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5 record.

6 **IN THE COMPETITION**

Case Nos. : 1236/5/7/15

7 APPEAL TRIBUNAL

1264/5/7/16

8 Victoria House,

1265/5/7/16

9 Bloomsbury Place,

1268/5/7/16

10 London WC1A 2EB

11 8 October 2018

12  
13 Before:

14 **THE HON. MR. JUSTICE ROTH (President), PETER ANDERSON, SIMON HOLMES**

15  
16 (Sitting as a Tribunal in England and Wales)

17 **BETWEEN:**

18 **1236/5/7/15 DSG Retail Limited and Another v MasterCard Incorporated and Others**  
19 **1264/5/7/16 TFL v Mastercard**

20 **1265/5/7/16 Dixon Carphone PLC v Mastercard**

21 **1268/5/7/16 Europcar UK Limited v Mastercard**

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3 **HEARING - Day 1**  
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7 **APPEARANCES**  
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9  
10 Mark Hoskins QC (of Brick Court Chambers) Matthew Cook (of one Essex Court) appeared on  
11 behalf of Mastercard  
12

13 Meredith Pickford QC, Julianne Kerr Morrison (both of Monckton Chambers) appeared on  
14 behalf of Dixons & DSG  
15

16 Thomas de la Mare QC, Ajay Ratan (both of Blackstone Chambers) appeared on behalf of TfL /  
17 Europcar  
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1 |  
2 Monday, 8 October 2018

3 (10.30 am)

4 Submissions by MR. HOSKINS

5 THE CHAIRMAN: Yes Mr. Hoskins.

6 MR. HOSKINS: Good morning, sir. There are quite a few  
7 familiar faces before you this morning. I appear with  
8 Mr. Cook for Mastercard, and then for the three Dixons  
9 claimants, at the far end of the bench you have  
10 Mr. Pickford QC with Ms Morrison, and then in the middle  
11 for TfL and Europcar you have Mr. de la Mare QC and  
12 Mr. Ratan.

13 You have had, I think it would be fair to say,  
14 detailed written submissions from us and I do not  
15 therefore intend to dwell very long in setting the  
16 scene. I do not think you would thank me for doing  
17 that.

18 I will remind you of the obvious. These claims are  
19 all follow on actions based on a Commission decision  
20 which was adopted in 2007, and the Commission decision  
21 found an infringement in respect of what is called the  
22 EEA MIF, and that was for the period from 22 May 1992  
23 until 19 December 2007.

24 The reason we are all here today is because the  
25 claims relate all the way back to the start of that

1 period to 22 May 1992.

2 THE CHAIRMAN: Just pausing there for a moment because there  
3 are four actions that are referred to, but my  
4 understanding is, and Mr. Pickford will correct me if  
5 this is wrong, that the DSG Carphone claim does not go  
6 back to 1992, but it only claims losses from the date of  
7 the merger. Is that right?

8 MR. PICKFORD: That is correct.

9 THE CHAIRMAN: It does not spring out at one from the  
10 pleading, I have to say. One has to sort of relate it  
11 to the other pleading. But that is clearly the  
12 position, that claim is only for losses after 2014?

13 MR. PICKFORD: That is correct.

14 THE CHAIRMAN: So I think, is that right then, Mr. Hoskins,  
15 that then there is not a limitation issue on that  
16 action?

17 MR. HOSKINS: It is right if that is what Mr. Pickford now  
18 says their claim is. I must admit we had understood  
19 that whilst Carphone Warehouse came into the picture in  
20 2014 with the merger, they also relied on the fact of  
21 prior losses which gave rise then to the compound  
22 interest loss, if I can use that shorthand, that they  
23 then claimed.

24 If Mr. Pickford is assuring us that that is not in  
25 fact the case -- if you remember, their plea is "we

1 would have made more money as the parent company" to put  
2 it very crudely, and my understanding was they were  
3 relying, in making that claim, partly on the fact that  
4 there was this pot of accrued losses they claimed had  
5 been suffered before they came on the scene. That's why  
6 we were assuming, I must admit, they were focused here.  
7 But Mr. Pickford is going to be in a far better position  
8 than I am to tell you what he is claiming.

9 THE CHAIRMAN: Yes, it is important to know which cases we  
10 are dealing with.

11 Their particulars of claim are at tab 11 of our  
12 first bundle. I note paragraph 58 and I think the  
13 merger was in 2014 or thereabouts. But this claim form  
14 sort of cross refers to the other claim form.

15 Mr. Pickford, can you clarify this, because it is  
16 your claim?

17 MR. PICKFORD: My Lord, this claim, as I think we indicated  
18 when we brought it, was brought effectively as an out of  
19 abundance of caution claim reflecting the fact that  
20 there had been a merger, and insofar as any losses were  
21 ultimately to be found vesting in the Carphone Warehouse  
22 Dixons entity then that needed to be a claimant.

23 It seems to me unlikely, given the date of the  
24 merger, that the limitation arguments that we are now  
25 discussing concerning the years between 1992 and 1997

1           could have any bearing on that particular claim.

2           But it has not been fully I think thought through by  
3           the economists in terms of whether there is some sort of  
4           remote chance that an accrual of interest somehow  
5           ultimately ends up properly being claimed by the Dixons  
6           Carphone Warehouse claimant. So it seems to me highly  
7           unlikely.

8       THE CHAIRMAN: Well, highly unlikely is fine, but I think --  
9           we are dealing with this at an interim stage -- it's got  
10          to be made clear that, for us to just exclude it from  
11          consideration, you are not claiming, as I think was said  
12          somewhere, maybe in the submissions on limitation --  
13          yes. It is in your submissions on limitation at tab 17.

14          If you look at tab 17 on page 3, paragraph 8:

15          "The inclusion of Mastercard's limitation case in  
16          the second application is unnecessary. Dixons Carphone plc  
17          makes no claim in respect of periods prior to either of  
18          these dates ... as the right to make ... any such  
19          claim remains in the hands of Dixons Retail Group and  
20          DSG."

21          Is that correct?

22       MR. PICKFORD: Sir, that's my understanding of the position  
23          and therefore it is very hard to see how in fact that  
24          claim can be relevant to this application.

25       THE CHAIRMAN: Can that be, as it were, on the record

1 incorporated in the particulars of claim in the action.  
2 Because if that were stated in the -- it maybe enough  
3 that you put it in the written observations which have  
4 obviously been approved, but if we can take that with  
5 the particulars of claim then that disposes of any issue  
6 on that action.

7 MR. PICKFORD: Yes, sir. I do not think ultimately anything  
8 substantive is going to turn on that. We are happy  
9 to --

10 THE CHAIRMAN: You are content to do that, yes. If we take  
11 that sentence there with the particulars of claim in  
12 that action then we have formally one less action to be  
13 concerned with.

14 MR. HOSKINS: Absolutely, my Lord, yes. There was  
15 a discussion Mr. Cook and I had over the weekend that  
16 reflects the discussion you have just had with  
17 Mr. Pickford. So I'm grateful for flushing that out.

18 THE CHAIRMAN: Yes.

19 MR. HOSKINS: Our skeleton argument, paragraph 5, you have  
20 the distinction drawn there between transactions which  
21 took place in the UK and transactions which took place  
22 outside the UK, and our submission is that in relation  
23 to both those types of transactions there is a time bar,  
24 partial time bar on the claims with which we are  
25 concerned.

1           I will come back in a minute to what we say the  
2 relevant date is for each of those types of  
3 transactions, but first of all just to clarify why there  
4 is a difference in the analysis for transactions in the  
5 UK and outside the UK, and that is because Mastercard's  
6 applications which have been heard today are based on  
7 the English law rules on limitation, and it is only  
8 common ground between the parties that English law is  
9 the applicable law in respect of the period prior to  
10 1 May 1996.

11           After that date, foreign rules of limitation may  
12 apply, but that's not to be decided today. But that is  
13 the reason for the distinction drawn in paragraph 5. It  
14 is because of the applicable law in tort.

15           No dispute re transactions in the United Kingdom,  
16 English law, but in relation to transactions outside of  
17 the United Kingdom it currently is only common ground  
18 that English law applies for transactions prior to  
19 30 April 1996. So that is the reason for the  
20 distinction.

21           In order to determine our applications, the Tribunal  
22 has to decide three issues and we have identified those  
23 at paragraphs 8 to 11 of our skeleton argument. I am  
24 going to deal with the first issue first of all.

25           Paragraph 9:



1           "There is an issue of statutory construction in  
2 relation to the effect of Rule 31(4) of the 2003 rules.  
3 Mastercard contends the effect of this rule is to  
4 preserve any limitation defence which existed under  
5 English law as at 20 June 2003."

6           Which is the date when section 47A of the  
7 Competition Act 1998 came into effect. But the  
8 claimants say that that rule only preserves limitation  
9 defences where the entirety of the claim is already time  
10 barred. I will just unpack that a little for you.

11           The Tribunal gained jurisdiction to decide follow on  
12 damages disputes when section 47A of the Competition Act  
13 1998 came into effect on 20 June 2003. Prior to that  
14 date, damages claims could only be brought in the High  
15 Court, and those were subject to the six-year limitation  
16 period under the Limitation Act 1980. Under that  
17 six-year period, any part of a claim alleging  
18 infringements of competition law prior to 20 June 1997  
19 would have become time barred in the High Court by  
20 20 June 2003. So you have 1997, June 2003 and the time  
21 bar hits in the High Court.

22           That of course is the date when the Tribunal's  
23 jurisdiction came into effect, which is why we are  
24 concerned with those dates.

25           The relevant cut-off date for limitation is

1 20 June 1997 for transactions inside and outside the UK.  
2 That is because we are considering claims which were,  
3 according to Mastercard, time barred under the  
4 Limitation Act when section 47A of the 1998 Act came  
5 into force on 20 June 2003.

6 As I have said, that is all claims that relate to  
7 the period prior to 20 June 1997. Because of the  
8 applicable law issue I flagged up to you, we are only  
9 looking at transactions outside the UK prior to  
10 1 May 1996. So they also, by definition, will have been  
11 time barred under English law by 20 June 2003 because  
12 more than six years will have passed.

13 So you have got the foreign claims; the magic date  
14 is 1 May 1996. You have got transactions in the UK;  
15 20 June 1997. But for both those sets, more than six  
16 years will have passed by 20 June 2003 when the 1998 Act  
17 comes into effect. So, in effect, the date for both of  
18 them, when we are looking at the relevant materials etc,  
19 is 20 June 1997.

20 The first issue for the Tribunal is whether the  
21 adoption of specific limitation rules for bringing  
22 actions in the Tribunal had the effect of resurrecting  
23 claims which had become time barred before the High  
24 Court. If we can look at the relevant rules,  
25 authorities bundle 2, tab 37. Sorry, bear with me,

1 I have an exploding bundle.

2 These are the Competition Appeal Tribunal Rules that  
3 were enacted when the Act first came into force. You  
4 will see the 2003 rules. We are concerned with Rule 31  
5 and you will see that Rule 31(1) to (3) sets out  
6 a specific limitation rule for claims brought before the  
7 Tribunal pursuant to section 47A, and it is different  
8 from the six-year limitation rule that applied in the  
9 High Court.

10 But the particular rule we are concerned with in  
11 this application is 31(4), which says:

12 "No claim for damages may be made if, were the  
13 claims to be made in proceedings brought before a court,  
14 the claimant would be prevented from bringing the  
15 proceedings by reason of a limitation period having  
16 expired before the commencement of section 47A."

17 The commencement of section 47A is 20 June 2003.

18 Mastercard's case is that in the cases before us  
19 now, Rule 31(4) precluded claims that were already time  
20 barred before the High Court from being brought in the  
21 Tribunal, and that, as I have explained, is all claims  
22 that relate to the period prior to 20 June 1997, ie six  
23 years before the Act came into force.

24 The claimants' case is that Rule 31(4) only applies  
25 if the entire proceedings were already time barred, not

1 if only part of the proceedings were time barred. So if  
2 you could bring a claim and part of it was out of time  
3 in the High Court but part of it was in time, they say  
4 you can bring the whole lot before the Tribunal. That  
5 is the battle line between us.

6 We submit that their construction is incorrect for  
7 a number of reasons. The first one is that the  
8 claimants' argument is contrary to the well established  
9 principle that a statute should not be interpreted  
10 retrospectively so as to take away an accrued right to  
11 plead a time bar unless that result is unavoidable on  
12 the language used.

13 One sees that principle recognised in a judgment of  
14 the Privy Council, it is a case called *Yew Bon Tew v*  
15 *Kenderaan Bas Mara*. Authorities 1, tab 3. You will  
16 see it is an appeal to the Privy Council from the  
17 Federal Court of Malaysia. If I can ask you to read to  
18 yourselves the headnote from E to F, you will see what  
19 the issue was in that case.

20 (Pause)

21 You see there was an accident, there was  
22 a limitation rule in place. Under that limitation rule  
23 the possibility of the claim became time barred, a new  
24 limitation rule was introduced which was longer than the  
25 previous one, the claim was brought and the argument was

1           whether that claim could be brought or whether it was  
2           still time barred.

3           There's two passages I would like to take you to.  
4           First of all, 558F to G, opposite F:

5           "Apart from the provisions of the interpretation  
6           statutes, there is at common law a prima facie rule of  
7           construction that a statute should not be interpreted  
8           retrospectively so as to impair an existing right or  
9           obligation [and then] unless that result is unavoidable  
10          on the language used. A statute is retrospective if it  
11          takes away or impairs a vested right acquired under existing  
12          laws,  
13          or creates a new obligation, or imposes a new duty, or  
14          attaches a new disability, in regard to events already  
15          past."

16          So that is the general principle.

17          If you turn over to page 563. If I can ask you  
18          again to read to yourselves, please, D to G, you will  
19          see that that principle applies to the accrual of time  
20          bar. So if you could read 563D to G, please.

21          (Pause)

22          You will see that the principle which I rely on is  
23          very clearly established in the opening few lines,  
24          opposite D. Faced with this authority, what Dixons  
25          says, for example, at paragraph 83(c) of its skeleton,

1 is it says, well, our cases are distinguishable from *Yew*  
2 *Bon Tew*. The reason they say they are  
3 distinguishable, and here I quote from their skeleton,  
4 is because:

5 "... section 47A introduced the ability to bring a  
6 new type of proceedings for which a different limitation  
7 rule applied."

8 Whereas *Yew Bon Tew* concerned the introduction  
9 of a longer limitation rule than it previously applied.

10 Now, there are differences between the cases. It is  
11 often the case there are distinctions that do not  
12 actually matter to the principle being applied. The  
13 distinction between the factual background of the two  
14 does not affect the absolutely general principle which  
15 is stated very clearly in *Yew Bon Tew*.

16 I must confess, and I may be corrected if  
17 Mr. Pickford and Mr. de la Mare stand up, I do not think  
18 they actually contest the principle that is established  
19 in *Yew Bon Tew*, the one I showed you at page 563D.

20 Now, those general principles which one sees in the  
21 common law have also been recognised on a statutory  
22 basis. If I can briefly show you that. It is  
23 section 16(1)(c) of the Interpretation Act 1978.  
24 Authorities 2, tab 32. It is page 3 of the copy.  
25 Authorities 2, tab 32, section 16(1):

1 "Without prejudice to section 15, where an Act ..."

2 Sorry, it is the side part:

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

5 "(c) affect any right, privilege, obligation or  
6 liability acquired, accrued or incurred under that  
7 enactment ..."

8 You have the same principle in common law and as  
9 a matter of statutory interpretation.

10 THE CHAIRMAN: Does that apply to the Interpretation Act in  
11 Scotland?

12 MR. HOSKINS: I need to check that.

13 THE CHAIRMAN: Because our rules of course do apply  
14 throughout the UK.

15 MR. HOSKINS: Yes, of course, I understand. We will check  
16 that and once we have checked I will get back to you.

17 THE CHAIRMAN: Mr. Anderson, who is familiar with Scottish  
18 law, thinks it does.

19 MR. HOSKINS: I see. We will check that.

20 So that is the first principle I rely on, that  
21 general principle against retrospectivity.

22 The second point is that the claimants' arguments if  
23 correct would lead to arbitrary results, and you have  
24 seen the example we have given in our skeleton argument.

25 Imagine an infringement lasting ten years which ends

1 on 19 June 1997. That is more than six years before  
2 section 47A came into force. That would not be  
3 actionable at all under the claimants' interpretation.  
4 But an infringement lasting ten years ending two days  
5 later on 21 June 1997 would be actionable in its  
6 entirety, for the whole of the ten-year period.

7 Our submission is that if that obviously surprising  
8 result had been the intention of the legislature, that  
9 is another reason, as well as the *Yew Bon Tew*  
10 principle, why there would need to be express words  
11 to that effect, and of course we see none in Rule 31(4).

12 The third point is that the claimants seek to rely  
13 on section 47A(3) of the Competition Act. If we can  
14 look at that as originally enacted at authorities  
15 bundle 2, tab 33.

16 If you look at section 47A(1) it sets out the  
17 jurisdiction of the Tribunal:

18 "This section applies to --

19 "(a) any claim for damages ..."

20 I am going to skip the irrelevant words:

21 "... which a person ... may make in civil  
22 proceedings brought in any part of the United Kingdom."

23 Then (3):

24 "For the purpose of identifying claims which may be  
25 made in civil proceedings," and you will see the echo in



1 the words referring back to the wording in (1), "any  
2 limitation rules that would apply in such proceedings  
3 are to be disregarded."

4 The claimants' say, well, that shows that all  
5 limitation rules, other than those established by the  
6 Tribunal, are to be disregarded.

7 But that point has already been decided. The  
8 President will be aware of that because it was his panel  
9 who decided it with Mr. de la Mare and myself I think,  
10 amongst others in front of him on that occasion. But  
11 the Tribunal has already held that that rule, (3), does  
12 not disapply limitation rules generally.

13 Before we go to the judgment I will show you the  
14 current version of the rules because those are the ones  
15 the Tribunal had before it.

16 Authorities 2, tab 34. You will see it is the same  
17 point. It is section 47A(1):

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

21 Then over the page, at the top of page 2, (4):

22 "For the purpose of identifying claims which may be  
23 made in civil proceedings," etc.

24 So you will see it is the same statutory framework.

25 When the Tribunal looked at the effect of (4), which

1 is the same as the previous (3), we see that in this  
2 bundle, authorities 2, at tab 29. We can pick it up at  
3 paragraph 54. Authorities 2, tab 29. If I could ask  
4 you please to read paragraphs 54, 55 and 57. You will  
5 see the point being made clearly in paragraph 57. It is  
6 page 16 of the judgment. Paragraphs 54, 55 and 57.

7 You will see there the Tribunal holding that  
8 section 47A(4) does not generally exclude the  
9 application of the limitation periods that would apply  
10 in courts. It is only doing so for the purposes of (1),  
11 and you will see that the claimants' actually accepted  
12 in that case that the limitation rules that would have  
13 applied in a High Court action, that was there the  
14 Foreign Limitation Periods Act, were applicable. We see  
15 that in paragraph 57.

16 So that statutory construction with respect to the  
17 claimants' has already been decided. It has already  
18 been decided against.

19 The fourth point I wish to deal with on this first  
20 issue is the claimants' reliance on the judgment of the  
21 Court of Appeal in *BCL v BASF*. That is in  
22 authorities bundle 1, tab 19.

23 If I could ask you to turn to page 429 which is the  
24 second page of the headnote. I just want to show you  
25 this case concerned a different issue.

1           You see just above B:

2           "Held, dismissing the appeal, that on their true  
3 construction the Competition Appeal Tribunal Rules 2003  
4 did not contain a general power to extend time and  
5 disapply the two-year limitation period for bringing  
6 proceedings under section 47A of the Competition Act  
7 1998."

8           So the issue there was about the power to extend  
9 time under the competition rules. The paragraph the  
10 claimants rely on is paragraph 32 on page 436. The  
11 Court of Appeal said:

12           "Rule 31(4) shuts out a claim if proceedings in  
13 a court would be precluded by a limitation period which  
14 had expired before section 47A came into force."

15           They rely on the use of the word "proceedings". But  
16 it is perfectly clear that paragraph 32 is merely  
17 a paraphrase by the court of the wording of Rule 31(4).  
18 It is not a finding by the Court of Appeal as to the  
19 correct interpretation of Rule 31(4). It is simply  
20 referring to it in the course of setting out its own  
21 reasoning. There is no decision there that Rule 31(4)  
22 only applies to complete proceedings. The reference  
23 simply does not bear the weight that the claimants seek  
24 to put on it.

25           So for those reasons, and particularly the *Yew Bon*

1           Tew principle and the arbitrary result that one would  
2           get if one adopted the claimants' interpretation, we  
3           urge our interpretation to be adopted by the Tribunal.

4           That would mean, as I said at the outset, that any  
5           claims that were already barred before the High Court at  
6           the time the Competition Act came into effect, ie  
7           20 June 2003, would still be barred when section 47A  
8           came into effect, and therefore we are looking at any  
9           transactions prior to 20 June 1997 which will be time barred.

10          The second issue --

11       THE CHAIRMAN: Just pausing there. That is the Dixons case  
12       which was brought before the rules were amended?

13       Whereas the other three -- well, we are concerned with  
14       two now -- are brought after.

15       MR. HOSKINS: Correct. So the first issue applies to the  
16       claim by Dixons Retail, not DSG, is my understanding,  
17       and by Dixons -- we have eliminated Dixons Carphone so  
18       I think it only applies to Dixons Retail. Again, if  
19       I am wrong Mr. Pickford will correct me on that.

20       THE CHAIRMAN: Were they not joint claimants'? It was one  
21       action.

22       MR. PICKFORD: That is right. We have two claims and it is  
23       only the second one we discussed earlier on which  
24       concerns Dixons Carphone Warehouse.

25       THE CHAIRMAN: But the Dixons Retail, when it was issued,

1           was for both claimants'.

2           MR. PICKFORD: It was, yes.

3           THE CHAIRMAN: So I think it is -- it does not really  
4           matter, it is that action. The action that was  
5           commenced in February 2010.

6           MR. HOSKINS: Sorry, I have confused myself as one of my  
7           footnotes relates to the Dixons claim, the Dixons  
8           Carphone claim.

9           THE CHAIRMAN: Good. It is relevant to the other case if  
10          you are right in saying that one must, as it were, read  
11          Rule 31(4) back in. The meaning of 31(4) is important.

12          MR. HOSKINS: Correct. We will come back to revisit 31(4)  
13          now in the second issue. That is right.

14                 So moving on to the second issue. That concerns the  
15          interpretation of Rule 119(2) of the Tribunal's 2015  
16          rules. We find that in authorities bundle 2, tab 38,  
17          page 66 of the extract. Again, I invite you to refresh  
18          your memory, I am sure you have read them already:  
19          paragraphs 119(1), (2) and (3). It is authorities 2,  
20          tab 38.

21                 (Pause)

22                 Let me begin by identifying which of the claims this  
23          issue is relevant to. The claim by DSG Retail and  
24          Dixons Retail Group was brought before 1 October 2015  
25          and therefore falls within Rule 119(1) and the second

1 issue therefore does not concern that claim.

2 The Transport for London claim, and Dixons Carphone  
3 claim and Europcar claim arose before 1 October 2015 but  
4 were made after 1 October 2015. Those claims therefore  
5 fall within Rules 119(2) and (3), and the second issue  
6 is therefore relevant to those claims. That is TfL,  
7 Dixons Carphone Warehouse and Europcar.

8 THE CHAIRMAN: Dixons Carphone Warehouse we can leave out.  
9 There's no limitation issue.

10 MR. HOSKINS: It has gone, yes.

11 So we are going to focus on Rule 119(2). What it  
12 says is that:

13 "Rule 31(1) to (3) of the 2003 Rules ... continues  
14 to apply ..."

15 If we go back to Rule 31 of the 2003 rules, that is  
16 in tab 37 of this bundle, we have already seen it this  
17 morning, you will see that Rules 31(1) to (3), the ones  
18 at the bottom of page 12, are the ones that establish  
19 a specific limitation period for the Tribunal. But  
20 Rule 119(2) of the 2015 rules makes no express reference  
21 to Rule 31(4) of the 2003 rules at the top of page 13.

22 The claimants' argument on this is that because  
23 Rule 31(4) of the 2003 rules is not expressly referred  
24 to by Rule 119(2) of the 2015 rules, a claim brought in  
25 the Tribunal after 1 October 2015 will not be time

1           barred even if it had been time barred, or even if it  
2           would have been time barred if it had been brought on  
3           20 June 2003, ie when section 47A first came into  
4           effect.

5           In other words, what the claimants' are suggesting  
6           is that the effect of Rule 119(2) adopted in 2015 is to  
7           revive claims which had previously been time barred as  
8           long ago as 20 June 2003.

9           MR. PICKFORD: Just to be clear, that is not our claim but  
10          I cannot speak in relation to Mr. de la Mare in relation  
11          to his --

12          THE CHAIRMAN: It does not concern him at this point.

13          MR. PICKFORD: Exactly. The claimants' have been referred  
14          to generally.

15          THE CHAIRMAN: Yes, we understand that.

16          MR. HOSKINS: That is certainly our understanding from  
17          reading the written submissions, and partly will be  
18          revealed if we have got that wrong.

19          On that understanding of the argument, if the  
20          claimants' were correct, it would mean that the claims  
21          by TfL, Dixons -- I will just leave Dixons Carphone out  
22          completely -- the claims by TfL and Europcar would not  
23          be time barred in respect of the periods prior to  
24          20 June 1997 because they were brought after  
25          1 October 2015.

1           So they would have the benefit of this particular  
2 construction. But of course the claims by DSG Retail  
3 and Dixons Retail Group would be time barred in respect  
4 of the period prior to 20 June 1997 because they were  
5 brought before 1 October 2015, and therefore Rule 119(2)  
6 does not apply to them.

7           Insofar as one can keep up with the plethora of  
8 dates flying around, we can agree it would be surprising  
9 if a limitation rule, such as Rule 119(2), had the  
10 effect of allowing the claimants' to go further back in  
11 their claims the later they brought those claims. That  
12 is not usually how limitation works.

13           In our submission this argument can be shortly  
14 disposed of. In the present case, prior to the entering  
15 into force of Rule 119 of the 2015 Tribunal Rules, if  
16 you are with me on the first issue, all of the relevant  
17 claims were already time barred in respect of the period  
18 prior to 20 June 1997 under the Limitation Act.

19           As I have already shown you this morning, the  
20 judgment of the Privy Council in *Yew Bon Tew*  
21 establishes that a statute should not be  
22 interpreted retrospectively so as to take away  
23 an accrued right to plead a time bar unless that result  
24 is unavoidable on the language used.

25           Therefore, Rule 119(2) should not be interpreted



1           retrospectively so as to take away Mastercard's right to  
2           rely on the pre-existing time bar unless that result is  
3           unavoidable on the language used. But there is nothing  
4           in the wording of Rule 119(2) which requires such  
5           an interference with Mastercard's accrued rights.

6           The wording of Rule 119(2) is perfectly capable of  
7           being construed in accordance with the principle  
8           recognised in *Yew Bon Tew*.

9           Indeed, in accordance with that principle, if the  
10          intended effect of Rule 119(2) was to interfere with the  
11          right to rely on accrued time bars, you would expect  
12          that to have been made clear by express wording.

13         THE CHAIRMAN: Well, you say there is nothing in the  
14          language that requires that. You have made the point it  
15          would be very surprising. I think we can understand  
16          that. But the fact remains that 119(2) refers to  
17          Rule 31(1) to (3) very specifically and does not include  
18          (4). Whoever produced these rules -- it certainly was  
19          not me -- would have given presumably some thought to  
20          doing that. So I think you need to help us a bit as to  
21          quite how you say it is not unavoidable to interpret it  
22          in the way the language appears to read.

23         MR. HOSKINS: If we go back to the 2003 rules. So tab 37.  
24          So we are in 2003. If you are with me on the first  
25          issue then when the 2003 rules came into force then

1 claims which related to a period prior to 20 June 1997  
2 were time barred from High Court claims and were also,  
3 because of 31(4), time barred from the Tribunal.

4 If you go forward to 2015 and the adoption of  
5 Rule 119, there is no need for the drafter of Rule 119  
6 to deal expressly with the 2003 position because as  
7 a matter of law, as at 2015 those are already time  
8 barred.

9 THE CHAIRMAN: Are they if the rules have been revoked?

10 MR. HOSKINS: They are, because you have the principle in  
11 *Yew Bon Tew* which applies throughout because it is  
12 a principal statutory interpretation. My point is that  
13 if Rule 119 was intended to have the effect of bringing  
14 back to life claims which had been time barred and  
15 remained time barred under the 2003 rules, the draftsman  
16 would have said so expressly.

17 Now, of course, sir, there is the ambiguity hanging  
18 of the reference back to Rules 31(1) to (3), but not  
19 (4). But because there is a gap there, what the  
20 Tribunal is required to do is to interpret Rule 119, and  
21 in interpreting Rule 119 of course an important  
22 principle of interpretation you have to apply is *Yew Bon*  
23 *Tew*.

24 MR. HOLMES: As a supplementary to Peter's question, you say  
25 in your skeleton that the claim shows that there was

1 an overly optimistic assumption by the draftsman. As  
2 I understand it, your position is that the draftsman did  
3 not make a mistake which would have certain implications  
4 as the claimants claim, but effectively you are  
5 accepting that it was an overly optimistic assumption.

6 Are we in some sort of territory where, with the  
7 benefit of hindsight, it might have been better for the  
8 draftsman to have made himself clearer, but something  
9 which does not amount to a mistake which would bring in  
10 the three-point test to which the claimants' refer  
11 citing *Inco*?

12 MR. HOSKINS: Hindsight is always a good thing, but actually  
13 in our submission it is not what we are engaged on in  
14 this exercise.

15 The exercise which the Tribunal has to carry out  
16 under this issue is one of statutory construction. My  
17 primary submission on this is that there is an ambiguity  
18 created because of what was the position under the 2003  
19 rules and then the non-reference back to Rule 31(4) in  
20 the 2015 rules. Wherever there is an ambiguity in  
21 construction it is then for the Tribunal to apply the  
22 normal principles of interpretation, and one of those  
23 principles of interpretation is *Yew Bon Tew*.

24 What *Yew Bon Tew* does say is that where there is  
25 an ambiguity, where there is a matter to be interpreted,

1 it should be interpreted in a way that does not remove  
2 accrued rights, including time bars, unless that  
3 conclusion is unavoidable on the wording of the  
4 provision being construed.

5 Our submission is that because of the wording,  
6 ie the non-reference in Rule 119(2) to Rule 31(4), it is  
7 not an unavoidable conclusion that the draftsman of the  
8 2015 rules intended actions which had been time barred  
9 for some 12 years to spring back to life.

10 But I put my case primarily as a matter of  
11 construction rather than some sort of question of what  
12 would the draftsman have done and what should he have  
13 done. I look at what he did do. I say first of all: is  
14 there an ambiguity? Yes. I say: how is that to be  
15 plugged by reference to rules of interpretation? I say  
16 it is *Yew Bon Tew*, and *Yew Bon Tew* does take us back  
17 then to looking at the wording. Is it unavoidable on  
18 the wording actually used? You have to say that accrued  
19 rights were taken away. Those are the three steps  
20 I have relied on.

21 THE CHAIRMAN: *Yew Bon Tew* uses the language of rights.

22 Perhaps people used that more liberally back in the  
23 early 1980s, but you are not saying there is any kind of  
24 right protected as a human right in your limitation bar?

25 MR. HOSKINS: No, I am relying on the fact that *Yew Bon Tew*

1           recognised that, and I will use the word "ability" to  
2           rely on a time bar falls within the *Yew Bon Tew*  
3           principle. So I do not tie my argument to having to  
4           elevate a time bar to any particular status.

5           THE CHAIRMAN: I think that would be difficult. Because  
6           then if that were to be the case we have got Section 3  
7           of the Human Rights Act and so on.

8           MR. HOSKINS: No, I am not going to a sort of Human Rights  
9           type argument. I take the word "right" as used in *Yew*  
10          *Bon Tew* there, a special meaning. But of more  
11          importance is the recognition in *Yew Bon Tew* that  
12          a time bar falls within the *Yew Bon Tew* principle.

13          THE CHAIRMAN: That I think is very clear.

14          MR. ANDERSON: Mr. Hoskins, can you help me with one small  
15          point and it is this: would you see that it would be  
16          possible under what are largely procedural rules to put  
17          back in place a substantive right?

18          MR. HOSKINS: Would it be possible?

19          MR. ANDERSON: In other words are these rules competent to  
20          re-establish what is a substantive law right.

21          MR. HOSKINS: I think the rules at present -- and  
22          correct me if I am wrong on this, but I think the  
23          Competition Appeal Tribunal Rules are statutory instruments.  
24          So I do not think it can be excluded that it would be  
25          possible for the Tribunal Rules to have the effect that

1 the claimants' claim for them. I would desperately like  
2 to cling on to your answer and say yes, but I have  
3 a question mark in my head on that.

4 The final point I would like to make actually  
5 reflects a question asked by Mr. Holmes. It is just to  
6 tidy up the claimants' reference to the *Inco Europe v*  
7 *First Choice Distribution* case which I am not going  
8 to take you to. I will leave it to them to do that.

9 I will simply say this in relation to *Inco Europe*,  
10 which is that that case concerns the question of when it is  
11 appropriate to add, omit or substitute words in order to  
12 correct an obvious drafting error.

13 Our submission is that that is simply not relevant  
14 in our case because, as I have just been submitting, we  
15 say Rule 119(2) is perfectly capable of being construed  
16 in accordance with the *Yew Bon Tew* principle without  
17 the need to add, omit or subtract any words. So we say  
18 we are not in the *Inco Europe* domain.

19 Can I turn to the third issue. If the Tribunal  
20 finds for Mastercard on the first two issues, and as  
21 I understand it, it is common ground that all the  
22 claims, Carphone on one side, are prima facie time  
23 barred insofar as they are based on the infringements  
24 prior to 20 June 1997. The issue then, the third issue  
25 of course, is claims could only be brought in respect of

1 transactions prior to those dates if the claimants' can  
2 demonstrate that they are entitled to rely on  
3 section 32(1)(b) of the Limitation Act 1980. So if they  
4 can extend the limitation period under that provision.

5 THE CHAIRMAN: And the burden is on them?

6 MR. HOSKINS: It is on them.

7 MR. HOLMES: That is accepted, is it, by the claimants?

8 THE CHAIRMAN: Is that in issue, that you bear the burden  
9 on? That is accepted?

10 MR. PICKFORD: When these matters actually come to be  
11 determined, when we say they should be determined  
12 properly at trial, the burden will be on us. But this  
13 is their application to strike out on summary judgment.  
14 So the burden is on them to demonstrate that our defence  
15 in that regard would be fanciful.

16 THE CHAIRMAN: They bear the burden of showing that there is  
17 no way you could discharge your burden.

18 MR. PICKFORD: Yes. So today's burden lies on them. We say  
19 in fact these matters should ultimately be determined at  
20 trial and at that point the burden will be on us.

21 THE CHAIRMAN: Yes, we understand you say that. Yes, thank  
22 you.

23 MR. HOSKINS: I do not think the burden is temporal in the  
24 way Mr. Pickford describes --

25 THE CHAIRMAN: I think you have the burden of showing the

1 summary judgment burden.

2 MR. HOSKINS: And the burden is theirs in terms of the  
3 substantive reliance. I will show you what our burden  
4 is as well. But they are not temporal. It is not  
5 something I have got today and they have got if they  
6 live to fight another day.

7 Section 32(1)(b) is at authorities 2, tab 36,  
8 page 17:

9 "... where in the case of any action for which  
10 a period of limitation is prescribed by this Act ...

11 "(b) any fact relevant to the plaintiff's right of  
12 action has been deliberately concealed from him by the  
13 defendant ..."

14 Skipping (c):

15 "The period of limitation shall not begin to run  
16 until the plaintiff has discovered the concealment or  
17 could with reasonable diligence have discovered it."

18 So those are the statutory provisions we are  
19 concerned with.

20 The particular issue for the Tribunal to decide, as  
21 you will have seen from the skeleton arguments, is  
22 whether any of the claimants could with reasonable  
23 diligence have discovered the facts necessary to plead  
24 a claim against Mastercard as at 20 June 1997.

25 So we are not seeking to establish they had actual



1 knowledge, we are relying on: or could with reasonable  
2 diligence have discovered it.

3 20 June 1997 is the relevant date for the  
4 application of English limitation law in respect of both  
5 transactions inside and outside the UK for the reasons  
6 I explained earlier.

7 Sir, you have the point. The substantive, if I can  
8 use that word, burden of proof is on the claimants in  
9 relation to section 32(1)(b), but we clearly bear  
10 a burden insofar as we are seeking a summary dismissal  
11 of that issue.

12 If we go to authorities 1, tab 25, which is the  
13 judgment of Mr Justice Simon, as he then was, in the  
14 *Arcadia v Visa* proceedings, he summarised at  
15 paragraph 19 of his judgment, principally eight points  
16 potentially relevant where one party is seeking summary  
17 dismissal. I think it is common ground between us all  
18 that these points are applicable in these applications  
19 before the Tribunal.

20 So paragraph 19, (1) to (8), they are very familiar  
21 principles. I just ask you to quickly look through  
22 them, please. I will not make any submissions on them  
23 unless you have any questions (Pause).

24 Mr. Cook reminds me, the overall burden of proof  
25 point is made at (7).

1 THE CHAIRMAN: Yes.

2 MR. HOSKINS: I want to go on in the judgment to  
3 paragraphs 23 to 24 because there Mr Justice Simon did  
4 a survey of the authorities concerning the proper  
5 application of section 32(1) of the Limitation Act. If  
6 I can just state three principles which I particularly  
7 wish to refer to and then I will ask you to read  
8 paragraphs 23 to 24.

9 But I say the following legal position is as  
10 follows. Section 32(1)(b) is to be interpreted  
11 narrowly, not broadly. To put that colloquially, it  
12 should not be too easy for a claimant to take the  
13 benefit of this provision.

14 I just use that colloquial expression to put the  
15 "narrowly" in context. Secondly, the claimant must  
16 satisfy what is called "a statement of claim test". The  
17 only relevant facts are those which are essential in  
18 order to permit a prima facie case to be pleaded which  
19 would not then be liable to be struck out.

20 The third point is that the essential facts that  
21 have to be pleaded do not include facts which are  
22 relevant to a possible defence. I will come back to  
23 that.

24 Having identified the propositions of law that  
25 I take from *Arcadia*, if I can ask you to briefly

1 re-read paragraphs 23 to 24 to yourselves, please.

2 THE CHAIRMAN: Yes. (Pause)

3 MR. HOSKINS: You will see the principles that I refer to.

4 Narrowly rather than broadly is in (1). Statement of  
5 case is in (4). Subsection (b) does not apply to a possible  
6 defence is in (5). The claim must not be liable to be  
7 struck out is in (7).

8 So that is the approach that we say should be  
9 applied to section 32(1)(b).

10 The next issue I want to look at is what are the  
11 essential elements of a claim under Article 101 TFEU or  
12 the chapter 1 prohibition under the Competition Act.

13 If we can go to *Arcadia* paragraph 31.

14 THE CHAIRMAN: Although we are not concerned with chapter 1  
15 and chapter 2, are we? This is --

16 MR. HOSKINS: Purely follow on, sorry, yes.

17 THE CHAIRMAN: Purely follow on.

18 MR. HOSKINS: So paragraph 31.

19 THE CHAIRMAN: Paragraph, sorry?

20 MR. HOSKINS: 31.

21 THE CHAIRMAN: In *Arcadia*?

22 MR. HOSKINS: In *Arcadia*. Still *Arcadia*:

23 "It is common ground that in order to establish  
24 a claim for damages based on Article 101 TFEU, four  
25 elements must be shown: (1) an agreement or a concerted

1 practice between undertakings; (2) having as its object  
2 or effect the prevention or distortion of competition  
3 which is (a) appreciable and (b) not objectively  
4 necessary; (3) which affects trade between member  
5 states; and (4) which has caused some loss and damage to  
6 the claimant."

7 You have seen some discussion of some loss and  
8 damage in the skeleton arguments.

9 THE CHAIRMAN: Yes.

10 MR. HOSKINS: Mastercard agrees with that. I think the  
11 claimants do as well, as an identification of the  
12 essential elements. But we quibble with one point.  
13 There is one point we disagree with because you will see  
14 it was apparently common ground in *Arcadia* that  
15 a claimant, as opposed to the defendant, bore the burden  
16 in relation to objective necessity.

17 But, sir, quite clearly objective necessity is  
18 a defence that may be relied upon by a defendant.  
19 A claimant is not required to establish that  
20 an agreement is not objectively necessary in order to  
21 plead a prima facie valid claim.

22 I do not think that should be a surprising  
23 proposition. I think it is pretty well established.  
24 But why it slips through the net in that way is probably  
25 because what suited the respective parties, but just to

1 give you authority to make good the point, tab 15 of  
2 this bundle, *The Racecourse Association and British*  
3 *Horseracing Board v Office of Fair Trading*,  
4 paragraphs 131 to 134. It is at page 58, paragraph 131.  
5 If I ask you to quickly read through particularly 131  
6 and 132 because the punchline is in 133, where the  
7 Tribunal makes it clear that the burden for objective  
8 necessity is on the defendants, not the claimant.

9 (Pause)

10 Here, of course, the applicants were the bodies that  
11 were being accused of an infringement. This is  
12 an infringement decision. (Pause)

13 In my submission, it really is incontestable that  
14 where you have an agreement or arrangement that prima  
15 facie falls within Article 101, if the parties to that  
16 arrangement wish to take advantage of the ancillary  
17 restraints doctrine, the objective necessity doctrine,  
18 quite clearly the burden is on them both to plead that  
19 point and they bear the burden of proof at trial in  
20 relation to it.

21 THE CHAIRMAN: It was of course considered in the  
22 Court of Appeal judgment in these MIF cases where  
23 I think objective necessity was featured quite  
24 prominently.

25 MR. HOSKINS: It did because I ran the point. I should know

1 the answer off the top of my head.

2 THE CHAIRMAN: Yes, I thought you did. Because that might  
3 discuss this very issue in circumstances rather closer  
4 than ones we are dealing with.

5 MR. HOSKINS: I will double check. I must confess I looked  
6 at that while I was preparing. I was not sure there was  
7 as crisp a statement as that.

8 THE CHAIRMAN: Could you have a look.

9 MR. HOSKINS: I will take a look --

10 THE CHAIRMAN: Particularly if you are saying that --  
11 because Mr Justice Simon's judgment, of course, it was  
12 as you say a concession, it was common ground. But  
13 I think the same point features in the judgment in the  
14 Chancery in the Court of Appeal, I think.

15 MR. HOSKINS: Objective necessity, slightly straying from my  
16 objective capacity, but as the advocate for Mastercard  
17 in that case, it was certainly a case that we bore the  
18 burden of proof in relation to the death spiral argument.

19 The only reason I am hesitating is whether there was  
20 a crisp recitation of that, the basis upon which we were  
21 all acting, so let us look for that.

22 THE CHAIRMAN: Yes.

23 MR. HOSKINS: Can I go back, please, to Mr Justice Simon in  
24 *Arcadia*.

25 THE CHAIRMAN: Yes.

1 MR. HOSKINS: At tab 25, paragraph 39. Can we say the  
2 position of the objective necessity is the same as the  
3 position as if a defendant, an infringing party, wished  
4 to claim an exemption. You see at 39 it just makes the  
5 obvious point that if someone wishes to claim  
6 an exemption the burden is on them and the claimant does  
7 not have to plead in its particulars of claim a position  
8 on exemptions. It is for the defendant to raise it  
9 first.

10 THE CHAIRMAN: That I think is common ground?

11 MR. HOSKINS: It is common ground, but I refer you to that  
12 because objective necessity is in the same position. It  
13 is a defence for the defendant to raise, it is not  
14 something the claimant has to pre-emptively deal with in  
15 order to put forward a prima facie case.

16 THE CHAIRMAN: One uses this term defence a bit loosely. It  
17 is not technically a defence. It is rather like  
18 objective justification in Article 102, is it not?

19 MR. HOSKINS: Yes, there would be no infringement. It is  
20 shorthand really for a point upon which the burden is on  
21 the party who wishes to rely upon it to raise and to  
22 prove.

23 Shall I deal with the sum loss issue and then  
24 I imagine you will want to take a break.

25 We made some submissions on this in our skeleton

1 argument. I am not going to repeat those. But the  
2 claimants have added an authority to the bundle which is  
3 very helpful on this point. It is authorities bundle 1,  
4 tab 9A.

5 THE CHAIRMAN: I hope that has reached me. What is the name  
6 of it?

7 MR. HOSKINS: The case is called *Aldi Stores* --

8 THE CHAIRMAN: I do not have it.

9 MR. HOSKINS: Shall we take the break now?

10 THE CHAIRMAN: I think perhaps we will take the break now  
11 because we can then insert this.

12 MR. HOSKINS: Certainly. (Handed)

13 MR. HOLMES: Could I just ask, can I put a point to you  
14 which I perhaps should have put to you when you listed  
15 the points cited in *Arcadia* at paragraph 19 when you  
16 ran through what you referred to as the eight points in  
17 relation to the strike out claim.

18 I wanted to ask if you had any comments on the very  
19 end of that section where Mr Justice Simon said, talking  
20 about the burden of proof on the defendants:

21 "It was for them to establish, if they could, the  
22 negative propositions that the claimants had no real  
23 prospect for success and that there is no other reason  
24 for trial."

25 Of course, in this case there are other reasons for



1 the trial in that there are periods for which claims are  
2 made other than the period for which you made the strike  
3 out action. Is that of any relevance to how we should  
4 consider the strike out action?

5 MR. HOSKINS: In my submission, not because if a party -- it  
6 is not uncommon for these sorts of limitation issues to  
7 be dealt with either on a summary basis as we are or as  
8 a preliminary issue, and if they are fit to be decided  
9 on a summary basis early then my submission would be it  
10 cannot be another valid reason for a trial that we are  
11 going to have a trial in relation to other periods.

12 The reason why the limitation point is important,  
13 for example. It is not just the value of the claim, it  
14 is in relation to the disclosure, the evidence etc that  
15 will have to be obtained for a period as long ago as  
16 1992 to 1997.

17 So our submission, and one of the reasons we are  
18 bringing this, is that there will be real value if it is  
19 fit for summary disposal for the Tribunal to make it  
20 clear to everyone you do not have to go back that far in  
21 time to prepare the trial. So the short submission  
22 I would make is the mere fact that some parts of the  
23 claim are in time is not itself another reason to refuse  
24 a summary disposal.

25 THE CHAIRMAN: We will come back at 11.55 am.

1 (11.47 am)

2 (A short break)

3 (11.55 am)

4 THE CHAIRMAN: Yes, Mr. Hoskins.

5 MR. HOSKINS: Hopefully you now have tab 9A in authorities  
6 bundle 1.

7 THE CHAIRMAN: Yes.

8 MR. HOSKINS: It is a judgment of the Court of Appeal,  
9 *Aldi Stores v Holmes Buildings Plc.* Having been  
10 through the facts, I am not sure it really helps to try  
11 and get completely to the bottom of the point I wish to  
12 make, so I think if you do not mind I will just leave it  
13 to paragraph 17.

14 It is actually on the following page you will see  
15 the heading "The Issues" after paragraph 17. It is  
16 above paragraph 18.

17 The first issue is:

18 "Does the amendment of the Part 20 claim in the Aldi  
19 action to add the claims for an indemnity in respect of  
20 the B&Q and Granchester claims involve the addition of  
21 new claims within the meaning of section 35(2) within  
22 the Limitation Act 1980 and CPR 17.4(2) ..."

23 So you will see that Aldi, the claimant, was seeking  
24 to add a claim.

25 THE CHAIRMAN: This was an application to amend, was it?

1 MR. HOSKINS: It was an application to amend which raised  
2 limitation issues. As I say, it is not set out very  
3 clearly, but paragraph 9, for example. But that  
4 pleading is going on by someone else in the action.

5 It is really just not very clear on the face of it.

6 I tried to --

7 THE CHAIRMAN: It is clear from the very first paragraph of  
8 the judgment, paragraph 2, is it not?

9 MR. HOSKINS: Yes.

10 THE CHAIRMAN: Permitted to amend, to introduce a claim.

11 MR. HOSKINS: Certainly.

12 THE CHAIRMAN: I see, that is what it was about.

13 MR. HOSKINS: The passage I wanted to take you to is at  
14 paragraph 21.

15 You see the heading "The first issue":

16 "The meaning of a 'new claim' within the definition  
17 from section 35(2) of the Act has been considered by  
18 this court on a number of occasions. Perhaps it is  
19 sufficient to refer only to what was said by  
20 Lord Justice Auld in *Lloyds Bank v Rogers* ... At  
21 85F, he said:

22 "'It is important to note that what makes a new  
23 claim as defined in section 35(2) is not the newness of  
24 the claim according to the type or quantum of remedies  
25 sought but the newness of the cause of action that it

1 involves.'" "

2 If I could ask you then to read to the end of that  
3 quote.

4 So the point that is made at the start of the  
5 quotation, ie that an application to amend merely to add  
6 to or alter the type or quantum of remedies sought does  
7 not give rise to a new claim or cause of action, is  
8 addressed again later in the judgment at paragraph 26:

9 "I cannot accept this submission. In my judgment  
10 the proposed amendments do not introduce new causes of  
11 action and therefore do not add new claims against WSP.  
12 As I see it, the amendments do no more than add new  
13 heads of loss to those already pleaded. No new duty and  
14 no new breach of duty is alleged by a proposed  
15 amendments. As Mr. Tomlinson QC points out, all that  
16 Holmes is proposing by its amendments is to say that as  
17 a result of WSP's negligence it has suffered damage not  
18 only in the form of its liability to pay damages to Aldi  
19 but also in the form of its ability to pay damages to  
20 B&Q and Granchester."

21 At 27:

22 "It is true that in order to prove its loss in  
23 respect of its liability to B&Q, Holmes must not only  
24 prove breach of duty but also causation, ie that it  
25 relied on the advice of WSP to enter into the warranty

1           that it gave to B&Q. I do not consider that this is  
2           enough to show that this is a new cause of action."

3           Then causation is picked up again at 28:

4           "The second reason why it seems to me that the  
5           submission of Mr. Soole must be rejected is that even if  
6           it is right to say that in order to succeed against WSP  
7           in relation to the B&Q and Granchester claims, Holmes  
8           must prove a causal link between the advice and entering  
9           into the deeds of warranty. That is not sufficient to  
10          show that these are new claims."

11          Then perhaps I could ask you to read again, please,  
12          to the end of that paragraph.

13         THE CHAIRMAN: Yes.

14         MR. HOSKINS: Sir, you see why we rely on that when you come  
15          to consider the statement of claim test, which we have  
16          to deal with. One is inevitably looking at what  
17          constitutes the essential right of action and we rely on  
18          this authority to show that different types, heads of  
19          loss, different types of remedy, different elements of  
20          quantum, different issues of causation, do not in  
21          themselves constitute new causes of action.

22          That is when why we submit that some loss is the  
23          essential fourth element of the tort, the  
24          claimant has to be able to plead a prima facie case that  
25          it has suffered some loss, it does not have to be able

1 to plead all the heads of loss it might wish to claim or  
2 be able to claim, and we rely on this authority as  
3 supporting that submission.

4 THE CHAIRMAN: It might go to reasonable diligence, might it  
5 not? Because -- and you are no doubt coming to that,  
6 the question of what would be reasonable might depend on  
7 what sort of loss you thought you suffered and could  
8 claim for. You would expect more diligence, reasonably,  
9 if you were thinking you could claim for half a million  
10 pounds than if you thought on the facts available you  
11 could only claim for £10,000.

12 MR. HOSKINS: That is a submission I am going to address.  
13 It is one Mr. de la Mare takes, which is that because of  
14 the nature of their losses then reasonable diligence  
15 should be seen in that light.

16 THE CHAIRMAN: Never mind whether on the facts of this case  
17 that is sustained, but as a general point, because you  
18 have taken us to Aldi showing that even if the loss and  
19 causation may be much greater, it is still the same  
20 cause of action. But might it not have a bearing, as  
21 a matter of principle, aside from the facts of this  
22 case, on what is reasonable diligence?

23 MR. HOSKINS: Can I come to that when I -- because I want to  
24 show you some case law.

25 THE CHAIRMAN: I do not want to take you out of order --

1 MR. HOSKINS: I want to frame what reasonable diligence  
2 means before I deal with that submission.

3 So those are the elements, the four elements, of  
4 an essential claim under Article 101(1). If I can go  
5 back to Mr Justice Simon in *Arcadia*, so authorities 1,  
6 tab 25, this time, please, back to paragraphs 44 to 48.  
7 I wanted to show you what the elements of the claim in  
8 *Arcadia* were. So paragraph 44:

9 "So far as the first element of the present claim is  
10 concerned (the existence of an agreement or concerted  
11 practice), the Particulars of Claim allege that each of  
12 the Visa MIFs constituted and remain decisions of an  
13 association of undertakings and/or agreements and/or  
14 concerted practices. In each case the pleaded basis for  
15 the allegation is the existence and nature of the  
16 Defendants, the existence of the MIF itself and its  
17 basic nature ..."

18 I will remind you of these paragraphs when we come  
19 to actually look at the evidence.

20 45:

21 "As to the second element ... the Particulars of  
22 Claim allege that the mere existence of a MIF, or at  
23 least a MIF greater than zero, is itself a violation of  
24 Article 101(1) ..."

25 46:

1           "The Particulars of Claim further allege that the  
2 relevant Visa MIFs:

3           "(1) have as their 'object' the restriction of  
4 competition because in particular they fix a substantial  
5 part of the price charged by acquirers to merchants;

6           "(2) have as their 'effect' the restriction of  
7 competition because in particular they create a floor or  
8 common cost for all acquirers since in the absence of  
9 MIFs the prices set by acquiring banks would have been  
10 lower to the benefit of the claimant merchants."

11           47, the third element:

12           "... (the effect on trade between Member States),  
13 the Particulars of Claim allege that the Visa EEA MIFs  
14 covered cross-border payments and applied to domestic  
15 transactions a number of EEA Member States ..."

16           I'm going to stop at "covered cross-border payments"  
17 because that is what we have in our case.

18           48:

19           "As to the fourth element of the claim, the  
20 Particulars of Claim allege that the overall effect of  
21 the breaches was unlawfully to inflate the level of MSC  
22 ..."

23           That is the merchant service charge:

24           "... paid by the claimant merchants to the acquiring  
25 banks over and above the amounts that would otherwise



1 have prevailed."

2 That was the essential pleading in *Arcadia*.

3 In relation to the restriction of competition,  
4 paragraph 97 of *Arcadia*:

5 "The first point to note is that simply as a matter  
6 of impression the words 'manner', 'mechanisms', 'precise  
7 nature', 'actual nature' tend to indicate that what was  
8 concealed were matters of detail rather than core  
9 issues."

10 Then it is the next sentence I particularly rely on:

11 "It is difficult to see why for example the manner  
12 and mechanisms by which the MIFs were set is  
13 an essential matter of proof which has to be established  
14 in order to found the cause of action. The essence of  
15 the cause of action is object and effect not means and  
16 it is not clear how the precise nature or even the scope  
17 of the MIF arrangements are facts which meet the Johnson  
18 test."

19 I have shown you what the pleaded objects and  
20 effects were at paragraph 46.

21 In relation to the relevant defendants, *Arcadia*,  
22 paragraph 98. Rather than having me read it out, could  
23 you read paragraph 98 to yourself, please. (Pause)

24 You will see in the middle of that passage:

25 "It was known that the fourth defendant existed, was

1 a subsidiary of the third defendant and acquired the  
2 assets of the former Visa Regional Board of the second  
3 defendant. From these facts the claimants were able to  
4 raise a prima facie case that the fourth defendant had  
5 some role in setting the UK MIFs."

6 Mr Justice Simon went on to say in modern litigation  
7 you cannot just sit and say "I do not", and we will come  
8 back and deal with that in reasonable diligence.

9 Over the page, paragraph 99, on the level of the  
10 MIFs:

11 "Finally, this is a price-fixing claim. Although  
12 the MIF levels may have been concealed, the actual MIF  
13 levels are not material to the existence of the claim  
14 (although they are potentially relevant to the measure  
15 of recoverable damage). The basis of the claim is the  
16 existence of any MIF setting the minimum charge since  
17 any MIF is characterised as an overcharge forming the  
18 basis for recovery. It follows the actual level of MIF  
19 is immaterial provided it is more than zero."

20 Paragraph 107 I take you to just because it is  
21 a very good encapsulation of the competing legal  
22 policies which underpin section 32(1)(b), if I could ask  
23 you to read that.

24 (Pause)

25 Then paragraph 108:

1           "Despite the abundance of documents available to the  
2 court on this application, the issue turns on  
3 a relatively narrow point where the facts which were  
4 known or discoverable by the exercise of reasonable  
5 diligence by the claimants before 2007 were sufficient  
6 to enable them to plead a 'statement of claim' which  
7 established a prima facie case."

8           Our position is that is the test to be applied.  
9 Could the claimants here have pleaded a statement of  
10 claim which established a prima facie case?

11           Dixons, in their skeleton at paragraph 40, suggest,  
12 and here again I am quoting:

13           "It is impossible to apply the statement of claim  
14 test without actually considering the detail of what has  
15 been pleaded."

16           The authority that is relied upon for that  
17 proposition is at paragraph 307 of the judgment of  
18 Lord Justice Rix in the case called *AIC Limited v ITS*  
19 *Testing*, which is referred to as the *Kriti Palm*,  
20 the name of the vessel in that case.

21           When one looks at the *Kriti Palm* and beyond that  
22 single paragraph, *Kriti Palm* is an authority which  
23 supports Mastercard's position. I would like to turn to  
24 that authority now. It is in this authorities bundle 1  
25 at tab 17.

1           Let me summarise the facts for you because it is  
2 quite a complex factual background. Paragraphs 1 and 2  
3 tell us the following.

4           The defendant, which was a testing company called  
5 ITS, issued a certificate of quality in respect of  
6 a cargo of gasoline which was due to be loaded on the  
7 Kriti Palm for carriage to New York. The contract  
8 provided that the RVP, which is the Reid vapour  
9 pressure, of the gasoline should be a maximum of 9 PSI  
10 under a particular test method and the test method was  
11 D5191.

12           Now, in error ITS used the wrong test method to  
13 carry out the testing and issue the certificate. It  
14 used D323 instead of D5191. So there was a problem with  
15 the certificate of quality in relation to the cargo of  
16 gasoline loaded. The claimant, which was AIC had bought  
17 the gasoline from Mobil; you see that at paragraph 4.  
18 On arrival in New York testing using the correct method  
19 revealed to AIC, the claimant, that the gasoline in fact  
20 exceeded the maximum PSI stipulated in the contract.  
21 That is paragraph 9.

22           So AIC was on notice of the problem when the cargo  
23 arrived in New York. ITS then carried out further tests  
24 this time using the correct method which, not  
25 surprisingly, also showed that the gasoline exceeded the

1 maximum PSI stipulated in the contract, and those tests  
2 were referred to as the "Cooper retest". You see that  
3 in paragraph 11 of the judgment.

4 One of the issues in the trial was whether AIC could  
5 rely on section 32(1)(b) of the Limitation Act 1980.  
6 You see that at paragraph 15.

7 The judge at the trial found that there had been  
8 deliberate concealment of the Cooper retest results, so  
9 the second set of tests that were done following arrival  
10 in New York. You see that at paragraph 17.

11 If we go into the judgment, at paragraph 301 --  
12 there are no page numbers on this. So paragraph 301.

13 If I could ask you, please, to quickly read 301 to  
14 305 because the facts are complicated. 301 to 305 will  
15 hopefully set the scene when I come onto make the legal  
16 submissions.

17 (Pause)

18 Sir, we say the words at the end of paragraph 305,  
19 at the top of that page, are important because they do  
20 show one of the problems that arises if the claimants  
21 were correct, which is that claimants could  
22 retrospectively seek to obtain extensions of limitation  
23 by means of the way they framed their own pleading if  
24 one had to look at the particular way in which they  
25 pleaded their case for the purposes of section 32(1)(b).

1 That is an obvious problem if they were correct. As  
2 I will show you, they are not correct as a matter of  
3 law.

4 Paragraph 307 is the one cited in Dixons' skeleton  
5 and upon which they rely. If I could ask you just to  
6 read the first half of it before it goes into the (1),  
7 (2) etc. I just want you to see the words they rely on,  
8 and it is the sentence:

9 "It is therefore important to consider the facts  
10 relating to an allegation of deliberate concealment  
11 vis-a-vis a claimant's pleaded case."

12 (Pause)

13 The claimant suggests that that sentence, those  
14 words:

15 "It is therefore important to consider the facts  
16 relating to an allegation of deliberate concealment  
17 vis-a-vis a claimant's pleaded case," supports their  
18 legal proposition that when a court or Tribunal is  
19 applying section 32(1)(b) you must consider the detail  
20 of what has actually been pleaded.

21 But those words cannot bear that weight given what  
22 follows later in this judgment, paragraph 322.

23 Paragraph 322 raises the question:

24 "The subsection speaks of any facts relevant to  
25 a plaintiff's right of action. What is meant by that?"

1 THE CHAIRMAN: Just a moment.

2 MR. HOSKINS: It is the first sentence at 322. If I could  
3 ask you please to read 323 and 324. So the proposition  
4 that I put forward on the basis of that. The first  
5 sentence of 323:

6 "... it is clear from authority that the statutory  
7 words 'any fact relevant to a plaintiff's right of  
8 action' are to be given a narrow rather than a wide  
9 interpretation."

10 Then the final sentence of 323:

11 "Therefore the statutory words 'must mean any fact  
12 that the plaintiff has to prove to establish a prima  
13 facie case'."

14 It is quite clear that the claimants' submission  
15 that for the purposes of section 32(1)(b), it is  
16 necessary to look at the facts which are necessary to  
17 plead the case actually pleaded by the claimant simply  
18 cannot stand in light of the analysis of  
19 Lord Justice Rix in the *Kriti Palm*.

20 So, again, we have I am afraid one sentence which is  
21 taken out of context and the weight that is put on it is  
22 simply not justified.

23 Sir, as you know, in *Arcadia* itself,  
24 Mr Justice Simon did decide the issue of limitation in  
25 favour of the defendants on a summary basis. But we do

1 not rely on the fact that he did so. Clearly what the  
2 task for this Tribunal is is to identify what the  
3 relevant legal principles are and to apply them to the  
4 facts of this case, and that is what we ask you to do.

5 The reference to *Arcadia* is important because  
6 clearly it has a helpful summary of the principles to be  
7 applied in relation to various issues.

8 I will show you briefly the Court of Appeal in  
9 *Arcadia* because, sir, as you have already referred to  
10 this morning, it upheld Mr Justice Simon's judgment.  
11 That is at tab 26 of this authorities bundle.

12 If I can look please first at paragraph 49:

13 "*Johnson* ... and the *Kriti Palm* are clear  
14 authority, binding on this court, for the following  
15 principles applicable to section 32(1)(b): (1) a 'fact  
16 relevant to a plaintiff's right of action' within  
17 section 32(1)(b) is a fact without which the cause of  
18 action is incomplete; (2) facts which merely improve  
19 prospects of success are not facts relevant to the  
20 claimant's right of action; (3) facts bearing on  
21 a matter which is not a necessary ingredient of the  
22 cause of action but which may provide a defence are not  
23 facts relevant to the claimant's right of action."

24 You will see the relevance of that to the objective  
25 necessity point I made earlier today.



1           Then over to paragraph 51:

2           "I do not agree that so far as concerns the proper  
3 approach under section 32(1)(b) competition claims are  
4 to be treated in principle in any different way to other  
5 claims."

6           I draw your attention to that because there are some  
7 submissions made, particularly in the Europcar TFL  
8 skeleton about the specificities of pleading competition  
9 cases. But that did not gain any attraction in *Arcadia*.

10          Finally, paragraph 59:

11          "The precise way in which the MIFs were fixed over  
12 and above what is already pleaded in the particulars of  
13 claim is in truth no more than something which goes to  
14 the strength of the appellant's claims and the  
15 commercial considerations, bearing on the advantages and  
16 disadvantages of commencing the proceedings."

17          Again, you will see the precise way in which the  
18 MIFs were fixed is given very little weight both by  
19 Mr Justice Simon and the Court of Appeal in this  
20 context.

21          So that is what I wanted to say in terms of the  
22 legal principles. I am going to come back to reasonable  
23 diligence, but in terms of what are the essential facts  
24 that have to be pleaded and therefore which could with  
25 reasonable diligence have been discovered, those are the

1 legal principles I invite the Tribunal to apply.

2 I turn now to the evidence which we have in this  
3 case. Now, as you know, the British Retail Consortium  
4 made a complaint to the European Commission on  
5 26 February 1992 and EuroCommerce made a complaint on  
6 22 May 1997. The claimants have suggested that these  
7 complaints are irrelevant because the contents of the  
8 complaints were not in the public domain at the relevant  
9 time. There were not published, for example, the  
10 complaints.

11 But the relevant point in relation to those two  
12 complaints is not whether they were published, but what  
13 they do show is the information which the claimants  
14 could with reasonable diligence have discovered. The  
15 point is simply if the BRC and EuroCommerce could  
16 discover these facts there is no reason why the  
17 claimants, using reasonable diligence, could not have  
18 discovered the same facts.

19 THE CHAIRMAN: Were Dixons not members of the BRC anyway?

20 MR. HOSKINS: They were, and two of the Dixons directors  
21 served on the board of BRC.

22 THE CHAIRMAN: So they would have had access to the  
23 complaint.

24 MR. HOSKINS: That goes to reasonable diligence.

25 THE CHAIRMAN: Whether they actually got it or not, we do

1 not know but they could have asked for it.

2 MR. HOSKINS: I sat down to prepare this and the difficulty  
3 is you have a lot of evidence from different sources,  
4 and of course the task for me and then the task for you  
5 if I have done my job well is to see from the various  
6 bits of evidence whether the essential elements of  
7 a prima facie claim could have been produced in  
8 June 1997.

9 We have put some sort of order, which -- I put some  
10 sort of order on this exercise, in the witness statement  
11 to Mr. Cotter. What I have done in preparing for this  
12 hearing is to produce a further note which tries to  
13 strip down even further what the relevant elements are.  
14 It contains no new evidence, but it will allow me  
15 hopefully to present more effectively the evidence we do  
16 rely on and allow me to do it more quickly.

17 The claimants have not had sight of this yet. Let  
18 me hand this up to you. (Handed) Hopefully this will  
19 allow me to walk through the issues more quickly than  
20 would otherwise be the case. You will see that what the  
21 note does is it splits up the evidence into the four  
22 elements that were identified in *Arcadia* as being the  
23 four essential elements of the cause of action that  
24 would have to be pleaded, and then we deal fifthly and  
25 finally with reasonable diligence, the evidence on

1 reasonable diligence.

2 Let me begin with the first element just to show you  
3 how this works.

4 I imagine this is the sort of exercise that you will  
5 need to probably reapply the cold towels around your  
6 head after we have all finished, but let me walk you  
7 through what we say is the relevant evidence and why it  
8 is relevant.

9 In the first paragraph I showed you where the  
10 summary of the Arcadia statement of case was because  
11 I wanted to come back to it in this note. On the first  
12 element, basically paraphrasing paragraph 44 of *Arcadia*  
13 here:

14 "... the [particulars of claim] alleged that each of  
15 the Visa MIFs constituted and remain decisions of an  
16 association of undertakings and/or agreements and/or  
17 concerted practices. In each case the pleaded basis for  
18 the allegation was the existence and nature of the  
19 defendants, the existence of the MIF and its basic  
20 nature."

21 So let's take that as the basis of a prima facie  
22 pleaded case under the first element and let's look at  
23 the evidence we have. First of all, the first  
24 subheading "Existence and nature of the Defendants".  
25 Here I would like to go first of all to an August 1989

1 MMC report. That is at bundle 3 at tab 30.

2 I am sure you are all aware that MMC was the  
3 Monopolies and Mergers Commission which was later  
4 subsumed into the CMA.

5 Can we pick it up, please, at page 15. Bundle 3,  
6 tab 30. At page 1 you will see this is a report on  
7 credit card services. It is a report on the supply of  
8 credit card services in the UK and this was obviously  
9 a published report. MMC used to publish this.

10 Then paragraph 2 of our note picks up certain  
11 elements on page 15. First of all, paragraph 2.40:

12 "The owner of the Mastercard trade marks is MCI,  
13 a membership corporation organised under the laws of the  
14 State of Delaware, USA."

15 Paragraph 2.41, first sentence, you see the  
16 sentence:

17 "... [these Eurocard trade marks, which appear on  
18 the back of the Access MasterCard [system], are owned by  
19 ECI, a company which has organised an internal  
20 international credit card system, with a head office in  
21 Brussels."

22 Then 2.42, heading "The arrangements between MCI and  
23 ECI":

24 "MCI has delegated to the board of ECI initial  
25 licensing authority in relation to Mastercard trade

1 marks in Europe."

2 Now, MCI is Mastercard International Incorporated,  
3 the second defendant in these claims. ECI is Eurocard  
4 International SA, which was the predecessor to  
5 Mastercard Europe SA, the third defendant. You can get  
6 that information from paragraph 2.13 of this report,  
7 which I will not take you to for the sake of speed.

8 It is also explained, as we say in the footnote,  
9 "1st Cotter, paragraph 24.2". That is bundle 2, tab 25,  
10 page 12.

11 THE CHAIRMAN: Sorry, what was that last reference?

12 MR. HOSKINS: Mr. Cotter explains the corporate history at  
13 paragraph 24.2, bundle 2, tab 25, page 12.

14 So that is the second and third defendants.  
15 Mastercard Inc, which is the first defendant, was not  
16 incorporated until 2001 and therefore it is not relevant  
17 to these applications.

18 The source for that is again Mr. Cotter's witness  
19 statement, paragraph 33.2, bundle 2, tab 25, page 19.  
20 In relation to the existence of the MIF and its basic  
21 nature, staying in this report, we are going to page 18,  
22 paragraph 2.60.

23 The MMC report states:

24 "The Mastercard and Eurocard systems determine  
25 interchange fees to be paid for international

1 transactions ..."

2 Going down to the bottom of the page:

3 "... Up to now, domestic interchange fees have not  
4 been paid between the members of the Access schemes in  
5 the UK ... but that situation will change as a result of  
6 the developments at merchant acquiring ... the  
7 Mastercard systems determine interchange fees to be paid  
8 for international transactions."

9 So you will have also seen in the evidence we put in  
10 a large number of contemporaneous newspaper reports.  
11 The reason for doing that I hope is obvious, that if  
12 a journalist using reasonable diligence could discover  
13 certain facts we say it follows that companies of the  
14 stature of the claimants should also have been in  
15 a position, using reasonable diligence, to discover the  
16 same facts as the journalists.

17 If I can ask you, first of all I would like you to  
18 look at bundle 4, tab 34.

19 THE CHAIRMAN: This is the press report?

20 MR. HOSKINS: Where I am taking you to now?

21 THE CHAIRMAN: Yes.

22 MR. HOSKINS: I am taking you to an article in The Times --  
23 sorry, to the first newspaper report, sorry.

24 THE CHAIRMAN: Yes.

25 MR. HOSKINS: This is an article in The Times newspaper

1           19 September 1989.

2           THE CHAIRMAN:  Sorry what page?

3           MR. HOSKINS:  Page 10.

4           THE CHAIRMAN:  Just one moment.

5           MR. HOSKINS:  Could I ask you to read the first six  
6           paragraphs of the reports, so down to and including "the  
7           so-called interchange fee levied by the card companies".

8                       (Pause)

9           THE CHAIRMAN:  Yes.

10          MR. HOSKINS:  You will see the final two paragraphs I asked  
11          you to read:

12                       "[The retailers] want Mr. Ridley to abolish a fixed  
13          fee charged by banks which is the so-called interchange  
14          fee levied by the card companies and passed onto the  
15          shops by their banks."

16                       If you could keep out bundle 4 because I am going to  
17          come back to it very shortly.  I would like to go back  
18          into bundle 3 for the next piece of evidence.  It is the  
19          BRC complaint.  Bundle 3, tab 31, page 12.

20          THE CHAIRMAN:  Bundle?

21          MR. HOSKINS:  3, tab 31.

22          THE CHAIRMAN:  It is not the BRC complaint, is it?

23          MR. HOSKINS:  I have a very grainy French Commission  
24          document, but behind it at page 11 things hopefully  
25          become clearer.



1 THE CHAIRMAN: Yes. Yes, page 12.

2 MR. HOSKINS: If you look at page 11 you will see the  
3 heading. I should explain, sir -- I am sorry, I hope  
4 this works. I am going to take you to the relevant bits  
5 for example of the BRC reports, under each of the  
6 headings. So I am going to visit it a number of times  
7 rather than read it to you all at once, rather than  
8 trying to deal with it that way.

9 So I am taking you to the bits at the moment which  
10 we rely on in relation to the first element. At page 12  
11 the bottom of page 12 you see the heading "Card scheme  
12 services".

13 The BRC said:

14 "It is difficult to obtain factual evidence about  
15 international interchange fee rates since the card  
16 schemes do not publish information on these matters. We  
17 are told, however, that the levy of cross-border  
18 transactions imposed by each scheme is centrally  
19 determined, applies to all members, is a single uniform  
20 rate, covers all ... member states and countries in the  
21 world."

22 You will be aware that the EEA MIF on which these  
23 claims are based are, of course, cross-border  
24 interchange fees.

25 Then section 3.1 over the page, you see the heading

1 "Article 85 infringement", 3.1 "Association of  
2 undertakings":

3 "The card schemes are associations of undertakings  
4 within the meaning of Article 85."

5 That is the way the BRC put its complaint.

6 I would like to go next, please, to bundle 4,  
7 tab 34, page 47. Page 47 is an article from the  
8 Financial Times, 15 July 1992, a survey of credit and  
9 charge cards. I would like to draw your attention to  
10 the penultimate paragraph on page 47.

11 It begins:

12 "Things could still get worse ..."

13 If you could read that, please.

14 (Pause)

15 You will see in the final sentence:

16 "Interchange fees are usually set by the  
17 international payment systems, Visa International and  
18 Mastercard and so are not subject to negotiation between  
19 a bank and its customer, and the customer of  
20 an acquiring bank is a merchant."

21 Then at page 72 we have set out the extracts in the  
22 notes. Hopefully you will see the format of this.  
23 Financial Times, 5 May 1994, the third paragraph begins:

24 "The structure of the industry is built round the  
25 two leading worldwide credit card associations."

1           If you could read that paragraph down to the third  
2 paragraph from the bottom of the page. So "around 1.7%  
3 of the value of the card transaction". (Pause)

4           You will see, sir, the detail that is given as to  
5 how the schemes function, how Mastercard functions.  
6 Mr. Cook rightly kicks me in the shins and makes the  
7 point that these are not just facts that journalists can  
8 with reasonable diligence discover and did discover,  
9 they are then published to the whole world, which is  
10 an obvious important fact which I did not mention.

11           The final piece of evidence --

12       THE CHAIRMAN: Is this discussion here about the UK, or is  
13 this about the European trans-border transactions?

14       MR. HOSKINS: It is not specific to either, sir, I do not  
15 think. That applies to the system generally. You will  
16 see for example the third paragraph:

17           "The structure of the industry is built round the  
18 two leading worldwide card associations," and the  
19 description that follows is perfectly apt to cover the  
20 system generally. It is not tied to the EEA or the UK  
21 MIFs.

22       THE CHAIRMAN: Yes.

23       MR. HOSKINS: Then the final source for the first element,  
24 tab 33 of this fourth bundle. It is the EuroCommerce  
25 complaint.

1           It begins at page 1 behind that tab. It is page 12  
2 I would ask you to look at for this purpose.

3 Section 1.3, "Proof". Sorry, bundle 3, tab 33, page 12.

4           Page 12, section 1.3, "Proof", the second paragraph:

5           "Card issuers and banks clearly have an agreement or  
6 at least a concerted practice amongst themselves on the  
7 charging of ad valorem fees to merchants."

8           Page 12, 1.3, "Proof", second paragraph, first  
9 sentence:

10           "Card issuers and banks clearly have an agreement  
11 ..."

12 THE CHAIRMAN: What does Article 3 say about -- annex 3  
13 rather, sorry -- the UK?

14 MR. HOSKINS: I do not think we have annex 3 in the evidence  
15 before you, sir, but we can certainly obtain it and have  
16 a look at it. The point I would make, sir, obviously we  
17 will obtain it for you, but the point is it was seen  
18 from a number of sources that both journalists and  
19 representative organisations were quite clearly able to  
20 see from the basic facts that they could put forward  
21 a complaint based on Article 101 on the basis of either  
22 agreement or a concerted practice or association of  
23 undertakings, and indeed, we see all three referred to.

24 THE CHAIRMAN: I am just looking at what is the ad valorem  
25 fee they are talking about.

1 MR. HOSKINS: The ad valorem fee is the MIF, because the MIF  
2 can be charged in a number of ways. It can either be  
3 charged as a percentage of the transaction or as a set  
4 amount per transaction. So ad valorem is one of the  
5 ways in which certain MIFs are set.

6 THE CHAIRMAN: Yes.

7 MR. HOSKINS: I am going to come back to some other parts of  
8 the EuroCommerce reports under the other headings.

9 THE CHAIRMAN: Yes.

10 MR. HOSKINS: I would like to finish this element by doing  
11 something I said that you do not have to do as a matter  
12 of law, which is to look at Dixons' pleaded case.

13 Now, you have had my submission on the law that it  
14 is not relevant. The touchstone of section 32(1)(b) is  
15 not to look at what Dixons have actually pleaded to  
16 identify essential facts. But what I want to take you  
17 to the Dixons pleading for is just an example of what  
18 the essential facts would look like and what would be  
19 sufficient. Does that make sense? I hope I have made  
20 myself clear.

21 So the test is not you must look at what Dixons have  
22 pleaded in order to apply section 32(1)(b), but I am  
23 going to show you the Dixons pleadings to show  
24 a pleading which went to the essential facts and  
25 established a prima facie case, which would not be

1           liable to be struck out would look like or might look  
2           like.

3           So forget it is Dixons for the moment. Just assume  
4           this is an anonymous particulars of claim. Bundle 1 at  
5           tab 8, page 13. Remember we are looking at the first  
6           element where there was sufficient evidence that would  
7           have allowed a claim to be pleaded as to the existence  
8           of an agreement, concerted practice or decision of  
9           association of undertakings.

10          Paragraph 40:

11          "A multilateral interchange fee, MIF, is  
12          an interchange fee based on a collective agreement  
13          between member banks of a payment organisation or the  
14          decision of a body within that association which has  
15          been empowered by member banks to determine the level  
16          and structure of the interchange fees with binding force  
17          for them."

18          Then 73, first sentence:

19          "The EEA MIF was at all relevant times the product  
20          of decisions of an association of undertakings within  
21          the meaning of Article 101(1) TFEU."

22          Our submission is that if a claimant had put forward  
23          a pleading on that basis in relation to the first  
24          element, that would have been a prima facie claim which  
25          would have satisfied the statement of claim test. The

1 elements identified there are what are essential to the  
2 cause of action.

3 The extracts that I have taken you to, the  
4 information I have shown you that was available before  
5 June 1997, shows that all the information necessary to  
6 plead that prima facie case in the first element was  
7 available pre-June 1997.

8 That is a very good point for me to break, if it  
9 suits you.

10 THE CHAIRMAN: Thank you. We will resume at 2 o'clock.

11 (1.00 pm)

12 (The short adjournment)

13 (2.00 pm)

14 MR. HOSKINS: Having dealt with the first element you will  
15 not be surprised to hear that I now turn to the second  
16 element, which is appreciable restriction of  
17 competition.

18 I am going to take it from the note that we handed  
19 up, page 4. Just to remind you in *Arcadia* of what  
20 the particulars of claim look like on restriction as  
21 summarised by Mr Justice Simon. That is paragraph 11 of  
22 this note:

23 "The mere existence of a MIF, or at least a MIF  
24 greater than zero, is itself a violation of  
25 Article 101(1) ...

1            "... the MIFs had as their object the restriction of  
2 competition because they 'fix' a substantial part of the  
3 price charged by acquirers to merchants;

4            "(c) the MIFs [had] as their effect the restriction  
5 of competition because they create a floor of common  
6 costs for all acquirers, since, in the absence of MIFs,  
7 the prices set by acquiring banks would have been lower,  
8 to the benefit of the claimants."

9            Then I set out paragraph 99 which I showed you when  
10 we went through the judgments. I will not read that out  
11 again. It is the point in the middle:

12            "The basis of the claim is the existence of any MIF  
13 setting the minimum charge ..."

14            Let's turn to the evidence that was available in  
15 June 1997 on appreciable restriction of competition.  
16 Back to the BRC complaint, please, at bundle 3, tab 31  
17 at page 12.

18            Under the heading "Introduction":

19            "The Commission has been active in promoting the use  
20 of payment cards as part of the programme for the  
21 completion of the single market."

22            It is the next sentence we rely on:

23            "The two major international card schemes, Visa and  
24 MasterCard Eurocard Access, operate in all member states  
25 in the community and dominate cross-border payment



1           effected by payment cards within and outside the EC."

2           At the bottom of the page under the heading "Card  
3           Scheme Services", we have already seen the third  
4           paragraph there in relation to the first element, but we  
5           rely on section 2 in its entirety in relation to the  
6           second element:

7           "Visa and Mastercard Eurocard Access are the major  
8           international card schemes operating in the EC. As  
9           a condition of membership, each card scheme acquirer is  
10          committed to pay a uniform levy under all transactions  
11          arising from cards issued in another member state or  
12          country."

13          That is a description of the EEA MIF, the MIF that  
14          has to be paid arising from cards issued in other member  
15          states or countries.

16          We have seen that it is difficult to obtain etc. We  
17          set that out in the note at the top of page 5. You will  
18          see that these are all to do with international  
19          interchange fees, IIFs, and the EEA MIF is itself  
20          a species of IIF.

21          Section 3.1, under "Associations of undertakings" we  
22          saw the first sentence. For the second element we rely  
23          on the next sentence:

24          "The rules for card schemes include obligatory  
25          payment of a fixed rate charge in relation to

1 cross-border payment, the IIF."

2 Section 3.3. The whole of that is relevant to the  
3 second element. Perhaps I could ask you to read 3.3,  
4 "Restriction of competition". (Pause)

5 So you will see there a description by the BRC of  
6 the way in which it says on the available facts the IIF  
7 created a restriction of competition. The fourth  
8 paragraph I need to refer to when we come to the fourth  
9 element, so I will just draw it to your attention now so  
10 I do not need to read it out again. But that is the one  
11 that says:

12 "Further, the IIF is passed by the acquirer wholly  
13 onto the acceptor ..."

14 The acceptor is the merchant:

15 "... who is the acquirer's sole source of income.  
16 Consequently, the IIF has a direct effect on the charge  
17 made to acceptors, ie merchants, by acquirers, the  
18 merchant fee. Thus competition at the  
19 acceptor/merchant/acquirer level is distorted by the  
20 existence of a fixed IIF."

21 I will refer to that when I deal with the fourth  
22 element.

23 The next source of information available at the  
24 relevant time is behind tab 32. It is at page 283.  
25 This is the Commission notice on the application of the

1 EC competition rules to cross-border credit transfers,  
2 published in the official journal of the European  
3 Communities on 27 September 1995.

4 Paragraph 1:

5 "This notice sets out the approach the Commission  
6 tends to take when assessing the compatibility of  
7 cross-border credit transfer systems with Articles 85 and  
8 86 of the EC Treaty."

9 Then if we can pick up the analysis in the notice at  
10 paragraph 40. I think the simplest thing is to ask you  
11 to read paragraphs 40, 41 and 42, please. (Pause)

12 You see what the Commission is saying there. Where  
13 you have a multilateral interchange fee agreement, as  
14 one did for both Mastercard and Visa, the Commission  
15 says that is a restriction of competition falling under  
16 Article 85(1) etc. It explains why, because it  
17 substantially restricts the freedom of banks  
18 individually to decide their own pricing policies.

19 It also says:

20 "The restriction is likely also to have the effect  
21 of distorting the behaviour of banks vis-a-vis their  
22 customers."

23 So that is a description of why a multilateral  
24 interchange fee agreement is, according to the  
25 Commission, an infringement of 85(1).

1           At paragraph 41, the second sentence, it suggests  
2           that the restriction might not be appreciable provided  
3           that the competing systems, not themselves, also contain  
4           similar multilateral interchange fees.

5           Here we know that the competing system, the main  
6           one, was Visa and it did contain similar multilateral  
7           interchange fees.

8           One of the ways one sees that, as we set out in the  
9           note, page 6, paragraph 16, when you look at the BRC  
10          complaint and the EuroCommerce complaint they are both  
11          in general terms directed at Mastercard and Visa. They  
12          are not directed solely at Mastercard because of the  
13          specificity relating to Mastercard that Visa did not  
14          have. They attack both those schemes because they are  
15          multilateral interchange systems.

16          This did come up in the recent Court of Appeal  
17          judgment in the Mastercard retailer actions, and we have  
18          set out an excerpt, paragraph 207 of the Court of Appeal  
19          judgment, at page 15 of our note.

20          THE CHAIRMAN: Which page are you on now?

21          MR. HOSKINS: Page 6, paragraph 15. So this is the court  
22          from the Court of Appeal:

23                 "We consider that the two schemes [Visa and  
24                 Mastercard] are materially identical for the purposes of  
25                 Article 101(1) analysis. They are both four-party card

1 payment schemes with an honour All Cards Rule for credit  
2 and debit cards, in which default MIFs are set which are  
3 paid to issuing banks and passed on to the merchants as  
4 part of the merchant' service charge imposed by  
5 acquiring banks."

6 I fully appreciate the Court of Appeal judgment was  
7 earlier this year, but the facts that it relies on to  
8 say the schemes are materially identical for the purposes of 101,  
9 as I have shown you through these materials, were all  
10 known at the relevant time in June 1997. We have added  
11 that judgment to the bundle. Sorry, it will be added to  
12 the bundle. So that is coming.

13 The next source of evidence on restrictions is the  
14 EuroCommerce complaint. So that is back to bundle 4,  
15 tab 33.

16 You see the heading under "Summary" at the top of  
17 the page and then (1) "More clarity". If I can ask you  
18 to read the paragraph that begins:

19 "There is currently a concerted practice ..."

20 That is the paragraph we rely on in relation to the  
21 second element. So page 4, summary section 1, "More  
22 clarity". It is that paragraph there.

23 (Pause)

24 Then on page 5, middle of the page, 1.2, "The  
25 functioning of the system". I will not read that out.

1           There you have a description of the way in which  
2           a four-party scheme works, which anyone who has done one  
3           of these Mastercard cases will now be far too familiar  
4           with. That description of how the system works is  
5           continued over the page at page 6.

6           Then on page 7, the last paragraph of that section,  
7           if I could ask you, please, to read to the paragraph  
8           that begins:

9           "The merchant fee however comprises more than just  
10          these processing costs ..."

11          (Pause)

12          You will see the punchline in the final sentence:

13          "Stripped of its disguise, the interchange fee  
14          becomes no more than an ordinary cartel for fixing the  
15          price and trading conditions connected to card payment."

16          Page 8 in the middle of the page, in the middle:

17          "The real object of the interchange fee is to secure  
18          the transfer to the merchant of the costs incurred by  
19          the cardholder's bank for acquiring and conserving its  
20          clientele and to ensure itself of a margin."

21          Then on page 9, in the middle of page 9:

22          "Consequently, the prices of processing are fixed on  
23          a cost plus basis."

24          So the cost of processing has added a significant ad  
25          valorem component to arrive at the interchange fee that

1 banks impose on merchants. That echoes a question you  
2 asked me earlier:

3 "Because the only variable is the level of this fee,  
4 the setting of which is entirely in the hands of a group  
5 of banks, the entire system functions without reference  
6 to nor control of the market."

7 Page 10, under 1.2.5:

8 "The interchange fee is used as a means of  
9 unjustified enrichment. EuroCommerce said the  
10 interchange fee is used both as a means to fix prices,  
11 as seen before, and as a means to shift costs for which  
12 there is no cause on the merchant's or cash-paying  
13 customer's part."

14 Page 14, the middle of the page, the heading is  
15 "Price fixing". 2.1.2:

16 "The user does not pay rule amounts to a  
17 price-fixing arrangement. This is a particularly  
18 serious restriction of competition as it is  
19 a restriction on the freedom of the merchants to  
20 determine their prices."

21 That clearly, we say, relates to the second element.

22 The next sentence relates to the fourth element --

23 THE CHAIRMAN: Is this not dealing with something other  
24 than the MIF, this bit here, 2.1.2? Is it not dealing  
25 with the no discrimination rule?

1 MR. HOSKINS: I think that is right. It is referring to  
2 a particular part of the scheme which is one I do not  
3 need to -- I think that is fair enough, sir. Thank you.

4 Then section 2.1.3, no competition left, again is  
5 the effect of the user does not pay rule. So it is  
6 irrelevant. So I think you can put square brackets or  
7 score through the section 14 references in the note.

8 So those are the main sources of information we rely  
9 on to show that it was perfectly possible for  
10 a commercial company of the stature of these claimants  
11 using reasonable diligence to plead a prima facie case  
12 of restriction of competition.

13 Let me do the same exercise, let us look at the  
14 Dixons pleading, but let us imagine it is an anonymous  
15 pleading as an example of what would be necessary to  
16 plead the second element.

17 So that is bundle 1, tab 8, page 25. It is  
18 paragraph 77.2. If I can just pick it up from the  
19 bottom because I am imagining an anonymous but prima  
20 facie and unstrike-outable claim. Four lines up from  
21 the bottom of 77.2:

22 "The EEA MIF creates an artificial cost base which  
23 is common for all acquiring banks and the MSC will  
24 typically reflect the costs of the EEA MIF. This leads  
25 to a restriction of price competition between acquiring



1 banks to the detriment of merchants."

2 Then 77.4:

3 "The EEA MIF distorts competition in the prices  
4 charged by acquiring banks to merchants for acquiring  
5 cross-border debit and credit card transactions with  
6 Mastercard payment cards because it creates an important  
7 cost element which constitutes a de facto floor for fees  
8 charged to merchants they acquire."

9 Those are the essential parts of a plea of  
10 restriction, then you will see they were perfectly  
11 capable of being pleaded and put forward in June 1997 on  
12 the basis of the materials I have shown to you.

13 Staying in this pleading, I would like to deal with  
14 appreciability, what is necessary for appreciability.  
15 That is paragraph 82 on page 30. We say that what is  
16 now pleaded at paragraph 82 could certainly have been  
17 pleaded in order to give rise to a prima facie  
18 unstrike-outable claim on appreciability on the basis of  
19 the evidence available in June 1997.

20 You remember, for example, the reference to the fact  
21 that Mastercard and Visa were the dominant cross-border  
22 payment systems etc. So appreciability with all due  
23 respect is not going to be a real hurdle that should  
24 detain us when we are revisiting June 1997.

25 Then objective necessity. I have made the

1 submission the claimant does not need to plead anything, but let  
2 us see what they did plead just as a test.

3 Paragraph 83:

4 "The EEA MIF is not objectively necessary for the  
5 operation of an open payment card scheme such as that  
6 operated by Mastercard."

7 Our primary submission, you have. The claimant does  
8 not have to say anything about objective necessity, but  
9 insofar as it does have to say something, it does not  
10 have to say anything more than it actually says at  
11 paragraph 83.

12 You will see there is no obstacle to that being put  
13 forward in June 1997.

14 THE CHAIRMAN: Well, it is founded on something in the  
15 decision.

16 MR. HOSKINS: It is, but the actual plea, sir, as it is  
17 pleaded is not objectively necessary. My submission  
18 would be if it were necessary for the claimant to say  
19 anything, then that would be sufficient. But the proper  
20 analysis is it is not necessary for them to say  
21 anything.

22 THE CHAIRMAN: Yes.

23 MR. HOSKINS: The third element of the statement of case  
24 test is the effect on trade. If I can go back to our  
25 note on page 9, we have set out again the description of

1 the *Arcadia* pleading:

2 "In *Arcadia*, the PoC alleged inter alia that the  
3 EEA MIFs covered cross-border payments and the UK MIFs  
4 applied to all payment card transactions within the UK."

5 Here, we are looking at EEA MIFs, the relevant bit  
6 of the pleading:

7 "EEA MIFs covered cross-border payments."

8 Effect on trade in terms of the evidence, well, let  
9 us look at the BRC complaint. That is bundle 3, tab 31.

10 Tab 31 at page 13. You see the heading in the top  
11 of page 3.2:

12 "Impact of intra-community trade.

13 "The presentation of a card in a foreign country  
14 causes a movement of capital to that country from the  
15 home country of the cardholder. Any agreement or  
16 practice which imposes charges and conditions associated  
17 with such transfers carries substantial and increasing  
18 numbers of intra-community transactions. By its very  
19 nature ... is apt to effect trade between member states,  
20 the concept of trade having a wide scope which includes  
21 monetary transactions."

22 If we could go to tab 32 at page 283, this is the  
23 Commission notice we have seen already. Tab 32. It is  
24 paragraph 10 of the notice, page 284. The Commission  
25 deals with this issue very shortly at paragraph 10:

1           "Articles 85 and 86 only apply where there may be  
2           an effect on trade between member states. Cross-border  
3           credit transfer systems, precisely because they carry  
4           cross-border credit transfers, will be capable of having  
5           such an effect."

6           It is obvious. Then let us imagine the anonymous  
7           prima facie statement of claim that cannot be struck out  
8           on effect on trade --

9           THE CHAIRMAN: I think you have quoted it at paragraph 24 of  
10           your note.

11          MR. HOSKINS: Sorry, the Dixons pleading?

12          THE CHAIRMAN: Yes.

13          MR. HOSKINS: Absolutely, we have set it out.

14          THE CHAIRMAN: So we do not need to turn it up.

15          MR. HOSKINS: Then the fourth element, evidence of harm to  
16           the claimants. Again, I have shown you what the *Arcadia*  
17           pleadings look like on this:

18                 "The PoC alleged the overall effect of the breaches  
19           was unlawfully to inflate the level of MSC paid by the  
20           claimants over and above the amount which otherwise  
21           would have prevailed."

22           The MSC is the merchant service charge which the  
23           merchant pays to the acquirer and it included the MIF as  
24           well as other charges.

25           Harm: well, the newspaper quotes I have already

1 taken you to at 5 and 7, and page 2 of the note, both  
2 deal with harm.

3 Sir, if you are happy to take the citations I have  
4 set out obviously I can take it more quickly. The MMC  
5 report this time it is at page 163 of the report,  
6 paragraph 7.82.

7 We have not seen that one. Would you like to see  
8 it?

9 THE CHAIRMAN: Perhaps we should.

10 MR. HOSKINS: Of course. It is bundle 3, tab 13, page 163  
11 of the bundle, paragraph 7.82. So you will see the  
12 linkage there of the MIF and the MSC which is paid by  
13 the merchant.

14 The next reference is one we have already seen. It  
15 is the BRC complaint. So next tab, 31, page 13.

16 3.3, "Restriction of competition". It was the  
17 fourth paragraph that I said I would refer to again when  
18 we came to the fourth element:

19 "Further, the IIF is passed by the acquirer wholly  
20 onto the acceptor or merchant."

21 That is the fourth element.

22 The final point, there are two passages in the  
23 EuroCommerce complaint. Bundle 4, tab 33, page 10. It  
24 is the paragraph in the middle of page 10:

25 "It is therefore at the cost of the merchant and

1 indirectly the cash-paying customer that this group of  
2 clients receives these free services."

3 If you could read that paragraph, please. Again,  
4 you will see a description by EuroCommerce of what it  
5 says is the impact on merchants of having to pay the MSC  
6 including the MIF.

7 So page 10:

8 "It is therefore at the cost of the merchant ..."

9 (Pause)

10 Then the final one, which does relate to the user  
11 does not pay principle, but the comment applies to the  
12 MIF generally. That is page 14, 2.1.2, "Price fixing".  
13 Sir, I agree with you that the first two sentences  
14 relate to the does not apply rule.

15 What follows does come out of that but is in general  
16 terms:

17 "What is worse, merchants clearly pay too high  
18 a price for the processing of their card payments. The  
19 interchange fee, which was part and parcel of the  
20 merchant fee, includes a large portion of ad valorem  
21 components which not the merchants but the cardholder  
22 should be made to pay."

23 Again, the linking of the MIF to the MSC to the  
24 alleged harm to the merchants.

25 Then we come finally, this is page 11 of our note,

1 to the putative prima facie particulars of claim. That  
2 is not liable to be struck out. Bundle 1, tab 8,  
3 page 54.

4 THE CHAIRMAN: 44, I think.

5 MR. HOSKINS: 44, yes, sorry. You see we have set it out in  
6 our note what the essential elements are:

7 "The MIF was passed on as part of the relevant MSC."

8 You see that in 123.1.

9 (b):

10 "The effect of the infringement was to inflate the  
11 MSCs paid by Dixons ... merchants to acquiring banks."

12 That is 123.2.

13 (c) in our note:

14 "Dixons, substitute merchants, paid higher MSCs than  
15 would otherwise have been the case but for the  
16 anti-competitive conduct."

17 You see that at 123.4.

18 Then finally in our note (d):

19 "Dixons have sustained loss and damage."

20 Those are the introductory notes to paragraph 123.

21 THE CHAIRMAN: 123.3 has two elements: directly, the EEA  
22 MIF; and then (b), indirectly because of the application  
23 of more a specific interchange fee because of its  
24 fallback nature, it sets an effective floor, alternative  
25 focal point, more specific MIF. Those are facts.

1 MR. HOSKINS: Those are facts.

2 THE CHAIRMAN: Are they facts that come out of any of the  
3 material that you have shown us?

4 MR. HOSKINS: Sir, my submission is they are not essential  
5 facts for the purposes of section 32(1)(b), they are  
6 facts which go to quantum and causation of that  
7 particular head of loss, and I showed you the case law  
8 in relation to that, particularly the Aldi judgment this  
9 morning.

10 THE CHAIRMAN: So you accept then, is that right, that the  
11 link between the EEA MIF and a UK MIF or domestic  
12 transactions, that is not something of which the  
13 putative claimant in 1997 would have been aware?

14 MR. HOSKINS: You cannot find that in the material I have  
15 shown you.

16 THE CHAIRMAN: So insofar as the claims are based on  
17 domestic transactions, that is not something --

18 MR. HOSKINS: Sir, none of them are based on domestic  
19 transactions.

20 THE CHAIRMAN: On a loss.

21 MR. HOSKINS: Absolutely. They are all follow on actions  
22 based on the EEA MIF, and the argument is that EEA MIF  
23 is an infringement. The EEA MIF has caused direct loss  
24 through overpayment, alleged overpayment, in respect of  
25 EEA MIFs, and a further head of loss which is pleaded is



1           that the EEA MIF caused domestic MIFs to be higher than  
2           they otherwise would have been causing further loss.

3           But that last leg relating to the UK MIF is  
4           a question of causation and another head of loss. That  
5           is why I took you to Aldi this morning, to show you that  
6           is an essential part of the claim.

7           THE CHAIRMAN: The fact that the domestic transactions might  
8           account for 80% of the loss you say is irrelevant.

9           MR. HOSKINS: Does not matter. Some loss. Could they have  
10          put forward a prima facie cause of action that was not  
11          liable to be struck out? Clearly they could.

12          THE CHAIRMAN: Suppose because the international  
13          transactions are so trivial, say for Transport for  
14          London, perhaps not for Europcar, do not, they decided  
15          they are not going to claim for international  
16          transactions, they are only going to claim for domestic  
17          transactions for that period.

18          MR. HOSKINS: So we are imagining a situation where it is  
19          a purely follow on action based on the intra-EEA MIF,  
20          but purely claiming domestic losses.

21          THE CHAIRMAN: What would be the position then?

22          MR. HOSKINS: The Tribunal would be asking itself the same  
23          question, which is: could, in June 1997, the claimants  
24          have pleaded a prima facie cause of action that was not  
25          liable to be struck out? And the answer is they could

1           because they could have pleaded that there was a breach  
2           of the intra-EEA MIF which caused -- because the EEA MIF  
3           was too high and that caused them this certain head of  
4           loss.

5           THE CHAIRMAN: Even though they are not claiming for that.

6           MR. HOSKINS: Exactly, but they could have also claimed for  
7           the intra-EEA direct loss. What a party cannot do is  
8           try and tailor its own pleadings in order to take the  
9           benefit of section 32(1)(b). It is an objective  
10          question for the Tribunal to ask itself: could a prima  
11          facie valid claim have been put forward? And as we saw  
12          from --

13          THE CHAIRMAN: Even a claim for different loss?

14          MR. HOSKINS: For a different loss as long as it was open  
15          for them to plead for the intra-EEA loss. They could  
16          have pleaded that. There was a cause of action that was  
17          open to them in June 1997 that was a valid cause of  
18          action. You cannot at their election, because of the  
19          head of loss they choose to claim, circumvent the  
20          requirement of section 32(1)(b) and the objective nature  
21          of the statement of case test.

22          THE CHAIRMAN: That is not covered by authority as such, is  
23          it, that proposition?

24          MR. HOSKINS: It is a submission based on the authorities,  
25          but the particular issue has not arisen, correct.

1           The two bases of authorities are the statement of  
2 case test, and the second limb, I think it was in the  
3 *Kriti Palm* with the observation that parties should  
4 not be allowed to tailor their pleadings in order to get  
5 round the objective requirements of section 32(1)(b) and  
6 the statement of claim test.

7           The exercise we suggest the Tribunal has to follow,  
8 and hopefully the note will assist, is first of all to  
9 identify what the essential elements of the claim would  
10 be, and we have tried to do that in the note. Having  
11 settled, having formed your own view of what the  
12 essential facts would be in order to make a claim, to  
13 then look at the extracts from evidence that we have  
14 identified to see whether those essential facts are  
15 indeed covered by the materials I have taken you to.

16           In our submission that is the exercise the Tribunal  
17 has to perform.

18       THE CHAIRMAN: How far does that go? If the amount of EEA  
19 transactions, cross-border transactions was 1% and 99%  
20 was domestic, you say it would still mean that one would  
21 say they should have started their claim in --

22       MR. HOSKINS: I think we are coming into reasonable  
23 diligence. When we are looking at just the issue of  
24 could they have pleaded a complete cause of action, then  
25 it does not matter that 1% was what was in the public

1 domain. They could have still pleaded a cause of  
2 action.

3 The issue will then become the point you put to me,  
4 sir, on a number of occasions today: what if, in fact,  
5 the situation is that the direct losses from EEA MIF are  
6 relatively small compared to the indirect losses which  
7 flowed from the EEA MIF through an alleged effect on the  
8 UK MIF. That is what I am going to turn to now in terms  
9 of reasonable diligence.

10 Certainly my submission is if you had a situation of  
11 one in 99, and we do not have that here, certainly not  
12 in relation to Dixons, I say it should not matter for  
13 the four elements.

14 So if I can now turn to reasonable diligence.  
15 I need to leave our note for a moment. I will come back  
16 to that for the evidence. What I would like to do first  
17 of all is to deal with the legal principles that apply  
18 to reasonable diligence. I would like to do that by  
19 reference to a case called *Gresport Finance v Battaglia*,  
20 second authorities bundle, tab 31.

21 THE CHAIRMAN: This has not been reported, has it?

22 MR. HOSKINS: I need to double check.

23 THE CHAIRMAN: It is sometimes helpful to have a headnote.

24 MR. HOSKINS: Absolutely. We will check that.

25 MR. PICKFORD: Sir, I do not think it has. It was us who

1           introduced this case and to the best of my knowledge  
2           this is the best we can offer.

3       THE CHAIRMAN: Thank you.

4       MR. HOSKINS: I would like to pick it up at paragraph 40,  
5           please. Again, if you do not mind I will ask you to  
6           read some paragraphs and then I will indicate some  
7           propositions that we draw from those paragraphs.

8           First of all, paragraphs 40 and 41. The next  
9           section is paragraphs 48 to 50, please. Just to  
10          enumerate the propositions that we take from those  
11          passages, first of all the burden of proof is on the  
12          claimant to establish that it could not have discovered  
13          the essential facts without exceptional measures, which  
14          they could not reasonably have been expected to take.

15          That is paragraph 41. But you will see it is a test  
16          that is put in high terms. Without exceptional  
17          measures. Secondly, again this is still in the quote on  
18          paragraph 41:

19                 "The test is how a person carrying on a business of  
20                 the relevant kind would act if he had adequate but not  
21                 unlimited staff and resources and were motivated by  
22                 a reasonable but not excessive sense of urgency."

23          You will see there the objective nature of the test:  
24          the person carrying on a business of the relevant kind.

25          So we are not looking for this purpose at, well,

1           what did the legal department of each of the claimants  
2           look like at the relevant time. It is the business of  
3           a relevant kind. It is not subjective.

4           Thirdly, there must be an assumption that the  
5           claimant desires to discover the essential facts. That  
6           is the paragraph 48 citation there: desires to discover  
7           the essential facts. That is important. It is not  
8           a neutrality. It is not a test in neutrality. You are  
9           assuming that they want to discover whether they have  
10          a claim.

11          The concept of reasonable diligence carries with it  
12          the notion of a desire both to know and to investigate.  
13          A desire to investigate. Again, one gets that in the  
14          quote at paragraph 48, the quote from Law Society v  
15          Sephton.

16          Fourthly, there must be something to put the  
17          claimant on notice of the need to investigate. That is  
18          the last sentence of paragraph 49. That is notice of  
19          a potential claim. In our submission that does not have  
20          to be notice of the amount of a potential claim. I will  
21          return to that point. It is a point you have been  
22          asking me about, sir.

23          That is our submission as to how that should be  
24          understood.

25          Then fifthly --

1 THE CHAIRMAN: Sorry to interrupt you, Mr. Hoskins. I think  
2 some of the claimants in their skeleton have referred to  
3 this as a trigger.

4 MR. HOSKINS: That is right. But something to put the  
5 claimant on notice of the need to investigate. That is  
6 the trigger. It is not something to put the claimant on  
7 notice of the size of a potential claim. You see the  
8 distinction I am trying to make?

9 THE CHAIRMAN: Yes.

10 MR. HOSKINS: Then the fifth proposition, and this is  
11 paragraph 50 of the authority:

12 "It is a question of fact in each case whether the  
13 claimant could not with reasonable diligence have  
14 discovered the essential facts."

15 The precise meaning of "reasonable diligence" varies  
16 with the particular context, but it is very important to  
17 note again from the quote in paragraph 50 that it is  
18 an objective not a subjective test. So, yes, the  
19 precise meaning of "reasonable diligence" varies with  
20 particular context, but it is still an objective test.

21 You see that very clearly, in our submission, in the  
22 quotation of Peco Arts v Hazlitt Gallery:

23 "I conclude first of all it is impossible to devise  
24 a meaning to put on those words 'reasonable diligence'  
25 which can be generally applied in all contexts, because

1 as it seems to me the precise meaning to be given to  
2 them must vary with the particular context in which they  
3 are to be applied. In the context to which I have to  
4 apply them, the mistaken attribution of an old master  
5 drawing, in my judgment I conclude that 'reasonable  
6 diligence' means not the doing of everything possible  
7 not necessarily the using of any means at the  
8 plaintiff's disposal, not even necessarily the doing of  
9 anything at all, but that it means the doing of that  
10 which an ordinarily prudent buyer and possessor of  
11 a valuable work of art would do having regard to all the  
12 circumstances, including the circumstances of the  
13 purchase."

14 So the relevant context there was the purchase of  
15 a valuable work of art. When one comes to apply the  
16 test, one is looking at it through the eyes of  
17 an ordinarily prudent buyer and possessor of a valuable  
18 work. It is not a subjective test, as suggested by the  
19 claimant, where you look at the particular facts of the  
20 particular claimant. In our submission, that is very  
21 clear from authority. So we say when the claimants  
22 submit to you, for example -- this is Dixons' skeleton  
23 paragraph 25 I am quoting, they suggest:

24 "The correct approach is for the Tribunal to decide  
25 as a question of fact what the claimants actually knew."



1                   That is clearly wrong.

2       THE CHAIRMAN: Well, that is the alternative limb, if they  
3                   knew.

4       MR. HOSKINS: Yes. That would apply. But that is not this  
5                   case. The submission has to be wrong on the basis of  
6                   this case, on the basis of the authority I have just  
7                   shown you.

8                   But they are suggesting, in this case, where it is  
9                   common ground between us that we are relying on the  
10                  reasonable diligence limb, not actual knowledge limb,  
11                  they are nonetheless saying in the reasonable diligence  
12                  limb the Tribunal has to decide as a question of fact  
13                  what the claimants actually knew.

14                  Dixons' skeleton paragraph 25 is where you find that  
15                  submission.

16       THE CHAIRMAN: Although, the trigger is subjective, is it  
17                   not? What you have described as there must be something  
18                   to put the claimant on notice, that must be something  
19                   that would have come to the attention of the claimant.

20       MR. HOSKINS: Would have come, precisely. If it is  
21                   constructive knowledge, certainly I would agree with  
22                   that proposition. But certainly what the authorities do  
23                   not say is that the trigger can only be satisfied by  
24                   subject to knowledge.

25       THE CHAIRMAN: Yes. If there are a lot of articles in the

1 newspaper, it is no good the claimant saying, well, we  
2 never read newspapers.

3 MR. HOSKINS: That is right.

4 THE CHAIRMAN: For example.

5 MR. HOSKINS: Correct. So does there have to be a trigger?

6 Yes. Does the trigger have to be subjective? No.

7 That leads me then to the evidence which relates to  
8 reasonable diligence. This is obviously a slightly  
9 different exercise from the one we did with the four  
10 elements, but we dealt with it in the same note.

11 It is page 12 of our note. Before I turn to  
12 particular items of evidence, let me make this general  
13 submission. Our argument is this: given that national  
14 non-specialist newspapers -- so we are not looking here  
15 at Credit Card Monthly, it sounds like Have I Got News  
16 for You, where they have the specialist publication. It  
17 is not that. It is The Times, it is The Independent, it  
18 is the Financial Times, national non-specialist  
19 newspapers. The BRC, which is an association of  
20 retailers, EuroCommerce, which is an association which  
21 includes retailers, were all aware that there was  
22 an issue with Mastercard MIFs in June 1997.

23 Our submission is that the claimants in this case,  
24 who were all substantial commercial companies which  
25 accepted Mastercard payment cards at the relevant time,

1           should also have been put on notice of the need to  
2           investigate the issue. There was so much in the public  
3           domain that the trigger was clearly satisfied in  
4           relation to commercial companies of this sort. Indeed,  
5           commercial companies of this sort did take action albeit  
6           through the BRC and through Eurocard.

7           So going to the evidence, you have actually had all  
8           the materials I have referred you to to date we rely on  
9           for reasonable diligence because this is all material  
10          that was out in the public domain and showing there was  
11          an issue which someone with a desire to investigate  
12          should have investigated. But I will show you some  
13          other particular aspects.

14          Bundle 4, tab 34. We can take this from the note  
15          because you have seen it. Page 12 of our note,  
16          paragraph 31. The Times article of 19 September 1989.  
17          I have shown you those quotes in a different context but  
18          they are clearly relevant to reasonable diligence. One  
19          I have not shown you yet is at page 45 of tab 34.

20          Tab 34, bundle 4, page 45. It is the first six  
21          paragraphs, if I can ask you to read them. Page 45. If  
22          you could stop when you reach the name "Bob Woodman".

23                 (Pause)

24          You have the Financial Times which we have seen  
25          before. I will just give it to you in this context.

1 Page 47, penultimate paragraph:

2 "Things could still get worse for the banks etc."

3 You have seen that.

4 The Independent on page 49:

5 "The five biggest supermarket companies are pressing  
6 Sir Bryan Carsberg, the director general of Fair  
7 Trading, to be allowed to process plastic card  
8 transactions, an activity which the is the exclusive  
9 preserve of the clearing banks."

10 But then go to the final paragraph:

11 "Earlier this year the banks unilaterally raised  
12 their merchant acquiring fees, provoking fury from the  
13 supermarkets which lodged a formal complaint with the  
14 OFT. The request to merchant-acquire is included in  
15 the submission lodged in May ..."

16 Over the page:

17 "... The grocers' main complaint is over the  
18 interchange fee, the charge paid by the card processing  
19 bank to the card issuing bank. This is included in the  
20 gross charge paid by the supermarkets, but they have no  
21 control over it."

22 THE CHAIRMAN: It is a domestic MIF?

23 MR. HOSKINS: Again, it is not specific to the UK.

24 THE CHAIRMAN: It is a complaint to the OFT. We can look at  
25 the complaint I think perhaps somewhere. Perhaps not

1           this complaint, no. But an interchange fee -- I do not  
2           even know if it is multilateral.

3           MR. HOSKINS: Sir, can I put it this way. If you are  
4           a merchant of the nature of these claimants and you are  
5           paying a merchant service charge and you are aware that  
6           it includes a MIF and you are aware that part of the MIF  
7           relates to intra-EEA fees, then these sorts of general  
8           articles about the unlawful nature of multilateral  
9           interchange fees generally will put you on notice both  
10          in relation to EEA and/or UK MIFs.

11           If, for example, you have an article which is  
12          specifically tailored to a UK MIF but says in relation  
13          to the UK MIF various people believe that it is unlawful  
14          because it is a multilateral interchange fee which has  
15          the following effects which we have seen, then given the  
16          desire to investigate, then that would be sufficient --  
17          it is not all we have got, but even if you had articles  
18          solely on that basis, that would still be enough to say  
19          to claimants of this sort: actually, we need to go and  
20          look at this in relation to the intra-EEA MIF because  
21          the sorts of characteristics which are being explained  
22          in these articles are, as I put it, in very general  
23          terms, and the terms in which these articles are  
24          written apply equally in terms of triggering a desire to  
25          investigate EEA MIFs just as much as UK MIFs.

1           Mr. de la Mare has asked me to draw your attention  
2           to the penultimate paragraph:

3           "Sir Bryan could either reject the grocers'  
4           complaint or negotiate undertakings from the banks or  
5           refer the complaint to the Monopolies and Mergers  
6           Commission.

7           "In 1989, the MMC examined the industry and found  
8           the banks made excessive profits from credit cards."

9           THE CHAIRMAN: This was not under anything like Article 85  
10          as then was because UK law did not have a chapter 1  
11          prohibition at the time. But your point is a more  
12          general one, that anti-competitive effect of MIFs and  
13          there was EU or EEC law at the time.

14          MR. HOSKINS: Yes.

15          THE CHAIRMAN: The BRC complaint to the Commission was about Article  
16          85.

17          MR. HOSKINS: As was EuroCommerce.

18          THE CHAIRMAN: Yes, because they are complaining to the  
19          Commission.

20          MR. HOSKINS: Absolutely. When I go to the domestic  
21          articles, let us assume against me, which I do not  
22          accept, but let us assume they were all purely about  
23          domestic UK MIFs. I would say in the round, given all  
24          the other evidence, it leads to the same trigger. If  
25          you are a substantial commercial company that accepts

1           Mastercards and you are aware that there is this great  
2           fuss and noise going on about the legality of MIFs, then  
3           the trigger is triggered in relation to you.

4           With respect, if the claimants try and say, well,  
5           none of these articles are relevant because in context  
6           these are all about UK MIFs, they are still all about  
7           the general problems that merchants perceived with MIFs.

8       THE CHAIRMAN: The previous articles were about EEA MIFs.  
9           It is this particular one.

10       MR. HOSKINS: That is right. We went to the sort of realm  
11       one finds quite often, which the test is not does  
12       each piece of evidence satisfy the burden, the question  
13       is: taken in the round, does all the evidence satisfy  
14       the burden?

15       THE CHAIRMAN: Yes.

16       MR. HOSKINS: Then taken in the round even material that is  
17       specifically relevant to the UK MIF is still relevant  
18       for the reason I have submitted. I could go on with the  
19       articles with diminishing returns. There were a lot of  
20       press articles. You get the picture. Picked out  
21       admittedly what we thought were some of the best ones.

22       THE CHAIRMAN: You have given us citations at paragraph 33.

23       MR. HOSKINS: Exactly. You have the BRC and EuroCommerce  
24       complaint in terms of triggering a desire to  
25       investigate.

1           BRC complaint 3, tab 31, page 11. Because the  
2 publicly known facts in June 1997 triggered this  
3 complaint by the BRC. If you could look on page 11 at  
4 the first three paragraphs, you will see the nature of  
5 the complaint that was triggered. Remember this is  
6 an association of retailers, an association of companies  
7 like the claimants, and indeed included Dixons as a  
8 member, as we know.

9           The final one is in the EuroCommerce complaint. It  
10 is the same sort of point. That is bundle 4, tab 33.  
11 It is a paragraph I have taken you to in relation to the  
12 second element. We have set out also in our note there  
13 is currently a concerted practice.

14           It is on page 4, "there is currently a concerted  
15 practice" at the top under "More clarity".

16           We rely on that paragraph also for reasonable  
17 diligence, because this is what the public information  
18 triggered with EuroCommerce.

19           The final point, I have dealt with it partially  
20 already, but the TfL Europcar point. In the relevant  
21 period, June 1992 to June 1997, that was worth only  
22 around £500,000 for us. My first submission is that  
23 argument cannot be put by Dixons because they accept the  
24 equivalent sums for them were material, and you get  
25 that, for example, in their skeleton argument,



1 paragraph 28(b) where they express in terms "except  
2 where the sums were material".

3 They then try and downplay them by reference to the  
4 overall turnover of the business, but they were so  
5 substantial even in those terms.

6 Then you have the TfL Europcar. Well, let me make  
7 a number of points in relation to that. The TfL  
8 Europcar argument is that the decision whether to  
9 investigate must reasonably depend on the extent of the  
10 potential loss to which the business was exposed. There  
11 is a slight chicken and egg about that in the starting  
12 point because of course what we are imagining is  
13 something ought to have triggered TfL Europcar to think  
14 there may be a problem with the MIF and they then should  
15 have gone to investigate if there was a problem and what  
16 the extent of that problem was.

17 That is why I say it is slightly chicken and egg to  
18 start with. This was a relatively small sum so far as  
19 we were concerned. Therefore we were excused from  
20 investigating.

21 The logic of their argument is that a claimant can  
22 safely do nothing, can ignore the press, pretend the  
23 press articles do not exist etc, whilst allowing  
24 a potential loss to accumulate on a daily basis. Then,  
25 when those losses have accumulated into a big enough pot

1 they suddenly say "Ah, we must now try and take  
2 advantage of section 32(1)(b)".

3 There is a sort of counterintuitiveness to this. It  
4 is not simply a one time small loss. It is a continuing  
5 loss, and one cannot, as a matter of general principle  
6 just sit on a continuing loss until it has got  
7 sufficiently big and then say "We have to act".

8 Of course the next question is: how big does it have  
9 to be before the trigger takes effect? How big does the  
10 loss have to be? Is it completely at large and a matter  
11 of discretion for a court or tribunal faced with the  
12 issue to decide? Because that is not a very attractive  
13 position for the court or tribunal to be in. It was  
14 only half a million pounds because you put the word  
15 "only" in front of half a million and it is not  
16 obvious.

17 I would put it this way: TfL and Europcar have taken  
18 the view that it is worth claiming for that period now.  
19 If they think it is worth having, then it should  
20 certainly be capable of triggering the section 32(1)(b)  
21 desire to investigate.

22 If one were to go down this route, if you were to  
23 not accept my submission that one should be looking at  
24 the amounts at stake, that is my primary submission, of  
25 course everything would have to come in in context. It

1 would not simply be that there is some magic trigger  
2 where £1 million would be enough, £2 million would be  
3 enough; it has to be looked at in context, and I have  
4 shown you the material that was publicly available in  
5 national newspapers etc. It was not very onerous to  
6 start this hare running.

7 Put it this way, for businesses like this you would  
8 have to be turning a wilful blind eye not to have the  
9 trigger operate against you in this case.

10 So those are the submissions I wanted to make, but  
11 there is a question I had to return to in relation to  
12 whether the Interpretation Act, section 16 applied to  
13 Scotland or not. I hope I do justice to Mr. Cook's  
14 investigations.

15 As it was originally in force as I understand it at  
16 the time in 1997, section 22 of the Act said it applied  
17 to any act passed after this date. Of course in 1997  
18 the only acts were Westminster acts of Parliament  
19 because Scottish devolution, if I have got my memory  
20 correct, had not happened yet.

21 I should say out of fairness that section 24  
22 expressly extends the Interpretation Act to Northern  
23 Ireland, but it does not make a reference to Scotland.

24 But our submission is that insofar as it applied to  
25 any Westminster act and the Limitation Act applied to

1           Scotland, then the Interpretation Act could also be  
2           prayed in aid. Failing that, if I am wrong --

3           THE CHAIRMAN: The Limitation Act does not apply to  
4           Scotland.

5           MR. HOSKINS: Sorry --

6           THE CHAIRMAN: That is clear, that does not matter. You are  
7           using this to construe the Tribunal rule.

8           MR. HOSKINS: True, let me finish --

9           THE CHAIRMAN: It is not 1997, is it? It is 2003 and 2015  
10          we are concerned with.

11          MR. HOSKINS: I did not do justice to Mr. Cook --

12          THE CHAIRMAN: But you can come back to that tomorrow or we  
13          can have a look at it.

14          MR. HOSKINS: The main point about section 16 is -- I will  
15          come back to it, whether I can rely on it directly. But  
16          the main point I rely on is to show whether the *Yew Bon*  
17          *Tew* principle is a well established principle that  
18          exists not just as a principle of common law, that has  
19          been picked up at the very least in an English  
20          interpretative statute --

21          THE CHAIRMAN: There may be an equivalent Scottish law but  
22          it does not apply.

23                 The other thing we are going to come back on is the  
24          Mastercard judgment in the Court of Appeal, whether it  
25          says anything about objective necessity, but you can look at that

1 overnight.

2 MR. HOSKINS: It's as I remembered, the Court of Appeal does  
3 not expressly say anything about the burden of proof on  
4 objective necessity, but that is because everyone was  
5 operating on the basis that we bore the burden.

6 THE CHAIRMAN: It might be in one of the three --

7 MR. HOSKINS: If you are happy to go to the three -- that  
8 little bit may have survived.

9 THE CHAIRMAN: I am happy for you to go to the three.

10 MR. HOSKINS: That is a fair comment. That is what I meant.

11 THE CHAIRMAN: Have a look overnight. It may well have  
12 been -- on this point it may have been common ground.

13 MR. HOSKINS: We shall check. But those are the submissions  
14 on behalf of Mastercard.

15 THE CHAIRMAN: Thank you very much, and thank you for  
16 keeping to time. We appreciate it.

17 Would it be sensible for us to take a five-minute  
18 break now and we will come back at 3.25 pm.

19 (3.20 pm)

20 (A short break)

21 (3.30pm)

22 Submissions by MR. PICKFORD

23 THE CHAIRMAN: Yes, Mr. Pickford.

24 MR. PICKFORD: Sir, members of the Tribunal, I am going to  
25 take the majority of the claimants' air time and Mr. de

1           la Mare will then follow.

2           We adopt each other's cases mutatis mutandis.

3           Obviously I have to adopt his prior to hearing I know  
4           what he is going to say and it is all excellent. So  
5           I do so now.

6           In any event, I am going to address the Tribunal on  
7           the majority of, I would say, all the main points in  
8           issue and then there are some further particular issues  
9           that Mr. de la Mare is going to take the Tribunal to as  
10          well.

11          So this is the last man standing of Mastercard's  
12          original four bases for striking out parts of the  
13          claimants' claims. In our submission, this one should  
14          also fail. It is a partial limitation defence, as you  
15          have heard, to our follow on claims and you will now be  
16          familiar with the fact that the decision on which we  
17          base our follow on claims concerns certain multilateral  
18          interchange fees that were applied by Mastercard in the  
19          EEA, known as the EEA MIFs, because there were a number  
20          of them.

21          There were also, as you will now be aware, domestic  
22          interchange fees that were applicable in the UK which  
23          are referred to as the UK MIF, and the core of our case  
24          as set out in our statement of claim, and certainly the  
25          core in terms of its monetary value, is that by setting

1 a de facto floor under the level of the UK MIF, the  
2 unlawful EEA MIF thereby caused loss and damage to  
3 Dixons.

4 Now, it is not in dispute that our follow on claims  
5 were issued within the two-year time limit described by  
6 Rule 31 and also under the transitional rules applicable  
7 under Rule 119. What is said by the defendants is that  
8 Rule 31(4) operates in a particular way so as to  
9 carve-out one segment, a five-year segment roughly, of  
10 the decision from being amenable to a follow on action,  
11 notwithstanding that follow on actions generally were  
12 supposed to be based on decisions as a whole. The  
13 defendants, say cannot get the first five years of that  
14 decision.

15 That raises obviously a question about Rule 31(4) of  
16 the 2003 rules to which I shall turn in due course. But  
17 it also raises questions about section 32 of the  
18 Limitation Act on deliberate concealment, and our  
19 essential case on that is that Dixons and other  
20 retailers could not have with reasonable diligence  
21 pleaded their claims prior to 20 June 1997. Therefore,  
22 Mastercard fails on its application even if it is right  
23 about its construction of Rule 31(4) of the Tribunal  
24 Rules.

25 I intend to deal with the application effectively in

1 three parts. Our first submission is that on a proper  
2 understanding of section 32 it would in fact be  
3 premature and wrong for the Tribunal to reach a decision  
4 on its application in the present case at this stage of  
5 the proceedings and on a summary basis, and the reason  
6 for that is the issue of what would in the present case  
7 constitute reasonable diligence to have discovered the  
8 facts necessary to plead the claim in question is  
9 something that can only properly be determined at trial.

10 It is a factual matter which is not amenable to  
11 proper determination on this application. So that will  
12 be the first strand of my submissions.

13 The second is that in any event the documents in the  
14 public domain, on which Mastercard found its  
15 application, do not bear the weight which Mastercard  
16 seeks to place on them. In particular, the document  
17 which is said to be in its skeleton the high point of  
18 its case, the complaint by the BRC from 1992, suffers  
19 from two key problems. Firstly, it was not in fact in  
20 the public domain, and I will come on to address the  
21 Tribunal about that issue because notwithstanding that,  
22 Mastercard say it can be relied upon, and that is in  
23 dispute. We say it is not proper for the Tribunal to  
24 rely upon it in this application.

25 Secondly, it does not actually contain the material



1 that Mastercard needs it to contain. We have heard this  
2 morning and this afternoon the principal means by which  
3 Mr. Hoskins tries to get round that problem is by  
4 reformulating the statement of claim test as if it  
5 merely applies to any statement of claim that you might  
6 have brought, and we say that is wrong in law. It  
7 applies to the claim that we brought, the cause of  
8 action that we brought, and it only applies to the  
9 essential elements of that claim. But nonetheless you  
10 cannot test it in the abstract by reference to  
11 a different claim that we did not bring.

12 We say that looking at all of the documents that are  
13 relied upon in the round, they do not establish by  
14 20 June 1997 either that we were put on notice of the  
15 need to investigate a claim under then Article 85(1) EC,  
16 nor do they demonstrate that with reasonable diligence  
17 we could have discovered all the facts necessary to  
18 plead a claim.

19 So that is the second strand of my submissions.  
20 Then the third and final strand is this. We say that  
21 Mastercard's case on limitation is in any event based on  
22 an incorrect construction of Rule 31(4) of the 2003  
23 rules and that consequently its interpretation of  
24 Rule 119 of the 2015 rules is also flawed. I will deal  
25 with that point last, and I will obviously be getting to

1           that tomorrow.

2           Turning then to the first question, which is the  
3           correct approach to section 32 and why we say this  
4           application is unsuitable for determination on a summary  
5           basis. The position we are currently in is that no  
6           defence has been pleaded, but were it to be pleaded what  
7           the defendants say is that they would rely on section 32  
8           of the Limitation Act. I beg your pardon, they say they  
9           would rely on section 2 of the Limitation Act, and we  
10          say in response, well, were you to do that, we would  
11          rely on section 32.

12         THE CHAIRMAN: But we do not need the pleaded defence to  
13          know that.

14         MR. PICKFORD: That is true, we do not need to plead  
15          a defence to know that. But nonetheless the fact that  
16          they have not yet pleaded a defence and we have not yet  
17          had disclosure and we ultimately are not able to test  
18          the facts is going to be relevant to the points that I  
19          have to make.

20         THE CHAIRMAN: That is about disclosure, but I do not see  
21          you need a defence to know that there is a limitation  
22          issue here.

23         MR. PICKFORD: Sir, I am merely putting the point in context  
24          as to where we are in the proceedings. I do not seek to  
25          argue that the fact that there is no defence is fatal to

1 the application. That is not my case.

2 We say that Mastercard's essential error is  
3 seemingly to infer from the fact that deliberate  
4 concealment was determinable on a summary basis in  
5 *Arcadia*, that it follows that it is amenable to the  
6 same treatment here. We say it is not, and that is for  
7 two reasons essentially.

8 Firstly, the documents in issue in *Arcadia* were  
9 entirely different, certainly the ones that were  
10 ultimately relied upon by the court, and the types of  
11 arguments that were raised by the claimants in that case  
12 were very different to the ones that we make here. So  
13 whilst it is not my case that it is impossible to  
14 determine a limitation point under section 32 as  
15 a preliminary matter, or rather on a summary basis, it  
16 very much depends on the particular facts of the  
17 particular case and what arguments are advanced in  
18 relation to it.

19 I have five essential points to make under this  
20 head. The first is that I am going to look again at the  
21 *Arcadia* case. Mr. Hoskins took you to it but it is  
22 fairly central in terms of summarising key principles  
23 and there are some that I would like to emphasise again,  
24 if I may.

25 Second, I would like to go to a limited number of

1 other authorities that are relevant to points that arise  
2 out of *Arcadia*. Third, I am going to explain the  
3 proper approach to the section 32 question of reasonable  
4 diligence. Fourth, I am going to explain why the  
5 assumptions that Mastercard urges on the Tribunal are  
6 inappropriate, and that is particularly in relation to  
7 documents that were not in the public domain. Fifthly,  
8 I will conclude by drawing those points together to  
9 explain why the application is misconceived, we say, in  
10 the light of the previous four points.

11 So that is the scheme of my submissions.

12 If I may, with that introduction, if we can please  
13 begin with *Arcadia*, which is at tab 25 of the first  
14 authorities bundle beginning at paragraph 9. That sets  
15 out section 32 of the 1980 Act. Although we have  
16 obviously been taken to it, I think it is probably  
17 helpful just to very briefly remind ourselves, because  
18 it is relevant to some of the discussion we then come to  
19 in some of the cases:

20 "Where in any case of any action for which a period  
21 of limitation is prescribed by this Act any fact  
22 relevant to the plaintiff's right of action has been  
23 deliberately concealed from him by the defendant,  
24 a period of limitation shall not begin to run until the  
25 plaintiff has discovered the concealment or could, with

1 reasonable diligence, have discovered it."

2 I emphasise the words "any fact relevant to the  
3 plaintiff's right of action" not because I say that is  
4 to be interpreted literally as any fact at all, which is  
5 relevant, but because that informs some of the  
6 discussion that the authorities then come onto when they  
7 talk about a broad construction versus a narrow  
8 construction.

9 What they are dealing with is the fact that you  
10 cannot interpret section 32 broadly as literally any  
11 fact that you want to plead at all. We accept that it  
12 is only the essential elements of the claim that are in  
13 issue, but there is a point between me and Mr. Hoskins  
14 about what constitutes an essential component of a cause  
15 of action.

16 We then come to paragraph 19 which Mr. Hoskins took  
17 us to. The particular points I would like to  
18 emphasise --

19 THE CHAIRMAN: You have gone on to 19. In *Arcadia*, which  
20 of course was also a summary judgment strike out  
21 application, I think, the claimant had anticipated there  
22 was going to be a limitation defence realistically --  
23 anyone would have realised that there, as here -- they  
24 actually in their statement of particulars of claim,  
25 they actually pleaded the fact that they said it had

1           been concealed, which they say they did not know. Which  
2           was very helpful. It is in paragraph 12.

3           So at some point it would be helpful certainly to me  
4           and I think to my colleagues to explain what actually  
5           you say are the relevant facts which you say you did not  
6           know or, more relevantly, could not with reasonable  
7           diligence have discovered so we know actually what they  
8           are.

9       MR. PICKFORD: Sir, I will be coming on to that, but  
10           obviously what I would like to do first is lay the  
11           groundwork for that.

12       THE CHAIRMAN: That is fine. As long as at some point you  
13           do that because there, you see, we have the four  
14           elements which were actually in the pleading.

15       MR. HOLMES: Perhaps if I could add a supplementary to that.  
16           Perhaps when you come to that point you can add what you  
17           understand to be the meaning of "deliberately conceal",  
18           which is the word within 32(1)(b). I would like to  
19           understand what has deliberately been concealed in this  
20           case.

21       MR. PICKFORD: Sir, I can. That point is not actually in  
22           issue on this application because that would be -- the  
23           way that the defendant is trying to defeat our  
24           application is saying effectively even if something was,  
25           within the meaning of 32(1)(b), deliberately concealed,

1 that essentially means done in the knowledge that it was  
2 unlikely to be revealed. But for our purposes, that is  
3 not actually an issue on this application. They are not  
4 debating the issue of what is deliberately concealed.  
5 They are saying: putting that question aside, we say --  
6 so effectively they are reserving their position on  
7 that. They are not admitting they deliberately  
8 concealed anything. They are saying: we can win, in any  
9 event, by demonstrating that whatever was or was not  
10 concealed from you by us nonetheless you could, with  
11 reasonable diligence, have discovered the facts  
12 necessary to plead your claim, effectively. That is the  
13 way I understand Mr. Hoskins puts his case.

14 So if he wins, then we never get to the deliberate  
15 concealment part of that. If I win, then we do get to  
16 that. That is something that we will be debating at  
17 trial.

18 THE CHAIRMAN: I think subsection (2) on the definition,  
19 which is a sort of deeming provision, which gives  
20 a rather generous meaning to deliberate concealment.

21 So --

22 MR. PICKFORD: That was indeed what I was trying to somewhat  
23 inelegantly paraphrase --

24 THE CHAIRMAN: So coming to a decision on the rules or  
25 coming to a decision on the MIF in a way that would not

1 immediately emerge would be enough to be deliberate  
2 concealment, I think.

3 MR. PICKFORD: Indeed. That is relatively broadly  
4 interpreted. Under this particular provision,  
5 deliberate concealment is something that is well  
6 accepted does not actually have to necessarily involve  
7 mendacity on the part of the defendant. It is given  
8 a broad interpretation.

9 The reason for that is that the whole purpose of  
10 this section is to ensure fairness to claimants that if  
11 a claimant is unable to plead something because with  
12 reasonable diligence they could not have discovered it  
13 because the defendant may well have known about it but  
14 they did not, they should not be shut out because of the  
15 operation of the six-year limitation rule that would  
16 otherwise be applicable.

17 THE CHAIRMAN: I do not think, to be fair to you, that  
18 Mastercard are saying that what you should have known  
19 about the EEA MIF at the moment it was entered into or  
20 decided upon, they are relying on subsequent materials which  
21 came into the public domain, they say.

22 MR. PICKFORD: Yes. It may be that there is not very much  
23 to debate about deliberate concealment, but my point is  
24 that it is not what this application is about.

25 Returning then, if I may, to the *Arcadia* judgment.



1 At paragraph 19, we have a very helpful paragraph which  
2 summarises the court's approach to applications under  
3 CPR 3.4 and 24. The Tribunal have already read that to  
4 itself. The paragraphs I would emphasise that are  
5 particularly applicable on this application are  
6 subparagraph (3) that:

7 "The court must avoid conducting a mini trial  
8 without the benefit of disclosure and oral evidence;

9 "(4) that the court should avoid being drawn into an  
10 attempt to resolve conflicts of fact which are normally  
11 resolved by a trial process."

12 (7), which Mr. Hoskins in fairness took the Tribunal  
13 to when there was a question about on who the burden  
14 lay, and he ultimately conceded that obviously on this  
15 application it lies on them.

16 Then (8), that:

17 "So far as part 24(2)(b) is concerned, there will be  
18 a compelling reason for trial where there are  
19 circumstances that ought to be investigated."

20 THE CHAIRMAN: Are you relying on some compelling other  
21 reason head?

22 MR. PICKFORD: Not a compelling other reason, other than in  
23 this case obviously we are going to have a trial of  
24 facts. We will have the relevant witnesses that will be  
25 called, and we say that that is the right moment at

1           which to determine these issues.

2           THE CHAIRMAN: It has to be a trial on 92 to 97. I mean,  
3           that is an occasionally relied on head for assisting  
4           summary judgment in circumstances where there is no  
5           arguable defence that you can say there is something  
6           very special about this that it ought to go to trial  
7           even though, as a defendant, you cannot show an arguable  
8           defence. There is a quite a discussion about it in The  
9           White Book.

10          MR. PICKFORD: We do not put it in that way. In this case,  
11          it is really subsections (3) and (4) which are critical,  
12          which is that ultimately what the Tribunal is being  
13          asked to do is engage in a task which requires the  
14          determination of facts, and that is something that it is  
15          appropriate to do at trial. It is not appropriate to do  
16          here. Particularly in the way, in view of the way in  
17          which the application was put when it was brought by  
18          Mastercard, and I will come on to that.

19                 But in the witness evidence of Mr. Cotter he makes  
20          it abundantly clear that Mastercard are not saying that  
21          they propose to have any investigation into what was  
22          actually known by any particular party. The way that  
23          they put the application, they say, is on this  
24          supposedly objective test.

25                 We say that actually when you consider the tests

1 properly you see that whilst that might sometimes be  
2 possible if claimants are prepared to make certain  
3 concessions, as they did in *Arcadia*, it is not always  
4 possible, and on these facts it is not for the reasons  
5 that I will come on to explain.

6 So we were then taken to paragraph 24 of *Arcadia*,  
7 which summarises some of the key authorities on a proper  
8 interpretation of section 32.

9 I will come on to explain what our position is  
10 overall on it, but one of the points that Mr. Hoskins  
11 made during his opening submissions was a point on  
12 subsection (1), that:

13 "Section 32(1)(b) is a provision whose terms are to  
14 be construed narrowly rather than broadly. See  
15 [Lord Justice Rose] in *Johnson*."

16 I would like to come back to *Johnson*. It is  
17 not currently in the bundle, but I would like to hand  
18 that up shortly because what Mr. Hoskins said about  
19 that, as he put it, it should not be too easy for  
20 claimants, and that is not, we say, what  
21 Lord Justice Rose was articulating as the relevant  
22 proposition in *Johnson*.

23 I will be coming back to that very shortly. In  
24 paragraph 26, which is not a paragraph we saw before, we  
25 see how the claimants in *Arcadia* were putting their

1 case. They say:

2 "At the heart of the claimants' case is the  
3 submission that section 32(1)(b) of the 1980 Act extends  
4 the limitation period where a concealed fact has not  
5 been discovered prior to the commencement of the  
6 proceedings and is still concealed. Mr. Randolph argued  
7 that section 32 should not be interpreted as confining  
8 the time of discovery of relevant facts to the time of  
9 the issue of proceedings since not all of the relevant  
10 facts are known even now. The limitation clock has not  
11 started and no limitation bar has accrued. The fact  
12 that the claimants had been able to plead their case did  
13 not mean that they discovered all the relevant facts for  
14 the purposes of section 32. The surprising consequence  
15 of this argument, as Mr. Randolph readily accepted, is  
16 that in relation to pleaded claims which go back to  
17 1977 time has still not begun for the purposes of  
18 limitation."

19 That was expressly at the heart of the claimants'  
20 case. That is not the case that we advance, but one can  
21 readily see from that why the court was able to  
22 adjudicate on that case without getting drawn into some  
23 of the factual issues that we say are relevant on our  
24 case.

25 We then turn to paragraphs 31 through to 33, which

1 deal with pleading in competition cases. It is indeed  
2 common ground that what needs to be shown in relation to  
3 this case is that there was an agreement or concerted  
4 practice between undertakings, or in this case in fact  
5 an association of undertakings, having as its object or  
6 effect the prevention or distortion of competition which  
7 is (a) appreciable, (b) objectively necessary.

8 I will come back to the objectively necessary point  
9 because Mr. Hoskins, having originally I think in their  
10 skeleton argument said this was common ground, they now  
11 demur from that and say there is a qualification that  
12 they want to enter in relation to that point, which  
13 affects trade between member states and which has caused  
14 some loss and damage to the claimant.

15 It is clear in competition cases, as appears in the  
16 quote at section 32, about halfway down:

17 "... it is insufficient merely to aver that a given  
18 concerted practice has as its effect the distortion of  
19 competition within the UK. This is a mere recitation of  
20 the statutory condition or conclusion imposed or  
21 required by section 2(1)(b) without alleging any primary  
22 facts from which it may be inferred or found."

23 The key in a competition case, indeed actually as in  
24 any case, is the allegation of the primary facts which  
25 underlie the legal conclusions.

1           The judge goes on at paragraph 33:

2           "I accept the Court insists on the proper  
3           particularisation of competition claims, not least  
4           because the allegations are serious, require details of  
5           the specific conduct relied on and how this is alleged  
6           to have infringed the law, see for example  
7           [Mr Justice Roth] in Sel-Imperial ..."

8           Which is an oft quoted case on the need for  
9           particular precision in the pleading of competition  
10          cases, of which obviously you will be very familiar.

11          There is then a point made about an allegedly  
12          generous approach to pleading competition cases, and  
13          there are three points that I would make in respect of  
14          that.

15          Firstly, Mr. de la Mare will be making submissions  
16          about the state of the law in 1997, which you have to  
17          remember is pre-CPR even, and whether there was in fact  
18          a recognised generous approach to pleading competition  
19          cases then.

20          THE CHAIRMAN: A generous approach is where it is  
21          an arrangement shrouded in secrecy, I think.

22          MR. PICKFORD: That was going to be my second point, sir.

23          THE CHAIRMAN: That is what Lord Justice Etherton, as he  
24          then was, was referring to, I think.

25          MR. PICKFORD: Exactly. That was the second of my three

1 points. It really concerns cartels, classic cartels,  
2 and Mastercard has consistently been at pains to  
3 emphasise throughout all the litigation involving it and  
4 Visa in recent years to say it is nothing like a cartel.

5 It is surprising that in its skeleton -- it is not  
6 a point Mr. Hoskins went to orally -- it aligns itself  
7 with this particular submission. But obviously that is  
8 odd in a case where it says its conduct is nothing like  
9 a cartel.

10 The third and, we say, in fact key point is this:  
11 that so far as concerns the proper approach under  
12 section 32(1)(b) of the Limitation Act 1980, competition  
13 claims are to be treated in principle in precisely the  
14 same way as other claims. That principle was  
15 articulated by the then Chancellor Sir Terence Etherton  
16 in *Arcadia* in the Court of Appeal. What that means is  
17 it is necessary to be able to plead out all of the  
18 necessary facts which founded the cause of action in  
19 a given case.

20 The generous approach certainly does not alter that  
21 even if it were applicable, which we say in this case it  
22 is really not because it is dealing with secret cartels.

23 So then we turn on to, if we may, paragraphs 50  
24 to 51 just very briefly. They mention two of the  
25 documents that come up in our discussions, namely the

1 BRC complaint and the EuroCommerce complaint. Notably  
2 they do not feature in the judge's analysis of what  
3 facts could be known by when. So when he goes on to  
4 address the section 32 question, those documents do not  
5 find a home in his analysis.

6 We then can skip on. Paragraph 98 was addressed by  
7 Mr. Hoskins but he did not read one particular point.  
8 At paragraph 98 he read out that:

9 "It was known that the fourth defendant existed, was  
10 a subsidiary of the third defendant and acquired the  
11 assets of the former Visa Regional Board of the second  
12 defendant. From these facts the claimants were able to  
13 raise a prima facie case that the fourth defendant had  
14 some role in setting the UK MIFs."

15 I am not sure what the primary facts he was alleging  
16 that correspond to our case are, but he did not go on to  
17 note that they pleaded in this case, in 2013, and have  
18 not alleged that they discovered any new facts after  
19 2007 which are relevant to this plea.

20 That does not help us in relation to questions about  
21 what facts were available prior to 1997.

22 If we then go on to paragraph 100 and following, we  
23 see that what was central to the debate in the *Arcadia*  
24 case was the 2002 exemption decision. That is the  
25 critical document from which the judge draws essentially



1 all of the essential points that were needed by *Arcadia*  
2 to make their case.

3 That obviously lies outside the timeframe that is  
4 relevant in our case.

5 Then we see at paragraph 107 through to 109 the  
6 judge's conclusions. In particular, beginning at  
7 paragraph 108:

8 "Despite the abundance of documents available to the  
9 Court on this application, the issue turns on  
10 a relatively narrow point: whether facts which were  
11 known, or discoverable by the exercise of reasonable  
12 diligence, by the Claimants before 2007 were sufficient  
13 to enable them to plead a 'statement of claim' which  
14 established a prima facie case. The issue under  
15 section 32(1)(b) is not concerned with other facts which  
16 the Claimants say they did not, or still do not know."

17 So the reasonable diligence point was not taken in  
18 that case. What the focus was on was we have got all  
19 these particular facts that are set out in the 2002  
20 decision; are those good enough to plead our case?

21 You will recall going back to the earlier paragraph  
22 I showed you. The essential point being put by *Arcadia*  
23 in that case is no, they are not, because we might well  
24 have been able to plead our statement of claim on the  
25 back of it. But there are still certain details about

1 the operation of the MIF and precise levels and things  
2 that we are unaware of. So it is on that basis that the  
3 application was ultimately rejected.

4 In 109 we see the judge found that the question in  
5 *Arcadia*:

6 "... [was] suitable for summary disposal since all  
7 the matters relevant to the Applications are before the  
8 Court. If the Applications are well founded, the  
9 limitation issues ... can be disposed of without  
10 the need for a trial of factual issues either as to what  
11 other matters the Claimants knew or did not know from  
12 time to time, or on the distinct allegations of  
13 'concealment'. Documents which might be disclosed and  
14 evidence which might be given have no bearing on the  
15 outcome."

16 That was that case. We say that approach is not  
17 possible for the reasons I am going to come on to  
18 explain in ours.

19 We can go very briefly through the Court of Appeal's  
20 judgment, which is at the next tab.

21 If we could go please to paragraph 18 first. This  
22 deals with what the statement of case claim requires.  
23 One sees in that the familiar wording that I read out  
24 from the judge below, and in particular it includes at  
25 (2), it is:

1            "... an agreement or concerted practice ... having  
2            as its object or effect the --

3            THE CHAIRMAN: This is just a recitation of what  
4            Mr Justice Simon said.

5            MR. PICKFORD: It is, that is right. But I am pointing to  
6            it for clarity because then the Chancellor goes on to  
7            say effectively: I agree with what has already happened  
8            and the common ground. That is the context.

9            Then at paragraph 21 the judge then referred to  
10           those parts of the particular of claims which allege the  
11           four elements are necessary.

12           At paragraph 29, the judge accepted the full picture  
13           was not available, and then a recitation of effectively  
14           the conclusions that I took you to.

15           Then we have a discussion, and paragraph 30 is that:

16           "The first ground of appeal is that the Judge  
17           wrongly applied the 'statement of claim' test. I do not  
18           agree."

19           So the statement of claim test that we have just  
20           seen formulated referred to at paragraph 18 is being  
21           challenged and the Chancellor says that he does not  
22           agree with the challenge.

23           It is true that --

24           THE CHAIRMAN: No, paragraph 18 was not challenged.

25           Paragraph 18 was common ground. That was not being

1            appealed. That had been agreed. What was being  
2            challenged was the way, what is necessary to complete  
3            the statement of claim.

4            MR. PICKFORD: Sir, that is true. I do not seek to argue  
5            that in the Court of Appeal the question about objective  
6            necessity was debated. It was common ground at First  
7            Instance. It was also common ground before the  
8            Court of Appeal, and it was endorsed, admittedly without  
9            argument but nonetheless endorsed by the Court of Appeal  
10           as the appropriate test.

11           THE CHAIRMAN: It was not endorsed, it just was not in  
12           issue, so it proceeds on that basis. The  
13           Court of Appeal does not have to express a view because  
14           it is not being argued. What they had to consider was,  
15           on that basis, on that assumption, what are the facts  
16           that are necessary that you need to know to have  
17           a statement of claim.

18           MR. PICKFORD: Sir, the submission that I make in relation  
19           to it is that the point being made here, nobody, whether  
20           it be the advocates or the courts, ought to challenge,  
21           and it is perfectly reconcilable with the authority to  
22           which Mr. Hoskins took the Tribunal which I am now --  
23           just to make sure there are not more points to address  
24           from *Arcadia* -- going to have to turn.

25           THE CHAIRMAN: It is quite a lot of quotation from

1           *Johnson*.

2           MR. PICKFORD: Yes. Indeed, as I said, we have *Johnson* --  
3           we have copies of *Johnson* now. Rather than having  
4           to rely on mere quotations, I can take the Tribunal to  
5           the judgment itself.

6           At paragraph 51, just for completeness because  
7           I said I would make good the point in my opening  
8           submissions, the Chancellor makes the point that he does  
9           not agree that:

10           "... so far as concerns the proper approach under  
11           section 32(1) (b), competition claims are to be treated  
12           in principle in any different way to other claims."

13           So the statement of claim test in its full vigour  
14           applies.

15           THE CHAIRMAN: Mr. Randolph for the claimant was saying that  
16           it should be more relaxed. The Court of Appeal said no.

17           MR. PICKFORD: We do not make that point. We say  
18           nonetheless pleading a competition claim in the same way  
19           that any claim is required to be pleaded is an exacting  
20           exercise because it requires all of the relevant  
21           necessary primary facts to be pleaded and to be attested  
22           by a statement of truth. That is not in the context of  
23           competition claims a trivial undertaking.

24           Sir, I am pausing because I can see you are reading.

25           THE CHAIRMAN: Do go on.

1 MR. PICKFORD: Thank you. Whilst we are at this judgment it  
2 may just very briefly, before turning to the horseracing  
3 case, be appropriate to go to paragraph 59 because that  
4 was noted by Mr. Hoskins.

5 It said there:

6 "The precise way in which the MIFs were fixed, over  
7 and above what is already pleaded in the particulars of  
8 claim, is in truth no more than something which goes to  
9 the strength of the appellants' claims and the  
10 commercial considerations bearing on the advantages and  
11 disadvantages of commencing the proceedings. As such,  
12 it is not a relevant fact ..."

13 Well, that was true in that case because what  
14 Mr. Randolph was saying was that we need to know  
15 particular details about levels of MIFs etc, in order to  
16 be able to work out precisely what our quantum is. That  
17 is not the issue that we will come onto in our case.

18 The issue in our case is far more fundamental. It  
19 is that there were core facts underlying the  
20 relationship between the EEA MIF and the UK MIF of which  
21 we were simply unaware.

22 For that reason we were not able to plead -- even if  
23 we were able to plead a case in relation to the EEA MIF,  
24 which we dispute, a case in relation to the UK MIF.  
25 That is a point which requires considerable

1 expansion and I am going to come on to it.

2 THE CHAIRMAN: I think Mr. Hoskins accepted that the  
3 relationship between them was not a fact --

4 MR. PICKFORD: He did --

5 THE CHAIRMAN: So the question is whether that is  
6 an essential fact or not.

7 MR. PICKFORD: Indeed. That is very helpful of Mr. Hoskins  
8 because that very much enables us to hone in on what is  
9 the key matter in dispute. There is a very important  
10 matter in dispute there as to whether that part of our  
11 claim is all part of one cause of action or not. We say  
12 it is not.

13 There are a number of other authorities I need to go  
14 to make good that point. This is just highlighting that  
15 what *Arcadia* is dealing with here is a very different  
16 point to the one I am going to be addressing the  
17 Tribunal on.

18 THE CHAIRMAN: There is a helpful paragraph in which the  
19 current Master of the Rolls sets out what the core facts  
20 that were sufficient to constitute the cause of action  
21 in paragraph 53.

22 MR. PICKFORD: Yes.

23 THE CHAIRMAN: He said that is quite enough for a claim of  
24 this kind.

25 MR. PICKFORD: Yes, but that claim, to be clear, the claim

1 that was brought by *Arcadia* which was a stand alone  
2 claim, so, to the best of my knowledge, I do not believe  
3 that what they were bringing was the claim that we  
4 are bringing, saying: here is the EEA MIF, here is the  
5 restriction in relation to the EEA MIF, that had  
6 an effect, not only directly when we paid EEA MIFs, it  
7 also had an effect indirectly because it acted as a de  
8 facto floor beneath the UK MIF.

9 As I understand it, because they were not  
10 constrained by a prior decision of the European  
11 Commission, which in our case was only in relation to  
12 the EEA MIF, in the *Arcadia* claim they sought to  
13 challenge UK MIFs directly.

14 THE CHAIRMAN: Yes. It was a High Court claim.

15 MR. PICKFORD: Exactly. That is an important difference  
16 between our claim and the claim in *Arcadia*. On that  
17 basis, if the Tribunal is content that we have seen  
18 enough of the Court of Appeal in *Arcadia* may I go to  
19 the horse racing case?

20 THE CHAIRMAN: Yes. This is the thing about -- it is not  
21 objectively --

22 MR. PICKFORD: This is the point about objective necessity  
23 and whether that needed to be something that we had to  
24 plead, effectively. Whether it was part of our  
25 statement of claim or needed to be part of our statement



1           of claim. That is at paragraph 15.

2           THE CHAIRMAN: Sorry, what tab is that?

3           MR. PICKFORD: I beg your pardon it is at tab 15 of the  
4           first one.

5           THE CHAIRMAN: Same bundle, yes.

6           MR. PICKFORD: Given that Mr. Hoskins helpfully took us to  
7           the preceding paragraphs that set up the key one,  
8           I think we can jump straight in at paragraph 133.

9           What is said halfway through that is that, once  
10          there is evidence before the OFT, and that was evidence  
11          about objective necessity:

12          "... the overall legal burden still remained on the  
13          OFT to prove the infringement of the chapter 1  
14          prohibition that it was asserting."

15          But what is made clear is that the evidential  
16          burden, from the previous sentence:

17          "If, as the appellants claimed, any apparently  
18          anti-competitive effect of the collective dealing  
19          between the Courses and the ATR was justified by the  
20          necessity of such dealing, it was for them to  
21          demonstrate it by evidence."

22          So what that is saying is that there is a legal  
23          burden on the person who is alleging a breach of  
24          Article 101, but there is an evidential burden once the  
25          matter is in issue on the person who is best able to

1 provide evidence on that, which is the defendant.

2 That, we say, is consistent with a statement of  
3 claim test that requires us to have a belief that the  
4 restriction of competition that we identify or rather --  
5 I beg your pardon -- I will step back, a genuine belief  
6 by us that an agreement of an association of  
7 undertakings that we identify has restrictive effects  
8 which are both appreciable and not objectively  
9 justified.

10 Reflecting that, that is precisely why we pleaded  
11 the point. We were able to plead it and we were able to  
12 sign that with a statement of truth because we had the  
13 decision of the European Commission and about 60 pages  
14 odd of it which deal in detail with the question of  
15 objective justification and I will come back to that  
16 when I go through our pleading. So we were able to  
17 satisfy the test that we had to satisfy ourselves that  
18 what we were saying was truthful because we had the  
19 Commission decision.

20 We did not expand on the point because ultimately,  
21 given that the evidential burden lies on the defendants,  
22 it seemed most appropriate to allow them to develop  
23 their case on it and for us then to respond to it in  
24 reply, but it was still nonetheless something that we had  
25 to address as part of our statement of claim.

1 MR. ANDERSON: Could you not have made the allegation and  
2 statement of truth without the decision of the  
3 Commission?

4 MR. PICKFORD: We say, no. That would have been --

5 MR. ANDERSON: Why is that?

6 MR. PICKFORD: Because the essential issues that arise on  
7 the question of objective necessity were: was it  
8 possible to have -- certainly in terms of the way we put  
9 our case -- because we attacked the MIFs per se. We do  
10 not merely say the MIFs are too high. We say these  
11 arrangements by which there was a decision of  
12 association of undertakings, where effectively banks  
13 between them decide on a MIF, this is our pleaded case,  
14 we say that that is unlawful and, as part of making out  
15 that case, we have to have a genuine belief that, as  
16 part of -- effectively, implicitly in that case there is  
17 a counter factual which is that you do not need to have  
18 that MIF at all in order to operate the scheme, because  
19 we quite accept that if it were the case that you could  
20 not operate a four party payment scheme without a MIF,  
21 then it would be objectively necessary for a four party  
22 payment scheme.

23 MR. ANDERSON: I follow that, but why does that require  
24 necessarily a decision of the Commission?

25 MR. PICKFORD: It does not necessarily require a decision of

1 the Commission but in our case it did require a decision  
2 of the Commission because what the Commission did that  
3 we were able to rely upon was investigate in its 1997  
4 decision whether --

5 THE CHAIRMAN: 2007.

6 MR. PICKFORD: I beg your pardon, in the 2007 decision. The  
7 number of dates bouncing around. Investigated whether  
8 it was in fact necessary, in order to operate a four  
9 party payment system, to have a MIF. That is something  
10 that it used its considerable powers of obtaining  
11 documents and answering questions to answer. One can  
12 see -- I can come onto the decision where it is  
13 addressed, but it is a very large portion of the  
14 decision which addresses that particular question. We  
15 did not know that, we were not in a position, certainly  
16 in 1997 to be able to assert you do not need a MIF, you  
17 cannot possibly need one of those. For all we knew  
18 maybe you did need a MIF. Maybe, if you did not have a  
19 MIF, the way in which these schemes worked, that they  
20 would, as in fact was asserted by some schemes, they  
21 would fall apart.

22 THE CHAIRMAN: Are you saying you cannot put in a statement  
23 of claim or particulars of claim unless you know you are  
24 going to win?

25 MR. PICKFORD: No, but you have to believe the facts are

1 true.

2 THE CHAIRMAN: The facts are true but if you do not plead  
3 objective necessity at all, you do not even say it is  
4 not objectively necessary, as many claims do not --  
5 certainly if you have a damages claim as a result of  
6 a cartel, you never see a pleading saying and this  
7 cartel was not objectively necessary. It is just silent  
8 about that, and if the defendants want to raise  
9 objective necessity then no doubt your reply will engage  
10 with it. You do not need to plead to it in your  
11 statement of claim, do you?

12 MR. PICKFORD: That is possibly because in the nature of  
13 cartels the idea that anyone is ever going to say  
14 a cartel is an objective necessity would be somewhat  
15 outlandish. But strictly speaking we do say that forms  
16 part of the statement of claim that we need to plead.  
17 As Mr. de la Mare points out it is an object  
18 infringement where one has a cartel.

19 MR. HOLMES: Even if it is something that is necessary for  
20 you to plead and that is what you say, is there not  
21 a distinction between having the facts sufficient to  
22 enable you to plead that and having sufficient facts for  
23 that to be proven, which is what you say the European  
24 Commission decision did, it made a finding, that it was  
25 not objectively justified in its investigation?

1 MR. PICKFORD: That is certainly true. That comes to one of  
2 the points that is raised in relation to the statement  
3 of claim test. There is a difference between the core  
4 facts that underlie a cause of action, the primary  
5 facts, and then everything that one might want to bring  
6 to bear on demonstrating you are right about that cause  
7 of action. We entirely accept those are different. To  
8 be clear, we do not say that we had to have the full  
9 70/50 page analysis of the European Commission in order  
10 to be able to plead the point.

11 Had, in fact, there been something different, that  
12 was sufficient to demonstrate to us that it was not  
13 necessary to have a MIF in order to be able to operate  
14 a four party payment card system, then we could have  
15 relied on that. I do not say that we needed everything  
16 in the Commission decision to be able to make that plea,  
17 but we needed something and we needed something that  
18 addressed in particular the counterfactual issue, well,  
19 imagine a world without a MIF; would a four party  
20 payment system in that world be able to function?

21 It is notable that that is only a decision that the  
22 Commission comes to in its, if I get this right, 2007  
23 decision. It had not undertaken that investigation for  
24 the 2002 Visa decision which is at the heart of the  
25 *Arcadia* decision, there was in fact by Visa

1 a concession on that issue.

2 But in the Mastercard case --

3 THE CHAIRMAN: By Visa a concession? What, Visa, was saying  
4 it is not objectively necessary?

5 MR. PICKFORD: I will need to, if necessary, go to the Visa  
6 decision to make that good but Ms Morrison points out to  
7 me that in the 2002 decision, which I have to confess is  
8 not one I focused on particularly for the purposes of  
9 this application because it falls outside the relevant  
10 date range, there was a concession by Visa that it was  
11 not necessary to have a MIF for a four party system to  
12 exist at all.

13 But Mastercard did not make that concession and in  
14 the 2007 decision, which is the basis for our claim,  
15 there is very considerable investigation and analysis of  
16 that question.

17 MR. HOLMES: You accept that you did not need to plead in  
18 relation to the possibility of an exemption and that is  
19 a matter for the defendants to raise.

20 I am still struggling to see why it is necessary for  
21 you to plead objective necessity, which is a point which  
22 would typically be taken by the defendants, when it was  
23 not necessary for you to plead in relation to  
24 an exemption.

25 MR. PICKFORD: Because ultimately the legal burden under

1 Article 101, as it now is, lies on us and it is all  
2 bound up with that burden of establishing the breach.

3 Although as lawyers we are familiar often with  
4 saying: here is the restriction, now is it objectively  
5 justified? Actually, when one thinks about a lot of  
6 competition cases, you do not necessarily have to  
7 compartmentalise in that way. Sometimes the answer in  
8 many ways to whether something is even restrictive is,  
9 well, is this really something that is necessary in  
10 order to bring about the pro-competitive thing that we  
11 say we are doing, if you are acting on behalf of someone  
12 who is the subject of a complaint?

13 Analytically, yes, it is often broken down in that  
14 way, and that is how it is indeed set out and clearly  
15 articulated in the *Arcadia* case as something that  
16 needs to form part of the statement of claim test.

17 It does not necessarily always fall out quite so  
18 neatly in every competition case and we say that what  
19 was incumbent on us and what we did, because we chose to  
20 do it, was we pleaded that there was no objective  
21 necessity to have this particular --

22 THE CHAIRMAN: Clearly you could do it easily because the  
23 Commission had reached that conclusion. So that was no  
24 sweat to put that in. The question was whether that was  
25 essential, as you accept, a test to plead that for your



1           cause of action in putting forward a statement of  
2           claim/particulars of claim and you say it was.

3       MR. PICKFORD:   Yes.

4       THE CHAIRMAN:   It was clearly an issue between you.

5       MR. PICKFORD:   Yes.

6       THE CHAIRMAN:   The same would then apply to objective  
7           justification for Article 102 for abuse.  Your statement  
8           of claim for abuse of dominance, you would have to say  
9           and this is not objectively justified?

10      MR. PICKFORD:   Yes, sir.  I believe that would be correct.  
11           I sense no reason why it would not come across.  I think  
12           my answer would be very similar, that in many cases they  
13           are two sides of the same coin.  There are many  
14           dominance cases -- I am not saying every one, but  
15           many -- potentially it is even clearer in a dominance  
16           case -- that whether something is abusive is really the  
17           flip side of whether it is objectively justified and  
18           vice versa.

19           I am slightly reluctant to trespass on this case, it  
20           is a case on which you decided, the Google Street Map  
21           case.  My understanding of that case is in many ways  
22           what Google said is what it was doing was  
23           pro-competitive and it was objectively justified and  
24           that was ultimately why it was not abusive and the two  
25           issues very much were fairly fluid and interrelated.

1 THE CHAIRMAN: In the judgment -- I cannot for the life of  
2 me recall what the pleading said and whether that was in  
3 the pleading of the claimants, it was certainly in the  
4 defence. But on your case the claimants for a proper  
5 statement of claim you, and say if the statement of  
6 claim did not say, to go back to our case, had not  
7 included an averment that it is not objective necessity  
8 then it could have been struck out. Is that your  
9 position?

10 MR. PICKFORD: Yes, if the claimants were willing to  
11 amend --

12 THE CHAIRMAN: But it could have been struck out as  
13 a pleading in all the elements?

14 MR. PICKFORD: In that form. I am not suggesting that that  
15 is what the court would ordinarily do. If that was the  
16 case and it was identified that there was effectively a  
17 slip and someone had not alleged --

18 THE CHAIRMAN: Then they would amend --

19 MR. PICKFORD: Yes. If they believed they had the basis for  
20 doing it. If they didn't believe they had the basis --

21 THE CHAIRMAN: The test is whether the pleading would be  
22 complete. You say it would not be.

23 MR. PICKFORD: Yes. That is what *Arcadia* says in terms.  
24 Sir, is that a convenient moment?

25 THE CHAIRMAN: I think it probably is, thank you.

1 MR. DE LA MARE: Sir can I mention, hopefully to speed to  
2 the plough for me tomorrow, we filled in in the bundle  
3 at tab 16 the case of O2 Germany GmbH, which goes  
4 precisely to this point. It is a decision one year or  
5 so after the BHB decision. Paragraphs 77 to 79. If you  
6 could read those please, those are the ones in my  
7 submissions exactly on this point --

8 MR. HOLMES: Which judgment again?

9 MR. DE LA MARE: The court of first instance in O2 Germany  
10 and it is about when it is you have to plead necessity  
11 or objective justification in a Commission decision for  
12 a Commission decision on 101 grounds to be validly  
13 constituted.

14 THE CHAIRMAN: We will look at that overnight which is at  
15 tab 16. But you are very much on target --

16 MR. PICKFORD: Yes, I believe so.

17 THE CHAIRMAN: No reason to sit early. We will say 10.30  
18 tomorrow morning. Thank you.

19 (4.35 pm)

20 (The court adjourned until 10.30 am  
21 on Tuesday, 9 October 2018)

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