Case No: 1415/5/7/21

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 24th April 2024

BEFORE:

**Andrew Lenon KC**
**Paul Lomas**
**Professor Anthony Neuberger**
**(Sitting as a Tribunal in England and Wales)**

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BETWEEN:

**The Secretary of State for Health and Social Care & Others**

Claimants

-and-

**Lundbeck Limited and Others**

Respondents

- - - - - -

George Peretz KC & David Drake (On behalf of Secretary of State and Social Care & Others) (Instructed by Peters and Peters Solicitors LLP)

Sarah Ford KC, Tim Johnston and Paul Luckhurst (On behalf of Lundbeck Limited & Others) (Instructed by Cleary Gottlieb Steen & Hamilton LLP, Skadden, Arps, Slate Meagher & Flom (UK) LLP, Dentons LLP, Macfarlanes LLP, Clifford Chance LLP and Pinsent Masons LLP)

Derek Spitz (On behalf of the Seventh Defendant Resolution Chemicals) (Instructed by CMS)

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**Wednesday, 24th April 2024**

**(10.31)**

THE CHAIRMAN: I am going to start with the customary warning. Some of you are joining us live-stream on our website so I must start, therefore, with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court. Thank you.

MR PERETZ: Good morning. I appear with David Drake for various claimants that I will refer to together as "the NHS", and my learned friends Sarah Ford KC with Tim Johnston and Paul Luckhurst appear for the defendant pharma companies. Sir, there is an old saying that if it looks like a duck, swims like a duck and quacks like a duck, then it is a duck. The NHS's case is that the document you have in front of you in your bundles at tab 2, looks like a claim form, is drafted like a claim form, conforms to all the requirements of a claim form under rule 30, and that it follows that it is a claim form under rule 30, with all the legal effects in relation to limitation that such a claim form has. So, we start by taking the Tribunal to the claim form at tab 2 of volume 1. At the very first page of tab 2, page 5, you will see at the top that it says that it is in the matter of section 47A of the Competition Act 1998. So, the very opening heading shows you that this is a claim form making a claim under Section 47A of the Competition Act.

THE CHAIRMAN: I think it has a T in the reference number does it not?

MR PERETZ: I will come to this later.

THE CHAIRMAN: Yes.

MR PERETZ: But my learned friends make a point about the case reference number.

THE CHAIRMAN: Mmh.

MR PERETZ: We say – I will deal with that later but for the present purposes, the sort of very opening words after the reference number, are that this is a claim under Section 47A of the Competition Act.

THE CHAIRMAN: Mmh.

MR PERETZ: My Lords, this might also be helpful if you get out a copy of the Tribunal rules which I think is at tab 22, rule 30, which is I think at tab 22 of the second volume of the authorities bundle. At page 1096 we have rule 30. Going back to the claim form, you will see at pages 6 and 7 that there is a full name and addresses of the NHS claimants and of their legal representatives, and an address for service in the UK. So, that is sub-paragraph 2 of rule 30, paragraphs (a) to (c). Page 7 – sorry, page 8 and 9, you will see the defendants to the proceedings. So, that is rule 30(2)(d). Then at page 14, paragraph 1, you can see that that is a statement as to whether the claim is in respect of an infringement decision. So, that is rule 30(3)(a). As for the last part of 30(3)(a), whether that decision has become final within the meaning of section 58A of the Competition Act, I refer you to paragraph 12 on page 16. The rest of that section which is headed "The Decision is final under section 58A of the Competition Act." I invite you to note in particular paragraphs 13 and 14.3, both of which refer to the rule 119/31 limitation period and to make it clear that this claim form is relying on the limitation period that is preserved by rule 119, the old rule 31 limitation period, as applicable to proceedings under Section 47A. Page 29, section C2, the required observations on which part of the United Kingdom the proceedings of the Tribunal are to be treated as taking place in under rule 18. So, that is rule 30(3)(b). Page 40.

THE CHAIRMAN: Have we got – sorry. Have we got rule 30(3)(b)? I am --

MR PERETZ: Sorry, 30 sub-paragraph (3).

THE CHAIRMAN: Oh yes.

MR PERETZ: 30(3)(b). So, page 40, section E and also section G starting on page

63, is a concise statement of any contentions of law which are relied on. So, that is rule 30(3)(d). On page 53, here begins the section that is required by sub-paragraph (c) of rule 30(3), a concise statement of the relevant facts, etcetera. Also see section H starting on page 69 which identifies relevant findings in the infringement decision. Then starting at page 101, and Annex A, starting at page 111, there is no need to take the Tribunal through them but a quick flick through will show that here you have an estimate of the amount claimed in damages, supported by an explanation as to how the amount has been calculated as required by rule 30(3)(e)(1). Page 110: you have a signed and dated statement of truth as required by sub-paragraph (4) of rule 30 and you have the date, 28 February 2023. It is not disputed that this claim form was filed on that date as at paragraph 6 of the agreed statement of facts. I can make exactly the same point, sir, about the amended claim form, which was filed on 17 March 2023, but I think there is no need to take you through it. It is effectively the same document, apart from the addition of the 12th defendant. So, rule 30 is the answer to the question: how do you make a claim under section 47A in the Competition Appeal Tribunal? And the answer provided in rule 30 is: you make a claim under section 47A by filing a claim form that complies with the requirements set out. If you file such a claim form, you will have made a section 47A claim in this Tribunal. Essentially the NHS's case is as simple as that. The NHS filed such a claim form, and the NHS made, by virtue of rule 30, a section 47A claim and the NHS did so on 28 February 2023, or, if you want to insist on the amended claim form, 17 March 2023. That is our case. It walks like a duck, swims like a duck, quacks like a duck; it is a duck. Just as a consequence of a bird being a duck is that when roasted it tastes delicious with orange or in those delicious Chinese pancakes with spring onions and hoisin sauce. The consequence of this document being a claim form complying with rule 30 is that when it was filed, the NHS made a claim under rule 30, and did so on 28 February 2023; and, sir, that

really is our case. I am almost tempted to sit down now, but in deference to the 23 pages and no doubt hours of effort and ingenuity that my learned friends have spent in their endeavor to argue that a bird that walks, swims, and quacks like a duck is not a duck, or their alternative case that the NHS has somewhere agreed not to call it a duck, I am going to say a bit more. First addressing the "it is not a duck" case, and then secondly the "you cannot call it a duck" case. There is a particular point about the 12th defendant, Sun Pharma UK Limited, that arises on my learned friend's case, but I will come to that at the end. So, let me start with paragraph 19 of their skeleton, which is a very interesting paragraph. That is on page 14. The second sentence of that paragraph makes a very interesting concession. It says, "It was always open to the claimants to [issue new proceedings when they filed the CAT claim form] …" and they say, "…. "they could have filed new proceedings in the CAT and discontinued their out of time High Court claim". What that shows is that it is actually common ground between the NHS and the Pharma companies that as (a) a result of the transitional provisions in rule 119, 2015 rules, and (b) as a result of the fact that the final judgment, disposing of the defendants' appeal against the 2013 decision, was delivered by the Court of Justice for the EU on 25 March 2021, it is common ground that it follows that it was open to the NHS to make precisely the same claim as is set out in the claim form that we have just been looking at, at any time between 25 March 2021 and 25 March 2023. That is common ground between us. So, that common ground makes it unnecessary for me to spend time going through the way in which those transitional provisions work, and section B of our skeleton argument sets them out in detail, and we do not understand the defendants to have any essential difference with our analysis there. Indeed, as we understand it, the pharma companies agree with us that the answers to each of the four questions that we set out at paragraphs 2.1 to 2.4 of our skeleton argument, are "yes", and essentially agree with the reasons

for those answers that we give in section B of our skeleton argument. Rather, the pharma companies' position, as we understand it, is despite the fact that the claim form was filed within the applicable rule 31 period, and despite the fact that the claim form complied with all the requirements of rule 30 of the 2015 rule, certainly no respect in which it did not comply with those requirements has been identified, the claim form, nonetheless, they say, does not have the legal effect of making a claim, despite the provisions of rule 30. Going back to paragraph 19 of their skeleton, it says, "It is not in dispute that the claimants did not issue new proceedings when they filed the CAT claim form". Well, let us be clear about that. It is definitely the NHS's position, that the filing of the claim form amounted to the making of a claim. The relevant verb here is "making" and "made". That is because that is what rule 30 says is what filing a claim compliant with the rule amounts to. It says: if you file a claim compliant with those rules, you make a claim. So, that is the key verb. That is the only relevant question. Also, if you look at the provisions of rule 31.1 of the 2003 Rules which is the relevant limitation rule here, preserved by rule 119, that also uses the verb "made". "A claim for damages must be made within a period of two years beginning with the relevant date". So, that is the relevant verb. Now, one can have a sort of interesting "angels on a pin head" type of discussion as to whether the effect of making a claim by means of a claim form filed on 28 February 2023 was to start a new set of proceedings, or whether the making of a claim can be regarded as a step in the existing proceedings, and to be frank, we are perfectly comfortable with either answer. It may be right that it started a new set of proceedings, but we are also comfortable with regarding it as a step in the existing proceedings. So, this is not an issue that needs to be resolved; the question is did it make a claim? The answer is straightforward: by rule 30, that is exactly what it did. The reason why we do not need to decide whether technically it amounted to new proceedings or a step in the existing proceedings is that, as I said,

first of all in either event, the claim form made a section 47A claim for the purposes of rule 31. Indeed, the claim form is insistent that that is what it was doing. It says it is making a claim under section 47A. So then if my learned friends' case is that the transfer, the original proceedings, were not section 47A proceedings, and that may be their case, then I suppose the position must be that the claim form started new proceedings, because whatever the claim form is doing, it is making a claim under section 47A. So, as I said, if my learned friends are right, and the old proceedings were not section 47A proceedings, then the answer is well, these are new proceedings. They are new proceedings under section 47A. In a sense, the claimants' observation that the old proceedings were not under section 47A, simply makes the case that these must be new proceedings that were brought by the claim form that was actually served.

THE CHAIRMAN: I mean, that point does matter, does it not, when you come to Mr Justice Barling's decision?

MR PERETZ: Yes. I will come to that later.

THE CHAIRMAN: Yes.

MR PERETZ: Essentially, we say he is dealing with a completely different set of situations --

THE CHAIRMAN: Yes.

MR PERETZ: -- in which no claim form was ever made or was going to be made in the CAT.

THE CHAIRMAN: Yes.

MR PERETZ: Unsurprisingly, given that the limitation rules turn on whether a claim form was issued or not, the absence of a claim form makes all the difference in terms of limitation. So, we say it is a completely different set of facts but I will come back to his judgment later. The other reason why it does not matter, it is this: I mean, it may

be right as I said, we do not need to rest our case on it, but the effect of the claim form making a new claim was that a new set of proceedings was started. That is not a particularly odd or troubling consequence. There is nothing odd about that. In practice, had there been no limitation issue at all, my learned friend had chosen not to take the limitation point, nobody would ever have worried about the fact that technically the claim form started new proceedings and that strictly speaking, you still have existing transfer proceedings, and on top of that, a set of new proceedings. That might be logically right, but it would have been a point completely without consequence, and if my learned friends had spotted the point and then applied, as perhaps they would have been entitled to do, to strike out the old proceedings, the transferred proceedings no longer being necessary given that there were now new proceedings, well, they could have done that, but they would have gained nothing from it but a prize for legal tidy-mindedness. In practice, what is more likely is, the point would never have been noticed or taken and things would have gone on perfectly happily without having to deal with the point. Of course, it is also critical here to note that the fact that you have ongoing proceedings in relation to a particular claim against a party, does not in itself – subject of course to a limitation period – prevent the party from making a fresh claim covering entirely the same ground and raising the same causes of action as the old claim. There is no rule of court or rule of the Tribunal that stops such a claim being made. Of course, in the ordinary run of things, if somebody tries to bring parallel claims for the same cause of action, they are at risk of getting one or other of the claims struck out, and they are very unlikely to have a defence to that. It is likely an abuse of process and they will probably have to pay indemnity costs, so they do not do it. But the point nonetheless remains, there is no basis for my learned friends to say that there was anything stopping us, even without withdrawing the existing claim or in effect doing nothing at all in relation to the existing claim in bringing a new claim; that is something

we were entitled to do. My learned friends, in the normal course of events, would have been entitled to strike one or the other out, but that does not alter the point that that was something that we could, on 28 February 2023, have done -- and on our analysis that is what we did do.

MR LOMAS: Take that argument one step further, assuming the time period had permitted it, if the defendants had run in the High Court their limitation defence and succeeded on it, and had your case struck out, that would not have prevented you issuing a claim form in CAT provided it was within the two-year time period.

MR PERETZ: Yes.

MR LOMAS: Yes. I assume that was the –

MR PERETZ: I do not --

MR LOMAS: I assumed that was the consequence of what you were saying.

MR PERETZ: Well, indeed and I think my learned friends accept that.

MR LOMAS: Yes.

MR PERETZ: Because they accept from paragraph 19, that we were entitled to bring a claim at any time between 25 March 2021 and 2023.

MR LOMAS: And there would simply be separate limitation periods --

MR PERETZ: Except for (Inaudible)

MR LOMAS: -- and the High Court decision would have been irrelevant.

MR PERETZ: Yes. Absolutely.

MR LOMAS: I see.

MR PERETZ: Absolutely, and that was a well understood consequence of the old rules. To point out, the length of time appeals tend to still be in the EU system is quite often well over six years. It is certainly not unusual that you have a situation where a High Court claim is definitely out of time because there has been a decision more than six years ago, but the old limitation periods which ran from the date of final judgment

gave you that extra two-year period. So, that is entirely normal and an understood position under the old rules and that for the transitional provisions, that is preserved. Absolutely. Now, there is another aspect of the very interesting paragraph 19 of the defendants' skeleton that I also want to emphasize. Once you accept, as the pharma companies do accept, that filing a claim form starting new proceedings would have counted as making a claim, the question then arises – and it is entirely obscure on my learned friends' case – what they say the NHS should have done, or should have done differently from what they actually did in order to take advantage of that concession. Put another way, on the pharma companies' case the 28 February claim form that I have been taking you through would have been filed on their analysis, and would have counted as a claim form making a claim under rule 30, if at some point – it being unclear at what point – the NHS had written to the CAT withdrawing the transferred High Court claim or perhaps dropped a note to the defendants saying that that is what they planned to do or done something along those lines – it is not clear what they say – it is effectively entirely unclear from what they say, what they say we should have done and precisely when we should have done it. Now, the problem with this is that not only is the pharma companies' position entirely obscure as to precisely what on their case the NHS should have done and when they should have done it, but it suffers from the fatal flaw that what it means is that the validity in effect under rule 30 of a claim form turns, according to them, not on anything one could ascertain from the claim form itself, or the manner or time of its filing, but on the existence of some form of notification of withdrawal – we are not told what – served at some point – we are not told when. I mean, all of that shows a fundamental problem with the pharma companies' attempts to draw distinctions worthy of scholastic philosophy between claim forms that count under rule 30 and identical claim forms filed in an identical way and at an identical time, that do not. In the NHS's submission, any argument that the

effectiveness of a claim under the limitation rules, turns on some state of affairs or document that is entirely extraneous to the form itself, or the time or manner of its filing is entirely unprincipled and it is entirely contrary to the purpose of the limitation rules; and the purpose of the limitation rules is at the end of the day to generate legal certainty by leading all parties to know with clarity at the end of the prescribed period, whether that period has been effectively interrupted or not. To put it in equivalent colloquial terms, one might say that if the point is that the defendant has to know with some certainty at the point that the limitation period ends whether it can safely crack open the champagne and plan for a future free of threat from legal proceedings. But once you start saying: well, it is the claim form, it complies with all the requirements, it is filed in the proper way, in the proper time, but because of the absence of some other document, it does not count, you are introducing entirely unprincipled elements of obscurity and uncertainty into the way in which the limitation rules operate. Indeed, the wholly unprincipled nature of the Pharma companies' position and its incompatibility with the fundamental purpose of limitation rules, we see most clearly at paragraph 26 of that skeleton. At paragraph 26, they complain that our approach is highly artificial, and then the third line down: "The reality of the matter is that as set out above, the reason why the claimants filed the CAT claim form was not because they were making a claim, but because…" and then it goes into the background, but the word I want to emphasize there towards the end of the third line is, "the reason". So, what they are saying is that – and this is really very revealing – the proposition that the Pharma companies are trying to sell to this Tribunal is that the effectiveness of the claim form under rule 30 turns on an inquiry as to the reason why it was chosen to be filed. Put as gently as I can, the need to carry out an inquiry into the reason why the NHS filed the claim form or as to its subjective understanding of what it was doing, is not -- put gently – obviously compatible with the requirement of clarity and certainty

when construing the limitation rules and of course, the CAT is in no position, given the absence of evidence, to conduct any such inquiry. A further example of the unprincipled absurdity of the pharma companies' position is back at paragraph 19 of their skeleton where I started. If you go over the page there is a list of sub-paragraphs; 19.1 onwards. Paragraphs 19.1 to 19.3 and 19.6 just restate the uncontentious background fact that there was a transfer order transferring HC (High court) proceedings to the CAT. If you then go to paragraph 19.4, the idea that anything can turn for the purpose of limitation on the contents of a letter from the NHS to the pharma companies – that is paragraph 19.4 – or on the existence of a reference to "these proceedings were originally issued in the High Court" in the claim form (that is paragraph 19.5) or to the claim reference number (paragraph 19.7) the idea that the effect of a claim form for the purposes of limitation turns on these background facts and footling details, is, we say, frankly absurd and certainly unprincipled. I cannot help but observe at this point that it is somewhat ironic, given their resort to these scholastic distinctions and textual straw clutching, that the pharma companies in their skeleton try to accuse the NHS of reasoning that leads to arbitrary and unprincipled distinctions. So, at paragraph 29 they complain that the effect of a transfer of High Court proceedings will depend for limitation purposes on whether the transfer is made on the basis that it was made on here, namely that a claim form would at some point be filed in the Tribunal, or whether as in the Sainsbury's case, which I will come to in a moment, it is made on the basis of a full set of High Court pleadings, so that no claim form was ever served in the Tribunal. They complain that that distinction is arbitrary or serendipitous, a word they use at paragraph 27, and it gives rise, they complain, to profoundly different legal outcomes, but there is absolutely nothing arbitrary or scholastic about the distinctions we are drawing at all. Rather, the distinctions we are drawing between cases where a claim form is correctly filed in the Tribunal and cases

where it is not, reflects the basic element of any limitation rule, namely that unless a specific procedural step is taken within the relevant time period, the claim becomes time-barred and therefore generates “a profoundly different legal outcome”. There is nothing unprincipled at all about a distinction between cases where a claim form is filed in the Tribunal within the limitation period, and cases where no claim form is filed within the limitation period. I mean, that distinction is no more arbitrary or serendipitous than the distinction between a case where a claim form is correctly filed or served one minute before the expiry of the limitation period and a case where it is correctly filed a minute after the expiry of that period; or cases where a claim form is correctly filed in time, and cases where all that is done is that a copy of the claim form is sent to the proposed defendants. I mean, recalling the facts of a case I acted in in the Tribunal some fifteen years ago, a case called Fish, a case where a claim form was sent in time to the correct Tribunal address and a case where it was sent in time to the incorrect Tribunal address. All of those distinctions have very profoundly different legal effects, because in one case the limitation period is complied with, and in the other case, it is not. Now, all of these cases generate differences that to a lay person could sound very peculiar, or very arbitrary, but any practitioner learns on the first day of their legal practice course, the rule of making a claim is you have got to get it in on time, and if you do not get it in on time in the correct way, then your claim disappears, and you may think that that is arbitrary or serendipitous -- you know, those are adjectives that could be thrown at it – but it is certainly not an objection to the rule and it is certainly not an objection to our position. What is entirely unprincipled and frankly inconsistent with any coherent account of the limitation rules, is the pharma companies’ attempt to make the effectiveness of a procedural step under the limitation rules turn on whether a particular position has been taken by the claimants in existing legal proceedings, and possibly on the manner or timing of any such position, or if you

take paragraph 29 seriously, an inquiry into the reason why the claimants chose to take that procedural step. Now, those are unprincipled distinctions being drawn, but they are being drawn by the pharma companies, not by us. With that I can now come to the Sainsbury's v Mastercard decision of Barling J on which the Pharma companies heavily rely. That is at Tab 10 of the second volume of authorities. Now, the background to this judgment is that it was given just after -- in late 2015, just after the wholesale change in Tribunal rules and in the limitation period that occurred as a result of the Consumer Rights Act 2015. In this particular case, you see from paragraphs 19 to 20, the case had started in the High Court, but it had not just started there; it had also been fully pleaded out there and indeed was very close to a trial. At paragraph 20 Barling J refers to the advanced stage that the proceedings have reached.

(11.02)

So that is the background, you have an already pleaded out case in the High Court and it has been transferred to the CAT.

There is then a discussion of the implications of all this for limitation rules and that starts at paragraph 24 on page 736. You will see that the background here is it appears that the solicitors for the claimants had just raised a point of enquiry with the court, so there is a query that Barling J is answering and I observe, to the extent that it matters, that it does not appear that there was any argument on the point in front of the tribunal. It just looks like a request from the solicitors for some guidance from the tribunal. So that, on the standard principles, would limit the weight that one gives to this but the principal point about this is that it does not in any event help the tribunal but to the extent that the tribunal might think that there is anything here that helps the pharma companies, then we would make the point that it appears to have been decided without the benefit of argument.

So starting at --- carrying on from paragraph 24, the learned judge went through the

relevant rules and then at paragraph 27 came to the conclusion that Rule 119 could have no application in the proceedings. The following paragraphs then give the explanation for that conclusion and you will see that at paragraph 29. So, first of all, if you go four lines down into paragraph 29 you will see the first reason given why Rule 119(2) would not apply is that the present claim is not a claim made on or after 1 October 2015. That of course is in itself a full and complete reason why Rule 119 would not apply; in a sense, it could have stopped there and the rest of the reasons he gives could again, to the extent that they are adverse to the NHS's case which in the end we say they are not, but to the extent that you think they are, the remaining reasons are clearly obiter because the first reason was entirely sufficient for Barling J to reach the conclusion he did and that is one that obviously does not apply here because on no basis was a claim made before 1 October 2015.

Then going to his second reason, so further along that line, he says, "It is, in my view, not a claim made in proceedings under section 47A." Well, that is in fact an obviously correct conclusion on the facts of his case because no claim form was ever made --- no claim form was ever filed on the CAT so there was no claim ever made under section 47A and nor would any such claim ever be made because there was no --- it was not contemplated that a claim form would be ever filed in the CAT and it would have just gone straight to trial in the CAT on the basis of the existing High Court pleadings.

Here, on the other hand, a claim form has been filed in the CAT so we say that Rule 30 applies and what Barling J says here really throws no light on the crucial question as to whether a claim form filed in those circumstances is one that is made for the purposes of Rule 30.

If you then go on, he does say - and my learned friend may put some weight on this - over the page -- he uses the word "originating" and -- yes, it is in the second line at the

top of page 738 where he says, “Third, it is clear from the wording of Rule 31 of the 2003 rules that that rule, too, applies only to claims originating in the CAT.”

We are not quite sure what he meant by “originating” because “originating” is not a word that appears in any of the rules. The rule cited uses the word “made” not “originating,” and we think actually the most natural reading of the word “originating” is simply an elegant variation, it is simply using “originating” as -- he could have said “claims that were made in the CAT.” It is a synonym and, therefore, it does not add anything, so we are back to the question of whether the claim form made a claim in the CAT.

In any event, he is certainly not dealing with a case where a claim started in the High Court, is transferred to the CAT and then a claim form complying with Rule 30 has been filed in the CAT. There is simply no basis whatsoever that he intended by using the verb “originating” to exclude such a case or to hold that Rule 119 could not apply to it. If he did mean that, then it was obviously entirely obiter because that was not the situation in front of him.

Finally --- I mean, our final back stop position on that would be that even if you take the view that he did mean something wider than that, and even if you did think that it is not obiter and binding, then, if necessary, we would say that by filing the claim form we did originate proceedings in the CAT using the word “originate” because we started new proceedings.

THE CHAIRMAN: Is it any part of your argument on the Sainsbury’s case that what Barling J was trying to do there was to prevent --- as I understand it, to prevent a limitation point being taken and having transferred it to the CAT as it was out of the two year period, so he was trying to shut off, if you like, an adverse consequence of something that otherwise makes sense to do?

MR PERETZ: That is a very good point. It is our case, yes, and thank you for making

the point. I adopt that, it is an entirely sensible -- an entirely correct point, absolutely. That is another distinction that that is very much what he was trying to do, to provide reassurance and explain that they would not be shut out by a limitation argument, yes. I need to deal with paragraph 30 of the skeleton argument of the pharma companies and they try and argue that if the tribunal accepts our case that there is a remote possibility that the transfer of the claim would operate to the detriment of claimants, essentially picking up on your point, sir. They point out that there was a concern that arose in Sainsbury's and they then set out a set of dates and scenario that is obviously entirely realistic and then they say at 30.5, "On the Claimants' case, the claim that was made in time becomes time barred." I am afraid we simply do not understand that at all. That is not our case whatsoever. On our analysis, Sainsbury's would apply. There is no claim form and the Rule 31/119 period would never operate and there is no reason why the claims set out there would be time barred, so the sort of in terrorem consequences that the pharma companies have sketched out at paragraph 31 --- they try and run that point but it simply does not get off the ground because they are not describing our case.

The reality, as I have said, is really the other way round; if the tribunal accepts the pharma companies' position, that a claim form that complies with all the timing, form and manner requirements of Rule 30 of the 2015 rules and Rule 31 of the 2003 rules, for some reason does not count because of the "reason" why it was filed, that is a conclusion that could generate uncertainty, not just in the CAT but in other courts and tribunals. So that is our case on the "it's not a duck" element of the pharma companies' claim. They now -- they also of course claim ----

THE CHAIRMAN: Sorry, can I just stop you there?

MR PERETZ: Yes.

THE CHAIRMAN: Just so that I understand 35, what do you say is the operative

limitation scheme on a transfer of a High Court case without more?

MR PERETZ: Well, they have got a - their case originates in time in the High Court - this is effectively the Sainsbury's case so we say that the transferred proceedings remain governed by the High Court limitation period, it was made in time on those facts within the High Court limitation period. The Rule 31/119 period just does not arise.

THE CHAIRMAN: Yes.

MR PERETZ: And it is simply not relevant.

THE CHAIRMAN: Yes. So you are putting the claimants in the best of both worlds?

MR PERETZ: I am always happy for that, yes.

THE CHAIRMAN: What would have happened on your case if the High Court proceedings had got a bit further and you had filed particulars of claim and the transfer had arisen at a later stage? How would that have played out?

MR PERETZ: The key question is had we filed a claim form by Rule 30. I entirely accept that if that had not been done - or if we had served particulars - things would have played out if we had served particulars of claim in the High Court and then transferred and at no stage did we serve a claim form in the CAT, then there would have been a problem, yes, I accept that.

THE CHAIRMAN: Okay.

MR PERETZ: But as always, that is just the consequence of the limitation rules. The limitation rules are about serving the right documents at the right time and it follows from my case that if we did not serve the right documents at the right time, we have a problem but my case is that we did.

THE CHAIRMAN: So, just to take that hypothesis a bit further, had you filed the particulars of claim and the transfer order was made a few months later, and you realised that your limitation period under the 1980 Act was perilous, you would have

had to have filed a claim form in the CAT ----

MR PERETZ: Yes.

THE CHAIRMAN: -- despite the fact that the CAT was already seized of proceedings and the particulars of claim were already standing as pleadings in the CAT, so you would have had to in a sense take a step back, correct the position by filing an anterior document to trigger your Limitation Act protection.

MR PERETZ: Yes.

THE CHAIRMAN: Is that the procedural consequences?

MR PERETZ: Absolutely in that case, so if to take those slightly varied facts, that is exactly this case. We have set out our case in detail and the particulars of claim in the High Court if it had then been transferred. On 23 March 2023 we realised, "Houston, we have a problem," because we suddenly realised, as you put it, that the limitation - the six year Limitation Act period was questionable - so, yes, on our case if we had managed to get a claim form in to the tribunal in time on 24 March, we could have - that would have had exactly the same effect as the claim form --

THE CHAIRMAN: With the slightly surreal consequence, you are making a claim form - you are filing a claim form in a claim that you are already halfway through?

MR PERETZ: Yes. Well, sometimes you need to do that with the position on limitation.

THE CHAIRMAN: Yes, thank you.

MR PERETZ: It is not usual to have limitation periods that start years after the event, that was the effect of the old --- you know, you will remember that there were all sorts of CAT disputes and controversies over people trying to file the claim early and before the final judgment and how you dealt with those applications and so on. There were a number of oddities that were generated by that limitation period but that is perhaps yet another of those oddities, yes.

Right, I now turn to the estoppel case which I characterise as the "you cannot say that

it is a duck" case and what that really boils down to is a claim that the NHS is prevented from relying on the claim form by paragraph 9.2 and possibly paragraph 6 and 7 of the transfer order. I will go through that in a moment but just a couple of background points, I do not think that there is any dispute between the NHS and the pharma companies about the doctrine of contractual estoppel and what it means. The pharma companies' skeleton itself argues that in the end all this - it boils down to a matter of construction of the contract and they refer to Chitty and Rolls-Royce which is at tab 19 of the authorities bundle. There is really no dispute between the parties here that we can discern, so the question is really how you interpret the transfer order using the usual contractual principles and there is authority that we cite --- I do not think we need to go to it because I think again it is uncontroversial, the Weston v Dayman case, at tab 5 of the authorities bundle, that you construe a consent order in the same way as you would construe a contract.

So against that background and looking at the paragraphs of the transfer order, what should the tribunal make of the claim that those prevent the NHS from relying on the claim form? We say that the pharma companies' claim here is completely unsustainable and the reason it is unsustainable is again obvious once the point seeps in, that the pharma companies have accepted that as at the time of the transfer order in July 2021 it was still possible at that stage - and they accept that it was still possible at that stage and up to 25 March 2023 - for the NHS to bring a valid claim within the Rule 119, Rule 31 limitation period by filing a claim form in the tribunal. So the legal background of the transfer order, and this is pretty critical when you look at paragraph 9 to what it means, is one in which at that stage the pharma companies were still vulnerable and would remain vulnerable for almost two years to a claim form being served in the CAT, taking advantage of the Rule 119, Rule 31 limitation period. That is the legal background or, in Lord Steyn's formulation the relevant contextual scene,

against which you have to construe the July 2021 transfer order.

So when you get to paragraph 9(2) and it is probably now worth turning it up, the transfer order is in volume 1 of the hearing bundle at page - starting at page 698 at tab 20. The paragraphs that are relevant are all at page 700. When you get to paragraph 9(2) which is the paragraph on which the pharma companies rely most heavily, the contextual scene, the background to this is that at that stage the pharma companies have no right - no accrued right not to be at the wrong end of a claim form filed in the tribunal on or before 25 March 2023. At that stage, the pharma companies, as they admit, had no such rights and were entirely vulnerable to such a claim being brought. So if you look at paragraph 46 of the pharma companies' skeleton argument, where the pharma companies claim that the claimants should have made it clear that the definition does not - that the claimants did not make the position adequately clear, it is a flat opposite of the true position. The true position is that the defendants had no accrued rights whatsoever at the time of paragraph 9(2) in relation to the Rule 119/31 limitation period because at that stage a claim - and for some months - for over almost two years further, a claim relying on that period was not out of time, so it is against that background that it is simply impossible to construe paragraph 9(2) as referring to any accrued rights, not to be at the wrong end of a claim form under Rule 119/rule 31, there were no such accrued rights, so what the pharma companies are up to in trying to construe paragraph 9(2) in the way that they do is not to preserve some right that they had already accrued, because they had not accrued any right; rather, they are trying to construe it in a way that deprives the NHS a right that it very much still had at that stage, namely, to bring a fresh claim relying on Rule 119/31. It is fine to do so by starting completely fresh proceedings and withdraw the existing ones or by doing it in the way that we in fact did it. However you read paragraph 9(2), it does not say that. There is nothing in it that supports the proposition that it qualifies the rights of the NHS

to bring a claim, the rights that the NHS at that stage already had and for the same reason the pharma companies' reliance in paragraph 28 of their skeleton argument on the Merricks case for the proposition that accrued limitation rights are not lightly interfered with is, a boomerang point because it hits them not us, because what they are trying to do is qualify our limitation rights. They had no accrued limitation rights at that stage but we certainly did and it is our rights that the pharma companies are trying to use paragraph 9(2) to cut down and exclude. As I said, the idea that paragraph 9(2) has the effect of depriving the NHS of existing rights that at that stage the NHS had does not exactly leap off the page or, bluntly, and to be entirely accurate, there is no basis for it whatsoever.

THE CHAIRMAN: What weight on the words deliberately used in 9(1) and (2) "as constituted in this court" - is it relevant that the two year period was not relevant to the claim "as constituted in this court"?

MR PERETZ: Yes, I mean, I suppose what the defendants presumably had in mind - and an obvious reading of it is that to the extent that the defendants had a limitation defence based on the Limitation Act 1980 that was this, even though it went to the CAT.

THE CHAIRMAN: Correct, but a limitation argument relating to the CAT rules may or may not fall within the phrase, "as constituted in this court." It may be something that Ms Ford comments on.

MR PERETZ: Yes, I suppose - I mean, it may be right - I am afraid I had not thought this through but it may be right that one could say that if one gives weight to those words you would say that it does not - that 9(2) simply does not apply to a claim that is constituted in a different court.

THE CHAIRMAN: That is the area that I was trying to --

MR PERETZ: I can see that, yes. I gratefully adopt that point on first impression; it

seems to be a good one, yes, I agree. Further, once you understand that the background to the transfer order is a position in which the pharma companies - and they accept this - remain highly vulnerable to a claim being brought in reliance on the 119 period the assertion that had the NHS wished to preserve their ability to rely on that limitation period they should have made it clearer on the face of the order is simply absurd. As I said, the reality is the mirror image; had the pharma companies wished to exclude the NHS's ability to rely on Rule 119 limitation period, that should have been clearly stated on the face of the transfer order and the reason why such an exclusion would never have been on the face of the order is that simply, to use the defendants' own phrase, of course the NHS would never have agreed to such an exclusion.

Then paragraphs 6 and 7 which my learned friends also rely on, nor do those paragraphs help the defendants - help the pharma companies. All paragraph 7 does is to provide that the NHS will file a claim form with the tribunal instead of filing particulars of claim. That is said there in the first line of paragraph 7, referring back to paragraph 6. Now, try as hard as you like, using all humpty dumpty's powers of ingenuity, you simply cannot read that paragraph as making any provision that affects or qualifies what the legal effect of the claim form under Rule 30 is or, to put it at its very lowest, it is certainly not clear that that is what it does and nor, once you understand the agreed legal background as it stood in July 2021 which is that the defendants remain utterly vulnerable to the filing of a claim form in the tribunal before 25 March 2023, would there have been any purpose in trying to limit the legal effect of a claim form served pursuant to paragraph 7. Such a provision would have been of no benefit whatsoever to the pharma companies because on their own case, as expressed in paragraph 19, they remain vulnerable to the NHS discontinuing proceedings and serving a fresh claim form for that date. So the pharma companies'

construction of paragraph 6 and 7, therefore, makes no commercial or logical sense even on their own case.

One is tempted to say that the only basis on the pharma companies' construction of paragraph 7 that could possibly have served a purpose is that the drafting was so obscure that it allowed the NHS to think that it could serve a claim form under paragraph 7 before 25 March 2023 and interrupt the limitation period, while leaving the pharma companies with the possibility of arguing in subsequent proceedings after the expiry of the limitation period that the drafting in fact precluded the NHS from doing any such thing but a construction that only serves any commercial purpose if it succeeds in tricking the other side is not a construction that should be favoured by any court.

For those reasons we say that it is clear from the wording in the transfer order and from the surrounding context that the pharma companies cannot deduce from it any contractual estoppel restriction on us calling a duck a duck or relying on the claim form but if the CAT is in any doubt as to the construction of the transfer orders, the authorities show that the ambiguity and lack of clarity is not enough for the pharma companies, they need clear words and express terms. We are dealing here with a contractual limitation period and for the purposes of the estoppel argument the pharma companies have to accept that there is a - that there is a contractual limitation period so we are dealing with - if the pharma companies are right, we are dealing with a provision that cuts down the pre-existing - the limitation period to a more narrow contractual limitation and it is clear from the authorities that if you are trying to interpret a contractual limitation period, which, as I said, is what on the pharma companies case we are, then any restriction - then that limitation period has to be clear to the extent that it qualifies the claimant's rights.

If I take you to the - you may be familiar with the authorities already but if I take you to

one more at tab 11 of the authorities bundle, which is the Court of Appeal in Nobahar -Cookson, at page 744, paragraph 5, you will see what the provision is here. It is that a claim had to be brought in any event within 20 business days after becoming aware of the matter and then paragraph 9 sets out the issue which is, as one might immediately guess, what does "aware of the matter mean," and then (a), (b) and (c) give alternative constructions. Then Briggs LJ (as he then was) says at the top of page 745 - we have summarised this and he says that one is the broadest and one is the narrowest and then says, "It is well-settled that contractual limitation periods for the notification or bringing of claims are forms of exclusion clause." Then he goes on, if you jump to page 747, the top of the page, paragraph 18, he says - he discusses how you deal with ambiguity in an exclusion clause and says, picking it up a few lines down, "The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect." He then cites various authorities for that. That is the same point - we quote - in the next tab, tab 12 you have the Cape Bari case which we quote at paragraph 34.4 of our skeleton argument which is to the same effect. If you are going to have a contractual restriction on your ability to make a claim within the limitation period allowed by the general law, then that restriction on your rights has to be in clear words and whatever you can say about the transfer order, it does not clearly have the effect for which the pharma companies contend. [11:31:16] Just a final point on paragraph 44 of the pharma companies' skeleton argument where they refer to some background materials, first of all - I mean, they refer to a couple of emails and, first of all, paragraph 44.1 and 44.2, the emails referred to here, are simply irrelevant because we - as I have made the point already, we are not talking about reserving any accrued rights of the pharmaceutical companies here because there were no accrued rights.

(11.31)

But, in any event, and to be fair on the pharma companies, they to some extent concede right in opening, to the extent that they are admissible as aids to the construction of the transfer orders, and we make the point, and we cite in our skeleton - the case - actually, I do not think we cite it in our skeleton but we rely on the case of Chartbrook v Persimmon at tab 8 of the authorities bundle for the general exclusionary rule; you do not normally look at emails of this kind as an aid to contractual construction and, indeed, as I said, to be fair, the pharma companies seem to accept that. So, the pharma companies' attempt to rely on the terms of the transfer order, which is what the contractual estoppel argument boils down to, is therefore we say entirely without foundation and the tribunal should dismiss it. I flagged up at the beginning, there is a particular wrinkle about the position of the twelfth defendant, which is Sun Pharma UK Limited. This was the defendant that was not subject to the High Court proceedings but was added by the amended claim form. So, there are two aspects to that wrinkle and we await with interest to hear how the defendants' case runs in relation to the twelfth defendant. First, in relation to the estoppel point that I have just been dealing with, the defendants have the problem that the twelfth defendant was not party to the transfer order and therefore cannot benefit from any contractual estoppel. I do not think that point is capable of elaboration, but from the twelfth defendant's point of view it seems to us to be fatal. There is no discussion in the defendants' skeleton of how their estoppel argument works in relation to the twelfth defendant and I wait with interest to hear it. Second, there were no High Court proceedings against the twelfth defendant, so there is no basis for saying that as regards the twelfth defendant the amended claim form is anything other than the making of a fresh claim against it and that that claim was made in time. So, again we wait with interest to hear what the defendants' position is on that. On that second point I should just - and I am not sure

how this point works but in the interests of frankness with the court - mention that there is, of course, s.35 of the Limitation Act 1980. We have copies of that available. Section 35 provides that, "in the case of any new claim made in the course of any action it shall be deemed to be a separate action and to have commenced (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced, and (b) in the case of any other new claim on the same date as the original action." If it is helpful I can just hand those round. If the tribunal holds that the pharma companies are right in their case - because if they are wrong none of this matters, which is our case - then s.35(1) seems to apply because this would be a new claim made in the course of an action. So, the date of the commencement of that claim would appear to be the 19th of June 2019. There is no basis we could see in s.35 for regarding the commencement to have taken place anywhere other than in the tribunal because the deeming provision of s.35 is only about the timing of the claim, not about the location of the claim. However, of course, the 19th of June 2019 is before the two year period started, which is on the 25th of March 2021, so permission would be required. Our position would be, if we get this far, that because the CAT gave permission to amend to add the twelfth defendant, we think that permission has already been obtained. But if necessary we would apply for it. So, it seems to us that even if the pharma companies' case had any merit in relation to the remaining defendants, which we say it does not, it does not help the twelfth defendant. That is we accept a rather odd result but it is a result that is a consequence of the pharma companies' case, not an odd result that is a consequence of our case, so to the extent that the tribunal thinks it is an odd result, it militates against their case, not against ours. As I said earlier this morning, the pharma companies are in the position of denying that something walks, swims and quacks like a duck is a duck, and I am going to conclude with another reference to ducks, and it is a reference to the

well-known tale of the Ugly Duckling by Hans Christian Andersen. As I am sure we all remember, the Ugly Duckling turns out not to be a duck at all but to be a swan, and at the end of the story the fact that it is a swan is obvious from the way that it looks, the way that it walks, the way that it swims, the way that it - I was going to say quacks but I think swans hiss. The pharma companies' case is analogous to that of an observer of the newly adult swan who ignores the fact that in every observable respect it is a swan and insists that because the bird started its life among ducks, was perceived as being a duck and perhaps even thought at one point that it was a duck, it must be a duck. Such an observer would be guilty of really bad ornithology and, in our submission, the NHS' submission, the analogous case of the pharma companies is equally bad law and should be dismissed. I am grateful.

THE CHAIRMAN: Mr Peretz, you skirted round the fact understandably perhaps that the NHS itself did not recognise the claim form as a duck. Clearly, the parties' understanding was that this was a continuation, that the claim form was simply a continuation of the existing proceedings and you would say that it simply does not matter?

MR PERETZ: We would say it simply does not matter. The first point is what the parties' private intentions are cannot possibly matter for the purposes of this matter. That just must be right. The only way in which the case can properly be put is that it is something - it has to be an objective point about the nature of the claim form. Now, our point is simply that the claim form, for reasons I went through at the outset, complies with all the relevant rules and, as I pointed out, actually, if you look at the claim form it says, almost the opening, right up at the top, the title, that it is a claim under s.47A. So, objectively if you look at the claim form, if you look at that opening title, if you look at the references at paragraphs 13 and 14.3, where it is said that there is a claim under s.47A and the rule 119 time limit is referred to, so if you look at those

paragraphs objectively, and it does not matter what the private thoughts or intentions of the NHS were at the time, but objectively that claim form is saying it is bringing, making a claim under s.47A. That is an objective reading of the claim form and an objective reading is the only one that matters. Yes, you are absolutely right, sir, at the end of the day we say it is completely irrelevant what the parties' private understandings are, subjective understandings of what we were doing is - as in the case of the famous Ugly Duckling, the fact that it thought that it was a duck does not make it a duck.

THE CHAIRMAN: No. I mean, it was a private understanding, but it appears to have been a shared understanding.

MR PERETZ: It may have been a shared understanding but I cannot see how that shared understanding has any contractual effect. The real question has to be: what is the objective meaning of the claim form? Just as a matter of fundamental principles of limitation, that must be right. You cannot be having inquiries into what the parties may have been thinking about privately at the time. Unless there is anything else?

THE CHAIRMAN: We will take a five minute break there.

(Short break)

MS FORD: Sir, members of the tribunal, I will start with a few words on the factual context and the reason I do that is because the claimants choose to focus on a single fact and that is the fact that they lodged a claim form in the CAT and they essentially invite the tribunal to disregard the parties' previous conduct and everything that has gone before. In our submission, that approach is highly artificial and so I start by briefly reminding the tribunal of some of the key documents. Behind tab 1 in the bundle is the claim form which was issued in the High Court on the 19th of June 2019. This, in our submission, is when this claim was made: it was made on the 19th of June 2019 when they issued this claim form. It is now common ground that by the 19th of June

2019 when this claim form was issued the claim was out of time for the purposes of the Limitation Act 1980. We then turn please to tab 33 in the bundle, which is an email dated 20th May 2021 and this is the claimants' proposal to transfer the proceedings to the tribunal. The tribunal will note in the third paragraph the explanation that is given: "The claim form in the proceedings was issued on the 19th of June 2019 with brief details of the claim. Particulars were not served due to a sequential series of 'standstill agreements' between our clients and yours, it being in the common interest to await a final decision of the Court of Justice before proceeding (as this will determine the nature and scope and nature of the claim). Now that the Court of Justice has issued its final decisions, we consider that it is in the interests of all parties for the proceedings to be transferred to the Competition Appeal Tribunal (CAT) ..." and it goes on to explain the CAT being a specialist tribunal and such like. And over the page there is then in the final line a request to agree the draft transfer order. The defendants responded to this suggestion in tab 34, a letter of 4th June 2021 from Macfarlanes on behalf of various of the defendants, and what it is essentially doing in the second paragraph is asking for more information as to why it is said that this is a matter which is appropriate for the CAT and, in particular, why the transfer should take place at this stage. The tribunal will note that there is an express reservation of rights in the final paragraph of this letter where they say, "Finally, for the avoidance of doubt, all the abovementioned defendants' rights are reserved in respect of the proposal in your 20th of May 2021 letter and this letter does not constitute on behalf of any of those defendants, any admission, whether as to applicable law, process for service, jurisdiction, liability (including as to any defence or argument based on limitation, time bar, laches, delay or related issue), or the existence of a duty of care or otherwise, howsoever, in relation to the claim." So, there is a fairly comprehensive reservation of rights. We then see in tab 35 the response from the claimants, an email dated 9th of June 2021 and what

it does is, it explains the timing of the suggestion of the transfer at this stage of the proceedings. If we look please at the second paragraph, we can see, “As the email of 20th of May 2021 and our proposed draft order make clear, the aim is not to file and serve particulars and only then to transfer to the CAT. That would involve unnecessary duplication (and a degree of otiose work by both parties). We wish to transfer the case to the CAT, and then file a claim form complying with the CAT rules 2015, including rule 30” and it is said, “It is, more specifically, our intention to give the confirmation referred to at rule 30(3)(a) relating to s.58A of the 1998 Act. The claim will now be a follow-on claim.” And then similarly the fourth paragraph, part-way through, three lines down, “The particular reason for this date is - to answer your final query - that the extant stand-still agreements relating to filing and serving of particulars in the Chancery Division will come to an end on Friday the 25th of June 2021. Those agreements (and indeed the filing and serving of particulars in the Chancery Division, instead of a claim form in the CAT) will, if our proposed order is obtained, become redundant: instead of particulars in the Chancery Division, the CAT’s requirement of a detailed claim form, with the appended decision(s) and other documents will be required for the claim to proceed.” So, that is the rationale ...

THE CHAIRMAN: Ms Ford, the sentence there, “The claim will now be a follow-on claim, a route which only became open upon the recent final rulings of the ECJ” - is that relevant to the debate?

MS FORD: It may or may not be the case. It is certainly the case that if one wants to characterise one’s claim as a follow-on claim, one can only - one has to wait for a decision in order to pursue it as such. Of course, strictly in terms of limitation, it is not the case that one must wait for a decision in order to pursue a valid claim.

THE CHAIRMAN: Sure, but does it point to a change in the nature of the claim - “claim” in the widest possible sense - that the claimants are bringing, that they are

choosing a follow-on jurisdiction at this stage whereas previously they had not been within the narrow sense follow-on approach?

MS FORD: It certainly comes up in the - I may be misunderstanding the point, sir, that you are getting to - it comes up in the transfer order because, of course, in the relevant paragraph of the order which deals with the claim as formulated in this court, there is then an additional sentence which recognises that to the extent that their claim as formulated in the High Court included elements that could not then be transferred to the CAT, those would be deemed to continue. So, I think it is fair to say that they are recognising that the high-level claim as formulated in the High Court could potentially have been broader than the strict follow-on which is now being pursued in the CAT.

THE CHAIRMAN: I think that is the point we are debating, yes.

MS FORD: Sir, I am grateful. As the tribunal is aware, there is this peculiarity of the CAT rules which is that, instead of having a claim form and a separate particulars of claim, like one would see in the High Court, one simply has a single detailed document which is headed, “Claim form.” But that document also performs the function essentially of a particulars of claim. And what, in my submission, the claimants were envisaging here is that rather than engage in a degree of duplication in pleading their case out in the High Court and then produce a claim form in the CAT, which demonstrably ticks the boxes of the various requirements under rule 30, they are suggesting, “We will essentially dispense with the requirement to produce a particulars of claim in the High Court and we’ll just go ahead and instead produce a claim form in the Competition Appeal Tribunal.” And that is the rationale behind the timing of the suggestion to transfer at this stage. If we turn then to tab 37, this is an email on behalf of the defendants dated 18th of June 2021 and we can see at this point, second paragraph, that there is an agreement in principle to a transfer. So, they say, “Subject to the parties being able to agree the terms of any transfer, the defendants are in

principle prepared to consent to the transfer of the High Court proceedings to the CAT ...” and then bullet point 1 is the point that I have just been addressing, and the defendants say, “We are content following the transfer of the proceedings for your clients to file a CAT claim form in lieu of High Court particulars of claim.” And at the bottom of this email we see, again, the same fairly comprehensive reservation of rights which expressly mentions limitation, time bar, laches, delay or related issue. There were then various exchanges concerning the drafting of the draft order and I do not propose to go into those. For the avoidance of doubt, we fully accept that exchanges about the actual terms of the draft order are not admissible for the purposes of construing the order, so I leave those aside. The letter to the High Court which attached the application notice which was seeking a transfer and the agreed draft order is at tab 47, which is the letter and paragraph 2 records the fact that, “The parties have agreed in principle that it would be appropriate for this claim to be transferred to the Competition Appeal Tribunal.” Behind tab 48 is the application notice that was provided and the order that is being sought is an order for the transfer of this case to the Competition Appeal Tribunal, and then behind 49 is the draft order. Now, the transfer order in the form it was made and the version that this tribunal has been looking at for the purposes of these submissions is behind tab 20. The Tribunal will see, first of all, the first recital, that it records the fact that the Claimants have issued the claim in the High Court of Justice. That is the first recital and if the tribunal turns over to page 699, the ninth recital records the fact that the parties have agreed to this order in draft form. Paragraph 2 is the operative part which gives effect to the transfer. It provides that, “The Claimants shall serve the High Court claim form within seven days of receipt of a sealed copy of this order, at which point these proceedings shall be transferred to the Competition Appeal Tribunal pursuant to s.16(4) of the Enterprise Act 2002.” We then have paragraphs 6 and 7 and they, in my submission, have to be

read together because they are, first of all, providing that the requirement for the Claimants to file particulars of claim in the High Court and for the Defendants to file acknowledgements of service in the High Court are dispensed with (paragraph 6) and then 7, "The Claimants shall in due course instead file a claim form with the CAT in accordance with rule 30 of the CAT rules." In our submission, that word "*instead*" is important because it is telling us that the function of filing the claim form in these circumstances is that it stands *instead* of the particulars of claim that would otherwise have been filed in the High Court. If we move on to paragraph 9 - paragraphs 9.1 and 9.2 also have to be read together. Paragraph 9.1 is concerned with the preservation of the Claimants' rights and paragraph 9.2 is concerned with the preservation of the Defendants' rights, and those two subparagraphs are, in my submission, counterpart to each other. The Tribunal will see they begin with essentially the same formulation of words, with the exception that paragraph 9.1 refers to, "The Claimants' claim as constituted in this court ..." - this court being, of course, at this stage the High Court - " ... their claim as constituted in the High Court, and paragraph 9.2 refers to, "The Defendants' accrued rights in respect of defence to the claimants' claim as constituted in this court" - as constituted in the High Court. So, essentially, what these two paragraphs are doing is to provide in an evenhanded way in respect of both the Claimants' position and the Defendants' position that the fact of the transfer does not alter the substantive position as between the parties. And that is, in my submission, an understandable and obvious provision to be included in a transfer order because, self-evidently, neither party to the proceedings would agree to transferring the proceedings to the CAT if they thought that the consequence would be that they would find themselves substantively worse off, either in terms of pursuing their claim or in terms of defending the claim.

THE CHAIRMAN: That is common ground, is it not? I mean, Mr Peretz accepts that?

MS FORD: I am not sure he does because he seeks to suggest that all the parties are doing is expressing a present intention but that the intention does not have substantive effect between them. That, as I understand it, is the position that he at least set out in his skeleton argument. We differ in that respect because, in our submission, those paragraphs do have concrete substantive effect and what they do is to preserve the substantive position of both parties even-handedly. So, the claimants' substantive position under 9.1, the defendants' substantive position under 9.2 is preserved on the point of transfer.

THE CHAIRMAN: The words, "As constituted in this court" - that could be given [to?] a broad claim, i.e. the claim that is before this court, or a narrower version, the claim as set out in the documents that are before this court. Does that wording have any limitation on the point you were just making or not?

MS FORD: I think it applies equally either way; either the claim as defined broadly or the claim as defined narrowly. But the key point is that it defines the Parties' rights as they stand at the point of transfer, so in the High Court, and that is what is sought to be preserved.

THE CHAIRMAN: So, do those rights as preserved before the High Court cover the right to file a stand-alone claim form before the CAT?

MS FORD: In my submission, that falls foul of 9.2, and the reason for that - and I will come on to ...

THE CHAIRMAN: You may want to expand on that and I can imagine you are going to get to that, so do not front run it, do it in your time.

MS FORD: I am grateful. But we do say that these are two paragraphs which, even-handedly in respect of both parties, preserve their substantive position at the point of transfer such that when the claim is then transferred over to the CAT neither party is any worse off, and the Tribunal has the points that in doing that the relevant paragraph

of the Defendants' rights specifically mentions accrued rights in respect of defence to the Claimants' claim as constituted in this court and, again, specifically any defence or argument based on limitation, time bar, laches, delay or related issues. It is something which is specifically identified in paragraph 2 as being preserved. A copy of that order was then provided by the Claimants to the CAT and this is tab 63 in this bundle and this is the Claimants' letter of 4th of August 2021, and paragraph 1 provides the sealed consent order and explains that it provides for the transfer of proceedings to the CAT pursuant to s.16(4) of the Enterprise Act 2002 upon service of the High Court claim form. Paragraph 2 also provides a copy of the High Court claim form and paragraph 3 is dealing with the claimants' expressed intention to file a claim form with the CAT in accordance with the tribunal rules, rule 30, and the claimants explain, "this replacing the need to serve full particulars in the High Court, only to transfer the case in near-parallel." So, again, that explanation of the function being performed here by service of the claim form is entirely consistent with the transfer order and previous correspondence; it is instead of serving particulars in the High Court. The claim form was then duly filed on the 28th of February 2023. We have already looked at that. It is in tab 2, page 5. We do simply draw attention to the presence of the "T" for "transfer", and that simply confirms the objective fact that the origin of these proceedings was that they were commenced in the High Court and then transferred. And that is correctly recorded within the claim form, if the Tribunal looks at page 30, at paragraph 47.6, where the claim form records, "As set out above, these proceedings were originally issued in the High Court of England and Wales before being transferred to this tribunal."

Turning to the question of construction of the CAT rules, and as the Tribunal appreciates there is a short issue between us, which is whether this claim is governed by the Limitation Act 1980, in which case it is out of time, or the two-year time limit in

rule 31 of the 2003 rules, in which case we accept that it is within time. That in turn turns on the construction in particular of rule 119(2) of the CAT rules and that is in authorities bundle, tab 22, page 1099. It may assist to spell out exactly what is the difference between us on rule 119. We agree that this is a claim which falls within paragraph 3 of rule 119, so we agree that it is a claim to which s.47A of the 1998 Act applies and we agree that it arose before 1st of October 2015. We also agree that the question whether the limitation provisions in rules 31.1 to 3 would apply depends on whether this claim meets the condition in rule 119(2), and the condition is that, "The claim must be made on or after 1st of October 2015 in proceedings under s.47A of the 1998 Act." That is the condition which must be satisfied. Our submission is that the condition is not satisfied. We say that the claim was not made in proceedings under s.47A of the 1998 Act, it was made in the High Court and then it was transferred to the CAT. So, this really turns on: what is meant by "making a claim"? In our submission, it simply means commencing proceedings. We say that is the obvious and straightforward meaning of the words and, in our submission, the Claimants face an uphill task in seeking to suggest that the word "made" should mean something other than its ordinary and obvious meaning. But we also say that the CAT rules themselves make clear that when they are referring to making a claim, what they mean is commencing a claim. We can see that in three places in the rules. The first is rule 30, which is in the same tab, page 1096, and this is the provision that the Claimants rely on to say that they have filed a claim form and therefore they have made a claim. But we can see, first of all, that rule 30 appears in a section of the rules headed, "Commencement of Proceedings." And then rule 30 itself ...

THE CHAIRMAN: Under 47A.

MS FORD: Under 47A, yes. Rule 30 itself is headed, "Manner of commencing proceedings under s.47A of the 1998 Act." So, sir, you are referring to ...

MR LOMAS: The subheading, yes.

MS FORD: There are two headings, both of which refer to commencement of proceedings. It is well established that headings may be taken into account in construing legislation and we have cited, for completeness, the relevant excerpt from Bennion for that proposition. It is in the authorities bundle behind tab 24, so if the Tribunal can just hold open the relevant provisions and then look across at tab 24, page 112, at the bottom of the page there is a subheading, “Section 16.7 headings” and that says, “A heading is a part of an Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief guide to the material to which it relates and it may not be entirely accurate.” And then for completeness there is also a section dealing with delegated legislation and that is page 1,122, and the Tribunal will see the heading, “Delegated legislation”, 16.10, “As with Acts, when interpreting delegated legislation, the significance to be attached to each component should be determined according to its function ...” and then specifically as to headings we see, “Headings may be referred to in interpreting delegated legislation ...” - this is the last section on this page - “ ... but it is important to bear in mind that the function of a heading is merely to serve as a brief guide to the material to which it relates and it may not be comprehensive.” In our submission, the headings in rule 30 are informative and they are clear and what they tell us is that references to making a claim mean commencing proceedings. Rule 119, which is the specific rule the tribunal is being asked to construe, is also consistent with that. If we go back to 119 on page, 1099, we have here subparagraph (1) and subparagraph (2). Rule 119(1) refers to proceedings commenced before the tribunal before 1st of October 2015, and then rule 119(2) is concerned with a claim which is made on or after 1st of October 2015. In my submission, the obvious purpose of these two provisions when read together is that they are making provision, first of all, in

respect of claims commenced before 1st October 2015 on the one hand and then in respect of claims commenced on or after the 1st of October 2015 on the other. So, what they are doing is drawing a chronological distinction and in doing so they are obviously equating the concept of commencing a claim and the concept of making a claim.

THE CHAIRMAN: 119(1), " ... before the tribunal ..."

MS FORD: I certainly would say that they are essentially equivalent to the wording in (2), " ... made on or after 1st of October 2015 in proceedings under s.47A of the 1998 Act." Obviously, what is going on in (2) is that there are two ways in which proceedings can now be commenced; the collective proceedings, which is (b), or regular proceedings, under (a). And we are here concerned with (a). That is the reason why this rule bifurcates. Prior to 1st October 2015 that was not a possibility, so one does not need the bifurcation. But it is an important element, that these rules are contemplating claims commenced before the Tribunal, and we have seen that that is consistent with Barling J's reasoning in Sainsbury's as well. That is the second place in which we see in the rules that it is equating commenced and made. The third place, in my submission, is rule 31 of the CAT rules 2003, so this is the limitation provision. That is in the bundle at tab 26 and the Tribunal will see again there is a heading here, "Commencement of Proceedings" under which rule 31 then appears. And rule 31 itself is headed, "Time limit for making a claim for damages." In my submission, again, this is an example of equating commencing proceedings with making a claim. And in DSG Retail in the Court of Appeal, the Court of Appeal described this section of this rule as, "…a new limitation period in respect of a new way of bringing follow-on claims through the Tribunal." That, for the Tribunal's note, is paragraph 54 of DSG Retail in the authorities bundle, tab 16, at page 861. The reason I emphasise that, that it has been described as a new limitation period, is because we know that limitation periods are

concerned with the point at which a claim is commenced. And so, in my submission, again, it is clear that references to making a claim in the context of a limitation period provision, which is what this is, are clearly references to commencing a claim. That is what it means.

MR LOMAS: I am sorry to come back on this, Ms Ford. I understand your point that the proceedings in their widest sense were commenced in the High Court. Is it your case that they were never at any stage commenced before this Tribunal?

MS FORD: Yes, they were transferred.

MR LOMAS: They were simply transferred and that does not equate in any way to a commencement?

MS FORD: It does not equate to a commencement. That is absolutely at the core of this, and the reason is that, when we look at each of these three elements of the rules, we see that what they are envisaging is that making a claim means commencing a claim, and the commencement in this case happened when the High Court claim form was issued back in 2019.

MR LOMAS: And it is not before this Tribunal when the Tribunal is seized of a claim which is subject to its rules?

MS FORD: It is before the Tribunal when it has been transferred under 16(4) of the Enterprise Act.

MR LOMAS: I understand but the concept of commencement then is not to be identified with this Tribunal being seized of the matter, responsible for it and it being subject to its rules?

MS FORD: No.

MR LOMAS: Because commencement happened two years earlier?

MS FORD: Absolutely right, commencement means - well, making a claim means starting a claim, and the Tribunal may be seized of the matter either by making a claim

before the Tribunal or by a claim which is made elsewhere being transferred to the Tribunal. And our submission is, of course, that this is the latter example.

MR LOMAS: Sure.

MS FORD: The Claimants spent some time this morning arguing that nothing prevented a claimant whose claim is time-barred under the Limitation Act 1980 from making a parallel claim in the Tribunal. We accept that it is true that they could have done that. We say that it is possible that with the benefit of hindsight they feel they should have done that, but, in our submission, it is indisputable that they did not do that. What they did is transfer an existing claim from the High Court to the CAT. And much emphasis was placed on paragraph 17 of our skeleton, which was a paragraph in which we simply listed, lest it be in any way in dispute that this is a case where there is a transfer, we listed all the factors that indicate that there is a transfer. We do not seek to suggest that it is all about subjective intention. Our submission is that it is about the objectively ascertainable fact that this was a matter which was originally commenced in the High Court and then transferred. I have been told that actually I have given the Tribunal the wrong reference. It is paragraph 19 of our skeleton rather than 17. The submission was sought to be made that what we are doing there is wrongly trying to make it all about the Parties', the individuals' subjective intentions. That is not what is going on in that paragraph. What we are seeking to establish, in case it was disputed, which in fact we do not understand that it is, is that this is a case of transfer. Our construction of the rules is supported, in our submission, by the reasoning of the former President of the Tribunal, Barling J, in Sainsbury's. If the Tribunal could turn that up in authorities bundle, tab 10, at page 733. This was the first instance of a transfer of a claim from the High Court to the CAT and we can see that there is some consideration of the relevant legislative background, including s.16(4), which is the operative provision for the purposes of our transfer, and the

wording of 16(4) is quoted in paragraph 7 of Barling J's judgment, towards the bottom of that paragraph: "subsection 16(4) of the 2002 Act, to transfer to the CAT "In accordance with the rules of court, so much of any proceedings before it as relates to a claim to which section 47A of the 1998 Act applies." That is essentially the empowering provision. Turning on to paragraph 24, which you have been shown already, what we can see is that the concern in Sainsbury's was actually the opposite of the issue that arises in this case because the claimants were concerned that transferring their claim to the CAT might render out of time a claim which was in time in the High Court. And that concern is, in our submission, an important point to be taken into account, but it is a point, in our submission, in our favour because, if the Claimants are right about their construction, the transfer of a claim could equally operate to the disadvantage of claimants; it could operate, as was the concern in this case, by rendering their claims out of time at the point that they are transferred to the CAT. Barling J gave a clear answer to that in paragraph 27. He says, "Whatever the precise ambit of Rule 119, in my view, it could have no application to proceedings such as the present if they were transferred in whole or in part to the CAT pursuant to section16 of the 2002 Act. The present proceedings have been commenced in the High Court. Therefore, what would be transferred to the CAT in such a case would be all or part of an *existing* claim, whereas it is, in my view, clear that Rule 119 is only dealing with claims originating in the CAT." In our submission, that reasoning is entirely correct. The key reasons which underpin that are then set out in paragraphs 29 and 30, in particular the second point made under 29: "…it is, in my view, not a claim "*made…in…proceedings under section 47A of the 1998 Act"* within rule 119(2)."

THE CHAIRMAN: But there he is referring to the claim in front of him.

MS FORD: He is referring to the claim in front of him.

THE CHAIRMAN: Which was not a s.47 claim.

MS FORD: No, and indeed this claim was not a s.47 claim before it was transferred.

THE CHAIRMAN: At that time. Yes, understood.

MS FORD: At that time, indeed, so the same applies. And he is saying, "Section 47A concerns "the right to make a claim in proceedings under this section"… That is not an apt description of the present claim, which was made not in proceedings under that section but in the High Court under the latter's own jurisdiction, not dependent on new or old section 47A." Again, in our submission, that is entirely correct as a matter of construction of the rules. We then see the third point concerns rule 31 of the 2003 rules, which we have looked at, and he says, "that rule too applies only to claims originating in the CAT." And just pausing there, I think, in response to a question from Mr Lomas, Mr Peretz was prepared to accept that originating in the CAT, the reference to claims originating refers to claims being made in the CAT at that point. He accepted, I think I am right in saying, that that was what was to be understood by this wording, and we agree that Barling J is using originating to mean, or understanding, making to mean claims originating in the CAT. He goes on to say, "Thus, "*The tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph 2(a)…No claim for damages may be made, if were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings ...*" His conclusion is in paragraph 30: "Therefore, regardless of whether Rule 119…applies only to follow-on (and not to stand-alone) claims, which the claimants' solicitors say is the subject of current debate, it would have no application to the present proceedings if they were transferred in whole or in part to the CAT under section 16. I can see no grounds on which it could reasonably be argued that a different limitation period would apply by reason of a transfer in circumstances such as the present" In our submission, that reasoning is entirely correct and it applies with equal force in these proceedings. The Claimants have

sought to address the reasoning in Sainsbury's in two ways. They have sought to distinguish it and they have sought to say that it is simply wrong, and I will deal with those in turn. Dealing with how they say they seek to distinguish it, they say that the relevant difference is that, in contrast with Sainsbury's, in the present case they filed the claim form in the CAT and so they say, had Barling J been faced with that factual scenario, he would have treated their claim as originating in the CAT as well. In my submission, that really does highlight the arbitrary consequences that would arise if the Claimants' construction were correct because they are saying that if proceedings commenced in the High Court are transferred after the claimant has filed a particulars of claim, then there would be necessity to file a claim form in the CAT and the limitation period in the Limitation Act 1980 will apply. But if proceedings commenced in the High Court are transferred before the claimant has filed a particulars of claim then they still have to particularise their claim, then they produce a CAT claim form in the CAT and then they say that the transitional provisions on limitation apply. In our submission, it simply cannot be right that these profoundly different legal outcomes turn on such arbitrary procedural differences as to whether the transfer takes place before or after the filing of particulars of claim in the High Court. As I have emphasised in the context of Sainsbury's, it is important to appreciate that in other cases those arbitrary distinctions could operate to the detriment of claimants; they could render out of time claims that are properly in time in the High Court. So, an outcome which would be sympathetic to these claimants in this particular case would risk causing uncertainty which is capable of adversely impacting a much wider pool of litigants.

THE CHAIRMAN: What is the uncertainty? Surely it is always open to a claimant to issue a fresh claim form, is it not, in the CAT, irrespective of the status of the existing proceedings?

MS FORD: Well, we certainly accept that, had that been done, and the Tribunal has

my point that in fact that is not what happened in this case, had that been done, had one commenced a claim in the CAT within the relevant time period, then the time limit in the CAT would apply.

(12.40)

Of course, it would be slightly bizarre, in my submission, if claimants were concerned about transferring their claim to the CAT because they were worried that the effect of the transfer would mean that they were somehow out of time and that they would have to take that duplicative step, simply in order to preserve their position. That is not the position under the current law under Barling J's ruling. The position under the current law is that the transfer does not have the effect on limitation provisions and that, in my submission, make sense as a matter of legal clarity and it follows properly from the construction of the rule. More fundamentally, we do say that it makes no difference whatsoever that the Claimants filed a claim form in the CAT, and I make that submission irrespective of how duck-like the claim form might appear at first glance. It is true that rule 30 envisages that a claim is made by filing a claim form, but that does not mean that whenever a claim form is filed, the claimant is making a claim. In this case, the claim was previously filed in the High Court; it is not made again simply because they produced a claim form in the CAT. All that was going on, as we know, is that the claim form was served as a substitute for the particulars of claim.

THE CHAIRMAN: Even though, to come back to a point I made earlier, the claim as constituted in the CAT is inevitably in full square a section 47A claim, whereas the claim before the High Court was a broader claim?

MS FORD: Potentially a broader claim. I think that the Claimants have – the effect of 9.1 in the transfer order was to the extent that it transpired that there was an element of their claim that they wanted to preserve that was not capable of being transferred over.

THE CHAIRMAN: It would stay.

MS FORD: It would stay. I do not think anybody has actually, in practical terms, identified any such --

THE CHAIRMAN: Mmh.

MS FORD: -- limb that is left over. The reality, and I think it came through from the exchanges in correspondence I showed the Tribunal, is that they always intended to rest their claim on a decision and they – it was the point at which the Court of Justice had given the judgment that they then said: Okay. Well now we will transfer it to the CAT. But my submission, that one does not make a claim simply by filing a claim form applies irrespective of the breadth or otherwise of the claim. It is a submission which is made because if a claim has been commenced in the High Court and transferred, that, in my submission, does not fall within the definition of making a claim.

THE CHAIRMAN: No, I understand that. I was just trying to puzzle out whether the scope of the claim, and what needed to be proved to establish the claim, was different under the section 47A CAT procedure than it would have been under the High Court procedure. So, in fact, the elements of establishing and succeeding on the claim would be materially different under the new procedure – the CAT procedure – from the anterior procedure.

MS FORD: If the Claimants wished to pursue an element of the claim which was stand-alone, for example, if they were seeking to allege that a party that had not been found to participate by the Commission decision –

THE CHAIRMAN: Or a different time period or something. Yes. Yes.

MS FORD: Or, for example, a different product – if they were seeking to pursue an element which was properly stand-alone, that is a claim which could not have been transferred to the CAT as a follow-on claim and that would be the point at which that proviso in their preserving rights paragraph, 9.1, would bite and one would say that

residual element remains in the High Court and yes, they would have to establish liability in respect of those elements. Whereas they say they have a binding decision which they seek to rely on within this jurisdiction.

THE CHAIRMAN: So, hypothetically the claim as constituted before us could be slightly different in shape from the claim as constituted before the High Court, but in fact, at the moment, nobody has suggested there is anything material in that.

MS FORD: Yes. Certainly I am not aware of anybody having suggested that there is some residual element that is preserved in the High Court, as a matter of fact. I do reiterate the submission that actually it does not matter. For the purposes of this question of construction, the question is: is a claim made --

THE CHAIRMAN: I understand that.

MS FORD: The alternative submission the Claimants make is that Barling J was simply wrong in Sainsbury's. That is the submission that they have made in paragraph 31 of their skeleton. Can I ask the Tribunal to just pick that up? What, in our submission, is telling, is that in order to make their argument that Barling J got it wrong, they have to read words into the rules which are not there. I am looking in particular at paragraph 31.2, and that paragraph asserts – this is line three – "From the point of transfer of the proceedings, the proceedings became "*a claim [that is being] made … in … proceedings under the Competition Act 1998 section 47A*"". The words "that is being" that have been inserted in square brackets do not appear in the rules. Those words are necessary to the Claimants' argument because they are trying to say that making a claim does not necessarily mean commencing a claim; it might mean some ongoing process of pursuing your claim in front of the Tribunal. That, in our submission, is not what the rules say and that is very clear from the fact that they have had to write words in, in order to make that submission. The same idea of an ongoing process of pursuing a claim is also present in paragraph 31.3 of the skeleton, and this

is concerned with rule 31(3) of the 2003 rules. They say there, this paragraph can clearly only apply to a claim that is being or is about to be pursued in proceedings in the Tribunal, but nothing about its wording limits it to a claim first pursued in the Tribunal. In our submission, reading "making" as an ongoing process of pursuing a claim is doing considerable violence to the clear words of this rule, but we also say that it is an extremely odd outcome for a rule which is expressly concerned with limitation because, as we know, limitation necessarily does focus on a very specific point in time. It focuses on: when was this claim made? When was it commenced? Limitation rules are not concerned with an ongoing process of pursuing the claim. They are necessarily concerned with hard edged boundaries by which a claim must be made and that, in my submission, is what "making a claim" means in the context of these rules. It is worth highlighting that actually the Claimants seem to have gone beyond the submission made in this paragraph in their oral submissions before the Tribunal because, as I understand the submissions made, they are not limiting their argument to saying: well, we might have pursued the claim in an ongoing way. They are saying we did in fact make a new claim. The Tribunal has my submission that it is not making a new claim when one transfers a claim from another court, irrespective of whether one does so by issuing a claim form. So, in our submission, Sainsbury's was clearly rightly decided. The transitional time limits in rule 119 and rule 31 do not apply to claims that were made elsewhere and then transferred to the CAT, and so, in our submission, the Claimants' claim is out of time. As a final point of statutory construction, it is important to emphasise that the effect of the Claimants' approach would be to deprive the Defendants of an accrued limitation defence under the Limitation Act 1980, and this Tribunal has been rightly wary of interpreting the CAT's transitional provisions on limitation in such a way as to override accrued limitation rights. That is evident, we say, from the recent judgment of the Tribunal in Merricks v

Mastercard. It is in the authorities bundle at tab 18. The particular issue we are concerned with is the one summarised at paragraph 11 in the judgment one page 914. (12.50)

The Tribunal explains "Mastercard contends that in the case of claims governed by English law, insofar as they are based on transactions prior to 20 June 1997 they are time-barred; and in the case of claims governed by Scots law, insofar as they are based on transactions prior to 20 June 1998 they are time-barred," and the contrary contention for the class representative is at the bottom of that paragraph, "The [class representative] contends that all the claims are entirely within time on the basis of s. 47A [of the Competition Act 1998] and rule 31(1) - (3) of the 2003 Rules, applied by reason of Rule 119(2) of the 2015 rules." So the provisions that the class representative is relying on in this case are the very ones that the Tribunal is being asked to construe in these proceedings.

If we turn to paragraph 31 the tribunal cites section 16(1) of the Interpretation Act 1978, (IA78) which provides that "where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, revive anything not in force or existing at the time at which the repeal takes effect;[…] affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment…" And the Tribunal then goes on to cite the judgment of the Privy Council in *Yew Bon Tew* of Lord Brightman, "…an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable." I do emphasise that, not least because the Claimants have made the submission that we have no accrued rights and the Tribunal is here citing authority to the effect that an accrued right to plead a time bar is in every sense a right.

The Tribunal then relies on that in construing the effect of the transitional provisions, so if we look at paragraph 34 in the Court of Appeal in DSG, the Court of Appeal had previously held that for competition damages claims started in the tribunal before 1 October 2015, claims for which the limitation period had expired before 20 June 2003 were time barred and it made that finding because of Rule 31(3) which was the provision that said that anything which was time-barred before entry into force of the rules - sorry, if I turn over my note, I find my speaking note is missing which is somewhat unfortunate but I will carry on, anything which is time-barred before entry into force of the relevant CAT rules is - remains time-barred. That is the point that the tribunal is dealing with at 34 and it goes on to consider what would be the position in respect of the claims after 1 October 2015. The difficulty there was that we have seen Rule 119 and Rule 119 does not cross refer to Rule 30(4). It does not cross refer to the relevant provision that the Court of Appeal relied on to the effect that nothing prior to the entering into the rules is time-barred and so the question was, do we get a different outcome in the event that you are dealing with a claim that started post October 2015? The tribunal says, "No, you do not," and the reasoning is partway down 34, "Rule 119 of the 2015 Rules does not express a contrary intention for the purposes of section 16(1)(a) and (c) of the Interpretation Act 1978," that is the provision that we have dealt with at 31, "either to affect any pre-existing right of a defendant to plead a time bar by reason of the expiry of the limitation period or to revive an obligation which had previously been extinguished by prescription.

"While the omission of the incorporation of Rule 31(4) of the 2003 Rules in Rule 119 may appear surprising…" they say, "…we consider that this omission cannot lead to an "unavoidable" construction of Rule 119 as affecting previously acquired rights of limitation: and it has no bearing in any event on the prescription period since that was never within the scope of Rule 31(4)" anyway. So they have applied the Interpretation

Act to the construction of Rule 119 and they then go on at 35 to 38 to consider a different argument that the class representative advanced which was based on section 47A(4) cited in paragraph 35, “For the purposes of identifying claims which may be made in civil proceedings any limitation rules or rules relating to prescriptions that would apply in such proceedings are to be disregarded” And the class representative said, “Okay, well, in any event, we can rely on that to say that you have to disregard the limitation rules.” That argument was rejected based on the reasoning of the Tribunal in Deutsche Bahn v Mastercard). You can see that at 36 to 38 and they reach that view without having to even consider section 16 of the Interpretation Act but they do say at 39, “We would reach that view following *Deutsche Bahn/Pilkington,* even without having regard to section 16(1)…; However, that provision reinforces this conclusion, since the requirement to disregard limitation or prescription rules for a specified purpose is far short of a statutory repeal, nor does it express an intention more generally to revive an obligation extinguished by prescription or affect a right to plead a time-bar in the clear terms that would be required.” So this is an example of the tribunal being rightly extremely wary of reading Rule 119 as having the consequence that it deprives the Defendants of an ability to plead a time bar that they had otherwise accrued.

Our submission is that even without the need to rely on that, the construction of Rule 119 is clear but, in any event, this Tribunal, in my submission, should be equally wary of according the concept of making a claim a construction which has the consequence that it deprives the Defendants of their accrued time bar defence. So, members of the Tribunal, that brings me to the end of the section of my submissions on construction. I have only got to deal with the contractual estoppel point, that may, if it is a convenient moment, be convenient to have the short adjournment.

THE CHAIRMAN: Yes, two o’clock.

(12.59)

(The Short adjournment)

(14.01)

MS FORD: Sir, I want to come back on three points that arose in exchanges with the tribunal before the short adjournment. Firstly, Mr Lomas was exploring whether a claim in the CAT, a section 47A claim might somehow be materially different to a High Court claim such that the Claimants might have to prove something different and so in that respect it might be thought that they are bringing a new claim, but the answer to that, in our submission, is no, the Claimants do not have to prove anything more in the CAT than they would do in the High Court. The effect of section 47A is essentially to operate as something of a filter in the sense that it defines the types of claims that the CAT has jurisdiction to hear and so it is conceivable that there might be claims which raise at the same time, for example, competition issues which the CAT can hear, and issues over which it has no jurisdiction whatsoever under section 47A. We were discussing this in the context of the distinction between follow-on and standalone claims but actually that may not be the best example because of course the CAT does now have jurisdiction in standalone claims and so a better example might be, for example, patent infringement proceedings which also raise, for example, abuse of - a dominant position allegation and in that context the CAT has no jurisdiction to decide whether a patent is infringed. That element of it would have to stay in the High Court. An allegation of a dominant position that somehow arises out of the patent proceedings could potentially be transferred to the CAT to be heard and, if that were to happen, then the claimants would face no higher hurdle in relation to that transferred element to the CAT than they would had it been pursued in the Hight Court. It is in no respect a different claim in that respect. So, in our submission, the fact of transferring an element of the claim in that way does not mean that they must be understood as

bringing a new claim. That was the first point.

THE CHAIRMAN: Just on that point, so that I can be clear, if you have a standalone claim that is then transferred to the CAT as a follow-on claim, which may be something you touched on this morning, is there anything left of the standalone claim?

MS FORD: Well, the Tribunal has jurisdiction to hear a standalone claim. If it were to be transferred in the form of a follow-on claim, then that simply means that the claimants are voluntarily constraining the scope of the claim that they are choosing to pursue going forward because they are saying, "We are not going to seek to establish any standalone elements, we are only now going to run it as a follow-on claim." The elements of the claim that the CAT hears, the Claimants do not have to establish anything more than they would have done had it remained in the High Court.

THE CHAIRMAN: Yes. What happened in this case - was that the claim as constituted in the CAT, did that have any standalone elements that you can identify?

MS FORD: Well, it was described very broadly. We can look at the claim form which is behind tab 1. It briefly deals with the claim on page 2, the Claimants' claim arises out of breaches of competition law contrary to Articles 101 and/or 102, chapter 1 or chapter 2 prohibition. It is pleaded that the breaches are relatively serious - a series of agreements then or decisions - associations of undertakings and the effect of that is pleaded. What they do not do in the claim form is suggest that they are entitled to rely for the liability element of their claim on any relevant finding in the commission decision and so, as and when this claim is transferred, it is transferred and the claimants are saying, "We are pursuing this as a follow-on claim, so we are relying on the finding of liability in the commission decision which has now become final." Importantly, in our submission, the quality of the claim, the nature of that claim does not change at the point where it is --

THE CHAIRMAN: Yes, no.

MS FORD: The second point was that I had exchanges with Mr Lenon about the question of what would happen if one were to overrule Sainsbury's and, in particular, how that might have detrimental consequences for claimants and we discussed how it would be unsatisfactory if on transfer a claimant had to protect its position by issuing new proceedings but the more fundamental point actually, and this was a point that we tried to draw out in our skeleton argument, is that it may not be open to the claimant at that point where the transfer takes place to protect themselves, they may already be out of time under the CAT rules and we have set out a scenario how that might conceivably occur, how quite realistically it might occur, at paragraph 30 of our skeleton argument. So at 30.1 we are saying let us assume that the claimants issued in the High Court and it is five years and eleven months after the publication of an SO press release and so within a six year period if one assumes that the time limit is running from the SO and then two years and six months after the decision that claim would be in time in the High Court. The cause of action in this case, let us assume, accrued before 1 October 2015, so we are within Rule 119(3) territory, there is no appeal to the Court of Justice in this hypothetical case, the claim is then transferred to the CAT shortly after issue in the High Court and the relevance of the "shortly after issue" is that we assume that the claim has not been particularised in the High Court, it needs to be particularised in the CAT, and so because of that consequence, the claimants have to produce a claim form in the CAT. If these Claimants were right, the fact of producing a claim form in the CAT would mean that the time limits in the CAT applied, the time limits in the CAT are two years from the Commission decision and so merely by virtue of this transfer, and the need to particularise your case in a claim form, those claimants find that a claim which was in time in the High Court becomes out of time in the CAT and there is nothing that they can do about it.

MR LOMAS: Unless this is dealt with by the transfer order.

MS FORD: Indeed, and of course that is exactly what the parties tried to do in this case, to hold the ring and preserve the position.

THE CHAIRMAN: Quite.

MS FORD: But this is the concern that Barling J was dealing with in Sainsbury's --

THE CHAIRMAN: Precisely.

MS FORD: -- and he was saying - on a question of construction that actually that does not happen. That was the second point that I wanted to raise.

The third point was that Mr Peretz sought to suggest for the first time orally that the position of Sun Pharma might in some way be different to the position of the other Defendants but we do not agree that Sun Pharma would be in any different position. The claim was issued in the High Court and then transferred and our case is that by reason of those facts, it is governed by the Limitation Act regime and Sun Pharma is added as a defendant to that claim and that claim form governed by that regime and so we say that it does not - that Sun Pharma does not find itself in any different position and certainly it does not mean that the Claimants are in any better position adding Sun Pharma at a later time rather than earlier. In fact, there is some correspondence in the bundle which touches on this point at tab 67 in the bundle which is the Claimants' correspondence concerning the proposal to add a party to the CAT claim and the particular passage that we draw your attention to is on the second page, page 1071, at the top of the page where the claimants say, "If we were going to start the proceedings from scratch in the CAT, then we would not need permission to add that defendant." They are, thereby, recognising that what they are doing (1) is not bringing a new claim and (2) is adding the relevant defendant to the existing claim. So those are the three points that arose before the short adjournment and I am now moving on to deal with the --

THE CHAIRMAN: If we can just come back to the first point, I did not want to interrupt

your flow but if we are just comparing the brief particulars of claim in the first High Court claim form and the CAT claim form, I am just establishing that we have got to a conclusion on this, but because it says that this is breach of statutory duty under 47A as a follow-on claim for damages, is the effect of your submission that the Claimants are pursuing, before the CAT by virtue of this claim form, a more narrowly and tightly defined case than their broader description of it in the original High Court claim form?

MS FORD: They are doing that. It is not by virtue of the fact that they characterise it as a section 47A claim --

THE CHAIRMAN: Because of the words “follow-on”?

MS FORD: Yes, because they have decided to narrow what they are claiming --

THE CHAIRMAN: On the follow-on jurisdiction, yes, I understand, but it is common - well, you accept that it is a narrower formulation?

MS FORD: Yes, I do.

THE CHAIRMAN: Thank you.

MS FORD: Yes, I mean, it is a matter for the Caimants --- which elements they claim and wish to pursue.

THE CHAIRMAN: Sure.

MS FORD: In our submission, the fact that they are now pursuing --- and are a narrower formulation would not operate to their advantage in limitation terms, it makes no difference, by the way.

THE CHAIRMAN: Yes.

MS FORD: Coming on to address the contractual estoppel point, it will be appreciated that this only arises in the event that we are wrong about the core issue of statutory construction, so in the event that the Tribunal were to decide that by filing a claim form instead of the particulars of claim the Claimants are to be understood as having made a new claim for the purpose of Rules 31 and 119, in those circumstances we say that

the Parties have clearly and unequivocally agreed that the transfer would not undermine the Defendants' accrued limitation rights and so we say that the Claimants are estopped from contending otherwise. I am grateful to Mr Peretz for indicating that there is not much between us in terms of the principles but I think it might help just to give some - a very brief summary of the principles of law.

We take the headline statement from Chitty which is in the authorities bundle at tab 23 and paragraph 7-029 where Chitty explains, "This form of "estoppel" is said to arise when contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist. The effect of such "contractual estoppel" is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract."

Then just by way of further illustration, we have cited a Court of Appeal case which concerned an exclusion clause in a lease and that contains essentially a useful citation of the relevant authorities. It is in the bundle at tab 15 and there are two passages that are relevant. The first is in the judgment of Lewison LJ page 821 starting at paragraph 47 and he says, "It is now firmly established at this level in the judicial hierarchy that parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue. This is a particular form of estoppel which has been given the label of "contractual estoppel". Unlike most forms of estoppel it requires no proof of reliance other than entry into the contract itself. Thus as a matter of contract parties can bind themselves at common law to a fictional state of affairs in which no representations have been made or, if made, have not been relied on." He is saying that because that is the particular circumstances in issue in that case.

He cites Springwell Navigation which is also from the Court of Appeal, ""If A and B

enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. Unless *Lowe v Lombank*…is authority to the contrary, there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties."" They cite the conclusion. ""So, in principle and always depending on the precise construction of the contractual wording, I would say that A and B can agree that A has made no pre-contract representations to B about the quality or nature of a financial instrument that A is selling to B,"" and that again is an example which is pertinent to the facts in that case.

Then just for completeness, there is also a summary of authority in Leggatt LJ's judgment at paragraph 41 to 93 and he starts at 91 by referring to the concept of a basis clause and he says, "The term reflects language used in the cases which have recognised the principle of "contractual estoppel". The first of these was Peekay Intermark Ltd v Australia and New Zealand Banking Group." He cites Moore Bick LJ, ""There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document, neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel." The Tribunal will see that he goes on to cite further authority in 92, a similar statement of principle cited in 92 and the Springwell Navigation citation in 93.

So those are the headline principles on which we rely and it has been established that a consent order is capable of giving rise to a contractual estoppel and there is an example of that in the bundle behind tab 13. This was a case where there was an application for summary judgment and it was resisted by the defendant on the basis that he had never been validly served with a claim form and the particulars of claim and the claimant argued in response that the defendant was contractually estopped from making that argument by reason of a consent order and that was an argument that was accepted at paragraph 6 of this judgment. The paragraph is quite a lengthy explanation but we can see at the beginning of that paragraph that there were two factors that the judge considered relevant. He says, "…first of all, that there is no point in providing for a defence and counterclaim unless the parties have agreed to proceed as if the Particulars of Claim had been served. Only on that basis could there be a defence and counterclaim to respond to a particulars of claim."

Then he says, "The second point to the same effect is the agreement to proceed further by making a joint application to transfer the claim from the general Queen's Bench Division into this court," and so he says that those two matters as provided for in the consent order give rise to a contractual estoppel and one can see that he is satisfied to that effect. If you look on page 775, partway down, he says, "That is the clearest possible foundation for the estoppel claimed for by the claimant," and then at the top of page 776 he says, "the facts ----" he obviously goes on to deal in some detail with it but the essential elements are there, he says, the fact of the consent order, "in my judgment established an unanswerable estoppel." I do not understand it to be in dispute that a consent order is capable in principle of giving rise to such estoppel and so the question is what was the nature of the Parties' agreement in these proceedings. We put the matter in two ways; we say that the relevant contract is either the transfer order itself or, alternatively, the exchange of correspondence which led up to the

transfer order and which is then recorded as evidence in the transfer order. In our submission, it does not really matter which of those formulations is adopted and we say that the parties were clear and unequivocal in agreeing two things; first of all, we say that paragraph 9(2) is an agreement that the transfer of the proceedings to the CAT would not have an effect so as to alter, limit or exclude in any respect any element of the defendants' accrued rights in respect of any limitation defence," and that is, in our submission, what is recorded at 9(2). Then there is a further agreement in paragraphs 6 and 7 and that is that the claimants would serve a claim form in the CAT instead of particulars of claim in the High Court and we do say that that constitutes an agreement as to the legal effect of the claim form. The claim form is functioning as a substitute for particulars of claim.

The effect of those agreements, in our submission, is that the Claimants are estopped from making assertions which are inconsistent with the terms of what they had expressly agreed, so we say that they are estopped from claiming that the defendants' accrued rights in respect of their limitation defence in the High Court are defeated by reason of the transfer of the proceedings to the CAT and we say that they are estopped from claiming that the effect of filing the claim form in the CAT was to make a new claim within the meaning of Rule 30 of the rules rather than simply as the parties agreed to perform the function of particulars of claim.

The Claimants obviously dispute our construction. They say that paragraph 9(2) is no more than a statement of the Parties' common intention; that is their common intent, it is the wording that the Claimants have used in their skeleton argument at paragraph 32, in our submission, that is clearly not right when one takes into account the context of this agreement. If all the Parties were doing was agreeing a present common intention that may or may not prove to be right, then that deprives this provision of any practical commercial utility for the Parties. It begs the question of why on earth would

you bother to record it if you are simply recording a temporary present intention without the intention that it has any substantive impact whatsoever.

In our submission, it is clear in the context that these were provisions which were intended to have substantive effect as between the parties and they do so in a very even-handed way. I have made the submission that paragraphs 9(1) and 9(2) are a counterpart to each other. Both Parties are seeking to preserve their own substantive positions on the transfer to the CAT and the effect is that the Parties have agreed that their substantive positions would not be changed by reason of the transfer. That, in our submission, is the effect of paragraph 9(1) and 9(2).

In their skeleton argument, the claimants seem to place a lot of emphasis on the fact that paragraph 9(1) had a second sentence, whereas paragraph 9(2) did not have a second sentence and I am referring to the submission that was made at paragraph 34.2 of the Claimants' submissions. That was not a submission that was repeated orally and, in our submission, it does not go anywhere. It simply means that as has been discussed in exchanges with Mr Lomas, if the effect of the transfer was that there was an element of the Claimants' claim that was left unable to be transferred to the CAT, then the Parties have provided that that would remain in the High Court. The fact that there is no need for any sort of equivalent in the equivalent type provision in relation to the Defendants' rights in 9(2) does not in any way lead to the conclusion that they were intended not to have substantive effect.

We then heard today the submission that our construction deprives the Claimants of their rights and remedies and so we should use clear words in order to give rise to that effect. That is something of a surprising argument given that paragraph 9(2) is expressly concerned with the Defendants' accrued rights. It has nothing to do with the Claimants' accrued rights at all but, in any event, we do not accept that there is anything unclear about the wording of paragraph 9(2) and just to address the particular

points that are made in the skeleton argument as to why it might not be clear, it is said that paragraph 9(2) focuses on the effect of the transfer order itself whereas the Claimants are relying on the fact that they filed a claim form which is a later step - that is their skeleton argument at paragraph 34.6 - and that later step was expressly anticipated and provided for in the transfer order, paragraph 6 and 7, so, in our submission, it is completely artificial to try and separate them out and say that they were not in some way a function of the transfer.

The last submission that was made was that the Defendants did not have any accrued limitation rights because they were always liable to be defeated by the filing of a claim form in the CAT. That, in our submission, is exactly the consequence that this paragraph is intended to address. It is intended to ensure that the Defendants' substantive limitation rights as the claim is constituted in the High court - and those words appear in the wording of 9(2) - will not be defeated by reason of the transfer and so, in our submission, it is completely circular for the Claimants to say, "Aha, this paragraph has no effect for you because your rights are already defeated."

So for those reasons, even if we are wrong about the strict construction of the CAT rules, in our submission, the claimants are estopped from claiming that the outcome of the transfer is to undermine an accrued limitation defence when they have expressly agreed to the contrary in the transfer order. Unless I can assist further, those are my submissions.

THE CHAIRMAN: Yes, thank you very much, Ms Ford.

MR PERETZ: I have a few points on both aspects of my learned friend's argument. First, dealing with what I call the "is it a duck?" case, my learned friend started by complaining that the NHS's case focused on the claim form and we simply make no apologies for that and that is because in the context of the limitation rules the focus has to be on whether the correct procedural step was taken, not on why it was taken,

not on the past history leading up to its being taken or even the parties' understanding as to why it was taken or even what it actually was. The question must be an objective one, what was actually done, did it comply with the form and manner and timing aspect of the relevant rule. That is --- and that is a very important --- it is very important to preserve that in the interests of legal certainty, to make sense of the limitation rules.

My learned friend then went on to refer to the background leading up to the service of the claim form as being - I think she used the phrase as "an objectively ascertainable fact". We do not accept, firstly, that that is actually a true account of her position, and my learned friend did keep referring to what she said were the understandings of the parties as deduced by her from the correspondence but, in any event, it misses the point. My learned friend accepts that, notwithstanding the transfer of proceedings, nothing stopped us making a claim within the rule 119/rule 31 period. She accepts that we could have done that. Her argument is that that is not what in fact was done. I mean, leaving aside obvious trivia such as the reference number on the top of the claim form, it turns on her claim that we should have withdrawn the transferred proceedings first. There is no other complaint about the form, manner, content, or timing of the claim form - and I have flagged up in my opening and my learned friend has simply not dealt with it, she provided no explanation as to how on her account, how that needed to have been done. Would it have been enough for us to have written an email to the defendants the day before we filed the claim form? What steps should we have taken and when should it have been taken? As I say, I raised that question in opening and my learned friend has simply not dealt with it, there was no response to that from my learned friend.

Returning to the background to the transfer and the correspondence leading up to it, the truth is that the parties' focus in that correspondence was on the question of whether particulars of claim should be filed in the High Court before transfer or whether

the need to particularise should be met by filing a claim form in this tribunal. The focus of the parties was simply not on the legal consequences of a claim form in terms of the limitation period and it was hardly surprising as both sides knew [1431:14] that the Rule 119/31 period as of July 2021 had still some time to run, so there was simply no help from that correspondence as to what the parties' understanding was as to the effect of a claim form, to the extent that that understanding is relevant in any event, which we say it is not.

(14.31)

We agree that the effect of paragraph 9.1 and paragraph 9.2 of the transfer order was to preserve both parties' accrued rights as they stood in the High Court, but the point is - and my learned friend sort of keeps dancing around it - but the point is that the Defendants simply had no accrued rights in the High Court for a claim form not to be made in the CAT making a section 47A claim. They were vulnerable to that occurring, so there was simply nothing there to preserve. Now, they did have accrued rights under the Limitation Act 1980, but we are not disputing that the claim made - set out - in a claim form would be time-barred in relation to the limitation period set out under that Act, so that is completely irrelevant. We are relying, as we were always entitled to do, on the alternative rule 119/rule 31 period. My next point is on the question of what "made", or "making", or that various --

THE CHAIRMAN: Sorry. Just interrupting you. I mean, the argument is that the effect of the Claimants' case is to defeat the accrued rights – the accrued Limitation Act rights. That is the --

MR PERETZ: Well, that is a mere consequence of there being two limitation periods, which the claimant... The Pharma companies accept that there are two applicable limitation periods.

THE CHAIRMAN: Mmh.

MR PERETZ: It is because of the existence of the separate 119/31 period that the Defendants' Limitation Act rights were never going to be enough. So, it is not a question of in any way trespassing on the accrued rights. As I said, we accept that we have missed the Limitation Act 1980 period. So, they have their accrued rights, we respect them. In fact, when – in paragraph 9.2 of the transfer order in preserving their accrued rights, has had absolutely the commercial effect that it was always intended to have. It preserves the position under the Limitation Act in relation to this claim, but the defendants' problem is that does not help them because there is this separate period, and they accept there is a separate period --

THE CHAIRMAN: Mmh.

MR PERETZ: -- and it is the existence of that period that means that – it is not that their accrued rights under the Limitation Act have in any way been qualified or trampled; they just were never good enough.

THE CHAIRMAN: Yes. Subject to that point, the transfer order envisages that the claim form will simply be a further step in the transferred proceedings; it will not have any other status than that.

MR PERETZ: Well, it says that it – what is says in paragraph 6 and paragraph 7 is that the service of the claim form will operate instead - is the critical word "instead of" serving a particulars of claim. That is what is says.

THE CHAIRMAN: Mmh.

MR PERETZ: It does not go any further than that. It does not make any provision as to what the effect of the claim form will be, and this is really moving – more moving on now to the point about estoppel, but the point nonetheless – the point there is – I mean, my learned friend... I simply do not understand the basis on which my learned friend does not accept this, I am afraid. I mean, it is obvious that what she is arguing for is a limitation on our rights, but she is saying: you could not... The point is fairly basic.

She is saying you agreed not to do this, to put it at its most simple, and that formulation: you agreed not to do this, that is a limitation on your rights that you agreed not to do something; that is a limitation on your rights and that brings in to bear the cases that I went through in opening, that any agreement that is... under which somebody agrees not to exercise their pre-existing rights, and that includes rights in the limitation context, to accept a shorter or more qualified limitation period than that would otherwise apply, that has got to be done in clear (inaudible) expressed, and however one reads paragraph 6 or 7, it does not expressly say, it does not clearly say that the effect of that claim form will be somehow different from what the effect of a claim form served in the CAT normally would be. That, I think, is just a complete answer to my learned friend's point on this, on estoppel So, going back to the question of how you construe the verb "made" in its various forms and in the relevant rules. The first point I should make is that we do maintain, and this is one strand of our argument, that the claim form did make, in the sense of "commence", proceedings.

THE CHAIRMAN: Yes.

MR PERETZ: My learned friend simply has not addressed that strand of the argument but if that is right, then in a sense all her arguments that "made" must mean "commence" get her absolutely nowhere --

THE CHAIRMAN: Mmh.

MR PERETZ: -- because our response to them is saying: well, that is what we did. We made/commenced proceedings, and as I made the point in opening, there was no reason why we could not do that. The mere fact that there were existing transferred proceedings did not stop us making it. I even say that it is irrelevant that either the defendants or us understood that that is what we were doing, because the question of whether we truly commenced proceedings must be an objective question. The sort of subjective understandings of the parties do not really matter, even if this Tribunal was

in a position to determine what they were, which it is not, because we have no evidence about what the parties actually understood was happening. The claim form refers to section 47A. That is the only statutory provision mentioned at the heading. It says it is a claim under section 47A, and as Mr Lomas said, that potentially, even if not actually, means that it had a different scope to the transferred proceedings and we have the difficulty here that because the claim was never really pleaded out in the High Court, it is – we went to the claim form and it is a bit difficult to tell. It may well be that the claim as set out in the claim form is narrower than the originally pleaded claim. We will probably never know. We say it does not matter. The point is that the scope could be different, and it is brought under a different statute. It is a different type of claim than the claim in the High Court, and in particular the High Court claim is not tied to the 2013 decision; it could not be, because at that stage the 2013 decision was not final, but the section 47A claim is. Going back to the point... So that is another reason for saying that actually this is commencing a new claim and, critically, the defendants have no coherent account of what would have had to have changed, what would have had to have been different about the claim form for it to be a claim form starting new proceedings which they accept it could have done - it is a technical possibility - but what they do not explain is what the differences are between the claim form that was actually served and the claim form – the putative claim form that they accept could have started new proceedings. We have trivia like the reference number at the top, but no substantive account of why it is different -- and that is hardly surprising on our case because our case is simply, there is no difference.

THE CHAIRMAN: Mmh.

MR PERETZ: It is exactly the same as is the claim that they accept that we could have served and which would have interrupted the limitation period, and because it is exactly the same as the claim form they accept would have interrupted the limitation

period, it did interrupt the limitation period. So, for that reason, my learned friend's argument about – to the effect that "made" is the same as "commence", that argument does not get her home because it fails to deal with that strand of the argument. Just addressing what she says on that, well first of all she took you to the Merricks - I am not sure I am doing this in the chronological order - but one of the points she made was taking you to the Merricks case and said well, you have got to read rule 119 in a very narrow way because it qualifies our limitation rights under the Limitation Act 1980. That was the thrust of her claim. That, with respect, is completely misconceived on the basis of Merricks, because what Merricks is about is a change in the law. That is why it starts off – and my learned friend took you to this – with section 16 of the Interpretation Act. Section 16 of the Interpretation Act is about situations where a statute repeals another statute, and there is an issue as to the preservation of rights under the repealed statute. That is simply not the issue here, and Merricks is dealing with the question of should you interpret the new limitation period as removing limitation rights that had accrued when the new legislation came into force. Just not the issue here.

(14.41)

This is about the relationship between two separate and self-standing limitation periods and there is simply no basis whatsoever for construing the rule 119/rule 31 limitation period narrowly just because the defendants also enjoy Limitation Act 1980 rights, or indeed, to put it the converse way round, there is no reason whatsoever for reading the Limitation Act 1980 rights narrowly in circumstances which could occur where the rule 119/31 period had expired but the Limitation Act 1980 one had not. These are two self-standing limitation periods, they are to be read separately from each other and the existence of one does not qualify - there is no basis for saying that the existence of one should qualify the reading of the other. So, that deals with her

attempt to rely on that. In relation to headings, my learned friend took you to the passage in Bennion. I think she actually took you to the point which says that you also have to remember that the headings are no more than a brief summary of what the provisions below deal with. That is inevitably true. In terms of statute, it will be Parliamentary counsel, in the case of a statutory instrument, but a member of the government legal department drafts the statutory instrument, but it is their brief summary of what the following provisions are dealing with. Bennion makes the point that you need to be cautious about using the headings to deal with atypical cases which are not central to the general run of what the provisions are dealing with, and this is, I think we can all accept this, a somewhat unusual and atypical case. On the construction of rule 119(1) and (2), if we go to that at tab 22 of the authorities bundle, page 1,099 in my note: my learned friend wanted to make the point that you needed to read 119, the word "made" in 119(2) in the context of rule 119(1), and I just observe that the verb that is used in 119(1) is "commenced" whereas the verb used in (2) is "made" and that might suggest that the two are to be read somewhat differently. One does not normally expect elegant variation in statutes. That suggests that "made" could well have a wider meaning. And as to rule 119(2), we say that, if a claim were to be made in proceedings under s.47A - well, "Made" in proceedings must include the case where it is the claim form that starts the proceedings, so it does not have to, it does not matter - the normal situation is that there would not be existing proceedings, it is the claim form that kicks them off. So, "in proceedings" must mean, include the meaning, "Which starts proceedings" and we say generally "made" in proceedings under s.47A of the 1998 Act must include the case where it is the claim form that gives rise to the existence of those s.47A proceedings, and here it is the claim form that has given rise to the existence of those proceedings because it is the claim form that first mentions the existence, first brings into play the concept of s.47A proceedings in this

case. The transferred proceedings were not s.47A proceedings. My learned friend tried to argue that if we were right other claimants might find themselves having rules of limitation applied to their disbenefit. The only example that my learned friend has come up with of that is the one at paragraph 30 of her skeleton. With respect, we adopt the reasons that Mr Lomas put forward as to why that does not work, because in the situation that she sets out in paragraph 30, the parties would agree in a transfer order to preserve what would be, really be in that case the Claimants' accrued rights as of the date of transfer in relation to the relevant limitation period, and in that context that is a proper use of the phrase "accrued rights" because those would be the Claimants' accrued rights under the limitation period. And that is in complete contrast to the position here, where, as of the date of the transfer order, the defendants had no accrued rights in relation to the limitation period at issue, which was the rule 119/31 claim. They had accrued limitation rights in relation to the Limitation Act 1980 but they had none in relation to the limitation period that we are actually concerned with in this hearing. My learned friend relies heavily on the Sainsbury's judgment. We are, and we are entitled to, run two horses in relation to that judgment. One, we say it is distinguishable and, second, we say, if it is not distinguishable, it is not right. I am happy to put far more weight on the distinguishable. It simply does not cover the situation which we are in where a claim form is issued in the CAT and where limitation turns on that step. And there is no reason to suppose that Barling J was addressing that situation. He was addressing the point in a very different context, of reassuring claimants as to the protection of their rights on transfer. We say more broadly that the distinction between the cases where a claim form is filed in time and cases where no claim form is filed in time is neither arbitrary nor remotely surprising. That is just how the limitation rules work. Claim form in time or not a claim form in time. The defendants may regret their misfortune that we filed a claim form on the 28th of

February rather than on the 28th of March and they may regard that fact as serendipitous, to use their word, but it is no more serendipitous than the claim form that is filed in time because the person who filed it just managed to beat the sliding doors on the last train, as against a claim form filed late because the person tripped on the platform and the sliding doors slammed in their face. That is serendipitous. Well, yes, so what? That is just how limitation rules work. On estoppel, just going back quickly to the two authorities that my learned friend took you to when she opened on estoppel. Tab 15, which is First Tower, and my learned friend took you to Leggatt LJ's concurring judgment and she read through paragraphs 91 to 93. She did not read you 94 and we invite the tribunal to read the first few lines of that and particularly four lines down, the point made by Leggatt LJ, where he simply says, yes, of course they can do all of this "provided that they make their intention clear." So, there is yet another authority in support of our proposition that an estoppel that had the effect of limiting the defendants' rights - as I have said, on any view, that must be what my learned friend is arguing for, she is arguing for an estoppel which she says limits rights that for the purposes of the estoppel argument she has to accept that we had. So, it is a limitation on our rights, and it must be clear. And then tab 13, she took you to the judgment of his Honour Judge Waksman, as he then was, and took you to 775. I am afraid it is a rather long paragraph but if you look at 6 on page 775, it is worth noting the point that he makes, starting on the fourth line, and he looks at the commercial background to the position and he says, well, "I am quite satisfied that commercially, if the defendant is reserving their point on service, there is no way in the world that these parties would have agreed to set aside default judgment." Here what we say is, there is no commercial, there is no reason why it made any commercial sense, it would have made any commercial sense for the NHS to have agreed to limit its rights under rule 119/31, which for the purpose of the estoppel argument my learned friend has to

accept they had. Why would the NHS have done that? There is simply no commercial purpose to it at all. The commercial purpose of the transfer, paragraph 9.2 of the transfer order, is obvious and it leaps out of the page and it is effective and we do not dispute it: it preserves the defendants' rights to run an argument for limitation at the 1980 period had expired. That is its commercial purpose. It achieved it. We do not dispute it. But it did not go beyond that. Those are my responses to my learned friend's points, and my learned friend on my right challenged me to bring in another wildfowl reference and I am going to rise to that challenge. At recital 120 to the Commission decision, which is at the authorities, tab 3, page 59, if anyone wants to look at it, the Commission drew attention to the fact that Lundbeck referred in its internal documents to Citalopram as being its "golden egg", but this golden egg was not laid by a magical goose. On the contrary, during the period of the infringement the gold was extracted from the NHS and ultimately from patients and taxpayers by means of a conspiracy between Lundbeck and the other defendants that paid those defendants to keep out of the market while Lundbeck carried on supplying this essential first line treatment for depression and anxiety - a hugely important drug for the NHS - at inflated prices. The purpose of this litigation is to get redress for the NHS and ultimately for patients and taxpayers for the loss they suffered as a result of that illegal conspiracy. It should be allowed to proceed. Those are my submissions.

THE CHAIRMAN: Thank you very much. The tribunal is going to reserve its judgment.

**(Court Adjourned/ Judgment reserved)**

**(14.53)**