Neutral citation: [2016] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1240/5/7/15
1244/5/7/15

Victoria House
Bloomsbury Place
London WC1A 2EB

27 July 2016

Before:

THE HON. MR JUSTICE ROTH
(President)
THE HON. LORD DOHERTY
MARGOT DALY

Sitting as a Tribunal in England and Wales

B E T W E E N:

DEUTSCHE BAHN AG AND OTHERS

Claimants

-and-

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

Defendants

A N D B E T W E E N:

PEUGEOT CITROEN AUTOMOBILES UK LTD AND OTHERS

Claimants

-and-

(1) PILKINGTON GROUP LIMITED
(2) PILKINGTON AUTOMOTIVE LIMITED

Defendants

-and-

ASAHI GLASS CO., LTD. AND OTHERS

Rule 39 Defendants

Heard at Victoria House on 29 April 2016

JUDGMENT

APPEARANCES

Mr Kieron Beal QC, Mr Tristan Jones and Mr Eesvan Krishnan (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants in Case 1240/5/7/15.

Mr Thomas de la Mare QC, Mr Tristan Jones and Mr Eesvan Krishnan (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants in Case 1244/5/7/15.

Mr Mark Hoskins QC and Mr Matthew Cook (instructed by Jones Day) appeared on behalf of the Defendants in Case 1240/5/7/15.

Mr Adam Johnson and Ms Kim Dietzel of Herbert Smith Freehills LLP appeared on behalf of the Defendants in Case 1244/5/7/15.

Mr Mark Hoskins QC and Ms Sarah Ford (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Rule 39 Defendants in Case 1244/5/7/15.

INTRODUCTION

1. When a competition damages claim is brought before the Competition Appeal Tribunal (the "Tribunal") pursuant to sect 47A of the Competition Act 1998 (the "CA") and the proceedings are treated as proceedings in England and Wales but the substantive claim is governed by foreign law, are the limitation rules which apply to that claim those set out in the CA and the relevant Tribunal rules (the "Tribunal Rules"), or is the Foreign Limitation Periods Act 1984 (the "FLPA") applicable so that the foreign law rules of limitation would ordinarily apply? That is the common question to be determined as a preliminary issue in one action and which arises on applications brought by the defendants in a separate action. Accordingly, the preliminary issue and the corresponding part of the applications have been heard together and this is the judgment on both.

2. The question is subject to the qualification that for claims which arose after 1 October 2015 and to which sect 47E CA will therefore apply, it is common ground that the FLPA is applicable. The implications of that are considered below. But both the present claims arose well before October 2015, as will many competition damages claims, since these typically concern matters going back over several years. The question is accordingly of considerable significance beyond the present two actions.

3. Both these proceedings are treated pursuant to the Tribunal Rules as proceedings in England and Wales. However, the Tribunal is a UK tribunal and the relevant provisions of the CA and the Tribunal Rules which fall to be construed apply equally to proceedings in Scotland and Northern Ireland. It is therefore both appropriate and necessary to consider the interpretation of those provisions also in the context of proceedings which would be treated as brought in those different jurisdictions in the United Kingdom.

4. The claimants in both proceedings are represented by the same solicitors and the argument for both sets of claimants has been presented by a single team of Counsel. The contrary argument has been shared out between the legal representatives of the two groups of defendants but it has been efficiently

presented with no overlap in the submissions. This has been very helpful and enabled an efficient and seamless conduct of the hearing.

THE PRESENT ACTIONS

5. Both these proceedings are so-called "follow-on" claims in that they are based solely on the infringement of competition law established by decisions of the EU Commission (the "Commission"). It is sufficient to set out only the briefest outline of the two claims and the relevant dates.

Case No 1240/5/7/15: *"MasterCard"*

6. By a decision adopted on 19 December 2007 ("the MasterCard Decision"), the Commission found that the MasterCard payment organisation and the legal entities representing it (i.e., the three defendants to this claim) infringed art 81 of the EC Treaty (now art 101 of the Treaty on the Functioning of the European Union ("TFEU")) by their arrangements concerning what was termed the "Intra-EEA fallback interchange fee". The infringement was found to last from 22 May 1992 until 19 December 2007.

7. The defendants' application to annul the MasterCard Decision was dismissed by the General Court on 24 May 2012, and a further appeal was dismissed by the Court of Justice of the European Union on 11 September 2014.

8. The arrangements were found, in effect, to set a minimum price which merchants had to pay to their acquiring bank for accepting MasterCard branded consumer credit and charge cards and MasterCard or Maestro branded debit cards. The Intra-EEA fallback interchange fee applied in Member States where no intra-country fallback interchange fee had been determined.

9. There are about 1000 claimants in this action, belonging to six large corporate groups. According to the claim, each time a customer made a purchase of services from one of the claimants by means of a MasterCard or Maestro branded payment card, the customer's bank (the issuing bank) would charge that claimant's bank (the acquiring bank) an interchange fee (unless the acquiring bank was the same bank as the issuing bank); and the acquiring bank would charge the claimant a merchant service charge ("MSC"). In summary, the

claimants contend that the MSCs they paid to their acquiring banks were inflated as a result of the unlawful arrangements condemned in the MasterCard Decision. The claimants claim for loss suffered in 17 countries over the period covered by the MasterCard Decision, i.e. 22 May 1992 to 19 December 2007, and an alleged "run-off" period until the MSCs returned to a level unaffected by the infringement.

10. The claimants commenced this claim in the Tribunal on 21 October 2015. In addition, it is pertinent to note that they had commenced actions for alleged breach of art 81 EC against the same three defendants in the High Court. There were in fact four separate claims started by different claimant groups in the High Court in late 2012 and 2013, but they have been consolidated. The High Court action overlaps with the claim in the Tribunal but goes wider, in that it is in part a follow-on claim but in part a "stand-alone" claim; it covers an additional country; it puts forward additional allegations regarding the MasterCard scheme, relying also on certain findings by domestic regulators; and it covers a longer period as it alleges loss suffered through to the date of the trial.

11. An application by the defendants in the Tribunal to strike out the *MasterCard* claim as an abuse of process by reason of the parallel High Court proceedings was dismissed by the President: [2016] CAT 13.

Case No 1244/5/7/15: "*Pilkington*"

12. By a decision adopted on 12 November 2008 (the "Car Glass Decision"), the Commission found that the two defendants to this action (together "Pilkington"), along with two other associated companies in the Pilkington group and companies in three other corporate groups, had infringed art 81 EC (now art 101 TFEU) by participating in a cartel in the automotive glass sector. The infringement by the companies in the Pilkington group was found to last from 10 March 1998 to 3 September 2002, and the infringement by the companies in the other corporate groups was found to last until 11 March 2003.

13. Pilkington's application to annul the Car Glass Decision was dismissed by the General Court on 17 December 2014. Although Pilkington has appealed against

the General Court's decision, that appeal relates only to the level of the penalty and does not challenge the finding of infringement.

14. There are nine claimants in these proceedings. All belong or belonged to groups of car manufacturers who purchased car glass. The claimants contend that by virtue of the cartel, their purchases were subject to an overcharge which caused them loss. They contend that the cartel had a continuing effect on the price of car glass until at least 2011, although the cartel itself had come to an end, on the basis that it took that time for normal market forces, unaffected by the cartel, to take full effect, and they claim for damages accordingly.

15. The claimants commenced this claim in the Tribunal on 18 December 2015. Like the claimants in *MasterCard*, the claimants had previously, on 4 November 2014, commenced proceedings against Pilkington in the High Court which overlap with, but are broader than, this claim in the Tribunal since the claim there alleges additional or alternative causes of action.

16. Pursuant to rule 39 of the Tribunal Rules, Pilkington has brought additional claims seeking contribution and/or indemnity from six companies in the Asahi group (together "Asahi") who, or whose corporate predecessors, were addressees of the Car Glass Decision. Pilkington has brought similar contribution and/or indemnity claims against Asahi under Part 20 of the Civil Procedure Rules in the High Court proceedings.

Governing law

17. In *MasterCard*, the claimants contend that the governing law is Belgian law. The defendants contend that the law of whichever of the 17 countries in which each particular claimant suffered damage is the governing law of that claimant's claims.

18. In *Pilkington*, the claimants contend that the governing law is English law. Pilkington's primary contention is that the governing law is French law as regards the 1st-8th claimants' claims and Swedish law as regards the 9th claimant's claim. On that basis, they allege that all the claims are time-barred under the applicable foreign law.

19. We should add that for competition damages claims arising after 11 January 2009, the governing law is determined by Regulation (EC) 864/2007: the "Rome II" Regulation. Accordingly, although we think it is appropriate to make reference to the Rome II Regulation in our discussion below, it does not apply to either of the present claims.[1]

THE STATUTORY FRAMEWORK

20. To appreciate the way the issue arises and the rival contentions of the parties, it is necessary to set out the relevant legislative provisions in some detail. The position is complicated by the various changes which have been made and the effect of transitional provisions. To keep citation from the statutory material in this judgment within bounds, fuller quotations from those statutes are set out in the Appendix.

(a) Competition damages claims

21. Prior to 2003, a private action claiming damages for breach of competition law could be brought only in the civil courts (i.e. in England, the High Court; in Scotland, the Court of Session; in Northern Ireland, the High Court of Northern Ireland). The Enterprise Act 2002 ("EA") introduced a new sect 47A into the CA, with effect from 20 June 2003, governing claims that may be brought before the Tribunal.

22. In its original form, sect 47A provided, in material part:

> "(1) This section applies to—
>
> (a) any claim for damages, or
>
> (b) any other claim for a sum of money,
>
> which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.
>
> (2) […]

[1] Although the Particulars of Claim in *MasterCard* currently plead reliance on the Rome II Regulation in respect of damage suffered after 11 January 2009, the claimants made clear that this allegation will be deleted.

(3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings—

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision."

23. A "relevant prohibition" is defined in sect 47A(2) as meaning the Chapter I or Chapter II prohibition under the CA or what was then art 81(1) or art 82 EC (now arts 101(1) and 102 TFEU). The decisions mentioned in sect 47A(6) were a decision of either the Office of Fair Trading or the Tribunal on appeal or, in respect of European competition law, a decision of the Commission. And the periods mentioned in sect 47A(7)-(8) were the period during which an appeal against the decision may be brought or, if an appeal was brought, the period before that appeal was determined: i.e., effectively the period until the decision became final.

24. Pursuant to sect 15 and Sched 4 EA, the limitation provisions for such claims were set out in rule 31 of the 2003 Tribunal Rules ("rule 31"), which provided, insofar as material:

"(1) A claim for damages must be made within a period of two years beginning with the relevant date.

(2) The relevant date for the purposes of paragraph (1) is the later of the following—

(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;

(b) the date on which the cause of action accrued.

(3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant."

25. The result was that the Tribunal's jurisdiction in damages claims was (i) confined to follow-on damages; (ii) could not be invoked before the relevant authority had taken a decision that the relevant prohibition had been infringed

(an "infringement decision"); and (iii) if the infringement decision was under appeal, could be invoked before the determination of that appeal only with the permission of the Tribunal. The jurisdiction was subject to a special time-limit of two years from the date when the infringement decision became final.

26. The policy of the original sect 47A and attendant limitation rule was accordingly to enable follow-on claims to be held in abeyance until such time as an infringement decision, which is binding on the UK courts and the Tribunal,[2] became final.

27. This special, but circumscribed, jurisdiction applied only to the Tribunal. Sect 47A(10) expressly preserved the right to bring any other proceedings in respect of the claim. Accordingly, there was a parallel jurisdiction for claims for follow-on damages in the courts, which were subject to the ordinary rules on limitation that apply to such actions there. Stand-alone claims could be brought only in the courts.

28. The jurisdictional landscape changed dramatically with the coming into force of the Consumer Rights Act 2015 ("CRA") on 1 October 2015. This substituted a new sect 47A, of which the material provisions are as follows:

> "(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.
>
> (2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—
>
> (a) the Chapter I prohibition,
>
> (b) the Chapter II prohibition,
>
> (c) the prohibition in Article 101(1), or
>
> (d) the prohibition in Article 102.
>
> (3) The claims are—
>
> (a) a claim for damages;
>
> (b) any other claim for a sum of money;
>
> (c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.

[2] Pursuant to the original sect 47A(9) CA, sect 58A CA and art 16 of Reg 1/2003/EC.

(4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded."

29. Sect 47A(6) defines an "infringement decision" to mean a decision of the Competition and Markets Authority ("CMA"), or the Tribunal on appeal from the CMA, that the Chapter I or Chapter II prohibition or art 101(1) or art 102 TFEU have been infringed, or a decision of the Commission that art 101(1) or art 102 have been infringed. Sect 47A(5) is analogous to the old sect 47A(10) in preserving the right to bring claims in the courts: see para 27 above.

30. Accordingly, the Tribunal now has full jurisdiction for competition damages claims, whether follow-on or stand-alone, that is completely parallel to the jurisdiction of the courts.

31. The new sect 47E provides for limitation. It includes special provision for collective proceedings brought under the new sect 47B, but for other proceedings it states as follows:

"(1) Subsection (2) applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made in—

(a) proceedings under section 47A, or

(b) […].

(2) Where this subsection applies—

(a) in the case of proceedings in England and Wales, the Limitation Act 1980 applies as if the claim were an action in a court of law;

(b) in the case of proceedings in Scotland, the Prescription and Limitation (Scotland) Act 1973 applies as if the claim related to an obligation to which section 6 of that Act applies;

(c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies as if the claim were an action in a court established by law."

32. Accordingly, now that the Tribunal has a fully parallel jurisdiction with the courts the policy of the new provision is that the limitation rule in the Tribunal should replicate that which would apply if the action had been brought in court. Special limitation rules apply to collective proceedings under sect 47B because of their particular complexities, but for such proceedings the Tribunal has exclusive jurisdiction.

33. However, whereas the new sect 47A applies to claims whenever arising, the new sect 47E on limitation applies only to claims arising after 1 October 2015: CRA, Sched 8, paras 4(2) and 8(2). Therefore, both of the present proceedings are governed by the new sect 47A but for neither is limitation determined by sect 47E.

34. New Tribunal Rules came into force at the same time as the CRA: the Competition Appeal Tribunal Rules 2015 (the "2015 Tribunal Rules"). Rule 119(2)-(4) of the 2015 Tribunal Rules apply to determine the limitation provisions for the transitional period: i.e. for proceedings brought after 1 October 2015 in respect of claims which arose before 1 October 2015. Although the application of this somewhat convoluted rule (see Appendix) to a stand-alone claim has given rise to some discussion, for a follow-on claim, the position is clear: rule 31(1) to (3) of the 2003 Tribunal Rules effectively applies so that the limitation period (or prescriptive period for a Scottish claim) is two years from the infringement decision becoming final.

35. It follows that if the only relevant limitation period is that set out in the CA and related Tribunal Rules, both the present proceedings are within time, at least for the period after 20 June 1997[3].

(b) Limitation periods and private international law

36. The primary statute of limitations in England and Wales is the Limitation Act 1980 (the "LA").

37. Sect 2 LA provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. Sect 32 provides that the period may be postponed in cases of fraud, concealment or mistake. Sect 39 states:

> "This Act shall not apply to any action … for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act)…."

[3] A claim for loss suffered prior to 20 June 1997 is subject to the question whether the claim may be barred by reason of rule 31(4) of the 2003 Tribunal Rules, notwithstanding Rule 119(2) of the 2015 Tribunal Rules. That issue does not arise for determination in this judgment.

38. The primary statute governing prescription and limitation in Scotland is the Prescription and Limitation (Scotland) Act 1973 (the "PL(S)A"). Sect 6 PL(S)A provides that if after the appropriate date an obligation to which that section applies has subsisted for a continuous period of five years, without any relevant claim having been made or the subsistence of the obligation having been relevantly acknowledged, then at the end of that period the obligation is extinguished. Sched 1 PL(S)A specifies obligations affected by Sect 6, and the terms of para 1(d) are wide enough to include an obligation to pay damages for breach of competition law.

39. At common law, a distinction was drawn between two kinds of limitation statutes, namely those which merely bar a remedy ("procedural" limitation provisions) and those which extinguish a right ("substantive" limitation provisions). If the relevant foreign limitation statute was procedural, then it did not matter whether time had expired under it: the only applicable statute in such a case was the domestic limitation statute. But if the foreign limitation statute was substantive, then a claim in tort had to be in time under both the English and the foreign limitation statute. See generally *Dicey, Morris & Collins, The Conflict of Laws* (15th ed.), paras 7-055 to 7-057. The position was analogous in Scotland: see *Anton, Private International Law* (3rd ed.), para 27.23; *Johnston, Prescription and Limitation* (2nd ed.), para 23.01).

40. This approach was strongly criticised, and the distinction between different foreign limitation provisions was abolished for England and Wales by the FLPA, which provided, as its long title explains, for any law relating to limitation to be treated as a matter of substance. Sect 1 states, insofar as material:

> "(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—
>
> (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and
>
> (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

41. Accordingly, the relevant foreign limitation provisions would apply to a tort claim brought in England. This was subject to a saving in respect of public policy, set out in sect 2(1)-(2):

"(1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings."

42. As just mentioned, the FLPA applies only to England and Wales: sect 7. Equivalent provision was made in Scotland by the Prescription and Limitation (Scotland) Act 1984, which amended the PL(S)A by inserting a new sect 23A into that enactment, as follows:

"(1) Where the substantive law of a country other than Scotland falls to be applied by a Scottish court as the law governing an obligation, the court shall apply any relevant rules of law of that country relating to the extinction of the obligation or the limitation of time within which proceedings may be brought to enforce the obligation to the exclusion of any corresponding rule of Scots law.

(2) This section shall not apply where it appears to the court that the application of the relevant foreign rule of law would be incompatible with the principles of public policy applied by the court."

43. The position in Northern Ireland mirrored the position in England and Wales. The Foreign Limitation Periods (Northern Ireland) Order 1985 contains substantially the same provisions as the FLPA.

44. However, those provisions did not disturb the so-called 'double actionability' (or 'double delict') rule with regard to tort (or delict). Under that rule, the tort or delict had to be actionable under both the law of the place of commission and under the domestic law of the relevant jurisdiction in the United Kingdom: see *Dicey, Morris & Collins*, paras 35-004 to 35-012. Accordingly, a claim had to be within time under both the relevant foreign law and the law of the forum: see e.g. sect 1(1)(b) and (2) FLPA.

45. The double actionability rule was subsequently abolished (save for claims in defamation), by the Private International Law (Miscellaneous Provisions) Act 1995 (the "PILMPA"), sect 10. Part III of the PILMPA sets out rules for choosing the law to be used for determining issues in claims relating to tort or delict within its scope. Part III (which includes sect 10) applies throughout the United Kingdom: sect 18(3). However, it only applies to acts or omissions giving rise to a claim which occurred after the statute's commencement date, i.e. 1 May 1996. That is relevant to the claims in *MasterCard*, which straddle that date and therefore are governed partly by the old common law rules and partly by the PILMPA.

46. Accordingly, claims falling within the PILMPA which are governed by foreign law according to its rules, are governed *only* by foreign law. If such a claim in England and Wales falls within FLPA, it therefore no longer comes within sect 1(2) and limitation is determined only by reference to the foreign limitation provisions. The position is the same in Scotland and Northern Ireland.

47. The final stage of legislative change came with the Rome II Regulation, which applies from 11 January 2009. Art 6(3) of the Rome II Regulation establishes the rules to be applied to determine the law applicable to a non-contractual obligation arising out of a restriction of competition.

48. Art 15 defines the scope of the law applicable under the Rome II Regulation. Art 15(h) provides:

> "The law applicable to non-contractual obligations under this Regulation shall govern in particular:
>
> …
>
> (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."

49. There is a saving for public policy in art 26, as follows:

> "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."

50. It follows that if, pursuant to the provisions of the Rome II Regulation, a foreign law is applicable to the claim, the provisions of that foreign law governing prescription and limitation will apply, subject only to the public policy exception.

51. However, the Rome II Regulation applies only to events giving rise to damage which occur after its entry into force, i.e. from 11 January 2009: art 31.

THE RIVAL CONTENTIONS

52. In summary, the defendants submit that the FLPA applies to claims in the Tribunal where the proceedings are treated as being in England and Wales. Insofar as the claims are governed by foreign law, the limitation period under that foreign law is therefore applicable, unless it offends against public policy – which is a very narrow exception that is not engaged in the present cases. This reflects the underlying policy of the FLPA, and the corresponding enactments for Scotland and Northern Ireland, that if the substantive law applicable to a claim is a particular foreign law, then the claim should be subject to the limitation provisions of that law. There is nothing in the CA or the Tribunal Rules to exclude the application of the FLPA (or the equivalent Scottish and Northern Irish provisions); and for claims arising after 1 October 2015, this result follows clearly from sect 47E CA.

53. The claimants submit that the CA and the Tribunal Rules constitute a complete and comprehensive code. There is accordingly no scope for the application of other limitation rules except insofar as they are incorporated by the CA, and it is only once sect 47E CA applies that this arises. That reflects the two contrasting legislative approaches adopted before and after the coming into force of the new regime introduced by the CRA. Before 1 October 2015, the only claims that could be brought under sect 47A CA were follow-on claims, so the CA applied a "wait-and-see" or "tolling" approach whereby a claim could be brought only after an infringement decision had been made and, save with permission, once it became final. The special two year limitation period under rule 31 was tailored to that approach and it would be inconsistent for it to be overridden by a foreign limitation statute. Claims arising from 1 October 2015 onwards are governed by the new sect 47A which gives the Tribunal full jurisdiction for private

claims, corresponding to the jurisdiction of the courts, so sect 47E CA applies the limitation or prescription provisions applicable to claims brought in the courts – including any relevant foreign law of limitation. The claimants further contend that the interpretation urged by the defendants gives rise to anomalies.

DISCUSSION

54. In essence, this issue is a matter of statutory interpretation. It is common ground that a claim brought under sect 47A CA may be governed by foreign law. It is also common ground that the FLPA applies to proceedings in a tribunal as well as proceedings in a court. See in that regard, *Hillingdon LBC v ARC Ltd* [1999] Ch 139 at [40]-[41]. The wording of sect 1 FLPA is entirely general. Unless the CA or Tribunal Rules provide otherwise, the relevant foreign law of limitation will therefore apply to these proceedings under sect 47A CA.

55. Moreover, since sect 47A applies irrespective of whether, pursuant to rule 18 of the Tribunal Rules, the proceedings are treated as proceedings in England and Wales, or in Scotland, or in Northern Ireland, it is clear that sect 47A must have the same meaning whichever is the applicable forum.

56. Considering the current sect 47A, which applies to both the present claims, we agree with the claimants that sect 47A(1) may conveniently be considered as comprising two limbs:

> "[LIMB 1] A person may make a claim to which this section applies in proceedings before the Tribunal, [LIMB 2] subject to the provisions of this Act and Tribunal rules."

The original sect 47A(4) was to the same effect, although the phrases were differently ordered: see para 22 above.

57. Determination of the claims to which the section applies for the purpose of limb 1 is made according to sects 47A(2)-(4) and the definition of "infringement decision" in sect 47A(6). Therefore, it is *for that purpose* that any limitation rules or rules of prescription that would apply are disregarded under sect 47A(4). Thus, both the *Pilkington* and *MasterCard* claims fall within sect 47A and may be brought before the Tribunal, irrespective of any limitation defence

under domestic or foreign law. The claimants accepted that sect 47A(4) does not in itself have the effect of excluding the application of the FLPA for all purposes, and in our view they were right to do so.

58. As regards limb 2, the claimants submitted that this establishes the CA and Tribunal Rules are a "distinct, *sui generis* scheme", which allowed no scope for the application of any external limitation rules save as expressly incorporated – as they are under the new sect 47E. However, in our judgment, the wording of limb 2 does not bear the weight which the claimants seek to thrust upon it. It of course means that the provisions of the CA and the Tribunal Rules will apply to a claim under sect 47A, but there is nothing in this language to require the exclusion of otherwise applicable enactments. Indeed, since the express exclusion of limitation or prescription rules under sect 47A(4) is confined to determining the application of limb 1, those rules will continue to apply for all other purposes save as overridden by express provisions elsewhere in the CA and Tribunal Rules.

59. For claims arising before 1 October 2015, there are special provisions of limitation and prescription in rule 31: para 24 above. However, there is nothing in the language of that rule to suggest that it overrides the FLPA (or the equivalent statutory provisions in Scotland and Northern Ireland).

60. We have referred above to the policy underlying the FLPA, and the Scottish and Northern Irish equivalents, that where foreign law governs the substance of a claim then foreign limitation rules should apply to the claim. Those enactments followed the reports of the Law Commission and Scottish Law Commission which highlighted the unsatisfactory anomalies of the old common law position. The Law Commission report, *Classification of Limitation in Private International Law* (Law Com. No 114, 1982), summarised the criticisms of what it called the 'English rule' of limitation in private international law, including the following (at para 3.2):

> "…"…It is a stultification of private international law to refuse recognition to a foreign right substantively valid under its *lex causae*, unless its recognition will conflict with some rule of public policy so insistent as to override all other considerations". On this basis a court in this country will give effect to the relevant foreign law in deciding both whether a particular right has been created and its

> extent. It seems anomalous that the relevant foreign law should not also determine the question of whether or not a party's right has been effectively extinguished.
> …
> … the English rule may operate to allow a claim which is barred under the law of the country under which it arose, and this would encourage a tardy plaintiff to make his claim in this country, provided of course that he can satisfy our rules as to jurisdiction."

The Law Commission therefore made its principal recommendation (at para 4.13) that:

> "… where under our rules of private international law a foreign law falls to be applied in proceedings in this country, the rule of that foreign law relating to limitation should also be applied, to the exclusion of the law of limitation in force in England and Wales."

See also the report of the Scottish Law Commission, *Prescription and the Limitation of Actions* (Scot. Law Com. No 74, 1983), paras 7.2-7.7.

61. Not only would the claimants' construction therefore go against the policy underlying the FLPA and the Scottish and Northern Irish equivalents, but in submitting that pursuant to sect 47A(1) CA the limitation provisions in rule 31 govern a foreign law claim, the claimants are in effect seeking to give those provisions an extraterritorial construction. That is exemplified in *MasterCard*, where two of the three defendants are US corporations, the third is a Belgian company, and it is alleged that the most significant elements of the defendants' impugned conduct took place in Belgium.[4] There is nothing in the CA to suggest that the limitation provisions made under it have such extraterritorial effect.

62. In *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379, Lord Sumption, with whom the other members of the Supreme Court agreed, said at [29]:

> "Implied extraterritorial effect is certainly possible, and there are a number of examples of it. But, in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extraterritorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to any one resorting to an English court regardless of the law that would otherwise apply."

[4] The claims are brought before the Tribunal pursuant to exclusive jurisdiction agreements, which expressly preserved all the parties' rights and defences.

In that case, where on a claim in tort for damages arising from a fatal accident in Germany it was accepted that liability was governed by German law, the Supreme Court held that the Fatal Accidents Act 1976 was not to be given extraterritorial effect and so would not apply to determine the nature or measure of the damages recoverable.

63. In our judgment, there are no overriding policy reasons which indicate that the limitation rules under the CA should be given such extraterritorial effect and displace the limitation rules of the foreign law which would otherwise govern. In particular, we are not persuaded that the limitation provisions in rule 31 aligned with what the claimants termed the "wait-and-see" approach underlying the jurisdiction for follow-on claims established by the original sect 47A CA represented such a fundamental or significant policy that it must have been intended to exclude the limitation rules of the governing law. In that regard part of the relevant context is that the jurisdiction of the Tribunal under sect 47A is not exclusive, and that the claimants therefore had the right to bring their claim in the courts, to which the special limitation provisions in rule 31 would not apply. In the circumstances it is hard to see why the policy upon which the claimants rely should be treated as being of overriding importance. In any case, nothing we have heard has caused us to conclude that limitation rules applicable by reason of the governing law were a matter which the legislation, objectively viewed, intended to address.

64. The claimants submitted that if a foreign limitation rule could apply instead of the special limitation provision in rule 31, there was a risk that a claim in the Tribunal, commenced only after the relevant decision of the Commission had become final so as to fall within the original sect 47A(5), might be out of time under that foreign limitation rule. However, there was nothing to prevent the claimants from starting proceedings earlier in the court. And as it happens, that is precisely what the claimants in both *MasterCard* and *Pilkington* have done.

65. The claimants argued that if the FLPA applies to a claim brought before the Tribunal governed by foreign law, then a stand-alone claim brought after 1 October 2015 under the new sect 47A, but which arose (i.e. was based on events which took place) before 1 October 2015, may be in time by reason of

the foreign limitation period although it would have been out of time if it were governed by the law of any part of the United Kingdom. That is because in the latter case, it is rule 31 and not sect 47E CA which determines the limitation period. The two year period prescribed by rule 31, applied in accordance with rule 119 of the 2015 Tribunal Rules, is likely to be shorter – and perhaps significantly shorter – than the foreign limitation period.

66. That is correct, but we do not regard this in itself as a significant anomaly, still less an anomaly which could justify a different interpretation of the CA and the Tribunal Rules on the question of foreign law limitation periods. If a stand-alone claim governed by domestic law may in this transitional period be out of time in the Tribunal because of rule 31, the potential claimant will be able to resort to the parallel jurisdiction for such claims in the courts, where the longer limitation period of six years (or in Scotland the prescriptive period of five years) applies. Moreover, unless the relevant foreign rule of limitation corresponds to the domestic rule, it is always the case that application of the foreign limitation period may permit (if it is longer) or preclude (if it is shorter) a claim that would face a different outcome if limitation were determined by the domestic rule. For example, the current statutory limitation period for a damages claim in the Swedish Act on Competition 2008[5] is 10 years from the time the damage was caused: art 25. Accordingly, even for claims arising after 1 October 2015, a claim governed by Swedish law brought in either the Tribunal or the UK courts may be in time although it would be out of time if governed by English or Scots law. We of course recognise, as the claimants pointed out, that for a collective action under sect 47B CA a claimant has no alternative but to sue in the Tribunal; but even in that case, the fact that such proceedings may be in time if governed by foreign law whereas they would be time-barred under rule 31 is inherent in the fact that rules on limitation are not the same in different legal systems. The application of foreign law may similarly produce a different outcome on the question of the assessment of damage, as *Cox v Ergo Versicherung* demonstrates.

[5] The period will be changed on the implementation by Sweden of the EU Competition Damages Directive, Dir 2014/104/EU, which is likely to lead to considerable harmonisation of limitation periods across EU Member States.

67. That is sufficient, in our judgment, for us to conclude that where proceedings under sect 47A CA are governed by foreign law, the relevant foreign rules of limitation will apply. However, we find additional support for our conclusion in two further considerations.

68. First, on the question of construction, there is the position regarding claims under sect 47A CA based on matters arising after 1 October 2015. The claimants accept that any relevant foreign limitation rule will apply in such cases, which they explain as being in accordance with the alignment between proceedings for breach of competition law in the Tribunal and in the courts now that the Tribunal has an equal jurisdiction. The limitation rules applicable to such proceedings in the Tribunal are determined by the new sect 47E CA. For proceedings treated as being in Scotland, sect 47E(2)(b) provides that the PL(S)A applies as if the claim related to an obligation under sect 6 of that Act; and sect 23A PL(S)A prescribes that the relevant foreign law shall determine the question of limitation or prescription. For proceedings treated as being in England and Wales, sect 47E(2)(a) CA provides that the LA applies; but, in contrast with the legislative scheme in Scotland, the LA itself says nothing about foreign limitation rules. The cohesion of the English regime arises through sect 39 LA, which provides that the LA will not apply to an action "for which a period of limitation is prescribed by or under any other enactment": see para 37 above. Accordingly, when sect 47E(2)(a) CA states that for proceedings in England and Wales the LA applies, that does not directly have the effect of making the FLPA applicable to those proceedings. If (as the claimants accept) the FLPA nonetheless applies, that can only be because (a) it does so on its own terms; and (b) there is nothing in the CA to preclude its application. Accordingly, the language of sect 47A CA is not to be read as precluding the application of the FLPA.

69. Secondly, on the question of policy, although the Rome II Regulation does not apply to either of the present actions, it demonstrates that the approach of treating limitation as a matter to be determined according to the governing law is in accord with the current conflict of law rules governing all EU Member States on matters of non-contractual obligations, including specifically obligations arising out of competition law.

70. Accordingly, the preliminary issue in *Pilkington* will be answered as follows:

> "On the assumption that foreign laws apply to the claims under sect 47A CA as alleged, the foreign rules relating to limitation apply in respect of those claims pursuant to sect 1 FLPA."

71. As regards *MasterCard*, we will hear submissions as to what order should be made on the defendants' applications in the light of this judgment and the judgment of the President at [2016] CAT 13.

The Hon. Mr Justice Roth The Hon. Lord Doherty Margot Daly

Charles Dhanowa OBE, QC (Hon) Date: 27 July 2016
Registrar

APPENDIX

Section 47A of the Competition Act 1998 (as inserted by section 18 of the Enterprise Act 2002)

47A Monetary claims before Tribunal

(1) This section applies to—

(a) any claim for damages, or

(b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section "relevant prohibition" means any of the following—

(a) the Chapter I prohibition;

(b) the Chapter II prohibition;

(c) the prohibition in Article 81(1) of the Treaty;

(d) the prohibition in Article 82 of the Treaty;

(e) the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community;

(f) the prohibition in Article 66(7) of that Treaty.

(3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings—

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are —

(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;

(b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or

(e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.

(7) The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in subsection (6)(a), (b) or (c) may not be brought without permission are—

(a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46, section 47 or the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 (S.I. 2001/2916);

(b) in the case of a decision of the OFT which is the subject of an appeal mentioned in paragraph (a), the period following the decision of the Tribunal on the appeal during which a further appeal may be made under section 49 or under those Regulations;

(c) in the case of a decision of the Tribunal mentioned in subsection (6)(c), the period during which a further appeal may be made under section 49 or under those Regulations;

(d) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal;

and, where any appeal mentioned in paragraph (a), (b), (c) or (d) is made, the period specified in that paragraph includes the period before the appeal is determined.

(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are—

(a) the period during which proceedings against the decision or finding may be instituted in the European Court; and

(b) if any such proceedings are instituted, the period before those proceedings are determined.

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.

(10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim.

Rule 31 of the 2003 Tribunal Rules

(1) A claim for damages must be made within a period of two years beginning with the relevant date.

(2) The relevant date for the purposes of paragraph (1) is the later of the following—

(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;

(b) the date on which the cause of action accrued.

(3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant.

(4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A.

Paragraph 4 of Schedule 8 Part 1 to the Consumer Rights Act 2015

4 (1) For section 47A substitute—

"**47A Proceedings before the Tribunal: claims for damages etc.**

(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.

(2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—

(a) the Chapter I prohibition,

(b) the Chapter II prohibition,

(c) the prohibition in Article 101(1), or

(d) the prohibition in Article 102.

(3) The claims are—

(a) a claim for damages;

(b) any other claim for a sum of money;

(c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.

(4) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded.

(5) The right to make a claim in proceedings under this section does not affect the right to bring any other proceedings in respect of the claim.

(6) In this Part (except in section 49C) "infringement decision" means—

(a) a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed,

(b) a decision of the Tribunal on an appeal from a decision of the CMA that the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed, or

(c) a decision of the Commission that the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed."

(2) Section 47A of the Competition Act 1998 (as substituted by sub-paragraph (1)) applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.

Paragraph 8 of Schedule 8 Part 1 to the Consumer Rights Act 2015

8 (1) After section 47D (inserted by paragraph 7) insert—

"47E **Limitation or prescriptive periods for proceedings under section 47A and collective proceedings**

(1) Subsection (2) applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made in—

(a) proceedings under section 47A, or

(b) collective proceedings at the commencement of those proceedings.

(2) Where this subsection applies—

(a) in the case of proceedings in England and Wales, the Limitation Act 1980 applies as if the claim were an action in a court of law;

(b) in the case of proceedings in Scotland, the Prescription and Limitation (Scotland) Act 1973 applies as if the claim related to an obligation to which section 6 of that Act applies;

(c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies as if the claim were an action in a court established by law.

(3) Where a claim is made in collective proceedings at the commencement of those proceedings ("the section 47B claim"), subsections (4) to (6) apply for the purpose of determining the limitation or prescriptive period which would apply in respect of the claim if it were subsequently to be made in proceedings under section 47A.

(4) The running of the limitation or prescriptive period in respect of the claim is suspended from the date on which the collective proceedings are commenced.

(5) Following suspension under subsection (4), the running of the limitation or prescriptive period in respect of the claim resumes on the date on which any of the following occurs—

(a) the Tribunal declines to make a collective proceedings order in respect of the collective proceedings;

(b) the Tribunal makes a collective proceedings order in respect of the collective proceedings, but the order does not provide that the section 47B claim is eligible for inclusion in the proceedings;

(c) the Tribunal rejects the section 47B claim;

(d) in the case of opt-in collective proceedings, the period within which a person may choose to have the section 47B claim included in the proceedings expires without the person having done so;

(e) in the case of opt-out collective proceedings—

(i) a person domiciled in the United Kingdom chooses (within the period in which such a choice may be made) to have the section 47B claim excluded from the collective proceedings, or

(ii) the period within which a person not domiciled in the United Kingdom may choose to have the section 47B claim included in

the collective proceedings expires without the person having done so;

(f) the section 47B claim is withdrawn;

(g) the Tribunal revokes the collective proceedings order in respect of the collective proceedings;

(h) the Tribunal varies the collective proceedings order in such a way that the section 47B claim is no longer included in the collective proceedings;

(i) the section 47B claim is settled with or without the Tribunal's approval;

(j) the section 47B claim is dismissed, discontinued or otherwise disposed of without an adjudication on the merits.

(6) Where the running of the limitation or prescriptive period in respect of the claim resumes under subsection (5) but the period would otherwise expire before the end of the period of six months beginning with the date of that resumption, the period is treated as expiring at the end of that six month period.

(7) This section has effect subject to any provision in Tribunal rules which defers the date on which the limitation or prescriptive period begins in relation to claims in proceedings under section 47A or in collective proceedings."

(2) Section 47E of the Competition Act 1998 does not apply in relation to claims arising before the commencement of this paragraph.

Rule 119 of the 2015 Tribunal Rules

(1) Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (the "2003 Rules") as if they had not been revoked.

(2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in—

(a) proceedings under section 47A of the 1998 Act, or

(b) collective proceedings.

(3) A claim falls within this paragraph if—

(a) it is a claim to which section 47A of the 1998 Act applies; and

(b) the claim arose before 1st October 2015.

(4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015 continue to apply to the extent necessary for the purposes of paragraph (2).