Neutral Citation Number: [2020] EWCA Civ 671

Appeal No: C3/2019/0942Y
Case No: 1236/5/7/15

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
The Honourable Mr Justice Roth, Mr Peter Anderson and Mr Simon Holmes

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 22/05/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE FLAUX
and
LORD JUSTICE NEWEY

B E T W E E N:

(1) DSG RETAIL LIMITED
(2) DIXONS RETAIL GROUP LIMITED

Claimants/Respondents

-and-

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

Defendants/Appellants

- -

Mr Meredith Pickford QC, **Ms Julianne Kerr Morrison**, and **Mr Conor McCarthy** (instructed by **Gowling WLG (UK) LLP**) for the **Claimants/Respondents**

Mr Mark Hoskins QC and **Mr Matthew Cook** (instructed by **Jones Day**) for the **Defendants/Appellants**

Hearing dates: 28th and 29th April 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 22 May 2020.

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. This appeal raises two significant questions affecting the limitation period applicable to follow-on claims made in proceedings before the Competition Appeal Tribunal (the "Tribunal") brought before section 47A of the Competition Act 1998, introduced by section 18 of the Enterprise Act 2002 ("EA 2002"), was amended by the Consumer Rights Act 2015 on 1 October 2015. The claims that are relevant for the purposes of this appeal are those brought by DSG Retail Ltd and Dixons Retail Group Ltd (together the "claimants" or "Dixons") against the three Mastercard defendants and appellants (together "Mastercard" or the "defendants").

2. The first question ("issue 1") turns on the proper construction of rule 31(4) of the Competition Appeal Tribunal Rules 2003 ("rule 31(4)"). The Tribunal decided that the claimants' claims relating to infringements of what later became article 101[1] ("article 101") of the Treaty on the Functioning of the European Union ("TFEU") between 22 May 1992 (the start date of the infringements) and 20 June 1997 (the date 6 years before the original section 47A came into force) were not time-barred. The defendants contend in this appeal that they were.

3. The second question ("issue 2") relates to the issue of whether the claimants could "with reasonable diligence have discovered" the concealment of "any fact relevant to" the claimants' right of action under section 32(1)(b) of the Limitation Act 1980 ("section 32(1)(b)"). That issue did not arise before the Tribunal because it had determined that the claimants' claims were not anyway time-barred. The Tribunal nonetheless decided that, even if the proceedings had been time-barred, the claimants had established an arguable case that the period for bringing their claims in respect of domestic (as opposed to intra-EEA) transactions should be extended under section 32 on the basis of deliberate concealment. Mastercard contends that the Tribunal was wrong, because the claims in relation to both intra-EEA and domestic transactions were based on the same infringement and are merely two types of loss arising from that infringement; the Tribunal had correctly held that the claimants could have pleaded a complete cause of action in relation to the infringement identified in the Decision[2] arising prior to 20 June 1997, and the claimants cannot rely upon section 32 in relation to any part of their claim.

4. By their respondents' notice, the claimants challenge the Tribunal's construction and application of the test in section 32(1)(b) concerning whether the claimants "could with reasonable diligence" have discovered Mastercard's concealment of any fact relevant to the claimants' right of action. In their skeleton, the claimants contend that the Tribunal: (i) was wrong to decide that the section 32(1)(b) issue was determinable summarily, (ii) misapplied the test for reasonable diligence under section 32(1)(b), and (iii) misapplied the "statement of claim test" in deciding that all relevant facts were discoverable with reasonable diligence in respect of the intra-EEA claims arising before

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1 Formerly article 81 of the Treaty establishing the European Community ("article 81").

2 The decision of the EU Commission adopted on 19 December 2007: see [8] below.

20 June 1997. Mastercard contends that these challenges do not raise points of law and, therefore, cannot be raised on an appeal from the Tribunal.[3]

5. I will return to these points in due course, but, in my view, the issues that actually require determination under the respondents' notice can be summarised as follows:

i) **Does there need to be a trigger point?** ("issue 3") Was the Tribunal wrong to conclude that: (a) it was answering an entirely hypothetical question as to what the claimants could with reasonable diligence have discovered,[4] (b) the concept of reasonable diligence was to be applied on the assumption that the claimant is on notice of the need to investigate,[5] and/or that (c) there did not have to be "something which would have put a person in the position of the claimant on notice of the need to investigate whether they have a claim".[6]

ii) **Did the Tribunal wrongly apply the "statement of claim test"?** ("issue 4") Was the Tribunal wrong to conclude in relation to the claimants' claims in respect of intra-EEA transactions prior to 20 June 1997 that the claimants could with reasonable diligence have discovered all the necessary pleaded facts,[7] and in particular that it was not necessary for the claimants to plead the factual basis on which the impugned arrangement was not objectively necessary?[8]

iii) **Law or fact?** ("issue 5") Are all or any of these questions properly raised as issues of law justiciable on an appeal from the Tribunal?

iv) **Outcome?** ("issue 6") Was the Tribunal right to determine that, if the claimants' claims in respect of domestic transactions before 20 June 1997 were time-barred under rule 31(4), the claimants had established a reasonably arguable case that the period for bringing them should be extended under section 32(1)(b) on the basis of deliberate concealment, or should the Tribunal have ordered a trial of these or any of the section 32(1)(b) issues?

6. Before dealing with these issues, however, it is necessary to explain the factual and statutory background to these claims, and the approach adopted by the Tribunal. I have taken the factual and statutory background from the Tribunal's judgment, abbreviating it and amending it mainly because the issues involving another claimant, Europcar UK Ltd ("Europcar"), were compromised in the run-up to the appeal hearing. That said, the comparison with the factual situation in the Europcar case is relevant to one of the main arguments on the first ground of appeal.

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3 See section 49(1A) of the Competition Act 1998.

4 [76] of the judgment of the Tribunal (the "judgment").

5 [106] of the judgment.

6 See [47] of the claimants' skeleton argument, and, for example, [103] of the judgment.

7 [80]-[102] of the judgment.

8 [97] of the judgment.

7. The issues are logically better dealt with in the following order: issues 1, 3, 4, 2, 5, and 6.

Factual background

8. The background was described by the Tribunal as follows:

> 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 article 81 (now, article 101 of the 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.[9] 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").[10]
>
> 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).[11] 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. MasterCard's application to annul the Decision was dismissed by the General Court on 24 May 2012,[12] and a further appeal was dismissed by the Court of Justice of the European Union on 11 September 2014.[13]

9 See article 1 of the Decision.

10 See recitals 118, 122, and 124 to the Decision.

11 See article 4 of the Decision.

12 Case T-111/08 *MasterCard and others v Commission* EU:T:2012:260.

13 Case C-382/12P, EU:C:2014:2201.

5. The applications are made in three separate private actions [only the first of which is now before the court on this appeal] against MasterCard, brought by:

(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 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. 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.

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). 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. Dixons Carphone made clear that the Dixons Carphone proceedings does not cover any losses over that early period. Accordingly, MasterCard does not pursue its application in the Dixons Carphone proceedings.

The statutory background

9. The Tribunal described the statutory background as follows:

> 10. 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 … fuller quotations are set out in the Appendix [to the judgment]. The following account is adapted from that in *Deutsche Bahn v. MasterCard Inc* [2016] CAT 14 ("*Deutsche Bahn*") 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. The [EA 2002] introduced a new section 47A into the CA 1998, with effect from 20 June 2003, governing claims that may be brought before the Tribunal.
>
> 12. In its original form, section 47A provided:
>
>> (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 section 47A(6) were a decision of either the Office of Fair Trading or the Tribunal on appeal or, in respect of European competition law, a decision of the Commission. And the periods mentioned in section 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 section 15 and Schedule 4 EA 2002, the limitation provisions for such claims were set out in rule 31 of the 2003 Rules ("rule 31"), which provided:

> "(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 Tribunal'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 Tribunal. 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:[14] However, section 32 of the Limitation Act 1980 ("section 32") provides:

> "(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 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 section 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 Tribunal,[15] became final, but not if bringing such a claim before a court would have been time-barred on 20 June 2003 when section 47A came into effect.

18. The special, but circumscribed, jurisdiction under section 47A applied only to the Tribunal. Section 47A(10) expressly preserved the right to bring any other proceedings in respect of

[14] Section 2 of the Limitation Act 1980.

[15] Pursuant to the original sections 47A(9) and 58A of the Competition Act 1998 and article 16 of Council Regulation (EC) No. 1/2003.

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 section 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;
> >
> > (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. Section 47A(6) defines an "infringement decision" to mean a decision of the Competition and Markets Authority ("CMA"), or the Tribunal on appeal from the CMA, that the Chapter I or Chapter II prohibition or article 101(1) or article 102 TFEU have been infringed, or a decision of the Commission that article 101(1) or article 102 have been infringed. Section 47A(5) is analogous to the old section 47A(10) in preserving the right to bring claims in the courts.

21. Accordingly, the Tribunal 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 section 47E provides for limitation. For proceedings, other than collective proceedings brought under the new section 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; …"

23. Accordingly, now that the Tribunal has a fully parallel jurisdiction with the civil courts, the limitation rule in the Tribunal replicates that which would apply if the action had been brought in court.

24. However, although the new section 47A applies to claims whenever arising, the new section 47E on limitation applies only to claims arising after 1 October 2015.[16] Therefore, the present proceedings are governed by the new section 47A but for neither is limitation determined by section 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

[16] Paragraphs 4(2) and 8(2) of Schedule 8 to the Consumer Rights Act 2015.

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, the 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.

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 section 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.

The Tribunal's judgment

The meaning of rule 31(4)

10. The Tribunal first recorded at [31] the common ground between the parties taken from *Arkin v. Borchard Lines Ltd* [2000] UKCLR 494 at pages 504-505, namely that (a) a party who has suffered loss by reason of a breach of article 101 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 between undertakings that is contrary to article 101(1) has been made, its implementation represents a continuing breach or series of breaches of duty; (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.

11. At [33], the Tribunal recorded that Mastercard had relied on *Yew Bon Tew v. Kenderaan Bas Mara* [1983] AC 553 ("*Yew Bon Tew*"), where Lord Brightman had said at page 558 that "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".

12. At [34], the Tribunal recorded that Mastercard had argued that rule 31(4), which was applied to the Dixons proceedings by rule 119(1), excluded any claim arising before 20 June 1997 because those claims would have been time-barred on 20 June 2003 when the EA 2002 came into force.

13. In relation to the Europcar proceedings (to which rule 119(1) did not apply as they had been issued after 1 October 2015), Mastercard had submitted that rule 119(2)-(3) should be interpreted so as not to deprive Mastercard of its accrued limitation rights, because of *Yew Bon Tew* and section 16(1) of the Interpretation Act 1978 ("section 16(1)"), which provided that "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 …".

14. At [36], the Tribunal recorded that Mastercard had submitted that there was nothing in rule 119(2) which required interference with Mastercard's accrued limitation rights. If that had been the intention, it would have said so expressly. Rule 119(2) did not preserve rule 31(4) in respect of proceedings issued after 1 October 2015, creating a gap which the Tribunal could fill by a process of statutory construction.

15. The Tribunal rejected these arguments at [37] because "the preservation of rule 31(1)-(3) but not rule 31(4), in the wording of rule 119(2) [was] clearly deliberate". Mastercard had accepted that this was not a drafting error that could be rectified by the court under the principle in *Inco Europe Ltd v. First Choice Distribution* [2000] 1 WLR 586. It was an unavoidable conclusion that, where the limitation period would have expired prior to 20 June 2003, the rule 31(4) time-bar did not apply to proceedings commenced after 1 October 2015. They were governed by rule 119(2). Mastercard was trying illegitimately to incorporate the substance of rule 31(4) into proceedings governed by rule 119(2). Rule 119(2) had expressly chosen not to incorporate or save rule 31(4), so that section 16(1) of the Interpretation Act 1978 did not assist and the case did not fall within the *Yew Bon Tew* principle. It followed that rule 31(4) applied to proceedings commenced before 1 October 2015, but had no application to proceedings commenced thereafter.

16. With that important introduction, the Tribunal turned at [38] to construe rule 31(4), holding that Mastercard's construction would produce a bizarre result, because: (a) claims for damages suffered prior to 20 June 1997 would be time- barred in the Dixons proceedings, because those proceedings were commenced before 1 October 2015, but (b) the same claims for damages in the Europcar proceedings would not be time-barred because those proceedings were commenced after 1 October 2015. That was the opposite to the way in which limitation periods normally operate. It would be "wholly unsatisfactory and, indeed, unjust".

17. At [39], the Tribunal held that the wording of rule 31(4) had to be considered in the "context of the policy underlying the limitation provisions applicable to the new jurisdiction" given to the Tribunal by the EA 2002. Both rule 31(4) and rule 119 distinguished between a "claim" and "proceedings". A single "proceedings" might comprise several claims. The EA 2002 was aimed at enabling the Tribunal to hear purely follow-on damages actions, and a special 2-year curtailed limitation period was introduced for such actions. A potential claimant could wait until the final decision of the authority, but then had to start proceedings before the Tribunal relatively swiftly.

18. The nub of the Tribunal's reasoning is at [40]:

> "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 section 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 section 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".

19. The Tribunal pointed out at [41] that this was consistent with the operation of rule 119, which preserved rule 31(4) for proceedings commenced before 1 October 2015 but not those commenced after that date, because "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".

20. The Tribunal recognised at [43] that this interpretation would mean that a defendant would lose the benefit of a limitation defence in some cases "but only when it committed a continuing infringement of competition law that persisted to a time for which it had no limitation defence". The injustice identified in *Yew Bon Tew* therefore did not arise. Finally in this connection, the Tribunal found some support for its construction of rule 31(4) in what Lloyd LJ had said in *BCL Old Co Ltd v. BASF SE (No 2)* [2010] EWCA Civ 1258 at [32]: "[r]ule 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".

21. It is perhaps worth emphasising that the *ratio* of the Tribunal's judgment was, therefore, that none of the claims brought against Mastercard, including those that arose before 20 June 1997, were statute barred. What it went on to say about section 32(1)(b) was *obiter*.

The Tribunal's treatment of section 32(1)(b)

22. The Tribunal considered Dixons' pleadings in detail at [48]-[59] and noted at [55] that "[w]ith regard to cross-border transactions when the EEA MIF applied directly, the effect of this on the MSC [Merchant Service Charge] charged to the merchant [was] clear", but that it was further asserted that "the EEA MIF also had the effect of increasing the charges to merchants in domestic transactions".

23. The Tribunal then sought to deal with the law on section 32(1)(b) at [60]-[74].

24. The Tribunal set out the parameters of its judgment at [61] saying first that Mastercard "did not suggest that this was not a case involving deliberate concealment of relevant facts". It said that "[t]he focus of the argument between the parties was as to whether there were any facts relevant to the [c]laimants' right of action, within the meaning of [section] 32(1)(b), which could not with reasonable diligence have been discovered by them by 20 June 1997", and that "[i]t 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 [section] 47A came into force".

25. The Tribunal dealt at length with the principles relating to the "statement of claim" test enunciated at first instance and on appeal in *Arcadia Group Brands Ltd v. Visa Inc* [2014] EWHC 3561 (Comm) (Simon J), and [2015] EWCA Civ 883 ("*Arcadia*"). None of what was said in *Arcadia* is controversial on this appeal, though it may be noted at once, as the Tribunal pointed out at [73], that there was no issue in *Arcadia* (as there is

here) as to whether the documents relied on could have been discovered by the claimants with reasonable diligence.

26. At [68], the Tribunal recorded what Simon J said was common ground in *Arcadia* at [31] as to the four elements required to establish a claim for damages based on article 101(1) namely: (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,[17] (3) which affects trade between Member States (Article 101), or within the United Kingdom (section 2 of the Competition Act 1998) and (4) which has caused some loss and damage to the claimant.

27. It is important to set out in a little detail how the Tribunal dealt with the law as to the meaning of "reasonable diligence" at [73]-[74]. First, it cited the test adumbrated by Millett LJ in *Paragon Finance v. Thakerar* [1998] EWCA Civ 1249, [1999] 1 All ER 400 ("*Paragon Finance*") at page 418: "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".

28. The Tribunal then referred to the Court of Appeal's decision in *Gresport Finance Ltd v Battaglia* [2018] EWCA Civ 540 ("*Gresport Finance*"), where Henderson LJ 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* ["*Sephton*"]*, [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:
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> > "… 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 emphasized 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."
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> 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

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17 See [37] below.

> 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 [see Webster J in *Peco Arts Inc v. Hazlitt Gallery Ltd* [1983] 3 All ER 193 ("*Peco Arts*") at page 199]".

29. The Tribunal then rejected at [75]-[77] the claimants' submission that determination of whether the claimants "knew or could have discovered the relevant facts within [section 32(1) required] an exchange of pleadings, disclosure and evidence". It set out Lewison J's well-known *dictum* in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] as to the approach to be adopted to a summary judgment application.

30. The Tribunal said at [76] that "[n]o doubt if [Mastercard] were contending that the [claimants] had *actual* knowledge of the relevant facts", disclosure and witness evidence would be needed. It was, however, common ground by the end of the appeal hearing that the question of the [claimants'] actual knowledge was in dispute and would anyway require to be resolved at the trial.

31. The Tribunal said that that was not the subject of Mastercard's application for summary judgment, which was "based entirely on what [Mastercard] submit that the [claimants] *could* with reasonable diligence have discovered" which was a "hypothetical question: if the [claimants] had used reasonable diligence, interpreting that concept as discussed above, would they have discovered the relevant facts?" Mastercard's argument was "advanced on the basis of documents that were either in the public domain or which reveal information that was in the public domain".

32. At [77], the Tribunal said that the position was analogous to that in *Arcadia*, even though the documents were different. If Mastercard could show that it was "clear that the Claimants could with reasonable diligence have discovered sufficient facts to enable them to plead a statement of claim in 1997", or that the claimants "have no realistic prospect of showing the contrary", then it was "appropriate to decide that question now".

33. At [78]-[102], the Tribunal applied the statement of claim test to the facts of the case.

34. The Tribunal said at [79] that it was necessary to "consider the various facts which it is alleged that the [claimants] needed to know and the basis on which [Mastercard] contend the [claimants] could with reasonable diligence have discovered them". The question was only whether a complete cause of action could have been pleaded in 1997, and the test was whether the claimants could with reasonable diligence have discovered all "the essential factual elements that entitle the claimant to its remedy".

35. The Tribunal considered at [80]-[86] the first element of the cause of action required to satisfy the statement of claim test, namely that the rules providing for the EEA MIF were the result of a decision of an association of undertakings for which Mastercard

was responsible. The Tribunal held that this was established by the Report by the Monopolies and Mergers Commission of August 1989 on Credit Card Services (the “1989 MMC Report”) and articles in the Financial Times in 1992 and 1994.

36. The Tribunal considered at [87]-[94] the second element of the cause of action required to satisfy the statement of claim test, namely that the nature of the arrangement had an anti-competitive effect by restricting competition between banks. The Tribunal held at [91] that 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”) was sufficient for that purpose. It was unnecessary to decide whether the claimants could have discovered the information contained in a complaint submitted to the Commission by the British Retail Consortium on 26 February 1992 (the “BRC Complaint”).

37. At [95]-[100], the Tribunal decided that it was not necessary for the claimants to plead a negative assertion of a lack of objective necessity. It was also accepted that the claimants could not anyway, with reasonable diligence, have discovered the relevant facts. The Tribunal relied on the reasoning in *Racecourse Association v. Office of Fair Trading* [2005] CAT 29 at [132]-[133]. It said that, in its experience, “many pleaded claims for breach of article 101 do not contain such an averment at all and they are not … struck out”.

38. At [101], the Tribunal recorded that it was not disputed that the third requirement of an effect on inter-state trade would have been discoverable “if not indeed obvious” in 1997, relying on [10] of the Commission’s 1995 notice.

39. In relation to the fourth element of the statement of claim test, namely that the claimants had sustained loss, the Tribunal held at [102] that it seemed “obvious” that a “higher level of interchange fee resulting from the MIF would affect the MSCs causing [the claimants] loss”. Provided there was some loss, the size of the loss was not relevant to the ‘statement of claim’ test.

40. Between [103] and the first sentence of [110], the Tribunal considered whether the claimants could, with reasonable diligence, have discovered the facts founding a cause of action for loss caused by cross-border transactions and the EEA MIFs. It recorded at [103] the claimants’ submission that, in respect of (a) decisions by an association of undertakings and (b) the appreciable effect on competition, in particular, “even if the relevant facts were discoverable in an objective sense, these specific claimants could not have been expected to discover them”, and that it was necessary to show that at the material time there was a “trigger point” to justify action by the claimants to investigate whether they had a claim. The claimants relied on the facts that, during the 1990s, (a) Dixons’ business was predominantly located in the UK, (b) the small proportion of payments that used Mastercard payment cards, (c) those that did were mostly domestic transactions, and (d) Dixons’ legal team was small with no specialist competition expertise.

41. The issues raised in this appeal demand a close look at precisely how the Tribunal dealt with the “reasonable diligence” points at [106]-[108].

42. It said that “in the first place, on the basis of the authorities as explained by the Court of Appeal in *Gresport Finance* … 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, the Tribunal thought that it was "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". Mr Meredith Pickford QC, leading counsel for the claimants, was said to have accepted that the claimants could "be assumed to have been aware of the reports in The Financial Times and The Times and … that they were aware that the BRC had submitted a complaint to the Commission". We have been shown the transcript where that concession was allegedly made. Whilst I do not find the passage in question easy to interpret, I do not think Mr Pickford did accept what the Tribunal records.

43. The Tribunal then said at [107] that "[a]ccordingly, in applying the concept of "reasonable diligence" there should be attributed to the [claimants] a desire to investigate". This, as it seems to me, is a misunderstanding of the passage from *Gresport Finance* cited by the Tribunal. What *Gresport Finance* was saying was that the draftsman of section 32(1)(b) was assuming that the claimant had a desire to investigate "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".

44. In the remainder of [107], the Tribunal applied Millett LJ's test in *Paragon Finance* asking "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"". It held that, even though the "commercial incentive to investigate a claim was much lower in 1997 than it subsequently became" and the losses up to 1997 were "much smaller than in later years", none of the claimants could be described as a small business and the lack of in-house expertise in competition law was not significant.

45. For those reasons, the Tribunal concluded at [108] 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". The Tribunal thought that reasonable diligence would very possibly have also led the claimants' solicitors to request a copy of the BRC Complaint, but that was not anyway necessary for the claimants "to have discovered sufficient "relevant facts"."

46. At [109], the Tribunal rejected the claimants' rhetorical submission that asked 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. The fact that the claimants might have wanted the comfort of the Decision of the Commission did not affect the statutory test under section 32(1)(b).

47. The Tribunal's conclusion in relation to EEA MIFs was expressed at [126(3)(i)] as being that "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". That actually meant that Mastercard's application for summary judgment in respect of claims based on EEA MIFs up to 20 June 1997 would have succeeded, had its construction of rule 31(4) been correct.

48. In relation to Domestic MIFs, however, the Tribunal took a different view at [110]-[125]. It concluded at [125] that the claimants "could not have discovered with reasonable diligence the factual basis for pleading a restriction of competition concerning domestic transactions", so that Dixons came "within [section] 32(1)(b) and the running of the period of limitation as regards those claims was therefore postponed". It was common ground that what the Tribunal meant by this statement was that Mastercard's application for summary judgment in respect of claims based on Domestic MIFs up to 20 June 1997 would have failed, had its construction of rule 31(4) been correct.

49. The Tribunal recorded at [112] that Mastercard had accepted that it 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". Its contention was, instead, that the claimants' allegations regarding Domestic MIFs did not amount to a distinct claim, but were a further form of damage alleged to result from the breach of competition law regarding the EEA MIFs.

50. The Tribunal cited passages from *Aldi Stores Ltd v. Holmes Buildings PLC* [2003] EWCA Civ 1882 ("*Aldi Stores*") and *AIC Ltd v. ITS Testing Services (UK) Ltd, The* "*Kriti Palm*" [2006] EWCA Civ 1601 ("*The Kriti Palm*"), before concluding at [121] that the cause of action relating to Domestic MIFs depended "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 [the "Domestic Fallback Rule"]; and further in the Dixons claim, that in some countries the EEA MIF was adopted as the Domestic MIF" [the "De Facto Adoption of the EEA MIF"]. This was demonstrated by recitals (417) and (421) of the Decision, on which the Particulars of Claim expressly relied, which the Tribunal cited with emphasis added as follows:

> 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 …*
>
> 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…".

51. At [123], the Tribunal held that, whilst in the absence of the Domestic Fallback Rule the claim in respect of cross-border transactions would be complete, the claim in respect of domestic transactions could not be advanced in its absence. In the result, "[o]n the basis explained in [*The Kriti Palm*] this clearly gives rise to a distinct cause of action". But, looking at the substance rather than the form of the pleading demonstrated that the claimants put forward "as a matter of substance these two distinct claims, by reference to the Decision". The effect of the EEA MIF on the Domestic MIFs was not "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".

<u>Issue 1: The first issue on Mastercard's appeal: Was the Tribunal right to hold that Dixons' pre-20 June 1997 claims were not time-barred under rule 31(4)?</u>

52. The Tribunal's reasoning on the meaning of rule 31(4) and rule 119 draws a distinction between the use of the words "claim" and "proceedings". It concluded that, where an infringement had come to an end less than six years before section 47A came into force (20 June 2003), a claimant could bring follow-on proceedings covering claims relating to the whole of that infringement, even if those claims arose from events more than 6 years before 20 June 2003. The claimants support that approach, contending that, rather than a 6-year rolling form of limitation that sub-divides continuing or repeated breaches that are more than 6 years old, "[section] 47A treats infringements authoritatively established by a relevant regulator as a whole, and applies limitation rules in relation to them, as a whole". They rely also on six points of context: (i) had the legislator intended to preserve the existing limitation approach, they would, as a matter of language, have used the word "claim" in place of the second use of the word "proceedings" in rule 31(4); (ii) even if the language is ambiguous the context of the new limitation regime makes what was intended clear. The new form of damages claim introduced by the EA 2002 was exclusively based on the decisions of competition authorities that often relate to infringements over long periods. (iii) The policy considerations under rule 31(4) are different from those adopted by the Privy Council in *Yew Bon Tew*. (iv) Even if there were an accrued right to plead a defence under the Limitation Act 1980, the rule in *Yew Bon Tew* would not be the correct test, because the statute is in different terms (see *Arnold v. Central Electricity Generating Board* [1988] A.C. 228 ("*Arnold*") per Lord Bridge at pages 271-2). (v) Section 39 of the Limitation Act 1980 excludes its application to any action for which a period of limitation is applied by another enactment, such as rule 31. (vi) Even though the 2015 Rules cannot be used to construe the 2003 Rules, they can provide an insight as to what must always have been intended by rule 31(4) as the Tribunal held at [37].

53. The proper interpretation of rule 31(4) is difficult, because I am constrained to agree that rule 119 of the 2015 Rules provides, at first sight, a pointer towards the construction adopted by the Tribunal. In my judgment, however, the 2015 Rules are diametrically the wrong starting point. One must start any such exercise with the words of the 2003 Rules themselves.

54. Starting then at the beginning, the words of rule 31(1) and (2) provide for present purposes that "a claim for damages must be made within" two years of the final

determination of the competition authority. That is, as the claimants submit, a new limitation period in respect of a new way of bringing follow-on claims through the Tribunal. *Prima facie*, I agree also that section 39 of the Limitation Act 1980 operates so as to exclude the application of that Act, where rules 31(1) and (2) apply. The question then is as to the nature of rule 31(4) and its precise formulation. It provides that "[n]o 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". That is a saving provision addressed, not to the new limitation period established by rule 31(1) and (2), but to provide for what may have been the position before the EA 2002 was enacted. It is directed at what should happen to claims for damages if, were they to be made in court, they would have been time-barred before the EA 2002 came into force. It is in that specific context that the second use of the word "proceedings" needs to be understood. On that basis, it seems to me that the "proceedings" that the claimants would be prevented from bringing must be proceedings in respect of the claims for damages to which rule 31(4) relates, not an entire set of proceedings including such claims for damages.

55. In those circumstances, I do not see that the meaning of rule 31(4) is ambiguous. It may be that the legislator could have used the word "claim" instead of the second use of "proceedings". I do not, however, believe that the meaning advanced by the claimants was realistically available in 2002, because it would have been addressing a problem that would not have been envisaged at that time. Up to 2002, both follow-on claims and stand-alone claims had to be brought in court. The only limitation periods applicable were found in sections 2 and 9 of the Limitation Act 1980 relating to torts and breaches of statutory duty. Those limitation periods applied, as was common ground, to claims that were completed by the suffering of loss. Thus in any putative stand-alone or follow-on infringement proceedings brought in court before the EA 2002, all claims for losses sustained more than 6 years prior to the issue of the proceedings would be time-barred, but all claims for losses sustained in the 6 years up to the date of issue of the proceedings would not. The saving in rule 31(4) would, therefore, have been looking back to the previous limitation regime, and preserving accrued rights to plead a time-bar. It is hard to see why it would have wanted to introduce a novel concept of allowing the entirety of proceedings to be brought if they included any claim that was not time-barred under the old regime, thereby reviving time-barred claims that would no longer be actionable on their own.

56. Mr Pickford suggested that that novel concept was introduced because the new form of damages claim introduced by the EA 2002 was exclusively based on the decisions of competition authorities that often related to infringements over long periods. But, as I have said, rule 31(4) was not concerned with the new approach to limitation of follow-on claims, but to look back to save what had already become time-barred under the old limitation regime.

57. In the course of argument, a lengthy debate took place as to whether or not it was appropriate to use later primary and delegated legislation to interpret earlier legislation. Many authorities were cited, most of which were referred to in customarily erudite passages from Bennion on Statutory Interpretation at sections 24-19 and 26-10 under the respective headings: "Inferences from later Acts" and "Law should be coherent and self-consistent". The principle stated under section 24-19 is that "[w]here the legal

meaning of an enactment is doubtful, subsequent legislation on the same subject may be relied on as persuasive authority as to its meaning". It is perhaps sufficient to record that Lord Sterndale MR in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 2 KB 403 at page 414 emphasised the point that the legislation being construed had first to be shown to be ambiguous when he said:

> "I think it is clearly established in Attorney-General v Clarkson [1900] 1 QB 156 that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier".

58. The problem here is that the earlier legislation in rule 31(4) is not, I think, ambiguous. It is only if you reason backwards from the later legislation in rule 119 that it appears that it might be.

59. Moreover, the supposed anomaly identified by the Tribunal, and which I have described above as providing a pointer towards its construction, is, on analysis, illusory. I do not think it is an inevitable conclusion that, in proceedings started after 1 October 2015, but which arose before that date, the preservation of rule 31(1)-(3), but not rule 31(4), by rule 119(2) has the automatic effect of expunging a defendant's right to rely upon an accrued right to claim that some of the losses claimed are time-barred. It should be emphasised that we are not asked to decide this question on this appeal, because the Europcar proceedings, which raised the point, were compromised shortly before the appeal hearing began.

60. The legislator's decision in 2015 to apply rule 31(4) to proceedings begun before 1 October 2015, but not to those begun afterwards may have been deliberate, as the Tribunal suggested. But that does not inform the question of whether, in the absence of rule 31(4), accrued limitation rights are to be abrogated. I accept it would be illogical and unsatisfactory to determine that those rights survived in proceedings started before 1 October 2015, but did not in proceedings started after 1 October 2015. Once, however, one accepts, as I think one must, that I have adopted the correct construction of rule 31(4), its disapplication to proceedings started after 1 October 2015 does not compel the conclusion that accrued limitation rights are being overridden. Instead, the extant legislation must be construed in accordance with section 16(1). Rule 31(4) may be disapplied, but that disapplication cannot, unless the contrary intention appears, "(c) affect any right … acquired under that enactment …". A contrary intention does not appear in the 2015 Rules. I cannot see anything in what Lord Bridge said in *Arnold* at pages 271-2 that contradicts that approach.[18] I do not accept that *Yew Bon Tew* was departed from in *Arnold*, but I do not think a complete analysis of either case is required, since I repeat that I do not find rule 31(4) ambiguous. Finally, in this connection, it is to be noted that the new section 47E introduced in 2015 restored the application of the Limitation Act 1980 for claims arising after 1 October 2015. Although neither the

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18 See the useful explanation of the decision in McGee on Limitation Periods 8th edition at 1-028 to 1-041.

Dixons nor the Europcar proceedings did arise after that date, the 2015 legislation was restoring the Limitation Act 1980 regime to follow-on claims, which gives no indication that the legislator would have been intending at the same time to revive statute barred claims in proceedings issued after the same date that arose before it.

61. In my judgment, the Tribunal ought to have held that Dixons' pre-20 June 1997 claims were *prima facie* time-barred under rule 31(4).

Issue 3: Does there need to be a trigger point?

62. Mr Pickford contended that the Tribunal had been in error on this question because, having set out the law correctly at [74] from *Gresport Finance*, it overlooked the passages it had cited and determined the matter on the basis that the concept of reasonable diligence was to be applied on the assumption that the claimant was on notice of the need to investigate.[19] The reason why this issue is important is because it meant that the Tribunal was able to determine the section 32(1)(b) question summarily. If it was able to assume that the claimants were on notice of the need to investigate, it could proceed directly, as it did, to the statement of claim test and the question of reasonable diligence. The claimants submit that there was, in fact, nothing to put them on notice, so that, since a trigger point is required, that question needed to be tried after disclosure and with the benefit of evidence. Mastercard submits that the Tribunal correctly set out the law and applied it. It could not have been ignoring *Gresport Finance*, because it relied in [106] on the claimants' awareness of the BRC complaint, as well as certain press articles.

63. I agree that the Tribunal referred to appropriate authority in [74] of its judgment. I do, however, take the view that it added uncertainty by saying at [76] that it was answering an entirely hypothetical question as to what the claimants could with reasonable diligence have discovered, and at [106] that the concept of reasonable diligence was to be applied on the assumption that the claimant was on notice of the need to investigate. In my judgment, on a proper analysis, the available authorities do not show either that (a) the test of reasonable diligence is *entirely* hypothetical¸ even if it is objective, or (b) the concept of reasonable diligence is to be applied on the assumption that the claimant was on notice of the need to investigate.

64. In a very recent case (which was not available to the Tribunal), Foxton J has summarised the available authority on these points in *Granville Technology Group Limited (in liquidation) v. Infineon Technologies AG*, 25 February 2020, [2020] EWHC 415 (Comm) ("*Granville*"). The Commercial Court in that case was hearing the trial of two preliminary issues concerning the application of section 32(1)(b) in follow-on proceedings brought for damages arising from a price-fixing cartel in the market for direct random access memory used in the manufacture of computers.

65. In considering what constituted reasonable diligence, Foxton J first cited at [40]-[43] *Peco Arts*, *Paragon Finance*, *Sephton* and *Gresport Finance*, and then said this:

> "44. This passage [Henderson LJ at [46] in *Gresport Finance*]
> was interpreted by the [Tribunal in this case] as entailing that the

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[19] [106] of the judgment.

court should assume, for the purposes of the s.32(1) enquiry, that the claimant has been put on notice that there is something to investigate, and the reasonable diligence test should be applied on the basis of that assumption … [106] …

45. If s.32(1) did involve a statutory assumption that the claimant was on notice of something meriting investigation, it would make it very difficult for many claimants to satisfy the s.32(1) test. Further, the application of s.32(1) in a number of the authorities has involved an enquiry into whether the claimant was on notice of something which merited investigation, with the courts holding that in the absence of such a "trigger", the claimant could not be said to have failed to exercise reasonable diligence in its investigations. Thus in *Allison v Horner [2014] EWCA Civ 117*, Aikens LJ at [35] held that "on the assumption that it was not self-evident that the statements … were false …, it would only have been reasonable for Mr Horner to take action to investigate the truth (or otherwise) of those statements if he needed to do so". Aikens LJ framed the issue for the court at [42] as whether Mr Horner was "put on enquiry that Ms Allison might have made such fraudulent representations so that he ought to have followed the matter up". Similarly, Henderson LJ in [*Gresport Finance*] at [52] rejected the contention that reasonable diligence had not been made out in that case because the matters relied upon would not have "triggered an obligation to investigate" or put the claimant "on enquiry as to Mr Battaglia's honesty". In these circumstances, I believe that Henderson LJ in *Gresport Finance* at [46] was stating that the drafters of s.32(1) were assuming that there would in fact be something which (objectively) had put the claimant on notice as to the need to investigate, to which the statutory reasonable diligence requirement would then attach (and which involved an assumption that the claimant desired to investigate the matter as to which it was or ought to have been put on enquiry).

46. I note that this is consistent with the view of Lewison J in *JD Wetherspoon Plc v Van De Berg & Co. Ltd [2007] EWHC 1044 (Ch)* at [42]. He was referred to the passage from Millett LJ's judgment in [*Paragon Finance*], and stated that "if there is no relevant trigger for investigation, then it seems to me that a period of reasonable diligence does not begin". It is also consistent with the interpretation of s.32(1) which Bryan J adopted in *Libyan Investment Authority v JP Morgan & ors [2019] EWHC 152 (Comm)*, [30] when he stated: "It was held by Henderson LJ that 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".

> 47. However, the issue of whether there was something to put the claimant on such notice must be determined on an objective basis".

66. I agree with these passages.

67. At [49]-[52], Foxton J considered how far the test of reasonable diligence fell to be qualified by the particular circumstances of the claimant. He pointed out that there was relatively little discussion of this question in the authorities, but cited Lord Hoffmann NPJ's judgment in the Court of Final Appeal in Hong Kong in *Peconic Industrial Development Ltd v. Lay Kowk Fair* [2009] HKCFA 17 ("*Peconic*"), where he had said this:

> "30. What does "the plaintiff …could with reasonable diligence have discovered [the fraud]" mean? The word "reasonable" denotes an objective standard. But that is not the end of the matter. It is the plaintiff who is supposed to have shown reasonable diligence. This leaves open to argument the extent to which the personal characteristics of the plaintiff are to be taken into account in deciding what diligence he could reasonably have been expected to have shown. It does not follow that because an objective standard is applied, he must be assumed to have been someone else. The extent to which the characteristics of the actual plaintiff are ignored depends upon the reason for invoking an objective standard. (Some of these questions are discussed in the context of the postponement of the running of the limitation period in personal injury cases in *Adams v. Bracknell Forest Borough Council [2005] 1 AC 76* and *A v. Hoare [2008] 1 AC 844*).
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> 31. There can be no doubt, I think, that for the purposes of the inquiry into what the plaintiff could have done, he must be assumed to have suffered the loss which he actually suffered. In this case, one assumes the plaintiff to be a bank which has lost some HK$400 million. When it discovered (or could reasonably have discovered) that it had suffered the loss, it must be assumed to have displayed some curiosity about why this should have happened. The question is then what steps it could reasonably have taken to try to obtain a remedy. In some cases it may be necessary to decide whether the plaintiff must be assumed to have had only the resources and other opportunities for investigation which he actually had or whether this too must be determined according to some objective standard. In [*Paragon Finance* at] 418, Millett LJ said (apparently at the suggestion of May LJ) that the test was —
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> How a person carrying on a 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."

> 32. For my part, I would prefer to leave this question open, because in the present case it does not arise…".

68. On the facts of *Granville*, Foxton J concluded as follows as to the relevance of the insolvency of the claimant companies at [56]:

> "I am not persuaded by Mr Jowell QC's submissions that in determining whether the Claimants were reasonably on notice of the need to enquire into whether they had suffered loss from a price-fixing cartel, I am required (for example) to assume that OTC was still a trading company buying and selling DRAM in and after June 2002 when in fact it had ceased to trade in January of that year. In my view, this is to read too much into Millett LJ's statement that the reasonable diligence test is to be measured in a business context by considering "how a person carrying on a business of the relevant kind would act". However, I accept that when it comes to considering the ability of a claimant to investigate matters of which, objectively, it has been put on notice, the question of what constitutes reasonable diligence is unlikely to admit of any substantial distinction between companies which are, and are not, in liquidation".

69. In my judgment, these authorities demonstrate that the Tribunal ought not to have considered whether the claimants could with reasonable diligence have discovered the facts concerning the infringements before 20 June 1997 (a) as a purely hypothetical question, and (b) on the assumption that the claimants were on notice of the need to investigate. The question of whether there was something to put the claimants on notice had to be determined on an objective basis, but as Lord Hoffmann explained in *Peconic* that "leaves open to argument the extent to which the personal characteristics of the plaintiff are to be taken into account in deciding what diligence he could reasonably have been expected to have shown". As Henderson LJ agreed in *Gresport Finance*, whether the claimant could with reasonable diligence have discovered the relevant concealment is a question of fact in each case.

70. In this case, the Tribunal considered some of the things that the claimants might have known about the alleged infringement, but did not ask itself what precisely had put the claimants on notice of the need to investigate a potential claim against Mastercard. At [106], the Tribunal wrongly assumed that the claimants were aware of important press articles as I have already explained. As it seems to me, the question of whether or not the claimants in this case had reason to investigate and whether they could with reasonable diligence have discovered the relevant concealment requires disclosure and factual evidence to be fairly determined. In particular, I think Mr Pickford was right to point out that, in an internet age, huge numbers of documents are in the public domain; it does not follow that, even objectively judged, a potential claimant was on notice of a particular claim, or that it could with reasonable diligence have seen particular documents.

71. It follows from what I have said that the Tribunal fell into legal error in enunciating and applying the test under section 32(1)(b) of: (a) whether the claimants were put on notice of their claims against Mastercard, and (b) could with reasonable diligence have discovered the relevant concealed facts.

Issue 4: Did the Tribunal wrongly apply the statement of claim test?

72. The next question is the more precise one concerning whether the Tribunal was wrong to conclude in relation to the claimants' claims in respect of intra-EEA transactions prior to 20 June 1997 that the claimants could with reasonable diligence have discovered all the necessary pleaded facts.[20] Mr Pickford submitted that the Tribunal had been wrong to deal first with the application of the statement of claim test, before coming afterwards to the question of what the claimants could, with reasonable diligence, have discovered. I agree that a measure of confusion was caused by the order in which the Tribunal dealt with the matters in issue before it. Logically, the Tribunal ought to have resolved the legal issues affecting the meaning of section 32(1)(b) first – such as the trigger point and the way in which the test of reasonable diligence operates - before trying to apply the so-called statement of claim test.

73. This question is, however, really answered by the authorities and discussion under the previous issue. But it is also important to note that the Tribunal seems to have regarded the decision in *Arcadia* as directly analogous "although the documents [were] different" [77], when in fact, as the claimants point out, there was no issue in *Arcadia* as to whether the documents relied on could, with reasonable diligence, have been discovered. In this case, the claimants contended that critical information pointed to by Mastercard was either not reasonably discoverable by them, or not such that they could have been expected to act upon it, or not publicly available.

74. The problem with the Tribunal's approach was that it did not address those concerns having decided that the statement of claim test would be satisfied if publicly available documentation could have been obtained before 20 June 1997 that identified the four necessary elements of the claim.

75. As I have already explained, that would have been a perfectly reasonable approach if it had been common ground that the materials in question could with reasonable diligence have been discovered at the relevant time by the claimants, but not otherwise. In this case, there was a prior question of whether the claimants were on notice of the claim in the first place before it could be determined what materials they could, applying the test set out above, with reasonable diligence have discovered.

76. In my judgment, the Tribunal ought to have concluded that, so far as the intra-EEA MIFs were concerned, those issues could not be fairly decided without disclosure and evidence, because, as the authorities make clear, the claimants' position may have some relevance to the way in which the objective test is applied. This is particularly true where questions arise as to whether specific public domain documents and newspaper articles could with reasonable diligence have been obtained. Here, there will also be, in due course, issues as to the availability of documents, and the claimants' actual knowledge of them. The Tribunal suggested at [76] that actual knowledge was not in issue before them. That was correct insofar as Mastercard's application for summary judgment was concerned, but it was common ground before us that if Mastercard's application were unsuccessful, the claimants' actual knowledge would be in issue at trial.

20 [80]-[102] of the judgment.

77. In these circumstances, I do not think the Tribunal could properly have undertaken the exercise it did at [80]-[102], particularly as regards the first two elements of the cause of action, namely the decision of an association of undertakings and the anti-competitive effect, which depended on showing that the claimants could with reasonable diligence have discovered particular documents at the relevant time.

78. The second question under issue 4 is the even narrower one of whether it was necessary for the claimants to plead the factual basis on which the impugned arrangement was said not to be objectively necessary. The Tribunal held at [97] that it was not. The claimants submitted that it was wrong. If they are right, that would dispose of the section 32(1)(b) defence issue because it was common ground that the claimants could not with reasonable diligence be expected to have discovered the basic facts supporting the lack of objective necessity at the relevant time.[21]

79. The need for the claimants to plead and prove a lack of objective necessity was accepted in *Arcadia*.[22] But in this case, the point was contested. The claimants contest the Tribunal's reasoning and its reliance on both *Racecourse Association* at [132]-[133] and Neill LJ's *dictum* in *Johnson v. Chief Constable of Surrey*.[23] But they do not engage with the reasoning of the Tribunal in *Racecourse Association*, which was to the effect that, even though the overall legal burden of proving an infringement remained on the authority, it was for the undertaking to justify any claim that an apparently anti-competitive effect of an agreement was objectively necessary. As the Tribunal said in *Racecourse Association* at [133]: "unless the [undertaking] first made out a necessity case on the facts, no such case would arise for consideration".

80. In my judgment, that translates itself into the pleading. Unless Mastercard first pleads the factual basis on which it says that the impugned agreement was objectively necessary, no case of objective necessity arises for consideration. The claimants in this case may have the legal burden of establishing the infringement (though in a follow-on claim they merely have to assert the decision upon which they rely under section 47(A)(6) and (9)), but they do not have to plead facts to establish that no defence of objective necessity is available, at least until the point is pleaded against them by Mastercard. I would reject this part of the claimants' respondents' notice.

<u>Issue 2: The second issue on Mastercard's appeal: Was the Tribunal right to decide that, if the claimants' claims were time-barred, they had anyway established an arguable case for time to be extended under section 32(1)(b) for claims in respect of domestic (as opposed to EEA) transactions because the claimants could not, by 20 June 1997, with reasonable diligence have discovered the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF?</u>

81. I have formulated issue 2 in the heading to this section in the light of my treatment of the judgment at [48]-[51] above. As a result of the outcomes of issues 1 and 3, this issue does not actually arise, because Mastercard's application for summary judgment will anyway fail. The claimants' argument that the limitation period should be extended

21 [97] of the judgment.

22 [68]-[69] and [95] of the judgment.

23 Court of Appeal, unreported, 23 November 1992, in the passage cited at [35] in *Arcadia* in the CA. See also [91] below.

under section 32(1)(b) in respect of their claims in respect of intra-EEA transactions will need to be tried.

82. Since, however, this issue has been fully argued, it is appropriate that we should express our views on it in order to limit the ambit of that trial. If the Tribunal was right on the point, the claimants will be able to rely on section 32(1)(b) in order to extend the limitation period for pre-20 June 1997 claims in respect of domestic transactions. If the Tribunal was wrong on the point, then the claimants' reliance on section 32(1)(b) to extend the limitation period for pre-20 June 1997 claims in respect of domestic transactions will stand or fall according to the success of its reliance on section 32(1)(b) for intra-EEA transactions.

83. There is a danger, in considering this issue, of confusion between questions of EU competition law on the one hand, and the principles of English law affecting the limitation period applicable to particular rights or causes of action.[24] Both parties sought to analyse the Decision in some detail to found their English law argument that the claimants relied on either two causes of action (according to the Tribunal and the claimants) or one single cause of action (according to Mastercard).

84. For my part, I am not sure that a detailed analysis of the Decision is needed. Articles 1-3 of the Decision found that:

> "Article 1: From 22 May 1992 until 19 December 2007 [MasterCard] have infringed [Article 101] and from 1 January 1994 until 19 December 2007, Article 53 of the EEA Agreement, by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the [EEA], by means of the Intra-EEA fallback interchange fees ["EEA MIF"] for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.
>
> Article 2: [MasterCard] shall bring to an end the infringement referred to in Article 1 in accordance with the subsequent Articles 3 to 5 …".
>
> Article 3: Within six months … [MasterCard] shall formally repeal the Intra-EEA fallback interchange fees … They shall moreover modify the association's network rules to reflect this order … they shall repeal all decisions taken by MasterCard's European Board and/or by MasterCard … [on] Intra-EEA fallback interchange fees on SEPA fallback interchange fees and on Intra-Eurozone fallback interchange fees".

85. Undoubtedly, the recitals to the Decision dealt in detail with the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF, as the Tribunal explained at [121] referring to Recitals [417] and [421] in particular. But, as Mastercard submitted, the actual decision did not expressly require Mastercard to repeal the Domestic Fallback Rule. That was hardly surprising since the focus of the Commission's Decision was on

[24] Section 38(9)(a) of the Limitation Act 1980 provides that references to a "right of action" include references to a "cause of action".

EEA MIFs. None of that, however, is necessarily determinative of the English law question under section 32(1)(b) as to whether the Tribunal was right to decide that the claimants' cause of action relating to Domestic MIFs depended "fundamentally on the distinct" Domestic Fallback Rule and the De Facto Adoption of the EEA MIF.[25]

86. It is first necessary, I think, to consider the legal nature of the follow-on claim that the claimants have brought. The claim was brought before the introduction of the new section 47A on 1 October 2015. It was accordingly pleaded on the basis of the old section 47A, which provided by section 47A(6) that the "decisions which may be relied on for the purposes of proceedings under this section" included decisions of the Commission "that the prohibition in Article 101(1) … [had] been infringed". Section 47A(9) provided that "[i]n determining a claim to which this section applies the Tribunal is bound by any decision mentioned in [section 47A(6)] which establishes that the prohibition in question has been infringed".

87. The next step is to consider the applicable English law as to the nature of a cause of action.

88. In *Paragon Finance* (1998), Millett LJ recalled the classic definitions of a cause of action as follows at page 405:

> "The classic definition of a cause of action was given by Brett J in *Cooke v Gill* (1873) LR 8 CP 107 ["*Cooke v. Gill*"] at p. 116:-
>
>> "Cause of action" has been held from the earliest time to mean every fact *which is material to be proved* to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse" (my emphasis).
>
> In the *Thakerar* case Chadwick J cited the more recent definition offered by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at pp. 242-3 and approved in *Steamship Mutual Underwriting Association Ltd v Trollope & Colls Ltd* [1986] 33 BLR 77 at p. 92:-
>
>> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."
>
> I do not think that Diplock LJ was intending a different definition from that of Brett J. However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction".

[25] See the judgment at [121].

89. The Tribunal cited extensively from *Aldi Stores* (2003) where Dyson LJ held that certain proposed amendments did not introduce new causes of action, but added only new heads of loss, on the grounds that no new duty and no new breach of duty was alleged in the amendments. Dyson LJ said this at [27]:

> "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. …
>
> 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 …".

90. The Tribunal also cited [458]-[459] from Buxton LJ's majority judgment in *The Kriti Palm* (2006) as follows:

> "458. … 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 ["*Broadley v. Guy Clapham*"] 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 … 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".

91. Finally, the Tribunal cited Sir Terence Etherton's conclusions from the authorities at [49] in *Arcadia* (2015) as follows:

> "*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."

92. The claimants submitted that their claim in relation to Domestic MIFs was a separate cause of action because (i) the Decision made discrete findings on restrictions of competition from different aspects of Mastercard's rules, (ii) even though the Commission did not say that the rules concerning Domestic MIFs were themselves infringements, the Domestic Fallback Rule had the effect of driving up those Domestic MIFs, (iii) the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF were not just embellishments that made the claimants' case stronger; they were essential elements in the cause of action, (iv) applying the *Cooke v. Gill* definition, these elements are facts which are "material to be proved to entitle the plaintiff to succeed" and facts "which the defendant would have a right to traverse", (v) applying Hoffmann LJ's approach in *Broadley v. Guy Clapham*, and looking at the way the claimants put their case, the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF are what they are complaining about. The claimants had no knowledge of them.

93. These arguments are compelling, but in my judgment, they cannot succeed.

94. First, the Decision was not directly about the legality of the Domestic Fallback Rule or the De Facto Adoption of the EEA MIF. As I have already said, Mastercard were not in fact required to abrogate them. The claimants pointed to a broad definition of "intra-EEA fallback interchange fees" in the Decision, but the Commission did not say (as the claimants accepted in argument) that the rules concerning Domestic MIFs were themselves infringements.

95. Secondly, section 47A(6) provided that it was the Decision that could be relied on for the purposes of proceedings issued by the claimants. And, as I say, the Decision did not hold the crucial facts relied upon by the claimants (the Domestic Fallback Rule or the De Facto Adoption of the EEA MIF) to be infringements of article 101 in and of

themselves. Under section 47A(9), the Tribunal was bound by the Decision in determining the claimants' claim.

96. Thirdly, when one applies the decisions that I have mentioned above, it is clear that whilst the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF are important facts for the claimants' establishment of losses caused by paying Domestic MIFs, they are not essential elements of their cause of action based on the Decision.

97. Applying each of the tests adumbrated in the cases:

i) The *Cooke v Gill* test is not satisfied because the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF do not entitle the claimants to succeed in claiming damages. All that has to be established for that purpose (abbreviating the full test) is an agreement between undertakings, having as its object or effect the appreciable distortion of competition, which affects trade between Member States, and which has caused some loss and damage to the claimant. Loss caused by payment of the EEA MIF was sufficient to complete the claimants' follow-on cause of action.

ii) Applying Dyson LJ's approach from *Aldi Stores*, proof of additional loss by another causative route flowing from the original breach of duty is not sufficient to show that there is a new or different cause of action.

iii) Hoffmann LJ's test from *Broadley v. Guy Clapham* approved in *The Kriti Palm* was also not satisfied. The claimants are not essentially complaining about the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF in this follow-on claim. They are complaining about the infringements identified by the Decision. That is made clear by section 47A itself, as I have already said.

iv) Finally, as Sir Terence Etherton C said in *Arcadia*, 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. The claimants' cause of action here is complete with proof of losses arising from the EEA MIF. The fact that the Domestic MIF losses may be larger is nothing to the point.

98. When the Tribunal said at [121] that the cause of action relating to Domestic MIFs depended fundamentally on the distinct Domestic Fallback Rule and De Facto Adoption of the EEA MIF, they overlooked the fact that it was the scale of the damages that depended on those elements, not the cause of action itself.

99. I therefore conclude on issue 2 that the Tribunal was wrong to decide that, if the claimants' claims were time-barred, they had anyway established an arguable case for time to be extended under section 32(1)(b) for claims in respect of domestic (as opposed to EEA) transactions because the claimants could not, by 20 June 1997, with reasonable diligence have discovered the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF. The claimants' reliance on section 32(1)(b) to extend the limitation period for pre-20 June 1997 claims in respect of domestic transactions will, therefore, stand or fall according to the success of its reliance on section 32(1)(b) for intra-EEA transactions (see issues 3 and 4 above).

Issue 5: Are all or any of these questions properly raised as issues of law justiciable on an appeal from the Tribunal?

100. Section 49(1A)(a) of the Competition Act 1998 provides that "[a]n appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings — (a) as to the award of damages or other sum (other than a decision on costs or expenses)".

101. It was common ground that the court had jurisdiction to hear Mastercard's appeal from the Tribunal's determination of its application for summary judgment, insofar as it was based on points of law.[26] It was, however, submitted that some of the points argued on the claimants' respondents' notice were not properly to be regarded as points of law. In my judgment, the way the argument developed made it clear that the points argued on the respondents' notice were indeed based on underlying points of law.

102. The question of whether the reasonable diligence test under section 32(1)(b) required the claimant's attention to be "triggered" was a question of law. As I have held the Tribunal was wrong in law in enunciating and applying the test under section 32(1)(b).

103. Under issue 4, the question concerned the application of the law to the facts. As I have held, however, the Tribunal failed to recognise that, so far as the intra-EEA MIFs were concerned, the question of whether the statement of claim test was satisfied could not be fairly decided without disclosure and evidence; the authorities made clear that the claimants' position might have some relevance to the way in which the objective test was applied. Accordingly, here too the Tribunal applied the wrong legal approach and the point was properly raised as a question of law.

104. I do not, therefore, think that there is any substance in Mastercard's submission that it was not open to the claimants to raise the questions they did by way of respondents' notice.

Issue 6: Was the Tribunal right to determine that, if the claimants' claims in respect of domestic transactions before 20 June 1997 were time-barred under rule 31(4), the claimants had established a reasonably arguable case that the period for bringing them should be extended under section 32 on the basis of deliberate concealment, or should the Tribunal have ordered a trial of these or any of the section 32 issues?

105. This issue has already been answered. For the reasons I have already given, the Tribunal was wrong to decide the question of whether the claimants had established a reasonably arguable case that the period for bringing their claims in respect of both intra-EEA and domestic transactions should be extended under section 32(1)(b) on the basis of deliberate concealment.

106. The Tribunal should, instead, have dismissed Mastercard's application for summary judgment on the basis that:

i) the pre-20 June 1997 claims were *prima facie* time-barred under rule 31(4),

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26 See *English Welsh and Scottish Railway Limited v. Enron Coal Services Limited* [2009] EWCA Civ 647 at [22]-[28], and *Merricks v. MasterCard Incorporated and others* [2018] EWCA Civ 2527 at [20]-[28] (heard in the Supreme Court on 13 and 14 May 2020).

ii) the question of whether the claimants could rely on section 32(1)(b) to extend the limitation period for pre-20 June 1997 claims in respect of domestic transactions would stand or fall according to the success of its reliance on section 32(1)(b) for intra-EEA transactions, but

iii) the question of whether the claimants could with reasonable diligence have discovered their claims in respect of both intra-EEA and domestic transactions needed to be tried.

Conclusions

107. The Tribunal was wrong in its first conclusion. Rule 31(4) of the 2003 Rules is engaged in the Dixons proceedings, so that the claimants' claims in respect of pre-20 June 1997 transactions are *prima facie* time-barred under rule 31(4).

108. The Tribunal was also wrong to conclude that the claimants could not succeed in extending time for their claims under section 32(1)(b) in respect of pre-20 June 1997 intra-EEA transactions. That question needed to be tried.

109. Finally, the Tribunal was wrong to conclude that the claimants could succeed in extending time for their claims under section 32(1)(b) in respect of pre-20 June 1997 domestic transactions. That question too needed to be tried and stands or falls by the same question in relation to intra-EEA transactions.

110. My conclusion that the reasonable diligence test under section 32(1)(b) is not a purely hypothetical one, and is not to be applied on the assumption that the claimants were on notice of the need to investigate (but requires something to trigger the claimants' attention) is dealt with under issue 3 above.

111. In the rather complex circumstances of this case, whilst I would allow Mastercard's appeal, the points raised by way of respondents' notice mean that its application for summary judgment ought to have been (and will be) dismissed in its entirety. The result was the same in the Tribunal but for different reasons.

Lord Justice Flaux:

112. I agree.

Lord Justice Newey:

113. I also agree.