OUTER HOUSE, COURT OF SESSION

[2020] CSOH 92

CA19/19 & CA29/19

OPINION OF LORD TYRE

In the cause

GLASGOW CITY COUNCIL

Pursuer

against

(FIRST) VFS FINANCIAL SERVICES LIMITED; (SECOND) AB VOLVO (PUBL); (THIRD) VOLVO LASTVAGNAR AB; (FOURTH) RENAULT TRUCKS SAS; and (FIFTH) VOLVO GROUP TRUCKS CENTRAL EUROPE GmbH

Defenders

and

(FIRST) MAN SE; (SECOND) MAN TRUCK & BUS SE; (THIRD) MAN TRUCK & BUS DEUTSCHLAND GmbH; (FOURTH) DAIMLER AG; (FIFTH) IVECO SpA; (SIXTH) IVECO MAGIRUS AG; (SEVENTH) FIAT CHRYSLER AUTOMOBILES NV; (EIGHTH) CNH INDUSTRIAL NV; (NINTH) PACCAR INC; (TENTH) DAF TRUCKS NV; and (ELEVENTH) DAF TRUCKS DEUTSCHLAND GmbH

Third Parties

and in the cause

WEST DUNBARTONSHIRE COUNCIL

Pursuer

against

(FIRST) VFS FINANCIAL SERVICES LIMITED; (SECOND) AB VOLVO (PUBL); (THIRD) VOLVO LASTVAGNAR AB; (FOURTH) RENAULT TRUCKS SAS; and (FIFTH) VOLVO GROUP TRUCKS CENTRAL EUROPE GmbH

Defenders

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(FIRST) MAN SE; (SECOND) MAN TRUCK & BUS SE; (THIRD) MAN TRUCK & BUS DEUTSCHLAND GmbH; (FOURTH) DAIMLER AG; (FIFTH) IVECO SpA; (SIXTH) IVECO MAGIRUS AG; (SEVENTH) FIAT CHRYSLER AUTOMOBILES NV; (EIGHTH) CNH INDUSTRIAL NV; (NINTH) PACCAR INC; (TENTH) DAF TRUCKS NV; and (ELEVENTH) DAF TRUCKS DEUTSCHLAND GmbH

Third Parties

Pursuers: Moynihan QC, Irvine; Anderson Strathern LLP
Defenders: M Ross QC, MacGregor; Brodies LLP
First to Third Third Parties: Lake QC; BTO LLP
Fourth Third Party: Dean of Faculty, Welsh; Dentons UK and Middle East LLP
Fifth to Eighth Third Parties: Thomson QC; Levy & McRae
Ninth to Eleventh Third Parties: McBrearty QC; Pinsent Masons LLP

11 November 2020

[1] On 18 January 2011, the European Commission announced that it had commenced an investigation into suspected anti-competitive practices among truck manufacturers in several EU member states. On 20 November 2014 the Commission reported that it had informed a number of heavy and medium duty truck producers that in the light of its investigations, it suspected them of having participated in a cartel by agreeing and co-ordinating their pricing behaviour, in breach of EU competition law, and that it was initiating proceedings against them.

[2] On 19 July 2016, the Commission advised the truck producers of its decision ("the Decision"), and issued a press release reporting it. In summary, the Commission found that five groups of companies ("the Addressees"), namely MAN, Daimler, Iveco, Volvo/Renault

and DAF, had engaged in collusive arrangements on pricing and gross price increases in the European Economic Area (EEA) for medium and heavy trucks, and on the timing and passing on of costs for the introduction of emission technologies for such vehicles. This infringement of competition law covered the entire EEA and lasted from 17 January 1997 until 18 January 2011. The undertakings which participated in the infringement were the defenders and third parties in the present action, with the exception of the first defender which, it was explained, has been called to provide a "Scottish anchor". Heavy fines were imposed on all of the Addressees, with the exception of MAN which had disclosed the existence of the cartel and applied successfully for immunity. The Decision became final on 29 September 2016. A provisional non-confidential text of the Decision was published on 6 April 2017. The "final non-confidential" text was not published until 30 June 2020.

[3] During the period when the cartel was being operated, a number of Scottish public authorities purchased trucks from one or more of the Addressees. Those authorities now sue for damages consisting of losses caused by the truck producers' anti-competitive practices. Two of those actions, at the instance of Glasgow City Council and West Dunbartonshire Council, have been selected as lead cases for the 22 actions raised in Scotland. In terms of the relevant EU regulations, national courts are not permitted to give decisions that conflict with a decision of the Commission. The present actions are therefore "follow-on" actions in which this court must make its decision in accordance with the findings of the Commission. The defenders and third parties contend, however, that any claims that the pursuers may have had against them have been extinguished by the operation of short negative prescription, and moreover that claims in respect of purchases in earlier years have been extinguished by the operation of long negative prescription. The present actions were commenced on 27 February 2019.

[4] The two lead cases came before me for a preliminary proof before answer on the prescription issues. Evidence was led, in written statements and orally, from four witnesses: Mr Grant Montgomery, Category Manager for Transport and Environment with Scotland Excel (a centre of procurement expertise for Scottish local authorities); Mr Emil Laiolo, Transport Services and Development Manager, Glasgow City Council; Mr Peter Hessett, a solicitor employed as Strategic Lead (Regulatory) by West Dunbartonshire Council; and Mr Alan Douglas, Manager of Legal Services, West Dunbartonshire Council. I accept their evidence as credible and reliable. The parties also entered into a joint minute agreeing various factual matters in order to minimise the oral evidence that required to be led.

[5] The Decision is concerned solely with two classes of vehicle, namely medium trucks (6 to 16 tonnes) and heavy trucks (more than 16 tonnes). Some of the pursuers in the Scottish actions, including West Dunbartonshire Council, have claims in respect of purchases of other vehicles, such as buses, produced by the Addressees during the period of the cartel. This being a follow-on action founded upon the Decision, I understood it to be accepted on behalf of the pursuers that claims in respect of vehicles other than medium and heavy trucks (as defined) are irrelevant, and I shall exclude those claims from probation.

The EU competition law framework

[6] Article 101 of the Treaty on the Functioning of the European Union (TFEU) (formerly article 81 of the Treaty establishing the European Community (TEC)) provides *inter alia* as follows:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention,

> restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions…"

Article 102 TFEU (formerly article 82 TEC) contains a similar prohibition in relation to abuse by one or more undertakings of a dominant position within the internal market.

[7] Council Regulation 1/2003 implements the rules on competition laid down in what are now articles 101 and 102. Article 16(1) provides as follows:

> "1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings…"

Article 16(2) contains a parallel prohibition of rulings by national competition authorities that would conflict with a Commission decision.

[8] Article 23(2) of Regulation 1/2003 empowers the Commission to impose fines for infringement of article 101 or 102 not exceeding 10% of the undertaking's annual turnover in the preceding business year. Article 23(3) provides that in fixing the fine, regard will be had to both the gravity and the duration of the infringement. In terms of article 23(5), a decision to impose a fine is stated not to be of a criminal nature.

[9] The Commission's policy in relation to mitigation of penalties for co-operation is set out in a Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), referred to as "the Leniency Notice". The notice (which has no legislative force) provides for both immunity from fines and reduction of fines. Immunity is granted to an undertaking if it is the first to submit information and evidence (as detailed in the notice) enabling the Commission to carry out a targeted inspection and find an infringement by the alleged

cartel. Undertakings which do not qualify for immunity may apply for a reduction of their fine; in order to qualify they must provide the Commission with evidence of significant added value to that already in the Commission's possession.

[10] One of the conditions of both immunity and reduction of fines (in paragraphs 12(a) and 24 of the Leniency Notice) is that the undertaking must not, unless otherwise agreed, disclose the fact or any of the content of its application for leniency before the Commission has issued a statement of objections.

The Decision: a summary

Nature and scope of the infringement

[11] At the outset of the Decision, the Commission noted that the facts as outlined in it were accepted by the Addressees in the settlement procedure. The principal evidence relied upon by the Commission consisted of documents submitted by MAN, Volvo/Renault, Daimler and Iveco, corporate statements made by these Addressees, documents copied by the Commission during the course of inspections, and replies to its requests for information.

[12] The aggregate market share of the Addressees in the EEA for medium and heavy trucks is approximately 90%. The pricing mechanism of each group starts generally from an initial gross list price set by headquarters. Transfer prices are then set for the import of trucks into different markets via wholly owned or independent distributor companies. The final net customer prices are negotiated by dealers or by the manufacturers where they sell directly to dealers or to fleet customers. The final net customer prices will reflect substantial rebates on the initial gross list price.

[13] Although the truck sector was characterised by a high degree of transparency, one of the remaining uncertainties for the Addressees was the future market behaviour of

competing producers, and in particular their respective intentions with regard to changes to their gross prices and gross price lists. With a view to removing that uncertainty, the Addressees exchanged gross price lists and information on gross prices, and most of them engaged in exchanging computer-based truck configurators. All of these elements constituted commercially sensitive information. Over time, truck configurators, containing the detailed gross prices for all models and options, replaced the traditional gross price lists. This facilitated the calculation of the gross price for each possible truck configuration. The exchange was operated both on a multilateral and on a bilateral level.

[14] The collusive contacts engaged in by the Addressees took the form of regular meetings at venues of industry associations, at trade fairs, product demonstrations by manufacturers, or competitor meetings organised for the purpose of the infringement. They also included regular exchanges via e-mails and phone calls. The Addressees' headquarters were directly involved in the discussion of prices, price increases and the introduction of new emission standards until 2004. From at least August 2002 onwards, discussions took place via German subsidiaries which, to varying degrees, reported to their headquarters.

[15] By way of an illustration of the discussions that took place at German level, the Decision notes (at paragraph 59) that at the end of 2004, an employee of DAF Trucks Deutschland GmbH (the eleventh third party in the present actions) sent an email to, amongst others, representatives of the Addressees' German subsidiaries requesting that they communicate their planned gross price increases for 2005. The summarised and compiled price increase information was sent back to all the Addressees a few days later. A meeting in July 2005 was attended by both headquarter-level representatives and employees of the German subsidiaries. Activities, meetings and special sessions were scheduled. During one of the special sessions, the Addressees exchanged information about their planned future

gross price increases for 2005 and 2006 as well as the additional cost of complying with emissions standards.

The Commission's investigation and findings

[16] The investigation began in September 2010 when the MAN companies applied for immunity in terms of the Leniency Notice procedure. On 17 December 2010, the Commission granted the MAN companies conditional immunity. Between 18 and 21 January 2011, the Commission carried out inspections at the offices of, *inter alia*, the Addressees. Shortly thereafter, on dates between 28 January and 10 February 2011, applications for leniency were submitted by the Volvo, Daimler and Iveco (but not DAF) companies. All of the Addressees made submissions to the Commission and responded to requests from the Commission for information. On 20 November 2014, the Commission initiated proceedings under Regulation 1/2003 against the Addresses by issuing its statement of objections, and made its files available to them. Thereafter all of the Addresses approached the Commission informally and asked for the case to be continued under the settlement procedure. The Commission agreed to launch settlement proceedings and provided the Addressees with an estimate of the fines likely to be imposed. Each Addressee then made settlement submissions including an unequivocal acknowledgment of its liability for the infringement as regards its object, the main facts, and the legal consequences, including its role and the duration of its participation.

[17] The Commission characterised the Addressees' conduct as a complex infringement of article 101, consisting of various actions which could either be classified as agreements or concerted practices, by which they knowingly substituted practical cooperation between them for the risks of competition, with the object of preventing, restricting and/or distorting

competition with respect to medium and heavy trucks within the EEA. This constituted a single and continuous infringement of article 101 from 17 January 1997 until 18 January 2011. In accordance with EU case law, it was not necessary to show actual anti-competitive effects as the anti-competitive object of the conduct in question was proved. The Addressees, including the parent companies, were held jointly and severally liable for the infringement. At paragraphs 101 and 102 the Commission observed:

> "(101) Where the Commission finds that there is an infringement of Article 101… it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.
>
> (102) Given the secrecy in which the arrangements of the infringement were carried out, in this case it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and to refrain from any agreement or concerted practice which may have the same or a similar object or effect."

[18] The Commission then proceeded to impose fines on each of the company groups (other than MAN, as already noted), the highest of which, imposed on Daimler AG, was of a sum in excess of €1 billion.

The pursuers' claims

[19] Glasgow City Council seeks payment from the defenders, jointly and severally, of sums amounting in total to approximately £10.1 million. The council avers that during the period of the infringement it purchased medium and heavy trucks produced by the Addressees for sums amounting to around £38 million. The sum sued for is calculated on the basis that the mean overcharge caused by the operation of the cartel was 26%. The council also seeks payment of an "overhang period overcharge" in respect of trucks

purchased within a year after the period of infringement, on the ground that truck prices would continue to be inflated during that period. Further claims are made with regard to excessive insurance premiums and fuel and tax overpayments which would not have been incurred if emission-compliant trucks had been introduced sooner.

[20] West Dunbartonshire Council seeks payment from the defenders, jointly and severally, of sums amounting in total to approximately £1.9 million. The basis of its claim is the same as that of Glasgow City Council, except that the West Dunbartonshire Council claim includes a sum of about £500,000 in respect of buses.

[21] It will be apparent from the chronology narrated above that all of the losses claimed to have been incurred by the pursuers were incurred more than 5 years before the commencement of the present actions, and that some were incurred more than 20 years before. In answer to the defenders' and third parties' contention that all of the claims have prescribed, the pursuers contend:

- that they did not learn of the Addressees' concealed wrongdoing until publication of the Decision in 2016, and accordingly that by virtue of section 6(4) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), prescription did not begin to run against them until then;
- that if sections 6 and 7 of the 1973 Act were construed in such a manner as to render their claims in whole or in part prescribed, that would be incompatible with the EU principle of effectiveness; and
- that in any event they were not aware and could not with reasonable diligence have been aware prior to the date of the Decision that they had suffered loss caused by the Addressees' illegal activities, so that section 11(3)

of the 1973 Act applied to postpone the commencement of the prescriptive period.

[22] In response, the defenders and third parties adopt a common position which was presented at the preliminary proof partly by senior counsel for the defenders and partly by the Dean of Faculty. They contend that the pursuers' claims are not saved from the operation of prescription by either section 6(4) or section 11(3), or by the principle of effectiveness. As regards section 6(4), it is averred that by March 2011 at the latest, the pursuers could with reasonable diligence have discovered the matters forming the substance of their claims. As regards section 11(3), the prescriptive period had begun to run when the alleged losses had been sustained, namely when the vehicles had been purchased. There was no incompatibility with the principle of effectiveness.

[23] The evidence led at the preliminary proof, and much of the legal argument, focused upon the question of what facts the pursuers were or could reasonably have been aware of more than 5 years before the actions were raised. The material relied upon by the defenders and third parties fell into two broad categories: (i) official statements and press reports of the initiation of the Commission investigation in early 2011 (and of a separate investigation by the UK Office of Fair Trading which began a few months earlier); and (ii) information contained in the Addressees' annual reports. Reference was also made to official statements and press reports of the Commission decision in 2014 to initiate proceedings, but as these fell within the 5-year period before the actions were raised they were not founded upon by anyone to the same extent.

[24] Court proceedings in relation to the infringements have been commenced in other jurisdictions. It is a matter of agreement between the parties that the first proceedings in the United Kingdom against any of Addressees were raised by Royal Mail in the High Court,

London, on 1 December 2016. Proceedings relying on the Decision were raised against, *inter alia*, MAN SE in the High Court, Dublin, in November 2016 and in the High Court, London, in July 2017.

Information available prior to publication of the Decision

Press articles: Office of Fair Trading investigations

[25] On 16 and 17 September 2010, it was widely reported in the UK online press that the Office of Fair Trading (OFT) was investigating several European truck manufacturers for alleged price fixing. Articles appeared on the BBC news website and in the online editions of the Guardian, the Telegraph, the New Statesman, the Financial Times, the Times, the Herald, and Bloomberg, as well as in two online trade journals called Transport Engineer (produced by the Institute of Road Transport Engineers for its members) and Logistics Manager. There was no evidence at the proof as to whether or not the print editions of the newspapers had contained similar articles. Most of the reports were similarly worded and appear to have emanated from a single source.

[26] Although the exact content varied, the substance of the articles was that the OFT had begun civil and criminal investigations into a number of truck producers, including Mercedes-Benz/Daimler, Scania, MAN, Iveco and Volvo/Renault, in relation to price fixing in what was variously described as the trucks market, the heavy trucks market, the trucking industry, and the commercial vehicle market. It was further reported that an individual at Mercedes-Benz's UK offices had been arrested and released on bail; the Financial Times (and later the Telegraph) named the individual concerned. The OFT was quoted as saying that "investigations were at an early stage", and that it would not be possible to conclude whether the law had been infringed until it had concluded its investigations. The

manufacturers were said to be co-operating with the investigation, although the Financial Times reported that they had said that they did not know its scope.

[27] The Bloomberg article included a comment from a former OFT lawyer that "this type of investigation is usually the result of one of the cartel members acting as a whistleblower and seeking leniency from the regulator".

Press articles: the Commission investigation

[28] On 18 January 2011, a memo from the Commission entitled "Antitrust: Commission confirms unannounced inspections in the truck sector" stated:

> "The European Commission can confirm that on 18 January 2011 Commission officials started to undertake unannounced inspections at the premises of companies active in the truck industry in several Member States. The Commission has reason to believe that the companies concerned may have violated EU antitrust rules that prohibit cartels and restrictive business practices and/or the abuse of a dominant market position (Articles 101 and 102 respectively of the Treaty on the Functioning of the EU).
>
> The Commission officials were accompanied by their counterparts from the relevant national competition authorities.
>
> Unannounced inspections are a preliminary step into suspected anticompetitive practices. The fact that the Commission carries out such inspections does not mean that the companies are guilty of anti-competitive behaviour nor does it prejudge the outcome of the investigation itself. The Commission respects the rights of defence, in particular the right of companies to be heard in antitrust proceedings.
>
> There is no legal deadline to complete inquiries into anticompetitive conduct. Their duration depends on a number of factors, including the complexity of each case, the extent to which the companies concerned co-operate with the Commission and the exercise of the rights of defence."

[29] This statement was reported online by the Financial Times and by Reuters and Euractiv. The Financial Times further reported that Daimler, Scania, Volvo and MAN had received "surprise visits" and were co-operating with the Commission investigators. EU officials had confirmed that the OFT and Commission investigations were separate but that

they were co-operating. An OFT spokeswoman, however, declined to comment to Reuters on whether there was any link between the two.

[30] A follow-up article in the Financial Times on 3 March 2011 provided further information and comment, under the headline "Truckmakers in Brussels antitrust probe". It is worth setting this article out in full (I have omitted some paragraph breaks):

> "Europe's antitrust officials are investigating allegations that some of the world's largest truckmakers have fixed prices and delivery times for more than a decade, in a probe triggered by German truck group MAN.
>
> In January, officials raided truckmakers' offices all over the continent. German car and truck group Daimler, Sweden's Volvo AB and Scania, MAN and Italy's Iveco are among the companies investigated. MAN is likely to escape a penalty after acting as the whistleblower in the case that could lead to heavy fines, two people close to the situation said.
>
> Brussels does not apply criminal sanctions in competition cases, but can impose fines of up to 10 per cent of a company's annual global turnover, although they rarely reach this level.
>
> The European Competition Commission declined to comment, citing a standing policy of not discussing ongoing investigations. All truckmakers that were approached by the Financial Times also declined to comment. People close to the situation said antitrust officials alleged truckmakers rigged prices and fixed delivery times in half a dozen European countries. The probe does not appear to include the UK, where the Office of Fair Trading started a separate criminal and civil investigation late last year.
>
> MAN claims it uncovered the European scheme as an indirect consequence of a wide ranging bribery scandal that emerged two years ago and prompted the truck and diesel engine group to significantly step up its compliance unit. The alleged price-fixing scheme emerged after a tip-off by an employee who called a newly created compliance help desk. MAN in turn alerted the European Commission.
>
> The case has bewildered executives across the industry – which has just emerged from its worst crisis in many decades – as they have been left in the dark about its scope. 'People are really nervous – not because they are worried, but because they don't know what it's about,' said one person close to the truck-makers. 'They are getting lawyers looking into all meetings, they need clearance before they can do anything – they are hindered in their day-to-day business.' Some truck groups have even ceased to submit monthly sales data to their industry associations such as Europe's Acea and Germany's VDA, due to fear this could be seen as an inappropriate sharing of information.

> Italy, which accounts for 10 to 15 per cent of the EU's commercial vehicle market, supplied no data on January sales to Acea. The industry group, which aggregates the data, substituted 'an extrapolation' made by data provider AAA instead."

Press articles: closure of OFT investigations

[31] On 22 December 2011, the Financial Times and Reuters reported that the OFT had dropped its criminal investigation into suspected cartel activity in the trucking sector. The OFT was reported as saying that there was insufficient evidence available for any individual to be charged with an offence. The civil investigation was still ongoing but at an early stage.

[32] However, on 15 June 2012, the OFT issued a press release stating that following discussions with the Commission, it had decided to close its civil investigation into "suspected cartel behaviour amongst commercial vehicle manufacturers", because the Commission was particularly well placed to take the investigation forward as part of its wider investigation into the European truck industry. The closure of the OFT civil investigation was reported on the website and in the print edition of the trade journal Commercial Motor.

Press articles: initiation of proceedings by Commission

[33] The Commission's decision to initiate proceedings against the Addressees was announced in a press release dated 20 November 2014 under the headline "Antitrust: Commission sends statement of objections to suspected participants in trucks cartel". The press release stated:

> "The European Commission has informed a number of heavy and medium duty truck producers that it suspects them of having participated in a cartel in breach of EU antitrust rules. The sending of a statement of objections does not prejudge the outcome of the investigation.

> The Commission has concerns that certain heavy and medium duty truck producers may have agreed or coordinated their pricing behaviour in the European Economic Area (EEA). Such behaviour, if established, would breach Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the Agreement on the EEA, which prohibit cartels and restrictive business practices.
>
> **Background**
>
> In January 2011, the Commission confirmed unannounced inspections in the trucks sector (see MEMO/11/29).
>
> A Statement of Objections is a formal step in Commission investigations into suspected violations of EU antitrust rules. The Commission informs the parties concerned in writing of the objections raised against them. The addressees can examine the documents in the Commission's investigation file, reply in writing and request an oral hearing to present their comments on the case before representatives of the Commission and national competition authorities.
>
> If, after the parties have exercised their rights of defence, the Commission concludes that there is sufficient evidence of an infringement, it can issue a decision prohibiting the conduct and impose a fine of up to 10% of a company's annual worldwide turnover."

The press release was reported by the Telegraph and Reuters. The Telegraph article stated that Volvo was making a €300 million provision "after examining the Commission's announcement". The Reuters article mentioned Daimler, Volvo, MAN and Iveco as being among the companies notified, but reported that the EU spokesperson had declined to identify the companies that had received notice of its findings, stating only that "a large number were involved".

Company annual reports

[34] During the period between 2010 and 2014, references were made in the annual reports of the Volvo, MAN, Daimler and Iveco groups to the OFT and Commission investigations. The references, which appear in notes to the accounts, are in brief and general terms. In this context it should be recalled that by virtue of the Leniency Notice, it

was a condition of the Addressees' settlement negotiations with the Commission that neither the fact nor any of the content of the applications for leniency would be disclosed.

[35] The following excerpt from its 2012 annual report is representative of the Volvo Group's reporting of the existence of the investigation:

> "In January 2011, the Volvo Group and a number of other companies in the truck industry became part of an investigation by the European Commission regarding a possible violation of EU antitrust rules.
>
> …
>
> Given the nature of the ongoing investigations initiated by competition authorities, the Volvo Group cannot exclude that they may affect the Group's result and cash flow with an amount that may be material. However, as regards the investigation initiated in Europe, it is too early to assess whether and when such effect may occur and hence if and when it could be accounted for. The Volvo Group has therefore not reported any contingent liability or any provision for the investigation initiated in Europe…"

[36] In its 2011 annual report, MAN SE reported the Commission investigation as follows:

> "From January 18 to 20, 2011, the European Commission conducted a search at MAN Truck & Bus due to a suspected possible antitrust violation in the commercial vehicles business… MAN has assured the competition authorities of its comprehensive cooperation in order to thoroughly clarify the allegations."

In its 2012 and 2013 annual reports, MAN simply reported that the investigation launched in 2011 was still ongoing.

[37] Daimler AG's annual reports for 2010 and 2011 contained the following disclosure:

> "In mid-January 2011, the European Commission carried out antitrust investigations of European commercial vehicle manufacturers, including Daimler AG. Daimler is taking the Commission's initial suspicion very seriously and is also – parallel to the Commission's investigations – carrying out its own extensive internal investigation to clarify the underlying circumstances. If antitrust infringements are discovered, the European Commission can impose considerable fines depending on the gravity of the infringement. In accordance with IAS 37.92 the Group does not provide further information on this antitrust investigation and the associated risk for the Group, especially with regard to the measures taken in this context, in order not to impair the outcome of the proceeding."

(IAS 37 is the international accounting standard dealing with provisions, contingent liabilities and contingent assets.)

[38] The 2013 annual report of CNH Industrial NV (the eighth third party, a member of the Iveco Group) stated:

> "Since January 2011, Iveco…, together with certain of its competitors, has been the subject of an investigation being conducted by the European Commission into certain business practices of the leading manufacturers of commercial vehicles in the European Union in relation to possible anti-competitive practices. It is not possible at the present moment to predict when and in what way these investigations will be concluded."

By the time of publication of CNH Industrial NV's 2014 annual report, the Commission had issued its statement of objections. This is noted, and the following comments are made:

> "The Statement of Objections is not a final decision and, as such, it does not prejudice the final outcome of the proceedings. Under the applicable procedural rules, the Commission will review the manufacturers' responses before issuing a decision and any decision would be subject to further appeals.
>
> Iveco is evaluating the Statement of Objections and the documents on the Commission's case file, and intends to issue its response to the Commission in due course and to avail itself of any opportunity allowed by the procedure to clarify its position in this matter. Given the numerous uncertainties in the next stages of the investigation, the Company is unable to predict the outcome or to estimate the potential fine at this time."

Similar comments are made in the 2015 annual report, published on 4 March 2016, except that instead of a reference simply to "Iveco", a particular company, Iveco SpA (the fifth third party), is named.

Summary of witnesses' evidence

[39] Mr Grant Montgomery first became aware that local authorities in Scotland might have claims against the truck manufacturers on about 19 July 2016, when he read a report on the BBC website about the fines imposed by the Commission, which appeared to have come

out of the blue. He drew the matter to the attention of his line managers and consulted Renfrewshire Council's legal team. On 25 July 2016 he sent an email headed "for information only – no action required at this time" to contacts in all Scottish local authorities, drawing the Commission Decision to their attention and suggesting that they discuss it with their legal departments. Any further action was outwith the remit of Scotland Excel. Mr Montgomery had not been aware at the time of the OFT raid on Mercedes-Benz's premises in September 2010, or of the OFT and Commission investigations. He kept up to date by reading various trade publications but, so far as he was aware, he had not seen any of the press releases or press reports in 2010/2011. Of the sources mentioned, he would normally only read the BBC website, and occasionally the Financial Times. He would not read company annual reports as a matter of course, although he might refer to them for information as to the creditworthiness of a tenderer.

[40] Mr Emil Laiolo became aware in late 2016 or early 2017 of the possibility of a claim by Glasgow City Council against the truck manufacturers. His information came by word of mouth from other local authority transport managers. He did not recall having seen Mr Montgomery's 2016 email. He was not aware of anyone at Glasgow City Council having had knowledge of the cartel investigation before the Commission fines were reported. None of the authorised dealers with whom he had contact had mentioned it. He had not been aware of events in 2010 and 2011 and was not aware of any of the press releases or reports from that time. He would normally derive his information from the BBC website. He did not consider that he would have done anything even if he had seen them, as there had been no legal finding or conclusion. It was just the start of something that might have come to nothing. A Scottish local authority would not have had the power or resources to obtain the information necessary to understand what was going on. It would not have crossed his

mind to look at company annual reports for further information. He was not a member of the Institute of Road Transport Engineers but there were other employees of Glasgow City Council who were.

[41] Mr Peter Hessett was first advised of the possibility of a claim by West Dunbartonshire Council against the truck manufacturers in August 2017 by a colleague from another local authority. He had not seen Mr Montgomery's 2016 email. He had since had enquiries made as to who within the council had received the email; it did not appear that any of the recipients had taken any action in response to it. Before 2013, Mr Hessett had been employed by Renfrewshire Council, where he was responsible for legal services. He had been unaware at the time of the OFT raid or the Commission investigation. He did not read the truck companies' annual reports and did not think that anyone at the council would do so as a matter of course. He had no recollection of seeing any of the press reports; the only source he would normally have looked at was the BBC news website. He did not think that the articles would have been of much interest because they only reported the existence of investigations and not conclusions. In his view, the time when a local authority could think about the possibility of a claim was not until it was clear that the investigation had come to something. It was not sensible to expect a local authority to carry out its own investigations. It was not clear from the press articles what types of trucks were under investigation.

[42] Mr Alan Douglas was informed of the possibility of a claim by Mr Hessett in 2017. So far as he knew, no-one at West Dunbartonshire Council had been aware prior to July 2016 that an investigation was in progress. He too had been unaware of announcements made in 2010 and 2011 and had not seen any of the press reports produced. He would not normally read any of these publications other than the BBC news website. He did not read

the truck companies' annual reports. If he had seen the media coverage he would have waited until it reached its conclusion before doing anything. Cartels were self-disguising, and a Scottish local authority would not have the resources to carry out its own investigation. Even in 2014, there was nothing for a local authority to do until the investigation reached a conclusion. Until then there was no evidence of wrongdoing upon which the council could act.

Prescription: the statutory provisions

[43] Section 6 of the 1973 Act provides *inter alia* as follows:

> "(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
>
> (a) without any relevant claim having been made in relation to the obligation, and
> (b) without the subsistence of the obligation having been relevantly acknowledged,
>
> then as from the expiration of that period the obligation shall be extinguished…
>
> …
>
> (4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—
>
> (a) any period during which by reason of—
>
> (i) fraud on the part of the debtor or any person acting on his behalf, or
> (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation, and
>
> (b) any period during which the original creditor (while he is the creditor) was under legal disability,

shall not be reckoned as, or as part of, the prescriptive period;

Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

[44] Section 7 provides:

"(1) If, after the date when any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years—

(a) without any relevant claim having been made in relation to the obligation, and
(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished…

(2) This section applies to an obligation of any kind (including an obligation to which section 6 of this Act applies), not being an obligation to which section 22A of this Act applies or an obligation specified inn Schedule 3 to this Act as an imprescriptible obligation or an obligation to make reparation in respect of personal injuries within the meaning of Part II of this Act or in respect of the death of any person as a result of such injuries."

[45] Section 11 provides *inter alia*:

"(1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

…

(3) In relation to a case where on the date referred to in subsection (1) above… the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

The EU law principles of effectiveness and legal certainty

[46] The principle of effectiveness is encapsulated in article 19 of the Treaty on the European Union and in article 47 of the Charter of Fundamental Rights. Article 19 requires member states to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. Article 47 states that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article". In *Impact* v *Minister for Agriculture and Food* [2008] 2 CMLR 47 (which pre-dated article 19 TEU and article 47 CFR), the Grand Chamber of the Court of Justice summarised the principle of effectiveness as requiring that:

> "the detailed procedural rules governing actions for safeguarding an individual's rights under Community law… must not render practically impossible or excessively difficult the exercise of rights conferred by Community law".

[47] In *Anwar* v *Secretary of State for Business, Energy and Industrial Strategy* 2020 SC 95, Lord Drummond Young, with whom Lord Malcolm agreed, expressed the view (at paragraph 77) that although it was clear from the Court of Justice authorities that if obtaining a remedy was "excessively difficult" the remedy would not be effective, the ultimate question was whether an "effective remedy" had been provided. Earlier in his opinion, Lord Drummond Young had made the following observations (at paragraph 52):

> "…(T)he main purpose of the principle of effectiveness is to ensure the proper enforcement of rights that arise under Community law. That is not an objective that is confined to the law of the European Union. It is encapsulated in the maxim *ubi jus ibi remedium*, which has been adopted in Scots law, English law and many other legal systems. It is obvious that if a legal right exists a remedy must be devised to permit its enforcement; otherwise the right is ineffectual. This extends not merely to the existence of a notional remedy but to ensuring that the remedy produces practical results. The principle of effectiveness is accordingly one that is not peculiar to EU law but is close to principles that are an integral part of most rational legal systems, and are in particular an integral part of Scots law."

[48] The EU principle of legal certainty was stated in *R (Intertanko)* v *Secretary of State for Transport*, Case C-308/06, at paragraph 69, as requiring "…that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly".

[49] It is well settled that the imposition of limitation (and prescription) rules by national law is a manifestation of the principle of legal certainty, and also that it does not conflict with the principle of effectiveness unless the effect of the limitation rules is to render the obtaining of a remedy practically impossible or excessively difficult (see eg *Rewe I (Rewe-Zentralfinanz eG* v *Landwirtschaftskammer für das Saarland)* [1976] ECR 1989 at paragraph 5; *Test Claimants in the FII Group Litigation* v *HMRC* [2012] 2 AC 337, Lord Walker of Gestingthorpe at paragraph 93). An example of a limitation period breaching the principles of legal certainty and effectiveness is provided by *Test Claimants in the FII Group Litigation* v *HMRC* [2014] AC 1161 (ECJ), in which the Court of Justice ruled that these principles precluded the introduction of a limitation period retroactively and with insufficient notice to allow a reasonable time for claims to be made. But the general rule was stated in *Haahr Petroleum* v *Havn* [1997] ECR I-4085 at paragraph 48 as follows:

> "It is apparent from the case-law, in particular from the *Rewe* and *Comet* judgments, that the laying down of reasonable limitation periods, which is an application of the fundamental principle of legal certainty, satisfies the two conditions referred to above and, in particular, cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought."

No distinction is drawn by Community law between rules of prescription on the one hand and rules of limitation on the other.

Short negative prescription: section 6(4)

Argument for the pursuers

[50] On behalf of the pursuer it was submitted that by virtue of section 6(4), the running of the prescriptive period had not begun until publication of the Decision on 19 July 2016. (It was not submitted that postponement of the running of prescription continued beyond that date.) In the context of section 6(4)(a)(ii), "fraud" meant concealment of wrongdoing, and included any case in which the defender's conduct was unconscionable or such that it was inequitable for him to avail himself of the lapse of time. Policy required a generous purposive interpretation to be given to the word "refrain": cf *BP Exploration Operating Co Ltd* v *Chevron Transport (Scotland)* 2002 SC (HL) 19, in which reference was made to the observations of Lord President Inglis in *Caledonian Railway Co* v *Chisholm* (1886) 13R 773 on the non-running of prescription during a period when the ground of action was concealed from the creditor. It included time when the creditor did nothing to enforce the obligation, whether or not that was the result of a conscious decision on his part not to press the claim. This was consistent with applying section 6(4) to the present claims, because the pursuers suffered overcharges of which they could not have known at the time of purchase because of the intentionally secret nature of the cartel. In judging "reasonable diligence", the standard was that which an ordinarily prudent person would do having regard to all the circumstances. It could be consistent with doing nothing if there was nothing that a reasonably diligent person could do to plead an action based on the fruits of reasonable enquiry.

[51] Here the fraud was discoverable only from the substance of the Decision. This was not a vague and generalised cartel activity: it concerned specific types of trucks and a defined, albeit long, period of time. The Commission had only been able to discover the

detail of it with the co-operation of the participants. The concealment did not end until publication of the Decision. Even after the initiation of the investigation had been announced, the Addressees maintained the concealment for purposes beneficial to themselves, namely the fulfilment of the Commission's conditions for leniency. Such information as became publicly available emanated from the regulatory authorities and was necessarily in general terms because no formal finding of wrongdoing had yet been made. In the United Kingdom the OFT had abandoned its criminal investigation due to lack of evidence. Nobody in the United Kingdom commenced proceedings for damages until after July 2016.

[52] It would have been impossible for the pursuers responsibly to have raised an action before publication of the Decision, even for the purpose of interrupting prescription. The legal wrong now complained of was a specific one: breach of competition law in a particular manner by particular companies, in relation to two specific types of vehicle and the introduction of emission technologies, during a particular period. None of those critical elements could have been known prior to the Decision. The identity of the correct defenders was not known and could not have been ascertained from publicly available material. There was no information that would, for example, have permitted the pursuers to sue the companies at the top of any of the groups mentioned. If the pursuers had sued on the basis of the press reports of the OFT investigation, they would have sued the wrong entities. The OFT investigation was irrelevant: it had been concerned with UK companies, none of which were Addressees. The press articles were uninformative in relation to the vehicles concerned: some referred merely to commercial vehicles and none specified the particular classes of trucks that formed the basis of the Decision.

[53] The companies' annual reports were equally uninformative. Long after they had submitted leniency requests to the Commission, their published annual reports continued to refer to investigations into "possible" violations, without further specification. This constituted intentional concealment with a view to seeking immunity or reduced fines. Only after the Commission's statement of objections was issued in 2014 did the producers feel free to provide any details of the companies being investigated. It would be inequitable to permit the defenders to found upon the leniency applications as a reason for not paying compensation to the pursuers.

[54] It was accepted that there would be circumstances in which the prescriptive period might begin to run before publication of a Commission decision, if sufficient information was already publicly available: the case of *Granville Technology Group Ltd* v *Infineon Technologies AG* [2020] EWHC 415 (Comm) provided an example of that. But the facts of the present cases were clearly distinguishable from those of *Granville*.

[55] The evidence of the witnesses accorded with the reality: if an employee of one of the pursuers had seen any of the press articles and drawn it to the attention of the council's legal team, he or she would have been told, correctly, that there was nothing that could or should be done until the outcome of the investigation was known. It was therefore irrelevant to consider whether any of the pursuers' employees ought to have been aware of the press coverage. In any event, as Sir Geoffrey Vos C warned in *DSG Retail Ltd* v *Mastercard Inc* [2020] EWCA Civ 671 at paragraph 70, where in an internet age huge numbers of documents were in the public domain, it did not follow that a potential claimant was on notice of a particular claim or could with reasonable diligence have seen particular documents.

[56] All of the above contentions were derived from domestic law, without reference to the EU principle of effectiveness. If, however, it were necessary to have regard to that

principle, the court should, in accordance with the *Marleasing* principle, construe section 6(4) in the manner contended for by the pursuers. Cases such as *Cogeco Communications* v *Sport TV Portugal SA* [2020] 5 CMLR 16 emphasised that national legislation specifying the commencement date for the running of limitation periods must be adapted to the specificities of competition law, so as not to undermine the full effectiveness of article 102. If Scottish rules on prescription were applied to the effect that a claim was prescribed under section 6 before the only effective investigation was concluded and the decision announced, that would make it practically impossible or excessively difficult for Scottish consumers to secure an effective remedy. In any event, there was no material difference between the principle of effectiveness and the approach adopted in *Caledonian Railway Co*.

[57] If the court were to hold that section 6 could not be construed as the pursuer submitted, even with regard being had to the principle of effectiveness, then the principle would require section 6 to be disapplied. It made no difference that an alternative procedure by way of an action in the Competition Appeal Tribunal ("CAT") had been provided by statute. The court should be able to give an effective remedy regardless of the availability of an alternative route. The case was analogous to *Minister for Justice and Equality* v *Workplace Relations Commission* [2019] 2 CMLR 471. In any event, following amendments made in 2015 to the Competition Appeal Tribunal Rules 2003, it was not clear that the special rule allowing follow-on actions to be raised in the CAT within 2 years after the Commission decision remained in force.

Argument for the defenders and third parties

[58] On behalf of the defenders and third parties it was submitted that the period during which the operation of prescription was suspended had ended in September 2010 when the

OFT investigation was reported. It was accepted that "fraud" in the present context included concealed wrongdoing, but the concealment had ended in 2010. The pursuers appeared to be contending that prescription did not begin to run until they had all their ducks in a row to raise a relevant action; however the observations of the House of Lords in *BP* v *Chevron* demonstrated that that was not correct. The 5-year period began with the end of concealment even if there remained matters requiring investigation before an action could be raised. It was not necessary to be in a position to plead a relevant case; it was sufficient to be able to serve a summons that interrupted the running of prescription. In the present case the pursuers were or ought to have been aware in 2010, or at least in 2011, that a secret cartel had been operated. Thereafter there was no concealment, and the fact that investigation by the pursuers of the details of the cartel would have been necessary was not a bar to the running of prescription. All that was required was sufficient actual or constructive knowledge to indicate a need for investigation. That knowledge was acquired by 2011 at the latest. The fact that an investigation by the Commission was under way did not suspend prescription.

[59] As regards actual or constructive knowledge, there was insufficient evidence to find that the pursuers, through their employees, were not aware or could not with reasonable diligence have discovered the concealment. It had been widely reported, and it would be astonishing if none of the pursuers' employees had seen any of it. Reasonable diligence on the part of a public authority with a fleet of trucks required that the press reports would have been seen and acted upon. The test, derived from *Paragon Finance plc* v *D B Thakerar & Co* [1999] 1 All ER 400, per Millett LJ at 418, was 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. The present case was on all

fours with the *Granville* case, in which there was no suggestion that it was necessary to await the Commission decision before raising an action. In that case Foxton J had observed that reasonable diligence required at least some attempt to see what material relevant to the price-fixing cartel was available on the internet. In the present case a simple internet search would have disclosed that truck producers were under investigation for price fixing, and this could have been confirmed by reference to their annual reports.

[60] As regards the principle of effectiveness, it was agreed that this was not peculiar to Community law and that it was an integral part of Scots law. The test, however, was a high one. It was not enough that investigation might be legally or practically difficult, or expensive.

[61] Regard also had to be had to the principle of legal certainty. Limitation periods were not objectionable *per se*. In that regard there was nothing special about competition law. Observations of the Court of Justice to the effect that victims of infringements should receive "full compensation" did not preclude the operation of limitation or prescription. The Court of Justice authorities founded upon by the pursuers did not support the proposition that prescription/limitation could not begin to run until the Commission had published its decision; the English authorities demonstrated that it could. Reference was made in *Granville* and elsewhere to the court taking a "generous" approach to pleadings where a claimant was unable to plead a full specification of the infringement.

[62] There was no proper foundation for the pursuer's argument that the principle of effectiveness required the disapplication of section 6. Effectiveness had to be looked at in the round. The CAT had provided an alternative route, and there was no requirement that availability of a remedy was subject to the same conditions in both the court and the Tribunal. On a proper interpretation of the Competition Appeal Tribunal Rules, the

limitation period of 2 years running from the date of the Commission's decision would have continued to apply to the present claims because they arose before 1 October 2015 when there was concurrence of injuria and damnum, and not on the date of the Decision. So even although the operation of prescription had by the date of the Decision cut off the right to recover damages by court action, the effectiveness principle did not require the disapplication of either section 6 or section 7, because proceedings could have been raised in the CAT. The pursuers had had an effective remedy, in a specialist tribunal, but had chosen not to use it.

Decision

Interpretation of section 6(4)

[63] The issues for decision are, firstly, the proper interpretation of section 6(4) and, secondly, its application to the facts of these cases. The first of these issues has been authoritatively determined by the House of Lords in *BP* v *Chevron*. In order fully to understand that decision, it is necessary to go back, as did the House of Lords, to the opinion of Lord President Inglis in *Caledonian Railway Co* v *Chisholm*. In that case the pursuers averred that the defender had concealed the fact that sacks which the pursuers had carried on their trains were for use in connection with goods other than those being carried by the pursuers, thereby avoiding a charge which the pursuers would have been entitled to make, had they known. The defender argued that the then triennial prescription (under an Act of 1579) applied to restrict proof to the defender's writ or oath. The court rejected the defender's argument. Lord President Inglis observed (page 776):

> "The statute is intended to prevent creditors from delaying bringing forward a certain class of actions enumerated in the statute. It contains, in the first place, an order or direction that all such actions be pursued within three years, and if the

> creditor fail to comply with that enactment, then he is to be subjected in this penalty, that he shall have no action unless he prove it by the writ or oath of the defender. Now, that undoubtedly implies that there is negligence upon the part of the creditor, that he ought to have pursued his action sooner, and that he ought not to have allowed the three years to elapse. But how is that possible in the case of these pursuers if their statements be true? By the false pretences of the defender they were prevented from discovering that they were carrying sacks free for which they were entitled to charge. And the defender was in the full knowledge of that and failed to disclose it. To apply the statute to a case of that kind, it appears to me, would not only be entirely unjust, but would be entirely against the meaning of the statute. The statute assumes that the creditor is in a condition to sue, and it is because of his failure to sue—because of his negligence in putting off the making of his claim—that the statute imposes the penalty upon him. It is clear to my mind, therefore, that wherever a case of this kind can be made, that the failure to sue is due to the conduct of the defender (whether it amount to fraud or not), to concealment on the part of the defender, or to the bringing forth of pretences which are false in fact, whether fraudulent or not, the pursuer cannot be visited by the penalty of the statute, because there is no negligence upon his part, but the sole cause of the delay in bringing forward his claim and raising the action is the conduct of the defender."

[64] It will be noted that in the last sentence of this passage, Lord President Inglis referred to a range of circumstances: conduct of the defender (whether fraudulent or not), concealment by the defender, and pretences which are false in fact, whether fraudulent or not. Those observations were clearly influential upon the recommendations of the Scottish Law Commission in its Report (No 15) on Reform of the Law Relating to Prescription and Limitation of Actions which led to the passing of the 1973 Act. The Commission noted (paragraph 93):

> "It is a defence to the existing triennial prescription that the creditor had been induced by the action of the debtor to refrain from pursuing the claim within the prescriptive period. We consider that on equitable grounds a defence against the suggested new short negative prescription should similarly be available to the creditor if he has been deterred from taking action within the prescriptive period by fraud or concealment by the debtor or by error on the part of the creditor, but only where the error has been induced by the words or conduct of the debtor… The effect of such fraud, concealment or error should be to defer the commencement of the prescription until the date when the fraud, concealment or error was discovered by the creditor or could, with reasonable diligence on his part, have been discovered."

[65] Section 6(4), as enacted, refers to fraud on the part of the debtor or error induced by words or conduct of the debtor, but does not expressly mention concealment. It is settled, however, that the words used in the subsection should not be construed as having a narrower scope than the circumstances described in *Caledonian Railway Co* v *Chisholm* and in the Scottish Law Commission report: see *BP* v *Chevron*, Lord Clyde at paragraph 67.

[66] The opinions delivered in *BP* v *Chevron* also confirm that a generous interpretation should be given to the word "refrain" in section 6(4). At paragraphs 31-32, Lord Hope of Craighead rejected the proposition that the word should be restricted to some conscious act of self-restraint on the part of the creditor:

> "…(T)o read the word in this way in this context would be to open the door to the risk of the very injustice which the subsection was designed to avoid. It would mean that time would run against a person whose reason for not making a relevant claim was not that he was stopping himself from making it, as a matter of conscious and deliberate decision on his part, but that he was wholly unaware of the obligation because its existence was being concealed from him by the debtor's fraud. That was the position of the pursuers in *Caledonian Railway Co v Chisholm*, where it was held that it would be unjust for the statute to be applied against them. Departing in this respect only from paragraph 93 of the report by the Scottish Law Commission, section 6(4) does not mention the problem of concealment. But it is not hard to see that, where the existence of the obligation or of the identity of the debtor is concealed from the creditor, the effect of the concealment is that he is not in a position to enforce it. If these facts are concealed from him by the debtor's fraud, or by error which has been induced by the debtor's words or conduct, the ordinary use of language would seem to be enough to entitle one to say in that context that what has happened is that the debtor's conduct has induced the creditor to refrain from making the claim."

Lord Hope accordingly held that the period of time covered by the word "refrain" in section 6(4) included time when the creditor did nothing to enforce the obligation, whether or not that was the result of a conscious decision on his part not to press the claim.

[67] At paragraphs 107 and 108, Lord Millett put the matter thus:

> "I think that section 6(4) of the Act operates in a very simple way. The first step is to take the period between the date when the obligation to make reparation arose and the date when the particular defender was served. If this primary period exceeds

> five years, then section 6(1) has the effect of extinguishing the obligation at the end of the fifth year…
>
> The next step is to exclude from the calculation of the primary period any period during which the creditor's failure to serve the defender was the result of an error which was induced by the defender or someone acting on his behalf. This period is coterminous with the subsistence of the error in question. It cannot begin until the creditor is induced to make the error and it ends when he discovers the truth…"

This is, of course, subject to the proviso to section 6(4) regarding discoverability of the error or fraud by reasonable diligence on the part of the creditor.

[68] As was accepted by the defenders and third parties, it is unnecessary to conduct an analysis of what is encompassed by the word "fraud" in the context of section 6(4). In my opinion it is clear from the dicta above that the focus remains where it was directed in *Caledonian Railway Co* v *Chisholm*, namely on concealment of the obligation by the debtor which induces the creditor not to make a claim. Whether this is to be characterised as fraud or as induced error is not of central importance. What is more important is identifying the time when the concealment comes to an end and the creditor discovers the truth. The question of earlier discoverability with reasonable diligence must also then be addressed.

[69] The authorities to which I have thus far referred do not address the question of what it is that has to be discovered in order to bring to an end the creditor's protection under section 6(4). That was not an issue in either *Caledonian Railway Co* v *Chisholm*, in which discovery of the concealment immediately revealed the ground of action, or in *BP* v *Chevron*, where the question was not whether a ground of action had arisen but rather the identity of the correct defendant. It does have to be addressed in the present case in which, at the very least, there was public disclosure of the existence of official investigations into a price fixing cartel more than 5 years before the actions were commenced.

[70] In *Arcadia Group Brands Ltd* v *Visa Inc* [2014] EWHC 3561 (Comm), the point arose in the context of claims for damages for infringement of competition law. The relevant English statutory provision, section 32(1) of the Limitation Act 1980 is not in terms identical to section 6(4) of the 1973 Act. It provides *inter alia* that the period of limitation shall not begin to run where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant" until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it. In the context of that provision, Simon J (at paragraph 24) identified in the authorities seven principles, some of which were acknowledged to overlap or reinforce one another:

(1) Section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly, in view of the public interest in finality and the importance of certainty in the law of limitation;

(2) There is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case. Section 32(1)(b) is concerned with the former;

(3) The section is to be interpreted as referring to any fact which the claimant has to prove to establish a *prima facie* case;

(4) The claimant must satisfy "a statement of claim test": in other words, the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a *prima facie* case. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it;

(5) Thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger. Nor does it apply to newly discovered evidence, even where it may significantly add support to the claimant's case, nor to facts relevant to the claimant's ability to defeat a possible defence;

(6) The purpose of section 32(1)(b) is to cover the case, where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action. It is therefore important to consider the facts relating to an allegation of deliberate concealment *vis à vis* a claimant's pleaded case;

(7) What a claimant has to know before time starts running against him under section 32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation.

[71] In *Granville Technology Group Ltd* v *Infineon Technologies AG* (above), all parties were content to adopt this statement of the applicable principles. On the basis of those principles, Foxton J concluded (paragraphs 28 and 29):

> "28. Reflecting the generally pragmatic and purposive approach to the interpretation of section 32(1)(b), therefore, the authorities establish that a claimant can be said to have discovered a fact when the claimant is aware of sufficient material to be able properly to plead that fact. This conclusion avoids the improbable interpretation of section 32(1)(b) by which a claimant who has in fact pleaded a particular fact might be said not yet to have discovered that fact for section 32(1)(b) purposes.
>
> 29. In order to be able to properly plead a claim:
>
> (i) any professional obligations which attach to making allegations of a particular kind must be satisfied;
> (ii) the pleaded case must be one which would not be struck out on the basis that it has no sufficient evidential basis or was not sufficiently arguable; and

(iii) the pleading must be one capable of being supported by a Statement of Truth."

Those observations are made in the context of English practice and procedure, as well as being concerned, as I have already noted, with the wording of the English limitation provision. It was submitted on behalf of the defenders and third parties that they provided unreliable guidance. In Scottish practice it was common, as well as professionally responsible, for an action to be commenced to interrupt the operation of prescription even where it was not (yet) possible to plead a case that was relevant and sufficiently specific for proof.

[72] Despite the difference in statutory wording, I am not persuaded that a materially different approach should be taken in Scotland to the question of what information is required to bring the operation of section 6(4) to an end. I accept that it is common, and entirely in accordance with professional obligations, for an action to be commenced in order to interrupt prescription with a summons that is so inspecific that proof could not be allowed upon it. I also recognise that in the particular context of claims for infringement of competition law, where the facts may be difficult to ascertain, there are observations in English cases to the effect that a "generous approach" should be taken where an application is made to strike out a claim for insufficiency of pleadings (see eg *Nokia Corporation* v *AU Optronics Corporation* [2012] EWHC 731 (Ch), Sales J at paragraph 67). However, Scottish practice also recognises that there are limits to what can responsibly be pled. A defender is entitled to protection against the trouble, expense and damage to reputation that may result from defending a case which is without merit, and is entitled to fair notice of the claim made against him. That is so in relation to a claim for infringement of competition law as it is for any other. The corollary is that prescription will not run against a pursuer who is unable to

plead a relevant case because critical facts that have to be pled in order to establish a *prima facie* case have been and continue to be concealed by the prospective defender or defenders. In the competition law context, those critical facts would, in my opinion, include at least the nature of the infringement said to have caused the pursuer loss or damage, and the identity of one or more of the alleged participants in it.

[73] I have already noted that the pursuers accept that there may be circumstances in which time will begin to run against a claimant in respect of a competition law infringement before publication of the Commission decision from which the claimant seeks to follow on. *Granville Technology Group Ltd* v *Infineon Technologies AG* provides an example. That action was raised within a 6-year period after the date of the Commission press release announcing its decision. There had, however, prior to the Commission decision, been lengthy price fixing investigations in the United States, culminating in a guilty plea and a fine, all of which was widely reported in the UK press and referred to in the defendant's annual reports. A substantial number of law suits had been raised in the United States, and the Granville companies had been approached by an American law firm to discuss participating in a class action for non-US claimants. The American lawyers had provided a draft complaint containing detailed allegations as to how the cartel had operated. A class action, which the Granville companies did not join, had been raised in the United States but later dismissed for want of jurisdiction. In these circumstances, Foxton J held that the claimants had been in a position to plead a viable case prior to publication of the Commission decision, and that the action was time-barred.

Application to the circumstances of the present cases

[74] I turn now to apply these authorities to the facts of the present cases and, in particular, to the question of when concealment of the infringement came to an end, thereby starting the running of the prescription clock. In my opinion it cannot be said that the concealment ended either in September 2010, when the OFT investigation was announced, or in early 2011, when the Commission investigation was announced. The information that entered the public domain at that time was extremely limited. The "story" being reported by the press was the fact that investigations into price fixing had been commenced, coupled, in the case of the OFT investigation, with the fact that an individual had been arrested. The names of various groups of companies were mentioned, but in all other respects the concealment continued. In particular the following matters remained concealed:

- There was no clear indication of the scope or extent of the alleged price fixing activities under investigation. As I noted earlier, the press reports referred variously to the trucks market, the heavy trucks market, the trucking industry, and the commercial vehicle market. An interested reader would have remained uninformed as to whether any particular vehicle that he had purchased fell within the scope of either or both of the investigations. The fact that the investigations concerned particular classes of trucks, ie medium and heavy trucks, did not emerge until 2014, and the fact that the activities of the cartel extended to the timing of the introduction of emissions technology remained concealed until the announcement of the Decision in 2016.
- There was no confirmation that the suspicions that had led to the investigations were well-founded. It is clear from the press reports and from the Commission press release that both the OFT and the Commission were

careful to assert that their investigations were at an early stage and that the fact that they had begun did not mean that infringements had occurred. The manufacturers themselves were reported merely as confirming that they would co-operate with the investigations, and the Financial Times article on 3 March 2011 went so far as to suggest that executives in the truck industry were bewildered as to what the investigation was about.

- Although the press reports refer to various groups of companies, including Daimler/Mercedes-Benz, MAN, Volvo, Renault, Iveco and DAF, no particular suable company is specified as having participated in the alleged price fixing activities.
- There was no specification of the geographic extent of the alleged activities, although the Financial Times article in March 2011 stated that the Commission "probe" did not appear to include the United Kingdom.

[75] It will be recalled that the announcement and press reporting of the commencement of the OFT and Commission investigations took place against the background summarised at paragraph 16 above, namely that in September 2010 the MAN companies had disclosed the cartel to the Commission and applied for immunity, that in December 2010 MAN had been granted conditional immunity, and that by February 2011 most of the other truck manufacturer groups who participated in the price fixing activities had applied for leniency. All of this remained deliberately concealed, for the very good reason that it was in the interests of the defenders and third parties to continue to conceal it in order to comply with the conditions of the Leniency Notice, and thereby obtain the benefit of immunity or leniency in relation to Commission fines. The rationale for operating a system of immunity/leniency is explained in the introductory paragraphs of the Leniency Notice:

> "(3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.
>
> (4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.
>
> (5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession."

[76] It is not for this court to make or imply any criticism of the defenders and third parties for complying with the non-disclosure conditions of the Leniency Notice in order to obtain the benefit of immunity or leniency. One of the consequences, however, of prolonging the concealment will be to extend the period during which a person in Scotland who has suffered loss as a consequence of the prohibited practices is protected by section 6(4) from the running of prescription against him.

[77] In my opinion the circumstances of the present cases are clearly distinguishable from those of *Granville Technology Group Ltd* v *Infineon Technologies AG*. In that case the nature and scope of the price fixing (sale of direct random access memory to manufacturers of personal computers and laptops) was public knowledge; the identities of the particular corporate participants were known; and the companies concerned had agreed to plead guilty in

US antitrust proceedings. All of this had been reported in the British press, and the Granville companies had even been provided with details of a proposed class action and invited to join in. It would not be difficult for a Scottish court, faced with such circumstances, to find that the concealment required by section 6(4) was no longer present.

[78] As regards the pursuers' submission that the press reports of the OFT investigation were wholly irrelevant, I am not entirely convinced that this would necessarily have been so. In *Granville*, the publicity given to antitrust proceedings in the United States was regarded as relevant to the issue of the claimants' actual or constructive knowledge. In the present case, had I regarded the reports of the OFT investigation as containing sufficient information to allow the pursuers to discover the concealment (which I do not), I would not have regarded the fact that both of the OFT investigations (criminal and civil) were subsequently terminated as a reason in itself to treat them as irrelevant to the question of actual or constructive knowledge.

[79] When one turns to the companies' annual reports, whose terms I have set out or summarised above, one finds nothing of substance to add to what was reported by the press in 2010 and 2011. No doubt that was largely for the same reason, ie preservation of entitlement to immunity or leniency, although one may add to that the discretion accorded by IAS 37 regarding the reporting of contingent liabilities. All that a reader of the reports would glean from them would be that investigations into possible anti-competitive behaviour by manufacturers of (in the case of all except Volvo) commercial vehicles or (in the case of Volvo) trucks had been initiated and were continuing, and that the outcome was uncertain. Indeed, the passages that I have quoted create an impression that it was still unclear to the companies themselves what infringement, if any, might have been committed. All of that, in my view, was entirely sufficient to amount to concealment which, in terms of

section 6(4), would induce a creditor to refrain from making a claim for compensation in respect of losses caused by the operation of a price fixing cartel in relation to particular types of commercial vehicles (or unspecified classes of trucks). The contrast with *Granville* is once again obvious: in that case the infringers' annual reports did disclose "a burgeoning number of law suits" arising out of the investigations.

[80] On the view that I have taken, the question of what the pursuers could with reasonable diligence have discovered assumes a reduced importance. I accept that the court has been provided with a reasonably representative sample of evidence of witnesses with technical and legal expertise within Scottish local authorities. I accept the evidence of those witnesses that they did not see any of the press releases, press reports or company annual reports at the time of publication. In my opinion it would have made no material difference if they had. For the reasons that I have explained, I consider that the published material merely prolonged the concealment beyond the time when the existence of the cartel was disclosed to the competition authorities and the investigations were commenced. There is nothing in it which, if seen by local authority employees such as those who were selected to give evidence in these cases, would or ought to have led to the discovery of fraud or error that was inducing their employees to refrain from making a claim for losses sustained as a consequence of breaches of article 101.

[81] Nor, in my opinion, could it reasonably be contended that sight of the material reported in 2010 and 2011, or in the company annual reports, ought to have prompted further inquiries by the pursuers which, if conducted with reasonable diligence would, or would have been likely to, have led to the discovery of such fraud or error. I reject the proposition that it was incumbent on a local authority to carry out its own investigation of an alleged price fixing cartel that was already under investigation by the Commission. The

analogy suggested during cross-examination of investigation of an alleged irregularity in the authority's own financial affairs is clearly inapt. In any event, I am in no doubt that if a Scottish local authority had attempted to inquire into the existence of a cartel whose activities had affected the prices paid for commercial vehicles of an unspecified nature during an unspecified period of time, it would have been met by a refusal by the companies concerned to provide any information, in order to avoid jeopardising their applications for immunity and leniency. It is not surprising that, as is common ground, no-one in the United Kingdom raised any proceedings against any of the Addressees before the details of the Decision were announced.

[82] The next event to consider in relation to the ending of concealment is the Commission announcement in November 2014 that it had issued a statement of objections to companies that it suspected of participating in a price fixing cartel, and the consequent publicity. Although none of the parties to the present action placed much emphasis on this event (because it was in no-one's interest to do so), I ought to express a view on it. I have set out the Commission press release and summarised the media reports at paragraph 33 above. In certain important respects the information publicly available was expanded. The press release contained an express reference to heavy and medium duty trucks, and the fact that the matter had proceeded to the stage of issuing of a statement of objections was a clear indication that the Commission, after investigation, was of the view that there was at least a case to answer. The press release contained no identification of the truck producers involved; however, the media reports mentioned Daimler, Volvo, MAN and Iveco, although the Commission declined to confirm the identification. It is also relevant to note that the companies themselves were no longer bound by the non-disclosure conditions of the Leniency Notice.

[83] On the other hand, certain important matters remained undisclosed. The Commission was still careful to present the matter as a charge rather than a finding of guilt, and there was clearly no acknowledgment by any of the truck producers that the charge was well founded. There was no specification of the particular companies involved, or of the duration of the suspected cartel, or of the geographic area in which it was suspected of having operated. In those respects the concealment continued and, applying the test already discussed, it would still not have been possible, in my view, on the information available in November 2014, for the pursuers to plead a *prima facie* case that they had suffered loss as a consequence of the operation of a cartel among truck producers.

[84] There remains, at least hypothetically, a possibility that at some date between the November 2014 announcement and the publication of the Decision in July 2016, further information regarding the concealment, of which the pursuers would or ought with reasonable diligence to have been aware, came into the public domain, thereby putting an end to the operation of section 6(4). However, no evidence of any such information was produced in evidence and I therefore make no finding to that effect.

[85] For these reasons, and subject to what I say below in relation to the operation of the long negative prescription under section 7 of the 1973 Act, I hold that in determining whether the present actions were timeously raised, the period prior to 19 July 2016 is not to be reckoned as part of the prescriptive period. Any obligation incumbent upon the defenders to make reparation to the pursuers had accordingly not been extinguished by the operation of prescription in terms of section 6 of the 1973 Act when the actions were raised on 27 February 2019.

The principle of effectiveness

[86] I have reached this view without express reliance on the EU principle of effectiveness. Each of the parties submitted, from their own perspective, that in the context of section 6, the principle added little to the approach adopted by domestic law. I agree, and it is therefore unnecessary for me to say very much about it.

[87] The application of the principle of effectiveness to the interaction of competition law and limitation periods was considered by the Court of Justice in *Cogeco Communications* v *Sport TV Portugal SA*, case concerning a claim for damages for infringement of article 102 (abuse of dominant position). Having rehearsed the established law which stated that, provided the principles of effectiveness and equivalence were observed, it was for member states to lay down detailed rules on available remedies for breach of article 102, including limitation periods, the Court made the following observations:

> "47 …National legislation laying down the date from which the limitation period starts to run, the duration and the rules for suspension or interruption of that period must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that right by the persons concerned, so as not to undermine completely the full effectiveness of Article 102 TFEU.
>
> 48 It follows that the duration of the limitation period cannot be short to the extent that, combined with the other rules on limitation, it renders the exercise of the right to claim compensation practically impossible or excessively difficult.
>
> 49 Short limitation periods that start to run before the person injured by the infringement of EU competition law is able to ascertain the identity of the infringer may render the exercise of the right to claim compensation practically impossible or excessively difficult.
>
> 50 It is indispensable, in order for the injured party to be able to bring an action for damages, for it to know who is liable for the infringement of competition law.

> 51 The same applies to a short limitation period that cannot be suspended or interrupted for the duration of proceedings following which a final decision is made by the national competition authority or by a review court.
>
> 52 The appropriateness of a limitation period, having regard to the requirements of the principle of effectiveness, is of particular importance both in respect of actions for damages brought independently of a final decision of a national competition authority and for actions brought following such a decision. With regard to the latter, if the limitation period, which starts to run before the completion of the proceedings following which a final decision is made by the national competition authority or by a review court, is too short in relation to the duration of these proceedings and cannot be suspended or interrupted during the course of such proceedings, it is not inconceivable that that limitation period may expire even before those proceedings are completed. In that case, any person suffering harm would find it impossible to bring actions based on a final decision finding an infringement of EU competition rules."

On this basis, the Court concluded (albeit apparently under a misapprehension as to the terms of the Portuguese law of limitation) that a limitation period of 3 years which started to run from the date on which the injured party was aware of its right to compensation, even if the infringer was not known and which could not be suspended or interrupted in the course of proceedings before the national competition authority, rendered the exercise of the right to full compensation practically impossible or excessively difficult.

[88] The view that I have taken of the proper interpretation of section 6 of the 1973 Act, and its application to the circumstances of the present case, is consistent with the Court's judgment in *Cogeco*. The suspension of operation of the prescriptive period provided for by section 6(4) prevents the short negative prescription from potentially falling foul of the effectiveness principle in the manner described in paragraph 52 of the judgment. I also note that the judgment emphasises the importance of the injured party being able to ascertain the identity of the infringer. It will be recalled that in the present case none of the material that was publicly available before July 2016 would have enabled the pursuers to identify and raise an action against the particular companies that had taken part in illegal cartel activities.

[89] I should mention for the sake of completeness that reference was made on behalf of the pursuers to a decision of the Amsterdam Court of Appeal in a case called *CDC Project 13 SA* v *Kemira Chemicals OY* (4 February 2020), in which (at paragraph 3.5.4) the court construed the *Cogeco* judgment as demonstrating that the principle of effectiveness, given the special nature of infringements of competition law, especially in the event of follow-on claims, entailed that the injured party had to be able to await the final decision of the competition authority (whether that be the Commission or a national authority), and had to have sufficient time after that to raise its action for damages, without a national limitation regime, as a whole, standing in its way. On the face of it, that view would appear to be inconsistent with the approach taken, for example, in *Granville Technology Group Ltd* v *Infineon Technologies AG* (above) where it was held that a limitation period could run prior to publication of the Commission decision. I did not understand the pursuers in the present case to insist that in cases concerning infringement of competition law the prescriptive period could never begin to run until the competition authority had given its decision; nor would I, for my part, regard that as a necessary consequence of the application of the effectiveness principle to the operation of section 6 in competition law cases.

Long negative prescription: section 7

[90] In advance of the preliminary proof, the pursuers in the two lead actions lodged lists of trucks purchased or leased during or after the period when the cartel operated. Some of the trucks were purchased (in the case of Glasgow City Council) or leased (in the case of West Dunbartonshire Council) more than 20 years before 27 February 2019. It was conceded on behalf of the pursuers that, subject to the application of EU law principles, any claims in respect of overpayment for trucks purchased or leased on or before 27 February 1999 had

been extinguished by the operation of the long negative prescription in terms of section 7 of the 1973 Act (set out at paragraph 44 above).

[91] It was submitted, however, that because the effect would be to render such claims excessively difficult or practically impossible, the principle of effectiveness required the court to disapply section 7. Reference was made to *Bundeswettbewerbsbehörde* v *Donau Chemie AG* [2013] 5 CMLR 658, in which the Court of Justice stated at paragraph 24 that the right to claim damages for an infringement of article 101 allowed persons who had suffered loss as a consequence of such infringement to claim "full compensation" not only for actual loss, but also for loss of profit and interest. The 20-year cut-off, which contains no exception for fraud or induced error, would prevent the recovery of full compensation and would therefore breach the effectiveness principle. The argument in relation to the availability of an alternative procedure in the CAT, which I have set out at paragraph 62 above in relation to section 6, applied with equal force in relation to section 7.

[92] In response, the defenders and third parties emphasised that regard also had to be had to the principle of legal certainty, and submitted that a prescriptive period of 20 years, even without any exception for circumstances in which the injured party could not reasonably have been aware of the existence of a claim, did not constitute a breach of the principle of effectiveness. The words "full compensation" used by the Court in *Donau Chemie* had to be read against this background, or else there could never be a period of absolute time bar. In any event, the existence of an alternative route via the CAT, in which actions could be commenced within 2 years after the date of the Commission's decision precluded any question of breach of the effectiveness principle. On a proper interpretation of the transitional rules, the special 2-year limitation period for follow-on actions had survived into the post-2015 regime.

[93] In my opinion, the submissions of the defenders and third parties are to be preferred on this issue. I was referred to no authority for the proposition that a long-stop prescription or limitation period of 20 years would require to be qualified by an exception for lack of means of awareness of the claim in order to comply with the principle of effectiveness. The decision of the Court in *Haahr Petroleum* v *Havn* (see paragraph 49 above) is clearly to the opposite effect. As the Court observed in that case, the laying down of reasonable limitation periods is an application of the principle of legal certainty which does not breach the effectiveness principle even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action.

[94] The rationale for an unqualified long-stop prescription period of 20 years was stated as follows in the Scottish Law Commission Report referred to above (at paragraph 34):

> "The general principle is that the long negative prescription runs from the date when a claim arises, and is not affected by absence of knowledge on the part of the person entitled to enforce it….
>
> If the negative prescription in actions of damages were to commence only when knowledge of the material facts came to the pursuer, there would be a class of claims where the application of the prescription might be indefinitely deferred. The law should not give countenance to latent and antiquated claims which may affect even the successors of the person responsible and, if revived after many years, may disturb the basis upon which they have arranged their lives."

In my opinion that rationale is consistent with the operation of the principle of legal certainty, and falls within the scope of options available to EU member states with regard to enactment of national limitation or prescription rules. I do not regard the reference to "full compensation" in *Donau Chemie* as casting any doubt upon that; the point at issue in the case was different, and there is no inconsistency in requiring national laws to provide full compensation for breaches of article 101, in the sense of compensation for all types of loss, subject to a reasonable limitation or prescription period in the interest of legal certainty.

[95] For these reasons it is unnecessary, in my view, to place any reliance on the existence of the alternative procedure in the CAT as preventing a breach of the effectiveness principle. Had I considered it necessary to do so, I would again have preferred the arguments presented on behalf of the defenders and third parties. The problem perceived to arise by the pursuers, as I understood it, was this: rule 31 of the (now superseded) Competition Appeal Tribunal Rules 2003 provided that a claim for damages had to be made within a period of 2 years beginning on one or other of two dates, one of those being related to the date of the relevant competition authority decision. That rule was preserved by rule 119 of the Competition Appeal Tribunal Rules 2015, but only if "the claim arose before 1 October 2015" (rule 119(3)). The pursuers submitted that it was unclear whether this was a reference to the date or dates when the loss was incurred or to the date of the competition authority decision that was being used as the basis of the follow-on action. If the latter was correct, then the 2-year period did not apply to the claims in the present cases, and ordinary prescription rules would apply instead. On that interpretation, the availability of a remedy in the CAT added nothing to the availability of a remedy in the courts. On behalf of the defenders and third parties it was submitted that the former interpretation was clearly correct. I agree. The general rule is that a claim arises when there is concurrence of injuria and damnum, and I see no reason to interpret the words differently here. Although it will usually be preferable for a claimant to await the decision of the competition authority in order to benefit from the latter's conclusions in a follow-on action, it is not necessary to do so. Regardless of whether the injured party's claim is follow-on or standalone, it arises when the loss was sustained and not when a competition authority decides that an infringement has taken place.

[96] Nor, in my opinion, does it matter that a different limitation period applies in the CAT from that applicable in the courts. The point in the *Workplace Relations Commission* case was a different one: the problem identified there was that a body created to decide questions of EU law relating to workplace discrimination did not (in contrast to the courts) have power to disapply a provision of national law that conflicted with EU law. I do not consider that any of the authorities founded upon by the pursuers vouched the proposition that the same limitation regime must apply both to the courts and to a specialist tribunal such as the CAT. The fact that each is bound to give effect to EU law does not, in my view, mean that the principle of effectiveness is breached if a right of action is cut off by the operation of prescription in one forum before it has been cut off in the other.

[97] I therefore hold that any obligation that the defenders may have had to make reparation to the pursuers in these cases for losses sustained on or before 27 February 1999 has been extinguished by the operation of long negative prescription.

Short negative prescription: section 11(3)

Arguments for the parties

[98] As an alternative to the postponement of the operation of prescription by section 6(4), it was submitted on behalf of the pursuers that in terms of section 11(3) (set out at paragraph 45 above), the commencement of the prescriptive period was postponed until publication of the Decision. In the light of my conclusion in relation to section 6(4), this issue becomes academic, but it is necessary for me to express my view on it.

[99] It is fair to say that senior counsel for the pursuers presented this submission without notable enthusiasm, as he recognised the difficulties created for him by the decisions of the Supreme Court in *David T Morrison Ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222 and *Gordon's*

Trs v *Campbell Riddle Breeze Paterson LLP* 2017 SLT 1287. Nevertheless I was invited to adopt the same approach as that taken by Sheriff Reid in *WPH Developments Ltd* v *Young & Gault* (Glasgow Sheriff Court, 8 April 2020), and to hold that on a purposive construction of section 11(3), and in accordance with the effectiveness principle, prescription in relation to a latent loss did not begin to run until the creditor became or ought to have become aware that he had suffered a legal wrong, especially where, as here, the wrong was concealed from him.

[100] On behalf of the defenders and third parties, it was submitted that such an argument could not be advanced in the face of the two Supreme Court decisions. The ratio of *Gordon's Trs* was clear: section 11(3) did not postpone the running of the prescriptive period until the creditor became aware that he had suffered a detriment because something had gone wrong. The sheriff in *WPH Developments Ltd* had misunderstood the ratio of *Gordon's Trs* and the case was wrongly decided. The contrary approach adopted by Lord Doherty in *Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* 2019 SLT 1327 was correct and should be followed.

Decision

[101] Delivering the judgment in *Gordon's Trs*, with which the other members of the Supreme Court agreed, Lord Hodge noted at paragraph 17 that in *Morrison* v *ICL*, the court had held that for the prescriptive period to begin under section 11(3), the creditor had to be aware (actually or constructively) only of the occurrence of the loss or damage, and not of its cause. Lord Hodge then proceeded, at paragraph 18, to identify "the question which this appeal raises" as follows:

> "In *Morrison v ICL* this court did not have to address the question which this appeal raises, namely <u>whether in section 11(3) the creditor must be able to recognise that he has suffered some form of detriment before the prescriptive period begins</u>. In

> *Morrison v ICL* the property damage was manifest on the date of the explosion. But where a client of a professional adviser suffers financial loss by incurring expenditure in reliance on negligent professional advice, the client, when spending the money, will often be unaware that that expenditure amounts to loss or damage because of circumstances, existing at the date he or she spends the money, of which the client has no knowledge. A question which the current appeal raises is whether section 11(3) starts the prescriptive clock when the creditor of the obligation is aware that he or she has spent money but does not know that that expenditure will be ineffective."
>
> (My emphasis.)

[102] It will be noted that the point identified by Lord Hodge as "the question which this appeal raises" (underlined above) is not exactly the same question as that identified in the last sentence, ie whether the prescriptive clock starts when the creditor is aware that he has incurred expenditure but does not know that it will be ineffective. At paragraph 21, Lord Hodge answered the question which he had identified as raised by the appeal as follows:

> "…Section 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure."

That, in my opinion, is the ratio of the judgment, addressing as it does the question raised for decision. As the last sentence makes clear, the prescription clock will start to run *either* when the creditor becomes aware that he or she has not obtained something sought *or* (if earlier) when he or she incurs expenditure.

[103] At paragraph 24, Lord Hodge applied the ratio thus enunciated to the facts of the case. He rejected the contention that time did not begin to run until the date of the Land Court decision which held that the attempt to regain vacant possession of the fields had been ineffective. Instead, he concluded:

> "…With the benefit of hindsight the failure to obtain vacant possession on 10 November 2005 can be seen as having caused loss to the trustees. At that moment, as in *Dunlop v McGowans*, the prescriptive period began to run under section 11(1), unless it was postponed by subsection (3). But there was no postponement under the latter subsection: the trustees were aware on 10 November 2005 that they had not obtained vacant possession of those fields. That was a detriment. They were in any event actually or constructively aware by 17 February 2006 that they had incurred expense in legal proceedings to obtain such possession. As the trustees did not commence legal proceedings against the respondents until 17 May 2012, it follows that the respondents' obligation to make reparation to them has prescribed."

In this passage, Lord Hodge identified two events, either of which would have started the prescription clock, namely (i) the trustees' awareness that they had failed to obtain vacant possession of the fields, and (ii) the incurring of legal expenses, another fact of which the trustees were actually or constructively aware. As the former occurred first, that was the date from which prescription ran.

[104] Applying the ratio of *Gordon's Trs* to the circumstances of the present cases, the earliest of the events identified by Lord Hodge was the incurring of what is now alleged to have been excessive expense on the purchase of each truck whose price was unlawfully inflated by the price fixing activities of the cartel. On each such occasion there was a concurrence of injuria and damnum, and an actual awareness by the pursuers that they had incurred expenditure. All of those circumstances occurred more than 5 years before the raising of the present actions, and accordingly, in my opinion, section 11(3) is of no assistance to the pursuers. In particular, it would be wholly inconsistent with the decisions in *Morrison* v *ICL* and *Gordon's Trs*, which are of course binding upon me, to hold that section 11(3) postponed the operation of prescription until the pursuers became aware, on publication of the Decision, that they had suffered detriment as a consequence of the defenders' wrongdoing.

[105] In so holding, I am respectfully differing from the analysis of Sheriff Reid in *WPH Developments Ltd*. According to the learned sheriff's analysis (at paragraphs 143-144), the ratio of *Gordon's Trs* is to be found in the passage at paragraph 24, and the case is not a binding authority for the proposition (a) that a creditor's awareness of the occurrence of damnum is to be assessed with the benefit of hindsight or (b) that a creditor's mere awareness of expenditure incurred by it precludes the operation of section 11(3). In Sheriff Reid's view (see paragraphs 145-158), the observations of Lord Hodge at paragraphs 18-22 were *obiter* and constituted an unsatisfactory basis upon which to draw wider conclusions. In my respectful opinion, the learned sheriff's analysis conflates the ratio of *Gordon's Trs* with its application to the particular facts of that case. It fails to take account of the fact that Lord Hodge's analysis addresses both patent and latent injury. The Supreme Court's decision that prescription began to run when the trustees failed to obtain vacant possession of the fields, as opposed to when they incurred expenditure, followed from the fact that that was what had happened first. That decision in no way detracted from or departed from the analysis in paragraphs 17-21, which confirmed that the prescription clock *could* be started by the incurring of expenditure, unless it had already been started by an earlier event such as, in *Gordon's Trs*, the failure to obtain vacant possession.

Disposal

[106] Parties were agreed that before pronouncing any interlocutor I should put the case out by order for discussion of further procedure. Questions of expenses are reserved.