

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1244/5/7/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10 February 2016

Before:
THE HON. MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

- (1) PEUGEOT CITROEN AUTOMOBILES UK LTD
(2) PEUGEOT MOTOR COMPANY PLC
(3) PEUGEOT CITROEN AUTOMOBILES SA
(4) SOCIETE EUROPEENE DE VEHICULES LEGERS DU NORD SEVEL NORD
(5) AUTOMOVILES CITROEN ESPANA SA
(6) PEUGEOT CITROEN AUTOMOVILES ESPANA SA
(7) PEUGEOT ESPANA SA
(8) PCA SLOVAKIA S.R.O.
(9) SAAB AUTOMOBILE AB KONKURSBO

Claimants

- and -

- (1) PILKINGTON GROUP LIMITED
(2) PILKINGTON AUTOMOTIVE LIMITED

Defendants

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HEARING

APPEARANCES

MR. TRISTAN JONES (instructed by Hausfeld & Co. LLP) appeared for the Claimants.

MR. ADAM JOHNSON (instructed by Herbert Smith Freehills LLP) appeared for the Defendants.

MISS SARAH FORD (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Asahi.

1 THE PRESIDENT: Yes.

2 MR. JOHNSON: May it please the Tribunal, can I start with representation: I represent the
3 defendants in these proceedings, two members of the Pilkington Group, as the Tribunal will
4 be aware. The claimants are represented by Mr. Tristan Jones of counsel; and Asahi, or
5 AGC, who you will have seen referred to in our skeleton, who are presently Part 20
6 defendants in the High Court proceedings, and soon to be additional defendants in these
7 proceedings, are represented by Miss Sarah Ford of counsel.
8 As the Tribunal will be aware, there are a number of case management issues pending for
9 determination or development this morning. In form, we are here to deal with my
10 application for a stay of these proceedings.

11 THE PRESIDENT: I gather that is not now being pursued - is that right?

12 MR. JOHNSON: In effect, it has been overtaken by events. There are some subsidiary issues
13 arising out of that application. There is a question relating to costs, which we may need to
14 come back to, or may not, we will see how we go. The practical effects of the application
15 having been made is that correspondence has developed between the parties, and a position
16 has now been agreed which will involve the exchange of pleadings in these proceedings.
17 The intention there is to align these proceedings, both in terms of the parties and in terms of
18 the procedural development, with those presently pending in the High Court. So there is a
19 measure of agreement in relation to what should happen next, but some disagreement over
20 the timing for provision for those proceedings. So there is in connection with my
21 application a residual issue concerning timing which the court will need to be aware of and
22 will need to deal with.

23 THE PRESIDENT: Yes.

24 MR. JOHNSON: Separately, however, and perhaps more the meat of it, is the claimants'
25 application for trial of a preliminary issue, in respect of which, as the Tribunal will have
26 seen, there is some measure of disagreement as to the scope of the issue for determination
27 and how, mechanically, that should be dealt with.
28 There is a related question concerning the management of the interrelationship between
29 these proceedings and those proceedings presently pending in the High Court.
30 I propose to pause there, because it occurs to all of us that the Tribunal may have its own
31 views about how the hearing this morning should develop. My own application has rather
32 been overtaken by---

33 THE PRESIDENT: You are not seeking a stay?

1 MR. JOHNSON: No continuing stay, We are content with the practical effects of the order that
2 the Tribunal made two or three weeks ago, which has achieved the desired objective,
3 namely to buy some breathing space and to allow some measure of accommodation to be
4 reached between the parties. We are now, I think, all ready to move forward from where we
5 are today. The question is what happens next?

6 THE PRESIDENT: As I understand it, from what I have read, the only reason for the CAT
7 proceedings having been started - is this right, Mr. Jones - is because of the limitation
8 period under the CAT rules. I think there are express statements, some of which I have
9 read----

10 MR. JONES: Sir, that is right.

11 THE PRESIDENT: -- that there is no purpose in the proceedings in the CAT if the limitation
12 period does not apply.

13 MR. JONES: If there was no limitation problem in the High Court there would be no purpose
14 served by these proceedings.

15 THE PRESIDENT: If the limitation period under the rules - the two years from the General
16 Court's decision - is, for some reason, not applicable because of the foreign law limitation
17 Act, then these proceedings have no point - is that right?

18 MR. JONES: Subject to one point, which is the English losses, because in the High Court the
19 defendants also say that we are limitation barred under English law in so far as, on their
20 case, English law is applicable. On their case that would relate only to sales in England.
21 We dispute that, but of course if we are wrong about that then in relation to those particular
22 losses the CAT claims would still work, even if they cannot work in relation to foreign law
23 claims.

24 THE PRESIDENT: So there is an element, but a relatively small element?

25 MR. JONES: A small element, we think. That is one of the points which is currently being
26 investigated further, but, yes, we think so.

27 THE PRESIDENT: It does seem to me to be sensible to have a preliminary issue, without
28 drafting it at the moment, in terms of whether the proceedings in the CAT - the CAT
29 proceedings - and one needs to distinguish always between the jurisdiction under which the
30 claim is brought and the forum where it is heard because, as you know, under s.16 cases can
31 be transferred within limitations either way - whether the Foreign Law Limitation Periods
32 Act applies to the proceedings commenced here. The hearing of that preliminary issue
33 should, I think, only take place after pleadings have closed so one can see exactly how the
34 point is put. I can see that from looking at the High Court proceedings which may be

1 mirrored in the proceedings here, but nonetheless I think we need pleadings. They could be
2 limited to limitation issues, but given that you have pleaded out fully in the High Court,
3 there is probably no reason to do that, and I see nobody is suggesting that now.

4 I think we can fix a timetable for pleadings. They can say that there will be that preliminary
5 issue.

6 The question of whether there should also be preliminary issues as to if the foreign law
7 limitation period applies, what follows, what law is then applicable, and whether the claims
8 are time barred or not? There might be scope for further preliminary issues, but I think they
9 are more complex, and it would be sensible to have the first one first, and then review the
10 position and not take them all together.

11 MR. JONES: Sir, we certainly would endorse that.

12 THE PRESIDENT: That seems to me sensible. It will also depend on what happens as regards
13 the High Court proceedings. What I would suggest is that we direct pleadings. It can state
14 that there will be a preliminary issue of that nature the exact framing of the preliminary
15 issue, I would like to wait to see the pleadings, and then invite the parties to seek to agree
16 the wording of that preliminary issue, and submit I hope an agreed draft; if it is not agreed
17 alternative versions and we will frame the question. I think, from what I saw, the indication
18 was that one day would be appropriate it seems to me for that permitted issue.

19 There was some suggestion early on that there is to be a challenge to jurisdiction. I do not
20 think this is a jurisdictional challenge it is a limitation defence.

21 MR. JOHNSON: That question has been superseded.

22 THE PRESIDENT: There is no problem about that. As far as the management of the High Court
23 proceedings are concerned, you might wish to write to the Chancellor and suggest that he
24 nominates me as the judge to manage the High Court proceedings, because they are in
25 parallel with these proceedings – it is obviously a matter for him if he will do that, but if
26 you invite him to do that for that reason that will enable me to manage those proceedings
27 and decide what happens there.

28 Before we come to details of timetable, just two points that I would mention, one is as
29 regards the question of transfer, some thought will have to be given, I think, as to whether
30 the claim in para. 28 of your claim, Mr. Jones, which is the distinct, stand-alone claim for
31 deceit, whether that is capable of transfer within s.16 of the Act. I am not sure that it is, but
32 it will require some thought.

33 MR. JONES: Yes, Sir.

1 THE PRESIDENT: The rest of it could be transferred, but whether that is sensible again needs to
2 be looked at. I understand in any event you are waiting to see what happens on the petition
3 to the Supreme Court as regards the conspiracy claim, is that right.

4 MR. JONES: Yes, as regards that particular claim, yes.

5 THE PRESIDENT: So in terms of case management of that case it is not immediately urgent.

6 The other point one can mention is this: there are quite separate proceedings which have
7 been started in this Tribunal by a group of claimants led by Deutsche Bahn against
8 MasterCard. MasterCard have raised a number of preliminary challenges to the claim one
9 of which is this same point, the others are quite separate points, and they are asking for an
10 early hearing of their challenges. You obviously do not want to become embroiled in their
11 other arguments, the jurisdiction clause they have in their agreements and so on, but as
12 regards this application of foreign limitation periods and whether the 1984 Act, as it were,
13 overrides the CAT Rules and so on, it might be sensible for that to be heard together with
14 the preliminary issue in this case otherwise we will have two tribunals hearing the same
15 point and you will not know what arguments the other one is hearing, and so on.

16 Obviously, I cannot direct that now because we have to raise that with the parties in that
17 case. It is possible that might mean the hearing goes to a day and a half, but I would have
18 thought it could still be done in a day because the arguments are the same it is just that there
19 are some additional parties and, in any event, you will not be allowed to duplicate your
20 arguments, it is just sharing them out.

21 I mention that now because it does seem to me sensible, if you have two different tribunals
22 producing different answers there is bound to be an appeal inevitably, and whichever view
23 was unsuccessful might feel aggrieved if another tribunal had taken a different view and
24 you had not been there to make the argument and so on. I do not know if you have any
25 views about that but at the moment it seems to me that it would be sensible from the point
26 of view of the parties now in the Tribunal that it should be heard with that particular issue
27 raised by MasterCard.

28 MR. JONES: In relation to MasterCard we have some knowledge of that, I am Junior Counsel for
29 the claimants in the MasterCard proceedings, and it is also Hausfeld representing the
30 claimants, so that is, as it were, on our radar. Our main concern is timing, and we will come
31 in a moment to discuss the detailed timing questions here. In broad terms it seems to us that
32 the preliminary issue here could come on quite quickly it is a short, straightforward point.
33 Whereas, in the MasterCard proceedings no date has yet been set, as I understand it, but
34 there has been a lot of correspondence between the parties, and they are looking at a date for

1 the parties' convenience because, of course, MasterCard is embroiled in another litigation at
2 the moment, and that is at the end of April which I think is currently being held, 25th, maybe
3 26th April.

4 I should say that we entirely agree that it is the same point, and we agree that the
5 proceedings could be done together, and the separate jurisdictional issue that arises in
6 MasterCard could be carved out maybe to a separate day to avoid costs being incurred on
7 that.

8 THE PRESIDENT: Yes.

9 MR. JONES: We do see the sense in that, but it does come back to timetabling, and we would be
10 concerned about having to wait until the end of April for what we see as a simple and
11 straightforward point to come on.

12 THE PRESIDENT: Yes, I am not sure that we would have a tribunal. This preliminary issue
13 here, of course, has to be heard by a tribunal not just by a Chairman so I think looking at
14 something before mid-late April when we have to do pleadings, would be rather ambitious.
15 I do not see, really, that there is a timing problem of significance.

16 MR. JONES: I should just on the timing generally for these proceedings, I was going to try and
17 persuade you – I will not go down this route but just to set the background – in fact
18 pleadings may not be necessary. The reason I say that is it is a straightforward and short
19 point about whether or not s.47A disapplies the Foreign Limitation Periods Act. Of course,
20 had it been raised by a jurisdiction application, as was considered, there would have been
21 pleadings.

22 But, secondly, and more importantly, Sir, given your indication, it seems to us the pleadings
23 could be done on a very quick timetable. First, there have been several weeks since the
24 claim here was put in and we do not understand why pleadings have not been done. We
25 have asked about that in correspondence several times, and we have----

26 THE PRESIDENT: I do not want to go into whether it could or could not be done, as I say, I do
27 not think we will have a tribunal until, clearly, after Easter, and I think there is an advantage
28 in understanding what it is said is the consequence of applying the foreign law limitation
29 period because I think you say in the High Court and no doubt will say the same here, that
30 you get back to English law even if the Foreign Law Limitation Periods Act applies. Is that
31 right? No? The appropriate choice of law is then English law?

32 MR. JONES: The question of what the applicable law is which, in the High Court, we say is
33 English law, focusing there, in particular, on the location of the defendants' conduct, the

1 defendants are based in England, and then, yes, under English law we would say it would be
2 in time under the Limitation Act.

3 THE PRESIDENT: Yes, but you say the proper law of the tort would be English law.

4 MR. JONES: The proper law of the tort would be English law.

5 THE PRESIDENT: You would say the same thing here, would you not?

6 MR. JONES: We would say the same thing here although it would not be relevant for this reason,
7 that when you get into s.47A if we are right that that disapplies the Limitation Act and the
8 Foreign Limitation Periods Act, the limitation period which then applies----

9 THE PRESIDENT: I understand that, yes, I see that. But, if you are wrong on that and the '84
10 Act applies then you say even so it is English law.

11 MR. JONES: Then we would be running that same argument that we run in the High Court, yes.

12 THE PRESIDENT: And that begs the question, if it is proceedings in the Tribunal, what is the
13 English law which then applies?

14 MR. JONES: The follow on would seem to be a breach of statutory duty claim.

15 THE PRESIDENT: Is it the law of the CAT Rules or is it the basic statutory limitation period? I
16 think it would be helpful - I am not suggesting any answer to this, but it may be that it is an
17 avenue one would not go down, for reasons that one would be persuaded to hearing that is
18 not a possible outcome - to understand what it is said is the consequence of the 1984 Act
19 applying when one is considering what is the parliamentary intent in s.47A. That is why I
20 think it is helpful to have the limitation point pleaded out, and that is all I would say about it
21 at the moment. I do think it is right to have pleadings, and I am not sure, even if it had been
22 sought to be brought as a pure jurisdictional challenge, one would have needed a full
23 statement of how the limitation point would play out.

24 I think we can move to considering pleadings, and I think there are two alternative
25 timetables being proposed: one from Herbert Smith Freehills for the defendants, and one,
26 Mr. Jones, from your clients, or Hausfeld's clients. As I say, the case cannot be heard until
27 after Easter, but I would have thought, Mr. Johnson, as Mr. Jones says, that pleadings can
28 be done relatively quickly, given that you have done it all, as it were, and indeed you have
29 done it covering rather more, because you have had to cover other claims.

30 Looking at what you have proposed for the defence and additional claim, I would have
31 thought you could do that by 25th February, which is two weeks, or just over two weeks
32 from today.

33 MR. JOHNSON: Sir, we are content with that.

1 THE PRESIDENT: That is Thursday, so you get an extra day. Then, Mr. Jones, reply, two
2 weeks, 10th March?

3 MR. JONES: Sir, we can reply within a week.

4 THE PRESIDENT: Assuming that everything is the same. All right, you say 3rd March?

5 MR. JONES: Yes, sir.

6 THE PRESIDENT: 25th February will also apply for the additional claim against AGC.

7 Miss Ford, for AGC's defence, you will get the claim on 25th February, so 10th March?

8 MISS FORD: Sir, is that three weeks?

9 THE PRESIDENT: No, it is two weeks.

10 MISS FORD: We would ask for 28 days, Sir, the reason being we do not know the form of the
11 defence. It may mirror the High Court proceedings, in which case no doubt we can turn it
12 around it very quickly. Of course, we do not know that that will be the case, and there may
13 be additional evidence. We would request 28 days.

14 THE PRESIDENT: Mr Johnson, are you anticipating that it will be more extensive than the claim
15 in the High Court?

16 MR. JOHNSON: Only in the sense that it will need to engage with the limitation point and the
17 proper meaning and effect of s.47. Otherwise, I think we apprehend that the format of the
18 claim will be essentially the same.

19 THE PRESIDENT: You do not have to argue the law extensively in your pleadings, so it will be
20 essentially the same. If it comes on the 25th - you are saying you want 17th March,
21 Miss Ford, is that right?

22 MISS FORD: Sir, 28 days, I am afraid I do not have the dates in front of me.

23 THE PRESIDENT: If it comes on 25th February - I think you can do it by 17th March, that should
24 not be a problem. The reply to the defence to the additional claim by 24th March.

25 I would have thought that once we have the reply, which you say you can do by the 3rd, the
26 defence to the additional, 17th March. Also by 24th March the parties could submit to the
27 Tribunal a proposed wording for the preliminary issue. I will then direct the precise
28 wording that it should have, so that we all understand the scope of it.

29 Then in the meantime we will get in touch with you with some possible dates for a one day
30 hearing. I think the fact, Mr. Jones, that you represent the claimants in the other case, it
31 means that if that point is heard with this one the extra time will be even less because it is
32 the same counsel.

33 MR. JONES: Different leaders, Sir, but apart from that----

1 THE PRESIDENT: In any event, it will clearly be essential that you share out between you, and
2 that applies also to AGC and Pilkington, how the arguments are put. There are not that
3 many arguments on this, and whether indeed - although it is a pleasure to hear you,
4 Miss Ford - depending on how the case is put for Pilkington, you need to appear. We will
5 see how the case goes.

6 MISS FORD: As it happens, leading counsel for AGC is Mark Hoskins QC, who is also
7 instructed for MasterCard, so there is commonality in representation.

8 THE PRESIDENT: There is a lot of commonality, so even more reason for hearing them
9 together.

10 What I think we will do, Mr. Jones, is try and arrange an early directions hearing in the
11 *Deutsche Bahn v MasterCard* - it can be very short, MasterCard's team are obviously
12 heavily embroiled in the Sainsbury case, but we can have a one hour directions hearing to
13 ventilate with them, carving out that point to be heard with this point - on a date which I
14 hope can be in late April, but we will have to assemble a Tribunal, and we will let you
15 know. We will seek to organise a directions hearing in the other case.

16 MR. JONES: I apologise, could I raise this as a backtracking point slightly. The reply on 3rd
17 March, I suggested in the hope that that would speed everything else along, but looking at
18 the timetable I see it does not really make any difference whether it is... It would be more
19 sensible, in light of that, to say 10th March, just to make sure we do not have to come back.

20 THE PRESIDENT: I was offering you 10th March, and you were very confident. I do not think
21 that should affect anybody else, because the further pleadings are all to do with the
22 additional claim. Very well, 10th March.

23 You also asked and proposed that the forum for this claim should be England and Wales. Is
24 anyone dissenting from that? No. I shall direct that that shall be the forum for these
25 proceedings, although we may need to look at the effect of disapplying s.47A on a case that
26 were in Scotland or Northern Ireland.

27 Then, as I say, I would suggest that you write to the Chancellor asking for a nominated
28 judge in the High Court action so it can be effectively managed with this one. I think that
29 would work sensibly.

30 MR. JONES: Sir, can I raise a point in that connection, which is that it seems to us that it may be
31 appropriate - nothing immediate, but possibly in the medium term - if there is a single
32 judge, for us to be able to have case management hearings in both cases at once. That may
33 be a point which we also would wish to raise with the Chancellor.

1 THE PRESIDENT: I think that sounds a very sensible suggestion. You do not want to appear, as
2 it were, in different places before the same person and run up costs that way. We can have
3 here a CMC in the Rolls Building, and I would have thought vice versa.

4 Where does that take one in terms of what we have to deal with this morning?

5 MR. JOHNSON: It may take us to the end of the road. There was, as the Tribunal will be aware,
6 a related issue concerning the scope of the preliminary issue and it would also be sensible in
7 case management terms at some point early on for, as it were, the broader preliminary issue
8 question concerning governing law and foreign law limitation in substance to be
9 determined. We have put down a marker in relation to that. Our concern coming to this
10 hearing today was simply to ensure that no steps are taken which compromise our position
11 in connection with advancing a case for early determination of those at some appropriate
12 point.

13 Relating to that, there is a question concerning the appropriateness of the transfer of the
14 High Court proceedings to this tribunal. It is not obvious that there should be a transfer if
15 there is to be determination of the preliminary issue concerned largely with legal and
16 perhaps some limited foreign law questions, as opposed to issues of causation, quantum,
17 and so on, in which determination of the issues would be assisted by the presence of
18 specialist members of a specialist tribunal. We recognise that there is a limit to how far that
19 point can be pushed today in the absence of agreement, and there is no agreement.

20 THE PRESIDENT: In any event, it is something that has to be raised in the High Court.

21 MR. JOHNSON: Indeed.

22 THE PRESIDENT: And when the issue of transfer is considered. I think nothing you have said
23 today in any way prejudices consideration of whether there should be such a preliminary
24 issue, and if so where it should be heard. I think we cross that bridge when we get to it. We
25 will deal with this more limited preliminary issue which, as I say, arises in another set of
26 proceedings as well. If you have a nominated judge in the High Court, whether you want to
27 have a CMC in those proceedings early on or whether you want to wait until the Supreme
28 Court has decided on the petition on the Emerald case, it is not a matter for me. It might be
29 sensible to wait for the outcome of that because that affects the scope of the claim.

30 MR. JOHNSON: We will give that some consideration. In due course, it may be a matter for you
31 of course if you are nominated in the High Court proceedings, but, as you say, we will cross
32 that bridge----

33 THE PRESIDENT: Wearing a different hat.

34 MR. JOHNSON: -- if and when we come to it.

1 THE PRESIDENT: Is there anything else?

2 MR. JOHNSON: Sir, from our side of the court room, no.

3 MR. JONES: Sir, we do apply for our costs of the stay application. It is only of the stay point,
4 because we do recognise that there have been helpful discussions on other issues, leading up
5 to and indeed today at the hearing, but costs have been wasted on arguing the point about
6 the stay which, as I will try and persuade you, was never a sensible application, not just---

7 THE PRESIDENT: What, realistically, given that this has all been bound up together, because
8 your application for a preliminary issue was issued about the same time as the stay
9 application, was it not?

10 MR. JONES: They were issued around the same time, that is right, but what has happened on the
11 stay is that witness statements have been put in. Sir, I do not know if you had a chance to
12 read the witness statements, but we, for our part, did not understand and made clear in
13 correspondence that we could not understand, even having read the witness statement, why
14 a stay was being sought. Correspondence has been exchanged on issues, including whether
15 there should be a stay, and we have always struggled to understand why there should be a
16 stay.

17 THE PRESIDENT: What do you say are your discrete costs of the stay application?

18 MR. JONES: Sir, the discrete costs of that - I have a schedule, shall I hand it up? (Same handed)

19 THE PRESIDENT: A lot of the letters that I saw pretty much dealt with both.

20 MR. JONES: The letters did deal with both, and what my solicitors have done is gone through all
21 of those letters and try and carve out how much of them are attributable to the stay, and it
22 varies between some letters where they say half of it was and some where they have said
23 down to a quarter or a fifth were. They have had internal discussions on a stay. They had
24 to consider whether to agree to a stay, evidence in reply. My fees, similarly, Sir, have been
25 looked at with that in mind, and since it became clear that this application was not really
26 being pursued we have not included, for instance, any of my fees so we have tried very hard
27 to limit it to that particular issue.

28 The essential point, I have made it already, we never understood why it was applied for.
29 The reason was said to be there were essentially lots of case management issues to discuss
30 and we think that we should discuss them.

31 There are two points on that. First, just as a matter of principle, the fact that there are issues
32 to discuss does not mean that you have a stay, so that straightforward assertion we could not
33 piece together the pieces to understand why a stay was needed.

1 Secondly, if one asks in practice what was being avoided by the defendants' approach to
2 this, what they avoided was filing a defence on the date which otherwise applied, or putting
3 in a Rule 34 application on a date which would otherwise have applied.

4 Just focusing on those particular stages in the CAT process it is impossible to understand
5 why they could not do a defence or why they could not decide what to do about the Rule 34
6 application.

7 One point which has been made in recent correspondence is there is a suggestion that they
8 were in some way waiting for the claimants to say whether we thought they should make a
9 Rule 34 application. So I should just deal with that because that seems to be now being
10 mounted as the reason why they could not press ahead. We find that a bizarre suggestion, it
11 is up to them whether they make a Rule 34 application. Secondly, they did not ask us – if
12 they wanted our opinion they could have asked. We did, in fact, eventually say: "Are you
13 waiting for us to tell you whether to do a Rule 34 application? We do not think you need
14 to." That is quite different from then now using that as a justification for not getting on with
15 things as they should have done.

16 If one then looks at what is said now, they say: "We have reached, in correspondence,
17 agreement on certain issues, and now that is why we do not pursue the stay application."
18 First, insofar as agreement has been reached in correspondence that proves my point that
19 that is what should happen, and ordinarily happens without the need for a stay.

20 Secondly, one should not exaggerate the degree of agreement here. It is true that there is
21 agreement as to the s.47A preliminary issue application, that is right. But, on everything
22 else, there is, as one would expect, degrees of disagreement: do they need to file pleadings
23 before that application and, if so, on what timetable should the High Court come across a
24 second preliminary issue?

25 The short point is we never understood why it was necessary, and we still do not understand
26 why it was necessary and costs have been spent on it.

27 If I am not successful on that, I would make this alternative application, which is an order
28 that there be costs in the case except for the defendants' costs of the stay application which,
29 at the very least they should know, that would cover the witness statement which simply
30 goes into a lot of detail explaining what the correspondence is all about.

31 THE PRESIDENT: Yes, thank you. Mr. Johnson, I was a bit puzzled by why a short stay – I
32 think it was a stay of six weeks or something – was being asked for?

33 MR. JOHNSON: The stay asked for originally was for six weeks or, in the alternative, for such
34 period of time as would enable the parties to engage and seek to agree some sort of sensible

1 case management structure moving forward. In order to understand why the application
2 was made when it was made, and why it was reasonable it is necessary to understand a little
3 bit about the background – perhaps I can try and summarise that without going through any
4 of the correspondence. One has to remember that the proceedings that we are concerned
5 with began some while ago now in the High Court, and as long ago as November of last
6 year the claimants were still continuing with the position that the High Court proceedings
7 should, as it were, take precedence over the CAT proceedings.

8 The CAT claim, as the Tribunal has already noted, was put forward on that basis on 21st
9 December. We were concerned at that point with the interrelationship between the two sets
10 of proceedings, and we were presented with a situation in which the High Court action was
11 pursued, as it were, as the main action, and the CAT proceedings as a back-up in the event
12 that we proved to be correct on the overall limitation question.

13 So, that was the position as we moved into the New Year. Then the difficulties we came to
14 be presented with all arise from a change of tack by the claimants in their letter of 13th
15 January 2016, which is appended to Miss Dietzel's witness statement at exhibit 10. Perhaps
16 we could just turn that up.

17 Here we see something of a change of position, turning over to p.2 at para. 5. It seems to
18 have been triggered by the decision of Mr. Justice Barling in *Sainsburys Supermarkets v*
19 *MasterCard*. Now, the claimants see the opportunity of transferring the High Court
20 proceedings to the CAT. What we are then presented with is not only a change of position
21 but some important case management issues at the time of some pressing urgency needing
22 to be addressed, concerning the interrelationship between the two sets of proceedings, and
23 how they were to be managed together. Aligned with that the point already has been made
24 that there was some uncertainty about the proper format for taking the s.47 point – or which
25 has materialised into the s.47 point – and whether that should, properly speaking, be taken
26 as a jurisdiction issue or in some other form. So two sources of uncertainty which one sees
27 unfolding in the correspondence, in particular in connection with the interrelationship
28 between the two sets of proceedings.

29 At KD1 tab 12 the Tribunal will see that we wrote to the claimants' solicitors on 18th
30 January in effect seeking clarification of their proposals regarding the terms on which the
31 claims could or should be managed together and proposing (at para. 3) a temporary stay of
32 both proceedings so that certain matters could be resolved, i.e. the need to agree the steps to
33 effect the transfer and consolidation, the position of the Part 20 claim, and the Part 20
34 defendant, and clarification of the claimants' case on 'unlawful' means 'conspiracy'.

1 So, we have a number of issues which are floating around creating a degree of confusion
2 and concern.

3 THE PRESIDENT: If I may interrupt you, you do not normally seek a stay while you try and
4 agree directions. You might want an extension of time for service of the defence, but to go
5 so far as to seek the whole proceedings to be stayed is an extreme step.

6 MR. JOHNSON: In substance what was sought was some more time, some thinking time. It
7 could equally, I suppose, have been put as an application for additional time for either
8 serving a defence or for mounting a jurisdictional challenge. But, in substance, we get to
9 the same point and, in substance, the reason for the application and, in substance, the relief
10 sought in effect is the same.

11 THE PRESIDENT: But it is not a jurisdictional challenge, is it?

12 MR. JOHNSON: No, it is not, we accept that.

13 THE PRESIDENT: It is conceded.

14 MR. JOHNSON: But the immediate position, prior to the making of the application on 22nd
15 January, as the Tribunal will be aware was receipt on the same day, 22nd January, this is at
16 Dietzel, tab 15, from the claimants, dealing with a range of outstanding matters, transfer and
17 consolidation, transfer of the Part 20 proceedings, stay of the main proceedings and
18 directions and so on – it is a five or six page letter. This was sent on Friday, 22nd – the
19 deadline for either filing the defence or for making a jurisdiction application challenge was
20 the following working day, namely, Monday, 25th. The idea was simply to buy some
21 thinking time to deal with this set of issues which had been developing for a relatively short
22 period post the Christmas break, a number of interconnected, interrelated case management
23 issues. It seemed to us that all parties would benefit from a certain period of time to take
24 stock and plan in some sort of sensible and structured way moving forward, and so it has
25 proved. If one tracks through the remaining correspondence one sees, yes, a measure of
26 agreement being reached, certainly not agreement on all issues, but one sees the
27 proceedings stabilising, and the parties being given an opportunity, some time and space to
28 reach a position which is fair and reasonable, and manageable. Those are the reasons why
29 the application was made and why we say it was reasonable at the time, and reasonable also
30 viewed in retrospect.

31 The Tribunal has already made the point that we are concerned here with a number of
32 interrelated issues, and it is very difficult we would submit, probably impossible to separate
33 out discrete periods of time where time has been spent which can safely be allocated to the
34 stay application looked at in isolation. The fair and sensible and, we would submit, really

1 only pragmatic order in circumstances like this is for the costs of the application to be
2 treated as costs in the case. No one is disadvantaged by that, and it will enable the costs to
3 be dealt with in due course depending on the outcome of the proceedings. So we would
4 submit that that is the appropriate order.

5 MR. JONES: If I may, Sir, briefly? Mr. Johnson draws an analogy with applying for an extension
6 of time for a Rule 34 application and for the defence. First, that was not what was asked
7 for, it was a stay. Secondly, even viewed in that light, I repeat what I have already said that
8 we do not understand why and if that would have been necessary. The claim was started on
9 18th December. The deadline for service of the defence was four weeks thereafter. The
10 position at that point was that they should have put in a defence. Mr. Johnson has not
11 explained why he had any uncertainty about whether he should file a defence in these
12 proceedings. Other things were going on, sure, but they still had to put in a defence, and
13 that is still the position, they have to put in a defence.

14 THE PRESIDENT: If the claim were going to be transferred to the High Court then query
15 whether the defence would have been needed to be heard with the High Court claim.

16 MR. JONES: That may be right, although that was an issue which had been in the background for
17 a long time, and so not an issue which one would leave until the very last moment for filing
18 a defence. If Mr. Johnson had said they had not prepared a defence because they thought it
19 was going to be transferred that would be one thing, but that is not what he is saying.
20 On the jurisdiction point, there was some confusion about that, but again totally unclear
21 why that would have been resolved by an extension. They did not even raise the confusion.
22 The position then was they did not need to put in the jurisdiction application and still is they
23 do not need to do that. So, I repeat what I have already said, there is no change and we still
24 struggle to understand why they could not comply with the steps initially complied with at
25 the time.

26 THE PRESIDENT: Yes, thank you very much.

27 The hearing today has proceeded on the basis of a large measure of agreement as a result of
28 which the stay which had been applied for by the defendants is no longer sought, and that is,
29 as Mr. Johnson, appearing for the defendants, has explained, by reason of the subsequent
30 agreement that the parties have come to considerably narrows the distance between them
31 and has enabled sensible directions to be given today.

32 It is right, as Mr. Jones, for the claimants, points out that the application for a stay to give
33 'thinking time' as it has been put, or time for discussion between the parties was surprising
34 and, in my view, an application for an extension of time for service of a defence would have

1 been more appropriate; a stay is a more extreme form of order that really should only be
2 sought either when ADR proceedings are ongoing with a clear timetable such that the court
3 proceedings can be frozen or, for example, in circumstances where the underlying
4 infringement decision is under appeal before the European Court such that the private action
5 ought to be put on hold. That is, of course, not an exhaustive list of examples. But, it is
6 not appropriate in my judgment, when the parties wish to have discussions to seek to freeze
7 everything in court proceedings. Nonetheless, I think that an extension of time for the
8 defence could have been sought in these circumstances.

9 We are in a relatively new field with the interrelationship between two sets of proceedings
10 between two different forums under a new statutory regime. That, understandably,
11 provoked considerable correspondence between the parties and I note that the claimants
12 themselves changed their position from initially suggesting that the CAT proceedings
13 should be transferred to the High Court, and then proposing the reverse. It does seem to me
14 that the correspondence that I have read between the parties was very wrapped up with the
15 question of timetabling, transfer and the appropriate course to take, and I do not think that,
16 although mistaken, the application for a stay materially led to different costs from an
17 application for an extension of time for the defence, which it appears would not have been
18 agreed to. The costs, even as sought in the claimants' costs schedule I have no doubt are a
19 very small proportion of the total costs that are being incurred in this matter and that is
20 before any assessment of what would be proportionate. I do not think that this is the sort of
21 situation where it is appropriate to make any special order with regards to the defendants'
22 application for a stay and, accordingly, I shall order that both applications shall be costs in
23 the case.

24 Other than that I shall say that on the stay application as such there will be no order.

25 MR. JOHNSON: I am grateful.

26 THE PRESIDENT: We will then draw up an order which will be served on the parties. We will
27 receive the pleadings and leave it to you to pursue the matter, I think it is for the claimants
28 but with the assistance of the defendants and the Part 20 defendants in the High Court in the
29 way that I have indicated. Is there anything else?

30 MR. JONES: Nothing further, thank you.

31 THE PRESIDENT: Thank you very much.

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