IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16, 1517/11/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 24th April 2023 – Wednesday 26th April 2023

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Merchant Interchange Fee Umbrella Proceedings

Walter Hugh Merricks CBE

Class Representative

v

Mastercard Incorporated and Others

Defendants

A P P E A R AN C E S

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

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Monday, 24 April 2023

(10.30 am)

MR JUSTICE MARCUS SMITH: Good morning, everyone. Before you begin, just a couple of housekeeping matters.

The first, as you will all be aware, this hearing is being live-streamed on our website, so I need to start with the usual warning that you have all heard before. An official recording is being made and there will be a transcript in due course by the authority of this Tribunal. It is strictly prohibited for anyone else to make a recording, audio or visual, to photograph the proceedings or to transmit them in any way. I'm sure that won't happen, but it shouldn't.

Secondly, I understand the proceedings are being transcribed separately. If counsel could bear in mind the utility of a mid-morning break, we will try and remember as well, but I think it would be helpful if we do that.

In terms of timing, we are minded to leave the parties to whatever order they have agreed. We did debate whether there ought to be some sort of allocation of separate issues to separate persons, but we think that it should just be the Claimants first, the Defendants following on, and then the same order, as it were, in reverse.

If, of course, any particular points crop up that require special treatment, we will handle that as and when, but that seemed to us the most appropriate course.

Unless there's anything more, we will hand over to you.

Good morning, Ms Kreisberger.

Submissions by MS KREISBERGER

MS KREISBERGER: Thank you. Good morning to members of the Panel.

Sir, I am grateful for that indication on timetable. That was the effect of discussions as well between the parties. We've agreed a roughly even split of time.

Mr Saunders, who appears for the *Merricks* Claimants, and I will endeavour not to

overlap in our submissions. I should say, I'm for the Stephenson Harwood Claimants. I'll be focusing on questions 1, 3 and 4. Mr Saunders' submissions will supplement in those areas but he also has question 2, and Mr O'Neill will be addressing the Scottish aspects of question 4.

Just in terms of housekeeping, there are only two hearing bundles but a record number of authorities for a three-day hearing. There are eight authorities bundles and two supplementary authorities bundles. I'll give references to the hard copies that work as well for the electronic versions, if that suits the members of the panel.

With that, I move on to my submissions. Just by way of brief prefatory remark before I then turn to question 1, we do not shrink from the fact that *Volvo* represents the first time that the Court of Justice has articulated the rule that time cannot start to run until an infringement of Article 101 or 102 has come to an end. But I will come on to show you that that is an evolution of limitation rules previously adumbrated by the Court of Justice under the competition prohibitions, and that the rule as articulated in *Volvo* has already been endorsed and applied by the Court of Justice in the subsequent case of *Deutsche Bank*.

In light of that, that really leaves no doubt that the ruling on limitation in *Volvo* is a correct statement of the law, and it's a rule which is generally applicable to competition law infringement. It's carefully framed as such, and I'll show you that.

It's also axiomatic that the Court of Justice applies to the construction of enactments as they ever were. So the limitation ruling in *Volvo* applies to claimsunder Article 101 irrespective of whether the facts arose before or after the judgment was delivered.

So, in the light of that, the merchants' rights to pursue claims for compensation under Article 101 prior to the UK's departure from the EU include the requirement, we now know, that time must not start to run before the infringement has been brought to

an end.

The right to bring these claims, therefore, must not be expunged by a domestic time-bar which is unlawful under EU law. That's the position under EU law.

Now, because the periods of time that we are concerned with all fall prior to IP completion day, the Withdrawal Act is of no consequence. We can just put that to one side, because the merchants' rights to compensation, as the accrued EU law rights, haven't been retrospectively taken away by that legislation.

Just as a final remark, it's also the case in these proceedings that the Tribunal will invariably be applying the *Volvo* rule on limitation to claims here before you, because some of those claims are governed by Member State law.

The Tribunal, in my submission, will not want to be in a position of applying different limitation periods under different versions of EU law in relation to the very same infringements.

That is a broad overview, and with that I turn to my detailed submissions.

Turning, then, to question 1, that's at Hearing Bundle 1, tab 1, page 4:

"As a matter of law EU law, is it the case that limitation periods applicable to a claim for damages for infringements of provisions of EU competition law and/or of national competition law provisions of EU Member States by reason of MIFs set for payment card schemes begin to run from the time when the infringement of competition law has ceased?"

My answer to that is, of course, yes, and you will have seen that in my skeleton.

I'd like to structure my submissions in five parts. I'll first take you through the *Volvo* judgment itself. I'm then going to show you the recent judgment in *Deutsche Bank,* which follows *Volvo*. Thirdly, I'm going to show you prior EU case law on which the *Volvo* and *Deutsche Bank* rulings rest, the foundation, to show you this is based on a long-running seam of jurisprudence. The fourth part is the application of *Volvo* to

pre-existing facts, the point I foreshadowed. Lastly, I'll respond to arguments advanced by the card schemes that the Court of Justice essentially got the law wrong in *Volvo*, which seems to be their position.

Turning, then, to the judgment itself, at the Authorities Bundle volume 7,, tab 123, page 3692.

Now, I appreciate you will be familiar with the judgment, but I need to take you through, just to show you the points we draw out from it.

If I could ask you to turn to page 3696 and pick it up at paragraph 15. I'll try and walk through, given time constraints, fairly crisply.

You see at paragraph 15 that the Commission adopted the Trucks cartel decision, which you will be familiar with, and that the infringement period spanned 1997 to 2011. The published summary of the decision was on 6 April 2017.

Then at paragraph 17, you see that one month later, after the published summary, 27 May, Spain transposed the Damages Directive into their domestic law with its five-year limitation period, and that replaced the prior Spanish limitation period of one year. The Damages Directive had actually been brought into effect late (inaudible) it was operative from December 2016.

Paragraph 18: RM lodged its claim for damages against the truck manufacturers on 1 April 2018, and paragraph 20 records that the defendants objected that the claim was time-barred, relying on the prior one-year period under Spanish law. Those are the facts on which this judgment was based.

If I could then ask you to move forward to paragraph 30 at page 3698. This is where the court encapsulates the issue before it. Just to paraphrase slightly, the issue was the temporal application of the limitation provisions in the Directive in relation to an action for damages brought after the Directive came into force in relation to an Article 101 infringement which ended before the Directive came into force. So

that's the core question there at paragraph 30.

Now, the court said that gave rise to two further questions. The first is at paragraph 38. The court said that the question there was whether the limitation provision in Article 10 of the Damages Directive was substantive or not because, if it's substantive, then the Directive provides that it has no retroactive application. And the court held that it was substantive, and its reasons for that are at paragraphs 45 to 46 on the next page. The court said this:

"The limitation period provided for in Article 10(3)… has the function, inter alia, first, of ensuring the protection of the rights of the injured party, who must have sufficient time in which to gather the appropriate information with a view to a possible action, and, second, of preventing the injured party from being able to delay indefinitely the exercise of his or her right to damages to the detriment of the person responsible for the harm. That period thus definitively protects both the injured party and the person responsible for the harm... In that context, it should be noted as is apparent from the case-law of the Court that, unlike procedural time limits, the limitation period, by resulting in the extinction of the legal action, is a matter of substantive law since it affects the enforceability of a subjective right which the person concerned can no longer effectively assert before the courts." [As read]

Now, I rely on the reasoning in both of those passages, as I'll come on to, and you will have seen this in our skeleton.

Then we move to the second sub-question articulated by the court. That's at paragraph 48:

"It is necessary, in order to determine the temporal applicability of *A*rticle 10… to ascertain whether the situation at issue in the main proceedings arose before the expiry of the time limit for transposing… the Directive or whether it continued to produce effects after the expiry of that time limit." [As read]

The court explains this further at paragraph 49. It says what it is necessary to ascertain.

And it says this is necessary given the specific features of limitation rules and in the context of this kind of competition law infringement action.

"... it is necessary to ascertain whether, [by] the date of… the transposition [of the Directive, the time limit for transposition of the Directive expired, whether on that date] the limitation period applicable to the situation at issue in the main proceedings had elapsed, which means determining the time when that limitation period began to run." [As read]

This is an important paragraph because it explains why this part of the judgment formed some of the core reasoning on which the operative part is based. What the court is saying there is that it needs to work out whether the Spanish claims under Article 101 were time-barred under the old rules, i.e. before the Damages Directive came into effect in December 2016. So, when the Directive came into effect, had a time-bar acted to cut off the claims?

Then it's saying, in order to work out whether they were time-barred at the end of 2016, the court further needs to address when did time start to run under the old rules pre-Damages Directive.

This is why *Volvo* contains a ruling on when time starts to run for damages actions for Article 101 infringements under EU law, as it existed before the Directive. It's a prior question, but the court makes clear it is a question that is necessary to answer, necessary to ascertain.

Now, the court addresses the question of when time begins to run under the old rules in the passages which follow. That starts at paragraph 50:

"With regard to the time when that limitation period began to run, it must be recalled that, according to the case-law of the Court, where none of the EU rules governing

the matter are applicable *ratione temporis*, it is for the legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an infringement of Articles 101 and 102 TFEU, including those on limitation periods, provided that the principles of equivalence and effectiveness are observed, that latter principle requiring that the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law not make it practically impossible or excessively difficult to exercise rights conferred by EU law..." [As read]

So this is a very well-trodden path here, the well-grounded general EU law principles of effectiveness and equivalence, with which members of the panel will be very familiar, and the requirement that domestic rules, the principle of national procedural autonomy, give way to those principles, including in relation to limitation.

Paragraph 51 then simply sets out the Spanish rules on limitation, that's the one-year period which runs from date of knowledge.

Paragraph 52 refers to the court's duty to give national provisions, a construction which conforms with EU law, provided that it's not *contra legem*.

Paragraph 53 I will read out:

"…it must be recalled that national legislation laying down the date on which the limitation period starts to run, the duration of that period, and the rules for its suspension or interruption must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that law by the persons concerned, so as not to undermine completely the full effectiveness of Articles 101 and 102 TFEU." [As read]

The court cites *Cogeco*, if I'm pronouncing that right, which I will turn to in a moment. That's an absolutely key paragraph because we have moved from general principles of effectiveness to their concrete application in the context of competition law

damages actions, which have, according to the court, particularities; they are not like other actions.

The court goes on at paragraphs 54 and 55 to cite two particular particularities of competition law -- that's some alliteration for you. The first is the bringing of actions for damages on the grounds of EU competition law requires in principle -- and I stress the words "in principle" -- a complex factual and economic analysis, again relying on *Cogeco*.

The second specificity is that these disputes are characterised by information asymmetry which operates to the detriment of the harmed party, the injured party. It's harder for the injured party to obtain the information necessary, they say.

On the basis of that reasoning, the court arrives at the conclusion, which I rely on, at paragraph 56, and the wording is important:

"In that context, it must be considered that, unlike the rule applicable to the Commission, set outinArticle 25(2)of Regulation No 1/2003, according to which the limitation period for the imposition of penalties [runs] on the day on which the infringement is committed or, in the case of continuing or repeated infringements, on the day on which the infringement ceases, the limitation periods applicable to actions for damages for infringements of the competition law provisions of the Member States and of the [EU] cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, the information necessary to bring his or her action for damages." [As read]

The court goes on:

"Otherwise, the exercise of the right to claim compensation would be rendered practically impossible or excessively difficult." [As read] In other words, in breach of the principle of effectiveness.

So the ruling is unambiguous. I just want to make a few comments on that, given the

argument of the card schemes. The principle of effectiveness calls for cessation of the infringement and knowledge as preconditions of time starting to run. That principle is violated by domestic limitation rules which ignore them. That's paragraph 57. Just so you have it, that conclusion is repeated at paragraph 61, at the bottom of the page.

Now, what I want to draw to your attention is that the card schemes in their skeleton place heavy reliance on the words "in that context" in paragraph 56, and "in those circumstances" at paragraph 61, and they rely on those phrases as a straitjacket, they say, which confines the reasoning here to the facts of the case before the Court of Justice.

In my submission, that is a misreading. "In that context," at paragraph 56, is simply a conjunction which refers back to the preceding paragraphs, in particular paragraphs 53 to 55. Those are the paragraphs which contain the propositions drawn from *Cogeco,* that detailed domestic provisions on limitation must be adapted in damages actions in order to give full effect to Article 101 given the particularities of competition damages actions.

So, in that context, it says nothing at all about the specific facts before the Spanish court. On the contrary, the passages it's referring back to say in general terms -- and this is at both 44 and 45 -- that the reasoning applies to actions for damages on account of infringements of EU competition law. It's not confined to any type of actions within that category; it's not confined at all. And notably, paragraph 53 refers to both Articles 101 and 102. They didn't need to refer to 102 because the Trucks decision was made under 101, so the claims were brought under Article 101.

So it's clear, general applicability in relation to damages actions for competition law infringements. And, as I say, the same goes for the wording "in those circumstances" at paragraph 61.

That deals with *Volvo*. If I may, I'd like to move straight to *Deutsche Bank,* which is in the same bundle at tab 131. It begins at page 3930. You will see from that first page this is a recent decision of the Court of Justice from 6 March this year. You will also see from the prior page that this is a translation which was received on 14 April and that was the day that skeletons for this hearing were lodged, so it was just in time to refer to it at footnote 29 on page 11 of our skeleton, with thanks to Mr Jackson for his efforts.

Turning to the judgment then, this refers to another request for a ruling from a Spanish court. You see on the first page, at the bottom, the Court of Justice heard Advocate General Rantos. Now, that's the same advocate general as in the *Volvo* case and, having heard him, the court decided to deal with the request by virtue of a reasoned order under Article 99 of itsRules of Procedure.

Now, I just want to show you, in light of that, why the court decided to issue a reasoned order to deal with this case by way of reasoned order. That's paragraph 30 on page 3936:

"Pursuant to Article 99 of its Rules of Procedure, when the answer to a preliminary question may be clearly deduced from case law, the Court of Justice may decide at any time, on the proposal of the Reporting Judge and after hearing the Advocate General, to rule by means of a reasoned order. This provision applies in these cases." [As read]

So the answer was clear.

If I could ask you to move forward to -- sorry, move back to page 3933, so I can show you what was addressed in this judgment. The case concerned a damages action which followed on from the Commission's finding of a single and continuous infringement between a number of banks in relation to Euribor. That's at paragraph 13 on that page, and the damages actions were claims for compensation

by consumers in relation to their mortgages.

Now, as to the substance of this judgment, it is a faithful application of the passages in *Volvo* which culminate in the conclusion that cessation is a condition of time starting to run for Article 101 damages actions. So, just so you have the facts, I'll deal with this briskly.

At paragraph 14, you see the infringement ran from September 2005 to May 2008. The infringement decision was given in December 2013; that's at paragraph 13. The claims were lodged in late 2020; that's at paragraphs 17 to 18. And *Deutsche Bank* argued that they are time-barred; that's at paragraph 20.

Turning then to what the court addressed as the second preliminary question; that's at paragraph 32 on page 3936. That question, relevantly for our purposes, was whether Article 101 and the principle of effectiveness should be interpreted to the effect that they were opposed to a limitation period which starts running on the date of the publication of the Commission's decision. So this is application of 101 and the principle of effectiveness, not the Damages Directive.

If we turn to paragraphs 32 to 37 -- could I suggest that members of the panel read those passages? It's a rather long section to read out. I'm grateful. **(Pause)**

Thank you for that.

Then if you move forward to paragraph 41, we will see the same conclusion was drawn in *Volvo*:

"Under these circumstances, it should be considered that the limitation periods applicable to actions for damages for infringements of the Competition Law of Member States in the Union cannot start to run before the infringement has ceased and the injured party is aware or could have been reasonably aware both of the fact that he… suffered a loss on account of that infringement and the identity of the perpetrator..." [As read]

Then if we move forward to the first and third preliminary questions -- that's at paragraph 53 -- the question was whether Article 10(3) of the Damages Directive should be interpreted to the effect that the temporal application should include an action for damages for infringement of the competition law which, despite referring to an infringement that ceased prior to the entry into force of that Directive,, was brought after the entry into force of the provisions that transposed that Directive into national law.

Then moving onto paragraphs 54 to 65, these reproduce again the rulings in *Volvo*. I don't think I need to read them out -- if I may, I'll let you cast your eye over it -- but it is a faithful application. It reproduces 13 -- it's 13 paragraphs reproducing *Volvo*. That's up to paragraph 65.

If I could ask you to go as far as paragraph 60. **(Pause)**

Then at 61, you see there the question of whether Article 10 of the Damages Directive is a substantive provision. That's answered in the affirmative at paragraph 63.

Then, at paragraph 64, the court poses the same temporal question as arose in *Volvo*, namely it's necessary to work out whether the claim was time-barred before the Damages Directive came into effect.

Then, importantly, we get to paragraph 66, which again repeats the limitation rule articulated in *Volvo*, including in relation to the cessation of the infringement.

Then the remaining paragraphs deal with knowledge.

My submission is that these passages put it beyond doubt that the findings in *Volvo*, the ruling which culminates with the conclusion in relation to cessation, represents good law, first of all, and secondly is of general application to domestic limitation periods in the context of competition law damages actions.

MR JUSTICE ROTH: You haven’t taken us to the operative part of this ruling. Does

this principle appear in the operative part?

MS KREISBERGER: If I can show you that. That's at page 393.

MR JUSTICE ROTH: 3943, I think.

MS KREISBERGER: 3943. I'm so sorry.

At paragraph 1, the court concluded:

"Article 101.. and the principle of effectiveness should be interpreted to the effect that they are not opposed to national legislation, as interpreted by national case law, according to which the limitation period applicable to an action for damages for an infringement… brought by a consumer starts to run from the day of publication… of the summary of the European Commission's final decision declaring such infringement, provided it can be reasonably considered that, on the date of the aforesaid publication, the injured party was aware of the essential aspects allowing him to bring his action for damages." [As read]

So that does not address the conclusion at 66, but you don't get there until you've gone through the stages of analysis in the judgment and equally the second conclusion in the operative part relates to the applicability of Article 10(3) of the Damages Directive. And, as I said, in both *Volvo* and *Deutsche Bank*, the court needed to work out if the claims were extant on the date on which the Damages Directive came into force and, in order to do that, it needed to work out whether a domestic time-bar had been operative, and that's where this becomes an essential step in the court's reasoning.

MR JUSTICE ROTH: So here I think you said the infringement ceased in 2008, didn't it?

MS KREISBERGER: Yes, but there was a knowledge issue.

MR JUSTICE ROTH: It's the knowledge issue that takes you into --

MS KREISBERGER: That's right.

MR JUSTICE ROTH: It's not the cessation.

MS KREISBERGER: On the facts of this case, yes, but it shows you that the court regards both limbs as a vital part of this test. But they haven't separated out knowledge; they've applied the full formulation which includes both the cessation condition and the knowledge part.

It really reinforces my submission that these rules were of general application, whether or not they're engaged, whether they bite on the facts of the case before it, and the court saw fit to reiterate that that is the position under Article 101.

I wasn't going to say anything further about *Deutsche Bank*, but move on to prior EU case law. I should say that on this topic, Mr Saunders and I are going to perform something of a double act. So I will be showing you some of the authorities on the principle of effectiveness in relation to limitation, and Mr Saunders, I think, is going to do an even deeper dive into some of the European authorities.

MR JUSTICE ROTH: Sorry, I wasn't quite clear. Did you say that there was no advocate general opinion in *Deutsche Bank* because they looked back to the advocate general's opinion in *Volvo*, or did they have --

MS KREISBERGER: I can't say that. All that's clear from the face of the order --

MR JUSTICE ROTH: It will be on the court's website.

MS KREISBERGER: There's no opinion but, as I understand it, I think that's the approach under Article 99, so I may be corrected on that, but certainly in this case there's no advocate general opinion. All we see is what we see from the face of the judgment, that he was heard, and that, having heard him, they dealt with the case under Article 99 because they decided the position was clear, but we don't know what he said.

I understand that that is right, that that's a standard approach under Article 99.

Moving on, then, to the prior EU case law, as I said at the outset, it's right that *Volvo*

is the first time that the Court of Justice has identified cessation as a precondition. I accept that. But it's certainly not right to say, as the card schemes do, that the relevant passages in *Volvo* somehow depart from prior Court of Justice case law. On the contrary, the ruling in *Volvo* on start dates for limitation periods is on all fours anddevelops those prior rulings on limitation. It's essentially a logical extension of them.

So I'm going to show you the case law in which the court has already held these two propositions. The first is that the domestic rules on limitation for competition damages actions are subject to and must comply with the requirement to give Article 101 full effect.

MR JUSTICE ROTH: That's common ground, isn't it?

MS KREISBERGER: I think that's right, but I will show you how that comes about because my core point is to show you that start dates for limitation periods is an aspect of that. We will hear, if it's right, that it's common ground.

Then the second proposition, which builds on the first, is that Article 101 and the principle of effectiveness make granular demands of Member States when it comes to limitation periods, and prior to *Volvo*, the Court of Justice had already articulated detailed rules on various aspects of limitation, including the particular issue of when time starts to run as well as rules on suspension periods and duration.

I should say, in response to your question, sir, the card schemes certainly labour the principle of national procedural autonomy, not to say --

MR JUSTICE ROTH: (Overspeaking).

MS KREISBERGER: We'll come to that.

MR JUSTICE ROTH: I just seem to recall a statement in one of the skeletons saying procedural autonomy is subject to the principle of effectiveness.

MS KREISBERGER: Which they give a much narrower --

MR JUSTICE ROTH: I think it may be in the Visa skeleton, stated in clear terms.

MS KREISBERGER: Yes. The difference is how they apply the scope.

MR JUSTICE ROTH: It's a question of what does the principle of effectiveness require --

MS KREISBERGER: Yes, quite.

MR JUSTICE ROTH: Not that it's not subject to it.

MS KREISBERGER: Now, in *Volvo*, the court, as I showed you, is providing further clarity for when time can start to run for repeated, continuing infringements, building upon these principles already articulated in the case law.

I'm just going to show you two authorities, because I've got a lot to get through and, as I said, Mr Saunders will pick up others.

I'm going to start with *Manfredi*, the seminal case familiar to us all, at volume 3 of the Authorities Bundle, tab 52, page 1183.

If I can ask you to look at paragraph 73 on page 1206. This was the question before the court:

"The national court asks, in essence, whether Article 81 [as it then was] must be interpreted as precluding a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81… begins to run from the day on which that prohibited agreement or practice was adopted." [As read]

So that was the question before the court, and its judgment addresses that particular question. The court agreed that a rule that runs from the first day of the infringement could infringe the principle of effectiveness. That's at paragraph 78 over the page, 1208. The court said this:

"A national rule under which the limitation period begins to run from the day on which the agreement… was adopted could make it practically impossible to exercise the

right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended. In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action." [As read]

Now, there you see the court applying the principle of effectiveness on the specific question of limitation periods, but it's been said by the card schemes, "But they didn't cite the rule that we now know to be the case in *Volvo*." Well, this judgment addresses the question before it, so the court was there considering a start date on the first day of infringement and particularly a short limitation period. It didn't need to go on to make other findings; this judgment is sufficient.

MR JUSTICE MARCUS SMITH: True, but paragraph 79 doesn't draw the distinction between continuous or repeated infringements, and you might say that if you look at *Volvo* carefully in reference to the cessation requirement, there's actually potentially quite a big difference between an infringement that is continuous and an infringement that is repeated.

MS KREISBERGER: Well, the phrase "continuous or repeated infringements" comes up in all of this case law, and it might be appropriate to substitute the concept of a single, continuous infringement, because a repeated infringement can be characterised, and often is, as a single, continuous infringement.

So I think there's a sort of semantic trap because although it could be that a series of cartel meetings, let's say, could be treated as numerous repeated infringements, when in actual fact, what is traditionally done is the approach is treated as a single, continuous infringement.

MR JUSTICE MARCUS SMITH: Indeed. I take your point about a semantic trap. But, in a sense, hasn't that trap been given teeth by the test that *Volvo* has created? And if one goes back to these earlier cases, you see that there's not really, certainly in paragraph 79, an awareness of that trap. They are equating the continuous and repeated, whereas, as you say, there might be actually quite a significant difference between the two.

I suppose what I'm putting to you is: is the way the matter is expressed in paragraph 79 rather indicating that the court didn't have in mind cessation as a precondition to limitation rather than it did?

MS KREISBERGER: I don't think the court had the particular question of cessation in mind at all in *Manfredi*, because it wasn't asked to address that question.

MR JUSTICE MARCUS SMITH: Okay.

MS KREISBERGER: It was simply looking at a start date on the first day of the infringement, and its reasoning is quite appropriately confined to that question. It didn't say anything at all about cessation.

MR JUSTICE MARCUS SMITH: No, but what it did do was not adopt a kind of phrasing of single, continuous infringement. What it has done is drawn a distinction between continuous and repeated infringements and equated them and wanted a single rule that operates in both of those separate cases, and I think what you are saying is that now, looking at the way *Volvo* has gone, you probably need to elide these two classes and regard the rubric not as continuous or repeated infringements but as a single, continuous infringement that may be continuous or repeated and so continuous.

MS KREISBERGER: Well, I think, sir, yes -- thank you for that -- I think it will ultimately depend on the facts of the particular case. So the rule applies regardless. Whatever the infringement you are dealing with is, the cessation condition bites, so

time can't run until that infringement is ended.

Now, that applies across both of the categories that you've identified, sir. So, if it is a long-running cartel agreement that spans a decade, time will run from the end of that cartel period. If it is a single meeting, time will run from the day of the meeting, if that meeting is treated as a single, distinct infringement, the rule applies to that meeting.

The rule is well tailored to be applicable to both situations. In practice, these long-running, unlawful arrangements do tend to be characterised as single infringements, now, and in order to be so characterised, they have to meet the test for SCIs.

MR JUSTICE ROTH: I do not quite see how *Manfredi* really helps us. I mean, if you are saying that it's cited for the proposition that limitation rules are subject to a principle of effectiveness, yes, that's been established not only in competition cases, but in equal pay cases or discrimination cases, and that's common ground.

Here, they are saying that that is so and they are considering a national rule where limitation starts from the date when the agreement was adopted.

Now, clearly on the facts of *Manfredi*, where the infringement started in 1994, the Italian competition authority's decision wasn't until 2000, that would be wholly ineffective for people to claim compensation. So it's a rather striking example of where the principle of effectiveness is infringed, and that's what they are saying.

But I don't see how that helps us in considering whether a cessation principle is necessary.

MS KREISBERGER: So that's not the point I'm seeking to draw out from the judgment. It's quite clear on the face of this, it's not addressing the cessation question.

MR JUSTICE ROTH: No.

MS KREISBERGER: But what I want to show you here is really in response to an argument that's made against me by the schemes. The schemes say in their skeletons *Cogeco* is a radical departure from what has gone before --

MR JUSTICE ROTH: *Volvo*.

MS KREISBERGER: *Volvo*, sorry. I haven't got to *Cogeco* yet. I apologise.

Volvo is a radical departure from what's gone before, and I'm drawing out from this a much less bold submission, which is that the Court of Justice has always felt able and regarded it as appropriate to test the start dates of limitation periods under Article 101.

So the Court of Justice has looked at the start date here -- as you say, it was an egregious example -- and has ruled that this start date, the moment from which the limitation period runs, is actually unlawful under EU law. It doesn't go any further, because it wasn't asked to go any further. It would be very odd if it did.

I'm only making the narrower submission that, as far back as 2006, the Court of Justice regarded the start date of limitation periods for competition law infringements as within the principle of effectiveness and Article 101, to give full effect to Article 101.

So it's a starting point; it's a fairly narrow submission.

Now I will move to *Cogeco* which is in the Authorities Bundle, volume 5 --

MR JUSTICE ROTH: And it does -- just to wrap that up, it does in *Manfredi*, of course, come into the operative part of the judgment, in paragraph 4 of the operative part.

MS KREISBERGER: Yes. I'm grateful for that, on page 1215.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: There's no doubt that these matters are within the jurisdiction of the Court of Justice when looking at competition law damages actions. And when

I say "these matters" I'm specifically talking about the start date of the limitation period. The Court of Justice will scrutinise for compatibility with Article 101.

Then moving on to *Cogeco*. That's at tab 97 of the Authorities Bundle, volume 5, page 2661.

This is more recent than *Manfredi*, 2019, but it is a pre-IP completion day subject, and it is another case that addresses limitation, this time in the context of Article 102.

You saw from *Volvo* that in that judgment the court saw no material difference between the two prohibitions for these purposes, 101 and 102, as you'd expect. So this 102 judgment is also applicable.

The court was asked to address questions by a Portuguese court about particular domestic rules on limitation under the general principles of law. That's at paragraph 23(2) on page 2665. If I could just ask you to read that. **(Pause)**

If I could then ask you to pick it up at page 2668, paragraph 38:

"In that regard, [so this is responding to these questions] it should be recalled that Article 102 ... produces direct effects in relations between individuals and creates rights for the individuals concerned, which the national courts must safeguard." [As read]

It's based on *Kone*, the umbrella damages case:

"The full effectiveness of Article 102 ... and, in particular, the practical effect of the prohibition ...would be put at risk if it were not open to any individual to claim damages for loss caused to him by abusive conduct ..." [As read]

Paragraph 40:

"It follows that any person can claim compensation for ... harm suffered where there's a causal relationship between ... harm and… abuse ..." [As read]

41:

"The right of any individual to claim compensation for such a loss actually

strengthens the working of the European Union competition rules and discourages abuses of a dominant position which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union." [As read]

Pausing there, one of the objectives served by the right to compensation is deterrence. Now, this principle harks back all the way to *Crehan*, which is cited in our skeleton, there's no need to turn it up. But that's an explanation as to why is competition special; why do these damages actions require special treatment?

Then continuing at paragraph 42:

"In the absence of EU rules governing the matter ... it is for the domestic legal system of each Member State to lay down the detailed rules governing… the right to claim compensation ... including ... on limitation periods, provided that the principles of equivalence and effectiveness are observed." [As read]As you said, sir, that can't be disputed.

"Accordingly, the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not be less favourable than those governing similar domestic actions [that's equivalence] and must not make it in practice impossible or excessively difficult [that's the principle of effectiveness] ...

"In that regard ... those rules must not jeopardise the effective application of Article 102 ..." [As read]

So that's the principle of effectiveness within the context of 102:

"In that context [so applying those principles], as limitation periods constitute detailed rules governing the exercise of the right to claim compensation for the harm resulting from an infringement ... it is necessary ... to take all elements of the ... rules on limitation into consideration.

"Secondly, account must be taken of the specificities of competition law cases

and in particular that… [they involve] a complex factual and economic analysis."

"In those circumstances, it must be stated that the national legislation laying down the date from which the limitation period starts to run, the duration and the rules for suspension or interruption ... must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that law… so as not to undermine ... full effectiveness ..." [As read]

That is the language that is transported into *Volvo*, the need to tailor your limitation period to the requirements of the competition infringements.

The court then concluded:

"It follows that the duration of the limitation period cannot be short to the extent that, combined with the other rules on limitation, it renders the exercise of the right practically impossible…" [As read]

That's addressing a different problem there.

Then just to show you the operative part over the page, at the bottom of the page there, if I could ask you to read paragraph 2, So that's confined to the particular rules in issue there, as one would expect.

The submission that I want to put before you is what you see there is *Cogeco* identifies a specific red line in relation to limitation under Article 101. So a red line in *Cogeco*, articulated there, is that time cannot start to run before the identity of the infringer is known. That was the operative finding, and Mr Saunders will be addressing you on that. That's one red line, on the facts of *Cogeco.*

But *Volvo* now sets out another red line which has arisen, so *Volvo* is a natural evolution of that case law.

Whether or not the red line in *Volvo* was applicable in relation to the facts of that case - which, as I understand it, it's not, it's a case about knowledge - is by the by, because it's the Court of Justice, the Court of Justice regards that as an essential

part of its reasoning to get to the conclusion in the operative part.

MR JUSTICE MARCUS SMITH: Ms Kreisberger, you didn't take us to the dispositif in *Volvo*, and assuming for the sake of argument the schemes are right and *Volvo* was a radical departure - I appreciate that's not what you're saying, but assuming it was -does one draw anything from the absence of a reference to cessation in the dispositif, as to what actually the court was deciding in that case, particularly when, as you've just said, the cessation point was, as it were, not a necessary part of the outcome in that case?

MS KREISBERGER: Sir, I was going to address you on that point later, but I wonder is now a convenient moment to break? I will start with that point and quickly re-order some pages?

MR JUSTICE MARCUS SMITH: Of course, but I didn't want to take you out of order.

MS KREISBERGER: It's an important point. I'm grateful for it.

MR JUSTICE MARCUS SMITH: If now is a convenient moment, we will rise - I see it's 11.40 am - we'll resume at 11.50 am.

(11.38 am)

(A short break)

(11.54 am)

MR JUSTICE MARCUS SMITH: Ms Kreisberger.

MS KREISBERGER: Thank you. If I may go back to the operative part of *Volvo*, so again that's Authorities Bundle, volume 7, tab 123 on page 3708. If I just read the operative part, the first passage:

"Article 10 of the Damages Directive… must be interpreted as constituting a substantive provision for the purposes of Article 22(1) of that Directive, and as meaning that an action for damages which, although relating to an infringement of

competition law which ceased before the entry into force of the directive, was brought after the entry into force of the provisions transposing it into national law falls within the temporal scope of that directive ..." [As read]

Then I would like to emphasise these words:

"... insofar as the limitation period for bringing that action under the old rules had not elapsed before the date of expiry of the time limit for the transposition of the directive." [As read]

Now, this is the wording in the operative part that refers back to the reasoning contained in the cessation condition.. As you very fairly pointed out, the conclusion in that case doesn't rest on cessation, it rested on knowledge, but this is the language in the operative part which brings in the reasoning where the court very carefully and very deliberately asked itself: when did time start to run under Article 101 and the general principles?

So that is where it is brought in.

Now, if I could just follow that and then I will make a couple of specific submissions, but I'd like to show you the relevant test.

MR JUSTICE ROTH: If I could just interrupt you for just a moment. There would be no need to change that wording at all if the cessation condition was not included in paragraph 56?

MS KREISBERGER: I accept that, for these purposes, but the fact of the matter is the court did address itself to a more holistic articulation of the relevant conditions on limitation and when time can start to run.

MR JUSTICE ROTH: But if that's right, and you very fairly accept it is, then it follows, doesn't it, that the cessation ingredient is not an essential foundation for the operative part?

MS KREISBERGER: That's the point I was going to come to next. Actually,

essential is not in fact the test. I think I need to show you next what the test is in relation to interpreting preliminary ruling judgments.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: Let me just show you that, sir, in answer to your question.

Now, it's right that Visa says in its skeleton that paragraphs 56 and 61 aren't binding because they are not part of the essential reasoning. That isn't quite right --

MR JUSTICE ROTH: They may say that. Just to be clear, I wasn't putting that. I was putting the narrow point that the cessation element of paragraph 56 is not an essential part.

MS KREISBERGER: Yes, I --

MR JUSTICE ROTH: I can see that the knowledge aspects might be.

MS KREISBERGER: I do, and I will come back to you on that, sir, but I think I do just need to ensure that we are approaching this on the correct basis.

As I said, Volvo relies on essential reasoning as being part of the test. That's the formulation which you see in the context of actions for annulment, actually.

MR JUSTICE ROTH: Mm-hmm.

MS KREISBERGER: A different test applies in relation to preliminary references.

If I could ask you to turn up the Authorities Bundle, volume 6, tab 384. Sorry, it's the Supplementary Authorities Bundle. Sorry, I misread my own reference. It's tab 6 of the Supplemental Authorities Bundle, page 384.

MR JUSTICE ROTH: So *Arsenal Football Club*?

MS KREISBERGER: That's the one.

Lord Justice Aldous rejected, in that case, the submission that it was only the operative part of a Court of Justice preliminary reference which was binding. That's at paragraph 31:

"Is the ruling of the ECJ binding? Of course the ruling of the ECJ is binding, insofar

as it is a ruling upon interpretation. However, I reject the submission of Mr Thorley that a national court should confine its attention solely to the ruling. Strictly speaking, the judgment is the explanation of the ruling, but, as Advocate General Warner explained in *[Bosch]:*, the operative part of the judgment of this Court should always be interpreted in the light of the reasoning that precedes it.' That is particularly apt in the present case as the ruling uses the words 'in the circumstances such as those in the present case'. To ascertain what the ECJ believed the circumstances were, it is necessary to have recourse to the preceding paragraphs of the judgment." [As read]

It then turns to consider the submissions.

Now, sir, this is relevant to your question. The operative part must be interpreted in the light of these paragraphs.

Sir, with respect, you are proposing a far-reaching analysis which posits a world in which you could still get to the operative part without the words on which I rely in relation to the cessation condition. I understand that. But that is not the world, and that is not, again in my respectful submission, the right approach to take, the right degree of textual scrutiny to apply to the judgment.

The fact is the court deliberately and carefully articulated the cessation condition in *Volvo*. The court clearly considers its findings in *Volvo* binding, including paragraphs 56 and 61. It regards them as correct, it regards them as binding, and has slavishly reiterated them in *Deutsche Bank*, and very clearly will apply it in future cases, no doubt where cessation does find itself in the operative part.

But it would be contrived to treat this judgment as saying something other than what it does, which is that both knowledge and cessation apply. It's not an accidental slip.

MR JUSTICE ROTH: No, I accept that, and clearly that's their view. They've articulated it there. But the question that concerns me -- I can't speak for my

colleagues -- is what is binding on this Tribunal. Clearly, that's the view of the tribunal that decided *Volvo*, but we've got to say what binds us. The operative part binds us. How much of the antecedent reasoning is actually binding, and that's particularly important because, forget about Brexit and all of that stuff, but we have a judgment of the Court of Appeal which does bind us which is clear, and we have to get to a position, as you say quite boldly in your skeleton, that we can ignore the decision of the Court of Appeal because it's been, as it were, displaced by a decision of the Court of Justice.

Well, we can only ignore it if we are actually bound to that conclusion, it seems to me, not because the Court of Justice has expressed a view. That's why this distinction, it seems to me, is so important.

MS KREISBERGER: I appreciate that, sir, and I'm grateful.

My response to that is that the operative part is carefully framed to bring in the reasoning which the court set out as to when time is said to run.

Now, it's not for the domestic court to go behind the Court of Justice's reasons. The reason for finding that limitation had not elapsed under the old rules -- if I can put it like this, so it's very clear -- the reason which the court articulated for finding that time hadn't elapsed under the old rules was that the correct limitation rule, as a matter of EU law, is that time does not start to run before cessation and knowledge.

That is the reason given by the Court of Justice. It's not for the domestic court to go behind that unambiguous statement and say, "Well, in my view, you could have got there with half of that sentence; you can redact some of that and say, 'I'm going to treat it as non-binding'." The test is that the operative part must be construed in the light of the explanatory passages, and the explanation, which the Court of Justice has seen fit to give, relates to both cessation as well as knowledge. The duty of the

domestic court is to apply that finding, not to apply some other version of it that the domestic court might prefer.

MR JUSTICE ROTH: Yes. Thank you.

You've said there's a different approach, if I understood it correctly, to the Court of Justice's judgment on annulment from the Court of Justice's judgments on preliminary ruling. Apart from *Arsenal* which doesn't make that distinction.

MS KREISBERGER: *Arsenal* is a preliminary reference.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So there are two separate seams of case law.

MR JUSTICE ROTH: Is that explained anywhere else, that there is a distinction in the approach one should bring?

MS KREISBERGER: We'll come back to you on that, sir. We have looked at this, and it does seem clear that the case which Visa relies on is an action for annulment, and one sees a different test in preliminary rulings based on the Advocate General in *Bosch*. But we will have another look, but --

MR JUSTICE ROTH: I mean, the fact that you interpret the operative part in the light of the preceding judgment, that applies as much to annulment. That's the general proposition.

MS KREISBERGER: I don't hang a great deal on this distinction. We wanted to put the correct test before you because it's the test articulated in the authorities. Whether one is referring to the reasoning as essential to the operative part or as reasons which must be taken into account in considering -- it's not an issue -- it's not a huge gulf, but I want to put the correct test in front of you.

MR JUSTICE ROTH: Thank you.

MS KREISBERGER: Now, given the time, I was going to move on to question 3. The question -- and I don't think we need turn it up -- is should the Tribunal follow the

judgment of the Court of Justice in *Volvo* pursuant to section 6 of the Withdrawal Act or because the claims concern accrued EU law rights? If not, to what extent should the Tribunal have regard to *Volvo*?

I'm so sorry, I realise I'm in error. I skipped forward to address your question, sir, and I'm at risk of lopping off some of my submissions on question 1, which I must not do. If you'll forgive me, I'm going to go back to where I was. I'm so sorry. So we'll park question 3, bearing in mind the time.

I think I can deal with my next point under question 1 briefly, because I don't understand it to be in contention. That's as regards the declaratory effect of Court of Justice judgments. They apply to factual situations which pre-date the judgment itself. This is well-settled law. It's often stated in EU jurisprudence.

If I could show you the case of *Meilicke* at Authorities Bundle, volume 3 at tab 53, page 1217. This is a case that concerned the construction of Articles 56 and 58 on free movement of capital.

If you could go to page 1233, paragraph 34, the court said:

"In that connection, regard must be had to the settled case-law of the Court to the effect that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 234…, the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule, as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule is thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied.

"It's only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the

right to rely upon a provision, which it has interpreted, with a view to calling in question legal relations established in good faith.

"In addition, as the Court has consistently held, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought." [As read]

Here, the legal provision being construed is, of course, Article 101 and the need to ensure its full effect and the right to compensation pursuant to it, and so the requirement that time can only run once the infringement has ended applies to claims irrespective of whether their facts pre-date *Volvo*.

Then my final part of my submissions on question 1, I'd like to pick up some of the Defendants' arguments. I'll deal with four arguments. The fifth I've addressed thanks to your questions.

The first, they say, properly understood, paragraphs 56 and 61 are limited to determining the temporal effect of the Damages Directive, and they say our construction is superficial and out of context.

I've taken you to the relevant paragraphs, and we've now ventilated that the court explains clearly why it needed to work out whether the claims were time-barred under the old rules before or by the time that the Directive took effect. It's just not right to say those paragraphs are about the temporal effect of the Damages Directive.

Their second argument is that *Volvo* is confined to its own facts and, as I said, they imbue the phrases *"in the context of"* and so on with this heavy significance. I say that's a bad argument. They are just conjunctions that link up to the points made in general about competition claims, and *Deutsche Bank* has frankly put paid to that argument; it can't possibly be confined to its own facts. This is a ruling of general application.

I just note paragraph 66 of *Deutsche Bank* on that point, which is formulated as

a generally applicable point.

Then the third argument, Visa says that the court's conclusion runs contrary to well-established principles of EU law. I've shown you that the conclusion fits within a line of authority that upholds the central proposition that time must not run from a date which frustrates the right to full compensation for breaches of Article 101. It's a development of the principles adumbrated in relation to that point. It's within that category.

The fourth point I can deal with very briefly. Visa protests that *Volvo* is contrary to national procedural autonomy and effectiveness. It's very clear that procedural autonomy is conditioned by the principles of effectiveness and equivalence.

With regard to the principle of effectiveness, it's clear from *Volvo*, paragraph 57, that a domestic limitation period which doesn't comply with the requirements in paragraph 56 is in breach of the principle of effectiveness.

Now, in any event, on the substance, Visa's argument is a bad one. The cessation condition does ensure the full effect of Article 101 for three reasons. Firstly, deterrence is an important aspect of the working of the competition rules. I showed you the Court of Justice's passage upholding that proposition.

Secondly, it improves the prospects of full recovery for long-running infringements by avoiding a start date which arises part of the way through a continuing infringement. As set out in *Volvo*, it strikes the right balance between the victim's right to compensation and the infringer's right not to be subject to indefinite delay. The infringer can hardly complain about delay when it's continuing in its breach of the competition rules.

Now, that's all I was going to say on question 1. So, after my false start, unless the Panel has any questions for me, I will move on to question 3.

MR JUSTICE MARCUS SMITH: No. Please do. Thank you.

MS KREISBERGER: The merchants' position on question 3 is that the Tribunal must apply the *Volvo* rule because it forms part of their accrued rights under EU law, namely the right to compensation under 101, which is extinguished by a non-compliant time-bar.

If the Tribunal disagrees, we say it should in any event follow *Volvo*, not least because it's going to have to apply the *Volvo* rule in the context of claims governed by the EEA Member States, which depends on my submission that it binds you as a matter of EU law. It would be certainly incoherent to apply two different versions of EU law in the same set of proceedings concerning the same infringements.

Before I turn to my detailed submissions, just a few introductory remarks on the core issue. With a few exceptions, which are spelt out and very carefully delineated in the Withdrawal Act, That Act has very little to say about EU law rights which accrued before IP completion day. Those rights are preserved.

That is because the entire thrust of the Withdrawal Act is -- and you will be familiar with this -- to take a snapshot of the body of EU law which existed on IP completion day, freeze-frame it and convert it into domestic law. That's the core purpose of the retained EU law which from that day become subject to the jurisdiction of the domestic courts on a prospective basis, essentially unshackled from the European Court's case law.

Now, this is going to be a point that crops up as a theme through my submissions: a broad rule of thumb for working out whether a case involves retained EU law, on the one hand, or accrued EU law rights, is to consider whether the relevant facts arose before or after IP completion day. If they arose pre-IP completion day, we are in the realm of accrued EU law rights, and provided that one of the narrow exceptions to that, which I'll show you, doesn't apply, the Withdrawal Act can be put to one side.

If the facts arose after IP completion day -- which is not the situation we are in -- it's then necessary to consider which provisions of EU law are retained, which have been absorbed into the fabric of domestic law, within the meaning of that Act. Happily, my submission is we don't need to worry about that today. That's because the facts here long pre-date IP completion day.

The question of whether the merchants' right to seek compensation is extinguished by a domestic time-bar must be determined by reference to their EU law rights, as they accrued before IP completion day, and that includes *Volvo* and *Deutsche Bank* limitation rules. I've already addressed you on the fact that their declaratory judgments then apply to pre-existing situations.

Now, I'm going to address you on the following four matters in this part: the European Communities Act, which must be the starting point for deriving the rights; the accrual of rights under the Interpretation Act; and the correct construction of the Withdrawal Act and in particular section 6. I will address you on some of the case law which makes for some interesting submissions, which we'll come to. Finally, I'll deal with arguments advanced by the Defendants.

The ECA 1972, as I'll call it, is at Authorities Bundle, volume 1, tab 1. Section 2(1) I imagine will be very familiar to you. As Lord Justice Green put it in one of the authorities in the bundle, section 2(1) was the "portal through which all EU rights flowed into domestic law". It's on page 13 of the bundle:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures [which] from time to time provided for, by or under the Treaties in accordance with the Treaties are without further enactment to be given legal effect or used in the [UK] shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions

should be read as referring to one to which this subsection applies." [As read]

The Panel will recall that it was this provision that conferred enforceable rights in respect of breaches under Article 101 in English law as far back as *Garden Cottage Foods*, which is close to its 40th anniversary.

This is how the competition prohibition breaches are actionable in English law, a breach of statutory duty.

Section 2(1) continues to be the statutory basis for all claims brought in the High Court for breaches of the competition prohibitions. That is a significant point that I'll come back to here.

Also, if I could just ask you to note section 3(1) over the page. If I could just ask you to read that, that's the provision which conferred binding effect on judgments of the Court of Justice as a matter of English law.

Based on my submissions in response to question 1, if we were in a world in which the ECA had not been repealed, something I like to call my happy place, the Tribunal would be bound by the limitation rules in *Volvo*, including in relation to the present claims. That's my submission.

I just want the analysis under the ECA to be clear. The merchants' right to compensation under Article 101 was given legal effect under section 2(1). That right is conditioned by the *Volvo* rule. The merchants' claims are actionable in the UK courts as claims for breach of statutory duty under section 2(1) ECA. That's because these claims were brought in the High Court. They are not section 47A claims; they were subsequently transferred. And again, under section 3(1) of the ECA, *Volvo* has binding effect.

So that's the first part of my submissions.

The second part relates to the Interpretation Act 1978.

MR JUSTICE ROTH: Can I just ask, when you say the merchants you represent the

Stephenson Harwood Claimants. Is it the case that all merchants are arguing the transfer point?MS KREISBERGER: I would need to check that. It's certainly true for those in the room today. I'm not sure if we can speak for the others; we'll come back to you on that. But it's certainly not true, of course, for the *Merricks* Claimants, obviously, because it's a collective claim. It's therefore necessary that I deal with the points that arise out of that today, as they don't concern Mr Saunders.

The question is whether the analysis I just laid out for you under section 2(1) and section 3(1) of the ECA is affected by the UK's withdrawal. My submission is that it's not. The effect of the repeal of the Withdrawal Act is governed by section 16 of the Interpretation Act which is the statute concerned with repealing enactments.

The overriding position is that accrued rights and the scope to bring legal actions enforcing those rights are not disturbed by repealing Acts, unless expressly provided for in the statute. The statute is in the Authorities Bundle, volume 1, tab 3, page 22. The relevant subsections are (c) and (e) so:

"Where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, …

"(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment; [or]

"(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, [et cetera];

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if" -- and this is important -- "the repealing Act had not been passed." [As read]

So, if I'm right that there's no contrary intention in the Withdrawal Act -- and we'll come onto that -- then it is incumbent upon the Tribunal to determine these claims, and their progress through the Tribunal, as if the Withdrawal Act had not been

passed.

There are two specific consequences from that provision in the present context. The first is that, as I've said, the section 2(1) rights which are accrued are preserved -- that's section 6(1)(c) -- unless limited or extinguished by the Withdrawal Act.

MR JUSTICE ROTH: 16?

MS KREISBERGER: 16(1)(c), I'm sorry. That's the second consequence.

The second is, in proceedings seeking to enforce those rights, the binding effect of *Volvo* and *Deutsche Bank* is preserved -- that's under section 3(1) of the ECA -- by 16(1)(e), again unless extinguished by the Act.

I address you on the world in which the ECA hadn't been repealed. Taking the analysis in stages, we now turn to a world in which the ECA has been repealed, and I will assume in my favour for this part of the argument that there is no contrary intention expressed in the Withdrawal Act.

So, in that world, the Tribunal has to apply *Volvo* because it forms part of the merchants' accrued EU law rights and it's binding under section 3(1).

I just want to end this section by showing you the authorities on construction -- on the construction of the Interpretation Act of section 16. For your note, sir, they are referenced at paragraph 39 of our skeleton. I want to first show you what Viscount Dilhorne said in *Floor v Davis*, in the Authorities Bundle, volume 2, tab 27, page 673. Towards the bottom of the page:

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

In other words, section 16 is your starting point, whether cited or not; it's a natural starting point.

If I could ask you to turn up the Second Supplementary Authorities Bundle, tab 3,

page 43. This is Craies on Legislation, the 12th edition. At page 43, the editors say this about section 16:

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

Then, over the page, this addresses the meaning of the phrase "unless a contrary intention appears". This is at 14.4.12:

"A contrary intention for [these purposes] must be very clear, although it could in theory arise by very strong implication." [As read]

That's the approach to construing section 16.

Now the fun bit starts. I'm going to turn to the Withdrawal Act itself and I'm going to show you now that there is no contrary intention to section 16.

The Defendants argue, essentially, that the binding effect of *Volvo* under the ECA is removed by section 6(1)(a) of the Withdrawal Act, and that's the provision that says the Tribunal is not bound by decisions of the European Court post-exit. "IP completion day" is a mouthful, so I may sometimes substitute "exit" for that, I mean IPCD.

I'm going to show you that section 6 isn't engaged at all in relation to accrued EU law rights, and that's for three overriding reasons.

The first is that section 6 -- we will turn it up -- is a provision about the effect or lack

of effect of post-IPCD judgments of the European Court in respect of retained EU law.

It therefore -- my second point -- has nothing to say about accrued EU law rights at all.

Thirdly, had the draftsperson intended section 6(1)(a) to prevail over and reverse the general preservation of EU law rights under section 16 and the binding effect of judgments at section 3(1) of the ECA, it would need to have said so in terms. That's a hierarchy of rules that would need to be spelt out very clearly. But that's not what section 6(1)(a) says. And a construction -- this is why I showed you Craies -- which undermines accrued rights can't be implied into 6(1)(a).

In order to make these points good, I need to walk you through the relevant parts of the EUWA, the Withdrawal Act, to show you the statutory scheme, how this Act operates. After that I'll then hone in, if I may, on section 6.

I'm going to begin a canter through the Act. I am going to be using the version of the Act in the Supplemental Authorities Bundle. There is a version in the Authorities Bundle as well, but this is an easier one to read, because of the way it's been downloaded, essentially. That's at tab 3, page 87, and it's the full Act.

We start at page 87, that's the repeal of the European Communities Act. Then over the page you see the heading "Savings… for implementation period" at the very top of the page. That's in respect of sections 1A and 1B. Essentially, the effect of those sections was to continue the ECA -- it continued to have effect until the end of the implementation period, so we needn't worry about those.

Then, moving forward to page 90, you see there the heading "Retention of saved *EU* law at end of implementation period". This heading covers sections 2 to 7 of the Act, which I'm going to take you through.

What I'm going to do is show you that the principal function of these provisions under

this heading, "Saved EU law", is to achieve the transposition of EU law into domestic law for the future, that's after the implementation period, which gives EU-derived law a continuing effect which you wouldn't otherwise have had, given the repeal of the European Communities Act.

Starting with section 2, the heading there is "Saving for EU-derived domestic legislation". Section 2(1) provides that this legislation continues to have effect after the implementation period as it had effect immediately before IPC date.

Then section 3 on page 91, headed "Incorporation of direct EU legislation", underneath that heading, section 3(1) provides:

"Direct EU legislation, so far as operative… before IP completion day, forms part of domestic law on and after IP completion day." [As read]

That's two categories of saved, retained, EU law.

Section 4 then, on page 93, that's the provision "Saving for rights et cetera under section 2(1) of the [European Communities Act]" and it says:

"Any rights… which immediately before IP completion day (a) are recognised and available in domestic law by virtue of section 2(1)… and (b) are enforced, allowed and followed accordingly, continue on and after IP completion day to be recognised and available in domestic law..." [As read]

So section 4 is essentially a sweep-up provision and it deals with the residual category of EU law which hasn't been given continued effect through sections 2 and 3.

Just pausing there, you've seen that each of those sections concerns the continued effect of EU law as a matter of UK law post-IP completion day. That's the wording you see in each of those provisions. It's absorbing EU law and retaining it for the future.

Coming back to my rule of thumb, this is about the prospective application from IPC

day of retained law.

None of these provisions are engaged on the facts of our case, because they concern facts arising prior to IP completion day, but I'm showing you this because I need to take you through the statutory scheme.

Section 5 then, that is a little different. It's headed "Exceptions to savings and incorporation". The main thrust of section 5 is to modify the effect of sections 2 to 4. Section 5 again is principally concerned with retained EU law as it takes effect after IP completion day.

But section 5, in combination with the schedules, does have something to say about EU law rights accrued pre-IP completion day. I'll pick them up as we go through.

Section 5(1) does away with the principle of the supremacy of EU law for enactments and rules passed after IP completion day, so domestic laws after that date. But 5(2) preserves the principle of the supremacy of EU law after IPC day -- it is a forward-looking provision -- but only in relation to enactments or rules passed before IP completion day.

So our corpus of domestic law must be either interpreted in conformity with EU law or else it must be disapplied under the principle of supremacy of law in the field of EU law. So it's an important provision in this context because it confirms that the duty on the Tribunal, to construe domestic rules pre-dating IPC day in accordance with EU law, continues to prevail.

Section 5(3) then applies the principle of supremacy to certain post-IPC day modifications for these prior enactments. We needn't concern ourselves with that.

Section 5(4) is an important one. Can I just let you read that? What section 5(4) does is it removes the Charter of Fundamental Rights from domestic law after IP completion day.

Section 5(5) has a clarification about rights which exist outside the Charter. Now, I'm

going to come back to that.

Section 5 is consistent with sections 2, 3 and 4 only about matters arising after IP completion day, so it was still in the realms of retained law not accrued rights, but section 5(4) is given retrospective effect in the Schedule. I'm going to show you that, because that does trespass on the accrued rights in the prior period.

Subsection (6) brings Schedule 1 into effect, and that's the schedule I have in mind, so I'm going to turn to that now, brought into effect by section 5. As Lord Justice Green observed in one of his judgments, it is fairly convoluted so it does need careful treatment. So if we go to Schedule 1 on page 129.

Here we get to the specific limited exceptions to accrued EU law rights. The heading is "Further provision about exceptions to savings and incorporation". Those exceptions are at paragraph 1: "There is no right in domestic law on or after IP completion day to challenge any retained EU law on the basis that, immediately before IP completion day, an EU instrument was invalid." [As read]

Paragraph 2 provides that general principles of EU law which weren't recognised before IP completion day don't form part of domestic law on or after completion day. So we're still in retained law, but we are going to come to something else soon.

Paragraph 3 provides that there's no right of action in domestic law on or after IP completion day based on a failure to comply with general principles of law.

Paragraph 4 removes the right to bring *Francovich* damages on or after completion day.

Paragraph 5(1) provides that references to the principle of supremacy, general principles of EU law or the rule in *Francovich* are to be read as references to that principle or rule so far as it would otherwise continue to be or form part of domestic law on or after IP completion day.

5(2) relates to modifications of EU law which post-date IP completion day, which are

not within supremacy.

As I said, all post-IP completion day, so all retained law, but they need to be read in combination with Schedule 8, paragraph 39 of that Schedule, which starts at 234. Schedule 8 starts at page 234 and we move forward to page 269.

I should just mention for your note -- we don't need to turn it up -- Schedule 8 is brought into effect by paragraph 23(7) of the Act. It brings Schedule 8 into effect, so I don't need to show you that.

MR JUSTICE ROTH: Which section?

MS KREISBERGER: Section 23(7) of the Act brings Schedule 8 into effect, so that's the formal -- it renders this paragraph operative.

Then paragraph 39(1) provides that section 5(4) of the Act, you will remember that's the section that referred to the Charter of Fundamental Rights, and paragraphs 1 to 4 of Schedule 1, which I've just shown you -- here's the critical point -- apply in relation to anything occurring before IP completion day as well as after.

This is the critical provision which gives retroactive effect to these exceptions, which are exceptions then to accrued EU law rights. These specific provisions, they override any accrued rights under section 2(1) of the ECA.

Then, just so you have the full picture, various modifications then follow.

Paragraph 39(3) says section 5(4) and paragraphs 3 and 4 of Schedule 1 don't apply in relation to any proceedings begun but not finally decided before a court or tribunal before IP completion day. In other words, actions based on the Charter, general principles of EU law and *Francovich* claims continue, if they were begun.

Paragraph 39(4) provides that paragraphs 1 to 4 of Schedule 1 don't apply in relation to any conduct which occurred before IP completion day which gives rise to criminal liability.

And together, just so you have it, 39(5) and (7) -- I'm not relying on these provisions

here but just so you have the full workings -- general principle challenges can be made if brought within three years of IP completion day and *Francovich* challenges can be brought within two years.

So, there, exceptions to the exceptions to accrued rights and carving-out. So this is not retained law; we are now looking backwards.

What you see here -- it's an important point for me to make today -- is these address specific, confined incursions into accrued EU law rights in relation to facts arising before completion day which would otherwise, but for these provisions, have been preserved under section 16. It is the retrospective expunging of accrued rights, and this is therefore a contrary intention for the purposeof section 16. It's clearly spelt out, meets the test.

There's no question of implication or suggestion or guesswork. It's provided for in terms in the Act.

With an eye on the time I won't take you there, but for your note, the operation of these provisions has been helpfully summarised by Lord Justice Green in Jersey Choice. That's at Authorities Bundle, volume 6, tab 113, page 3399, paragraphs 21 to 23. Also, for your note, they're described in the Explanatory Notes to the Withdrawal Act at paragraphs 405 to 411, and that's at Authorities Bundle, volume 8 8, tab 144, page 4350.

I am now going to turn to section 6 of the Withdrawal Act, so we now get to the provision which the schemes rely on. Looking at the time, we could break, but perhaps if I just introduce the point.

MR JUSTICE MARCUS SMITH: Yes, of course.

MS KREISBERGER: Section 6 is at page 95 in the version we're in, so you have it before you.

My overriding submission is that unlike these detailed exceptions that I just took you

through, section 6(1) does not evince a contrary intention in relation to the preservation of accrued EU law rights. That is because this section -- the clue is in the heading -- is about the interpretation of retained EU law which applies prospectively from completion day onwards, not to past facts.

It provides:

"A court or tribunal is not bound by any principles laid down, or any decisions made, on or after… completion day by the European Court, and cannot refer any matter to the European Court on or after… completion day.

"Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after completion day by the European Court, and so far as it is relevant to any matter before the [Tribunal.]

"Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day, and so far as they're relevant to it, in accordance with any retained case law and retained general principles of EU law, and having regard (among other things) to the limits, immediately before IP completion day, of EU competences." [As read]

Then it goes on to say the Supreme Court is not bound by retained law, or the High Court sitting in certain capacities.

MR JUSTICE ROTH: It's the High Court of Scotland.

MS KREISBERGER: Yes, I'm sorry, sir, that's right, the High Court of Justiciary.

Then if we go down to subsection (6), this refers back to subsection (3), which:

"... does not prevent the validity, meaning or effect of any retained EU law which has been modified on or after IP completion day from being decided as provided for in that subsection if doing so is consistent with the intention of the modifications."

I skated over (5) and (5A) to (5C). They make supplementary provision in relation to section 6(4), but we don't need to consider them further.

I was going to turn to three overriding points on statutory construction, but I think that may be the natural moment for me to break, if that's convenient to the Tribunal.

MR JUSTICE MARCUS SMITH: That's fine. Thank you very much.

2 o'clock or do you want a little bit more time?

MS KREISBERGER: I'm very happy with 2 o'clock.

MR JUSTICE MARCUS SMITH: Very good. We'll resume then at 2 o'clock.

MS KREISBERGER: I'm grateful. Thank you.

(12.59 pm)

(The luncheon adjournment)

(2.00 pm)

MR JUSTICE MARCUS SMITH: Ms Kreisberger, good afternoon.

MS KREISBERGER: Good afternoon. Thank you, sir.

I will continue by making three brief points on the statutory construction of section 6. You will recall my submission is that section 6 is a provision which concerns retained EU law. If you'd like to have it in front of you, the reference again is the Supplementary Authorities Bundle, tab 3, page 95.

I'll then come on to deal with some of the aids to construction in the case law.

My first point was about the heading which I already drew your attention to, "Interpretation of retained… law", and we set out in our skeleton at 52(b) that headings are aids to statutory construction.

The second point is that according to ordinary principles of statutory construction, a phrase or passage must be read in the context of the section as a whole. Section 6 must be read as whole and, when it is read in that way, it is clear that what it achieves, it lays down a complete set of rules governing the treatment of European Court judgments, both pre- and post-IPC day, in relation to retained EU law.

Let me just unpack that a little. Section 6(1) and (2), it's clear that the effect of those sections is that European Court judgments delivered after completion day are not binding in relation to retained law, but the courts may have regard to them. There's no doubt that that is the core effect of 6(1) and 6(2).

MR JUSTICE ROTH: Isn't 6(1)(b) saying something beyond that?

MS KREISBERGER: And referring --

MR JUSTICE ROTH: But is that not just confined to retained EU law, or are you saying we could resolve this point about *Volvo*?

MS KREISBERGER: We can't. I'm going to come back to you on that because that's governed by another -- I'm going to come back to you on that, if I may, with the correct provision. That is not my submission.

MR JUSTICE ROTH: Is 6(1)(b) the provision that stops us, or do you say something else?

MS KREISBERGER: From referring? Something else.

MR JUSTICE ROTH: Something else?

MS KREISBERGER: Yes, a different provision. But 6(1) does not have anything beyond retained law in mind, and I say that because, as I say, when you step back, it's dealing with European Court judgments on either side of that date.

Now, under 6(3), European Court judgments which pre-date IP completion day are binding in relation to retained law -- you get that from 6(3) -- because that law has been frozen.

So what you get from section 6 is a complete code for the treatment of European Court judgments as they apply in relation to retained law. That's the law which applies to facts after IP completion day.

Section 6 doesn't have any mention, it's silent, on its face, as to the treatment of European Court judgments in respect of accrued EU law rights, whether delivered

pre- or post-IP completion day. So 6(3) is only addressing European Court judgments prior to completion day in relation to retained law. We know they're effective in relation to accrued rights, but section 6 is not purporting to engage with that point.

That makes sense when you understand it within the broader scheme of the Act, and that's why I took you through it quite carefully this morning. It's section 5 of the Act, in combination with Schedule 1 and Schedule 8, paragraph 39, which are the provisions which address the limited impact of the Withdrawal Act on accrued rights, by laying down those very specific exceptions to their general preservation.

So that's where you see the removal of rights. It would be wrong to imply -- and it would have to be implied because there's no mention of accrued rights -- an intention to remove the binding effect of European Court judgments delivered after IP completion day which clarify the contours of accrued EU law rights, given that section 6 says nothing at all about their enforceability.

MR TIDSWELL: You've got accrued rights, what are the conditions that would then -- in any case that would then allow us to take account of post-completion date CJEU cases? I think obviously it has to be something that hasn't been carved out of the savings.

MS KREISBERGER: Yes.

MR TIDSWELL: And I think you would say it needs to be declaratory, it needs to have that effect of relation back to --

MS KREISBERGER: Precisely.

MR TIDSWELL: But apart from those conditions, is it the case that any existing accrued right at completion date would allow reference to a subsequent CJEU decision, and be bound by it?

MS KREISBERGER: Yes, in exactly the way that you set out, sir, which is that if it is

a judgment that clarifies the contours of that pre-accrued right, then it is specifically preserved by section 16. That has to be the position, unless it's been, as you say, carved out in the Act.

MR TIDSWELL: So if there was a development in the European Courts in relation to, say, effects and the need to show effects and that hadn't been apparent as at completion date but it is in that category of being declaratory, then that would apply to a case where there was a vexed question and would bind the Tribunal in relation to that now?

MS KREISBERGER: That's right, if it were clarifying the scope of a right that already existed. So, if it were clarifying some aspect of Article 101 directly, that would be right.

Now, I see your concern, sir --

MR TIDSWELL: It's the breadth, isn't it? I suppose I am concerned about quite how wide that is.

MS KREISBERGER: I see that, but it is worth noting that -- well, two points. This is an issue which will slowly recede into the distance because it only applies to claims brought under Article 101. So there will come a day where we see the last Article 101 claim in this jurisdiction, and then the point falls away; 101 and 102. But there is nothing -- if you step back, there is nothing in the Act which expressly states that those rights, for instance, under 101, applying more widely, are not preserved but eroded through the passage of time.

It has always been the case that European Court judgments are declaratory and that's a matter of EU law. We can't rewrite EU law. So, as long as that's the case, there is no version of EU law which allows you to unshackle future judgments insofar as they interpret existing rights. We're unshackled for the future, we're unshackled for retained law, but not for accrued rights. That would have to be explicitly laid

down by legislation. It can't be implied.

MR TIDSWELL: Yes. So, if there was a Chapter 1 case, an Article 101 case, involving the same matter, you actually could reach a different conclusion, couldn't you?

MS KREISBERGER: That's right.

MR TIDSWELL: Because it would be very much subject to retained law --

MS KREISBERGER: That's right.

MR TIDSWELL: -- whereas the other would be looking forward?

MS KREISBERGER: Yes, that's precisely it, and of course Article 101 isn't retained law, and that's why it recedes into the distance.

MR TIDSWELL: On that point, just looking at section 4, you could read section 4 as creating the linkage between the accrued rights and the retained law. In other words, it effectively -- well, it affects the accrued rights because it defines as retained law those matters which are rights, powers, rights, liabilities, obligations, et cetera, that exist under the ECA immediately before completion date.

So that would suggest, if that interpretation were right, that would suggest that actually all the provisions about retained law are also about accrued rights, but you are saying that that's not, that's saying something different?

MS KREISBERGER: That's helpful. I'll be clear about that.

First of all, Article 101 has been deemed -- has been deleted, as it were, from the Competition Act.

MR TIDSWELL: Yes.

MS KREISBERGER: So there's a separate provision. So, as far as Article 101 is concerned, it's not within the body of retained law.

What this is doing is saying these are the rights that don't fall within legislation, are snapshotted, freeze-framed, and absorbed into domestic law, and going forward

we're not subject to the jurisdiction of the European Court, because the prospective basis, we have taken back control in relation to the prospective application of those rights.

So it's referring to rights that existed before, but section 4 is only talking about their application from IPC completion day onwards, and their application is governed by section 6 which means it's unshackled from the European Court going forward.

MR TIDSWELL: And where do accrued rights actually -- if not from here, where do accrued rights obtain their identity?

MS KREISBERGER: Section 16.

MR TIDSWELL: Section 16.

MS KREISBERGER: That's why I took you to the authority --

MR TIDSWELL: I understand, yes.

MS KREISBERGER: -- that says section 16 always applies, whether it's referred to or not.

MR TIDSWELL: Yes.

MS KREISBERGER: So for any repealing enactment, section 16 is your starting point. That's stage 1, your first-order question, as it were. Then your second-order question is: is there contrary intention in the Act? And I showed you where there is: Schedule 1 to 4 -- sorry, Schedule 1, paragraphs 1 to 4; section 5(4) on the Charter of Fundamental Rights; and then paragraph 39(4) -- 39(1) of Schedule 8 -- I've had a fun weekend -- apply those retrospectively and they erode accrued rights in those specific areas.

MR TIDSWELL: Yes.

MS KREISBERGER: So those are the contrary intention provisions.

MR TIDSWELL: Yes. So you say you don't need to create (inaudible) exists and, under the Interpretation Act, you therefore need your express provision?

MS KREISBERGER: Yes.

MR TIDSWELL: I understand. Thank you.

MS KREISBERGER: Thank you, sir.

That really covers the point I was about to address you on, which is that's the broader scheme of the Act. Section 6 deals with the interpretation of European Court judgments in relation to retained law; section 5, Schedule 1, Schedule 8, paragraph 39, are the accrued rights provisions that go -- they look backwards, they take away rights retrospectively. And you can't imply into section 6(1) unless it's actually stated: the intention here is that we're uncoupling for the purposes of accrued rights retrospectively. That would need to be spelt out.

Now, I'm going to show you that that's in line, that's consistent with the statutory aids, the aids to statutory construction. Before I do, I want to make my last brief point. So as well as my point that this would distort the workings of the statutory scheme, because section 6 is retained law, section 5 and the other schedules are accrued law rights.

In addition to that, my last point is if the intention had been for section 6(1)(a) to withdraw the binding effect of judgments delivered after IP completion day, which clarified the scope of pre-existing rights, then that intention would need to be captured very explicitly in the provision. It can't be implied.

I'd like to now turn to two aids to construction, the White Paper and the Explanatory Memorandum. I'll do that briefly. The White Paper is at Authorities Bundle, volume 8, tab 142.

If I had the luxury of time, I would take you through the White Paper and the Explanatory Notes, but I will give you, if I may, references for your note.

MR JUSTICE ROTH: I am so sorry, could you say the page number again?

MS KREISBERGER: It is page 4188. That's the White Paper. For your note, the

main aims of the Act are set out at paragraph 1.24 on page 4190, but the aims are the freeze-frame and absorb question. There's nothing about accrued rights.

If I may ask you to turn to page 4193. This is the section which deals with the case law of the Court of Justice, and at paragraph 2.12 they say:

"The Government has been clear that in leaving the EU will bring an end to the jurisdiction of the [Court of Justice]... Once we have left…, the UK Parliament… will be free to pass its own legislation". [As read]

"The Great Repeal Bill will not provide any role for the Court of Justice in the interpretation of that new law, and the Bill ..." [As read]

Sorry, I pause at the words "in the interpretation of that new law", so no role in interpreting the freeze-framed law.

"... and the Bill will not require the domestic courts to consider [its] jurisprudence. In that way, the Bill allows the UK to take [back] control of its… laws [and] will, of course, continue to honour our international commitments…".

"However, for as long as EU-derived law" -- that corresponds to EU retained law in the Act -- "remains on the UK statute book, it is essential that there is a common understanding of what that law means." [As read]

So this is retained law.

"The Government believes this is best achieved by providing for continuity in how that law is interpreted before and after exit day. To maximise certainty, the Bill will provide that any question as to the meaning of the EU-derived law will be determined in the UK courts by reference to the [Court of Justice's] case law as it exists on the day we leave the EU. Everyone will have been operating on the basis that the law means what the [court] has already determined it does, and any other starting point would be to change the law. Insofar as case law concerns an aspect of EU law [that has not been] converted…, that element… will not need to be applied by the UK

courts." [As read]

So that's all about retained law and interpreting it prospectively, and that's what underlies section 6.

Turning, then, to the Explanatory Notes, that's at Authorities Bundle, volume 8, the same bundle, page 4286, tab 144.

Just for your note, the main aims of the Act are set out at paragraphs 10 and 11. They don't mention accrued rights.

Then if you could move forward to 4314, paragraph 109, I should say Mastercard cites this in their skeleton, but they leave out paragraph 109. Under the heading "Section 6: Interpretation of retained EU law:" "Section 6 sets out how retained law is to be read and interpreted on and after exit day"; that's my submission. Subsections (1) and (2) set out the relationship between the [Court of Justice] and domestic courts and tribunals after exit. These subsections provide that decisions... made after exit day will not be binding…; domestic courts cannot refer cases…; and domestic courts and tribunals are to have regard to actions of the EU taken post-exit… where they are relevant to any matter", and so on.

"Subsection (3) provides that any question as to the meaning of unmodified retained EU law will be determined in UK courts in accordance with relevant pre-exit [Court of Justice] case law and general principles", and so on. It talks about a purposive approach.

Again, these explanatory notes confirm this construction of section 6 as applying to retained law.

We can put that away. It's since been confirmed in the authorities that that's the right reading of section 6. There are a few, I won't have time to go to all of them, but I will start with a Supreme Court ruling in a case called *News Corp*. That's in Authorities Bundle, volume 7, page 3860, tab 128 in the bundle.

What this authority does is it confirms my first proposition, so let me put before you again my two propositions, distinct but related. Retained EU law bites only on facts which arise post-IP completion day, and that's not a matter of common ground. And section 6 is concerned with the treatment of EU law in respect of retained EU law only.

In this authority, the Supreme Court confirmed my first proposition. Just note it's a unanimous decision from the Supreme Court, and you see from paragraph 1 that the case concerned pre-IP completion facts, relating to a period going back to 2010, 2010 to 2016.

If you could turn the page to 3863, paragraph 7, they said this:

"It is common ground between the parties that the withdrawal of the UK from the[EU] has no impact at all on the issues in this case. While the UK was part of the EU, VATwas governed by the EU Directives and [they] were implemented… by domestic statutes… By reason of the [Withdrawal Act],… the relevant EU law and EU-derived domestic legislation is [retained law after IP] completion day, but in any event, the period with which this case is concerned expired before the implementation completion date." [As read]

So that confirms that it is a correct rule of thumb as to the dividing line. We are not concerned with retained law because our facts arise pre-IP completion.

Now, what I've just said may seem like a statement of the obvious, but -- and I make this submission with the utmost respect -- that distinction has unfortunately been missed in some of the other authorities, which is why I needed to take you to News Corp, and it has been the subject of some academic commentary.

MR JUSTICE ROTH: (Inaudible - speaking off mic) any post-IP judgment?

MS KREISBERGER: No, but I have another authority for you on that, so we will come to that point quite soon. No, it's simply the broader proposition as to the

relevant application of the two systems of law.

If I can ask you to turn up *Lipton* at Authorities Bundle, volume 6, tab 107, page 3164. Now, I rely on this judgment.

MR JUSTICE ROTH: I'm so sorry, can you give me the page reference again?

MS KREISBERGER: I'm so sorry. It's page 3164.

I'm going to be turning to the judgment of Lord Justice Green, and to introduce the point, I rely on it for its confirmation of my second proposition that section 6(1)(a) is only concerned with retained law, not accrued rights.

Now, I'll show you that immediately. That's at paragraph 65 on page 3180. You can see there, that's the finding. "Section 6(1) is concerned…",. And that's section 6(1) in terms, not section 6, "is concerned with the interpretation of retained… law. It deals both with the binding, effect of EU law and with the non-binding, persuasive effects of such law…", and so on.

So I rely on that and it binds this Tribunal, of course.

Because I rely on that, I need to show you the error in *Lipton*, so it can't be said against me that this isn't a good authority. The error, while unfortunate, does not taint the exposition in the judgment of the Withdrawal Act, and section 6 in particular and I commend it as, with respect, a judgment on the operation of the Withdrawal Act, it's extremely helpful. But let me just show you the error nonetheless.

At paragraphs 5 to 7 of page 3166, the facts are set out. I don't need to read them out, but you can see immediately it concerns events in January 2018, so it pre-dates IPC day. That quite simply means that retained law should not have been an issue.

Now, this point has been picked up in a blog post by Mr Jack Williams of Monckton Chambers, and his blog post has already been cited in a judgment by Mr Justice Picken which I'm about to come on to, so it is appropriate, I think, in those circumstances, for me to cite it as well. Given the time, I'm not going to read it out,

but if I could just refer to it for your note, it's at Supplemental Authorities Bundle, tab 16, page 635, and it's called "Accrued EU law rights: A guide for the perplexed". I commend it as a very useful and robust exposition of the dividing line between accrued EU law rights and retained law.

I'll come back to it in the judgment of Mr Justice Picken. But the point is simply that it was treated as if it were a retained EU law case, and it wasn't, but it doesn't seem to have been argued in that way before the court, so it's not a matter that was addressed by the court. The wrong assumption was made that retained EU law applied even though it was a retrospective case.

Now, unfortunately, *Lipton* is not alone in making that error. It's early days. It's been a learning curve, in fact. *Tower Bridge* is another such case, and the card schemes rely on it so I'm going to address it. That's again at Authorities Bundle, volume 7, page 3709, tab 124.

This is a tax case. It's a judgment from Lord Justice Lewison. I needn't get into the complexities of import tax, but it is clear from paragraph 3 that the facts arose pre-IP completion date. You can see that immediately from paragraph 3.

The error in the case arises at paragraph 108. Lord Justice Lewison says:

"The real question, I think, is whether EU law has moved on..." [As read]

He then refers to the relevant provisions of VAT law, which continue to have effect in domestic law as EU-derived legislation. He refers to section 6.

Sorry, I'm going to pause there. So the assumption is made that the relevant provisions of VAT law apply as retained law to the facts of the case.

Lord Justice Lewison then goes on to say that section 6 deals with the interpretation of EU retained law. I rely on that, as I did in relation to *Lipton*. He explains what retained law means at paragraph 111.

Now, I'll just take you to paragraph 119.

MR JUSTICE ROTH: 111, are you saying that's erroneous?

MS KREISBERGER: The summary of how the Withdrawal Act operates is impeccable. The application of EU retained law to the facts of the case was a mistaken assumption, because the facts applied before EU retained law came into effect. It should have been approached as an accrued rights case.

That's why, sir, I took you to *News Corp* at the outset, because that really quashes the notion that there can be any confusion between retained law from IP completion day onwards and accrued rights working back. Retained law does not have retrospective effect. Here, it's applied retrospectively.

MR JUSTICE ROTH: But the statement of retained EU case law, which is a distinct concept, isn't it? I mean, paragraph 111, so far as I understand it, is simply repeating what's in one of the subsections of section 6.

MS KREISBERGER: Yes, correct.

MR JUSTICE ROTH: So that's correct?

MS KREISBERGER: That's correct. The error was -- let me show you paragraph 119.

But just to go back again, paragraph 3 shows that we're concerned here with events in 2009.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So at paragraph 111, retained -- you almost get it from this paragraph -- it means "any principles laid down… as they have effect… immediately before IP completion day", yes, going forward.

If you go back to section 6 -- sorry, it's section -- just to turn it up -- so retained EU case law is defined in subsection (7) of section 6 of the Act.

MR JUSTICE ROTH: Yes. That's the sort in 111.

MS KREISBERGER: Yes, and then subparagraph (3) says retained EU law is to be

decided on the basis of the pre-IPC day case law.

So, as I say, he's quite right, his Lordship, in his approach to how section 6 operates, what retained EU case law is. That's all absolutely correct. Unfortunately, it's the correct analysis for a different set of facts, because these facts arose at a time when there was no such thing as retained EU case law. We just had EU law. Retained EU law becomes operative at the moment of IP completion.

Then he goes wrong at paragraph 119, and of course the card schemes rely on this. *Kemwater* is a European Court judgment. Because it was given after 31 December 2020, we're not bound by it, although we may have regard to it. In my submission, that is the consequence of his erroneous assumption that he was within the Withdrawal Act and retained law.

MR JUSTICE ROTH: And you say that it was -- if I got it right because the facts are pre-IP completion date, theygo back to 2009, therefore it was dealing with accrued rights, therefore any judgment of the Court of Justice, unless they limit it expressly, is declaratory; therefore, though the judgment is post-IP completion date, it's fully binding because it's dealing with accrued rights?

MS KREISBERGER: Exactly right, and of course his judgment has nothing to say, but for present purposes, because there was no argument about accrued EU law rights, it seems to have been argued on the wrong basis. There's certainly no reference to it on the face of the judgment. So it's simply an assumption that was made and no alternative analysis, the right analysis, wasn't put before the court, unfortunately.

It appears that it was simply argued on the wrong assumed premise, so the court didn't direct its mind to the issue, sir, that you have just articulated.

But I do rely on his construction of section 6 which is quite right.

There is one more judgment in this vein. I'm not going to take you to it in the

interests of time, unless of course members of the Panel would like me to, but I would just draw it to your attention. It's a lower authority, it's Employment Appeal Tribunal, and I've taken you to the Court of Appeal judgments, but it's the judgment of Mrs Justice Eady in a case called *Beattie*. For your note, that's at page 3771 of the Authorities Bundle. It's volume 7, tab 126.

At paragraph 87, her Ladyship says that section 6 is concerned with how retained EU law is to be interpreted, so again I adopt that. It's not technically binding on this Tribunal, however, as *Lipton* and *Tower Bridge* are.

But it does underline that the authorities all speak with one voice, consistent with the Explanatory Notes, that section 6(1)(a) is concerned with the interpretation of retained law.

Just to keep things interesting, this case is a little more complicated on the facts, because they straddle IP completion date. So it's a case which should have been analysed as accrued rights and retained law. So the court was right to conduct the retained law analysis, except for -- it concerned benefits, pensions benefits, and they were received on both sides of that date.

For your note, the error is made at paragraph 136 at page 3833. I should say it's been commented on by another of Mr Williams' blogs.

But while it's unfortunate that some of these cases make this erroneous assumption that retained EU law applies retrospectively to pre-IP completion day facts, that has now been definitively quashed by the *News Corp* judgment by the Supreme Court.

Sir, you put to me: does this case address the particular question that you are concerned with? And they don't.

MR JUSTICE ROTH: Before you move on, were you going to show us the judgment of Mr Justice Picken?

MS KREISBERGER: That is the one. Thank you, sir. That is at page 3492,

volume 6 of the Authorities Bundle, tab 118. Now, he didn't decide the issue because he didn't need to, but he foreshadowed it. It's at 3492 of the bundle.

Just to give you the context, it's a competition law case against Microsoft in relation to some software licences, Article 101 and Article 102 infringements, and Microsoft applied for strike-out and/or summary judgment, and the claimant, JH, relied on a Court of Justice judgment in a case called *Sumal*, which you might be familiar with, on the concept of an undertaking, and that is a post-IP completion day judgment. You see that at paragraph 35, page 3502, and they have counsel for JH, Ms Lester, pointed out that:

"The concept of an undertaking was recently explained… in [*Sumal]* ..."

At paragraph 43, Mr O'Donaghue for Microsoft nonetheless sought to persuade the court that this is not the case by inviting the court to disregard *Sumal* on the basis that section 6 of the Withdrawal Act provides that tribunals are not bound by EU case law which postdates the end of the implementation period.

There are three difficulties. The first two don't concern us.

At paragraph 46, Mr Justice Picken said:

"Thirdly, there is at least a realistic possibility that section 6(1) ... does not apply to the interpretation of Articles 101 and 102 ... insofar as the [claimant] relies on them… in its claims for the pre-Brexit period. This is an issue which was the subject of a recent article by Jack Williams ... it is not an issue which is suitable for summary determination." [As read]

So that's why the judge here didn't decide the issue.

He then expresses a view:

"However, in essence, the argument is that, insofar as ValueLicensing seeks to rely …on ... 101 and 102 in respect of the pre-Brexit period, those are rights which are to be regarded as having arisen under section 2(1) of the European Communities Act…

The... Act having now been repealed, then, pursuant to section 16 of the Interpretation Act 1978, the rights that ValueLicensing had under the[European Communities Act], whilst… in force, fall to be treated as having now been accrued, so as to mean that [the claims] for the pre-Brexit period are to be determined by reference to EU authority ..." [As read]

The key wording:

"... whenever that authority is decided, since nothing in the Brexit legislation evinces a 'contrary intention', and section 6 of the 2018 Act is concerned only with the interpretation of 'retained EU law'... If that is right, then, Microsoft ... cannot avoid Sumal for this further reason." [As read]

I note the brackets:

"'Retained EU law' (i.e. such EU law as was incorporated, prospectively, into EU law on Brexit)." [As read]

That is my submission, in a nutshell, and it answers Mr Tidswell's question, which is yes, essentially, for as long as claims are brought under Article 101, it is right that clarificatory judgments, which apply for all time to the rule in question, are part of the claimant's accrued rights under EU law, which is not repealed for the purposes of that period retrospectively by the Withdrawal Act.

It doesn't matter when *Volvo* was decided, as Mr Justice Picken points out, because it's concerned with the scope of accrued law rights, as they have always been.

So, to conclude this section --

MR JUSTICE MARCUS SMITH: It has accrued rights in respect of legislation, though?

MS KREISBERGER: So the relevant legislation is Article 101, and section 2(1) and section 3(1).

MR JUSTICE MARCUS SMITH: Then it makes no difference to your analysis

whether one regards EU decisions as finding EU law or making EU law? They are either which way declaring retrospectively what the law is?

MS KREISBERGER: Yes, so here the law in question, as I said, is Article 101.

MR JUSTICE MARCUS SMITH: Yes.

MS KREISBERGER: So what *Meilicke* says -- and there is a judgment, *Skanska*, specifically on Article 101-- that the principles adumbrated by the court in respect of Article 101 apply to the operation of 101 and Articles 81 and 85 as it then was.

MR JUSTICE MARCUS SMITH: Of course, normally, it doesn't make very much odds whether one is -- let's shift to a common law example, so if we make it nice and neutral in this matter. The thinking used to be that the common law courts in this jurisdiction found what the common law was and when they are considering a statute found what that statute was.

MS KREISBERGER: Yes.

MR JUSTICE MARCUS SMITH: And they didn't make law; they were simply undiscovering that which had been undiscovered by previous generations of judges. It was simply declaring what the law was.

The present thinking -- and I'm simply speaking about the English common law at the moment -- the present thinking is no, that's actually not right. One is making law, the court, when they find an uncertain matter, is not miraculously discovering that which was previously unknown. What they are saying is, "This is what the law is", and that becomes retrospective. It affects accrued rights. And therefore, there is a measure of retrospectivity in the English common law.

Now, the first question: is that a distinction that exists in the European analysis, or is it still the case that one is declaring that which has always been and only discovering it for the first time later? First question.

Second question: when one is looking at a transitional Act like the withdrawal

legislation where one is moving from one regime to another legal regime, and one is therefore talking about how pre-existing Acts remain, does that retrospectively, if it exists under EU law, make a difference in how we view accrued rights under that legislation? Because it's not purely a question of EU law, it is in part a question of construing the Acts of the United Kingdom Parliament.

MS KREISBERGER: Very well. I'll try and take that in stages, sir.

So it's not right to apply the common law approach, as you highlight, you are suggesting --

MR JUSTICE MARCUS SMITH: I'm articulating what is merely common law as a way of conveying the question.

MS KREISBERGER: Yes, and I'm grateful for that because it really flags the differences in approach. So that's the common law approach.

Meilicke is very clear and I'm just going to call that up. Thank you. So, coming back to it, it's page 1232, 1233 of the Authorities Bundle. The rule is -- this is one of those rules which you see cited frequently. *Meilicke* is one of the seminal judgments on it, but one could pick any number of judgments that contain this rule. I should say it's been applied in the competition law context in relation to Article 101 in the judgment of *Skanska*, which is in the Authorities Bundle. I can go to that as well if helpful.

But the way -- of course we have to take EU law as we find it. We are dealing with periods of time when EU law applied. It's worth just focusing in on the wording of paragraph 34 on page 1233. It's tab 53, volume 3:

"…the interpretation which… the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted… must, be applied even to legal relationships which arose and were established before the judgment [was delivered]." [As read]

Now, this is why I was quite careful earlier to clarify what rule we're talking about. The correct analysis, just turning back to my note on it, is that the rule of law that's being interpreted is Article 101, and it's the right to compensation under that provision --

MR JUSTICE MARCUS SMITH: Yes.

MS KREISBERGER: -- as given effect in English law by the European Communities Act. And the *Volvo* judgement is, as *Meilicke* says, providing an interpretation of that rule of law.

MR JUSTICE MARCUS SMITH: Well, indeed. We may have to look at it, we surely will, after submissions, but I must say I read paragraph 34 as being essentially a neutral one between the finding and making of law, but you are saying it is not neutral; it is making… it's finding, not making.

MS KREISBERGER: Yes, quite. So as long as -- the question is: is the court construing a pre-existing rule of law, which *Volvo* does in terms -- and you see the application of settled principles, and so on -- then it applies to legal situations which arose prior --

MR JUSTICE MARCUS SMITH: Yes, but that's true under English law as well.

MS KREISBERGER: Yes, because it's simply a clarification of how the law applies.

MR JUSTICE MARCUS SMITH: The reason I'm pressing you on this is because, in one scenario, the rule is retrospective. In the other, it is not; it is simply declaring that which it has always been.

MS KREISBERGER: Exactly. It's not retrospective.

MR JUSTICE MARCUS SMITH: Not retrospective.

Just to follow up, I know you would say it doesn't make any difference, but does that retrospectivity matter when one is construing the withdrawal legislation that affected the United Kingdom's exit from the EU? In other words, does the question make

a difference?

MS KREISBERGER: What matters is that -- so one avoids the term "retrospectivity" because that is not how EU law approaches this. It's close to declaratory, but it's simply saying the interpretation adopted in the judgment applies to that rule of law, Article 101, and on that basis the Withdrawal Act is of no relevance at all, except for the fact that you have to check that there isn't an exception that applies to accrued rights.

Once you have satisfied yourself that there's no exception, that's why I walked you through each of them, you can put it to one side.

That's what the Supreme Court did in *News Corp*, it just put it away, because it related to past facts. So that's very clear.

Perhaps just for your note, *Skanska* is the case which applies the *Meilicke* principle to Article 101, that's at volume 5 of the Authorities Bundle, tab 96, paragraphs 53 and 59. That's just for your note.

Just to draw that together, and then I'm going to move to a different point advanced by the card schemes. Under section 16, the Tribunal has to approach these claims for accrued EU law rights as if the Withdrawal Act had not been passed, unless there is contrary intention. If it had not been passed, the Tribunal would be bound to apply the rule set out in *Volvo* and in *Deutsche Bank* in competition law infringement claims in the usual way, which we've just ventilated.

Section 6(1)(a) does not set out any intention to override accrued EU law rights. Retrospective elimination of accrued rights is a thing not done lightly. It would need to be set out in terms in the Act, as it has been where that's the intention. It can't be implied.

I turn then to two other arguments advanced by the card schemes, which they rely on to show that *Volvo* is not binding. So we move on from section 6. The card

schemes rely on section 60A of the Competition Act. Now, they argue that the Tribunal is bound to disapply post-IP completion day judgments by virtue of section 60A(8).

Now, the short answer to that is that provision has no application whatsoever to the question of the limitation period applicable to the merchants' claims. None at all.

I'm going to need to take you through the steps in the argument, their statutory construction argument. I'll do it, I'm not actually going to take you to it, but by reference to the Visa skeleton at paragraph 44, but both schemes seem to be running this argument.

Visa begins by noting that Articles 101 and 102 are not retained law. As I said in my exchange with Mr Tidswell, that's quite right. It follows from reg 62 of 2019 Regs -- no need to turn them up -- but members of the Panel would be familiar with that.

Then the first stage of the argument is paragraph 14 to Schedule 4 to the 2019 Regulations. Let me put those before you. That's at page 505 of the Authorities Bundle, tab 17, volume 1. These are the regulations which modify the Competition Act, so will be very familiar territory.

At page 505, you see paragraph 14 of Schedule 4, which says this, 14(1), which doesn't seem to appear there. I'm going to read it out, given the time:

"In this paragraph, EU competition infringement means an infringement or alleged infringement of… Article 101." [As read]

Then it continues:

"Where an EU competition infringement occurs before… on or after [exit day] aperson may continue any claim… in relation to that infringement… [or] make any claim… which the person could have made before [exit day]." [As read]

Yes, sorry, it is on the preceding page.

MR JUSTICE MARCUS SMITH: You are looking at version 2 of 2 and you are

reading version 1 of 2, are you?

MS KREISBERGER: It starts on page 504 which was -- that's a bit misleading, but yes.

MR TIDSWELL: We don't want to waste your time, you can provide us with a copy of that --

MS KREISBERGER: We've got the full version of the 2019 Regulations, because I found this very, very difficult. So we will make sure that is handed up.

MR TIDSWELL: I don't want to slow you down.

MS KREISBERGER: I'm grateful. It's been very difficult.

MR JUSTICE MARCUS SMITH: We have your sympathy, yes.

MR JUSTICE ROTH: I'm a bit confused, and it is confusing.

MS KREISBERGER: Just to cut through --

MR JUSTICE ROTH: The 2019 Regulations were then amended by the 2020 Regulations, weren't they, and that's why section 1 has been -- subsection of which paragraph, 14(1), has been removed.

MS KREISBERGER: We are just not sure why 14(1) has been deleted, but this is, you see, the 2020 version, so this is the right version.

MR JUSTICE MARCUS SMITH: If you see the note, it says it's been revoked by the 2020 regulations. It's a bit of an interesting --

MS KREISBERGER: I'm so sorry. I was reading the wrong one. This is the right one. That's the confusion. I'm terribly sorry. So this is the correct version.

MR JUSTICE MARCUS SMITH: So we don't need --

MS KREISBERGER: Because competition infringement is defined on the page before, that's all.

But the key provision is subsection (2), and what this does, as you will know, is it preserves the ability to continue or make claims for breaches of Article 101 which

pre-date the completion date.

Just to note to that effect, it's on all fours with section 16(1)(e) of the Interpretation Act which I showed you. It doesn't supplant that provision.

What this does, I feel somewhat like I'm teaching my grandmother to suck eggs, but this provision extends the CAT's jurisdiction to hear claims for pre-IP completion day Article 101 infringements which would not otherwise have been preserved. The Interpretation Act couldn't achieve that, so this extends the CAT's jurisdiction to hear these Article 101 infringements. So the CAT's jurisdiction is preserved. That's the first step.

Step 2, those claims which are preserved under this provision are then automatically made subject to the new section 60A by virtue of paragraph 15 of Schedule 4. That is at page 506.

So, in relation to claims described in paragraph 14(2), those are the preserved claims, the enactments in 7(3) to 8 have effect. So we then move to paragraph 7 to see which enactments are in issue here. So we move backwards to 490.

The provision that the schemes rely on is 3(a), and 3(a) says:

"Part 1 of the [Competition Act] has effect without the modifications made by Part 2 of these Regulations, other than the modifications made by regulations 21(3), 22 and 23..." [As read]

I'm going to cut through this because this is common ground. The combined effect of reading these provisions together as relevant for our purposes is that in relation to preserved EU infringement claims, the old version of Part 1 of the Competition Act applies, the unmodified version, except that section 60 is replaced by section 60A. So it's ex-Part 1 of section 60A. So we are agreed thus far.

We would then conclude that all of that means that section 60A applies to the merchant claims so as to disapply the *Volvo/Deutsche Bank* case law under

subsection (8) of 60A. That's where the error occurs.

So we turn to section 60A, which is at page 101, tab 6 of the Authorities Bundle. MR JUSTICE MARCUS SMITH: I think it's page 110.

MS KREISBERGER: Yes, 110. Thank you. And section 60, as it then was, is on the previous page as well.

The error in Visa's reasoning concerns the scope of section 60A. It is correct, as I said, that the effect of the 2019 Regs is to apply the unmodified version of Part 1 with section 60A, but the scope of section 60A is limited to questions arising under this Part in relation to competition in the UK. Questions arising under this Part.

The merchant claims were not brought under Part 1 of the Competition Act. They are not section 47A claims. They were brought in the High Court under section 2(1) of the European Communities Act. They were transferred subsequently. So they are not claims brought under this Part.

Now, as I said, it's right that the provisions in the 2019 Regs roll over this unmodified version of Part 1. So if in these proceedings a question arising under this Part came up, section 60 would be operative. I'll give you an example of that in a moment because, yes, this is a little contorted.

What these provisions don't do is to make Part 1 of the Competition Act applicable to a claim to which it did not apply. So the merchants' claims were brought under Article 101, given direct effect under section 2(1) of the ECA, not section 47A.

That means that the limitation rules that apply to the merchants' claims are those rules which apply in the ordinary way in the High Court. They are not determined by this Part of the Act.

So the question of limitation is not in any way governed by section 60A, It's inapplicable to limitation in relation to the merchants' claims, those claims at least brought in the High Court, which applies to all of my clients.

Now, I'm going to make a further point for completeness.

MR JUSTICE ROTH: If that's right, it would be a different outcome if they started in this Tribunal, as they could have been.

MS KREISBERGER: Well --

MR JUSTICE ROTH: Surely it can't be right. Isn't the reason why section 60A-- it just doesn't apply to claims under EU law, because they are not concerning questions of competition in the UK; they are concerning the question of competition in the EU, and section 60 and now 60A is dealing with the interpretation of Chapter 1 and Chapter 2 and that is what the minister said in the extract from Hansard that the card schemes quoted.

MS KREISBERGER: Both points are correct. So it is correct that limitation simply doesn't arise under Part 1 if it's a High Court claim. It is also -- so I don't need to make the further argument, but I was going to do so in any event. If I may, sir, gratefully adopt your formulation. I agree with that entirely. I want to just flesh it out a little bit.

It may seem odd, given what you say, that section 60A should be applicable at all in the context of Article 101 claims, because, as you say, the provision is about consistency between UK competition law and EU competition law. It's obvious. So it seems nonsensical to think about a duty.

Now, what the card schemes say -- and I want to respond to this -- they say there's a category of accrued EU law rights which is governed by section 60A. That's what they say.

My submission is that is an invented, fabricated category, and it's essentially a nonsense for precisely the reason you have just given, sir. That's not what section 60A is about, it's about what the old section 60 was about, consistency between UK and EU rules.

I was going to -- and I think given your comment, sir, I can do this quite briefly -- to just point out that of course section 60A is clear on its face what it's talking about; it's competition in the UK.

Can I just show you the Explanatory Memorandum, just very briefly, which is at Supplementary Authorities Bundle, tab 15, page 619.

Sir, because the oddity is -- and the reason why I'm going through this -- is those provisions do apply section 60A to Article 101 claims, which seems odd.

I just want to show you one paragraph. It's page 625, Supplementary Authorities Bundle, tab 15. It just confirms your point, sir. There can't be any doubt that section 60A regulates the relationship between domestic prohibitions and EU law after exit, the first section of 7.4:

"Section 60A provides that competition regulators and UK courts will continue to be bound by an obligation to ensure no inconsistency with pre-exit EU competition case law when interpreting UK competition law, but… they may depart where it is considered appropriate in specified circumstances." [As read]

So that's your point, sir. Of course it's right that section 60A provides the consistency between the UK and the EU competition prohibition case law. But then one asks --

MR JUSTICE ROTH: That is as much in the High Court as it is in the Tribunal.

MS KREISBERGER: One asks -- so it's inapplicable here for that reason, but I want to go a little deeper, because, sir, I showed you the effect of the 2019 Regulations does seem to be to make section 60A applicable to claims, preserved claims, under Article 101. That is what paragraph 15 of Schedule 4 together with paragraph 7(3)(a) of Schedule 4 achieve. In relation to the preserved Article 101 claims, unmodified Part 1 applies, but with section 60A, and one asks oneselves: "Well, what's the point of that? Because if it's a claim under Article 101, it's a claim

governed by EU law, so why did we need -- why did the 2019 Regulations provide that section 60A would apply to Article 101 claims which are governed by EU law?"

We gave this some careful thought and it seems that one can think of provisions in Part 1 of the Act, so that is UK provisions, which would still apply to an Article 101 preserved claim, like section 58 and section 58A which provide for the binding effect of Commission decisions, the binding effect of CMA decisions and the binding effect of findings of fact by CMA decisions.

If you have an Article 101 claim such as this one, if you were addressing the point as to which recitals in the Commission Decision are binding in these proceedings, that might be a matter to which you would have regard to the duty of consistency with EU law. So that is the best I can do on why the 2019 Regulations provide for this at all, because other than a point like that, it would be -- were it not for those kinds of issues -- that's the one I can think of under Part 1 -- it's a redundant provision because it's a nonsense to say, as the card schemes do, that there's some form of accrued EU law rights regulated by section 60A. Section 60A is about ensuring consistency when applying English competition law with European case law.

MR TIDSWELL: (Inaudible) it says section 60A will apply from the point of exit to all competition regulatory investigations and UK court cases, whether the facts of those cases arose before or after exit. So you would say that's consistent with what you have just said, and it makes it explicit that it does apply to accrued rights cases.

MS KREISBERGER: Yes --

MR TIDSWELL: And you are then left wondering why --

MS KREISBERGER: -- in a marginal sense, essentially, but certainly not on questions that arise under Article 101 itself, like limitation, because one's gone through the mirror if you're talking about consistency between EU law and EU law. It makes no sense.

So that's why I've given quite a detailed explanation there as to my understanding of how that operates, but it certainly doesn't operate as the card schemes say.

Sir, I'm just taking stock of the time. I think I should --

MR JUSTICE ROTH: (Inaudible) accrued UK right, and it's providing, making clear, that even though it's an accrued UK right, the old section 60 will not apply to that UK right; the new section 60A will.

MS KREISBERGER: Yes, that's right.

MR JUSTICE ROTH: Might that not be why they've had to provide for it?

MS KREISBERGER: Well, except that the preservation applies specifically to claims under Article 101. That's the puzzling aspect of it.

But I think, despite that very long explanation, the position is it's pretty marginal and it certainly doesn't apply to limitation.

I'm going to deal with the final argument from the card schemes and that's in relation to the *Arcadia* judgment. I'll deal with it briefly because I think we'll need to hear from them. They say that the Court of Appeal's judgment in *Arcadia* establishes that limitation periods in section 9, without the cessation condition, is binding on the Tribunal and overrides *Volvo* and *Deutsche Bank*. I can deal with this very briefly. I've got three short points.

The first point is the Court of Appeal did not address the validity of the limitation period in section 9 in that judgment. It concerned the application of section 32. So the card schemes say in their skeleton it's a case about section 9; that's not right.

I'm not going to go to it; I'm going to give you the references. In the judgment of Justice Simon below, that's at Authorities Bundle, volume 4, tab 75, page 2130, paragraphs 8 to 10, and it's also paragraph 10 of the Court of Appeal judgment at tab 77,page 2217.

But because it's a judgment about section 32, it's not binding in relation to this matter

in any event.

My second point is EU law is supreme and European Court judgments take precedence over domestic judgments. That flows from section 3(1) of the ECA and is preserved as well by section 5(2) of the Withdrawal Act which I showed you, which applies to pre-IP completion day infringements.

Then my third point is a very brief one. The card schemes say that this Tribunal is bound by *Arcadia* because it's a judgment of the higher court. That's also wrong as a matter of European law. Domestic judgments cannot take precedence over European case law. It's settled European law -- I was going to turn up the case, but I won't in view of the time -- that's a case *Elchinov* which is at Supplemental Authorities Bundle, tab 8, page 426. It's a Grand Chamber judgment concerned with the primacy of EU law over national rules, and it addresses precisely that point in relation to a higher domestic court.

This shows, if the Tribunal is with me that *Volvo* and *Deutsche Bank* are binding rulings, then it must be applied by the Tribunal.

I'm sorry, it's paragraph 24 and then paragraphs 30 and 31 of *Elchinov* .

MR JUSTICE ROTH: Sorry, what's the difference between your third point and your second point?

MS KREISBERGER: The card schemes make the specific point that because *Arcadia* is a Court of Appeal authority, even if it's wrong as a matter of European law --

MR JUSTICE ROTH: I see, yes.

MS KREISBERGER: I've given you the authority which deals with it.

Lastly and briefly, if the Tribunal is not persuaded to adopt the analysis I've laid out, then we do say that it should nonetheless have regard to *Volvo* under section 6(2) of the Withdrawal Act.

I rely on the reasons given at paragraphs 53 to 59 of the skeleton, particularly given the time, so I'm now going to focus on three short principal reasons why the Tribunal should, even if not bound, follow the European Court's approach.

My first and overriding reason is that *Volvo* and *Deutsche Bank* clarify what is the correct position on limitation periods in respect of Article 101 infringement claims under EU law. You can put aside any concerns as to whether it was necessary for the operative part. The position is clear. This is the statement, the correct statement of law by the European Court, we have two judgments, and the Tribunal is here concerned with a period of law when EU law was supreme as a matter of English law.

The Tribunal should apply the correct version of EU law, even if it is not bound by it, because if the Tribunal were to reject what is now stated to be the position under EU law, the effect would be to apply a time-bar to the claim which will expunge those claims for losses suffered over many years in circumstances where we now know that that would be contrary to EU law, that time-bar is unlawful, and that would be a denial of the right to compensation under Article 101. That runs counter to the full seam of EU jurisprudence.

Ignoring *Volvo* means applying a distorted version of EU law which doesn't give full effect to Article 101.

The second and related reason is that the Tribunal will inevitably be applying the cessation condition in the (inaudible) of the foreign claims governed by EEA Member State law. So the Tribunal would then end up in the illogical position of applying two different versions of the limitation rule even though EU law is applicable to each one. So that would be incoherent in the context of these proceedings.

The third reason is--

MR JUSTICE ROTH: I'm just trying to understand that. If, contrary to your

argument, we say this is not a binding judgment as to the requirements of the principle of effectiveness, why should it be any more binding as regards to claims governed by French law, for example, than claims governed by UK law under EU law?

MS KREISBERGER: With respect, one could only arrive at that position by going behind the Court of Justice's reasoning on the face of the judgment and saying, "We, in this Tribunal, don't agree that this reasoning was necessary", but --

MR JUSTICE ROTH: But you say it is effectively obiter and therefore it's not part of EU law, although it's a view that was expressed, and so it's not part of EU law for any Member State, and we don't know what a French court might do, so we've got to do our best.

MS KREISBERGER: But that would be quite a strange position to adopt in circumstances where you've got two judgments from the European Court that says, "This is the rule, in terms, on its face; this is the rule." So you say, "Okay, well we take the position it's not formally binding", but it's very clear that the European Court thinks this is the position, they have now said it twice. So if one is in the realm of having regard to it, it should be had regard to in the foreign claims and under the Withdrawal Act.

MR JUSTICE MARCUS SMITH: But in the foreign claims, wouldn't it be a question of factual evidence, so we get expert reports telling us what the foreign limitation rule was and we can decide it on the basis?

MS KREISBERGER: It will be determined at the EU level, so it really comes down to, for Member States --

MR JUSTICE MARCUS SMITH: It comes down to what a French court would do in circumstances where you could make a reference in circumstances where, if a reference was made, the court might decide one thing or another. So it would be

quite a different question.

MS KREISBERGER: That's a very fair and correct observation. I don't push the point any further. That's quite right, of course it is.

The third reason is that there's now a consensus that this is the right approach and that's throughout the EU but also in the UK, that's the approach we adopt now. So I set out in my skeleton why that's right as a matter of policy and the effectiveness of competition law and it strikes the right balance between the interests of the injured party and the perpetrator of the harm, and it achieves deterrence and meets the objectives of the workings of the competition rules, and incentivises infringers to bring their unlawful practices to an end.

So those are the reasons why we say the Tribunal, even if it concludes it's not bound, should apply the approach laid down in the judgment.

With an eye on the time, that completes my submissions on question 3, unless of course the Panel have any questions for me.

MR JUSTICE ROTH: Well, you were going to come back and help me on why we can't make a reference.

MS KREISBERGER: Yes, if I may come back to you on that, sir, after the break.

What I was going to do is propose that question 4 I don't address you on now. It's addressed in my skeleton and those are the points that I put before the Tribunal.

Of course, because there was a sequential exchange of skeletons, I haven't yet heard what the schemes -- sorry, concurrent, not consecutive exchange -- I haven't heard what the card schemes say about that, so I wondered whether, in the interests of time, I could park question 4 and come back to that in reply, rather than take up further air time now.

MR JUSTICE MARCUS SMITH: That seems fine. How exactly -- I know the order -- but having carved up the time, how far behind are we?

MS KREISBERGER: About half an hour, which may be saved, but the order would then be Mr Saunders, after the transcriber break, who will make submissions.

MR JUSTICE MARCUS SMITH: What you have proposed is very sensible, that we will have to hear on question 4 in reply.

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

That concludes my submissions for now, in that case.

MR JUSTICE MARCUS SMITH: We are grateful. Mr Saunders, we will hear from you after the break.

I notice it is rather hot in here. We will see what we can do about the air-conditioning in the next 10 minutes, but we'll resume at 20 to. Thank you.

(3.31 pm)

(A short break)

(3.45 pm)

MR JUSTICE MARCUS SMITH: Mr Saunders.

Submissions by MR SAUNDERS

MR SAUNDERS: Gentlemen, can I begin by highlighting a division of labour on our side? As you've heard, Mr O'Neill will address you on the Scots law parts of the case, and for these purposes you are sitting as a Scots Tribunal. Without stealing his thunder too much, there are no points of Scots law to be resolved, but I'm going to also address you on the point about differential treatment as between the Scottish prescription regime and the English Limitation Act regime. So there are a few points there for him to --

MR JUSTICE MARCUS SMITH: That is helpful, Mr Saunders. We are very grateful to have Scottish law assistance, but I think we have made it very clear that we will

take that on a step-by-step basis in terms of what jurisdiction we are sitting under and what we need assistance on. So you shouldn't take it as read that we are regarding this case as a matter where Scots law is essential. It may be, but we will see where we go.

MR SAUNDERS: Of course. I wasn't suggesting that you have to sit in a particular mode, but Mr O'Neill can address you on that.

Can I just begin by picking up a few points specific to the *Merricks* proceedings, and then I'll turn through -- what I was proposing to do was I will pick up some of the earlier case law about effectiveness and how that has developed. We are slightly behind time, so I'll try and do that rather speedily, so if you can bear with me as we whiz through the authorities. Then I'll turn to *Volvo* and some additional points we would like to make on that, and then just pick up the points which Mastercard, who is obviously our opposite number for the purposes of the *Merricks* claim, make in relation to *Volvo*, and also pick up some of the Visa arguments as well.

Just in terms of the actual *Merricks* case, as you are aware, this is a follow-on claim for damages for breach of statutory duty, so there is no dispute about the characterisation of the claim. The class members are members of the public who, between 22 May 1992 and 21 June 2008, purchased goods or services from businesses selling in the UK that accepted Mastercard cards. So there's a residency and an age requirement that goes with that, but it's an opt-out action to recover losses as a result of paying prices that are too high as a result of the infringement.

So the position taken in Mastercard's Amended Defence is that they rely on the six-year limitation period under the Limitation Act.

Then, if I could just take you very briefly to the Re-Re-Amended Reply, so we need volume 2 of the Hearing Bundle. Hearing bundle, volume 2, tab 17.

There, there is an argument for suspension of the Limitation Act period under

section 32, and as far as EU law is concerned, that doesn't arise for today's purposes. EU law, if we could just have a look at page 595, you will see just before that page that this is where *Volvo* is pleaded out, and then page 595 deals with the Limitation Act as a right, but you will see also in particular 9D, which is a knowledge plea.

Mr Merricks relies on both what's been called by the Claimants as the cessation condition, that an infringement time -- the clock shouldn't start running until after the infringement has ceased, but also on those matters set out in 9D about the extent to which the Represented Persons, those consumers, knew or could reasonably be expected to know, among other things, of the existence of the infringement and the existence of harm.

Now, as I'll develop in a moment, we get the knowledge aspect of this from *Cogeco,* so actually many of the issues involved in *Volvo*, it is an earlier case which gives me, as Mr Justice Roth observed earlier on, the knowledge requirement, in a dispositif of that judgment.

Finally, Mastercard's Rejoinder, so that's just over the tab, tab 18, and then you will see -- if we could just have a look at page 632, just following the bundle numbering, so that's their response on the EU law points. They say that *Volvo* is not binding under section 6(1)(a). The court said that limitation doesn't contravene EU principles of effectiveness and full compensation. Then they say they rely on *Arcadia*, which is the case my learned friend was just addressing you on a moment ago. We have some further submissions on *Arcadia* which I will bring you to.

Then they make a rather broad, unparticularised plea about public policy. That is developed in Mastercard's skeleton argument and also seems to be an argument which Visa are running, which is essentially that it is contrary to public policy for the effect of EU law to cut across the Limitation Act provisions.

It rather begs the question, that submission, because if we are right about the effects of EU law, it does have that cutting-across effect. This is also a point that can be made against many of Mastercard's arguments about -- some of the points about inconsistency with the balance in the Limitation Act, and so on. That is just reflecting the fact that if EU law has not, as it were, penetrated and washed into these matters, then you are left with just the statutory language. But the starting point for the argument is wrong. One has to look at the law, apply it, and these sorts of arguments don't, in my submission, get one much further forward. I will address them in the reply.

Those are the pleaded issues. A slightly more detailed pleading than there is for the Umbrella Claimants, and, as I mentioned a moment ago, there are two aspects of the case law that Mr Merricks relies upon, the cessation condition and the separate issue about the extent of knowledge.

Now, I won't -- in general, I won't repeat the Umbrella Claimants' submissions. What I propose to do is, as it were, supplement them. There are a few areas where I think we slightly disagree with the way the Umbrella Claimants are putting their case, but I'll come through to those in a moment. You can take it as read that if I don't mention something, then we're in agreement.

Can I pick up the principle of effectiveness generally? Now, obviously, as you are all extremely aware, effectiveness and equivalence are general principles of EU law. What you see from the case law is that they have really developed -- one of the peculiarities of the preliminary reference procedure is that there is no opportunity for the Court of Justice to set out a comprehensive codification of the law in particular areas. So there is a certain aspect of happenstance, depending on what cases are sent before it, and so you see themes in relation to effectiveness developing piecemeal as those cases get referred.

Now, the effectiveness case law arises in two particular contexts. The first one is really what I'd describe as recovery of overpayments type case law. So you've got cases like *San Giorgio*, which is much beloved of the HMRC. There are cases like the France investment scheme, Marks and Spencer's, and so on, where people are trying to recover overpayments of money using some kind of restitutionary, pseudo-restitutionary, case.

Then you have direct cases where effectiveness is engaged in relation to direct effect of treaty rights, much as we are here with Article 101, and in the absence of the Damages Directive, it was that direct effect of the treaty right which was the thing that effectiveness attached to because there was no other legislation that applied to individuals.

The position was slightly different for the Commission, because the Commission had the implementing regulation back in 2003, Regulation 1 of 2003, which among other things gave it a statutory limitation period, including a cessation condition.

So there is a bit of an oddity. The Commission could carry on and have its own limitation period, but individual claimants were stuck, potentially, because they didn't get the benefit of that statutory right. There's an oddity there because that information is gained by the Commission in the course of its inquiry and it can then fine within the limitation period, and so on, but in a follow-on action, of course, you don't want to get into a position where the clock has stopped for the private claimant. That is part of the tension that underlies some of the case law that we'll see in due course.

In fact, that cessation condition has been in the law since 1974, so it was obviously something that the Commission considered to be something that was quite important in terms of maintaining its ability to both investigate and fine in these cases.

MR JUSTICE ROTH: It's part of the balance (Inaudible) province of EU law dealt

with the Commission's rights and obligations and private claims which are left to the national courts?

MR SAUNDERS: That's right, my Lord, subject to the principles of effectiveness, and that's --

MR JUSTICE ROTH: That's the sort of -- as a base line, but beyond that it's left to the Member States to fashion their own laws?

MR SAUNDERS: Yes, because there is no directive that has harmonised the laws, there is no regulation that harmonises until such time as the Damages Directive came along.

MR JUSTICE ROTH: Yes.

MR SAUNDERS: But the oddity is created by the fact that because the Commission benefits from the extended periods, it has its own limitation regime. Insofar as one is looking at bringing follow-on actions and so on, private claimants may not necessarily -- and I don't put it any higher than that for the purposes of the logical analysis -- may not necessarily have an effective right if they can't stop time running, because it's very easy to see how a national limitation regime could run out whilst the Commission itself, through its speciality legislation, has the benefit of this additional time.

There is a fundamental tension in the way the system is set up and, as I say, I will come on to some of the case law later on, but you will see that the case law recognises that this isn't the same point because the Commission has to be the powers given to it to be a competition authority.

But actually, when you look at the way the case law works around that, it does make logical sense, the way that the law develops over time, and I'll be looking to make that point good in a second.

As I mentioned a moment ago, this all started, to a certain extent, with San Giorgio.

I won't take you to it, but just for your note, it's Authorities Bundle, volume 2, tab 30, and then paragraph 14 is where we start to see the formulation develop, the "virtually impossible or excessively difficult" formulation which comes in in some of the later case law.

Could I have a look at *Courage v Crehan* with you, so that's Authorities Bundle, volume 2, tab 44. If you go to page 991, using the bundle numbering. So this is the PDF. This is the well-known 'beer tie' case. Mr Crehan ran a pub and he was sued by Courage for unpaid deliveries of beer. He said that the beer tie was an infringement of what was then Article 85, now Article 101.

If you look at page 1000 of the PDF, this is paragraph 24 -- it goes on to -- this is still in the early days -- it goes on to record that the competition of infringement provisions of the treaty were directly effective. It cites some earlier case law like in paragraph 23.

Then paragraph 25:

"As regards the possibility of seeking compensation for loss caused by a contract or by conduct ... it should be remembered from the outset that, in accordance with settled case-law, the national courts ... must ensure that those rules take full effect and must protect the rights which they confer on individuals ..." [As read]

So we start to see the language here of "full effect" in the context of enforcing those directly effective rights.

Then in paragraph 26:

"The full effectiveness of Article 85of the Treaty and, in particular, the practical effect ... would be put at risk if it were not open to any individual to claim damages ..." [As read]

Therefore, Mr Crehan had to have a mechanism where the full effectiveness of that article enabled him to go off and claim damages.

27, just at the bottom of page 1000:

"... the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert ... liable to restrict or distort competition. From that point of view, actions for damages ... can make a significant contribution to the maintenance of effective competition ..." [As read]

So it is recognising that private actions are an important adjunct of the Commission's -- at that stage, just the Commission's -- competition regulatory function.

There is a public interest in pursuing actions for recovery, and that is an important starting point.

We then get to Manfredi, which is, as it were, chronologically the next one in the bundle. If we just look at the section of that that we were looking at a moment ago, so that's the Authorities Bundle, volume 3, tab 52, page 1208, so looking in particular at paragraphs 78 and 79.

Now, I think this is one area where there is a slight difference of approach between us and the Umbrella Claimants. *Manfredi* -- I take it, gentlemen, you are familiar with the background to that case -- but where we are dealing here, with these questions about the application of the principle of effectiveness to the limitation period, what you see in those two paragraphs, 78 and 79, are the identification of two potential vices that the national law could adopt which would have the effect of rendering the directly effective rights ineffective. That's a rather wordy way of saying it. But the principle of effectiveness is engaged.

78, the first principle, is essentially if you adopt a short limitation period, so you do it from the date on which the agreement or concerted practice was adopted, it could make it practically impossible to exercise the right, particularly if it wasn't then

capable of suspension. The reason for that is obvious, because if you don't have knowledge of the circumstances, particularly if you imagine in a cartel case or something, it's just simply impossible for someone to exercise their rights.

79 talks about a situation in which there are continuous or repeated infringements. It is possible the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.

What that is again saying is that if the limitation expires prior to the conclusion of the infringement, it is also impossible for an individual to bring the action.

Now, the impossibility test is that same one that has been developed in some of that earlier case law as being the trigger for the principle of effectiveness. So, in my submission, there are two different vices that one sees in 78 or 79.

MR JUSTICE ROTH: They are related.

MR SAUNDERS: They are related.

MR JUSTICE ROTH: It's only in such a situation of a short limitation period.

MR SAUNDERS: Well, I don't think they are necessarily -- the shortness would also bite against the continuous infringement, because it's just so short the continuous infringement wouldn't get caught. But, in my submission, the continuous infringement point in 79 is a different point to the mere fact of a short limitation period.

It's the usual slightly infelicitous ECJ translation, but in my submission there are two different things that this judgment is addressing. Just a short limitation period per se and one where, if you have a continuous or repeated infringement, the limitation period expires.

Now, it could be, if you had a continuous infringement that lasted ten years and a limitation period of nine, you still get caught by 79.

MR JUSTICE ROTH: But it says, "in such a situation". You are removing those words.

MR SAUNDERS: I'm not removing them. It's --

MR JUSTICE ROTH: It's not saying "separately" or "in addition". It's relating it back to 78.

MR SAUNDERS: But actually, properly construed, 79 is addressing a slightly different point, because in my submission it's limitation period non-specific, otherwise you would just say well, it's too short to be caught.

MR JUSTICE MARCUS SMITH: Well, yes. That also begs an awful lot of questions, because you've got to ask yourself what the effect of an out-of-time claim is. Does it extinguish or does it simply act as a procedural bar? One can see that that can make all sorts of differences, and for my part I would be quite surprised if, even if one had a continuous infringement and short limitation period, you were barred from claiming in respect of the continuing infringement that was not precluded by the time limitation.

MR SAUNDERS: Yes. It's a question of the kind of vagaries of national law. That's the difficulty.

MR JUSTICE MARCUS SMITH: But the Court of Justice has a problem, that it has to articulate, in the context of a very particular reference a formulation that is going to make sense to a large number of different laws.

MR TIDSWELL: (Inaudible) common to 78 and 79 the fact that the limitation period runs from the date on which the agreement is adopted? Is that why it says, "in such a situation"? Because in both cases -- in the first case, the short limitation period in 78 assumes it's not continuing, 79 assumes it's continuing.

MR SAUNDERS: Yes. There is a distinction, I would submit, between 78 and 79, because one is about continuous infringement which has prospective -- potentially

prospective acts -- prospective continuing act of infringement. That is one other way of reconciling the difference.

But the point that I want to suggest to you is that 79 reflects and leads one to a logical conclusion, and the logical conclusion is one of two things: either to achieve effectiveness you have to have jolly long limitation periods, because if you are dealing with a continuous or repeated infringement case, you've got to make sure they are big enough to catch the continuous infringement. Now, quite how you would go about doing that as a national legislator is rather tricky and it would lead to a lot of stale claims sitting around -- I suppose you could come up with a hugely long period of 30 years or something, just to make it an effective provision; or the consequence is that you have to have something that leads one to something very close to a cessation condition.

Can we look at what the Commission had to say about this particular paragraph of *Manfredi*? So if we can look at -- if you could take up the Authorities Bundle, volume 8, tab 137.

This is the White Paper that relates to the Damages Directive. If we could look at the PDF page 4130, paragraph 234. You will see, in paragraph 234, it actually talks about *Manfredi*:

"… the Court stated ..."

This is the paragraph that we were just looking at, although actually I do note, in the light of Mr Justice Roth's comment, that they've chopped the first four words out of the quotation:

"... that 'where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement'…'." [As read]

Then it goes on:

"Since one cannot a priori determine how long a specific continuous or repeated

antitrust infringement will last, the breach of the effectiveness principle the Court refers to in this quote cannot be remedied by setting a particular duration, unless it [is] a very long [one]. The Commission therefore suggests remedying this situation by stating that in case of a continuous or repeated antitrust infringement, time cannot begin to run before the day on which the infringement ceased." [As read]

That is, in my submission, recognising that there are two logical ways out of this, one which is actually very unattractive, because introducing a very long duration limitation period could give rise to all sorts of the sorts of public policy problems you have with long limitation periods generally which is, when those actions are brought, there is nobody left around who is capable of defending them, or the courts are having to adjudicate stale claims, and so on.

Where we do slightly differ from the way the Umbrella Claimants presented this is that we say this is a nascent -- the consequence of this actually gets you very close to a cessation condition and actually, when you think it through, the alternative is a very unattractive alternative for a Member State to make.

The cessation condition, the seeds of it, we say are very squarely planted in *Manfredi* and that is the proper interpretation of that paragraph.

If I may just continue working through the cases. The next one is *VEBIC*, so you need Authorities Bundle volume 4, tab 67.

This is a Grand Chamber decision. There is -- I should actually just pause there -- there is a slightly odd point taken by both sets of Defendants, that *Volvo* was not a Grand Chamber decision and so therefore should be accorded less weight.

I'm sure as you are all aware, the CJEU normally sits in chambers of either three or five judges. The First Chamber which decided *Volvo* is also a five judge chamber and is notionally the most senior chamber. Cases go to the Grand Chamber of 15 judges usually under one of two different circumstances. If a Member State or the

Commission requests it, the case will be bounced up. That has happened from time to time. Or the court refers it up as a result of the Judge Rapporteur at the general meeting of the courts saying that this case needs to go to the Grand Chamber.

When they go, they tend to go because there's a conflict in earlier case law that needs to be resolved. One example of that was all the case law about supplementary protection certificates which were resolved in a case called *Actavis*. The case was going every which way and the court tried to draw a line underneath all that, somewhat unsuccessfully but the intention was there.

There are also cases where they are just of extreme importance generally, for all sorts of other reasons. Those are the reasons the cases go to the Grand Chamber.

The idea that this is in some way to be accorded less weight because it's not a Grand Chamber decision -- in actual fact, I would suggest that's actually a point against the Defendants, because what it actually reflects is that *Volvo* itself was not about a fundamental change in the law or about some kind of inconsistency, the sorts of things that, absent a Member State pushing the button, would have resulted in it going to the chamber, it was just reflecting the law and these various principles which I'm going to draw out.

So that's entirely consistent with what we say is the correct approach to *Volvo*. Actually, there's even some paper which the Defendants rely on which is some artificial intelligence model to say that there is inconsistency between the chambers of the courts, which I won't trouble you with, but in my submission it doesn't really get them anywhere.

What we do see -- one of the things that is quite important, when you look at the cases going through, is the identity of the Judge Rapporteur, and one of the things that is quite striking, when you look at *Cogeco* and then look at *Volvo*, is we have the same Judge Rapporteur, and that is actually part of the reason why this is

a consistent application and development of the law.

So back to *VEBIC*. *VEBIC* was a reference about the implementing regulations -- this is the regulation that gives the Commission its powers, amongst other things. You will see that's in paragraph 1 on page 1886.

How the case arose is that *VEBIC* was an association of bakers and confectioners, and they had been fined by the Dutch competition authorities for price-fixing. What they did was they circulated an index of cost price increases and everybody sold their goods at exactly the same price, and needless to say the Dutch competition authorities didn't think much of that.

Now the problem was that the Dutch Competition Council couldn't itself participate in the proceedings, so the question is how does the principle of effectiveness apply in that kind of case to give it a right to be able to address the arguments that are being made by the parties?

We see that if we look, in the page numbering, at PDF 1906.

If we just look briefly at paragraphs 56, 57 and 58. The Member States designate a competition authority. The authorities must in accordance ensure the treaty articles are applied effectively. This is the one where the regulation, we are talking about the implementing regulation in 57, leaves it to the domestic legal order of each Member States to determine the detailed procedural rules. They mustn't jeopardise the attainment of the effectiveness of the regulation which is to ensure that Articles 101 and 102 are applied effectively by those authorities.

Then at 58:

"... as the Advocate General has remarked ... if the national competition authority is not afforded rights as a party… and is thus prevented from defending a decision that it has adopted in the general interest, there is a risk that the court ... might be wholly 'captive' to the pleas in law." [As read]

It was essential, therefore, for the national competition authority to be able to become involved.

Now, that is a slightly -- I won't take that point any further forward because we will see how that gets developed in later case law in a moment.

If we look at the next tab in the bundle, so that is Authorities Bundle, volume 4, tab 68, and that is *Pfleiderer* and the German competition authority. PDF 1911. So this is another reference under the implementing regulation, and we will see that there if we just look at 1914, paragraph 2.

This one was about access to the file of the German competition authority relating to a cartel, and this was a cartel in the wallpaper sector. *Pfleiderer* was a customer of one of the five companies and wanted to get a civil action running for damages. So there is a leniency procedure: could *Pfleiderer* get hold of the documents from the competition authority?

Paragraph 18 on 1922 sets out the question that was referred, and you see there:

"Are the provisions of Community competition law - ... Articles 11 and 12 of Regulation No 1/2003 ... to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information", and so on. [As read]

The fundamental question was, if there's a leniency arrangement, can you get the information.

Then 1924, if you can look at 1924 in the judgment, paragraphs 23 and 24 -- so again you will see:

"... even if the guidelines set out by the Commission" -- so there's a model leniency procedure that was established -- "have some effect on the… national competition authorities, it is, in the absence of binding regulations ..." [As read]

And this is another one where there is, as it were, a lacuna in the regulation.

"... for Member States to establish and apply national rules on the right of access, by persons adversely affected ..." [As read]

So this is again the Member States who did this.

24:

"However, while the establishment and application of those rules fall within the competence of the Member States, the latter must none the less exercise that competence in accordance with European Union law ... and specifically ..." [As read]

Just looking at the end of that paragraph:

"... in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 ... and 102 ..." [As read]

And citing *VEBIC*.

One of the submissions I'm going to make, when you look through this case law, is that there is a distinction between some of the more general cases on effectiveness, where you have the particular test which is the "not render it impossible" test, and then some specific considerations that are developed in the case law that relate to competition actions in general, and in my submission competition damages actions in particular.

So you start to see coming through the case law, as we run through, some specific considerations that apply to competition damages actions, and this was a case where the claimant wanted to bring a claim.

The question is do the rules jeopardise the effective application? That is the test. In my submission, it's a much broader test than the much more limited approach to effectiveness you see in some of the other case law. What it recognises is that competition is a slightly special beast; there are some special considerations to be considered.

What we see here, and again, just to reiterate -- slightly ironically, I do take this point -- it is a Grand Chamber decision, so what they have identified is there is an additional factor that's to be taken into account. They must ensure they do not jeopardise. That's the test we see.

I'll do one more, if I may, before the end of the day. The next one is Authorities Bundle, volume 4, tab 72, so this is *Donau Chemie* -- I apologise for my dreadful pronunciation of all of these -- so PDF 2097.

This was a First Chamber decision, and then at paragraph 1 on page 2098 sets out the scope. So it is about the interpretation of the principles of effectiveness and equivalence in relation to the Austrian legal system action for damages. So this is a domestic legal system being tested against effectiveness and equivalence.

The context was that there was a fine in the chemicals market and the question for the court that was referred is at page 2100, paragraph 13:

"Does European Union law, [particularly] in the light of the judgment in *Pfleiderer* ..." [As read]

Which we looked at a second ago.

"... preclude a provision of national antitrust law ... in proceedings involving the application of Article 101 or ... 102 ... on the implementation of… rules ... [which]makes the grant of access to documents before the cartel court to third [parties] who are not parties to the proceedings, so as to enable them to prepare actions for damages ... subject, without exception, to the condition that all the parties ... must give their consent, and which does not allow the court to weigh on a case-by-case basis the interests protected ..." [As read]

There was, as it were, a hard-line condition under Austrian law and the question was: is it effective for third parties to come along and have access to this material so they could bring their case.

If we could turn through to paragraphs 21 to 24, so you will see here there's quite a convenient little summary of where we've got so far in the case law. We've got -- at 21 we've got *Manfredi*:

"... practical effect of the prohibition ... would be put at risk if it were not open ..."

So this is the "put at risk" test.

22, you've got they have to:

"... take full effect and ... protect the rights… they confer on individuals ..."

Entitlement, and so on.

Then 23:

"… theright of any individual to claim damages for loss caused to him by conduct which is liable to restrict or distort competition... strengthens the working ..."

So this is the synergistic, as it were, supervening benefit of running the two systems in parallel, thus:

"... making a significant contribution ..."

And the:

"… right constitutes effective protection against the adverse effects that any infringement ... is liable to cause to individuals, as it allows persons who have suffered harm due to that infringement to seek full compensation not only for actual loss… but also for loss of profit ... plus interest ..." [As read]

One of the principles you see in *Manfredi*, if you look at the judgment -- what it essentially says is you shouldn't get a windfall as the claimant, but you are entitled to go off and get your loss of profit.

All of these are general points of principle which underlie the requirement of effectiveness. And again, in a competition context, it is not just impossible or excessively difficult. We see all of these factors that are identified here as being things that are relevant to the public policy of permitting the recovery of damages in

damages actions more generally.

The question, if we look at page 2013 -- hang on, maybe that's wrong -- it could be 2103, I'm sorry. Yes, 2103, paragraph 29, you will see the summary of the first question there at paragraph 29, and then the consideration, paragraphs 31 to 33, the persons -- you will see 30 recognises:

"…the national courts must weigh up the respective interests in favour of disclosure ..."

31:

"That weighing-up is necessary ... any rule that is rigid, either by providing for absolute refusal … or granting access ... is liable to undermine the effective application of ... Article 101 ..."

32:

"... it is clear that a rule under which access to any document forming part of competition proceedings must be refused ..." [As read]

Infringes.

Then, when you get through to the ruling, the dispositif, on page 2106, you will see it essentially says you've got to balance things up; you have to weigh up the interests.

These are all again general developments of the principle of effectiveness.

MR JUSTICE MARCUS SMITH: They say they are applying effectiveness, paragraph 27, the principle of effectiveness?

MR SAUNDERS: Absolutely.

MR JUSTICE MARCUS SMITH: That's what they say in the reply.

MR SAUNDERS: Absolutely.

MR JUSTICE MARCUS SMITH: The language, as so often, it becomes somewhat formulaic, but they repeat it again and again. That's how it's defined.

MR SAUNDERS: I think we are probably allowed to say, now that we have left

Europe, that there is a bit of a mantra sometimes at the Court of Justice with some of these formulations.

But the submission I wanted to make is that there are possibly two mantras or more mantras. There is the mantra of general principle of effectiveness, which you see from some of those early cases and it gets carried through, and then there are these specific competition issues about maintaining full effectiveness and maintaining all of these sorts of threads, and the public policy that's reflected in making sure that there is a public interest to enable consumers or third parties to obtain damages. Those are the threads that start to come together when we get to *Cogeco* and then *Kone* and some of these --

MR JUSTICE MARCUS SMITH: This is a competition case.

MR SAUNDERS: Yes, it is. This is an Article 101 --

MR JUSTICE MARCUS SMITH: They adopt the classic language in this context of what the principle of effectiveness means?

MR SAUNDERS: Absolutely, but again they are competition-specific questions.

MR JUSTICE MARCUS SMITH: In paragraph 27.

MR SAUNDERS: Yes, but that formulation, the impossible or excessively difficult, is often swept up -- so if you look at the structure of these judgments, they often identify a series of principles, and then they summarise it by saying you must not make it impossible or excessively difficult.

The point I'm trying to develop is that the principle of effectiveness is not limited to that test because you could see, if you take that language literally, it would rule out virtually nothing. Actually, a lot of -- whereas a lot of these principles are engaged in these cases because more general considerations apply in the competition damages context.

MR JUSTICE MARCUS SMITH: Well, "excessively difficult" is quite a broad

concept, and they apply it flexibly in an Act-specific way. You can only rule out everything if it gets a very narrow interpretation.

MR SAUNDERS: Yes. The first limb is probably the impossibility limb.

MR JUSTICE MARCUS SMITH: Again, in practice.

MR SAUNDERS: Yes. It's the practical effect of the prohibition or the rule that's being considered, and then obviously one sees how the court looks at that standard of what is excessively difficult, and you see that that is used in a lot of these cases to justify applying -- to justify using the principle of effectiveness to modify Member State national provisions where those don't give proper effect to the direct effect of 101.

Gentlemen, I was going to go on to look at *Kone* and the others. I'm not sure if -- do you want to rise at 4.30 or -- I'm not sure how you want ...

(Tribunal conferring)

MR JUSTICE MARCUS SMITH: We'll do one more, I think.

MR SAUNDERS: One more. All right. Actually, that will fit rather well, because we will come on to *Cogeco* fresh in the morning.

If we look at Authorities Bundle, volume 4, tab 74, and then it's PDF page 2121.

The *Kone* case, you will see the claimants -- if you look at 2121, *Kone* -- you have a series of elevator manufacturers, *Kone*, Schindler and ThyssenKrupp, and then OBB Infrastruktur AG, which is the Austrian federal railways on the other side. They were pursuing Kone, who was a party -- and the other parties who were parties to the elevator cartel, quite literally price rises. And the question set out in paragraph 17 at 2124. So:

"Is Article 101 TFEU ... to be interpreted as meaning that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not a party to the cartel who, benefiting from the protection of the increased

market prices, raises his own prices ... more than he would have done without the cartel…?" [As read]

This is the umbrella case: do you get the uplift effect of being able to behave like that? "Can any person claim?" was the bottom line.

Paragraph 21 on page 2124, you will see:

"The full effectiveness of Article 101 TFEU and, in particular, the practical effect ..."

Just to pause there, we are looking at full effectiveness of Article 101.

"... the practical effect of the prohibition laid down in … that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition [so *Crehan* and *Manfredi* and so on].

"[A] person is thus entitled to claim compensation for the harm suffered where there is a causal relationship ..."

Paragraph 22.

"The right of any individual to claim ..."

Paragraph 23 strengthens the whole mechanism because:

"... it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition ..."

Therefore it's all part of making a contribution to the competition regime.

And 24:

"In the absence of EU [law] ..."

So this is the fact that the Member States are to implement their own rules for this.

"... it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right ... resulting from an agreement or practice ... including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed." [As read]

That's again Member States can do it subject to those principles.

If we just look through to 27 ... 25, 26 and 27 are also important paragraphs. And you see in 27, the context is again that effectiveness has a specific dimension in competition law. It mustn't jeopardise the effective application of 101 and 102 TFEU, so that's 26.

So, in the competition context, that's central, it's about this question of whether the effective application of those Articles is jeopardised, not just our impossible or excessively difficult test. You have to look at the practical consequences and what we see in this and the other cases is identifying principles which enable the proper application, the effective application, of 101 and 102, to be applied. Part of that is recognising that there is a very important role for consumers and for private persons as claimants.

Sorry, paragraph 29. Yes, so that's about the context of the case. Yes. Sorry, it would be 31 and 30 -- sorry, I'm looking at the wrong part of my note -- so paragraphs 30 and 31, it was excluded, the equivalent, the provision which categorically excludes a right to compensation with the causal link was excluded.

Then look at 32:

"It is true ... that it is, in principle, for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of the 'causal link'. However, it is clear from the case-law of the Court, referred to in paragraph 26 ..."

Just wind back to 26, we are looking at not jeopardising the effective application of Article 101, so that is the test in *VEBIC* and *Pfleiderer.*

"... it is clear from the case-law of the Court ... that national legislation must ensure that the European Union competition law is fully effective ..."

This is a slightly different sense in which effectiveness and fully effective was used,

and again they cite *VEBIC*.

They.

"... must therefore specifically take into account the objective ..."

So you've got to look at the policy objective:

"... [of] Article 101 ..."

Which aims to get over Article 101:

"... which aims to guarantee effective and undistorted competition in the internal market, and, accordingly, prices set on the basis of free competition. ... national legislation must recognise the right of any individual to claim ... loss, [and so on]."

33:

"The full effectiveness ... would be put at risk if the right of any individual to claim compensation for harm ... [were limited in that way]." [As read]

So it is the public policy issues here are writ large. Consequently, 34, the effect is that you can go and get the umbrella pricing.

Just to sum up, one sees that in the context of competition damages actions and Article 101, there are a wider range of principles that are being developed by the court and they are being brought together with the test of effectiveness as it applies to matters which Member States have within their national competencies.

With that, sirs, I will come back to *Cogeco* tomorrow, if I may.

MR JUSTICE MARCUS SMITH: We are very grateful. We are a little bit behind, but there are no issues about anyone being unduly pressed for time over the next two days?

MR SAUNDERS: I'm very grateful. You mean you are asking --

MR JUSTICE MARCUS SMITH: I'm asking.

MR SAUNDERS: We are behind in time, but probably with a combination of relying on -- sir, if I can pick up some of the points which the Defendants have made, and

then some of our points are set out in our skeleton argument so I can address you on those.

MR JUSTICE MARCUS SMITH: We can pick up the pace. I don't want anyone to get a sense that they are going to be under undue pressure to make points more quickly than they would otherwise like.

MR SAUNDERS: Sir, would it be convenient at all ...

(Tribunal conferring)

MR JUSTICE MARCUS SMITH: What we are debating is whether it would assist not just you but the others who are yet to address us, whether we started at 10.

MR SAUNDERS: I think for our part, we would be very grateful if we do that.

MR JUSTICE MARCUS SMITH: In that case, we will do that.

MR SAUNDERS: Thank you.

MR JUSTICE MARCUS SMITH: Thank you all very much ...

Sorry, Ms Kreisberger.

MS KREISBERGER: I want to say sorry. I haven't come back to you yet on section 6(1)(b), but given that airtime is in scarce supply, we will produce a note overnight, if that's suitable?

MR JUSTICE MARCUS SMITH: I think that would be helpful, Ms Kreisberger. I think the main thing is that the card schemes' counsel have a chance to come back, so if we get it to all parties overnight, then they can make such points as they wish and you will be able to deal with their points in reply.

MS KREISBERGER: It's very rough, it will be a couple of sides, but it simply confirms that one doesn't rely on section 6(1)(b) in relation to references and we just wanted to give you the provision.

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

10 o'clock tomorrow morning. Thank you.

(4.41 pm)

(The hearing adjourned until 10 am the following day)