Neutral citation [2024] CAT 41

<u>IN THE COMPETITION APPEAL TRIBUNAL</u>

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

<u>19 June 2024</u>

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
THE HONOURABLE LORD ERICHT
JANE BURGESS

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

<u>Class Representative</u>

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

<u>Defendants</u>

Heard at Salisbury Square House on 16 to 26 January 2024

Supplementary written submissions received on 3 May 2024

JUDGMENT (LIMITATION)

APPEARANCES

Ms Marie Demetriou KC, and Ms Ligia Osepciu (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Class Representative.

Ms Sonia Tolaney KC, Mr Timothy Otty KC, Mr Matthew Cook KC, and Mr Daniel Benedyk (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

CONTENTS

A. INTRODUCTION

1. This judgment follows a further stage in the trial of these opt-out collective proceedings brought pursuant to s. 47B of the Competition Act 1998 ("CA 1998"). The Tribunal made a collective proceedings order ("CPO") on 18 May 2022. The proceedings have already been the subject of a number of judgments of the Tribunal and the appellate courts, both before and after the making of the CPO.

2. Mr Merricks is the class representative ("CR") and we shall refer to the defendants compendiously as "Mastercard". The nature of the claim has been described in the previous judgments of the Tribunal, in particular the judgment on preliminary issues of 21 March 2023: [2023] CAT 15; and the judgment on causation and value of commerce of 26 February 2024: [2024] CAT 14 ("the Causation Judgment").

3. In summary, these are follow-on claims based on the decision of the European Commission of 19 December 2007 finding that Mastercard had infringed Art 101 of the Treaty on the Functioning of the European Union ("TFEU") (henceforth, "Art 101") from 22 May 1992 by reason of its rules and decisions concerning the cross-border default EEA multilateral interchange fees ("MIFs") to be charged by cardholders' issuing banks to merchants' acquiring banks: COMP/34.579 and COMP/36.518 *Mastercard* ("the Decision"). A final appeal against the Decision was dismissed by the Court of Justice of the EU ("CJEU") on 11 September 2014: Case C-382/12P *Mastercard v Commission*, EU:C:2014:2201. The Decision required Mastercard to amend its EEA MIFs by 21 June 2008.

4. It will be necessary to explain the CR's allegations more fully below, but in essence the CR contends that the EEA MIFs which were the subject of the Decision affected the level of interchange fees ("IFs") paid by merchants' acquiring banks to cardholders' issuing banks, whether those IFs were set bilaterally or multilaterally; that those acquiring banks passed through those IFs in the charges which they levelled on merchants for processing card transactions (the merchant service charge or "MSC"); and that merchants in turn passed

through the MSC in whole or in part in the prices charged to customers in the UK. On that basis, the CR contends that if the EEA MIF had been at a lawful level (either zero or in any event much lower than it was), the prices charged by merchants would have been correspondingly lower: this difference constitutes the "overcharge" which is claimed as damages.

5. Since merchants generally did not charge more to customers who paid by credit card, this alleged overcharge affected all customers, whether or not they paid by credit card. The class on behalf of which the proceedings are brought accordingly comprises all individuals who, between 22 May 1992 and 21 June 2008, when aged 16 and above and resident in the UK, purchased goods and/or services from businesses selling in the UK that accepted Mastercard cards. This class is accordingly estimated to number some 45.5 million people. Further, following the ruling by the Tribunal on the CR's application (see [2022] CAT 43), the claim form was further amended to incorporate 'run-off periods': i.e. to allege that although the EEA MIFs were reduced to lawful levels on 21 June 2008, this was not immediately reflected in the levels of UK domestic MIFs, and, in turn, in the MSCs. On that basis, the claims now extend to purchases made by class members ("CMs") up to 21 June 2010.[1] The CR seeks aggregate damages pursuant to s. 47C(2) CA 1998, which are estimated at around £10-10.3 billion, including simple interest to 6 June 2023 and with the most generous assumptions as to pass-through.

6. While there are now a very large number of actions before the Tribunal brought by merchants claiming damages by reason of the level of MIFs, the present proceedings are distinct from most of the merchant actions as they are confined to follow-on claims, based on the Decision. The other proceedings allege that the UK MIFs (and in some of the cases, commercial EEA MIFs which were not the subject of the Decision) directly infringe Art 101 and the Chapter I prohibition under the CA 1998. They are therefore stand-alone claims, although they rely on the reasoning of the Decision. The merchant claims which were

[1] The class definition was not amended so losses in the run-off period concern only further purchases by those who satisfy the class definition as at 21 June 2008.

the subject of the Supreme Court judgment in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24 were similarly stand-alone claims.

7. The Tribunal determined early on, and with the agreement of both sides, that the trial would proceed in stages. As noted at the outset, this judgment follows a further stage and concerns limitation.

B. THE LIMITATION / PRESCRIPTION ISSUES

8. As explained above, the full infringement period under the Decision is 22 May 1992 – 21 June 2008, but with the run-off periods the claims cover losses alleged to have been suffered up to 21 June 2010.

9. By its defence, Mastercard raised limitation and prescription defences. Mastercard contended that:

   (1) in relation to claims governed by English law and Northern Ireland law, claims based on an infringement prior to 20 June 1997 are time-barred;

   (2) in relation to claims governed by Scottish law, claims based on an infringement prior to 20 June 1998 are time-barred; and

   (3) in relation to claims in respect of purchases by CMs from merchants abroad (i.e. purchases by mail order, internet or telephone), limitation will be determined by the law of the country in which the merchant was based, which will bar some or all of those claims.

10. The Tribunal decided to deal with limitation/prescription as a preliminary issue. That issue involved several aspects.

11. First, by its judgment of 22 June 2022 in Case C-267/20 *Volvo AB and DAF Trucks NV v RM*, EU:C:2022:494 ("*Volvo*"), the CJEU indicated that the EU principle of effectiveness[2] required (or may require) that a limitation period under national law could not begin to run before the infringement of EU

---

[2] See para 72 below.

competition law had ceased. *Volvo* was a post-Brexit judgment, decided after "IP completion day" for the purpose of the European Union (Withdrawal) Act 2018, as amended ("EUWA 2018"). If such a "cessation requirement" was to apply in UK proceedings, it would have significant implications also for the merchant claims. The position of Mastercard, and also Visa which is similarly a defendant to many of the merchant claims, is that no such cessation requirement applies. An Umbrella Proceeding Order pursuant to the Tribunal's Practice Direction (Umbrella Proceedings) of 6 June 2022 has been made in the merchant claims. Since the question of a cessation requirement for the limitation rules arises equally in the present proceedings and the Umbrella Interchange proceedings, it was appropriate to determine it for all the MIF claims in common. A joint hearing was accordingly held and, by a judgment issued on 26 July 2023, the Tribunal determined that a cessation requirement does not apply as regards limitation in any of the proceedings: [2023] CAT 49. An appeal against that decision is pending before the Court of Appeal.

12. Following a CMC in late September 2022, by order of 14 October 2022 the Tribunal directed that the other aspects of limitation, as set out at para 9 above, be determined at a trial to be held in January 2023.[3] One of the issues as regards the question of limitation and prescription was the application of s. 32 of the Limitation Act 1980 ("LA 1980"), and the corresponding s. 6(4) of the Scottish Prescription and Limitation (Scotland) Act 1973 ("PLSA 1973"), on which the CR relied. The parties were directed to file an agreed statement of facts setting out what information relevant to limitation was in the public domain. However, shortly after that joint statement was filed in November 2022, it became clear that the CR was alleging deliberate concealment on a basis that had not been pleaded and which Mastercard would dispute. The CR then served a draft Re-Re-Amended Reply particularising the alleged deliberate concealment. It was common ground that this issue would involve some disclosure and factual evidence. It was therefore impossible to deal with this in the confines of the trial in January 2023. After hearing the parties, the Tribunal held at the outset

[3] Save that the trial should consider only which law(s) should govern claims in relation to transactions with merchants based outside the UK, and would not address any resulting questions of the limitation rules under such foreign law or laws.

of that trial that the CR should be given permission to amend his Reply and that this aspect of limitation/prescription should be adjourned to be heard separately: [2023] CAT 5. On 10 February 2023, directions were given for further pleadings, disclosure and evidence on the matters raised by the amendment and it was directed that a separate hearing of the issues under s. 32 LA 1980 and s. 6(4) PLSA 1973 be held in January 2024.

13. Accordingly, the trial proceeded in January 2023 to deal with all other aspects of limitation/prescription (save for the *Volvo* cessation requirement issue), along with a wholly discrete issue concerning exemption. On 21 March 2023, the Tribunal issued its judgment on those preliminary issues: [2023] CAT 15. The Tribunal held that:

(1) application of the relevant general legislation on limitation/prescription is not precluded by the CA 1998 and the Tribunal's Rules;

(2) insofar as the claims are governed by Scots law, this was a case of a continuing act, neglect or default within the terms of s. 11(2) of PLSA 1973, such that the prescription period of five years ran from 21 June 2008; and

(3) English law applies for the purpose of limitation to claims by English CMs in relation to transactions with merchants selling from outside of England and Scots law applies for the purpose of prescription to claims by Scottish CMs in relation to transactions with merchants selling from outside of Scotland.[4]

Applications for permission to appeal against (1) and (3) are pending before the Court of Appeal.

14. In the light of the decision summarised at (2) above that s. 11(2) PLSA 1973 applies, the CR does not pursue his alternative case under s. 6(4) PLSA 1973.

---

[4] The parties agreed that the position of Northern Irish CMs is the same as for English CMs.

Thus the hearing before us concerned only English law (since Northern Irish law is agreed to be to the same effect).

15. At the time of the judgment in the joint hearing on the *Volvo* 'cessation requirement' issue (para 11 above), a reference was pending before the Grand Chamber of the CJEU in Case C-605/21 *Heureka Group v Google LLC* raising questions of the implications of the principle of effectiveness on national limitation rules. The CJEU issued its judgment in that case on 18 April 2024: EU:2024:324 ("*Heureka*"). Insofar as that judgment concerns the cessation requirement, that is a matter which has been determined by the Tribunal and is subject to consideration by the Court of Appeal. But insofar as it concerns other aspects of the principle of effectiveness, it potentially has implications for the issues which were addressed at the hearing leading to the present judgment. Accordingly, in response to the Tribunal's invitation, on 3 May 2024 the parties submitted short supplementary written submissions on *Heureka*.

16. The limitation argument is undoubtedly of great practical significance for these proceedings. Although it does not affect the claims by Scottish CMs, they are a minority of the vast class.[5] It is common ground that, subject to s.32 LA 1980 and/or potential application of the EU principle of effectiveness, the claims would be time barred in respect of loss suffered before 20 June 1997. That accordingly accounts for five out of the 18 years claim period. Although the value of commerce affected in the earlier part of the period was significantly less than in the later part of the period (presumably due to the combined effect of inflation and a notable growth in the value of card transactions),[6] since the potentially excluded period is the first five years, the effect of interest will markedly increase the relative value of the affected claims.

C. DETAILS OF THE CLAIMS

17. The Decision found that Mastercard infringed Art 101 because, in summary:

---

[5] The population of Scotland was around 9% of the total UK population over the relevant period.
[6] See the value of commerce table agreed between the experts and adopted in the Causation Judgment.

(1) Mastercard was an association of undertakings, within the terms of Art 101(1);

(2) the cross-border EEA MIFs were set by Mastercard;

(3) the EEA MIFs operated as a base or *de facto* floor for the MSCs charged by acquiring banks to merchants since a bank was most unlikely to charge an MSC below the level of the MIF. As each bank knew that the same MIF was being paid by every other bank, this restricted competition between banks in the acquiring market as regards the MSC they charged to merchants, and as a cross-border MIF it restricted competition between EU Member States. Moreover, in eight EEA Member States (but not the UK) the EEA MIF applied as the domestic MIF. The setting of the EEA MIFs therefore constituted a restriction of competition by effect, contrary to Art 101(1); and

(4) Mastercard's EEA MIFs did not satisfy the conditions for exemption under Art 101(3).

18. The cross-border EEA MIFs were 'fallback' or default MIFs. They in principle applied, as their name suggests, to transactions where the merchant's acquiring bank and the cardholder's issuing bank were in different EEA states. Although they are 'fallback fees', meaning that they only apply where the issuing and acquiring bank have not bilaterally agreed IFs which will apply as between them, it is acknowledged that for cross-border transactions (i.e. where the two banks were located in different states), there were virtually no such bilateral agreements, at least at the relevant time. However, the position was not necessarily the same where both banks were within the same country. Specifically as regards the UK, until 1 November 1997 there were a significant number of bilaterally agreed IFs between UK banks, and from that date onwards domestic, UK MIFs were set. The CR contends that the EEA MIFs which were the subject of the Decision caused the prices paid by UK consumers to be higher than they otherwise would have been, for two reasons. First, insofar as UK consumers made remote purchases from merchants in the EEA (by mail order, telephone or, online), those transactions would be subject to the EEA MIFs.

Secondly, and much more significantly, it is alleged that the EEA MIFs were causative of the level of the domestic UK IFs and (after 1 November 1997) the UK MIFs. The alleged causative effect of the EEA MIFs on UK IFs and MIFs is the subject of the Tribunal's Causation Judgment.

19. Since these are pure follow-on claims, they depend on establishing a chain of causation of loss from the infringing EEA MIFs. The claims are not restricted to the effect of cross-border purchases, to which the EEA MIFs would directly apply, but cover the effect of all purchases paid for with Mastercard credit cards: that is the basis of the calculation of the value of commerce. And as we have mentioned above, the class is not restricted to consumers who held Mastercard credit cards. On the basis that the IFs paid by acquiring banks were passed on to merchants through the MSC and then passed on by merchants to their customers, since there was little or no differential pricing, all customers at outlets which accepted Mastercard credit cards are alleged to have suffered a loss on every purchase that they made, whether that purchase was paid for by card, cheque or cash.

D. THE PLEADINGS

20. By para 9 of its Defence served on 9 May 2022, Mastercard raised a limitation defence and alleged that insofar as the claims are governed by English law, claims related to infringements occurring before 20 June 1997 are time barred. That contention is based on a combination of the original s. 47A CA 1998, which came into effect on 20 June 2003, rule 31(4) of the Competition Appeal Tribunal Rules 2003 ("CAT Rules 2003") and s. 2 LA 1980. Rule 31(4) of the CAT Rules 2003 provided that no claim for damages may be made if the claimant would have been prevented from bringing the proceedings by a period of limitation having expired before 20 June 2003. For claims that were not so time barred, s. 47A CA 1998 introduced a new limitation period which, where the claim was based on a Commission decision, was two years from the time when appeals from that decision were finally determined or the time for bringing an appeal expired.

21. The claim form in the present proceedings was issued on 6 September 2016, which is just under two years from the date of the CJEU judgment dismissing Mastercard's appeal, i.e. 11 September 2014: para 3 above.

22. Claims in respect of loss suffered before 20 June 1997 would have been time barred on 20 June 2003, when the original s. 47A CA 1998 came into force, pursuant to the primary limitation period of six years under s. 2 or s. 9 LA 1980.[7]

23. By para 4 of his Reply, as amended, the CR contends that the operation of the primary six year limitation period was suspended pursuant to s. 32(1)(b) or alternatively s. 32(2) of LA 1980. Alternatively, the CR relies on the EU principle of effectiveness. Aside from the cessation requirement as set out in the *Volvo* decision (see para 11 above), the CR contends at para 9D of his Reply, as amended, that this principle means that no limitation period could begin to run before the CMs knew or could reasonably be expected to know (a) the existence of the infringement, (b) the existence of the harm they suffered, (c) the causal link between that harm and the infringement, and (d) the identity of the perpetrators of the infringement. Specifically, he asserts that this principle does not include any requirement of deliberate concealment and further states, at para 9F:

> "As to the relevant date, … the reasonable typical consumer would not have recognised that they had a worthwhile claim prior to June 1997 (nor indeed subsequently, including up to the date of the Statement of Objections in 2003, and including up to the date of the EC Decision in 2007)."

24. Accordingly, the limitation issue falls under three broad heads:

(1) LA 1980, s 32(1)(b);

(2) LA 1980, s 32(2); and

(3) the EU principle of effectiveness.

[7] A claim for breach of Art 101 is a claim for breach of statutory duty but it has not been conclusively established whether that falls within s. 2 (claims in tort) or s. 9 (claims for sums recoverable by statute). Since the limitation period under both provisions is the same, it makes no material difference.

25. It was common ground that the burden is on the CR to establish that the primary limitation period of six years should not apply.

26. Although Ms Demetriou KC for the CR put her case under the principle of effectiveness first, we approach the matter in the order set out above. It is only if the domestic limitation rules prevent the claim going ahead that it is necessary to consider the implications of the EU principle.

E. THE TRIAL

27. As mentioned above, the parties filed in November 2022 an agreed joint statement of facts ("JSOF") summarising, with sources, the matters that were in the public domain prior to 20 June 1997 and that remain available through print media and published reports. Only minor comments in the JSOF were not jointly agreed. Both parties contributed to the materials referred to in the JSOF, which was very helpful.

28. Prompted by what was said in a witness statement for the CR served on 7 December 2023, Mastercard conducted further searches which found 276 additional articles which had not been identified in the original JSOF. They were disclosed to the CR on 15 December and Mastercard applied for permission to place them before the Tribunal. Having heard submissions from the parties at the outset of this trial, we ruled that Mastercard should be permitted to rely on those further materials: [2024] CAT 4. An amended JSOF, incorporating reference to those additional documents, was accordingly the document relied on in the trial.

29. The Tribunal heard from three witnesses of fact, all of whom were cross-examined:

(1) Mr David Jenkins was called by the CR. After first working for Midland Bank, Mr Jenkins spent six years at the third defendant, then called Europay International SA ("Europay"), in Brussels between 1992 and February 1998. Europay changed its name after merging in 2002 with

the second defendant.[8] At Europay, Mr Jenkins was involved in the pricing of all services offered to member banks, including interchange and other fees. His evidence principally concerned the approach to confidentiality and disclosure of information at Europay.

(2) Mr Michael Hawkins was called by Mastercard. He had also given evidence in the trial on causation in July 2023. He was Head of Card Schemes at NatWest/RBS from 1989 until his retirement in 2002. He also represented NatWest/RBS at the association of UK licensees of Mastercard and Europay, a body which changed its name several times but which has been referred to in these proceedings as Mastercard/Europay UK Ltd or "MEPUK". Mr Hawkins chaired MEPUK's Rules and Compliance Committee from its establishment in 1993 until 2001, and he was also on the MEPUK board. His evidence primarily concerned information about interchange fees which banks could and did make available and any constraints to which they were subject.

(3) Mr Vincent Bellis was also called by Mastercard. He joined Europay in 1992, and worked until March 1998 as manager within its Commercial Affairs division, responsible for the operational and technology aspects of Europay's relationship with its southern European members. In March 1998, Mr Bellis was promoted to be Head of the Business Support and Pricing department at Europay, a position which he held until 2002. As such, his role was to set strategic direction for the areas for which the department was responsible, including interchange fees. Like Mr Hawkins, Mr Bellis is now retired. His evidence was directed at the extent to which Europay sought to keep information about interchange fees confidential, including in its dealings with regulators.

30. As would be expected, all three witnesses gave honest evidence, although we felt that Mr Jenkins in part sought to give evidence on matters with which he was less familiar. However, it is not necessary to comment in detail on the

[8] For the merger and formation of the first defendant, see further the Causation Judgment at [9]-[10].

individual witnesses since we found that most of their evidence was of relatively little significance to the matters we have to decide.

F. LA 1980, SECTION 32

31. LA 1980 s. 32 provides, insofar as relevant:

> "(1) …, where in the case of any action for which a period of limitation is prescribed by this Act, …
>
> …
>
> > (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;
> >
> > …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the … concealment … or could with reasonable diligence have discovered it.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

32. The principles governing the application of s. 32[9] have been considered by the Court of Appeal in a number of recent cases concerning competition law: *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 ("*Arcadia*"); *DSG Retail Ltd v Mastercard Inc* [2020] EWCA Civ 671 ("*DSG*"); *OT Computers Ltd v Infineon Technologies AG* [2021] EWCA Civ 501 ("*OT Computers*"); and *Gemalto Holding BV v Infineon Technologies AG* [2022] EWCA Civ 782 "*Gemalto*"). Furthermore, they have very recently received authoritative consideration by the Supreme Court in *Canada Square Operations Ltd v Potter* [2023] UKSC 41 ("*Canada Square*"). As a result, many important aspects of the statutory provisions have been clarified and the following principles may be stated.

33. First, these provisions are to be applied in the same way to competition law claims as to other claims: *Arcadia* at [51].

---

[9] All subsequent references to s. 32 are to s. 32 LA 1980.

34. Secondly, a "fact relevant to the plaintiff's right of action" ("relevant fact") in s. 32(1)(b) is a fact without which the cause of action is incomplete: *Arcadia* (approved, *obiter*, in *Canada Square* at [96]); *DSG* at [97](iv)]. That means that relevant facts are facts which would justify embarking on the preliminaries to starting a claim, such as taking advice and collecting evidence: *Gemalto* at [43]-[46].

35. Thirdly, relevant facts do not include facts which improve the prospects of success (or conversely decrease those prospects) or facts which may have a bearing on a possible defence: *Arcadia* at [49]; *Gemalto* at [47]. Accordingly, in *Arcadia,* which concerned claims by merchants against Visa for breach of European and domestic competition law by reason of the Visa MIFs that caused higher MSCs, the Court of Appeal rejected the argument for the claimants that the manner and mechanism by which Visa fixed the MIFs and also the levels of those MIFs and the amount of the overcharge in the MSC, were relevant facts. Moreover, the Court upheld the decision of the judge below (Simon J, as he then was) that facts which went to the question whether the defendants would be able to obtain 'exemption' under Art 101(3) were not relevant to establishing a complete cause of action. In his judgment, [2014] EWHC 3561 (Comm), Simon J stated, at [95]:

> "I accept that it would be prudent as a matter of business commonsense to see whether the MIFs qualified for exemption under Article 101(3) before embarking on expensive litigation. However the cases make clear that there is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of success, and, as [Counsel for Visa] submitted, it would be for the Defendants (who bear the burden) to prove the conditions for exemption under Article 101(3) or s.9 and not for the Claimants to disprove them. Matters which may be relevant to disproving a defence are not relevant for the purposes of s.32(1)(b)."

36. Fourthly, and for the same reason, relevant facts do not include facts which go to the question whether the defendants can rely on objective necessity to show that an arrangement falls outside Art 101(1): *DSG* at [80]. In *Gemalto*, which was a follow-on claim arising from a cartel between suppliers of smart chip cards, Sir Geoffrey Vos MR explained the application of the test, at [53]:

> "In a case of this kind, a worthwhile claim arises when a reasonable person could have a reasonable belief that there had been a cartel. The claimant can embark on the preliminaries to the issue of a writ (and therefore the limitation

> has begun) once it knows that there may have been a cartel and the identity of the participants, without knowing chapter and verse about the details. It would not, however, know that it had a worthwhile claim if a claim pleaded on the basis of the details it knew would be struck out."

37. Fifthly, determination of when the claimant "could with reasonable diligence have discovered" a relevant fact requires:

(1) that there was a 'trigger' which would reasonably put the claimant on notice that there is something worth investigating: *DSG* at [65]-[66], [69]; and

(2) on the basis of such a 'trigger', that the claimant's reasonable investigation could have discovered that fact.

The reasonableness standard for both these elements is to be applied objectively, but in the context of a person in a similar position to the claimant: *OT Computers* at [59].

38. *DSG,* like *Arcadia,* concerned claims by merchants for damages under competition law caused by MIFs, in that case against Mastercard. They were follow-on claims based on the Decision and, as in the present case, sought to cover the period going back to May 1992. Mastercard argued that the claims were time-barred for the period prior to 20 June 1997 and sought 'reverse' summary judgment as regards that part of the claims. A distinct aspect of the limitation argument concerned the provisions of the CAT Rules, which are not relevant for present purposes. But as regards the claimants' invocation of s. 32(1)(b), the Tribunal held that it was clear on the publicly available information that the claimants could with reasonable diligence have discovered the relevant facts for claims for loss caused by cross-border transactions by 20 June 1997.[10] Reversing that decision, the Court of Appeal held that the Tribunal erred in conducting the reasonable diligence analysis on the assumption that the claimants were on notice that there was something worth investigating to see if they had a claim. Since that could not be assumed, it had to be determined on

---

[10] The question of "deliberate concealment" was not raised on the summary judgment application: see at [24].

the evidence, which accordingly required disclosure and could not be decided summarily: [43] and [69]-[70].

39. In *OT Computers*, which concerned a claim for damages against participants in a price-fixing cartel, the court found that a business engaged in the relevant field could reasonably have discovered sufficient facts to plead a viable claim by July 2005 at the latest, following press reports of the defendants pleading guilty to an antitrust cartel investigation in the United States. Those were matters which a company engaged in purchasing the relevant products could be expected to notice: see at [11]. However, the claimant had entered into administration some years before, and then went into liquidation and brought the claim through its liquidators. The Court of Appeal upheld the approach of the trial judge that in those circumstances the question of reasonableness should be applied to a reasonably diligent insolvency practitioner, who would not be expected to follow press reports about the market in which the company had ceased trading. In short, the claimant was not to be treated as if it was still a trading company in the relevant market when it was no longer in business at all: [54]. The Court of Appeal noted that this approach is consistent with the approach enunciated by Millett LJ, adopting the formulation of May LJ, in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 at 418:

> "… the test 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."

40. Sixthly, "concealed" has its ordinary and simple meaning of 'kept secret' or 'withheld'. It does not imply that there was any duty to disclose the relevant facts, whether legally or morally: *Canada Square* at [98]-[104].

41. Seventhly, "deliberately" also has its ordinary meaning of 'intentional'; it does not embrace recklessness: *Canada Square* at [108]-[109]. Hence Lord Reed summarised the elements of s. 32(1)(b) as follows:

> "What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts in question."

42. Similarly, "deliberate" in s. 32(2) is distinct from 'reckless': *Canada Square* at [153]. Therefore, as regards the "deliberate commission of a breach of duty", the Supreme Court approved and adopted the statement of Lord Millett in *Cave v Robinson Jarvis & Rolfe (a firm)* [2002] UKHL 18 at [24] that it is necessary that "the defendant is aware of his own deliberate wrongdoing.": see at [124]. Lord Reed explained the policy supporting this interpretation. Defendants, including professional people, will often know that they are exposed to potential claims; but it is only if they have intentionally committed wrongdoing that it is justified to deprive them of a limitation defence: [151]-[152].

G. WAS THERE DELIBERATE CONCEALMENT OF RELEVANT FACTS: s.32(1)(b)?

Relevant facts

43. There was some recasting in the course of the trial of the CR's case as to what facts are said to be "relevant" for the purpose of the statutory test and are alleged to have been concealed.

44. Although the CR said that relevant facts included (a) that Mastercard was at all material times an association of undertakings (for the purpose of competition law) and (b) that there were interchange fees charged by issuers to acquirers, it is not alleged that Mastercard concealed either of those facts.

45. Further, by the end of the trial, the CR did not contend that the relevant facts included the *actual levels* of MIFs set by Mastercard or its methodology for setting those MIFs.

46. In their closing submissions, counsel for the CR set out four facts which they rely on as relevant and deliberately concealed:

(1) that there was an EEA MIF applying to cross-border transactions;

(2) that this EEA MIF was set by Mastercard;

(3) that it was set above zero over the relevant period; and

(4) that it acted as a fallback IF for domestic transactions.

We address these four matters in turn.

(1) <u>EEA cross-border MIF</u>

47. Ms Demetriou accepted in response to questions from the Tribunal that it is the fact that there was a *cross-border* MIF applying to EEA transactions which is all that was needed to found the claim. It was not necessary to be aware that there was a specific *intra-EEA* MIF distinct from the inter-regional MIF that applied, for example, to Europe-US transactions.

48. We agree that, as so qualified, this is a relevant fact. But we find that it was not deliberately concealed. The 1989 report of the Monopolies and Mergers Commission, *Credit Card Services* (the "MMC Report") described the arrangements made for international interchange (i.e. cross-border transactions) using the Mastercard and Visa systems. See at para 2.13 and then at para 7.82 the MMC Report stated:

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

49. Ms Demetriou submitted that the 1989 MMC Report can be disregarded as it referred to the old arrangement of the JCCC for UK banks issuing Mastercard/Eurocard. That is correct as regards domestic transactions, but not as regards cross-border transactions where a foreign cardholder made purchases in the UK or a UK cardholder purchased from a foreign supplier. What the MMC Report stated at para 7.82, and the description of cross-border transactions at paras 7.3-7.4 of the Report, remained applicable. Moreover, the CR's witness, Mr Jenkins, said that all banks in the UK were aware of the existence of cross-border interchange fees (whether or not those banks were part of the Mastercard system), and Mastercard's witnesses agreed. And there was

no evidence to suggest that the existence of cross-border interchange fees were deliberately kept secret by Mastercard: indeed it was self-evident that some centrally determined interchange fee covering EEA cross-border transactions was needed as no UK bank would be able to negotiate and agree bilateral IFs with every other bank in Europe.

50. The CR sought to rely on the confidentiality claims made by Mastercard regarding the Report by Mr Don Cruickshank on *Competition in UK Banking* ("the Cruickshank Report"), prior to its publication; and similarly in its representations to the Commission regarding the excisions to be made in producing a non-confidential version of the Statement of Objections ("SO") in the course of the Commission's proceedings. Although both those matters post-date the relevant period, they were said to provide valuable evidence of what Mastercard sought to keep confidential and thus concealed.

51. However, what Mastercard actually said to the Cruickshank Banking Review team in February 2000 was to ask that the *rates* (i.e. the levels) of the various MIFs be withheld in the published report. Para D3.51 of the final Report accordingly followed Mastercard's request in stating:

> "Europay provided the following information of how interchange fees have changed over the past five years. The fallback interchange fees for intra European transactions have remained constant over the period under consideration."

And the table above that passage expressly referred to the "Europay/Mastercard default interchange rates", with the actual rate figures redacted. Similarly, the requested redactions of "confidential information and business secrets" made to the Commission concerned "Information re: MasterCard's MIF methodology, cost elements and components" and "Information re: level of MasterCard's MIF". The non-confidential version of the SO duly made those redactions, but openly stated (at para 36):

> "MasterCard's MIF applies for all cross-border transactions within the EU, i.e. transactions where a MasterCard card, issued in Member State A is used at a merchant's POS in Member State B. The acquirer has to pay the issuer an [*sic*] MIF for every transaction with a MasterCard."

(2) <u>MIF set by Mastercard</u>

52. Just as the existence of a cross-border MIF was not concealed, so also there was no hiding of the fact that it was Mastercard which set this MIF, as Visa did similarly as regards the MIF for transactions on the Visa system. Indeed, there was no one other than the international payment organisations that could effectively set these international MIFs: see the extract from the MMC Report at para 48 above.

(3) MIF was above zero

53. This articulation of a relevant fact was further developed in oral submissions to be that the MIF was "appreciably above zero". However, "appreciable" here must be viewed in context. The relevant EEA MIFs were never above 2% over the relevant period and some (there were a range of different MIFs) were only 0.75%: see the summary of MIF rates in the Causation Judgment at [158]-[165]. The huge volume of individual transactions meant that MIFs at these seemingly low levels were appreciable in terms of value.

54. The MMC Report referred to the MIF rate as being 1%. That this was the approximate amount of the MIFs was reflected in various press articles. For example, an article in the *Independent* (business section) on 23 December 1992 referred to the interchange fee paid by acquirers to issuing banks and said that it "accounts for about 1% of the overall 1.8% merchant service fee." In May 1994, an article in the *Financial Times* explained the interchange fees and reported: "The interchange rate on credit card transactions varies between 1 per cent and 1.3 per cent." We recognise that these articles do not specifically refer to cross-border, as opposed to domestic, interchange fees, and it is correct that the changes to the various MIF rates over the relevant period were not made public. We are prepared to accept that Mastercard intended the specific levels of the MIFs to be kept confidential. But once MIFs were being set and charged, we consider it fanciful to suggest that they may have been at *de minimis* levels of, say, less than 0.1%. Given the information in the public domain regarding the broad range of interchange fees, we consider that there was no deliberate concealment of the fact that the EEA MIFs were "appreciably above zero", in the relevant sense here of "appreciable."

(4) EEA MIF a fall-back for domestic transactions

55. We do not accept that this is a relevant fact. The claims in these proceedings are for aggregate damages suffered due to higher prices paid by all CMs resulting from higher MSCs charged to merchants than in the counter-factual of a lower or zero EEA MIF. The MSC charged by acquirers to merchants reflected both the EEA MIF, which acquirers would pay on cross-border transactions, and the domestic IF or MIF. Acquirers almost invariably charged a 'blended' MSC that reflected both these interchange fees, and it was wholly impractical for them to charge differing MSCs for particular transactions according to whether the purchaser used a foreign or domestic card. The EEA MIF directly governed cross-border transactions (whether a purchase in the UK by a foreign visitor or a purchase by a CM in the UK from a foreign, European supplier). The CR alleges that because the EEA MIF was the fallback rate for domestic transactions, the level of the EEA MIF materially 'caused' the level of domestic IFs or at least operated as a floor or benchmark for those domestically set fees. That allegation is the subject of the Causation Judgment. In terms of *quantum*, inclusion of the effect of the EEA MIF on domestic IFs and MIFs is very significant, since the relative impact of domestic interchange fees on the level of the MSC was much greater than the direct impact of the EEA MIF. But in terms of the cause of action, that is complete without this indirect effect: since the EEA MIFs applied to cross-border transactions, this affected the MSCs charged to UK merchants, which (on the CR's case) fed through to the prices they charged to their customers (i.e. the CMs represented in these proceedings), thereby causing them loss.

56. That is apparent from the CR's pleading. At para 98 of the claim form, the CR states:

> "The Infringement caused the interchange fees paid by acquiring banks to issuing banks, on both Cross-Border Transactions and Domestic Transactions, to be higher than they would have been absent the Infringement (the "Overcharge"). The Overcharge was passed on by acquiring banks to businesses in the form of an MSC that was higher than it would have been absent the Infringement. The Overcharge was, in turn, passed on by those businesses to the consumers in the class through higher prices for goods and services sold by those businesses."

At para 100, it is asserted that the EEA MIF applied directly to cross-border transactions. As regards domestic transactions, the claim form gives extensive particulars, which have been amended and expanded following disclosure, of how the EEA MIF is alleged *also* to have had a causative effect on domestic transactions. Then at para 108 the pleading states:

> "The Overcharge caused by the Infringement in the context of Cross-Border Transactions and the Overcharge caused by the Infringement in the context of United Kingdom Domestic Transactions, as well as the Run-Off Overcharge, were passed on to all consumers in the proposed class without distinction based on:
>
> a. whether the consumers in question were themselves engaged in Cross-Border or United Kingdom Domestic Transactions; and/or
>
> b. how the consumers paid for the goods and/or services that they purchased."

57. The position is directly analogous to that considered by the Court of Appeal in *DSG.* Although that decision concerned claims by merchants, they were also follow-on claims resting on the Decision: see para 38 above. Exactly as in the present case, the merchants contended that because the EEA MIF operated as a fall-back for domestic transactions there was a connection between the level of the EEA MIFs and the domestic IFs or MIFs, so that their claims covered losses incurred through higher MSCs resulting from both domestic and cross-border transactions. In applying s. 32(1)(b), the Tribunal held that the claims in respect of domestic transactions were to be treated as distinct because of the different mechanism of causation, rejecting Mastercard's argument that the claimants' allegations regarding domestic MIFs did not amount to a distinct claim but were a further form of damage alleged to result from the breach of competition law regarding the EEA MIFs: *DSG* at [48]-[51]. That decision was reversed by the Court of Appeal. After referring to various authorities, Sir Geoffrey Vos C explained, at [96]:

> "…, when one applies the decisions that I have mentioned above, it is clear that whilst the Domestic Fallback Rule and the De Facto Adoption of the EEA MIF[11] are important facts for the claimants' establishment of losses caused by

---

[11] The claim by Dixons also concerned its losses in some foreign countries where the EEA MIF had been adopted as the domestic MIF: this was referred to as the "De Facto Adoption of the EEA MIF". That is of no relevance to the present proceedings.

> paying Domestic MIFs, they are not essential elements of their cause of action based on the Decision."

And he added, at [98]:

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

58. Accordingly, in our judgment, no relevant facts were deliberately concealed by Mastercard in terms of the test under s. 32(1)(b).

59. If we had reached a different conclusion, it would have been necessary to consider whether those facts could have been discoverable with reasonable diligence. As set out at para 37(1) above, that requires a 'trigger': something that puts the claimant on notice of a matter worth investigating. In that regard, we were referred to a significant number of articles in the broadsheet press regarding, in particular, retailers' complaints about interchange fees, including a report in *The Independent* in May 1992 about the complaint lodged by the British Retail Consortium with the Commission against Visa and Mastercard under competition law concerning cross-border interchange fees.

60. Ms Demetriou submitted that the question of reasonable discoverability is to be asked with regard to the "average class member". We were provided with a table of the circulation at the time of the various publications and it is clear, as is indeed common knowledge, that the circulation figures for the various broadsheets, individually or cumulatively, accounted for only a small proportion of the UK population.[12] We have no doubt that a significantly smaller number would have looked at the MMC Report.

61. The "average class member" is of course a legal fiction who appears to join the cast of hypothetical persons whom the law has created for various purposes: see per Lord Reed in *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49 at [1]-[2]. The alternative fictitious person who featured in

[12] The combined circulation of the *Financial Times, The Times, The Independent* and *The Guardian* accounted for around 10% of the UK population over the age of 15, in the period 1992-1997.

the argument was the "average consumer"[13], who has already been recognised in the jurisprudence on trademarks and passing off, although we were not referred to any of those authorities: see *Kerly's Law of Trademarks and Trade Names* (17th edn), chap 3.

62. However, as applied to limitation in these proceedings, there is a paradox. The primary limitation provisions in LA 1980 ss. 2 and 9 are expressed in terms of the time by which "an action" must be "brought." The postponement of those primary periods by s. 32(1) are based on reasonable discoverability of particular circumstances by "the plaintiff". The underlying premise of these provisions is that the plaintiff is the person by whom the action is brought, such that the plaintiff should know sufficient facts to bring his or her case. However, collective proceedings are of a fundamentally different nature. The claims are those of the class members but they are not the persons bringing the proceedings: the proceedings are brought by the CR: see s. 47B(2) CA 1998.

63. Even in September 2016, long after the Decision, when the CR started these proceedings, we do not think that the average class member (or average consumer) would have been on notice that there was any reason to make inquiries or discover the relevant facts. We think it is obvious that the Decision, which did not concern a secret cartel or involve the imposition of any headline grabbing fine, would not have featured in the popular news media. We find it unsatisfactory in collective proceedings to apply the reasonable discoverability test to the average class member/consumer when it is the CR who needed to discover the relevant facts in order to start the proceedings. Here, the CR is a solicitor who was for three years the Insurance Ombudsman and then served for a decade as the chief ombudsman of the Financial Ombudsman Service. He is therefore very far from being an average class member: see the Tribunal's original judgment in these proceedings: [2017] CAT 16 at [93].

64. In response to questions from the Tribunal, Ms Demetriou acknowledged, without making any formal admission, that going forward it might be more appropriate to apply the reasonable discoverability test to the CR rather than to

[13] Or, in the skeleton argument for the CR, "the average reasonable consumer".

the average class member, but she stressed that this was not possible for the years 1992-1997, the relevant period in the present case, since at that time there were no collective proceedings available. In any event, there are obvious difficulties in applying the statutory language of s. 32(1)(b) to the class representative as opposed to the actual claimants.

65. In the present case, where the class comprises in effect the entire adult population of the UK and the relevant facts concern the arrangements between banks for settling credit card transactions, the concept of the "average class member" is somewhat elusive. However, we consider that if we had to decide the question of reasonable discoverability, we would find that the relevant fact which is the foundation of the claim, the existence of the cross-border MIF, although not confidential, was not commonly known among consumers. Further, we consider that there was nothing to put the "average class member" on notice to investigate whether she or he might have a damages claim as a result of the arrangements made by Mastercard for the settlement of credit card transactions as between banks. The press reports relied on were infrequent and in most cases appeared in newspapers, and indeed in sections of those newspapers, which the average class member did not read, and, as we have observed, she or he would not be expected to look at the MMC Report. See also the *obiter* observations by Green LJ in *Gemalto* at [89].

66. Nonetheless, because of our conclusion on concealment, the CR's argument under s. 32(1)(b) fails. But we should add for completeness:

(1) We do not consider that any concealment would have to be directed specifically <u>at</u> consumers or <u>at</u> class members, as Ms Tolaney KC submitted for Mastercard. If Mastercard had sought to keep the relevant facts confidential as between the member banks, that would mean that it did not wish the facts to be disseminated any further, and therefore they would in effect be withheld from consumers. The absence of a natural channel of communication between Mastercard and consumers is, in our view, irrelevant.

(2) We do not think that the discussions which took place between acquiring banks and the larger merchants in negotiation over the MSC, about which Mr Hawkins gave evidence, are relevant to the question we have to decide. The relaxation of confidentiality whereby merchants would sometimes be told the interchange fee which the acquirer had to pay to issuers was limited and, on the evidence, came only in the late 1990s, whereas the 'cut-off date' for the limitation inquiry is 20 June 1997: para 22 above. Moreover, the references to interchange fees in those discussions occurred in the context of confidential commercial negotiations and did not lead to wider dissemination of the information.

(3) We did not gain much assistance from the confidentiality provisions in the agreements signed by the member banks in the Mastercard or Europay network, on which the CR sought to rely. Those agreements make clear that if a matter is in the public domain, it is not treated as confidential for the purpose of the restriction, and we have found that the relevant facts at (1)-(3) above were accessible in the public domain. Rule 12.1 of the Europay Rules requires any member bank to enter into such a confidentiality agreement; we do not consider that it imposes a requirement to treat as confidential something which is expressly excluded from confidentiality under that agreement.

(4) Although the CR sought to suggest that there was a 'culture of secrecy' at Europay/Mastercard, in our judgment the evidence did not indicate any more than the concern of virtually any commercial enterprise to protect its business secrets, in particular from its competitors. In the case of Mastercard, its main competitor was Visa, and there clearly was a concern to keep confidential the method used by Mastercard to determine its MIFs and the actual levels of MIFs which were set, and especially any forward strategy affecting the structure (i.e. different categories) or level of MIFs. But we do not consider that this applied to any of the relevant facts (1)-(3) set out above. As Mr Jenkins said in his evidence, Mastercard/Europay and Visa competed for issuers on the basis of the interchange fees that they offered, but the simple facts that interchange fees were paid by acquirers to issuers and that both scheme

operators set positive default MIFs for cross-border transactions were well-known.

H. WAS THERE A DELIBERATE BREACH OF DUTY: s.32(2))?

67. Ms Demetriou accepted that there was no deliberate commission of a breach of Art 101 considered as a whole. There was abundant evidence that until well after 1997, Mastercard would reasonably have expected that if the Commission did find a breach of Art 101(1), Mastercard would get an 'exemption' under Art 101(3). The CR's contention was that a deliberate breach of Art 101(1) in those circumstances would nonetheless amount to a breach of duty for the purpose of s. 32(2) since (a) Art 101(1) imposes a prohibition, and (b) that is all that has to be pleaded to bring a claim.

68. We reject that submission for a number of reasons:

(1) Although often referred to as providing grounds for an "exemption", formally Art 101(3) is a *disapplication* of the prohibition in Art 101(1). In Whish & Bailey, *Competition Law* (10th edn, 2021), chap 4, it is notably described as providing a "legal exception". And however it is categorised, an agreement or decision which satisfies the terms of Art 101(3) falls outside the prohibition. Therefore if Art 101(3) applies to the agreement or decision, there is no breach of duty at all.

(2) Viewed substantively, a breach of duty in terms of s. 32(2) refers to some form of wrongdoing: see *Canada Square* at para 42 above. If the four cumulative conditions imposed by Art 101(3) are fulfilled, there is no wrongdoing in any meaningful sense. Thus it cannot be said that the innumerable parties that entered into commercial exclusive dealership agreements, which came or come within the terms of the successive 'block exemptions' for vertical agreements[14] issued with regard to Art 101(3), were or are engaged in wrongdoing. Nor could the airlines that entered into "strategic alliances" which have been authorised by the

[14] Originally Reg 67/67, then Reg 1983/83, then Reg 330/2010, now Reg 2022/720.

Commission under Art 101(3) be regarded as acting wrongfully: e.g. *Air France /Alitalia* OJ 2004, L362/17. Even if "wrong" is given a wide interpretation, someone who reasonably believes that their acts or agreement will be authorised by the Commission as meeting the requirements of Art 101(3) cannot, in our view, be regarded as committing a deliberate breach of duty. That conclusion as a matter of principle is reinforced by the terms of the Commission's letter to Europay of 15 November 1996, in response to Europay/Mastercard's notification of their rules. The Commission indicated its provisional view that Art 101(1) applied to the MIF rule but that the conditions of Art 101(3) were satisfied, and stated:

> "The result of our assessment of the MIF and no-discrimination rule can be summarized as follows. Our conclusion as to the MIF is that we are now satisfied that it is not incompatible with the EC competition rules….."

(3) The fact that a claim can be pleaded alleging breach of Art 101(1) without having to state expressly that the terms of Art 101(3) are not satisfied is in our view irrelevant. Indeed, in English law the claim is for breach of statutory duty, and the statutory duty is that imposed by Art 101 as a whole. It is therefore implicit in the assertion of liability that the agreement or decision does not satisfy Art 101(3). This is entirely distinct from the proposition that a claimant does not need to know and plead *facts* relevant to the non-application of Art 101(3) in order to bring a claim: cp. paras 34-36 above.

69. We should add that the fact that at the material time only the Commission could apply Art 101(3) to an agreement or decision, and thus declare that the 'exception' applies, is irrelevant. What happened with the 'modernisation' reform introduced by Regulation 1/2003, which made Art 101(3) directly applicable, was a procedural change; it did not alter the substantive law, and thus the scope of the prohibition.

70. We do not consider that the case of *Giles v Rhind* [2008] EWCA Civ 118, on which the CR relied, affects this conclusion. The issue there was whether s. 32(2) could apply to s. 423 of the Insolvency Act 1986 ("IA"), on the basis that

engagement of that provision involved a "breach of duty" for the purpose of s. 32(2). The defendant, resisting the application of s. 32(2), argued that s. 423 IA did not impose a prohibition, and that breach of duty concerned a duty owed by the defendant to the claimant. The first submission was held to be irrelevant and the second was rejected. Section 423 IA has the statutory heading "Transactions defrauding creditors" and provides that an application may be made, in an insolvency context, to set aside a transaction made at an undervalue where it was entered into for the purpose of putting assets beyond the reach of an actual or potential creditor or creditors. The Court held that 'breach of duty' is not to be given a narrow meaning but applies to "a legal wrongdoing", of a kind that can be raised in an action to which s. 32 applies: see at [38]. In the present case, we think that there is no doubt that 'breach of duty' could apply to a breach of Art 101 as whole, although Art 101 does not create a duty to UK consumers. But, by contrast with a transaction defrauding creditors, an act which would come within Art 101(1) but falls within the exception created by Art 101(3) does not constitute "a legal wrongdoing".

71. That is sufficient to determine the argument under s. 32(2). But if we were wrong on that, we also find that Mastercard did not *deliberately* breach Art 101(1). We recognise that in its September 1995 *Notice on the application of the EC competition rules to cross-border credit transfers*, the Commission expressed the view (at para 40) that a MIF constitutes an agreement falling within Art 101(1). As noted above, the Commission set out its "current thinking" to the same effect specifically with regard to the Mastercard/Europay MIF rule in its letter of 15 November 1996.

72. However, that does not mean that Mastercard/Europay shared this view. On the contrary, Europay had notified the scheme for credit cards to the Commission in May 1993, seeking "negative clearance" (i.e. that it fell outside Art 101(1)) and only in the alternative an exemption under Art 101(3). That was not a fanciful position. Mastercard contested the proceedings before the Commission and then all the way through appeals to the General Court and the CJEU on this basis. Moreover, notwithstanding the provisional view it had set out in its November 1996 letter, the Commission's first SO issued in May 1999, which

alleged that the non-discrimination rule (and some other rules) violated Art 101, did not raise any objection to the EEA MIF.

73. On the evidence, we are not satisfied that Europay/Mastercard knowingly or intentionally breached Art 101(1).

I. THE PRINCIPLE OF EFFECTIVENESS

74. The principle of effectiveness, along with the related principle of equivalence, is one of the general principles of EU law, developed in the jurisprudence of the EU Courts. Those principles were recognised prior to 31 December 2020 ("IP completion day") and accordingly constitute "retained general principles of EU law" pursuant to s. 6(7) EUWA 2018. Art 101 constituted "retained EU law" pursuant to ss. 4(1) and 6(7) EUWA 2018, now "assimilated law" following s. 5 of the Retained EU Law (Revocation and Reform) Act 2023 ("the REULA"). Pursuant to ss 4(1) and 6(3) EUWA 2018, the principle of effectiveness, like the principle of equivalence, accordingly applies to these proceedings.[15]

75. The two principles were succinctly summarised by the CJEU in Cases C-295-298/04 *Manfredi*, EU:C:2006:461, at para 62 (and see also paras 71-72):

> "In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) …."

76. *Manfredi* concerned a claim for damages in the Italian courts in respect of the alleged overcharge paid by way of motor insurance premiums, following a decision that the motor insurers had unlawfully colluded to exchange information over a period of five years. The defendants contended that the actions were out of time, relying on the Italian domestic provision that the limitation period began to run on the date when the concerted practice was adopted. In its judgment on a reference from the Italian court, the CJEU stated:

---

[15] The application of those provisions to these proceedings is not affected by the REULA: see s. 22(5).

> "78. A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended.
>
> 79. In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.
>
> 80. It is for the national court to determine whether such is the case with regard to the national rule at issue in the main proceedings."

77. The CJEU further considered the application of the principle of effectiveness to a national limitation period concerning a competition damages claim in Case C-637/17 *Cogeco* EU:C:2019:263. That case concerned a follow-on claim for damages arising from abuse of dominance contrary to Art 102 TFEU, as found by the Portuguese competition authority. The relevant limitation provision of Portuguese law provided that:

> "The right to compensation expires after a period of three years from the date on which the injured party was aware of his right, even if unaware of the identity of the person liable and the full extent of the damage, …"

78. On a reference from the Portuguese court asking whether this provision was incompatible with general principles of EU law, the CJEU set out the principle of effectiveness (as expressed in *Manfredi* and then repeated in Case C557/12 *Kone and Others*, EU:C:2014:1317, from which the Court quoted). The Court proceeded to state:

> "53. … it must be held that a limitation period of three years, such as that at issue in the main proceedings, which, first, starts to run from the date on which the injured party was aware of its right to compensation, even if the infringer is not known and, secondly, may not be suspended or interrupted in the course of proceedings before the national competition authority, renders the exercise of the right to full compensation practically impossible or excessively difficult.
>
> …
>
> 55. … Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority."

79. Ms Demetriou submitted that in contrast to s.32 of the English statute, the EU principle of effectiveness does not include any requirement of concealment. Although not concealed, or not deliberately concealed, if the relevant facts could not reasonably be discovered by the claimant then the limitation period could not start to run. Ms Demetriou sought to buttress that submission by reference to the decision in *Volvo*. There, in addition to articulating the 'cessation requirement' (see para 11 above), the CJEU stated:

> "56. … the limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, the information necessary to bring his or her action for damages.
>
> 57. Otherwise, the exercise of the right to claim compensation would be rendered practically impossible or excessively difficult.
>
> 58. As regards the information necessary for bringing an action for damages, it should be recalled that it is apparent from the settled case-law of the Court that any person is entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of EU competition law (see, to that effect, judgments of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 22 and the case-law cited, and of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 40).
>
> 59. What is more, it is apparent from the case-law of the Court that 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 (judgment of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 50).
>
> 60. It follows that the existence of an infringement of competition law, the existence of harm, the causal link between that harm and that infringement, and the identity of the perpetrator of the infringement are among the necessary elements which the injured party must have in order to bring an action for damages.
>
> 61. In those circumstances, it must be considered that the limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the European Union cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, (i) the fact that it had suffered harm as a result of that infringement and (ii) the identity of the perpetrator of the infringement."

Although *Volvo* is a post-Brexit case, and accordingly the Tribunal has held that pursuant to s. 6(1)(a) EUWA 2018 it is not binding,[16] the Tribunal may

[16] See [2023] CAT 49.

nonetheless "have regard" to it: s. 6(2) EUWA 2018. Ms Demetriou submitted that in this respect *Volvo* merely restated established principles and should be followed.

80. In their supplementary submissions, counsel for the CR contended that this is reinforced by the subsequent judgment of the CJEU in *Heureka*. That was a preliminary ruling on a reference from a Czech court in a follow-on action brought against Google, based on the Commission decision of 27 June 2017 finding that Google had infringed Art 102 TFEU by favouring its own shopping comparison website over competing websites ("the *Google Shopping* decision"). Damages were claimed for the period of abuse covered by the *Google Shopping* decision (i.e. February 2013-27 June 2017). The limitation period under the relevant Czech law was three years from the date when the injured party knew, or could be expected to know, the identity of the infringer and the harm suffered. Moreover, in the case of continuing or repeated infringements, every new 'occurrence' of harm could be claimed separately and set a new limitation period running (judgment at para 33). The claim was brought on 26 June 2020, just within three years of the adoption of the *Google Shopping* decision. Google contended that Heureka knew about the matters complained of at least in 2014, when a press release was published concerning the commitments Google had offered to address the allegations of abuse made by the Commission. Accordingly, Google argued that Heureka could have brought its action earlier, and increased progressively the quantum of its claim depending on the increase over time in the harm suffered (see judgment at para 28).

81. In its ruling, the CJEU restated the position it had adopted in *Volvo* that it is contrary to the principle of effectiveness if the limitation period began to run before the infringement came to an end: paras 55-59. The Court further stated:

(1) At para 60:

> "… in view of the complexity of quantifying the harm in competition law cases where the infringement is still ongoing, requiring the injured party to increase gradually the amount of compensation claimed on the basis of the additional harm resulting from that infringement would render the exercise

of the right to full compensation practically impossible or excessively difficult."

(2) At para 62:

"… rules on limitation which provide for a limitation period of three years, the *dies a quo* of which precedes the end of a single and continuous infringement and which cannot be suspended or interrupted during the Commission's investigation, could have the consequence that that period expires well before the adoption of a Commission decision finding that infringement, which would directly affect the injured party's ability to bring an action for damages following such a decision (follow-on damages action) and, therefore, would render the exercise of its right to seek full compensation excessively difficult. It is generally difficult for that party to adduce evidence of an infringement of Article 101(1) or Article 102 TFEU in the absence of a decision by the Commission or by a national authority."

And the Court added that such a cessation requirement for the limitation rules may have a deterrent effect and lead the perpetrator of an infringement to bring it to an end sooner.

82. The Court then addressed the 'knowledge requirement' of the principle of effectiveness, i.e. that the injured party knew or could reasonably be expected to know the information necessary for bringing an action for damages for the infringement of competition law. The Court stated at paras 64-65:

"64. … it should be borne in mind that the existence of an infringement of competition law, the existence of harm, the causal link between that harm and that infringement, and the identity of the infringer form part of that information (see, to that effect, judgment of 22 June 2022, *Volvo and DAF Trucks*, C-267/20, EU:C:2022:494, paragraph 60).

65. In the absence of that information, it is extremely difficult, if not impossible, for the injured party to obtain compensation for the harm caused to it by that infringement."

83. Although the CJEU noted that determination of when the injured party could reasonably be expected to have this information was a matter for the national court, it proceeded to give 'clarifications' in that regard, and said that, in principle, this would be on publication of a summary of the Commission decision in the *Official Journal*. However the Court added, at para 70:

"… it cannot be ruled out that the elements necessary for bringing an action for damages may be known to the party injured by an infringement of the competition law provisions well before" [such publication]."

The burden was on the defendant to show that this was the case.

84. Further, the CJEU held that the principle of effectiveness does not require that the limitation period cannot run while a Commission decision is under appeal (as is the case with *Google Shopping*), and therefore has not become final. The injured party has all the information necessary to bring an action for damages based on the decision: paras 78 and 80.

85. Relying on the knowledge requirement as expressed in *Volvo*, the closing argument of the CR set out, at para 54, an expanded list of "relevant facts" which it was submitted a class member would need to know in order to bring proceedings:

(1) the existence of a cross-border MIF which applied to transactions in the EEA;[17]

(2) the fact that this MIF was set by a decision of an association of undertakings for the purpose of Art 101;

(3) that it was Mastercard which was responsible for this decision;

(4) that this MIF had the effect of preventing, restricting or distorting competition in a manner which was appreciable;

(5) that this MIF caused some loss and damage to the class member, which was more than nominal; and

(6) that the cross-border MIF operated as fallback in the rules and caused UK interchange fees to be higher for domestic transactions.

86. This list, and in particular points (4) and (5), goes significantly beyond the list of "relevant facts" relied on for the purpose of s. 32(1)(b): see paras 44-46

[17] The formulation in para 54 stated that the consumer would have needed to know that there was a specific intra-EEA MIF, but that was qualified in oral argument in terms that a MIF which applied to cross-border EEA transactions would be sufficient, irrespective of whether that was specially confined to the EEA.

above. Moreover, point (5) was stated to mean that "the average consumer" would have had to know, as a minimum, that:

(1) the cross-border MIF applicable in the EEA gave rise to an overcharge to the acquiring bank, that was appreciably above zero;

(2) the overcharge was passed through to merchants by their acquiring bank via the MSC; and

(3) the merchants then passed on the overcharge contained in the MSC to all of their retail customers.

87. For Mastercard, it was submitted, in summary, that (a) a limitation period as such is not contrary to the principle of effectiveness; and (b) *Arcadia* is binding English authority that s. 32 complies with the principle of effectiveness under EU law. Further, as regards *Volvo* and *Heureka*, Mastercard emphasised that as post-Brexit cases, they are clearly not binding on the Tribunal or UK courts. Mastercard contended that the elaboration of the 'knowledge requirement' in *Volvo* was a significant extension of the prior case-law, and it stressed that although *Heureka* was expressed in this regard as merely reflecting existing case-law, in fact the only prior case referred to was *Volvo*. Mastercard pointed out that in its *Volvo* limitation judgment the Tribunal had criticised the reasoning of the CJEU in *Volvo*, and submitted that these post-Brexit decisions should not be followed.

88. Before addressing the issue and arguments, it is relevant to note that Art 10(2) of Directive 2014/104/EU ("the Damages Directive") provides:

> "Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
>
> (a) of the behaviour and the fact that it constitutes an infringement of competition law;
>
> (b) of the fact that the infringement of competition law caused harm to it; and
>
> (c) the identity of the infringer."

However, Art 22 of the Damages Directive prescribes that it is not to apply retroactively. As transposed into UK law, Art 10 of the Damages Directive applies only to proceedings in respect of loss suffered as a result of an infringement of competition law that takes place on or after 9 March 2017: CA 1998, Sch 8A, para 42. Accordingly, it is common ground that Art 10(2) does not apply to the present proceedings.

89. In *Arcadia*, the claimants submitted that if, as the Court held, their claims were statute-barred under LA 1980 because they could not come within s. 32(1)(b), that limitation period was overridden by the EU principle of effectiveness. The Court of Appeal roundly rejected that submission. In his judgment (with which Richards and Patten LJJ agreed), Sir Terence Etherton C stated, at [75]:

> "… there is no basis for concluding that a limitation period of six years for a competition claim, with the benefit of the postponement provisions in section 32(1)(b) of the 1980 Act, is in principle incompatible with the EU principle of effectiveness."

Counsel for the claimants there further sought to rely on Art 10(2) of the Damages Directive, submitting that it merely codified "longstanding EU jurisprudence". That submission also was rejected. The Chancellor noted the provision against retroactive application in Art 22 and concluded, at [78]-[79]:

> "I consider that it is plain that the provisions of article 10(2), in particular, are new law.
>
> The legal position as to the application of EU law to the limitation issues on this appeal is clear."

90. Ms Demetriou submitted that these statements in *Arcadia* related to the opening provision of Art 10(2) which set out the 'cessation requirement', since in *Arcadia* the Court held that no new relevant fact had come to light in the six years prior to the issue of the proceedings in 2013, so that the claimants could have issued their claims before 2007.

91. It is correct that the claimants there in particular invoked Art 10(2) of the Directive for its articulation of a cessation requirement. However, the robust statements by the Court of Appeal are expressed in broader terms. The Court was not identifying one particular provision *within* Art 10(2) by distinction with

the remainder of that sub-article. Moreover, this is consistent with the approach of Art 10 as a whole, in prescribing a new code of the essential requirement for limitation periods in national law applicable to competition damages claims. Hence Art 10(3) prescribes that such limitation periods must be at least five years. There was manifestly no such five-year minimum prescribed by reason of the general principle of effectiveness.

92. Ms Demetriou further sought to distinguish *Arcadia* on the basis that it did not directly address the question whether the requirement for deliberate concealment in s. 32(1)(b) infringed the principle of effectiveness. It is true that although Visa there argued that there was no concealment, or deliberate concealment (see at [13]), the judgment of the Court of Appeal was directed at whether the facts which were in the public domain constituted sufficient relevant facts for the claimants to bring their claims. However, the statement by the Court at [75] regarding the compatibility of the English limitation provision with EU law is expressed in general terms and expressly rests on the postponement provisions in s. 32(1)(b), for which the foundation is concealment of relevant facts by the defendant.

93. The judgment in *Cogeco* post-dates *Arcadia*, and we accept that if the decision in *Cogeco* is contrary to *Arcadia*, we must follow the judgment of the CJEU and we are not, in those circumstances, bound by the judgment of the Court of Appeal: see *Byrne v Motor Insurers' Bureau* [2007] EWHC 1268 (Comm) at [56]. However, we do not accept that *Cogeco* requires a different approach. There, it was the *combination* of a short limitation period (three years) and the lack of any requirement that the injured party should know the identity of the person infringing competition law which engaged the principle of effectiveness, since in those circumstances the limitation period could expire before the claimant would know whom to sue.

94. We reject the CR's contention that in *Cogeco* the CJEU further held that the principle of effectiveness required that a limitation period could not start to run before the claimant knew that it had suffered harm as a result of unlawful conduct. Since the applicable Portuguese law provided that the limitation period started from the date when the injured party was aware of its right to

compensation, this point was not at issue and the CJEU did not have to consider whether or not that was an essential requirement.

95. *Volvo* concerned a secret cartel, where *none* of the relevant facts was in the public domain. The applicable limitation period under Spanish law was only one year but that period began to run "only from the moment when the circumstances giving rise to the liability became known to the claimant concerned." In that regard, the issue between the parties was whether the claimant would have had sufficient information about the cartel from the Commission's press release announcing its decision (as the defendants contended) or only on the publication of the summary of the decision in the *Official Journal* (as the claimant, the Commission and the Spanish government contended): see the judgment at paras 62-63. The CJEU ruled, having regard to the content of the press release, that in that particular instance it was the publication in the *Official Journal*, which occurred over eight months later. That was a sufficient basis for the decision in *Volvo,* where much of the judgment addressed the distinct question of the direct applicability of Art 10(2) of the Damages Directive to the case before the court.

96. Nonetheless, we recognise that the statements in the *Volvo* judgment at paras 56-61 go further and provide support for the CR's position. Effectively, the Court there treated Art 10(2) of the Directive as a codification of the principle of effectiveness – directly contrary to the view of the Court of Appeal in *Arcadia*: see the judgment of the CJEU at para 60. Moreover, we consider that *Heureka*, as a judgment of the Grand Chamber, now clearly establishes that these elements of the knowledge requirement (along with the cessation requirement) are part of the principle of effectiveness in EU law.

97. However, in our view, this was a significant development of the existing law. There was nothing to the same effect in the relevant prior EU jurisprudence and such a strict, prescriptive approach seems to us at odds with the broader view adopted by the CJEU in *Cogeco*. There, the Court stated, at para 45:

> "…, as limitation periods constitute detailed rules governing the exercise of the right to claim compensation for the harm resulting from an infringement of competition law, it is necessary, first, as the Advocate General observed in

> point 81 of her Opinion, to take all elements of the Portuguese rules on limitation into consideration."

That is a reference to the view of Kokott AG that:

> "… in the assessment of effectiveness it is not sufficient to consider individual elements of the national rules on limitation in isolation. Instead, this rule must be assessed as a whole."

Indeed, we note that it was only following *Volvo* that the CR sought, by further amendment of his Reply, to plead that the EU principle of effectiveness is relevant for limitation in the present proceedings.

98. It is common ground that *Volvo* and *Heureka* are not binding on us, whereas we consider that on the question whether Art 10(2) of the Damages Directive merely codifies prior EU law this Tribunal is bound by *Arcadia*. Therefore, we do not think it is open to us to follow this part of the judgments in *Volvo* and *Heureka*.

99. However, in case *Arcadia* can be distinguished, as the CR urges, or is now subject to fundamental reconsideration in the light of *Cogeco*, or indeed that *Volvo/Heureka* are to be regarded as highly persuasive, we proceed to consider the matter more broadly.

100. First, we do not think that the reference by the CJEU to knowledge of "the existence of an infringement of competition law" can be read literally. It is difficult to see how this condition could apply in a stand-alone action, where there is no decision by a competition authority finding an infringement. The claimant bringing such an action will often only know that the facts they allege *might* establish an infringement of competition law: those facts may be contested or it may be unclear whether as a matter of law they give rise to an infringement. For example, to bring an abuse case alleging excessive pricing, a claimant no doubt needs to know the prices being charged and grounds for contending that they are excessive, but it will not know that charging those prices is contrary to competition law until the case is decided. Therefore, we do not see a sharp distinction between the established English approach of the 'statement of claim' test and the expression by the CJEU of the "necessary elements" to bring an action for damages.

101. Accordingly, we do not accept that all the facts relied on by the CR, as set out at para 46 above, were relevant to enable a consumer to bring a claim. Some are matters which a claimant could allege following advice from a lawyer or economist on the basis of the underlying facts. In particular, the fact that the cross-border MIF had the effect of distorting competition is effectively a conclusion based on analysis of the underlying facts. It is indeed something which a claimant could only *know* following the Decision, and in a stand-alone case it is something that a claimant would only know following a judgment in its favour.

102. Secondly, as regards 'reasonable discoverability', Ms Demetriou stressed the difference between a fact being in the public domain and being public knowledge. In that regard, she relied on *OT Computers* (para 39 above) and also the decision of the Inner House in *Glasgow City Council v VFS Financial Services* [2022] CSIH 1, which Lord Ericht drew to the parties' attention. Like *Volvo*, that was a case arising from the trucks cartel, where damages were claimed by Scottish local authorities. Delivering the opinion of the Court, the Lord President said, at [46]-[47]:

> "The fact that some piece of news has made its way into the media, or has been the subject of a report somewhere on the BBC's website, does not necessarily make that news something which is known to the public generally, or even to those who might have an interest in the subject matter.
>
> The existence of information "in the public domain" does not carry with it an implication that it is public knowledge. The pursuers did not trade in trucks. They purchased trucks for their own use. There was no obvious reason for them to be alert to the financial or business pages of the news media to see what was happening in that sector of the market. The published information does not seem to have been in any prominent part of the media. Certainly, the evidence indicated that it was not something which gained much traction."

103. Since the 'average consumer' is a legal fiction, there can be no evidence from such a notional individual and the Tribunal has itself to determine the applicable standard. In our judgment, the average consumer would know that Mastercard, like Visa, operates a major international credit card system. They would know that since cardholders can use their credit cards in a wide range of outlets, credit card transactions must involve arrangements for payment from the cardholder's bank to the merchant's bank, and for the merchant to receive payment from its bank for the transaction. Further, we consider that the average consumer, if they

thought about it, would realise that there must be some centralised or standardised arrangements so that visitors from abroad can use their cards to pay at shops in the UK, since the UK merchant's bank cannot possibly have bilateral agreements with all the banks in the many countries from which visitors come to the UK. The same applies, vice versa, by reason of the ability of UK cardholders to use their cards to purchase goods or services from suppliers abroad.

104. We consider that the average consumer would also appreciate that if a merchant was subject to an extra charge for each transaction by its bank, that could well have an effect on the prices that the merchant charges to its customers.

105. However, we recognise that in order to bring proceedings, a claimant would also need to know:

(1) that the cardholder's bank charged the merchant's bank a fee for each transaction (i.e. an interchange fee);

(2) that Mastercard was an association of undertakings such that its decision would be subject to competition law; and

(3) that Mastercard set a positive cross-border MIF which applied to transactions between banks in different EU Member States.

106. We also accept the CR's case that the average consumer, who did not read articles in the financial pages of the broadsheet press, still less the MMC Report, would not know these things in 1997. However, we pressed Ms Demetriou as to when the CR considers that the average consumer would have acquired this knowledge. Ms Demetriou's response was that this is a fact-sensitive question and that the average consumer might know those facts after publication of the Decision in December 2007. However, the Tribunal is not divorced from reality. We have no doubt that if we apply the approach of the CR to reasonable discoverability, some if not all of the necessary facts set out at para 105 above did not become public knowledge, in the sense relied on, after the Decision or indeed when these proceedings were started. And if there is a further

requirement of a 'trigger' that would put the average consumer on inquiry as to whether to investigate a claim, even today, many years after these proceedings were commenced, we doubt that the average consumer would be on notice that, irrespective of whether they ever had a Mastercard, they have a potential claim against Mastercard for the harm caused by an overcharge on all goods and services which they acquired over a prolonged period. It seems to us that an approach which leads, or may well lead, to the conclusion that the limitation period had not begun to run at the time when the proceedings were started, on the basis that the average consumer did not have the information necessary to start those proceedings, is close to nonsensical. We cannot accept that a general principle of EU law mandates such an approach.

107. That suggests to us that the EU principle of effectiveness is more nuanced and responsive to the realities of the particular situation. We think that para 70 of *Heureka* reflects that approach, and that as a general principle of EU law, it looks to substance, not form.

108. We note that on the facts of *Volvo*, aside from the fact that the English limitation period is six years, the result would have been the same had the case been brought in England and decided under s. 32(1)(b) since a secret cartel is almost the paradigm case of deliberate concealment. As for *Heureka*, if the claim for loss suffered in the years 2013-2017 had been brought in the Tribunal in England in June 2020 (i.e. the time when Heureka brought its claim in the Czech court), then for loss suffered up to 1 October 2015 the limitation period would have started to run not from the date of the Commission's *Google Shopping* decision (as the CJEU indicated should, in principle, be the earliest starting date) but only from the date when that decision becomes final (i.e. when appeals to the EU Courts have been determined), pursuant to rule 31 of the CAT Rules 2003, as preserved by rule 119(2)-(4) of the CAT Rules 2015; and for loss suffered on and after 1 October 2015, the limitation period was six years: s. 47E(1)-(2) CA 1998. Altogether, under the applicable English limitation rules the proceedings would therefore have been in time as regards the entirety of the loss.

109. However, there is in our judgment a much more fundamental point. Unlike any of the cases considered by the CJEU, these are opt-out collective proceedings brought by a class representative. Applying the approach advocated by the CR as to what is general public knowledge (see para 102 above), it is self-evident that the overwhelming majority of the class was wholly unaware of the proceedings at the time when the CR began this case, and that most members of the class are still unaware of it. In our judgment, the EU principle of effectiveness does not impose a hard-edged rule that for such proceedings the limitation period cannot being to run until the 'average class member' can reasonably be expected to discover the relevant facts necessary to bring those proceedings or be aware that they have suffered harm as a result of the alleged infringement.

110. The collective actions regime allowing a class representative to bring proceedings seeking aggregate damages for an opt-out class is a radical departure from the usual form of civil proceedings. Application of the EU principle of effectiveness is not constrained by the way LA 1980 s. 32(1) is drafted. The unsatisfactory consequence to which we refer at paras 62-63 above can therefore be avoided. Since the class representative is the person bringing the proceedings, we consider that for the purpose of the EU principle of effectiveness, the knowledge requirement should apply to the class representative. We have already observed that, here, the CR was very far from being in the position of the average class member or average consumer: para 61 above. The burden is on the CR to displace the operation of the primary limitation period and we did not hear any evidence as to what the CR knew or could reasonably have discovered. We can only say that we would be surprised if the CR, as a former financial services ombudsman, did not know and could not reasonably have discovered the relevant facts set out at para 105 above.

111. We of course appreciate that, whatever knowledge he may have had, the CR could not have brought these proceedings prior to 1997 since at that time there was no collective proceedings regime in the UK. But that only highlights the unreality of the case advanced for the CR. We think it is inconceivable that any consumer, assuming that she or he knew all the relevant facts, would have brought an individual claim, or even that a group of consumers might have

brought a group action of several thousand claims. The class comprises some 45.5 million people and, when commenced, on the basis of a claim including compound interest, the estimated aggregate damages were around £14 billion.[18] That amounts to an average claim of just over £300 per head. The causation and quantum allegations in these proceedings are both extremely complex and even by the standards of competition law, these are hugely expensive proceedings. The pursuit of these claims was "practically impossible or excessively difficult" prior to October 2015 because there was no collective or class actions regime for aggregate damages pursuant to which they could be brought.

112. We do not consider that the EU principle of effectiveness requires displacement of national limitation provisions on the basis that an average class member would not have the necessary information to start individual proceedings which it is inconceivable that any class member would ever have wished to bring. And it is clear that the EU principle of effectiveness does not require each Member State to have a collective actions regime and permit aggregate damages.

113. Moreover, there is no EU principle that requires a state which introduces such a regime to have a special limitation provision so as to enable collective claims to be made for periods prior to the regime coming into force. The UK collective proceedings regime has a limited retrospective effect, resulting from CA 1998 ss 47A-47B and rule 119 of the Competition Appeal Tribunal Rules 2015: see part C of the Tribunal's judgment of 21 March 2023. [2023] CAT 15. That retrospectivity is in fact extensive and enables the CR here to bring collective proceedings for loss suffered by class members back to 1997, some 18 years before the collective proceedings regime came into force. That is a result of a policy decision implemented in the primary and secondary legislation: such retrospective effect was not required by any general principle of EU law. Accordingly, we do not see that the EU principle of effectiveness can be the foundation for further retrospective application of the collective proceedings regime – in this case, to 1992.

---

[18] With the claim now confined to simple interest, the latest estimate of aggregate damages, including for the run-off periods, is dramatically reduced to under £10.3 billion, i.e. under £227 per head.

114. For all these reasons, we find that the application of the English rules of limitation in the circumstances of the present case is not precluded or modified by the principle of effectiveness under EU law.

115. Finally, we should refer to the observations of the Supreme Court in *BCL Old Co Ltd v BASF plc* [2012] UKSC 45, which we drew to the parties' attention. That case involved a damages claim under competition law against a participant in a cartel which was the subject of a Commission decision, where the defendant cartelist had appealed against the fine to what was then the EU Court of First Instance. The appeal concerned the effect of the EU principle of effectiveness on the special limitation period under the CAT Rules 2003 applicable to a follow-on action. There, the contention was that the way the domestic rules operated failed to comply with the principle of effectiveness because it was not reasonably foreseeable or so uncertain as to make the exercise of the EU law right to compensation excessively difficult. The Supreme Court held that the way the special limitation period had been held to operate, both as regards the commencement of that period and the power to extend time, was sufficiently certain, such that the principle was not violated.

116. That conclusion was sufficient to dispose of the appeal, but Lord Mance (with whose judgment the other members of the Supreme Court agreed), proceeded to consider briefly what the consequences would have been if the Court had held that the principle of effectiveness had been breached. Lord Mance stated:

> "45. I find it impossible to think that European law requires the setting aside as between civil parties of a limitation defence, which a defendant, who is independent of the State, has successfully established under domestic law, on the ground that its existence or scope under domestic law was uncertain until the court decision establishing it. For a successful party other than the State to be deprived in this way of the fruits of victory on limitation would mean that there was little point in raising the limitation defence in the first place. No-one would then ever know with clarity what the true legal position was. The national limitation period would be deprived of effectiveness and national law of legal certainty.
>
> 46. Some confirmation that this is not the European legal position is, I think, also provided by the nature of the proceedings and the decision in *Commission v Ireland* itself. The Commission there brought proceedings against Ireland because of the application of a limitation provision of previously uncertain effect in proceedings between SIAC and the NRA, a statutory body. The complaint was not that the Irish courts acted contrary to European law in giving effect to the limitation provision. But it should have been, were it the European

> legal position that legal uncertainty invalidates a limitation period as between parties to civil litigation, as Mr Vajda contends. The judgment did not proceed on that basis either. Rather, it, like the complaint, accepted the validity as between the parties of the limitation provision in the sense determined by the Irish High Court. But it declared the Irish State to be in breach of the Directives dealing with public works and remedies "by maintaining in force Order 84A(4) of the Rules of the Superior Courts …. in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined". The limitation provision was, in short, treated as valid between the parties, but the State was in breach for maintaining it in force in uncertain terms.
>
> 47. On this basis, if (contrary to my view) BCL were to have any complaint, it would lie against the United Kingdom, and not affect BASF's right to rely upon the limitation period to which it has established its entitlement in the Court of Appeal in the present proceedings. While it does not arise, I would, if necessary, have regarded this point as sufficiently free of any reasonable doubt to be *acte clair* and inappropriate for reference to the Court of Justice."

117. Aside from the fact that these observations are clearly *obiter*, Ms Demetriou submitted that they were confined to circumstances where the principle of effectiveness applied on the ground that the domestic limitation rule was uncertain, and that they did not apply more widely. Mastercard did not seek to argue the contrary. Excluding any broader application appears consistent with the approach of the CJEU in *Cogeco*, where the judgment is expressed in terms of "precluding" the application of national legislation, presumably in the private proceedings. Accordingly, we do not hold that if, contrary to our conclusion, s.32 LA 1980 was contrary to the EU principle of effectiveness, Mastercard could still rely on it in these proceedings such that the only remedy for the claimant class would be by way of *Francovich* damages against the United Kingdom.

J. CONCLUSION

118. For the reasons set out above, we accordingly decide that:

(1) there was no deliberate concealment of relevant facts for the purpose of s. 32(1)(b) LA 1980;

(2) there was no deliberate breach of duty for the purpose of s. 32(2) LA; and

(3) the application of the limitation rules under English law is not precluded or modified by the EU principle of effectiveness.

119. The effect of this decision is that the English (and Northern Irish) law claims are time-barred in respect of any loss suffered before 20 June 1997.

120. This judgment is unanimous.

The Hon. Mr Justice Roth Chair	The Hon. Lord Ericht	Jane Burgess

Charles Dhanowa O.B.E., K.C. (*Hon*) Registrar	Date: 19 June 2024