IN THE COMPETITION APPEAL TRIBUNAL

Case No:1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 12th January 2023

Before:

The Honorable Mr Justice Roth
Lord Ericht
Jane Burgess

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Walter Hugh Merricks CBE

V

Defendants

Mastercard Incorporated and Others

A P P E A R A N C E S

Marie Demetriou KC, Victoria Wakefield KC & Morag Ross KC (On behalf of Walter Hugh Merricks CBE) Instructed by Willkie Farr & Gallagher (UK) LLP

Sonia Tolaney KC, Matthew Cook KC & Daniel Benedyk (On behalf of Mastercard Incorporated and Others) Instructed by Freshfields Bruckhaus Deringer LLP

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Thursday, 12 January 2023

(10.30 am)

Housekeeping

MR JUSTICE ROTH: Good morning. These proceedings, like all proceedings in this Tribunal, are being live streamed. For those who are watching or observing on the live stream, I must emphasise that an official recording of the proceedings is being made and it is strictly prohibited for anyone to make any unauthorised image or recording, whether audio or visual, of the proceedings and to do so constitutes a contempt of court.

I think we should just start by clarifying the arrangements for tomorrow and as regards Scottish counsel, we were asked if Scottish counsel could, for their convenience, address us tomorrow and we are quite content with that, as we indicated in the letter. What is the parties' position at the moment?

MS DEMETRIOU: Sir, thank you. So we have agreed an order, a running order, as it were, which, subject to the Tribunal's approval, runs as follows: so we start with the application to amend --

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: -- today and we then address the question of the section 47A and the proper interpretation of the rules, the rule 31.4 point and Mastercard will go first on that, we will respond and then Mastercard will reply.

That may or may not take us to the end of the day, depending on how long the application to amend takes, so we may get on to applicable law later or we may not, but in any event, applicable law will proceed into tomorrow morning and, again, Mastercard will make their submissions, we will follow, Mastercard will reply and then Scots law will come at the end. Again, Mastercard to start, us to follow and Mastercard to reply and we anticipate that's likely to start after lunch and take the afternoon.

So I think there is agreement between us as to that running order; we are not quite

sure whether applicable law, we will get on to that today or not, but if the Tribunal's happy with that, that's what we think is sensible.

MR JUSTICE ROTH: Can we clarify two points? One is that on the rule 31.4 point which I think if we look at the -- let's look at your skeleton argument, on your pleading, Ms Demetriou. That, I think, is section C of your skeleton, starting on page 3.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: And that's in --

MS DEMETRIOU: That's bundle A1, tab 3.

MR JUSTICE ROTH: At page --

MS DEMETRIOU: Page 51.3, sir.

MR JUSTICE ROTH: That's where you start your section on rule 31.4.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: And if one goes on into that, on page 11, still part of this section --

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: -- you then say:

"The Scots law position."

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: And similarly, Mastercard, I think, has a rather shorter part of its skeleton dealing with rule 31.4, also adverting to Scots law. Is that, as opposed to the 1973 Scottish Prescription Act, is that something that's going to be addressed by Scottish counsel tomorrow --

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: -- or is it something that you're going to deal with?

MS DEMETRIOU: Absolutely not. So it's going to be addressed by Scottish counsel tomorrow, as far as we're concerned. I apprehend the same -- and Ms Tolaney is

nodding.

MR JUSTICE ROTH: It should be both the limitation prescription aspects and that part of rule 31.4?

MS DEMETRIOU: All tomorrow afternoon, yes.

MR JUSTICE ROTH: That's helpful. Finally, on choice of law --

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: -- much of the period and that's governed by the 1995 Act which applies for the whole of the UK, I think it's now accepted that we're not concerned with Rome II.

MS DEMETRIOU: That is right.

MR JUSTICE ROTH: But there is the earlier part in the period where it's governed by the common law rules and the Dicey Rule. As far as we can see, both sides have addressed that on the basis that this is the same for England and Scotland. Is that the basis on which we are proceeding? We have had no written argument that the Scots common law position is different.

MS DEMETRIOU: Yes, so I think we have both been proceeding on the basis that -- so England is the forum and so then we apply the English choice of law rules to determine applicable law.

MR JUSTICE ROTH: Right. The fact as emerged and, indeed, the way the case has now developed, has led us to think further about the application of rule 18 of the CAT Rules and if we just remind ourselves of what Scot rule 18 -- yes, rule 18, it is rule 18.

MS DEMETRIOU: Rule 18.

MR JUSTICE ROTH: 18, on forum(?).

MS DEMETRIOU: I very foolishly forgot to bring my purple book, so ...

MR JUSTICE ROTH: I don't think you will be disadvantaged. I can read it out:

"The Tribunal, after taking into account the observations of the parties, may, at any

time, determine whether any proceedings or part of any proceedings before it are to be treated for all or for any purpose, including a purpose connected with any appeal from a decision of the Tribunal made in those proceedings as proceedings in ... Wales, in Scotland or in Northern Ireland."

MS DEMETRIOU: Yes, sir.

MR JUSTICE ROTH: So it's a very broad and flexible rule. We indicated in a letter, I think in December, drew attention to this rule and its breadth, that at that time, we did not see any reason to make any order under that rule.

Having now seen the skeleton arguments and the way the arguments have developed, we have reconsidered that and we are now minded, subject to what the parties may say, to make an order that that part of the case dealing with the interpretation and application of the Scottish Limitation and Prescription Act, the 1973 Act, for the purpose of appeal, shall be treated as proceedings in Scotland.

We say that because we will be asked and we will have to, in our decision, deal with interpretation of the Scottish statute. What we say will have implications not only for this case but potentially for other cases applying that statute and it seemed to us rather unsatisfactory that any appeal from that part of our decision should go to the Court of Appeal in London, as opposed to the Court of Session in Edinburgh.

So that's what we are minded to do. As you see from the rule, it's subject to the observations from the parties. I won't ask you to respond immediately. I would like both sides, please, to consider that and give us your response if you can, and I would expect you can, first thing tomorrow.

Of course, it means that there could be appeals from one judgment going, some aspects, to the English Court of Appeal and other aspects to the Court of Session but they are dealing with different aspects of the law and so we think that on balance, it's nonetheless preferable it should be dealt with that way.

That's as regards the Scottish statute.

Now, the other aspect where we're going to be addressed on Scots law, as you've just explained, we don't think should be subject to such an order because there, what we're dealing with is the interpretation of the CAT rule and we are not really dealing with any difficult questions of Scots law and we think there, it would be extremely confusing if the question of interpretation, application of the CAT rule in the single judgment was to go to, potentially, two different appellate courts.

So we would confine it to the points on prescription and the 1973 Act and it would be for the purpose of any appeal, not for the purpose of costs which should be dealt with all in one place.

MS DEMETRIOU: Sir, thank you, we understand and we see the sense in that and I will take instructions and revert by first thing tomorrow morning on those proposals. I'm sure Ms Tolaney will do the same.

MR JUSTICE ROTH: If you're able or feel in a position to do it by letter overnight or first thing in the morning, that's also, of course, fine.

Very well. So we start, then, with the application to amend, which is, of course, your application.

Application by MS DEMETRIOU

MS DEMETRIOU: If we can go back, please, to bundle 1A. The Tribunal has our application behind tab 5 and the draft amended pleading behind tab 6. Perhaps we could start with the draft amended pleading and the draft amendments do three things. If we could turn behind tab 6 to page 61. So pages 61 through to 68. The top of page 68, you can see all the amendments. They relate -- they allege that Mastercard deliberately concealed a fact or facts relevant to Mr Merricks' right of action under section 32(1)(b) of the Limitation Act. That's the first thing that the amendments do. The second thing that they do, you see on page 69, is to clarify the position under

Scots law because there was an error in the previous draft and the third thing they do --

MR JUSTICE ROTH: Just pausing there, on page 69, it's also incorporating, of course, paragraph 4B.

MS DEMETRIOU: That's quite right.

MR JUSTICE ROTH: So it's not just an error on the reference to --

MS DEMETRIOU: No, sir, that's quite right. It's relying on the facts and matters set out in paragraph 4B. And then if you could turn to page 72. The amendments you see on page 72 to 74 plead the effect of the CJEU's Volvo judgment which was handed down at the end of June and just cutting to the chase, if you look at page 73, paragraphs 9C and 9D, they set out the two principles which we contend emerge from the Volvo judgment. So the first at 9C is that no limitation period -- to say the limitation period under UK law -- does not begin to run before the infringement had ceased. In other words, 19 December 2007. So that's the first contention.

The second is at 9D and that's further, alternatively, no limitation periods began to run before the represented persons knew or could reasonably be expected to know of the matters listed thereunder, so including the existence of the infringement.

And then if you look over the page, we say for the avoidance of doubt, there is no requirement that there be deliberate concealment in order for that principle, that second principle, to apply.

So those are the amendments. I can take you to them in more detail a little later but what I want to do is show you first how they came about. So if we could turn up the current version of the pleading. So first of all, Mastercard's defence. That's behind tab 12 of the same bundle, starting -- if we go to page 225, paragraph 9 and if we look at the summary. So under the heading "Limitation", the second part of paragraph 9 says that:

"Under English law, insofar as the claims are based on transactions at merchants based in the UK and upon an infringement having occurred prior to 20 June 1997, the claims are time-barred, pursuant to rule 31.4 of the Tribunal Rules, the original section 47A and the standard six year limitation period, pursuant to sections 2 and 9 of the Limitation Act."

So that's the defence that's raised.

Now, of course, we have made the point in our skeleton that that's inaccurate, in that rule 31.4 did not apply at the material time but we will deal with that point later. And then this allegation is essentially repeated at page 232 in paragraph 25. So it's the same point that is made and there it then says:

"Alternatively, insofar as the Class Representative wishes to pursue claims under Northern Irish or Scottish law, it must ... rely on the equivalent limitation periods of these national laws."

So that's the defence. And then if we turn up Mr Merricks' reply to that defence which is behind tab 13 and if we look at page 298. So that contains, at paragraph 4, a denial that claims to which English law applies and which are based on an infringement having occurred prior to 20 June 1997 are time-barred and then it says in particular -- and A is the point about the rules, so it says that Mastercard's reliance on rule 31.4 in paragraph 25 that we just looked at is wrong as a matter of law, since it doesn't apply.

And then at B and this is the material provision for these purposes:

"Alternatively, the six year limitation period pursuant to section 2 and/or 9 of the Limitation Act was suspended under section 32."

And then we add:

"The reasonable typical consumer would not have recognised that they had a worthwhile claim prior to June 1997."

Et cetera.

Now, pausing here, the first point that we make is that in that first sentence we have pleaded a case under section 32 of the Limitation Act that pursuant to section 32, the six year limitation period was suspended. So that's the clear effect of the first sentence.

Now, we would then, obviously, have to go about proving that case. Now, one could certainly have an argument, a debate, as to whether or not that is sufficiently particularised, but what we say is crystal clear is that suspension in accordance with section 32 of the Limitation Act was squarely pleaded and in order to make good the allegation, the contention of suspension, then plainly the burden would be on us, we accept that, to prove the constituent elements of section 32 of the Limitation Act.

Now, those constituent elements are well-known. Perhaps we can just turn up the provision. So it's in bundle B2. We can put away for now the pleadings and if we turn up bundle B2 behind tab 32, page 1332, you have section 32 there. And that makes plain on its face that a party seeking to rely on section 32 will need to establish first that one of the conditions in subsection 1A, B or C is satisfied. So that says -- because it says:

"Where, in the case of any action for which a period of limitation is prescribed, either the action is based on the fraud of the defendant or any fact relevant to the plaintiff's rights of action has been deliberately concealed or the action is for relief from the consequences of mistake. The period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or could, with reasonable diligence, have discovered it."

So it's crystal clear that what you have in section 32 is a threshold condition. So one of the conditions in 32(1)A, B or C needs to be met and if it is met, then the period of limitation doesn't begin to run until that thing is discovered or could, with reasonable

diligence, have been discovered. So you have a condition and then you have a second requirement that goes to when limitation begins to run.

So we say that we pleaded suspension of the limitation period under section 32. No, it wasn't particularised, but we pleaded that the requirements of section 32 were met. That's the only way of understanding our pleading.

Now, what Mastercard could have done when they saw this pleading, when they saw our pleading, was to seek further particulars. So either in relation to deliberate concealment or in relation to discoverability or both, but they didn't do that at all and what happened instead was that Mastercard made an application in advance of the September CMC for the limitation issues between the parties to be determined early.

If we could go back to volume A, please, behind tab 19, so A/19/368 of the bundle.

This is Mastercard's application made in advance of the September CMC, so that's A/19/368. And you see at paragraph 2 that Mastercard seeks an order "either for a trial of preliminary issues or a split trial for a first trial dealing with ..."

And then over the page there are three things, the first of which is limitation.

And then paragraph 5 further down the page on 369 identifies the limitation issues which would be determined by way of preliminary issue and it does it by reference to the pleadings and you see that that includes paragraphs 4 to 7 of Mr Merricks' reply.

And that of course included, we have just seen in paragraph 4, Mr Merricks' allegation that the limitation period was suspended pursuant to section 32. And then we see that reflected again in paragraph 8 of the application, over the page. So there is a clear understanding that there are two points raised by Mr Merricks' reply. The first is the rules, the effect of the rules and the second is suspension under section 32 of the Limitation Act.

And then if we go to paragraph 15 on page 371, that notes that Mr Merricks has not

yet set out a final position but that Willkie Farr's letter indeed indicated that limitation may be an appropriate issue for early determination. And, sir, you will probably recall, by the time we got to the hearing that was common ground, that it should be determined early.

Then at paragraph 16 the issue is described in broad terms but as we have seen, Mastercard's application has described these issues already by reference to the parties' pleaded case, including specifically referring at paragraph 8 to the section 32 point.

Now, just going on to tab 21, this is the evidence served, filed by Mastercard in support of its application, the first witness statement of Mr Sansom. If we go to page 386, please, of the bundle. So Mr Sansom says at paragraph 16:

"Based on my review --"

So this is the witness statement supporting an application for early determination of limitation:

"Based on my review of the pleadings in this case and as set out in the application, I understand there is a clear limitation issue between the parties under English law that I believe is appropriate to be determined on a preliminary basis."

So, again, this is all being put forward by reference to the pleadings which raise the section 32 suspension point. This echoed -- so what Mr Sansom said here echoed Freshfields' letter of 12 August which we don't have in the bundle but we have set out the relevant part in our reply in respect of the -- to Mastercard's response to our application to amend. That's behind tab 8 and if you go to page 119 at paragraph 2, you will see Freshfields' letter --

MR JUSTICE ROTH: Just a moment.

MS DEMETRIOU: So tab 8, sorry, page 119 and then you see at paragraph 2 -- the second half of that paragraph, we see Mr Sansom's statement, saying that:

"Mastercard's proposal followed a review of the pleadings. This echoed Freshfields' letter of 12 August which notified Mr Merricks of Mastercard's intended application, in which it said 'in identifying and formulating these issues, Mastercard has considered carefully the pleadings filed in the proceedings over the past several months, including most recently Mr Merricks' reply'."

Now, by the time we got to the CMC, as I have just said, Mr Merricks' position was that he agreed that limitation should be dealt with early as a preliminary issue and the Tribunal also agreed with Mastercard's application and the discussion at the CMC was all about logistics.

Now, if we stay in this bundle and go behind tab 23, please, where we have the transcript of the September hearing and if we could turn to page 490 and if the Tribunal has page 490 behind tab 23, you see, sir, at the top of the page at line 4, you said there that -- you raise the question about proper law and so the parties -- Mastercard hadn't proposed that proper law be dealt with and you raised the question:

"Well, shouldn't proper law be dealt with?"

And both Mr Hoskins, who appeared at that hearing for Mastercard, and I, agreed that that would be sensible.

And then at line 17 you ask:

"Won't this hearing involve any factual evidence at all? Is there a point under section 32 which will involve some factual evidence or not?

So I have said:

"I think that can be dealt with by an agreed statement of fact because the question -- I think the question will be what was in the public domain..."

And you say "Yes."

I say:

" ... rather than what could reasonably have been discovered, so I think it's capable of

determination on the basis of an agreed statement of facts and then how the law applies to those facts, so it does come down to legal submissions."

And then Mr Hoskins agrees with that at the top of the next page.

So there was agreement between the parties that there would be an appendix setting out what was in the public domain that was relevant to the question of discoverability under section 32 of the Limitation Act.

MR JUSTICE ROTH: I am slightly puzzled, if I may interrupt you, by that and I think it echoes what was said in the witness statement which no doubt you're about to take us to which was put in by those instructing you for that hearing, because if, as you pointed out, section 32 has these other elements, on what basis could those other elements, namely the deliberate concealment element, be dealt with, simply by looking at what could have been discovered by the class members?

MS DEMETRIOU: So they couldn't have been and they clearly couldn't have been and the assumption under which we were operating was that as in the DSG case, that point would not be live or was not contested by Mastercard. Now, it turns out that that isn't the position.

MR JUSTICE ROTH: That's the whole problem, isn't it?

MS DEMETRIOU: That's the whole problem but the point I seek to make now -- so we were labouring under the assumption which my learned friend says "Well, you had no right to assume that", we will come to that, but we were labouring under the assumption that Mastercard -- Mastercard has never, as far as we know in all of these proceedings, contested the point of deliberate concealment and in DSG, that hearing proceeded on the basis that it didn't matter what they thought about deliberate concealment because --

MR JUSTICE ROTH: Just a moment, Ms Demetriou. Yes, but that was because that was a summary judgment application.

MS DEMETRIOU: Sir, yes, and I'm going to come to it.

MR JUSTICE ROTH: And I think our attention's been drawn to the transcript, where --

MS DEMETRIOU: I'm going to come to the transcript. I'm going to come to that, sir, so Ms Tolaney --

MR JUSTICE ROTH: I don't know what happened, and Mastercard will doubtless know, after the DSG Court of Appeal judgment and someone here will know. It may be the case settled but I don't think there ever was a subsequent hearing on limitation, following the Court of Appeal.

MR COOK: There were pleadings but it settled long before we got to, in subsequent hearings, other substantive issues but, yes, having had the Court of Appeal hearing, we then put a defence in and then there was a reply, I believe, which would have pleaded out the particulars of concealment.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So, sir, yes, I'm not seeking to hoodwink anyone about what happened at DSG, I'm going to come to the transcript, so the other side don't need to worry about that but what we do say is you're absolutely right, sir, that the agreed statement that the parties proposed producing and the Tribunal ordered, could not deal with deliberate concealment and so we were labouring under the assumption, wrongly, that this wouldn't be contested or wasn't contested.

Now, with hindsight, probably what should have happened is that there should have been a rejoinder in this case and that would have all been flushed out before this hearing was ordered. But what we do say is that -- turning back to the transcript, Mr Hoskins says here -- well he agrees with the statement of facts which goes to reasonable discoverability, but what we don't see him saying is, "Well, that's not going to deal with the question of deliberate concealment and we will need some further particulars first from Mr Merricks before that point can be decided."

Nor did he say, "Well, actually, the pleading is deficient, it's defective because they haven't pleaded deliberate concealment and so this whole hearing that we have asked for on section 32 is futile because there is a pleading that is strikeable." So he didn't say either of those two things.

Then if we go behind the next tab, 24, behind page 554, there is a discussion about timetabling of skeleton arguments. You see that at the bottom of the page on 554. And, sir, you suggested at lines 13 to 17, you suggested that Mastercard goes first on limitation, "as you're taking the limitation point."

And then Mr Cook says at the bottom of the page:

"The only point I'd say in relation to limitation is it's not really Mastercard taking the point, in the sense ... the limitation period under English law which is predominantly clear."

What's said against us is then a section 32 point, so it's really the claimant making the running on saying section 32 applies here to remove the ordinary limitation period.

So your answer, sir, is "Well we have the agreed statement of facts", and that was the end of it and, again, Mr Cook didn't say, "Well we need particulars, further particulars on deliberate concealment and how that's not going to be dealt with by the agreed statement of facts", nor did he say, "Well, actually, this whole exercise is futile and a waste of everybody's time because the pleading is deficient and is strikeable now."

Instead, all of the parties and indeed the Tribunal, proceeded on the basis that the section 32 issue could be determined in January and that sufficient provision had been made by way of directions to enable that to happen. And then what happened is that the parties cooperated in producing the agreed statement of facts which was filed on 25 November and there were, as you would expect, several exchanges of drafts before that, before the final agreed appendix with the material in the public domain was filed.

And just two days before that, on 23 November, Mastercard said for the first time that Mr Merricks' pleading didn't separately plead as to the separate elements of section 32. If we pick up bundle A2, behind tab 61 and if we look at page 977, paragraph 15, at the bottom of the page, Mr Merricks' pleadings do not allege any facts or matters that would satisfy any of these three criteria.

And then it says what the criteria are. The only relevant factual material alleged relates to what a reasonable, typical consumer would have recognised. However, that would not establish any of the three criteria for suspending limitation.

Then you see at 21, "It's therefore clear", so that's on page 979 at the top of the page: "It's therefore clear that paragraph 4B of the re-amended reply is not arguable" so saying: well, the whole thing should be struck out.

That's essentially what they're saying.

But, again, they hadn't, at the CMC, applied to strike it out. Instead, what they had done was applied for it to be determined at an early hearing.

Now, if you go to tab 63 --

MR JUSTICE ROTH: Just a second.

MS DEMETRIOU: You see Willkie Farr's response and if --

MR JUSTICE ROTH: Just a moment.

MS DEMETRIOU: So sorry.

(Pause).

MR JUSTICE ROTH: Yes, and you're going to Willkie Farr's response.

MS DEMETRIOU: That starts at 983 behind tab 63 but if you could look at page 985, please. This asks Mastercard to now clarify whether it contests concealment and how that squares with its position in DSG, so that's the question that's being put.

And just turning, just because DSG has been mentioned, turning to DSG --

MR JUSTICE ROTH: Just a minute.

(Pause).

Yes.

MS DEMETRIOU: So just parenthetically, as it were, picking up bundle B3, behind tab 72 which is where DSG is and looking at page 2169.

MR JUSTICE ROTH: Yes. Which paragraph?

MS DEMETRIOU: So paragraph 61. So the defendants did not suggest this was not a case involving deliberate concealment of relevant facts. The focus of the argument between the parties was as to whether there are any facts relevant to claimant's right of action.

MR JUSTICE ROTH: I have them both, Ms Demetriou. Is this the CAT judgment or the Court of Appeal judgment?

MS DEMETRIOU: This is the CAT judgment but the reason I am taking you to the CAT judgment is that the Court of Appeal simply refer back to this and I can dig out the reference to that if that's important.

MR JUSTICE ROTH: No, no, I just wanted to find it, that's all. Paragraph 61.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So what's said there is the focus of argument between the parties is to whether there are any facts relevant to the claimant's right of action which could not, with reasonable diligence, have been discovered by the critical date. It was common ground that if the relevant facts could have been discovered by that date, then the claims would have been barred by limitation.

So that's what the DSG judgment says. I will come back to the transcript, and so I totally -- I'm not seeking to --

So then going back to the correspondence, behind tab 68 this time, we have Freshfields' response of 30 November and then at paragraph 3, they say that there is

no mention of concealment in the reply or of the other necessary elements under section 32 and it's not Mastercard's responsibility to assist Mr Merricks in advancing a sustainable case.

And then if you look at 4, they say that it's unlikely that Mastercard would admit any allegation of deliberate concealment.

Then we have the Willkie Farr response behind tab 71 and if we go to page 1015, what Willkie Farr say there is that Mastercard must now confirm whether it will contest concealment and they say that if Mastercard confirms that it does intend to contest concealment, then it accepts it can't be dealt with at the January hearing but says that the January hearing can determine the remaining issues, including discoverability.

Now, pausing there, and without seeking to attach any blame to anyone at the moment, had this issue been identified back in September, so had it been identified before the CMC, then it's highly unlikely that the hearing would have been set for January because if Mastercard were contesting deliberate concealment, then disclosure from Mastercard would have been required.

So it's the fact that this point was under the radar, as it were, and was not alighted on by anyone that meant that the hearing itself -- that determined the early date of the hearing.

And Willkie Farr say here "Well if you are intending to contest concealment, then we will amend the pleadings." We recognised that we needed to give further particulars of the allegation that the Limitation Act was suspended.

Then if we go to tab 75 we have Freshfields' reply of 9 December and paragraph 2 says that no case has been particularised or pleaded alleging that Mastercard deliberately concealed any facts. And we say "Well, actually, section 32 has been pleaded, the suspension, and that obviously means the constituent elements have to be met but it's correct that no case has been particularised."

And then paragraph 3, that -- so it says that -- that's more of the same, really, so it's the pleading didn't make any allegation of deliberate concealment. Well, we say that it was obvious that Mr Merricks would have to prove that all the constituent elements of section 32 were met, insofar as these were contested by Mastercard.

MR JUSTICE ROTH: Didn't it appear, because normally you would plead the elements of section 32 you rely on. Indeed, there's some reference to a case saying you need to. You don't just plead a statutory section; you plead core facts you rely on to satisfy the elements of it. The pleading itself was on the assumption that Mastercard would take the same position as in DSG.

MS DEMETRIOU: I'm not sure that we can read that into the pleading itself. I think that the pleading itself purported to plead suspension of the limitation period under section 32. I can't recall now, as a matter of fact, whether or not the reason -- so it is an unparticularised -- it suffers from lack of particularisation.

MR JUSTICE ROTH: It's an inadequate pleading of section 32. Indeed, you show in your skeleton, Mastercard, on the basis of what they now say, could have sought to strike it out, so maybe it could have been corrected but it wasn't pleading the necessary elements of the section, just to plead a section and not, albeit in brief terms, how it sought to rely on it. It's not even clear from the pleading whether it's fraud or mistake or deliberate concealment. It's not adequate and take it from what Mastercard say, as you know, "We operated on their assumption." Your assumption was that they were taking the position of DSG. Their assumption was that you considered that all that needs to be shown is, in this case, discoverability.

MS DEMETRIOU: Sir, that's, with respect, an incoherent submission because section 32 says what it says and we all know what it says. So the idea -- Mastercard hasn't pointed to any basis on which we could conceivably have thought that section 32 is enough just to rely on discoverability. They haven't explained how that

could have arisen and nobody ever thought that section 32 can be fulfilled just on the basis of reasonable discoverability.

I think that where things have gone wrong is because of what happened in DSG and we totally take on the chin that the pleading, although we have put section 32 in issue, that it's not adequately particularised.

But what we say should have happened is that Mastercard -- it was Mastercard's application, sir, for the section 32 issue to be determined. It really wasn't reasonable for them, if they had at that point thought that this pleading is defective, it wasn't reasonable of them to proceed on the basis that there should be a determination of it in January and for everyone to do a lot of work putting together an appendix and skeleton arguments and preparing for the hearing, in circumstances where the proper course would have been either, at that point, to say "Well you've got this wrong because your pleading is defective because you haven't specified which of 1 A, B and C applies and what the particulars are."

Or it could have said, "The pleading is defective and we're applying for it to be struck out."

What it did instead was proceeded on the basis, sought a preliminary issue on the basis of an agreed statement of facts and so we say that, obviously, something has gone wrong. I'm not seeking to resile from that or persuade you that it hasn't, but we say that there was quite possibly a mutual error, not as to the constituent elements of section 32, everybody knows what those are, but a mutual error probably, from our part at least, as to Mastercard's position on DSG.

And that then had an impact on what the Tribunal determined. But what we say can't be right, it can't be right that Mastercard knew about this at the time, didn't raise it because, obviously, if it had raised it in September, we would have said, "Oh yes, all right, let's come back with some further particulars", and the problem would have been

resolved at that early stage. What it can't do is sit on the point and then just before coming up to the hearing, say, "Well this hearing has been set now and we're so close to it that your amendments are far too late and you can't run the section 32 point at all."

And we say that would be manifestly unfair.

So, sir, turning to Mastercard's arguments, it does not oppose, and this is important, it does not oppose the application on the grounds of arguability, so it accepts that the amendments, the draft amendments, are reasonably arguable. The basis on which it opposes the application to amend is, in Mastercard's submission, a very late amendment and if we look at Mastercard's response to our application to amend, going back to bundle A1, tab 7 and if we could turn to page 105, as the Tribunal has seen, Mastercard rely, at paragraph 24 and following, on page 105, on the Quah line of authorities. And as Mastercard says -- and there is no dispute about what Quah says. So these cases identify a category of very late amendments and what that means are amendments made when the trial date has been set and where permitting the amendments would mean that the trial date is lost.

And courts, in those circumstances, strike a balance between injustice to the applicant, if the amendment is refused and injustice to the opposing party and to litigants in general, if the amendment is permitted. And, of course, the significance of litigants in general is that when the trial date is vacated, other court users are disadvantaged.

And in the case of very late amendments, a heavy burden lies on the party seeking the amendment. So it's not the general position that if it can be compensated for in costs, then the amendment will be allowed.

Now, we make the following submissions. So we say first, this case, we're not within the category of very late amendments identified by this line of case law and this is essentially for two reasons. The first is that these amendments are not very late within

the meaning of the cases because no trial has been listed. On the contrary, we're at a very early stage of these proceedings, having had the first CMC in September.

Now, Quah was, of course, a case --

MR JUSTICE ROTH: Can I stop you. You say no trial listed. This is the trial.

MS DEMETRIOU: I'm going to come to that, sir. I will come to that point because they make that point.

MR JUSTICE ROTH: But whether they make it or not, this is the trial. It's a preliminary issue, it's not an interim interlocutory hearing.

MS DEMETRIOU: Sir, that's correct.

MR JUSTICE ROTH: It's part of the trial.

MS DEMETRIOU: That's correct.

MR JUSTICE ROTH: So I find it hard to see that it's not a late amendment.

MS DEMETRIOU: So, sir, I'm going to come to that point.

MR JUSTICE ROTH: Quah doesn't say late amendments must never be permitted, it says there is a heavy burden but to say that it's not a late amendment, personally I find a bit difficult.

MS DEMETRIOU: Sir, let me grapple with that point, of course, because as you have said, this is a preliminary issue to determine the point. So one then says, "Well this is the relevant trial." I understand that point.

But our answer to that is that this trial was fixed for January, as I have shown you, on the basis of what I assume was a common understanding, that the section 32 issue could be determined in January. So both parties were proceeding on the basis that the section 32 issue could be determined in January.

Now, had Mastercard known then that it needed further information on paragraph 4B of our reply before the section 32 issue could be determined, then we say it could and should have sought that information at the time it made the application for the

preliminary issue and had it done -- equally, I have made the point already, had Mastercard thought that the pleading, as it says now, as it said in correspondence now, had it thought that the pleading was unarguable, in other words strikeable, then it should have said so at the time and the point could have been dealt with.

And had it made those points, then it's highly unlikely that the section 32 issue would have been listed for January because it would all have been flushed out; the issue would have been flushed out at the CMC. Probably what would have happened is that Mastercard would have said, "Well the pleading as it stands is unarguable because of this point about deliberate concealment." We would have said, "All right, we will go away and produce some draft amendments", and there would then have been, presumably, a rejoinder from Mastercard and there would have been a discussion as to how the section 32 issue could properly be dealt with but that isn't what happened and it's Mastercard's application.

So, in effect, what's happening is that Mastercard's argument is a bootstraps argument because it's saying, well, it sat quietly in September and procured a hearing in January which is very early and now it's saying, "Ah, well, the January hearing date is lost." But we say it's lost because in part -- of a function of its own conduct. So for that reason, it's unfair, we say, to say that the January hearing, the fact that the January hearing has been lost which we say -- I'm going to come on to say why it's not lost but we say the focus on the January hearing is unfair because the fact that it was set in January is a function, at least in part, of Mastercard's own conduct.

Now --

MR JUSTICE ROTH: Aren't you really, within what you're saying, looking at Quah which is quoted in Mastercard's response to the application to amend at A105 and A106, really in subparagraph F of Mrs Justice Carr's judgment, you're saying it may be late but there's a good explanation from the way it's arisen. That's really what

you're saying, isn't it?

MS DEMETRIOU: I put the point in two ways, so I do say that, so that's one of the ways I put the point but we also say that we're not squarely within the Quah line of authorities for two reasons. The first is because the trial date really is a function of both parties' assumption that section 32 could be determined without getting into deliberate concealment.

The second point is that the trial date has not been lost. I'm going to come on to that point in a moment. But I just want to take you first to Mastercard's response to what we say about -- so in this document, if we go to paragraph 46, starting on page 112. In fact, if we go to page 113. So what Mastercard say at 46C is they say this. They say:

"Even if Mr Merricks had thought Mastercard would not dispute deliberate concealment, there would still be the critical issue of exactly what facts Mastercard is said deliberately to have concealed, since it's only in relation to such concealed facts that the issue of reasonable discoverability arises. A specific pleaded case would therefore have been required in any event."

Now, just pausing there, what it's saying is that in order to determine even reasonable discoverability, you need a pleaded case on deliberate concealment because otherwise, how are you determining what facts are reasonably discoverable? So that's Mastercard's position.

But then what was it doing when it agreed to produce the appendix containing materials in the public domain? If its position is reasonable discoverability can't be addressed because you need a pleading on deliberate concealment first, what was it doing when it was working to produce that appendix? What it should have said, what it could have said and should have said in September, instead of agreeing to the appendix, it should have said, "Well there's no point in ordering the parties to produce

an appendix of materials because discoverability can't be determined because we don't know what Mr Merricks' case on deliberate concealment is."

Now, then if you look at paragraph 48B of the response at page 115, Mastercard there says first that -- it says that it's absurd to suggest that Mastercard was under an obligation to point out flaws in Mr Merricks' case so he could correct them but we say that misses the point because if Mastercard thought in September that Mr Merricks' pleading was strikeable, then of course it should have said so rather than leading everyone down the garden path towards a PI that could not, on its case, possibly determine the issue.

Equally, if it had thought, as I said, that reasonable discoverability can't be determined until it's been established what's been concealed, then it shouldn't have agreed to produce the joint appendix. So that whole exercise, the whole listing of the preliminary issue, the whole exercise of producing the joint appendix, is, on Mastercard's case, as set out at paragraph 48, totally pointless.

Then Mastercard says that it was entitled to proceed on the basis that Mr Merricks' legal team had satisfied itself that discoverability was enough. And, again, I say, well, that is in respect an incoherent submission because we all know what section 32 says. It requires one of those conditions in 1 A, B and C to be met.

Now, the second reason why we say we're not within the Quah line of cases is because the hearing date has not been lost. On the contrary, this hearing is effective. Quah, sir, you will recall, is a case which had been set down for trial for some time and the whole trial had to be vacated quite close to the time. That's very far from the position here because treating the preliminary issue trial, treating this trial as the trial, this hearing is effective and is able to determine the other applicable law and limitation issues that arise which may well be dispositive of Mastercard's limitation defence.

So in particular, first point, if we're right on the rules issue, then we don't need

section 32, we don't get to that at all.

Further, we say that the discoverability issue is capable of being argued and determined at this hearing which is precisely what happened in DSG. That's exactly the basis on which the parties proceeded.

If we go to the transcript -- that's at bundle D, volume 3, behind tab 21.

MR JUSTICE ROTH: Well, I'm not sure, speaking for myself, that it really would be appropriate to deal with discoverability because first of all, it's not addressed in your skeleton. It's put in an appendix which is effectively a supplementary skeleton for which no permission has been granted. It's not addressed in Mastercard's skeleton because they say section 32 doesn't arise at all on your pleading because the case is bound to fail on section 32.

So speaking for myself, yes, the rule point can proceed. I would have thought section 11 of the Scottish Act is not dependent on this, so that can proceed, but I would have thought to split up section 32 is really unattractive and, as I say, you haven't properly addressed it in your skeleton but you've sought to put in a further skeleton, effectively, by calling it an appendix.

MS DEMETRIOU: Sir, I think it's important to separate out two points. I think that you've expressed the view that it wouldn't be satisfactory to determine the discoverability point at this hearing. One can see arguments for and against that. Obviously, just standing back from the procedural points about skeleton arguments, in DSG it was determined in that way and so as a matter of substance, we say it's capable of being determined.

Now, the procedural points that you raise, sir, in a sense are points of Mastercard's own making because when it filed its skeleton argument, it decided to take the position that none of this is arguable anyway, a position which, as I have said now a number of times, it could have taken in September and it didn't file a skeleton argument on it.

Now, we have filed a skeleton. I know it's called an appendix, I know that permission is required but the reason that we did that is we couldn't fit it within the 25 pages because Mastercard had -- there are a large number of other issues and so we would require permission to adduce it.

Now, the reasons that you've canvassed, sir, for not being in a position to decide it at this hearing, really are largely of Mastercard's own making because if it had put in a skeleton argument on reasonable discoverability, then we would have had a debate and we would probably both ask for permission for more pages and it would have been decided, just as it was in DSG. So we say it would be unfair for Mastercard to rely on the Tribunal's view that it can't be determined at this hearing, in circumstances where it has largely brought that position about.

So all in all, we say this is a million miles away from Quah because this hearing hasn't been lost. It's an effective hearing which may well be determinative of the limitation points.

MR JUSTICE ROTH: Well, the other points, given that clearly, quite a bit of the two days is now spent on the amendment, I suspect we won't have spare time --

MS DEMETRIOU: Sir --

MR JUSTICE ROTH: -- if we proceed to determine -- if we grant your application or refuse it, to deal with the rule 31 point and section 11 of the Scottish Act and then, of course, we have choice of law which isn't affected by any of this.

MS DEMETRIOU: Sir, we think there's time next week. We think that time could be set about next week but I fully understand. I'm not seeking to persuade the Tribunal away from the practical view that you've expressed.

Now, sir, looking at the other points that are in issue, whether Quah applies or not and you have our submission that it doesn't, particularly because the trial date hasn't been lost, but we say that it's common ground that the amendments are arguable, that we

say that -- I have made all the points about the, as it were, conduct of Mastercard and the fact that this was a joint error and what Mastercard did. You have those points.

Once the point had crystallised as an issue, Mr Merricks provided the draft amendments as quickly as possible, so there is that correspondence which culminated in December and we have produced the draft amendments as quickly as we could.

We say the prejudice to the class of consumers would be severe if they were deprived of a good defence to Mastercard's limitation argument. They would be denied compensation for loss they have suffered over a number of years, as a result of Mastercard's wrongdoing and that prejudice plainly outweighs any prejudice to Mastercard, for all the reasons that I have given.

Sir, the third point and related point I wish to make relates to the Volvo amendment and I am coming to the end of my submissions and I have shown you what the two substantive points are that emerge from Volvo and the second which you saw at 9D of our amended pleading is that no limitation period can begin to run until the claimants knew or could reasonably be expected to know about various things, including the existence of the infringement. And we say that if we're right on that, there is no requirement to show deliberate concealment.

And so it follows that this Volvo argument is, even on Mastercard's case, squarely within our original pleading because if Mastercard is right that we didn't properly plead section 32 because we omitted to particularise the deliberate concealment element, that doesn't lead -- it's clear on that basis, even on that basis, that the Volvo argument falls squarely within our original pleading, where we pleaded suspension of the limitation period without reference to deliberate concealment because on Volvo, you don't need deliberate concealment, if we're right.

So we would, in any event, be able to advance the legal submission that section 32 should be read subject to Volvo because of the principle of effectiveness. That's really

a legal submission.

MR JUSTICE ROTH: The Volvo, as you doubtless know and certainly Ms Wakefield does, is going to be heard in the umbrella proceedings on a date not yet fixed but some time in the spring.

If that amendment were to be allowed, it seems to me sensible that the Volvo argument in this case should also be heard with the Volvo argument in the other case, so it wouldn't be heard now anyway. No one has addressed it in any detail.

MS DEMETRIOU: No.

MR JUSTICE ROTH: And, indeed, at the CMC in the umbrella proceedings, as Mr Cook will recall, there was discussion of whether Volvo might be raised in Merricks and I think Ms Wakefield said that you're thinking about it.

So it is in a slightly different category, I think, from -- and it doesn't involve any disclosure, either.

MS DEMETRIOU: Sir, no.

MR JUSTICE ROTH: Mr Cook is looking unhappy, but that's my recollection and I am speaking from memory. I may have been mistaken that it was actually canvassed at the CMC in the umbrella proceedings.

MS DEMETRIOU: Sir, you're quite right. I went back to the transcript and I had a look at that. It was canvassed and the implicit assumption was that if Mr Merricks was going to take the case, it should be dealt with all in one go. That would make the most sense.

MR JUSTICE ROTH: Volvo would be dealt with all in one go.

MS DEMETRIOU: Volvo would be dealt with all in one go and the point -- and, sir, we do agree that if the Volvo amendment is allowed -- and in a sense we say, strictly speaking, the amendment is not necessary for Volvo because you have the suspension of the limitation period, that's what we need and then what one is doing is

arguing by way of legal submission that the principle of effectiveness has an impact on that.

Anyway, for the sake of clarity, we have pleaded it out.

Mastercard says we could have pleaded Volvo sooner. Had we done so, it's very likely in any event, so had we pleaded it by the time of the November umbrella hearing for example, it's very likely that that issue would have been wrapped up in the joint hearing, as it were, of the Volvo point and so there is no prejudice whatsoever in allowing the Volvo amendment but that has a knock on consequence for the alleged prejudice that Mastercard says would occur if the deliberate concealment amendments were allowed because it says, "Well this trial will be lost -- will have been lost." That's wrong, for the reasons I have given already, but in any event, it makes much more sense to determine section 32 as a whole, in light of the ruling of the Tribunal in Volvo because if we're right on Volvo, then the materials in the public domain that are in the appendix will need to be viewed through the Volvo prism.

Essentially the point I am making, sir, is that we say this hearing hasn't been lost really because it's deciding lots of things that are capable of being determinative but in any event, there is no prejudice to allowing the Volvo amendment and once that's in, then there is a very good case for deferring section 32 until after that ruling in any event.

MR JUSTICE ROTH: So that rather goes against what you said earlier about saying that we could deal with discoverability under section 32.

MS DEMETRIOU: We're in the Tribunal's --

MR JUSTICE ROTH: Because Volvo affects discoverability in a sense.

MS DEMETRIOU: We're in the Tribunal's hands. We think you could deal with discoverability now but if you're against me on that and you think it should be deferred, well we say there is a good case for deferring it in any event because of the Volvo point, so we're very far from a case in which this trial has been rendered ineffective or

lost. So those are my submissions on the application to amend.

MR JUSTICE ROTH: You know we take a mid-morning break for the benefit of the transcriber, so we will come back at 10 to 12.

(11.38 am)

(A short break)

(11.54 am)

MR JUSTICE ROTH: Ms Demetriou, you did say in your submissions that you will come to the transcript of DSG and I think you might have overlooked that.

MS DEMETRIOU: I did and it's in D3.

MR JUSTICE ROTH: D3?

MS DEMETRIOU: Yes, and behind tab 21 at page --

MR JUSTICE ROTH: What tab?

MS DEMETRIOU: Sorry. 21, sir, 1385 to 1386. Sir, so yes, I wanted to come to the transcript so that you have before you what happened in DSG, which is not perhaps evident from the face of the judgments, but you can see here in an exchange with the Tribunal, Mr Pickford -- so Mr Holmes asks:

" ... What you understand to be the meaning of deliberately conceal and what has been deliberately concealed in this case."

And then Mr Pickford says:

"That point is not actually in issue on this application because the way the defendant is trying to defeat our application is by saying even if something was deliberately concealed, that essentially this means done in the knowledge it was unlikely to be revealed but for our purpose, that's not actually an issue in this application."

So if you read down, you can see the point I apprehend Ms Tolaney was going to make when she jumped up which is this was a strike out and we didn't concede it but that we argued it on the basis that if we're right on deliberate concealment, it doesn't

arise, is correct. That is what, in fact, transpired.

MR JUSTICE ROTH: Yes.

Yes, it wasn't admitted or indeed, it was reserved.

MS DEMETRIOU: I think it was reserved.

MR JUSTICE ROTH: "If I win, then we do get to that. If he wins, we never get to deliberate concealment. If I win, then we do get to that."

MS DEMETRIOU: That's my understanding of this, so it's correct -- I think it would be wrong to say that we understood all of this at the time in September but looking at it all now, what we can't say is: well, Mastercard admitted deliberate concealment. Obviously, we can't say that. I just wanted to show you what the position was.

MR JUSTICE ROTH: Yes, Ms Tolaney.

Submissions by MS TOLANEY

MS TOLANEY: My Lord, first of all, could I make some introductory remarks over what this is about and then I will give you the four key reasons why the application should be dismissed.

So just standing back, what this is about is a claimant who has failed properly to plead their case and has recognised that at the last hour and, remarkably, has obfuscated and blamed the other side, advanced explanations which that transcript demonstrates are not, in fact, sustainable -- Mastercard has never admitted deliberate concealment -- and has done so making an application without reference to the rules or to any of the relevant case law and I will show you the application that was made.

Perhaps even more remarkably, there has been no apology to the Tribunal as to the state of affairs or responsibility taken for where we're at.

I may be old-fashioned, sir, but the pleadings are always considered to be important. Allegations of fraud and serious wrongdoing must be set out. That is in multiple

authorities. One of the chair's authorities, Sel-Imperial most recently. Even litigants in person are held to those standards, let alone highly experienced, sophisticated litigators with funders.

And when a pleading is defective, there are consequences and the rules then need to be followed. And at the heart of my learned friend's submissions was a clear inconsistency because on the one hand it was said that section 32 is really clear; one needs to set out the relevant elements, whether it be concealment, fraud or mistake, and the same is true of section 32.2 with statutory duty. I will show you the authorities on that.

So Ms Demetriou said that it was very clear, but then proceeded on the basis that it was, somehow, not clear to her side she needed to plead the case but it was for Mastercard to have pointed it out. And as you, sir, have pointed out, the suggestion that it was all sufficiently clear was undermined by the position taken in the skeleton that it could have been struck out by Mastercard.

So that is the unedifying context and we say that the application must be dismissed for four reasons.

First of all, there is simply no doubt that the application has been made very late, as defined in the case law and in particular in the Quah case. It is very late because first of all, the trial date, being this hearing, has been fixed.

Secondly, permitting the amendments would cause the trial date of the section 32 issue to be lost. And the fact that subsidiary issues might be able to be determined and the time used to a point, is not the test in the case law. The test in the case law was when was the issue, whether it be with evidence or not, to be determined and is that going to be lost. That's the question and there's no doubt here, even on Ms Demetriou's position, that that would be the case.

Once that is clear, that we are in the territory of very late amendments, which we are,

then it is also clear that a strict set of requirements applies, and the Tribunal's discretion on an application of this nature is not unfettered and it's not governed by a generalised balance of prejudice, as my learned friend's skeleton tried to suggest. It is quite clear from the Quah case that there is then a strict set of requirements.

Can I just show you the relevant passage so that you see it, please. It's at bundle B3.

MR JUSTICE ROTH: Is it the one in your skeleton?

MS TOLANEY: It is. I would just like to show you the full paragraph in 96, please. It's B3, tab 67 at page 2001.

So, sir, you will see it's the judgment of Mrs Justice Carr, as she then was. You can see that at the front at 1979, and the relevant paragraph, if I can show you, is at paragraph 96 and if you could please read it because it's crucial to note that "The merits of the amendment are not relevant to the question", and you see that four lines up from the bottom, "irrespective of the merits of the proposed amendment."

MR JUSTICE ROTH: Yes, although she does somewhat paradoxically go on to say, "but in any event, the merits are not sufficiently compelling."

MS TOLANEY: That is right and she had considered them but the point is these tests apply anyway, in modern litigation.

Just while you have the case open, sir, if you could go back to paragraph 33 on page 1985. I'm not going to take you through the facts of the case but what I will show you is that there is a change in the case at the last hour but to some extent, one sees at paragraph 35, what was introduced were new pleas as to the true construction of express terms and statutory duties and new facts as to what Goldman Sachs were said to have known or believed and you see that at A and D.

Here, by contrast, it is much worse because what Ms Demetriou showed you was a ten page plea, new plea, of serious wrongdoing and deliberate concealment that is being advanced at the last hour. So it's not an introduction of a new cause of action under

the contract, a sort of contractual claim, it's a claim now advanced as serious wrongdoing, with a whole series of new facts that have never been articulated before. So, sir, that's the second point of my four, that a set of strict requirements clearly applies and the consequence of that is there must be good reason for the delay, in order for the court to entertain the application to amend.

And if there is no good reason and the amendment would result in disruption or prejudice, the application should be refused.

Now, it's clear from this that the burden is firmly on the applicant to show what the good reason was and so far, what has been put forward is that even though the pleading requirements of section 32 are said to be clear, it has been said that there was some misapprehension on the basis of DSG. But you have seen the transcripts, I will come back to it, there is no basis for the claimant, and it's the same claimant, to be able to say that they genuinely thought Mastercard would accept deliberate concealment.

But even if it were the case that they did, it doesn't get round the fundamental flaw which is that you are required to plead the pleading in any event, and I will come back to that. Because in order for a party to admit deliberate concealment, one has to know what facts and what it says had to be concealed. So the misapprehension it is said may or may not, and that seems to be as high as it's put orally, wouldn't amount to a good reason, even if correct.

And the second argument that seems to be being advanced is that somehow it was incumbent on Mastercard to tell the claimant what to plead and again --

MR JUSTICE ROTH: I don't think that's what's being framed.

MS TOLANEY: It is being said we should have asked for particulars, sir.

MR JUSTICE ROTH: It's been said that in putting forward seeking the preliminary issue, you should have made a point that there is deliberate concealment which has

not been alleged and, frankly, much of the work was pointless.

MS TOLANEY: My Lord, the answer to that is very clearly, number 1, it's an adversarial system. Number 2, the pleading requirements are clear and number 3, it was not for Mastercard to be telling claimants what they may or may not be arguing, in circumstances where they had made their own points as to the nature of the preliminary issue. And I will come on to show you --

MR JUSTICE ROTH: It is for the parties in this Tribunal to cooperate on identifying the issue.

MS TOLANEY: Of course it is but can I show you what was said, because it's really important, sir, when you see how it was presented, to note that my learned friend didn't show you the full chronology and I will show it to you, but the key point is this: my learned friend accepted that the burden is on the party alleging deliberate concealment. So now seeking a late amendment, that has to be borne in mind. Even if it's suggested that it might have been helpful if the other party had pointed out defects in the pleading, that's not the way amendment applications work. The question is, was it good enough to have relied on a defective pleading up until December 16th?

MR JUSTICE ROTH: It becomes a late amendment because this preliminary issue was fixed for January and that's why it becomes --

MS TOLANEY: Indeed.

MR JUSTICE ROTH: So this question of why this preliminary issue was fixed for January is also relevant.

MS TOLANEY: Indeed, and I'm going to show that to you but what we say for the third point is that in light of the test, Mr Merricks has not and cannot come close to demonstrating a good reason.

And then finally, there is no doubt the amendments cause real disruption and prejudice, so those are the four key points.

Now, can I show you the chronology because you have seen from my learned friend's chronology the defence that raised the limitation defence and then you have seen the reply -- if I can just show you that again at bundle A1, tab 13, page 298.

If you go to paragraph 4, what we see is that it's pleaded that the 2015 rules in subparagraph A deprive Mastercard of any accrued limitation defence and then subparagraph B, there is a plea under section 32 and the only point that seems to be taken is that the reasonable, typical consumer would not have recognised that they had a claim. And, obviously, Scottish law points are also taken.

You were then shown Mr Sansom's first statement which is dated 5 September which said -- and just to remind you, it was at tab 21 and what it said was based on the review of the pleadings, it looked like limitation was an issue that could be determined as a preliminary issue.

Now, it was presented in my learned friend's submissions as saying Mastercard pressed for the January listing, but what you were not shown was, first of all, the statement at tab 22 of this bundle and this is a statement of Mr Merricks' solicitor.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And this is in response to Mr Sansom's statement and what you see at paragraph 9 on page 408 is a pressing for the limitation issue to be heard now. So what is said is:

"Whilst Mastercard's trial proposal refers to preliminary issues, in fact many of the issues it identifies will require substantial disclosure and evidence."

And it's suggested that Mastercard's proposal is that the issues be heard in a year's time:

"Mastercard gives no explanation why resolution of two pure legal issues, the limitation issue and the exemptibility application, should be delayed."

And then paragraph 10:

"The limitation issue and exemptibility application are pure questions of law which do not require substantive factual or expert evidence."

Now, we will come back to that but what's very clear is that if deliberate concealment was being advanced, one sees the facts, it was never a question of pure law and what's clear is that what was on the pleadings was the 2015 issue and potentially some argument as to the reasonable consumer test.

And if we go, please, to D3 --

MR JUSTICE ROTH: I didn't quite catch that. What was on the pleadings was the --

MS TOLANEY: 2015 issue, the 2015 rules.

MR JUSTICE ROTH: The rules.

MS TOLANEY: The question of law and the pleaded test of was it sufficient that a reasonable -- when a reasonable consumer knew.

MR JUSTICE ROTH: Well, section 32 as pleaded.

MS TOLANEY: As pleaded.

MR JUSTICE ROTH: But section 32 was --

MS TOLANEY: That is right.

MR JUSTICE ROTH: -- was the issue, yes.

MS TOLANEY: But it was characterised and pleaded without reference to setting out any deliberate concealment or breach of statutory duty and that's why it was characterised by Mr Merricks as pure law.

And, again, just so the Tribunal has it, sir, it was said in Mr Merricks' skeleton argument for the CMC that limitation raised a short point of law and could be heard in two days and it was pressed that this must be heard expeditiously, and so it was Mr Merricks' pressing for this January hearing.

MR JUSTICE ROTH: Yes.

MS TOLANEY: At the September CMC the purpose of the order was to resolve

limitation at the earliest possible stage and if I could just remind you -- the order is at tab 15 of the bundle. What you will, of course, remember and you see this from page 345, is that the order was made as part of a broader scheme of directions for trial of other preliminary issues which the Tribunal made to facilitate the efficient resolution of these very complex proceedings.

What we see at paragraph 17 to 18 are later preliminary issues, so it was always structured that limitation would come first in January. And that all made good sense because it could have a knock-on effect on other issues.

And so you will remember, sir, the orders were made in 9, 17 and 18 of the order and the key point is that limitation was to be determined in advance of more factually complex issues being heard later this year and, clearly, whether or not claims are time-barred will have an important bearing on the scope of the dispute going forward which is why it was structured for now.

In addition, the Tribunal also set down a timetable for amendments to the pleadings to address run-off amendments and as part of those amendments, Mr Merricks amended his limitation case under Northern Irish law and that was done in November 2022, 11 November 2022.

So Mr Merricks did look at his pleading and consider it and amend it in November 2022.

The parties then prepared the joint memorandum and on 15 November, Mr Merricks provided comments on the joint memorandum and this accepted that there were specific conditions for the postponement of limitation under section 32(1) and that, if I can just show you, is in bundle A2 at tab 49.

What you see is the header of 15 November, including the amendments from Mr Merricks to the joint memo. If one goes to page 944, that's where the document starts. Sorry, sir, it's A2, tab 39.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And this was the first time that it was apparent that Mr Merricks was accepting that it was not just a question of reasonable discoverability in this document and two days later --

MR JUSTICE ROTH: You say apparent that he was accepting --

MS TOLANEY: This was the joint memorandum.

MR JUSTICE ROTH: Yes, I understand what it is but accepting it's not just -- and are you saying that Mastercard thought that Mr Merricks' legal team believed that that's all you have to do for section 32?

MS TOLANEY: Well, that's the case that appeared to be being advanced, sir.

MR JUSTICE ROTH: Yes, but that's not the question I asked you. Is it really the case that the lawyers for Mastercard believed that Merricks' lawyers were under such a massive misunderstanding of section 32?

MS TOLANEY: Sir, all I can say because, obviously, I was not a part of -- I can't speak for Mastercard, I am fairly new counsel on this but what I can say to you is that Mastercard understood that there were preliminary issues of the pleaded case, that Mr Merricks has very experienced, sophisticated lawyers who had put in what is fair to say, certainly when I looked at it, but that's some time later, a defective pleading, but that the case that was being run was that 31.4 was in issue and the 2015 rules and that was the end of the case or that there was a point being taken as pleaded on what a reasonable consumer needed to know.

MR JUSTICE ROTH: That's the section 32?

MS TOLANEY: That's the section 32 point.

MR JUSTICE ROTH: Section 32 was being taken --

MS TOLANEY: Yes.

MR JUSTICE ROTH: -- and it was being taken on the basis that that's all you have to

show.

MS TOLANEY: Yes, well that's what was pleaded. They amended the case --

MR JUSTICE ROTH: And that, you say, is the reasonable understanding, never mind what actually was understood, the reasonable understanding of the case?

MS TOLANEY: I have said, sir, given who we were against, two KCs and --

MR JUSTICE ROTH: Doesn't that mean you would expect them to appreciate the obvious meaning of section 32?

MS TOLANEY: Well, sir, if they had, I would have also expected them to know and I will show you the case law, that they needed to plead it. It's not for Mastercard to be setting out to another party, to say which facts -- "Are you saying we made a mistake, fraud or deliberately concealed and which facts?"

MR JUSTICE ROTH: Well, you do sometimes ask for further information --

MS TOLANEY: People do.

MR JUSTICE ROTH: -- precisely for that reason.

MS TOLANEY: Can I show you, sir, before we get too heavily engaged on the burden being shifted to the opposite party because that would be a remarkable transition from the CPR. One has to see first of all, that it is common ground that the burden is on the claimant to plead a proper case and to advance their case, and secondly, that there is binding case law as to what that has to involve. So that is why, if now they are being permitted to amend their pleading at this stage, they would have to be given permission to plead the proper case.

So one has to start with that context and then, sir, it would be -- I think your question then is: notwithstanding all of that, should Mastercard have done something different earlier?

MR JUSTICE ROTH: Well, the parties were to identify and cooperate on what issues again arise. You say there is an issue in section 32, that there is a wholly defective

pleading and that deliberate concealment is strongly contested and, therefore, one can't resolve it in a short hearing, as indeed, Ms Demetriou then accepts.

MS TOLANEY: Not, sir, if the facts are going to be pleaded out in the way they have in ten pages. It's fair to say that Mastercard was entitled to think that maybe some other route was being taken but this is the point at which it is engaged upon in November and can I just show you this. What happens is that immediately upon receipt, immediately, so we're in November at this point --

MR JUSTICE ROTH: Yes.

MS TOLANEY: -- Mr Merricks amends his pleading on 11 November. The joint memo comes back on 15 November. Then if we go to tab 51, we then see two days later, 17 November, a long letter from -- longish letter from Freshfields querying aspects of the joint memorandum and in particular, if one reads 4, 5 and 6, please, on page 959 and 960.

(Pause).

MR JUSTICE ROTH: Yes.

MS TOLANEY: And also if you look at paragraph 7, you see that Volvo is raised by my instructing solicitors at paragraph 7 and paragraph 8.

MR JUSTICE ROTH: Yes.

MS TOLANEY: Now, no response was received to that letter and those instructing me wrote again on 23 November, pressing for clarification and that's at tab 62 -- not 62; 60, I think.

MR JUSTICE ROTH: Yes, that's when you say paragraph 4B is not argued.

MS TOLANEY: And then on 24 November -- and, sorry, if you go to paragraph 61, paragraph 4B and paragraph 13 as well, through to 15 and over the page as well. So if I could just invite you, please, to read paragraph 13 onwards.

(Pause) Just pausing there, sir, what's happened is you have seen that it's been said

it's a short point of law. On 11 November there is an amendment to the pleadings, so the pleadings have come back into focus.

On 15 November, comments are provided but don't identify the point of law --

MR JUSTICE ROTH: It was agreed by your counsel, not you personally of course --

MS TOLANEY: Yes.

MR JUSTICE ROTH: -- but them at the CMC, that this involved a short point of law.

MS TOLANEY: Well it did, on the 2015 rules.

MR JUSTICE ROTH: No, the limitation defence. The preliminary issue was the limitation defence, both the rules and section 32, and that was agreed to involve -- and now Freshfields are saying: what is your point of law?

MS TOLANEY: The reason, sir, that they are asking and, sir, with respect, Mastercard were just being criticised for not pointing out the defects in the pleading and here, what you see is immediately upon receipt of an inconsistent acceptance of section 32(1)(b), needing to set out one of concealment, fraud or mistake. Immediately upon receipt of that acceptance, you see Mastercard's team writing exactly as you're anticipating, to say, "Well hang on a minute, hang on a minute, what's the point of law because you're accepting that you have to show mistake, fraud or concealment." We don't get a response to that letter.

We then chase again a week later, setting out in some detail the provisions of the Limitation Act and saying, "You have to plead it and your position has been that it would all turn on a point of law."

Paragraph 19:

"Any allegation of fraud, deliberate concealment, mistake, commission of a wrong would raise questions of fact, so what are you saying?"

Now, that's not an unreasonable stance and it's surprising that no response had been given, given where we were at this point. What's then happened and it is important,

sir, to just look at the chronology, what then happens is that by a letter of 24 November, the next day, and this is at tab 63 of the bundle, we are told the pleading is adequate. Sir, this is page 983.

You see at the bottom of the page and it's tab 63:

"Your 17th November letter asked Mr Merricks to identify the short point of law raised. Mr Merricks is surprised by this question since the issue has been pleaded out by both parties."

And it said first of all, there is a short point of legal construction, the rules, and then in the alternative, you see in the bottom paragraph on page 984:

"As to this, Mr Merricks will say this is fact and context sensitive."

And then it said Mastercard should have taken issue but it's suggested that it's properly pleaded.

A week later --

MR JUSTICE ROTH: Just a moment. Let me just read it.

(Pause).

MS TOLANEY: What you see, sir, is the paragraphs here have the element of what might have been the point of law that was being argued which is that consumers couldn't have been expected to know and it wasn't clear whether that was the point of law and still isn't entirely, that it was being advanced, rather than a full on section 32 case. Where here, it is now being suggested that there is a full on section 32 case and it's being said if it's -- "assuming concealment is properly raised on the pleadings, whether in their present form."

Just pausing there, it seems to be common ground that it can't possibly have been properly raised or assuming an amendment and the DSG position is cited.

So at this point they're still suggesting that it's properly raised on the pleadings in their present form and it clearly isn't, and trying to say that it's DSG.

And one week later, we go to tab 71, and this is on 2 December, it's now suggested that there needed to be an amendment and this is at page 1013 and it's over the page, page 1014, second paragraph, "As stated".

And it's being suggested that it's for Mastercard to suggest whether it's contesting concealment, even though the facts have not been set out. But it's clear at this stage and it plainly was clear even, we suggest, much earlier, but certainly by 24 November and 2 December, that a new pleading was required.

And no draft amendments were then provided, notwithstanding the urgency. Instead, Mr Merricks waited until Mastercard had served its skeleton and the covering letter enclosing the amendments referred to Mastercard's skeleton on 16 December, when the amendments were then served.

MS DEMETRIOU: Sorry, can I just clarify because we have now gone round the houses on this a few times and what Mastercard -- what its legal team are continuously doing is throwing out an allegation that we have deliberately sat on these amendments until the skeleton argument was served and Ms Tolaney has repeated it again but we do find that very concerning if that's the allegation. It's simply not true and we have responded to it.

MS TOLANEY: I'm not making that allegation.

MR JUSTICE ROTH: On 2 December, they say they're going to seek to amend and then the amendments are served two weeks later and given the nature of the amendments, once they have decided that they should seek to amend to take -- for a fortnight, is not unreasonable, it seems to me, for an amendment of this kind because they haven't addressed their mind to it before. Indeed, you complain about that. So that's the reality.

But whether you say they should have done it in a week or three days or 24 hours, I'm not attracted by the idea that they were deliberately, after 2 December, dragging

their feet to let you serve their skeleton.

MS TOLANEY: I'm not suggesting that, what I am saying is --

MR JUSTICE ROTH: Right --

MS TOLANEY: -- they did wait before serving it --

MR JUSTICE ROTH: "Wait". That suggests deliberately withholding.

MS TOLANEY: Well, sir, with respect, it was incumbent -- as I understand it, there is a counsel availability issue that has been relied on but when I say "wait", a letter could absolutely have come back in under two weeks, saying: these are the facts that we suggest were deliberately concealed at a very minimum, let's say, this is the outline --

MR JUSTICE ROTH: Ms Tolaney, it wouldn't have made any difference. Once that's going to be sought, it's quite clear there wouldn't be time, even if it were practicable, to deal with that issue in this hearing because for a start it needs disclosure, you need time to respond to it, so whether they had done it in one day, three days, seven days or 14 days makes no difference and I don't think --

MS TOLANEY: That may be the case.

MR JUSTICE ROTH: -- it gets us anywhere.

MS TOLANEY: That may be the case, sir, I accept that --

MR JUSTICE ROTH: As I say, what happened after 2 December -- I mean, by that point, either it seems to me you've made your point, it's all too late or they say they have a good excuse and those extra 14 days are not going to make any difference.

MS TOLANEY: Sir, I accept that but what I have simply shown you was the full chronology that you were not shown and what you were not shown by Ms Demetriou were what her side had said and done and it was important that you saw it.

MR JUSTICE ROTH: Yes.

MS TOLANEY: Can I then turn to the application and the fact that it's very late. The first point we made was when making the application, it was incumbent on the

applicant to adhere to the case law and to try and address it which it didn't. In its submissions, written, not a single authority on the approach to the amendment of pleadings or allowing late amendments was cited.

And there is extensive jurisdiction; there has to be good explanation and there does have to be an eye to the consequences.

Sir, I have already addressed you as to why we say the trial date was fixed and as to why it would be lost, because this was the trial of the section 32 issue and there's no doubt it will be lost.

In that sense and it matters, the sense in which it's used in the authorities, it is actually a late amendment; a very late amendment. And the principles, as we have cited in our skeleton, are the ones in the Quah case and the balancing exercise is one of injustice, not prejudice because refusing permission to amend will often prevent an applicant running a valuable claim but that is not unjust if it's the result of the applicant's own position and conduct. And as you know, sir, paragraph 38(b) of Quah, a heavy burden rests on the parties seeking a very late amendment and they're not just simply permitted as a matter of practice. Gone are the days when it's just a question of prejudice.

And the key which we say has not been provided here, is that there has to be a good explanation and the good explanation isn't, we would submit and I will come on to develop this, blaming the other adversarial party. The good explanation has to look at when pleading a case, was it always incumbent to plead a proper case and has there been very clear evidence, which I suggest there has not. You asked me, sir, what Mastercard knew or thought. There has not been very clear evidence as to what Mr Merricks' side knew or thought when they did not plead the case and, indeed, their counsel has accepted that section 32 requires a proper pleading.

So even if they had made assumptions about DSG, that doesn't answer why

section 32 wasn't pleaded, if they intended to run a section 32 case in its entirety. And all of that applies, as I know you will know, to CAT proceedings and, indeed, that's clear from the guide to the CAT proceedings.

So can I just, then, cover briefly first of all, whether there is a good explanation for the delay, the first requirement. And it's important to have in mind what the requirements are for pleading a deliberate concealment case, when you come to consider this. These are set out in Mastercard's written skeleton at paragraphs 39 to 41.

MR JUSTICE ROTH: Yes, you quoted an unreported judgment of a case which no doubt, through the good efforts of Mr Cook, came to your attention.

MS TOLANEY: Indeed.

MR JUSTICE ROTH: At paragraph 31 of your skeleton argument.

MS TOLANEY: That is right and if you look at paragraph 39, please, sir, that's at page A/110; bundle A/110. Now, it's common ground and this is in the joint memorandum, that a claimant bears the burden of showing that a claim has been brought within the prescribed limitation period and that any allegation of deliberate concealment and so on has to be clearly pleaded.

It's also clear that any allegation of conscious wrongdoing under the CPR now has to be, in fairness to party accused, properly particularised and, sir, you will be familiar with the whole host of cases we cite, including one of your cases, Sel-Imperial v The British Standards Institution.

But there are numerous cases in which, including the Three Rivers case, in which it’s said and that's just so you have the note -- it's bundle D2, tab 15, at paragraphs 55 to 56 -- where it's intended that there be an allegation that fraud has been committed, a party must allege and prove it and it has to be properly pleaded.

The same applies to any other allegation of serious wrongdoing which would include concealment and that is apparent from the Lakatamia Shipping case and the

judgments of Mr Justice Bryan at paragraph 40, bundle B2, tab 16. And you, sir, found in the Sel-Imperial judgment the need for proper pleading of infringement of competition law.

MR JUSTICE ROTH: Yes, I'm not sure Sel-Imperial helps you very much because the infringement of competition law is pleaded, because that's the decision. It's the concealment.

MS TOLANEY: Indeed, what we say, it is a fortiori in a competition case where there is deliberate concealment.

Put another way, there is no suggestion that different standards to that of the High Court or the Court of Appeal apply to competition cases; the contrary is true.

So it's clear that if a party wishes to allege deliberate concealment, it must do so by reference to the requirements of section 32 of the Act, setting out which fact or facts are said to have been deliberately concealed and you have seen the quotation and it's in our response at subparagraph E on page A/111.

Mr Justice Hamblen, as he then was, could not have set it out more clearly in the Morrison Supermarkets case as to the reliance on section 32.2 and bear in mind the pleading of Mr Merricks didn't even specify whether it was 32.1 or 32.2 and it didn't specify fraud, mistake or concealment and it's quite clear what would have needed to have been pleaded to advance that.

Now, Mr Merricks' explanation, we say, is quite hard to follow and in itself that means there is no good reason because none has been advanced.

First of all, Mr Merricks says he was operating under an understanding or assumption that Mastercard did not contest deliberate concealment and, secondly, it said that Mastercard only wrote to inform Mr Merricks that his pleading was inadequate in November and the amendments have therefore been made promptly.

Now, it was said by Ms Demetriou on her feet that Mastercard had, I thought she said,

had never contested deliberate concealment, but that's just not correct. The Morrison case, I showed you the extract from Mr Justice Hamblen, that came about because Mastercard was contesting deliberate concealment and you have seen and we will briefly look at if we need to again, the DSG transcript, where Mr Pickford said in terms he understood that Mastercard did not accept deliberate concealment.

So that submission does not stack up.

But in any case, it's very hard to accept the explanation, when you consider what the consequences would have been for this hearing because the suggestion Mr Merricks was taking that approach means that he intended to come to the hearing and invite the Tribunal to proceed on the basis of multiple unpleaded factual allegations of deliberate wrongdoing, find there had been deliberate concealment without having ever raised the point before and it would be surprising if the Tribunal would have been content with that approach.

Secondly, it doesn't make sense anyway because Mastercard would always have needed to see what was being alleged and we have seen ten pages, and as no case was alleged, there was no pleading for Mastercard to respond to it. So what we say is it was incumbent, if they were going to try and allege that sort of detailed case, to put it forward.

Now DSG, I don't know how far it's really pursued now, in light of the transcript, that that really was the basis upon which it was assumed Mastercard didn't contest deliberate concealment but assuming it is, one can see from the transcript it's not a sustainable point. It wasn't checked with Mastercard at any time and the correspondence tone is quite surprising because instead of saying, "We have obviously been operating under a misapprehension here, we understood you weren't doing that", there was aggression after aggression from Mr Merricks' solicitors, seeking to blame Mastercard for not appreciating an assumption that isn't sustainable

on the face of the transcript of the hearing.

And the other problem is that Mr Merricks has had a very long time in which to familiarise himself with Mastercard's limitation defence, because it was provided to him back in January 2017. So his case must be that he proceeded silently on the basis of that assumption for a period of five years.

His assumption is also undermined and this is why I'm saying it's hard to follow, because I showed you a letter in which it seemed to be being said that on 24 November, that the case was pleaded. That was the first reaction. The case is pleaded, so it wasn't said we didn't need to; it was then adjusted in a letter of 2 December.

The second argument, that it's somehow Mastercard's fault, we say if the Tribunal were to find that, that would change all of the dynamic on all cases of pleading and the fact that there is a preliminary issue has been ordered can't alter the burden of whose responsibility it is to plead a proper case and a limitation case. The case law is very clear as to that burden.

And it's factually inaccurate in any case to state that Mastercard's correspondence claimed Mr Merricks' pleading of deliberate concealment was inadequate. So what's said by Mr Merricks is, "Oh, you didn't tell us it was inadequate before mid November." Well we didn't say that, what we said was there is no pleading of deliberate concealment. We didn't get a response to the letter, the original letter and then we set it out in detail and we were then told it was pleaded and once it was clear that they were advancing this different case that was not on the face of the pleading, we were the party that set out what needed to be pleaded and how it should be done and we then didn't get a response to that for a week and then we didn't get the pleading for three weeks.

Now, it may be said that's not a large amount of time but we were preparing for this

hearing.

But in any case, it can't be the responsibility of the adverse party to point out the various different options as to what could be pleaded and I have shown you the correspondence of 24 November showed that there may have been a legal point being taken on whether consumers had a different standard of when knowledge was required from --

MR JUSTICE ROTH: That's a separate point. That arises on discoverability.

MS TOLANEY: That is right but that's the only --

MR JUSTICE ROTH: That's the second point. You say that we don't even get to that because we have to have deliberate concealment first.

MS TOLANEY: That is right but that appeared to be being run into the section 32 case in the way it's pleaded and that could have been the point of law.

MR JUSTICE ROTH: That's a point of law but it couldn't be the whole point of law because there's this other point.

MS TOLANEY: But, sir, if you're going to suggest that somehow Mastercard is responsible and, therefore, permission should be given, that will be saying that every opposing party, even where you have highly sophisticated opponents, should take it on themselves to enquire what deliberate wrongdoing they are being accused of.

MR JUSTICE ROTH: No, of course we're not saying that, Ms Tolaney. This came about -- we're in this situation which is a very unhappy situation because the parties agreed in September that the limitation defence which comprises, as you say, a rule 31 point, it comprises section 32 and it also comprises -- as we now know, provisions of a Scottish statute involves points of law and facts that can be set out in an agreed memorandum and that's all -- those were the issues that we had to grapple with and that was accepted on both sides back in September and if it hadn't been accepted, we would not have this trial set for today or at least it wouldn't cover all the things that it's

been set to cover and that was on the basis that those --

And then you go ahead and cooperate on producing a detailed statement of facts of what was in the public domain on discoverability. Now your position is: well, we needn't bother to read that, it's irrelevant, because they don't get past first base.

MS TOLANEY: Indeed --

MR JUSTICE ROTH: So what was the point of going along with that exercise when your case is that it fails completely and there is no point having a preliminary issue on discoverability?

MS TOLANEY: Well, sir, it seems to me that first of all, it clearly wasn't clear what the case was that was being advanced by Ms Demetriou's team, other than the rules point. It's clear that that's why those instructing me, as soon as they received an acceptance on 15 November, that to run a section 32 case, there had to be one of concealment, fraud or mistake. That's immediately why there was then a query raised: well, if you say that, which one -- essentially, what are you saying is the point of law then?

MR JUSTICE ROTH: But if it wasn't clear, then that should have been clarified before the hearing in September.

MS TOLANEY: Well, sir --

MR JUSTICE ROTH: Both parties should have done that.

MS TOLANEY: That may be right but from our perspective, the points that have not been answered and at the moment, the test is for Ms Demetriou's clients to explain the good explanation and you have to look at what explanation has been offered and the points that have not been answered are, 1, what were the points of law that they assumed that they were arguing when they pressed? And it was they who pressed that this happen now, not at the end of the year.

Number 2, when they say they made assumptions about DSG and the fact that it said that we wouldn't contest discoverability, how --

MR JUSTICE ROTH: Contest concealment.

MS TOLANEY: Concealment, contest concealment -- sorry, sir, thank you -- how could they say that, in light of the history where Mastercard had always contested concealment and never accepted it and the transcript makes that plain.

And, thirdly, if they say, as they do, that they accept that section 32 places the burden on the claimant to set out its case and that's common ground, what then were they doing when they said their case was properly pleaded on 24 November? Why was there no response to the first letter of 15 November and why is it being suggested that it could ever have been appropriate to plead a section 32 case without setting out the particulars, in light of binding case law?

Now, sir, you may say: well Mastercard obviously should have put its hand up, if that's the perspective of the Tribunal, but what you can see is we did, and we didn't get an answer, and there has been a delay. But we did --

MR JUSTICE ROTH: But I still don't understand, and you haven't really explained, why Mastercard was saying in September this can be done on the basis of a short point of law and agreed statement of facts without seeking to clarify how the section 32 point was advanced, when on your case, the statement of facts is irrelevant.

MS TOLANEY: Sir, can I just, though, correct one thing: we didn't say it was a short point of law. Our original proposal was that there were suitable issues for preliminary issues. It was Mr Merricks' side that said "Don't listen to Mastercard, who want to delay it all off until the end of 2023." There are two issues they said, I will show you that again, there are two issues they said that are pure points of law and should come sooner.

So can I just show you that? That's at tab 22.

MR JUSTICE ROTH: I know there was an argument about when it should be heard.

MS TOLANEY: No, it's tab 22, so all that my solicitor said was that it was suitable for

preliminary issue on the face of the pleading and the response at tab 22 of bundle A1 --

MR JUSTICE ROTH: Just a minute, bundle A1 at ... well, yes.

MS TOLANEY: A1, tab 22. This is the statement of the solicitors for Mr Merricks and it's at page 408, paragraph 9.

MR JUSTICE ROTH: Why didn't Mastercard say: no, it's not a pure question of law because there's a question of fact about deliberate concealment?

MS TOLANEY: Well, that case wasn't pleaded at the time and that's why we were wondering what the point of law was beyond the rules and asked --

MR JUSTICE ROTH: Why wasn't that clarified before the order was made? You've got a duty to cooperate with each other to identify --

MS TOLANEY: Can I just take instructions, sir. One of the problems, sir, is I wasn't at this hearing.

MR JUSTICE ROTH: No.

MS TOLANEY: What I can say is it is difficult. I know you're asking me questions but it does feel as though Mastercard is getting blamed for statements made by the other side about their own case, in circumstances where as soon as it became apparent that they wanted to run a deliberate concealment case, two days later a letter was sent, saying: hang on a minute -- it doesn't feel like we could have done anything much more quickly.

MR JUSTICE ROTH: What I am saying is this: Mastercard always knew, A, that it disputes deliberate concealment.

MS TOLANEY: But it wasn't pleaded, sir.

MR JUSTICE ROTH: Just listen, please.

MS TOLANEY: Yes.

MR JUSTICE ROTH: First, that it does not accept deliberate concealment. B, that

section 32 can't get off the ground without deliberate concealment. That's also been Mastercard's position throughout, I'm sure.

MS TOLANEY: Sir, can I just come back on that.

MR JUSTICE ROTH: I haven't asked you a question. I just said that Mastercard has never considered that deliberate concealment is not an essential element of section 32. It's been, I'm sure, consistent in that.

They then agree to a preliminary issue on a pure question of law, on the basis that that will resolve this and do not seek to push back, other than on a question of timing and at no point say: well, actually, section 32 isn't a pure question of law or at least not a question of law with an agreed statement of facts because it's clear to anyone that section 32 has various elements and so this won't work.

MS TOLANEY: So, sir, first of all, the pleading didn't refer to concealment. That's my first point. It didn't plead section 32(1)(b). It just pleaded section 32. They're also advancing a case of breach of statutory duty now in the amendments which is section 32.2. Deliberate commission of breach of statutory duty.

MR JUSTICE ROTH: Yes, but you still need deliberate wrongdoing.

MS TOLANEY: That is right but the pleading didn't specify either. What it specified was a point on the reasonable typical consumer test which it might have been said was the point of law that they wanted determined at this stage, on the basis they wouldn't contest other things.

Now, I don't know, but what I am saying is it's not as straightforward as, sir, you've presented, that we should have said what are the facts because it wasn't actually pleaded out.

MR JUSTICE ROTH: The preliminary issue is not section 32, it's not rule 31, it's whether the proceedings are time-barred. That's the preliminary issue on that basis. Insofar as section 32 is invoked, that clearly involves, unless it is conceded, which you

say it was never Mastercard's intention, and they were mistaken in assuming that, inevitably involves difficult questions of fact that can't be resolved in this way.

MS TOLANEY: I do understand. Mr Cook wants to say something about the hearing because he was there.

MR JUSTICE ROTH: It's perhaps fairer for him because you weren't there and I am asking you about what happened in September.

MS TOLANEY: Before I do that, I would just remind you, sir, and I appreciate these are fair questions but the burden, not just on the pleading but on this application, is not on my clients to explain why they didn't raise it earlier but on Ms Demetriou's clients for why they didn't plead it or raise it earlier. And all I was just urging on you was there has been no explanation of what the point of law was they said existed and they haven't given a good explanation because every element of the explanation has been undermined by a further inconsistent submission or the facts on DSG. And so if one is applying the case law test, it's clear that they have not discharged the burden that would be required to get permission at this stage.

In terms of Mastercard's role and any criticism you may have, sir, I think I have explained and Mr Cook is going to discuss the hearing, but what I have shown you on the correspondence is a very swift reaction when it became apparent that there was a mismatch and a continual delay. I appreciate, I hear what you say about the 2nd to the 16th but it was not a very fast responsive position that was taken from 15 November.

Should I just quickly give Mr Cook the floor for two minutes to be able to deal with the hearing before the break?

MR JUSTICE ROTH: Yes.

Submissions by MR COOK

MR COOK: Sir, I am in a position to speak on what our position was at that hearing. I am always a little bit conscious we may be in just almost matters of evidence, but our position was that there was a clear case pleaded, that they had said section 32 applied, so there was a deferment because of the reasonable consumer point. That is what they had pleaded. They did not allege fraud, mistake, deliberate commission of wrongdoing or deliberate concealment. So we didn't at any point think those points were live because they were unpleaded and the case law is very clear and we have been around the houses on that in various proceedings.

So we thought they were saying the short point of law. We thought they had come up with some kind of argument, possibly. We thought that was completely misconceived within section 32 and it's now common ground, but they, leading with two King's Counsels and lots of juniors behind them, very, very experienced competition solicitors, had pleaded section 32 applied because of the reasonable consumer point. There has been nibbling around the edges of section 32 in various cases in recent years. Certainly nothing we thought that would go anywhere near that far but they thought there was a point. So as far as we were clear, that's what they thought their point was. We thought it was misconceived, that's what you have hearings to determine.

At no point would we ever have said there needs to be a trial with evidence, disclosure, on deliberate concealment because there was no pleaded case on that. So we did anticipate this hearing would fully resolve the pleaded case against us, which we saw as being completely misconceived, but nonetheless, that's what hearings are for, to determine those kind of points.

MR JUSTICE ROTH: Yes, thank you.

MS TOLANEY: And it is worth, sir, you just having the reply in front of you, because you can see how that --

MR JUSTICE ROTH: Having the ...?

MS TOLANEY: The reply in front of you, just to put that submission in context. It's at --

MR JUSTICE ROTH: The original reply, yes.

MS TOLANEY: -- tab 13 of the bundle.

MR JUSTICE ROTH: Yes. You mean how section 32 was pleaded.

MS TOLANEY: 4B.

MR JUSTICE ROTH: Yes, we have seen that. The original paragraph 4B.

MS TOLANEY: That is right. I am conscious of the time; I do have to say something briefly about the Volvo amendments. I don't know if you would like me to take that now.

MR JUSTICE ROTH: I think that would be sensible, and we can rise a bit later.

MS TOLANEY: What we say is, again, applying the test that the Tribunal we say should be applying, the Quah test, no explanation was provided for the delay in pleading the Volvo case within Mr Merricks' application; nothing was put forward.

In the reply submissions an explanation was put forward, but Mastercard has set out its submissions in its response at paragraph 38. Volvo came out in June 2022 and it was only when Mastercard asked are you going to plead it that the position was then seen to be taken and it took a while to come out.

Now, what is said is that the amendments had been made out of an abundance of caution and that they are not necessary, because it's a point of law. If that is right, there's no reason to permit them. If the point is genuinely open as a point of law then there is no reason for these points to be pleaded now and permission given, but the fact is that, again, there is a hearing and it should have been taken earlier --

MR JUSTICE ROTH: It wouldn't be heard now, anyway.

MS TOLANEY: No, I understand that.

MR JUSTICE ROTH: So I think that does seem to me in a rather different category.

MS TOLANEY: I understand that. What I was going to say is it doesn't meet the test in terms of the good reason, but if permission is given it's a discrete point. What it certainly can't be used as, which came in very late in my learned friend's submissions, as some sort of Trojan horse for suggesting that therefore everything else can be permitted because it's a discrete point. And I accept it's a discrete point and I accept that there is a subsequent hearing. All I would say is that there is no good explanation really that's been put forward, but the Tribunal will make its own decision on that. It's of a very different nature to advancing a whole new factual case very late in the day.

The final point to cover -- which I'm not going to take orally to any degree -- is disruption. It's absolutely clear that if permission is given with section 32 amendments that it's extremely disruptive. It's not just disruptive because of the delay of resolving the particular issue; it's the knock-on effect to all the other preliminary issue trials and the structure set down by the Tribunal. And it's also very disruptive because it's very difficult to know when this hearing could be listed given, certainly, Mastercard's counsel team's availability, and they mustn't be prejudiced by this going off.

So it's going to be severely delayed with a severe knock-on effect and we say, if this case was available and they wanted to pursue it, they should have done so a long time ago.

MR JUSTICE ROTH: Yes. Thank you very much.

MS TOLANEY: I am just being told by Mr Cook he feels strongly that the CPR rules as to parties cooperating is no different, he says, to the competition position, and that the CPR rules say the parties cooperate but recognise the adversarial system.

MR JUSTICE ROTH: Yes.

MS TOLANEY: I appreciate --

MR JUSTICE ROTH: Yes, whether they're different or not, I hadn't checked them.

Yes, Ms Demetriou.

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, I can reply very quickly now; I am in your hands. If you want to consider it over the lunchtime adjournment I can reply in five minutes.

MR JUSTICE ROTH: We would like to consider it over lunch because I think it's very important we give our ruling, even if we give our reasons subsequently, because it will affect, obviously, what happens in the rest of this hearing.

When you say -- I don't want to curtail your time unreasonably -- how long?

MS DEMETRIOU: Five minutes.

MR JUSTICE ROTH: Yes, no problem.

MS DEMETRIOU: Sir, I think I can be very short because we have canvassed, really, the points. So the first point I make is that Ms Tolaney started by saying the trial date has been lost, but that's because of how she defined what this trial is about, so she said it's been lost because section 32 can't be determined, but that's the wrong way of looking at it, because the issue here is whether the proceedings were time-barred and that may well be capable of being determined.

The second point that I want to make is that really the question here is we are not of course saying, and Ms Tolaney kept saying that we say it's Mastercard's fault, and I think the Tribunal understands we're not saying that, but we are saying that the basis on which Mastercard say this is a very late amendment is because of the hearing in January; the hearing was fixed in January. So it is very important to understand why the hearing was fixed in January.

Now, Ms Tolaney referred to Mr Bronfentrinker's statement where he talks about the section 32 raising a pure point of law. What he was talking about there, as I think is clear from the context, is the point about reasonable discoverability and that's why at

the CMC the parties agreed and the Tribunal ordered that we should put in a joint -- agree a joint appendix of materials in the public domain, and so it was anticipated there could be legal argument about reasonable discoverability based on that appendix.

That should have been, we say, a red flag to Mastercard, so it should have thought: well, that's not the only issue that needs determining, and so when the Tribunal, when you, sir, asked: aren't there matters of fact that are raised? And I said: well, we can put in this appendix on materials in the public domain, Mastercard should at the latest, at that point, have said: well, actually there are further factual issues that are raised by section 32, but it didn't say anything.

Instead it just went along with the proposal to list this hearing for January and on the basis that the January hearing would determine the section 32 point.

Now, either Mastercard knew our pleading was defective at the time, which is what Mr Cook seems to be saying, and it deliberately didn't take the point, in which case it went along with the idea of having a joint appendix. It didn't say: well, Mr Bronfentrinker is wrong when he says there is a short point of law relating to discoverability. They simply sat quietly, didn't say anything and let everybody proceed on the basis that section 32 could be determined in January.

If that is right then we say that's plainly a good reason for allowing our amendment or the position is that, like Mr Merricks, Mastercard only really became alive to this point in November. These are really the two possibilities and, again, that's highly relevant because it also provides a good explanation for the delay, namely that both parties were proceeding on a flawed basis that January was the appropriate date and could determine the section 32 issue.

So that's the key point I want to make in reply. I just want to deal with a couple of very small points.

The first is that Ms Tolaney said repeatedly, well, when we raised this problem they didn't answer, and I think what she was referring to, then, was if we just go back quickly to bundle A2, tab 50, the letter of 17 November -- tab 51, the letter of 17 November from Freshfields at page 959, and you will recall she took you to paragraph 5.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Paragraph 5 is after a detailed discussion about reasonable discoverability and it says:

"Mr Merricks has never previously identified the point of law."

Well, the point of law Mr Bronfentrinker was talking about was a point of law on reasonable discoverability and so this is all about when we received this, we assumed they were talking about the point of law on reasonable discoverability. Nothing came in that regard at this point to say: you haven't pleaded deliberate concealment. That came a little later, as I showed you, and the Tribunal has the point that once that came then we sprung into action.

Now, the final point I want to make, again, it's a point of correction on what Ms Tolaney said about the case law and pleading standards, because if you pick up bundle B3 -- again, it's not material, necessarily, to what the Tribunal has to decide, but I just want to correct it.

So B3, tab 80 and Gemalto, page 2549. So bundle B3, tab 80, page 2549.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Ms Tolaney emphasised the strict rules of pleading in fraud and I just want to show you what the Court of Appeal said here, because they said at paragraph 44 that:

"The stricter rules of pleading in fraud are not applicable in competition cases or to cases of deliberate concealment."

Again, as I say, I don't think anything particularly turns on that as far as this application

is concerned, but I do think it is important to correct the position so the Tribunal sees what it is, given what Ms Tolaney said in her submissions.

So, sir, members of Tribunal, standing back, of course it's clear what section 32 requires. One of the conditions in section 32.1 does need to be fulfilled. The idea that we didn't appreciate that or that we don't know that as lawyers is obviously wrong. It wasn't pleaded because we proceeded on the basis of DSG that this wasn't going to be something in dispute, so I think that's what went wrong, frankly.

Ms Tolaney says: oh, you have seen the transcript in DSG. Well, we hadn't seen it at the time so that's how all of this arose and we do apologise that it has arisen, because it is inconvenient and we do see that.

But then what happened is that Mastercard, which was apparently -- we hear from Mr Cook -- alive to this point, simply didn't raise it but instead went along with all of the process laid down by the Tribunal for determining this point in January and we say that it shouldn't have done that; it should have cooperated.

We're not blaming it for our mistake. We recognise that there are adversarial rules, but what you can't do is in a sense run a bootstraps argument which is that you are far too late when you could have resolved the point earlier by pointing it out, in which case the January hearing wouldn't have been listed for January.

Sir, those are my brief submissions in reply.

MR JUSTICE ROTH: Yes, thank you very much.

We will return at 2.15.

(1.15 pm)

(The luncheon adjournment)

(2.21 pm)

Ruling (Extracted)

MR COOK: I understand from that, that you intend to exclude reasonable discoverability from this hearing.

MR JUSTICE ROTH: Yes, that is right because that's part of section 32.

MR COOK: Absolutely (inaudible).

MR JUSTICE ROTH: And section 6. Then we proceed to deal with, I think, the rule 31, the CAT Rules. Rule 119, rule 31, et cetera.

Submissions by MS TOLANEY

MS TOLANEY: Thank you, sir. As Ms Demetriou outlined, there are limitation issues arising under both English law and Scottish law. I will address the English law position and Mr Johnson, King's Counsel, will address the Scots law position.

Can I start by briefly addressing the overall landscape of the limitation issues. The Tribunal will have seen that in relation to purchases by UK consumers at businesses with a physical presence in the United Kingdom, Mastercard relies on a partial limitation defence to the effect that the claims are subject to English law and pre-dating 20 June 2007, are time-barred.

It is common ground that the relevant limitation rules for Northern Ireland are the same as under English law.

A limitation defence is also advanced for those claims subject to Scots law. Those that pre-date 20 June 1998 are, we submit, time-barred. And the scope of the disputed issues that arise for determination at this hearing amount to three issues, although one has gone, I think, now.

The first issue concerns the effect of the adoption of the Tribunal's 2015 Rules and the legislation that came into force at the same time on Mastercard's limitation defences and in a nutshell, Mastercard's case is that as a matter of English law, Mastercard had accrued limitation defences that it didn't just lose when those later amendments were

made to the Tribunal's rules. And we submit that that's absolutely clear, both as a matter of principle but also from the Court of Appeal's decision in DSG.

And there are some specific points on Scots law on this issue which Mr Johnson will address.

The second point is that there was the issue on the pleadings as to whether the running of the limitation period was postponed until such time as facts relevant to the cause of action had been or could be reasonably discovered but I think it's now conceded, and obviously we have had the amendment application, that in order to establish postponement, one of the specific conditions, namely here, concealment, needs to be established, so there is no pleaded case just on the question of postponement. That's gone.

And then the third issue on limitation is concerning only Scots law and that's that Mastercard, it said, has no prescription defence because the setting of the EEA MIF was a continuing act, neglect or default, for which loss and damage are deemed to occur only when the act ceases and that will be addressed tomorrow by Mr Johnson.

Can I turn to the first point which is the one that I am focusing on and that's on the 31.4 and 2015 rules and we address this in paragraphs 8 to 25 of our skeleton argument and there is now only a fairly narrow dispute which is as follows: it's common ground now that any limitation defence that Mastercard had in June 2003 was preserved by the 2003 Tribunal rules and would have been applied to any claim issued in the following 12 years.

The issue in dispute now is solely whether those statute barred claims were revived 12 years later by the 2015 Tribunal Rules.

Before turning to address that narrow point, it is necessary to address the steps leading up to it. So starting with the position prior to 20 June 2003 first. As I mentioned, the partial limitation defence relates to claims accrued in the 1990s, up

to 1997 in England and 1998 in Scotland. So starting with the limitation rules that applied at that time, that's all common ground and you can see that from the joint memorandum in bundle A at tab 9. It's A1, tab 9.

And you can pick up the relevant passage at paragraph 7 on page 127. So what we can see here is in paragraph 7:

"Prior to 20 June, the general rules as to limitation were applicable."

And it's the six year limitation period.

And for the Tribunal's reference, this is confirmed by the Court of Appeal's judgment in DSG and I will come on to it but for your note, it's paragraph 55 of that judgment.

And then if you just read on 8 and 9, that's all common ground, subject to the green and orange text.

MR JUSTICE ROTH: Yes, it doesn't really matter, does it?

MS TOLANEY: No, it doesn't for these purposes.

And for the Tribunal's reference, paragraphs 27 to 29 record that under Scots law, the five year prescription period applies.

So that was the position prior to 20 June 2003 and on that date, amendments to the Competition Act 1998 took effect, but immediately prior to 2003, if a cause of action had accrued more than six years earlier, it was statute barred and obviously subject to any postponement argument and that's how we get our dates.

So Mastercard at this point, it's common ground, had accrued limitation defences for claims arising before those dates. With effect from 20 June 2003, a new section 47A of the 1998 Competition Act permitted damages claims for infringements of competition law to be brought in the Tribunal on a follow-on basis. And if we look again at the joint memorandum at paragraphs 10 and 11, again, that sets out the agreed position as to that Act.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And you will see at paragraph 11, obviously 31.4, we will be focusing in on during the course of my submissions but you can see at paragraphs 12 and 13, the position taken by Mastercard, which is not agreed, that it's a savings provision. And what is now common ground, I think, pursuant to the Court of Appeal's decision in DSG, is that rule 31.4 expressly preserved any limitation defences that had accrued prior to 20 June 2003 and that's paragraph 54 of that judgment which we will come on to.

Now, Mr Merricks, in his skeleton, has introduced a new argument that's not in the joint memorandum and that is at paragraph 6 to 9 of Mr Merricks' skeleton argument. And there my learned friend refers to section 47A(3) and we will come on to the full text of it in a moment but the quotes that are relied upon are:

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

And based on that wording, the submissions are made at paragraphs 6 and 9 that:

"The primary legislation expressly provides for the limitation rules that would otherwise be applicable to be disregarded."

And paragraph 9:

"Parliament has mandated that claims can be brought ... regarding the six-year period."

It's not entirely clear what Mr Merricks means by this but it appears to be suggested here that the 2003 rules excluded any prior limitation periods altogether. The reason it's not clear is elsewhere in his skeleton, for example at paragraph 25, Mr Merricks accepts that even after 2003, up to October 2015, the claims were time-barred, so that's why it's not clear.

But if he is arguing that the pre-existing rules were excluded by the 2003 rules, then that's directly contrary to the Court of Appeal's judgment in DSG and it's also

an argument that has been rejected by the Tribunal in the Deutsche Bahn v Mastercard case which is in volume B3 at tab 68. If we could just get that, because that helpfully sets out the relevant statutory provision as well.

Section 47A is helpfully set out in the appendix at page 2024 of the bundle. So you can see in subsection 1 that:

"The section applies to any claims for damages or any other sum of money claimed which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings."

And there are a couple of terms used in subsection 1, "relevant prohibition", and "may make in civil proceedings." And subsection 2 defines what the relevant prohibition is and subsection 3 explains how to identify the claims made in civil proceedings and that's the wording cited by Mr Merricks in his skeleton, subsection 3.

And this was the wording that the Tribunal considered, chaired by the President, at paragraphs 56 to 58 of this judgment and that start at page 2017. And what was held was that subsection 3 is establishing a definition for the purposes of section 47A, so as to identify the kinds of claims that can be brought in the Tribunal because section 47A was creating a new procedural route to bring new kinds or particular kinds of claims and that's why it was necessary to define them. And the exclusion for the purposes of limitation rules was done by the draftsperson to avoid confusion as to whether a claim may be made in civil proceedings, arising in the expiry of limitation.

So it was done to focus on the question of whether the claim was otherwise leaving aside limitation of a kind that was recognised in civil courts. It was not and is not meant to be taken as a general exclusion of limitation rules, if that is what Mr Merricks is suggesting and perhaps the Tribunal could just read 56 to 58 which makes that point.

(Pause).

MR JUSTICE ROTH: Yes.

MS TOLANEY: As I have said, Mr Merricks does seem to accept in other passages in his skeleton that even after the 2003 rules were enacted, the claims against Mastercard were time-barred up to October 2015.

So with that point taken to one side, now can I turn, then, to the real point of contention between the parties and as is clear I think, from the skeletons, Mr Merricks' case is that pursuant to the 2015 rules, an accrued limitation defence that would have been recognised and applied from June 2003 to September 2015, so it was in force for those 12 years, was then annulled, following in proceedings that were commenced after 1 October 2015. So put another way, claims which had been time-barred for some 12 or more years would have somehow been revived back to life, on his analysis. Under Scots law, on Mr Merricks' case, the effect would have been to resurrect obligations which had been extinguished and so no longer existed.

Standing back before I explain why that's not right, it clearly would be an extraordinary result, requiring, we submit, explicit language to make it plain that a statute in 2015 was going to revive, or bring back to life, claims that either no longer had been time-barred or no longer existed. And the 2015 rules definitively do not contain such language.

Now, the Tribunal will be aware, of course, that the expiry of the limitation period confers rights on a defendant which are not affected by subsequent legislation unless clear language is used and that's why Mr Merricks' argument is so extreme and we find this from section 16.1 of the Interpretation Act and that is in B2 at tab 29.

I will come back to the wording about this for various points, so if we can just look at it very carefully:

"Where an Act repeals an enactment, the repeal does not, unless the contra-intention appears, (a) revive anything not in force or existing at the time at which the repeal takes effect ... (b) affect the previous operation of the enactment of repeal or, (c), affect

any right, privilege, obligation or liability acquired, accrued, incurred under the same enactment."

So just pausing there, it won't revive anything not in force or existing and it doesn't affect, as one would expect, any right that has acquired, unless the contra-intention appears.

And in the Yew Bon Tew case, which is --

MR JUSTICE ROTH: Just pausing there for a moment, I don't think it's in the bundle but I believe the Interpretation Act applies also to Scotland.

MS TOLANEY: Indeed, sir. And then in the Yew Bon Tew case which we cited in our skeleton which is in the same volume at tab 54, the Privy Council affirmed that this principle applies to accrued limitation defences and that's at 563D which is in the bundle at B1/1482 and it's at 563, letter D.

MR JUSTICE ROTH: Yes.

MS TOLANEY: If we could go in the same volume, then, back to tab 49, please. So the beginning and end of Mr Merricks' arguments on the 2015 rules relates to the wording of this provision, 119, and in particular, if one reads 2 and 3, subsections 2 and 3.

And the argument is that rule 31.4 is not referenced, whereas in subsection 2, rules 31.1 to 31.3 of the 2003 rules are. So it says that the omission of the savings provision in rule 31.4 is what ought to be looked at as showing a contrary intention to maintain the limitation position and to revive statute barred claims and it is said this was deliberate. That's the argument.

MR JUSTICE ROTH: It's really the same argument as advanced to the Tribunal in DSG.

MS TOLANEY: Indeed, and in fact the skeleton shows that. My learned friend's skeleton literally advances the same points and, sir, what we say is that the

Court of Appeal's decision in DSG took a different approach and for reasons I will develop, the argument now, that the 2003 rules can be interpreted as my learned friend suggests, it has been determined and the position now is clear and that has a knock-on effect on the 2015 position and that's why -- I will develop this -- that's why the position advanced by my learned friend is unarguable, whether it's ratio obiter or not, we can come on to.

And in a nutshell, the Court of Appeal held that the omission of rule 31.4 from rule 119.2 does not demonstrate the clear legislative language needed to annul such an accrued right and they went further than that but I will come on to that decision in a moment. But the short point on the Interpretation Act is you would have needed express wording to take away limitation rights and you don't have it.

And fatally for Mr Merricks' position, there was no need for rule 119.2 to expressly refer to the 31.4 savings provision and the reason for that is as follows: rule 31.4 merely reiterated standard principles of statutory interpretation. It was a belt and braces provision and it was included at the time, in 2003. It merely confirmed the result that would already have followed from general principles of law.

And you can see that from the wording of the Interpretation Act that I showed you, which was that the repeal does not revive anything or affect any right. So 31.4 just simply re-enacted in the savings provision what was already the position.

And as at 19 June 2003, Mastercard had accrued limitation defences that could only be annulled by clear legislation, so even if 31.4 had not been included in the 2003 rules, Mastercard still would have had those rights.

So the first point -- and I have four -- the first point is that rule 119 of the 2015 rules did not specifically provide for rule 31.4 to continue, but it made no difference to the accrued rights, so it doesn't matter.

The second of the four points is that the most likely reason a reference to rule 31.4

was omitted in 2015 was because rule 31.4 may have been seen as an historic provision.

Just pausing there, it preserved limitation rights which existed in 2003 which meant, in practice, a time-bar in relation to conduct prior to 1997, so that would have been 18 years prior to the 2015 rules. So you can see why it may have been thought unnecessary to reiterate the common law provision to claims relating to some 18 years ago.

And that is very different from there being a deliberate decision to revive claims that had been time-barred for over a decade. If that had been the intention, it would have been spelt out in clear terms.

Now it may be said against me: well, 31.1 to 31.3 are referenced, why is 31.4 different? But there is a difference. Rules 31.1 to 31.3 were rules of continuing effect which applied to conduct not already time-barred, so to conduct from 1997 to 2015, and that's very different from what one could call the snapshot stated at rule 31.4 which only applied to limitation defences already accrued as at June 2003.

The third point is that even if rule 31.4 did have some independent effect, which we say it didn't, its repeal in 2015 could not revive the time-barred claims. Again looking at the wording of the Interpretation Act which is at 29 of the bundle that you have open. So even if 31.4 had been repealed, the repeal of itself wouldn't revive anything not in force or existing at the time or affect any right or privilege existing. And the contrary intention that Mr Merricks points to is the fact that other provisions, namely rules 31.1 to 3, were said to continue to apply under rule 119, but the fact that other provisions, 31.1 to 31.3, continued to apply, can't logically evince an intention to revive claims that are either extinguished or statute barred.

And put another way, those provisions, 31.1 to 3, couldn't continue to apply to the pre-1997 claims against Mastercard because they had never applied. Those claims

were time-barred as at June 2003.

And the fourth point -- it's my final point on this -- is that Mr Merricks' case requires the Tribunal, therefore, to find that a contrary intention can be unequivocally discerned purely from the omission of a reference to 31.4 and ignoring the common law position. And the only case that's cited in support of that is the case of Gangar v Espinet and it's a very, very different case. If we could just look at that. That's in volume B2 at tab -- just checking the reference -- at 1684. It's page 1684.

MR JUSTICE ROTH: Tab 59.

MS TOLANEY: 59. So this was a case in which a five year limitation period for a criminal offence was abolished and the decision for the Privy Council was whether the offences should then be construed as having a six month limitation period or no limitation period and at the same time, a statutory obligation to refer potential offences to the DPP was created and the Privy Council inferred that this strongly indicated that the intent of the legislature had been to strengthen legislation to combat corruption, not weaken it.

And so if we could look at paragraphs 10 to 11 of the decision. That starts at 1688 and one of the key passages is at 11.

(Pause).

MR JUSTICE ROTH: Yes.

MS TOLANEY: Then if we could go, then, to page 1693, paragraph 22, please.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And what this judgment shows is that you have to have a very, very clear indication for contrary intention. Here, the Privy Council found the contrary intention to be strongly suggested, those were the words used, by the overall structure of the legislation and said the contrary intention was entirely plain.

And that was because they had concrete and unambiguous indications from which to

draw that intention, including explanatory statements in the legislation, making it plain that the five-year limitation period in this case had been regarded as an impediment to investigation and, secondly, the requirement to refer matters to the DPP, which is completely different from the situation before the Tribunal in this case.

And in particular, the Tribunal's not faced with the argument from Mastercard that the limitation would be much shorter than before. Mastercard's position is that the limitation rights already accrued many years ago shouldn't be, somehow, revived.

Mr Merricks seeks to draw a parallel with the changes made by the Consumer Rights Act and refers to various background materials from 2012 and that's at paragraph 23 of his skeleton. But there is no suggestion that the changes contemplated, in this case, abolishing limitation defences that had accrued more than a decade before and the changes made to the Tribunal's Rules were made more than three years later, after the consumer rights bill had been revised.

So what we say is, if anything, the Gangar case shows what you would need and why. It wouldn't be simply through an admission of what was arguably an unnecessary savings provision in any event and one can see why, in relation to claims 18 years prior, the draftsman might not have included it.

So that's the position as a matter of principle, but to put the matter, we say, beyond any doubt at all, you then have the Court of Appeal's judgment in the DSG case. The position on that is that -- if we just turn to it, please. It's in the bundle at 77; B3/77. And the Tribunal's decision at first instance which we may need to turn to briefly, is in the same bundle at 72.

Essentially, the Chancellor who gave the judgment of the court considered, first of all, rule 31.4 on its own terms and that starts at paragraph 55. But in fact, it may be easier to start the passage at 52 which is where the issue starts and if you are able to just put your finger in that tab and go back to 72, it may just help. It's not very clear in the

subsequent judgment. But the passage that was being considered, essentially, of the Tribunal's decision, was at paragraphs 37 and 38 of the Tribunal's decision at page 2161.

Essentially, the court found that rule 31.4 hadn't been preserved and that if one looked -- construed 31.4 looking at the subsequent legislation in 2015, there would be an anomaly and that you can see in paragraph 38. And the Court of Appeal proceeded on the basis that it was appropriate not to look at 31.4, in a sense, through the telescope of 2015 but to just look at it on its own terms and considered that there was not an ambiguity in 31.4 and you can see that in paragraph 55:

"I do not see the meaning of 31.4 is ambiguous."

And here the court finds that, there, 31.4 was a savings provision that preserved the claims up to 2003. So this is the passage that I had said that the new argument of Mr Merricks is completely undercut by. And in 58, the Chancellor says that because it's not ambiguous, it's only if you reason backwards that it appears that it might be.

And then at 59, the Chancellor looks at the anomaly, ie the mismatch between 31.4 being included and not included, but what the Chancellor finds is there is no anomaly.

So essentially the ratio of this case is that there is no anomaly. If anything, the anomaly is the other way round and as a result, the ratio of the case is that the 2003 rules had the savings provision and it follows, both in the Court of Appeal's judgment but actually on the Tribunal's reasoning, that the same must then apply to 2015.

And were there any doubt on it, perhaps we could read 59 and 60 of the Court of Appeal's decision, where that is clearly the view of the Court of Appeal.

So we submit it's quite clear, looking at the Tribunal's decision and then how it was reviewed and upheld or not in the Court of Appeal's decision, that once you start with the 2003 rules and find that 31.4 is not ambiguous and preserves the claim, it follows -- it preserves limitation defences, it follows that 2015 is exactly the same,

otherwise there would be a very bizarre anomaly and there is certainly no words that could be looked at that could come close to having what would be regarded as an utterly bizarre outcome and that's the Court of Appeal's decision.

Now, it says first of all, I think by my learned friend, that it's wrong, but for the reasons I have outlined, that's not correct. The only submission I think that would be wrong is the idea that limitation defences that existed could somehow be abolished by silence and claims revived.

Secondly, it's not open to my learned friend to say that the 2003 decision, decision on the 2003 rules is wrong. It's part of binding ratio. She may disagree with it but it is binding.

MR JUSTICE ROTH: I don't think they do seek to say that, I think that's accepted.

MS TOLANEY: It is.

MR JUSTICE ROTH: The decision on the --

MS TOLANEY: It is, but it follows from that and the reason I make that point, sir, is it follows from once you look at how the decisions are structured, it follows from that, that it's clearly right as a matter of absolute logic of the Court of Appeal's decision, even if they had not said anything, that the 2015 position would be the same because the Tribunal's position was you wouldn't have a mismatch, you would have an anomaly and they have reversed the anomaly.

So it doesn't matter and this is my final point, whether or not what was said about the 2015 rules was obiter because it follows as night follows day on what is the ratio. In fact, we say we don't accept it is obiter because the claimant's argument in DSG was that for proceedings commenced after 1 October 2015, the 2015 rules removed the accrued rights and so the 2003 rules had to be construed as having the same effect. That was their case and that's what they argued in front of you, sir.

And in order to deal with that argument, the Chancellor had to consider the 2015 rules.

I accept that the 2015 rules didn't actually apply because of the settlement of the Europcar proceedings but the Chancellor did actually have to consider it as part of the argument and he noted the inconsistency of the argument, if, as he said, claims begun before 1 October 2015 would be time-barred but a claim begun after that date would not:

"I accept it would be illogical and unsatisfactory to determine those rights survived in proceedings starting before 1 October 2015 but did not in proceedings starting after 2015."

And the Chancellor then explained the disapplication of rule 31.4 under rule 119 did not override accrued legislation and limitation rights.

And so what we submit is it was actually a necessary part of the argument for him to consider it because of the way the claimants had advanced their case because they said the two went hand in hand. But as I say, it doesn't matter because the way the Tribunal approached it at the claimant's behest was the two went hand in hand and the reality is they do because the only justification for their construction was the two had to be consistent and now the Court of Appeal has found in binding terms that the 2003 rules have to be interpreted in a particular way, as I say, as night follows day and on the claimant's own case, the interpretation of the 2015 rules is clear.

MR JUSTICE ROTH: Whether it technically is ratio or obiter, the ratio of the Tribunal's decision was that the 2015 rules are construed that way as to produce consistency with the 2003 rules, but the application of 2003 rules has been held bindingly to be different from that which the Tribunal found and therefore the ratio of the Tribunal in construing the 2015 rules in the way they were, is swept away.

MS TOLANEY: Exactly. That's exactly the point and that's why I say it doesn't matter whether it's obiter or not. It's clear, it goes to the heart of the point.

Sir, the only other point is, I think, a pleading point is taken against me in paragraphs 4

and 5 of Mr Merricks' skeleton argument. It seems to be a pleading point that may have been taken late in the day but the basis of the argument appears to be that Mastercard has referred to 31.4 as the 2003 rules in its defence but that doesn't apply because it's not picked up by the savings provision in rule 119 and what is said is that means Mastercard hasn't pleaded any limitation defence.

Now, as you have seen, in fact we plead limitation on every basis in the defence. Rule 31.4 is relevant because it confirmed operation of the general legal principles on limitation defences and it's also relevant in light of the DSG decision of the Court of Appeal and what we say is this isn't a pleading point; this is just another way of arguing the point I have just addressed. That's why I have left it to the end.

MR JUSTICE ROTH: In light of what we heard this morning, it may be not terribly attractive for Mr Merricks to take a pleading point.

MS TOLANEY: No, particularly as I said, there is an answer. I don't know if I can be of any further assistance.

MR JUSTICE ROTH: Thank you very much.

Ms Demetriou, we will take a break at some point. We, of course, only started at 2.15. We can do it now or we can do it a little later, whatever suits you.

MS DEMETRIOU: Well, if you don't mind doing it now, that might just allow me to gather my thoughts.

MR JUSTICE ROTH: Yes, it might help.

(3.12 pm)

(A short break)

(3.22 pm)

Submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, members of Tribunal, I want to go back to the legislation, please, the 2003 legislation, so if we can pick up bundle B2 and it's tab 43, page 1382,

section 47A.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And the Tribunal knows that this represented a major legislative change because before this time, action for damages for breach of competition law could only be brought in the High Court and this introduced a follow-on action before this Tribunal.

MR JUSTICE ROTH: This is the same section that we were looking at in --

MS DEMETRIOU: Deutsche Bahn.

MR JUSTICE ROTH: In the appendix to Deutsche Bahn.

MS DEMETRIOU: It is and I'm sorry I have to go over it but we take a different view as to what the legislation means.

MR JUSTICE ROTH: No, that I understand, it's what we have here is no different, is it, or are there bits of the section that -- it's just having two references for the same statutory section.

MS DEMETRIOU: It should be the same section but we will just double-check to make sure nothing has gone wrong.

MR JUSTICE ROTH: It's easier to mark up the same page, you see.

MS DEMETRIOU: Yes. So just going through the section --

MR JUSTICE ROTH: Yes, just a minute. We had it at -- it's in the same bundle -- no, it's not, it's B3.

MS DEMETRIOU: The next bundle.

MR JUSTICE ROTH: Speaking for myself, it gives us one less of the references.

MS DEMETRIOU: I quite understand, it's B3/68, I think.

MR JUSTICE ROTH: It's B/2024.

MS DEMETRIOU: Yes, so B3, tab 68, page 2024. It's the same.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: If the Tribunal has that. So just taking it through quite slowly. So subsection 1:

"The section applies to any claim for damages or any other claim for a sum of money which a person who has suffered loss or damage as a result of an infringement of a relevant prohibition may make in civil proceedings."

And then you have the definition in subsection 2 of relevant prohibition and they're essentially the competition rules.

And then you have at 3:

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

And you read that with 4:

"A claim to which this section applies may be brought in proceedings before the Tribunal."

And so what you have is the section applies to claims for damages that may be made in civil proceedings. That's one. For the purposes of identifying those claims, you disregard the limitation rules that would apply in civil proceedings and then once you have that category of claims, those are the claims that may be brought in proceedings before the Tribunal.

So we say that what that means is that section 47A effectively requires the limitation rules in the Limitation Act to be disregarded, to be set aside. That's what the Act says.

And as we will come to see, the Court of Appeal --

MR JUSTICE ROTH: Disregarded for all purposes?

MS DEMETRIOU: To determine what cases may be brought before the Tribunal. That's at 47A(4). So when you're looking at what cases may be brought before the Tribunal, then you disregard the limitation rules and what happens then is that the new regime provides for different limitation rules to apply and I'm going to come on to

that but just while we are on this provision, you then see that -- so I think we may not need to go through the rest of the provision, but you see at 10 over the page that:

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

So you still have your claims before the ordinary courts.

Now, at the same time and this is why I'm afraid we're going to have to go back to the other bundle which has all the rest of the statutory provisions -- so we're back to B2. And if we go to B2/39/1346, so at the same time, section 15 of the Enterprise Act introduced a very broad rule making power and the power to make rules, as the Tribunal knows, is exercisable by statutory instrument and we see the power here in section 15.

Then if we turn to the next tab, tab 40, we see in schedule 4, paragraph 11, which is on page 1353, that the rules specifically -- there is specific provision for the rules to make provision as to limitation.

Now, Ms Tolaney seeks to give section 47A(3) a narrower meaning than we say it bears. I'm going to come on to say why the Court of Appeal didn't agree with that but just turning back to -- and I'm sorry to flip backwards and forwards but if we turn back to the Deutsche Bahn case in bundle 3, tab 68 again.

She took you to passages on page 2017 and you will recall she talked about the two limbs that the Tribunal identifies but two points to make about this, sir. So you will recall that Ms Tolaney took you to paragraph 56 of Deutsche Bahn which says that 47A(1) may conveniently be considered as comprising two limbs.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And it seemed to be on that basis that she was saying that section 47A(3) doesn't sweep aside the limitation rules in the Limitation Act but in

fact -- there are two points I want to make. In fact, if you look at paragraph 57, the Tribunal's conclusion is that both the Pilkington and Mastercard cases fall within section 47A and may be brought before the Tribunal, irrespective of any limitation defence.

And then the rest of the discussion, it's very important to see the context of this discussion, the Tribunal may recall that what was being argued in that case -- it was a case about foreign law, applicable law, that was the main point.

MR JUSTICE ROTH: Just to interrupt you, I don't recall and the two members of the Tribunal with me, of course, were not in that case. Don't assume there is any memory of it.

MS DEMETRIOU: That's a very fair point. I never recall cases but I am always surprised when judges do recall their own cases and so I didn't want to assume.

MR JUSTICE ROTH: I'm generally not one of them.

MS DEMETRIOU: Well that is fair enough. The key point that arose in the case, we can see from paragraph 1, if we go to page 2004:

"When a competition damages claim is brought before the Tribunal and the proceedings are treated as proceedings in England and Wales but the substantive claim is governed by foreign law, are the limitation rules which apply to that claim those set out in the Competition Act and the relevant Tribunal rules or is the Foreign Limitations Period Act applicable, so that the foreign law rules of limitation would ordinarily apply?"

So that's the question that was being decided and the relevant provisions of the Foreign Limitation Periods Act are set out at paragraph 40 on page 2013 and you can see at the bottom of the page, subsection 1A, that:

"Where the law of another country is applicable, the law of that other country relating to limitation shall apply in respect of that matter."

So that's the rule in the Acts but then what was being argued was that that should be swept aside because the Act contains its own self-contained code for limitation, so that's a very different proposition and you see that in paragraph 53 on page 2016. So the claimants submit that the Competition Act and the rules constitute a complete and comprehensive code. There is, accordingly, no scope for the application of other limitation rules, except insofar as they are incorporated by the Competition Act. So what the Tribunal was faced with was on the one hand, the Foreign Limitation Periods Act saying the foreign limitation period applies and this argument that: well it can't apply because the Competition Act is a self-contained code and quite understandably, the Tribunal said: no, that's not right, you don't just sweep aside the foreign limitation periods. So that was the context in which that discussion arose, which is obviously very different to the present context.

What it's certainly not authority for is the proposition that section 47A(3) doesn't mean what it says, which is that you can bring the combination of 47A(3) and (4) which is you can bring claims before the Tribunal. In deciding what claims you can bring before the Tribunal, you disregard any limitation period that would apply in civil proceedings. I will come in a minute to show how the Court of Appeal agreed with that.

So going back to bundle B2. So you have a position where section 47A(3) says that the ordinary limitation rules are to be disregarded and then if we go to bundle B2, tab 42, this is the version of the rules that came into force in 2003, at the same time.

MR JUSTICE ROTH: 47A(3), although being considered in Deutsche Bahn in the context of foreign limitation rules, it's not restricted to foreign limitation rules; it's any limitation rules, so it would apply just as much to domestic limitation rules, wouldn't it?

MS DEMETRIOU: Sir, no, we say that can't be right. If that were correct -- think about it this way. We say: if that were correct, you have to think about the position after 2003. So you have a limitation rule -- you have the six year limitation rule, so what

happens after 2003, if a claim has gone time-barred under the six year rule but you're still within two years of the decision, well plainly the new limitation regime under the Act applies. So the new limitation regime under the rules that's been instituted under the Act applies.

So it's not the case that the previous limitation rules remain in force. The purpose of the legislative change was to sweep aside the limitation rules and have a new limitation regime that was tailored to the follow-on nature of the action, so it focuses on the decision rather than the accrual of the --

MR JUSTICE ROTH: The claim comes with the jurisdiction of the Tribunal, because this section 47A was a jurisdictional provision. So for the purpose of determining the jurisdiction, you disregard limitation rules and then you look at, for applying limitation, the new rules which includes 31.4 which preserves prior limitation rights.

MS DEMETRIOU: Yes, I don't think I am disagreeing but I am trying to meet, and I will maybe do this in a more direct way a little bit later, but I'm trying to meet Ms Tolaney's submission which is she says: well rule 31.4 was redundant; you didn't need it because there are already accrued limitation rights. That's the premise for her whole argument and I will come on to deal with that.

But I don't really demur from the way you've just put it, sir, which is that you sweep away the limitation rules to decide what proceedings can be brought and then you turn to the new rules to look at whether or not they're in time. And so turning to the rules which are in bundle B2, tab 42. So the 2003 rules took effect on the same day as the new provisions in the Act came into force, so 20 June 2003 and these do indeed lay down new limitation rules establishing the time limit for bringing a claim under section 47A. And that, sir, if you have that, that's B2, tab 42, page 1381. And so you see the first point is that:

"A claim for damages must be made within a period of two years, beginning with the

relevant date."

And then at 2:

"The relevant date is the later of the determination of any appeal or the expiry of the period for bringing an appeal against the decision establishing the infringement and, secondly, the date on which the cause of action accrued."

And so pausing there, it's a very different limitation rule to the rules under the Limitation Act because it's focusing on -- the time starts running as from the date of the decision or at the appeal against the decision, once the appeal process has expired.

And so thinking for a moment about a claim brought after -- a claim that arises -- so thinking for the moment about a claim might well be time-barred under the Limitation Act, so it might well have accrued more than six years ago but permissible because the Tribunal has jurisdiction and because the regulatory decision came later and the claim is brought within two years of the regulatory decision.

But then what you have in rule 4 is a saving for claims that would already be time-barred on 20 June 2003, had they been brought in a court and we say that that provision is critical because if it didn't exist, then the effect of section 47A(3) and (4) and the remainder of this rule, so rule 31.1 to 3, really 1 to 2 is most relevant, would be that those limitation rights would have been expressly set aside, so 31.4 is critical.

So if you imagine for a moment 31.4 didn't exist back in 2003, then you have a position where section 47A(3) has said you disregard the general limitation rules, then you have a new limitation regime and it doesn't say anything about claims that have already been time-barred. In fact, it says those limitation rules are disregarded and there is this new limitation period.

So rule 31.4 is of critical impact in terms of preserving accrued limitation rights for claims where limitation has already expired as of the date of commencement of these

new provisions.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Now, in 2015 of course, the Consumer Rights Act came into force and this substituted a new section 47A, which as the Tribunal knows, provided for both follow-on and stand-alone claims, giving the Tribunal full jurisdiction to hear competition damages claims and, of course, it instituted the collective actions regime. And staying in this bundle, if we go to tab 46 -- sorry, I think it's 45, you have that version of section 47A and it's structured a little bit differently but if you look at subsection 4, it has exactly the same provision, saying that limitation rules or rules relating to prescription which would apply in such proceedings are to be disregarded. So any limitation rules. So for my purposes, we can ignore prescription. Any limitation rules that would apply in civil proceedings are to be disregarded.

And then this applies both to claims arising both before and after commencement of the provision and we get that from tab 50 in this bundle, page 1406, paragraph 4.2. This is in schedule 8 to the Act. So section 47A as substituted, applies to claims arising before the commencement of this paragraph, as it applies to claims arising after that time.

And then if we go back to tab 47, at the same time there is a new section 47E which reintroduces, confusingly, the rules in the Limitation Act and we see that from subsection 2A.

MR JUSTICE ROTH: This is which tab?

MS DEMETRIOU: This is tab 47. So "Subsection 2" -- I am reading section 1:

"Subsection 2 applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation period which would apply in respect of the claim if it were to be made in proceedings under section 47A or collective proceedings at the commencement of those proceedings."

And then you see 2A:

"In the case of proceedings in England and Wales, the Limitation Act applies as if the claim were an action in a court of law."

But that provision and we get this from tab 51, that provision only applies to claims which arise after 1 October 2015 and we see that from schedule 8, paragraph 8.2 which is on page 1407. It's actually on page 1408, I'm so sorry.

MR JUSTICE ROTH: It's arising after -- what's the date?

MS DEMETRIOU: After commencement of this paragraph which is 1 October 2015.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So the position is that for claims arising before 1 October 2015 but brought after that date, section 47A provides for the general limitation rules to be disregarded, but for claims arising after 1 October 2015, the Limitation Act is brought back into play by virtue of section 47E.

And so focusing on the position of our case which is a claim arising before 1 October 2015 but brought after that date, what is the position? So we have seen that the new section 47A provides for the general limitation rules to be disregarded, just as the 2003 Act did and, again, just as in 2003, the limitation rules that are applicable to such claims are determined by the rules made pursuant to the primary legislation.

And the relevant rule here is rule 119 which you have seen which is behind tab 49. Sorry, can we start with rule 118, actually, that's the prior tab.

So what that does is it revokes the 2003 rules. That's what rule 118 does and then turning to tab 49 and rule 119, you have a saving, so the rules have been revoked but then there is a saving and if you look at 119.1, so proceedings commenced before the Tribunal before 1 October continue to be governed by the rules.

So that's claims before 1 October. But then 119.2, rule 31.1 to 3 of the 2003 rules,

time limit for making a claim, continues to apply in respect of a claim which falls within paragraph 3 for the purposes of determining the limitation period which would apply in respect of the claim if it were to be made on or after 1 October 2015.

And you see from paragraph 3 that that applies to claims which arose like this one, before 1 October 2015. So you have a position where the primary legislation has said: for these claims, disregard the limitation rules in the Limitation Act. You then have rule 118 which gets rid of, revokes the 2003 rules, but then the legislator says: well we have to have a time limit for these claims and so it expressly saves rules 31.1 to 3 and says that those are the rules which are to be applied for the purposes of determining the limitation period for those claims.

So if we could turn, now, to the Tribunal's judgment first in DSG and that's bundle B3, tab 72. If we could go to 2161. Page 2161. And it's paragraph 37 and the Tribunal says at paragraph 37 that the preservation of --

MR JUSTICE ROTH: Just a moment.

MS DEMETRIOU: So sorry.

MR JUSTICE ROTH: Paragraph 37.

MS DEMETRIOU: Yes, 2161, sir, behind tab 72. It's the Tribunal I am on at the moment. I'm going to go to the Court of Appeal in a moment.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So the Tribunal there finds that the preservation of rule 31.1 to 3 but not rule 31.4 in the wording of rule 119 is clearly deliberate and Mr Hoskins, appearing for Mastercard, then accepted that it wasn't an error. And then the Tribunal says:

"In our judgment the conclusion is unavoidable ..."

And picking up words from Yew Bon Tew:

" ... that the time-bar imposed by rule 31.4, in circumstances where the limitation period

would have expired prior to 20 June 2003, does not apply in the proceedings commenced on or after 1 October 2015. Mr Hoskins' submissions were, in effect, an invitation to incorporate by a process of construction, the substance of rule 31.4 but that would be contrary to the language which expressly chose not to incorporate or save the rules."

And so whereas rule 31.4 applies to proceedings commenced before 1 October 2015, it has no application to proceedings commenced thereafter.

Now, we agree with that. We agree that the decision of the legislator was clearly deliberate and picking up Yew Bon Tew, we say that that conclusion, the Tribunal was right to say that that conclusion was unavoidable.

Now then moving on in the Tribunal's reasoning, at paragraph 38, the Tribunal found that if rule 31.4 meant what Mastercard had been arguing, then this would give rise to a bizarre result. So the Tribunal has reached the decision here, that the omission of rule 31.4 is significant and it then says:

"If Mastercard were right about the construction of rule 31.4, it would produce a bizarre result."

And the bizarre result being that you have claims which can't be brought on one day and then the next day can be brought, even though the next day is later and the Tribunal says that's not normally how things work.

And in that case it was stark because there was one set of proceedings, Dixons, which had been brought by Dixons before 1 October 2015 which would have been time-barred but then Europcar's proceedings were brought after that date and they wouldn't have been time-barred.

So that led the Tribunal to interpret rule 31.4 as applying only where the whole of the proceedings following a regulatory decision would have been time-barred and not just a portion of the proceedings. And you see that in the next paragraphs of the Tribunal

judgment, where they draw a distinction. The Tribunal draws a distinction between the use of the language of "claim" and "proceedings" and so essentially, what the Tribunal has done in this judgment is to say: well it's clear, it's crystal clear that the omission of rule 31.4 in the later legislation is meaningful and deliberate, so that must mean that claims which -- that the fact that the Limitation Act may have prevented such claims being brought can't matter but the Tribunal wanted to resolve the consequence that would result, so it resolved it by interpreting 31.4 in a different way to the way that the Court of Appeal eventually interpreted it.

So essentially, it interpreted rule 31.4 as permitting claims to be brought, in circumstances where they were time-barred in 2003, if the entirety of the proceedings wouldn't have been time-barred.

So that's how the Tribunal squared the circle in terms of the oddity about Dixons being time barred and Europcar not being time-barred.

Now, the point we make for present purposes, just staying with the Tribunal for a moment, is that relates to the Tribunal's observation about odd consequences and it's this: that the very premise for the rule in Yew Bon Tew and in section 16 of the Interpretation Act is that legislation can indeed change limitation rules, such that claims that were time-barred can now be brought. That's the premise for section 16 and for Yew Bon Tew.

Now, every time that happens there will be some odd consequences around the date of the change, so there will be consequences every time that happens, along the lines of Dixons and Europcar. So there will be -- if you have had a limitation period which has expired and the legislator decides to sweep it aside and provide that expired claims can now be brought, there will be some unfairness or arbitrariness in the outcome. In a sense that's baked into section 16 and into Yew Bon Tew, but those consequences don't mean that the legislator can't achieve that result and what the

Interpretation Act requires and what Yew Bon Tew requires is that the result can only be achieved if the conclusion is unavoidable, so those are the words picked up by the Tribunal, or if no contrary intention appears. That's the words in the Interpretation Act.

So we say that -- the point I am getting to really, is that we say, when it comes to interpreting the legislation, the key thing for the Tribunal to do in our respectful submission is to interpret the language of the legislation and to apply the Interpretation Act and Yew Bon Tew, we don't disagree that those principles apply, and to determine what the outcome is. And so the fact that there may be odd results shouldn't be the motivating factor behind the Tribunal's interpretation.

Now, turning to the Court of Appeal --

MR JUSTICE ROTH: Because they're odd results, they would be odd results. Obviously, Parliament can do anything in legislation, subject to perhaps, human rights, means that you need clear language or contrary intention.

MS DEMETRIOU: It does and we don't dissent from that but it doesn't mean more than that, sir. That's my point. If you start saying: it's very odd, you have to strain at the interpretation, that isn't consonant with the Interpretation Act or with Yew Bon Tew. So, sir, you're completely right, we agree with how you put it. Unless there is contrary intention and so on, but otherwise, one is just looking at the plain words of the Act.

Now, going to the Court of Appeal in DSG which is behind tab 77 and I would like to start, please, with paragraph 54 on page 2485.

The point I am going to be making about this part of the Court of Appeal's judgment is that it's supportive of our position as to how these rules fit together and not supportive of Mastercard's position which, effectively, is premised on the submission that rule 31.4 was redundant and did nothing to -- simply confirmed the existing law.

So if we look at paragraph 54, you see that the Court of Appeal is saying that the

words -- that rule 31.1 and 2 provide, as the claimants submit, a new limitation period in respect of a new way of bringing follow-on claims through the Tribunal.

And then the Court of Appeal say that they agreed that section 39 of the Limitation Act operates so as to exclude the application of that Act, where rules 31.1 and 2 apply. So it's not saying: well, the limitation rules and the Limitation Act continue to apply in some way; it's agreeing, the Court of Appeal, that there is a new limitation regime contained in the Tribunal rules and that the Limitation Act would be excluded because you have a new, more specific limitation regime.

We say, of course, that also follows from section 47A(3) and (4), for the reasons that I have given.

MR JUSTICE ROTH: They don't do this on the basis of 47.

MS DEMETRIOU: I don't think they do seem to do it on the basis of 47. We say that it does also follow from 47. So they do it on a different basis which is section 39 of the Limitation Act but it all comes to the same result.

So the Tribunal is saying: well, that takes us to rule 31.4 --

MR JUSTICE ROTH: Just a moment.

(Pause).

Yes.

MS DEMETRIOU: So the Tribunal is now addressing rule 31.4 and considering whether the Tribunal's conclusion that rule 31.4 permits claims that are time-barred, where the proceedings as a whole are not time-barred, so the distinction between proceedings and claims.

So one way of -- the rule that the Court of Appeal interpreted, rule 31.4, we will come to, is to say that all accrued rights, limitation rights under the Limitation Act as of the date in June 2003 are saved and the Tribunal had held, no, they're not all saved, so if you have proceedings which as a whole, are not fully time-barred, then you can bring

claims in relation to those proceedings, even if those claims are time-barred.

So that's the area of dispute before the Court of Appeal. That's the only point that arose in the Court of Appeal because the Europcar proceedings had settled, so they're looking at the position of Dixons which is in a different position because the claim had been brought before the extinction of the revocation of rule 31.4.

So the Court of Appeal judgment interprets rule 31.4 and considers that distinction between proceedings and claims and reaches a different conclusion to the conclusion of the Tribunal. Now, what it doesn't do and so, if you look at paragraph 55 -- sorry, going back to paragraph 54, you see that -- you can see that, so you can see a discussion there at the end of the paragraph about the use of the word "proceedings", so it's grappling with the Tribunal's distinction.

What we then see in paragraph 55 and these are the words that Ms Tolaney relies on, so she relies on the words about two-thirds of the way down:

"The saving in rule 31.4 would have been looking back to the previous limitation regime and preserving accrued rights to plead a time-bar."

Well, we agree, that is what it was doing because the Court of Appeal has found that there is no distinction between proceedings and claims; you look back to whether the claim is time-barred, any part of the claim is time-barred and if it is, then 31.4 means that those accrued rights are saved. But that doesn't undercut our argument at all which is what Ms Tolaney suggests. On the contrary, it's fully consistent with our argument. The Court of Appeal is not saying that rule 31.4 is unnecessary which is Mastercard's argument before this Tribunal. It's saying the opposite, it seems to us, otherwise there would no point in interpreting rule 31.4.

It's saying that the limitation rights which have been accrued and which would otherwise have been lost as a result of this new limitation regime are preserved, insofar as they have accrued as of that date. That's what it's saying. So the

Court of Appeal is saying rule 31.4 does have, is necessary, in order to preserve those accrued rights because otherwise, what you have is a new limitation regime which disregards them.

So, so far, this is consistent with our argument and where the Court of Appeal reaches a conclusion which is inconsistent with our argument before this Tribunal is at paragraph 60. Now, what we say is this is obiter and that does matter. It's a point which really does matter because if it's obiter, it's open to this Tribunal to depart from it and we do say it's wrong. That's our argument before this Tribunal.

And if you look at paragraph 59, the court says in terms in the last sentence of that paragraph that they emphasise that we are not asked to decide this question on this appeal because the Europcar proceedings which raised the point were compromised shortly before the appeal hearing began. So they have said in terms, indeed they have emphasised that they don't need to decide this point. So that really is the definition of an obiter observation because it's not necessary to the ruling in the case. And the point that they say that they're going to go on to consider, even though they don't have to decide it, is the point now before the Tribunal that is between the parties at this hearing which is whether the preservation of rules 31.1-3 but not 31.4 has the automatic effect of expunging a defendant's right to rely on an accrued right. So that's the point. It's the point before the Tribunal and it's a point which the Court of Appeal made observations in paragraph 60 which run counter to the argument I am putting to the Tribunal but which we're inviting you to depart from.

So let's look at what paragraph 60 says. So paragraph 60 starts promisingly for us by saying that the legislator's decision in 2015 to apply rule 31.4 to proceedings begun before 1 October 2015 but not to those begun afterwards, may have been deliberate, as the Tribunal suggested. So there is no suggestion, in fact it seems to be rather agreeing with the Tribunal's decision that it was deliberate.

It then finds that this doesn't inform the question whether, in the absence of 31.4, accrued limitation rights are to be abrogated. And the court then says that they agree that it would be illogical and unsatisfactory to have claims time-barred and then not time-barred which is the point the Tribunal was concerned about. But then says that however, once one has accepted our interpretation of 31.4, that doesn't compel the conclusion that accrued limitation rights are being overridden. Instead, the extant legislation must be construed in accordance with section 16.1. Rule 31.4 may be disapplied but that disapplication cannot, unless the contrary intention appears, affect any right acquired under that enactment.

So we don't dissent from the principle that the Court of Appeal is applying there. They're saying you need to look at the legislation and decide whether a contrary intention appears. So we agree that that's the test but we say that the Court of Appeal reached the wrong result because they say that a contrary intention does not appear in the 2015 rules and that's where we part company.

So they say that there is very little by way of reasoning in paragraph 60 as to why a contrary intention doesn't appear. It's really just asserted. And we respectfully contend that it's wrong. We say that the contrary intention does appear and it appears as follows: Parliament has twice in the primary legislation said that the Limitation Act is to be disregarded and that a new limitation scheme must be followed for follow-on claims, for claims brought under section 47A.

And the legislator has demonstrated a clear intention that rule 31.4 should not apply by revoking the rule and then saving only part of it. So rule 31.1 to 31.3 and intentionally not preserving rule 31.4. So we have a position where, when you look at the primary legislation, that says you disregard the Limitation Act. Instead, there is a new limitation regime. The new limitation regime is in the rules and the rule which Mastercard needs in this case is intentionally, we say, and explicitly not adopted when

laying down the limitation regime for claims brought after 1 October 2015 but arising before.

And we say that it's difficult to envisage what more the draftsman could have done to demonstrate the intention that rule 31.4 doesn't apply and we do say that the Tribunal's reasoning at paragraph 37 is absolutely right on this point.

MR JUSTICE ROTH: They're not saying, clearly the Court of Appeal is not saying that rule 31.4 does apply afterwards. That's beyond argument. It does not apply. What they're saying is that the mere fact that rule 119 does not expressly refer to saving 31.4 is not sufficient to be a contrary intention to the preservation of accrued limitation rights.

MS DEMETRIOU: That is right.

MR JUSTICE ROTH: That's what they're saying.

MS DEMETRIOU: That's what they're saying, I agree with you that's what they're saying, sir, and we're saying that's wrong and the Tribunal was right on that point and it's an obiter point and we say that the Tribunal was right in paragraph 37 in saying that the omission is meaningful and picked up -- the Tribunal, you will remember, picked up the words on Yew Bon Tew, so the Tribunal reached a different conclusion to the Court of Appeal.

It's an obiter conclusion and we say the Tribunal's reasoning is correct and we say the Tribunal's reasoning is correct because of the fundamental nature of the scheme which is that the old limitation rules were removed under the primary legislation. You have a new limitation regime that comes in which is contained in the rules, that rule 31.4 is necessary in order to achieve a position for defendants whose claims are time-barred as of 2003. So without rule 31.4, claims that were time-barred could have been brought if they were within the new limitation period.

MR JUSTICE ROTH: What I am not quite clear is are you saying that the contrary

intentions is in section 47A, subsection -- whatever it is, 3 or 4 -- 4, I think, now the new section 47A but which, like the old section 47A, contains the provision about disregarding limitation rules; are you saying that that is the contrary intention expressed and that having expressed that intention, that disregards -- that sweeps it out, unless it's brought back expressly, which it was in the old regime by 31.4 and it isn't in the new regime?

MS DEMETRIOU: Sir, yes.

MR JUSTICE ROTH: Is that what you're saying?

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: So it's not that the lack of reference to rule 31.4 in itself is a contrary intention; it's that one has to go to -- whether it's section 39 of the Limitation Act which nobody has referred to -- the Court of Appeal does -- or the new section 47A, subsection 3 -- I think -- is it still 3? It was 3. And the new section, just remind me, the new section 47A is --

MS DEMETRIOU: Do you mean the bundle reference?

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: It's at B2. So it's B2/43, page 1382, I think. Let me just check that is right. I was wrong. Thank you, Mr Cook.

MR JUSTICE ROTH: It's now subsection 4.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: It was 3. Any limitation rules are to be disregarded. Are you saying: well that is -- which wasn't the argument of the Tribunal or the reasoning of the Tribunal, I don't think it was argued that way. It was argued simply on looking at rule 119 but I think you're saying one has to look at section 47A(4). That means they have all gone, unless they are preserved under the regime. They were preserved under the old regime, under 31.4. They are preserved under the new regime with 47E

but 47E wasn't in force.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: So you're left with rule 119 which doesn't preserve them.

MS DEMETRIOU: Sir, yes.

MR JUSTICE ROTH: Is that the point?

MS DEMETRIOU: That is what we're saying but we're saying you have to look at it all as a whole. You have to look at the legislative scheme as a whole. So the way that it works is that 47A tells you to disregard the limitation rules. Then you have a new limitation regime brought in by the rules. That includes 31.4, originally. And then we do also place weight on the fact that, of course, 31.4 is not replicated and it is deliberately omitted. So one has to look at the entire context.

When one is looking for contrary intention, well, the contrary intention is that the legislator, Parliament, didn't intend the Limitation Act to apply, that there was a rule which specifically preserved a category of accrued rights under the Limitation Act and then that rule was deliberately not adopted in 2015, when at the same time, Parliament again enacted 47A(4), saying that the Limitation Act doesn't apply.

So we say that's more than sufficient to give rise to the contrary intention.

MR JUSTICE ROTH: Although it would produce then, the anomaly which the Court of Appeal refers to, namely the new section 47E, although it doesn't apply to this claim, but it comes in under the same regime which does bring in the Limitation Act rules. So you have this odd lacuna, on your argument, of cases which somehow get left out.

MS DEMETRIOU: Well, sir, on that point I think the position going forward is different because going forwards, what you have is a situation where both follow-on and stand-alone claims can be brought and so I think that's the reason for reverting to the Limitation Act; it's to simplify limitation.

But you're left with a position where, because of other transitional rules, it wasn't possible for Mr Merricks, for example, to bring a stand-alone claim in these proceedings. So he was confined to a follow-on action and I think maybe -- I'm not -- I don't know but that may be why there is this distinction which you see on the face of the legislation, between 47A applying to claims that arose before but 47E only applying to claims going forward.

But, sir, the position is and I'm not going to shy away from this, that in a sense, you're right to say that it looks a bit anomalous and there's a bit of a lacuna but the problem arises, the anomaly arises on both sides' arguments because on Ms Tolaney's argument, you simply ignore the fact that 31.4 was deleted.

MR JUSTICE ROTH: Well, that's the argument, but the anomaly is in the substantive result. That doesn't arise on Ms Tolaney's argument. It's the substantive result which you recognise, I think you recognise in your skeleton argument very frankly and say: well that's just the result of the legislation, because -- if I can find it. It's paragraph 25 of your skeleton.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: A claim brought before 1 October 2015 led to a claim being time-barred, whereas the same claim brought after 1 October 2015 might not be time-barred. Well, that's the result this Tribunal, in DSG, was keen to avoid, which the Court of Appeal was keen to avoid and you now recognise that on the construction you (inaudible) on the Tribunal, that is going to be the result.

MS DEMETRIOU: Sir, I do and I'm not shirking from that but what we do say is that that sort of anomaly is inherent every time a legislator decides to revive claims or allows claims to be revived that were previously time-barred, so you will always have that anomaly. And so we're back to the point that we were -- that --

MR JUSTICE ROTH: The one thing -- sorry to interrupt you, the one thing the Tribunal

and the Court of Appeal agreed on in all other respects -- I think the Court of Appeal say we got it wrong -- the one thing we agreed on is that one should try and avoid that sort of anomaly.

MS DEMETRIOU: Sir, yes, but with respect, one has a position where the Tribunal, to avoid the anomaly, has interpreted the legislation one way, the Court of Appeal has interpreted it another way and there's disagreement. So both have striven -- but the problem with the Court of Appeal's conclusion is that they assert that there is no contrary intention but we say there plainly is and so it may just be one of those cases where there is an anomaly. But what the Tribunal has to do, in our respectful submission, is interpret the rules and the legislation.

MR JUSTICE ROTH: Yes, and although you say it's obiter, it may technically be obiter, it's not a throwaway remark and the Court of Appeal had a considered judgment of the Tribunal looking at the question of contrary intention. They obviously considered that judgment very carefully because it was the judgment under appeal and they expressed the view that the Tribunal was wrong, in paragraph 60.

MS DEMETRIOU: Sir, yes. So that's correct but the main thrust of the judgment is about the Tribunal's construction of 31.4.

MR JUSTICE ROTH: Yes, no, I see that.

MS DEMETRIOU: And then it's dealing with the point raised by the Tribunal about the anomaly and it simply says with very cursory reasoning, in my respectful submission, that an anomaly is not compelled because of the no contrary intention and we say and, again, I come back to the submission that we say that that's wrong, that there is contrary intention here and the Tribunal's finding at paragraph 37 that this was deliberate and that there is a contrary intention, is to be preferred. And we have cited in our skeleton and perhaps I will just briefly take you to it, so Bennion, bundle B3, tab 84.

MR JUSTICE ROTH: What's the reference in your skeleton?

MS DEMETRIOU: I think it's a footnote in our skeleton but let me just take you to it, sir. So it's Bennion, B3, tab 84, page 2609. And it's the proposition which is that in order to understand the meaning of legislation, it's essential to take into account the state of the previous law and its evolution. So when one is looking at contrary intention, one does go back to the previous version and compare it and we see at --

MR JUSTICE ROTH: This is which paragraph of Bennion?

MS DEMETRIOU: So sorry, it's Bennion, 2609, halfway down, 24.5.

MR JUSTICE ROTH: "Earlier law as aid to construction."

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: 24.5.

MS DEMETRIOU: Yes, and you see:

"At its most basic level, the purpose of an Act is normally to make changes in the law." And so you need to understand what the law was before and so changes are significant.

Then just while we're on this, if we look at 2605, there is another principle of statutory -- there is a presumption that every word in an enactment has a meaning and that the legislator doesn't do anything in vain.

Now, Mastercard's argument offends against that principle because they say Article 31.4 was redundant. I'm just going to deal with that submission briefly now.

MR JUSTICE ROTH: I think you have dealt with that.

MS DEMETRIOU: I have dealt with it.

MR JUSTICE ROTH: You say it's not redundant because of section 47A --

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: And then it was (4).

MS DEMETRIOU: And also what the Court of Appeal said about a new regime and

section 39 of the Limitation Act.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So we say that Mastercard is plainly wrong on that, that 31.4 was redundant and it doesn't offer any explanation for why it was included in the first place but it also offers no explanation for why it was deliberately omitted in 2015. Its argument is really a parasitic one. It says: well it didn't mean anything in the first place, so you don't read anything into the fact that it was omitted. But that falls down because it was essential in the first place.

And so, sir, standing back and summarising, we say that our argument -- it's our argument that properly reflects the words used by the legislator, both in the primary legislation and in the rules and Mastercard's argument fails to adhere to the words in the legislation, so it doesn't give proper effect to section 47A which provides for the Limitation Act rules to be disregarded. Then it says that rule 31.4 was redundant and then it says that the decision of the legislator not to save rule 31.4 just doesn't matter, you can just ignore it. And we say that each stage of that argument is inconsistent with the plain words of the legislation and that the Tribunal's decision, we respectfully say, should be driven by the express words of the legislation and not by a need to avoid a result which looks odd.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Sir, those are my submissions.

MR JUSTICE ROTH: Just one moment.

(Pause).

Ms Tolaney, we would like to hear you in reply, particularly regarding the effect of section 47A subsection 4, I think it now is and the interrelation of that with the position now and the old 47A(3), as it was, I think, with rule 31.4, but we also think it would be very helpful to hear the Scottish argument on rule 31 immediately afterwards.

MS TOLANEY: We agree.

MR JUSTICE ROTH: And not with --

MS TOLANEY: Not with applicable law in the middle --

(Overspeaking)

MR JUSTICE ROTH: (Inaudible) on section 11.

MS TOLANEY: Agreed.

MR JUSTICE ROTH: So that we get all the submissions on rule 31 together. So what we would propose, it's now 4.25, is to rise now, give you time to gather your thoughts and focus your submissions, which I imagine won't be very long, in reply and then we see that both Scottish counsel, very helpfully, have been here today, to hear the Scottish law argument on rule 31 and then whether we will want to come back to either you or Ms Demetriou afterwards, we will see.

MS TOLANEY: I'm entirely in your hands, sir. I can do it now, it was my first point, or I'm happy to wait until the morning.

MR JUSTICE ROTH: I think it's now 4.25. We will do it first thing tomorrow and then we will wrap up rule 31. We then have section 11 of the Scottish -- well, we will probably either go at that point -- whether we go to foreign law, choice of law or we go on with section 11, we're very much in your hands.

MS TOLANEY: I think it really depends on what the Tribunal will find helpful. I can see a logic in completing limitation before moving to applicable law, now we know all the Scottish lawyers are here.

MR JUSTICE ROTH: I think that's sensible and also it means that once that's complete, Scottish counsel do not have to stay and can go back to Scotland in time for the weekend.

MS TOLANEY: Indeed.

MR JUSTICE ROTH: If choice of law should potentially get squeezed, we can always

add some time on Monday morning.

MS TOLANEY: Of course.

MR JUSTICE ROTH: So that's what we will do. We will hear your reply first. We will then hear rule 31 from the perspective of Scots law, any further observations arising out of that and then we will move on to section 11 of the 1973 Scottish Act and we will resume at 10.30 tomorrow.

(4.25 pm)

(The hearing adjourned until 10.30 am on Friday, 13 January 2023)