IN THE COMPETITION APPEAL TRIBUNAL

Case No:1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 13th January 2023

Before:

The Honorable Mr Justice Roth
Lord Ericht
Jane Burgess

(Sitting as a Tribunal in England and Wales, and in Scotland)

BETWEEN:

Class Representative

Walter Hugh Merricks CBE

V

Defendants

Mastercard Incorporated and Others

A P P E A R AN 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, David Johnston KC, Ewen Campbell & Daniel Benedyk (On behalf of Mastercard Incorporated and Others) Instructed by Freshfields Bruckhaus Deringer LLP

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Friday, 13 January 2023

(10.30 am)

(Proceedings delayed)

(10.37 am)

MR JUSTICE ROTH: Yes, Ms Tolaney, good morning.

MS TOLANEY: Good morning, sir. Good morning to the Tribunal.

Reply submissions by MS TOLANEY (continued)

MS TOLANEY: I have a short reply and I will start with the point, sir, you raised yesterday. So it's Mr Merricks' argument on section 47A that was under consideration and Ms Demetriou sought to argue yesterday that pre-existing limitation defences were ousted by section 47A(3) of the Competition Act 1998 and that came into force in 2003 and the same wording in the new section, 47A, subsection 4, which came into force in 2015.

In her submissions yesterday, the case was made that this showed a clear contrary intention for the purposes of the Interpretation Act and the argument, sir, is wrong for four reasons.

First of all, the argument is clearly wrong on the wording of the two subsections and they are identical, of course.

The second reason is it's also an argument which has been considered and rejected by the Tribunal in Deutsche Bahn.

The third reason is that the provision introduced in 2003 clearly demonstrated no contrary intention because it's common ground that accrued limitation defences were preserved in 2003. It was restated, the section, in 2015 in identical terms, so by itself it cannot demonstrate a contrary intention and the reality is that Ms Demetriou's case stands and falls with the omission of rule 31.4 from rule 119, section 47A adds nothing.

And the fourth point is that in any case, my learned friend's case that the combination of section 47A and rule 119, evincing a contrary intention, is hopeless, in the light of the terms of the Interpretation Act and the case upon which my learned friend relies.

So those four reasons, and may I just briefly develop them, but those four reasons each demonstrate why the point is wrong.

Starting with the wording of the provision, if we could go, please, to bundle 3, tab 68 -- B3/68/2024. This is the appendix to the Deutsche Bahn case and I thought it was easiest to take it here.

So it's subsection 3 and this is the 1998 Act. The wording is:

"For the purpose of identifying claims which may be made in civil proceedings ..."

And the emphasis is on those words, in my submissions, and then reads:

" ... any limitation rules that would apply are to be disregarded."

Now, the subsection does not say limitation rules are to be disregarded, rather, it expressly states that limitation rules are to be disregarded for a single specific purpose, which is to identify claims which may be made in civil proceedings. So all it is doing is explaining how you identify what claims could be brought in normal civil proceedings; it's not addressing limitation in proceedings before the Tribunal at all.

And we can see the role of the definition of the claims which may be made in civil proceedings in subsection 1 and that states that:

"Section 47A applies to any claim for damages or any other claim for a sum of money which a person ..."

And then one drops down:

" ... may make in civil proceedings."

So this is simply defining the claims that section 47A applies to.

MR JUSTICE ROTH: And it's really feeding into the jurisdiction --

MS TOLANEY: Exactly.

MR JUSTICE ROTH: -- the scope of the Tribunal.

MS TOLANEY: Exactly.

MR JUSTICE ROTH: We're a statutory Tribunal, so we can only have jurisdiction over those proceedings that are given to us --

MS TOLANEY: That's precisely right.

MR JUSTICE ROTH: -- which is what subsection 4 says and then these are clarifying definitions.

MS TOLANEY: It's a jurisdictional provision, precisely. And the same is true, sir, therefore, of section 47A which was introduced in 2015, and that, if one goes over the page in the same bundle, to 2026, you see subsection 4 of the restated provision is in the same terms, subject to simply adding a reference to prescription. Otherwise the clause is unchanged.

MR JUSTICE ROTH: Yes. Slightly odd that prescription is left out of the earlier one.

MS TOLANEY: I'm sure.

MR JUSTICE ROTH: Looks like an oversight.

MS TOLANEY: I'm sure. So that's the only change and one sees the same role for the definition in 47.2 and so it still remains a jurisdictional provision.

And so standing back on the wording, there is simply no scope to suggest that you can infer a contrary intention that accrued limitation rights should be lost from this section. And to put the matter beyond doubt, the Deutsche Bahn case considered and rejected any such argument. This appendix is to the Deutsche Bahn case and one needs to go to paragraph 56 at page 2017. So paragraph 56 addresses the 2015 version of section 47A, which is obviously in the same terms, apart from the reference to the Prescription Act 2003. And the Tribunal explains that there are two limbs to section 47A(1); the first limb setting out that a person may make claims before the Tribunal and the second limb making clear that such claims are the subject of the

provisions of this Act and the Tribunal rules. And the Tribunal explains that the original 47A operated in the same way.

And then if one goes on to paragraph 57, that paragraph explains that it is solely for the purpose of identifying claims to which the section applies that limitation rules are disregarded.

My learned friend alighted on the fact that it says that claims against Mastercard fall within section 47A and may be brought before the Tribunal, irrespective of any limitation defence under domestic or foreign law, but that does not help my learned friend. This is simply about jurisdiction, as we have said and as here, the Tribunal has jurisdiction to hear the claim but that is different to whether the claim will ultimately fail in whole or part on limitation grounds and that analysis is confirmed by paragraph 58. Essentially the same argument was made by the claimants in this case as, in substance, my learned friend's argument and it was rejected.

MR JUSTICE ROTH: If Ms Demetriou's argument is right, it seems to me Deutsche Bahn was wrongly decided --

MS TOLANEY: That's correct.

MR JUSTICE ROTH: -- because if it excludes domestic limitation rules, then it equally will exclude foreign limitation rules.

MS TOLANEY: That's absolutely right and at one stage, sir, you will remember that my learned friend suggested that the reasoning in DSG was limited to whether foreign limitations continue to apply and that was at 86 of the transcript yesterday, and her argument wrong, for the reasons you suggest. The Deutsche Bahn case makes it clear it was addressing both domestic and foreign limitation rules in paragraph 58.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And indeed, paragraph 58 bears some reading because the final sentence in particular, which starts:

"Indeed, since the express exclusion of limitation or prescription rules under section 47A(4) is confined to determine the application of limb 1, those rules will continue to apply for all other purposes, save as overridden by express provisions elsewhere in the CA and Tribunal rules."

And so what we see is the rules will continue to apply for all other purposes. So there is no scope to suggest that section 47A(3) and then subsequently, 47A(4), changed the position.

Then going to the third point of my four points, the same wording. It's also instructive, of course, that the wording in 47A(4) in the 2015 Act is exactly the same as the original wording, so it clearly can't have a different purpose to what it had in 2003 on its own terms. And on Ms Demetriou's case, the 2015 position changed.

Now, what I think her case is, is not simply relying on just purely the wording of 47A(3) and (4), although it wasn't very clear, she is trying to rely on it in some sort of combination with rule 119.

MR JUSTICE ROTH: Yes.

MS TOLANEY: But the reality is that 47A(4) doesn't do anything different to the previous version of it, when the position is clear that limitation defences were preserved and that's why I --

MR JUSTICE ROTH: I have to say, I didn't understand her submissions to say there was a different interpretation of what became subsection (4) from subsection (3). I thought she was saying it has the same meaning.

MS TOLANEY: That is right.

MR JUSTICE ROTH: In one case it's brought back by rule 31.4 and in the other case, it isn't.

MS TOLANEY: Exactly, which is why I say that her submissions ultimately stand or fall with the effect of rule 119 because you have the same wording in 2003 and 2015

and it really is then, whether 119 makes a difference and really, what she has to show, therefore, is that there was an express provision elsewhere which overrode Mastercard's accrued rights and certainly until yesterday's submissions, we had understood that to be -- really, her case to be firmly on rule 119. There was a development yesterday but in fact, we say it makes no difference.

The fourth point is that in any case, even if one accepted Ms Demetriou's submission that 47A(4), together with 119, somehow ousted the operation of the limitation rules, you would then have to look at whether the provisions could be read together as so doing, in light of the Interpretation Act. And section 16B of the Act which we looked at yesterday, makes it absolutely plain that the repeal of an Act does not, unless the contrary intention appears, revive anything not in force or existing at the time or affect the previous rights and so on.

And the same point applies to rule 119, omitting a reference to 31.4, whether looked at together with 47A(4) or not. The reality is that the words simply don't say that. And yesterday, my learned friend submitted that the premise of section 16.1 of the Interpretation Act was to enable the legislator to change limitation rules. That was said yesterday in the transcript, Day 1, page 93, lines 8 to 13.

Now, that shows the fallacy in my learned friend's argument because the reality is that the purpose of the Interpretation Act and the premise of 16.1 is that rights are not lost unless clearly stated to be so and her argument seeks to reverse the express terms of 16.1.

And just to remind you, that's at volume B2, tab 29. And I'm sure the Tribunal is very familiar with this but if you look at the actual wording, one can see that the words are: "The repeal does not, unless the contrary intention appears, revive anything, affect any rights ..."

And so on. So the premise is the absolute opposite of what my learned friend would

have to contend for and did.

MR JUSTICE ROTH: This goes to rule 118, really. The repeal of the old rules doesn't disturb accrued rights unless expressly stated.

MS TOLANEY: That's right. That's absolutely right.

Can I then turn to my learned friend's final submission which was that the Court of Appeal was wrong in the DSG case which, of course, that case is fatal or the final nail in the coffin of this argument and my learned friend was driven to saying that the Court of Appeal was wrong and that the Tribunal should make a different decision. And that's at Day 1, page 97 to 99, to page 103 of the transcript.

Now, first of all, that's a bold submission, when the decision was of the Chancellor, speaking for a strong court who had carefully considered the operation and construction of the --

MR JUSTICE ROTH: Yes, we have that --

MS TOLANEY: -- 2003 rules. And it's also, sir, though, it's not just the 2003 and 2015 rules but also the inter-relationship between the two. But the submission, sir, also ignores three fundamental points which completely end the argument. First of all, the Court of Appeal determined the effect of the 2003 rules, holding that in 2003, accrued limitation defences were preserved and it was common ground that that was ratio.

It follows from that binding finding that very clear wording would have been needed to oust those limitation defences and revive statute barred claims from 18 years prior and there is no such wording in rule 119.

Second, the case advanced in DSG was that both the 2003 rules and the 2015 rules removed accrued limitation defences, otherwise there would have been an anomaly. And that's why the Tribunal at first instance reached the decision it did, and that was the decision that was reversed by the Court of Appeal, because the Court of Appeal held that any anomaly would be if the 2015 rules removed accrued limitation defences,

when the 2003 rules preserve them.

And so my learned friend's submission thus ignores the fundamental reasoning of the Court of Appeal.

Third and finally, it follows on the Tribunal's own reasoning and ratio in DSG that once it accepted that the 2003 rules preserved accrued limitation rights, then as night follows day, the 2015 rules must also do so. So there's no scope at all for my learned friend to suggest that the finding of the Court of Appeal on the 2003 rules is binding but that the Tribunal should reach a different conclusion on the 2015 rules. There is no scope, because the reasoning is entirely intertwined and that matters not, whether it's ratio or obiter; it's the reasoning and the rationale.

Standing back, one can test it in any case, that the outcome, that the 2003 and 2015 rules are interpreted consistently, is the only approach that makes common and legal sense and that's precisely what the Tribunal held at first instance and the Court of Appeal considered and also held. And that is entirely fatal to Mr Merricks' case, not least now because he has conceded the operation of the 2003 rules.

If I can be of any further assistance, sir.

MR JUSTICE ROTH: Before you sit down, we asked both sides yesterday about the move to the Scottish position about the forum point, to consider the order we were minded to make. Have you had a chance to do that?

MS TOLANEY: We have and Mr Cook is going to deal with this point, if he may.

MR JUSTICE ROTH: Yes, thank you.

Submissions by MR COOK

MR COOK: Yes, sir. The starting position, we absolutely agree that section 11(2) should be dealt with by the Tribunal, as though you were sitting in Scotland. Just to address two points, to ensure we sort of all understand the issues that arise here.

There is, of course, the route of appeal point, which court it goes to.

There is another additional problem which, of course, is the statutory Tribunal and the route of an appeal. The scope for an appeal is limited to a point of law, along with the classic English position, and I can't help you on whether it's the same in Scotland, that findings on foreign law -- and for an English Tribunal, findings of Scottish law will be findings of foreign law -- are classically considered to be findings of fact.

So if an English Tribunal reached a ruling on Scots law, subject to the extreme judicial review arguments about failure to take account of evidence or whatever else, that would essentially be unappealable which, again, it seems to us to be a problematic outcome.

MR JUSTICE ROTH: Yes. There may be a further reason but --

MR COOK: The reason we flag it is on section 11(2), there is absolutely no problem at all, that just makes logical sense, that that's dealt with as a Scottish Tribunal. There is, of course, the further point which is the rules point we are dealing with now. Those rules are, of course, the Tribunal's rules generally, both for Scotland, also for Northern Ireland and you're going to hear some, perhaps, rather shorter submissions on the Scottish aspect in relation to that. There is then a question of whether that ruling should be by the Tribunal in England or in Scotland.

MR JUSTICE ROTH: We are a UK Tribunal.

MR COOK: Yes, but the decision is made where you sit.

MR JUSTICE ROTH: Yes, I certainly wouldn't want to decide the point but I am somewhat reluctant to think that the decision we make regarding the position under Northern Irish law, Scottish law, just because our forum for the proceedings is said to be England, becomes a finding of fact of the UK Tribunal and that may have to be explored one day but I don't think we need to do so now but I would --

MR COOK: We simply wanted to flag it. It seemed to us those are the two routes of

appeal and ability to appeal, are the two considerations. 11(2), it's very easy, because that's going to be a stand-alone part of the judgment. In relation to a finding on the operation of the Tribunal's rules, that is going to be a single judgment, whether it incorporates some aspect of consideration of Scots law as well and just simply to flag whether -- it would be undesirable for there to be two judgments which had to then go off to separate appeal courts for consideration. Clearly unpalatable, but we just wanted to make sure that the Tribunal is alive to the issue of whether any reference to Scots law there, might then become problematic.

It may turn out to be illusory because I think the Scots law points are going to be narrow.

MR JUSTICE ROTH: Controversial with regard to the rule but thank you for flagging the point.

The other aspect where it's relevant is assessment of costs and we did think that the proceedings should be in Scotland, only for the purpose of appeal. We thought that the notion that any finding, any award of costs might have to be split up to be separately assessed, as regards the Scottish part in Scotland and the English part -- doesn't make any sense, so we will --

MR COOK: As a matter of practice, that clearly makes sense and -- we would agree, you have the ability to define any issue as being --

MR JUSTICE ROTH: You don't push against that. No, thank you very much.

Ms Demetriou, on that short point.

Submissions by MS DEMETRIOU

MS DEMETRIOU: Thank you. So we have come to the same conclusion as Mr Cook, so we're content with the 11(2) point, for the Tribunal to sit as a Scottish Tribunal. We had also noted the potential difficulty with the rules point of sitting wholly as an English

Tribunal because we think that, like Mr Cook, that then your findings on Scottish law would be, technically, findings of fact which could not be challenged on appeal and so whilst we completely see that it would be undesirable on the rules point to have two separate judgments with two different routes of appeal, we think that potentially sitting as just an English Tribunal might create another problem.

MR JUSTICE ROTH: We can do this at any time.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: We were minded to do it not simply for section 11(2) but also for section 6, which is not being argued today --

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: -- but will be in due course, so for that purpose, as well.

MS DEMETRIOU: Sir, yes, and we agree with that and we agree with what you have said about costs.

MR JUSTICE ROTH: Yes, thank you very much. That's very helpful.

And I think we then go, do we, to the Scots law argument on rule 31, and rule 119?

MS TOLANEY: We do, sir, and I'm just going to switch places, with your permission.

MR JUSTICE ROTH: Of course, yes. I think we will stay here.

MS TOLANEY: Thank you.

MR JUSTICE ROTH: Yes, good morning, Mr Johnston.

Submissions by MR JOHNSTON

MR JOHNSTON: Good morning, sir, and good morning to the members of the Tribunal. In addressing the section 47A issue, I'm really just going to provide a very short coda to the submissions already made by Ms Tolaney and it will be obvious to the Tribunal why that is so, because the provisions on limitation and prescription are the same. Of course, we have seen that one of the versions of the rule includes

reference to prescription and the other does not. It's not clear why that is. I think the best explanation is that it's simply an attempt to be clearer in the second version than the rule was in the first, but in my submission, for the reasons --

MR JUSTICE ROTH: By the rule, do you mean the statute?

MR JOHNSTON: I'm sorry, yes, sir. I'm sorry, that's what I am referring to, yes. The passage that you looked at with Ms Tolaney just before, just a few minutes ago.

So the only useful addition I can make to her argument is to emphasise for the benefit of the Tribunal that in Scots law, obligations of this kind, to pay damages for infringement of competition law, are subject to prescription rather than to limitation and the consequence of that is that the obligations are extinguished when the prescriptive period has been completed.

And you have that in section 6 of the 1973 Act, the reference to which is the authorities bundle, bundle B4, tab 89.

MR JUSTICE ROTH: I think it's also in a very helpful appendix --

MR JOHNSTON: Yes, sir.

MR JUSTICE ROTH: -- to the skeleton argument that you and Ms Tolaney and Mr Cook produced.

MR JOHNSTON: It is, sir. If you prefer to use that, we can go to that page instead.

The key point I make and the Tribunal will have noted this already, is that section 6(1) explains that:

"An obligation which has subsisted for a continuous period of five years, without interruption by a claim or an acknowledgement ... "

And then we read on below:

" ... as from the expiration of that period, shall be extinguished."

So the obligation no longer exists. It's not like the procedural bar that is brought in by a rule of limitation, it simply no longer exists. So what's the significance for present

purposes? Well, in my submission, the submission is, firstly, that Ms Tolaney's arguments apply in their entirety to Scotland as well. The only difference is that the position on Mr Merricks' approach is even more extreme in Scots law than it is in English law, because it requires not simply that one overlooks accrued rights and an accrued limitation defence but it requires one to reconstitute obligations which simply no longer exist.

Now, it's accepted, I think on all sides, that in order to deprive a person of an accrued limitation defence, there has to be very clear language and so my submission is a fortiori, if one is going to deprive a person of a right which they have or subject them to an obligation which has already been extinguished, then very clear, probably even clearer provision is required.

And for the reasons Ms Tolaney gave, there simply is no such clear language here. It's noticeable that in the skeleton argument, Mr Merricks cites no example of where something of this kind has occurred, where extinguished rights have been revived, let alone revived by a side wind in the manner that's suggested here.

And I imagine that that is because there simply are no such examples. There are certainly none of which I am aware and in case it's of interest to the Tribunal, the few occasions recently when the Scottish legislature has considered whether it might be appropriate to revive extinguished rights, they have not pursued that opportunity because of concerns about violating people's human rights. We haven't put any material about that in the bundle and I mention it simply in passing but my point really is that there is no example of this kind.

LORD ERICHT: (Audio distortion) bundle, just so I have an understanding of where you are coming from or what are you thinking of in particular?

MR JOHNSTON: My Lord, what I am thinking of in the first place is a Scottish Law Commission report from 2007 about limitation and prescribed rights in relation to

personal injuries actions and the prescribed rights portion of that report, it's report number 207 from 2007, was made on a reference by the Scottish government to the Commission because it was anxious to see if it could actually revive a personal injuries claim that had already been extinguished by prescription prior to 1984, which is when prescription ceased to apply to claims of that kind. So it was given consideration by the Commission there and it was decided that it was not appropriate, owing to concerns about human rights.

More recently in 2014, when the same kind of issue arose in relation to claims for damages in relation to childhood abuse. Again, the legislature was very keen, if possible, to revive extinguished claims, but again, if one looks at the report of the Justice Committee to the Parliament, it was very clear, albeit reluctant, that it was simply not possible to do that.

But we can, of course, provide that material if it would assist the Tribunal but I think the reason I mention it now is to show the extreme nature of the argument that's being made, that extinguished rights should somehow, without there being any clear statutory basis for it, to somehow be reconstituted or created, because, as I say, even in cases of quite anxious social policy of the sort I have just mentioned, the legislature has turned against taking that dramatic step.

My submission is, as Ms Tolaney has already said, that there is nothing in the 1998 Act or the 2015 Act which has the effect of recreating prescribed extinguished obligations, let alone doing so in clear language and I think there's nothing else I can usefully add on this chapter of the argument. This is just, as I said, a short coda to the principal arguments that the Tribunal has already heard in relation to section 47A.

LORD ERICHT: Thank you. There is one thing which you might be able to help me with which is I would like to look at a snapshot of what the position in 2003 was and for that purpose, we see that we have section 47A which, on Ms Demetriou's argument

on English law, takes out limitation and then we have rule 31.4, which her position, as I understood it, was to bring back limitation.

Now, there is a significant difference in 47A and perhaps if I can give you a reference to that. It's set out in the Deutsche Bahn case in B2/024 -- it's 47A, it's helpfully -- so it's B2/024 of the bundle.

MR JOHNSTON: Yes, thank you, sir. I have found it now.

LORD ERICHT: Thank you. If you look at 47A(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 that is very specific; it's just limitation rules, it's not rules of prescription.

MR JOHNSTON: Yes.

LORD ERICHT: So at that stage, it looks like the Scottish prescription rules still apply. So on Ms Demetriou's argument, in English law, 47A(3) removes the English general rule of limitation and then that's brought in again by rule 31.4. In Scotland, as it appears to me, we don't need to go through these hoops because the Scottish law of prescription, even if we accept Ms Demetriou's arguments, has never been removed, so that never has to be put back in again. Is that your understanding or am I missing something?

MR JOHNSTON: I think that's correct, yes. I think one could also add this other point which was made this morning, in discussion between my learned friend Ms Tolaney and the Chairman, that this section is all about the jurisdiction of the Tribunal. So to the extent that there is or is not reference to prescription, the point that your Lordship made is, of course, right, but when we focused on the fact that we're concerned here with, jurisdiction, the argument for Mr Merricks flies off, as it were, because it depends on saying that the rules of limitation or the rules of prescription have somehow been taken out of play, such that the elderly claims can be revived.

LORD ERICHT: Thank you.

MR JOHNSTON: Sir, I'm not sure if the intention was to move to the reply by Ms Ross or whether you wish me to continue on to section 11(2).

MR JUSTICE ROTH: I think we will deal with the rules point.

MR JOHNSTON: Thank you.

Submissions by MS ROSS

MS ROSS: Thank you.

Good morning, sir, good morning to the members of the Tribunal. There is, in my submission, a good deal of common ground between the position in England in respect of limitation and the position in Scotland in respect of prescription. I am conscious, though, in the conversation that's just taken place between my learned friend and Lord Ericht, that there is a particular question arising about the construction of the statute and the emergence of the reference to prescription in 2015 that wasn't there in 2003 and that the Chairman, in an earlier remark this morning, observed that it was maybe odd that it wasn't there before.

In my submission, there is, in fact, a good reason for its absence in the period from 2003 to 2015 and I will come on to explain that, but it may help if I set out what I understand to be some uncontroversial propositions first, before turning to the view that I submit is the correct one.

However, stepping back and looking at matters in the generality, the overall purpose of the legislation and, indeed, its practical effects, are, in my submission, the same. Clearly, this is obviously common ground, the only period in dispute here is 1992 to 1998 and on the Mastercard submission, those claims would have been time-barred in 2003; time-barred, I think has to be understood as general in both England and in Scotland. And it is accepted that any claims arising after 1998 for Scottish purposes

are brought in time and these are squarely within the Tribunal regime, where, since 2003, there has been a two-year time limit in place. That is all uncontroversial.

That then links to the submissions to come in relation to section 11(2) because if Mastercard -- Mastercard does accept, as it must, that if section 11(2) operates to suspend prescription in respect of all of the claims, then no obligations would have prescribed before 2003 and all claims, so far as Scots law is concerned, are in time. That's, I think, again, uncontroversial.

What, then, is the effect of 47A? When looking at what claims can be brought, neither limitation nor prescription is an obstacle and that's the jurisdiction question. Looking at the legislation itself, and I think the Tribunal probably has the same page already before it, it is a claim that may be made in civil proceedings.

Now, prescription is not a procedural bar to making a claim. Unlike limitation which does operate as a procedural question, a claim which is subject to an argument about prescription is not, in itself, one which may not be made. So section 47.2 as now, but the old manifestation of 47A, it was for a claim to which this section applies -- sorry, may be made in proceedings before the Tribunal, but -- it's in subsection 1 -- may make in civil proceedings brought in any part of the United Kingdom.

So that encompasses a claim in which a prescription issue arises, even one which a defender may say relates to a long-extinguished obligation. After all, there might be other issues arising. That a prescription plea might be taken in a civil action is not a bar to that claim being brought to the Court of Session and, therefore, that a prescription plea might be taken is not a bar to that claim being brought before the Tribunal.

That has always been the case as a matter of law and that's perfectly consistent with what was said in 47A, as it then was, in 2003 and that's consistent with the law as it currently stands. And I do not understand that to be controversial; that's simply

a matter of law.

Jumping ahead slightly, though, I will come back to this point, it might be that all that was happening in 2015, when the -- or rules relating to prescription was introduced, was that it was just restating what was a matter of law anyway. It's slightly odd to talk about rules relating to prescription, it's just the law. That might be an explanation. In my submission, there is an alternative explanation but I will come to that presently.

So that is uncontroversial. You could bring a claim which would be subject to a prescription argument and you could bring it to the Tribunal.

Secondly -- and also I understand this to be uncontroversial, although in light of some of the submissions by Ms Tolaney this morning, it's probably important that I do make clear what the position is. The Tribunal has its own regime and its own time limits and these displace the 1973 Act for claims brought before the Tribunal. There is or was, of course -- currently, as at 2023, we're in a different regime, but for all material purposes, there is a two year limit, starting with the relevant date.

LORD ERICHT: Just so I am clear, you say they displace; did you mean they displace the substantive law of prescription?

MS ROSS: Yes, because they substitute a new prescriptive regime and we can see that it's called a new regime of prescription, when we come to see what the rules say.

LORD ERICHT: We will come on to that but I will be quite interested to hear what you have to say about the competency of disapplying a substantive legal matter by rules of a Tribunal rather than by primary legislation, but we can come on to that.

MS ROSS: It is by primary legislation, sir, because you can't just read the rules on their own. The rules are made under the statute itself and, indeed, what the statute says is that claims are subject to this Act, to this section and the rules and I can give the Tribunal the reference to that, certainly in the current version of 47.

It is subject to this Act, if you bear with me a moment. Yes, it's in 47A(1), as this is in

the current:

"A person may make a claim to which this section applies, in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules."

So we see in the primary legislation that claims are to be subject to the rules themselves. You have to read the two together; it's not simply the rules displacing the impact of prescription, it's the Act itself.

LORD ERICHT: I think the Court of Session's power to make an Act of Sederunt prescribing rules is ultimately a statutory power under the Court of Session Act but are you saying they could use that to disapply their substantive law of prescription by rules?

MS ROSS: Yes, in my submission. Well, one conceivably, although it wouldn't be in the business of doing so, whereas here, the purpose of this legislation is to establish a Tribunal with its own specific set of rules and it's clear -- in the skeleton argument I've made reference to the very helpful table at the end of my learned friend's book which sets out a whole host of different fora, where different rules apply, where effectively, the provisions of the 1973 Act are displaced. So I do not understand it to be controversial that it is possible to displace the 1973 Act through express provision and in my submission, it is perfectly plain to see that an Act, the purpose of which is to say: here is a Tribunal, here is a set of time-barred provisions, it is two years from the relevant date, that that is what applies in that forum. Now, I appreciate that there's a distinction between -- and this is where it becomes controversial, in my view, because as I understand it, there is no doubt at all that that must be true from 2003 onwards. The question is whether it is displacing the application of prescription for the period prior to the Act coming into force. As I say, I don't understand there to be any suggestion that for the period since the Tribunal has had this jurisdiction, that there is somehow a twin track approach, where you have a choice.

That might have been suggested and I wasn't entirely clear whether that was Ms Tolaney's submission this morning. It's not an area that is in dispute at all, since we are only talking about pre-2003. So far as England is concerned, of course, the section 39 of the Limitation Act 1980, which serves to -- that highlights how alternative provisions are displaced. As my learned friend Mr Johnston makes clear in the appendix to his book, there isn't an equivalent of section 39 for Scottish purposes but, nevertheless, it is clear -- in that textbook, it's made quite plain that as a matter of principles of statutory construction, that you can substitute a different regime, using primary legislation. And in my submission, that is what has happened.

As I say, the question -- and in a moment, I will turn to, if you like, Lord Ericht's snapshot question as to how it would have been previously, but if I can just perhaps -- in case there is any doubt about this question about what the current arrangements are in the Tribunal -- I don't need to take the Tribunal to it, but I can give the members of the Tribunal the reference. I think Ms Demetriou has already considered this yesterday but the Court of Appeal in the DSG case, the page references is B2/485, did make reference to the effect of section 39 and it makes it clear there that what has happened, certainly for English purposes, is that there is displacement of the former regime.

In my submission, it clearly -- the two have to be treated as the same for the purposes of the jurisdiction of the Tribunal.

If I can just pause there to say that's why for English purposes, it made it clear that 31.4 was absolutely essential because you had displaced limitation. 31.4 was essential to protect the old rights and it's now gone.

And perhaps just to confirm the submission that I have just made, rule 119, and I think that that does appear at the back of the same page, page 2/028 in the authorities bundle, B2/028, where we see rule 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 purpose of determining the limitation or prescriptive period which would apply in respect of the claim, if it were to be made on or after 1 October 2015."

Now, that's clearly describing the Tribunal's exercising of its function and there it describes it as the limitation or prescriptive period. And we know, therefore, that the prescriptive period is two years because it protects rule 31.1 to 3.

So that's, as I say, the uncontroversial position so far as 2003 is concerned and so the answer to the snapshot question at 2003 is it's very clear; it's two years. The question then becomes, and this is where it is perhaps more controversial, is what is the Tribunal to do with claims which are properly before it? Because there is no jurisdiction issue, they're clearly properly before it, insofar as they relate to obligations prior to 1998.

And --

LORD ERICHT: Sorry to labour this one but just so we understand it, you see, in 2003, the Scottish position is it's a two year prescription.

MS ROSS: Two years, yes. And so the question is, if the Tribunal is looking at it, looking at -- let's say there was no question of any old obligations. Let's say it was really a much more recent thing. No question of anything prior to 2003. The question would be, has this been raised -- this is in the Tribunal. Let's say the earliest possible starting date was after 2003, but nevertheless, a prescription question arises, then the simple question is: what does the Tribunal do with that? It asks: was it brought in time? In order to ask "Was it brought in time?", was it brought within two years of a relevant date? And if the answer to that is yes, clearly it is something that is before the Tribunal. I don't understand there to be any suggestion otherwise.

MR JUSTICE ROTH: I'm sure it's my fault, I am a bit confused. It can be brought

before the Tribunal two years before the relevant date but if it's a Scottish claim --

MS ROSS: Yes.

MR JUSTICE ROTH: -- and if the claim would -- under Scottish law of prescription, the obligation would be prescribed, do you say that as in under the old rules, before the 2015 amendment of either statute or rules, the prescriptive right, prescriptive effect is overridden?

MS ROSS: Yes, I do and if there were --

MR JUSTICE ROTH: And how do you get to that, when, as you pointed out, the primary legislation doesn't displace prescription and the secondary legislation doesn't refer to a prescription?

MS ROSS: By the operation of section 47A, which requires the Tribunal to -- by making it clear that claims are brought subject to this Act and the rules, and the obvious consequences of it being unsatisfactory to have two different sets of rules applying simultaneously.

This claim was not brought under the old rules but even if it were under the old rules, then I say that the claim would properly be before the Tribunal and the Tribunal would apply its own rules. It would ask itself, "Was it brought within two years?" and that's sufficient.

MR JUSTICE ROTH: So there would be a stark difference, then, would there, between the Scottish claims and the English claims? Because the English claims, clearly, under rule 31.4, if they were time-barred as at 2003, they couldn't be brought, but the Scottish ones, you say prescription wouldn't apply because it's not preserved by rule 31.4?

MS ROSS: I was going to come on to exactly that difficulty because I appreciate that that, on the face of it, looks like quite an awkward discrepancy between the two. Again, just to be clear, we're now back to the position where we're talking about how

the Tribunal would be treating pre-2003 matters because that's all that the rule 31.4 -- so we're really looking at, as a hypothetical situation, how would the Tribunal have dealt with this previously.

MR JUSTICE ROTH: It's not hypothetical; it's an actual position, it just doesn't apply directly to this case, but it's relevant for this case because the whole argument of this case is the lack of reference to rule 31.4 and rule 119.

MS ROSS: Yes.

MR JUSTICE ROTH: So it's of direct relevance and that's why everyone has been addressing it.

MS ROSS: Yes. I suppose in using the term "hypothetical", we are in the territory of the post-2015 regime which does have this reference to all(?) prescriptive rules. And I will come on to the significance of that, introducing that phrase. But on one view, that was never necessary, to spell that out because you could bring a claim which might be prescribed, but the question then is, how the Tribunal might have dealt with the situation arising prior to 2015. In my submission, it would not have been bound to apply rule 31.4 which only refers to limitation. Looking at rule 31.4, a pursuer would not have been prevented from bringing proceedings because prescription is not a procedural bar, and so the result, on that analysis, would have been that everything would be before the Tribunal.

Alternatively, the Tribunal might have said that it couldn't operate its rules retrospectively, such that its rules displaced prescription for the period prior to 2003, and moreover, that might have been attractive because it would be consistent with the position in England for rule 31.4.

MR JUSTICE ROTH: Sorry, can you just say that again? The Tribunal could have said that it wouldn't apply its rules -- when you say retrospectively?

MS ROSS: Yes, if we're dealing with the claims that depend on obligations which

arose prior to 1998 which would have prescribed by 2003, the Tribunal might have taken the position that it could not apply the two-year limit to those because those arose prior to the introduction of the regime and that would have the attraction of being consistent with the English position of ensuring that rule 31.4 meant that those claims could not be before the Tribunal. The Tribunal couldn't --

MR JUSTICE ROTH: The claims arose prior -- what about a claim that arose in 2000? That arose prior to the --

MS ROSS: It wouldn't have prescribed. There would be no question that that -- there were no -- if you're talking about accrued prescription rights, if that were brought in 2003, it wouldn't have prescribed.

But, of course, what we know now is that rule 31.4 has gone and that's so, for all of the reasons which have been canvassed earlier. And in addition, section 47A has been strengthened by the specific reference to prescription.

Now, it may be that that makes explicit what was always true as a matter of law. It makes it clear that only the Tribunal rules apply, but where the position comes to be is that either the claims did not prescribe or, at worst for the claimant here, in the past, rule 31.4 meant that claims for that old period could not have been brought and on that view, the claims ought to be treated alike and the position simply falls to be determined in the same way as it does in England.

LORD ERICHT: 47A, as it's changed in --

MS ROSS: Yes.

LORD ERICHT: -- 2015, at the point when the words about prescription are added.

MS ROSS: Yes.

LORD ERICHT: Assuming for the moment, for the purpose of argument, if 47A is not a jurisdiction issue, it's actually a time-bar issue, then what's taken away in 47A is immediately given back in 47E.

MS ROSS: For future -- yes. Yes, that is so but we're not in that zone.

MR JUSTICE ROTH: I'm still a bit puzzled. Suppose a claim arose in 1999.

MS ROSS: Yes.

MR JUSTICE ROTH: It's brought in 2011, within two years of a Commission Decision or a court decision of pleading it, so it comes within the two years.

MS ROSS: Yes.

MR JUSTICE ROTH: But, of course, under Scottish rules of prescription, it was prescribed and it was prescribed -- you say it's not retrospective because although it relates to a claim of 1999, before the legislation came in, the prescriptive effect did not take place until after the legislation came in. Is that why you say it's not retrospective? It's still applying it to a pre-legislative claim.

MS ROSS: Yes, but that claim would not be precluded by prescription because it could have been brought as a valid claim or, rather, one only applies the two-year rule for the period from 2003 and that incorporates -- and that's why we're only talking about up to 1998.

MR JUSTICE ROTH: Yes.

MS ROSS: The point where it comes to -- and dealing with my learned friend's submission that this is an extreme result and that it's not possible to resurrect an extinguished obligation, and I have no real observation to make in relation to consideration that's been given by the Scottish Parliament to these things, there has to be some meaning associated to the introduction of -- or rules relating to prescription in the new version. It may simply be that it is a, for the avoidance of doubt, sort of provision, if there was doubt previously, but it could also be interpreted as making it clear that the effect would be to ensure that the Tribunal is only applying its own rules, which is the two-year limit, and that is consistent with the Tribunal having an expansive scope for claims which are unlimited in time.

The position, though, remains as it does for English law, that the rule 31 obstacle is removed and that is to the effect in England that all claims are covered. The consistent position in Scotland, notwithstanding the apparent extremity of the submission, is that that includes those in the 1992 to 1998 period.

Those are all of the submissions I would wish to make in respect of this chapter. Obviously, section 11(2) is a separate matter --

MR JUSTICE ROTH: Can I just ask you --

MS ROSS: Yes.

MR JUSTICE ROTH: -- because I understand it -- and I know less, of course, about Scots law than at least three other people in the court room -- rules of prescription are substantive, is that right, rather than procedural?

MS ROSS: Well, yes.

MR JUSTICE ROTH: They extinguish the obligation.

MS ROSS: I can't dissent from that; that would be the effect, yes.

MR JUSTICE ROTH: Doesn't that limit the power of the Tribunal rules to remove prescriptive rights because if you look at the rule-making power of the Tribunal, which is of course statutory, which is in the schedule to the Enterprise Act -- I think Ms Demetriou took us there right at the beginning, but I need to turn up the reference, so give me a moment, unless someone has it before I do.

MS DEMETRIOU: I think it's volume B2, tab 39.

MR JUSTICE ROTH: Thank you very much. B2/39.

(Audio distortion).

MS DEMETRIOU: It's actually both, I think, so it's both sections.

MR JUSTICE ROTH: Yes, it is, thank you. It's B1/353. This is the schedule to the Enterprise Act. At paragraph 11:

"Tribunal rules may make provision as to the periods within which the manner in which

proceedings are to be brought."

And that's clearly the two-year rule:

"The provision may, in particular, make further provision as to the procedural aspects of the operation of the limitation or prescriptive periods in relation to claims which may be made."

So if you say the rules actually remove the prescriptive regime. Isn't that going beyond the procedural aspect of the operation of prescriptive periods?

MS ROSS: I think the answer, looking at the question, as we are, with 2015, is the effect of the specific reference to prescription in that version of the rules. Now, one could say that's the jurisdictional gateway into matters, but it would be extraordinary to allow or to say that any rules of prescription that would mean that a claim could not be brought before the Tribunal, that must have some meaning, for the Tribunal then to be applying substantive or to be applying prescription, when the Tribunal has its own provisions which I think, uncontroversially, mean that for the period from 2003 onwards, mean that it's a two-year limit.

It couldn't be the case that under primary legislation, you are to disregard prescription and then to bring it back in again. That would be --

MR JUSTICE ROTH: Well, in primary legislation, the old version, it doesn't say you disregard prescription, the 2003 version. Primary legislation, as you pointed out, doesn't refer to prescription.

MS ROSS: It doesn't, but in my submission, we are treating matters now, as they are according to the version that applies from 2015. The position previously, in my submission, was that you could look at any claim but the Tribunal would be applying its rules.

I don't understand there to be -- my submission would be that because the rules are made under primary legislation, that the effect has to be that you are displacing the

section 6 limit that would otherwise apply.

MR JUSTICE ROTH: But made under primary legislation, that only permits rules to deal with the procedural aspects of the operation of prescription.

MS ROSS: The effect, in my submission, must be that you can't have a situation where you have multiple rules applying. For present purposes, though, we are not looking at claims brought afterwards; we're only looking at the old provisions, the old obligations.

Now, I accept that the explanation has been provided that that is a relatively or might be characterised as an extreme position, because we are looking at something where prescription has operated. There's no suggestion, no suggestion at all has been made that it's operated, so that subsequent, more recent claims have prescribed. That just is no part of the proceedings before this Tribunal. So we're only looking at the, arguably, more extreme position.

MR JUSTICE ROTH: Yes.

(Pause).

Yes. Mr Johnston, you have a right of reply. As I think you were with the Tribunal yesterday, so you know we take a mid-morning break because the proceedings are transcribed and it's for the benefit of our transcriber. I don't know how long you anticipate being.

MR JOHNSTON: In reply, perhaps I could just take a couple of minutes, sir, and then --

MR JUSTICE ROTH: Yes, let's hear you first and then we'll have our break.

Reply Submissions by MR JOHNSTON

MR JOHNSTON: I really just have three points. Firstly, nothing that Ms Ross said engaged with the fact that, as discussed with the Tribunal, we are looking at

jurisdictional provisions and, therefore, they are not provisions which are intended to disapply the law of prescription.

Of course, there is no argument that that can be done by legislation, if the legislation is in the appropriate words, but that's not the situation we're in.

Secondly, nothing that was said addressed what I think is uncontentious, the terms of the Interpretation Act, that very clear language is needed to deprive a person of accrued rights which is, of course, the effect of reimposing on that person an obligation which has been extinguished.

Thirdly, and this was the focus of most of the discussion of the Tribunal with my learned friend, her submissions were addressed really at procedure rather than substance and I think that became clear when the Tribunal was asking how is it, if the primary legislation did not displace prescription in 2003 and the secondary legislation did not refer to it in 2003, how was it that there was this effect that preparation was disapplied? And her answer to that was, I think, a procedural answer, looking at the references to procedure under section 47A. But as the Tribunal has observed, prescription is a substantive matter and whatever the procedural rules may say, if the right is prescribed, the right is prescribed. On the terms of the legislation we have seen, there is nothing that revives those prescribed rights.

And that links in with the point which was under discussion right at the end about the scope of the Tribunal's own powers under schedule 4 of the Enterprise Act and as the Chairman observed, rightfully, I would say with respect, those powers are clearly limited. They do not entitle the Tribunal to disapply substantive rights which would include those which are gained by the operation of the law of prescription.

So for all those reasons, in my submission these rights had prescribed and the arguments that have been made to suggest otherwise are unsound.

Sir, that's all I wish to say in reply.

MR JUSTICE ROTH: Yes, thank you.

We will take our break now. If either Ms Demetriou or Ms Tolaney want to say anything about the English law argument on rules arising out of any consequence of the Scottish law arguments, we can hear you very briefly when we come back. It may be that you don't but we will give you that opportunity, if you think that anything has come out of Scotland, by reason of any desire to achieve what the knock-on effect is, if I can put it that way, on the English law position.

We will come back at about 12 noon.

(11.53 am)

(A short break)

(12.08 pm)

MS DEMETRIOU: I'm not going to make any more submissions.

MR JUSTICE ROTH: Thank you. So we go, now, to a pure Scottish law point now which is, I think, section 11 of the 1973 Act.

Submissions by MR JOHNSTON

MR JOHNSTON: Yes, sir, thank you. It might be helpful if the Tribunal had the section in front of them, just to begin. It is in B4, tab 89.

MR JUSTICE ROTH: Can I just ask you: is there more there than in the, what I found very helpful, appendix?

MR JOHNSTON: To our skeleton?

MR JUSTICE ROTH: To your skeleton, your joint skeleton.

MR JOHNSTON: I don't believe so. I will just check. I think everything you need should be there.

MR JUSTICE ROTH: Ms Burgess helpfully points out A49.

MR JOHNSTON: Thank you very much.

Yes, that's all that's needed. All I wanted to do, just looking at the passage on A49, is to remind the Tribunal that section 11 is a special rule in the prescription legislation which sets out the dates on which -- what are called obligations to make reparation which in more normal language, would be obligations to pay damages.

It sets out a prescription -- well, several, three prescription rules for obligations of that kind. So it's not concerned, for example, with payment obligations or other such things; it's only concerned with damages. And the primary rule is in subsection 1, where we can see that subject to these later subsections:

"Any obligation ..."

And then we're told it can arise from:

" ... an Act or a rule of law, breach of contract, [et cetera], to make reparation for loss, injury or damage caused by an act of neglect or a default, shall be regarded for the purposes of section 6 as having been enforceable on the date when the loss, injury or damage occurred."

Now, we looked at section 6 before. That's the one that says "extinction of obligations by prescriptive periods of five years", and it's set out immediately above this on page 49.

MR JUSTICE ROTH: Yes.

MR JOHNSTON: So I think it's important just by way of background to note that that is the default rule for these kind of damages obligations, that they begin to prescribe on the date when the loss occurred.

Now, the subsection with which we're concerned, subsection 2, is a special rule which departs from that ordinary rule in the case of "a continuing act, neglect or default, where loss has occurred before the act, neglect or default ceased", and if that's the case, then the loss is deemed, for the purposes of subsection 1, to have occurred on the date when it ceased.

So we can see that's a deemed date for prescription which takes the place of the one that would apply under the ordinary rule. But in order to get into this deeming provision, obviously we need first to identify a continuing act, neglect or default.

In these submissions which I hope will be quite brief, what I am proposing to do is just simply address several points which were made in the skeleton argument lodged on behalf of Mr Merricks and, obviously, I take as read the arguments that we lodged in our own skeleton argument.

The first point I would like to address is in his paragraph 34, where he relies on Article 1 of the Commission Decision and I'm going to go to the Commission Decision immediately anyway, so I wonder if it might be helpful just to turn that up and it's in the core bundle, volume 2, tab 25, and it starts at page 609. However, the first point I would like to take the Tribunal to is on page 823. A/823. And this is Article 1 of the Commission Decision.

This is obviously the Commission's Decision but it's also what Mr Merricks relies on in Article 34 of the skeleton, to say that between the dates mentioned there, 1992 to 2007, Mastercard have infringed Article 81 and then reading down to four lines from the end:

"By in effect, setting a minimum price, merchants must pay to their acquiring bank for accepting payment cards in the EEA by means of the interchange fees ..."

Et cetera, et cetera.

So what's relied on there by Mr Merricks is setting a minimum price and we see that in the re-amended claim, as we pointed out in our own skeleton argument. So the re-amended claim focuses the infringement on precisely what is said there, namely, in effect, setting a minimum price merchants must pay.

The first point I would make is the words "in effect" make it clear that this is not intended to be a particularly precise or exact account of how the infringement occurred

and that's why I would like to take the Tribunal to a few subsequent passages which spell it out in more detail.

Before I do so, however, in my submission it's worth making the point and, indeed, we do so in the skeleton argument, that "in effect, setting a minimum price", if one just looks at that without any prior context, setting a minimum price, on no view would one say that was a continuing act; you have set a price, you set a price on the date that it's set. It's not a continuing act of any kind.

MR JUSTICE ROTH: May I just understand that. If, for a period of 14 years -- so I see if you set a price in 1997 and that price is the same in 2011, that's not, you say, a continuing act?

MR JOHNSTON: That is right.

MR JUSTICE ROTH: If you set a price in 1997 and then you set a new price in 1998, with a new price in 1999 and a new price in 2001 and so on and, indeed, there are multiple prices, because there's not one MIF; there are a series of MIFs, as the decision made clear. Is that a continuing act or not?

MR JOHNSTON: Sir, no, it's not, in my submission. It's a series of acts but that's quite distinct from a continuing act and that's really the point --

MR JUSTICE ROTH: If it's done under the ambit of an overall rule of an association, whereby that's done and it is the combination of that overall rule and each decision constitutes the infringement, is that a continuing act?

MR JOHNSTON: Again, in my submission, for reasons I will develop, obviously, it's not a continuing act because in order to have the infringement at each time by setting the positive MIF, one needs to take that step of actually making the decision to do so and that is, as the Tribunal has held in one of its earlier decisions, an essential ingredient of the infringement. And that being so, one cannot, for the purposes of the section 11(2) argument, one cannot ignore that. There has to be such a step setting

the rate.

Then if you say there must be a step of that kind, the question arises: well, how is that then to be classified as a continuing act? Each of these decisions only has a limited temporal effect until it is displaced or superseded by the next one.

I will develop these points in relation to the case law in a moment. I don't know if the Tribunal would wish to look at it but there are just a few references I would, in any event, wish to give to passages in the decision.

MR JUSTICE ROTH: I think that's very helpful, if you would, please.

MR JOHNSTON: Yes, thank you, sir. The first one, then, is on page 619. It should be paragraph 13 --

MR JUSTICE ROTH: Can I just, before we go further, there's a confidential and a non-confidential version of the decision.

MR JOHNSTON: Yes.

MR JUSTICE ROTH: This looks like the confidential version. Is there any issue about that? It's not a question I expect you to answer, Mr Johnston. It's just you appreciate my --

MR COOK: My understanding is the version that's in the bundle is the one that includes a number of pieces of information that were redacted in 2007 but in 2007, that was contemporaneous and, therefore, rather more commercially sensitive. It shouldn't include any information or a lot of that information is now, therefore, public record or not public record; it's not something that we can preserve as confidential. So that version is something that can be --

MR JUSTICE ROTH: There's no problem with that, thank you.

MR JOHNSTON: Thank you, sir.

I think I have about eight different passages to refer to but not to explore in great detail because, obviously, that's not the function of today's trial.

The first, paragraph 13, discussing remedy, explains what the remedy is and the passage to which I would draw the Tribunal's attention is in the last five lines, where it is said that:

"The order does not prevent Mastercard's member banks from adopting an entirely new MIF under exception [set out in the brackets] that can clearly be proven to fulfil the four cumulative conditions of Article 81.3, based on solid empirical evidence."

So one can see -- the reason for pointing to this is that it indicates that the concern is with a MIF set at a level which cannot or has not been proven to meet the cumulative conditions of Article 81.3. So, as I say, the concern is with the MIF itself and the level at which it has been set.

If we take these points fairly rapidly, but of course, the Tribunal can stop me if I am going too rapidly. If we move on forward three pages, it's, I think, also helpful to see the reference in the glossary to the definition of Mastercard MIF in the first complete paragraph and in the decision it's used to refer to "the organisation network rules and", which is italicised, "the decisions of its bodies or managers that determine the intra-EEA, fallback interchange fees", and so forth.

MR JUSTICE ROTH: I'm so sorry, which definition is it?

MR JOHNSTON: It's Mastercard MIF, sir, it's just at the top of A/622.

Yes, I just looked at the first three lines and pointed out that they refer both to the rules and to the decisions that determine the fees.

From there we go to page 662, please, and this should be paragraph 142. Yes, page 662, under the heading "The structure and level of intra-EEA fallback interchange fees", and we can see it is said there:

"As set out in annex 1 ..."

Perhaps it's just helpful not to go to it but to note that annex 1 is on page 826 but:

"As set out in annex 1, Mastercard currently distinguishes 27 intra-EEA fallback

interchange fees and five for Maestro-branded payment cards."

I think that's a point, sir, that you put to me, in essence, in the question you asked me a few moments ago.

So in the annex and, indeed, in the Mastercard schedule which is lodged in the bundle immediately following this, it's on page 863, we have to find the details of when the decisions were made and what rates were applicable from the date of each decision, until superseded by the next decision.

If I could go from there, please, to page 66 -- no, that can't be right. I will just check the page number. Yes, page 666, please. Here we have -- the Tribunal may find this the most helpful passage for understanding the procedure that was operated for setting the fee. And it falls into two sections. The first one that starts with paragraph 156 is the procedure up until mid September 2006 and reading it short, all I want to indicate to the Tribunal is the procedure that was gone through, at least approximately, and it can satisfy itself as to the detail later.

But we can see at 157 that the consultants were employed to gather information and at 158 -- this is perhaps worth looking at in full, and the Tribunal can perhaps just read it -- that what management did was to prepare proposals and it's worth reading the rest of that paragraph to see what informed the proposals that they actually made.

MR JUSTICE ROTH: Should we read that?

MR JOHNSTON: If you would, sir, yes.

MR JUSTICE ROTH: Just a moment.

(Pause).

Yes.

MR JOHNSTON: Thank you, sir, so by the end of 158 we've got to Management Proposals which we then see, reading on, come to the Business and Marketing Advisory Committee, which reviewed and decided whether or not to endorse the

proposal, and then at 160, the European board could either adopt or reject them. So that's what happened up to mid September 2006 and thereafter, there is a similar series of paragraphs explaining the changes that took place then, which are essentially that the matter was delegated to the Chief Operating Officer of Mastercard.

Then at 162, again we see reference to consultants. 163 is perhaps another paragraph which I could invite the Tribunal to read.

(Pause).

MR JUSTICE ROTH: Yes.

MR JOHNSTON: Thank you, sir. We see that after the procedure that's been set out in paragraph 163, there is discussion of what might be involved in the proposal. At 165, it is brought to the European Interchange Committee and then at 166, if there is a positive recommendation by that committee, the Chief Operating Officer approves it.

There are, I think, just two more passages I would like to mention and then I will sum up what I invite the Tribunal to draw from all of this. The second to last one is on page 672 and it's paragraph 182. It's simply to note there that according to the minutes of the European board and of the Business and Marketing and so forth Committee, there were several drivers influencing the board's decision to set the fees and it makes reference to competition. Incentives to issuers and acquirers to adopt new technology. The aim to keep the structure and level similar to the fees outside Europe and the results of costs studies.

But I think that's probably sufficient for present purposes. The point I am seeking to make is simply that by way of filling in what is the rather general language of Article 1 with which we began, is that we can see from this narrative and these recitals of the Commission's Decisions that decisions were taken by a sophisticated procedure in several steps, at regular intervals, following on fairly substantial information-gathering,

consideration by committees, review before the decision was actually taken. And when such a decision was taken to set a positive MIF, it had effect until such time as the whole procedure was gone through again and another decision was taken.

So that's the factual background against which I now come back to section 11(2). Again, this is really addressing the key question which is, indeed, the whole issue, really. The key question that you, sir, have put to me at the beginning: is this a continuing act or is it not? And my submission is that when one has regard to the material we have just looked at, this is clearly not a continuing act; it is a series of decisions, each of which was a one-off decision. It had effect in its own terms until supplanted by the next decision.

In my submission, that's the correct way to understand the Commission's Decision.

MR JUSTICE ROTH: Again, while we're in the decision, it may be that paragraph 398 on page A/727 is relevant. Technically, recital 398.

That rather sums it up, I think.

MR JOHNSTON: Yes. Yes, sir, that is clearly -- essentially the conclusion that is drawn which forms the basis of what is said in Article 1, that regard is had for the competition law analysis under Article 81, both to the network rules that form part of the Mastercard MIF and the decisions taken to set the rates.

MR JUSTICE ROTH: You have a continuing rule --

MR JOHNSTON: Yes.

MR JUSTICE ROTH: -- to (inaudible) and then that's the framework in which you have this series of decisions taken in the way you've just drawn our attention to.

MR JOHNSTON: Yes, exactly so. In our submission, we will see this as we go along -- not that I am going to go along for very long -- but we will see this, that it's important, in my submission, to be clear that the analysis for competition law purposes, where one can say that the infringement consists in the rules and the decisions taken

within the framework of those rules, that is a familiar kind of analysis for the competition lawyer.

But when one comes to looking at section 11(2), as we are doing, the question is a different one. The question is: do we have a continuing act for the purposes of the Scots law prescription? And my submission is that when one looks at these things, we have to identify the wrongful act and we then have to identify: are we satisfied that this wrongful act is a continuing one?

In my submission -- I have said this already and I no doubt will say it again -- my submission is because the setting of the positive MIF rate is integral to the competition law infringement, one doesn't have an infringement until that is done and it is done each time a decision to do that thing is taken, which means, of course, that the framework is important, but one cannot substitute the framework for the decision, as indeed, this Tribunal has held in the Westover case, to which I will come. From there, perhaps it might be helpful if I touch on two of the Scottish cases which are in the authorities bundle, bundle B. B4/99 is the first tab and this is the case of Johnston v The Scottish Ministers.

My reason for going to this case is that according to Mr Merricks' skeleton argument, it is of little assistance and, in my submission, in fact the contrary is the case. So this is B4, tab 99 and there is just one paragraph to look at, which is on page 2758, paragraph 17.

Before I go to it, perhaps it's just worth underlining, I think the Tribunal knows this, that there is very, very little case law on this provision, section 11(2) and the Tribunal has, I think, all of it, bar perhaps one decision at a lower court level, but it certainly has all the cases that could be of any possible materiality.

In my submission, contrary to what is said on behalf of Mr Merricks, this is the most helpful of those decisions, precisely because it's closest to the situation we have of

decision-making, where the infringement complained of here involves taking decisions.

Now, in this case, as we can see if we read down to about the sixth line of paragraph 17, the pursuer in that case is complaining about an illegality and a statutory instrument and was challenging it by bringing proceedings against the Scottish ministers, and the case was presented on two bases. One was that the wrong complained of was making the order in the first place and the judge says, this was Lady Dorrian:

"The wrong to which the pleadings are directed is the one-off act of promulgating an allegedly ultra vires order, not, as the pursuer now submits, the maintenance, prosecution or enforcement of the order."

The key point I rely on is this:

"The promulgation of the order in 1986 was a completed act at that date and it cannot properly be seen as a continuing act. The fact that the 1986 order had continuing consequences, does not make the passing of the order a continuing act."

And in my submission, this is precisely the territory we are in. Of course, everybody knows that if one makes a statutory instrument, it continues to have effect. It's not a one-off in that sense, but it's important, in my submission, to have regard to the judge's analysis that it is a single completed act, it is a one-off, as she puts it in an earlier sentence and it's not properly for 11(2) to be seen as a continuing act.

My submission is that this is our position too because we are dealing with the making of a decision analogous to the promulgating of a statutory order and the making of the decision is the alleged wrong. Of course, I appreciate that the background, the framework rules matters too, but when one has regard to the decisions, in my submission we are in exactly the territory of this, so we need to be very alert to whether what we have before us is a continuing act or an act which remains in force, has

continuing consequences but has actually been done and is complete.

So (inaudible) of Scottish case law goes, in my submission that is the most useful case for the Tribunal to consider. In fairness, I should also mention the one that Mr Merricks says is the most helpful which is the Shore Porters' case which is in the same bundle at tab 105. I think all that I need say about that, which I think in fairness, is essentially said in Mr Merricks' skeleton anyway, is that this case turns very much on its own pleadings and the Tribunal will see that on page 2849, in paragraph 59.

So if the Tribunal has that paragraph, 59, we can see that the judge -- this is a decision following a debate, that's to say just an argument on the pleadings rather than evidence -- the judge concludes:

"It is artificial to look at each misallocation in the accounts in isolation and unconnected to the other."

And she says, referring to the pleadings:

"What the society offers to prove are large numbers of misallocations made over an extended period of time which it said were effected or condoned by one or more of the defenders. The society avers a general course of conduct and also examples of various practices persisting over periods of years, coupled with averments of a continuing failure on the part of the defenders at the level of accounting and supervision and a continuing failure on their part to take reasonable care to see that the society's funds were applied in accordance with its rules."

And it was submitted that those were a continuing act.

Now, I would submit that it's clear that there is a basis for allowing that to go to proof as a potential continuing act because we don't have, as in our case, a series of discrete decisions, each of which could be said to be a wrongful act. We have instead, something that just seems to have been happening over a long period. We don't get further particularisation but we do get averments of a general course of conduct and

of practices which have been continuing.

I would suggest that this is a very different situation from what the Tribunal has before it here and, therefore, that the case is not really of much assistance to it in reaching a conclusion on 11(2).

I think that leaves me with, perhaps, two or three further points to make. Returning, just so the Tribunal knows the order of my arguments, I am returning to look at -- this is paragraph 40 of the Merricks' skeleton argument and it doesn't say much, other than to refer to my book which I feel, since I am here, I ought to mention.

There is a reference in the book which, if you want, is B4/109. I'm not particularly recommending looking at it but it's there. There is a reference in the book to competition law infringement as being a possible example of a continuing act case under section 11(2), but I think it's clear, without criticising the author in any way, I think it's clear -- whether it is such an infringement would depend on the facts, because as the Tribunal knows, a competition law infringement can consist of a single act or it can consist of something that goes on for a long time.

So --

MR JUSTICE ROTH: Can you give me an example for competition law infringement which, on your analysis, goes on for a long time?

MR JOHNSTON: I suppose if -- I think it is quite difficult to do so in the abstract because generally speaking, one is going to need to analyse, in the way the Commission has done, how the decisions were made and which --

MR JUSTICE ROTH: Can't you envisage how any competition law infringement -- you're dealing with business conduct (inaudible) -- on your analysis, goes on for a long time?

MR JOHNSTON: I think the short answer I would give is on reflection, it appears to me that competition law may not be a good example for section 11(2). In reality, the

sort of thing that is a clear example of section 11(2), the best examples I can think of would have nothing to do with this sort of area of law.

One would be -- for instance, if one owes in a building or apartments, if one owes a duty of support to those above and does not provide it, that would clearly be a continuing failure to comply with one's duty. I think that's probably the best example. There are, no doubt, others, but it's perhaps noticeable, just from the lack of the case law, that there are a few instances -- indeed, all the other cases, all the cases apart from the Shore Porters' case which we've just seen, have declined to find any continuing act. So I think that is a clear pointer to the fact that such things are rare and as I say, failure to provide a continuing right of support is perhaps the only clear example I can think of at the moment.

MR JUSTICE ROTH: Basically you're saying that one should give this provision a very narrow construction.

MR JOHNSTON: I think that's appropriate, sir, yes. Partly when one bears in mind that it is an exception to the ordinary rule of section 11, which is that time starts to run from the date on which the loss occurred, not on which the wrongful act ceased.

LORD ERICHT: Just on that question, an example under the competition law, I think what might be worth looking at here is Article 101 itself, which is in volume B, at tab 1. And you will see in 1 it says:

"The following shall be prohibited: all agreements ... undertakings, decisions by association of undertakings and concerted practices."

Well, a concerted practice would perhaps be more amenable to the analysis that it's a continuing act, whereas a decision by an association might be more amenable to an interpretation that it was a one-off decision.

MR JOHNSTON: My Lord, yes, I see that and, thank you, I think that's helpful because practice clearly does seem to suggest something that continues or may be

capable of continuing.

The difficulty -- I think I have made this point before -- the difficulty, obviously, which is a matter before the Tribunal is applying the competition law concepts within the framework of our domestic prescriptions statute which no doubt was not drafted particularly with this kind of situation in mind. But in my submission, as indeed, as his Lordship, Lord Ericht, has just said, there might be scope for arguing that the concerted practice would fall within section 11(2). What is more difficult, he said also, is to apply that to a series of decisions of the kinds that we have in the present case.

MR JUSTICE ROTH: I can see if one gives it a very narrow construction, it might seldom apply competition law and you have in support of that, the fact that it is very seldom applied, apparently. But if one thinks about a cartel, a sort of classic competition law infringement, as opposed to (audio distortion), I can see if you have the sort of cartel arrangement that says: well, you will agree that company A shall have the exclusive territory of the UK and Ireland and company B is not going to sell its products in the UK and Ireland; company B will sell them in France and Belgium and company A is not going to sell its marketed products in France and Belgium, and they make that agreement and they carve up the market and it's one agreement and it lasts for several years until eventually, one of them says: I'm not going to do this anymore, it's too dangerous, we might get caught and it's contrary to competition law, you could say: well, it's an agreement on a certain date, that's the infringement and what follows is the consequences of the agreement, not a continuing agreement. It may be arguable but I see that your argument is that would be the date of the agreement, as I understand it, not -- the rest is the consequences of the agreement.

MR JOHNSTON: Yes, it will depend on the facts. The consequences, yes, if it's purely consequences, then, yes, then we have a completed act followed by consequences. On other facts, one might say that the agreement on its own had no

impact until such time as it was put into effect and then putting it into effect by making transactions which were anti-competitive, that would clearly be a wrongful act but, again, depending on the facts, committing a wrongful act of that kind might, on the face of it, simply be a single act, not a continuing act. But I think it's very hard to answer the question in the abstract.

MR JUSTICE ROTH: Well, that's why I am trying to think of common examples. If you had a different kind of cartel that said that: we're going to allocate tenders between us, and these are the sort of things that actually happen, of course, in competition law, address it and they make that agreement, so that any time that an invitation to tender is going to be circulated and then: we will agree between us who is going to win the tender and the others will overbid and they make that arrangement and then each time there is an invitation to tender by a customer in the market, email goes round and they then agree who shall get that tender for that contract.

So each time you have a separate decision, but it's within a framework that they're going to allocate tenders between them and that lasts for four years, until they pull out or it's investigated, there is a whistle blower and the whole thing comes to an end and the competition authority investigate. It seems rather artificial to say: well, there is a separate act each time there is an invitation to tender and they take a decision who shall get the tender. It's within the framework that that's how they're going to operate.

MR JOHNSTON: Yes.

MR JUSTICE ROTH: And if someone wants to bring a damages claim or reparation, claim for reparation, as a customer, of saying -- not one of the contracting parties, but a customer of the resulting product, saying: well, this whole arrangement led to higher prices in the market, so you can only do it about this particular decision and the ones thereafter on invitation to tender but not about the previous ones because it wasn't a continuing act, it does seem rather artificial.

MR JOHNSTON: I understand the point, sir. I think it's simply a point at which the competition law analysis is likely to be different from the analysis under this statute.

MR JUSTICE ROTH: But we've got to look at the analysis --

MR JOHNSTON: Yes.

MR JUSTICE ROTH: -- of the facts that give rise to competition law infringement.

MR JOHNSTON: Absolutely, but if one takes your example of the tender, the question is going to be, if we go back to section 11 and we're asking when does a wrongful act occur which does harm to somebody who wants to pursue a claim for damages in relation to that harm, at the date the agreement is made, they are not going to be in a position to do that. So although it may be a wrong as a matter of competition law to enter into the agreement at all, we don't at that point, because no steps have been taken and nobody has been harmed in consequence of the agreement, we don't at that point have anything for section 11 to bite on.

So in my submission, the correct analysis would be, when we do finally have the exchange of emails and the fixing of what is to go ahead, we do then have something that somebody could sue on and that is the wrongful act. That's when section 11 comes in and then we ask --

MR JUSTICE ROTH: Is it a decision that then -- I'm sorry to interrupt you -- but isn't the position, I see, if the agreement is never implemented you can say there is nothing anyone could ever claim on, but once it starts to be implemented you have a distorted market and that market continues to be distorted until the cartel comes to an end, and that's the fact that it's -- you have this anti-competitive market that's continuing as a result of a series of individual decisions within an overall framework, that we are going to distort competition in the market.

It just strikes me as slightly artificial for the purpose of deciding, you know, when can you plan to pluck out the individual decisions, but you may say: well, that's what

section 11 requires.

MR JOHNSTON: That is what I say, sir, yes. That is what it requires, because the ordinary rule is that we have to pinpoint the date on which the loss occurred, and that is the date from which prescription starts to run.

The special rule is if we can identify first a continuing act, but here on our particular facts -- and this is why we refer to the Westover case in our skeleton -- on our particular facts, and indeed the Tribunal may wish to have it before them, it's bundle B4, tab 106, and it's really just one paragraph, but it may be helpful for answering your question, sir. Paragraph 46 on page 2870.

MR JUSTICE ROTH: Yes.

MR JOHNSTON: And I was reminding you, sir, of one of your own decisions, so taking it shortly, it's concluded after discussing the setting of MIFs that:

"Even if the relevant scheme rule envisaged the setting of positive MIFs, we consider that the setting of a positive MIF pursuant to that rule was an essential element of the restriction."

And then it's noted that that emerges sufficiently from passages in judgments quoted earlier, including by the Supreme Court, referring to the MIF having the effect that is restrictive of competition and the MIF setting a reservation price.

And then it's noted at the end:

"Moreover, that is highlighted by the period of a year when Mastercard did set a zero MIF, notwithstanding the reason for that step, as discussed above it, in our view it is clear that in respect of ... transactions to which that zero MIF applied, Mastercard could not be said to have infringed Article 101, although it retained its default MIF settlement rule throughout."

In my submission, that perhaps is a helpful way of distinguishing between our case and the tender case that we were considering a moment ago because, firstly, we see

that the infringement consists in each decision to set a positive MIF. In principle the decision could be, as we see at the end of the paragraph, a decision to set a zero MIF, and that would not be infringing, whereas I think on your example, sir, the exchange of emails to fix the procurement exercise in implementation of the agreement would clearly be a wrongful act, whatever happened.

The difference here is that, until such time as the decision is made to fix a positive MIF, one cannot say that there is infringement of Article 101.

LORD ERICHT: (Audio distortion) Is this a situation where there are a series of decisions and fixing MIFs and none of them were objectionable on competition law grounds?

MR JOHNSTON: My Lord, yes, and in my submission that's an important distinction compared with the sort of examples I have been discussing with the chairman in the last few minutes, because it does show that we need to focus very sharply on the decision-making from time to time and that is, as I submit, a strong pointer against regarding this as a continuing act.

I think there is very little I would wish to add. I can add it all before 1 o'clock, if that's convenient.

I simply wanted, since it's in the supplementary bundle, for completeness, to draw attention to the Commission press release, which is the last item in supplementary bundle D, and it's simply because it confirms that the level of the MIF is clearly an important matter, so this is D -- I think there is only one volume of D. D/30.

MR JUSTICE ROTH: I'm sorry to say there are two.

MR JOHNSTON: I'm sorry, sir, then it must be in 2.

MR JUSTICE ROTH: It's --

MR JOHNSTON: It's the very last item.

MR JUSTICE ROTH: Sorry, there are three volumes.

MR JOHNSTON: I apologise. I --

MR JUSTICE ROTH: That's D3, at tab 30.

MR JOHNSTON: Yes, sir.

MR JUSTICE ROTH: The press release of April 2019.

MR JOHNSTON: Exactly. The only point I wish to draw from it is that the Commissioner for Competition made this announcement publicly, recording that Mastercard was applying a new methodology, resulting in a substantively reduced average-weighted MIF, and she explained that there was no intention to take proceedings following that.

So one can see from that that the level of the MIF is crucial. It's only once one gets to a certain level of MIF that the argument for anti-competitive conduct can arise at all. I don't seek to place weight on this as authority, but it's simply perhaps helpful to complete the picture.

I think the only other point I wanted to make -- and indeed we have really touched on this in another context -- is a question about single continuous infringement under competition law and I suspect, as I say, we have covered this, but my submission is that that categorisation of an infringement is a categorisation of competition law which enables the Commission to conduct its own investigations into those who may have been involved in competition infringements in collaboration with others, the extent of their involvement, possible joint responsibility, appropriate penalties and so forth.

So there is a particular purpose with which the Tribunal will be very familiar for such a categorisation in competition law terms, but the short point I make is that none of that has anything to do with prescription or limitation, and it's implicit in the discussion we have been having over the last two days and is indeed, I think, common ground that those issues, prescription and limitation, are issues for national law.

So the question is not how the Commission may categorise the infringement for its

purposes but -- and this is what I have been discussing with you, sir, and in the chair in the last few minutes -- the question is how does one categorise this infringement for national law purposes for applying the rules of prescription and limitation.

And in concluding my submissions, it's for the reasons I have given orally and for those set out in our skeleton argument, that in our submission this is not a section 11(2) case; it's a case about individual, distinct decisions to set different positive rates of MIFs on different dates, decisions that were superseded by later decisions and, that being so, it's not a continuing act for the purposes of section 11(2).

Unless I can assist the Tribunal further, those are my submissions.

MR JUSTICE ROTH: Just to clarify one point, if the prescriptive rule, assuming what you say is right and the prescriptive rule applies, that's for five years, takes you back to 98, I think.

MR JOHNSTON: Yes.

MR JUSTICE ROTH: If there was a MIF set in 97 which was not changed for two years, would that decision in 97, on your analysis, that be a continuing act?

MR JOHNSTON: No, sir.

MR JUSTICE ROTH: Because that would be the MIF being applied for -- until the next decision, so I can see you would say: well, the previous one of 95, that was a previous decision, but the 97 decision was continuing and everyone was implementing it --

MR JOHNSTON: Yes.

MR JUSTICE ROTH: -- into the five-year period, so would that decision be a continuing act until superseded by the next one?

MR JOHNSTON: In my submission, the analysis is the same regardless which date one takes, so I attempted to explain, one needs to look at the decisions discretely and looking at the Westover case, if the decision is to set a positive MIF which is within

Article 101 then that is an infringement but, in my submission, that is an infringement at the date that is done. It has continuing consequences, but for the section 11(2) purpose it is a decision that was taken on that date and therefore prescription runs from then.

MR JUSTICE ROTH: Thank you.

LORD ERICHT: There is just one thing I wanted to raise. Perhaps I could just mention it now and we could perhaps hear about it after lunch, which is the case of Deutsche Bahn, which -- you don't need to look at it just now; I will just identify what the point is -- which is in tab 69, and page B2/404, it's paragraph 42.

It analyses the breach of competition law as akin to breaches of statutory duty, and what I am wondering is, is there anything in the analysis of how Scots law would deal with a breach of statutory duty which might be relevant if we're working on the basis that that is the appropriate analogy here, so perhaps that's something you could consider over lunchtime.

MR JOHNSTON: Yes, I will do so, my Lord, thank you.

MR JUSTICE ROTH: We will return at 2 o'clock.

(1.03 pm)

(The luncheon adjournment)

(2.00 pm)

MR JOHNSTON: Thank you, sir, I just wanted to address the question Lord Ericht asked at the end. This is by reference to paragraph 42 of the Deutsche Bahn case on B2044. I think the question was whether the analysis in Scots law of a breach of Article 101, akin to a breach of statutory duty, would be the same in Scotland. In my submission, that would be the approach that was taken in Scotland. So the approach would be the same as is set out in that paragraph of the judgment, that one would need to establish all the relevant elements that constitute the delict or tort.

Of course, one of those, just as it is in English law, would be the occurrence of loss or damage flowing from the infringement, so I'm not sure that's the only point your Lordship was interested in.

LORD ERICHT: Prescription point under 11(2) is the same as a breach of statutory duty more than anything else. We look at whether the breach is an act with continuing consequences or whether it is a continuing breach.

MR JOHNSTON: Yes. I suppose if one goes back to 11.1, the basic provision, then we know that that applies to damages arising from various things, one of which is arising from any enactment, so we could say that the damages here arise from an enactment, in the sense that -- I think one could say that. At any rate, whether or not that's so, it's clearly akin to a breach of an enactment and therefore the same principles would apply, so it would be for the Tribunal to identify the act. In fact, the decision has identified what the act is and we have discussed that already and then the question is, is that act which causes the loss, is that act a continuing one or not or are we or are we not within section 11(2).

LORD ERICHT: Thank you very much.

MR JOHNSTON: Thank you, my Lord.

MR JUSTICE ROTH: Thank you very much, Mr Johnston.

Yes, Ms Ross.

Submissions by MS ROSS

MS ROSS: Thank you. In respect of section 11(2), the parties' positions are relatively clear-cut. The explanation that's been provided, of course, on behalf of Mastercard, is that this is not a continuing act, rather there are individual completed acts and I understood in response to one of the questions before lunch, the explanation to be given that each decision was itself a completed act with continuing consequences.

In my submission, that badly mischaracterises the reality of the situation. That reality being that this was a single, continuous infringement, both as identified by the Commission and I will come to say a little more about the Commission Decision itself; there are a number of the recitals that the Tribunal has already been taken to but there are several others that are also important for context and I will turn to those shortly.

The term "single continuous infringement" of course has the meaning which is understood within competition law and in my submission, it is also a perfectly accurate description of what actually happened for the purposes of section 11(2), that there should be a coincidence in how the Commission understood and identified what was going on and how it is best understood for our purposes in looking at the 1973 Act, should come as no surprise at all. And in any event, the fact that the Commission has analysed matters in that way is itself significant for the purposes of the present proceedings.

I would propose to start with the authorities. My learned friend Mr Johnston took the Tribunal to the elements of the decision and I will come to those but seeing that the Tribunal already has had before it the particular authorities of Johnston v The Ministers, and Shore Porters, I will deal with those first.

I think the Tribunal has already been told that it has before it pretty much the entirety of case law, I think with one sheriff court decision that's not here, so obviously, the authorities are not abundant but they are reasonably clear and consistent.

There is, of course, an issue of fact sensitivity and so there is a limit to what can be taken from any one case, but turning first to Johnston v The Scottish Ministers because I think it is important to say just a little more about that case before turning to Shore Porters'. That decision is in the authorities at volume 4 of the authorities at tab 99, the decision of Lady Dorrian sitting in the Outer House, of course, and the particular paragraph that the Tribunal has already seen is at page B2/758.

There is a simple identification, first of all, of the task which has to be done, which has been referred to elsewhere in the other authorities that we don't need to look at but at paragraph 17:

"In determining whether an act comes within the ambit of section 11 ...(reading to the words)... then one must first identify what the act, neglect or default is and then one must consider whether it is continuing."

And the case here, obviously, was the promulgation of an order by the Scottish ministers. That was the completed act and it had continuing consequences, the court found.

Now, it is said that we are close to this case, but really what this case was about was the promulgating of a statutory instrument and then a quite different series of events that followed from that. What is said, as I understand it, against me, is that each decision is akin to this statutory instrument, that each decision takes on this great significance of a statutory instrument that then has to be implemented. So in other words, the Mastercard position would be that you have a whole series of quasi-statutory instruments, quasi-orders, each one being a one-off act, with distinct consequences.

But that's really taking the facts of Johnston and running with them quite a long way because what was happening in Johnston, is that you have a single thing and then the argument was made it was maintained, implemented over a longer period and in my submission, it simply doesn't bear the comparative analysis at all.

It's not even as if in this case, it's not Mastercard's position that it was the rule that was made back at the beginning and that you then have decisions which are the continuing -- that's no part of their argument. That might be a sort of description that you could see might be a parallel here but that wouldn't work either because of the way in which, as I will come on to explain, the rules and the decisions are all part of

the same thing. So it's quite a different scenario from the position that was before Lady Dorrian and which she analysed in that case as being a decision that happened, an order, with different things afterwards.

So the characterisation, in my submission, of this as a set of circumstances parallel to Johnston, is just not well-founded. In particular, because it fails to have regard to the significance of the rule. The rule is all-encompassing and it's the decisions that take place in this case are decisions which take place under that rule; they're all part of the same thing.

It was also suggested in Johnston that there was a failure by the ministers to keep the order under review. And that was part of the discussion in that case and, again, one can see there is no hint of a suggestion here that that's what -- that's certainly not the argument that's being made and it's very far from the circumstances. There's no contention that Mastercard made the rule and then didn't review it. It's completely the contrary. Mastercard just kept doing the same thing. They kept on doing what the rule required them to do, which was to implement these decisions.

So in my submission, whilst Johnston identifies in very simple terms what you have to do, what's the act and is it continuing, it doesn't really take matters any further forward. Shore Porters' on the other hand -- and this is the only other case that my learned friend and I, I think, feel that it's necessary to direct the court's attention to -- Shore Porters', the decision of Lady Wolffe, is also in that same bundle at volume 4 and it is behind tab 105. It's quite a lengthy decision, various other things before the court, but the particular discussion about the continuing nature of the act starts at 2849. I don't need to take the Tribunal to this in great detail; a number of the passages have already been referred to.

But in my submission, this clearly carries a much greater degree of comparison. Her Ladyship, Lady Wolffe, does acknowledge the paragraph in my learned friend's

textbook and goes on to, in bringing matters -- the court, the Tribunal has already seen paragraph 59, but refers in paragraph 59 to it being artificial to look at each misallocation in isolation and as unconnected to the other. Just pausing, of course, the facts of the decision in Shore Porters', the Tribunal is already aware, it's a series of allocations of funds and the challenge was to the propriety of putting them into one set of accounts rather than another. So these are decisions taken to place sums of money in one account rather than another.

These were the misallocations.

It was artificial to look at each of these in isolation, each of these separate decisions. It's too simplistic and it fails to take into account the whole features. Large numbers of misallocations made over an extended period of time which were affected or condoned. It's a general course of conduct. Now, of course, yes, it was on the averments and in the pleadings but nothing turns on the fact that it was a debate, but a course of conduct, a continuing failure is akin to what we are looking at here.

Later in the paragraph that I have just referred to:

"Such systemic issues are properly to be viewed as a continuing act, neglect or default, such as the frequent emission of noxious vapours would be regarded."

So a system, systemic issues connotes a system, a strategy, a method and that is similar to what we have here.

Likewise, as we read on into paragraph 60, over the page:

"Numerous similar steps repeated over an extended period of time which, collectively, had the effect of inflating the profits."

We see that these are described as all inextricably lengthened and the same description can apply here.

They were described as not -- in the paragraph that follows, they are not disparate, intermittent or unconnected. A course of conduct, an institution of a practice, with

a view to inflating the profitability of the working department whose constituent elements are the individual misallocations.

So I take from that that one can see readily see the parallels with which we are dealing with here. We have the institution of a practice. It's set out in the rules. It is done over an extended period of time. The acts themselves are connected. Of course they're connected because, as we will come to see, they're all anchored in the rules. There is an obvious connection between them, they are not disparate. They were something that had to be done in accordance with the rules. They are not intermittent, they follow a programme.

And there is a reference to whose constituent elements are the individual misallocations. The Mastercard analysis seems to rely and place too much emphasis on constituent elements but there's nothing wrong with a continuing act having constituent elements. If you were going to exclude an act on the basis that it's got constituent elements, nothing would ever be continuing, there wouldn't be a concept of continuation. To have an act that continues connotes that you have things that happen repeatedly over a period of time. It's almost inherent, the existence of constituent elements is almost inherent in the concept of something that is continuing. So in my submission this is the case that comes far closer to the facts in the present case.

Now, turning then to the decision of the Commission itself and my learned friend took the Tribunal to several recitals and just as an overview, it was said to be -- we will come to look a little more at the process -- it was said to be a sophisticated process. We will look at the details of that and clearly the Commission Decision itself describes something of some complexity and I'm sure the members of this Tribunal and perhaps the Chair in particular, will be well aware of the complexity, but just because something is complex and just because something requires sophisticated actions to be taken,

does not elevate those individual component parts into something separate or distinctive. So it would be a mistake, in my submission, to see something, just because it's complex and difficult and sophisticated, as necessarily being broken down into something that is not continuing.

I said that I would turn to the Commission Decision. It's in the core bundle, I think, volume 2. I think it's the first item in that core bundle, and I would like to turn first of all to recital 118 which is at page A656. And I do this really to put in context the submissions which I'm going to make but also to put into context those recitals to which my learned friend drew the Tribunal's attention before lunch, because this sets the -- or it introduces what the subject of the decision is.

So firstly in paragraph 118 at the top of that page, this decision addresses the Mastercard MIF:

"The Mastercard MIF is a decision of an association of undertakings comprising Mastercard's network rules and decisions of the organisations, bodies or managers on intra-EEA fallback interchange fees ... "

And goes on:

" ... other interchange fees which apply to virtually all cross-border payment card transactions and to some domestic card transactions."

So the Mastercard MIF is a decision of an association of undertakings comprising the rules and the decisions. That is what the MIF is. That's what we're talking about; it is a thing. Of course it has component elements but as I have just said, the fact of having component elements, rules and decisions does not itself take it out of being a continuing act.

We see, then, at the next recital, 119:

"The Mastercard MIF is anchored in the MCI by-laws and rules; the MCI by-laws and rules, the interchange and service fees manual, as well as the Maestro rules that are

all issued by Mastercard."

These are, broadly speaking, the Mastercard rules and the critical word there is they are "anchored" in them.

We know, because of later recitals -- and I'm turning, now, to recital 142, if I may, which the Tribunal will find at page A662, and we see here that they apply uniformly across all EEA member states. It's a small point but we're looking at something which is consistent, applying throughout the EEA, whilst they are made -- the decision is made from time to time. They are integrated, in the sense that they are of uniform application.

The Commission, then, in the paragraphs that follow, in the recitals that follow -- and I am now turning to those starting at 146, recital 146 which the Tribunal will find at A664, and it is here that the Commission records the evolution of Mastercard's views on the purpose of its interchange fees. It says that Mastercard's views on the purpose of its interchange fees have evolved over time and so we start out:

"Mastercard initially described its interchange fee as a mechanism [a mechanism] by which the acquirer reimburses the issuer for the issuer's costs related to the transaction which are not reimbursed elsewhere. "

And it goes on to describe how Mastercard characterised it. But it's a mechanism. That is what the interchange fee is and it's important to remember, a mechanism has to be implemented and how is it implemented? It was implemented by making decisions and those are put in place. But it is singular, a mechanism.

Then we come to -- it clarifies, this is at recital 153 on A665. It's clarified but it's still a mechanism for balancing cardholder and merchant demand for payment scheme services, so even though matters are evolving, it is still a mechanism.

And that is summarised at recital 155 on the same page. The decisive point is that:

"According to Mastercard's most recent submissions, it is a mechanism to balance

demands of card holders and merchants and does not have the function of a price, properly speaking."

So we see the Commission going to some trouble to trace the history of Mastercard's own presentation of what it was doing. Of course, what we don't see anywhere here or anywhere else in the decision is any suggestion that Mastercard were characterising it in the sort of sliced up way, placing emphasis on particular decisions. Now, of course, they weren't looking at section 11(2) of the 1973 Act, so it might be said: well, so what? But we don't see any suggestion that these are discrete -- really important, discrete, separate things that happened. That's been no part of how it's been characterised. This is a novel approach that is now being taken for this process.

I turn, then, to recitals 156 onwards and the Tribunal had a couple of these recitals before it this morning and I think it was in relation to the process as described here, that it was said to be a sophisticated process with questions, questionnaires going to banks, to the member banks, management preparing proposals and so forth, but I don't want to repeat myself. Just because you have to do all of that doesn't make it separate, discrete, in the way that's been contended.

We see, though, that there's a consistency to it. They might be sophisticated actions but there is a consistency. Finally, the European board could either adopt or reject the proposals and later that became the President and the CEO who subsequently delegated them to the Chief Operating Officer, so there has been a slight change as to who makes the decisions. A complete consistency of how it is. The board and then it's the CEO or the COO, so we see a common thread throughout there.

The same decision-makers, the same process, taking account of the same things, all anchored because the Commission has told us that, in the same rules. And it matters not, in my submission, whether it shifts to the board or the CEO.

This, then, is the whole context for what we see subsequently in the decision itself and

in Article 1 of the decision, A823. It's against all of that background, all of these recitals, that we understand that the Commission decided that from these dates, from 1992 until December 2007, Mastercard infringed these parts of the treaty by, in effect, setting a minimum price merchants must pay to their acquiring banks. It's a clear description of what they did.

And in my submission, this is precisely the sort of situation which demonstrates that a breach of competition law was indeed a well chosen example in the paragraph of the book to which reference has been made.

Now, the Tribunal, you sir, and the Chair, invited my learned friend Mr Johnston to consider, to contemplate what else might come within that description and whilst it is possible to figure circumstances where cartel behaviour could be seen to be something which is continuing, certainly those examples might exist but in fact, one does not need to look beyond the description, the factual analysis of the Commission that that exists here.

And to make a point which is already made in the skeleton argument, it's there before the Tribunal, it is difficult to see how a court or a Tribunal now looking at the circumstances in a follow-on claim, where the facts have been considered, have been gone through in very great detail by the Commission -- and it is on the basis of those recitals, that understanding of what happened -- that they have reached the view that they have and expressed the conclusion that they have in number 1 and it's accepted by Mastercard that the Commission identified this as a single continuous infringement, it is very difficult to see how, if one understands what single continuous infringement means, both as a technical term for competition law purposes -- I will say a little more about that -- but as an accurate description of what happened, using plain language, looking at it in both ways, given that analysis and the fact that this is a follow-on claim, relying on that decision, is really difficult to see how one can belatedly come to

the Tribunal to say for the purposes of section 11(2) being special and different and requiring a domestic law analysis, that you could come to any sort of different view. That, in my submission, is something that must weigh very heavily in the balance.

There are a couple of further points, just in dealing with the analysis and there are a couple of points I think it probably is important just to tease out a little further in response to some of the questions that the Tribunal members had with my learned friend, Mr Johnston. I had understood one of the questions from Lord Ericht to be a question about -- perhaps on a hypothetical scenario, about: well what about the level of the MIF? And forgive me, sir, if I haven't completely understood the direction of the question, but I think it is important to be quite clear that this being a follow-on claim, one takes what one has here and all of the MIFs were unlawful; there wasn't any suggestion that we're looking here at separated, broken up -- they were all unlawful.

And this comes back to my original point. These are all part of the overall structure, but forgive me if I haven't understood that --

MR JUSTICE ROTH: No, that's very helpful, thank you.

MS ROSS: The other question and this was Lord Ericht's final question about the nature of the statutory breach and I think that was by reference to the Deutsche Bahn case which I will just go back to, if you bear with me one moment. I have the paragraph marked. I believe it was paragraph 42 in Deutsche Bahn but I will give the correct reference --

LORD ERICHT: It was 42, yes.

MS ROSS: Just a moment. I think it's at B40 --

LORD ERICHT: 2044.

MS ROSS: Thank you, sir. I realise I was still in the core bundle.

Yes. I'm not sure that I can really -- there isn't a great deal in this. What we see here,

the task is to identify all the elements of the events constituting the tort. Again, I am repeating myself. The fact that a tort, the tort, the delict has elements, is neither here nor there. There appear to be -- it's akin to breaches of statutory duty, as understood in English law terms. There appeared to be a measure of agreement between the parties that the principal elements of the tort are the adoption of the relevant MIFs and the CAR by means of a decision by an association of undertakings and that language itself, in my submission, explains or describes what we are dealing with here. It's adoption by means of decision and perhaps no more than saying what's already been said, that you have a mechanism, you make the mechanism work and that is what is being described there. Is that akin to a breach of a statutory duty? It may be but I'm not sure that anything beyond turns on that.

It seems to me that those are the principal issues that were arising in the context of the discussion that took place earlier. If the Tribunal would just bear with me for one moment.

(Pause).

It simply leaves me able to conclude that for the purposes of section 11(2) of the 1973 Act, the events, the circumstances as described by the Commission and as is clearly understood by the Tribunal, as a matter of fact do fall squarely within the description for which Parliament has made provision in that part of the statute and, for that reason, the prescriptive clock starts ticking at the end of that infringement.

And so those are my submissions, unless the Tribunal has any further questions.

LORD ERICHT: I wonder if you could assist me by unpacking your paragraph 42 a little.

MS ROSS: Sorry, my Lord?

LORD ERICHT: 42 of the skeleton argument and there are two things I want to ask about. First of all -- I will just give you a second to get that up.

MS ROSS: Yes. On this occasion it might be easier if I take this one. Thank you. Yes.

Yes, I'm sorry.

LORD ERICHT: Your first sentence, you say Mastercard accepts that the Commission identified the facts as a single and continuous infringement.

MS ROSS: Yes.

LORD ERICHT: Just for my notes, do you have a reference to where Mastercard accept that?

MS ROSS: In their skeleton. We find that over -- it's back at the previous tab and the paragraph reference in relation to that is found at --

MR JUSTICE ROTH: 54, I think.

MS ROSS: Thank you.

Yes, thank you. Yes, it's paragraph 54:

"Mastercard acknowledges that the Commission identified the facts on which its decision is based as constituting a single continuous infringement."

LORD ERICHT: The other element of unpacking 42 is I wonder if you could just talk us through the European cases that you have on your footnote and what the relevance of these is.

MS ROSS: Yes, these are simply -- I'm happy to turn them up but these -- well, it may assist --

LORD ERICHT: If you would.

MS ROSS: -- the court to do that. They're simply decisions which explain what a single continuous infringement is. They're not intended to do any more than identify those propositions and I believe that they are in the supplementary bundle.

Perhaps I don't need to take the Tribunal to both of them and it may be sufficient to look at the Scania decision which is at tab 3. This is bundle D.

LORD ERICHT: Yes, thank you.

MS ROSS: Which starts at supplementary page 48 but the particular references are to paragraphs -- it's perhaps sufficient to look at paragraph 208, which one finds at page 82. And that's the reference that the Commission demonstrates that the various instances of conduct which it has identified form part of an overall plan designed to achieve a single anti-competitive objective.

And that is drawn from the references to settled case law and references are made there in paragraph 191 which is the other reference that's given. That's at page 78 of the same bundle, shortly before that:

"According to settled case law, an infringement of Article 101 can result not only from an isolated act but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions of the undertakings involved form part of an overall plan because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in infringement considered as a whole."

Now, in some other cases, one would see it in the cartel context but here we see a general description of how the Commission views a continuous conduct. And there is acknowledgement there that there might be things that, in isolation, can be sliced up and identified as wrongs, as infringements, but the Commission was perfectly clear that it can see those as continuous, where they are part of an overall plan.

So that's simply the significance of (inaudible) and one sees there, I'm not sure I need to turn it up, but the same principle probably did not need to cite two authorities for one proposition. It's essentially the same thing in Verhuizingen Coppens.

LORD ERICHT: Yes, and Mr Johnston says that this sort of issue is an issue which

bears on the Commission's ability to impose penalties rather than being relevant to what we're discussing today.

MS ROSS: Well, he does. I understand that that's Mastercard's position, but that, in my submission, really is to try to box single continuous infringement into something very restricted for penalties.

I accept that that is how the Commission approaches it. In my submission, that doesn't mean that this Tribunal ought simply to disregard. In fact, this Tribunal cannot really disregard the analysis, the factual analysis with which the Commission has engaged. The Commission is not engaging in its assessment of the facts for the purposes of imposing a penalty. It's dealing with it as it finds it and it's explaining what has happened. So the close analysis which the Commission has given to the factual scenario which leads it to a conclusion that it's a single continuous infringement, the fact that that then has a bearing on penalties, in my submission is neither here nor there. We are left -- that is to try to hive off the description of single continuous infringement to some other area of responsibility. It remains that that is the way in which it conceived it. That's the way it described it. That was the analysis that it provided and that's what's before the Tribunal.

So I say that's really neither here nor there.

LORD ERICHT: Thank you.

MR JUSTICE ROTH: The real question, it seems to me, single continuous infringement is a concept, a term of art under European law.

MS ROSS: Yes.

MR JUSTICE ROTH: The fact that it's there for the purpose of -- in fact for limitation but for imposition of penalties is neither here nor there. It's also a term -- then we have the term in section 11. The question is whether they have the same meaning, not the purpose for which they're there but whether the reference in section 11 which we are

addressing now, continuing act, has the same meaning as single continuous infringement.

MS ROSS: Yes, my Lord. Respectfully, I agree. I'm not asking this Tribunal, it would be entirely improper to -- not what we're dealing with at all, to say as a matter of European law, is this a single continuous infringement. The Commission has done that, but whether one sees it as that's what they did for European law purposes or as a description -- in fact, it is more than just a description because of the significance of the decision. Because this is a follow-on claim, it has a particular status for that purpose, but respectfully, sir, I agree, it's neither here nor there.

MR JUSTICE ROTH: Yes. Thank you very much.

Yes, Mr Johnston.

Reply submissions by MR JOHNSTON

MR JOHNSTON: Thank you, sir. There are just four points I would like to address. The first very short one relates to the Johnston case which we don't need to take up, look up again, where it was suggested it was quite different because making SIs is quite different from making decisions and here, there was only one SI, whereas in the present case, there are lots of decisions.

In my submission, that simply misses the point of the submissions I was making. Why should it make a difference whether there is one decision or more than one decision? And the question is whether, when one looks at it, the decision represents an act or whether one can say that it represents a continuing act, and therefore, in my submission, the Johnston case remains helpful by drawing out the difference between an act on the one hand, which is complete but has continuing consequences, and the continuing act on the other hand.

Second point, this was said in relation to the Shore Porters' case but it doesn't

particularly depend on the fact of that case, but at one point, discussing that case, my learned friend said there is nothing wrong with a continuing wrong having constituent elements. That may be right on particular facts but in my submission, if we're analysing these facts for purposes of section 11(2), we need to be very clear about how the facts are going to fit with that analysis.

On the material that I took the Tribunal to before in my submissions, I hope I made it clear that the rule on which my learned friend placed emphasis, the rule itself, without more, is not an infringement. It's not an infringement until decisions implementing that rule by setting a MIF at an excessive rate are made. And this actually picks up on the point Lord Ericht asked me at the end of my submissions. One can say that the rule itself does not cause anybody loss because nothing has happened, so we don't have the completed facts for a breach of statutory duty. We only get them, if we get them at all, once the rule is implemented, by making a decision which is a breach of competition law.

When such a decision is made, the question will be: is that itself an act with continuing consequences, as I say it is, or is it a continuing act? And I think confusion may be apt to arise if one just says: well, obviously, when you make the decision, people have to pay that rate until you make another decision. But that's not, in my submission, the point. The decision is made, the consequences continue, consumers and retailers pay according to the decision that's in force, but that doesn't mean it's a continuing act; it simply means the losses continue and one has to distinguish, of course, between act and loss. If that were in any doubt, which I don't suppose it is, it's clearly shown in section 11 which uses those twin concepts of act and loss, in order to determine when prescriptive periods begin, whether it's on the date of the loss or on the date that the act ceases.

So that was the second point, that one needs to be very precise in the analysis and

not to be seduced too readily by the fact that consumers continue to pay a certain amount, into thinking that that involves a continuing act.

Thirdly, the point was made that it's difficult to see how this Tribunal could come to a different view from the Commission about the continuity of the infringement. In my submission, the Commission was clearly not concerned with the issue for the purposes of national law of prescription or limitation. Therefore, there is no question of coming to a different view. The question for this Tribunal is, sticking to the same view that the Commission has taken, what is the correct analysis for the purposes of section 11? Is this for our purposes in domestic law, a continuing act or is it not?

And that actually leads on to the fourth point which arose right at the end by reference to the Scania case and the notion of a single continuous infringement, because I think it may be helpful if the Tribunal still have paragraph 191 in front of them, supplementary page 78 in bundle D. We can see that the first sentence explains that: "According to settled case law, an infringement of Article 101 can result from an isolated act but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or of continuous conduct could also, in themselves, and taken in isolation, constitute an infringement of that provision."

So we're looking under the concept of a single and continuous infringement andseveral quite different fact patterns, one of which is a series of acts, one of which is continuous conduct. In short, the only point I seek to take from this is that the fact that the Commission has found there to be a single continuous infringement, does not answer the question whether, for our domestic purposes, there is a continuing act. That is going to depend on the proper analysis of the facts, according to our domestic law and in my submission, on that proper analysis, the answer to the question is that there is not and that this is a simple section 11.1 case, where prescription starts from the date of the loss.

MR JUSTICE ROTH: Then there is the important next sentence. They say in the first sentence, "could result from a series of acts", but they go on to say:

"If the different actions form part of an overall plan because the identical object distorts competition, then they are entitled to find that it is an infringement as a whole."

MR JOHNSTON: Yes, sir, of course that is right and I accept that. I have dealt with that, I think, already in my submissions by pointing to the fact that one needs then to scrutinise the details. Here, for our purposes, the particularly important details are those that the Tribunal identified in the Westover case.

MR JUSTICE ROTH: Both --

MR JOHNSTON: Both the rules and the decision.

MR JUSTICE ROTH: And the decision.

MR JOHNSTON: Sir, that concludes my submissions, unless the Tribunal has anything to ask me.

MR JUSTICE ROTH: Thank you very much.

I think that concludes the Scottish law part of this hearing.

MR JOHNSTON: Yes.

MR JUSTICE ROTH: So of course, you are welcome, like anyone, to stay. But equally, Scottish counsel are excused and you may wish to return for the weekend to Scotland. And although it's a little earlier, I think it's sensible to take our break now and then we move on to choice of law and you can re-organise yourselves in the front row accordingly.

But thank you and also, Ms Ross, very much and your juniorsfor your assistance on what is clearly not the -- if I may say this with no disrespect to anyone north of the border -- not the clearest bit of Scottish law. I think that seems to be the one thing that's common ground.

Thank you very much.

(2.53 pm)

(A short break)

(3.10 pm)

MR JUSTICE ROTH: Yes, Ms Tolaney.

Submissions by MS TOLANEY

MS TOLANEY: Good afternoon.

Turning, then, to choice of law, sir. The claim includes purchases -- if we can just have a look at this. It's in A1, tab 11, page 175 and it's the claim form paragraph 23(b)(ii), and you can see from the paragraph that the paragraph includes purchases at businesses that sell in the United Kingdom through channels such as the internet, mail order or via telephone shopping and which have a physical presence at the material time in other member states.

Mr Merricks has said that where there are more than de minimis purchases at such non-UK merchants, he wishes to pursue a claim. Given the cross-border nature of these claims, a question of applicable law arises and the main point of the importance on which applicable law will have a bearing is limitation.

MR JUSTICE ROTH: Yes, can I just try and clarify one aspect. I see clearly, "purchases in the UK from a business in France", but given what we have been hearing and if it should turn out there is any difference between English law of limitation and Scots law of prescription, what's the position of purchases by class members in England from a business in Scotland or vice versa? Because that, I suspect, is going to be much more significant than, particularly in a period before the internet, consumer shopping on the internet was as developed as we know it is now. But there is going to be a lot of cross-border, within the UK, trade. Now, how does that fit in to this part of the argument, is what I am asking?

MS TOLANEY: I think the same point will apply as it would to the purchases in France.

MR JUSTICE ROTH: Yes, so it then becomes, potentially, rather more significant.

MS TOLANEY: It does.

MR JUSTICE ROTH: Yes.

MS TOLANEY: It does.

Sir, the pleaded case of Mr Merricks is that three sets of choice of law rules apply over different periods of time, which are first of all, the common law double actionability rules for the period up to 1 May 1996. Secondly then, the statutory choice of law rules in the Private International Law (Miscellaneous Provisions) Act 1995 for the period 1 May 1996 up until 21 June 2008. And then the pleaded case was that the Rome regulation for the period after 21 June 2008 applied, but that, it has now been accepted in Mr Merricks' skeleton at paragraph 44, does not apply, so we only have the first two of those to address.

May I start with the 1995 Act and there are two provisions that are relevant under the 1995 Act, sections 11 and section 12. Starting with section 11, can we look at the text, which is at B2 --

MR JUSTICE ROTH: Again, if I can interrupt you, I did find the appendix to your skeleton very helpful, because you have it all, as it were, on one page.

MS TOLANEY: I do, it is at --

MR JUSTICE ROTH: So unless that disrupts your presentation.

MS TOLANEY: No, it's at page 50 of the A bundle, the appendix, and it has 11 and 12, as you say, helpfully set out there.

Looking at the text, section 11.1 provides:

"The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur."

If one drops down, then, to subsection 2:

"Where elements of those events occur in different countries, the applicable law under

the general rule is taken as being ..."

And then if we look at C, subsection C:

" ... in any other case, the law of the country in which the most significant event or elements of these events occurred."

There is a well-known established line of authority as to how section 11 is to be approached, and I think it is common ground as to that approach. It's set out at paragraph 76 of our skeleton argument, which is at A1, tab 2, page 41 to 42. This is the approach that was set out by the Court of Appeal in the VTB case and if I can just invite the Tribunal to read the citation and the quotation.

(Pause).

MR JUSTICE ROTH: Yes.

MS TOLANEY: And Mr Merricks accepts that this represents the law and the reference to that is paragraph 46 of his skeleton argument. The bundle reference is A1, tab 3, page 51.16.

So it's common ground, sir, that the first step is to identify the elements of the events constituting the alleged tort. The crucial question obviously being then, to make the judgment as to significance.

Now, Mastercard's skeleton argument identified, based on the pleadings, four elements and these are set out in paragraph 79 of our skeleton on the same page that you have open. As you can see, the first element is the fact that it's alleged by Mr Merricks that the EEA MIF restricted competition in the acquiring market, with there being separate national acquiring markets in each member state.

And just so you have the reference, that is pleaded in the claim form at paragraph 93 and the bundle reference is A1, tab 11, page 201.

The second step is set out in B, which is the allegation that as a result of those MIFs, acquiring banks were caused to pay higher interchange fees, and that is pleaded at

paragraph 98 of the claim form.

Paragraph C sets out the third element, the allegation that the overcharge was passed on to the merchants by the acquiring bank and, again, that's also in paragraph 98 of the claim form.

And then subparagraph D alleges that the overcharge was passed on to consumers, causing loss and, again, that's to be found in paragraph 98 of the claim form.

So those are the four elements that Mastercard identifies on the face of Mr Merricks' pleaded claim. In his skeleton argument he contends that the elements should also include a separate element, based on the location in which the decision was made, as to the setting of the MIF.

Now, we would point out that the actual decision to set the MIF is not particularised by Mr Merricks in his claim form as an element of the breach of statutory duty, but even if it was, and assuming that it is an element, we submit that nothing turns on it because neither party contends that that would be the most significant element of the tort or that the applicable law should be the place -- the law of the place where the MIF was set. So I raise the point just to have addressed it but it makes no difference.

The other two points that are raised by Mr Merricks.

MR JUSTICE ROTH: Sorry, just so I understand, the location where the decision is taken to set the MIF, do we know where that is on the pleading or is that Belgium? I saw it was said to be Belgium in the judgment of Mr Justice Barling.

MS TOLANEY: That's right, I am told it's largely that. We can't be definitively sure that it's always that but it's largely likely to be that.

But as I say, sir, there is no suggestion that that would be the relevant law for the purposes of this debate.

MR JUSTICE ROTH: I mean, I suppose it could be relevant, not because we're going to end up with Belgian law and nobody is suggesting that, but just in exercising the

value judgment, we have to weigh all these things up, so it comes into the balance somewhere.

MS TOLANEY: As I say, sir, I think it's not actually particularised by Mr Merricks as an element, as a breach of the statutory duty and what we have done in paragraph 79 is to take the elements that are in the pleading.

MS DEMETRIOU: Sir, sorry, just to clarify. Obviously, this is a follow-on claim, where taking the infringement is that set out in the decision, so the fact it's not particularised is neither here nor there.

MR JUSTICE ROTH: Yes, does the decision, with respect, in Belgian law -- does the decision tell us where it was taken?

MS DEMETRIOU: We will check for references.

MR JUSTICE ROTH: Yes.

MR COOK: If I can help on that just factually, it was something -- the decision doesn't state where it was and that's something that's then the subject of (audio distortion) limited evidence from Mr Justice Barling in the Deutsche Bahn case which was predominantly Belgium, not universally and after 2006, it was the US in any event.

MR JUSTICE ROTH: It was the US, yes.

MS TOLANEY: Mr Merricks has raised two other points as to whether a particular element specified by Mastercard, as in paragraph 79, are actually separate from each other and that's in paragraph 51 of his skeleton argument and I will address these points briefly but we see again, it's not necessary to resolve this debate.

His first point is that Mastercard's first and second element, so we can look at those as set out in paragraph 79 of my skeleton argument, his first point is that those two elements are the same element, so that's the finding of the infringement, and then as a result of the MIFs, acquiring banks being caused to pay higher interchange fees.

Now, we don't accept that those are the same. The first element is that there was

a restriction of competition in the relevant market and Mr Merricks accepts that this is an element of the tort, at paragraph 48 of his skeleton.

The second element set out at 79B is that the acquiring banks paid higher interchange fees and we say that actually, again, on the claim form, Mr Merricks identifies this as part of the element of causation and we say treats them separately.

Mr Merricks also contends that the third element identified by Mastercard, the payment of higher fees by merchants, is not an element either and we say, again, that's not reflected with Mr Merricks' pleaded case which alleges the payment of higher charges as part of causation. And, again, that's in the claim form at paragraph 98.

What we say is we don't accept that they're not separate elements based on the way the claim is pleaded, but it doesn't really matter. It may be an arid question, because the crucial question relates to the significance of the elements and we say that they should be weighed up with that in mind.

Can I summarise the competing alternatives advanced by the parties, then, on the crucial question of significance. So Mastercard, sir, contends that the most significant elements of the tort occurred in the place where the merchant is located and that's set out in our skeleton at paragraphs 80 to 85 and we say this is the case primarily because competition was affected in that market and the place where competition was affected is the most significant element.

MR JUSTICE ROTH: Sorry, this is paragraph?

MS TOLANEY: It's in 80 to 85, sir. In particular, 82:

"Here, the most significant element is the effect of setting of a minimum price for merchants in the acquiring market, since this is the basis on which the EEA MIFs were found to restrict competition in breach of competition law."

And you see, as I will come on to show you, that that was the finding of Mr Justice Barling in the Deutsche Bahn case.

MR JUSTICE ROTH: Just a moment.

(Pause).

And the place of that is what? That's the place where the acquiring bank is situated, isn't it?

MS TOLANEY: It's the place where the merchant is located.

MR JUSTICE ROTH: Why? But the restriction is -- in the case before Mr Justice Barling, one was dealing with foreign merchants and I can see that if it's a French merchant, as I think Mr Justice Barling says at one point, most likely the acquiring institution is a French bank, so that will be the place of the acquiring market. The problem, and that's why I asked the question at the outset, that if we're dealing intra-UK, it by no means follows necessarily, maybe but I haven't seen any evidence of it, that if the merchant is in Glasgow, that its acquiring bank may not be an English bank. The acquiring market that's affected is the English market. That's the slight problem we have and particularly when, of course, in the Commission Decision, they treated the acquiring markets as national, so the acquiring market here is the UK market which doesn't necessarily help us as between England and Scotland.

So I fully see your point when we're dealing with what may be rather less significant, namely sales from France or Germany or whatever, but when we're dealing with the intra-UK position, it seems to me it's a bit more complicated.

MS TOLANEY: It may be, sir, but I think if one goes to annex A in the list of issues, which is A346, and that is -- it's a list of issues for the order made for this hearing. It's at bundle A1, tab 15, page 346. And the intra-UK position isn't something that we are dealing with separately for the purposes of this hearing; it is simply, if you read paragraph 3:

"In relation to transactions at merchants which were based outside the UK --"

MR JUSTICE ROTH: Yes, that's fine and question whether at some point --

MS TOLANEY: We need to deal with --

MR JUSTICE ROTH: -- you might need to consider what is the position as regards -- but that might depend on our resolution of what we say about the Scottish law prescription.

MS TOLANEY: Exactly.

MS DEMETRIOU: Sir, we had been proceeding on the basis that we would have to determine that question, the intra-UK question.

MR JUSTICE ROTH: I think Ms Tolaney is right, that it's not as defined for this hearing.

MS DEMETRIOU: I'm not sure that was deliberate, because we had understood that the applicable law points would determine all the applicable law points. We could then apply the relevant limitation period.

MR JUSTICE ROTH: I think that was the intention but I have not appreciated this distinction until I read the skeletons, I have to say, in the last couple of days.

Let's see how we go. I don't want to disrupt Mastercard's presentation if this is not something they have been prepared to address, but it's clear we're not going to finish choice of law today. I don't think that's going to cause us problems, because in fact, the fourth day or the second day of part 2 was always a day in reserve and I think exemptibility is a day and a half; it's not two days. In any event, at most, a day and a half, so it may be you will be able to consider that over the weekend --

MS TOLANEY: Of course.

MR JUSTICE ROTH: -- and see how we get on. It does seem desirable, if possible, we should address it but I think it's quite complex because the acquiring market, it seems to me, is going to be the UK. It would be very odd to think about an acquiring market for banks in the UK being separate, Scotland from England.

MS DEMETRIOU: Sir, of course, so we had addressed it in our skeleton at

paragraph 43B. We highlighted the issue. Of course, that difficulty doesn't arise on our case because we say it's where the consumer suffered loss, so -- yes.

MR JUSTICE ROTH: Don't necessarily -- can't assume or decide your case (inaudible).

MS DEMETRIOU: No.

MR JUSTICE ROTH: Yes.

MS TOLANEY: I think that is right, sir, so we haven't seen a detailed exposition but we will --

MR JUSTICE ROTH: Something to think about.

MS TOLANEY: Yes.

So, sir, putting that point to one side for the moment.

MR JUSTICE ROTH: Yes.

MS TOLANEY: The competing cases are that Mastercard, following Mr Justice Barling's decision and as a matter of a correct application of law, contends that the most significant element of the tort is where the merchant is located, because competition was affected in that market, and it's also where the acquiring banks that paid interchange fees were likely based --

MR JUSTICE ROTH: But that's why.

MS TOLANEY: Indeed.

MR JUSTICE ROTH: It's not because of the location of the merchants because it's the location of the merchants' bank.

MS TOLANEY: Indeed. I think we say it's in addition, sir, because it's competition; the competition being affected where the merchant is located and in addition, that the acquiring banks paying the interchange fees were likely based in that market.

MR JUSTICE ROTH: Sorry to go on about this but the competition that was being distorted was competition between the acquiring banks, wasn't it? That's the

competition that was distorted, not between merchants.

MS TOLANEY: These are the elements of the connection though, sir, that's what I am identifying, that first of all, you have the competition being affected because of the merchant location where the acquiring banks pay the interchange fees being likely to be based in the market and the higher fees being paid in that market and the merchant selling to consumers from a base in that market. Those are the elements.

Whereas by contrast, Mr Merricks' case is entirely focused on where the consumer was domiciled and thus suffered loss. So Mr Merricks' case ignores the concept of market as defined in Deutsche Bahn and at all, we would say, and just focuses on, essentially, a question that's not part of the 1995 Act, where the damage was suffered, being the loss.

And we say that doesn't work.

MR JUSTICE ROTH: That's an element of the tort because you need loss to constitute --

MS TOLANEY: That is right.

MR JUSTICE ROTH: And, of course, Deutsche Bahn was a claim by a merchant, so this was irrelevant. This is a claim by --

MS TOLANEY: Consumers.

MR JUSTICE ROTH: -- purchasers, so it is relevant.

MS TOLANEY: Except that what I was saying, my Lord, was if it was obvious that it was going to be the place where the loss was suffered, the act could have provided that. So essentially, and you, sir, have identified exactly the nub of the point, the reason why in this case Mr Merricks says that it would always be loss that's the relevant point, is simply, it is said, because it's a follow-on claim and it's about consumers and that's essentially their case.

MR JUSTICE ROTH: Well, it must be right, isn't it, that it's an element of the tort?

MS TOLANEY: Indeed.

MR JUSTICE ROTH: And then the question is the value judgment of what's more significant and there Mr Merricks says it's the place of the loss because it's consumer claim.

MS TOLANEY: Exactly.

MR JUSTICE ROTH: And you say that doesn't necessarily follow.

MS TOLANEY: Exactly.

MR JUSTICE ROTH: But it is an element and we have to look at all the other elements.

MS TOLANEY: That is right.

MR JUSTICE ROTH: Yes.

MS TOLANEY: That's exactly right.

So can we just look at Mr Justice Barling's approach in the Deutsche Bahn case, which is in bundle B3 at tab 69. And the key paragraph is at paragraph 121, which is on page 2060.

(Pause).

MR JUSTICE ROTH: Yes.

MS TOLANEY: And when considering Mr Justice Barling's analysis and considering the present case, which has been presented very much as a consumer case, it's important to remember that Mr Merricks' case is based on merchants having paid any overcharge first, before it was passed on to consumers and that's in the claim form at paragraph 98.

And that's important for two reasons, because first, it means that the consumer claim is dependent on the merchant having a prior claim, so payment of an overcharge by the merchants is an important element and it obviously took place where the merchants are based.

Secondly, if this were a claim brought by the merchants, as in the Deutsche Bahn case, the Deutsche Bahn case establishes that the applicable law would be the law of the place where the market -- where competition was restricted. And it would be logical, we submit, for the applicable law to be the same in respect of claims brought for the same loss at different points in the stream of commerce.

MR JUSTICE ROTH: Yes, I think Mr Merricks' case as pleaded is actually the merchants haven't got a claim because it's all passed on. They suffer an overcharge but they don't have a claim because they pass on the entirety of the overcharge, so they suffer no loss.

MS TOLANEY: But if, in fact, they had -- you stopped when they -- the clock and what Mr Merricks' claim would do would be to split the applicable law analysis. Just because he formulates his claim in that way doesn't mean that if, logically, one breaks it down, you don't end up where my submissions are.

MR JUSTICE ROTH: I think to be fair, I think speaking from memory, his experts' report acknowledged that pass-on may not be 100 per cent.

MS TOLANEY: Exactly, and that's quite a big debate, sir, as you know. So that's why, despite it being pleaded, no doubt for that reason in that way, the risk I have mentioned and, in particular, the risk of inconsistent judgments, would arise.

Now, the place where the loss was incurred by consumers, which Mr Merricks says is the most important element, we submit is less significant, and that's because consumers are the third group said to have paid the overcharge after acquiring banks and merchants, and that means the consumers, we say, are more removed from other elements of the claim and, obviously, the same fragmentation of loss point.

MR JUSTICE ROTH: On this point that you just made, that it would be unsatisfactory if claims for the same loss were governed by different laws or claims seeking to recover the same -- is that not more a section 12 point? It's not about valuing the different

elements of the tort but, rather, saying: well, there's some overriding reason for displacing the result?

MS TOLANEY: I think it's under both. You may say it has more impact in the way that, sir, you've just put it under section 12 but it also goes to the analysis of the significant element because you have to look at what the claim is and although the claim is pleaded on the basis of 100 per cent pass-on, in fact it does require, if broken down on analysis, the merchants to have paid the overcharge first. And, therefore, looking at the analysis of the claim, we say that the elements of it do require one to look at the location of the merchants having the prior claim, those aspects to it. So we would say it was part of the analysis, just as it was in the Deutsche Bahn case, under section 11.

If you could go on to 122 of Mr Justice Barling's decision, he deals with the setting of the MIFs there.

(Pause).

MR JUSTICE ROTH: Yes, I didn't quite understand the second sentence, because a MIF is a multilateral interchange fee. If he said the setting of an interchange fee is not inherently unlawful but -- and then he says the need for a multilateral decision. Well, that's the point of it being a multilateral interchange fee, isn't it, is that it's a multilateral decision? I can never quite follow that.

MS TOLANEY: Mr Cook is saying quite rightly that there is a difference between international fees as they are plus different parties, not how they are set.

And paragraph 88 gives the factual basis for the findings made in 122. And if one tests Mr Merricks' case by contrast, that it's where the consumer suffers loss, non-UK merchants could have made sales to persons anywhere which would mean that the location of the element of loss depends on the definition of the class and had the class included persons making purchases whilst domiciled in other jurisdictions, there would

be multiple locations of loss and on Mr Merricks' case, multiple applicable laws.

And all of that is ignored by Mr Merricks' case because what he says is:

"These claims are brought on behalf of consumers which requires a focus on the position and expectation of consumers."

That's paragraphs 49A and B, and essentially, that boils down to saying that in any consumer claim, loss is de facto the most significant element and we say that that is not supported by authority and is not the legal test.

MR JUSTICE ROTH: Are there consumer authorities dealing with consumer claims -- analysing section 11, in the context of consumer claims?

MS TOLANEY: We can check on that before I say definitively either way, sir.

MR JUSTICE ROTH: Yes, because you say that's not the position --

MS TOLANEY: No --

MR JUSTICE ROTH: -- in any consumer claim but I don't know if there are any consumer claims that have considered this before.

MS TOLANEY: Well, the first point is that one would expect Ms Demetriou's skeleton to have cited them if they were.

MR JUSTICE ROTH: Yes, then it may be there are not any.

MS TOLANEY: That is right.

MR JUSTICE ROTH: But you would say that would be the consequence for future consumer claims?

MS TOLANEY: It would be because the way the argument is framed would mean that you don't really have to get into -- it would denude section 11 of any real application because it would be basically saying that in any consumer claim it's driven by where each individual consumer in any class suffered their respective loss. So it could potentially both denude section 11 of this application but also create an unworkable position.

MR JUSTICE ROTH: Is that not the other side of the coin of your argument, which is it's where the merchant is and if you have people buying from merchants all over the world or narrow it down -- well, could be all over the world but even if it's a pan-European cartel -- this is not a cartel case but there are, of course, claims here for cartel cases and with participating undertakings from countries across Europe and indeed, Japan, South Korea, then it's going to be a multiple -- it could be a multitude of laws which are going to apply, even though all the claimants are in the UK, so it's going to depend on the facts of the particular case.

MS TOLANEY: Well, it may be, sir, but I don't think cartels, which I will come back to, are necessarily the right analogy, which may be the answer to your point but may I just come back to that.

The other point that Ms Demetriou has focused on is that these are also follow-on claims. Now, what's said is the infringement is already established and, therefore, the infringement isn't relevant to identifying the significance of the elements of the tort and that's in paragraph 49D of her skeleton argument.

MR JUSTICE ROTH: You say that can't be right because it's not what section 11 says.

MS TOLANEY: That is right and it's also -- if you look back at the VTB Capital case and we set out the relevant quote in our skeleton at paragraph 76, the Court of Appeal held that:

"Significance means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation."

So the fact that the infringement doesn't need to be investigated, doesn't mean that the element of infringement is less significant, and it's --

MR JUSTICE ROTH: It's again a section 12 point.

MS DEMETRIOU: I think that is right and I'm happy to proceed on that basis.

MR JUSTICE ROTH: It must be, yes.

MS TOLANEY: And the same is true, therefore, of the aggregate damages point, as well.

What we say, sir, is for those reasons, as set out in our skeleton, the elements of greatest significance are located in the place where the merchant was physically based and the general rule under section 11.1 is law applicable in that place --

MR JUSTICE ROTH: You want to be quite clear. It's because that's where -- Ms Tolaney, thank you -- because that's where the competition is distorted and that's why it's a place where the merchant is located. Is that right? That's why you say it's (inaudible).

I'm just trying to understand why is it the place where the merchant is located? Not because the merchant suffers loss, because the consumer suffers loss, so it's not that. Why is it the place where the merchant is located?

MS TOLANEY: We accept, sir, that it's where the acquiring bank is.

MR JUSTICE ROTH: Because that's -- it's really where the acquiring bank is.

MS TOLANEY: I think the reason why we're being hesitant here is that it's the nationally acquiring market and it's usual that the acquiring bank is in the market where the merchant is, which is why I am putting it in that way.

MR JUSTICE ROTH: It might be important when we come to Scotland.

MS TOLANEY: It may be important.

MR JUSTICE ROTH: Yes, so it's where the acquiring bank is which we can, I think, sort of assume by, I suppose, take legal recognition of the fact as found by Mr Justice Barling that within a national regime, truly national, so UK, France, Germany, will be where the merchants are.

MS TOLANEY: And, sir, the national market point may be the distinction in the cartel -- you gave me the example of cartels, because whereas a pan-European cartel

might involve a single European wider market and that would be a different analysis, here the point is that the market in each case is national. That's what we're arguing about.

MR JUSTICE ROTH: May or may not, doesn't always. Yes.

MS TOLANEY: So those are the points under section 11, sir, and we say that the judgment of Mr Justice Barling is extremely persuasive, that it doesn't point to a different analysis just simply because it's a consumer claim.

MR JUSTICE ROTH: Obviously, the judgment of Mr Justice Barling is not only helpful but important, but he didn't have to add the extra element of where the claimant's loss is suffered, because that was the same; that was the merchant. So we have that extra element to weigh in the balance, to add to the weighing exercise. I appreciate you say, well even though you add that in, you still come out, as I understand it, saying that the most significant of the evaluative exercise is -- that the most significant element is the place where the acquiring market is, i.e. the place where the foreign merchant is for foreign sales.

MS TOLANEY: Sir, two points. The first is if one looks at paragraph 124 of Mr Justice Barling's decision, he breaks it down to find, first of all, that the most significant elements of the tort in this case relate to the restriction of competition.

MR JUSTICE ROTH: Yes.

MS TOLANEY: The fact that any loss alleged to have been suffered by each of the claimants would also have occurred in the same country, reinforces that conclusion, but you see his analysis is to take the significant element as the restriction of competition first and foremost.

MR JUSTICE ROTH: So you say it's only reinforcement.

MS TOLANEY: Yes.

MR JUSTICE ROTH: Okay, we haven't got that reinforcement here but it's still

following his first sentence.

MS TOLANEY: That is right and the reason I say it, sir, is just because without the restriction of competition, you wouldn't get this case, and so one can compress it down into the loss alleged to have been suffered by the consumers but we say that's an artificial analysis and one that, actually, would be inconsistent with Mr Justice Barling's analysis in paragraphs 121 to 124 of his judgment because you have to start with the restriction of competition to get to the follow-on claim and the follow-on claim is assuming something that is not proven and we submit is not likely to be ever proven or right, that there is 100 per cent pass-on.

And that's why we submit, sir, that although Ms Demetriou said now that the points about the consumers' expectation are actually section 12 points, they can't therefore assist, I think she is conceding, on section 11 and so the fact --

MR JUSTICE ROTH: No, I'm sorry, that's not what she said. There was a separate point, about, as I understood it, the class definition which I thought she said she conceded, the section 12 point. Let Ms Demetriou explain.

MS DEMETRIOU: And I apologise because it was unhelpful for me to stand up and make the point like that. I should have waited but the point I was saying was a section 12 point was specifically, very specifically the point that because this is a follow-on claim and you don't need to investigate restriction of competition, that is a factor to weigh into the balance. And I accept that that is more appropriately a section 12 rather than a section 11 point. I wasn't making any concession beyond that.

MS TOLANEY: So Ms Demetriou's case that there is a different outcome on section 11 is entirely driven by seeking to say that one essentially ignores the fundamental basis of the claim being a restriction of competition that leads to the merchants' claim and ignores that it wouldn't necessarily be 100 per cent pass-on and

just looks at the end loss of the consumer, wherever they're located. And what we say is that is not the most significant element of the tort and it would be inconsistent with this judgment to do so, to say that it suddenly becomes the most significant element, simply because it's a consumer claim.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And the reason I say that it's put in that way is that I have regard to paragraphs 49A and B of Mr Merricks' skeleton argument. So I'm not putting it in a tendentious way; it's the way it's advanced, that the claims are brought with a focus on the position and expectation of consumers being appropriate, when one looks at section 11.

MR JUSTICE ROTH: Yes.

MS TOLANEY: Can I turn, then, to section 12 of the 1995 Act. So the alternative case advanced is that if restriction of competition is to be regarded as the most significant element, nevertheless, the general rule under section 11.1 should be displaced and the law is the place where the consumer was resident and in which they suffered loss, should be regarded as more appropriate under section 12.

Now, section 12 is again set out in our skeleton argument in the annex.

MR JUSTICE ROTH: Yes.

MS TOLANEY: The starting point here is that the Tribunal will have found, before getting to this analysis, that the most significant element is the restriction of competition in the acquiring market, when individually or combined with the payment of the alleged overcharge by merchants.

In those circumstances, we say it's difficult to see how section 12 could lead to an alternative analysis, because you would have to displace that finding as to significance, in order to find that there was another jurisdiction that was more appropriate, another law that was more appropriate.

And Mr Merricks' case, we say essentially amounts to the same arguments as advanced on section 11, albeit with one now solely on section 12. And in particular, if we look at paragraphs 58A and B of Mr Merricks' skeleton argument, the focus is on the protection to be afforded to consumers who made purchases from the UK and incurred loss in the UK, and one sees that particularly in, I think, (b). Taking that point first, we say that's not sufficient for the purposes of section 12 because looking at section 12 and the VTB case, it's clear that it's necessary to conduct a comparison of the competing factors.

Now, the competing factors here are not weighed up by Mr Merricks. There's no comparison showing the numerous factors pointing to the law, where the merchants are based or the effect on competition or the payment of the MIFs by acquiring banks and the payment of charges by the merchants and the sale of goods and services by the merchants. There is no analysis undertaken here.

What is simply said is one has to look at the consumer position and they're based in the UK, and, secondly, the fact that it's a follow-on claim is said to be relevant because you can ignore, essentially, the infringement.

MR JUSTICE ROTH: Well, you won't have to determine the infringement.

MS TOLANEY: That's because it's the very premise that enables the claim to be brought.

MR JUSTICE ROTH: No, because it's been found.

MS TOLANEY: Yes.

MR JUSTICE ROTH: Yes, so actually, in the hearing of the case, although it's significant, it won't be a matter in dispute.

MS TOLANEY: But the fact that it's not in dispute doesn't take away from the fact that it's a significant element for the purposes of section 11, which is one of the reasons it will have been found to be under section 11. So section 12, it's still a factor that can't

be ignored. And what we say is, essentially, Mr Merricks' case is that the place of the consumer's domicile simply dictates the applicable law because it's a consumer claim, and that is why we say that's completely at odds with the approach under the statute and we say would set a very troubling precedent, if that's the analysis.

MR JUSTICE ROTH: But it's one of the factors set out in section 12, subsection 2, isn't it? Factors relating to the parties, so it's a relevant fact.

MS TOLANEY: I'm sorry, sir, which -- section 2, subsection 2?

MR JUSTICE ROTH: Section 12 and it says:

"What can the court or Tribunal take into account for the purpose of section 12?"

And the non-exhaustive list highlights factors relating to the parties, so it's clearly a relevant factor that we can and, indeed, are encouraged, one might say, to take into account in applying section 12.

MS TOLANEY: But it doesn't suggest that that is the factor.

MR JUSTICE ROTH: No.

MS TOLANEY: And that's my point, that that's the essential -- I suppose the way I'm putting it is this argument stands or falls with the argument that this is a consumer claim, and, sir, you would have to find that that is the essential factor, I submit, in order to displace everything else, including at this point, you will have found, and that's the premise of this, that the most significant element was, in fact, the restriction of competition in the acquiring market and then that will be displaced simply because of the nature of the parties or factors affecting the parties.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And my point was simply this: that that's a very extreme reading of section 12 and we don't accept that that is the right analysis. Mr Merricks' skeleton doesn't actually engage with the analysis suggested by the Court of Appeal or held by the Court of Appeal to be applicable under section 12, and, thirdly, if that's the

analysis, it would apply in every consumer case, so it would have very wide ramifications.

MR JUSTICE ROTH: Well, it might not, because it might have consumers who were, in many countries, bringing a claim, in which case, you know, even in this Tribunal, you could have an opt-in class which covers consumers in Europe, in which case it wouldn't be a factor, because you would have consumers from many countries, so it wouldn't take you to -- one to England.

It's this case because the consumers, by definition, have to be resident more or less in the UK.

Anyway, I see your point. Usually they're UK consumers.

MS TOLANEY: And consumer litigation in this jurisdiction would often be primarily based on UK consumers, so it would be saying that in a UK consumer piece of litigation, of which we're seeing more and more, that's the way that section 11 and 12 will operate.

MR JUSTICE ROTH: Yes.

MS TOLANEY: So I can move now to the common law rule, sir.

MR JUSTICE ROTH: Yes.

MS TOLANEY: So the common law choice of rules apply in relation to the period prior to the 1995 Act taking effect and that means for claims based on the MIFs for 22 May 1992 to 30 April 1996, and the common law choice of rule referred to as double actionability, provides that a claim in tort may be brought in respect of an act done in a foreign country only if the claim was actionable under the law of England and the law of the place where it was done.

Again, if we could look at the Deutsche Bahn judgment again on this point, at paragraph 142. There is a helpful summary of the rules set out from Dicey and Morris, which starts, if one goes to the second paragraph in the quotation, main paragraph:

"This reflected the law as stated in Phillips v Eyre ... owing to the different views."

And if I could just ask you to read down.

(Pause).

MR JUSTICE ROTH: Yes.

MS TOLANEY: So the first question is to ascertain whether the claim is made in respect of an act done in a foreign country and this was put in the Distillers case which is in the bundle at B2, tab 52. The question asked there was you needed to look back over the series of events constituting the tort and to ask the question: where, in substance, did this cause of action arise? And that is at page 468E. Shall I just show you that, sir?

MR JUSTICE ROTH: Of Distillers?

MS TOLANEY: Of Distillers.

MR JUSTICE ROTH: Yes, I'm not sure you've given us the reference to Distillers.

MS TOLANEY: So it's B2, tab 52. And it's page 468E of the report, which is on page 1419 of the bundle. Letter E.

The judgment of Lord Pearson. The facts are not particularly relevant but one can see the passage here:

"The right approach is when the tort is complete, to look back over the series of events constituting it and ask the question: where, in substance, did this cause of action arise?"

MR JUSTICE ROTH: So sorry, my fault, what page in the judgment?

MS TOLANEY: In the judgment, sir, it's 468E; letter E.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And in the bundle it's B1/1419. And it related to the purchase of a drug including thalomide and the purchase was made in New South Wales and there is a question as to where the cause of action arose.

MR JUSTICE ROTH: Indeed, he says it's not the right approach to say it's wherever the damage happened to occur.

MS TOLANEY: Exactly.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And the finding was it was where the purchase was made; where the drug was acquired was the relevant place.

MR JUSTICE ROTH: Where the purchase -- how does that apply to a cross-border sale; where is the purchase made? If the seller is in country A and the buyer is in country B, where is the purchase made?

MS TOLANEY: The facts of this were that the manufacturing was done in England. It was sold to an Australian company. The Australian company sold the drug in New South Wales, which is where it was purchased.

MR JUSTICE ROTH: Yes, but they were both in -- I don't know -- was the issue about New South Wales law or Australian law? Is it the law of New South Wales or ...? Therefore, they conclude the most significant ...

MS TOLANEY: The facts were, sir, if we go to 49C to E --

MR JUSTICE ROTH: What was the result here?

MS TOLANEY: The result was that the cause of action arose within the jurisdiction of where the purchase was made in New South Wales and the relevant facts were at 49C to E.

49C to E of page 1420 of the bundle. And 469 of the report.

MR JUSTICE ROTH: 469, yes.

Yes, I see.

MS TOLANEY: And our submissions are that here, the cause of action arose in the place where the merchants were established, having regard to the fact that the claims concerned the MIFs found by the Commission to have affected the acquiring market

and acquiring markets being national, in the place where the merchant's based, and any higher interchange fees that were paid, if they were, were paid by acquiring banks in those markets.

And on Mr Merricks' case, acquiring banks then passed on to the merchants, in the place where the merchants were established, through higher charges, and on Mr Merricks' case, the merchants established in other countries then raise their price accordingly.

MR JUSTICE ROTH: The difference there is that the suppliers of the drug were also in New South Wales, the chemist, the pharmacist, the doctors prescribing, so you had both the supplier to the purchaser and the purchaser in New South Wales.

MS TOLANEY: But the manufacturer was in England.

MR JUSTICE ROTH: In England.

MS TOLANEY: And the loss might have been anywhere.

MR JUSTICE ROTH: Well, the loss in the claim was where the purchasers were, but they say but it's the failure to put the warning on, by communication to persons in New South Wales.

Yes. Well, that's, one has to say, a rather simpler case to now.

MS TOLANEY: But if we look at a similar case to ours, that's again the Deutsche Bahn case, a similar reasoning was applied by Mr Justice Barling and it's at paragraph 152 of that judgment, at page B -- bundle B3, tab 68, page 2066. Sorry, it's tab 69, I beg your pardon.

(Pause).

MR JUSTICE ROTH: Yes.

MS TOLANEY: Mr Merricks says that the relevant factor is the place where the consumers were based. At paragraph 67 of his skeleton he says:

"In substance, the cause of action arose when the represented persons paid the

inflated prices for the goods and services which they were purchasing, thereby suffering loss."

Paragraph 67.

But the question is not to identify the point in time when the cause of action arose, but the place where, in substance, the cause of action arose, and here, we say is a good example of conflating the idea of when they purchase, with different questions because on Mr Merricks' approach, the relevant place would always be where the damage is incurred because that will be the point when the cause of action arises, on that submission.

Mr Merricks, in his next paragraph, 68, of his skeleton, tries to invoke the exception under double actionability.

MR JUSTICE ROTH: Is this Dicey sub-rule 2?

MS TOLANEY: That is right.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And we address that, sir, in our skeleton argument at paragraph 96. And in particular, as we set out there, we cite two authorities, one of the Court of Appeal, the other the Privy Council, emphasising that the general rule must apply unless clear and satisfying grounds have shown why it should be departed from and what solution derived from that other rule should be preferred and as Lord Slynn stated, the exception should only be applied or should be applied only in exceptional cases.

And notably in Mr Merricks' skeleton, these cases and that test, we say is not engaged with. It's a very high threshold.

MR JUSTICE ROTH: Yes.

MS TOLANEY: And we say there is no reason to apply the exception here to disapply foreign law and no clear and satisfying grounds have been identified. Again, the point

that's made in paragraph 68 of Mr Merricks' skeleton is that the present case is one involving harm to consumers in the UK, which thereby justifies the application of UK law and we say that is not an appropriate point and it ignores where the cause of action arose and the fact that the transaction relates to transaction with foreign merchants. And we say there is no reason for the exception to double actionability to be applied.

MR JUSTICE ROTH: Yes.

MS TOLANEY: Sir, those were my points on applicable law. We will certainly go away and think about the point that you raised and I don't know whether you want me to come back on that on Monday morning or --

MR JUSTICE ROTH: It would be helpful, because it does inform, it seems to me, on the other point, so I think if you could, please, address us on that --

MS TOLANEY: We will do that.

MR JUSTICE ROTH: -- on Monday morning and then we will hear Ms Demetriou. And just thinking about timing, I do also need to hear you about timetable on the section 32 but that will, I hope -- I hope that's something the parties are discussing, to try and agree timetable for pleading and so on.

But we should be -- you will no doubt have considered how long you think exemptibility is going to take but I would have thought it's not much more than a day, is it?

MS DEMETRIOU: It might be a little more than a day, I think a day might be optimistic but I am confident that we're not going to -- we have both days, don't we? I am confident that we can --

MR JUSTICE ROTH: We should be able to start that after lunch -- we should be able to start --

MS DEMETRIOU: At lunchtime and we should -- I'm sure we can confidently finish in a day and a half.

MR JUSTICE ROTH: We do have to finish on Tuesday, that's clear, so if you could

adjust your --

MS DEMETRIOU: Of course.

MR JUSTICE ROTH: Very well. We will adjourn until 10.30 on Monday.

(4.25 pm)

(The hearing adjourned until 10.30 am on Monday, 16 January 2023)