IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1517/11/7/22 (UM)
1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 26th April 2023

Before:
The Honourable Mr Marcus Smith
The Honourable Mr Justice Roth
Ben Tidswell

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Merchant Interchange Fee Umbrella Proceedings

AND BETWEEN:

Walter Hugh Merricks CBE

Class Representative

v

Mastercard Incorporated and Others

Defendants

A P P E A R AN C E S

Mehdi Baiou (Instructed by Humphries Kerstetter and Scott & Scott)
Ronit Kreisberger KC, Philip Woolfe, Oliver Jackson and Antonia Fitzpatrick (Instructed by Stephenson Harwood)
Simon Salzedo KC, Daniel Piccinin KC, Jason Pobjoy and Isabel Buchanan (Instructed by Linklaters LLP and Milbank LLP on behalf of Visa)
Timothy Otty KC, Matthew Cook KC, Naina Patel, and Ben Lewy (Instructed by Jones Day on behalf of Mastercard)
Nicholas Saunders KC, Aidan O'Neill KC, and Anneliese Blackwood (Instructed by Wilkie Farr & Gallagher on behalf of Walter Hugh Merricks)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Wednesday, 26 April 2023

(10.01 am)

MR JUSTICE MARCUS SMITH: Mr Otty, good morning. Just a short word on pacing and in terms of the submissions that we would like to hear from all the parties that will assist us most. We are concerned to ensure that Ms Kreisberger has an appropriate amount of time to deal with the points that you've all been throwing at her, and aspirationally, and we say this as an indication only, I think it will be helpful if Ms Kreisberger were on her feet at about 11.30, that is to say that you and Mr Saunders and Mr O'Neill have an hour and a half in which to get through things. That's only an indication. I know you can cut matters as they go, but we are very familiar with *Volvo*, so if you could cut your cloth in that way, that would be helpful. But it's not a guillotine; it's an indication as to what we would be most helped by.

MR OTTY: Thank you. I was anticipating yesterday a 10.30 start would see me finish by the lunch break, so I'm now down to one and a half hours rather than two and a half, but I'll do my best and see how we go.

MR JUSTICE MARCUS SMITH: We'll see how we go. What I am anxious is that we don't have Ms Kreisberger in full flood at 4.15.

MR OTTY: No. I'm sure she shares that sentiment.

MR JUSTICE MARCUS SMITH: I'm sure she does.

Submissions by MR OTTY (continued)

MR OTTY: Thank you, Sir, for that indication. I will do my best.

I dealt yesterday with the case law prior to *Volvo,* principally *Manfredi* and *Cogeco,* and where we got to was, one, limitation rules were, prior to the Directive, matters for national legislatures, subject to the principle of effectiveness; two, whether

a domestic regime complied with the principle of effectiveness would require consideration of all its features; and three, the Damages Directive did not merely codify pre-existing rules.

That then provides the context for *Volvo* itself. I wanted to take you briefly, if I could, to the Advocate General's opinion and then to some of the passages in *Volvo,* but, as you have seen, and given the indication you have just given, I will be as quick as I can on it.

The Advocate General's opinion is at Authorities Bundle, volume 8, tab, 152, page 4577.

MR JUSTICE MARCUS SMITH: Sorry, which bundle number?

MR OTTY: Authorities Bundle, volume 8, tab 152, page 4577. I should say this is a certified translation, I think, of the Advocate General's opinion.

You see at paragraphs 1 and 2 on page 4577 a summary of what the Advocate General considered the case to be about, namely the interpretation of Article 101 of the Treaty and Articles 10, 17 and 22 of the Damages Directive.

Then, at paragraph 4, the focus is on the effect *ratione temporis* of the Directive and the potential impact of the case on any litigation pending before national courts raising the issue of the application *ratione temporis* of the Directive. So no reference, here at least, to the Advocate General understanding that some broader, freestanding issue as to the reach of the general principle of effectiveness to be in play or the potential for the case to impact on litigation not concerned with the Directive at all.

Paragraph 20 sets out, as you've seen already, the particular factual context and the very short Spanish limitation period of one year which the defendants were seeking to rely upon.

Paragraph 21 setting out the questions the Spanish court had raised, which again

you have already seen.

Paragraph 22 shows the range of parties making submissions in the case set out: the claimants or the applicants, the defendants of course, the Spanish and the Estonian governments and the Commission.

Paragraph 23, the Advocate General summarised again the focus of the case: the temporal application of provisions of the Directive.

Paragraphs 24 and 26, he summarised or made the point about the infringement having ceased seven years earlier, before commencement of the Spanish proceedings. So, on the facts of the case, as you've already seen and noted, no question of the point of cessation of infringement being material to prevent time from running in the case under consideration.

At paragraph 29, he explained the approach he would take of answering the second and the third questions before him, before turning to the first question, noting that questions relating to principles of primary law would only need to be considered if the obligation in question couldn't be deduced from the specific provisions of the Directive before him.

He then emphasised, at paragraphs 34 through to 69, a series of core principles of EU law as informing his approach and his ultimate conclusion, and that approach, as we have submitted in our skeleton, was entirely in line with the principles that we have already seen articulated.

Firstly, at paragraphs 34 to 35, he explained that the rules going to non-retroactivity, legal certainty and legitimate expectations meant that the application of new substantive rules to pre-existing situations could only be appropriate when it was clear from their wording, purpose and scheme that that was mandatory.

Secondly, at paragraph 39, he pointed out that in general terms, *Cogeco* had already held the Directive was not applicable to facts occurring before adoption of and entry

into force.

Thirdly, and this is perhaps an important point to note in then subsequently analysing what *Volvo* actually decided, at paragraph 41, the Attorney General recorded the claimants' submission to the effect that the Directive applied in its entirety because the proceedings were brought after its entry into force. He then rejected that argument at paragraphs 43 to 44 as contrary to the wording of the Directive, most obviously Article 22, and contrary to the objectives of predictability and giving rise to a risk of resurrecting actions which were already time-barred.

So, notably, in this record of the claimants' case, there was no reference to any argument that the provisions of Article 10 of the Directive somehow applied already through the gateway of the principle of effectiveness, and there is no reference anywhere to either the government or the Commission having advanced such an argument, and that makes it even more of a stretch, we say, to then interpret the court's judgment in *Volvo* as having reached precisely that conclusion, which is in essence what the Claimants' case in these proceedings is.

MR JUSTICE MARCUS SMITH: That raises the interesting question of the relationship between the AG's opinion, the court's judgment, and the dispositif at the end of the court's judgment.

MR OTTY: It does, yes.

MR JUSTICE MARCUS SMITH: And my question is -- we've seen and it is self-evident that one interprets the dispositif in light of what was said, and here really, in the judgment -- to what extent is the AG's view an interpretative element in construing what is and is not in the dispositif?

MR OTTY: Our primary position would be that it isn't, and the approach indicated by *Arsenal* and articulated by Mr Salzedo yesterday is the right approach. You look at the dispositif. If you are in doubt about the interpretation of the dispositif, you look at

the *ratio* necessary for the dispositif, and that is that.

But if you want any comfort in working out what the *ratio* is, perhaps it's to import a domestic concept without an adequate basis in EU law terms, but as a matter of common sense we would say you could look at what the parties have actually argued, and if the parties haven't actually argued for the far-reaching conclusion that it is being contended the court found, then that is a further basis for saying, as a matter of common sense, that really isn't what the dispositif is to be read as doing.

MR JUSTICE ROTH: You're really using that, the Attorney General's opinion, not for his view but just as a convenient summary of what the parties were saying to the court?

MR OTTY: Yes, on this point, that's absolutely right. And in terms of recitation of all of the general principles, he's not really going further than the authorities we have already looked at.

MR JUSTICE ROTH: No. Yes.

MR OTTY: In summary, as to what the AG found, where we get to, again, like the court in *Cogeco,* like the court in *Volvo*, he treats Article 10 as a substantive provision.

He emphasises the principles of legal certainty and non-retroactivity. He emphasises again, like all the other authorities before the case, that assessing the principle of effectiveness means looking at the whole situation, not individual elements in isolation.

But perhaps of most significance, it's that point, as my Lord has just indicated: to provide a proper, meaningful context for interpreting the dispositif, it may be of assistance to see what the parties were actually arguing.

Now, *Volvo* itself, you have read it and you have seen all the material passages, and we've addressed it in our skeleton arguments, and in the light of the indication that

the President has just given me, I don't think it would probably be particularly profitable to go through all of those passages.

What I'd like to do instead is, assuming them all as read, I'd like to explain five reasons why we say the critical paragraphs that the Claimants rely upon, namely paragraphs 56, 57 and 61, simply cannot bear the weight placed upon them and do not justify the interpretation of *Volvo* contended for.

The first basic point is the one we already alluded to this morning: there is no such conclusion in the operative part of the judgment at page 3708. Just to turn that to you, at least, so we've got that in front of us, it's Authorities Bundle, volume 7 tab 123 page 3692. Sorry, it's 3708 for the dispositif, the operative part.

So this is the first point: there is no such conclusion in that operative part, where the emphasis in that critical first paragraph is all on the temporal scope of the Directive and its interpretation. There is no reference to the cessation condition here and there is no reference either to knowledge as a concept or the particular landing point on knowledge that the Claimants contend for.

The reasoning, if one goes back into the reasoning, the reasoning necessary to reach the conclusion that is expressed here in this first paragraph involved no more than, first, an explanation as to why Article 10 was a substantive provision which could not be applied retroactively by virtue of Article 22 of the Directive; and, secondly, an analysis of what retroactivity might or might not involve. And specifically, it was not necessary to the conclusion expressed here to decide either, (a) that time could not start to run until an infringement had ceased or, (b) that time could not start to run until the particular form of knowledge identified in paragraph 61 of the judgment or in the Damages Directive had been attained.

If the Court of Justice had intended to make a definitive ruling, contrary, we say, to everything that had been said previously in Court of Justice judgments, including

Manfredi and *Cogeco,* about the need to consider effectiveness in the round, taking account of all features of the national limitation regime -- if it had intended to conclude that regardless of any other features of the limitation regime, the principle of effectiveness required both a cessation condition and a particular landing point in terms of knowledge included in the Directive, then that would have been set out in the operative part of the judgment.

The fact that there is no reference either to cessation or to knowledge shows that it didn't intend that, and it would have been extremely easy to include the words the Claimants seize upon in paragraphs 56, 57 and 61 in that operative part. We've seen in *Cogeco* that's what they do sometimes.

And that's probably the shortest of all the short answers to the Claimants' case in these proceedings.

MR JUSTICE MARCUS SMITH: Your point is really a related double-barrelled one, in the sense that this is a departure, a new point, that doesn't appear in the dispositif.

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: In other words, if you've got an established principle that appeared in the dispositif of an earlier case, you would not expect it to be repeated or not necessarily repeated in the dispositif of a later case; you would regard it as a building block going forward --

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: -- which you just take into account as the established law of the EU.

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: Really you would expect an alteration, a resiling from that to appear in the dispositif, not simply a confirmation.

But here you are saying -- obviously we've got Mr Saunders' submissions on this in

mind -- but here you are saying this is a departure in a number of respects.

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: And if it is an intended departure, it will be in bold at the end and, if it isn't, then all you've got is a discussion --

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: -- which isn't part of the dispositif.

MR OTTY: Yes, and it's a departure going in precisely the opposite direction to the direction the court went in *Manfredi,* where it specifically had an opportunity to embrace a cessation condition and didn't take it.

MR JUSTICE ROTH: Though it does depend on the limitation period not elapsing.

MR OTTY: That's true.

MR JUSTICE ROTH: And while cessation was irrelevant on the facts of this case, because cessation was long before, the knowledge was relevant, as they point out in the reasoning. It's because of the knowledge point that the limitation period, as they interpret effectiveness, had not elapsed. So there is a difference --

MR OTTY: There's a difference and there's --

MR JUSTICE ROTH: -- in the relevance of the two and cessation is really irrelevant.

MR OTTY: Cessation is completely irrelevant.

MR JUSTICE ROTH: Whereas knowledge is directly relevant.

MR OTTY: Yes. I can see how you can get to a point where you say a knowledge component is relevant to the analysis. The question for this Tribunal is whether the particular landing point on knowledge contended for by the Claimants is a necessary part of the reasoning. And we say that the English law on limitation, in particular with section 32, embraces a knowledge component in the context of covert practices, deliberate concealment, and what might or might not reasonably be discovered.

So this provides no answer to the question whether or not that kind of approach to

knowledge is compatible with the principle of effectiveness.

So that's our first point.

Our second point, which is related, and in a sense is very similar to the different articulation that the President just put to me, is that if the Claimants' interpretation were correct, then the Court of Justice would have in substance departed *sub silentio* from all previous case law by the creation of a far-reaching and hard-edged rule applicable in all circumstances, whatever the length of the limitation period, whatever provisions might exist for its suspension, whether or not that limitation regime provided for causes of action to accrue on a daily basis, and in a case where one part of the hard-edged rule contended for at least, namely that relating to cessation, was, as my Lord Mr Justice Roth just put it, entirely irrelevant on the facts of the case. Furthermore, a proposition which, it appears, was not the subject of any argument by any party appearing.

So that's the second reason, pointing to the inherent unlikelihood of the Claimants' interpretation being correct.

The third reason is that if that had been the court's conclusion, it would have rendered academic all of the debate about the temporal scope of Article 10 of the Directive, and in turn paragraph 1 of the dispositif, because the key points in issue would already have been part of applicable Union law through the gateway of the principle of effectiveness. The court could and would have been able to cut right through all of the argument about the temporal effect of the Directive by simply saying the key provisions of Article 10 are already provided for in the general principle of effectiveness, so we don't need to dance on a pin head and look at Article 22 and all the rest of it.

The fourth point, and the reason the court couldn't go down that road, in addition to the fact that it would have involved a departure from pre-existing authority, without

any explanation or argument -- the fourth point is that that would have been a state of affairs that would have been inconsistent with the wording of the Directive itself, and in particular Article 22(1), and it would have been inconsistent with the approach of a number of Member States in providing only for the prospective transposition of the Directive, and this is perhaps another point one gets a factual point of assistance from the Advocate General, which the Advocate General had referred to and which the Commission had not objected to.

Then the fifth point which I've already made, under different guises, I suppose, so it's perhaps not a fifth point but I will emphasise it again: it would be a pretty startling outcome in a case where no party appearing, embracing two governments and the Commission, had actually argued for it. That's, we say, a complete answer to the Claimants' case. It means we could end submissions there, in one sense, and not deal with anything else, but I will resist that temptation; I've got, even on the curtailed time, a bit of time to go.

Deutsche Bank is the only other Court of Justice case referred to. It's a very recent one. We respectfully submit the Claimants get nothing at all from it. It's at Authorities Bundle tab 131 at page 3930

As we see from paragraph 8, it too concerned the same Spanish law limitation provisions considered in *Volvo,* so in that sense it's immediately unsurprising that it simply followed the approach in *Volvo.* It too, as we see from paragraph 14, continues infringement which had long since ceased, so again cessation was completely irrelevant.

The operative part of the order in this case, paragraph 73(1) on page 3943, was all about knowledge, nothing to do with cessation, and whether a domestic provision which allowed for the commencement of a limitation period on publication of a Commission summary was compatible with the principle of effectiveness.

Nothing that the order said about limitation periods and cessation of infringement was relevant, let alone necessary, to that conclusion, and there's again nothing here to say that only the specific landing point on knowledge identified in Article 10(2) will do.

To the extent the court in this case cited *Volvo,* it did nothing more than cut and paste passages from it. It added nothing by way of analysis or reasoning.

So that's the Court of Justice case law. Even post-*Volvo*, even post-*Deutsche Bank,* its binding content remains, as I submitted when I started yesterday, when giving an overview of our submissions, and as I sought again to summarise this morning. Prior to harmonisation, limitation is a matter for the individual states. The rules are subject to the principle of effectiveness, and the principle of effectiveness did not incorporate a hard-edged rule mirroring Article 10(2).

So that's our first argument.

Our second argument on *Volvo* is that the Claimants' case, that the content of Article 10 of the Directive reflects the general principle of effectiveness, is barred by binding Court of Appeal authority in the form of *Arcadia.* As I sought to indicate yesterday, we say there is no tension at all between a proper interpretation of the Court of Justice case law and *Arcadia*; they're entirely consistent.

Arcadia is at Authorities Bundle, volume 4, tab 77, page 2217, and the key passages are at paragraphs 73 to 79, beginning on page 2235, in the leading judgment of the Chancellor, Sir Terence Etherton.

The same argument is now advanced by reference to the general principle of effectiveness, and the same provisions of the Damages Directive were rejected as unarguable.

74, just by C to D, his Lordship accurately summarised the content of the principle of effectiveness and drew attention to the Supreme Court's confirmation that

reasonable periods of limitation were likewise recognised in EU law as necessary and desirable by reference to the principle of legal certainty.

At 75, by F to G, his Lordship found that there was no basis for concluding that a limitation period of six years for a competition law claim, with the benefit of the postponement provisions in section 32, were in principle incompatible with the principle of effectiveness. That's the passage I referred to at the outset yesterday in summarising what we submit to be the flaws in the Claimants' cases. It's simply wrong to say that *Arcadia* was only about section 32 and had nothing to say about section 9 of the Limitation Act. The reference to the six-year limitation period is obviously to section 2 and section 9, and it's worth noting in this regard that paragraph 8 of the Chancellor's judgment at page 2220 expressly refers to those sections too.

At 76, back in the key passages of the judgment, his Lordship mentioned the Court of Justice decision of *Danske Slagterier,* which he said he found of no assistance. That case was, as his Lordship rightly held, very different on its facts, relating to free movement of goods and issues of inadequate transposition, and it had in fact held that a national limitation period commencing when the first injurious effects were produced was not liable to breach the principle of effectiveness.

I don't need to turn it up, I don't think, but I will give the reference so the Tribunal has it. It's at Authorities Bundle, volume 4, tab 62, page 1742, and the material holding is at page 1743, and in the judgment at paragraphs 49 to 52.

The only point I want to mention it for, and the only reason I'm really referring to it, is that you will see in those passages of the *Slagterier* judgment the key passages in *Manfredi* were themselves set out. So any notion such as that which Mr Saunders appeared to be floating at one point, without expressly articulating, yesterday, that *Arcadia* was somehow decided *per incuriam* because it didn't have *Manfredi* before it

in the list of cited cases, is a bad point; the principles were there. But as I've submitted yesterday, the principles are entirely consistent with the landing point of the Chancellor.

Paragraph 77, the Chancellor recorded a submission that in the context of infringements of competition law, the relevant EU principles were laid down in the Damages Directive, particularly Article 10(2), and that these provisions merely codified longstanding EU jurisprudence. That's of course in substance what the Claimants say here.

Then at paragraph 78 his Lordship rejected that argument. As the Chancellor put it, by reference to Article 22 of the Directive in particular, it was plain that the provisions of Article 10(2) in particular are new law. So exactly the same landing point as the Advocate General in *Cogeco* had arrived at.

At paragraph 79, this position was held to be so clearly against the claimants that a reference to the Court of Justice was refused.

Now, all that's said in response to *Arcadia* is -- in the skeleton arguments at least -- that it was of limited relevance because it preceded the key case of *Cogeco* and therefore provides no authority that this court should have regard to. Now, that argument just proceeds, on the basis of a straightforward misreading of *Cogeco*, as I sought to explain yesterday.

The result is therefore that *Arcadia* remains good law and is binding on the Tribunal. You get in fact to precisely the same destination as the Court of Justice case law takes you to anyway.

The third argument we have on why if it's in play, *Volvo* shouldn't be followed, is the incoherent and unprincipled nature of its reasoning, if it's said to justify the conclusion that the Claimants contend for as to its interpretation. This is a point that we've set out in our skeleton argument at paragraphs 30(b) to (g) and at paragraph

73, and again I can, I hope, cut through it quite quickly, summarise it quite quickly. It boils down again to --

MR JUSTICE MARCUS SMITH: Mr Otty --

MR OTTY: I don't need to go there?

MR JUSTICE MARCUS SMITH: -- you can leave that.

MR OTTY: I won't. It's set out in those passages.

MR JUSTICE MARCUS SMITH: We'll obviously read it but we don't think you can helpfully add anything to your excellent written submissions.

MR OTTY: Thank you very much, Sir.

None of the arguments as to why, on the Claimants' case, *Volvo* should somehow be followed overcome any of these problems. I'm not going to take time going through them. They are a series of generalised assertions, they are a series of misunderstandings or misinterpretations of EU law, and to cite laudable objectives pursued by competition regimes is interesting but ultimately analytically irrelevant.

So where does that take us on the key questions? The answers are, as I submitted yesterday. Firstly, the judgment in *Volvo* is, on any view, not binding authority for anything. It's not relevant; it shouldn't be followed, for all the reasons I've just given, whether that's the binding Court of Appeal authority, the Court of Justice case law, or the incoherence in the reasoning behind 56, 57 and 61, etc.

MR JUSTICE MARCUS SMITH: In a sense, there's a nexus between your incoherence point and your interpretation of the dispositif --

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: -- in that as one would expect, the more surprising the outcome, the clearer the statement that it is intended in the dispositif.

MR OTTY: Yes.

So applying all that, then, to the listed questions before the Tribunal, the answer to

questions 1 and 2 follow -- as we've submitted them in page 3 of our skeleton argument. The answers to questions 1 and 2 follow from what we submit to be the correct analysis of the Court of Justice case law, up to and including *Volvo.*

In terms of the particular landing point on knowledge contended for, in terms of the cessation condition contended for, it's the Directive and nothing else.

The answer to question 3 follows from Mr Salzedo's submissions and the submissions I've just made. If *Volvo* is in play somehow, it shouldn't be followed.

And the answer to question 4 is it follows that English law is concerned with and governed by the Limitation Act provisions as they stand -- see *Arcadia* -- and, as you heard yesterday, in the light of the Tribunal's ruling earlier this year, no separate issue arises under Scottish law.

Now, that only leaves left to be addressed equal treatment, remedy and abuse of process, which I was going to touch upon very briefly, if that would assist.

Equal treatment first. This is the new argument advanced by the Merricks Claimants. As I said yesterday, they are unpleaded; no notice was given of them prior to receipt of the Merricks skeleton argument. They don't flow from *Volvo* and they fall, therefore, outside of the originally envisaged scope of this hearing, set out in your order, Sir, of 23 December 2022 at Hearing Bundle volume 2, tab 19, page 634. And they also don't of course form part of the list of questions.

So our primary position is they should just be put to one side.

It's particularly obvious in circumstances where the Merricks Claimants themselves, at paragraphs 41 to 42 of their skeleton, seek to prevail on the argument by complaining about a lack of evidence justifying differential treatment.

But in any event, the submissions are flawed, and the reason they are flawed is explained in the case of *A and B v Secretary of State for Health,* in the judgment of Lord Reed and Lord Hughes, which was agreed with in this respect, although

differed in other respects, by Lord Kerr. You have that in the bundle at Authorities Bundle, volume 5, tab 85, page 2345. It's particularly paragraphs 40 to 44 of Lord Reed, first of all, especially 40, 42 and 44, if I could just ask the Tribunal to cast their eyes down those paragraphs.

What you will see from them is --

MR JUSTICE ROTH: Sorry, do you have the bundle page?

MR OTTY: I'm sorry, 2345 is the judgment.

MR JUSTICE ROTH: Is the start.

MR OTTY: Then the paragraphs begin at 2361.

MR JUSTICE ROTH: Thank you.

MR OTTY: It's, as I say, 40 through to 44.

Then Lord Kerr, agreeing with Lord Reed's approach in paragraph 90 which is at page 2377.

So what you get from these passage is that the mere existence of variations between different legal jurisdictions within a single state does not per se constitute discrimination.

MR JUSTICE ROTH: This was for the purposes of the Convention, wasn't it?

MR OTTY: It was. It was for the purposes of Article 14 of the Convention.

MR JUSTICE ROTH: Which was not the argument that the Merricks Claimants are raising. They are not relying on the Convention.

MR OTTY: They do rely upon the Convention, because they rely upon *Carson,* among other cases.

MR JUSTICE ROTH: I see.

MR OTTY: And they equate equal treatment with Article 14, and there's a similar analysis that applies because, in both contexts, to get either an equal treatment off the ground in EU law terms or an Article 14 argument off the ground in Convention

terms, the starting point is you've got to find two different groups in a relevantly and materially indistinguishable position who are being treated differently.

MR JUSTICE MARCUS SMITH: I just want to see how far you agree with the point that Mr Tidswell put to Mr O'Neill when this point cropped up. It's not enough to say that A in one area is being treated differently to B in another area because that is or may be part of the constitutional arrangements within a given Member State, so such differences can be perfectly legitimate and explicable, as is explained indeed in paragraph 40 of *A and B.*

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: So you've got to have some form of right, EU-derived right, which is implemented differently without justification across the two law areas.

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: So suppose one's got not a directive but a regulation. Were one to see in one law district a materially different application of that regulation compared to the other area, then that discrimination would require some degree of justification because the point about regulations is they create a uniform set of rights across the EU and so discrimination there is something which is difficult to explain by simply the fact that they are two different law districts in a non -- completely unitary state.

MR OTTY: Yes.

MR JUSTICE MARCUS SMITH: Here, however, we are talking about either a directive, if one is looking at the Directive, or a set of principles regarding effectiveness of EU law which contains within it a degree of discretion or penumbra which means that you have different implementations in different areas, both between Member States and between law districts in a single Member State which

gives a room for manoeuvre.

MR OTTY: Exactly.

MR JUSTICE MARCUS SMITH: And *A and B* is saying no more than that, if I read it --

MR OTTY: I respectfully adopt that analysis. All this really adds is to say that it's certainly not enough to say there is, within a single state, a different set of legal provisions because, exactly as you have just articulated it, Sir, and consistent with the Court of Justice case law, the overall target is the same, the principle of effectiveness. But just as when you are dealing with different Member States, that can be satisfied in different nuanced ways, so within a single state that can be satisfied in different nuanced ways.

So you just don't get an argument about equal treatment or discrimination off the ground, we say.

This argument, remember, only arises, *ex hypothesi,* if the Claimants have failed by reference to their principle of effectiveness arguments. So it's particularly difficult to see how it could prosper. And all of this shows, consistent with the approach --

MR JUSTICE ROTH: It doesn't depend on the -- it's not a different application of the principle of effectiveness because, as you say, it arises if that argument fails, so the principle is satisfied, and then you are just left with the principle being satisfied but a more generous limitation rule being adopted by the legislature of one part of the UK. This has happened in a whole host of areas.

MR OTTY: Yes, exactly, and even the adjective "generous" gives rise to its own difficulties, as illustrated by the question that the President put to Mr O'Neill yesterday in terms of levelling up. Who are you going to be generous to? Are you going to be generous to the defendants, with their limitation defences, or are you going to be generous to the claimants --

MR JUSTICE ROTH: I meant generous to the claimants, obviously. But do you have --

MR OTTY: And none of the cases about levelling up involve that situation where you have two interested groups with diametrically opposed interests, depending on the landing point of limitation.

Yes, thank you. Mr Cook has very helpfully reminded me and just turned my attention to my Lord Mr Justice Roth's point. At the end of 44 in Lord Reed, although your Lordship is absolutely right, this was a Convention case, he is drawing attention to the same analysis and approach applying in a Community context by reference to the *Horvath* decision, in the five/six lines of 44 on page 2363 of the Authorities Bundle.

MR JUSTICE MARCUS SMITH: Yes. That's very helpful.

MR OTTY: So that's equal treatment and that leaves only remedy and within that abuse. And obviously we say remedy doesn't arise, for all the reasons given above. If it did arise, then we agree with the analysis relating to disapplication set out in both the Visa skeleton argument at paragraph 40 and the Stephenson Harwood skeleton argument set out at 82 to 83. This would be a case of disapplication in relation to proceedings brought prior to completion day or nothing.

We reject the argument advanced by the Stephenson Harwood Claimants that somehow section 2 of the Limitation Act could be construed such that "date when the cause of action accrued" should be interpreted as meaning the date on which the anti-competitive practice came to an end. That would be contrary to very long-established and basic principles of English law to the effect, as we have discussed already, that where a continuing tort is alleged, a fresh cause of action accrues every day, with a right to bring an action restricted to that part of the wrong committed in the previous six years. It would also give rise to the nonsensical result

which the Stephenson Harwood skeleton fairly acknowledges at paragraph 71 that it would mean that a claimant wouldn't have a cause of action and couldn't bring a claim until an abuse of practice had ceased.

Abuse of process then is the last argument and it's set out at paragraphs 80 to 81, and it's the one upon which Ms Kreisberger reserved her position so she could hear what we had to say.

It said, I think, that for the Defendants to rely upon the Limitation Act in the way they do would involve an abuse of process, it says, since the Tribunal is bound to give effect to EU law. They cite the Hyderabad funds case, which the President will recall fondly, I'm sure, as supporting that proposition. Now, that case of course involved very different circumstances, and a party picking and choosing when to deploy sovereign immunity arguments and when to deploy limitation arguments. There's nothing remotely of that kind here. All the Defendants have done is invoke primary legislation and a binding Court of Appeal judgment setting out clear limitation defences.

If instead -- it's not entirely clear to us, but if instead the Claimants' complaint on abuse is that it is an abuse of process for a defendant to invoke limitation provisions in circumstances where Parliament has itself barred their disapplication by reference to EU law, that is a more striking submission still and involves a collateral attack on parliamentary legislation.

MS KREISBERGER: I'm so sorry to interrupt whilst Mr Otty is in his flow but I can confirm that we don't maintain this argument.

MR OTTY: Oh. Well. I didn't have ten other pages to make. That's it then, the abuse of process argument doesn't arise; it doesn't need to be discussed.

Those are my submissions, Sir, so I've beaten the clock, unless there are any particular questions that I can attempt to assist on.

MR JUSTICE MARCUS SMITH: Mr Otty, we are really very grateful and thank you for accommodating the pressure we put you under to get through your submissions. We are really very grateful. We have no further questions.

MR OTTY: Thank you very much, Sir. Mr Salzedo couldn't resist the temptation to have the last word but I understand it's extremely short.

MR SALZEDO: I just wanted to check the Tribunal received overnight from us, I hope, an authority in support of something I said yesterday for which I did not give any authority. I see some blank looks, in which case I'm glad I stood up.

MR JUSTICE MARCUS SMITH: We have not, but we will make sure we track it down.

MR SALZEDO: In that case, it may make sense for me to just show it to you.

MR JUSTICE MARCUS SMITH: What is it?

MR SALZEDO: It's a House of Lords decision called *Odelola*, which was on the point that the presumption against retrospectivity varies depending on precisely what retrospectivity is in issue. I was conscious that I said that yesterday --

MR JUSTICE MARCUS SMITH: It is at tab 7 in the Third Supplemental Authorities Bundle.

MR SALZEDO: I'm very glad to hear it. We said in our covering letter, all we did was we gave reference to the paragraphs that I say support what I said yesterday. So, if it assists you, I will point them out to you now.

MR JUSTICE MARCUS SMITH: Yes, that will help.

MR SALZEDO: The least important is probably the first which is Lord Hoffmann at paragraph 5, and then there's Lord Brown at paragraphs 31 and 32, and I particularly draw attention to the quotation from Lord Mustill at paragraph 32 which I say supports very distinctly what I said yesterday.

Finally, there is Lord Neuberger at paragraphs 55 to 57, including a quotation from

Justice Staughton at paragraph 57.

As I say, I don't want to make any new submissions, but that supports, in my submission, what I said yesterday.

I mention one other thing, Sir, which is that while Mr Otty has been on his feet, we have been sent a further authorities bundle, containing I think two items. One is a slightly extended version of the Lenaerts extract that I showed you yesterday, and I do not know which part of that is relied on or what for, and another is a recent decision of the Court of Appeal, which again we don't know I think at the moment what is being relied on. I just make the point that we have not had an opportunity to deal with those authorities.

MR JUSTICE MARCUS SMITH: Thank you very much. We are very grateful.

Mr Saunders?

Reply submissions by MR SAUNDERS

MR SAUNDERS: Gentlemen, I'm afraid I have to confess that I'm not entirely on top of all the recent authorities that have been coming in, but probably I don't need to address those anyway, I think certain aspects of the case don't particularly affect the thrust of our arguments.

Can I just pick up -- Mr Salzedo started yesterday with a number of points about *stare decisis* and the effect of Court of Justice judgments. It is important just to step back a little bit. When the Court of Justice gives a preliminary ruling, it is not deciding the case before it but it is giving a ruling on the validity or interpretation of one of the legal acts or a legal provision that it has been asked about. That is the procedure. The EU law says nothing about what happens about the further conduct of the national proceedings once a reference is received. It does say though that it binds the referring court in its application of Community law. If the referring court

didn't comply with the ruling, then the Commission might try and nobble the Member State for infringement proceedings or there might even be state liability.

So that's the regime. It's almost as if the referring court cedes part of its jurisdiction to the Court of Justice to rule and then the case comes back to it.

The binding effects -- you have heard submissions from all of us about *Bosch*, as cited in the Court of Appeal in *Arsenal*, and that sets out conveniently a summary of the fact that the dispositif is to be interpreted in the light of the reasoning of the judgment.

The binding effect of the ruling generally does not stop national courts from making further references. Sometimes they found that they need to ask further questions or that the original ruling didn't answer the questions that they had. The English courts were great fans of that in some of the parallel import cases many years ago, and there are several examples of that happening. Bosch was in fact one of those.

But what a national court cannot do is make a renewed reference in a case to challenge the validity of the earlier ruling, and there's a recent order in case C69/85, *Wunsche*, that knocks that point on the head.

So the pressure valve argument doesn't quite work in that way that Mr Salzedo was saying. You are, as a national court, stuck with the rulings, you can re-refer to ask further questions, but you can't just say, "Have another go at this", unless there is some basis for asking for further assistance from the court.

In those circumstances, the earlier decision is *acte clair*, as opposed to *acte clair*. It has already been ruled upon, it's *acte clair*, which is a different doctrine.

Now, the effect on other parties. Preliminary rulings are declaratory. They lay down how EU law must be interpreted from its inception. My Lord has seen the authorities on that. But part of the -- the reasoning in the decision, the ratio that leads to it, is binding more generally, and that is one of the reasons why Member States

frequently intervene and the Commission is required to be at preliminary reference hearings because, obviously, if they rule that a particular provision has a particular effect, then that carries across to Member States right across the Union.

Take, for example -- there are many judgments where the court has ruled that the particular article of the directive amounts to a full harmonisation of the law in a particular area. That may not be seen in the dispositif dealing with the question that was specifically referred, but it's a jolly important thing that Member States will intervene on because that then limits their discretion when they are applying their national laws and has a huge effect on the legal system more generally.

So those rulings, the reasoning in the rulings is of great importance, so one shouldn't, as it were, apply the kind of highly reductionist approach which the Defendants seem to be approaching the reasoning on.

It is correct that the CJEU defines the meaning and scope of the rule and how it must have been understood from the time it came into force. There is one limitation to that which is that the Court of Justice does recognise *res judicata* for national decisions. So, if there is an earlier judicial decision applying Community law as it was previously understood, the fact that the Court of Justice comes along later on and says, "This is how the law should be interpreted", does not unravel all national earlier jurisprudence. So they recognise *res judicata* in those circumstances because otherwise, as you'd imagine, the whole system would collapse pretty quickly and everyone would be trying to reopen all the national decisions. So that is an exception.

But beyond that, the law is absolutely clear: they are declaratory of the proper approach.

Mr Otty made a series of submissions -- I should say before I finish with Mr Salzedo, his submissions on the Withdrawal Act, we didn't detect any particular difference

between his submissions and approach to the Act and the approach that I outlined to you yesterday, so I don't think there's anything that we need to come back on on that.

Mr Otty yesterday dealt with the CJEU case law. You heard my submissions on why it is important to trace through the development of those principles. One point that Mr Otty was at pains to emphasise a number of times was the fact that the court emphasises that aspects of the limitation regime need to be taken in the round. That is absolutely correct. But -- and we see that in the judgments I took you to -- the point that is made repeatedly is you can't just take the limitation period on its own. It is the starting and stopping of the clock that is actually, if anything, more important. So that you get.

But where Mr Otty goes with that is to say it is implicit there is therefore a wide Member State discretion and the UK Limitation Act it follows is just fine. That doesn't follow because what we see time and time again is the Court of Justice descending into the detail of the national regimes. So it does make specific rulings about certain things not being compatible with the principle of effectiveness, and then Member States have got to sort it out. So by considering those factors in the round, it doesn't stop the court intervening when it needs to say that something is not consistent with the principle of effectiveness.

The knowledge requirement, we say, is clearly there as a theme in the case law. You see that in *Cogeco*. It's written down in *Volvo*. *Volvo* does nothing more, we say, than record the consequences of *Cogeco*, and note in that regard the Advocate General's opinion of Advocate General Kokott in *Cogeco* that my learned friend took you through. That actually talks through the knowledge requirements and sets it out in a quite a lot of detail, just below the section you were taken to.

The knowledge requirement is, we say, an essential aspect of the principle of

effectiveness for limitation to start to run. That is a separate point; just to be absolutely clear, it is a separate point to the question of the proper interpretation of our domestic law, section 32 and section 2. We might be right about a concealment defence on section 32 on English law as it stands, but either way you have got to build into the approach to limitation, section 2, section 32, the knowledge requirement, we say, when you are considering limitation periods for competition damages actions, otherwise you are not giving effect to the required principle of effectiveness.

So I just want to be absolutely clear that the two are not one and the same; they are separate. This was a separate principle of EU law which we say cuts across post-IP completion day case law. My learned friends referred to *Tower Bridge*, which was in the Authorities Bundle volume 7, tab 124. That authority was not followed because firstly it was at odds with earlier jurisprudence. Secondly, it relied on a case called *Ferimet* which the Court of Appeal earlier noted was not applicable. So if you look in the judgment at paragraph 114. That case proceeded without an Advocate General's opinion and it failed to deal with earlier case law. So it was quite an extreme case, *Tower Bridge*, and in those circumstances it is not entirely surprising that the Court of Appeal was not terribly enamoured with it.

London Steamship, that authority was not followed, in that case, because it was contradicted by an earlier CJEU case in *Cartesio*, and you see that again in paragraph 55 of that judgment.

One case that was referred to in my learned friend's skeleton argument which he didn't address you on orally was *TuneIn*. In that case, Lord Justice Arnold -- that was a case about a "communication to the public" right, which is an aspect of copyright. There has been a whole series of references asking what is a communication and who are the public in essence, I think about 20 or something. In

that case, Lord Justice Arnold did rely on post-IP completion day -- on a post-IP completion day judgment of *VG Bild*. That's in paragraph 91. One of the reasons he gave for relying on it is that it builds upon and further refines the CJEU's previous jurisprudence. That's paragraph 117 to 122 of his judgment.

Lady Justice Rose, as she then was, agreed with Lord Justice Arnold's judgment, she just cautioned on giving some sort of gazetteer setting out principles of EU law, in a form of a sort of series of enumerated points. And Sir Geoffrey Vos, the Master of the Rolls, again said it wasn't a good idea to set out the gazetteer points, that it was better to focus on the authorities which included the post-IP completion day case of *VG Bild*.

MR JUSTICE MARCUS SMITH: I don't think the Defendants are saying we're precluded from following *Volvo*. They say the legislative regime that applies is that we may have regard to it.

MR JUSTICE ROTH: Yes.

MR JUSTICE MARCUS SMITH: And they say you can have regard to it but look at it and we shouldn't follow it.

MR SAUNDERS: Yes, you have regard to and then you pop it in the bin.

MR JUSTICE MARCUS SMITH: Yes, you consider it for various reasons, and then there is clear distinction between being bound and having regard. If you have regard, it means you have a right to say, "No, no", you have to give reasons for that, why you think it's not appropriate to follow.

MR SAUNDERS: My Lord, we don't -- as you will heard from my submissions yesterday, I don't think we have any disagreement with that in terms of the approach on section 6.

MR JUSTICE MARCUS SMITH: So if in certain cases the English courts have had regard and said, "Yes, we think we should follow", I don't know if that helps us.

MR SAUNDERS: It can give you confidence. *TuneIn* is not an authority in my learned friend's favour, properly analysed. The point that the Court of Appeal, particularly Lady Justice Rose and Sir Geoffrey Vos, was concerned about was making these sorts of enumerated lists of principles which -- I don't think they particularly liked that. But they were relying -- they were looking on -- they formed a view that you had to be cautious about post-IP completion day cases but they were nevertheless, as Lord Justice Arnold identified, recognised that this particular one built upon the earlier cases and assisted him in that regard.

So it's not an authority in my learned friend's favour, in my submission. That's the only point I wanted to make. I agree that this is not a hard-and-fast rule in the sense that I point to things where it's happened and he points to things where it hasn't. The Tribunal needs to form a view itself as to whether it's appropriate. We say in this case, if we are wrong about these being threads in law, you should still nevertheless absolutely follow *Volvo* for the points that we have made already.

Deutsche Bank, can I just address you very briefly about that. It may just be worth looking at that, if we could. Authorities Bundle, volume 7, tab 131.

Can we just look at the dispositif --

MR JUSTICE MARCUS SMITH: Can you give me the --

MR OTTY: PDF 3930 is the start, and can we look at page 3943.

You will see just there -- the part that I wanted to draw to your attention was just the end of the first paragraph of the dispositif on page 3943:

"... provided it can be reasonably considered that, on the date of the aforesaid publication, the injured party was aware of the essential aspects allowing him to bring his [claim] for damages."

So, whilst the point which is made in relation to *Cogeco* was a slightly narrower one in relation to the dispositif there, we've got it here in *Deutsche Bank*.

MR TIDSWELL: That's quite different from *Volvo*, isn't it?

MR SAUNDERS: Yes.

MR TIDSWELL: You don't see that appearing in *Volvo* even though actually a lot of this is a re-cast of *Volvo* in the decision.

MR SAUNDERS: Yes.

MR TIDSWELL: That's quite a material difference, isn't it?

MR SAUNDERS: It is, but you have to look at how the question arises because quite often the formal dispositif is just a response to the way the questions were formulated to the court. Then you have the reasoning in between which gets you to the formal conclusion which is limited to the points that were taken.

MR TIDSWELL: Yes.

MR SAUNDERS: So actually, what you've got here is, because of the way all this was structured, you've got the court just bringing together the earlier case law and writing it down as part of the dispositif, rather than part of the reasoning in the earlier decision.

MR TIDSWELL: Yes.

MR SAUNDERS: *Arcadia*, Court of Appeal, our position -- you have already heard my submissions on that -- none of the key cases are cited. It was pre-*Cogeco*, pre-*Deutsche Bank*, pre-*Volvo*. We are not concerned in this case with whether the Damages Directive is a codification of the principle of effectiveness or not. That is, to use a term, an Aunt Sally in the sense that it doesn't matter. What we are concerned with is what is the proper scope and approach as far as the question of effectiveness is concerned for a directly effective action under Article 101. The Damages Directive, we submit, is something of a red herring and it doesn't -- there is a forensic point but no more than that, which is a lot of the submissions were made -- you will see in the skeleton argument there's a long tour through the highways and

byways of the travaux for the Directive, which again doesn't really assist one at all in terms of just identifying the answer to the questions that the Tribunal has before it.

I think those are our only points by way of reply, save if I may just hand over to Mr O'Neill for two minutes, just to deal with ...

Reply submissions by MR O'NEILL

MR O'NEILL: I was hoping for five.

Again, I'll do this bullet-point style. First of all, of course, as Mr Justice Roth pointed out, our arguments on an EU law basis, the Convention case law is referred simply for comparative purposes in terms of the supererogatory nature.

The case of A and B which Mr Roth, he took one to, he seems to have misunderstood. That is a case -- the facts were that women in Northern Ireland couldn't get abortions in Northern Ireland so they were moving to England, and they were not being allowed NHS-funded abortions there.

So that is a case where, unusually, the Supreme Court actually went beyond the jurisprudence of the Court of Justice -- of the Court of Human Rights, and it said that the right to an abortion was a matter of Article 8, and the differentiation between -- of women moving from Northern Ireland as opposed to women resident in England and the treatment there was sufficient to be caught by Article 14. It was going beyond the case law. And, as a result, the unanimous decision of the court was that differential treatment required to be justified. Two of the Judges, Lord Kerr and Baroness Hale found it not to be justified. Three of them did.

So it very much is a case on point with the idea that differential treatment within a Member State, whether by legislation or by administrative decision, is something which in principle is caught by the prohibition against discrimination.

And Lord Reed's judgment is absolutely and unequivocally clear on that, where he

says at -- the parts that weren't taken and I'll just give for the notes -- paragraph 47:

"Differential treatment ... can be ... present whether the legislation in question is national or sub-national in origin, and whether the residence test relates to residence within the country in question or within a constituent part of [the country]. A law which treats the residents of a place differently from non-residents therefore differentiates on the basis of personal status, within the meaning of Article 14, whether the law ... has been passed by the Parliament of the United Kingdom and applies to the whole of the UK, or has been passed by the devolved legislature of one part of the UK ..."

He says if that applies to legislation, the same applies to administrative arrangements, but concludes that that just means that the difference in treatment has to be justified.

Mr Otty then referred to-- but there's a passage in paragraph 44 of Lord Reed's judgment which is simply agreeing indirectly with Lord Hughes, it's a minority and obiter remark in terms of the EU law, which is what we are interested in, where he says at paragraph 44, by reference to the case of Horvath v Secretary of State for the Environment in which he quotes a passage at paragraph 58, but he quotes it selectively, so it's important to look at Horvath which is actually in the bundle, when he says it is accepted by the Court of Justice that "where the constitutional system of a member state provides that devolved administrations are to have legislative competence, the mere adoption by those administrations of different ... standards ... does not constitute discrimination contrary to Community law".

The references to *Horvath*, that's in the Authorities Bundle at volume 4, tab 64, page 1829. Picking up the President's point, that is precisely a case where, unusually, the EU legislature allowed for differential treatment within a Member State. It was specifically to do with good agricultural and environmental conditions that were

conditional on getting the single farm payment.

Unusually, the specific regulations in relation to those said that those good agricultural and environmental conditions could vary depending on the region within the Member State, and therefore it was open to the Member States to devolve regionally what those conditions might be.

MR JUSTICE MARCUS SMITH: But you say it's got to appear in the EU instrument?

MR O'NEILL: That's precisely what Horvath says, and I will give the passages. It's paragraphs 25 and 26 in the PDF bundle, 1840 to 1841, where it says the Member States under the regulation have a certain discretion with regard to the actual determination of the requirements, "the Community legislature gives them the possibility of taking into account the regional differences which exist ..." He says that at paragraph 48.

In the light of that power, therefore, the differential treatment was not in breach of the principle of equal treatment, but it's in the light of the power given by the specific regulation. Otherwise, the general principle is as set out at paragraph 56 in Horvath which, referring to the earlier decision of Klensch, says that in the context of implementing EU law where there's a choice between a number of ways of implementing it, the Member States may not choose an option whose implementation in its territory would be liable to create, directly or indirectly, discrimination between, in that case, producers.

That's the general principle. That's what applies unless the legislature, the EU legislature, allows for differentiation.

MR JUSTICE MARCUS SMITH: Let's just be clear about this. Let's suppose we have a hypothetical EU directive that states what to achieve but leaves the means of achieving that end to the Member State, and in -- a hypothetical Member State, it's a federal state, you've got ten regions, and the implementing of the directive is left

not to the federal government but to the regions, and they all do it differently. Some are more generous than others.

MR O'NEILL: Indeed.

MR JUSTICE MARCUS SMITH: That is unlawful.

MR O'NEILL: That is precisely the situation that has arisen in cases which -- the last case I referred to, the Government of Wallonia v Government of Flanders. It is precisely because of the idea that within a Member State there should not be discrimination, that if insofar as there is differential treatment which causes some to be treated less favourably than others, then that is in breach of the principle of equal treatment. Not that it is unlawful, but that it has to be shown to be justified, and if it is not shown to be justified, then it will be unlawful, when they are relevantly similar claims.

It doesn't, as I say, apply in terms of treatment between different Member States, but within the Member State the principle applies.

And the case of A and B says also that applies from a Convention point of view as well.

MR TIDSWELL: So are you saying that applies here regardless of *Volvo*? Are you suggesting that because there is a difference between Scots law and English law, that discrimination has arisen because of that feature?

MR O'NEILL: The discrimination has arisen because of the decision of this Tribunal of 21 March which has become a final decision.

MR TIDSWELL: That tells us what Scots law says. So that's the question. So however you put it, if you assume that as a matter of Scots limitation law-- prescription, you have a particular position, then English limitation you have a different position, you say that that per se gives rise to a discrimination and therefore an unlawfulness?

MR O'NEILL: No. I say that what it does is this: it requires -- it brings into -- because in these proceedings which have been determined by this Tribunal to be relevantly similar proceedings between the Scots and the English, and that this Tribunal has determined, has come with a final judgment, that the Scottish claimants have to be treated in a way whereby their claims are not time-barred, then if and insofar as there is going to be different treatment of the English claimants, that has to be justified. That's as far as it goes.

MR TIDSWELL: And that's independent of any argument about *Volvo*?

MR O'NEILL: Yes. That's why it's a relevant consideration at this stage for the court to take into account when it's coming to its decision on this point.

MR TIDSWELL: In relation to the question as to whether to have regard to it rather than -- for present purposes, I think we are assuming in this argument that we are not bound by *Volvo*. That must be the case for us, for the reasons Mr Otty --

MR O'NEILL: Yes. See, if it be the case that your decision -- whether you call yourself bound by *Volvo* or not, or have regard to *Volvo*, but if your ultimate provisional decision is such that the English claims within the Merricks proceedings are time-barred, whereas the equivalent claims within the same proceedings, because they are governed by Scots law, are not time-barred, then there's a problem of you, the Tribunal, coming out with a judgment which is, on the face of it, in breach of the principle of equal treatment.

So, therefore, the Tribunal has to take that into account as part of its consideration, as to what judgment it will come to within the context of these proceedings. Because you don't want to end up coming out with a judgment which is itself in breach of an EU principle.

MR TIDSWELL: Which is the EU principle being equivalence, yes.

MR O'NEILL: Of equal treatment, yes. Equal treatment not equivalence;

equivalence is a different --

MR TIDSWELL: Equal treatment, yes.

MR O'NEILL: And of course you can, as we have said, as long as there's good reason, as long as it's properly justified, you can have justified differential treatment, but it can't be justified simply by saying, "Well, we've got different legislatures, because the EU tells us that, and we have different subregional or subnational approaches." Why do you have that such that it results in the actual specific difference in the time-bar between the Scottish claims and the English ones?

And the issue is it's a question of an equivalence of rights, who is to be levelled up and who is to be levelled down. Who has to be levelled up are those who have been harmed by the infringement of EU law, and that's the issue. There is no doubt that the Claimants here in this follow-on damages claim have been harmed by an infringement of EU law, so they are the ones where the higher protection, if it's greater than the principle of effectiveness as interpreted by this Tribunal, has to be given. That's why one comes up to the Scottish standard, which has been set by this Tribunal itself.

So those are my points.

MR JUSTICE MARCUS SMITH: I'm very grateful, Mr O'Neill. Thank you very much.

MS KREISBERGER: Sir, would now be a convenient moment for a break?

MR JUSTICE MARCUS SMITH: Yes, indeed. We will resume at half past.

MS KREISBERGER: Thank you very much.

(11.19 am)

(A short break)

(11.41 am)

Reply submissions by MS KREISBERGER

MR JUSTICE MARCUS SMITH: Ms Kreisberger.

MS KREISBERGER: Thank you, Sir. I'm very grateful to the Tribunal for the additional time. I sense I may still have some work to do to persuade you.

Sir, in the light of my learned friends' submissions, with the Tribunal's permission, I'd like to address the following propositions upon which my case rests.

The first is that the cessation condition in *Volvo* is binding as a matter of EU law, and I'll address that point in three parts. First, I'll address you on which elements of a Court of Justice judgment in a preliminary reference ruling are binding on national courts. I can do that briefly. Secondly, I will show you why it is that the ruling on cessation does form part of the ratio, which is essentially what binds in both *Volvo* and *Deutsche Bank*, but I'm only going to go to *Volvo*.

Then my third point is a subsidiary point. It doesn't go to the binding effect but, in the interests of logic, I'm going to just address it here briefly. Sir, you asked, "What does the cessation condition bringing to the party?", and I'd just like to say a few words on that.

So, those are the first set of submissions that I will address in relation to *Volvo* under European law.

I will then turn to the position under UK law, if I may, and my principal submission there is that the Withdrawal Act does not alter the position as a matter of UK law because, put very simply, it does not apply to the period of time some years in the past, with which we're concerned.

I'm going to address that point in four parts. The first is that the overwhelming focus of the Withdrawal Act is to introduce a new category of law into domestic law. That is the category of retained EU law which applies prospectively from completion day.

My second point will be that generally, the Withdrawal Act leaves accrued EU law rights undisturbed. Apart from some narrow, targeted exceptions, the rest are left in

place when it comes to accrued rights. There are no exceptions made to accrued rights under Article 101. That's my third point.

And my fourth point is on *Arcadia*. I'll just say a very brief word about that.

So those are my points on the Withdrawal Act. Then, lastly, I will address you on the section 60A Competition Act argument, and I'll show you that section 60A has no application whatsoever to the limitation periods in the merchants' claims. That doesn't engage the duty to act consistently with pre-completion day European case law.

So, that sets out the route map to my reply submissions. So, taking first then the question of whether the cessation condition in *Volvo* is binding as a matter of European law, the first question must be: which parts of a preliminary ruling judgment bind the national court? You've heard quite a lot about this this morning. I'd like to cut through to the heart of this. I think it is essentially common ground but I want to make sure that the position is absolutely clear: the Tribunal is bound by the operative part and the reasoning on which that operative part is based. That's the ratio.

Now, although earlier in his submissions Mr Salzedo veered into some unorthodox territory when he said the ratio is not binding on the national court and he actually objected to the adverb slavishly, but I think we can put that to one side because, in the end, Mr Salzedo accepted that the ratio of the judgment binds. That's at transcript page 58, lines 20 to 24.

Perhaps we could just turn that up briefly because it's obviously an important point. This was in answer to a question from the President. Mr Justice Roth at line 20 said: "Yes, that's what I understood you were saying, that it's the ratio -- you were saying it's binding only as to ratio and one could depart from it, but we could only depart from it by staying and making a reference."

And Mr Salzedo said:

"Pre-Brexit, if you were taking the view it was ratio then the only way to depart from it would be to make a reference first."

So I think it is common ground that the ratio binds as a matter of EU law.

Now, Mr Salzedo also relied on *Lenaerts*, and he described the authors of that book, quite appropriately, as very eminent. That's, just for your note, transcript page 52, line 19. But he didn't show you the full section to which he referred. Now, that's been added into the Fourth Supplementary Bundle. I have it as a loose version, which I believe has just been handed up. It's also been circulated in the soft copy.

MR JUSTICE MARCUS SMITH: We have a little --

MS KREISBERGER: Yes, I think that's the one, and there are tabs 1 and 2.

MR JUSTICE ROTH: Yes, we have that.

MR JUSTICE MARCUS SMITH: *Balogun* is tab 1 and then the extract I think you are about to refer to is at tab 2.

MS KREISBERGER: That's the one. I'm grateful. So this is a sort of soft hard copy. And the relevant section to which Mr Salzedo took you begins at page 243, and I think it's paginated page 30 of this stand-alone supplemental bundle, and it begins, at the heading above 6.27, "As regards the national court deciding the case at issue in the main proceedings ... Binding effect", it says, "A judgment ... under [Article] 267 ... is binding", and then the second paragraph says this:

"The binding effect attaches to the whole of the operative part and main body of the judgment, since the operative part has to be understood in the light of the reasoning on which it is based."

Now, that's the test I put to you in opening. Now, that's in the section on the national court deciding the case in the proceedings, but it then goes on over the page, heading B, "As regards national courts generally", so now we're outside of the

specific proceedings.

Mr Salzedo didn't show you this. At paragraph 6.30 under the heading, "Binding on all national courts":

"The binding effect of a judgment by way of preliminary ruling extends further than to merely what is necessary to determine the main proceedings. It also applies outside the specific dispute in respect of which it was given to all national courts and tribunals, subject, of course, to their right to make a further reference ... In other words, the judgment of a preliminary ruling on interpretation ... is said to have *erga omnes*, as opposed to merely *inter partes*, effect."

So that's the position. So, put together, the binding effect attaches to the operative part, which must be understood in light of the reasons on which it's based, and it has binding effect *erga omnes*.

I thought it would just be worth noting on the following page, paginated page 32, the section on "Declaratory nature of the interpretation". That goes to one of the President's questions about declaratory effect, so I thought perhaps I would give you a moment to cast your eyes over that as well, whilst we are in this authority.

So it's wrong to seize on the idea that it only affects *inter partes*, which clearly is not the position.

Putting Lenaerts away --

MR JUSTICE ROTH: Just before you do that, fully appreciating the *erga omnes* point, but the statement in 6.27, "The binding effect attaches to the whole of the operative part and main body of the judgment, since the operative part has to be understood in the light of the reasoning…". They are not equating the reasoning with the operative part in that there is clearly a distinction between them. Aren't they saying it's the reasoning insofar as that's necessary to understand the operative part?

MS KREISBERGER: Yes, and that is my submission. So the reasons which are necessary to understand the operative part. I'm grateful, Sir. That's precisely my submission.

And of course that paragraph has footnote 146 which refers back to Bosch which we have already addressed you on.

I should also note that section 6.31 that you just read is also of course consistent with section 3(1) of the European Communities Act in relation to binding effect.

I'm grateful. That is my submission. The court is bound by the operative part and the reasoning on which it is based or has to be understood in the light of. That is the ratio.

So I then have to persuade you that the cessation condition forms part of the ratio. I'm going to move on to that now.

So if I could ask you, for one last time, to turn up *Volvo*, please. That's Authorities Bundle, volume 7, tab 123, page 3693. So, I'm going to show you why I say it forms part of the ratio.

If I could ask you to pick it up at page 3700. That's at paragraph 48. The second part of that sentence at 48:

"... it is necessary, in order to determine the temporal applicability of Article 10 ... to ascertain whether the situation at issue ... arose before the expiry of the time limit for the transposition of the directive or ... continued to produce effects after [that date]."

Then going on to 49, the latter part, again:

"... it is necessary to ascertain ... on the date ... for [transposing the] Directive ... [whether] the limitation period applicable to the situation at issue ... had elapsed, which means determining the time when that limitation period began to run."

So what the court is saying here is that working out the start date is an essential part of its chain of reasoning. It uses the term "necessary". It's got to begin by working

out the start date. So that's step 1. And the reason it's doing that is it needs to work out whether the claim was time-barred by the date of transposition. So we are into start date.

As you know, the court then says, in order to work out the start date, when time can run, it must look through the lens of the particularity of competition actions, and you've seen those paragraphs. That's 53 onwards, citing *Cogeco.*

We then get to the key paragraph, 56, on the next page. I'm going to read out 56 and 57 for clarity, without the irrelevant part of that passage. So the court said -- as I say, having referred to the particularities of competition law:

"In that context, it must be considered that ... the limitation periods applicable to actions for damages for infringements of the competition ... provisions ... cannot begin to run before the infringement has ceased and the injured party knows, or can be reasonably expected to know, the information necessary to bring [the] action ... Otherwise, the exercise of the right to claim compensation would be rendered ... impossible or excessively difficult."

Pausing there, I'd like to make three observations on these two paragraphs, particularly 56 is where I'm focusing. What you see at 56 is the Court of Justice positing a test under EU law to determine whether time begins to run -- that's the purpose of the test -- positing the test, and it's a test that has two limbs, cessation and knowledge. So it's formulated the test.

It then says, "Here's the test. Both these conditions must be satisfied." It uses the word "must", "it must be considered"; we've got to apply the test. There's no grey area. These are imperative conditions.

My third observation -- this picks up the President's question of yesterday -- it's abundantly clear that they are framed as cumulative requirements. That's why they use the conjunction of "and". So cessation is limb 1, knowledge is limb 2, and you

need to satisfy limb 1 and limb 2 in order for time to run. That is crystal clear.

So, coming back to the dictum that we have seen -- and there was some discussion of it this morning -- that national rules on limitation are assessed for compatibility with EU law in the round, that is of course correct. That's a proposition that you see in the authorities. If you are looking at a particular provision of national law, you don't do it in some contrived way; you look at all the circumstances. So, before you declare a national law to be invalid, you've got to look at it in all its aspects. Any other approach would be very strange.

That's not inconsistent with this paragraph, which is making clear that there are certain imperatives, certain conditions which must be met. That means, under European law, you can't say, "Well, look, my rule doesn't apply -- doesn't provide for cessation, but it's okay because it has other benefits, cause of action accrues daily and parties can still go back six years in their claims, so it's compliant." It's not compliant because it doesn't meet the conditions set out in paragraph 56. They're hard-edged; they are imperatives. It's what I referred to in opening as a red line of European law, a limitation period that doesn't comply with it falls foul of it.

And *Cogeco* sets out a different red line, related to knowledge about identity of the infringer. These are, to use Mr Otty's phrase, hard-edged rules. They are phrased as such. One has to read them on their face.

Now, returning to the judgment, the two-limb test for time starting is then repeated verbatim at paragraph 61. Again, it's imperative, it must be considered, and limb 1 and limb 2.

Then, importantly, we turn to paragraph 62, which I fear has been overlooked and I no doubt bear responsibility for that. Paragraph 62 is the application of the test in paragraphs 61 and also 56. The court starts by applying the first limb, and it says this:

"... the infringement ceased on 18 January 2011."

So that is the first limb of the test. It's not ignored. It's applied. The court looks at the date which is produced under the first limb. So it satisfies itself of that date. Then it goes on to apply the second limb, which is knowledge, and that's the later date. And then you have the paragraphs which follow on, which is the relevant date of knowledge, so they all go to that second limb.

And the second date is the operative one, merely because the conditions are cumulative; they're not alternatives. If they were alternatives, it would make a mockery of the test, frankly.

Then you see the conclusion set out at paragraph 72. The court said:

"Consequently, the full effectiveness of Article 101 ... requires it to be considered that, in this instance [on these facts], the limitation period began to run on the [date] of ... publication."

So that's April 2017, on these facts. April 2017 is the result of the application of limb 1 and limb 2, which gives you the later date because you can't start time running until limb 1 and limb 2 have been satisfied. So that's the consequence of applying the limbs of the test.

And we see from paragraph 73, that finding, then, on when time started to run, formed the basis of the conclusion that time was still running by the time the Damages Directive came into effect.

We then move to paragraph 1 of the operative part on page 3708. As I drew your attention to in opening, the relevant wording is at the end of that paragraph:

"... in so far as the limitation period for bringing that action under the old rules had not elapsed before the date of expiry of the time limit for the transposition of the directive."

So I come back there to the test in Mr Salzedo's authority, in Lenaerts, that what

binds is the operative part and, as Mr Justice Roth put it, the reasoning on which it is based and the reasoning in the light of which it must be understood.

The finding in the operative part is that time was still running when the Damages Directive came into force. The reasons for that conclusion were that there are two conditions. They must both be met, cessation and knowledge, which the court then applied to the facts of the case.

In other words, you can only understand the operative part by reference to these paragraphs which explain when time began to run.

So, with utmost respect, it is my submission that it is not right to say, as Mr Justice Roth floated, that you can simply delete the wording in relation to cessation or it's completely irrelevant. As a national court, you can't simply lop off limb 1 in circumstances where the European Court saw fit to articulate limbs 1 and 2 and apply them both critically at paragraph 62.

It's just happenstance -- it's just happenstance in this case that limb 2 produced the later date, but that doesn't make limb 1 any more redundant or less a part of the test than limb 2. They are both set out in terms.

Sir, that's what I was proposing to say on *Volvo*, unless you have any questions on that. I was then going to move on to the third part of my submissions on cessation.

MR JUSTICE ROTH: My only question, and it's not directly relevant, you may say, is I was very puzzled by the statement in paragraph 56 where there is a reference to the competition law provisions of the Member State. I can't see on what basis it can be said the principle of effectiveness applies to that. It's just not --

MS KREISBERGER: I'm sorry, you are referring to --

MR JUSTICE ROTH: Paragraph 56.

MS KREISBERGER: Yes, the wording in that paragraph?

MR JUSTICE ROTH: "... the limitation periods applicable to actions for damages for

infringements of the competition law provisions of the Member States and of" --

MS KREISBERGER: I see, yes.

MR JUSTICE ROTH: -- "cannot begin to run". It seems a very strange statement for the Court of Justice to apply the principle of effectiveness to the laws of the Member States.

MS KREISBERGER: That's the upshot of all of this case law, because they are concerned with national provisions. They are setting out the hard-edged rules of European law with which the national provisions must comply in order to be lawful.

MR JUSTICE ROTH: Well, the national provisions implementing EU law but not -- perhaps that's what you say it means.

MS KREISBERGER: I do.

MR JUSTICE ROTH: It reads as though it's the complete national provisions of Member State competition law.

MS KREISBERGER: Applying European law. I think that's implicit if not spelt out.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: Yes, clearly. Oh, I see the point. Yes. I don't think the European Court is trespassing beyond its own jurisdiction.

I make a very minor point as well. I don't place heavy reliance on it. There has been -- you have been addressed on the question of whether this is all otiose, it would be otiose, because it simply -- the codification question, codification of the Damages Directive. Of course, I should just point out -- as I say, it's a marginal point -- this paragraph isn't actually coterminous with Article 10 of the Damages Directive, because Article 10 has, for instance, suspension. So they are simply addressing here what they say are the hard-edged rules under general effectiveness, effectiveness of Article 101. That's a pretty marginal point in the scheme of things.

So then I move to the third part of my first set of propositions: what is cessation bringing to the party? As I say, this is clearly not relevant to the question of binding effect but, while we are in *Volvo*, it would of course be relevant if you are in the realms of having regard to the judgment rather than being bound by it, so I answer it for that purpose, for completeness.

And I make two key points, essentially, on why cessation is a welcome guest at our limitation party which we have been having. This is what my social life has come to.

The first is, under our law as it now stands, and continues to do so post-Brexit, we have a bespoke limitation regime for private competition actions under schedule 8A of the Competition Act, paragraphs 17 to 19. No need to turn it up. You will be well familiar. That regime has the three components of knowledge, cessation and suspension for regulatory investigations. All three are included in our domestic law. So they must have a function, otherwise they'd be otiose; why would we do that?

So let me turn to that. Why do we have that rule; what is its function? First of all, as I have already addressed you on, it incentivises the bringing of infringements to an end.

In that context, I wanted to address a point which the President raised, which was, well, would it in actual fact have the opposite effect of encouraging continuation of the infringement to avoid the cause of action accruing? I think that was your question, Sir, could it have that deleterious effect. It's a fair question, but it's a question that's framed through the lens of English law, English law which may be incompatible with EU law in the sphere of competition or damages actions, or at least English law which needs to be understood in a different way, in a conforming way.

So I'd like to unpack that submission. It's the Limitation Act, sections 2 and 9, which have coupled the moment when time starts to run with the accrual of the cause of

action. That's the framing of those provisions in the Limitation Act. Now, that's where this particular problem lies, but that's a feature of English law, and it's a feature which, as I've just said, doesn't actually apply anymore prospectively under the Competition Act. The Competition Act has deliberately untethered the running of time from the date on which the cause of action accrues. We have a bespoke regime now; we didn't at the relevant time.

Now, if I'm right that *Volvo* binds this Tribunal, a conforming or compatible position, as set out in my skeleton, will also require the untethering of start date from date of accrual. But the Court of Justice in *Volvo* is, of course, not thinking about cause of action accrual, because that forms no part of the EU rule.

So what the Court of Justice is saying, and our own domestic law now says that under the Competition Act, in order to give effect, knowledge should not be your only and final trigger date for time to run. If an infringer persists in unlawful conduct -- and I come back here to the rationale, what's the purpose -- the consequence is that the injured parties -- if they persist in infringing, the injured parties get the benefit of longer to bring their claims, whether or not they know about it. And that implements what is a requirement to give full effect to Article 101, as set out in the case law.

The Court of Justice explains in *Volvo* that that rule, where time must run from the later of cessation or knowledge, strikes the right balance between the interests of the injured party and the perpetrator.

I'm assuming by now you recall those paragraphs. That's paragraphs 45 and 46.

Let me put it another way. I'm labouring the point because you had some questions on how would this actually work. The infringer does not get the benefit of a time-bar, a time-bar which extinguishes the subjective right to compensation, in circumstances where he's carrying on violating the law. He doesn't get it.

Finally, before I move on from *Volvo* -- sorry.

MR JUSTICE MARCUS SMITH: Isn't the assumption you're making that it's clear that the law is being violated?

MS KREISBERGER: That's the assumption for the purposes of looking at the limitation law.

MR JUSTICE MARCUS SMITH: Yes, so let's assume you are an infringer where there is genuine uncertainty about whether there is or is not infringement. You will know that there is no pressure on the claimants to bring a claim because of the cessation point, so you will be forced to take a view as to whether you are or are not infringing, and it therefore follows that there's a pressure actually to abandon what might be perfectly legitimate and indeed pro-competitive provisions in an agreement, because you are worried that you are stacking up a potential claim for damages going forward.

MS KREISBERGER: But that, Sir, is a risk in relation to any aspects, any element of competition law. All of the thrust of competition law, both private actions and regulatory rules, is to encourage parties -- we don't have notification, we don't have a notification regime anymore -- is to encourage parties to bring their infringing agreements to an end. If they are not sure whether they are infringing or not, well, the way the regime works and has worked for many years, is they have to go and take advice, and it's not always easy and that's competition law and that's what keeps us all busy, but that is part of the game, that you encourage --

MR JUSTICE MARCUS SMITH: Yes, but what you are doing is you are introducing into the game an incentive on claimants not to go for, let us say, an injunction, but to just sit back and let the damages, if you succeed, clock up.

MS KREISBERGER: Well, the claimants --

MR JUSTICE MARCUS SMITH: Plus interest, one might say.

MS KREISBERGER: The claimants will want to bring their claims, and as I put to

you there is no bar, on this analysis, to the cause of action accruing.

MR JUSTICE MARCUS SMITH: No, I accept that.

MS KREISBERGER: So it's then a question -- but that's no different from if you take a cartel, the participants have to take a view. The longer we do this thing --

MR JUSTICE MARCUS SMITH: Yes, but my distinction is between exactly that, the covert and the overt cartel. I quite take the point that if you've got a covert cartel that is hidden away, then there is no real debate about legality. It's detection that is the question, and there cessation may have an effect.

But where you are talking about a provision that is there for all to see, the debate is not did it happen but what is its significance.

Well, I remain in difficulties about what a cessation condition brings to the party, over and above a reasonable knowledge, in that particular case, not to put it any wider than that.

MS KREISBERGER: I understand. I'm grateful. But of course one needs a generally applicable rule, and it may be that there are cases that ultimately turn out not to be infringements and that will be determined in the trial.

MR JUSTICE MARCUS SMITH: Yes.

MS KREISBERGER: But what the Court of Justice is saying is one needs a rule that reinforces deterrent effects on anti-competitive infringements, and parties that don't think they are infringing will take advice and take their chances on that basis.

MR JUSTICE MARCUS SMITH: If we are struggling to see what is the rationale for the rule, clearly it is thought by some there is a rationale because it's there in the Damages Directive, and that directive wasn't written overnight. A huge amount of discussion and deliberation went into it and some people thought, "This is appropriate." Maybe the court thought the same. I'm not sure the soundness or otherwise, or what we might think of the soundness or otherwise, will be really

determinative for us.

MS KREISBERGER: I hope my submission is clear. It's not relevant to the binding effect at all, not at all. It either binds or it doesn't, and it's only relevant to have regard to -- and as I say, I raised it in response to a question, but it shouldn't muddy the analysis. Either it's part of the ratio or it's not.

MR JUSTICE ROTH: We may feel, for the reason the President has given, that it's an unfortunate rule even in the Directive, and you don't need it for the cartel, because knowledge gets you what you need, because you won't know about it so you don't need the cessation condition. But there it is.

MS KREISBERGER: I would invite the members of the Panel to put aside any subjective views of that nature because they don't arise in relation to this part of the case.

(Tribunal conferring)

I'm being reminded that of course ultimately damages will only be available if the party has suffered loss. When one talks about delaying the claims, damages will only be ultimately awarded in the event of loss.

Finally, before I move on, I'd like to -- has this been handed up? Yes. If I could ask you to turn back to that recent unbundled bundle.

No, I'm told it's been handed up separately. It's a single page. I'm not sure where that's been placed and I apologise for that.

MR JUSTICE ROTH: Was it not a single page?

MS KREISBERGER: On the first page, it says, "Request for a preliminary ruling, Eureka v Google".

MR JUSTICE ROTH: Yes.

MS KREISBERGER: I'm grateful. Thank you.

Now, I'm not making -- I'm bringing this to the Tribunal's attention. I'm not placing

any reliance on it in my submissions. But it came to my attention and I thought the Tribunal would want to be aware of this. That is the full extent of my submission on it.

MR JUSTICE ROTH: So this is a pending reference, is it?

MS KREISBERGER: I'm told the hearing has taken place but there is no judgment. I just thought the Tribunal would want to be aware of it. That really is the extent of it. So it's a request for a preliminary ruling. The request was made, as we see, in September 2021. I understand the hearing took place.

If I could ask you to just read question 4, please.

I just thought the Tribunal should be aware of that.

There is also some reference to cessation in question 3. If you are able to comprehend question 3, then you are ahead of me, but I just raise it.

MR JUSTICE ROTH: Do you know when the hearing took place?

MS KREISBERGER: About six weeks ago, I'm told.

MR JUSTICE ROTH: So it's only recent.

MS KREISBERGER: 20 March.

So, Sir, that concludes my submissions on *Volvo*, and I move to what falls within the scope of question 3, which is then, on the assumed basis in my favour that cessation does form part of the ratio and therefore binds the Tribunal, my submission is that the Withdrawal Act does not alter the position as a matter of UK law.

So I'd like to begin on this topic by crystallising the argument made against me by Mr Salzedo. I want to be clear: it's a radical one. His submission yesterday was that section 4 converts the merchants' accrued claims into retained EU law. That's at page 61 of the transcript and it was at -- I think it's at line -- I will come back to this, actually -- lines 10 and 11. Mr Salzedo said:

"Now, that saves a number of things."

He's referring to section 4. We are going to go there in a moment.

MR JUSTICE ROTH: I'm so sorry, which page?

MS KREISBERGER: I'm sorry. Page 61 of yesterday's transcript, lines 10 and 11. He says section 4 is not just about accrued rights, it's about all kinds of things. Then at line 18 he says:

"Their contention that their rights are not saved by section 4 was stated yesterday morning, but is not supported by any word of this section, not by its context, either. There is no reference in section 4 to retained EU law only. This section concerns rights and everything else that were recognised by virtue of section 2(1)."

And at line 1 as well, he said -- sorry, on page 63:

"... section 4 is the place where you find the intention [to adjust accrued rights]. So section 4 must potentially be about accrued rights."

So that's what I'm responding to.

His submission is therefore that section 4 of the Withdrawal Act has retroactive effect, that it's not about retaining law as domestic law for the future, it's somehow reaching backwards and grabbing accrued rights and doing something with them for this past period.

Now, the real problem for Mr Salzedo is that's not what section 4 says or indeed the rest of the Act. Section 4 is actually very clear about its temporal scope, and it operates in exactly the same way as section 2 and section 3. I'm going to show it to you.

So his submission is wrong as a matter of statutory construction.

Let's go to that provision. I'm staying with the Supplementary Authorities Bundle for the Withdrawal Act. It starts at page 93. Yes, section 4 is at page 93, and the wording is this:

"Any rights" -- let's stay with rights -- "which, immediately before ... completion day --

"(a) are recognised and available in domestic law [under] section 2(1)… and

"(b) are enforced, allowed and followed accordingly,

"continue on and after IP completion day to be recognised and available in domestic law ..."

Any rights that existed before IP completion day continue to be available as rights in domestic law after it. This is a prospective saving for rights. I'm going to take you through this.

This doesn't say anything at all about the enforceability of past rights. It doesn't refer to claims, for instance, claims in relation to rights. It's simply saying this; I'm going to give an example. It's not saying anything about enforcing rights which parties had in a previous period of time before retained law existed as a category of English law. It's converting rights which you previously got from European law into domestic law following completion.

We will keep this open, but that's also very clear from the Explanatory Notes at Authorities Bundle, volume 8, tab 144, page 4310.

Whilst we are just in the Explanatory Notes, can I just show you 10 and 11 which we'll come back to. And they elucidate this point:

"The principal purpose of the Act is to provide" --

MR JUSTICE ROTH: Is this paragraphs 10 and 11 of the Explanatory Notes?

MS KREISBERGER: I'm sorry, on page 4292 of the Explanatory Notes. I didn't have time to take you to this in opening:

"The principal purpose of the Act is to provide a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply ... after exit as on the day before…

"The Act performs four main functions. It:

"-- repeals the [Communities Act];

"-- converts EU law as it stands at the moment of exit into domestic law before the UK leaves the EU and preserves laws made in the UK to implement EU obligations;…".

So the first two functions are delete, repeal the Act, and then convert the law that existed in Europe into the fabric of domestic law. The second two are create powers to make secondary legislation and restrictions on devolved competence.

Then we move forward to paragraph 92, so I'm coming back to section 4, page 4310.

MR JUSTICE ROTH: Thank you.

MS KREISBERGER: That's paragraph 92, towards the bottom of the page, "Saving for rights…":

"Section 4 ensures that any remaining EU rights and obligations which do not fall within sections 2 and 3 [those are the legislation provisions] continue to be recognised and available in domestic law after exit."

And that includes -- and Mr Justice Roth had a question about this, I think -- directly effective rights contained within the EU treaties, so treaty rights are section 4 rights.

MR JUSTICE ROTH: Thank you.

MS KREISBERGER: We can put the Explanatory Notes away.

What this section is doing -- and I'm going to illustrate it with an example, so it's absolutely clear -- is that if you have a right on 31 December 2020 under a treaty article that's actionable in the courts, that right has rolled forward; it still exists in English law on 1 January 2021. So that's what this is doing.

Now, I said I'd illustrate it with an example. Let's assume, for the purposes of this example, that Article 102 is retained law. I'm conscious that it isn't because of reg 62, but my brain can only function in competition-based analogies, so I'm going to stick with competition law.

So let's assume Article 102 has been retained. That would mean that if I bought

an overpriced, excessively priced drug tomorrow that's been excessively priced by a dominant pharma undertaking, I would have a right, under domestic rules, for damages suffered as a result of that 102 infringement because, on this hypothetical example, 102 has been absorbed. So, if I bought the drug tomorrow, I still can rely on my right under the Treaty. That's what section 4 would give me, the right not to be the victim of abuses by dominant firms.

Now, that's not a right that has accrued to me under European law. That's a right from which I now benefit under rules of English law, because EU retained law is a species of UK law. That's why it's slightly misleading because you have the term "EU" but we are only in the English jurisdiction now, and should that be in any doubt whatsoever, that is enshrined in section 6(7) of the Withdrawal Act at page 97. The definition of "'EU retained law' means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of 2, 3 or 4 ..."

So that's what section 4 is doing. It's bringing these directly effective rights into English law, but they only become operative after completion day and not before. That is entirely distinct from the question of accrued rights, it says nothing about accrued rights.

Accrued rights aren't -- if section 4 wanted to talk about accrued rights, it would have to preserve claims in respect of past rights. It's not talking about actioning past rights, making past rights enforceable. It's about new rights that are actionable from IP completion day.

MR JUSTICE ROTH: It doesn't say new rights. I think we are all with you that it does what you say it does.

MS KREISBERGER: Well, it does that --

MR JUSTICE ROTH: The question is whether it does more than that.

MS KREISBERGER: Well, yes. It does say, just turning it up, any rights that were in

existence will be recognised tomorrow, so they are new rights because it didn't exist in English law because there was no such thing as EU retained law, and we know from section 6(7), Mr Salzedo I think said "but section 4 doesn't even refer to the retained law", but section 6(7) tells you that what section 4 is talking about is EU retained law. Section 6(7) defines EU retained law as "law which continues to form part of domestic law by virtue of section 4".

So section 4 is, on the face of the Act, entirely a provision about retained law.

You've got retained legislation, so if you go back, section 2, "Saving for EU-derived domestic legislation"; section 3, "Incorporation of direct EU legislation"; and then section 4 is the sweeping up of rights that aren't within either EU legislation or domestic EU-derived legislation.

So these are new rights; they didn't exist. They were --

MR JUSTICE ROTH: But isn't the problem that you've got that you are bringing a claim -- yes, it's an accrued right -- but you have a claim before the court based on Article 101, which you can enforce before our courts or the Tribunal, because of the European Communities Act, otherwise it would be --

MS KREISBERGER: Correct, yes, absolutely.

MR JUSTICE ROTH: And the Withdrawal Act has repealed that Act, and therefore the basis of your claim has completely gone.

MS KREISBERGER: No. Sorry --

MR JUSTICE ROTH: That's what I think is the case against you, and it would have gone but it's not gone because -- and you need section 4 to be able to maintain your claim and that's why it's within the statute.

MS KREISBERGER: In my respectful submission, Sir, that's not the appropriate analysis of how this works. Section 1 repeals the European Communities Act from completion day, so the rights only disappear after completion day.

If I may, I'm actually very grateful for this question because it has perfectly set up a diagram that I would like to hand up to the Tribunal.

MR JUSTICE MARCUS SMITH: Before you do, it seems a little odd to be asking this question on Day 3 at 12.40, but what exactly do you mean by an accrued right?

MS KREISBERGER: I'm very happy to answer that.

MR JUSTICE MARCUS SMITH: Do you mean a right that arises out of past law that has been articulated in a cause of action? Is that what you mean by an accrued right?

MS KREISBERGER: I mean a --

MR JUSTICE MARCUS SMITH: Do you mean that you can have an accrued right without a cause of action being asserted prior to the repeal of the ECA?

MS KREISBERGER: I do, yes. So might I just hand up this diagram, because it goes to that question. I'm grateful. It might assist. **(Handed)**

Can I just take you back to section 16 of the Interpretation Act which is at Authorities Bundle, volume 1, tab 3, just as my starting point and then I'll turn to the diagram, and this also goes to the question that Mr Tidswell put to me on the first day: where do the accrued rights come from? They come from section 16 of the Interpretation Act. That's tab 3 of the Authorities Bundle, volume 1, page 22. It applies to every repealing enactment. It applies whether it's cited or not. I gave you the authorities on that in opening. It's always the starting point:

"Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears ...

"(c) affect any right ... acquired, accrued or incurred under that enactment".

So it's the ordinary position under English law, and the draftsmen of the Withdrawal Act will be very familiar with it. But the ordinary position under English law is that you look for the taking away of rights in the Act. If it doesn't purport to take away

past rights which arose in law before the repeal date, then the Act doesn't do it. It needs to tell you -- because that's a very strong thing to do -- that is Retroactivity 101. You can repeal the Act, but you don't remove the rights that existed before the Act, unless you say so. Then it's the legislative intention.

If I might, Sir, this diagram illustrates the correct position. If your facts arise pre-IP completion day, that's the left side of my diagram, EU law applies under section 2(1) of the Communities Act, and all that time that we were sitting within the Union, those in this jurisdiction accrued rights; they acquired rights vested.

MR JUSTICE MARCUS SMITH: Well, were they vested without them doing it?

MS KREISBERGER: Yes, so I have a right not to be overcharged by a cartel under 101 pre-departure.

So, coming back to the European case law in relation to our case, you saw, and if I could just emphasise it for your note, in *Volvo* the court talks about a subjective right, I think it's paragraph 42, a subjective right to compensation, that the time-bar would extinguish. So that's the right we are concerned with today.

So those rights accrue whilst that law is in place.

MR JUSTICE MARCUS SMITH: They exist. I think I could accept that.

MS KREISBERGER: I think "exist", it works absolutely fine.

MR JUSTICE MARCUS SMITH: "Accrue", it seems to me, has a narrower meaning, but I'm struggling to nail exactly why it is narrower. I think there is a link between rights that exist at a point in time and the assertion of those rights through a form of legal process by which they are asserted.

In this jurisdiction, the way you assert it is you plead a case on the law as it stands which you don't need to assert, alleging the facts that make good that cause of action.

Now, that is then resolved -- I mean, all you are doing is asserting, you're saying,

"On the law as it stands and the facts that I have pleaded, I get this outcome", and a court then determines that.

Now, what I think Mr Salzedo was saying yesterday is that what's happened is that if you've got a cause of action that accrues pre-IP completion date, then, when you pass through the vertical line in your diagram, nothing changes except the legal jurisdiction that is applying the same law unless it is changed. In other words, at the point of your vertical line, the accrued rights that you have translates from being, as it were, in the EU orbit to being in the UK orbit, the right remaining the same but the process --

MS KREISBERGER: There's a problem with that --

MR JUSTICE MARCUS SMITH: I'm simply putting to you what I understood Mr Salzedo to be saying.

MS KREISBERGER: Yes. That's very helpful.

MR JUSTICE MARCUS SMITH: I'm quite sure you have a problem with it. I'm keen to articulate what the nature of it is.

MS KREISBERGER: I'm grateful, but that's where I started, Sir. This section 4 doesn't say that claims which arose under the prior law are preserved and rolled over under retained law. It doesn't say anything about causes of action, it's silent, because this is not what it's doing. It's providing for rights under EU law which vanish. Because of the repeal, rights do not vanish retrospectively, unless they are legislated to do so.

MR JUSTICE MARCUS SMITH: Yes, but isn't this the point that section 4 is making? Because what it's saying is your rights continue unaltered unless we choose to change them, and yes, we can change retrospectively, but that will need to be made clear.

MS KREISBERGER: But when I bring a claim in relation to the overpriced drug, for

simplicity, I bring it on the basis of my rights which existed at the time that the harm arose. So, when we are talking about past claims, one brings those claims on the basis of accrued rights, the old law, and, if I want to bring my claim after IP completion day, this tells me I still have a right. It doesn't say anything about the rights which existed. What it would have to say, as it does in later parts of the Act that we are going to come back to, it would have to say that those rights are revoked and it would have to say that in terms. There's absolutely no way an Act could remove the right I had to bring a claim of action on 31 December. The legislation cannot take that right away from me without spelling it out in terms.

MR TIDSWELL: But it hasn't been taken away from you because it's been replaced with something which is the same.

MS KREISBERGER: I can't make a claim under EU retained law in relation to facts that persisted before EU retained law even existed as a species of UK law.

MR TIDSWELL: That's precisely what this clause is doing, isn't it? Isn't that precisely what the scheme of the legislation is?

MS KREISBERGER: That's not how the law works. It has to say the old rights are revoked. It doesn't say anything about revocation. Come back to the Enterprise Act. The starting point is all rights accrued under the law prior to its repeal persist. That's the Enterprise Act.

This Act doesn't say anything, apart from the exceptions, about the rights that accrued under the Communities Act; silent. All it's saying is that certain rights are absorbed into domestic law as a new species of domestic law.

I can't claim under domestic law post-IP completion day in relation to facts which arose before IP completion day, because that law didn't exist and that's not how law works. That would be retroactive. And it doesn't need to do that, and it doesn't say it's doing that. All it's saying is -- and it may help if I can find a list of directly effective

Treaty articles in the Explanatory Note.

I'll come back to that. There's a list of directly effective --

MR JUSTICE MARCUS SMITH: Page 4311, I think.

MS KREISBERGER: So all this is doing -- now, I should say, with the utmost respect, this is the assumed basis on which courts have been approaching this. That's why I showed you News Corp, and I'm going to show you another authority, because the applicable law is the law that applied at the time that the facts arose, unless there's legislation telling you something else.

This doesn't do that. This is simply creating rights which become enforceable on completion day, so you can action them, you have a cause of action from completion day. These don't give you a cause of action for past rights. It would have to say so.

MR JUSTICE ROTH: Take your example, because, as you said, it can be helpful to have a concrete example, if you are purchasing the overpriced drug, and lay aside any right you have under Chapter 2, because that's unaffected by all of this. If you purchased the drug pre-IP completion, three years ago, you could bring a claim today, within the limitation period -- you don't need *Volvo* -- you bring your claim. You would say it's a breach of Article 102. Would you not be bringing your claim, because you say that was a right under 102, directly effective right, which was recognised by reason of section 2(1) of the European Communities Act, and you can pursue it today because that right, pursuant to section 4 of the Withdrawal Act, continues and is now available? Is that correct? No?

MS KREISBERGER: That's wrong, with respect, Sir, but this is the trap that that article came into --

MR JUSTICE ROTH: That's the core of --

MS KREISBERGER: What this says -- again, just let's come back to the wording -- the right is "recognised and available" after IP completion day. So you posited

a breach which took place before completion day. This right, this EU retained law right, which is a species of English law, didn't exist pre-IP completion day.

MR JUSTICE ROTH: Wasn't it a right which immediately before IP completion day was recognised by virtue of section 2(1)?

MS KREISBERGER: Correct, so it's available on the day after completion day. So if I bought my drug on the day after completion day, my cause of action is under section 4(1); right?

MR JUSTICE ROTH: Yes.

MS KREISBERGER: But I don't get any cause of action under section -- again, coming back to the wording -- any rights which were available before completion day become English law after completion day.

So, when I buy my overpriced drug after completion day, I've got a cause of action under English law --

MR JUSTICE ROTH: Yes, but I think --

MS KREISBERGER: -- and I'm actioning that.

If I buy it before IP completion day, my rights derive from Article 102 and section 2(1) of the Communities Act, and I enforce those rights, and it is important not to be misled by the fact that the cause of action is being pursued after IP completion day.

What this section would need to say is that, as it does in relation to the exceptions that I'd be keen to show you again -- it would need to say those rights that did exist before IP completion day no longer exist.

This creates rights from the moment of the coming into effect of these Acts. It doesn't do anything for the backward-looking period because it doesn't have retrospective application.

Can I show you, before we --

MR JUSTICE MARCUS SMITH: Before you do, I think the problem, the difficulty, is

that there are two ways of framing the same issue. You're framing it, and I quite understand why you are, that we are talking about a hard line where new rights are created prospectively --

MS KREISBERGER: Yes.

MR JUSTICE MARCUS SMITH: -- and old rights are completely unaffected. That's your world view.

MS KREISBERGER: Absolutely.

MR JUSTICE MARCUS SMITH: I think we must acknowledge the fundamental nature of the change of the exit of the United Kingdom from the European Union. We are talking about a removal of a Member State from a union of nations into a state where that union is no longer having us as a member. So it's a fairly fundamental shift in terms of legal regime.

And the alternative way of seeing that change is that you don't have this hard line. What you've got is old rights, what you call accrued rights but I'm not sure I like that label. Old rights are not abrogated and new rights created. What you get is a translation of the old rights into a new set. In other words, the old rights continue but they are translated into the new legal order that is the United Kingdom outside the European Union.

If you see it that way, then all you are doing in section 4 is you are saying, "Yes, of course there's this old regime, it is a complex body of law, we are now leaving the entity that created those rights, we are leaving the EU, we don't want those rights to just vanish, so what we are doing is we are translating them into the new legal order" that commences on the far side of your vertical line.

Now, those are the two ways of seeing it. Don't get me wrong. I know which side you're pushing --

MS KREISBERGER: Yes, no, I appreciate that.

MR JUSTICE MARCUS SMITH: -- but let me ask you a few questions about how that translation might or might not work.

So let's suppose you are right and there is simply an old law that continues unchanged. Any court hearing that case will not be able to make a reference to the Court of Justice; you accept that, don't you?

MS KREISBERGER: I do, yes.

MR JUSTICE MARCUS SMITH: Okay. And presumably any decision or judgment that is made will be enforceable under the new regime, not the old?

MS KREISBERGER: Could you repeat that, Sir?

MR JUSTICE MARCUS SMITH: Yes. Any judgment that issues in respect of an old right, but post your vertical line, post-IP completion date, how will that be enforced internationally; what regime will apply to that? Will it be regarded as a judgment that can be enforced across the EU without more?

MS KREISBERGER: I don't think that's a relevant consideration.

MR JUSTICE MARCUS SMITH: Okay. Why not?

MS KREISBERGER: Judgment will be given in the ordinary way.

MR JUSTICE MARCUS SMITH: I'm not so interested in the relevance at the moment. I'm interested in the answer.

MS KREISBERGER: I'm sorry, Sir, I don't understand what the distinction is for that purpose, because it would be a recognisable --

MR JUSTICE MARCUS SMITH: Let's stick with the preliminary reference.

MS KREISBERGER: Yes.

MR JUSTICE MARCUS SMITH: Since we are agreed on that.

MS KREISBERGER: Yes.

MR JUSTICE MARCUS SMITH: So here you've got a situation where actually, the process by which the controversial question under old law is resolved, namely by

referring a matter to the Court of Justice, is not available, and what you are saying is that it's not available and there is no way of filling the vacuum.

MS KREISBERGER: Yes --

MR JUSTICE MARCUS SMITH: That's your position.

MS KREISBERGER: -- that's the position because we have left, but --

MR JUSTICE MARCUS SMITH: So the consequence of your articulation of the way it works is that one has got a removal of certain procedural attributes in respect of the old law, without any form of thought being given to how they are replaced under the new regime.

MS KREISBERGER: Well, much thought has been given for how the rights apply from completion day.

MR JUSTICE MARCUS SMITH: No, I'm asking about your position.

MS KREISBERGER: But the pre-IP completion day facts can only be determined, so the cause of action cannot be EU retained law which has not been applied retrospectively.

MR JUSTICE MARCUS SMITH: So the consequence is that when one gets a case where there is a question of difficult EU law in respect of the old law, and we are sitting there scratching our heads trying to work out what the answer is, we can't make a reference, so what do we do?

MS KREISBERGER: You have to apply the law.

MR JUSTICE MARCUS SMITH: What do we do? Do we toss a coin?

MS KREISBERGER: Not at all.

MR JUSTICE MARCUS SMITH: So what do we do?

MS KREISBERGER: You are applying -- the only difference is you can't make a reference.

MR JUSTICE MARCUS SMITH: Right.

MR JUSTICE ROTH: I suppose you say it's the same under retained EU law, that we can't -- the law is the same, the substance is the same --

MS KREISBERGER: Yes, but you have jurisdiction --

MR JUSTICE ROTH: -- and you can't make a reference.

MS KREISBERGER: You can't make a reference, but of course then you don't have the post-completion date judgment issue that arises on these facts.

MR JUSTICE ROTH: Right. Okay.

MS KREISBERGER: There is, in my submission, no other reading of section 4. Section 4 does not carry across causes of action that arose under prior rights under European law. It also does not revoke rights which existed under European law. It creates new rights from completion day as a species of domestic law. That's all it does.

MR JUSTICE ROTH: I struggle with this concept that -- you say it doesn't revoke rights, and you may say that section 2 or section 1 on its own, look at the Interpretation Act, that would not revoke rights.

MS KREISBERGER: Yes.

MR JUSTICE ROTH: So the rights that existed before continue. But the cause of action is an assertion of a right. It's not something in a completely different box from a right.

MS KREISBERGER: But you have to --

MR JUSTICE ROTH: You only have your cause of action because you have a right.

MS KREISBERGER: Absolutely.

MR JUSTICE ROTH: And you're asserting a right which you had before IP completion date, and what I struggle with is why you say section 4 cannot be read as saying that that right which you had before completion date, which you are asserting in your cause of action, now you can continue to enforce it, but it is now, to use the

President's word, translated as the same substance, so you are not losing anything. This is an express provision and meets, therefore, the Interpretation Act requirement. It translates into this form of domestic law right.

MS KREISBERGER: It does all of that, Sir, but the question is which regime did your cause of action arise under?

So all this provision does is it creates an actionable right for a directly enforceable treaty article, let's say, from IP completion day, because laws don't operate retrospectively, unless they say so in terms.

So the right that I used to have to sue the dominant pharma firm exists on the day after IP completion day. So, if I incur loss on the day after IP completion day, I'm into section 4. That's my right. If I incur loss on the day before IP completion day, this doesn't help me because it doesn't help me that there's a new right being recognised after IP completion day. On your formulation of it, that would be to apply section 4 retrospectively.

If I suffer loss before such a thing as retained EU law exists, a cause of action arises on the day that I suffer loss. My cause of action arose under section 2(1). If this Act wanted to do something much, much more ambitious, which no one has suggested, not in any authorities, not in the Explanatory Notes, not in the parliamentary statements or the White Paper, no one has suggested that the intention of the Withdrawal Act was to take away pre-existing rights under European law.

If that had been the intention -- that's a very far-reaching thing to read into this piece of legislation -- it would have to have been stated, and it does say that for certain accrued rights.

I'm conscious, Sir, you don't like the formulation of "accrued rights". I'm going to show you those. But for Francovich damages claims, on the day before IP completion I can bring a Francovich damages claim. The Act says you can't do it

anymore and actually you can't do it in relation to past facts. Now, if there was a general revocation of rights, it wouldn't need to spell that exception out. It's an exception to the fact that this Act does not apply, it does not have retroactive application, but it does for Francovich damages claims.

MR JUSTICE ROTH: It's not really a revocation of a right if you say you're translating the right with the same content but into different clothing. You're saying it was previously classified as an EU law right. You continue to have the same right but it's now classified as a domestic law right. That's not a revocation, is it?

MS KREISBERGER: It would be, on the opposing formulation, because the domestic right only applies to causes of action which accrue after IP completion day. Could I show you just one authority --

MR JUSTICE MARCUS SMITH: It's 1 o'clock.

MS KREISBERGER: I'm so sorry. It's too interesting.

MR JUSTICE MARCUS SMITH: It's too interesting. I'm going to leave you -- yes, the limitation party is going into swing -- I'll leave you with a question and, to be clear, the answer can come at 2 o'clock and not immediately, because I want you to think about it. Let's suppose what you call an accrued claim, what I would say is a cause of action asserting a pre-IP completion day right, and it comes to trial post-IP completion date, and the Judge trying it scratches his or her head and says: "You know, this is a really hard question, section 101, if only I could make a reference. But I can't, because I can't, so I'll do my best and I'll decide the matter by reference to what I understand EU law to be as at the time the right was extant." So the Judge does his or her best and by a coincidence that might be regarded as fortunate or unfortunate, France has made a preliminary reference on exactly the same point to the Court of Justice, and a week after judgment has been handed down, in a preliminary reference an answer is given which is completely

contradictory to what the Judge has decided in this particular case. So the Judge would have reached one conclusion, did reach one conclusion, and would have reached a different conclusion had they appreciated what the Court of Justice would have said had they regarded it as binding.

In those circumstances, what does the Court of Appeal do?

MS KREISBERGER: Thank you, Sir. I will take that away.

MR TIDSWELL: Can I give you another completely different piece of homework as well, but just to save catching you by surprise at 2 o'clock when we start again. I'm just interested in whether in Schedule 8, in the section -- I think you are going to take us there as well --

MS KREISBERGER: Yes.

MR TIDSWELL: -- but there is paragraph 38, which deals with the transitional position in relation to directives, so it's actually, I think, referring to section 2 or 3, I can't remember which one it is, but it does seem to suggest - whichever section it is - is recognising the existence of rights that could be brought now under retained law rather than, on your assumption, and that does also seem to be what's said in the Explanatory Notes at paragraph 404. I may be wrong about that and no doubt you will tell me if I am, but it just seemed to me that wasn't sitting squarely with the analysis you were advancing.

And I think the point about paragraph 38 is that it doesn't refer back to section 4, so it seems to be making it plain that the right you would have to sue on a directive that arose -- the right that arose prior to completion date would be one that was covered by section 4. At least that's my reading of it, but you'll tell me if I've got that wrong.

MS KREISBERGER: Thank you, Sir. That should be enough for me to be getting on with.

MR JUSTICE MARCUS SMITH: Well, Ms Kreisberger, we will start at 2.10, giving

you a full hour. So we will resume then.

MR JUSTICE ROTH: Can I just ask, without giving you another question but a rather more mundane question, about how long, assuming we don't bombard you with too many questions, about how long you think you might need?

MS KREISBERGER: I think I will need about an hour, possibly less, actually, no more than.

MR JUSTICE ROTH: So we are in no danger of going beyond 4 o'clock?

MS KREISBERGER: No, I don't think so, depending on --

MR JUSTICE ROTH: Depending on interruptions.

MR JUSTICE MARCUS SMITH: We will try and restrain ourselves.

Thank you, Ms Kreisberger. We will resume at 2.10.

MS KREISBERGER: Thank you very much.

(1.09 pm)

(The luncheon adjournment)

(2.13 pm)

MR JUSTICE MARCUS SMITH: Ms Kreisberger, good afternoon.

MS KREISBERGER: Good afternoon. Thank you, Sir.

If the Tribunal would indulge me, I will come to the questions in a few moments, but if I might just begin again with the starting point of section 16 of the Interpretation Act.

MR JUSTICE MARCUS SMITH: Yes.

MS KREISBERGER: This is the starting point, that's the usual position under English law. As you observed, Sir, it is of course right that leaving the Union was of a different order of magnitude. That's right politically, but the EUWA is a repealing enactment so, as a matter of law, the same rules apply.

That means that the Withdrawal Act does not affect any right which arose before that repealing enactment.

If I could ask you to turn up section 16, which is at Authorities Bundle, volume 1, tab 3, page 22. What I'd like to do is start with the wording of the provision and then take you to some brief authorities on it.

So the provision says:

"... where an Act repeals an enactment, the repeal does not, unless the contrary intention appears ...

"(c) affect any right ... acquired, accrued or incurred under that enactment".

Can I just pause there, Sir, I'm going to come back to the term "accrued" which you have raised, so I hope I can help on that in a moment.

And the repeal does not, at (e), "affect any ... legal proceeding ... in respect of any such right", and critically "any such ... legal proceeding ... may be instituted, continued or enforced ... as if the [repeal] Act had not been passed."

So that's my principal submission, that that's the world we're in here.

If I could just go back to the authorities, one I'll deal with very briefly, but it makes an important point so I will refer to it now, which is Floor v Davis in Authorities Bundle, volume 2, tab 27, page 673.

Just towards the bottom of the page, above H -- I have shown you this before but it's relevant to the discussion we've had this morning:

"It must be borne in mind that the Interpretation Act is to apply unless a contrary intention is shown. It is not the case that an intention that the Act should apply has to be shown [in order] for it to apply."

So that's the comfort that we're right to begin with the Interpretation Act, and of course it's displaced by any contrary intention in the repealing enactment.

If I could ask you to turn up Craies on Legislation. That's in the second supplementary, it's what I call the -- yes, so it's the Second Supplementary Authorities Bundle, SSA, and it's tab 3, page 43.

I'm going to take you through this, if I may, because it answers a number of the questions. If I could begin on page 42, at paragraph 14.4.8:

"The effect of a repeal unless savings are made is expressed in the following dicta --

"'I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced ... whilst it was an existing law.'"

"It has long been established" --

MR JUSTICE MARCUS SMITH: Well, "commenced, prosecuted and concluded".

MS KREISBERGER: Yes, and concluded whilst it was an existing law.

"The result was that an offence committed against a penal Act while it was in force could not be prosecuted after the repeal of the Act. And pending proceedings could not be further continued after the repeal, even to the extent of applying for a certificate of costs."

That was the original position under common law prior to the Interpretation Act. That's essentially what the Defendants are advocating for, sort of obliteration.

It goes on at 14.4.9:

"The position is altered by the Interpretation Act ... sections 15 and 16 of which deal with the construction and application of one provision which repeals another."

Then we go on, at the top of page 43:

"Section 16, which unlike section 15 is subject to the usual qualification about the absence of contrary intention, in essence" -- and this directly answers your questions, I hope, of this morning -- "preserves transactions past and closed from the effect of a repeal."

I'm going to come back to the wording of section 4, of course, so these are the principles.

So section 16 preserves transactions past and closed, in other words prior facts are protected from the effect of the repeal.

It then cites section 16 which I've just shown you, and then the paragraph underneath this section is really illuminating:

"So, for example, a person who has become liable to some penalty as a result of contravening a requirement imposed by a provision is not saved from liability for the penalty by later repeal of the provision, and can be proceeded against by way of enforcement of the penalty after the repeal."

Then this important wording:

"This principle is really the corollary of the presumption against retrospectivity: just as we assume, in the absence of very clear evidence to the contrary, that the legislature does not intend to introduce a new law in relation to past events, so too we assume that the abolition of a particular law for the future is not intended to prevent the due operation of the rule of law as it stood prior to the abolition's taking effect. Section 16 is a very broad set of propositions and the courts will give it an appropriately wide construction, so as not to frustrate the underlying intention of allowing matters arising before the repeal of an enactment to be followed through to their conclusion as if the repeal had not happened."

Then over the page, 14.4.12:

"The notion of a right accrued in section 16(1)(c) requires a little exposition."

Just as you observed.

"In particular, the saving does not apply to a mere right to take advantage of a repealed enactment (clearly, since that would deprive the notion of a repeal of much of its obvious significance). Something must have been done or have occurred to cause a particular right to accrue under a repealed enactment. So where under the Agricultural Holdings Act 1908 a tenant had become entitled to compensation by his

landlord's having given him notice to quit, he acquired a right to compensation [at that moment] which was not lost by the repeal of the Act, so he was entitled to continue after the repeal the proceedings necessary for the recovery of compensation."

So, pausing there, I'm extremely grateful, and I think I need to correct what I said earlier, I don't simply have a right that's accrued not to be overcharged by a dominant firm, excessively overcharged, but when I buy the overpriced drug, that's when my right accrues, rather than just having it -- sorry, I do have the right but it accrues within the technical meaning of the term when it's actioned in this way. Something must have occurred to accrue the right.

"A contrary intention for the purpose of displacing section 16 must be very clear, although it could in theory arise by very strong implication."

So I rely wholeheartedly on that exposition of the operation of section 16.

At that juncture, I'd like to show you a Court of Appeal judgment handed down last week, which only became available to us yesterday, which is why it's late to the bundle, late to the party, and it perfectly demonstrates this point, albeit without much consideration because it was treated as a very obvious point. So it should be in the two tabs of the Fourth Supplementary Authorities Bundle and it's simply paragraph 1 of the judgment of Lady Justice Elisabeth Laing. This case concerns rights to reside in the UK which were conferred by EU law and in particular by Directive 38 of 04, before 31 December 2020. Specifically, it concerns the impact of divorce and of imprisonment on the rights conferred by EU law on the member of the family of a national of an EU Member State, for convenience "an EU national", who is himself not a national of an EU Member State. The judgment simply proceeds on that basis. These were rights to reside conferred by a directive. The rights in question accrued before IP completion day. There's no further mention at all of the need to go to the

Withdrawal Act. That perfectly illustrates the point.

And you have my submission on News Corp, which I don't think we need to go back to, but the same precept underlies the approach there.

Now, I'd just like to come back again to the rights in this case and the wording of section 4 itself. One could conceive of the rights in this way, which is there's a primary right under Article 101 not to be injured within the meaning of 101, and there's a right to seek compensation for injury suffered, that secondary right, which supports the full effect of Article 101. There's a right to seek compensation from the court and that right is the right which is the basis for the cause of action, the actionable right to compensation.

So those are the rights which I say arise under section 2(1) of the Communities Act, and these rights are unaffected by section 4 because section 4 is not concerned with rights which accrued before completion day. Section 4 is serving a different function which is to create new rights after completion day which are copycats of the rights which existed prior to completion day. But if the right to seek compensation from the court accrued before the repealing enactment, they can be enforced as if the repealing enactment had not been passed.

Now, let me take the case that's been put against me on section 4. The case which is being put against me, the proposition that the card schemes advocate, is that section 4 first of all snuffs out all rights to sue under section 2(1) of the Communities Act. It snuffs them out and it creates new rights to sue, and those new rights to bring causes of action, to sue, are then backdated to cover old facts.

That's a very radical thing to do, because I've shown you the ordinary course of events is that the law which applies to determine the dispute is the law that applied when the cause of action accrued, when something occurred to trigger your right.

Now, had that been the intention, had the intention behind section 4 been to snuff

out old rights under the Communities Act and to create new rights and then backdate them so that retained EU law had retrospective effect -- had that been the intention, that is obviously a contrary intention for the purposes of section 16, quite an unusual one. Because that would count as a contrary intention, to snuff out and backdate, it would have needed to be made abundantly clear -- I've shown you Craies on that -- and what it would need to do, and I don't want to necessarily suggest precise drafting, but it would need to say in terms that all rights arising or accrued under section 2(1) of the European Communities Act prior to IP completion day are no longer enforceable, can no longer -- if one thinks about the wording of section 16 -- can no longer be enforced, proceedings can't be continued, instituted, and so on. So those rights are no longer enforceable.

And causes of action arising before IP completion day are instead to be enforced only under the rights given by this section. Section 4 doesn't say that, section 3 doesn't say that in relation to EU-derived domestic legislation, and section 2 doesn't say that. Sorry, 3 is direct EU legislation and 2 is derived legislation.

So, none of these sections do anything like this rather extreme departure from the ordinary approach which is to extinguish rights, snuff them out, create new rights and then backdate them to old facts, prior loss, sustained before this new species of law even existed. It doesn't do that.

All it does is it takes the old rights and it makes new law which is in many respects, not all respects, a carbon copy of the old law, and that new law applies to rights which accrue after its bringing into operation.

Now, with that, I'd like to address the questions, but can I just make this observation? No, I'm going to turn to the questions and address it as part of them. So, in relation to the President's question on the Judge who makes a decision and then sees a judgment a week later, the position is the ordinary position, which is the Judge

must apply the substantive law as it applied to the facts at the time, so substantive law. Procedural rules operate differently. The procedural rules are, in the usual way, applied as they are at the moment of the decision. That's the classic distinction.

And if it turns out that the law changes one week later, that will need to be sorted out by the Court of Appeal, and we've seen that happen in cases. It's an intervening judgment, and it will need to be treated as such.

So that would be the position there.

I did also want to come back to the enforceability of judgments because I am conscious I didn't quite answer the President's question on that.

MR JUSTICE MARCUS SMITH: You don't need to worry too much because I didn't put what I would have put had there been a unity of minds on this.

MS KREISBERGER: I was simply going to say then that enforceability will just be governed in the ordinary way by the relevant rules of those other states in force at the moment, because it's enforceability, so that's the distinction there.

Just out of interest, because this is all quite interesting, Article 67(2) of the Withdrawal Act has transitional provisions in relation to this and applies the Brussels Regs, so that's the backdrop.

Then coming to Mr Tidswell's question on paragraph 38 of Schedule 8, if we turn - so what we need to do is start with section 4(2)(b) in the main Act, which is on page 93 of the Supplementary Authorities Bundle, so those in hard copies can flick between.

So section 4(2)(b) provides that rights arising -- I'm paraphrasing; I'll of course let you read it -- but rights arising under directives which haven't already been recognised by even the European Court or the national courts don't become part of the new retained law. So that's an exclusion but it's only prospective; it's a retained law. So that's an exception to the carbon copying of the rights as they exist. They

haven't been -- they're in the directive but they haven't been recognised by these courts. Then, unfortunately for them, they don't get copied across.

We then go to paragraph 38 of the Schedule at page 268, and it provides an exception to 4(2)(b). So 4(2)(b) doesn't apply to rights from EU directives, rights arising under EU directives, if they are of a kind, recognised by a court or tribunal in the UK, in a case decided after IP completion but begun before it.

So, if you go back, it's a little bit tortuous, if you go back to 4(2)(b) and read them together, rights arising under EU directives which were not recognised by a court before IP completion day don't make it into retained law, but they do actually make it into retained law if they are recognised after IP completion day by a UK court in proceedings that had already begun.

MR TIDSWELL: So does that not suggest that you've got a situation where a right has arisen before completion day that is then being dealt with under retained law? Doesn't that actually make it plain that section 4 was applying to pre-completion day accrued rights, to use your expression?

MS KREISBERGER: No, because all that section 4 is doing is rolling law -- it's creating law which protects rights from IP completion day. So this provision doesn't stop you from enforcing your right under the EU directive in relation to rights which accrued before IP completion day.

MR TIDSWELL: So when it talks about a case decided --

MS KREISBERGER: By --

MR TIDSWELL: -- begun before completion day, are you saying it's a different case, not in the case that --

MS KREISBERGER: Yes, because this is talking about what becomes retained law. It's not preventing you -- so if you come along and say, "I've got this right under a directive" -- I'm searching my mind for a good example -- *Balogun*.

MR TIDSWELL: *Balogun* is the same --

MS KREISBERGER: Of course. So there is nothing here, as you can see from *Balogun*, that prevents you from enforcing your right after IP completion day, and it has been enforced in *Balogun*. This is just regulating whether it becomes converted into retained law.

MR TIDSWELL: But the difference, as I think you are saying -- you are not saying this applies to *Balogun*, you are saying *Balogun* is the mechanism that creates the enforceability?

MS KREISBERGER: Yes.

MR TIDSWELL: So it's not the reading -- my immediate reading of it was, I think -- what I was putting to you was that this is talking about a right that's arisen -- it exactly is *Balogun*, so that it would be a directive, a right has arisen and it indicates that -- not the *Balogun* situation -- in certain situations, if *Balogun* hadn't previously been recognised but the case had been started, then you could carry it over. But actually you are saying that's not right. You are saying it is only if some other case has commenced a proceeding in relation to that directive that I can then -- that then puts it into retained law.

MS KREISBERGER: Yes, exactly. That's precisely the point.

MR TIDSWELL: Yes. Okay. Thank you. And is the commentary consistent with that?

MS KREISBERGER: The commentary, it is, and I have the reference.

MR TIDSWELL: It's 404.

MS KREISBERGER: Yes. You in fact began with that. It's Authorities Bundle, volume 8, I'm told, page 4350. It's behind tab 144. At the bottom of the page:

"Paragraph 38 provides that rights ... which arise under EU directives and are recognised by courts or tribunals in the UK in cases which have begun before exit

but are decided on or after exit day are preserved by section 4 and are not excluded by subsection (2) ..."

So all that's saying is when you are working out whether they are in retained law, which applies to facts arising after IP completion day, you can include these.

MR TIDSWELL: Yes.

MS KREISBERGER: But it says nothing about past enforceability.

MR TIDSWELL: Again you would say that the "in cases" is not -- this is not about rights that have been recognised in cases begun, it's about rights that are accrued because cases have been begun. Yes, I understand.

MS KREISBERGER: Yes.

MR TIDSWELL: Thank you.

MR JUSTICE MARCUS SMITH: Thank you.

MS KREISBERGER: So this doesn't change -- section 4 doesn't change the ordinary position that you apply the law as it stood at the time the loss was suffered, for the purposes of our facts.

Now, I'm just going to pick up now -- as I said, the draftsmen will have been well aware of the Interpretation Act and the need to spell out in terms any contrary intention. And that's precisely why the Act does spell it out, where 95 per cent of this Act is concerned with the creation of new law which is operative from completion day.

But, as I have submitted earlier, there are some exceptions to that, where they are clawing back rights -- they are taking them away, they're withdrawn -- and I want to show you those provisions, that they would be otiose if there was some greater taking away of rights.

Now, the removal of backdated -- the retroactive removal of rights is actioned by Schedule 8, paragraph 39(1), so very close to where we were, going back to 269, so

again that's tab 3 of the Supplementary Authorities Bundle.

Again, with all of this, it sometimes helps to exclude the irrelevant wording. Paragraph 39 says:

"Subject [to certain provisions which needn't concern us], section 5(4) [of the Act] and paragraphs 1 to 4 of Schedule 1 apply in relation to anything occurring before IP completion day (as well as anything occurring on or after [it])."

Just pausing there, that is the wording you don't see in section 4. This is an explicit backdating of the removal of rights. And I take the point that it's being said they have been taken away and then they are created. That would need to be spelt out. So we see it there. The draftsman is doing their job.

Just to remind you, I'm very happy to turn back to those provisions if it's helpful, but paragraph 5(4) is the one that refers to the Charter of Fundamental Rights.

MR JUSTICE MARCUS SMITH: Section 5(4).

MS KREISBERGER: Sorry, section 5(4), I'm so sorry, and paragraphs 1 to 4 of Schedule 1 concern matters like the general principles and Francovich damages claims.

Would it be helpful to turn those up or are they now well, well ingrained --

MR JUSTICE MARCUS SMITH: Probably.

MS KREISBERGER: I thought you may say that, Sir.

So the effect of section 39(1) is to slice away, slice off some accrued rights, although you will recall that some claims in respect of them are preserved based on timing.

So if we go back to the diagram, the exceptions can't be enforced. So if you look at the right-hand side, then you are in post-IP -- I'm sorry, you're in pre-IP completion day facts on the left side. That means rights have accrued under EU law; that's bottom left. You then move to bottom right, we are now in the present day, and the injured party wants to enforce their rights, and they can do that. So anything new

arising is governed by retained EU law. The enforcement of prior rights is under the old law, European law, unless you fall within these exceptions, then you are prevented, in terms, from enforcing your rights in relation to these matters. So that's the wording there, with specific exceptions.

MR JUSTICE ROTH: Just to make sure I've understood this, section 5(4), which is headed, "Exceptions to savings and incorporation", and says, on page 94:

"The Charter of Fundamental Rights is not part of domestic law on or after IP completion day."

That is, you would say, although everything else in -- or other rights in prior IP day EU law do become part of domestic law after IP completion day, the Charter of Fundamental Rights does not. So bringing a case where your claim has accrued after IP completion day, you can't do it on the basis of the Charter, but without more you could, if it accrued previously, because that was an accrued right not within the scope of section 4, but then you say subparagraph (1) of paragraph 39 of Schedule 8, is it --

MS KREISBERGER: Schedule 8.

MR JUSTICE ROTH: -- gives it broader effect and says it also applies in relation to anything occurring before IP completion date.

MS KREISBERGER: Yes.

MR JUSTICE ROTH: And that is specifically put in there because, without that, section 4 and 5(4) would not have that effect.

Then there's an exception to the exception in subparagraph (3) of paragraph 39 --

MS KREISBERGER: Yes.

MR JUSTICE ROTH: -- which says that exception won't apply if the proceedings are already started.

MS KREISBERGER: Yes.

MR JUSTICE ROTH: Is that how I follow that?

MS KREISBERGER: That's an exposition of how I say this operates and is quite clear from the face. And the same analysis applies to paragraphs 1 to 4 in Schedule 1.

No, I adopt that, Sir, if I may.

MR JUSTICE ROTH: I'm trying to follow. Yes.

MS KREISBERGER: Mr Salzedo's submission, coming back to that, was he said, in terms, that the Act read as a whole essentially extinguishes all EU law rights; they go in the bin. But the narrow disturbance, erosion of accrued EU rights that you do see here would be completely unnecessary; on Mr Salzedo's analysis, the EU accrued rights went up in smoke.

Now I'd like to address another point he made. He seemed to be placing emphasis on the fact that this paragraph achieves that removal of accrued rights by latching on to these prior paragraphs, paragraphs 1 to 4 in Schedule 1, and section 5(4), and then, as you see here, applies them retroactively. He made the point so I need to respond.

But that's just a sensible drafting technique, to avoid repetition. The rights in this particular bucket -- Charter of Fundamental Rights, general principles, Francovich damages actions -- those rights, as Mr Justice Roth just said, are both excluded from domestic retained EU law. So, coming back to my diagram, no causes of action arise for post-IP completion day facts, on the right-hand side. So no cause of action arises after completion day in relation to those facts, but the same bucket of rights are also excluded from accrued rights in respect of past facts, and that's the left side of my diagram.

All the draftsman did is save himself some ink with a cross-reference. He didn't mean to snuff out the entirety of rights accrued under EU law.

On this point, Mr Salzedo said that I accepted that *Lipton* was against me. That's not quite right. That's not an accurate characterisation of my submission. There's actually no statement within the *Lipton* judgment that causes me any difficulty, and in fact I think I said in opening I would commend it, with respect, as an excellent exposition of how the different parts of the Act work. So I positively adopt the analysis in *Lipton* of retained EU law, and you will recall it's said in *Lipton* that section 6(1) is only about the interpretation of retained EU law, so I rely on that.

It's just that in *Lipton*, it doesn't seem to have occurred to anyone which bit of the diagram we're in, that the facts of the case pre-dated the Withdrawal Act; it wasn't argued.

Now, if the Court of Appeal in *Lipton* were right to deal with that case as domestic law, retained EU law, which is English law, even though there was no such thing as retained law in English law when the facts arose, then *Balogun*, which is another Court of Appeal authority, was wrongly decided; they can't both be right.

I've got a minor point on *Lipton* that I will just identify very briefly for you, Sir, and that is -- so if we just turn it up briefly. It's at Authorities Bundle volume 6, tab 107, page 3165, which is still in the headnote. You see there that the claim was refused by the trial Judge on 26 June 2019. Sorry, at the end of the headnote, under the word "APPEAL", then you see:

"By a decision dated 26 June 2019 Deputy District Judge Printer refused the claim."

So that was the initial trial Judge's decision. That pre-dated the repeal of the European Communities Act, and that illustrates the error which unfortunately pervades the Court of Appeal judgment.

So that brings me then to section 6, just briefly, because you have my submissions on that. Section 6 does not undermine or reverse the binding effect of European Court judgments in respect of accrued rights -- in the words of Mr Justice Picken,

which I adopt, from the Microsoft judgment -- whenever the judgment was delivered, in other words pre or post-completion day. If accrued rights are enforceable on the analysis I've laid out for you, then judgments which clarify their scope are binding on this Tribunal. If there had been the contrary intention to limit accrued rights and detach them from post-completion day judgments, which clarify the scope of those accrued rights, then the Act would have needed to say so. It can't be implied, you can't imply an erosion of accrued rights, because that's a breach of all the principles I've just set out for you in relation to section 16; it's got to be made abundantly clear. And the reason you don't see anything like that in section 6 is because section 6 is not aimed at accrued rights. You have the point, Sir. It's headed, "Interpretation of retained law". Lord Justice Green and all the other Judges in the judgments before you in the bundles have also confirmed that section 6 governs the interpretation of retained law, and the Explanatory Notes say that it's concerned with retained law. In fact, there's not a single authority or piece of evidence that suggests that section 6 is concerned with anything other than retained law.

So section 6 is no obstacle to the binding effect of the *ratio* in *Volvo*.

That concludes my submissions on the Withdrawal Act. I was just going to say a very brief word on *Arcadia*, unless you had any questions for me.

MR JUSTICE MARCUS SMITH: No, thank you.

MS KREISBERGER: Just then on *Arcadia* -- I'm not going to go back to the judgment -- if we are right that *Volvo* binds you as part of the merchants' accrued rights, then it doesn't matter what *Arcadia* says because it's a domestic authority. It must give way; it's not an authority that addresses cessation.

That's all I was going to say about *Arcadia*. If I'm right, it doesn't assist the Defendants.

With that, I was going to move to my last point on question 3 which is --

MR JUSTICE ROTH: Before you move on, if you are wrong on accrued rights and section 6, such that we are not bound but may take *Volvo* into account, which is the Defendants' position and indeed, I think, Merricks' position, then *Arcadia* would be relevant on how we interpret the principle of effectiveness as applied to UK limitation laws, would it not?

MS KREISBERGER: Our submission is it doesn't stay your hand because it didn't address the cessation condition. So they were looking at postponement of the six-year limitation period.

So my submission is it doesn't formally bind you. Of course, if you took the view that it does, then it's potentially something that would need to be sorted out by the Court of Appeal.

MR JUSTICE ROTH: Well, it's probably the Supreme Court, but surely it would bind the Court of Appeal as well.

MS KREISBERGER: But that's not my submission. It doesn't bind you because they didn't address this point, so it's not formally binding; it doesn't bite.

MR JUSTICE ROTH: Thank you.

MS KREISBERGER: So then I turn to section 60A of the Competition Act, and I'm going to do my best to keep this very simple and very brief, but it's another interesting point.

Section 60A in my submission simply doesn't govern limitation in these claims.

Just to crystallise the argument against me, Mr Salzedo's argument is that section 60A applies to the determination of the limitation period and that section 60A(2) therefore prevents you from taking account of *Volvo*. That's the submission, and that's wrong in law.

I understand it's still live as an argument.

MR SALZEDO: Not on my learned friend's formulation (inaudible) into account.

MS KREISBERGER: But section 60A, I understand, is still relied on.

So my submission is this. Section 60A imposes a requirement of consistency between, on the one hand, the determination of questions arising under Part 1 of the Act in relation to competition in the UK and on the other hand, European law principles as they stood before completion day.

And the short answer to why it's inapplicable in this case -- I've got a short answer and a slightly longer answer -- the short answer is that in determining the *Volvo* question, you're not asking yourself a question under Part 1 of the Act. You are asking yourself a question under Article 101 in combination with section 2(1) of the European Communities Act and also section 3(1) of the European Communities Act which makes *Volvo* ...

(3.02 pm)

(Audio missing)

(See end of transcript for parties' note of missing audio)

(3.07 pm)

MR JUSTICE MARCUS SMITH: It looks as if it's resetting silently, Ms Kreisberger. Why don't you chance your arm and carry on and we'll proceed without the live stream and hopefully it will just catch up.

MS KREISBERGER: I'm grateful for that, thank you.

So pressing on then, as I said, if you were asked to determine under section 58A, which parts of one of the relevant infringement decisions is binding, that is a determination which falls within the scope of section 60A, to which the duty of consistency between UK principles and EU principles as pre-completion day makes sense. It makes sense to have consistency to that question under Part 1.

I didn't need to make that submission for the purposes of my case. The President asked for some assistance on this yesterday for the judgment, and it seems to me

that that explains why these mechanics are there. That's why section 60A applies to preserved Article 101 claims. It's not otiose. It does seem to have a function. But it's a function that is irrelevant to the matter before you. So we can put section 60A away, on my submission; it's inapplicable.

Sir, that brings me to the conclusion of question 3. I wasn't proposing to add anything on question 4 because you have my written submissions and I really have nothing to add. If you're with the Claimants on questions 1 and 3 then it's right that English rules must either conform or be disapplied. We have suggested how the conforming construction may work in the skeleton. Unless you have any questions, I wasn't proposing to say anything further on that.

MR JUSTICE MARCUS SMITH: No, we don't. These are the reply submissions and of course we will be backtracking across everything that hasbeen said, the writing and all before us, so we have no particular questions for you at this point.

MS KREISBERGER: Sir, I'm very grateful for that.

In that case, unless I can be of further assistance, that completes my submissions.

MR JUSTICE MARCUS SMITH: Ms Kreisberger, we are very grateful to you.

Mr Salzedo, you are on your feet.

MR SALZEDO: Yes, Sir. There were two new authorities cited in reply which I would like to say something about.

MR JUSTICE MARCUS SMITH: If you wish to, then of course you will have an opportunity.

Reply submissions by MR SALZEDO

MR SALZEDO: The first was some further paragraph of Lenaerts -- I don't believe I do need to say anything on that because they were entirely consistent with what I said about the other paragraphs, so nothing to say about that.

Balogun, there are a few things to say. My learned friend relied on paragraph 1. Paragraph 1 is simply a statement of fact which is true, I assume, as far as we know, on anybody's case. It's just a statement of fact about rights having been conferred in the past.

That said, of course my learned friend is right to say that the Court of Appeal then went on to talk in terms of European rights in this case. One possible response to that, that one might have, without looking too closely at it, is that this was a case a bit like News Corp where it made no difference because there were no later decisions of European courts that would have made any particular difference to the outcome, and so nobody troubled to argue about the difference between retained EU law and EU law. That's one possible reaction to it. There is nothing in it that I have been able to spot that's inconsistent with that.

That said, Sir, this was a decision about citizens' rights. If we just look at paragraph 2, just to see what the case was about, it was an appeal from an appeal from an appeal, from a decision as to whether the Secretary of State in 2016 was entitled to revoke A's EEA residence card. So it's about citizens' rights.

Now, citizens' rights is a very specific and very complex area of European law and of the Withdrawal Agreement and therefore of the Brexit legislation, none of which we have looked at. It is so complex that it is one of the few areas in which preliminary references to the European Court remain open to the UK courts.

We will, with permission of the Tribunal, really want to look at that in more detail after today, because it is not a matter I can just deal with on my feet. The materials for it are not in the bundles. But I would not want to concede today, and I think it may well be wrong to do so, that actually this was on a "it just doesn't make any difference" basis. It may that be the Court of Appeal was quite right because, as I say, there are some very complicated provisions and it is an area in which references may be

possible.

So I would crave the Tribunal's indulgence for a further note on this point because *Balogun* is clearly being relied on very heavily and we would need an opportunity to look at it.

MR JUSTICE MARCUS SMITH: It is. There is no necessary inconsistency between your two answers, is there?

MR SALZEDO: No, there is no necessary inconsistency at all, but I wouldn't want --

MR JUSTICE MARCUS SMITH: I do understand where you are coming from, Mr Salzedo. The reason I'm hesitating is because if the position was -- had been unpacked in the way you are suggesting it might have been, we have more than paragraph 1 in the judgment. We'd have rather more complexity than there is.

So my sense is that your first answer is probably the only answer.

I'm going to float something but I'm going to make sure my colleagues are happy with this. What I'm going to suggest is that we invite you to give a note after we've been able to consider things a little bit further and if we think we would be assisted by it, then of course we will invite you to do that, but I'm quite conscious that we have more than enough supplementary bundles of materials already and we'd only I think want to trouble you, and so trouble ourselves further, if it was a point that we felt could make a difference materially in our judgment.

So I'll just check with my colleagues.

(Tribunal conferring)

Mr Justice Roth has just drawn my attention to paragraph 89, and a case that might -- we don't know because the date isn't there -- but might be said to post-date --

MR SALZEDO: Yes.

MR JUSTICE MARCUS SMITH: -- IP withdrawal.

MR SALZEDO: Yes, it does. The case does.

The reason my first answer was given is that there is no suggestion here that it made any difference whether the Court of Appeal was bound by European decisions post-IP. Sir, that's the basis of my first answer. But of course it is true that there is --

MR JUSTICE MARCUS SMITH: It would be relevant to your second answer.

MR SALZEDO: Yes.

MR JUSTICE MARCUS SMITH: I quite understand that.

Somewhat through gritted teeth --

MS KREISBERGER: Just on that point -- I'm sorry to interrupt, Sir --

MR JUSTICE MARCUS SMITH: No, of course.

MS KREISBERGER: -- the judgment cited at paragraph 89 that Mr Justice Roth has picked up, just so you're aware, the date it was handed down was 2 September 2021.

MR JUSTICE MARCUS SMITH: Right, so it is potentially interesting.

Mr Salzedo, you have to permission to put in a note, and obviously, Ms Kreisberger, you have every opportunity to respond.

Just so that we know, the section 60A note is still in the course of --

MR SALZEDO: It is.

MR JUSTICE MARCUS SMITH: I just want to make sure we haven't missed it.

MR SALZEDO: That will be coming very soon, I think. I think we have said something in a letter about when we are promising it for, but I'm sure it's this week, isn't it? Yes, this week.

There are two other things I wanted to say about *Balogun*. The first thing is this. I think at one point, if I understood her correctly, my learned friend said in her reply that if my case were right, then *Balogun* would have been wrongly decided. That's not right and it does point out the important point about these Court of Appeal

decisions and why it's important that whether *Lipton*, but more importantly Tower Bridge, is or isn't against my learned friend.

Let's say I'm right and let's say the Court of Appeal -- well, if the Court of Appeal went on the basis that EU law continued to apply without being retained law, because this was accrued rights, that would not be ratio decidendi of *Balogun*, because nobody has suggested to this Tribunal at the moment that UK law would have required a different answer to the question whether the Secretary of State was entitled to revoke A's EEA residence card. Given the answer that the Secretary of State was so entitled, it seems unlikely that a change to retained EU law could have made that difference.

MR JUSTICE MARCUS SMITH: I quite take your point, Mr Salzedo. The point is not so much: "Would the outcome be different?" but "Is the process of reasoning different?"

MR SALZEDO: It is, that's true, but there's nothing -- that reasoning is not relevant to the decision. That's the point. Whereas the point in Tower Bridge and London Steamship is that the decision would have actually gone the other way, if my learned friend was right. So I do say that this Tribunal is bound by those decisions, because they would otherwise -- if you went with my learned friend, then you would have to be saying those decisions were actually wrongly decided, and they are Court of Appeal decisions. So that's an enormous difference between this kind of, "Well, if you look at this, they don't seem to have referred to retained EU law", and the points in those cases where it was actually critical to the decision.

Then the last thing I wanted to say about *Balogun* was since that it's been put in the bundle, we rely on paragraph 117 at page 24 of the Fourth Supplementary Authorities Bundle in relation to this quite different question of when you come to -- if you come to have regard to *Volvo*, the way in which you should do so.

The Court of Appeal says:

"This case illustrates two difficulties. First, it is hard to derive reliable general principles from decisions of the Court of Justice, which, necessarily, answer a question or questions which have been referred by a national court, and which have been referred on the facts of a particular case. Second, the reasoning in the decisions of the Court invites selective readings of sentences or paragraphs which make it harder, not easier, to work out what the relevant principles are."

We of course say that that is a pretty good statement of some of the difficulties that arise when you try to pull out sentences as my learned friends do from a decision like *Volvo*.

MR JUSTICE MARCUS SMITH: Thank you very much.

MR SALZEDO: Thank you, Sir.

MR JUSTICE MARCUS SMITH: Just to establish a time frame. We said, for both of your notes, 4 pm Friday, and then, Ms Kreisberger and Mr Saunders, 4 pm Friday the following week for any responses you might want to make. Is that a timetable you can work to?

MS KREISBERGER: Yes. Thank you, Sir.

MR JUSTICE MARCUS SMITH: Mr Otty, of course, I would hope that you can continue the double-act --

MR OTTY: We're saying (inaudible) on this side of the Tribunal, Sir.

MR JUSTICE MARCUS SMITH: But if you wanted to put in a separate note because --

MR OTTY: No, I think we will keep it in one note. I'm sure it makes sense.

MR JUSTICE MARCUS SMITH: We will obviously reserve our judgment, and we will endeavour to get something to you as soon as we can.

Can I thank everyone for what has been a very helpful three days. You have done

a marvellous job in unpacking really quite difficult provisions. We are very grateful to you all and your teams, so thank you very much.

We'll adjourn now.

(3.21 pm)

(The hearing concluded)

****

Parties' note of missing audio at 3:02pm

Ronit Kreisberger KC submitted that it made no sense to impose an obligation of consistency between questions of EU law and EU law, which would be "comparing apples with apples". She further submitted that it was common ground that the Competition (Amendment etc.) (EU Exit) Regulations 2019 applied the unmodified Part I of the Competition Act 1998 to preserved Article 101 claims, substituting s.60A in place of s.60. She cited an example of where s.60A might bite to impose a duty of consistency with EU law, namely where the Tribunal was asked to consider the binding effect of decisions of the Competition and Markets Authority and the European Commission under Article 101. Section 60A was therefore not otiose but did not apply in relation to the limitation period at issue.