IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1240/5/7/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 April 2016

Before:

THE HON MR JUSTICE ROTH
(President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

DEUTSCHE BAHN AG
& Ors. Claimants

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SPRL Defendants

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HEARING

A P P E A R AN C E S

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

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

THE PRESIDENT: Yes, Mr. Cook.

MR. COOK: Sir, as you will know, this is my application to have the present claim struck out as an abuse of process on the basis the claimants have made exactly the same claim in the High Court, which has been the subject of ongoing proceedings since December 2012 in relation to most of the claimants and February 2013 in relation to the Hertz claimants.

Sir, in a number of places in their skeleton argument - if you turn to para.21 that is an example - the claimants used the terminology 'the CAT claim' to try and distinguish the claim that they make in this Tribunal from the claim they make in the High Court. I make the point that the CAT claim could not have been commenced any earlier than it was, and we will come back to why we say that that is irrelevant and not right in any event.

To be quite clear, the claims that are being brought are, to the extent they overlap, identical. There are some additional claims in the High Court but the claim is identical. It is a follow on claim for damages for breach of statutory duty based on the Commission decision that MasterCard's intra EEA cross-border interchange fees from May 1992 to 19th December 2007 were anti-competitive. That is the relevant claim made in the High Court, it has been the claim made since December 2012, and it is identical to the claim that three years later they try and pursue in this Tribunal. We simply say that coming along three years down the road and trying to issue the same claim in a different court, because you think you might get a better outcome is abusive, and that is slap bang in the middle of the principles laid down in *Henderson v Henderson* originally, as that has evolved through into *Johnson v Gore Wood*.

Sir, I was going to start by going to those cases. I appreciate that you are going to be familiar with them to some extent, and both parties of course rely upon them, but there are some differences of emphasis, and I was going to lead through from *Johnson v Gore Wood* into the additional authority you were kind enough to point our attention to, *Virgin Atlantic v Zodiac*, namely the latest word of the Supreme Court.

THE PRESIDENT: Can I be clear about one thing. You made the point just now, 'three years down the road', and I think you say in your skeleton argument, para.44, that it was open to the claimants to seek permission from the Tribunal to commence their Tribunal claim at the same time as the High Court claim, there is no reason to think the Tribunal would refuse permission, and so on. Are you saying, as I understood that, that if they had sought to commence at the same time in the Tribunal that would not be an abuse, and it is the three years that makes it an abuse?

MR. COOK: I was not intending to. You may force me to fight that scenario----

THE PRESIDENT: I am trying to understand what you say, and you make the point now 'three years down the road'.

MR. COOK: I emphasise the point 'three years down the road' on the basis that had it been issued at the same time back in December 2012 then there might have been - and I only say might have been - practical case management solutions at that stage which might have mitigated the abuse and that might have allowed, therefore, the court to say that it was acceptable. The difference is, because we are three years down the road, this is something where we have done a tremendous amount of work in the High Court, and what we are saying is that the half suggestions being made about some kind of case management solution are simply far too late.

THE PRESIDENT: What would have been the case management solutions? First of all, they could not just have issued, they would have had to seek permission. Are you saying MasterCard would not have objected?

MR. COOK: As a starting part, Sir, had they told us that that was the plan all along then it almost does not matter whether the Tribunal gave permission or not. The parties, if it was the case they had commenced the High Court claim and everybody understood that they were either going to seek permission to go the CAT immediately or that the High Court was going to be there but then the CAT claim was going to come in as soon as it could, that would be something where everybody could have looked at solutions at that stage, instead of which it is March 2016----

THE PRESIDENT: What sort of solutions would there have been? What do you mean by 'solutions'?

MR. COOK: One possibility is that you hear them all; they are brought in one forum in terms of case management and, at that stage, it might be relatively easy to look and see what is the reason why they want two claims and what is the easiest way to determine if there is an advantage to those two claims.

THE PRESIDENT: We all know it is limitation.

MR. COOK: Absolutely, but what you are hearing on Friday will, to some extent, give an idea and that will potentially be the start of the process. But, in the High Court there is a situation in which we are faced with many different foreign laws – originally it was up to 25 different foreign laws and factual issues about how those all operate. That is a process that has been going on now for three and half years, which is a very heavy process.

THE PRESIDENT: But you have to do that because the High Court claim embraces matters that cannot be heard in this Tribunal under a CAT claim.

MR. COOK: The limitation issues are not identical in relation to the two of them. First, the follow-on action is only from 2007 onwards, so the limitation issues in relation to that are very limited on the basis that, as you would expect, if you commence a claim in 2012 matters going back to 2007 there are a couple of countries we say they are limited in, but in many cases they are not, the issues are much narrower.

There are some domestic claims – domestic claims are only issued a year later. There were four original domestic claims, they were then widened a year later. Again, in relation to those, there are only some countries, there are only some periods, there are some limitation points but not the same swathe of issues in relation to that. So the scope of those points would have been far narrower potentially, so what we are saying is that at that stage the right thing to do in that period, what the court would have the opportunity to do, is see if there was a way to cut through it more quickly. One way to cut through it would be to determine the Foreign Limitation Act point in relation to the effect on the Tribunal's Rules, on the basis that if the Tribunal does not have substantially different limitation rules as the outcome of that process, then the advantage of having two claims goes away, and that is obviously a narrower point of law than the multiple legal jurisdictions that we have been getting into in the High Court for three years.

So there would undoubtedly, we suggest, have been scope at that stage, knowing that there was the possibility of two possible claims, if we had been told that, to try and ensure that we were not fighting multiple fights, some of which may turn out to be wasted.

THE PRESIDENT: So is this your understanding? You say that there were more limited standalone claims only for some countries – how many countries are involved altogether in the High Court claim?

MR. COOK: I believe it started off with 23, this is the same in relation to both claims, and I believe we have now got down to two countries and that is simply on the basis that they dropped some of the smaller countries, just on the basis it was not worth the----

THE PRESIDENT: 18 excluding the UK?

MR. COOK: 18 including the UK.

THE PRESIDENT: Including the UK?

MR. COOK: I believe., but that has been there all along, and that is in relation to the follow-on action because they say the follow-on action leads to----

MR. BEAL: My Lord, I am sorry to rise and interrupt my learned friend. Can I just clarify one thing so that I understand what is being said against me about what my case is? Our case is

that we have a claim that certainly goes back before 2007 for all of the relevant aspects of the claim in the High Court. We have not limited it to any way in shape or form.

THE PRESIDENT: I think what is being said is that insofar as it goes back before 2007. The follow-on claim is the same as in the CAT claim. The differences are that your High Court claim goes on after 2007, but I want to come back to that. Secondly, there are some standalone claims in the High Court which are not in the CAT claim, but they relate to just a limited number of countries. That is what is being said.

MR. BEAL: Fine, I am sorry, I misheard. I apologise for rising.

THE PRESIDENT: This is just a question of fact. I have not looked at the High Court pleadings and all those sorts of things. Is that basically right, Mr. Beal?

MR. BEAL: The follow-on claim in this jurisdiction has been deliberately crafted to represent the follow-on claim that is pleaded in the High Court so far as possible to minimise the need for changing anything.

The stand-alone claims relate to a number of countries. Whether or not they are limited is a matter for debate. The parties have chosen to restrict for test claim purposes the claims to four countries for limitation purposes, but the claim itself is not so limited.

THE PRESIDENT: The stand-alone claims, are they for as many countries in the High Court as the follow-on claims?

MR. BEAL: Yes, there is no sub-set of claims on the stand-alone basis that do not reflect the follow-on claim.

THE PRESIDENT: Yes, because what is said, if you look at Mr. Cook's skeleton argument, para.17, the CAT claim mirrors the High Court claim. In addition the original High Court claim - it does say 'original':

> "… infringement continued after December 2007, and the claimants advanced four stand-alone claims in relation to domestic interchange fees in four countries, two of which have since been dropped."

MR. BEAL: The stand-alone claims are not so limited. The original claim did not include stand-alone claims. There was a subsequent claim form that brought the stand-alone claims in, and that has been consolidated. What my learned friend is referring to there are four separate domestic administrative decisions of a national competition authority upon which we based a parallel claim to the Commission, two of which have now gone because of developments in those particular jurisdictions.

THE PRESIDENT: So the stand-alone claims are for as many countries as the follow-on claim. So there would have to be a limitation issue in the High Court for all of them.

MR. COOK: With respect, my learned friend has left out a certain amount of quite important detail. Firstly, the claim as originally commenced only raised four stand-alone claims, which arise at para.17. What then happened a year later, was they issued stand-alone claims in relation to a number of other jurisdictions.

THE PRESIDENT: That is your para.24?

MR. COOK: Yes, that is para.24, but it is important to bear in mind that those are stand-alone claims only in relation to periods and countries where MasterCard itself set domestic interchange fees. In certain countries that happens very, very late indeed.

THE PRESIDENT: There will be different limitation periods in different countries. Even maybe December 2007, the follow-on claim, it is in time if it is the English limitation period, but I think you say it is various foreign limitation periods. Is there any foreign limitation issue for a claim commenced relating to damage occurring after 19th December 2007?

MR. COOK: There are a couple. It is a much narrower scope.

THE PRESIDENT: So there would be. On any view, there are going to foreign limitation issues in the High Court, even if they had started a CAT claim, or asked for permission to do it at the same time.

MR. COOK: There would have been some issues.

THE PRESIDENT: So you could not just have said, we will deal with the CAT limitation and then that will resolve everything.

MR. COOK: We are not saying it would have resolved everything. What it would have allowed us to do is, if we resolved the CAT limitation point at that stage and said what has actually been pleaded there, and there is a difference in the pleading. Originally it was just four countries, and what they added on a year later, but in relation to those there are a number of countries where MasterCard started setting domestic interchange fees, Germany being an example, where we started doing that, certainly for one kind of card, in 2014. So their claim only goes back in relation to German domestic, as a stand-alone claim, to 2014. Unfortunately, these are big and messy cases and one cannot say that there is a silver bullet which would kill everything. However, my submission is that ultimately the foreign law limitation issues in relation to stand-alone claims are dramatically more limited than in relation to the claim that goes all the way back to 1992 because the stand-alone claims are in relation to much shorter periods in almost all situations. As a result, in many of them, there is simply no live issue of limitation because the claims have simply arisen very, very recently.

So we would not have pleaded out, we would not be dealing with that many foreign laws and that much complexity if it was clear that the core of the claim as originally commenced going back to 1992 was going to be dealt with in the CAT by reference to CAT Rules because they provided some additional advantage, and the extent of that advantage.

So what we do say is that the problem here is, because there was no indication given prior to March 2015 and the CAT claim was only commenced in October 2015, the parties have done a tremendous amount of work in relation to the High Court, and will now end up doing work in relation to the CAT limitation points. That is being vexed twice, and that was something that certainly could have been mitigated had this been something they had indicated at the start. Whether it could have been mitigated enough may be a different question, but it would certainly have been dramatically less problematic had----

THE PRESIDENT: What has happened in the High Court action? There was a stay there to await the Court of Justice decision, was there not?

MR. COOK: There was a stay, but that was a stay after close of pleadings. By that stage we had pleaded out limitation defences under 25 different laws.

THE PRESIDENT: So what happened was pleadings essentially under different laws with expert assistance?

MR. COOK: Yes. In a normal case one might think just doing a pleading would be a relatively easy matter, but we were into pleading 25 foreign laws of limitation. That is a much more substantial job----

THE PRESIDENT: Some of which, I think you accept, you would have to do anyway, because certain parts of the High Court claims are outside the scope of what was then s.47A, some of which you say could have been possibly avoided - is that what it comes to?

MR. COOK: Absolutely, yes. In terms of where we are now we are pushing on towards a ten day preliminary issue trial, and the parties have carried out disclosure and are crystallising their case in terms of a number of foreign laws for test cases. To some extent, that is where we have got to in the High Court now and we are so far down the road it is difficult to change direction at this stage.

THE PRESIDENT: Is your client not also saying that this Tribunal had no jurisdiction in this matter? That was your position.

MR. COOK: That was always a point in relation to the jurisdiction clause in our agreements.

THE PRESIDENT: I understand that. When you say they should have started in the CAT at the same time, had they done so you would be saying this Tribunal has no jurisdiction.

MR. COOK: We would have had that fight then, but we obviously had not the fight----

THE PRESIDENT: It makes it slightly less attractive to say they are at fault for not starting here when your clients' position until last week was that they could not start here.

MR. COOK: Their position has always been, or has been since it occurred there was an advantage in going to the CAT, or it may be they had always thought it, but once the issue arose their position has been that they are entitled to come here and they have chosen to do so and it is not in dispute now that they are permitted to do so.

We say in relation to that again, ultimately if they had commenced the proceedings back in December 2012, or indicated they were going to do so, that is the kind of point that could have been resolved at that stage and we would have clarified what the position was.

Ultimately matters are a question of degree and to some extent I am not going to say that if they had issued everything back in 2012 that would necessarily have been fine. It would have been a lot easier and it would certainly have been much more difficult for us to argue it was a problem. What we do say is that, as a matter of degree, we are certainly so much further down the line now, if it would not have been an abuse in 2012 it certainly is now.

THE PRESIDENT: Yes.

MR. COOK: Sir, I was going to take you to *Johnson v Gore Wood* that has been the key authority on this, the speech of Lord Bingham. That is in the authorities bundle at tab 8. Could I ask you to pick it up, Sir, at p.22, which starts at C with the heading "Abuse of process". I quoted the section in my skeleton which starts at E, which is the quote from Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*, or I quoted the first part of that, which is inherent power. Ultimately that is not in dispute.

Sir, I did not provide the full quote, but I would just draw your attention to the final line of that. It is Lord Diplock saying:

> "It would, in my view, be most unwise if this House were to use occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

It is important to recognise, based on that, that this is an area in which the courts are saying that while it may not be an area of bright lines necessarily, it is not a discretionary power. It is an absolute duty to protect both the courts and defendants from this kind of abuse, if you accept it is an abuse.

THE PRESIDENT: If there is an abuse you have got to act.

MR. COOK: Absolutely, sir. That is the underlying power. We obviously have the original formulation over the page from Sir James Wigram V-C in *Henderson v Henderson*, matters

have moved on a very long way since then and, certainly, a number of academic authors would say he was not actually addressing what we are now leaning with in any event, he was addressing cause of action estoppel; it has certainly now blossomed into something wider, which is what Lord Bingham goes on to develop.

THE PRESIDENT: Whatever academic authority may have said, he is dealing with *res judicata*, is he not? He is dealing where a matter has been adjudicated upon.

MR. COOK: To some extent we come on to see Lord Sumption----

THE PRESIDENT: He makes that quite clear.

MR. COOK: Yes, well, he talks about it being the broad heading category, the portmanteau term he uses is '*res judicata*', but it is quite clear from the cases it does not require there to have been anything decided. While issues like cause of action estoppel and issue estoppel rely upon there actually being a judgment of the court the *Henderson v Henderson* line of authority necessarily generally involves circumstances in which there is no relevant determination by the court.

THE PRESIDENT: That is the objection there has been in the adjudication by the court, or there has been a dismissal of the case that may give rise to an estoppel, but I have never understood *Henderson* applying in a case where there has been no previous court decision or determination.

MR. COOK: I will show you that that is exactly one of the points that Lord Bingham goes on to address, and makes clear there is certainly no requirement for there to have been a----

THE PRESIDENT: There is not for abuse, but there is for *Henderson v Henderson*. Abuse is broader, clearly abuse can be all sorts of things but the *Henderson v Henderson* principle is one where the Vice-Chancellor says in the opening sentence something has been the subject of litigation and of adjudication by a court. That is what he is dealing with. It has not adjudicated upon the point now being raised. The whole issue is it could have, and the parties should have raised it, but there has been a prior adjudication.

MR. COOK: If I take you on to what Lord Bingham starts by saying in relation to this at para. 30H because to some extent it is from Lord Bingham I take the point about *Henderson v Henderson* having grown beyond what Vice-Chancellor Wigram was saying:

> "It may very well be, as has been convincingly argued . . . that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*."

To some extent, as you observed, there is different terminology being used here. Lord Sumption favours *res judicata* for the entire principle, and this is, perhaps, *res judicata* being raised in a rather narrower context. Then he goes on to say:

> "But *Henderson v Henderson* abuse of process, as now understood . . ."

So it seems to have moved on and, to some extent, what we do see a little bit is a distinction being drawn between Lord Bingham here talking about three categories: *Henderson v Henderson* abuse, cause of action estoppel and issue estoppel, and then Lord Sumption, who breaks down his *res judicata* portmanteau term into six categories.

THE PRESIDENT: Yes, that is now decisive being the decision of the Supreme Court, considering *Johnson v Gore Wood* is obviously binding.

MR. COOK: I think, with respect to Lord Sumption, that may be more of an analysis in terms of how one breaks it down. I do not think he is suggesting that he was inventing new categories or widening the principles, he was simply perhaps applying slightly more of a detailed analysis of different categories, rather than suggesting that he was changing the law in any respect in this regard.

The particular points I would draw to the court's attention, if we go down three lines, it says:

> "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."

We say that is the core principle, and Lord Sumption says the same thing, it is the core principle underlying this. It is the general desire that people should not be twice vexed. We say, certainly on the broader principle of abuse there is a narrower *Henderson v Henderson*, which is what Lord Sumption suggests, that under the broader principle of being vexed in the same matter applies regardless of whether there has been a court decision of any kind, and we see that from Lord Bingham that we will come to in a moment.

The particular points Lord Bingham draws attention to, he says:

> "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."

We would say that point is now doubly important. This time Lord Bingham was referring to the Woolf Reforms, which were the reforms coming, with corresponding changes both to the Civil Procedural Rules, and also the CAT Tribunal Rules, emphasising the importance of this, and emphasising the importance of the court's scarce resources are not wasted doing

the same thing twice, the fact that it is the High Court on one side, and the CAT on the other side, they are ultimately the same scarce resources being deployed in relation to this.

The next sentence, we say, is important, which says:

> "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."

So that is making quite clear that, while it is not saying it will necessarily always be the case because it comes on to that, it is saying it is enough if the court concludes that it should have been raised earlier, it is then an abuse, or can be an abuse to raise it again. We say looking at the wider principle that Lord Sumption comes to, if it is the case that it is an abuse to raise something that should have been raised in earlier proceedings, it must doubly be the case it is an abuse----

THE PRESIDENT: Earlier proceedings that result in an adjudication.

MR. COOK: That is correct in relation to this case.

THE PRESIDENT: That is what Lord Bingham is talking about, that is made clear by his approval of Sir Robert Megarry's formulation on the next page.

MR. COOK: Sir, if you are concerned with that point I should come to it now. It is 32H:

> "The second subsidiary argument was that the rule in *Henderson v Henderson* did not apply to Mr. Johnson since the first action had culminated in a compromise and not a judgment. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first."

We say that is an establishment of proposition. Certainly under the wider principle it does not matter whether the court has reached a final decision in relation to a case, in long running litigation it would be absurdly technical to suggest that if you realise midway through a trial that actually you have missed out on a big alternative argument and you commence new proceedings that you should have really been running all along, that must be just as abusive as if you had waited two weeks, got the judgment and realised that that was the mistake you made, and now you issued new proceedings. It would be absurdly putting form over substance to suggest that one is less vexing, one is less wasting the court's time and resources, based simply on when you issued the claim slightly before

judgment or slightly after judgment. We say that para. 32H is making clear that point that there is no necessity for there to be a court ruling in relation to it. It is simply always going to be abusive potentially.

Going back then to p.31 and the analysis of Lord Bingham, and this is the section I have quoted in my skeleton argument. If we go down to para. C, it is saying there is no need "to identify any additional element such as a collateral attack on a previous decision or some dishonesty", they obviously do have those, that will be helpful:

> ". . . and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party."

In relation to that language we do suggest that what Lord Bingham goes on to say at the paragraph I have just taken you to, 32H, is very important where he says: "An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter."

We are saying you should avoid unjust harassment, and then going on to say, repeated claims in relation to the same subject matter necessarily involve harassment. We say there is obviously still a question of whether that is an unjust element. It goes on to say there are questions about whether or not it is excused or justified by special circumstances, and that is the bottom of p.31 at F.

> "… it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

So we are saying in this case that waiting two and a half years, three years, to bring proceedings in relation to same subject matter necessarily means we are being harassed in relation to repeated actions concerning the same subject matter, and my learned friend would have to satisfy you it is excused or justified by special circumstances which justify their actions, and justifies them having waited that two and a half or more years.

THE PRESIDENT: If the claimants are successful in the High Court on limitation, they have no wish to continue these proceedings. They are protected. They have made that clear. So nothing would happen, you will not be harassed. They would just be stayed pending the outcome of the High Court proceedings.

MR. COOK: That would, yes, technically be the position.

THE PRESIDENT: There would be a stay before you even have to plead a defence, so where is the harassment?

MR. COOK: To some extent, the harassment is the fact that we have the potential of having to go through it again. It is slightly an artificial question, with respect, Sir, on the basis that the reality is that the CAT proceedings are only going to go forward if they think there is some advantage to be derived from doing so.

THE PRESIDENT: Or they are transferred to the High Court and they are considered together. You have pleaded to all these points that are in the CAT claim because you have just made the point that it does not add anything that is not in the High Court claim. So there is no additional work for you.

MR. COOK: There is, on the basis that we end up fighting out the special rules in relation to the CAT, which is the territory that we are now in.

THE PRESIDENT: That could have been avoided as well, if it had been suggested that we wait and see what happens in the High Court. You have sought to bring that application in the CAT. You could have said, "We reserve our position, it should be stayed, we will see what happens in the High Court".

MR. COOK: Effectively we would say these proceedings either serve no purpose, in which case they are not going to take them anywhere, or they will force us to fight the claim out twice.

THE PRESIDENT: You say "fight the claim out twice". There is a preliminary issue in the High Court on limitation. You could have waited for the outcome of that. You chose not to. You are entitled not to, so you have sought to have a substantive hearing on limitation here. There is no substantive defence. It is the same.

MR. COOK: With respect, Sir, limitation is a substantive----

THE PRESIDENT: No, I say, apart from limitation it is the same.

MR. COOK: But the end result of it is that they are doing something which only serves a purpose if it ends up harassing us twice.

THE PRESIDENT: That I do not follow. As I say, there are two limitation arguments that have to be heard.

MR. COOK: With respect, we say that once you are into territory of there being substantive arguments, and limitation is recognised now to be a substantive element of the case, not simply procedural, and you are spending significant time and effort and the High Court proceedings show very significant time and effort on these points then you are being harassed twice.

THE PRESIDENT: That is inherent in the fact that there are two different limitation periods, unless you are saying that a party has to elect at the outset and take its chance. If it gets it

wrong, the defendant gets off, but it cannot maintain its claim in the two forums to see which limitation period will assist it.

MR. COOK: We are saying certainly where we have got to now, because given the amount that has gone under the bridge in terms of the amount of work that we have done, certainly by this stage that is the territory that they should not be entitled to maintain two claims on the off chance that one succeeds rather than another. The reality is that in the majority of these kind of cases that one gets where these principles of abuse are put forward, somebody advances a tort claim and then realises later that it has got potentially a contract claim as well. The second claim is nearly always on the premise that they think the second claim gives them an advantage.

THE PRESIDENT: You are saying it is a broad merits based judgment, which the House of Lords supplied in *Johnson v Gore Wood*, where of course they held there was no abuse. That is Lord Bingham and he says the fact that the first action has been settled rather than decided does not make an appreciable difference.

MR. COOK: We say the logic of the principle is the fact that it is issued at a point where you have not got to either settlement or judgment, but you could be potentially being vexed twice.

THE PRESIDENT: Even if it is stayed?

MR. COOK: What you are being is being vexed by the possibility that once you reach the stage, as we are now, where you cannot case manage them safely from the start, and you are in a situation where they want the possibility to do this twice. We say that is the abusive, wanting the possibility to have two bites at the cherry.

The reason why one can draw a distinction between them is to some extent if you issue two claim forms but have them almost immediately consolidated and tried together, that is unlikely to be abusive on the basis that it does not add anything to the process. Once you are at the stage where you have got a second claim coming in years later, which is why I draw the distinction between saying the time that we have spent and the work already done in relation to the High Court is what takes us out of a situation in which you have simply got two claims that could be sensibly together without adding anything to the burden. We do accept that one has to look at the substance, and if you had two claims and they are tried together, in practice that adds little or nothing to them being simply one set of particulars of claim to start with. We are well beyond that, and that is the reason we say we are now in the territory of this being an abuse.

Turning on, Sir, to the Supreme Court decision in *Virgin Atlantic v Zodiac*----

THE PRESIDENT: Should we look at Lord Millett or not, in your view?

MR. COOK: Lord Millett's judgment to some extent is one where - three other Law Lords agree with Lord Bingham - he takes a slightly different approach. So the four to one majority is Lord Bingham's.

THE PRESIDENT: A similar approach, I think, but, yes. So where do we go now?

MR. COOK: It is the final tab in the authorities bundle, which is *Virgin Atlantic v Zodiac*, which was a case concerned with cause of action estoppel on the basis that there had been a judgment by the Court of Appeal which was final. In terms of the basic or the general principles, Lord Sumption dealt with these at paras.17 onwards of his judgment. There were three Law Lords who agreed with Lord Sumption's speech, and Lord Neuberger delivers his own speech and says at para.42 that Lord Sumption summarised the relevant principles and he agrees with that position. So it is unanimous in relation to these parts of it.

Paragraph 17, *res judicata* is the portmanteau term. It is probably a slightly different terminology than that used by Lord Bingham, and then he identifies six categories. At G further down the page it is five and six which are of particular significance for our purposes. Five is the *Henderson v Henderson* principle:

> "… which precludes a party from in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones."

Then, finally, the sixth principle:

> "… 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."

It is probably right to say that we have moved into the sixth principle here.

THE PRESIDENT: Yes, which was the point I was making, yes.

MR. COOK: We would agree with that, but ultimately this is, as Lord Sumption says, the policy underlying all of the six principles, albeit in the specific context of where a point has been particularly decided or not. We do certainly say that my learned friend's suggestion that effectively the principle does not apply in the present circumstances is simply wrong. Certainly the principle is applicable where separate claims have been commenced in relation to the cause of action. That is potentially applicable at that stage, it is just a question of whether the principle makes this an abuse or not.

Sir, I was planning to come back to the specific decision reached in relation to *Virgin Atlantic v Zodiac*. I am happy to deal with it now or come back to in due course. At this stage I was dealing with the general principles of law.

THE PRESIDENT: As we have got it here let us look at it.

MR. COOK: Ultimately, Sir, as you will have seen, *Virgin Atlantic* is an intellectual property case. Lord Sumption sets out the factual, the legal background to the decision at para.3 onwards, the statutory framework of his judgment. He starts by saying:

> "The appeal perfectly illustrates the problems arising from the system of parallel jurisdiction for determining the validity of European patents."

Then at paras.4 and 5 he sets out the specific provisions of the Acts in question. At para.6 he goes on to explain the procedure that exists in relation to challenging patents before the European Patent Office, and at para.7 he explained the end result of all of this, which is:

> "The effect of these provisions is that the English courts have the same jurisdiction to determine questions of validity and infringement in the case of a European patent as they have for domestic patents, but that concurrent jurisdiction over questions of validity is exercisable by the EPO. There is, however, an important difference between the legal effect of a decision in the two jurisdictions. Both are decisions *in rem*. They determine the validity of the patent not only as between the parties to the proceedings, but generally. But the English court's jurisdiction over the question of validity is purely national."

So you have a situation in which there is, on the face of it, concurrent jurisdiction, but concurrent jurisdiction with a different scope. The English court can only decide on English validity. The European Patent Office will decide for the whole of Europe, and that, we say, is ultimately a very specific factor associated with this case which explains the decision----

THE PRESIDENT: A bit like the position here, as it was, that the High Court can look at stand-alone, has jurisdiction over stand-alone infringements and the cap was limited to follow-on.

MR. COOK: Yes.

THE PRESIDENT: The High Court can also do follow-on, but it could do more.

MR. COOK: Then if we go to para.8 we can see the specific facts of this case, and it concerned, amongst other things, a reclining flat bed for aircraft. The proceedings arose, we see from the middle of para.8, after:

> "… Virgin Atlantic began proceedings against Zodiac in the High Court claiming an injunction and damages …"

So the claim started off with Virgin bringing High Court enforcement proceedings, which Zodiac defended on the ground of basically challenging, among other things, the patent validity. Then it says over the page:

> "They also, on 29 February 2008, opposed the validity of the patent in the EPO along with a number of airlines who had bought their seats and were at risk of infringement proceedings…"

So that is a situation where, very much at the same time, they are forced to counterclaim in English High Court proceedings that the patent is invalid, but then commence proceedings directly in the European Patent Office saying the patent is invalid. There is a logical and sensible reason for that which is that winning in England would have been nice for them, but it would still have exposed them to the possibility of claims in every country in Europe, and for an airline that is a serious problem. Therefore, they needed to win in the EPO to protect their claims throughout Europe.

Lord Sumption then goes on to say in that paragraph, that there was a certain amount of argument about the significance of this fact that no application had been made for a stay of the English proceedings, and it was enough to say that under the guidelines this would not necessarily have been successful. To some extent, there seems to have been a body of case law here which developed on the basis of whether it was sensible for the English court to stay proceedings, to wait and see what happened at EPO, and Lord Sumption goes on to say, in the final paragraph of his judgment. He thinks----

THE PRESIDENT: It should be reconsidered.

MR. COOK: It should actually be reconsidered, para. 38, it should be reconsidered, and it is not the job of the Supreme Court to do that. Effectively, the indication one gets from Lord Sumption is that he thinks in these circumstances the right thing to do would always be to await and see what happens with the EPO.

THE PRESIDENT: Well, that is carried forward in the Court of Appeal, which said that is not necessarily the right thing to do. But there is no suggestion if a party does challenge validity opposing in the EPO, it is an abuse to challenge validity in the High Court, it is just whether the High Court case should be stayed, but it is not suggested it is an abuse because you are already running the argument in the EPO.

MR. COOK: To some extent on the facts of this case it has not been a point that has been raised, and it may be something where it is happening all at the same time it is resolvable by sensible case management.

THE PRESIDENT: It is common practice, as you may know, to do that in litigation, and sometimes they run in parallel, sometimes one stayed, but there have been countless patent cases where that happens. One would have thought that if that is in some way abusive at least one member of the Supreme Court would have suggested that this raises issues of abuse, or one of the many patent Silks involved in those cases would have run that argument.

MR. COOK: We say in relation to that is first, this is triggered by something where you have to defend the proceedings. Virgin has commenced proceedings against you----

THE PRESIDENT: I accept it is a counterclaim.

MR. COOK: Yes, it is a counterclaim. You are forced into doing it, and you have a legitimate interest in commencing the EPO proceedings because winning in England is not actually going to give you what you need and you are also under time pressures----

THE PRESIDENT: There are cases where it starts not as a counterclaim but by original action for declaration, because before launching the product the producer wants to be sure that it will not be an infringement, so they launch a claim for declaration challenging the validity of the patent, at the same time they oppose it in the EPO. It is not an abuse to say you should not launch your English proceedings because you are opposing it in the EPO and it overlaps, indeed, it does more than the English proceeding.

MR. COOK: On that basis it is accepted that is the route to go. We would say the case law is quite clear on what the general approach is and the fact there is a specific approach, which has been adopted in the isolated world of intellectual property, recognising the practical differences between the two sets of jurisdictions, and historically as well recognising there was an advantage to the English proceedings in the sense they were likely to move more swiftly, or it was perceived they were likely to do so. It does not alter the general principles that vexing somebody twice in most circumstances with two claims is abusive and harassment.

We simply say that ultimately this is a limited area of law and the general principles one gets from Lord Sumption's general principles section establishes the main principle that you should not be vexed twice with the same subject matter.

Sir, I was going to come next to a number of points made against me by my learned friend, in terms of why he says this is not abusive, before coming back to why we say ultimately it is, and these are paras. 20 onwards of his skeleton argument.

THE PRESIDENT: Although you say it is a particular area of law, there parties really are vexed because they have to fight the full blown English patent litigation with all the arguments,

elaborate arguments on the patent, validity and novelty obviousness, etc. and they have to fight a separate appeal tribunal in the EPO, because there

there really is a very major double expense.

MR. COOK: We can say that in relation to a lot of these cases, a lot of abuse cases that one would be faced with two trials, the general proposition is that that is seen as being unacceptable.

THE PRESIDENT: That is why they suggest the solution is a stay. There is no question here of there being two separate trials, a trial of the claim in the CAT and, quite separately a trial in the High Court. What is suggested is once these preliminary matters are out of the way that either this case in the CAT should be transferred to the High Court, or now, arguably under the rules that came into force in October, the High Court case is transferred here if that is possible, but one way or the other they are heard in the same forum, so there is no risk of two trials in this case.

MR. COOK: There is no risk of two ultimate trials. What we are going to have, if we have a preliminary issue trial in the High Court it is a 10-day trial, which in most terms is a fairly significant size----

THE PRESIDENT: The limitation questions which are distinct and being heard separately but the overlap is heard once.

MR. COOK: A significant issue determining the validity of the claim is heard----

THE PRESIDENT: Yes, there are separate issues that arise, but the same issues are not going to be heard twice.

MR. COOK: We are going to be vexed twice with fighting out potentially two sets of issues which are substantial issues.

THE PRESIDENT: Different issues, yes.

MR. COOK: Different issues but ultimately the same cause of action, and one could say that would arise in almost all of these cases, if you have a tort case and you have a contract case, where somebody brings the tort case initially, loses, and then wants to bring a contract case. Ultimately, they are different issues----

THE PRESIDENT: That is where *Henderson v Henderson* applies because you have had a trial.

MR. COOK: But even if you got knocked out on the limitation basis you have fought it out and you should have, we say, brought it all in one place so it could have been dealt with once. The points start at para. 20 of their skeleton argument, and I am going to work my way through those, setting out what we say the answers are to these points.

They say, first, that the CAT claim could not have been brought any earlier, and we say the terminology "CAT claim" is misleading. There is a single follow-on claim which they have brought----

THE PRESIDENT: Well, we know what they mean. The point they are making, the substantive point, is it could not be instituted unless the CAT gave permission and they have subsequently, I think, identified the decision of the CAT saying "Only in exceptional circumstances should permission be granted", that is the point that is being made, that they did not have, as it were, an open door at the CAT, that is the point.

MR. COOK: That is the point being made and we say that is, with respect, wrong. First, they could have applied to the Tribunal for permission to do so. Exceptional circumstances – we say that may well be a situation that would have been met here in circumstances in which there were going to be High Court claims, and it would be desirable to ensure they tied in together. But, in any event, even if they thought it was not going to be practical to get permission from the Tribunal, this is something that if they had raised it with the High Court in December 2012, raised it with us in December 2012, and said "This is what the route is going to be, how do we case manage that appropriately to avoid being vexed twice?" then there would have been options available, and by not mentioning it for two and a half years, by delaying commencing the CAT claim for nearly three years all those options have largely fallen away. So, that is the reason why we say what they have done, by not raising it as a possibility is problematic and ends up, therefore, being abusive.

The next point is para.22, they are saying such complaint is outside the scope of *Henderson v Henderson* abuse of process. It is where we rely upon Lord Sumption's sixth category, which is slightly wider, perhaps, than the *Henderson v Henderson* abuse, certainly as focused by Lord Sumption, but ultimately it is the same portmanteau area and the same principles.

We say it must be permissible to raise these kind of arguments in respect of the current claims, otherwise you have the absurd situation which is as long as you commence shortly before judgment you will be fine, whereas, if you commence the second limb shortly after judgment you will not be. They are equally vexatious, and they are equally wasting the court's time in those circumstances.

The next point is in relation to para. 23(a), which is s.47A(5) of the Competition Act 1998, which allows for concurrent proceedings in the CAT. With respect, we say the assistance they try and draw from 47A(5) is misplaced. The fact that you have a right to bring a claim----

THE PRESIDENT: Yes, all it is saying is it is not exclusive.

MR. COOK: Absolutely. It does not say: "Go ahead and issue in two places", so that does not assist. They say the CAT proceedings are framed and pursued in such a way as to avoid the defendants being vexed twice in the same matter. We say that is simply not the case. Three years of work has been done in the High Court, and that is what we have been forced to do because we did not know they were going to bring the CAT claim until a long way down that road.

THE PRESIDENT: That is their primary claim. They would have had to do that even if they brought the CAT claim, and said "We want this stayed, because this is our primary case."

MR. COOK: With respect, to say that is their primary claim, it is their primary claim, it is their primary claim now because they are two and a half years into the High Court. If they had indicated they were going to commence both at the same time it would have been up to the court to decide, based on submissions of the parties, what was the right way to proceed, and whether the right thing to do was to go down the route of something that was going to be an enormous multi-law preliminary issue trial in the High Court, or whether the right thing to do was going to be test the foreign law, the Foreign Limitation Periods Act point in the CAT to see if it was advantageous. The fact that they are now pursuing that as being their primary claim is only a reflection of the fact that they have brought the CAT claim so late in the day and it has eliminated the possibilities of sensible case management that would have been available three years ago. That is what we say in relation to para. (c), simply that it is too late in the sense that the options of sensible case management have largely gone away compared to what they were three years ago.

In terms of (d), there is no hard and fast rule as to what course a claimant could follow when confronted with different limitation rules. With respect, the authorities they cite for that do not assist, and do not support the propositions that they are making. They rely *Ako*, which is at tab 7 in the authorities' bundle. It is not a case dealing with limitation at all.

THE PRESIDENT: That is a cause of action, estoppel, is it not, where a case has been dismissed, and whether that amounts to – the Court of Appeal authority means that the cause of action has been determined, so it is rather far from this case.

MR. COOK: It is very far from this case. It was actually one where, if one looks at the facts as well, you can well see why nobody was going to suggest that was abusive. It is tab 7 in the authorities' bundle, but the original claim was commenced on 17th June 1999. It was withdrawn 11 days later. The decision was taken four days after that, and six days later a fresh application was issued, so from start to finish, from the original claim being issued,

paras. 2, 3, 4, 5 and 6 in the judgment set out those dates. The time between the original claim being issued, withdrawn, and a new claim being issued was three weeks.

THE PRESIDENT: It was not run on the basis of abuse; it was run on the basis of a binding rule of cause of action estoppel.

MR. COOK: Yes, and it was a very technical point about the fact that in the Employment Tribunal there is a decision made to dismiss the claim rather than simply withdrawing it. With respect, it does not help at all in this context.

The other case they rely upon is *Nayif*, which is at tab 14 of the bundle, which is another Employment Tribunal claim. Again, we say there is a limitation point here, but it does not assist them for two reasons. Firstly, if we go to tab 14, the discussion by the Court of Appeal is at paras.25 to 29, or that is the key part of it. Effectively, what happened is the claim had commenced outside the three month limitation period for an employment tribunal claim, which is actually jurisdictional threshold in the Employment Tribunal as opposed to simply being a defence that you may or may not rely upon. The case had been knocked out by the Tribunal immediately on the basis that it was outside the three month period. The question was, did that bar the possibility of a High Court claim?

THE PRESIDENT: The Tribunal had a discretion, and I think there was even an appeal, was there not?

MR. COOK: There was an appeal.

THE PRESIDENT: Or an attempt to appeal.

MR. COOK: The appeal was dismissed on the basis of----

THE PRESIDENT: There was a hearing no doubt on whether it should exercise its discretion, he failed. He tried to appeal, he failed. Then, having gone through that he started separate proceedings in the High Court on the same factual basis.

MR. COOK: They make a couple of points in relation to justification for that. Firstly, para.28, that there was no scope for the claim for negligence in the Employment Tribunal, so you simply did not have the ability to bring the claim that you are now pursuing in the High Court before the Employment Tribunal. They say that could not attract the principle of *res judicata*, so it was a different cause of action that was not available earlier. Effectively, they also say in the middle of para.27:

> "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."

We say that is simply a case where part of the reason why there was no abuse point taken is it is cut out at the earliest possible stage, and it is not going to be abusive in those circumstances to issue in a forum which does have jurisdiction.

THE PRESIDENT: There has been no actual adjudication of any issue here.

MR. COOK: We say it is quite clear in relation to the way in which Lord Sumption formulated a wider principle and the way in which Lord Bridge set out in his judgment that being forced to face two separate claims is harassment. That is the principle that we say is applicable here.

There is a distinction, we say, in relation to a case like this, which is knocked out almost on day one on the jurisdictional basis.

THE PRESIDENT: It was not on day one.

MR. COOK: It is the first thing that is considered. Effectively, immediately they receive the papers, the Employment Tribunal looks at it and says you are at time. Yes, it is right to say there was then an attempt to persuade them to exercise their discretion, but it is an immediate jurisdictional point. To use an analogy in international competition claims, if you try to commence proceedings in one jurisdiction and you were knocked out on jurisdiction grounds and told you did not have the right to do so, you would not be saying that that was an abuse to then go to the jurisdiction you were told you should go to instead. We say that is exactly the situation here, that you are knocked out at the first stage and told you have to go somewhere else, and that is what----

THE PRESIDENT: Are you not doing that here, attempting to do that? It is just that the limitation ground here is rather more complicated. There it was very simple. Here it is more complicated because it is foreign law. If it was issued in the High Court seven years after the Commission's decision and there was no issue of foreign law, you would have said, "You are out of time under the Limitation Act, the case should be dismissed".

MR. COOK: That is a substantive defence as opposed to an initial jurisdictional defence.

THE PRESIDENT: So you say it is different because this is jurisdiction on the time limit under the Tribunal Rules, and here it is a substantive defence? That is the distinction.

MR. COOK: Sir, that is the distinction. It is also a question ultimately of scale. The benchmark here is how much we are being harassed by two separate sets of proceedings. If ultimately you start something and it is easily resolved and it is misguided and is knocked out very quickly, it is difficult to say that you are truly harassing somebody by then commencing a

second set of proceedings which is now in the right place bringing the right cause of action, whatever it might be. That is the reason why we say the three year point is significant, that a great deal of work has been done.

It is ultimately going to be a question of degree, and this is one which is at one end of the spectrum. It was as easily resolved as perhaps you forget something, and therefore they were not in that kind of territory. We would say we are the opposite end of the spectrum where considerable work has been done, and we are now at the stage where it will have to carry on being done.

We say that neither of those cases ultimately provide any particular relevance in relation to the idea or principle that my learned friend tries to get through, that you are not required to choose a single forum and then are stuck with the limitation rules applicable to that forum. That is the end of para.23(d) of his skeleton argument. It says, provided the claimant acts responsibly, i.e. not abusively, he is entitled to pursue claims in both. Whether you accept that as a principle or not, we say that "provided the claimant acts responsibly" would be the key words, and waiting three years is not acting responsibly. That has caused a lot of work to be done needlessly and that is what makes it abusive. There will always be question marks about bringing two claims. It becomes increasingly a question of degree as you are further apart and more work is done in relation to one. That is the reason why we say timescale is important.

In sub-para.(e), they say that in the present case they are doing no more than bringing their whole case before the court so that all aspects may be finally decided. With respect, we say it is the same stand-alone claim and they wants two bites of the cherry in the hope they will get different results.

Paragraphs 24 and 25 onwards are there. They say at para.24 that it is not abusive to take advantage of different time limits. Now, as soon as you create the possibility of different time limits, of course you are entitled to try and pursue the one you consider to be more generous. What we say you are not entitled to do is do them so far apart and in ways that result in effectively a claimant facing multiple claims. That is the same point we take from para.26 where they rely upon the *BCL* decision in the Supreme Court, which referred to the fact that a claim could have been brought by BCL in the High Court even after the limitation period in the CAT had expired. That was a situation where the High Court had the longer period. Again, that is simply saying if there is an option, then you have the ability to choose between them. It is not suggesting that you are entitled to pursue both, and

certainly not pursue both in a way which effectively means that they end up running consecutively.

We say, Sir, this is a situation in which we are being vexed with two claims and that is absolutely within the general principle. It is wasting the court's time, it is leading to unnecessary costs being incurred, and very substantial costs given the complexity of these issues.

THE PRESIDENT: Yes.

MR. COOK: Sir, unless I can assist you further those are my submissions.

THE PRESIDENT: No. Thank you. Yes, Mr. Beal, can you help me on this three year period and what would have been the effect or difference if your solicitors had written to MasterCard's solicitors in 2012 and said, "We are aware that we have an alternative jurisdiction in the CAT and we need permission to go there, and if there are limitation problems in the High Court we would wish to pursue our case in the CAT"? In other words, effectively, you had written the letter you wrote in March 2015 back at the beginning. Mr. Cook made that a fairly central part of his submissions.

MR. BEAL: He did, and there is no evidence as to what, had that been done, MasterCard's legal advisers or MasterCard would have done. In our respectful submission, previous case law shows what they are very likely to have done if we had turned round and asked for permission from this Tribunal to bring a claim prematurely.

THE PRESIDENT: I think we know they would have said, presumably, jurisdiction agreement does not allow that. That is one thing they would have said. They said that in 2015.

MR. BEAL: Yes. They had not at that stage concluded their application for annulment before the General Court, nor had they brought their appeal before the ECJ. It was a key part of the submissions of----

THE PRESIDENT: I thought the annulment was before - was the judgment of the General Court not before the----

MR. BEAL: They had not yet concluded their appeal to the ECJ. So they were sitting on a General Court decision which was against them, and which we had pleaded in our particulars of claim in the original claim. They had sought a stay of the *Sainsbury's* proceedings to enable the appeal to the European Court to be dealt with before that High Court claim proceeded any further. On the back of that we accepted that it was appropriate to have a stay to the European Court, and a stay was therefore agreed in joint terms in December 2013 and sanctioned by the order or direction of Mr. Justice Sales. Perhaps it is

convenient if I pass up a chronology that I have prepared which deals with some of these dates.

THE PRESIDENT: Yes, thank you. (Same handed)

MR. BEAL: This chronology follows on from a chronology I prepared for a directions hearing last November.

THE PRESIDENT: I have not kept that. There was a very short stay in May, less than a month. I do not know what that was for. That was not to do with the appeal to the Court of Justice.

MR. BEAL: I will be corrected if I am wrong, but I think that was to enable us to consider the Particulars. We were updating the data in relation to the list of claims before we committed to a final pleading. That was where we had got to. The Particulars of Claim were then served on 26th July 2013, and the Defence was served on 23rd August 2013. There was then a very short period of some months, three to four months, when nothing happened save for us pleading our Reply.

THE PRESIDENT: So the Defence - was that the Defence that went into all these laws of limitation?

MR. BEAL: Could I take you to that, Sir. Much has been made of the great deal of work that was required. It is in bundle 3, tab 3, and the limitation pleading starts at p.88. The relevant paragraphs pleading out the limitation claim are at paras.39 to 43.

THE PRESIDENT: These are just the different limitation periods?

MR. BEAL: The different laws, the limitation periods, and it is simply said the primary limitation period for each of these countries is three, four, five years. You can go back three, four, five years, and that is it. We are a long way in the limitation pleadings, as currently pleaded out before the High Court, from that bare statement of position. It is now recognised that a number of these jurisdictions have suspense provisions, tolling provisions, extensions of time, date of knowledge provisions, all manner of issues which go massively beyond a simple statement of what the primary limitation period is.

THE PRESIDENT: So that was the August 2013 pleading, and then you serve a Reply. Does that go into this?

MR. BEAL: The Reply is at tab 4. We did go into a great deal more detail in relation to our limitation case, as you will see, Sir, from p.144 onwards. Page 144 deals with English limitation law, and there is a topic with Belgian law. We have set out that the pleading is embarrassing for want of particularity. This is p.144, para. 42.2:

> "If and insofar as the Defendants intend to allege that a Claimant's state of knowledge under Belgian law is such that the Claimant's claim or any part thereof

is time-barred under Belgian law, the Defendants' pleading is embarrassing for want of particularity, including (i) of each Claimant alleged to have such knowledge; (ii) from which date(s); and (iii) upon the basis of which facts and matters."

What then happens is we plead a particular point in relation to the English law limited period which we need not dwell on. At p.145 we then plead with a greater deal of particularity foreign law, other than Belgian law. This is because our primary case, at least for the period from May 1995 through to January 2009 is that Belgian law is the applicable law of all of the tort.

We then advance a case on reliance on 23 foreign laws.

THE PRESIDENT: Your primary case is that Belgian law applies?

MR. BEAL: Yes. This is the unamended, unconsolidated claim, and therefore it does not include the standalone claims, and there are some wrinkles with the standalone claims, not least that we have asked for details as to who was setting the rates within the Mastercard organisation before 2007 and the defendants have simply refused to give us that information.

THE PRESIDENT: So the follow-on claim, your primary case, is that Belgian law governs – is that right?

MR. BEAL: For the period from May 1995 through to January 2009 and, I think, probably beyond that because we say that the event causing the damage took place before January 2009 and therefore we do not get into Rome II, so the purely follow-on aspect of the claim is Belgian law all the way through. The follow-on aspect of the damages claim can be traced back to an event that causes loss before the key period in which Rome II comes into play.

THE PRESIDENT: Yes, can you just remind me, what was the period the Commission decision covered?

MR. BEAL: 1992 through to December 2007. Now, the period before 1st May 1996 it is, I am sorry, for the 1995 Act coming into effect, is governed by double actionability and that raises complications, but for present purposes that is a relatively small part of the claim both in terms of time and also in terms of quantum.

Our pleading then at p.145 through to p.149 deals both with the primary limitation period and with date of knowledge provisions, and if there are any peculiarities in the particular limitation period those are indicated as well.

Finally, at p.149, we have a summary of the applicable law principles.

Of course, it is right that in the CAT claim, if my learned friend's argument on Friday succeeds we will have to look at the applicable law in the CAT claim as well.

Could I draw to your attention, please, their amended pleading at tab 9?

THE PRESIDENT: If they are right on Friday you will not be any better off in the CAT, will you?

MR. BEAL: If they are right on Friday that the foreign law limitation rules apply here, then no.

THE PRESIDENT: No, you are in the same position.

MR. BEAL: Apart from English claims. Tab 9 is their amended pleading on choice of law and limitation. I do not propose to go through the forensic exercise of saying it is much more detailed, suffice to say it is much more particularised.

THE PRESIDENT: That is what date?

MR. BEAL: That was served very recently. That was initially served in January this year. It was then served in amended form on 1st April 2016. All of that is post the initiation of this claim in this Tribunal; that is where the work is being done. That makes sense, with respect, because, of course, the limitation being raised as a preliminary issue was not ordered by Mr. Justice Barling until November 2015.

THE PRESIDENT: Yes, but the pleading on limitation would precede that.

MR. BEAL: The bare pleading in Defence is the one I have shown you when they simply say this is the primary limitation period, anything outside that is time barred.

THE PRESIDENT: The amended pleading is April 2016.

MR. BEAL: The original amended pleading is 11th January 2016, you do not have that date, I do not think, on the document.

THE PRESIDENT: Was it re-amended?

MR. BEAL: The original pleading on choice of law and limitation is 11th January 2016. This is an amended one that takes into account the CAR claim, which is the Central Acquiring Rule claim, which is----

THE PRESIDENT: I am looking at the amended one. It does not have the date of the original one.

MR. BEAL: It does not have the original date on it, no. It is in my chronology because we have taken it from documentary records that we have.

THE PRESIDENT: Just so I follow – 11th January 2016?

MR. BEAL: Yes.

THE PRESIDENT: That is the detailed pleading on non-limitation.

MR. BEAL: My learned Junior is pointing out that I ought to clarify something. This pleading has been directed by Mr. Justice Barling, as a result of directions following on from the October hearing. They have been subject to amendment but they were finalised in or around November, a series of directions as to what we should do for test countries plus Belgium. This pleading follows on from that direction, so this is designed to be the entirety of their case on the limitation issues.

THE PRESIDENT: I think we have that order in here, in fact.

MR. BEAL: Yes, the chronology sets out that order. It also sets out a series of procedural steps in the High Court, some of which you do not have before you – you may say "mercifully", but it is, at least all there, and I have taken that chronology largely from one that was before Mr. Justice Barling in October. You have not been burdened with all the documents.

THE PRESIDENT: I am looking at his order, which we do have, the one you referred to. "The defendants shall particularise their case as regards limitation under the laws of . . ." four countries that were taken as the test, I think - is that right that four countries were taken for test purposes for the preliminary issues.

MR. BEAL: What happened there was we suggested a sampling exercise would be sensible and then peace broke out between us, and we were able to alight upon four countries that would then proceed on the test basis for the preliminary issue, and that was one way we thought, sensibly, what would otherwise be a very complicated hearing could be managed, because there are certain similarities between certain jurisdictions in the Continent.

There is a common approach with the Code Napoléon----

THE PRESIDENT: I can see that, and that detailed pleading of 11th January was dealing with those four countries?

MR. BEAL: Yes.

THE PRESIDENT: Not all the countries that were in the original list.

MR. BEAL: No, plus Belgium I am told.

THE PRESIDENT: Just one moment. Actually the UK is one of the four, is it not?

MR. BEAL: The UK is one of the four, but I suspect that in the light of the *Arcadia*----

THE PRESIDENT: Yes, the four countries referred to are Belgium, Italy, Germany and Poland.

MR. BEAL: Yes.

THE PRESIDENT: That is what I mean by the four countries.

MR. BEAL: Those are the test countries, but in addition the preliminary issue will cover----

THE PRESIDENT: The UK.

MR. BEAL: And Belgium as well. We see in para. 4 of the order----

THE PRESIDENT: Yes, I understand that. Therefore, the pleading that you have just shown me at tab 9 is dealing with those countries?

MR. BEAL: Yes.

THE PRESIDENT: Yes, I see. Thank you. So that was 11th January pleading and then amended more recently.

MR. BEAL: On 1st April 2016. Our amended reply to that is due in on 6th May, I think. The original pleaded response to that----

THE PRESIDENT: Well, the point you make is it is all after your March 15th letter.

MR. BEAL: Yes, perhaps it is easiest if I go straight to the chronology and show you exactly what has happened.

THE PRESIDENT: One has to see what is in it.

MR. BEAL: I was actually going to take you through some of the correspondence that you have not seen.

THE PRESIDENT: Yes.

MR. BEAL: Turning to the relevant background facts. If you would be kind enough, please, to turn up in bundle1, tab 4A, p.403, we see the jurisdiction agreement that the parties agreed. At p.404 subpara. (b) in the recitals:

> "Whereas the claimants have indicated that they may pursue claims against Mastercard for losses arising out of or relating to the infringements by Mastercard and the parties have agreed that, save for any actual or potential claims the claimants may have against Mastercard for losses suffered in the United States, all remaining claims arising out of or relating to the infringements of Mastercard shall if pursued all be pursued in the courts and tribunals of England and Wales, and not in any other jurisdiction."

To that end the parties agreed that the courts and tribunals of England and Wales shall have exclusive jurisdiction. You no longer are required to adjudicate upon a challenge to that agreement. That agreement is clear in its terms. The claims are capable of being brought both in the High Court and in this Tribunal.

THE PRESIDENT: It is not suggested now that you could not have brought your case in the Tribunal, that is not the issue?

MR. BEAL: No. What we also see in the evidence of Ms Nicola Boyle is that the reason why we have brought this claim in the Competition Appeal Tribunal is to protect our rights on limitation.

THE PRESIDENT: I thought we were dealing with the point about what would have been the effect if you had indicated in 2012 what you indicated in March 2015, namely that you would be bringing a parallel claim on a protected basis, and what effect that would have had on the work being done. That is the point I was hoping you would help me on.

MR. BEAL: Sir, just on that point, if we pick up the chronology as at the service of the defence the first time round which I have indicated was 23rd August 2013. That is the first stage at which a limitation defence is pleaded. You have seen the nature and extent of the work that has gone into that. There is then a reply by us which is all work on our part.

THE PRESIDENT: Which you have shown me as well.

MR. BEAL: Which we would have had to do in any event. We then made a series of proposals for standstill agreements to be entered into and a stay pending the CJEU's judgment.

THE PRESIDENT: You suggest that?

MR. BEAL: We suggested that on 25th November 2013. There is a letter from Jones Day, which we have not burdened you with, agreeing the stay pending the CJEU judgment, and they propose an exchange of amended statements of case in the light of that judgment. We object to standstill for the standalone claims which is why there has been a separate process of claims being issued for standalone claims in due course. That is then crystallised in a consent order which you do have at tab 14 of bundle 3, where Mr. Justice Sales sanctions the approach of the parties which is to agree a stay of those proceedings pending the outcome of the ECJ judgment. So nothing is actually done substantively by the defendants, save to agree a stay of the CJEU judgment.

THE PRESIDENT: Then we get the judgment in?

MR. BEAL: The judgment then comes in in September 2014.

THE PRESIDENT: Then we have a period of about 10 months, I suppose – what happens?

MR. BEAL: What then happens is, if I have this right, at or around the same time as we serve our Amended Particulars, which is 27th March 2015, we send a letter----

THE PRESIDENT: Just before we get to March, looking at your chronology, you send an amended RFI request.

MR. BEAL: Yes, and there is a response to that.

THE PRESIDENT: What is that going to?

MR. BEAL: It is worth looking at that.

THE PRESIDENT: Does that have anything to do with limitation?

MR. BEAL: It does not have anything to do with limitation, save to this extent: we turn round and say, "Please tell us who was setting your domestic rates?"

The first one you need to pick up, Sir, is at tab 7 of the bundle 3, p.189. The purpose behind our request - I have taken you to the response because it summarises the request and then has the response. At p.190 we see the first request is:

> "Please state what the level of EEA fall-back interchange fee was for each card type and transaction type, together with the respective waste average for each card type in respect of each material period from 1992 to June 2008?"

The reason for that was to ascertain who had done what, where, and therefore what the applicable law might be. True it is that that may go to limitation, but the key thing from our perspective is to consider what the defendants' response was.

Their response was, see the second paragraph down the page:

> "Pending resolution of these issues …"

and they are there referring to issues concerning choice and limitation which they say they will ask for on a preliminary basis:

> "… there is a dispute about whether and, if so, to what extent the claimants can pursue claims in respect of the period to 18th December 2007, this being the primary limitation which is applicable under Belgian law which the claimants contend applied to all of their claims based on the direct or indirect of the EEA fall-back interchange fees. In these circumstances the defendants do not consider it reasonable or proportionate for the claimants to request and the defendants to provide the extensive historical information on such fees prior to this date. This applies to the present request and those identified below."

So their default position was, you are not going to get anything prior to 2007. That remains their response, but what they have then given is some generally available information that they had, and then they provide detailed information in relation to the period from 2008 to the present date which they would have had to provide in any event come what may, regardless of the outcome of the limitation period.

THE PRESIDENT: The first part is what is in the decision - is that right? It is referring to annex 1 of the decision.

MR. BEAL: Appendix 1 to this response.

THE PRESIDENT: No, I am looking on p.190, the penultimate paragraph, in answering your question. They say, "For the period 2002 to 2007 see the decision".

MR. BEAL: Which is a non-confidential version of the decision.

THE PRESIDENT: From 2008 onwards, appendix 1.

MR. BEAL: They provide the data, which again you do not have before you.

So the additional added value from their perspective is providing the average rates from 2008 to the present day, which they would have to provide come what may, even on their limitation, because of course even for the claim under English law they recognise it goes back six years from the date of issue. On any view, we go back to 2007 for the purposes of English law - indeed December 2006 for the main claims.

So the added value is all happily unrelated to the alleged limitation defence. Where there is a limitation defence they simply refuse to provide the information sought, see p.192, where they cross-refer back to the response.

Page 193, we have asked for copies of the MasterCard Network Rules in force from 1992 to date. Their response, "We will give you them for the period after 18th December 2007". Then, as one works through this document, one sees that the default position is, and still remains, see p.195, response 12, "This data falls outside the period after 18th December 2007". So they are confining their response at all stages to the period after 18th December 2007.

THE PRESIDENT: Is that the six years?

MR. BEAL: That is five years back from the date of issue, which they say is the primary limitation period under Belgian law. So they are saying, "If Belgian law applies and you have got five years going back, therefore we are going to cap our response at December 2007".

Page 198, response 16----

THE PRESIDENT: The allegation that it is Belgian law, that is your case.

MR. BEAL: That is our allegation. That is our case. It was initially their case as well, but then they changed and said, no, it is market by market.

THE PRESIDENT: And said it is English law?

MR. BEAL: They said it is English law for England. They adopt a market by market analysis.

THE PRESIDENT: At this point it was accepted that it is Belgian law, was it?

MR. BEAL: I will be corrected if I am wrong, but I think at this stage they had not yet served their amended defence, and therefore they had not yet changed their Belgian law was the law.

THE PRESIDENT: That fits with what they say in response 12.

MR. BEAL: So their amended defence does not come until May 2015, and it is at that point that there is suddenly the change and they say, "We are no longer saying Belgian law, we are saying market by market". You may infer from that that they have gone out and updated the expert evidence, but I am not in a position to speculate on that.

That is the response. It is all confined to periods post-December 2007, and that remains the position. They have refused to engage with us in our repeated requests for details of who set the rates prior to that point so that we can then try and analyse our case on applicable law, and that remains the position. Myself and my learned juniors are trying to plead our response to their limitation case but they have not told us who was responsible for setting domestic fees in any jurisdictions where we have a claim.

THE PRESIDENT: Just one moment. I am looking at your request 24, p.201. The response is, "See response". I do not understand that.

MR. BEAL: Request 24 is saying, "Please can you give us details in relation to each card type and transaction type of the relevant domestic fees that were set and who actually set them. I think what they mean there is "See response 1", but I do not know, they simply say, "See response and appendix 16". I can confirm that the information that has been provided only relates to the period post-December 2007, because their default position has always been that we are not entitled to anything before that because limitation applies.

This was the work that was done by MasterCard at this stage. It is important then that you understand two further documents.

THE PRESIDENT: Just so I am clear, this information after December 2007 would be relevant to your substantive claim, would it?

MR. BEAL: Yes, it is relevant for our substantive claim in any event, and it goes to the High Court claim and it is unaffected by the limitation defence. That is the point. This is information that would have to be provided come what may, and it is precisely on that basis that they have given it, because they recognise that they cannot say limitation precludes any analysis of this data.

There is then a further amended request with some slight variations, but none of that takes the matter any further forward. It is right to say that there is an additional response dated 27th February 2015 at tab 8. The response, as you will see, simply refers back to the earlier response dated 21st November 2014, and does not provide any----

THE PRESIDENT: The annex, the appendix, which I find rather difficult to read----

MR. BEAL: The appendix you have at p.207, but that relates - it is very difficult to read----

THE PRESIDENT: I cannot read it at all. What is that about?

MR. BEAL: It is 2008 onwards, in the top row, issuer country, and then the very first row is slightly coloured in, and it starts with 2008/2009/2010, etc, so it is all data that post-dates December 2007.

THE PRESIDENT: This is part of that document, it is part of the response.

MR. BEAL: That is appendix 16 that was served with it.
THE PRESIDENT: Just reading the response, "See response 16 of the previous response in addition to appendix 16 of this response". That is the appendix 16?
MR. BEAL: My understanding is that is the appendix 16 which then follows on the numbering. Rather confusingly, it adopts the numbering from the previous one. So we would have appendices 1 to 15 with the previous response, and then this is appendix 16.
THE PRESIDENT: I thought there was not an appendix, but maybe I have misunderstood.
MR. BEAL: My understanding is there were not 15 prior to this one in the response.
THE PRESIDENT: What I do not quite follow, if you go back to p.202, response 24. So there was an appendix 16 to the early one. Is this an amended appendix 16? I am a bit confused.
MR. BEAL: Can I just take instructions on that, Sir.. I am instructed that I may have misunderstood that there were 16 appendices. What MasterCard have done, in so far as there is an appendix that was geared to a response, they gave it the same number. For example, in this main document starting at p.189, not every answer has an appendix or an annex.
THE PRESIDENT: I see.
MR. BEAL: So it is only those responses that deserve an appendix - we see, for example, response 1 has a reference at the bottom of p.190, to "Appendix 1 to this response", but then the next reference to an appendix is at response 4, p.192, and that says, "Attached is appendix 4". What I had not appreciated, but I am told on instructions, and no doubt I will be corrected if I am wrong, is that there were not appendices 2 and 3.
THE PRESIDENT: I see, yes. The answer to 24 is a reference back to the appendix which is in answer 16 on p.198. For some reason your question on p.205 is numbered 16.
MR. BEAL: It is. My learned junior points out it is an amendment to the earlier request.
THE PRESIDENT: But the appendix 16 that we have on p.207 is not an amendment of the previous appendix 16, is it? It is a new appendix - is that right?
MR. BEAL: That is my understanding.
THE PRESIDENT: Mr. Cook, can you help? This is just trying to understand these documents.
MR. COOK: My instructions are that it is an updated version of it, but it is not change-marked.
THE PRESIDENT: That is very helpful. That clears it up.
MR. BEAL: I am grateful for that.
THE PRESIDENT: We know what appendix 16 looks like.
MR. BEAL: The key point that I am seeking to derive from it is that it is dealing with data from 2008 onwards.

By this stage, February 2015, you have seen, Sir, the extent of the engagement by MasterCard with our case, and with our requests to understand who was setting what, where, for applicable law purposes, which would then feed into the limitation issue. They have adopted a blanket approach of saying, "If it is going towards the limitation issue, you are not going to get anything before December 2007", in essence.

The next step is one that is taken by us. We then serve an amended consolidated particulars of claim on 27th March 2015, and you will see that is at tab 3, p.32, which is behind tab B2. It is headed: "Amended and Consolidated Particulars of Claim".

THE PRESIDENT: Can you give me the date again?

MR. BEAL: That is 27th March 2015. That pleads out our case on applicable law. It does not, I think, deal with limitation because we chose to deal with limitation responsibly once it was pleaded, but it does deal with applicable law at p.62 and onwards, and we say what the applicable law of the torts would be on various analyses.

By this stage, we are back into the process, post the stay, of setting out our amended case for the High Court claim, and it is at this stage that those instructing me choose to write to Jones Day in the terms that you will see in bundle 1, tab 5, p.421. You have got the essential thrust in my point, at this stage there has been some preliminary skirmishing. Limitation has been dealt with in an unparticularised way, in a way that we say is so unparticularised that it is vexatious and embarrassing to plead to. Nothing of substance has been done by Mastercard on the limitation point at this stage and, instead, we see at p.421 a letter from those instructing me to Mr. Cotter of Jones Day, in which it is suggested in the third paragraph down:

> "If our clients' claims in the High Court were time barred in the manner set out in your defence, we would have an alternative action in the Competition Appeal Tribunal under s.47A. Following the conclusion of your clients' appeal to the ECJ the period for filing the claims has now commenced, and will not expire until September 2016. 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."

Just pausing there, that, of course, is not all of the High Court claims. So you have the standalone claims, you have the CAR claim, all of which necessitates the pleading of limitation come what may. What we are saying is, insofar as the follow-on claim could

validly be brought before this Tribunal, then please accept that you will not take any protection point because otherwise it would be redundant, and it would be pointless – and that is without prejudice to our clients' limitation defence.

The response from Jones Day we see at p.423 and in the absence of any evidence from Jones Day or, indeed, anyone else on behalf of Mastercard as to what they would have done, this gives us, perhaps the best inferential evidence as to what their response would have been had we raised this point directly and rather unfeasibly in December 2012, if that is now what is being suggested.

We see in the third paragraph down:

> "Secondly, dealing with your second letter of 30th March which requests clarification of our clients' position in relation to limitation under Belgian law, which your client contends governs certain parts of its claims. As a starting point we would note that there is a dispute between our clients about proper law, and so it is not common ground which parts of your clients' claims are subject to Belgian law."

That is the first indication that they are not going to accept that Belgian law covers a substantial part of the claim.

> "However, insofar as your clients' claims are subject to Belgian law, our clients' position is that sufficient facts were publicly known about the relevant interchange fees more than five years prior to the date of the claim and trigger the five-year limitation period applicable under Belgian law."

They then say:

> "We note you appear to recognise that this is an issue which should be considered at the CMC. We agree. It is our clients' intention to seek preliminary issues to process those questions."

And they refer to the fact that such an order was made by Mr. Justice Field in the Commercial Court claim with Morrisons.

They then say, and this is the important part:

> "We do not accept in this respect that the CAT is a viable alternative forum for many of your clients' claims given that the majority of the potential claimants are not domiciled in the UK and/or suffered no loss in the UK in respect of cross-border and/or non-UK domestic interchange fees. Certainly we do not consider that this option militates against determining applicable laws and limitation periods in relation to all the High Court claims through a preliminary process.

So they were saying, essentially: 'We do not think you have a valid CAT claim; in any event we are going to push ahead with our application to have a preliminary issue regardless.' Given that we were, at this stage----

THE PRESIDENT: I do not understand the first sentence: "We do not accept because the claimants are not domiciled in the UK"?

MR. BEAL: I think that the suggestion is that the CAT jurisdiction only encompassed UK claims, or claims with a sufficient UK connection. That was how we took it, because we then wrote back saying: "Hold on, we have a jurisdiction agreement that covers the Tribunal", and that is what the next letter at p.426 says. As a matter of law, if the CAT is validly seised of jurisdiction the identity or nationality of the defendant is nothing to the point.

THE PRESIDENT: So you took this as a sort of forerunner of the jurisdiction point.

MR. BEAL: Precisely. And so we see, under a section headed: "Jurisdiction Agreements":

> "You suggest in your letter most of our clients cannot bring their claims before the CAT as they are not domiciled in the UK, have not suffered loss in the UK. This ignores the agreements reached with your clients under the respective jurisdiction agreement."

Then, at p.427, in the third paragraph down, say:

> ""In light of the above it is clear that those of our clients which are party to an original jurisdiction agreement are entitled to bring claims before the CAT, subject, of course, to those claims being within the scope of s.47A."

"Claims Before the CAT" is then given a separate heading half way down the page.

> "We deal in this letter with potential CAT claims by those claimants which are party to an original jurisdiction agreement and reserve our position in relation to the others."

Then, perhaps you would be kind enough, Sir, to read the next three or four paragraphs starting: "As mentioned above" through to the end of the letter.

THE PRESIDENT: (After a pause) Yes. This was written, of course, some time before the CAT claim was brought?

MR. BEAL: Yes.

THE PRESIDENT: Is that affecting the claim that these categories A to G are no part of the CAT claim?

MR. BEAL: No. Sorry, they are part of the CAT claim. They are aspects----

THE PRESIDENT: The follow-on claims include cross-border, that is the follow-on claim?

MR. BEAL: Yes. We say they are part of the CAT claim.

THE PRESIDENT: Yes.

MR. BEAL: (After a pause) What looks slightly confusing, and the reason I paused was that there is a reference there to domestic claims, which I associate with being domestic standalone claims but, as my learned Junior has rightly pointed out, they are domestic claims predicated on the EEA fall back interchange fee being the determination of the domestic fee. So it is those cases which are parasitic upon the EEA fee, which of course is the principal target of the follow-on claim.

You then see the case management suggestions overleaf and, in particular, we say: "It is sensible to issue the claims in the CAT and request a transfer to the High Court." Pausing there, in the light of the approach of Mr. Justice Barling in the *Sainsbury's* litigation it is equally possible, of course, to apply post 1st October 2015, that facility was not available to us at this stage, but it is now.

So, we are making absolutely clear why we are engaging in this correspondence. This correspondence is engaged in with Jones Day, on behalf of Mastercard well before, or it is incepted well before the due date for their amended defence. We see from the chronology that their Defence is then filed on 22nd May 2015, admittedly only a week after this particular letter, but six weeks after the letter dated 30th March in which we had made the sensible proposal, and seven weeks after service of our Particulars of Claim. So it was perfectly open to Mastercard to say: "Yes, we see the force of your letter of 30th March 2015. We see the sense in that, let us discuss what we are going to do". That is not the course Mastercard adopted. Mastercard instead adopted the course of proceeding to serve its amended defence in which it changed its stance on Belgian law being the applicable law and so on and pleaded out, albeit not fully, various limitation defences. They then proceeded in due course, at the beginning of October 2015, to apply for a preliminary issue to have applicable law and limitation dealt with, and you can see that at bundle 1, tab 6A, p.433.

I should, for the sake of completeness, take you to the response from Jones Day, it is at p.429.

THE PRESIDENT: Yes, I have read that.

MR. BEAL: I am grateful. That is where they turn around and run the three different arguments which they have now adopted. What then happened is, having set their course on their three arguments as to why they said it was appropriate to look at the CAT, they proceeded to issue the application for the limitation at p.433 and we, in due course, responded to that.

You have well in mind the date of issue of the CAT claim, which was before the hearing before Mr. Justice Barling. Mr. Justice Barling was aware of the fact that the CAT claim had been issued, and the application proceeded nonetheless on the basis that Mastercard would wish to have the preliminary hearing issue dealt with in the High Court, notwithstanding the issue of the CAT claim. All of the directions for substantial work take place, and are effective only after the date of the November 2015 order.

Our primary submission is that the chronology that I have just taken this Tribunal through simply does not support the very broad assertion by counsel, unsubstantiated by any evidence, that: "significant chunks of work have been undertaken over a prolonged three-year period", all of which is in vain if our request to have a claim heard by this Tribunal is acceded to, or, conversely, if the abuse application is rejected. That simply cannot be substantiated on the facts. Even if such a broad and sweeping allegation of substantial work could be made out on the basis of the materials of this Tribunal, which it cannot, that is work that would have to be done in any event.

It is work that would have to be done because whilst the limitation issue before the High Court has been confined to four particular test countries, it always remains parts of MasterCard's case that each of our claims in the respective jurisdictions is time-barred by reference to the primary period of limitation in each of those jurisdictions. That remains their case. It is a case that will need to be pleaded for the stand-alone claims and for the CAR claim if it is to be advanced by MasterCard, which it is. So there is no sense in which any of this work has been wasted.

THE PRESIDENT: What Mr. Cook said is that some of the stand-alone claims start later and in some countries, therefore, there is not a limitation issue.

MR. BEAL: The only reason that they would start later is if, for example, MasterCard entities did not set domestic rates in those countries until after 2008. I think we still do not have a clear picture as to which those countries are. So Mr. Cook can stand here and say what the position, but I have no way of checking it because they have refused to give disclosure of at what point and at what times particular MasterCard entities set these particular rates.

That is also the same issue that arises in relation to the central acquiring rule, which we now have permission to proceed with in the High Court.

Stand-alone claims in principle go back to 1992. The CAR claim goes back to 1992.

THE PRESIDENT: What claim, sorry?

MR. BEAL: The CAR, the Central Acquiring Rule. It is the claim that we have deployed on a relation back basis for which Mr. Justice Barling gave us permission in a recent judgment, which you have in the bundle of authorities.

THE PRESIDENT: In the bundle of authorities?

MR. BEAL: It is in the bundle of authorities, it is at tab 17. It is a judgment dated 11th December 2015. It sets out the basis for our application to amend, and the reasons why the learned judge gave us permission to do so.

THE PRESIDENT: That is not part of the----

MR. BEAL: It is part of the High Court claim. It is no part of the CAT claim.

THE PRESIDENT: Because it is not part of the Commission decision.

MR. BEAL: Precisely. The CAR is currently subject to some investigation by the European Commission, but there have been no findings on it yet.

Could I then please take you to the CAT claim form in bundle 1, tab 1, p.1. If the correspondence had not made clear what our aim and----

THE PRESIDENT: I have seen what you say in 6 and 7.

MR. BEAL: We have made it clear throughout that the scope of this claim is----

THE PRESIDENT: Yes, I have seen all that.

MR. BEAL: We are not seeking to claim the same loss twice. We are not seeking to vex the defendants.

THE PRESIDENT: No, you do not want two trials.

MR. BEAL: We do not want two trials ourselves.

THE PRESIDENT: Yes, I see that.

MR. BEAL: We are simply protecting our rights. The closest analogy I have been able to find is where, in relation to an amended claim, my learned friend sought to elide, if I may respectfully say so, two separate propositions: firstly, the scope of *Henderson v Henderson* abuse of process as a doctrine where, as you have rightly pointed out, Sir, that is predicated upon either an adjudication or a settlement which is treated as comparable to an adjudication. That is one set of cases. This is not that case because there are no sequential claims. We have concurrent claims.

What are we looking at here? We are looking at the type of case in which a claim is initially made, facts or disclosure then become available which reveal the scope for a different claim, and it is said by the defendant, "Ah, that claim is time-barred". That is a situation which happens time after number in the civil courts of this country. The response from the civil courts of this country is, with respect, revealing, because what the courts say

is, if the limitation defence is clearly wrong then you can have your amended claim within the scope of the existing pleading; if the new claim that you are now seeking to raise is arguably time-barred then the proper course is to refuse the application to amend, but instead require the claimant to issue a further claim form, so a second claim for - it used to be called a "second writ app" - to protect their position on limitation, and you then need case management to work out how you deal with the limitation issue.

Sir, that is clear from an excerpt from the White Book, which is at tab 19 of the bundle of authorities, CPR 17.4:

> "This rule applies where -
>
> (a) a party applies to amend his statement of case … and
>
> (b) a period of limitation has expired under …"

either the 1980 Act or the 1984 Act or any other enactment that is relevant.

> "(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts …"

So the analysis then takes place.

Turning over to p.3, the third paragraph down, the notes to the White Book indicate:

> "Where it is reasonably arguable that the relevant limitation period has expired before an amendment is made, the onus is on the applicant to show that the amendment falls within the provisions of rr,17.4 or 19.5. A new claim under s.35(3) is not made until the statement of case is actually amended… Unless the case falls within one of the exceptions …."

i.e. it arises out of the same facts or substantially the same facts -

> "… such permission cannot be given after the relevant limitation period has expired. It is immaterial that the limitation period had not expired on the date the application to amend was made …"

It cites *Welsh Development Agency v Redpath*.

> "… or on the date upon which the court adjourned a hearing on the basis that the specific amendments sought would be revised and brought back to court for later approval."

This is the key paragraph:

> "Where it does appear reasonably arguable that the defendant has a limitation defence in respect of a new claim, the court should not permit the claimant to raise that new claim by amendment since to do so could defeat the arguable defence, i.e.

the amendment would take effect from the date of the original document amended …"

That is the doctrine of relation back.

"Instead the claimant should be left to bring fresh proceedings on the new claim …"

So the CPR is expressly envisaging through these notes and some authorities that I will take the Tribunal to in a moment two concurrent risks existing to protect the limitation position and for the court then to exercise case management power to work out how to deal with the limitation issue.

This arose in *Goode v Martin*, which is behind tab 20. The facts of that case, briefly stated, were that a claim was brought on the basis of personal injury suffered by a law graduate who was on a boat in the Solent. When the boat tacked into wind the sail whipped round and she was knocked unconscious. She did not really know what had gone on. She pleaded a case in negligence. In their defence they turned round and said we have got what happened wrong, in fact it was this. She then sought to adduce that very defence as a new claim, and the issue was whether or not she could do so because it was outside the primary limitation period.

I should indicate for the avoidance of any doubt, this decision of Mr. Justice Colman was overturned on appeal but on a different point. The points of principle start at p.569, and please could I invite the Tribunal to read p.569G through to 570F.

THE PRESIDENT: (After a pause) Yes.

MR. BEAL: The approach was endorsed by Lord Justice Jackson in the *Chandra* case. That is behind tab 22. The material facts are rather convoluted, and I do not think we need them for the points of principle. At paras.63 and 65 the learned Lord Justice considered the *Redpath* case and noted that it was a decision that proceeded on the basis of the old Rules of the Supreme Court, and he then went on to consider the approach under the new CPR.. Please would the Tribunal read paras.66 through to 69, in which the Court of Appeal sanctions the two writ approach, two claim form approach.

THE PRESIDENT: (After a pause) Yes.

MR. BEAL: We respectfully suggest that the guidance from the learned Lord Justice at para.69 is of equal application here. What has happened is that the defendants have raised a limitation defence, particularised properly for the first time only after we had initially suggested to them by letter that the limitation period for the follow-on part should be kept under a different ambit for precisely the reason that the CAT claim could, and sensibly would, be

brought to protect our position. In any event, we have now issued the claim to protect our position in the face of a limitation defence. We have two concurrent claims that are going to need determination in principle. We suggest, and have suggested throughout, that careful case management including consolidation, transfer, and so on, can ensure that there is no risk of conflicting decisions between the CAT and the High Court, and that all of the issues can be sensibly managed together.

Could I please go through, in response to some of my learned friend's submissions----

THE PRESIDENT: I do not think I need trouble you with that. I think I would like to hear Mr. Cook on the points you have made and those additional cases.

MR. COOK: Sir, I was going to start with the additional cases just on the basis that we have them open in front of us. Sir, essentially my submission in relation to those cases is that nothing in those cases is considering whether or not that might give rise to an abuse, and there will certainly be circumstances in which that process will give rise to an abuse. To give an example, if you were right up against trial - the problem with my learned friend's submission is that he ignored the fact that permission to amend is not simply about limitation. Permission to amend is about the court's discretion, and the discretion to be exercised based on what the consequences of the litigation will be and the consequences for the other party. If one had a situation in which you were trying to amend close before the trial, and you knew that there was no way you would get that permission because it would undermine the trial, it would not be acceptable to simply go and issue a claim form, and say, that is fine, that can be dealt with in due course. That would be a situation where the court would say that is abusive, you should have brought that in the first claim, and that is classic *Henderson v Henderson*. So, with respect, this case law does not take matters anywhere forward. There will undoubtedly be situations in which it is appropriate at a very early stage, or part way through the litigation, to be given permission to amend on the basis that there is no limitation point and it is not going to cause any problems. Of course, that also arises even when there is a limitation issue, when you are in the line of authority that says it is arising out of the same, or substantially the same, facts because in those circumstances effectively the reasoning is it is not changing anything very much about the litigation, going back to the yacht example: the case was all about everyone knew that she hurt herself on a yacht, it was 'how did that happen?' and ultimately all the evidence was going to be: how did she come to hurt herself and who was at fault, if anyone? The fact that she changed her case slightly about how that took place, fundamentally was not changing the litigation. So, in those circumstances, there is obviously no problem with the court in saying that it is

substantially the same facts, it has been brought in in sufficient time, one should be able to go ahead. Nothing in these cases we have to submit is intended to override the effect of the authorities we have been through in relation to abuse, which would say there are circumstances in which the end result of that will be to vex the claimant in relation to claims. What we are seeing are cases which deal with the situation where, clearly, there was no abuse issue perceived as arising, and one can see in many cases that will, indeed, be the position. There will be situations in which one runs up into the abuse issue because the result of issuing a new claim is it is not going to be practical to deal with it in a way that will avoid vexing a defendant twice.

We simply say in relation to those that it shows that at one end of the spectrum there will be times where you can issue two claim forms without any problems, at the other end of the spectrum there will be times where you can issue your two claim forms and it is going to cause severe problems, and that is abuse.

THE PRESIDENT: So it depends very much on the facts of the case?

MR. COOK: And, of course, that is exactly what happens when you try and seek permission to amend, the court takes account of all the factors, how close you are to trial, what it is going to require you to re-do in terms of disclosure, witness statements, matters like that, regardless of the limitation issues my friend was getting into, in those circumstances you often may be turned down just on the basis you are too late. You cannot get round that judgment, either one that is made or avoiding having that judgment simply by issuing a new claim form. The court would say you are too late, and if you run away from asking permission to amend and issue a new claim form that will be met with *Henderson v Henderson* or the sixth limb of Lord Sumption.

So, we say, effectively this case law adds nothing to the question and we are back to: are we in the territory where we are being vexed twice, and in most of the circumstances in practice one is not in the amendment cases. That is what we say in relation to the case law.

In relation to the work my learned friend did in terms of taking you through what happened historically on this, a couple of points to make in relation to that.

First, in terms of the work that was done, he took you to the pleadings. Pages 85 and 90 in the bundle, our defence, and pp. 140 to 150 in the bundle is the relevant part of their Reply. Some cases have only a small amount of text, but what one is looking at, and what one needs is assistance from foreign lawyers in relation to multiple different laws. What has been pleaded there is it started off, and I set the numbers out in my skeleton, I think it started out with 25 foreign laws being pleaded as relevant. It has come down a little bit

because we said in which case let us accept English law applied to the whole, and they have dropped a couple of claims since then. We are down to 18 now, but you do not plead foreign law in relation to limitation without everybody needing to do work to ensure that what you are pleading is adequate, and we have taken to some extent what may be an 'English-centric' approach of pleading the primary limitation period, and then putting the burden on the claimants, as they have done in their reply, to explain why the primary limitation period does not apply and then, in turn, we have considered their case on that.

So, when you are in a situation where you are dealing with that many laws, over 20 initially down to 18, simply looking at the number of pages of text taken up in a pleading is, in my respectful submission, not the right way to look at it, it is substantial effort being deployed by both sides, and it is quite clear that substantial effort was deployed by us to allow us to plead 25 different limitation periods, and then by the claimants in serving their reply in order to come back and identify all the reasons why they say in some cases they could extend the limitation period and go beyond the primary limitation period. In the same way they pleaded, and subsequently dropped, deliberate concealment under English law. We pleaded the six-year period, they pleaded justification for extending it, and that is what both parties did. Obviously, under English law it is much easier for us because we know what the law is, in other areas it is not.

So, we say in relation to that that my learned friend is trying to seduce you by looking at the end product and not recognising the significant work that is required, even if the end product is not enormous in terms of volume, to actually go through and do all of that work, and it is work, with respect, that was initially done at a point when the follow-on claim was the only substantive claim other than the four standalone cases for four countries. So it was done originally just in relation to what was a standalone claim, effectively, other than the fact it extended slightly further in time.

THE PRESIDENT: The follow-on claim?

MR. COOK: The original High Court claim was effectively just a follow-on claim with the extension of time, and then it added four countries to it. So all of that work originally, the defence you were taken to was all in relation to a claim at that stage which was, in terms of the limitation points, nearly all follow-on, exactly the same counterclaim.

THE PRESIDENT: When did the other countries come in, the standalone ones? Because now standalone claims are all countries.

MR. COOK: Well, it is standalone claim for all countries, and my learned friend was, I am going to say 'forgetful' about his knowledge of these matters in terms of which countries are

covered, but standalone claims came in a year later, so standalone claims came in – my learned friend's chronology will no doubt say – it is the beginning of 2014.

THE PRESIDENT: It is December 2013, is it not?

MR. COOK: Yes, 18th December 2013, so that was a year later before they brought those standalone claims.

In relation to the standalone claims, where I say my learned friend was forgetful is he took you to appendix 16, which is at p.207. Appendix 16 is the factual story in relation to that, and if one goes to that, and I apologise for the text being a small as it is, but if one goes through that then you can see that we set out in relation to each of those periods who was setting----

THE PRESIDENT: I thought it only goes back to 2008.

MR. COOK: It does only go back to 2008, but----

THE PRESIDENT: Standalone claims go back to 1992.

MR. COOK: No, standalone claims only apply in relation to situations where Mastercard set domestic interchange fees, and this table sets out who was setting domestic interchange fees.

THE PRESIDENT: From 2008.

MR. COOK: From 2008.

THE PRESIDENT: But I thought some of the standalone claims go back to 1992. You may have a defence saying that Mastercard was not setting them until 2003 or whatever. But is it your position that in no country did Mastercard set the interchange fee prior to 2008?

MR. COOK: No, it is not.

THE PRESIDENT: So standalone claims go back?

MR. COOK: Some standalone claims. I was going to show you in relation to this some of the examples to see the fact what I am saying is the limitation issues arising in relation to standalone claims is dramatically narrower. I am not suggesting there are no limitation issues, it is simply a much narrower point.

THE PRESIDENT: This schedule does not cover those standalone claims, which you are agreed, go back before 2008, does it.

MR. COOK: It does not specifically do so, but in relation to a country like Austria, for example, you can see that Mastercard started setting those in 2015.

THE PRESIDENT: Well, I cannot----

MR. COOK: You might have to take that at----

THE PRESIDENT: Does someone have a better copy of this? If we are going to be referred to it, we do need to have a copy we can read. I can just about make out "Austria", but I cannot make out----

MR. COOK: It is the far right hand side; the three rows say: "Mastercard as from 1st January 2015".

THE PRESIDENT: Does someone have a better copy of this?

MR. COOK: Somebody, somewhere must.

THE PRESIDENT: There are enough people and paper in court.

MR. BEAL: Sir, it has not been set in a way that is accompanied by a statement of truth that the consequence of this table is that no rates were ever set for any country in any period prior to 2007. So, is not, for example, the subject of a pleading confirmed by a statement of truth that rates were not set in Austria prior to this date, this simply provides the date at which rates were set for particular countries in the period from 2008 through to whenever it ends, 2013?

THE PRESIDENT: All I can see from this is that there seem to be about four countries where it was from 2015 it is said, but there are a lot of other countries where it was not, and the great majority where it was not.

MR. COOK: I accept that 2015 is not obviously the key date, and I apologise for the size of this, and we will try and get a blown up copy of it. Denmark, for example, and I appreciate you will struggle to read that, the first time Mastercard appears on that is in 2014.

MR. BEAL: Sir, if it helps we have a soft copy in Tribunal with us, and we are more than happy to forward that by email.

THE PRESIDENT: Yes if you send it to the Référendaire we can print it out. Yes, I see Denmark, and there may be another one. Is it Spain?

MR. COOK: Spain is one we started setting in 2014, we also did in relation to Portugal, in Norway in 2010, Greece in 2010, in Bulgaria in 2011.

THE PRESIDENT: Yes, I see, so some of them are and some of them are not.

MR. COOK: We are not saying limitation does not arise in relation to standalone. However, in relation to a number of countries it simply does not arise. So it is not right to say that we would be engaged in all of the same issues in all of the same fights in any event. There are particular standalone issues that are considerably narrower on limitation grounds than in relation to the follow-on action.

THE PRESIDENT: What about the CAR claim?

MR. COOK: The CAR claim is a much more recent one, but partly turns on what is the proper law in relation to that, or whether that is governed by a central proper law, and the claimants say Belgium, so it raises one law, or whether it again raises a number of different laws.

THE PRESIDENT: What is your position?

MR. COOK: I may have to check, but I believe our position is that it is governed by different laws, but again we say it does not actually apply for the period my learned friend says, because it was not in place all the way back.

THE PRESIDENT: Yes, and is it the same date that Mastercard on your view gets involved in the CAR, as for the domestic interchange fee as set out in this appendix?

MR. COOK: No, the CAR is a central rule, so it is a European-wide one.

THE PRESIDENT: So Mastercard would have been involved in that. Does the CAR claim go back to 1992?

MR. COOK: It is pleaded as that we say----

MR. BEAL: 1995 is their pleaded case on that. We plead 1992, and they say 1995 at p.216.

THE PRESIDENT: You say, even on your case, 1995, and you say it is governed by all the different national laws, so there will be need to look at all those laws on the CAR claim?

MR. COOK: We shall see. Whether the right thing to do in relation to CAR claim is to try and resolve that is a different matter.

What we say in relation to this is my learned friend has taken you through but the reality is that substantial work has been done both by the defendants in preparing our defence, by the claimants in preparing their reply, which my learned friend says was more detailed than our case. We say that is unsurprising, we plead the basic limitation period and then they explain why they can extend. They have done that work. Inevitably, of course, when you get a pleading from the other side setting out their case on those matters that does not involve no work on the part of the defendant, we need to review and consider that. My learned friend said part of that process resulted in us changing our choice of law case as well.

So we do say that looking at the work product is misleading here. Very substantial work has been done. My learned friend largely avoided the question you posed as he stood up: "What would have been different?" and, with respect, we say it is quite clear that had this all been started back in 2012 there would have been a completely different analysis of the way in which to proceed and take these matters forward. If my learned friend turns out to be right about the Foreign Limitation Act point that would be a narrow point of statutory construction relatively easily resolved, there would have been no need to set off down this route of identifying the laws and pleading out 24 different jurisdictions, and people would

not have headed off down that route. We did it because up until March 2015 there was no suggestion that there was anything else on the table by way of an alternative, and that is what we say makes this abusive, and that is the point that we say stands, and my learned friend's analysis of showing there were other things going on does not alter the facts that substantial work has been done.

THE PRESIDENT: Thank you very much. For reasons that will be set out in a written judgment, which will be handed down in due course, this application is dismissed.

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