of negligence, and that the Cooper retests merely added evidence that strengthened those cases.
>
> ...
>
> 457. ... it was contended that, looking in more detail at the claims now sought to be made, AIC had been able, before it had access to the Cooper retests, to plead, first that the wrong test ... had been used; and second, on the basis of the disport tests [i.e the test by the subpurchaser on discharge] would if so minded have been able to plead that, contrary to the certificate, the cargo was or might be off-specification. The Cooper retests were irrelevant to the first of those claims, and in respect of the second of them only added further evidence.”

119. Buxton LJ rejected those arguments:

> “458. I consider that these arguments do not sufficiently respect the nature of a cause of action in negligence, or breach of contract, when applied to the facts of this case. A party may fail to perform his duty, whether in contract or in negligence, in a variety of different ways. In the present instance, the certifier may breach his duty by negligently reaching a wrong result; or by misinforming his client about some material fact; or by failing to reveal some matter that is relevant to the client’s reliance on the certificate. Although each of those complaints relates to a failure of the certifier to perform his duties, the breaches relate to different aspects or heads of those duties, and generate different causes of action: even though all of them are causes of action in negligence, and all of them complain of the certifier’s performance of his duties.
>
> 459. I am fortified in the view that that is the correct approach by the observation of Hoffmann LJ in *Broadley v Guy Clapham* [1994] 4 All ER 439 at p 448h, cited with approval by Lord Nicholls in *Haward v Fawcetts* [2006] 3 All ER 497 at p 501h, that
>
> > “One should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which the complaint is based.”
>
> It is thus for the claimant to formulate the particular acts of negligence or breach of duty of which he complains. Unless those are incoherent in law, or abusive in that they completely overlap with an already pleaded complaint, so that they would in any event be struck out..., the claimant is entitled to proceed with them, and to seek the protection of section 32 in respect of those claims if they were made unavailable to him by a breach of duty on the part of the defendant.”

120. On that basis, Buxton LJ held that all parts of AIC’s pleading that rely on the Cooper retests assert new causes of action and not simply better evidence in

support of existing causes of action. Sir Martin Nourse expressed his general agreement with Buxton LJ, and added, at [385]:

> "In particular, I agree that it is incorrect to look simply at the umbrella complaint of breach of contract and negligence. What must be looked at are the individual complaints, each of which raises a separate cause of action. The complaint that ITS deliberately concealed the Cooper re-tests and their results from AIC raised a new and separate cause of action."

121. Turning back to the present cases, although the claims are for breach of art 101, that provision may of course be breached in different ways. We do not think it is a correct characterisation of the pleadings to say that they simply assert that the EEA MIF had the effect of restricting competition. The infringement relied on is more particularly the decision of the Defendants as an association of undertakings to adopt particular rules concerning the EEA MIFs. It was the rule that the EEA MIF shall apply to all cross-border transactions in the absence of a bilaterally agreed interchange fee between the banks involved which had the effect of restricting competition as regards those transactions, with the consequent impact on the MSCs for these transactions. But the allegation of an infringement affecting domestic transactions does not rest on that rule alone. It depends fundamentally on the distinct rule that in the absence of a separately agreed Domestic MIF, or a bilaterally agreed interchange fee, the EEA MIF would also apply as a fallback Domestic MIF; and further in the Dixons claim, that in some countries the EEA MIF was adopted as the Domestic MIF.

122. The distinct nature of those allegations is demonstrated by recitals (417) and (421) of the Decision, on which the Particulars of Claim expressly rely:

> "417. First, the MasterCard's Intra EEA fallback interchange fees create price restrictions with respect to domestic MasterCard/Maestro transactions in countries where this MIF applies as such to domestic card transactions. *This happens because according to MasterCard's network rules the intra-EEA interchange fees apply as "fallback" in countries where local banks do not agree on specific domestic MIFs for domestic transactions* [BUSINESS SECRET -2a] (or where [MASTERCARD][BUSINESS SECRET -2a] has not adopted on the banks' behalf specific domestic "SEPA" interchange fees).
>
> …
>
> 421. Second, some of MasterCard's member banks view Intra-EEA fallback interchange fee rates de facto as a minimum starting point for setting the rates of domestic interchange fees. *Due to MasterCard's network rules issuing banks have the certainty that in the absence of their consent to the adoption of*

a domestic MIF the Intra-EEA fallback interchange fees will always automatically apply as domestic MIF in their country. Issuing banks have no incentive to agree to domestic interchange fees below this default rate because interchange fees are revenues. Both the adoption of a domestic MIF and of a bilateral agreement requires, however, the consent of the issuing banks (see section 3.1.1.) Hence, even in countries where MasterCard's Intra-EEA fallback interchange fees do not apply as such as domestic MIF (see above), the cross-border interchange fees may act as a minimum benchmark for setting the level of domestic interchange fee rates."

[Emphasis added]

123. The position of the EEA MIF with regard to domestic transactions is accordingly a distinct infringement of the competition rule in art 101. In the absence of the default rule regarding domestic transactions, the claim in respect of cross-border transactions would be complete. Indeed, it is essentially irrelevant to that claim. And, more importantly, in the absence of that rule, the claim in respect of domestic transactions, on the basis alleged, could not be advanced. The latter claim depends, as an essential element, on the distinct and additional restriction of competition in the rule that made the EEA MIF a fall-back MIF also for domestic transactions. On the basis explained in *The "Kriti Palm"*, in our judgment this clearly gives rise to a distinct cause of action.

124. We accept that a party cannot convert what is in reality a single cause of action into two separate causes of action by adopting a particular way of setting out its pleading. It is necessary to look at the substance not the form of the pleading. Here, scrutiny of the pleadings, as summarised above, demonstrates that they put forward as a matter of substance these two distinct claims, by reference to the Decision. Accordingly, the effect of the EEA MIF on the Domestic MIFs is not, as Mr Hoskins sought to argue by analogy with the *Aldi Stores* case, merely a matter of causation resulting in further harm. It was not foreseeable that the setting of a MIF for cross-border transactions would in itself have an effect on domestic transactions. To establish the link between the EEA MIF and domestic transactions, the fact that the EEA MIF would apply also as a default in the domestic setting was not merely relevant; it was essential.

125. It follows that the Claimants could not have discovered with reasonable diligence the factual basis for pleading a restriction of competition concerning domestic transactions. To the extent that the Dixons and Europcar claims

advance that cause of action, they come within sect 32(1)(b) and the running of the period of limitation as regards those claims was therefore postponed.

E. CONCLUSION

126. Accordingly, we find that:

(1) Rule 31(4) of the 2003 Rules is not engaged by the Dixons proceedings and none of the claims in those proceedings are time-barred.

(2) Rule 31(4) of the 2003 Rules does not apply to the Europcar proceedings. Even if it did apply, it would not be engaged by those proceedings. Therefore, none of the claims in those proceedings are time-barred.

(3) If, contrary to (1) or (2) above, rule 31(4) was engaged:

(i) the claims in respect of loss on cross-border transactions for the period 22 May 1992 to 20 June 1997 could not be made as the period of limitation for such claims would have expired if they had been made in proceedings in the High Court brought on 20 June 2003; but

(ii) the claims in respect of loss on domestic transactions for the period 22 May 1992 to 20 June 1997 can be made as if they had been made in proceedings in the High Court brought on 20 June 2003 they would not have been out of time by reason of sect 32(1)(b) LA 1980.

127. MasterCard's applications are therefore dismissed.

128. This judgment is unanimous.

The Hon Mr Justice Roth
President

Peter Anderson

Simon Holmes

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 14 February 2019

APPENDIX

Section 32 of the Limitation Act 1980

32 Postponement of limitation period in case of fraud, concealment or mistake

(1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3) Nothing in this section shall enable any action—

(a) to recover, or recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

(4) A purchaser is an innocent third party for the purposes of this section—

(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

(4A) Subsection (1) above shall not apply in relation to the time limit prescribed by section 11A(3) of this Act or in relation to that time limit as applied by virtue of section 12(1) of this Act.

(5) Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).

Section 47A of the Competition Act 1998 (as inserted by section 18 of the Enterprise Act 2002)

47A Monetary claims before Tribunal

(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.

(2) In this section "relevant prohibition" means any of the following—

(a) the Chapter I prohibition;

(b) the Chapter II prohibition;

(c) the prohibition in Article 81(1) of the Treaty;

(d) the prohibition in Article 82 of the Treaty;

(e) the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community;

(f) the prohibition in Article 66(7) of that Treaty.

(3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

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

(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; and

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

(6) The decisions which may be relied on for the purposes of proceedings under this section are —

(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;

(b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or

(e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.

(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—

(a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46, section 47 or the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 (S.I. 2001/2916);

(b) in the case of a decision of the OFT which is the subject of an appeal mentioned in paragraph (a), the period following the decision of the Tribunal on the appeal during which a further appeal may be made under section 49 or under those Regulations;

(c) in the case of a decision of the Tribunal mentioned in subsection (6)(c), the period during which a further appeal may be made under section 49 or under those Regulations;

(d) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal;

and, where any appeal mentioned in paragraph (a), (b), (c) or (d) is made, the period specified in that paragraph includes the period before the appeal is determined.

(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are—

(a) the period during which proceedings against the decision or finding may be instituted in the European Court; and

(b) if any such proceedings are instituted, the period before those proceedings are determined.

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.

(10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim.

Competition Appeal Tribunal Rules 2003

31. 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.

(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 1998 Act in relation to the decision on the basis of which the claim is made;

(b) the date on which the cause of action accrued.

(3) 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.

(4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A.

<u>Paragraph 4 of Schedule 8 Part 1 to the Consumer Rights Act 2015</u>

4 (1) For section 47A substitute—

"47A Proceedings before the Tribunal: claims for damages etc.

(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.

(2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—

(a) the Chapter I prohibition,

(b) the Chapter II prohibition,

(c) the prohibition in Article 101(1), or

(d) the prohibition in Article 102.

(3) The claims are—

(a) a claim for damages;

(b) any other claim for a sum of money;

(c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.

(4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded.

(5) The right to make a claim in proceedings under this section does not affect the right to bring any other proceedings in respect of the claim.

(6) In this Part (except in section 49C) "infringement decision" means—

(a) a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed,

(b) a decision of the Tribunal on an appeal from a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed, or

(c) a decision of the Commission that the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed."

(2) Section 47A of the Competition Act 1998 (as substituted by sub-paragraph (1)) applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.

Paragraph 8 of Schedule 8 Part 1 to the Consumer Rights Act 2015

8 (1) After section 47D (inserted by paragraph 7) insert—

"47E **Limitation or prescriptive periods for proceedings under section 47A and collective proceedings**

(1) Subsection (2) applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made in—

(a) proceedings under section 47A, or

(b) collective proceedings at the commencement of those proceedings.

(2) Where this subsection applies—

(a) in the case of proceedings in England and Wales, the Limitation Act 1980 applies as if the claim were an action in a court of law;

(b) in the case of proceedings in Scotland, the Prescription and Limitation (Scotland) Act 1973 applies as if the claim related to an obligation to which section 6 of that Act applies;

(c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies as if the claim were an action in a court established by law.

(3) Where a claim is made in collective proceedings at the commencement of those proceedings ("the section 47B claim"), subsections (4) to (6) apply for the purpose of determining the limitation or prescriptive period which would apply in respect of the claim if it were subsequently to be made in proceedings under section 47A.

(4) The running of the limitation or prescriptive period in respect of the claim is suspended from the date on which the collective proceedings are commenced.

(5) Following suspension under subsection (4), the running of the limitation or prescriptive period in respect of the claim resumes on the date on which any of the following occurs—

(a) the Tribunal declines to make a collective proceedings order in respect of the collective proceedings;

(b) the Tribunal makes a collective proceedings order in respect of the collective proceedings, but the order does not provide that the section 47B claim is eligible for inclusion in the proceedings;

(c) the Tribunal rejects the section 47B claim;

(d) in the case of opt-in collective proceedings, the period within which a person may choose to have the section 47B claim included in the proceedings expires without the person having done so;

(e) in the case of opt-out collective proceedings—

(i) a person domiciled in the United Kingdom chooses (within the period in which such a choice may be made) to have the section 47B claim excluded from the collective proceedings, or

(ii) the period within which a person not domiciled in the United Kingdom may choose to have the section 47B claim included in the collective proceedings expires without the person having done so;

(f) the section 47B claim is withdrawn;

(g) the Tribunal revokes the collective proceedings order in respect of the collective proceedings;

(h) the Tribunal varies the collective proceedings order in such a way that the section 47B claim is no longer included in the collective proceedings;

(i) the section 47B claim is settled with or without the Tribunal's approval;

(j) the section 47B claim is dismissed, discontinued or otherwise disposed of without an adjudication on the merits.

(6) Where the running of the limitation or prescriptive period in respect of the claim resumes under subsection (5) but the period would otherwise expire before the end of the period of six months beginning with the date of that resumption, the period is treated as expiring at the end of that six month period.

(7) This section has effect subject to any provision in Tribunal rules which defers the date on which the limitation or prescriptive period begins in relation to claims in proceedings under section 47A or in collective proceedings."

(2) Section 47E of the Competition Act 1998 does not apply in relation to claims arising before the commencement of this paragraph.

Competition Appeal Tribunal Rules 2015

118. Revocation

The following Rules are revoked—

(a) the Competition Appeal Tribunal Rules 2003

(b) the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004.

119. Savings

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

(2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) 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—

(a) proceedings under section 47A of the 1998 Act, or

(b) collective proceedings.

(3) A claim falls within this paragraph if—

(a) it is a claim to which section 47A of the 1998 Act applies; and

(b) the claim arose before 1st October 2015.

(4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015 continue to apply to the extent necessary for the purposes of paragraph (2).