IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1517/11/7/22 (UM)
1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 25th 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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Tuesday, 25 April 2023

(10.00 am)

MR JUSTICE MARCUS SMITH: Mr Saunders, good morning.

Submissions by MR SAUNDERS (continued)

MR SAUNDERS: Good morning, judge. Yesterday we got to the *Kone* umbrella pricing decision so, if I may, I will take to you the next authority in the sequence, which is *Cogeco*. That's at the Authorities Bundle, volume 5, tab 97 and PDF page 2661.

Cogeco is a decision of the Second Chamber from 28 March 2019, so therefore before IP completion date with Judge Arabadjiev as Rapporteur. He is the same Judge Rapporteur we see in the *Volvo* case which we will see in a moment. You will see that on page 2661 in the composition of the court.

The significance of the Rapporteur, I'm sure you're familiar with, but when the case is originally assigned, it's assigned one Rapporteur and an Advocate General and then it goes to the court's general meeting who then decides how to treat it in the light of a report that the Rapporteur writes and they decide then to allocate to a chamber and so on.

If I can pick up the background facts, those are in paragraph 12 of the judgment, just turn through PDF page 2664, paragraph 12. Cogeco was a Canadian company and it was -- had a shareholding in Cabovisao, a Portuguese company. In April 2008, Cabovisao and Sport TV Portugal had signed a distribution contract for a TV channel. Cabovisao then complained to the Portuguese Competition Authority about discriminatory pricing in premium TV channels which it said was an abuse of dominance. So that's how the thing then went forward. The Competition Authority then fined Sport TV 3.7 million euros and Cogeco then brought proceedings in the

Lisbon District Court to recover damages. You will see that at paragraph 19.

The defendants, for their part, said the action was time-barred under Portuguese limitation law which was three years. That's paragraph 20. They said time started running on the date of the agreement or the date of filing of the complaint at the Competition Authority or the date on which anti-competitive conduct ended or when Cogeco sold Cabovisao. So that's their position.

Cogeco's position was in paragraph 21. It said limitation only ran from the date of the adoption of the decision of the Competition Authority and in paragraph 21 you will see their position was that it was only that decision that enabled it to have all of the information available that was necessary for it to be aware of the existence of the practices contrary to competition law. So it's quite striking in a way that that position was maintained even in circumstances where it was Cabovisao that had made the complaint. So just hold that thought for a second, we will come back to how that is manifested in the judgment in a moment. So even if you make the complaints, you don't necessarily have all the information that's required.

Now, this was before the transposition of the Damages Directive in Portugal, paragraph 22, so the District Court asked the Lisbon District Court a series of questions that you see at paragraph 23.

The first is essentially can you -- can one company sue another; is there a private right of action. You will see that each of the questions is "may articles of the" -- so it identifies the articles of the Damages Directive and then:

"... as well as the remaining provisions of that directive or general principles of EU law ..."

So that was the hook for the court to start interpreting general principles of EU law.

Over the page we have some more questions, 3, 4, 5 and 6. 5 and 6 are potentially about the temporal application of the Directive. The judgment starts at paragraph 24

and considers the fifth and sixth questions on temporal application which we're not particularly concerned with. The conclusion there is at paragraph 34. So:

"... that directive is not applicable to the dispute in the main proceedings."

And then the bit that we are interested in starts at 35, which is looking at the second question and the first part of the fourth question.

Now, 35 and 36, the court reformulates the question as though it's just reciting the case law in which we also see, I think to a certain extent, the same sorts of principles in *Volvo* where they have the ability to look at the file and reformulate as they see fit to best assist the court.

37 is how they have then, just over the page, how they have actually reformulated. So it's apparent from the order of reference that the Tribunal is uncertain as to whether Article 102, so this is a breach of dominance case, and the principles of equivalence and effectiveness must be interpreted as precluding national legislation which first provides that the limitation period in respect of actions for damages is set at three years and starts to run from the date on which the injured party was aware of its rights to compensation, even if unaware of the identity of the person liable and the full extent of the damage and secondly, it does not include any possibility of suspending or interrupting.

That's the way that it was reformulated. Paragraph 38 then recites that Article 102 is directly effective. Of course, we know Article 101, which is important for present purposes, is also directly effective.

39, again, the formulation is the full effectiveness of Article 102 and in particular the practical effect of the prohibition laid down in that article would be put at risk if it were not open to any individual to claim damages. So that's reflecting the public policy that we have seen in the *Kone* decision.

40, it follows that any person can claim compensation if there is a causal

relationship.

41, it actually strengthens the effect, so this is, again, the same synergistic effect between private damages actions and those of the -- and the competition rules that's enforced by the Commission and other competition authorities. So that's a significant component. Significant contribution, you will see in 41, to the maintenance of effective competition.

Paragraph 42 encapsulates the general principle that it is for Member States to lay down their detailed rules for limitation provided that the principles of equivalence and effectiveness are observed. That is, again, of course, we have seen through a series of these judgments, now the default position. There is no legislation at this point which harmonises, so it must remain that this was a Member State competence subject to those overriding principles of EU law.

Then accordingly the rules derived from the direct effect of EU law must not be less favourable and must not make it, in practice, impossible or excessively difficult to exercise rights conferred by EU law. So that's the articulation of the principle of effectiveness.

Then, 44 is the competition specialty, as it were, which is, in the context of competition laws, it must not jeopardise the effective application of Article 102. So this requirement for not jeopardising in the context of competition cases is an important aspect of the overall principle of effectiveness as it is applied to those cases. So that’s effectively the submission I was making in relation to the earlier authorities yesterday.

45, effectively says you have to look at the limitation rules in the round, look at all the aspects. But then, 46, you have to take account of the specificities of competition law and in particular the fact that bringing of actions for damages on account of infringements requires in principle a complex factual and economic analysis.

That is, again, a specialty of -- it is a recognised principle that we have seen in several of these cases now, that you can't get the case off the ground unless you can do the analysis, the court is recognising there.

In those circumstances, the consequence of that recognition in 46 is what we see in 47.

"In those circumstances, it must be stated that national legislation laying down the date from which the limitation period starts to run, the duration and the rules for suspension or interruption of that period 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..." [As read]

So that is quite a striking formulation, in my submission.

48 considers the combined effect of the rules on limitation as it must. We have seen that that's a necessary thing. 49 is the comment about short limitation periods.

MR JUSTICE MARCUS SMITH: So you look at 48. You look at the Portuguese, or whatever the national limitation rules are, in their full application how they work.

MR SAUNDERS: Yes, you have to look at the combination of effects. My Lord, what we're taking from the case law is that you don't look in the abstract at a six-year period or three-year period or a four-year period. It's also about the combination of the suspension and these other factors like the ones we saw in *Manfredi.* The case law does seem to be consistent that when you look at it you look at it in the round.

That's actually the approach that was taken in the Damages Directive itself because if you recall Article 10, which we haven't looked at yet, actually has a number of limbs to it harmonising not only the period but also other aspects including the cessation condition, as well.

So they are all integral aspects on the whole and the --

MR JUSTICE MARCUS SMITH: In the round means much more than just the limitation period. It includes things like the trigger for the running of limitation period.

MR SAUNDERS: Precisely.

MR JUSTICE MARCUS SMITH: So things like when a cause of action accrues, whether there is a knowledge requirement. You have to look at the whole thing.

MR SAUNDERS: Actually you can test -- in a way there is a bit of a slightly -- so if you had an incredibly long limitation period, as I was submitting yesterday, actually perhaps some of these other issues wouldn't arise because the competition authorities may clobber a cartel quick enough for everybody to still be able to bring a follow-on action within time. That may or may not happen and you end up with a very long national limitation period which is a very peculiar thing to have because then a whole load of extremely stale disputes will be raised before the courts in circumstances -- in other circumstances and it's not a very sensible way forward for a Member State.

It is much better to adopt an approach where the consequences that you stop time running in certain circumstances, as we see reflected here, or you have a cessation condition, and you do it in that way. As a logical structure, those are a much fairer and more sensible manifestation of effectiveness as part of these rules than just assuming that the outcome should be some extremely long period.

But what you can't do is have a short period combined with a period which effectively chops off the action because if you chop off the action, you're not -- you are undermining completely the full effectiveness of Article 102, you have the test in 47 which, as I say, is in quite striking terms. The language is -- it is -- I mean, it is not just a sort of let's have a look and see how -- see whether that's something that's excessively difficult or not. Excessiveness is measured relative to this test in competition cases and that's why, as I will come to submit in a second, all of these

aspects of the case law are kind of drawn together in *Volvo*.

We have the short limitation period. 51 recognises the same applies to a short limitation period that cannot be suspended or interrupted, so you have to be able to stop the clock in order to give -- so as not to undermine completely the full effectiveness.

52 then says, I'm sorry, paragraph 50, I skipped over:

"It is indispensable, in order for the injured party to be able to bring an action for damages, for it to know who is liable for the infringement of competition law." [As read]

The knowledge requirement is an essential aspect of the claim, but we know that already because you have to do the -- you have to do the complex factual and economic analysis, otherwise your claim will get struck out.

52, as it were, brings it all together and the second half of that paragraph is important so:

"With regard to the latter, if the limitation period, which starts to run before the completion of the proceedings following which a final decision is made by the national competition authority or by a review court, is too short..." [As read]

This is looking at the completion of the proceedings below and then a limitation period running after that, then it:

"... cannot be suspended or interrupted ... it is not inconceivable that that limitation period may expire before those ... are completed." [As read]

Very similar to what we saw in *Manfredi*:

"In that case, any person suffering harm would find it impossible to bring [an action]..." [As read]

In that context, it must be held a limitation period of three years which starts to run, as it does in the Portuguese position, regardless of whether you know the factual

basis of the claim - the infringement is not known - it renders the exercise of the right of full compensation practically impossible or excessively difficult.

What we're taking from this, in my submission, is the practically impossible or excessively difficult effectiveness test in EU law is -- has been expressed to have specific aspects as it applies to competition cases to reflect the public interest in bringing those as part of a synergistic whole with enforcement by the competition authorities and there is a striking formulation in 47 of what the effectiveness test has to achieve.

We have looked at the judgment. I will skip over the other five questions, then and just finally the dispositif on 2670, paragraph 2, and that's just giving effect to their reasoning earlier on.

So that's *Cogeco*.

What have we learnt so far? Well, we know that Article 101 is directly effective. We know that the full effectiveness of Article 101 must be maintained. There is a public policy interest in people being able to recover damages. That's synergistic with competition by enforcement -- competition enforcement agencies taking action. Domestic legal systems can lay down their own limitation periods, but there is no harmonisation prior to the Damages Directive, but that must be subject to the principle of effectiveness.

Effectiveness is breached if it's rendered practically impossible or excessively difficult to make a claim. When deciding a national limitation period is compatible with effectiveness, you need to take account of the specificities of competition law cases and so if you bring a claim, you need a complex factual and economic analysis. National legislation for limitation must be adapted to the specificities of competition law so as not to undermine full effectiveness of Article 101.

If you start the limitation clock running on the day that the agreement or concerted

practice was adopted, you can make it practically impossible or excessively difficult to seek compensation. In that situation, it could be that limitation expires even before the infringement is brought to an end. That was *Manfredi* and we have seen a hint of it here again. We say the consequence of that is that if you have a limitation period that expires before a continuous or repeated infringement ends, that renders it practically impossible or excessively difficult. That was what the Commission recognised in relation to the *Manfredi* judgment.

As we saw in relation to *Cogeco*, you have to know the details of who is liable and the facts that underlie your claim because otherwise you can't bring it. If you have a period that starts to run before you have that information, that isn't effective because it leaves you in the dark about being able to bring your claim and who you serve and so on.

That -- I'm sorry, Mr Tidswell.

MR TIDSWELL: To what extent does knowledge answer a lot of that? What you see in this case is a summary of the decision from the Commission being inevitably the reference point of the cases and we see that in *Volvo* when you come to it in a minute again. But if that actually deals with a lot of the problems that have been identified in terms of being practically impossible or excessively difficult, that seems, once you get to the point where you have the summary, a lot of these probably go away, don't they? It's not -- I think in a way you've just put it suggest that the answer to the problem might be the cessation condition, but actually equally the answer is possibly -- the answer that appears more often is the knowledge point and this publication of the summary.

MR SAUNDERS: Yes. So the way we put it, I think you have to have the knowledge in order to bring your claim. You may obtain the knowledge from the Commission decision because that sets out the results of its findings and so on, but

it has to spell them out sufficiently for to you conduct the required analysis to know that you have a claim to bring, so you can bring it.

Now, if the effect of that decision and the publication of that decision is coterminous with the cessation of the infringement, then that is one scenario because at that stage you have gained all of the knowledge through the coterminous -- through -- there's no more running infringement to catch, potentially. If you have periods of infringement that are not caught by the decision, either because they're not within the scope of the period that the decision considered or because for some reason they have continued after the date of the decision, then you do need something like a cessation provision because you don't have an ability to get everything you need from the decision that's been handed down.

If you think about it in the round, the whole rationale behind this is to ensure that people can bring private actions for damages as part of that component. You have to look at what they are provided with in order to bring that. If everything they need is contained within a particular decision at a particular date, then that's one scenario. If that decision doesn't cover the full period or there are ongoing acts of infringement that are not for some reason reflected, then you're going to lose the ability to claim for those because you haven't got the knowledge in relation to those from the decision. So that's why the cessation condition --

MR JUSTICE ROTH: You might have the knowledge from somewhere else.

MR SAUNDERS: It is a possibility.

MR JUSTICE ROTH: I think the point being put to you is what you need is knowledge. It may come from a decision. There may be no decision as the court says in that passage, it may be a stand-alone claim. But what you need is the knowledge. If you have the knowledge, why do you need anything else? If you have the full knowledge, including the identity of the infringer, the nature of the

infringement.

MR SAUNDERS: It depends on the -- the logical conundrum that's caused by an ongoing infringement, if you have a continuous act of infringement and time runs against you such that you can't then recover for the acts of infringement -- I mean, if you think of the overlapping window of the limitation period and the continuing acts of infringement, in my submission it doesn't give full effect to the Article 101 if you can't then -- if limitation bites you where you haven't got a further basis on which to bring your claim and that is why we see developed in the case law these two: the *Manfredi* situation, which is the kind of logical consequence of a continuation of an infringement, and the separate knowledge requirement in *Cogeco*. So we don't -- I don't accept that they're one and the same, I think, which is the thrust of Mr Tidswell's point.

MR JUSTICE MARCUS SMITH: What I don't quite understand now is why you're focusing on effectively the need for complete knowledge in order to bring a claim. What you need is enough information to commence the proceedings. Now, I fail to see why you can't commence an action for an infringement that is ongoing and claim damages for an injunction in respect of any continuing breach. Why does the cessation matter at all if you have the knowledge?

MR JUSTICE ROTH: And indeed we have claims before this Tribunal for breaches that are continuing. People are bringing claims for damages up to date. They don't say, “Oh, I can’t bring my claim because this breach -- infringement is still going, so I'm not able to bring a claim”. They do bring claims.

MR SAUNDERS: My Lord, I accept that and there are -- and also the Tribunal has jurisdiction to grant relief to enjoin in certain circumstances and so on if a party is continuing an act and so on.

But for the purposes of the present discussion, I don't -- obviously for the Merricks

claimants, the knowledge aspect is particularly critical for us --

MR JUSTICE ROTH: You may have a section 32 argument and that will be heard.

MR SAUNDERS: Section 32 is a different point, in my submission, because section 32 is a domestic remedy. This is the effect of EU law, the knowledge requirement of EU law for effectiveness. So it isn't -- it may be that one can construe section 32 in such a way as to be consistent with that requirement. That isn't the traditional aspect -- the traditional approach to the construction of section 32. So we say that there are two threads to EU law that we see in *Volvo*: the recognition both of the cessation requirement and the knowledge requirement. We get the knowledge requirement very squarely from *Cogeco*, so -- and we get the cessation requirement from *Manfredi* and the logical consequence we say from *Manfredi*.

MR JUSTICE MARCUS SMITH: I think that's where I have a problem. You call it a cessation requirement and my question to you is: assuming one meets the knowledge requirement and has got a safeguarding against, well, the old Pirelli v Faber prism of the cause of action having accrued, time running and you not knowing it. That's a problem we have had for 30, 40 years and we resolve it by having a knowledge requirement which means the time either additionally or alternatively runs from date of knowledge. So we get that.

But what does a cessation requirement bring to the party? Why have it in addition to a scheme that is based upon knowledge? What harm does it mitigate?

MR SAUNDERS: My Lord, I think in relation to the case law the harm is that identified in that paragraph of *Manfredi* that we looked at earlier on.

MR JUSTICE ROTH: The problem with *Manfredi* is that it ran - the limitation period - from the start of the infringement. It wasn't a limitation regime like the UK one. That was the difficulty there.

MR SAUNDERS: No, I accept that, so the Italian position was a slightly different --

MR JUSTICE ROTH: One can see that's what made it impossible. If you cannot get your knowledge in time.

MR TIDSWELL: If you had knowledge, if they had knowledge in *Manfredi*, that would have solved the problem.

MR SAUNDERS: But the way that the law has developed, through what we would say are these two threads within the principle of effectiveness, is that they have been recognised through the case law as separate threads. From my position, I think the Umbrella Claimants have, as you see, slightly more emphasis on the cessation condition than we need, actually, but the knowledge is a critical aspect of that and we say that both of these threads are to be seen in the case law and both recognised in *Volvo*.

MR JUSTICE ROTH: *Cogeco* doesn't recognise the other thread, does it?

MR SAUNDERS: No, not itself because that is dealing with knowledge.

MR JUSTICE ROTH: In its general discussion, it doesn't reflect that.

MR SAUNDERS: No, it doesn't explicitly reflect it by reference --

MR JUSTICE ROTH: Or reference to the Advocate General, I think.

MR SAUNDERS: No, Advocate General Kokott, I think it was, in *Cogeco*, wasn't it? But you do see that formulation in 49 to 51, which is the need for a limitation period to be suspended or interrupted for the duration of proceedings following which a final decision is made by the national competition authority.

MR JUSTICE ROTH: No doubt --

MR SAUNDERS: That's the suspension of an otherwise running period.

MR JUSTICE MARCUS SMITH: I suppose my question is this. You've mentioned two threads -- and I suspect there are many more if you're trying to have an effective regime -- but are you saying that if you take the knowledge thread and the cessation thread that they are cumulative requirements for an effective regime or alternative

requirements?

MR SAUNDERS: I think you're saying that they are alternative requirements, but I will double-check that I haven't said something that shoots us in the --

MR JUSTICE MARCUS SMITH: Let me be clear what I mean by alternative.

MR SAUNDERS: I think *Volvo* recognises that they are both requirements.

MR JUSTICE MARCUS SMITH: Yes, that would be cumulative then.

MR SAUNDERS: For my case I don't think I need to go as far as that, but they are alternatives, both requirements in themselves. They're not cumulative in the sense that one is a precondition for the other, in my submission.

MR JUSTICE MARCUS SMITH: No, that's not what I mean. What I mean is look, let's look at the test in 48:

"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 to claim compensation practically impossible or excessively difficult." [As read]

So that's what we're talking about, we're talking about efficacy of claims being brought.

MR SAUNDERS: Yes. My Lord, I entirely accept that you have to look at all the rules together in the round.

MR JUSTICE MARCUS SMITH: If we have a rule which is squarely a knowledge requirement, it says you need to have this sort of knowledge before time begins to run or you get an alternative period and it's a generous period and the definition of knowledge is such that it is tied in to what you need in order to bring a claim and you have that, why do you need anything else? I can see if you don't have that, a cessation requirement might be another way of doing it, but that's what I mean by alternative rather than cumulative. In other words, why, in order to meet the test in 48 of efficacious enforceability of rights, do you need both?

MR SAUNDERS: My Lord, in a way I think the difficulty is it's quite difficult to do this -- one can conceive of a situation in which it may not make any difference at all, but then it is also possible to think of situations in which there are continuing manifestations of an abuse where you may not have -- the knowledge requirement does not enable one to have -- to know of the complex and factual circumstances until such time as that manifestation of that abuse has concluded and so that is why the cessation requirement may give you something different to the knowledge requirement as at an earlier date. So that is -- I mean, my Lord, if you think about them, as it were, theoretically they are potentially performing slightly -- there may be a kind of penumbra of overlap between the two, but they are performing different functions, the two requirements, and you can see why, in my submission, they're developed in the case law that cessation in certain circumstances may have an important role to play, because the cessation of an ongoing infringement, it may not be possible to conduct the detailed analysis or one doesn't have the knowledge. In my submission, it is not -- it isn't right as a matter of general approach to collapse the two or say that in a way that the penumbra of knowledge is always sufficient because it would encompass the cessation requirement. They are separate things.

MR TIDSWELL: Isn't that why the -- reading *Volvo* as having applied a cessation condition is quite difficult because it would rather depend on the factors in the case and that's different from saying that knowledge has to be a condition because all of this really goes to the point as to whether or not a claimant is in a position to be able to make the claim, articulate the claim satisfactorily? So you can see why you might get that being put as a necessary condition in order for there to be a playing board, although it may be it is arrived at in a number of different ways, as Mr Justice Roth indicated. But it does seem quite odd, doesn't it, then to say that you would have a cessation condition which is, as a matter of *Volvo*, binding on this court and indeed

all matters with accrued rights, when actually an analysis of the situation, of the factors relating to the rules on limitation, might lead you to the conclusion that knowledge was going to be dealt with in some other way.

MR SAUNDERS: It may that be you don't need the cessation condition because knowledge gives you what you need. If knowledge doesn't give you what you need and so therefore you don't get -- you do, therefore, get a potential undermining of the direct effect of 101 and all the other factors that I addressed you on earlier, then the cessation condition, in my submission, does come into play as a freestanding principle because what it is recognising is the fact that in an ongoing infringement it isn't effective for the clock to start running prior to the act of cessation.

You can see why, as a matter of principle, that would be a sensible thing to adopt because you have someone who is abusing, who is carrying out competition infringements, overcharging and the like and time should only start to tick against the people who want to recover their losses from the cessation of those particular acts.

Now, that may or may not be, in any particular case, coterminous with the knowledge requirement, but they are, in my submission, two separate threads that we see in *Volvo* and that's one -- one of the difficulties about talking about this in the hypothetical is that you can -- it's quite difficult to see whether in any particular case it makes a particular difference, but we do know that -- we can see both of those threads, in my submission, coming through in the case law from *Manfredi* in the cessation requirement, and the knowledge requirement very clearly in *Cogeco*.

MR JUSTICE MARCUS SMITH: I think the difficulty I have is that we're talking here about making a claim practically impossible or excessively difficult and my difficulty is that if one postulates a limitation regime that has embedded within it a well-structured knowledge requirement against which time begins to run, I don't see a place in that regime for a cessation requirement because it seems to me that

the knowledge-based regime makes the exercise of the right practical and straightforward.

Now, I can see that one might say that there is a theoretical case where a regime so drafted might not work, but paragraph 48 isn't concerned with the theoretical case; it's concerned with practical impossibility or making something extremely difficult, and so I do think you need to go a little further than the purely theoretical. Of course they're different tests.

MR SAUNDERS: Yes.

MR JUSTICE MARCUS SMITH: Yes. But there needs to be some practical problem not resolved by a knowledge approach which makes cessation necessary in the scheme of things and that's where I have some difficulty.

MR SAUNDERS: My Lord, if you take the theoretical framework--

MR JUSTICE MARCUS SMITH: Yes.

MR SAUNDERS: You can see how the two have potentially different roles, in my submission. You can see how, in my submission, you can also see how writing down the cessation requirement is what we would say is a logical consequence from *Manfredi* and the kinds of considerations that the court identified there.

Now, the test which my Lord identified a second ago is the classic impossibility or excessively difficult test, but my submission a second ago, just to be clear, is that is something that has to be adapted, so this is the paragraph 47 test, has to be adapted to the specificities of competition law.

It may be that, in any particular case just before the Tribunal, it makes no difference because the periods elide, but in order for effectiveness to be manifest when one is approaching domestic limitation, in my submission, if it does make a difference then you have to recognise and give effect to these separate principles and one should do it in favour of enabling the full effectiveness of Article 101 and so that's our

submission on that. I don't -- you see those threads developed and how they're manifest in a particular case depends on, as it were, the interlocking periods.

Can I just turn to *Volvo* itself very briefly? *Volvo* is in Authorities Bundle, volume 7, tab 123, PDF page 3692-- My Lords, can I just address one other point just in relation to cessation which is a practical question? It's been recognised elsewhere, not in these authorities, that there is an interest in ensuring class actions and also ensuring that infringement -- people are compensated for the losses they have suffered as a result of infringements.

There is a practical difficulty in class actions because if you are required to bring them without the equivalent of something akin to a cessation condition where you can look at how -- so you can then form an economic view as to the totality of the claim and then consider funding and everything else, it may or not be, that feeds into the extent to which it's economic to actually bring a claim in the first place.

So there is another aspect to this which, in my submission, does, although not formally something that we see in these cases, it is a practical reason why the cessation requirement may be of some significance in certain cases, because it is when the completion of the infringement has occurred that one can then conduct the economic assessment as opposed to taking a punt --

MR JUSTICE ROTH: It hasn't stopped Mr Gutmann in quite a number of class actions for ongoing violations. If you can claim six years' worth of damage, you have, given the scale of damages in a class action, you've a very substantial sum.

MR SAUNDERS: My Lord, I'm not suggesting that there are instances where it's happened, but it is a factor which we say should also be put into the mix. It is something that means that in some cases it may be appropriate to look for a cessation requirement.

Again, it depends on the nature of the claim and the nature of the infringement and --

MR JUSTICE MARCUS SMITH: It does, but doesn't a cessation condition prove rather too much or deliver rather too much in the case of an infringement where it is overt but disputed, like this case where one has interchange fee agreements plain for all to see and the argument, to the extent it is, is was the provision infringing or not.

Now, that's something where one would need an early determination of infringement or not and a wait and see approach is entirely inimical to legal certainty and a cessation requirement, if you're debating whether there is indeed an infringement or not, a cessation requirement means that a wait and see approach is likely to be incentivised whilst the damages rack up and the infringer is left in a state of great uncertainty about whether to shut up shop or not because only by shutting up shop and ending what is potentially a legitimate course of conduct can they ensure that the claim is brought or not.

MR SAUNDERS: But, my Lord, I don't think we accept that shutting up shop is a necessary consequence. What we're talking about is whether the infringer could regulate their behaviour so that they no longer conduct the infringement.

Now, it is recognised that one of the incentives of this regime is to make sure that people who are infringing behave themselves.

MR JUSTICE MARCUS SMITH: Well -- but my point is it's actually not always straightforward to understand whether you are infringing. If it was that easy then we would have a lot less work.

MR SAUNDERS: My Lord, there are -- it is -- it becomes rather easier in the context of a follow-on case because one has already been through the wringer of the regulator.

MR JUSTICE MARCUS SMITH: True, indeed, but we can't debate these generalities on every single specific case.

MR SAUNDERS: Yes, that is the difficulty more generally because one can conceive of cases at the margins that, as it were, bring into sharp relief different aspects of the overall regime. I mean, for present purposes, I don't need to put my submission that high because all we say is that you see through *Manfredi* the nascent cessation condition and you see in *Cogeco* the knowledge requirement and, in a second, without stealing my thunder, *Volvo* brings them all together and writes them down. That's the thrust of our submission.

So the ins and outs of the overall operation of the scheme was applied to a myriad of different hypothetical cases, it is not something we need to concern ourselves with at present, although I can see my Lords have a different -- one different supervisory role as well you have to consider for the shape of the Tribunal and all the different sorts of claims that come before it in the future.

In any event, as Mr Justice Roth, I think, acknowledged earlier on, the knowledge requirement is our primary concern in Merricks, at least.

Can we just turn to *Volvo* itself. *Volvo* is at Authorities Bundle, volume 7, tab 123, PDF page 3692. Again, Arabadjiev as the Rapporteur. You know, my Lords, the facts; I won't go through that. I will just pick up, if I may, on the operative parts of the judgment.

You will see, just to pick it up at the bottom of -- or pick it up at paragraph 50, if I may, of 3701, so what we see is paragraph 50 reciting via the Rapporteur's earlier case in *Cogeco* the principle of effectiveness.

51 is reflecting the one-year limitation period and national laws. There is a bit of uncertainty about exactly how it was run. I am slightly surprised that they didn't cross-examine the Spanish advocate on that. That tended to be the sort of thing that would happen, but there is some uncertainty there.

Paragraph 52, you mustn't do it *contra legem.* There seems to be a point taken

about that paragraph by the Defendants. In essence, it's saying don't trump national law. That misses the point. The law is that national provision must be disapplied only insofar as it conflicts with EU law, but only if there is no interpretation, a conforming interpretation, that can be carried out. So it isn't -- we say you can construe it in conformity, but -- so I'm not sure whether -- I will wait to hear how my learned friends develop that, but I'm not sure that really takes their argument any further.

53 says you have to adapt to the specificities of competition law. We have seen that in *Cogeco* and all the earlier cases.

54 is the complex factual analysis point. Again, we have seen that before.

55 is the information asymmetry. That's a consequence of the-- just writing down the consequence of the fact that you need to have to carry out the factual and economic analysis.

56 and 57 are the consequences of all of that.

Now, 56 we say reflects the consequence, the logical consequence of those earlier threads of law. Then you see the knowledge at 56, final sentence. 59, 60 and 61, again my Lords have seen these paragraphs, but all of that is bringing together, in our submission, all of those threads. It is not coming from nowhere; it's reaffirming and expressing the same principles we have seen in earlier cases or effectively just writing them down. So *Volvo* is rather more the kind of same steady people carrier that you would imagine it would be. It is not a kind of completely new rewriting of all these principles.

Now, the other point just to make on *Volvo* is what is absolutely clear, looking at these principles, is these are all of the same case law, the same principles about effectiveness and equivalence. These are not Damages Directive specific things, they are precisely what -- precisely the same sorts of principles we have seen drawn

together through all those threads of the earlier case law.

So that's *Volvo*. You've heard my submissions, I won't repeat them more generally. What do we say about the questions? Well, yes and yes, you have seen that in our skeleton argument for questions 1 and 2. The knowledge requirement you see from *Cogeco* and we also have that reflected in *Volvo* paragraph 61.

If I may, I will just pick up very briefly some of the blizzard of points that are made against this argument by my learned friends for Mastercard and Visa.

The first of those is it is said that *Volvo* should not be followed because of *Arcadia*. Now, my learned friend, Ms Kreisberger, made some points about that yesterday which we absolutely agree with, but one very short point is that EU law has moved on after *Arcadia* was decided because we have *Cogeco*. It didn't address that. But actually can we look extremely briefly at the Court of Appeal decision itself. We find that in Authorities Bundle, volume 4, tab 77, PDF page 2217.

This is the appeal decision before Sir Terry Etherton, the Chancellor, and Lord Justices Richards and Patten.

If you just look on 2218, there is a list of the cases that were referred to and the cases cited to the court. Just whizzing through those, you have the Test Claimants in the *FII Group Litigation*, that's the Supreme Court decision on the FII Group which was a recovery case.

What you don't see is the run of cases that we have just been discussing and so -- and nor do we see those sorts of cases about the specific principles that arise in relation to competition claims, the manifestation of effectiveness as it arises in competition cases.

If we look at 2235, this is the relevant part of the decision, it's a very robust, you see paragraph 74, a very robust conclusion, but it's one that on its face was made without the benefit of the argument in *Cogeco* or, in fact, as far as we can see, any of

the other authorities that I have just addressed you on.

To submit that this is the answer to the case, leaving aside its binding status or whether the law has moved on or whether it states-- I mean, it just doesn't grapple with the same issues at all. And so that is a very important bump in the road, I will put it no higher for the time being, for I think my learned friends' arguments that they're going to make in due course about the importance of *Arcadia*.

I think it is mentioned in the Mastercard skeleton at least 13 times, and the Visa skeleton at least five times, so it's obviously a big point, but it is a difficult one because it just isn't looking at the same points.

It is said that the reasoning in *Volvo* is incoherent and unprincipled. That's not right at all. We submit *Volvo* is effectively writing down the consequences of those earlier cases and you can see how we have drawn all that together.

It is said that *Volvo* should be limited to the facts of the case, Mastercard made that point three times. That isn't how CJEU authorities are normally treated. There are references, preliminary references on points of law, but it isn't a reasonable reading of *Volvo* anyway in my submission. They say it's unsupported by prior EU authority. Well, you have heard my submissions on that and you can see, just on the face of the authority, how it all brings it together.

They say it's not -- the Advocate General's opinion should be preferred. That's not the law. And it's not -- they say that that's -- a part of that submission is that it's not consistent with the earlier case law. Well, it is because actually, if you look at Cogeco and so on, you can see all these threads drawn together.

There is the point that *Volvo* shouldn't be given any weight because it wasn't a decision of the Grand Chamber. You can say that about all but a very small number of ECJ decisions, it is a bad point. Actually, if anything, it's a point against them because all it is doing is drawing together the same threads that the

Rapporteur saw before.

They say that it's contrary to English public policy having removed accrued limitation rights. That argument simply begs the question because Mastercard may have thought that it had accrued some limitation rights by not having considered the effect of the principle of effectiveness, but all it does, it isn't a freestanding point. It's really -- all it does is just beg the question of what is the correct approach to the proper scope of the EU law points which are before this Tribunal. So once you've resolved those, I suspect there are no legs in the public policy argument separate to that.

I will obviously come back to other things in reply.

Can I just address you relatively briefly on question 3. Now, my learned friend was working from the text in the Supplementary Authorities bundle, so if I may I will do the same. So that's the first Supplementary Authorities Bundle at tab 3, PDF page 87.

MR TIDSWELL: Can you give me the page?

MR SAUNDERS: It's Supplementary Authorities Bundle, tab 3, page 87 in the PDF. There is also-- in the Authorities Bundle, volume 1 there is another copy of it, but it doesn't run all the way through. So if you have the Authorities Bundle, volume 1 you will have most of it.

MR TIDSWELL: For some reason my -- apologies.

MR SAUNDERS: So my learned friend, Ms Kreisberger, has already addressed you in detail on this and if you're with her on those submissions, then we enthusiastically follow on with those. If not, then in my submission there is another way through and I will just address you briefly on that.

The starting point is to recall what -- the Merricks proceedings are collective proceedings. Their individual claims are claims for damages caused by breach of

statutory duty in infringing Article 101 of the treaty. So they were collective proceedings. They were issued on 6 September 2016, so long before by the IP completion date and they're a claim for the accrued rights of every customer in the country who has suffered as a result of the infringement, unless you've opted out, and subject to those qualification requirements which you may recall.

So they're follow-on claims.

If we may, let's look at the structure of the Act. So page 87 if you have -- start with section 1. Page 87 provides in bare terms that the 1972 European Communities Act is repealed on exit date, so it is not qualified in any way, it is absolute. So that's obviously suboptimal for my case if it were left there but fortunately it's not.

1A and 1B deal with the implementation period and then we get to sections 2, 3 and 4 which pick up on page 90 of the PDF. They're in a section called “Retention of saved EU law at the end of the implementation period”. So what broadly those do is section 2 at a high level saves EU-derived domestic legislation. So, for example, if you were in the UK implementing a directive, that's saved by section 2.

Section 3, over the page on page 91, incorporates everything immediately before IP completion day, so this deals with regulations and decisions and so on. You will see that there just in the definition 3(2)(a):

"Any EU regulation, EU decision or EU tertiary legislation” is frozen and carried forward.

Then section 4 on page 93 provides for -- saves the rights under section 2(1) of the European Communities Act, so any rights that are recognised and available in domestic law by virtue of section 2(1) are:

"... enforced, allowed and followed".

They continue after completion day. So that's my claim.

We're okay under section 4(1) because all our accrued rights are recognised and

remain available in domestic law and those that were immediately before IP completion day, they're carried forward.

So far so good and just to make that-- if you look at the Explanatory Notes, so you need the PDF 292, page 292 in the Supplementary Authorities Bundle, and then paragraph 92 and 93, so you will see here these are obviously the Explanatory Notes to the Act, but: "section 4 ensures that any remaining EU rights and obligations which do not fall within sections 2 and 3 continue to be recognised and available… This includes… directly effective rights contained within EU treaties."Directly effective rights.

It then tells us what they are.

"94. The Government --"

And you will see it has a little table of the ones that it thought were directly effective and there is 101 and 102, just down there.

If we can go back to section 4 on page 93. So that's the basis on which the rights are preserved, section 4(1).

Section 5 then sets out an exception to that which is frozen and those are the exceptions to savings or incorporation. Notably section 5(4), "The Charter of Fundamental Rights is not part of domestic law", which is particularly ironic because just before this, the UK had won a whole series of cases on the Charter of Fundamental Rights, but it was all chopped out.

Then you will see in 5(6), you see a provision bringing into effect Schedule 1. So that 5(6) on page 94 is the thing that activates Schedule 1. So let's have a look at that.

Schedule 1 starts on page 129 of the PDF. And then if we can look at over the page just at page 130, paragraph 2, so "General principles of EU law":

"No general principle of EU law is part of domestic law on or after IP completion day

if it was not recognised as a general principle… by the European Court in a case decided before IP completion day (whether or not as an essential part of the decision in the case)."

It's a freezing of the general principles and then you will see in 3 and 4 they actually -- 4 actually excludes the possibility of a *Francovich* damages claim, so this is a general principle. This, we say, doesn't -- effectiveness absolutely was the general principle that was recognised.

There is no right after IP completion date to bring a claim based on a failure of a general principle. I can't bring a *Francovich* damages case anymore, but we also need to look at Schedule 8 which deals with the claim on foot. So that's page 234 and then over to page 269.

Buried here in paragraph 39, subsection (3), so that says:

"Section 5(4) and paragraphs 3 and 4 of Schedule 1 do not apply in relation to any proceedings begun but not finally decided..."

So that's us. We're begun but not finally decided. So those claims on foot-- so we have a pre-IP completion day claim for accrued rights which are recognised under section 4(1). It's preserved. So that's the default position.

Now could we look back at PDF page 95, so 95 in the Supplementary Authorities Bundle, section 6. So that's how the court -- so the court, this court or Tribunal is not bound by principles or decisions made on or after IP completion day. So formally you are not bound on this analysis by a decision made after IP completion day and nor can you refer. There are some in all sorts of wiggly bits at the end of this that enable references to be made in relation to Northern Ireland Protocol and all sorts of things, but don't worry about those for the time being. So, there is still some competency to refer but very limited.

Then we have the court may have regard to anything done by the European Court.

So that's a matter for you to consider:

"Questions [of] validity, meaning or effect of … EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it … retained case law and any retained general principles of EU law..." [As read]

So we say that effectiveness is a retained general principle of EU law and you have heard my submissions on that.

So you're under an obligation to determine that retained law by reference to the retained case law and you may have regard to the later cases, but it is not right, these cases that we're considering here, *Volvo*, does not -- is not one which is setting up some new principle of EU law. In my submission, properly construed, it is writing down the consequence of that earlier principle which has already been identified.

If we could just look over the page to page 97, you will see that retained EU law definition, so this is in subsection 7:

""Retained EU law" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law [either in] section 2, 3 or 4..." [As read]

So it sucks in everything.

Now, so we say *Volvo* reflects the law as it was prior to IP completion day, as it were the torch light of that reference is shone upon aspects of that retained law, but that is something which -- all it is doing is explaining the consequences of the earlier case law.

In any event, judgments are declaratory and CJEU judgments are declaratory and we put the reference in our skeleton, Dansk Industri and so on, about -- this was the debate my Lord was having yesterday about whether one was, as it were, finding the common law or whether it is just declaring, but Dansk Industri establishes that the Court of Justice is telling one how things always were. So they're sort of less

troubled by the common lawyer's concerns in that regard, perhaps.

But if we're wrong about all of that, we say that you should still have regard to *Volvo* and the first point on that, we say, is that there is nothing on any view that-- *Volvo* is consistent with the retained EU case law that we have already looked at. At best, it is just a more explicit articulation of principles that already existed in that context and the Court of Appeal has looked in various cases at post-IP completion date case law. There are references in our skeleton at paragraph 48 where that's happened.

We say the rationale behind the *Volvo* case is equally applicable to Merricks. All of that is about achieving the full effect of Article 101 and facilitating private damages actions.

One point we do make which is possibly slightly more of a jury point than anything else, but we do say it's unreasonable for Mastercard to gain what we say is, in effect, a windfall as a result of this whole arrangement by being permitted to reduce the scope of its claims, even though they were commenced in the UK prior to -- when the UK was still a Member State, but that reduction is not permitted in relation to equivalent claims brought before IP completion day in other Member States because they have -- it would have *Volvo* and there is no question of that happening.

So it is -- there is a very unattractive aspect of this through no fault of anyone. If the effects of the legislation were to achieve all of this, then in my submission, just at a high level, one would expect to see a very clear basis on which to form a principled distinction in that way. So we say the answer to question 3 was yes, but even if we're wrong you should follow *Volvo*.

MR JUSTICE ROTH: I'm not sure I understand. You're saying that Article 101 is retained EU law, the general principle -- the principle of effectiveness is part of retained EU law because it's a pre-established general principle. *Volvo* is clearly a post-IP completion date decision, but we clearly may have regard to it. The statute

says so. We should have regard to it and it's not saying anything new; it's consistent with everything which went before which we are bound by and therefore we should apply it. Is that --

MR SAUNDERS: Absolutely, my Lord.

MR TIDSWELL: How does that sit with section 6(3)? Isn't that telling us that when we look at retained EU law, we're to do it by reference to the freeze-framed position and not future position?

MR SAUNDERS: Well, my Lord, what we would say about that is that these principles are already there. All *Volvo* is doing is declaring the scope of the principles that pre-exist and, as I say, that's why I went through the exercise of trying to draw threads together into *Volvo*.

MR TIDSWELL: Yes, I understand that. So you're -- it's really the point Mr Justice Roth just repeated back to you, that you just say that there is clarification of what the law was. You're effectively saying the law --

MR SAUNDERS: The law was there.

MR TIDSWELL: You get to *Cogeco*. It is pretty clear (overspeaking) -- that brings it all together, but actually the law is still there and therefore as part of retained law it goes through section 4 and therefore can be applied under section --

MR SAUNDERS: One way of looking at *Volvo* is someone wrote down the consequences of that case law, effectively.

MR TIDSWELL: Yes.

MR SAUNDERS: But that is a long, long way from the sort of thing that is intended to be excluded. Imagine the Court of Justice cooked up a new damages liability that arose in some particular circumstances. You can quite imagine why this legislation would be intended to cut that off, but this is not that sort of case by any stretch of the imagination. It's a long, long way from that, we would say.

MR TIDSWELL: Yes, thank you.

MR SAUNDERS: My Lord, now, the next question is 4(a), so that's the English law of limitation. That's already been -- there's a Tribunal decision that deals with our position on that. We put the references in the skeleton argument and that's subject to an appeal, but those issues, the application of the limitation regime as it applies to the Merricks claim is already subject to those findings. So, if I may, I won't address you on that and we set all the material out in the skeleton argument. We are where we are with the Tribunal's earlier ruling on that.

Which leaves us with the Scots law issues. If I may, I will hand over to Mr O'Neill.

Submissions by MR O'NEILL

MR O'NEILL: Obliged. It's proposed that I take this very briefly, so basically I'm going to have to speak in bullet points, but if there are any bullets which the Tribunal wishes to stop or dodge, then just stop me and I will expand on them as might be of any use.

The Merricks proceedings, as we know, contain Scottish and English claims and claimants and that's -- and that distinguishes them from the merchant claims, so that's an important point to start with.

The Scots law considerations are only relevant to the Merricks proceedings and, again, that's potentially important in terms of the potential application of the principle of equal treatment which I will look through.

Because the Tribunal in the earlier decision decided that Scots law was the applicable law for the Scottish class members, then the Tribunal has to have regard to Scots law for those purposes as the *lex fori* otherwise it would be determining Scots law as foreign law and therefore that would, as a matter of fact, need expert evidence and would not allow for the potential for appeal to the Court of Sessions

such as the legislation allows for.

In a sense, what you have with these collective proceedings - because they encompass both Scottish class members where the applicable law is determined to be Scots law and non-Scottish class members who have English or Northern Irish law - in a sense, you have parallel simultaneous proceedings all within the one claim all being decided by the same the Tribunal. So the Tribunal is both-- simultaneously both a Scottish Tribunal applying *lex fori* of Scots law in relation to the Scottish claimants, but is also simultaneously a Tribunal of England and Wales applying English law and Northern Irish law to the other claimants, and potentially other applicable law. But it's doing the foreign applicable law as an English Tribunal, so that's a matter of fact but when it's applying Scots law it's as a Scottish -- it's sitting in Scotland, as it were, in order, as I say, not to make a finding of Scots law as foreign law.

Effectively, the previous decision of the Tribunal has determined that the Scots law is, in fact, *Volvo*-compliant, at least in the sense that it does contain a cessation condition. So at some levels then one can say that the question about – the question 4(b) has been superseded and I think that, in fact, is common ground because the result of saying that Scots law contains a cessation condition, such as has been adumbrated in *Volvo*, is that none of the Scots law claims are time-barred. Everything is covered from 1992 to 2007.

The important point, however, is that that, unlike the English law aspects of the decision for which permission to appeal has been sought from the Tribunal, there has been no permission sought in relation to the Scots law claims. So that finding by this Tribunal, sitting as a Scottish Tribunal, has come -- is now a final decision on a matter of Scots law. There is no appeal to it. It is definitive on that point.

Now, that I say, the fact that you now have a definitive finding by the Tribunal on

what Scots law requires and that none of the Scots law claimants are time-barred, is at least a relevant consideration at this stage for the Tribunal to take into account in relation to the Merricks claims, and only the Merricks claims, which are governed by English law and Northern Irish law with applicable laws other than Scots law.

I say it is a relevant consideration at this stage because the Tribunal has not -- because -- it's a relevant consideration for the Tribunal to come to its decision because, of course, the Tribunal is bound to apply general principles of EU law when coming to its decision and if its decision is one which, on its face, is contrary to the principle of equal treatment, then it should not come to that decision.

It has to at least take into account at this stage what might equal treatment require. If it turns out that the Tribunal does decide that there should be unequal treatment, as it were, that the English-based Merricks claims are time-barred whereas the Scottish-based Merricks claims are not time-barred, then that might raise a separate and distinct ground which would have to be looked at in the light of the decision of the Tribunal in terms of its compatibility with EU law principle of equal treatment.

At this stage, before the Tribunal comes to any decision, it should at least always bear in mind the equal treatment aspects given the treatment which has been given to the Scots law claims.

MR JUSTICE MARCUS SMITH: Just to understand, when considering that question, where or in which part of the United Kingdom we are sitting, if we were talking about levelling up, in other words extending the limitation period to make it more generous, that would be an England and Wales question. If we were talking about a levelling down, which no one is arguing about, but if we were, hypothetically speaking, to do that, that would a Scotland question.

MR O'NEILL: Yes, but when it comes to the application of the principle of levelling up, which is a requirement of EU law, you are sitting as an EU Tribunal, as they said

in *Lumsdon*.

MR JUSTICE MARCUS SMITH: I appreciate that, but we are not -- that's not one of the options on the menu, I don't think.

MR O'NEILL: Well, it's a necessary option on the menu. As is said in *Lumsdon* in the Supreme Court, when a national court is considering and applying EU law, such as done here, it is acting as if it were an EU court and working from the perspective of EU law.

Now, it's interesting, for example, the case of News Corp which has just been put in by the -- in terms of the Authorities Bundle, volume 3, the reported version of that. The judgment of Lord Hamblen and Lord Burrows on that issue, which was about whether or not there should be zero VAT rating for online newspapers, as it were, said we have to look at this from the perspective of EU law. It is from the perspective of EU law as to what it regards is appropriate in terms of zero rating for VAT purposes and what -- and it's from that perspective that one then interprets in a very narrow way, the court says in *News Corp*, because one is taking, as it were, the view from above-- the view from Luxembourg that one then interprets national law provisions, whether or not in that case the statutes were always speaking and what that meant, in a very narrow way to ensure that the EU law perspective took -- was vindicated ultimately.

So one cannot -- I say the fact that this court-- this Tribunal is unusual but not unique in the sense that it does-- it can sit simultaneously as a Scottish Tribunal and as an English Tribunal and the Employment Appeal Tribunal potentially does that as well. It can't sit in Northern Ireland. The UK Supreme Court, as we know, sometimes is a Scottish Tribunal, sometimes it's an English Tribunal and it doesn't matter as to the composition of the judges. That doesn't make something a Scottish or an English Tribunal. It's a question of which legal system it comes from.

But from the perspective of EU law -- and this is important from the point of equal treatment -- from the perspective of EU law, the UK is a Member State and equal treatment as a principle of EU law applies within the context of treatment of claims within the UK as a Member State.

Even if sitting as a Tribunal of England and Wales, one is applying EU law and therefore taking the EU law perspective, which is to say that equal treatment applies within the context of the whole Member State. The important thing is, of course, that the principle of equal treatment does not apply in terms of comparing how different Member States operate.

One would not have a claim for a breach of equal treatment on the basis that as a Netherlands national, French nationals had a different approach or a longer time period or anything of the sort, but because EU law treats the Member State as one, you do have that claim where there's a differential, as in this case, potentially, between how this Tribunal treats the Scots law based claimants in terms of time-bar as opposed to the non-Scots law claimants.

So that is necessarily a relevant consideration and it's the EU principle of equal treatment. Of course, it's not the domestic issues around equal treatment. We know from the case of *Gallaher v Competition and Markets Authority*, which was a Supreme Court decision of 2016, that there is no separate domestic administrative law -- principle of equal treatment, but there is a strong and quite discrete principle of equal treatment which does apply as a matter of EU law.

It's akin to what we have seen in some of the case law, the principle of equivalence and they talk about the principle of equivalence and of effectiveness, but it's not the same as that. It's not a question of looking at how other domestic law claims in the same position are treated. It's a broader principle than that and what it says is that, if you have relevantly similar claims, they have to be treated in the same way unless

there is objective justification as to why they should be treated differently.

We know from the very fact that this Tribunal made an order under section 47B(6) to include Scottish and English claims within the one proceedings. It could only have done that on the basis that the claims, as 47B(6) of the Competition Act says, "Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings". [As read]

So I say it is a necessary -- it follows on from that that for the purposes of the principle of equal treatment, the Scots law claims and the English law governed claims are relevantly similar. The principle of equal treatment in a sense applies. Therefore, if you're going to treat them differently in terms of holding some cases to be time-barred and some not, there has to be proper, objective justification for that differential treatment and it is not enough, because it is wholly circular, to say well that's because they're Scottish claims or that is because these are English claims, that that's why we treat them differently. That's not an objective justification such as would be required under EU law.

What objective justification would require is justification under reference to the classic proportionality test. What is the legitimate aim of treating the Scots law claimants - of time-barring the English law claims but having all the Scottish law claims non-time-barred. What is the legitimate aim which is sought by that? Is that legitimate aim being achieved by differentiating on terms of time-bar between the Scottish and English claims? Is there a less restrictive alternative which might achieve whatever the legitimate aim is? And, finally, is there a disproportionate burden expected to be distributed or placed on one group or class compared to another in attempting to reach that legitimate aim?

So a classic proportionality analysis would be required for objective justification and,

frankly, simply saying, well, that's how our constitution is that we have two separate legal systems and that we're simply paying heed to that or respecting it, is not enough. There are plenty of cases. This is not an issue which has arisen only in the United Kingdom; it arises constantly, as one might expect, in Belgium given the radical decentralisation or the radical federalisation within Belgium and the tensions between Wallonia and Flanders and the case law is consistent. There is a consistent line of case law to the effect that you cannot rely on your own internal constitutional arrangements to say that principles otherwise-- the application of principles otherwise required under EU law should not be applied in this case.

So that's why I say it's not enough simply to say, well, these claims we have decided are governed by different systems of law within the United Kingdom. What is your justification for that treatment in terms of as required as a matter of EU law? That has to be taken into account.

The other point which it's important to make is, of course, that equal treatment can be prayed in aid, in a sense, in relation to treatment which is better than is required as a matter of EU law. That's a supererogatory approach, as Lord Justice Laws referred to it, in that it parallels the position in ECHR law, where rights which have been voluntarily provided to -- by the contracting states, to individuals which are beyond what is required under the Convention still have to be -- there still has to be equal and non-discriminatory application of those rights because one falls within Article 14 ECHR.

The case of *Chester v McGeoch* from the Supreme Court, again, I won't turn it up, but it's at tab 9 of the Supplementary Authorities Bundle, page 461 and it was to do with prisoner's voting rights which is not what one would expect to be discussing in the Competition Appeal Tribunal, but there it is. There is discussion there by Lord Mance of a previous case of the Court of Justice about -- again about voting

rights called *Eman and Sevinger v The Netherlands* and that was a case in which the right to vote for the European Parliament in the Netherlands was granted to persons who lived within -- who were Dutch nationals within the Kingdom of the Netherlands, but was taken away if you moved to territories such as Aruba or the Dutch Antilles which were also still integrated as part of the Kingdom of the Netherlands. So there was differential treatment of Dutch nationals in relation to election to -- the right to vote in the European Parliament and that was held to fall within the principle of equal treatment and was held to contravene that principle of equal treatment even though there wasn't an EU law requirement as to who might or might not vote in the European elections at the time.

So that's an example of the application of the principle of equal treatment to treatment given by the Member State which is greater than might otherwise necessarily be required by EU law. This is why we come then to the levelling up principle.

In the present case, it might be that the court feels that the principle of effectiveness does not require the cessation provision being put into the English law limitation legislation, but nonetheless because this court has, this Tribunal has, made a final and unappealable decision that the Scots law claimants do have a cessation provision in line with *Volvo*, then they are required, even though it's going more than the Tribunal considers to be required by the principle of effectiveness, they're required by the principle of equal treatment to bring the standards up to the same level. And there is lots of case law to that effect. *Cresco* is the most recent Grand Chamber decision and they're noted-- the full references are made in the skeleton argument.

So in sum, we have in this case relevantly similar claims between the Scots and the English claimants. We have no evidence and no grounds, really, upon which

the Tribunal at this stage can say it would be justified for there to be a differential treatment between the Scots and English claims in terms of the time-bar.

So one has to, as an EU law Tribunal, achieve the levelling up which EU law requires. In a sense, one can be agnostic about how the Tribunal wishes to reach that decision. It can do it by saying, "Well, actually, there is not going to be unequal treatment because *Volvo* properly interpreted is simply in line with what has been put forward by the claimants and it's part of the principle of effectiveness, so the problem disappears". That's why I say it's a relevant consideration at this stage; the problem disappears.

But if the view is that effectiveness does not require that, that the Defendants are correct and that *Volvo* is some kind of innovation and is not binding and shouldn't be had regard to and certainly shouldn't be applied, it still remains the case that, in the Merricks case and the Merricks case alone, because it's only in this case that the equal treatment bites, that that necessity for levelling up in these proceedings comes in and that can be done either by conforming interpretation or by disapplication. We know that those principles are preserved expressly in the 2018 Act, but we also know that such conforming interpretation and/or disapplication are specific to the particular case and the particular facts. This court would not be saying for all purposes the English limitation provisions have to be interpreted with the cessation condition or the like.

It is only because of the peculiarities of the case of Merricks with its requirements of equal treatment because you have claimants from -- with cases governed by Scots law which doesn't have a cessation -- which does have a cessation requirement and covered by English law that you then have to treat them in the same way.

So one does not have to worry about flood gates or what does this mean for other cases. There are no other cases like this, but disapplication is always specific to the

particular circumstances before it.

So I think that's my 20 minutes or so.

MR TIDSWELL: What's the equivalent in this case of the legislative provision in the prisoners' voting case? Because I don't think you can just say, can you, that there is a difference in the limitation periods and therefore there is a requirement to level up? That doesn't -- that can't follow just because the legislation happens to be different, the principle immediately applies because otherwise that would apply to every difference between English law and Scots law.

So what's the further principle here that equates to the requirement that was in the prisoners' voting case that prisoners had to be entitled to vote?

MR O'NEILL: It was found that was an unsuccessful attempt to get prisoners' rights to vote and it was said that because EU law didn't require it, then they didn't apply it and it wasn't a difference between English and Scots law because both in England and Scotland -- they were two parallel cases.

MR TIDSWELL: Maybe it's a bad example, but I think what I am putting to you is there must be something more than just a difference in limitation periods. There must be some overriding principle or requirement and here -- you could say -- obviously you could say it's *Volvo*, but of course if it was *Volvo*, then we would be required to apply it and there wouldn't be a need to level up. So assume it's not *Volvo*, what is it?

MR O'NEILL: What it is, is Merricks. You have unusually a claim which is most clearly reliant upon the direct effect of EU law, the damages claim is a follow-on damages which is directly found and bound by EU law and it is being applied within the one set of proceedings in which the Tribunal has said that these are relevantly similar claims against a background that EU law requires not just effectiveness but, as is said in *Cogeco*, effective applicability.

MR TIDSWELL: But why does that not apply, then, to the other proceedings? Why does it make any difference whether they are the same proceedings?

MR O'NEILL: It doesn't apply in the other proceedings because they don't have the Scots law element. Therefore, there is no unequal treatment in relation to those proceedings.

MR TIDSWELL: So you're saying that the thing that makes it necessary to create equality is the fact that it's all the same proceedings?

MR O'NEILL: But the same proceedings in which a judgment has been made that the consumers at issue are in a relevantly similar position otherwise one couldn't have made the collective -- whereas the merchants case is that everybody has elected simply to be governed by English law. There is no suggestion of some merchants being covered by Scots law or the like. The election has been made, but in this case it has not, but --

MR TIDSWELL: But essentially the characteristics of the collective proceeding that give rise to the obligation for --

MR O'NEILL: Yes, the characteristic of this collective proceeding which this Tribunal has found has two different applicable laws internally.

MR TIDSWELL: Yes, thank you.

MR O'NEILL: The principle of equal treatment applies to internal situations within the Member State. The Member State is obliged to treat everybody within its jurisdiction equally. They don't apply, as I have said before, between differences between Member States, but Scotland and England are part of the one Member State, well, were part of the one Member State, so that's the difference.

MR JUSTICE MARCUS SMITH: Let's hypothesise that a class member or potential class member subject to the law of England and Wales opted out of the Merricks proceedings, which limitation period would apply to that person if they brought

a claim independently?

MR O'NEILL: Well, if they opted out and got it independently, it would be whichever was their applicable law was the limitation -- but that is always the case.

MR JUSTICE MARCUS SMITH: Yes.

MR O'NEILL: The question as to whether or not the principle of equal treatment can be prayed in aid --

MR JUSTICE MARCUS SMITH: Yes, that's my question.

MR O'NEILL: -- in relation to -- and in order to do that you have to identify and say that there are similarly treated claims which are -- there are similarly situated claims which are treated differently. So an opt out would be able to, assuming that the opt out was for reasons other than well, my claim is different from the rest of them, would potentially be able to claim that equal treatment principle.

MR JUSTICE MARCUS SMITH: I see.

Thank you very much, Mr O'Neill, much obliged.

MR SAUNDERS: There is one thing which I wished to address you on which was the remedies. We set that out in our skeleton at 53 to 64. Unless my Lords have some questions for me, I won't go back over that, but that's just the remedies if, on the two different positions, *Volvo* -- if the principles in *Volvo* already arise in the UK case law, or if they don't, we set out our position on each.

MR JUSTICE MARCUS SMITH: I am grateful.

MR SAUNDERS: Unless Mr Justice Roth has a question. Just as a formality.

MR JUSTICE MARCUS SMITH: No, I am grateful.

Is it Mr Otty or Mr Salzedo going next?

MR OTTY: We will be boxing and coxing, starting with me. I don't know whether now would be a convenient moment for the transcriber--

MR JUSTICE MARCUS SMITH: I think now is a convenient moment, we have been

going since 10 o'clock. We will rise until 5 to midday and we will resume then with you.

(11.43 am)

(A short break)

(11.55 am)

MR JUSTICE MARCUS SMITH: Mr Otty.

Submissions by MR OTTY

MR OTTY: Thank you, sir. I, as you know, appear for Mastercard together with Mr Cook, Ms Patel and Mr Lewy, and our case remains as set out in our skeleton argument and we also respectfully agree with and adopt the skeleton argument filed by Mr Salzedo and his team.

In those circumstances, as I indicated before the break, if it is acceptable to the Tribunal and in an attempt to avoid repetition, Mr Salzedo and I would like to engage in what I called a degree of boxing and coxing and our preferred course is that I start and give an overview of what we submit to be the key issues for the Tribunal and a summary of our position on them.

Mr Salzedo would then address the Tribunal on the Brexit legislation and how it is to be read and I would then return to the fray to address *Volvo* itself, what it means, why we say it shouldn't be followed in the present case, before summarising where that leaves us in terms of the Tribunal's four questions. Mr Salzedo would then follow with any additional points he wishes to make but also seeking to avoid repetition as he does so.

MR JUSTICE MARCUS SMITH: I'm very grateful. That seems sensible, thank you.

MR OTTY: So until the Court of Justice's decision in *Volvo* delivered on 22 June last year and the Claimants' subsequent embrace of it, there was no doubt as to the

limitation rules applicable to any of the claims pending before the Tribunal.

So far as English law is concerned, they were those set out within the Limitation Act and the Competition Act described in our skeleton argument at 31 through to 49 and summarised at paragraph 50.

So far as claims governed by other laws are concerned, those too would have fallen to be determined in accordance with the relevant domestic limitation rules applicable under those laws.

In the light of *Volvo*, however, the Claimants now in substance contend that no limitation period at all can be treated as running before the ongoing infringements of which they complain had ceased and before they had obtained the particular form of knowledge in respect of their claims described in paragraph 61 of the *Volvo* judgment and, in substance, mirroring Article 10(2) of the Damages Directive.

In those circumstances, we say, if any party is seeking to modify accrued rights, it is the Claimants since it is they who are seeking to remove limitation defences that everyone understood existed prior to IP completion date and it's against that background, of course, of *Volvo* that the Tribunal directed the four questions before it should be addressed and in respect of which Mastercard's position is summarised, as I say, in the skeleton argument.

Now, it is our submission by way of overview that the central issues before the Tribunal can, in fact, be reduced further down to two basic questions. The first basic question in the post-Brexit world we're living in is what status does *Volvo* have before this Tribunal -- or indeed any other UK court or tribunal -- when the Tribunal is considering matters of UK law, it being, of course, a decision delivered after what is described as the IP completion day at 31 December 2020.

As to that, and as Mr Salzedo will explain in more detail in a moment, we say in summary that it is not binding and it is simply a decision that the Tribunal is entitled,

at most, to have regard to if it is relevant at all. That is, we say, the clear effect of section 6 of the 2018 Withdrawal Act and section 60A of the Competition Act and, to be clear, we rely on both, but either is, of course, sufficient for our purposes in moving from that binding to “have regard to” status.

That's the outcome whether one characterises the Claimants' claims as relating to retained EU law or as relating to accrued EU law rights, a term of art which the Stephenson Harwood Claimants base their case on but which, of course, features nowhere in the Brexit legislation itself.

Parliamentary legislation, ministerial statements, explanatory notes and international agreements in the form of the Withdrawal Agreement are all to one effect. Court of Justice decisions after 31 December 2020 have no binding effect in proceedings before UK courts or tribunals in relation to matters of EU law. So that's the first basic question and, as I say, Mr Salzedo will address the substance of it shortly.

The second basic question is, if *Volvo* is not binding, whether its approach should be followed and, again, in summary we say it should not be.

First, its operative part and reasoning is on a proper analysis irrelevant to the present proceedings. Properly analysed and understood *Volvo* was a case about the interpretation and temporal scope of the Damages Directive and its application to a particularly strict Spanish limitation regime. That is not what these proceedings are about and that means that Volvo does not bind this Tribunal and should not be followed regardless of the Brexit legislation debate.

Secondly, the Claimants' central argument that *Volvo* establishes that the English legal framework on limitation, as set out in the Limitation Act, is contrary to the principle of effectiveness is itself contrary to binding, very clear Court of Appeal authority in the form of *Arcadia*.

Thirdly, such reasoning as there was in *Volvo* and which is said to underpin the Claimants' interpretation of it was, with respect, incoherent and unprincipled and should not be followed for that reason, too.

As well as not being reflected in the operative part of the judgment itself in *Volvo*, the Claimants' interpretation is inconsistent, we say, with previous Court of Justice case law. It is less persuasive than the opinion of the Advocate General in the same case and it involves a series of *non sequiturs* failing to adequately respect the principles of Member State autonomy, legal certainty and non-retroactivity.

Now, before handing over to Mr Salzedo to address the first of these two questions in more detail, I would like to preview and emphasise, if I may, what we submit to be six basic flaws in the approach of the Claimants which dovetail to some extent with the summary of our positive case, as I have just sought to articulate it, but add something, I hope, too, and which will recur in the course of our submissions.

The first point is that so far as the status of *Volvo* as a post-Brexit decision is concerned, we say the Stephenson Harwood Claimants seek a reading of section 6 of the 2018 Act which is inconsistent with the clear unequivocal words used in section 6(1) and which undermines a central tenet of the legislation and indeed of Brexit more broadly. One only needs to have a basic appreciation of the agonising over the state of Court of Justice decisions in relation to the Northern Ireland Protocol to have regard to the surprise that will be caused by a ruling in the Claimants' favour.

Second, the Claimants seek to apply general principles of EU law without regard to the express repeated requirements in the 2018 Act and indeed in section 60A of the 1998 Act that a court or tribunal is only to apply such general principles as they had effect prior to IP completion day. So it's no answer to point to the general principle of effectiveness having a long history. What matters is how that general principle of

effectiveness had effect at IP completion day.

Thirdly, we say none of the Claimants' proposed answers to section 60A of the Competition Act is sound. First, as Mr Salzedo will explain in a moment, the 2019 Regulations' effect was to convert the Claimants' Article 101 claims into claims brought under Part 1 of the Competition Act.

Secondly, we submit that limitation issues are necessarily questions arising under Part 1 of the Competition Act, either because they arise directly under section 47E or because they provide a defence to claims as advanced.

Thirdly, these claims do indeed involve restrictions on competition in the United Kingdom.

Fourthly, both the Stephenson Harwood Claimants and the Merricks Claimants are guilty, we say, of materially understating the radical nature of the departure their interpretation of *Volvo* would involve. It is an approach which is not supported by the two primary earlier decisions they cite and which I will come to in due course, *Manfredi* and *Cogeco*, or any of the other case law. It is an approach which would render unnecessary both the Court of Justice's detailed consideration in the *Volvo* judgment of Article 10 of the Directive and to a very large extent the provision itself because everything they seek to establish would be established through the gateway of the general principle of effectiveness.

Indeed, the Merricks Claimants' case becomes more ambitious still, we say, in the light of Mr Saunders' submissions with what is in essence a rewriting of the principle of effectiveness as repeatedly and consistently set out in the case law.

Properly understood, all the Court of Justice case law is to one effect. The principle of effectiveness has to be respected and, in determining whether it is respected, it is necessary to look at every aspect of a relevant domestic limitation regime and that embraces, as the President observed earlier, not just the length of the limitation

period, not just how that regime approaches questions of knowledge, not just when a limitation period starts to run, but also, to take the matter into the English domain, a rule which says that a fresh cause of action accrues on a daily basis in the context of an ongoing infringement.

Now, none of the Court of Justice case law has considered that kind of situation. None of it has considered a national regime with that daily accrual principle. None of it has considered a regime with a limitation period as long as six years and none of it has considered an approach to questions of concealment and knowledge as reflected in section 32 of the Limitation Act.

So the general principles established by the Court of Justice really, we say with respect, get the Claimants absolutely nowhere in seeking to demonstrate some unequivocal ruling in their favour.

That takes me, then, to my fifth point of six in terms of central flaws. Neither the Claimants for Stephenson Harwood nor the Merricks Claimants get anywhere near adequately confronting what is a clear and binding authority on this Tribunal, namely *Arcadia.*

The decision is barely mentioned in the Claimants' skeleton arguments and the submission made yesterday on behalf of the Stephenson Harwood Claimants that it was a case concerned only with section 32 of the Limitation Act is, I'm afraid, simply not accurate. The Court of Appeal's judgment expressly referenced the six-year limitation period reflected in sections 2 and 9 of the Limitation Act, as well as section 32, and concluded in terms-- robustly yes, but clearly -- at paragraph 75 that there was no basis whatever for contending that their combined effect -- and I emphasise combined effect -- chiming with all the EU case law breached the principle of effectiveness.

For good measure, the Court of Appeal also expressly rejected a submission that

Article 10(2) of the Directive did no more than codify existing law-- which is, in substance, the Claimants' case at this hearing.

The sixth and final flaw in the Claimants' approach, sir, is that the Merricks Claimants now seek to bring in an entirely new, unpleaded argument before the Tribunal relating to the principle of equal treatment. It is not an argument that flows from *Volvo* at all which is the purpose of this hearing. And they then compound that situation by seeking to prevail by complaining at the absence of evidence explaining the differences between English and Scots law on limitation in doing so.

Now, we say that cannot be a legitimate approach, but to the extent the argument is entertained at all, it is in any event misconceived and contrary to Supreme Court authority in the form of the *A v B* case, which I will come to, making it abundantly clear that differences within a sovereign state in terms of legal jurisdictions cannot in and of themselves call for justification or constitute discrimination.

We have a vast array of authorities before us, sir. In substance, we say this case can and should be decided in the Defendants' favour by consideration of a very few of them. All one really needs to look at from the EU perspective is *Manfredi* and *Cogeco*, to provide the context for it, and then of course *Volvo* itself and, from a UK perspective, *Arcadia*. Once you've done that, the answer, we respectfully submit, is entirely clear and all of the answers we have proposed in our skeleton arguments follow.

With that, by way of overview, I will hand over to Mr Salzedo, if I may, to undertake the quietly heroic task of embracing the Brexit legislation.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Otty.

Mr Salzedo.

Submissions by MR SALZEDO

MR SALZEDO: May it please the Tribunal. I adopt what Mr Otty has just said and what he will say later as well as -- since I do not promise to go up there at the end of his submissions, although he's very kindly offered me the opportunity to do so and also adopted the contents of my skeleton argument, which I'm not going to traverse much of.

As he has indicated, we have divided the topics up and I will make oral submissions on the framework of Brexit-related UK law.

I'm going to start with some submissions about what the position was pre-Brexit on questions of authority, then the relevant Brexit legislation, the Withdrawal Act 2018, the 2019 Regulations and then section 60A of the Competition Act. Then I will say something about the Interpretation Act, section 16, and then make some submissions on issues raised by the Claimants, if I haven't already covered them.

First of all, what was the position on authority of European Court judgments before Brexit? When the UK was part of the EU legal order, as you've already seen yesterday, there was a specific statutory rule in the ECA at section 3(1) requiring adherence to the principles and judgments of the European Court. I don't think we need to go back there. That reflected, among other things, the European principle that a preliminary ruling in the European Court had effects not only in relation to the proceedings in respect of which that ruling had been sought, but also, as it was called, *erga omnes*. But there are two relevant limitations on that principle.

First, the European legal order did not adopt the common law concept of stare decisis. It is therefore necessary to be careful about exactly what effect a preliminary ruling had in other cases and what exactly was meant when a European Court ruling was called binding.

The second relevant limitation is that, to the extent that any decision did have effect on other cases, the decision comprised the operative part and the essential

reasoning or *ratio decidendi* for the operative part.

Now, sir, we mention these matters in our skeleton argument and we gave a reference to the text by Lenaerts, Maselis and Gutman which we have at Authorities Bundle, volume 8, tab 139, page 4142. If anyone is looking at electronically, the PDF page seems to be 4145.

MR JUSTICE ROTH: Can you give me the page reference again?

MR SALZEDO: The page reference is 4142.

MR JUSTICE ROTH: Thank you.

MR SALZEDO: In my version you have to add three by the time you reach that exalted level of the bundle. Maybe I have the wrong version and Mr Piccinin is not agreeing with that.

In any event, 4142, and if we go to 4144 we can see the first page of the text and the first paragraph on there is about the declaratory effect of preliminary rulings which is a point that Ms Kreisberger relied upon yesterday, namely the theory is that the rulings declare the law as it has always been rather than making new law. I will say something briefly about her submission on that a bit later; it's not what I'm on now.

The second point at 6.32 is the point that preliminary rulings have the objective of securing uniformity in the application of Union law and at the end of the first sentence is footnote 159. There is a quote from the opinion of Advocate General Warner in the case of *Manzoni* stating that all courts were bound by the *ratio decidendi* of a judgment of the court and that's equivalent to the reasons that were necessary for the operative part of the judgment.

I'm going to show you in a moment the original but I rely on that passage in the footnote and on the fact that it's cited by these very eminent authors for that proposition that the binding effect, such as it was, of European Court judgments was always limited to the operative part and the necessary reasons for the operative part.

Now, Ms Kreisberger's answer to that submission in our skeleton argument was to say that we had overlooked a distinction between annulment cases and preliminary references and that our authority was an annulment case and she cited the Court of Appeal decision in *Arsenal* which in turn relied on Advocate General Warren's opinion in *Robert Bosch* for which she said was a different test in preliminary ruling cases. Now, I'm afraid she was simply wrong about that.

The entire discussion in this text in Lenaerts was about preliminary references. *Manzoni* was a preliminary reference case, one that post-dated *Robert Bosch*, in which Advocate General Warner gave a more detailed opinion, that is *Manzoni* was the more detailed opinion, and I will show you that in just a moment.

Now, while we're still looking at the passage in Lenaerts, it also refers, as you have seen in that footnote 159, to the phrase *stare decisis*, but we can see that that's not absolute from the next sentence in the main text. So going back up into the main text at 6.32, which is:

"The Court of Justice assumes that, with the exception of any new feature necessitating a refinement or even a reversal of… existing case-law, the preliminary ruling provides all national courts and tribunals with an answer to the question of Union law which gave rise to the interpretation given." [As read]

Then if we see footnote 160, there are references to European Court authority and then the authors say:

"For some examples of… express reversal of case-law prompted by a new reference for … preliminary ruling, see [various cases]". [As read]

So this confirms the point that *stare decisis* was not quite the same as in English law. I don't think that phrase was actually used very often apart from by Advocate General Warner, but it wasn't the same principle. The Court of Justice was fully entitled to reconsider an earlier judgment. There was no special rule it had to apply

before doing so and it sometimes did so expressly, as in the cases in that footnote, and at other times as we know it did so without acknowledging that that's what it was doing.

The third sentence in the text here, this is underscored by Article 99 of the Rules of Procedure which is then quoted, refers, of course, to a point about which you heard yesterday morning from Ms Kreisberger when she showed you the *Deutsche Bank* decision in which the Court of Justice did indeed decide to give a ruling by reasoned order.

The important point is that the Court of Justice in that situation has a discretion to give a judgment by reasoned order from which it, of course, follows that it also has a discretion not to do that and if there is a reason for it to reconsider something said in an earlier case, then the court is free to do just that. Indeed, I think yesterday Mr Saunders gave that as one of the reasons why a case might sometimes be put up to the Grand Chamber.

What follows from that is that a European Court decision in some other case in a preliminary ruling never had the strictly binding status of a UK Supreme Court judgment on a point of law. If a Member State court state did not want to apply the ratio decidendi of a decision of the European Court from an earlier judgment, it was permissible for that Member State to refer the same point again. The Court would have the option of reconsidering the judgment, whether expressly or implicitly, or the option of just saying we have already decided the point.

What sense was the ratio binding? It was binding in the sense that it was not proper for a Member State court to depart from the ruling without a further reference. That would not have been acceptable, but it was not binding in the sense that it had to be -- and to adopt a phrase that Ms Kreisberger used yesterday of what the European Court was doing in Deutsche Bank -- slavishly reiterated. It was never the

case that even a subsidiary court had to slavishly reiterate rulings of the CJEU, but they were obliged not to go against them without re-referring.

Ms Kreisberger sought to downplay the significance of that important limitation by referring the case of *Elchinov* and she mentioned paragraphs 24, 30 and 31, but when you come to look at those paragraphs what you will find is that they all concern the situation where they have been a reference in the same case. That's quite different. In that situation, the ruling of the Court of Justice is binding in every sense, binding on the court which made the reference, but that's a quite different situation to the general question of how it binds as a point of law in other cases.

Now, these points can all be seen in the actual opinion of Advocate General Warner in Manzoni which we have now added to the bundles in Supplementary Authorities Bundle, tab 17, page 649 -- Supplementary Authorities Bundle, tab 17, 649, *Manzoni*.

You can just see on the first page that this case involved several references in different cases and the Advocate General's opinion starts at Supplementary Authorities Bundle, page 657, report page 424 and starting at the foot of that page I would just like to show you what he says about the fourth case, the very foot of that page. The fourth case, 32/77, *Giuliani*, comes to the court, turning the page, by way of a reference for a preliminary ruling from the Sozialgericht of Augsburg and a few lines -- well, the work concerned is Italian:

"The case differs from the other three, not only in that it comes from the Federal Republic of Germany instead of from Belgium, but also in two other respects. First, the Sozialgericht of Augsburg is not content to ask the Court to work out the consequences of its rulings in *Petroni* and *Strehl* cases. It invites the Court to reconsider those rulings." [As read]

I don't think we need the second distinction.

Then on -- you can see at the foot of that section he then says it's “convenient to deal with the Giuliani case first” and he does deal with the *Giuliani* case first.

If we go on a couple of pages, 427 in the report, you can just see a reference at the bottom of the page, a repetition that the Sozialgericht “does not confine itself to asking the Court whether that argument is correct”, but then on 428, which is 661 of the bundle, halfway down, the starting of the paragraph:

"Not only the Sozialgericht but also the Commission and the Italian Government have indicated that, in their view, it would be valuable if this Court were now to clarify the law as to the binding effect of its rulings under Article 177." [As read]

A spoiler for the Tribunal, I'm afraid, the Court did not do so, but the Advocate General did have a go and his approach is the one which is still cited in the standard text on the subject.

He refers to learned discussion under the heading on page 428 and at the top of the next page, 429 of the report, 662 of the bundle, he says this:

"I respectfully agree with [various learned authors] that a ruling of the Court declaring under Article 177, that an act a the Community institution is incompatible with the Treaty…" [As read]

Let me just pause there. This is a ruling under Article 177. It's not annulment even though it's a declaration of an act as incompatible:

"… cannot be held to have the same effect as a decision of the Court declaring such an act void under Articles 173 and 174."

So that is annulled:

"So to hold would be to render almost nugatory the limitations in Article 173 as to the period within which, and persons by which, actions under that Article may be brought." [As read]

So he draws the clear distinction between Article 177 and annulment and he makes

the point that a ruling, a preliminary ruling, cannot have the same effect as an annulment ruling. So in other words, in whatever way it binds it's less binding than an annulment really.

He then goes on in the first complete paragraph on the page to say that it cannot be right that to say that a preliminary ruling has no binding effect other than in the case in which it is given.

About halfway down the long paragraph on that page 429, you can see that he says:

"It is more accurate to say that the ruling binds the Court or Tribunal making the reference than to say it constitutes *res judicata* only *inter partes*." [As read]

And that proposition is then supported by reference to authorities.

Then at the foot of the page and on to the next page, he says:

"This, it seems to me, is where the doctrine of *stare decisis* must come into play. The doctrine is of course a flexible one. The mode of its application varies widely according to the particular relationships between particular courts. But I do not think there can be much doubt about the mode of its application in the present instance. It means that all courts throughout the Community, with the exception of this Court itself, are bound by the *ratio decidendi* of a judgment of this Court. (I refer to the *ratio decidendi* of such a judgment rather than to its operative part, because one must allow for cases to which the ruling in the operative part of first sight applies but which are in reality distinguishable from the case in which that ruling was given)." [As read]

So the Advocate General is saying there that sometimes the operative part might appear to be applicable, but when you look at the reasons you see that actually it's too widely stated and that it doesn't apply. So the *ratio decidendi* there is narrower than the operative part, not wider. I think I would have to accept that in theory it could be wider as well but it certainly can be narrower and the reason that he refers

to *ratio decidendi* is to explain that it can be narrower.

He also then makes the point that *stare decisis* operates only in the slightly more limited sense that I have described it. At the end of this paragraph he says:

"Acceptance of that conclusion, on the other hand, means that all courts in Member-States are, in this respect, in the same position. If they have any doubt about the correctness of a decision of this Court, they have a discretion either to apply it nonetheless to the case before them or to refer that case to this Court, inviting it to reconsider … as indeed the Sozialgericht has very properly done in the present case." [As read]

So although there was that maybe slightly critical sounding reference at the start to the Sozialgericht not being content to ask about the scope of previous rulings, here he explains that they have actually very properly referred their doubt as to the correctness of a previous decision.

In the next paragraph, he makes the point that, on his understanding of the way these rules work, they are consistent with section 3(1) of the European Communities Act which he sets out.

So, gentlemen, even before Brexit, a decision of the CJEU was binding only as to ratio and only in the sense that it could not be departed from without a further reference. There was never a rule that every word in such a judgment was binding and there was never a rule that even the ratio had to be followed slavishly in Ms Kreisberger's word.

Just to spell it out, I'm sure the Tribunal has the point, it's my submission that even if the Claimants were right about what *Volvo* says, the relevant parts of it would still not have bound this Tribunal before Brexit and it would not bind a French or other Member State judge today.

MR JUSTICE ROTH: Not binding in the sense that we couldn't act inconsistently

with it, but we could make a reference.

MR SALZEDO: That's if you were to hold that their interpretation relates to the ratio.

MR JUSTICE ROTH: Yes, that's what I understood you were saying, that it's the ratio -- you were saying it's binding only as to ratio and one could depart from it, but we could only depart from it by staying and making a reference.

MR SALZEDO: Pre-Brexit, if you were taking the view it was ratio then the only way to depart from it would be to make a reference first. That is right. That is, in my submission, quite significant for reasons that I will develop in a moment.

That's what I wanted to say about pre-Brexit.

If we then go on to the Withdrawal Act and I just mention that we set this out briefly in our skeleton argument at paragraphs 31 to 34.

Now, I'm afraid I am going to have in front of me the version of the Withdrawal Act in the main Authorities Bundle, volume 1 at tab 15, but I will attempt to give references to the version that the Tribunal has already been shown by other counsel in the Supplementary Authorities Bundle. So I will give both references, but I just make it clear I may have the wrong one in front of me. I simply haven't had time to go through a new version and add it to my notes.

MR JUSTICE ROTH: The text will be the same.

MR SALZEDO: Yes, I hope -- I very much hope the text is the same. It was introduced yesterday by Ms Kreisberger as not actually containing any differences and no one in my team has told me that it does. So I am hoping that it won't cause any problems, but I just thought I would let you know that I am not going to be looking at the same pages as we might be looking at.

We have the current version, my version at Authorities Bundle, volume 1, tab 15, page 357 or in the Supplementary Authorities Bundle at page 87. Just looking at the title of the Act, the long title is:

"An Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the [UK] from the EU". [As read]

And section 1, as you know, simply states:

"The European Communities Act 1972 is repealed on exit day." [As read]

Which in the end was 31 January 2020. That's in section 20, it was eventually amended.

Ms Kreisberger reminded the Tribunal that the European Communities Act section 2(1) has been described by Lord Justice Green as the portal through which EU rights flowed into domestic law. So on that version, on that metaphor, section 1 of this Act closed the portal and EU rights could no longer flow into domestic law.

At page 359, or 88 of the Supplementary Authorities Bundle, you see section 1A, which set out that between exit day and IP completion day was the implementation period and “IP completion day” was defined as 11 pm on 31 December 2020. We don't need to turn it up, it's not controversial, but if you want the page in the bundle, it's in Authorities Bundle, volume 1, tab 19, page 544.

Then at page 361 or Supplementary Authorities Bundle, 88 you see section 1A which sets out that between exit day and -- sorry, 1B, I'm so sorry, section 1B and subsections 1 to 5 have been repealed by subsection 6. So turning to there, you can ignore 1 to 5 if you have them. I have them on my version but I think it's an error by Westlaw.

But at subsection 7 there is a definition of “EU-derived domestic legislation”, which is essentially what you might expect those words to mean and, although it's not in our bundles, I mention that Interpretation Act section 23 provides that the word "enactment" includes secondary legislation as well as act of Parliament. So the definition includes for example the 2017 Regulations that implemented the Damages Directive. That's all EU-derived domestic legislation.

Then at page 363, Supplementary Authorities Bundle 90, we have section 2 which saves EU-derived domestic legislation as it has effect in domestic law immediately before IP completion day. And you've already heard Mr Otty emphasise essentially those words, which appear in a number of places, “as it has effect… immediately before IP completion day”. And it also preserves that legislation subject to section 5 and Schedule 1, which are the exceptions to savings and incorporations as well as section 5A.

Then we go to section 3, my page 364, Supplementary Authorities Bundle 91, which saves direct EU legislation. I don't need to say much about that.

But then section 4 of my 367, Supplementary Authorities Bundle 93, which is headed "Savings for rights etc. under section 2(1) of the [European Communities Act]". And based on that heading what you might expect to find in section 4 is that any accrued rights which were going to survive the repeal of section 2(1) might be dealt with in here.

What we see at section 4(1) is indeed that, that:

"Any [rights and many other things:] rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day - are recognised and available in domestic law by virtue of section 2(1) … and are enforced, allowed and followed accordingly, continue… to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)." [As read]

Now, that saves a number of things. As I say, it is not just about accrued rights; it's about all kinds of things. But one thing it plainly does save is any right which had arisen under section 2(1) of the European Communities Act which, as I understand it, the Umbrella Claimants accept is a description of their rights. It is really a bizarre oddity that the Umbrella Claimants come before this Tribunal and submit that their

rights were not saved by section 4 because they think they can get some windfall benefit on limitation by contending that they were saved by some other mechanism not explicitly stated anywhere in place of this.

Their contention that their rights are not saved by section 4 was stated yesterday morning, but it is not supported by any word of this section, not by its context, either. There is no reference in section 4 to retained EU law only. This section concerns rights and everything else that were recognised by virtue of section 2(1).

Section 4(2) then carves out certain rights, powers, et cetera to which section 1 does not apply, which is not critical for us. And then subsection 3 makes this section also subject to section 5 and Schedule 1, and that's important.

These are clear words --

MR JUSTICE ROTH: I do struggle with a bit of this. Section 3(1), that will include Article 101, will it? That's direct EU legislation, forms part of domestic law which was operative before IP completion, forms part of domestic law on and after completion. That will include the directly effective provisions of the Treaty and therefore Article 101?

MR SALZEDO: I'm not sure that is right, sir. The definition in 3(2) includes regulations, decisions or tertiary legislation, annexes to the EEA agreement under (b), and (c), Protocol 1. It does not, I think, include the treaties themselves.

MR JUSTICE ROTH: There was that bit in the Explanatory Notes which listed, which I think Mr Saunders took us to, which lists those provisions of the Treaty which are expressly preserved. Yes. That's under a different --

MR SALZEDO: That's section 4.

MR JUSTICE ROTH: That's under section 4, yes.

MR SALZEDO: I see. I think Mr Saunders is indicating that he agrees with that.

MR SAUNDERS: (Inaudible).

(Overspeaking)

MR JUSTICE ROTH: 3 is just -- it therefore doesn't cover what we're dealing with.

MR SALZEDO: It does not cover the Treaty. That is right. That is right, that's why I passed relatively quickly over that and spent more time on section 4, which is the provision that saves claims under Article 101 among other things.

And I was making the submission that it's significant that section 4 is subject expressly to section 5 and Schedule 1. So that saving of all-- potentially almost all rights, et cetera, that were recognised and available at IP completion day through the portal of section 2(1), that saving is subject to what are described in the brackets at subparagraph 3 as exceptions to savings and incorporation in Schedule 1.

So to the extent that Schedule 1 could be said to adjust accrued rights, as Ms Kreisberger accepted that it did, section 4 is the place where you find the intention that it will do so. So section 4 must potentially be about accrued rights.

Secondly, it is significant because section 4, section 5 and Schedule 1 are all clearly concerned with the same subject matter. This subsection 3 is a bridge between them and that points to a contradiction in the Claimants' arguments. The Umbrella Claimants argue that sections 4 and 5 are concerned with retained law, which they say are in a completely separate category to accrued rights that just remain unaffected by any of this, but then she accepts that section 5(4) and Schedule 1 take away accrued rights. That's in their skeleton at paragraph 45 and was confirmed on the transcript yesterday at page 43. So there is a great contradiction here between the way the Act is actually structured, which is with a strong link between section 4 and section 5 and Schedule 1 and the way the Umbrella Claimants' arguments require it to be structured.

And the reason is obvious -- and I'm going to repeat myself, I suspect, in the course of today -- but the reason is the Act only recognises one type of EU right in domestic

law after IP completion and that is a right save from the repeal by section 1 which falls to be determined by retained EU law as it is to be developed by domestic courts after IP completion.

We come, then, to section 5 on page 369, Supplementary Authorities Bundle 94: the principle of supremacy does not apply post-IP completion. Accordingly, in subsection 2, that is to say, because it has only been disapplied as stated in subsection 1, the principle of supremacy does continue to apply to the interpretation, disapplication or quashing of laws made before IP completion.

3 deals with modifications post-IP completion. 4 and 5, the Charter of Fundamental Rights is no longer part of domestic law. And Schedule 1, which makes further provision about exceptions to savings and incorporation, has effect.

We will see in a moment what Schedule 1 says but, for now, it's important to notice that it is implemented by section 5. Section 5 is what implements Schedule 1, and section 5 sits in this set of initial sections which repeal the European Communities Act and outline and, to some extent, vary the principle of consequences of that repeal, and that is where Schedule 1 comes into effect.

At 372 and Supplementary Authorities Bundle 95 we have the central section of the arguments at this hearing, section 6, headed "Interpretation of retained EU law". Section 6(1):

"A court or tribunal (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and (b) cannot refer any matter to the European Court on or after IP completion day." [As read]

Now, unlike subsections 3 to 6, subsection 1 does not refer to retained law. Nobody disputes that *Volvo* is a decision made by the European Court after IP completion day and it follows that this section of this statute provides unambiguously that this Tribunal is not bound by *Volvo*.

But the equally indisputable rules of stare decisis in the UK provide that this Tribunal is bound by *Arcadia* and I do want to make it clear that although I will take my share -- you may by the end feel more than my share -- of three days of argument, I do submit that the right answer to the first essential question before this Tribunal is the very short and simple one that I have just given based on nothing more than section 6(1)(a). It's a clear statutory injunction to all courts in this country.

6(1)(b) states that a court may not make a reference to the ECJ. And I accept what is said on the part of the Claimants, that even without this provision, it wouldn't in practice be possible to make a reference owing to the fact that the UK is no longer a Member State.

So why is this provision here? Well, the answer is that 6(1)(a) and (b) are two sides of one coin. If a CJEU decision is difficult or undesirable in a particular case, the safety valve in the EU legal order is the ability of a Member State court to refer the point. A court or tribunal which cannot make a reference obviously should not be bound by decisions which it has no mechanism to have taken part in or to challenge in any way and it would require, in my submission, very clear language before a court would impute to Parliament the intention to create such an obviously unsatisfactory situation and that's why (a) and (b) sit together in section 6(1), because they do go together.

Before we come to the other subsections of section 6, we should look at the definitions in subparagraph 7 which I have on page 374. You will have it a couple of pages later on and subparagraph 7, "Definitions":

"Retained case law" is both retained domestic case law and retained EU case law. "Retained domestic case law" in essence is the case law of the UK courts in relation to European law issues insofar as that European law itself is retained. "Retained EU case law" is similar.

And then the definition of “retained EU law”:

"Anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified … under this Act or by other domestic law from time to time)." [As read]

So this includes the law and principles upon which the Claimants have to rely to bring the claims in the Umbrella Proceedings, because they are the rights and principles that were saved by section 4. There is no other way that those rights and principles come into domestic law and that's why Ms Kreisberger's argument cannot accommodate the point that her clients' rights are saved by section 4, because if the obvious point that they're saved by section 4 is correct then they're governed by retained EU law and all the rest of the structure of these provisions apply to them. And that is the accurate position, but it's the one that they resist.

And the next definition, “retained general principles of EU law”, which are “the general principles… as they have effect in EU law immediately before IP completion day and so far as they relate to anything to which section 2, 3 or 4 applies, and are not excluded by section 5 or Schedule 1”. [As read]

So all these sections are bracketed together, they're intended to work together as a whole. Section 5 and Schedule 1 are always bracketed together as being the relevant savings provisions; they’re not separated.

There is no dispute that the principle of effectiveness is a principle which had effect immediately before IP completion day but, as far as this Tribunal is concerned, it is a principle only insofar as it had effect at IP completion day and as later developed by domestic courts. That’s what has been preserved as part of the law of this jurisdiction.

And then going back to the operative section of section 6, subsection 2 provides that:

"Subject to subsections (3) to (6), a court or tribunal may have regard to anything done [by any EU entity including the Court of Justice] in so far as it is relevant to [something before that court]." [As read]

Subsection 3 explains how questions of the meaning of retained EU law are to be addressed. So the meaning or effect of:

"… the validity, meaning or effect of any retained EU law", the whole broad collection of EU law, "is to be decided, so far as [it] is unmodified on or after IP completion day and so far as they are relevant to it in accordance with … retained case law and … retained general principles… and having regard… to the limits, immediately before IP completion day, of EU competences." [As read]

So very specific as to how the (inaudible) effect is to be determined. It does involve the court looking back to how that law stood on IP completion day and interpreting it in that light.

Then subsection 4, especially (4)(c):

"No court or tribunal is bound by … retained domestic case law that it would not otherwise be bound by." [As read]

Now, the converse is not specifically stated, but it doesn't need to be stated because it remains correct in our system that a court or tribunal is bound by any retained domestic case law that it would otherwise be bound by. There is nothing here saying that retained case law ceases to be binding on lower courts if it comes from higher courts, so that remains the case.

5 to 5C are not of immediate relevance. The effect of the regulations that have been made is that both the Supreme Court and the Court of Appeal, but not at the moment this Tribunal, are free to depart from retained EU case law if they do so applying the test from the 1966 House of Lords Practice Direction. So they are in fact free to depart and of course that is part of the crucial safety valve which is necessary

because no court is any longer free to refer, so there has to then be the ability to depart.

Subsection 6 deals with post-IP modifications and 6A with the Withdrawal Agreement. So drawing together section 6, these relevant definitions make clear that if a court or tribunal decides to have regard to a post-IP decision of the European Court as it is entitled to do under subsection 2, it is not bound by such a decision under subsection 1(a) and it remains bound by ordinary retained domestic case law, just as it would otherwise be bound which, in the present case, includes the Court of Appeal's decision in *Arcadia*.

So that really repeats the short and simple answer. I say that actually it's possibly even shorter than the way Mr Otty put it. You can actually just take section 6 and it gives you the answer to the questions in this case.

I'm going to go on to Schedule 1 but I think it's about four minutes to, so I wonder if -- would it be sensible to break there.

MR TIDSWELL: Just before you do, can I ask you just a question about section 5 and section 5(3), which talks about a modification and I think -- I will check I have this right -- I think this is saying that supremacy of EU law will apply if an enactment of a rule passed-- I think it means passed in the UK-- Is that what it means? So that this is -- this says that if you have a piece of legislation and you change it, then depending on how you change it, the supremacy of the EU may still apply. Is that how you read it?

MR SALZEDO: Yes, so the clear overall intention is – I think the answer is yes, but let me just spell out why I say yes. The overall intention is you have retained EU law interpreted as at IP completion day. Domestic legislators and courts have the power to vary and develop respectively that retained law. The principle of supremacy, which has been brought back to applying so far as relevant to interpretation,

disapplication, et cetera of rule of laws before IP completion is not removed again, not to be taken away again, merely by the fact that the relevant rule of retained law has been modified. So the court would then – if that had happened, the court would have to ask itself whether the intent of the modification is such as to take away again the application of supremacy. There could be a very difficult question, I should think, in some cases.

MR TIDSWELL: Well, yes. So the modification, the enactment of the rule of -- the rule of law that has been modified is a domestic one albeit it may be retained EU law; it's not an EU form of law.

MR SALZEDO: Sorry, which was --

MR TIDSWELL: So the rule of law that's been talked about is a domestic one albeit that it may be through retained EU law. It's not a rule of law of the EU, for example.

MR SALZEDO: Oh, I see.

MR TIDSWELL: I don't think it is. I think I just want to be clear that's --

MR SALZEDO: I think that is right, sir, yes.

MR TIDSWELL: Thank you.

MR JUSTICE MARCUS SMITH: To take an example, a hypothetical example, if one had an anterior piece of UK law which was subject to EU supremacy under the rules but one, say, consolidated it into a post-Brexit Act just intending consolidation and nothing more, then you wouldn't have that modification or change removing EU supremacy if that otherwise would apply.

MR SALZEDO: Yes. Yes, I think that's exactly right, sir, exactly as you say. If it's been merely consolidated then clearly the argument would be: well, it's only been consolidated; you don't have to change anything.

MR JUSTICE MARCUS SMITH: There is no such thing as mere consolidation and I'm sure one would have difficult questions even in that context, but that's what this is

getting at. It's getting at an after-the-event alteration but non-substantive alteration of the rule and you don't want something to fall away that's previously applied for no good reason. On the other hand, if there is a good reason then it falls away.

MR SALZEDO: Yes, exactly. So it's really if the law changes is it relevantly the same, becomes the question.

MR JUSTICE MARCUS SMITH: Indeed.

Well, thank you very much, Mr Salzedo. We will resume at 2 o'clock.

(1.01 pm)

(The luncheon adjournment)

(2.00 pm)

MR JUSTICE MARCUS SMITH: Mr Salzedo, good afternoon.

MR SALZEDO: Good afternoon. I was about to turn to Withdrawal Act, Schedule 1, which in the main Authorities Bundle is at page 388, in the Supplementary Authorities Bundle at page 129. Schedule 1, paragraph 1, makes clear that subject to transitional provisions, if a person wants to allege the invalidity of a retained EU instrument post-IP completion, they must do so in domestic courts pursuant to regulations that will be made. Notice that this is expressed to be a challenge to retained EU law. That's the wording in 1(1).

Paragraph 2 of the Schedule on page 389 or 130 states that no new general principles of EU law are to be recognised as part of domestic law post-IP completion.

Then on the next page, paragraph 3:

"There is no right of action in domestic law ... based on a failure to comply with any of the general principles ..." [As read]

And no disapplication or quashing of laws for such a failure, and it's common ground that there's an exception made to this that we'll see in Schedule 8, paragraph 39, that provides that this paragraph 3 and also 4 do not apply in proceedings

commenced before IP completion. There's a common pattern here, which we see over and over again, which is that the overall right is removed, both forward- and backward-looking, and then it is restored or saved for the backward-looking part of it. We see that in a number of places. Essentially, section 1 is perhaps the prime example of that, but some of the smaller ones are a bit clearer and therefore easier to see what they're doing.

It's important just to note that it's common ground that the effect of paragraph 3 means that domestic limitation law may not be disapplied in relation to any claims that may be commenced after IP completion day. That's common ground in the skeletons, so it's not a matter that troubles you, but it's an important point to note.

Then we go to paragraph 4 of the Schedule, page 391 or 131, which abolishes the right to Francovich damages, again in those absolutist terms.

Then paragraph 5. Paragraph 5, "References in section 5 and this Schedule to the principle of… supremacy…, the Charter of Fundamental Rights, any general principle of EU law and the rule in Francovich are to be read as reference to [those principles, et cetera], so far as they would otherwise continue to be, or form part of, domestic law on or after IP completion day by virtue of section 2, 3, 4 or 6(3) or (6) and otherwise in accordance with this Act". [As read]

Then 5(2) expressly excludes anything that would bring into domestic law any modification of EU law that happens after IP completion date. So there's a few points to note about this paragraph 5. The first is it's a very clear bridge between these provisions in the Schedule and the concept of retained EU law.

Paragraph 5 refers to the principle, Charter, or the rule in Francovich, as being part of domestic law by virtue of those sections. In other words, it's only because, and to the extent that, they become retained EU law that they form part of domestic law at all.

The second point to make about paragraph 5 is it's one of the many provisions, we've already seen some, where you can summarise what they're doing by the metaphor or analogy of a fork in the road of legal development. The effect is that, to the extent EU law is carried forward into domestic law, it's carried forward as it stood at IP completion, it's thereafter subject to development by domestic legal institutions, both the legislature and the courts, but it is no longer subject to development by Union institutions. That's true of the definitions we were looking at a moment ago in section 6 of the Act, and it's very clear that that's what the Act is doing. Indeed, based on Ms Kreisberger's submissions yesterday, I'm not sure that that way of looking at it is actually controversial. The only controversial bit is that somehow they says her clients have claims which have escaped this net.

We go next to Schedule 8, which in my bundle is -- I just want to point to a provision at page 408 or Supplementary Authorities Bundle 242, which is Schedule 8, paragraph 7. It is maybe not a critical point, but it's another clear example of the fork in the road approach, which is that any power to make subordinate legislation which immediately before exit day is subject to the implied restriction that it has to be exercisable compatibly with EU law are to be read after exit day without that restriction, and after IP completion date without any corresponding restriction in relation to compatibility with retained EU law insofar as the restriction concerned is not applicable in the UK by virtue of the Withdrawal Agreement. So it's a similar point.

In Schedule 8, as you recall, Ms Kreisberger placed some emphasis on paragraph 39, which in the main Authorities Bundle is at page 462, Supplementary Authorities Bundle 269.

Now, paragraph 39(1) provides that subject to the further subparagraphs in paragraph 39, the relevant separation agreement law and certain regulations,

section 5(4) and paragraphs 1 to 4 of Schedule 1 apply in relation to anything occurring before IP completion day as well as anything occurring after IP completion day.

I accept that this provision confirms that certain provisions have retrospective effect in certain respects, but the critical part of Ms Kreisberger's argument on this issue is when she said that these provisions do not concern retained EU law. She said these were backward-looking, and therefore concerned her category of accrued rights, which was separate to the category of retained EU law. She said that yesterday at pages 44 to 45. It was wrong.

I've shown you section 5(4) and Schedule 1, referred to here, are concerned with the content of EU retained law. So the clear understanding of all these provisions is that EU law continues to be relevant as domestic law if, and only if, it is retained EU law.

The Umbrella Claimants' argument that paragraph 39 contains clear statements of an intention to adjust accrued rights is a valiant attempt to make virtue out of necessity, but it does not work, because the matters in paragraph 39 are all concerned with retained EU law. So they demonstrate the absence of any distinction in the mind of the legislators between retained EU law and accrued rights. There is no additional category over and above retained EU law.

The argument is, as I understand it, that as a matter of construction, aside from the effect of paragraph 39(1) and the provisions to which it refers, the repeal of the European Communities Act provided for at section 1 does not apply to accrued rights claims, but that is inconsistent with what this provision says.

Section 5 and Schedule 1 referred to here are exceptions to the saving in section 4, which itself is a saving from the repeal in section 1. It would make no sense to say in Schedule 8, “Well, these exceptions apply to events that took place before IP completion, if section 1 had not repealed the European Communities Act as it

applied to events that took place both before and after". That's the only way these savings make any sense.

If you read the whole Act together, it's clear that the intention is to repeal the European Communities Act absolutely, both in its application to the past and its application to the future. There is then a complex set of savings and counter-savings and exceptions to savings, in some cases there are clarifications of exceptions and further exceptions to exceptions, to some extent they built up about the uncertainty of whether the Agreement would ever be made, and then the Agreement was made, but the upshot of all of it is that there is one category of preserved EU law rights and obligations, and that's the category of retained EU law.

The right to continue these claims is preserved by section 4, which I've already shown you, and not by anything else in this Act. There is another provision which I'll come to in the Regulations, but in this Act, these claims only continue to exist by virtue of section 4.

That position is confirmed by the summary which Ms Kreisberger commended to the Court yesterday given by Lord Justice Green in Jersey Choice. I wonder if we might look at that. I think she mentioned it without asking to look at it. It's in Authorities Bundle, volume 6, tab 113, page 3392. A decision of the Court of Appeal from December 2021. Lord Justice Green gave the only reasoned judgment, with which Lord Justices Arnold and Snowden agreed.

At page 3398, paragraph 20, is the paragraph upon which Ms Kreisberger relied, the section of the judgment, anyway, which she mentioned:

"I turn now to the availability of damages claims following the exit of the UK from the EU. Whilst the UK was a member of the EU the principal domestic measure which governed the relationship ... was the [ECA] ... Section 2(1) was the portal through which all EU rights flowed into domestic law." [As read]

He sets out section 1.

Then at paragraph 21, you can see that Lord Justice Green's understanding as set out in this judgment is that rights under section 2(1) were repealed save where they were saved or preserved by specific provisions. He says:

"This was repealed by section 1 ... of the [Withdrawal Act] ... Transitional and savings provisions were included for certain rights under section 2(1) ... which were to continue to be recognised and available in domestic law on and after 'IP completion day'... Important exceptions to such saved and preserved rights were set out..." [As read]

That's all entirely consistent with my case. It's entirely inconsistent with the Claimant's case.

Moving down to paragraph 24, Lord Justice Green makes the point that:

"Rights which were saved [by] this ... regime form part of the body of retained EU case law and retained general principles of EU law..." [As read]

Rights which were saved under this somewhat convoluted regime form part of the body of retained EU case law:

"... and retained general principles of EU law in accordance with which domestic courts must decide any questions as to the validity meaning or effect of retained EU law so far as relevant and so far as that law is unmodified..." [As read]

Again, this understanding is entirely consistent with my case, but entirely inconsistent with the Claimants' case.

I'm proposing now to go to the 2019 Regulations, which I have in Authorities Bundle, volume 1, tab 17, at page 474. We've summarised the effect of them in our skeleton at paragraph 41. If we start at page 477, we have regulation 22, which articulately omits section 60. The next page, regulation 23, after section 60 inserts section 60A.

I'm just showing you those really to give you the references, there's nothing

controversial about this part.

The next regulation I want to go to though here is one which you did not see yesterday. Page 480, regulation 62. Now, this is a rather important provision. We spelled out its importance in our skeleton argument at paragraph 75, but if Ms Kreisberger has an answer to it, she did not articulate it yesterday. As you can see, what it provides is that:

"Any rights, powers, obligations, restrictions, remedies and procedures which-

“continue by virtue of section 4(1) ... and

"are derived from Articles 101 [et cetera]…

"cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly) on the coming into force of these Regulations." [As read]

What we have here is section 4(1) saved the rights, powers, et cetera, which disappeared with the repeal of the ECA, but regulation 62 then unsaves them insofar as they are derived from certain parts of the Treaty, including Article 101. Those rights, forward- and backward-looking, clearly refers to both, cease to be available in domestic law.

Regulation 62 refers to rights at (a) which continue by virtue of section 4(1). That also implies that the legislator understands that section 4(1) concerns rights which had already accrued, as well as those that might accrue in the future. Section 4(1) continues rights under Article 101. In fact, this also absolutely implies that the legislator understands that the effect of section 4(1) was to continue, among other things, rights derived from Article 101. Those rights, under this regulation, cease to have effect.

If we then look at regulation 64 on the next page, we can see that Schedule 4 is given effect, which, as regulation 64 summarises, makes saving and transitional provisions.

If we then turn to Schedule 4 at page 490, paragraph 7 contains some provisions that have wider relevance. As you can see, where paragraph 7 applies, various modifications to the Competition Act that were made in these Regulations are disapplied, while other modifications made in these Regulations do apply.

An important consequence of this is that section 47A, which used to confer jurisdiction on this Tribunal to hear claims for breaches of both EU and UK competition law went back into its pre-Brexit form. So that's why, although this Tribunal no longer has jurisdiction to hear new claims for infringement of EU competition law which postdate IP completion, it does retain jurisdiction in relation to claims for infringement of EU competition law that occurred before IP completion. The most significant modification for present purposes, where this paragraph 7 applies, is mentioned at 7(3)(a), the modifications made by regulations 21(3), 22 and 23, which include the replacement of section 60 with section 60A as I've just shown you.

MR JUSTICE ROTH: Just before this, Mr Salzedo, this is, you say, regarding the jurisdiction of the Tribunal to hear claims under 101 and 102; is that right?

MR SALZEDO: Not specifically -- I'll come in a moment back to 101, but at this stage this is modifying various of the statutory provisions in certain circumstances, so in particular at 7(3), Part 1 of the 1998 Act has effect without the modifications made by Part 2 of these Regulations other than those of 21, 22 and 23.

MR JUSTICE ROTH: So it preserves 47A in its old form?

MR SALZEDO: Yes, exactly.

MR JUSTICE ROTH: Therefore, including the references to EU competition law in 47A?

MR SALZEDO: Yes.

MR JUSTICE ROTH: Where, then, is the jurisdiction of the High Court in

a competition claim to hear Article 101 and 102 preserved?

MR SALZEDO: We're going to see that in just a moment.

MR JUSTICE ROTH: That's somewhat else?

MR SALZEDO: Yes, it is and I will be there in just one moment. I'm going to stop off at just one other paragraph.

MR JUSTICE ROTH: I don't want to make you out of order.

MR SALZEDO: I'm doing this in a somewhat methodical order, I don't know if that's the right way to do it, but it seemed a logical way to do it.

Before I get to the answer to your question, I'll just stop off very briefly, page 504, paragraph 13A just to show you the definitions there, "domestic competition infringement" and "EU competition infringement", and then we turn over to paragraph 14, which you saw yesterday, and which provides that where an EU competition infringement occurs before IP completion day, then even on or after IP completion day, a person may continue a claim, or a defence to a claim, in relation to that infringement in proceedings before a court or tribunal and make any claim before a court or tribunal which the person could have made before IP completion day. So that's 14(2).

Now, the point we made in our skeleton at paragraph 75 is that the purpose of paragraph 14(2) is that it saves the effect of regulation 62 on those claims, which are EU competition infringements that occurred before IP completion day. So we see that pattern again, that regulation 62 deletes the rights, and then paragraph 14 of Schedule 4 restores or saves the ability to continue or make claims in relation to pre-IP completion infringements only.

MR JUSTICE ROTH: And that's for both the Court and the CAT?

MR SALZEDO: It is, yes, exactly.

MR JUSTICE ROTH: Yes.

MR SALZEDO: So the Claimants' claims in this case are among those that are unambiguously abolished by regulation 62, subject to the saving in Schedule 4. They're saved, and they become claims that can be continued or made in UK courts and tribunals, applying retained EU law as developed by domestic courts.

Now, Ms Kreisberger's submission yesterday at page 69 was that paragraph 14 preserves the ability to continue or make claims for breaches of Article 101 which predate the completion date, and we don't take issue with that formulation. It does a number of things, but that's certainly one of them. But on her argument, it's very hard to understand why paragraph 14 is needed, because if you don't mention regulation 62, why do you need to preserve or restore those claims? But the answer is it's because regulation 62 clearly and in terms otherwise would remove them.

What Ms Kreisberger went on to say, in an argument to avoid the consequence that the claims we're talking about are claims under section 4 and then regulation 62 and then paragraph 14, she went on to say that the purpose of paragraph 14 was to give this Tribunal jurisdiction over the claims. That was the part of her submissions when she feared she might be inviting the Tribunal to learn to suck eggs.

In fact, there's just one difficulty with that submission, which is that there are no words in paragraph 14 that support it. The operative words of paragraph 14 are that a person may continue or make a claim or a defence to a claim of particular types. They're not -- paragraph 14 is not concerned with where the claim may be brought. It doesn't mention this Tribunal apart from being as a tribunal or court, and that would include the High Court.

For example, paragraph 14 would include, if somebody brought a claim for a breach of contract in the High Court, and somebody else alleged as a defence that the contract was void for breach of Article 101, that defence is something that would need paragraph 14 to save its existence. That has nothing whatever to do with the

jurisdiction of the Tribunal.

We do know which provision brings it into the -- enables the claims to be brought or continued in this Tribunal, which is paragraph 15 read together with paragraph 7. The next page, paragraph 15:

“In relation to claims (and defences …) described in paragraph 14(2) the enactments… in paragraph 7(3) to (8) have effect as described there." [As read]

Subparagraph 1:

"... continues to apply if the claim (or defence ...) includes a claim ... in respect of loss or damage arising from a domestic ... infringement that occurred before IP completion day including if that domestic infringement continued on or after..." [As read]

That brings in the enactments mentioned at 7(3) to (8) which we looked at before and which deal with the jurisdiction of this Tribunal. Of course, among other things, that means that section 60A applies instead of section 60, as I've shown you.

So that's the effect of the 2019 Regulations. I'm now going to make some submissions about section 60A of the Competition Act. We deal with this in our skeleton at paragraph 43.

We have section 60A in its place in the Act in Authorities Bundle, volume 1 at tab 6, page 110. The significance of this is, as I've just shown you, by the 2019 Regulations, Schedule 4, those claims and defences which are saved by first section 4 and then the Regulations, Schedule 4, paragraph 14, which include these claims, are going to be subject to section 60A. So that's the significance of section 60A.

Ms Kreisberger suggested yesterday that it did not apply to the present claims, even though she had accepted that the present claims were saved by paragraph 14. That is plainly wrong because of the clear provision of Schedule 4, paragraph 15, which

I've just shown you.

MR JUSTICE ROTH: Section 60A applies to all claims, doesn't it? It applies to domestic law claims, which are not part of these regulations, because section 60 is gone, which is what used to govern domestic claims. It has been replaced by section 60A, hasn't it? So if it's a Chapter 1 claim, it's governed by section 60A.

MR SALZEDO: Yes, but whether it's a Chapter 1 claim or not it is governed by 60A.

MR JUSTICE ROTH: Well, one question is whether 60A, which is now in the Act, whether it applies to -- because section 60 never applied to Articles 101 and 102 claims.

MR SALZEDO: No, so that's why I've shown you what the 2019 Regulations do is that they apply section 60A quite specifically to all claims which have been allowed to be brought pursuant to paragraph 14 of Schedule 4. So that's the effect of paragraph 15. Did you want to go back there? That was page 506, was paragraph 15, which provided that the claims mentioned in paragraph 14 were subject to the enactments in 7(3) to (8), and that includes 60A.

MR JUSTICE ROTH: Well, it includes the Act as modified.

MR SALZEDO: Yes, and the modifications --

MR JUSTICE ROTH: That's one of the modifications. So it’s subject to the Act in the modified form, but it doesn't say specifically section 60A will apply to a claim on retained EU law.

MR SALZEDO: Well, my submission is that it does say specifically that those modifications apply.

MR JUSTICE ROTH: They're governed by the 1998 Act as modified.

MR SALZEDO: Yes.

MR JUSTICE ROTH: But you still then have to look at the section of the Act and say, “What does that section say?”.

MR SALZEDO: Yes, you do, of course.

MR JUSTICE ROTH: Then the question is does section 60A on its wording apply to a claim for breach of the retained EU competition law which is preserved by the provisions you've referred to.

MR SALZEDO: Yes, absolutely. The reasons -- and I'll look at the wording in just a moment -- the reasons that Ms Kreisberger gave for saying that section 60A did not apply to these claims, the first was to say that some of the claims were not originally brought in the Tribunal, and I've been making the submission that that is irrelevant. If one looks at 60A, subsection 1:

"This section applies when one of the following persons determines a question arising under this Part in relation to competition within the [UK]." [As read]

Obviously, that includes this Tribunal. So that is the question, it's not where it was commenced, it's not where the claim was commenced, it's whether there is --

MR JUSTICE ROTH: I'm with you on that.

MR SALZEDO: Yes. The second one, and one which was adopted from a question from Mr Justice Roth in argument, was to suggest that it only applies to questions of competition in the UK, and therefore not Article 101. But we say to that that all the cases we're talking about here are cases that are alleged to involve restrictions of competition in the UK.

MR JUSTICE ROTH: Well, then, why didn't the old section 60 apply to Article 101?

MR SALZEDO: Mr Piccinin, who knows this a lot better than I do, says it did. We can see at page 108 the wording of the old section 60.

Subsection 2 adopts a similar rubric to 60A(1):

"At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part…) with a view to --" [As read]

MR JUSTICE ROTH: Under the old section 60, we had to apply the decisions of the

Court of Justice, because of section 3 of the ECA. We were bound. You cited from -- I think it was you, it may have been Mr Otty, but I think it was in your skeleton, from the explanation given by the Minister in Hansard for this provision. It may be --

MR SALZEDO: It's Mastercard's skeleton at paragraph 13.

MR JUSTICE ROTH: Yes, you're quite right, it's the Mastercard skeleton, on page 9. It repealed section 60 and introduces a new section 60A, which "provides that UK courts and regulators will continue to ensure consistency with pre-exit EU competition case law when interpreting UK competition law". That's the point of it. Just as the old section 60 ensured that one would interpret UK competition law consistently with EU competition law. But now it's cutting back, as you pointed out, freezing the EU competition law as at IP completion date.

MR SALZEDO: The important point is that that retained EU competition law is now UK competition law. It is now part of UK competition law. And that's the change that's been made.

MR JUSTICE MARCUS SMITH: What you're saying, I think, Mr Salzedo, is that even so far as retained EU law is concerned, it has migrated so that it is frozen, subject to an entirely UK-centric regime, such that we have closed out the present European influences, and they echo in the past, but the extent to which they do echo is a matter for the UK jurisdiction alone and no-one else, and that's why you need to expand, as it were, section 60A to include what would formerly have been purely EU claims effective in UK law as a matter of EU law through section 2(1) of the ECA, 3(2) which now no longer applies, so you have to try to create the consistency in some other way, and section 60A is that route, part of that route?

MR SALZEDO: Yes, exactly. That is exactly what we say.

The relevant law is in one sense frozen and in another sense not frozen. It's frozen

in the sense that identifying the European component is frozen as at IP completion date, but not in the sense that the law can't develop, it can develop, but will now develop on domestic lines.

MR JUSTICE MARCUS SMITH: It may develop upon EU lines, but on domestic terms?

MR SALZEDO: Yes, it will be domestic courts and legislators which decide the extent to which any further developments within the Union are to be adopted within the UK. Yes, exactly.

Going back to 60A on page 110, you can see that subsections 2 and 3 draw a clear line around both principles in European Court decisions and Commission statements before IP completion, really the point we've been discussing, and 4, 5 and 6 are exclusions from the obligations to seek consistency from any matters that are excluded from domestic law or contrary to binding authority.

So looking at 6:

"Subsection (2) does not apply [that's the obligation of consistency] so far as the person is bound by a principle laid down by, or a decision of, a court or tribunal in England and Wales, Scotland or Northern Ireland that requires the person to act otherwise." [As read]

We say you can read in there "such as a Court of Appeal decision like *Arcadia*".

7 relaxes the obligation to seek consistency on a variety of considerations, one of them at (e) is a post-IP decision of the European Court. So that's one of the grounds upon which a court or tribunal may act. But at 8 --

MR JUSTICE ROTH: It still only applies on a question concerning competition within the UK.

MR SALZEDO: Yes, it does.

MR JUSTICE ROTH: And when we're applying Article 101 now, as preserved for

existing claims in the way you've shown through the regulations, one is looking at it in terms of what Article 101 is concerned with, which is competition as between Member States?

MR SALZEDO: No, I don't accept that, sir. It's always been possible to have a claim that alleged restriction of competition in the UK, which was an infringement of Article 101.

MR JUSTICE ROTH: But not necessarily. You could have claims under Article 101 which were competition between the UK.

MR SALZEDO: Not necessarily, but that's why I began my answer a few minutes ago by saying that these claims in fact do all involve allegations of restriction of competition in the UK acquiring market.

MR JUSTICE ROTH: Then section 60A applies to some claims under Article 101, but not others. It applies to these claims, but might not apply to other claims we have, also under 101, because they are more cross-border.

MR SALZEDO: That may be right, sir, but --

MR JUSTICE ROTH: It would be very strange, as opposed to just having a general application. I mean, I thought you had shown us that Schedule 4, having at one point removed Article 101, effectively saying it's not retained EU law-- I mean it was retained EU law under the Act, it's removed by the Regulations, but then it's restored for the limited purpose of claims that have already been commenced. Is that right?

MR SALZEDO: Well, it's restored in the sense that claims and defences may be continued and may be brought in relation to pre-IP completion matters, so that may mean --

MR JUSTICE ROTH: They continue, by reason of those provisions, as claims under Article 101.

MR SALZEDO: Well, under --

MR JUSTICE ROTH: Isn't that what it's saying in the regulations?

MR SALZEDO: In a sense, yes. The rule represented by Article 101, which becomes --

MR JUSTICE ROTH: And we apply EU law under Article 101 as frozen at IP completion.

MR SALZEDO: Yes.

MR JUSTICE ROTH: I just don't see how --

MR SALZEDO: Sir, can I say this --

MR JUSTICE ROTH: And all the provisions you showed us in the governing statute show that we are bound by decisions of European courts up to IP completion date, but thereafter are not bound but can only have regard to them.

MR SALZEDO: Yes. The question of section 60A is of only -- well, it's only of secondary relevance. If my case is right, then I get everything I need out of section 6, which clearly --

MR JUSTICE ROTH: Yes, I see that.

MR SALZEDO: We do make the secondary point that it's also the case that section 60A says something very similar for these claims. I'm afraid I'm not in a position to make submission about what might happen in relation to a purely non-UK breach of Article 101 claim.

MR JUSTICE ROTH: I'm just saying that if we're trying to interpret section 60A, which is what you're asking us to do, it would be odd to give it a different interpretation in its meaning --

MR SALZEDO: Well, it goes back to the point that Mr Justice Roth put to me is well, you have to look at whether it does apply on the wording. It clearly applies to these claims. That's all I need for my argument. If the Tribunal wants submissions on how it might apply to a purely non-UK claim, we can probably do that.

MR JUSTICE ROTH: It applies to these claims if you say that a question relating to competition in terms of Article 101 embraces a question relating to competition in the UK and where it does, then you say this applies.

MR SALZEDO: Yes, I put it the other way round. These claims are, in fact, about competition within the UK and they also happen to involve allegations of breaches of Article 101. That may be an unnecessary quibble.

MR JUSTICE MARCUS SMITH: I take point that you're making that you say that these claims are within the United Kingdom, and therefore we don't need to worry about, as it were, claims involving factual circumstances without the United Kingdom, but we're going to have to make sense of these provisions in the general case rather than just the specific. So Mr Justice Roth is clearly right, there is a distinction being drawn in section 60A, 60A(1) between questions arising in relation to competition within the United Kingdom and those instances where the matter is not within the United Kingdom, at least in part.

Now, my question is to what extent is this effectively a choice of law question, in that where you have a claim within the United Kingdom, you are looking at essentially UK law, or one of the law districts within the UK.

If one has, let us say, a claim that is in relation to competition, let us say, within France, you might have a different applicable law indicated which would require you to look elsewhere for your law. Now that might be EU law. It might be EU law intermediated through French law, if you decided that was the applicable law, and you have a very interesting question in private and national law terms as to whether the EU counts as a law district in its own right, or whether one is looking at France in this hypothesis as the law district to which EU law applies as a matter of French law for their equivalent for the ECA 1972. Is that what this is getting at? In other words, it is looking at the transnational domestic competition dispute, and it is indicating

what law we should be applying to the purely internal, within the United Kingdom case, and not the case which might involve non-domestic law? Or am I barking up the wrong tree? Please do feel free to say so, Mr Salzedo.

MR SALZEDO: I would desperately like to be helpful, but I am even more concerned about the risk of misleading the Tribunal if I pretend to have knowledge of all the provisions, which I don't have. I don't really want to give an answer to precisely what the legislation may say in the case of a purely non-domestic claim, which is not these claims. I'm afraid I would assist if I thought I could do so without running that risk.

MR JUSTICE MARCUS SMITH: Of course, I entirely understand. I think, from my point of view, it would be helpful -- and of course the other parties should feel free to respond to that -- if you, ideally jointly with Mr Otty, could put on a page what you think the answer is when you get a chance to consider matters. I quite understand these are horribly complicated provisions, but for my part I approach construction in a manner that is holistic, and I think it would -- no that would is putting it too high -- may assist if you say how it works in a case which you say is not this case, because we want to have an overall picture that makes a degree of sense.

MR SALZEDO: I accept entirely that the question is one to which the Tribunal may want to have an answer, and we will get one, hopefully overnight, but certainly when we can.

MR JUSTICE MARCUS SMITH: Ms Kreisberger, of course, you will have an opportunity to respond to that if you wish to, depending on what Mr Salzedo decides he wants to say.

MR JUSTICE ROTH: I take your point that you don't need this on your section 6 argument. The other problem, it seems to me, is that if you brought this claim in the High Court, or it remained in the High Court, I don't see how the Article 101

argument would be a question arising under this part of the Act.

MR SALZEDO: Well, the regulations in the Schedule make it clear that such an argument can be raised by way of claim or defence, including in the High Court, and if so with the application of this. So then the question would be, well, does that involve one of the following persons, including a court, determining a question arising under this Part? That may raise a question for that particular court or tribunal, whether they are in fact determining a question arising under that Part or this Part. We would need to look at the whole Part, probably, to ...

MR JUSTICE ROTH: The Part doesn't include Article 101 at all.

MR SALZEDO: No.

MR JUSTICE ROTH: Other than to give this Tribunal jurisdiction to determine Article 101 and 102. The Part brings in UK competition law.

MR SALZEDO: Yes. There may be an interesting question about whether section 47A --

MR JUSTICE ROTH: That gives this Tribunal jurisdiction to decide Article 101.

MR SALZEDO: It certainly does that, but there may be an interesting question as to whether it also describes a claim which could then be determined by another person.

MR JUSTICE ROTH: That would be a fairly novel view of what it does, because the High Court have been deciding claims under Article 101 before the Competition Act came in.

MR SALZEDO: Yes. Sir, it may be, given that this is all rather subsidiary, and there is of course a limit of time, may we come back to these issues in writing as well? Maybe we can add that point --

MR JUSTICE ROTH: You may not need it.

MR SALZEDO: Yes.

MR JUSTICE MARCUS SMITH: No, that would be helpful. To be clear, if you are

persisting with this secondary string, then these are questions to which we need an answer. If you decide to, as it were, cut the Gordian Knot of your second string, that will be very good as well. But if we have to decide it, we want to get it right, that's I think the central point, and this is a plea for help in that regard.

MR SALZEDO: Yes. I just want to just draw attention to subsection 8, which says that:

"In subsection (2)(b), the reference to principles laid down [by the Treaty] before IP completion day is a reference to such principles as they have effect in EU law immediately before IP completion day, disregarding the effect of principles laid down, and decisions made, by the European Court on or after IP completion day." [As read]

What that means is that there is effectively two stages. The first stage is the interpretation of what is retained EU law, and that interpretation is to be made disregarding anything that's said after IP completion day by the European Court. There's then the second stage, which is whether or not it's right to take into account under 7(e) a principle laid down by the European Court after IP completion day. I just wanted to make that point about these two stages. First identification and then the question of whether you take it into account.

As I say, we've said in paragraph 45 that it's not necessary to determine whether section 60A means that this Tribunal could decide a claim under Article 101 in a way that was inconsistent with pre-IP completion decisions. That doesn't arrive under *Volvo*. But on any view, this supports section 6 in saying that post-IP decisions are not binding, and indeed at the first stage of working out what the relevant law is, they're actually to be disregarded.

That was what I wanted to say about the Brexit legislation, subject to what I'm coming to next, which is the Interpretation Act, section 16.

There's no doubt that section 16 codified a longstanding principle in common law

that legislation was not to be interpreted as abolishing or adversely affecting accrued rights unless the contrary intention appears, to use the word of the section.

In this case, it's important to notice that if we're right in our case, the effect of the legislation on the Claimants' rights is actually minimal. Now, I know in practice they will say, “Well, it’s a big effect, because we now realise we could be claiming back for many, many years we previously thought we couldn’t claim for”. So in that sense it's a big effect. But in legal terms, the effect is rather minimal. Let me explain what I mean by that.

The portal through which their rights formerly flowed has been closed by section 1 of the Withdrawal Act. Those rights were then saved by section 4, removed by regulation 62 of the 2019 Regulations and saved again, to a limited extent, by Schedule 4, paragraph 14.

Pursuant to these provisions, what happens to accrued rights is that the Claimants’ claims are then brought under retained EU law. The court's approach to the interpretation of retained EU law is mandated by the Withdrawal Act section 6 and also Competition Act section 68, and that includes the approach to determine what the principle of effectiveness requires in relation to limitation. Section 6(1) mandates that in relation to that question, the court is not bound by post-IP decisions of the European Court.

Sections 1, 4 and 6 all demonstrate an intention to effect rights, but it's very important to notice that, taken together, the whole scheme does not deprive the Claimants of any accrued rights. The only right that they had accrued by IP completion date was a substantive right to pursue claims in accordance with EU law as it stood on IP completion date. They couldn't have accrued anything else.

The only difference between Ms Kreisberger's approach and mine is whether the authority to determine what EU law consisted of at IP completion date is to land with

the CJEU or to land with this Tribunal and the courts of the United Kingdom.

That's the question that the legislator has answered in favour of this Tribunal. It doesn't abolish or reduce the Claimants' rights, not at all. It merely alters the legal authority for interpreting exactly what those rights were on IP completion date.

On any sensible reading of the withdrawal legislation taken as a whole, that shift of authority as to who is to interpret what the law is, is clearly what the legislator intended. It appears all through the legislation.

When you come to consider is the intention sufficiently shown to be deemed to have an effect on accrued rights, it's obviously important to consider the nature of the effect as well as the words of the legislation. Here, it's very important that the effect, if any, is minimal. In legal terms, there's no effect. Their rights remain as they were. It's just a question as to which court decides what those rights actually were. So why should there be a strong presumption that the legislator didn't intend to do that, when it's stated in any number of sections and paragraphs that that's exactly what it was trying to do.

My submission is that, after reading the legislation, there is just no reality to a proposition that Parliament intended that EU infringement claims would be decided in UK courts by something other than the application of retained EU law. There is no realism about the proposition that Parliament intended that future decisions of the CJEU should still bind domestic courts in these cases. The contrary intention has been expressed throughout.

That's what I say about section 16. Then let me just make my last heading in my notes and submissions on a few of the points that were made by the Claimants.

The declaratory theory. The Claimants say *Volvo* did not modify EU law, because the theory is that any decision of the European Court merely declares how the law always was, rather similar to the traditional theory of common law, obviously taking

into account that there are some that say that's no longer how it is or not the right analysis.

Whether that's the right philosophical characterisation of the effect of EU law or common law, it can't make any difference to the approach this Tribunal should take, and I'll explain why. *Volvo*, of course, restated the principle of effectiveness, and that's not controversial. It's part of retained EU law. What is controversial is whether the principle of effectiveness implies or requires the cessation condition.

If we follow the Claimants' argument, then the relevant question becomes whether or not in that respect *Volvo* modified EU law as it stood on IP completion date. So on the question whether effectiveness requires a cessation condition, did *Volvo* change EU law as it stood on IP completion date?

Now, that question is to be determined in this Tribunal as a matter of law, and it doesn't matter whether it's domestic law or EU law, the Act provides both are to be decided as a issues of EU law. That's actually a section we do not have in the bundle, but it is Schedule 5, paragraph 3.

In deciding that question, whether or not *Volvo* modified EU law as it stood on IP completion date, section 6 says in deciding that question, the Tribunal is not bound by *Volvo*, but is bound by earlier decisions of the UK *stare decisis* regime, including *Arcadia*.

To make the argument that *Volvo* doesn't modify EU law actually adds nothing to the question before the Tribunal, because the question before the Tribunal is whether what was said in that part of *Volvo*, assuming that to be what was said, and as you know we don't accept that's what it actually says, but if it did say that, whether that is or was required by the principle of effectiveness. Parliament has decided that from IP completion day, questions of that sort, whether that was EU law as retained or not, are to be answered by reference to retained law. Later decisions of the

European Court are not to be treated as binding.

It doesn't matter that the European Court says, “I'm only declaring what the law always was”, that is a classic boot strap. It doesn't matter that that's what it says, it doesn't make it so. This Tribunal is required by the legislation to consider whether that is so, i.e. what did the principle of effectiveness require at IP completion date. It just takes you round the same circle to make that declaratory argument.

MR JUSTICE ROTH: In a sense, otherwise, all the future EU Court of Justice cases on the declaratory principle would have to be followed, because they're all declaring, unless it's some new treaty provision or some new regulation introduced after IP completion day, but if it's any judgment dealing with primary or secondary legislation that existed pre-IP completion on a declaratory basis, they're always just declaring what it was and you would have to keep on following them.

MR SALZEDO: Yes, exactly so. It can't change the argument to rely on that philosophical aspect of it.

The second point I wanted to mention was the submission from Ms Kreisberger yesterday morning that *Volvo* represented -- it's a similar point, perhaps, but maybe not -- a development, was one of her words --

MR JUSTICE MARCUS SMITH: Mr Salzedo, what happens if it is an established principle of EU law pre-Brexit that EU law is declaring that which has always been?

MR SALZEDO: I think the answer to that would be that that's not a “principle” in the sense in which that's used. It's not recognised as a principle of EU law. It's a position within the jurisprudence of the court and of commentators on it, but I don't understand that to be recognised as a principle of EU law.

Even if it is recognised as a principle of EU law, that the court is declaring what the law always was, it would still take you back round in the same circle, because in deciding -- you still have to decide what these other principles did require. And the

fact that the European Court has said that they always required X, the principle A always required X, does not make it so unless this court is bound by the European Court, which section 6 says it is not.

MR JUSTICE MARCUS SMITH: I take your point that there's a certain circular element here. I think the problem is quite possibly a philosophical one in that one can have a pure declaratory principle in a single system, provided there is only one entity that is doing the declaring.

If you have two entities that are doing the declaring, you are essentially having two different lights being shed on the same thing, and quite possibly revealing different aspects, if I can stick with that analogy, and that is something which is going to result into, effectively, incoherence.

It may be that one needs to say that the premise of the UK legislation is that any system of creating a wider effect of court decisions which are affecting the law more generally than just the case before that court, need to be seen for analytical purposes as having an effectively retrospective effect, and therefore they are occurring after the relevant break here, IP implementation, and therefore you can break the circle in that way.

Now, it may be we're saying the same thing in slightly different ways, but if it were the case, I'm quite sure Ms Kreisberger could find a number of authorities saying that EU law does work on a declaratory principle, if that were to be a principle of EU law, then we do have a problem of two masters.

MR SALZEDO: Well, in my respectful submission, sir, this is not a problem. As you say, I think what you're putting to me is very consistent, mostly, with my submission. In particular, it's why I emphasised the importance of the inability to refer. The inability to refer means that we are in a separate system. We can't be part of that system, and that's why it is necessary to do exactly what the legislature has done,

which is to say that domestic courts are no longer bound by what the European courts say. Even if they're bound by a principle that European Court pronouncements are declaratory, that principle still doesn't tell you that the European Court has correctly declared what the principle was, and that's still the issue that the domestic court has to grapple with.

I do say that the cut-off works. The theory that the European Court is attempting to declare what the law was may be there, but unless the European Court is also infallible or, to put it in a less derogatory term, unless it is also binding, then what they say there always was does not change what the law always was and that remains a question for the domestic court or tribunal to grapple with. And that's precisely where we are.

The second point I wanted to go to was the submission yesterday that *Volvo* represented a development, was one of Ms Kreisberger's words, and another was a logical extension of previous position in EU law. Now, obviously to a large extent Mr Otty is going to deal in detail with what *Volvo* actually represented, but even if we assume that it did say what the Claimants say, and that it was a change which should be directly characterised as a development or an extension, let's just assume that, I just want to deal with that point as to what that would mean. Even then, that submission would mean it was perhaps one possible development or extension, but it would not even then be the only possible development or extension which would be consistent with the retained position at IP completion. So even if we go all the way with the Claimants and say *Volvo* says what they said, it's not really a change but is a development or a logical extension, even then that doesn't get them where they need to go, because this court still has to consider the question of whether it's the only possible extension or development, and if not, is it the right one for the UK circumstances? I just wanted to deal with that point.

I now want to deal with the argument raised on the basis of authority, that this Court can somehow extract from the Supreme Court's decision in News Corp the proposition that accrued EU rights are governed by separate principles to retained EU law, and that several decisions of the Court of Appeal saying the opposite can be discarded as erroneous.

Lipton, as you know, was a considered decision of the Court of Appeal precisely on what was the position in the light of the Withdrawal Act and the other Brexit-related legislation.

If I start with *Lipton*, another decision of Lord Justice Green, in Authorities Bundle, volume 6, tab 107, page 3179. At paragraph 53, you can see that Lord Justice Green was addressing the question of what is the new approach, in the last line.

At paragraph 57, he explained that the regulation in issue in *Lipton* had changed its status, and then goes on to explain that it had become part of EU retained law. Ms Kreisberger yesterday relied on paragraph 65 on page 3180 for the proposition that section 6(1) was concerned with retained EU law. But this was something said by Lord Justice Green in the context of his analysis that any EU law that remained relevant was retained EU law. If there is no other category, then of course section 6(1) is concerned with retained EU law. So the way he puts it is entirely consistent with my case. He's not saying it's limited in some way that means there's another category. That point is confirmed at paragraph 67 on page 3181.

Lord Justice Green's understanding was that section 6(7), where I showed you the definitions, defines “retained EU law” as anything that continues to be or forms part of domestic law by virtue of sections 2, 3 or 4. The relevant regulations, he says, forms part of domestic law by virtue of section 3 and is therefore retained law. So, as far as he's concerned, the relevant EU law doesn't depend on whether somebody

has a right from before IP completion date or not. The substantive law itself becomes retained. That's the way he looks at it.

At paragraph 83 on page 3186, Lord Justice Green sets out basic principles. His subparagraph (i) on page 3186 essentially explains the fork in the road approach, and his subparagraph (vi) at the top of the next page confirms that the meaning and effect of a measure should be determined by reference to the case law made prior to IP completion date.

And then just to identify that you can see on that page that Lord Justice Haddon-Cave agreed with both judgments, and turning back to 3166, paragraph 4, you can see that Lord Justice Coulson agrees with Lord Justice Green's analysis of the withdrawal legislation.

This is one of the two cases which Ms Kreisberger accepted was against her and said was erroneous.

The other case which she accepted was against her is the *Tower Bridge* case, which is at Authorities Bundle, volume 7, tab 124, page 3709. The relevant part starts at page 3738, paragraph 108. Lord Justice Lewison set out the basic position, really, in accordance with our argument, setting out, going on from there, in his case dealing with certain EU derived legislation. It sets out paragraph 6, down to 111.

At paragraphs 112 to 118, Lord Justice Lewison examines the relevant decisions of the CJEU, and then the important part on page 3743 is paragraph 119, where Lord Justice Lewison decided not to follow post-IP completion date decision of the CJEU called *Kemwater*, for the reasons he gives at paragraph 119. If one reads through those paragraphs, it's quite clear that that decision is *ratio decidendi*, it's essential to the decision, and therefore the reasoning that leads to it is binding on this Tribunal. That reasoning includes the ability to not follow a CJEU decision, even though all the facts, as Ms Kreisberger told you yesterday, occurred before IP

completion.

Just to complete this, on the last page, page 3745, you can see that Lord Justice Snowden and Sir Launcelot Henderson agreed with the judgment. Those are the two that Ms Kriesberger mentioned. In our skeleton at paragraphs 37 and 39, we refer to two other Court of Appeal decisions on this point. We rely on those as well. In particular, the second, *London Steam-Ship Owners' Mutual* was another one where a decision was actually not followed. But it's the same point, so there's no need for me to ask you to turn that up as well, but I rely on Ms Kreisberger's acceptance that these decisions of the Court of Appeal are contrary to her argument.

She says that the decision in *News Corp* is somehow relevant and in favour of her argument. We've put a reported version of that in the bundle, which is now in the Third Supplementary Authorities Bundle, which may be numbered 6, I don't know if you have the numbering of the bundles.

In that bundle, it's at tab 5, page 97. It's always nice to have the report, especially when counsel probably is not going to take you through the facts in any detail, but also there is a particular point where the report is helpful. If you have page 97, page 513 of this year's 2 weeklies, just to identify the dates, you can see this was argued for two days in November last year, and decided in February this year. Going to page 98 of the bundle, you can see that the reporters have set out the cases that are referred to in the judgments, and on the next page, at the end of that list of cases, they state at report page 515, just above letter G:

"No additional cases were cited in argument."

It's a longish judgment, because it concerned both a tax point and a point about the always speaking principle of statutory interpretation upon which Lord Leggatt took a slightly different view to the majority, although with the same result in the case.

Now, Ms Kreisberger relied on paragraph 7, which we see at page 101 of the bundle, 517 of the report. The key words in paragraph 7 are the opening words: "It is common ground between the parties."

"It is common ground between the parties that the withdrawal… from the [EU] has no impact on the issues in this case." [As read]

There was no need for anybody to address the EU legislation, there was no mention of it in the judgment, none of the Court of Appeal decisions about it, even though they had happened and been reported before the argument, none of them were mentioned.

This is the leading judgment, of course. It then says two things, by way of apparent explanation of the common ground that Brexit had no impact on the issues in the case. The first thing they say is:

"While the UK was part of the EU, VAT was governed by EU Directives and those Directives were implemented in the UK by domestic statutes… By reason of the [Withdrawal Act] and the [Withdrawal Agreement Act], the relevant EU law and EU derived domestic legislation is “retained EU law” after the implementation completion day..." [As read]

Just pausing there, if Ms Kreisberger's statement was correct, then that statement was completely irrelevant to the Supreme Court. If she was right that they were thinking that their case was about accrued rights, then they wouldn't need to say that, by reason of those matters, the relevant legislation was retained EU law. They then go on to say, the passages that she relies on:

"…but, in any event, the period with which this case is concerned expired before the implementation completion date." [As read]

Of course, Ms Kreisberger's argument is that if my argument is correct, then that statement was irrelevant to the case before them.

There's a paradox. The obvious solution of that paradox is that their Lordships were assuming that those two propositions were consistent with each other. They did not have in mind that someone would seek to argue that the two matters they set out in that sentence were two alternative contradictory approaches to why the law continued to be as it was before in the case before them. So in that respect, the sentence assists my argument --

MR JUSTICE ROTH: Sorry, I'm a bit confused. The first part of that, saying it's retained EU law, that's clearly correct, isn't it?

MR SALZEDO: Yes.

MR JUSTICE ROTH: The second part of it, namely the period with which this case is concerned expired before IP completion, is also clearly correct.

MR SALZEDO: Yes, it's clearly correct on the facts.

MR JUSTICE ROTH: So they're not inconsistent.

MR SALZEDO: No, they are only inconsistent if Ms Kreisberger is right that accrued rights are treated quite differently.

MR JUSTICE ROTH: They would be irrelevant, but there's nothing inconsistent.

MR SALZEDO: That's right. It clearly is factually correct.

This is all based on an assumption that one makes reading paragraph 7, that the second sentence is by way of explanation of the first sentence. It may or may not be. None of us can know, but that's the assumption that Ms Kreisberger's argument makes. But what I'm going to suggest is that the more realistic position is that this is a passing comment in support of common ground which really from-- which was not intended to be authority for anything.

As is pointed out, those words are factually correct, the relevant law is retained EU law, which is consistent only with my case, it doesn't matter that the facts happened before, it remains retained EU law. That's consistent only with my case. But the

insertion of this sentence is not intended to decide any difficult point. In my submission, that's quite obvious. They're just explaining the common ground for someone reading it later.

MR JUSTICE MARCUS SMITH: It's implicit in your submission that there was no *Volvo*-type case before the Supreme Court in this instance, that is to say a post-Brexit change of direction, if I might call it that, that needed to be dealt with. I imagine if there had been such a case, then even paragraph 7 would have been somewhat differently framed one way or the other.

MR SALZEDO: Exactly. And that's why nothing further was cited. *Lipton*, which in particular has been cited many times already, was not cited, nor was Tower Bridge, which would have been important if it was really being suggested that this mattered. I mean, it clearly didn't matter.

Where does that leave us? Ms Kreisberger candidly accepted yesterday that at least two of the cases we rely upon in the Court of Appeal were simply against her. She said they were erroneous. She did not spell out any basis upon which she contended this Tribunal was free to depart from the erroneous, as she would have it, decisions of the Court of Appeal.

Now, we did have in the Authorities Bundle, somehow someone had put in *Bristol Aeroplane*, but as often happens they put in the House of Lords, which doesn't have the relevant passage. We've now put it into the new Third Supplementary Bundle so you have it. The relevant *Bristol Aeroplane* decision in the Court of Appeal, that's in bundle 6, tab 4, page 84. I'm not going to turn to it, but just to give you a note the famous passage setting out the exceptions to the rule is at pages 95 to 96 of the Third Supplementary Authorities Bundle, 729 to 730 of the report.

In the present case, none of the exceptions apply. There's no conflicting decision of the Court of Appeal, no-one's suggested that. Ms Kreisberger relied on that

throwaway comment in paragraph 7 in *News Corp*, but she rightly stopped short of making any submission that *Lipton* and *Tower Bridge* could not stand with *News Corp*. That position would have been impossible, because if paragraph 7 had said anything at all about the issue, it would obviously have been *obiter dicta* at most. It is pretty clear that the Supreme Court were not seeking to say anything about the issue, but if they had been, it would have been *obiter dicta*, which therefore would not contradict the ratio of the Court of Appeal decision.

She also did not submit that the Court of Appeal decisions were *per incuriam*. Again, that would have been impossible, because the only thing they could have been per incuriam of was the legislation, and they obviously weren't, because Lord Justice Green went through the legislation in detail and explained his view of it. So that it was not per incuriam.

The simple point is, even if this Tribunal were minded to agree with Ms Kreisberger that the Court of Appeal had made a mistake, this Tribunal would still have to accept that that was the law unless and until a higher court overturned it.

MR JUSTICE MARCUS SMITH: I'm not sure that follows on Ms Kreisberger's case. I appreciate you are saying that the prism through which she views acquired rights is wrong, but if one buys into her premise, the point is that this is an area of EU law that is, as it were, untrammelled by translation into UK law by all this legislation. We're talking about an accrued right which is subject to EU law on the EU law side of things. So on that basis, we would be obliged to follow EU law, even if there was a decision of a higher domestic court going the other way. I think that's how -- I'm sure she'll correct me if I am wrong in reply, but I think that's how she would --

MR SALZEDO: I'm sure you're right, sir, so I'm grateful for being given the opportunity to answer it that way.

What that way of looking at it does is it takes the accrued rights argument a step

further, and says not only did they have a substantive right to sue for breaches of Article 101, which was not disturbed, but they also had this procedural right that the conditions of that action, including limitation, should be determined by the European Court rather than by the English courts.

Now, my submission is that is a further step. Even if you were to think that section 1, section 4 and section 6 do not abrogate the underlying right to sue for breach of Article 101, which then has to come back, as it does, through the rest of the position, even if you were to think that, the legislation clearly does still say that the European Communities Act is repealed, it's no longer possible to make a reference, courts and tribunals are not bound by the European Court. It still says that.

There's actually a second step to the Claimants' argument as the Tribunal has just put it to me, which is that not only did they retain this substantive right, which in fact is retained through the legislation, but let's assume it's not, not only did they retain that through silence, they also retain this additional procedural right that it should be determined under what becomes then a kind of foreign law, because it's not retained EU law, it's determined under continuing foreign EU law.

My submission is that that's a second step, and I do accept that if you were with the Claimants that that second step were right, then you would be applying continuing EU law to these claims, including the principle that the Court of Justice was superior to all other courts. But my submission is in a way once you try and extend it to that second step, you see how utterly, utterly against the whole scheme of the legislation that approach would be.

MR JUSTICE MARCUS SMITH: Yes, though it would be subject to a point that Ms Kreisberger made yesterday, that the problem will die out over time, because the past accrued rights will at some point be resolved, and fresh accrued rights, as it were, post-Brexit or post some other time, will be on a different basis. So it is

a sunset provision that is determined not by the legislation but by when these accrued claims are finally resolved in these courts.

MR SALZEDO: Two responses to that. One is it is irrelevant, because the law is whatever the law is, and to say we'll apply something that isn't really the law because it doesn't matter because it'll run out soon would not be a right approach.

The second response is that it could be an awfully long sunset if they're right about the effect of *Volvo*. It could go on for a long time. So I certainly don't accept that.

My point about the Court of Appeal decisions is that it actually stops the argument at the earlier stage, because this Tribunal is bound is to find that there's no accrued substantive right. So it's quite hard to see, given that binding effect, how it could be consistent to then find that there is nevertheless an accrued procedural right to have these claims decided under a foreign continuing EU law. It's very hard to see how that could actually happen.

I think, with that, it may be a convenient time for a break, and unless I'm told during the break that there's something I have forgotten, or if the Tribunal has any questions, then I'll hand over to Mr Otty after it.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Salzedo. Just to enable you to consider timing, we have post court commitments, and we will have to have an absolute hard stop at 4.30. I think if you aim at 4.20, then there will be a few minutes of overrun today. We are flexible about when we start tomorrow, but there will be a similar hard stop, and I think we should probably say 20 past tomorrow. So do factor that in. We don't want anyone to be rushed, but we may need to frontload the timetable if those deadlines are a problem.

We will rise and resume at 3.40. Thank you very much.

(3.28 pm)

(A short break)

(3.46 pm)

MR JUSTICE MARCUS SMITH: Mr Otty.

Submissions by MR OTTY

MR OTTY: Thank you, sir. As I said at the outset, the second key question we say is what regard should the Tribunal have to *Volvo* and what implications does *Volvo* have for the limitation issues in these proceedings? The answer to that is, as I've already submitted, none and none.

These are matters we address in our skeleton argument at paragraphs 20 to 30 and 64 through to 73, and our key points are, as I've already summarised them, capable of putting in three basic propositions.

Firstly, properly understood, *Volvo* was a decision about the interpretation and temporal effect of the Damages Directive.

Its binding content does not establish either the cessation condition or the particular landing point on knowledge contended for by the Claimants. As such, it is irrelevant to the proceedings before this Tribunal.

It was, in particular, on a proper analysis, not a decision in which the Court of Justice was being invited or purporting to sweep away and replace or, to use perhaps less dramatic language, to harmonise all national legislation relating to limitation by way of invocation of general principles. That is the substance of what the Claimants' case is.

The Claimants' case, properly analysed, is that Article 10(2) of the Damages Directive had already come in through the gateway of the general principle of effectiveness. So that's our first basic proposition; the proper analysis of *Volvo* goes nowhere near where the Claimants need it to go.

The second point is that the Claimants' case to the effect that the English law on the limitation of actions is, with all its nuances and detail, including its relatively generous

six-year limitation period, including its repeated accruals, including its deliberate concealment of knowledge provisions in section 32, inconsistent with the EU law of principle of effectiveness. That's their case, and it's a case which is simply barred by the Court of Appeal's authority of *Arcadia.*

As I said earlier -- and we'll go to it -- the Court of Appeal held in terms in those proceedings that it was not even arguable that the approach to limitation in competition proceedings as set out in English law by those provisions, 2, 9 and 32 of the Limitation Act, ran counter to the principle of effectiveness.

There is nothing, we say, in the operative part or ratio of *Volvo* which is inconsistent with those findings. They sit perfectly happily together. So *Arcadia* represents, as our second core submission, an insurmountable obstacle to the Claimants' case.

Our third proposition is that even if *Volvo* is interpreted as being of wider effect than simply deciding the matters that we contend for, relating to the temporal effect of the Directive, and even if *Arcadia* is somehow to be set to one side, then the Court of Justice's approach should still not be followed. It should instead, with respect, be disregarded as inconsistent with prior Court of Justice case law, unprincipled and incoherent in its reasoning, and less persuasive than the approach of the Advocate General.

Taking those points in turn, sir. First of all, is *Volvo* relevant at all? Obviously the first task in determining potential relevance is to analyse correctly what *Volvo* actually decided. As I say, we have addressed this in our skeleton at 24 to 30, and we have sought to set out there what *Volvo* was about.

Before going do it, I'd like to address very briefly, if I may, what elements of a Court of Justice judgment are properly characterised as binding at all, and to place the *Volvo* decision itself in context by looking in particular at *Manfredi* and *Cogeco*.

Dealing first, then, with the question of what aspects of a Court of Justice decision

are binding, Ms Kreisberger relied on the *Arsenal Football* case, but her submissions went, we say, rather further than the Court of Appeal did in that case. The key paragraph which the Tribunal has seen is paragraph 31. That's in supplementary bundle 6, page 384 at 395.

As you see from that paragraph, as I say, page 395 -- the judgment is 384, the relevant passage is 395.

MR JUSTICE MARCUS SMITH: I fear we haven't had our supplemental bundles re-renumbered, so we have authorities 1 through to 8, and then three supplemental bundles on top of that.

MR OTTY: This is the supplementary hearing bundle, sorry.

MR JUSTICE MARCUS SMITH: Number 1.

MR OTTY: Number 1, I'm sorry, yes. Supplementary Authorities Bundle, page 395, paragraph 31, which makes clear that the ruling of the Court of Justice, it's the dispositif which is binding, with the main body of the judgment then available as an aid to interpreting the dispositif. It does not suggest that other passages in the judgment that are not necessary to explain that dispositif can have any binding force at all.

Mr Salzedo has also referred to Advocate General Warner's opinion in *Manzoni*, and we adopt all of his submissions too in relation to the *ratio decidendi*. In practice, it amounts to little more than, we say, what is said in *Arsenal*; namely, the binding part of the CJEU's judgment is indeed the operative part, the dispositif, but you interpret it in the context of the wider judgment.

Against that background, it's then critical, we say, in understanding *Volvo* and what it did or didn't decide, to look at not the whole run of case law, but two cases in particular. As I say, *Manfredi* and *Cogeco*. We say once the content of those decisions is properly understood and acknowledged, it illustrates how ill-founded the

Claimants' case on *Volvo* is, either as a matter of interpretation or as suggesting that their interpretation is merely a reflection of earlier case law, or as something which follows inexorably from earlier case law.

So *Manfredi* is in the main Authorities Bundle, volume 3, tab 52, page 1183.

MR JUSTICE MARCUS SMITH: Sorry, 1184?

MR OTTY: 1183. It's addressed by Visa in their skeleton at 15(1) and 66. The case, as the Tribunal has seen, concerned an anti-competitive agreement between vehicle insurance companies which had caused policyholders to pay excessive premiums.

One of the specific questions asked of the Court in this case was whether Article 81, the predecessor of Article 101, meant that for limitation purposes time ran from the day a practice was adopted or from the day it was brought to an end.

So the cessation condition, as it's now contended for, was one of the specific scenarios the Court was invited to consider. That's apparent from the questions which the Tribunal hasn't yet seen, but which are at paragraph 20(3) and 21(4) on pages 1190 and 1192. Those questions are then the ones that are answered in the passages that the Tribunal has looked at so far, which begin at page 1206 under the heading “The third question… and the fourth question…". It's 73 through to 79 where the Court's approach is set out.

Firstly -- and under "Findings", we have them beginning at 77.

Firstly, at paragraph 77, we have the Court explaining that there were no Community rules applicable beyond the principle of effectiveness.

At 78, it's said simply that a national rule which provided that time began to run from the date of adoption of a practice could -- I emphasise could -- make it practically impossible to exercise the right to seek compensation, particularly if accompanied by a short limitation period incapable of suspension.

At 79, it said in a case of continuous or repeated infringements it was possible --

I emphasise again possible -- that a limitation period could expire before the infringement is brought to an end, which would make it impossible for an individual who suffered loss after the expiry of the limitation period to bring a claim.

Just pausing there, it's notable immediately that the Court is contemplating a completely different national rule to that applicable under English law, because it's contemplating the commencement and expiry of a single limitation period rather than the accrual of individual and fresh causes of action, and the commencement of fresh limitation periods with every instance of continuing infringement; one of the particular features of the English regime that I emphasised this morning.

Now, it's obvious why a rule such as that the Court was considering would be likely to be unacceptable, since a claim could become time-barred even before an individual claimant had suffered loss on that analysis. That, of course, is not possible under English law, where the cause of action only arises once loss is suffered.

Going back to the judgment, at paragraph 80, the Court said that it was for the national court to determine whether this was the case, having regard to the national rule at issue.

At 81, it said that in the absence of Community rules, it was for the domestic legal system to prescribe the limitation period for seeking compensation for harm, provided the principles of equivalence and effectiveness were observed.

At 82, it was for the national court to determine whether a commencement date referable to the date of a prohibited practice was adopted, accompanied by a short limitation period, without the potential for suspension did indeed render it impossible or excessively difficult to exercise the right to seek compensation.

The Court specifically refused the domestic court's invitation to provide a hard-edged answer of the kind the Claimants contend for in this case, and it specifically refused

to find that the cessation condition was required by European Union law, even though that was one of the two scenarios expressly canvassed in the questions put before it.

That is entirely consistent with the summary of the law that I advanced earlier today.

Cogeco is next, and it took a similar approach of emphasising that while the general principle of effectiveness applies, it was always necessary to look at all aspects of a domestic regime relating to limitation before deciding whether that principle of effectiveness was infringed.

The judgment in *Cogeco* is Authorities Bundle, volume 5, tab 97, page 2661. Paragraph 1, the Court of Justice summarised the case concerning the interpretation of the Damages Directive and rules governing action for damages under national law as well as Article 102 and the principles of equivalence and effectiveness.

It sets out the key provisions of the Directive at paragraphs 2 through to 8, and it's 10(2), which is at paragraph 6, which is obviously of most relevance for our purposes.

It then set out the Portuguese limitation period in issue or limitation rules in issue at paragraph 9, with its provision for a three-year limitation period to start from awareness of a right to compensation, even without knowledge of the identity of the person liable or the full extent of damage suffered. So again, just pausing by way of contrast, half the primary limitation period applicable under the Limitation Act, the six-year period, with no equivalent of section 32, and no indication that under Portuguese law, a fresh cause of action accrues with every instance of infringement.

The questions in the reference are then set out at 23, at page 2665. It's the second question at paragraph 23(2) which matters here, with its reference both to the Directive and to general principles of EU law. The court then begins its consideration of that question at paragraph 35 and following, beginning at

page 2667.

Just as was the case in *Manfredi*, at 42, the Court stated that in the absence of EU rules,

"...applicable *ratione temporis*, it is for the domestic legal system of each Member State to lay down the detailed rules ..." [As read]

Including those on limitation, provided always that the principles on effectiveness and equivalence were observed.

At 43, it set out what those principles were in terms of the principle of effectiveness. The repeated mantra that we see throughout the case law:

"The rules ... must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law." [As read]

And that is the test. It's not enough to say there's a risk that the overall public policy objectives might not be served, or this particular scenario might in some unspecified way jeopardise the pursuit of a claim. This is the test repeated throughout the case law. In order for a national limitation provision to breach the principle of effectiveness, the entire regime viewed together must make it in practice impossible or excessively difficult to exercise the relevant rights.

At paragraph 45, we have it emphasised by the Court, as the Advocate General had before it, that it was necessary to undertake a detailed fact-sensitive inquiry, taking into consideration all the elements of the Portuguese rules.

At 46, it referred to the complex factual and legal analysis which EU competition law required.

47 emphasised the limits on national legislation in relation to when limitation periods started to run, their duration, and the rules for suspension or interruption, and stated that they could not undermine completely the full effectiveness of Article 102.

At 48, the Court stated that it followed that the combined effect of all limitation rules

could not be such as to render the right to claim compensation practically impossible, excessively difficult and so on. So again emphasising the need throughout to look at the totality of the picture, the need to look at the entirety of the relevant domestic regime under scrutiny, and eschewing the idea of a hard-edged rule.

To similar effect at paragraph 49, the Court said only that short limitation periods commencing before the knowledge of the identity of the infringer may -- I emphasise may, not will -- render the exercise of the practically impossible or excessively difficult.

At paragraph 50, the Court stated that it was indispensable for an injured party to be able to bring an action for it to know who was liable. Well, that is true and a statement of the obvious, but it is not, either as a matter of language or logic, a finding that a limitation period can never begin to run before an injured party has knowledge of its right to compensation.

At 51 -- and indeed paragraph 49 had just said precisely the opposite -- at paragraph 51, the Court then referred to short limitation periods which had no provision for suspension pending investigation by national authorities, and said that the same applied, namely that it was possible, not inevitable, but possible, that such features could render the exercise of pursuing compensation practically impossible or excessively difficult.

At 52, it gave an example of a scenario where a limitation period would expire before national competition authority proceedings had been completed.

Then at 53 and 55, it expressed its conclusions on how the principle of effectiveness applied to the facts of the case before it and the particular provisions of Portuguese law before it. Again, it did so on a fact-specific basis. It identified the combination of three particular features of the Portuguese rules as being precluded by the principle of effectiveness.

A three-year limitation period. Commencement of that period, even if the claimant was unaware of the identity of the person liable, and the absence of any possibility of suspension. But it was the combination of those three, not any one taken individually, it was the combination of those three that led to that conclusion.

That key reasoning in *Cogeco* is then reflected word for word in the operative part of the judgment itself, at paragraph 2 on page 2670. There was no difficulty at all in *Cogeco* in working out what the binding part is, what the reasoning for it is, what the conclusion of the Court was. But there is nothing in *Cogeco* to support the idea that Article 10(2), which the court had in mind and had set out, had simply codified the general principle of effectiveness insofar as limitation periods were concerned. And nothing to displace the idea that in cases not governed by the Directive, anything other than a fact-sensitive inquiry, having regard to all individual features of the relevant national limitation rules, is required in order to test whether those rules meet the requirements of the principle of effectiveness.

Now that was an approach which again reflected the fact that there weren't at this point any detailed rules relating to limitation forming part of EU law, which entirely respected Member States' autonomy and entirely respected the fact that different States might properly pursue and achieve the same objectives in different manners. We see a very obvious example where the Court, if it's intending to take something from its reasoning and import it into its operative part or dispositif, doing so word for word.

Now, in taking this approach, the court in *Cogeco* reached the same conclusion as the Advocate General had, but there are a small number of additional passages in her Opinion which I would also wish to emphasise. Her Opinion is at Authorities Bundle, volume 8, tab 146, page 4374. It's paragraphs 72 to 83 that I wanted to draw to the Tribunal's attention, beginning at page 4387.

72 set out the question. 73 referred to the conclusion that the case fell outside the temporal scope of the Directive. 75 emphasised that, absent the harmonisation brought about by the Directive, it was for domestic legal systems to prescribe rules subject only to the principles of effectiveness and equivalence.

77 explained that a detailed examination of any relevant rule was required to assess whether it was compatible with the principle of effectiveness.

78 to 79 then set out the Advocate General's conclusion that even a three-year period of limitation was not, per se, too short to comply with the principle of effectiveness, even though less generous than the five years set out in the Damages Directive.

Then 80, at page 4389, contains the clearly stated view, not contradicted by the Court in its judgment which would follow and is consistent with the conclusions that it reached, that Article 10(3) of the Directive was not to be understood merely as a codification of that which already resulted implicitly from primary law in the form of Article 102 and the principle of effectiveness.

As I say, as matter of substance and analysis, it is codification of Article 10(2) which the Claimants' case in these proceedings really boils down to, and you will immediately see and recall from that word "codification" how well *Cogeco* sits with *Arcadia*, where Sir Terence Etherton rejected the submission that the Damages Directive merely represented codification of pre-existing law. So far from casting doubt on *Arcadia*, *Cogeco* sits neatly side by side with it.

So that's *Manfredi* and *Cogeco*. It's no surprise that prior to *Volvo* being decided, against the background of *Manfredi* and *Cogeco*, as we just looked at them, it's no surprise that no Claimant in the present proceedings had thought to plead that a cessation condition was part of the general principle of effectiveness, and no Claimant in the present proceedings had sought to plead that the particular landing

point on knowledge set out in the Damages Directive was already part of the general principle of effectiveness. There was nothing in EU law to suggest that that was the case.

I should emphasise, so far as *Manfredi* is concerned, that it's not merely inconsistent with the Claimants' case, it's directly contrary to it, because in *Manfredi*, as we've seen, the Court had before it a specific question: is there a cessation condition, essentially. It declined to go down that route.

For completeness, and without going to each of them, I should say that the other earlier decisions cited by the Claimants, either in their skeleton arguments or through the oral submissions of Mr Saunders yesterday, take the Claimants absolutely nowhere. That's the case with *Kon*e, that's the case with *Crehan*, it's the case with all of the decisions relating to access to court files and so on. All of those decisions contained only general statements about the policy objectives pursued by competition regimes, general statements about the right to claim compensation, and the repeated formulation which we embrace as a correct statement of law as to the general principle of effectiveness. Does the rule make pursuit of the right to compensation, exercise of the right to compensation, excessively difficult or impossible?

That's the formulation, and none of those cases cast any doubt on it. None of those cases were limitation cases, save for one -- no, not even that, actually. Each was concerned with legal provisions in the case of *Kone* and *Crehan*, providing an absolute bar to particular claims.

Nothing in those cases, as I said earlier, established that anything which impairs or jeopardises the pursuit of compensation in any way will either be a breach of the principle of effectiveness or otherwise beyond the proper judgment of national legislatures, having regard to the other important principle of legal certainty that

we've heard very little about on the Claimants' side. Indeed, if Mr Saunders' test of mere impairment, or jeopardy, or lack of unattractiveness, as it seemed to be being put at one point, was the test, then that would all but do away with the possibility of a limitation defence at all.

Now that provides, we say, the true and important context for *Volvo* itself, which is where I'm going to go to next. It provides, we say, a very weak foundation for the submission either that the decision as interpreted by the Claimants represented existing law, as the Merricks Claimants contend, or that it followed inexorably from earlier case law, as the Stephenson Harwood Claimants contend.

That might be a convenient moment, because I doubt I'll deal with *Volvo* in two minutes.

MR JUSTICE MARCUS SMITH: I suspect not, Mr Otty. In terms of timing, is 10.30 enough?

MR OTTY: I think 10.30 should be fine, sir. I will finish by lunchtime on that basis, I would think, or very shortly after, but probably before. Even though that will grant the Claimants more than 50 per cent of the time if we go through to 4.20, I won't taking any point on that. I think we're fine in terms of timing if we start at 10.30.

MR JUSTICE MARCUS SMITH: Very good. And then it will be Mr Saunders followed by Ms Kreisberger, or the other way round?

MS KREISBERGER: I think it will be the other way round. I've had a very quick word with Mr Saunders.

MR SAUNDERS: It may be that we can get out of the way slightly quicker, but let's see how we go tomorrow.

MS KREISBERGER: As long as I can start straight after lunch, that should be fine, and I'll leave Mr Saunders some time at the end. We'll have a word.

MR JUSTICE MARCUS SMITH: Have a word. Unless you can agree, I think we'll

have Mr Saunders followed by you, Ms Kreisberger, reverse the order. But it's sounding like a 10 o'clock start might not be a bad idea, just to get an extra half an hour.

MR OTTY: We're certainly entirely content to start at 10.

MR JUSTICE MARCUS SMITH: We will do that. That's not to be taken as encouragement to go longer.

MR OTTY: No.

MS KREISBERGER: I'm conscious I have quite some ground to cover.

MR JUSTICE MARCUS SMITH: I'm quite conscious that you do, Ms Kreisberger.

MS KREISBERGER: I'm grateful.

MR JUSTICE MARCUS SMITH: I want you to have a baseline to which you can operate, but we will finish with a hard stop at 4.20 tomorrow.

MS KREISBERGER: I'm very grateful for that.

MR JUSTICE MARCUS SMITH: So we can adjust lunch and we can adjust other things, but that's when we finish.

MS KREISBERGER: Sir, whilst I'm on my feet, I just wanted to check that the Tribunal had received our note that was circulated last night.

MR JUSTICE MARCUS SMITH: We did indeed, thank you very much.

MS KREISBERGER: I'm grateful.

MR SAUNDERS: Sir, there was one other point that I was going to raise. Mr Salzedo alluded to a note that was going to be coming about the foreign competition claim. Is that coming separately, or is that coming tomorrow morning?

MR JUSTICE MARCUS SMITH: I anticipate that that is not going to be coming overnight, and that is something which we will deal with on the papers. This was the section 60A point.

MR SALZEDO: I have a very efficient team, no credit whatsoever to me, so there is

some hope that it may come overnight, and of course counsel on all sides will be sent it as soon as the Tribunal is. If we can manage it before the end of the hearing, we will, but I cannot promise that.

MR JUSTICE MARCUS SMITH: That's your answer, Mr Saunders.

MR SAUNDERS: I'm grateful. I may not be able to deal with it, depending on when it arrives.

MR JUSTICE MARCUS SMITH: We certainly will not have you disadvantaged by when it comes. If it comes very late tonight, don't feel obliged to burn the midnight oil dealing with it.

MR SAUNDERS: Not on that, anyway.

MR SALZEDO: If Mr Saunders lets me know when he's planning to finish work, I'll try and time it for 15 minutes before that.

MR JUSTICE MARCUS SMITH: I'm sure Mr Saunders will take that in the spirit that it was intended. Thank you, Mr Salzedo.

We'll resume at 10 o'clock tomorrow morning.

(4.20 pm)

(The hearing adjourned until 10 o'clock the following day)