



Neutral citation: [2016] CAT 13

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1240/5/7/15

Victoria House
Bloomsbury Place
London WC1A 2EB

27 July 2016

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N:

DEUTSCHE BAHN AG AND OTHERS

Claimants

-and-

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Defendants

Heard at Victoria House on 26 April 2016

JUDGMENT

**(APPLICATION FOR AN ORDER UNDER
RULE 34 OF THE TRIBUNAL RULES)**

APPEARANCES

Mr Kieron Beal QC, Mr Tristan Jones and Mr Eesvan Krishnan (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants.

Mr Matthew Cook (instructed by Jones Day) appeared on behalf of the Defendants.

INTRODUCTION

1. By a decision adopted on 19 December 2007 (“the Decision”), the EU Commission (the “Commission”) found that the MasterCard payment organisation and the legal entities representing it, who are the three defendants to this claim and to whom I shall refer collectively as “MasterCard”, infringed art 81 of the EC Treaty (now art 101 of the Treaty on the Functioning of the European Union) and art 53 of the EEA Agreement by their arrangements concerning what was termed the “Intra-EEA fallback interchange fee”. The infringement was found to last from 22 May 1992 (as regards art 81 EC) and from 1 January 1994 (as regards art 53 EEA) until 19 December 2007.
2. The arrangements were found, in effect, to set a minimum price which merchants had to pay to their acquiring bank for accepting MasterCard branded consumer credit and charge cards and MasterCard or Maestro branded debit cards. The Intra-EEA fallback interchange fee (or “Intra-EEA MIF”) applied in Member States where no intra-country fallback interchange fee (or “domestic MIF”) had been determined.
3. The General Court of the European Union dismissed the defendants’ application to annul the Decision on 24 May 2012, and a further appeal was dismissed by the Court of Justice of the European Union (“CJEU”) on 11 September 2014.
4. There are over 1000 claimants in this action, belonging to six large corporate groups. In late 2012 and 2013, four actions were commenced in the High Court by the various claimants seeking damages from MasterCard for losses allegedly caused by the infringements of EU and EEA competition law found in the Decision and also for further alleged infringement of those provisions and of various domestic competition laws of states in which the claimants operated, including arrangements concerning the domestic MIF in several countries. Those actions were subsequently consolidated and I refer to them as “the High Court proceedings”. MasterCard raised limitation defences to those claims under the various foreign laws which it contends govern the different claims in the High Court proceedings.

5. On 21 October 2015, the claimants commenced the present claim in the Tribunal (the “CAT claim”) as a protective measure in the light of those limitation defences. In the CAT claim, the claimants seek damages for loss arising only from the infringement found in the Decision. The High Court proceedings accordingly overlap with the CAT claim but are significantly more extensive in scope.
6. MasterCard has applied under rule 34 of the Competition Appeal Tribunal Rules 2015 (the “2015 Rules”) for an order that the Tribunal has no jurisdiction to hear the present claim or, insofar as it would otherwise have jurisdiction, should not exercise that jurisdiction, on the ground that the CAT claim is an abuse of process by reason of the pending High Court proceedings.
7. At the conclusion of the hearing, I announced that this application is dismissed. This judgment sets out the reasons for that conclusion.
8. I should add that the applications (the third defendant made a separate application from that brought by the first two defendants but they are in similar terms) also relied on two further, independent grounds. First, MasterCard contended that under various jurisdiction agreements between the parties, the High Court was the sole and exclusive forum for the hearing of such claims so that the Tribunal had no jurisdiction. Secondly, MasterCard contended that the Foreign Limitation Periods Act 1984 (the “FLPA”) applied to a claim brought pursuant to sect 47A of the Competition Act 1998 (the “CA”), and that since the claimants’ pleaded case was that their claims were governed by Belgian law, their claims were time-barred under that law. However, on 19 April 2016, the date for exchange of skeleton arguments, MasterCard informed the claimants and the Tribunal that they had decided to withdraw the first ground. And as regards limitation, since the question whether the FLPA applies to a claim under the sect 47A CA arose also in other proceedings before the Tribunal, by consent that ground of MasterCard’s applications was heard by a full tribunal together with a preliminary issue in those other proceedings and is accordingly the subject of a separate judgment: [2016] CAT 14.

THE LEGISLATIVE FRAMEWORK

9. To understand how the issue arises, it is necessary to appreciate the governing legislative framework.
10. The High Court and the Tribunal have an overlapping jurisdiction for private competition law actions. The scope of that overlap significantly changed with effect from 1 October 2015 when the Consumer Rights Act 2015 (the “CRA”) came into force, as did the new 2015 Rules, replacing the Competition Appeal Tribunal Rules 2003 (the “2003 Rules”).
11. The High Court has always had full jurisdiction for claims for damages for infringement of competition law. However, prior to 1 October 2015, the jurisdiction of the Tribunal was limited to so-called “follow-on” claims, which were based on an infringement of either EU or UK competition law which had been determined by a decision of the Commission or the UK competition authority, or by the Tribunal on appeal from a decision of the latter (an “infringement decision”). The CRA substituted a new sect 47A CA whereby, since 1 October 2015, the Tribunal has full jurisdiction for competition law damages claims: i.e. for stand-alone claims in which there has been no prior infringement decision, as well as for follow-on claims. The new sect 47A CA applies to claims whenever arising: Sched 8, para 4(2) CRA.
12. Both before and after 1 October 2015, the Tribunal was able to transfer any claim for damages under sect 47A CA to the High Court: rule 48 of the 2003 Rules; rule 71 of the 2015 Rules.
13. The rules on limitation for competition law damages claims differ as between the High Court and the Tribunal. In the High Court, limitation is governed by the Limitation Act 1980 (the “LA”). The relevant limitation period is six years from the date on which the cause of action accrued: sect 2 LA. But this is subject to postponement where any act relevant to the claimant’s right of action has been deliberately concealed by the defendant and could not with reasonable diligence have been discovered: sect 32 LA. Further, the LA expressly does not apply to an action for which the period of limitation is prescribed under any other enactment: sect 39 LA. This means that a

competition claim in the High Court governed by foreign law will be subject to the relevant foreign rule of limitation by reason of the FLPA.

14. In the Tribunal, prior to 1 October 2015, under the old sect 47A, a competition damages claim could not be started before an infringement decision, and even after an infringement decision could not be started without the permission of the Tribunal before that decision became final through the determination of any appeals or the time for appealing having expired: sect 47A(5) and (7)-(8). The governing limitation provision was set out in rule 31 of the 2003 Rules:

- “(1) A claim for damages must be made within a period of two years beginning with the relevant date.
- (2) The relevant date for the purposes of paragraph (1) is the later of the following—
 - (a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;
 - (b) the date on which the cause of action accrued.
- (3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant. [...]”

15. Under the new sect 47A, the restriction on the commencement of a competition law damages claim no longer applied. For claims *arising* after 1 October 2015, there is a new limitation regime pursuant to sect 47E CA, which effectively applies the same regime as the High Court. But for claims *arising* before 1 October 2015 (although commenced after 1 October 2015), there is a transitional limitation regime pursuant to rule 119(2)-(4) of the 2015 Rules:

- “(2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in—
 - (a) proceedings under section 47A of the 1998 Act, or
 - (b) collective proceedings.
- (3) A claim falls within this paragraph if—

- (a) it is a claim to which section 47A of the 1998 Act applies; and
 - (b) the claim arose before 1st October 2015.
- (4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015 continue to apply to the extent necessary for the purposes of paragraph (2).”
- 16. Here, since the CAT claim was commenced after 1 October 2015 but arose well before that date, it is governed by this transitional regime.

THE HIGH COURT PROCEEDINGS AND THE CAT CLAIM

- 17. The various claimants commenced proceedings in the High Court on 18 December 2012 and 21 February 2013, and further stand-alone proceedings were issued on 18 December 2013. As mentioned above, all those claims have been consolidated. In the defence to the High Court proceedings, MasterCard contends that the claims are governed by various foreign laws under which limitation has expired for certain periods of the claims.
- 18. On 11 September 2014, following the dismissal of MasterCard’s appeal by the CJEU, the period for filing a claim in the Tribunal under the old sect 47A commenced: see para 14 above. On 30 March 2015, the claimants’ solicitors wrote to MasterCard’s solicitors pointing this out and, referring to the potential for an alternative action in the Tribunal, stated:

“To avoid multiplicity of proceedings and additional associated costs, or the need for separate claims to be issued in the CAT with an application to transfer to consolidate the claims, we would ask your clients to agree that they will not take any limitation defence in the present proceedings where those claims could otherwise be validly brought in the CAT.”

- 19. MasterCard would not agree to this course, and indeed the letter in response from its solicitors stated:

“... to the extent that any of your clients seek to commence parallel proceedings in the CAT, this will be opposed to the maximum extent possible.”

- 20. The claimants’ solicitors further pressed their suggestion by letter dated 18 May 2015, indicating that if MasterCard did not accede to their invitation then it would be sensible for them to issue claims in the Tribunal and request a transfer to the High Court so that all the claims can be before the same court.

In their reply dated 18 June 2015, MasterCard’s solicitors contended that, for almost all the claimants, the jurisdiction agreements between the parties precluded any claim other than in the High Court; and further asserted that for the claimants to bring claims in the Tribunal would be an abuse of process since they would be duplicating the claims before the High Court.

21. Against the background of that correspondence, the claimants issued the CAT claim on 21 October 2015. The claim form refers to the High Court proceedings and makes clear that the claim is brought in order to protect the claimants’ position on limitation insofar as it affects the follow-on elements of their claims. The claim form states accordingly:

“7. The Claimants invite the CAT to:

- a. allocate these claims to (or to a panel including) the honourable Mr Justice Barling, who is the allocated Judge in the High Court proceedings;

and in due course,
- b. transfer these claims to the High Court under rule 71 of the 2015 CAT Rules, with a view to their consolidation with the existing High Court proceedings.

...

10. The Claimants rely on these claims only if and to the extent that their existing claims in the High Court are time-barred under any applicable law of limitation (which is denied).”

THE PRESENT APPLICATIONS

22. MasterCard contends that it is an abuse of process for the claimants to bring the CAT claim when the claims which it makes are already raised in the pending High Court proceedings, and in any event to commence the CAT claim only when the High Court proceedings have already been pending for some three years without having given any indication earlier than March 2015 that such a course was contemplated.
23. Since the claimants’ sole purpose in bringing the CAT claim is to get the benefit of the special limitation period of two years following the infringement decision becoming final, I should add that MasterCard has also contended that the FLPA applies to a claim in the CAT under sect 47A just as it does to a

claim in the High Court, so that if foreign law governs the claim then the relevant foreign rules of limitation will apply. As explained above, that contention was heard by a full tribunal along with another case in which the same point was raised, and is the subject of a separate judgment. If MasterCard's contention in that regard is correct, it would seem that there is no benefit for the claimants in pursuing the CAT claim in any event. But that is not directly relevant to the issue of abuse addressed in this judgment.

ABUSE OF PROCESS

24. In his submissions on behalf of MasterCard, Mr Cook relied on what is known as the rule in *Henderson v Henderson*, as subsequently developed by more recent judicial decisions.
25. The original formulation by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 114-115, was that:

“where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

26. The authorities were extensively reviewed in *Johnson v Gore Wood & Co* [2002] 2 AC 1 by Lord Bingham, giving the leading judgment on this issue (with which Lords Goff, Cooke and Hutton agreed) and he expressed the governing approach as follows (at 31):

“... *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would

not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice. ”

27. The rule in *Henderson v Henderson* applies where there has been a prior adjudication of the dispute between the parties, and in *Johnson v Gore Wood* it was held that the same principle applies when the first action has been settled. In his judgment, Lord Millett explained (at 59):

“It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon.... While...the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression.”

Emphasising that the only question was whether the course there pursued by the claimant was oppressive or otherwise an abuse of the court's process, Lord Millett stated:

“As May LJ observed in *Manson v Vooght* [1999] BPIR 376. 387, it may in a particular case be sensible to advance claims separately. In so far as the so-called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.”

28. Hence in that case, the House of Lords unanimously held that it was not an abuse for Mr Johnson to bring a personal claim for professional negligence against a firm of solicitors arising out of a conveyancing transaction, although proceedings concerning the same alleged negligence brought by a private company which Mr Johnson controlled had been settled over two years earlier. If Mr Johnson had joined his personal claim with the company's claim, that would have caused substantial delay which would have caused the company to go into liquidation, and the defendant's solicitors had been put on notice that Mr Johnson would pursue a personal claim well before the company's claim was settled.
29. The general principles in this area of the law have now been authoritatively set out by Lord Sumption (with whom the other members of the Supreme Court agreed) in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160, at [17]:

“Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is “cause of action estoppel”. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgement has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as “of a higher nature” and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principles of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State TR 355. “Issue estoppel” was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197 – 198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there

is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.”

And Lord Sumption further explained, at [25]:

“Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court’s procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.”

30. The *Henderson v Henderson* principle, whether in its original or extended form, will not apply if the previous action has not concluded. As May LJ stated in *Manson v Vooght*, in a passage quoted with approval by Lord Bingham in *Johnson v Gore Wood* (at 29), that principle “is encapsulated in the proposition that the litigant could and should have raised the matter in question in earlier concluded proceedings.” But the considerations which underpin the principle may be said to inform the concept of abuse of process generally.

WAS THERE ABUSE OF PROCESS HERE?

31. Although initially put forward in terms of *Henderson v Henderson*, Mr Cook recognised that case did not fall directly within that principle. But he said that the fact that the first action has not been concluded cannot be decisive – otherwise where the court refused permission to amend a claim because the application was made only shortly before trial, a claimant could circumvent the consequence of that decision by starting a second action. However, if the bringing of such a second action was held for that reason to be an abuse (which I think is not necessarily the case), that would be a logical extension of *Henderson v Henderson* since the first action would be concluded or determined well before the second came to trial, so the pursuit of the second action after judgment in the first would engage the principle. In any event, that situation is far from the present case, where the claimants have expressly proposed that the High Court proceedings and CAT claim be heard together and where there is no procedural obstacle to that course.
32. The fact that there are two overlapping jurisdictions does not mean that a claimant must make an irrevocable election as to which it pursues. The proper

approach to a second action because of a limitation defence barring the first was considered by the Court of Appeal in *Nayif v High Commission, Brunei Darussalam* [2014] EWCA Civ 1521, [2015] 4 All ER 159. There, a claim brought in the employment tribunal for psychiatric injury which the claimant alleged he suffered by reason of harassment and abuse in his employment, which he said was attributable to race discrimination, was dismissed as being out of time, and his application for permission to appeal was refused. The claimant then issued proceedings in the High Court in negligence and breach of contract in respect of the same alleged injury. The Court of Appeal held that the second action should not be struck out on grounds of res judicata or issue estoppel. Giving the lead judgment, Elias LJ noted (at [25]):

“... as a consequence of the claim having been lodged too late, the applicant did not have the opportunity to have the complaint considered at all. It was not a case of someone choosing to forego that opportunity. On the contrary, the appellant wished to have the merits adjudicated upon but was unable to do so.”

And Elias LJ continued (at [27]):

“The underlying principle is that there should be finality and matters which have been litigated, or would have been but for a party being unwilling to put them to the test, should not be re-opened. But I see no justification for the principle applying in circumstances where there has been no actual adjudication of any issue and no action by a party which would justify treating him as having consented, either expressly or by implication, to having conceded the issue by choosing not to have the matter formally determined.”

33. *Nayif* was approached on the basis of Lord Sumption’s first and fourth categories set out in the *Virgin Atlantic* case, since there the first action had been concluded by a dismissal. It was not even suggested that the sixth category, abuse of process, was engaged. In my judgment, the resort by a claimant to both of two overlapping jurisdictions is not in itself an abuse, and indeed may be well justified when the second is invoked because of a potential obstacle to his claim that applies only in the first. The question is whether such conduct is oppressive or amounts to harassment of the defendant.
34. Here, the circumstances are even further from abuse than those in *Nayif* since the first set of proceedings are very far from being concluded. The claimants are not seeking to have successive trials in different forums, or to put it colloquially, “a second bite of the cherry”. On the contrary, they expressed at

the outset of the CAT claim, in their claim form, their desire for transfer so that the two proceedings may be heard together.

35. Although not cited in argument, I note that this approach is supported by the judgment of Arnold J in *Actavis UK Ltd v Eli Lilly & Co* [2014] EWHC 1511 (Pat), [2015] Bus LR 154, at [371]:

“...it is not an abuse of process to bring a further claim on the same cause of action during the pendency of an existing claim if there is a good reason for doing so and case management tools like consolidation are used to avoid unnecessary duplication of effort and cost: see *Rosenberg v Nazarov* [2008] EWHC 812 (Ch) at [71] – [77] (Thomas Ivory QC sitting as a deputy High Court judge). A common example of this in the intellectual property field is where the claimant is relying on a cause of action, such as secondary infringement of copyright, which requires knowledge or reason for belief on the part of the defendant. Prior to the CPR, it was common for claimants, where there was doubt that the defendant had the requisite knowledge or reason for belief as at the date of the writ, but it was clear that the defendant did have it at a later date, to issue a second writ and apply to consolidate the two actions or to have them heard together. Under the CPR it is possible to take the simpler course of pleading facts arising after the date of the claim form. If there was doubt about that, however, it would not be an abuse of process for the claimant to issue a second claim form in order to ensure that it was able to rely on the defendant’s knowledge or reason for belief as at the date of the second claim form in the alternative to the date of the first claim form and then to apply for the two claims to be heard together on the same evidence.”

36. Mr Cook submitted that even if, contrary to his argument, starting an overlapping claim in the Tribunal was not in itself an abuse, here the claimants’ conduct came within Lord Sumption’s sixth category because they waited three years before even notifying MasterCard of their intention to bring a claim in the Tribunal. He asserted that much wastage of effort on the part of MasterCard had resulted which would have been avoided if the CAT claim had been notified earlier.

37. It seems to me that, in most circumstances, complaints of that kind, if made out, are more appropriately dealt with by a penalty in costs and would not constitute an abuse of process justifying the extreme course of dismissal of the second action altogether. However, since abuse of process involves a “broad, merits-based” judgment, I do not exclude the possibility that there might be an exceptional case where for a claimant to wait a long time without giving any indication that it was contemplating a second action could perhaps amount to an abuse. I will therefore consider in more detail what happened here.

38. The original High Court proceedings included stand-alone claims, both on the basis that the infringement by reason of the Intra-EEA MIF continued well beyond the period covered by the Decision and on the basis of various domestic MIFs, relying on the decisions of certain domestic competition law authorities. The total period embraced by the various claims was 22 May 1992 to date (but not all the claims covered that entire period). The defences pleaded by MasterCard in 2013, as regards limitation, addressed the various periods involved. For the periods up to 10 January 2009, MasterCard's primary contention was that Belgian law was the relevant law (along with English law up to 1 May 1996, the date from which the double actionability rule was abolished by statute), except as regards the alleged infringements of domestic competition law, for which the relevant domestic law was the governing law. Alternatively, MasterCard contended that the law of the country in which the relevant transactions took place was the governing law for that claimant's claim. For the periods after 11 January 2009, to which Regulation (EC) No 864/2007 (the Rome II Regulation) applies, MasterCard asserted that in relation to loss and damage suffered in a particular country the claim is governed by the law of that country. The defences set out in a list the date on which the claims would be time-barred under 24 different laws (including the laws of England & Wales and Scotland). Those dates result from a simple application of the primary limitation period under those various systems of law, without regard to any potential suspensory or 'tolling' provision analogous to sect 32 LA.
39. In December 2013, the claimants issued a further claim in the High Court, making further stand-alone claims. A few days thereafter, by order of Sales J, all the High Court proceedings were stayed pending delivery of the judgment of the CJEU in MasterCard's appeal against the decision of the General Court. That accordingly put those proceedings on hold until 11 September 2014, when the CJEU handed down its judgment.
40. In the months that followed, the claimants served amended requests for further information, to which MasterCard responded. But in its responses to a series of requests regarding the circumstances of the various interchange fees, MasterCard made clear that since it contended that the primary limitation

period which applied to the Intra-EEA MIF was governed by Belgian law and that accordingly the claims were time-barred prior to 18 December 2007, it would not provide information regarding those fees prior to that date. Since the claimants' claim for the period after 18 December 2007 was framed both as a stand-alone claim (on the basis that the infringement continued beyond the date of the Decision) and a follow-on claim (on the basis that there was a run-off period in which the charges were inflated by reason of the earlier charges condemned in the Decision), that work would have had to be done in any event, irrespective of any potential claim in the Tribunal.

41. All four High Court proceedings were consolidated, and on 27 March 2015 the claimants served Amended and Consolidated Particulars of Claim in the four actions, to which MasterCard served an Amended and Consolidated Defence in May 2015. By that stage, of course, the claimants' solicitors had written to put MasterCard on notice that they had an alternative claim in the Tribunal, albeit of more limited scope as that was a follow-on claim. And, as I understand it, it was only after Barling J ordered on 11 November 2015 that there be a preliminary issue as to limitation in the High Court proceedings that MasterCard for the first time produced a detailed pleading of the limitation position under various foreign laws, in January 2016.
42. The CAT claim, as I explained at the outset, is only a follow-on claim. Although the High Court proceedings overlap with it, they are much broader in scope, both as to the periods covered and the basis on which the claims are put. Given their broader scope and the procedural chronology which I have summarised above, I am not persuaded that significant work by MasterCard's legal advisers would have been avoided if the claimants had given notice of a potential CAT claim earlier than 30 March 2015.
43. Moreover, although MasterCard suggested that the claimants could have started their CAT claim much earlier, it is by no means clear that they would have been able to commence this claim in the Tribunal prior to the judgment of the CJEU on 11 September 2014. Under sect 47A(5)(b) and (8) CA in the form the statute then took, such a follow-on claim could not be brought before all the appeals had been determined, save with permission of the Tribunal.

The Tribunal's jurisprudence as at that time made clear that such permission was the exception, with the burden resting on the would-be claimant to satisfy the Tribunal that justice could not properly be done if the claimant had to wait until the final determination of appeals in the EU courts: see *Emerson Electric Co and ors v Schunk GmbH and ors* [2008] CAT 8. It is therefore uncertain whether the claimants here would have succeeded in obtaining permission, and I think it is unreasonable to criticise them for failing to make an uncertain application.

44. Furthermore, when the claimants did assert that they could bring a claim under sect 47A CA before the Tribunal, the position adopted by MasterCard was that the Tribunal had no jurisdiction by reason of the exclusive jurisdiction clauses. That contention was indeed pursued by MasterCard in these applications, and abandoned only a week before the hearing. I have little doubt that MasterCard would have given the same response if the claimants had raised the prospect of a CAT claim in 2012 instead of in 2015. In my view, it does not sit well for MasterCard to argue that the claimants are to be condemned for abuse of process because they failed to start earlier a claim in the Tribunal which until only very recently MasterCard asserted had no jurisdiction at all to hear that claim.
45. In my judgment, some of these factors would be sufficient individually to dispose of the contention that it was an abuse of process on the part of the claimants not to have given notice of a CAT claim prior to late March 2015. Taken together, I consider that the result is overwhelming. The commencement of a claim under sect 47A CA in the Tribunal as a protective measure, with the expressed intention to have that claim heard together with a pending claim in the High Court, in the circumstances here, does not even come within striking distance of an abuse. Indeed, until the question of whether the FLPA and foreign rules of limitation apply to a claim under sect 47A had been determined, I consider that it is the course which many prudent legal advisers, faced with a limitation defence in the High Court, would have followed.

46. Accordingly, this part of MasterCard's applications is dismissed.

The Honourable Mr Justice Roth
President

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 27 July 2016