



Neutral Citation Number: [2024] EWCA Civ 759

Case No: CA-2023-001091 & CA-2023-001099

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL**  
**MR JUSTICE ROTH, LORD ERICHT AND JANE BURGESS**  
**[2023] CAT 15**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 05/07/2024

Before :

**SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT**  
**LORD JUSTICE GREEN**  
and  
**LORD JUSTICE SNOWDEN**

Between :

**WALTER HUGH MERRICKS CBE**

**Respondent/  
Class  
Representative**

- and -

- (1) MASTERCARD INCORPORATED**
- (2) MASTERCARD INTERNATIONAL  
INCORPORATED**
- (3) MASTERCARD EUROPE S.P.R.L.**

**Appellants/  
Defendants**

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**Marie Demetriou KC, Crawford Jamieson and Anneliese Blackwood** (instructed by **Wilkie  
Farr & Gallagher**) for the **Class Representative**  
**Sonia Tolaney KC, Matthew Cook KC and Daniel Benedyk** (instructed by **Freshfields  
Bruckhaus Deringer**) for the **Defendants**

Hearing dates : 1 to 3 May 2024

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on Friday 5 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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## **Sir Julian Flaux C:**

### Introduction

1. These appeals concern three preliminary issues decided by the Competition Appeal Tribunal (“CAT”) in its judgment handed down on 21 March 2023 in the collective proceedings brought by Mr Merricks as Class Representative on behalf of some 45 million consumers who were resident in the UK between 1992 and 2008 and who, in that period, purchased goods and services from businesses selling in the UK that accepted Mastercard cards.
2. The present proceedings are follow-on claims for damages alleged to arise by reason of the infringement found by the European Commission (“the Commission”) in a Decision on 19 December 2007 (“the Decision”) which found that Mastercard had infringed Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) based on the rules and decisions of Mastercard concerning cross-border EEA multilateral interchange fees (“EEA MIFs”) to be charged by cardholders’ issuing banks to merchants’ acquiring banks. Appeals by Mastercard against the Decision to the General Court and subsequently the Court of Justice of the EU (“CJEU”) were dismissed.
3. The essence of the claim in these proceedings, in respect of which a Collective Proceedings Order (“CPO”) was made by the CAT on 18 May 2022, is that the EEA MIFs the subject of the Decision were causative of the domestic MIFs set by Mastercard, that the MIFs were passed through by acquiring banks in the charges they levied on merchants for processing card transactions (the merchant service charge or “MSC”) and that the merchants passed through the MSC in whole or in part in the prices charged to their customers in the UK.
4. There are three preliminary issues on appeal:
  - (1) Whether the application of the Limitation Act 1980 (and the Prescription and Limitation (Scotland) Act 1973) have been precluded by the Competition Act 1998 (“CA 1998”) and the CAT Rules. The CAT found in favour of Mastercard that claims governed by English law, in so far as they are based on transactions prior to 20 June 1997 are time-barred and claims governed by Scots law in so far as they are based on transactions prior to 20 June 1998 are time-barred (“the limitation/prescription issue”).
  - (2) For the purposes of limitation or prescription, which law governs the claims in relation to transactions with foreign merchants. The CAT found that English and Scots law respectively governed such transactions (“the applicable law issue”).
  - (3) Whether, as a matter of law, Mastercard is entitled to advance a counterfactual based on an alternative exemptible EEA MIF pursuant to Article 101(3) of the TFEU. The CAT found that Mastercard was not entitled to advance such a counterfactual by reason of the binding effect of the Decision, alternatively, that to do so would be an abuse of process (“the exemptibility issue”).
5. On 10 August 2023, Green LJ granted Mastercard permission to appeal in relation to the exemptibility issue on the basis that it was both arguable and of legal importance. In relation to both Mastercard’s application for permission to appeal on the applicable

law issue and Mr Merricks' application for permission to appeal on the limitation/prescription issue, Green LJ considered that *prima facie* the reasoning of the CAT was persuasive, but that the issues of law were important and with ramifications for other cases. Accordingly, he deferred both applications for permission to appeal to an oral hearing to be heard at the same time as the appeal on the exemptibility issue, on a rolled-up basis. We conducted the appeal and the rolled-up hearing over three days on 1 to 3 May 2024.

#### The judgment of the CAT

6. In relation to limitation, the CAT noted at [11] that the relevant period for the claims starts on 22 May 1992 and that Mastercard contends that, by virtue of the respective law on limitation or prescription at the time that the original section 47A CA 1998 and the 2003 CAT Rules came into force, claims governed by English law, in so far as they are based on transactions prior to 20 June 1997 are time-barred and claims governed by Scots law in so far as they are based on transactions prior to 20 June 1998 are time-barred. Mr Merricks contends that all the claims are in time on the basis of section 47A CA 1998 and rule 31(1)-(3) of the 2003 CAT Rules, applied by reason of rule 119(2) of the 2015 CAT Rules.
7. The CAT noted that, to explain the parties' contrasting positions, it was necessary to revisit the vexed question of the transitional provisions of the CAT Rules. These had been considered in detail by the CAT in *DSG Retail Ltd v Mastercard* [2019] CAT 5 and by the Court of Appeal in that case, largely reversing the CAT ([2020] EWCA Civ 671). The CAT in this case then set out an outline of the legislative framework derived from the CAT judgment in *DSG* which was adopted by the Court of Appeal.
8. The CAT pointed out that, prior to 2003, a private action claiming damages for breach of competition law could be brought only in the civil courts. The Enterprise Act 2002 ("EA 2002") introduced s.47A into the CA 1998 with effect from 20 June 2003, which governed claims that may be brought before the CAT. At [16] of the judgment the CAT said that 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...; 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 new, special time-limit set out in rule 31 of the 2003 Rules."
9. The CAT noted at [19] that the jurisdictional landscape changed dramatically with the coming into force of the Consumer Rights Act 2015 ("CRA 2015"), which introduced a new section 47A CA 1998, together with section 47B which introduced the regime for collective proceedings. As the CAT said at [21] this meant that since 1 October 2015:

"the Tribunal has had full jurisdiction for competition damages claims, whether follow-on or stand-alone, that is parallel to the

jurisdiction of the courts. And in addition, the Tribunal has exclusive jurisdiction for collective proceedings”.

10. At [22] to [25] the CAT made reference to the new section 47E CA 1998, introduced by the CRA 2015, providing that, subject only to certain special provisions, proceedings before the CAT were subject to the same provisions regarding limitation and prescription as in the civil courts. However, although the new section 47A applies to claims whenever arising, the new s.47E on limitation applied only to claims arising after 1 October 2015: CRA 2015, Sch 8, paras 4(2) and 8(2). Moreover, section 47E has itself now been repealed by regulation 3 of the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385) (the “2017 Regulations”). The 2017 Regulations introduced Sch 8A into the CA 1998 with new limitation and prescriptive periods, but this only applies, and the repeal of section 47E only takes effect, as regards claims relating to loss or damage suffered after 9 March 2017: Sch 8A, para 42 and Sch 2, para 5(2) of the 2017 Regulations. Accordingly, as the CAT concluded at [25]: “neither s. 47E nor Part 5 of Sch 8A apply to the present proceedings.”
11. The CAT then referred to the CAT Rules, noting that both the 2003 and the 2015 Rules were made pursuant to section 15 and Sch 4 of EA 2002. At [27] the CAT set out rule 31 of the 2003 Rules which dealt with the time limit for making a claim for damages:
  - “31(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.”
12. At [28], the CAT noted that the 2015 Rules came into effect on 1 October 2015, corresponding to the new provisions of CA 1998 introduced by CRA 2015, including the collective proceedings regime. The 2003 Rules were revoked by rule 118, and there were no substitute provisions for the old rule 31: limitation and prescription were to be governed by the new section 47E. However, since section 47E did not apply to claims arising before 1 October 2015, the 2015 Rules contained a savings provision in rule 119, which provides:

“Savings

119.—(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(c) continue to apply to the extent necessary for the purposes of paragraph (2).”

13. At [29] the CAT made two observations about this Rule, first that it does not cover prescription under Scots law and second that rule 119(2) only preserves rule 31(1) to (3) of the 2003 Rules, but not rule 31(4). In *DSG*, the CAT said this omission must be deliberate and the Court of Appeal at [60] of the judgment did not dissent from that view.

14. At [30] to [32], the CAT stated:

“30. The present proceedings were started after 1 October 2015 but comprise claims which arose before 1 October 2015. Accordingly, they fall within r. 119(3) of the 2015 Rules and are therefore subject to r. 119(2). They are therefore governed by r. 31(1)-(3) of the 2003 Rules. It is on that basis that the proceedings could be commenced on 6 September 2016, just within two years of the judgment of the CJEU. However, the 2003 Rules, which introduced this exceptional “two years after final decision” limitation provision, came into force on 20 June 2003.

31. Section 16(1) of the Interpretation Act 1978 (“IA 1978”) states, insofar as relevant:

“(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—

(a) revive anything not in force or existing at the time at which the repeal takes effect;

[...]

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment...”

This provision applies to the whole of the UK.

32. In *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553, the Privy Council held, as set out in the judgment of Lord Brightman at 563:

“... an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable.””

15. The CAT then observed at [33] that the Scots law of prescription “involves a fundamentally different approach”: “[w]hereas the expiry of a limitation period under English law operates to bar the pursuit of a valid claim, under Scots law once the period of prescription expires the underlying obligation is extinguished.”
16. At [34] the CAT applied the approach of the Court of Appeal in *DSG*:

“In *DSG CA*, the Court of Appeal held that in competition damages actions started in the Tribunal prior to 1 October 2015, claims for which the limitation period had expired before 20 June 2003 remained time-barred. (The Court did not specifically address prescription since Scots law was not engaged in those proceedings.) Accordingly, if individual CMs had brought their claims against Mastercard in, say, January 2015, they would have been subject to this regime. Because these proceedings for all CMs were started after 1 October 2015, they are subject to the 2015 Rules, which revoked the 2003 Rules. But rule 119 of the 2015 Rules does not express a contrary intention, for the purpose of s. 16(1)(a) and (c) IA 1978, either to affect any pre-existing right of a defendant to plead a time bar by reason of the expiry of the limitation period or to revive an obligation which had previously been extinguished by prescription. While the omission of incorporation of r. 31(4) of the 2003 Rules in r. 119 may appear surprising, we consider that this omission cannot lead to an “unavoidable” construction of r. 119 as affecting previously acquired rights of limitation; and it has no bearing in any event on the prescription period since that was never within the scope of r. 31(4): para 29(1) above.”

17. As a result the CAT noted that the argument for Mr Merricks rested primarily on the terms of section 47A(4) CA 1998 which provides:

“(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.”

18. At [36] the CAT stated that the correct interpretation and effect of this provision was considered by the CAT in *Deutsche Bahn AG v Mastercard Inc, Peugeot Citroen Automobiles UK Ltd v Pilkington Group Ltd* [2016] CAT 14 (“*Deutsche Bahn/Pilkington*”). In that case, the CAT rejected the claimants’ argument that section 47A(4) had the effect of excluding the Foreign Limitation Periods Act 1984 (“FLPA”) and the Scottish and Northern Irish equivalents, so that the defendants were not entitled to rely on foreign law of limitation/prescription in answer to the claims (insofar as the claims were governed by foreign law). At [38] in the present case the CAT said that although not technically bound by that conclusion, it saw no reason to differ from it, stating:

“We consider that it is clear that s. 47A has to be read as a whole. The statutory requirement to “disregard” limitation or prescription rules is not unlimited but, on the contrary, expressly directed to be “[f]or the purpose of identifying claims which may be made in civil proceedings” and therefore relates back to the jurisdiction of the Tribunal in private actions as defined by s. 47A(1)-(3). The sub-section precludes any argument that the jurisdiction of the Tribunal cannot be engaged because the claim cannot be made in civil proceedings because it is out of time.

39. We would reach that view, following *Deutsche Bahn/Pilkington*, even without having regard to s. 16(1) IA 1978. However, that provision reinforces this conclusion, since the requirement to disregard limitation/prescription rules for a specified purpose is far short of a statutory repeal nor does it express an intention more generally to revive an obligation extinguished by prescription or affect a right to plead a time-bar in the clear terms that would be required.

40. We have arrived at this conclusion by interpreting the statutory provisions in the light of established principles and authority. But our conclusion is strongly supported by the view of the Court of Appeal in *DSG CA*. In the actions subject to those proceedings, the Tribunal had given a somewhat strained construction to r. 31(4) so as to achieve consistency with its view that r. 119(2) by its incorporation of r. 31(1)-(3) but not r. 31(4) meant that the limitation period under the Limitation Act 1980 would not apply to claims which arose before 1 October 2015 but were commenced after that date: *DSG CAT* at [35]-[43]. (As set out above, we have come to a different view and do not consider that the omission of r. 31(4) in itself can establish that result.) However, on appeal, the Court of Appeal reversed the

Tribunal’s construction of r. 31(4). The issue before the Tribunal regarding claims started after 1 October 2015 was no longer live before the Court of Appeal because the Europcar action raising that issue had settled. But the Court of Appeal addressed that issue since it raised the same concern to achieve consistency with the different construction which the Court had given to r. 31(4).”

19. The CAT then cited [59]-[60] of the judgment of Sir Geoffrey Vos C (with which I and Newey LJ agreed). Of particular relevance is the passage in [60]:

“Once, however, one accepts, as I think one must, that I have adopted the correct construction of rule 31(4), its disapplication to proceedings started after 1 October 2015 does not compel the conclusion that accrued limitation rights are being overridden. Instead, the extant legislation must be construed in accordance with section 16(1). Rule 31(4) may be disapplied, but that disapplication cannot, unless the contrary intention appears, "(c) affect any right ... acquired under that enactment ...". A contrary intention does not appear in the 2015 Rules.”

20. Whilst the CAT accepted that those comments may be obiter, they were highly persuasive and the CAT considered they were correct. At [42], the CAT rejected Mr Merricks’ argument:

“If the CR’s argument were right then, as Ms Demetriou acknowledged, proceedings commenced before 1 October 2015 might be subject to a time bar in respect of claims arising prior to 20 June 1997, whereas proceedings commenced after 1 October 2015 in respect of claims arising in the same period would not be time barred. We cannot imagine that the legislator could have intended such an illogical outcome and, like both the Tribunal and the Court of Appeal in *DSG*, we consider that the relevant legislative provisions should be construed insofar as possible to avoid this result. As set out above, it is perfectly possible to do so.”

21. The CAT continued at [43] in conclusion on this issue:

“We should add that although in its Defence Mastercard pleads that the claims for transactions prior to 20 June 1997 were time-barred pursuant to r. 31(4) of the 2003 Rules, the CR was clearly correct in asserting that r. 31(4) has no application to the present claims because of the terms of r. 119(2) of the 2015 Rules, and we note that counsel for Mastercard did not seek to rely on r. 31(4) in their written or oral submissions. In the light of this, we do not think it is necessary to reach a view as to why it was thought appropriate to include r. 31(4) in the 2003 Rules.”

22. The CAT turned to the applicable law issue at [69] of its judgment, setting out at [69] to [74] the issue and the parties’ respective positions:



“69. The question of the proper law arises because the proceedings encompass purchases by CMs in the UK from merchants based in foreign jurisdictions who were selling in the UK. It therefore covers mail order, internet and telephone purchases by consumers in the UK from suppliers abroad, although it is clear that this accounts for only a minor part of the transactions encompassed by the claims. Internet purchasing was of course far less frequent prior to 2008 than it has become since. The question of the proper law is similarly raised as regards purchases by Scottish CMs from merchants in England and Wales, and vice versa. Although such purchases would sometimes have been ‘in person’, for convenience we refer to all purchases in this overall category as “remote purchases”.

70. Mastercard’s position as to the governing law is set out at para 24 of its Defence:

“The Class Representative will ... need to establish the transactions which took place at merchants in each Member State and the claims in relation to each Member State will be governed by the national law of that state.”

On that basis, and pursuant to the decision of the Tribunal in *Deutsche Bahn/Pilkington*, the question of limitation or prescription is governed by the limitation/prescription period of the applicable foreign law.

71. Although expressed this way in the Defence, Mastercard’s essential case is that the proper law is the law of the place where the merchant’s acquiring bank is situated. Mastercard explained its pleading on the basis that in practice the acquiring bank would be in the same country as the merchant. We are content to proceed on the basis of that assumption, which the CR did not question. Accordingly, as we understand it, there is no dispute that for purchases by CMs based in England and Wales from merchants in England and Wales, English law will apply; and similarly that for purchases by CMs based in Scotland from merchants in Scotland, Scots law will apply.

72. The CR’s position is that the proper law is the law of the place where the CM is based who made the purchases, and accordingly will be English or Scots law for all their purchases, including remote purchases. As explained above, although for CMs based in Northern Ireland, the CR’s formal position is that Northern Irish law will govern, since the only relevant aspect of foreign law is limitation and the parties have agreed that the limitation position under Northern Irish law is the same as under English law, the CMs in Northern Ireland can be assimilated for these purposes to CMs in England and Wales, and they do not require separate consideration.

73. It is now agreed between the parties that the question of the proper law falls to be decided in respect of two periods:

(1) from 1 May 1996 to the end of the claim period, for which it is governed by the Private International Law (Miscellaneous Provisions) Act 1995 (“PILMPA 1995”); and

(2) from 22 May 1992 to 30 April 1996, for which it is governed by the common law rules.

74. The relevant part of the PILMPA 1995 applies to the whole of the UK: s. 18(3). As the forum of the proceedings is (save for the s. 11(2) PLSA issue) England and Wales, it is further agreed that the applicable common law as regards all claims is the law of England and Wales.”

23. The CAT then set out the relevant provisions of the PILMPA 1995, sections 11 and 12:

“11. Choice of applicable law: the general rule.

(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being:

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant event or elements of those events occurred.

...

12. Choice of applicable law: displacement of general rule.

(1) If it appears, in all the circumstances, from a comparison of:

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.”

24. The CAT noted at [76] that the Court of Appeal had addressed these provisions in *VTB Capital v Nutritek* [2012] EWCA Civ 808 (“*VTB Capital*”), where Lloyd LJ, giving the judgment of the Court, said, at [148]-[149]:

“148. (1) Section 11 of the 1995 Act sets out the general rule for ascertaining the applicable law of a tort. It adopts a geographical approach to that question. (2) Where the elements of the events constituting the tort or delict occur in different countries and the cause of action relates to something other than personal injury or damage to property, then section 11(2)(c) requires an analysis of all the elements of the events constituting the tort in question. (3) In carrying out that exercise, it is the English law constituents of the tort that matter. (4) The analysis requires examination of the 'intrinsic nature' of the elements of the events constituting the tort. It does not, at this stage, involve an examination of the nature or closeness of any tie between the element and the country where that element was involved or took place. This latter exercise is only relevant if section 12 is invoked. (5) Once the different elements of the events and the country in which they occurred have been identified, the court has to make a 'value judgment' regarding the 'significance' of each of those 'elements'. 'Significance' means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation. (6) Under section 11(2)(c), (i.e. in relation to causes of action other than in respect of personal injury or damage to property where the elements of the events constituting the tort occur in different countries) the applicable law of the tort in question will be that of the country where the significance of one element or several elements of events outweighs or outweighs the significance of any element or elements found in any other country.

149. If section 12 has to be considered, we derive the following additional propositions from our consideration of the statute and the cases. (7) The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule. (8) At this stage there has to be a comparison between the

significance of those factors with the other country. The question is whether, on that comparison, it is ‘substantially more appropriate’ for the applicable law to be the law of the other country so as to displace the applicable law as determined under the ‘general rule’. (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the ‘elements of the events constituting the tort’ in section 11. They can include factors relating to the parties’ connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict. (10) In particular the factors can include: (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict.”

25. The CAT stated at [77] that, although the Supreme Court concluded that the Court of Appeal erred in its conclusion as to the governing law of the tort, it accepted this statement of the relevant principles: [2013] UKSC 5 at [199]. At [78] the CAT went on to consider the previous detailed judgment of Barling J in *Deutsche Bahn AG v Mastercard Inc* [2018] EWHC 412 (Ch) (“*Deutsche Bahn*”)” on which both parties relied and which also concerned the EEA MIFs and a series of domestic MIFs. It noted that having cited the propositions stated in *VTB Capital*, Barling J stated at [40]-[41]:

“40. In the light of this guidance, it is clear that in applying section 11 the task for the court is threefold: first, to identify all the (English law) elements of the events constituting the alleged tort, then to identify the countries in which those elements and/or events took place, and finally to decide, on the basis of a value judgment, in which one of those countries occurred the element(s) which was the most significant in relation to the tort in question.

41. In relation to “significance”, it is clear that the correct approach is for the court to consider the significance of the relevant events in the light of the facts of the case before it. In *Protea Leasing v Royal Air Cambodge* [2002] EWHC 2731 (Comm) Moore-Bick J stated that the 1995 Act contains a “much more flexible principle and one which might yield different answers in different cases even in relation to the same kind of tort”.

26. The CAT then noted at [79] that Barling J proceeded to identify the elements of the events constituting the tort of breach of Article 101 TFEU which the parties agreed included:

“(a) the adoption of the relevant MIFs and the CAR by means of a decision by an association of undertakings, including the Defendants; (b) the decision must have the object or effect of restricting competition within the EU; (c) loss or damage is caused to the claimant. In addition, in so far as concerns the claims based on Article 101 TFEU and Article 53 of the EEA Agreement, the decision must be capable of affecting trade between Member States.”

27. He held that a restriction of competition was also a relevant event, stating at [50]:

“The factual state of affairs constituting the outward manifestations of the competitive restriction represents an "event" or "events" for the purposes of section 11, no less than does any recoverable loss established by the Claimants. I see no justification for discounting these events which constitute a restriction on competition, simply because they may also have a role in the causation of any loss allegedly incurred by the Claimants.”

28. The CAT continued at [80]:

“It was common ground that relevant product market was the acquiring market and that the relevant geographical markets were national. The judge accordingly held that the alleged restriction of competition took place as regards each claimant in the product and geographical market where it operated its business. As regards the location of the loss, that also occurred in the country where the merchant claimant operated its business. Finally, as regards the location of the setting of the EEA MIFs, that was the subject of some dispute but the judge found that it was Belgium, the location of the centre of the Mastercard’s European operation, between 1992 and 2006, and thereafter (because of a change in the structure of Mastercard) the USA. Neither side suggested that the element of an effect on trade between EU Member States affected the analysis.”

29. On that basis, in *Deutsche Bahn*, Mastercard submitted as regards each of the claimants that the most significant element of the tort for the claim of each claimant occurred in the country where it operated its retail business. The claimants submitted that the most significant factor was the setting of the EEA MIF, since that constituted Mastercard’s wrongdoing, which they contended meant that Belgian law was the governing law (at least up to 2006). They relied on a number of decisions where the courts had held that the place where the loss was suffered was not the most significant element of the tort. Barling J distinguished those authorities at [118], on the basis that the alleged tort was different from that in *Deutsche Bahn*. In *Deutsche Bahn*:

“The alleged loss of each of the Claimants is suffered in the country in which they are established, and it occurs there because that is the home of the market affected by the alleged restriction of competition”.

30. Barling J concluded at [121]-[124] that:
- “the most significant elements/events in the tort alleged in the present case is not the loss allegedly suffered by the Claimants, significant though that element undoubtedly is. Nor is it the setting/management of the MIFs and the adoption of the CAR, though these also have significance. It is the restriction of competition... If there is no restriction of competition, there is no tort... The fact that any loss alleged to have been suffered by each of the Claimants would also have occurred in the same country as the relevant restriction of competition, reinforces that conclusion.”
31. At [84], the CAT noted that the contention of Mr Merricks in the present case was different, that the most significant element of the tort is the place where the loss was suffered, whereas Mastercard submitted, as in *Deutsche Bahn*, that the most significant element of the tort was the place where the restriction of competition took place, namely in the national acquiring markets where each merchant conducted its business. At [86] the CAT pointed out a fundamental difference between this case and *Deutsche Bahn*. In that case the claims were brought by the merchants so the location of the restriction of competition and the location of the loss were in the same country where the merchant was based. Here the claims in the collective proceedings were brought by consumers purchasing from merchants, so the loss was suffered in the country where the consumers lived. Mastercard contended that the most significant element of the tort was still the setting of a minimum price for merchants in the location of the restriction on competition.
32. Mr Merricks argued that a different result should apply in this case: the facts that the claimants were all consumers resident in the UK and these were collective proceedings brought under a statutory regime which had the purpose of enabling consumers to recover aggregate damages for their loss should be given particular weight in determining that in the present proceedings the loss was the most significant element of the claims.
33. At [88] the CAT noted uncertainties in PILMPA 1995. The wording of section 11(2)(c) sets out a relative test but the statute does not set out the criterion by which “significance” is to be evaluated. Is it significance in terms of the tort seen in the abstract or significance in terms of the part the events will play in the proceedings i.e. the extent to which they are in dispute? If the answer is the former, the CAT should follow *Deutsche Bahn* in holding that the most significant event is the restriction of competition, if the latter then the CAT considered the most significant event was the occurrence of the loss. At [90] the CAT held “although not without hesitation” that the assessment of significance should be made on the basis of the significance that the various events will have in the actual proceedings before the CAT, so that the general rule under section 11 led to English law being the applicable law for claimants in England and Wales and Scots law for claimants in Scotland.
34. The CAT went on to consider whether, if it was wrong about that, the general rule should be displaced under section 12. The CAT cited at [91] the summary of the test under section 12 by Lloyd LJ in *VTB Capital* at [159]:

“This means that, in both cases, we have to go on to consider section 12, which requires us to make a comparison of the significance of the factors which connect a tort with the country whose law would be the applicable law under section 11(2)(c) with any factors which connect the tort with another country. We have to ask: is it substantially more appropriate for the applicable law of that other country to be the one that determines the issues (in tort) arising in the case; if it is then the applicable law will be that of the other country. The test is specific to the issues that arise in the particular case concerned. As already noted, section 12(2) makes it plain that a broad range of factors can be considered in this exercise.”

35. Whilst recognising that, as a departure from the general rule, section 12 should not be readily engaged, the CAT said at [92] that it was in the statute because the legislator envisaged there will be circumstances where it is appropriate to displace the general rule. The non-exhaustive list of factors in section 12(2) shows that a broad range of circumstances may be considered. The CAT concluded that, if the law of the place where the restriction of competition occurred would be the governing law under the general rule in section 11, it had no doubt that in the particular circumstances of these proceedings, that should be displaced, for the purpose of determining the issues, by the law of the place where the class members resided, i.e. England or Scotland.
36. The CAT reached that conclusion for a number of reasons set out in the sub-paragraphs to [92]. First, section 12 directs attention to the determination of “the issues that arise in the case”, which are not whether there was a restriction of competition but causation and quantum of loss, which point strongly to the law of the place of the loss as the most appropriate law. Second, although not relevant under section 11(2)(c), factors relating to the parties are relevant under section 12(2). The class members were all resident in England or Scotland. The countries where the merchants who made remote sales were located have no connection with them, nor does Mastercard have a connection with those countries: its decisions on rules and the EEA MIFs were taken in Belgium, then in the USA. It was material that the relevant consequence of the restriction of competition here is alleged to be the payment of higher prices by millions of consumers in the UK who constitute the class on whose behalf the proceedings are brought.
37. Third, *Deutsche Bahn* was an action brought by some 1,300 merchants. Application of the law where the merchant was located led to a single law governing each merchant’s claim including for determining whether it was time barred. Collective proceedings, although one action, do not give rise to a distinct cause of action but are a procedural regime enabling individual claims to be pursued collectively. The class representative is not a claimant bringing a new form of mass tort claim but represents a multitude of class members with individual claims. It was obvious that each individual made the majority of purchases in their home country. Remote purchases would account for a very small proportion of their individual claim. If the law of the place where the merchant carried on business were to be applied, the issue of limitation for any individual class member would be determined for the major part of the loss by the law of the place where they lived and by various laws of other countries for small elements of their loss. The CAT considered that if a class member brought a claim individually against Mastercard, it would clearly be more appropriate for the issue of limitation to

be determined by a single system of law. The CAT did not see that there should be a different evaluation under section 12 just because these were collective proceedings seeking aggregate damages so that remote purchases could be estimated across the class. It referred to what Lord Briggs had said in his judgment in the Supreme Court in *Merricks* at [45]:

“... it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose.”

38. The CAT then turned to consider the position at common law, noting at [93] that the parties agreed that the common law rule of double actionability was as stated in Rule 203 of *Dicey and Morris on the Conflict of Laws* (12th edition 1993) (“Dicey 12<sup>th</sup> edition”) at 1487-1488:

“(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both

a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and

b) actionable according to the law of the foreign country where it was done.

(2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.”

39. The CAT noted at [94] that Clause 1(b) of the Rule requires determination of the place where the act was done, the *lex loci delicti*. In relation to the common law rule, Barling J in *Deutsche Bahn* had placed little weight on the words “act done” explaining at [154] that the rule was not enshrined in a statute and that he considered that the words were intended to cover in a general sense the commission of the tort. The CAT noted that this came close to the approach of the Court of Appeal in *Metall & Rohstoff v Donaldson Inc* [1990] 1 QB 391 at 446. It cited the passage in Dicey 12<sup>th</sup> edition at 1512 referring to that case:

“...it is submitted that the English courts will apply the “substance” test to determine the place of a tort for the purposes of clause (1)(b) of the Rule. Adoption of such a test avoids the mechanical solution inherent in an outright choice between the place of acting and the place of harm. It is also sufficiently flexible to take account of factors such as the nature of the tort alleged to have been committed and the material elements of the relevant tort, and will, without undue rigidity, enable the court to locate the tort in one place for choice of law purposes.”

40. At [96] the CAT noted that in *Deutsche Bahn*, Barling J concluded that:



“the *lex loci delicti* should be treated as the place where all those effects arise which Article 101 is aimed at preventing, and in particular the restriction on competition, that place being the marketplace where each Merchant operated. That is also the place where recoverable loss was allegedly suffered.”

41. At [97] the CAT said that the fact that in that case a large number of merchants chose to bring their tort claims together could not alter the *lex loci delicti* for the purpose of the tort in each claim. However the application of the “substance of the tort” test to the individual claims in the present collective proceedings was more problematic. The remote purchases accounted for a small minority of purchases and may well have been made in several different EEA countries. Application of the *Deutsche Bahn* approach of asking in which market the restriction of competition took place for the purpose of the tort does not produce a single answer but multiple answers. The CAT said that although it agreed with Mastercard that some important elements of the tort took place outside the UK they did not see how they could be located “in one place for choice of law purposes”.
42. The CAT turned to Clause 2 of Dicey Rule 203 which originates in the speeches of Lords Hodson and Wilberforce in *Boys v Chaplin* [1971] AC 356, saying at [98] that the foundation of the principle is explained in Dicey 12<sup>th</sup> edition at 1497:

“... It must be considered as an exception to the general rule contained in clause (1) of the Rule which requires double actionability by the *lex loci delicti*. Lord Hodson stressed that the rule in *Phillips v. Eyre* must be given a flexible interpretation because Willes J. himself said that the rule was only applicable “as a general rule”. Lord Wilberforce stressed the need to segregate the relevant issue and to consider whether, in relation to that issue, the general rule of double actionability ought to be applied or whether “on clear and satisfactory grounds”, it ought to be departed from.”
43. The CAT then set out the various circumstances in which Dicey considers the exception might apply in place of the general rule. The CAT applied those principles at [100]-[101] and concluded that there were clear and strong grounds for the exception to apply to the issue of limitation/prescription, so that the governing law for that issue should be the law of the place where the loss was suffered, English law for the claims of class members resident in England and Wales and Scots law for the class members resident in Scotland.
44. The CAT then turned to the exemptibility issue in Section E of the judgment. It noted at [102] that this is a follow-on action based on the Decision and that it was common ground that Mastercard could not challenge the infringement of Article 101 found in the Decision. It stated:

“As in any competition damages claim, the claimants’ loss is to be determined on the basis of the counterfactual, i.e. the extent to which, if at all, prices paid by the CMs would have been lower if Mastercard had not committed the infringement and had acted lawfully. A critical part of that counterfactual accordingly

involves consideration of what would have been the position as regards Mastercard's EEA MIFs.”

45. The CAT noted at [103] that Mastercard contends that it is open to it to demonstrate that the conditions of Art 101(3) for exemption would have been met in relation to alternative EEA MIFs set at a different level. It noted at [105] Mr Merricks' case that the only permissible counterfactual is a zero MIF with settlement at par (i.e. a prohibition on *ex post* pricing) on the basis that this results from the binding effect of the Decision, alternatively that it is an abuse of process for Mastercard to seek to contend otherwise. The CAT considered those contentions in turn.
46. The CAT considered the key aspects of the Decision noting that the Commission found that the setting by Mastercard of the EEA MIFs contravened Art 101(1) and did not qualify for exemption under Art 101(3). Pursuant to Art 16(1) of Regulation 1/2003, the Decision is binding on the Tribunal for the purpose of these proceedings, including findings in the recitals, citing the CAT in *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 7 (“*Trucks – CAT*”) which neither party challenged as a correct statement of the law.
47. At [112] the CAT stated that the essential basis for finding a restriction of competition was summarised in recitals [458]-[460]:
- “458. ... The MasterCard MIF not only creates an (artificial) common cost for acquirers and thereby sets a floor for the fees each acquirer charges to merchants. Acquirers also know precisely that all of their competitors pay the very same fees. The price floor and the transparency of it to all suppliers involved (that is to say the knowledge of each acquirer about the commonality of the MIF for all other acquirers in the MasterCard scheme) eliminate an element of uncertainty.
459. In the absence of MasterCard's MIF, the prices acquirers charge to merchants would not take into account the artificial cost base of the MIF and would only be set taking into account the acquirer's individual marginal cost and his mark up.
460. Statements of retailers demonstrate that they would be in a position to exert that pressure if acquirers were not able to refer to interchange fee as the “starting point” (that is to say, as the floor) for negotiating the MSC. This is because without a default that fixes an interchange fee rate in the absence of a bilateral agreement, merchants could shop around to contract with the acquirer who incurs the lowest interchange costs....”
48. This aspect of the Decision was explained by the Supreme Court in *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2020] UKSC 24 at [75]-[76] which the CAT cited. As the Supreme Court proceeded to state, that approach of the Commission was upheld by the General Court and then the CJEU. The CAT noted that the Supreme Court held at [93] that the “essential factual basis” upon which the CJEU held that there was a restriction on competition included the facts that:

“(iv) the counterfactual is no default MIF with settlement at par (that is, a prohibition on ex post pricing); (v) in the counterfactual there would ultimately be no bilaterally agreed interchange fees; and (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower.”

49. The CAT said that since this was a follow-on claim for damages allegedly caused by the same MIFs as were the subject of the Decision, the relevant counterfactual for the purpose of a restriction of competition would be a no-default or zero MIF with settlement at par. As was fully accepted by Mastercard, it would not be entitled to argue that a lower level of MIF would not restrict competition. However, Mastercard submitted that, whereas the determination in the Decision as regards the restriction of competition was found by the Supreme Court to be a general finding as regards any MIFs, the determination in the Decision as regards the application of Article 101(3) concerned the actual level of MIFs the subject of those proceedings. It argued that it was therefore able to rely on a counterfactual of different levels of MIF which, though contrary to Article 101(1), would meet the criteria for exemption under Article 101(3). The CAT said at [117] that to determine this issue it was important to consider the basis of the Decision as regards the application of Article 101(3) to the MIFs the subject of the present proceedings.
50. At [118]-[131] of its judgment, the CAT then reviewed the relevant aspects of the Decision and the Commission’s conclusions as to why the first three conditions of Article 101(3) were not satisfied. At [132] it recorded the submission of Ms Demetriou KC for Mr Merricks:

“Referring to recital (700), Ms Demetriou submitted that Commission had effectively invited Mastercard to submit empirical evidence that might justify its MIFs or some level of MIF, but Mastercard had disavowed that approach and sought to argue on the basis that the essential concept of a MIF and the way it was set met the criteria for exemption. Mastercard’s arguments failed, and as a result the Decision made a broad finding of infringement with no part of its MIFs exempt.”

51. At [133]-[134] the CAT accepted that submission as correct:

“133. We think that submission is correct. It is clear that Art 1 of the operative part of the Decision stated that the infringement comprises the MIF as a restriction “by in effect setting a minimum price merchants must pay to their acquiring banks for accepting payment cards”. That is the effect of any MIF; it is not dependent on the particular levels of MIFs which Mastercard had notified: see at para 64 above. And as we have concluded above in section D regarding s. 11(2) PLSA, the subject-matter of the Decision was the “Mastercard MIF”, including the relevant Mastercard network rules, which Art 3 of the Decision required Mastercard to modify: see para 64 above.

134. A finding by the Tribunal that different levels of MIFs which might have been set by Mastercard for the period covered by the Decision did not infringe Art 101 because they met the conditions for exemption under Art 101(3) would, in our view, run directly counter to this determination. It is of course implicit in Art 1 of the Decision that Mastercard's MIFs were not exempted. And the essential basis for that finding, as set out in the antecedent recitals, did not rest on the level of those MIFs, as the extracts from the Decision set out above demonstrate."

52. The CAT considered that this view was reinforced by Articles 4 and 5 of the Decision and concluded at [136]:

"Accordingly, we find that the case for exemption was argued by Mastercard on the high-level basis that its MIF scheme as such met the conditions for exemption, not that exemption was dependent on the level of the MIFs. As a result, the Decision did not simply hold that the particular level of EEA MIFs set by Mastercard did not qualify for exemption, but that for the period covered by the Decision the relevant Mastercard rules and MIFs were not exempt."

53. The CAT noted that Mastercard had relied strongly on recital (13) in the Executive Summary at the start of the Decision (as it did before this Court). That provides:

"As MasterCard's MIF restricts price competition between acquiring banks without fulfilling the first three conditions of Article 81(3) of the Treaty the Commission orders MasterCard to withdraw its intra-EEA and SEPA/intraEurozone fallback interchange fees within six months upon adoption of this decision. This remedy excludes one aspect of MasterCard's MIF as far as commercial cards are concerned. The Commission will further research the possibility of efficiencies in this respect. The order does not prevent MasterCard [...] from adopting an entirely new MIF (other than the Intra-EEA fallback interchange fees and the SEPA/intra-Eurozone fallback interchange fees) that can clearly be proven to fulfil the four cumulative conditions of Article 81(3) of the Treaty based on solid empirical evidence."

54. The CAT considered that this was looking to what Mastercard might seek to do for different periods in the future:

"138. However, in our view that only acknowledges and records the fact that the Decision deals with the Mastercard MIF over the relevant period and is not addressing any EEA MIFs which Mastercard may seek to set for a different period in the future. Thus for future periods, Mastercard can seek to argue that its rules and the MIFs it may introduce satisfy the conditions for exemption under Art 101(3), relying on sound evidence for that purpose. That is unsurprising, both on the analysis of the Art 101(3) conditions in the Decision to which we have referred and

the fact that, as recorded in the Decision at recitals (33)-(35), the Commission had in 2002 granted a time-limited exemption to the Visa intra-regional MIF after Visa had reformed various elements of the MIF, including a change to the operating rules that applied to its member banks.”

55. This was to be contrasted with what Mastercard was seeking to do in the present case:

“139. By contrast, what Mastercard is seeking to do in the present proceedings is to say that the Decision is not binding in respect of exemption for any MIFs over the relevant period other than the specific MIFs that had been notified for exemption, since it appears that the Commission would have been prepared to consider whether a particular level of MIF might be exemptible. We consider that this is a forensic attempt to recast the Decision made by the Commission, on a basis that was not advanced before the Commission but which Mastercard could have advanced. In our judgment, the fact that the Commission might have made a different decision of more limited scope if the case before it had been argued differently cannot assist in determining what the Decision which the Commission did make actually decided. It is the Decision that was made which is binding on the Tribunal.

140. Mr Cook KC, who argued this part of the case for Mastercard and whose skilful submissions did not lack for ingenuity, submitted that the Decision does not consider other levels of MIF as it was addressing what happened in the actual world (i.e. the MIFs Mastercard set). The counterfactual world that is relevant for the assessment of damages is by definition hypothetical, so Mastercard should be free to submit that there were levels of MIF which would have qualified for exemption in the counterfactual world where Mastercard would have notified those MIFs (or perhaps a different method for setting MIFs) for exemption. But for reasons we have explained, that involves narrowing the scope of the Decision which as set out above concerns Mastercard’s network rule and its setting positive MIFs, and which holds that the conditions for exemption for Mastercard’s positive MIFs (as opposed to particular levels of Mastercard MIFs) were not satisfied. That was the infringement found by the Decision in this particular case and the counterfactual is accordingly a situation where that infringement did not exist: i.e. where Mastercard did not for the relevant period apply the relevant network rule or set positive EEA MIFs (save for commercial MIFs which were outside the scope of the Decision).”

56. The CAT then dealt with further arguments raised by Mastercard in support of its case. Mastercard relied upon the approach to exemption in the domestic merchant cases, in particular the judgment of the Court of Appeal in *Sainsbury’s Supermarkets Ltd v Mastercard Inc* [2018] EWCA Civ 1536. The CAT did not consider that judgment

relevant since it was not dealing with a follow-on claim and the Court of Appeal was addressing the general approach to be taken to an exemption argument in terms of the burden and standard of proof. More relevant was the decision of Popplewell J in *ASDA Stores Ltd and ors v Mastercard Inc* [2017] EWHC 93 (Comm) in which, by reference to recital (13) in the Decision, the judge said that: “the Commission did not regard its decision as precluding MasterCard from adopting new MIFs if it could prove that such MIFs fell within the exemption criteria based on further evidence.” The CAT said at [150] that having had the benefit of more detailed submissions than before Popplewell J, it had reached a different conclusion.

57. The CAT went on to address the alternative argument on abuse of process which only arose if it was incorrect as to the effect of the Decision. It noted at [152] that the application of the principles of abuse of process to a private damages claim following a Commission Decision had been considered by the CAT in *Trucks-CAT* upheld by the Court of Appeal in *AB Volvo v Ryder Ltd (Trucks-CA)* [2020] EWCA Civ 1475. The Court of Appeal held that the whole of a Commission Decision finding infringement of Article 101(1) constitutes a “final decision” for the purposes of the abuse of process doctrine. The Court of Appeal endorsed the CAT’s approach that the test derived from *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 (“*Bairstow*”) at [38] should be applicable:

“If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute.”

58. Having referred to *Trucks-CAT*, *Trucks-CA* and the well-known speech of Lord Bingham in *Johnson v Gore Wood* [2000] UKHL 65; [2002] 2 AC 1, the CAT noted at [157] that there was no dispute regarding these general principles: “Before us, there was no dispute regarding these general principles. The threshold is a high one, but at the same time the doctrine is flexible not mechanistic.” The CAT noted at [159] that the finding of abuse of process in the *Trucks* case rested heavily on the fact that the matters the defendants were seeking to raise were ones they had previously admitted in their settlement of the Commission proceedings. The CAT said that the situation in the present case was clearly different but abuse of process is particularly fact-sensitive so that as in *Trucks* it was necessary to consider what happened in the proceedings before the Commission.
59. The CAT then reviewed the proceedings before the Commission. It reiterated that the Commission had in effect been inviting Mastercard to submit empirical evidence to justify its MIF (or part of it) but it was clear that Mastercard had expressly disavowed any intention to justify particular levels of MIF. As the CAT said at [162]:

“Accordingly, Mastercard had every opportunity to submit arguments to the Commission that the level of its MIFs met the conditions for exemption. If it had done so, then if the Commission considered that the Mastercard MIF was too high,

it would have addressed what level would meet the criteria for exemption. That is evident from the very different approach adopted by Visa and the resulting *Visa II* decision on exemption.”

60. The CAT noted at [163] that, in the course of the Visa proceedings, the Commission sent Visa a statement of objections stating that the Visa MIF scheme violated Article 101(1) and did not qualify for exemption under Article 101(3). Following that statement and an oral hearing, Visa had engaged with the Commission to discuss possible changes to its scheme and thereafter modified its scheme, including reducing the overall level of its EEA MIFs. In its assessment of the modified scheme, the Commission held that the modified MIF arrangement infringed Article 101(1) but met the conditions for exemption under Article 101(3). The CAT noted that the approach in that case was not unusual and reflected the way the Commission administered competition law before the Modernisation Regulation 1/2003. The CAT noted at [165] that there was no consideration by the Commission in the present case of what level of MIF or modified rule might qualify for exemption because Mastercard disavowed seeking exemption on that basis.
61. The CAT therefore said at [166] that this was not a case where Mastercard was seeking to raise again matters expressly addressed in the Decision, but where it was seeking to raise an issue which could have been raised before the Commission, but it very deliberately chose not to raise. This therefore related to the type of abuse adverted to by Lord Bingham in *Johnson v Gore Wood* in the passage the CAT cited at [156]:

“It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.”

As the CAT noted, in considering whether abuse was made out, it had regard to the fact that the parties in the present proceedings were not the same as in the previous proceedings and the high threshold accordingly applies.

62. The CAT concluded at [167]:

“Having chosen to go through extensive proceedings with the relevant competition authority on the basis that exemption under Art 101(3) did not depend on the level of MIF and despite every opportunity to engage with the authority on what level of MIF might satisfy the conditions for exemption for the period covered by those proceedings, when sued by the victims of the

infringement determined by the authority claiming damages allegedly caused by the Mastercard MIFs over that same period, Mastercard seeks to contend that there are various alternative MIFs one of which, depending how the expert evidence comes out, would have been granted exemption: see Mastercard's pleaded defence on exemption set out at para 104 above. Since for the overwhelming part of the relevant period exemption was in the exclusive jurisdiction of the Commission, the Tribunal would in effect have to determine the level of MIF which would probably have been exempted by the Commission although Mastercard never advanced its case before the Commission that way. Having regard to all the circumstances, we consider that to permit such a defence would bring the administration of justice into disrepute."

63. It went on to note at [168] that:

"Mastercard's strategy in response to the Commission's investigation and its decision (in contrast with Visa) not to engage in argument about an exemptible level of MIF were accordingly adopted with the recognition that if the Commission's decision went against it, it may very well face significant damages claims."

64. Finally at [169] the CAT said that although this was a 'different parties' case, it was very different from the kind of case considered in some of the authorities where there are two distinct private actions. As Mastercard had stressed infringement was an essential element of the tort of breach of statutory duty here and as a follow-on case it was somewhat unusual since the first part of the tort was established by the Decision and Mr Merricks was seeking to establish the second part: causation and quantum. The CAT saw some force in the submission of Ms Demetriou KC that although clearly not in the same proceedings, there was a close relationship between them i.e. between the Commission proceedings and the current proceedings. The CAT concluded at [170] that to allow Mastercard to advance its case on alternative potentially exemptible levels of MIF would constitute an abuse.

#### Grounds of appeal

65. Mr Merricks advances four grounds of appeal on the limitation/prescription issue:

- (1) The CAT erred in its application of the principle in *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553 ("*Yew Bon Tew*") and in relying on obiter dicta of the Court of Appeal in *DSG-CA* [2020] EWCA Civ 671, [2021] 1 All ER (Comm) 63;
- (2) The CAT erred in law in its reasoning as to time-bar for proceedings pre- and post- 1 October 2015 and that the legislator cannot have intended to make this distinction;
- (3) The CAT erred in law in failing to address why rule 31(4) was included in the CAT Rules 2003 but omitted from the CAT Rules 2015. This vitiated its conclusion that the omission could not lead to an "unavoidable construction of rule 119(2)" of the 2015 Rules "as affecting previously acquired rights of limitation";



- (4) The CAT misdirected itself as to the decision in *Deutsche Bahn* and thus erred in law by finding that section 47A(4) of the Competition Act 1998 did not relevantly disregard the limitation and prescription regimes.

66. Mastercard advances four grounds of appeal on the applicable law issue:

- (1) The CAT erred in law in its application of the “general rule” under section 11(2)(c) of PILMPA 1995 and in finding that under that subsection the applicable law governing the claims was English or Scots law. If the CAT had applied the test under the subsection properly it would have found that the applicable law was the law of the place where the restriction of competition occurred;
- (2) The CAT erred in law in its application of section 12 of PILMPA 1995 and its conclusion that this should displace the “general rule” under section 11(2)(c). If the CAT had applied the law properly it would have found that the general rule was not displaced and the applicable law was the law of the place where the restriction of competition occurred;
- (3) The CAT erred in law in concluding that pursuant to the common law rule of double actionability, the place where the “act was done” for the purposes of the claims cannot be located in a single jurisdiction. If it had properly applied the common law rules the CAT would have found that the place where the “act was done” was the place where the restriction of competition occurred, which produces a single answer in respect of each country in which a class member made a remote purchase;
- (4) The CAT erred in law in concluding that the exception to the common law rule of double actionability should apply such that the applicable law should be English or Scots law. If it had properly applied the common law rules the CAT would have found that the exception to the common law rule of double actionability did not apply and/or that the applicable law was the law of the place where the restriction of competition occurred.

67. Mastercard advances two grounds of appeal on the exemptibility issue:

- (1) The CAT erred in law in concluding that the Decision made binding findings in relation to whether alternative EEA MIFs would have met the criteria for exemption such that Mastercard is precluded from advancing a case at trial that EEA MIFs at different levels to those that it had put in place during the period relevant to these proceedings would have been eligible for exemption and such alternative lawful EEA MIFs provide the appropriate counterfactual for the purposes of assessing causation and quantum;
- (2) The CAT erred in law in concluding that Mastercard is not entitled to advance a counterfactual based on alternative exemptible EEA MIFs because this would be an abuse of process.

The parties’ submissions

68. The Court heard submissions first from Ms Tolaney KC for Mastercard on the applicable law issue. Her overriding submission was that the CAT had been wrong to conclude that the applicable law should be English/Scots law as the law of the place

where the consumers suffered loss because, looking at the claim as it stands, loss is the issue most strongly in dispute in these follow-on collective proceedings. This was focusing on the most contested issue effectively 24 years after the tort was committed to determine the governing law of the tort.

69. There were two red herrings to be cleared away. First, the fact that these were collective proceedings was completely irrelevant to the question of governing law. The collective proceedings regime is a procedural mechanism which is a “wrapper” for pre-existing claims and does not change the cause of action or therefore the governing law. Second, the suggestion that the significance of the elements of the tort is different because this is a follow-on claim is not correct. The analysis of the underlying tort cannot change depending on the stage at which the proceedings are, nor can the governing law. For example if these were not follow-on proceedings, and shortly before trial, the defendant were to admit liability, the appropriate choice of law would not suddenly switch. If it were otherwise, the applicable law would be unknown until the extent of the dispute was known during the course of the proceedings and would float depending upon what was in issue. Ms Tolaney KC submitted that once these two red herring points were cleared away there was no case against Mastercard on section 11.
70. In relation to the alternative case under section 12, she submitted that it was a very high bar to displace the general rule in section 11 and that the reference to “issues” in section 12 was to issues relating to the elements of the tort, not the stage of the proceedings. She submitted that the fundamental error in the CAT judgment was that it applied a test not of what is the significant element of the tort but what is the most significant element of the proceedings. There were three reasons why the CAT’s approach was wrong as a matter of law.
71. First, the approach of the CAT to the construction of sections 11 and 12 of PILMPA 1995, that they were unclear, was wrong: the terms of the sections are clear and have been clearly interpreted by the courts. Second, its approach was contrary to binding authority, *VTB Capital* and *Deutsche Bahn*, which set out the correct approach to sections 11(2)(c) and 12. They emphasise that significance is to be assessed by reference to the constituent elements of the tort and *VTB Capital* specifically says that it is impermissible to assess significance by reference to which aspects of the litigation will involve the most elaborate factual investigation at trial. Third, the approach of the CAT was wrong as a matter of principle because it would mean the governing law could change and would be unknowable.
72. Ms Tolaney KC submitted that section 11 was focused on the events constituting the tort, which were to be determined at the date when the tort was committed. It does not extend to events going beyond those constituting the tort, such as what happens in litigation. She referred to the critical passage in *VTB Capital* in the Court of Appeal at [148]-[149] which I have quoted at [23] above and submitted that six points arose from that analysis. First that a geographical approach is to be adopted to the general rule under section 11, working out where the act was done. Second, section 11(2)(c) requires an analysis of all the elements of the events constituting the tort. Third, in carrying out that analysis, it is the English law constituents of the tort that matter.
73. Fourth, at this stage of the analysis, the Court is required to examine the intrinsic nature of the elements of the events constituting the tort, for example the tort of deceit requires proof of a false representation of fact, an intentional or reckless state of mind, reliance,

causation and loss. Fifth, once those elements have been identified, the Court is required to make a value judgment as to the significance of each of those elements by reference to the tort itself, not by trying to predict which element of the tort will be the most central in subsequent litigation. Ms Tolaney KC submitted that one is looking for the applicable law at the time that the tort is inflicted. Sixth, the applicable law under section 11(2)(c) is that of the country where the significance of one or several of those elements outweighs the significance of any element found in any other country.

74. Ms Tolaney KC submitted that, accordingly, in concluding at [88] to [90] of its judgment (summarised at [33] above), that significance was to be evaluated by reference to the part that the events or elements will play in the proceedings rather than by reference to the tort itself in the abstract, the CAT fell into error. Merely because the Commission had decided the issue of restriction of competition in the Decision, did not mean that restriction of competition was not still an element of the tort. Furthermore, answering the question as to what is the applicable law, by reference to the part those events will play in the proceedings underpins that error, which is contrary to the decision of the Court of Appeal and the Supreme Court in *VTB Capital*.
75. She submitted that the correct approach was that taken by Barling J in *Deutsche Bahn*, applying *VTB Capital* at [42], which defined the elements of the tort with which the present case is also concerned:

“The first task is to identify all the elements of the events constituting the tort. The causes of action relied upon in this case (breaches of Article 101 TFEU/Article 53 EEA and of kindred domestic provisions) are akin to breaches of statutory duty as understood in English law terms. There appeared to be a measure of agreement between the parties that the principal elements of the tort are: (a) the adoption of the relevant MIFs and the CAR by means of a decision by an association of undertakings, including the Defendants; (b) the decision must have the object or effect of restricting competition within the EU; (c) loss or damage is caused to the claimant. In addition, in so far as concerns the claims based on Article 101 TFEU and Article 53 of the EEA Agreement, the decision must be capable of affecting trade between Member States.”

76. Ms Tolaney KC took the Court to the value judgment Barling J made at [121] in concluding that the most significant element was the restriction of competition:

“In my view, based on the value judgment I am required to make, the most significant elements/events in the tort alleged in the present case is not the loss allegedly suffered by the Claimants, significant though that element undoubtedly is. Nor is it the setting/management of the MIFs and the adoption of the CAR, though these also have significance. It is the restriction of competition. Although, as the Claimants have pointed out, loss is not a necessary element of an infringement of Article 101, a restriction of competition *is* necessary and, indeed, is at the heart of such an infringement. The same applies to the tort alleged here, based as it is on that Article (and kindred EEA and

domestic provisions). If there is no restriction of competition, there is no tort. The mischief at which Article 101 is aimed, or to put it more positively, the beneficial aim of that provision is the protection of the competitive process. Competition does not occur in the abstract, but on a market. Here, it is not in issue that the material markets are each of the national markets for providing "acquiring" services. It is those separate markets which are alleged to have been subjected to the restriction of competition. Those markets are the theatres of the wrong allegedly done by the Defendants."

She submitted that that analysis of the tort was the one the CAT should have made here. Indeed, it had said at [90] that it would have reached the same conclusion as Barling J had it not been for the follow-on nature of the claim. She submitted that whether the claim was, as in *Deutsche Bahn*, by the merchants or as here by the consumers, it was the same tort in relation to which the identity of the victim was not one of the constituent elements.

77. On the basis that the most significant element was the restriction of competition, the place where that occurred was in the country where the merchant was located because the merchant's acquiring bank was located there, the conclusion reached in *Deutsche Bahn* applying *VTB Capital*. Ms Tolaney KC did not shy away from the consequence being that, in collective proceedings such as the present, this would lead to a different governing law for each of the claims where the consumer had made a remote purchase from a merchant in another EEA country. The applicable governing law could not be different because the collective proceedings regime applied.
78. Turning to section 12 of PILMPA 1995, Ms Tolaney KC submitted that it was absolutely critical that the threshold to displace the general rule is a high one which only applies when it would be "substantially more appropriate for there to be a different governing law", what Lord Clarke in *VTB Capital* described as "exceptional, a very rare case". That threshold was simply not met in this case and the CAT did not grapple with why this was an exceptional case. She submitted that the wording of section 12(2) made it clear that the factors to be considered still focused firmly upon the connection of the tort with a country, not on the proceedings. This section was still tied to the events constituting the tort, albeit not just at the point in time when the tort was committed. It did not permit an inquiry into how the case came to be argued, that is the events in the proceedings. The factors that could be taken into account did not include matters relevant to convenience of the forum (which Lord Clarke at [209] of *VTB Capital* considered impermissible) or concerned with the case management of the proceedings. If it had been intended that another country was substantially more appropriate by reference to the proceedings, the statute would have said so.
79. Ms Tolaney KC made the point that it would be surprising if a factor that had not led to a particular result under section 11(2)(c) could be redeployed under section 12 to reach that result. It was no doubt because one could not simply redeploy the same factors that section 12 would only apply in a rare case. This was a point made by Tuckey LJ in *Dornoch Ltd v Mauritius Union Assurance Company Ltd* [2006] EWCA Civ 389; [2006] 2 Lloyd's Rep 475 ("*Dornoch*") at [48]-[49].

80. Second, she submitted that the CAT approached the issue with the incorrect assumption that Mr Merricks' case on causation was an issue wholly or substantially connected to the residence of the class members. Third, the CAT erred in its consideration of factors relevant to the parties, mistakenly finding that neither Mastercard nor Mr Merricks has connections with the countries where the restriction on competition occurred.
81. Ms Tolaney KC pointed out that there were only four cases where section 12 had overridden the general rule in section 11(2)(c). They were all cases where there was a pre-existing contractual relationship and the alleged tort was closely connected with the contract, for example misrepresentation or inducement of breach of contract. She referred specifically to the decision of Aikens J in *Trafigura v Kookmin Bank* [2006] EWHC 1450 (Comm). At [97] he dealt with the test under section 12:
- “Section 12 ...invites a court to make a comparison between the significance of the factors which connect a tort with the country whose law would be the applicable law "under the general rule" (ie. under section 11) and the significance of any factors connecting the tort with another country. Section 12 does not lay down any precondition before this further comparison can be undertaken. Moreover, it is clear from the terms of section 12(2) that the factors that a court can take into account as connecting a tort with a country under section 12 are broadly stated. Section 12(2) identifies a number of particular factors, but they are not said to be exclusive. Mance LJ noted in the *Morin* case [*Morin v Bonham & Brooks* [2004] 1 Lloyd's Rep 702] that the factors are potentially much wider than those to be considered under section 11(2)(c). In some cases there may be only limited scope for the application of section 12, but in others there is much greater scope; it depends on the facts of individual cases.”
82. Ms Tolaney KC submitted that even though the words “more appropriate” in section 12 meant that the factors to be taken into account under the section could be broad, they do not include pragmatic or case management considerations.
83. She then dealt with the position at common law which covered the period from 22 May 1992 to 30 April 1996. The first ground of appeal was that whilst the CAT had correctly identified at [96] the general rule at common law that requires determination of the place where the act was done, it had not followed the correct analysis of Barling J in *Deutsche Bahn* that this was the place of the restriction of competition.
84. The second ground was that the CAT misapplied the exception to the rule on double actionability. Ms Tolaney KC submitted that the exception was applied incredibly rarely. She relied on what Lord Wilberforce said in *Boys v Chaplin* at 391H: “The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred.” This statement was approved by the Privy Council in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190. She submitted that the CAT's approach effectively abrogated any decision under the general rule by finding that it could not identify a place where, in each case, the act was done but used the exception to fill the lacuna. This effectively turned the exception into an alternative primary means of identifying

the governing law, which was not an approach supported by any of the authorities. In any event, there was in each case a place where the act was done, the place where the restriction of competition occurred.

85. We then heard submissions in response on the applicable law issue from Ms Demetriou KC. She pointed out that it was common ground that the elements of the tort in this case were, as the CAT accepted, as set out by Barling J in *Deutsche Bahn* in the passage set out at [74] above. It was also common ground that the next step was for the Court to carry out an evaluative judgment to determine where the most significant element(s) of the tort took place, on the basis of the facts in the case. This was clear from [155] of *VTB Capital* in the Court of Appeal. At [158] the Court of Appeal reached the “tentative conclusion” that the most significant elements of the events constituting the tort of deceit in that case took place in England. The Supreme Court only differed in determining that that conclusion should be definitive not tentative. As Lord Clarke put it in [201]-[202]:

“The events constituting the tort of deceit are indeed the making of the misrepresentations which were known to be untrue, reliance on the misrepresentations and the loss sustained as a result. All those occurred in England. The misrepresentations were made to VTB in England, VTB relied upon them in England and incurred its loss in England. In my opinion that is plain.

...In these circumstances there was in my opinion no room for a tentative conclusion that English law is the applicable law under the general rule set out in section 11. It is plainly the applicable law under the general rule.”

86. Ms Demetriou KC submitted that the key point was that one was not looking at the matter in the abstract, asking what is inherently the most significant element of the relevant tort. Rather the correct approach was to identify all the elements of the tort and then ask which country has the most significant element, where is the tort most firmly tethered compared with any other country in the mix. This was clear from the *Morin* case, a case of negligent misstatement. At [18] Mance LJ said:

“The legal elements of the tort of negligent misstatement are clear enough, and the new statutory wording of the 1995 Act requires a value judgment about their 'significance' in the context of the particular facts in issue.”

87. Adopting that approach here, she submitted the first element of the tort is the adoption and maintenance in force by Mastercard of its EEA MIF, the decision by the association of undertakings, which took place in Belgium but no-one was arguing that weight should be given to that since it was happenstance that Belgium was where Mastercard was based. The second element was the restriction of competition which took place where the merchant’s acquiring bank was located, which would be in a patchwork of different countries. The third element was loss which in each case was suffered in the United Kingdom so that when one asks which is the single country where the most significant element of the tort took place, the answer is clearly the United Kingdom, England or Scotland. There is no other single country to which the tort is most closely

tethered on the facts of the case. Ms Demetriou KC submitted that each claimant's claim was against Mastercard in respect of all his or her purchases and the tortious act on which the claim is based is Mastercard's system for determining the MIF, as the CAT found in its judgment on permission to appeal. The individual class member was not bringing different claims against different merchants. Each purchase is just an instance of loss flowing from a single breach. She submitted that this was the effect of applying [148(6)] of the judgment of the Court of Appeal in *VTB Capital* quoted at [23] above.

88. Ms Demetriou KC submitted that the key point of distinction between *Deutsche Bahn* and the present case is that, in that case, the claims were brought by individual merchants so that for each merchant there was a place of restriction of competition where their acquiring bank was, so where the merchant was based, whereas because this is an indirect claim, that is not true of each individual class member in this case. For each individual class member, the majority of purchases will have been in the United Kingdom, so the restriction of competition was here, there will also have been purchases from a number of other countries, so that the restriction of competition will have been potentially in multiple different countries, whereas all the loss was suffered in the United Kingdom.
89. She submitted that Mastercard's approach gave no effect to the words "on the facts of the case" against which the case law recognised that the significance of the elements of the tort was to be assessed. Its approach identified the elements of the tort which were common ground then asked in the abstract what was the most significant element to which, in a case such as the present, the answer would always be the restriction of competition because this was a competition claim. The assessment had to be in the light of the facts of the particular case rather than in the abstract. She pointed out that, at [41] of *Deutsche Bahn*, Barling J had quoted what Moore-Bick J said about PILMPA 1995 in *Protea Leasing v Royal Air Cambodge* [2002] EWHC 2731 (Comm), that it contains a "much more flexible principle and one which might yield different answers in different cases even in relation to the same kind of tort".
90. Ms Demetriou KC submitted that not only was this case all about the loss suffered in the United Kingdom by a large class of consumers, but it was a collective claim seeking an aggregate award of damages. Mastercard was wrong in saying that the collective action was a procedural mechanism, a wrapper. She referred to [58] of the majority judgment given by Lord Briggs in *Mastercard v Merricks* [2020] UKSC 51; [2021] 3 All ER 285:

"Another basic feature of the law and procedure for the determination of civil claims for damages is of course the compensatory principle, as the CAT recognised. It is another important element of the background against which the statutory scheme for collective proceedings and aggregate awards of damages has to be understood. But in sharp contrast with the principle that justice requires the court to do what it can with the evidence when quantifying damages, which is unaffected by the new structure, the compensatory principle is expressly, and radically, modified. Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms. Nothing in the provisions of the Act or the

Rules in relation to the distribution of a collective award among the class puts it back again. The only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable.”

91. She submitted that that demonstrated that it was not correct that this is simply an accumulation of different individual claims, but a claim for aggregate loss suffered by the class, not for loss suffered by an individual member of the class. As Lord Briggs went on to say at [77]: “A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss.” The same point was made by Lords Sales and Leggatt in the minority judgment at [94]-[95]. The collective proceedings regime is not just a wrapper, but the statute has radically altered the law. The opt-out nature of the proceedings meant that there was no need to identify the individual claimants except by the class definition, another demonstration that it was a claim by the class.
92. In support of her case that the most significant element of the tort in this case was the loss, Ms Demetriou KC submitted that the consumers comprising the class were far removed from the MIF and most of them probably did not know it existed. They were not paying it themselves. Their claim under this new collective proceedings regime was also very far removed from the restriction of competition. Loss is the most significant element of the tort because these are collective proceedings seeking aggregate damages and that is the purpose of the claim.
93. In answer to the point raised by Snowden LJ that “the facts of the case” to which the case law refers means the facts comprising the tort, Ms Demetriou KC submitted that it was a fact of this case that the restriction of competition had been definitively decided against Mastercard by the Decision of the Commission. She submitted that the facts of the case are not limited to the facts that gave rise to the original tort but can include the facts of the case as pleaded. She submitted that what she described as Ms Tolaney KC’s “in terrorem” point, that on Mr Merricks’ case there could be a floating applicable law, does not arise because one is looking at the case as pleaded.
94. Ms Demetriou KC submitted that, even if Ms Tolaney KC were right that under section 11 the “facts of the case” were limited to the facts comprising the tort, the wider facts concerning the Decision of the Commission and the way the case is now pleaded going forward are clearly relevant under section 12. She submitted that section 12 clearly by its nature permitted something different from what would happen if the general rule under section 11 applied. Under section 12(2) the factors which may be taken into account may include factors relating to the parties, the events constituting the tort or the circumstances or consequences of those events. She submitted that the reference to the parties was clearly to the parties to proceedings, as to talk of parties to a tort was meaningless. Furthermore, the subsection is not exclusive. She submitted that it was certainly relevant to take into account as one of the factors that, by operation of statute, the infringement of competition has already been definitively decided when looking at the significance of the connecting factors. Whereas the general rule under section 11 might lead to restriction of competition as the most significant element of the tort, the fact that the Commission has decided that issue would mean that it was “substantially more appropriate...for determining the issues arising in the case” within section 12(1) for the applicable law to be the law of the England or Scotland as the place where the loss, which is claimed on an aggregate basis in collective proceedings, occurred.



95. Ms Demetriou KC submitted that the reasons given by the CAT at [92] of its judgment for concluding that if it had been wrong about section 11(2)(c) the general rule should be displaced (which I have summarised at [35] and [36] above) were entirely correct.
96. So far as the position at common law is concerned, Ms Demetriou KC submitted that the CAT had rightly concluded at [97] in relation to Clause (1) of Dicey Rule 203 that, applying the approach of Barling J in *Deutsche Bahn* of asking in which market the restriction of competition took place for the purpose of the tort did not produce a single answer but multiple answers, so it was not possible to say that the elements of the tort could be located in one place for choice of law purposes under the test in Dicey 12<sup>th</sup> edition set out at [38] above. She submitted that Mastercard's first ground of appeal on the common law was ill-founded, but in any event it was difficult to see where it went since the CAT had then proceeded on the basis that double actionability was engaged and that it would need to apply the exception in Clause (2) of Dicey Rule 203, which is what Mastercard contended for.
97. In relation to the exception, Ms Demetriou KC noted that the passages from Dicey 12<sup>th</sup> edition quoted at [98] and [99] of the judgment emphasise that one has to look not only at the tort but at the issues in the case. The CAT had set out at [100] the factors upon which it relied in concluding that this was an unusual case where there were clear and strong grounds for the exception to apply. She submitted that the second factor, that the primary basis of liability of Mastercard was breach of EU competition law which applied throughout all Member States was an important point, since the rationale for the double actionability rule was to avoid a situation where an act takes place in a foreign country where it is not tortious and the defendant is sued in England where it is tortious, but with which there is a tenuous connection. However, that rationale does not apply here, because the breach of EU competition law applies throughout the EU.
98. The third factor was also important, that the issue for which the exception was being applied was limitation/prescription, so it is not part of the substantive tort law being applied. Overall she submitted that the factors were matters the CAT was entitled to take into account and were correct. There was no error of principle in the CAT's approach.
99. In relation to the limitation issue, Ms Demetriou KC on behalf of Mr Merricks submitted that the key provision for present purposes was rule 119(2) of the 2015 Rules set out at [12] above. This preserved rules 31(1) to (3) of the 2003 Rules so far as claims under section 47A CA 1998 which arose before 1 October 2015 are concerned. The two year period under rule 31(1) and (2) (cited at [11] above) essentially ran, in the case of a follow-on claim, from the date of the Decision or any appeal from the Decision (2(a)) or from the date on which the cause of action accrued (2(b)). Here the claim was brought within two years of the judgment of the CJEU on appeal from the Decision. Ms Demetriou KC submitted that the legislature had deliberately omitted the continued application of rule 31(4) of the 2003 Rules and that omission had to be given effect. The only effect it could have is that all claims to which rule 119 of the 2015 Rules applies which are within the limitation period set out in rule 31(1) to (3) can be brought in the CAT, regardless of whether they were time-barred under the Limitation Act.
100. She submitted that the CAT Rules thus provided a bespoke two year limitation regime and the six year limitation period under the Limitation Act no longer applied. The purpose of rule 31(4) was to preserve accrued limitation rights: that although the

Limitation Act regime had been replaced, if someone had an accrued right under that regime it was preserved. It was then omitted deliberately in rule 119 of the 2015 Rules for this category of cases. She accepted in answer to a question I posed that the practical effect of her submission is that a claim where the cause of action accrued more than six years before 20 June 2003 (when the 2003 CAT Rules came into force) was time barred on 20 June 2003 and remained time barred until the 2015 CAT Rules came into force on 1 October 2015, but was no longer time barred as a consequence of the effect of rule 119 of those Rules.

101. Ms Demetriou KC submitted that the effect of section 47A(3) CA 1998 as originally enacted with effect from 20 June 2003 (which was now section 47A(4)): “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” was to make it clear that the Limitation Act would not apply to such claims, in other words to make it clear that limitation, so far as claims in the CAT were concerned, was exclusively determined by the new two year bespoke regime in rule 31(1) to (3).
102. The CAT had been wrong to read the provision as simply ignoring limitation for the purpose of identifying claims which may be made in civil proceedings which could be brought in the CAT under this section. She submitted that Mr Merricks’ construction of section 47A(3) (which is section 47A(4) in the section as amended) as replacing the Limitation Act regime with the new two year bespoke regime under rule 31 was supported by the first two sentences of [54] of the judgment of Sir Geoffrey Vos C (as he then was) in *DSG CA*:

“Starting then at the beginning, the words of rule 31(1) and (2) provide for present purposes that "a claim for damages must be made within" two years of the final determination of the competition authority. That is, as the claimants submit, a new limitation period in respect of a new way of bringing follow-on claims through the Tribunal. *Prima facie*, I agree also that section 39 of the Limitation Act 1980 operates so as to exclude the application of that Act, where rules 31(1) and (2) apply.”
103. Ms Demetriou KC also referred to [55] where Sir Geoffrey Vos C said: “The saving in rule 31(4) would, therefore, have been looking back to the previous limitation regime, and preserving accrued rights to plead a time-bar.” She agreed that that was the effect of rule 31(4).
104. She noted that section 47E, introduced by the CRA 2015, did not apply to proceedings which arose before its commencement on 1 October 2015 but which were issued after its commencement, which would include the present proceedings. If one then asked what limitation rules do apply to this case, the answer was in rule 119 of the 2015 Rules (set out at [12] above). She submitted that for claims arising before 1 October 2015 but brought after that date as here, section 47A(4) CA 1998 disapplies the Limitation Act. Rules 31(1) to (3) of the 2003 Rules apply the two year limitation period from 11 September 2014, the date of the CJEU judgment. Rule 31(4) does not apply, so there is no saving for accrued rights of limitation.
105. When asked by Green LJ what the purpose and intention of Parliament would be in effectively allowing the revival of a claim which was time-barred until 1 October 2015,

Ms Demetriou KC said that its intention was very clear from the deliberate omission of rule 31(4), to which effect has to be given. Nothing in the CAT judgment or Mastercard's submissions gives the omission any effect. She also accepted, as I suggested, that the reason for the omission may have been that when the 2015 Rules were being drafted it was thought that the situation covered by Rule 31(4) was so far away in the past that it would not arise so that it was no longer necessary.

106. She also submitted, in relation to section 16 of the Interpretation Act (cited at [14] above) that the contrary intention does appear from the deliberate omission of Rule 31(4). In relation to the CAT's conclusion at [34] (cited at [16] above) that the omission could not lead to an unavoidable construction of Rule 119 as affecting previously accrued rights of limitation, applying *Yew Bon Tew*, Ms Demetriou KC submitted that this was wrong. Rule 119 does express a contrary intention by not preserving rule 31(4) when it could easily have done so. She submitted that the key error in the CAT judgment was its conclusion that the legislation did not contain a contrary intention for the purposes of section 16 of the Interpretation Act.
107. Ms Demetriou KC referred to [37] of the judgment of the CAT in *DSG-CAT* which she submitted stated the position correctly:

“The preservation of rule 31(1)-(3) but not rule 31(4), in the wording of rule 119(2) is clearly deliberate. Mr Hoskins very properly accepted that this is not a case of a drafting error which could be ‘rectified’ by the court under the principle in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586...In our judgment, the conclusion is ‘unavoidable’ that the timebar imposed by rule 31(4), in circumstances where the limitation period would have expired prior to 20 June 2003, does not apply in the case of proceedings commenced on or after 1 October 2015 which are governed by rule 119(2). Mr Hoskins’ submissions were in effect an invitation to incorporate by a process of construction the substance of rule 31(4) as regards proceedings which are governed by rule 119(2). But that would be directly contrary to the language of rule 119(2) which expressly chose not to incorporate (or “save”) rule 31(4). Accordingly, sect 16(1) of the Interpretation Act 1978 does not assist and the case does not fall within the *Yew Bon Tew* principle. It follows that whereas rule 31(4) applies to proceedings commenced before 1 October 2015, it has no application to proceedings commenced thereafter.”

108. She says that the CAT then went on at [38] to interpret rule 31(4) to try to avoid this consequence which it considered undesirable. She submitted that it was not correct to start from the assumption that it was inherently unlikely that the legislature would abrogate accrued limitation rights. The test was whether the construction which had that effect was unavoidable, which she submitted it was. She referred to the passage in [59]-[60] of the judgment of Sir Geoffrey Vos C in *DSG-CA* cited at [19] above, which was obiter, and she submitted that the conclusion that a contrary intention does not appear in the 2015 CAT Rules was wrong.

109. In relation to the Scots law of prescription, the CAT, in refusing permission to appeal noted that Mr Merricks' argument about the omission of rule 31(4) ignored the fact that rule 31(4) clearly does not apply to a time bar under Scots law. On his argument, claims governed by Scots law would be subject to the statutory regime of prescription whereas claims governed by English law would not be subject to the statutory regime of limitation. The CAT considered that it was inconceivable that the drafters intended this consequence. Ms Demetriou KC submitted that the most natural way to interpret the omission of rule 31(4) so far as Scots law is concerned is that, even if the prescriptive period was extinguished prior to June 2003, a claim could still be brought in the CAT if it was within time under rule 31(1) and (2). However she accepted that that construction would be surprising because it would mean that accrued rights under English law were preserved by rule 31(4), but accrued rights under Scots law were not. The other possibility was to read the words "limitation period" as extending to prescriptive periods under Scots law. Although that would not be the actual meaning of the words it may better reflect the legislative intent.
110. Ms Tolaney KC submitted on behalf of Mastercard that what was section 47A(3) (now section 47A(4)) CA 1998 was just an identification provision as to what claims could be brought in the CAT, to which it was no answer that the claims would be statute barred if brought in civil proceedings in Court. This is what Roth J had found in *Deutsche Bahn/Pilkington* at [56]-[58] and it had been accepted on behalf of Mr Merricks at the PTA stage before the CAT that this properly articulated the law.
111. She submitted that the reason why rule 31(4) of the 2003 Rules was not referred to in the 2015 Rules was because it was never needed in the first place, being only clarificatory and not changing the law. Accrued limitation rights could not be disturbed by secondary legislation. The Rule was also looking at the period before it came into force whereas the 2015 Rules were just concerned with the period prior to the CRA 2015. It was a historic provision.
112. Ms Tolaney KC submitted that one could not discern any intent on the part of the legislature to abrogate accrued limitation rights and the argument that claims which had become time barred sprang back into life was just bad. Accrued limitation rights would not be affected by subsequent legislation unless it was unequivocally clear, which it was not, since it would be being done by silent omission. Furthermore, the arguments for Mr Merricks had already been rejected in *DSG-CA*, which was not obiter. Mr Merricks' argument also ran into real difficulty in the case of prescription under Scots law which extinguished the claim, so that it no longer exists, making it impossible to revive.
113. The oral submissions for Mastercard on the exemptibility issue were made by Mr Matthew Cook KC. He accepted that Mastercard cannot seek to justify its actual EEA MIFs, but submitted that, if it can show that alternative lower EEA MIFs would have met the criteria for exemption, damages should be assessed on that basis. He relied on three points to show that lower levels of MIFs were potentially exemptible: (i) the five year exemption granted by the European Commission to Visa on the basis that its MIFs would fall by 30% over that period; (ii) Recital (13) of the Decision which expressly raised the possibility that Mastercard would be free to set new EEA MIFs provided they met the criteria for exemption; and (iii) following the Decision, in 2009, Mastercard did set new EEA MIFs which were 70% lower than the previous ones and the Commission broadly accepted these.

114. He submitted that Mastercard only notified its actual EEA MIFs to the Commission, so that it was only considering those, not some hypothetical alternative. It was clear from Article 1 of the operative part of the Decision that the Commission’s finding was as to the effect of the actual MIFs notified, not all potential MIFs. Mr Cook KC was critical of [133] of the CAT judgment which referred to Article 1 but omitted reference to the critical words: “by means of the Intra-EEA [MIFs]”. He submitted that the CAT had been wrong to say the Commission was not making a decision dependent on any particular level of EEA MIF. The Commission was focusing on the actual EEA MIFs, not making a general determination about MIFs or that only zero MIFs were acceptable.
115. He submitted that it was clear from recital (13) that the Commission was not making a blanket ruling that the MIF was necessarily unlawful. It was just saying these MIFs are unlawful, not that only a zero MIF is lawful. Furthermore, it was no part of the Commission’s remit to address alternative MIFs which might have been lawful.
116. Mr Cook KC relied on the definition of “Mastercard MIF” in the Decision:
- “MasterCard MIF is used as a reference to the organisation’s network rules *and* the decisions of its bodies/managers that determine the Intra-EEA fallback interchange fees ... The Mastercard MIF is the subject of this Decision.”
117. Then at recitals (663) and (664) the Commission said:
- “663. The MasterCard MIF constitutes a decision of an association of undertakings....
664. That decision restricts competition between acquiring banks by inflating the base on which acquiring banks set charges to merchants and thereby sets a floor under the merchant fee. In the absence of the multilateral interchange fee the prices set by acquiring banks would be lower to the benefit of merchants and subsequent purchasers.”
118. The MIF was thus the combination of the rules and a specific set of decisions setting these particular MIFs. Thus, he submitted that when recital (665) said that the Mastercard MIF was not objectively necessary, that was a reference to the rules and the specific decisions on these MIFs not on MIFs generally. Pressed by the Court about Article 3 of the operative part of the Decision and recitals (759) and (761) (quoted at [62] of the CAT judgment) requiring Mastercard “to cease and desist from determining in effect a minimum price merchants must pay for accepting payment cards by way of setting Intra-EEA [MIFs]”, Mr Cook KC maintained that recital (13) contemplated that Mastercard could come back later with MIFs set at a level which would be exempt, even though it restricted competition and that the Decision was always limited to the actual EEA MIFs. He also relied upon the fact that in 2009 the Commission had allowed Mastercard to put forward lower EEA MIFs which it had accepted as demonstrating that the Decision was limited to the actual EEA MIFs.
119. Mr Cook KC sought to rely on what the CAT said at [165] in the context of Mastercard not having advanced an alternative MIF before the Commission: “Here, no consideration by the Commission of what level of MIF or modified rule might qualify

for exemption took place because Mastercard disavowed seeking exemption on that basis.” He agreed with that and submitted that it demonstrated that the Commission could not possibly have been ruling that any level of modified MIF would not qualify for exemption.

120. Mr Cook KC also relied in oral submissions (and in short written submissions after the hearing of the appeal for which we gave the parties permission) on the CAT judgment in *Westover Limited & Ors v. Mastercard Incorporated & Ors* [2021] CAT 12; [2021] 5 CMLR 14 (“*Westover*”) in support of Mastercard’s case that the Commission’s finding of infringement was restricted to the specific level of Mastercard’s EEA MIFs and did not extend to any positive MIF set by Mastercard under its scheme rules. He also sought in those written submissions to make a more wide-ranging submission about Article 3 of the operative part of the Decision in these terms:

“Article 3 of the Commission Decision cannot and should not be interpreted as requiring Mastercard to “take away the whole structure”, since that would go beyond what was necessary to bring the infringement found by the Commission to an end and would have left Mastercard without the ability to set the zero EEA MIF (or equivalent) which the Commission recognised was necessary for the Mastercard scheme to work. What Article 3 required was Mastercard to repeal the EEA MIFs (i.e. the actual EEA MIFs in place). It did not require Mastercard to repeal all aspects of its rules in relation to interchange fees, but only to make such modifications as were necessary to reflect the order to repeal the EEA MIFs so as to bring the infringement identified in Article 1 to an end i.e. the positive EEA MIFs which the Commission held infringed Article 101.”

121. Turning to the abuse of process argument, Mr Cook KC submitted that it was important to differentiate between two lines of authority. The first, most recently exemplified by *Trucks-CA*, is where an issue was decided in previous proceedings between different parties and one of the parties in the previous proceedings seeks to reargue the point in proceedings with a different party. The second was where there were previous proceedings between the same parties or their privies and one of the parties in the new proceedings seeks to raise an issue which they could and should have raised in the earlier proceedings, the *Henderson v Henderson* (1843) 3 Hare 100 type of abuse. The present case is a third category, an undecided point as in the second category, but between different parties, which he submitted the law did not regard as an abuse.
122. In relation to the first category, Sir Geoffrey Vos C summarised the relevant principle at [139] of *Trucks-CA*:

“Where the parties to the two proceedings were not the same, “it will only be an abuse of process of the court to challenge the factual findings [in the earlier proceeding] if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated; or (ii) to permit such relitigation would bring the administration of justice into disrepute” (*Secretary of State for Trade and Industry v Birstow* [2003] EWCA Civ 321 at [38])”

123. Mr Cook KC also referred to what Rose LJ said at [103] of her judgment:

“The CAT referred to cases emphasising that the situations in which it will be an abuse to litigate an issue which has not previously been decided between the same parties will be "entirely exceptional" (see per Flaux LJ in *Kamoka v Security Services* [2017] EWCA Civ 1665, [119]) or "rare" (per Lord Hobhouse in *In re Norris* [2001] UKHL 34 at [26]).

124. In relation to the second category, Mr Cook KC referred to *Johnson v Gore Wood* [2000] UKHL 65; [2002] 2 AC 1 and what Lord Millett said at p 58:

“As May L.J. observed in *Manson v. Vooght* [1999] BPIR 376 at p. 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions.”

125. He submitted that this explanation of the principle was important because it is the successive actions causing prejudice to a defendant which is critical to this species of abuse of process. Lord Millett went on to say:

“However this may be, the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon...

The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.”

126. The same point was made by Lord Bingham at p 32. In other words, Mr Cook KC submitted, this species of abuse of process only arises where the parties are the same as in the previous proceedings or there is privity of interest, hence the concept of double vexation. He submitted that the CAT had evidently focused on the slightly earlier passage of Lord Bingham’s speech at p 31 which the CAT cited at [156] (set out at [61] above) and had wrongly thought this provided an open field day. However, this passage was still in the context of relitigation between the same parties.

127. In [166] to [168] of the CAT judgment (referred to at [61] to [63] above), the CAT had erred in principle in not recognising that this case was neither within the *Bairstow* principle nor *Henderson v Henderson*. Mr Cook KC submitted that, although the categories of abuse are not closed, the present case fell outside the doctrine entirely. In relation to the second limb of *Bairstow* he submitted that it could not possibly bring the administration of justice into disrepute for Mastercard to argue that damages against it should be assessed on the basis of the same level of exemptible MIF as the Commission had agreed for Visa and in due course agreed for Mastercard in 2009.

128. In her submissions, Ms Demetriou KC reminded the Court that the Decision in December 2007 followed a very lengthy investigation by the Commission commenced in 1992, involving repeated meetings between the Commission and Mastercard, various rounds of submissions and expert reports, a statement of objections, a supplementary statement of objections and a hearing. Throughout that process, Mastercard adopted the particular stance that having a MIF was lawful as a matter of principle. It deliberately did not seek to do what Visa had done and try to justify any particular level of MIF by reference to empirical evidence and its strategy failed, because the Commission found that the Mastercard MIF infringed Article 101, on the basis that in effect it set a minimum price which merchants must pay to their acquiring bank for accepting payment in the EEA. What Mastercard is trying to do on this appeal is have a second bite of the cherry and the CAT rightly said it was precluded from doing so.
129. Ms Demetriou KC pointed out that Mastercard’s pleaded case was that only the very specific level of MIF was precluded by the Decision and that it could have come back with alternative MIFs close to or even above the level of the EEA MIFs, although because it was forensically more attractive it was now limiting itself to arguing for lower alternative MIFs. The argument that only the very specific level of MIF was precluded was wrong. She took the Court to the Commission’s Visa Decision which demonstrated that, when the Commission said on a provisional basis that Visa’s MIF was not lawful, Visa engaged with the Commission to establish a level of MIF which was exempt on the evidence which the Commission would be happy with. In contrast, Mastercard’s position was that a MIF is lawful as a matter of principle whatever its level was.
130. She submitted that, when one was looking at the loss caused by this tort, one is asking what would have been the position but for the infringement found by the Decision. The counterfactual thus involves stripping out the infringement. She turned to the operative part of the Decision and Article 1 which states:

“From 22 May 1992 until 19 December 2007 the MasterCard payment organisation and the legal entities representing it, that is MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe S.p.r.l., have infringed Article 81 of the Treaty and, from 1 January 1994 until 19 December 2007, Article 53 of the EEA Agreement by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.”

131. Ms Demetriou KC submitted that the finding of infringement was in broad terms, the setting of a minimum price merchants must pay to their acquiring bank for accepting payment cards. Articles 2 and 3 of the operative part of the Decision provided:

“Article 2

The MasterCard payment organisation and the legal entities representing it shall bring to an end the infringement referred to in Article 1 in accordance with the subsequent Articles 3 to 5.



The MasterCard payment organisation and the legal entities representing it shall refrain from repeating the infringement through any act or conduct as described in Article 1 having the same or equivalent object or effect. They shall in particular refrain from implementing the SEP A/the Intra-Eurozone fallback interchange fees.

### Article 3

Within six months after notification of this decision the legal entities representing the MasterCard payment organisation shall formally repeal the Intra-EEA fallback interchange fees, as well as the SEP A/Intra-Eurozone fallback interchange fees. They shall moreover modify the association's network rules to reflect this order and the order according to Article 2 second paragraph. They shall repeal all decisions taken by MasterCard's European Board and/or by MasterCard's Global Board and/or its delegate the President and CEO of MasterCard Incorporated and/or his designee the Chief Operating Officer or other persons in the association on Intra-EEA fallback interchange fees on SEPA fallback interchange fees and on Intra-Eurozone fallback interchange fees.”

132. Article 2 thus required Mastercard to bring an end to the infringement and Article 3 required Mastercard to repeal not only the actual fees but also all of the rules and decisions, in other words the whole of the MIF and its architecture. Under Articles 4 and 5 the changes had to be communicated to the relevant financial institutions. This was all explained by recital (759):

“In order to remedy the restriction of competition by [Mastercard] these undertakings should be obliged to cease and desist from determining in effect a minimum price merchants must pay for accepting payment cards by way of setting Intra-EEA fallback interchange fees.”

133. In other words, as she put it: “Everything must go.” The infringement found is not just the setting of a minimum price and that the level of Mastercard’s actual EEA MIF is not justified on the evidence, but is a general finding about EEA MIFs. This was also clear from recitals (767) and (769). The Commission obviously thought that the counterfactual was no EEA MIF and that the position needs to be restored to no EEA MIF in order to remove the competitive harm.

134. So far as *Westover* is concerned, in written submissions after the appeal hearing, Ms Demetriou KC and Mr Jamieson submitted that nothing in that case supported Mastercard’s submission that the scope of the Decision was limited to the specific level of its MIF. They submitted that in *Westover* the CAT held that the default settlement rule and the decision to set a positive MIF together amounted to the restriction of competition, which was wholly consistent with Mr Merricks’ case and did not help Mastercard. Mr Merricks was not seeking to argue that the finding of infringement by the Commission related to the scheme rules in isolation. They submitted that consistently with the CAT’s conclusion in *Westover*, the infringement established by

the Commission was the setting by Mastercard of a positive MIF, i.e. a “minimum price merchants must pay to their acquiring banks” as set out in Article 1 of the operative part of the Decision. Accordingly, the Commission required Mastercard at Articles 2-5 of the Decision both to repeal its actual MIFs and to modify its rules (which enabled the setting of a minimum price) and repeal any decisions on intra-EEA MIFs.

135. As for recital (13) on which Mastercard placed so much reliance, Ms Demetriou KC submitted that it was just a prospective provision. Because this was an effects not an object case, the Commission was not saying one can never have a MIF, which was clear from the Visa Decision, but what it was saying was that Mastercard had failed to justify any MIF on the basis of the evidence it had put forward. However, because it was an effects case, recital (13) was saying Mastercard would not be precluded from putting forward an entirely new MIF in the future which could clearly be proved to fulfil the conditions of Article 101(3) based on solid empirical evidence.
136. Ms Demetriou KC took the Court to other recitals in the Decision which she submitted demonstrated that Mastercard’s stance was that it was not going to justify the level of the MIF because it considered it should be able to set it at any level. An example was recital (678) quoted at [122] of the CAT judgment:

“MasterCard argues that the Commission was wrong to request MasterCard to establish under Article 81(3) of the Treaty that the interchange fee “set at a certain level” was indispensable to achieve objective efficiencies within the meaning of Article 81(3) of the Treaty, because such requirement amounted to an “attempt to regulate the level of MasterCard's interchange fees” and the Commission would lack such powers to set MasterCard's interchange fees at a certain level.”

137. The Commission held that Mastercard’s attempt to justify the MIFs on the basis of economic theory was wrong and that empirical data needed to be provided to justify the level, which Mastercard had failed to do. This was made clear, for example in recital (690) quoted at [124] of the CAT judgment:

“Hence, whether a MIF should be paid by acquirers to issuers or vice versa, and whether it should be set at a certain amount or at zero, cannot be determined in a general manner by economic theory alone. A claim that an interchange fee mechanism creates efficiencies within the meaning of Article 81(3) of the Treaty therefore must be founded on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts. Apart from MasterCard’s general assertion that balancing of the demand of cardholders and merchants leads to a better performance of the MasterCard system, is inherent and indispensable to the operation of a fourparty payment card system, contributes to overall economic welfare and therefore “undoubtedly” fulfils the first condition of Article 81(3) of the Treaty, no such analysis and empirical evidence was provided to the Commission.”

138. Accordingly, Ms Demetriou KC submitted that the Commission had found that Mastercard had failed to justify the existence of a MIF altogether. This explained the terms and scope of the operative part of the Decision. The Commission rejected Mastercard’s submission that having a MIF in principle was justified by economic theory and that it should have complete discretion over the level. This was made absolutely clear by recital (731) quoted at [126] of the CAT judgment:

“Contrary to MasterCard’s perception the Commission’s position is not that only the level of a MIF is a decisive criterion for assessing whether that MIF fulfils the first condition of Article 81(3) of the Treaty. Rather, the existence of objective appreciable efficiencies is assessed in relation to the MIF as such, the effects it produces on the market and the manner in which it is set. In particular, the Commission verifies on the basis of the evidence submitted whether the model underlying a MIF is based on realistic assumptions (which is not the case here), whether the methodology used to implement that model in practice is objective and reasonable (which is not the case for the two methodologies used by MasterCard) and whether the MIF indeed has the positive effect on the market to the benefit of both customer groups which the model claims.”

139. Ms Demetriou KC submitted that the abuse of process point only arises if Mr Merricks is wrong on construction of the Decision. She reminded the Court of the factual history of the investigation and procedure before the Commission and the conclusion of the CAT at [162] quoted at [59] above, that Mastercard had every opportunity to submit arguments to the Commission that the level of its MIFs met the criteria for exemption and its further conclusion at [165] that Mastercard had eschewed adopting the same approach as Visa.
140. She submitted that, as the speech of Lord Bingham in *Johnson v Gore Wood* made clear, the rationale for *Henderson v Henderson* abuse was not just avoidance of double vexation but finality of litigation. She relied on the fact that the cases on such abuse of process were considering private litigation between private parties. The position of this Decision was different because the Commission was essentially acting as a public enforcer of competition rules on behalf of consumers. Furthermore, Parliament has determined that the decision of the regulator, in this instance the Commission, should be binding in proceedings.
141. Ms Demetriou KC also submitted that the difference in substance between this case and *Trucks-CA* was very slender. In that case, this Court found that it would bring the administration of justice into disrepute for the defendant who had been found guilty of an infringement by the competition regulator, to be able to say, when faced with claims in Court for compensation by consumers who had suffered harm as a result of the infringement, that it now had further evidence which would demonstrate that the Commission was wrong. That was very similar to the position here where Mastercard had made a tactical decision not to seek to justify an alternative level of MIF and was now asking for a second bite of the cherry.
142. She submitted that the position here was also analogous to that in *Sainsbury’s* where the Supreme Court at [233]-[237] held that, having rightly decided that Popplewell J

should have dismissed Mastercard’s Article 101(3) defence and given judgment for the claimants, it was not open to the Court of Appeal to order the Article 101(3) issue to be remitted to the CAT.

143. Ms Demetriou KC accepted that this was a novel case so far as abuse of process is concerned but emphasised that the categories of abuse are not closed and that the vice here of having a second bite of the cherry was not very different from the vice in *Trucks-CA*.
144. The Court invited the parties to put in short written submissions on the decision of this Court in *Kamoka v. Security Service* [2017] EWCA Civ 1665. We are grateful to both teams of counsel for those submissions, but do not consider that they advance this part of the debate any further.

## Discussion

### *Applicable law*

145. I will address the three issues on these appeals in the same order as we heard submissions. In relation to the applicable law issue, given that this issue arises for the first time in the context of collective proceedings and is of some importance financially (although the transactions in relation to which this issue arises are only about 2% of the overall claim, that represents in excess of £200 million), I would be minded to give Mastercard permission to appeal. However, for the reasons set out below, albeit somewhat different from those given by the CAT for rejecting Mastercard’s case on applicable law, I would dismiss the appeal on this issue.
146. The correct approach to section 11(2)(c) is that set out by the Court of Appeal in *VTB Capital* quoted at [23] above. The Court has first to identify the elements of the events constituting the tort, an analysis which involves examining “the intrinsic nature of the element(s) of the tort – and not the nature or closeness of any tie between those elements and the country where they occurred.” (per Mance LJ in the *Morin* case). As Mance LJ went on to say the nature or closeness of the tie may well be relevant to the question whether the general rule under section 11 is displaced under section 12, by reference to the “factors which connect a tort with another country”. In my judgment, when the case law says that the significance of the elements of the events is to be assessed “in the light of the facts of the case” (see for example [41] of *Deutsche Bahn* quoted at [24] above), the focus is on the facts comprising the tort when it was committed, the events constituting the tort when and where they occurred, hence the “intrinsic nature” of the elements of the tort or what the Court of Appeal in *VTB Capital* described as the “geographical approach”. The focus is not on the facts in dispute before the Court at the time when the issue of what is the applicable law has to be determined, which may be (as in the present case) many years after the tort was committed. Were it otherwise, the applicable law might well vary, depending upon what stage the pleadings have reached or what admissions have been made during the course of the proceedings, an example of a “floating” applicable law which the Courts will not recognise. Thus, in the present case, the Decision of the Commission is itself years after the tort was first committed. The fact that, because the Decision found that there was a restriction on competition, there is no issue about restriction of competition in the follow-on proceedings commenced many years after the tort was committed, cannot mean that somehow the significance of the restriction of competition, in terms of the intrinsic

nature of the tort, is to be disregarded or downgraded. Under section 11 the focus is on the tort committed, not on the claim before the Court.

147. However, I consider that this is one of those cases (albeit rare) where the general rule under section 11, which would lead to the applicable law being that of the other EEA countries where the restriction of competition occurred, should be displaced under section 12. It is clear from the references to “determining the issues arising in the case” in section 12(1) and the parties in section 12(2) that, in contrast to section 11, this section is focusing not just on the constituent elements of the tort, but on wider factors including the litigation as it is being conducted. Under this section the Court can and should take account of the fact that restriction of competition has been definitively decided by the Commission and that this is a follow-on claim in collective proceedings where the loss suffered is an aggregate loss of the class. That the exercise under section 12 is a broader one of looking at the issues which are in dispute between the parties and before the Court is borne out by the decision of the Court of Appeal in *Baturina v Chistyakov* [2014] EWCA Civ 1134; [2014] 2 CLC 209, to which Ms Demetriou KC referred. Looking at the proceedings as they are presently constituted, which is clearly permitted by the reference to “the issues arising in the case” in section 12, the most significant factor in the case is clearly the aggregate loss claimed, which is connected with England and Wales or Scotland respectively. Ms Tolaney KC’s submission that the factors which can be taken into account under the section do not include pragmatic or case management considerations is simply not justified by the wide wording of section 12 or the specific reference to the issues arising in the case, without any limitation.
148. I agree with Ms Demetriou KC that it is wrong to describe the collective proceedings regime as a “wrapper” for a whole series of individual claims, each of which needs to be considered separately for the purpose of this issue. As the passages from the *Merricks* judgments in the Supreme Court referred to at [90] and [91] above make clear, the collective proceedings regime has effected a radical change in the law under which the claimants are not identified other than in the definition of the class and any damages will be assessed on an aggregate basis.
149. Given that the issue of restriction of competition has been decided by the Commission and this is a follow-on claim by the class for aggregate damages, the issues of causation and quantum of loss are the most significant issues in the proceedings as they are constituted and those issues are clearly most closely connected with the respective UK jurisdiction. It is substantially more appropriate for those issues in the proceedings to be determined by the law of England and Wales or Scotland respectively, rather than by the law of the other EEA countries where the restriction of competition occurred.
150. The consideration of the factors relating to the conduct of the proceedings under section 12, specifically that restriction of competition has already been decided and that the aggregate loss claimed clearly has its closest connection with the relevant UK jurisdiction does not simply involve going through the same exercise as under section 11(2)(c) pursuant to which, on this hypothesis, the most significant element of the tort is the restriction of competition. This addresses the point about not going through the same exercise again under section 12 as has been undertaken under section 11(2)(c) which Tuckey LJ made in *Dornoch* at [48]-[49] referred to at [79] above.

151. I also agree with Ms Demetriou KC that the reasons which the CAT gave for displacing the general rule in [92] of its judgment were entirely correct. Specifically, it was clearly a material consideration to which the CAT was entitled to give weight that the relevant consequence of the restriction on competition (in whichever country that occurred) is alleged to be the payment of higher prices by the millions of consumers in the United Kingdom who constitute the class.
152. In relation to the position at common law, I consider that the CAT was correct in concluding, so far as Clause (1) of Dicey Rule 203, that, because the application of the *Deutsche Bahn* approach of asking in which market(s) the restriction of competition took place did not admit of a single answer but led to a patchwork of different countries, this was a case in which the CAT had to consider whether the exception in Clause (2) applies. In my judgment the CAT correctly identified in [100] and [101] the various relevant factors which led to this being an unusual case in which there were clear and strong grounds for the exception to apply and for the law applicable to the relevant issue, limitation/prescription, to be the law of the place where the loss was suffered, England and Wales or Scotland. The suggestion by Mastercard that the CAT's approach turned an exception into an alternative primary means of identifying the governing law is misconceived. The CAT correctly applied the law as summarised in the passages from Dicey 12<sup>th</sup> edition cited at [98] and [99] of its judgment and there was no error of principle in its approach or conclusion.

#### *Limitation/prescription*

153. In relation to the limitation issue I consider that the CAT was correct to dismiss the arguments advanced by Mr Merricks. Whilst it is true that the limitation provisions in both CA 1998 and the CAT Rules are confused and confusing, the short answer to these arguments, ingenious though they are, is that it is inherently unlikely that Parliament ever intended that claims which had become time barred by 20 June 2003 should somehow be revived and become no longer time barred twelve years later, when the 2015 Rules came into force. A conclusion to that effect would be highly surprising and illogical.
154. In my judgment, this Court should not reach the conclusion that accrued limitation rights were abrogated in that way unless, as the Privy Council held in *Yew Bon Tew*, that conclusion is unavoidable. Essentially for the reasons given by this Court in *DSG-CA*, I consider that it is not. As Sir Geoffrey Vos C said at [60]:

“The legislator's decision in 2015 to apply rule 31(4) to proceedings begun before 1 October 2015, but not to those begun afterwards may have been deliberate, as the Tribunal suggested. But that does not inform the question of whether, in the absence of rule 31(4), accrued limitation rights are to be abrogated. I accept it would be illogical and unsatisfactory to determine that those rights survived in proceedings started before 1 October 2015, but did not in proceedings started after 1 October 2015. Once, however, one accepts, as I think one must, that I have adopted the correct construction of rule 31(4), its disapplication to proceedings started after 1 October 2015 does not compel the conclusion that accrued limitation rights are being overridden. Instead, the extant legislation must be construed in accordance

with section 16(1). Rule 31(4) may be disapplied, but that disapplication cannot, unless the contrary intention appears, "(c) affect any right ... acquired under that enactment ...". A contrary intention does not appear in the 2015 Rules."

155. Although that part of the judgment may have been obiter, it is persuasive and, in my judgment, correct. The omission of rule 31(4) of the 2003 Rules from the saving provision in rule 119 of the 2015 Rules may well have been deliberate, possibly because, as was canvassed with counsel in argument, the drafter of the 2015 Rules considered that it was a historical provision which was no longer necessary, given how long ago any claim to which it would have applied would have become time barred. What is clear though, in my judgment, is that, whatever the reason for the omission, it was not so that those stale time barred claims could be revived. The position under the CA 1998 as it now stands and the 2015 Rules has to be construed in accordance with section 16(1) of IA 1978. A "contrary intention" to affect accrued limitation rights through the repeal of rule 31(4) does not appear in rule 119 of the 2015 Rules, nor is the construction for which Mr Merricks contends unavoidable.
156. Furthermore, I do not accept Ms Demetriou KC's argument that the effect of what is now section 47A(4) CA 1998 is that the Limitation Act is to be disregarded in relation to any claims made in the CAT because it has been completely replaced by the two year regime in rule 31(1) to (3). The CAT was correct to follow *Deutsche Bahn/Pilkington* and conclude that the purpose of the provision is just, as it states, to identify what claims can be brought in the CAT disregarding limitation rules not to exclude limitation defences which might arise once those claims are brought in the CAT. This was explained by Roth J giving the judgment of the CAT in *Deutsche Bahn/Pilkington* at [57]:
- "Determination of the claims to which the section applies for the purpose of limb 1 [i.e. what claims can be brought in the CAT] 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 [the Foreign Limitation Periods Act 1984] for all purposes, and in our view they were right to do so."
157. Mr Merricks' case that the effect of omission of rule 31(4) from rule 119 of the 2015 Rules was to revive those stale time-barred claims is even more unsustainable in relation to Scots law than in relation to English law. Under the Scots law of prescription, the effect of the claims becoming time barred is that they were extinguished. There is simply nothing in the CA 1998 or in the 2015 Rules which even begins to justify a conclusion that those extinguished claims were somehow brought back to life by the omission.
158. For all these reasons, I consider that the limitation/prescription issue is not arguable and I would refuse permission to appeal.

*Exemptibility*

159. Turning to the exemptibility issue on which Mastercard was granted permission to appeal by Green LJ, the resolution of this issue depends upon the correct construction of the Decision. The starting point is how Mastercard ran its case before the Commission. Unlike Visa, it did not seek to justify a particular level of EEA MIF or alternative lower EEA MIF by reference to empirical evidence. Rather it sought to justify the existence of the MIFs on the basis of economic theory arguing that the level at which the MIFs were set was a matter for its complete discretion. That is clear from the various recitals referred to in [122] to [126] of the CAT judgment, some of which I have cited above in summarising the submissions. The Commission rejected that argument and concluded that empirical evidence needed to be provided to justify the level of MIF which Mastercard had failed to do. One other recital, (732), makes this absolutely clear:

“Any claim that a MIF creates efficiencies within the meaning of Article 81(3) of the Treaty must therefore be founded on a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts. MasterCard has not provided such analysis and empirical evidence, only a general assertion that the balancing of the demand of cardholders and merchants through a MIF leads to a better performance of the MasterCard system, is inherent and indispensable to the operation of a fourparty payment card system, contributes to overall economic welfare and therefore “undoubtedly” fulfils the first condition of Article 81(3) of the Treaty.”

160. In my judgment, it is clear from the Decision as a whole that, because of the way in which Mastercard chose to run its case, the Commission was not deciding that Mastercard had failed to justify the particular level of its EEA MIFs (let alone that some other lower level of MIF would have been justified), but rather that Mastercard had failed to justify the existence of EEA MIFs at all. That is why Articles 3 to 5 of the operative part of the Decision do not say that Mastercard’s MIFs are too high and should be set at a lower level but that Mastercard has to dismantle its entire system of rules and decisions in so far as it concerns EEA MIFs, its entire EEA MIF architecture, within six months. This is also clear from recitals such as (759) quoted at [132] above requiring Mastercard: “to cease and desist from determining in effect a minimum price merchants must pay for accepting payment cards by way of setting [EEA MIFs]”. This requirement is made absolutely plain in recitals (767) and (769):

“767. The requirement on Mastercard to cease and desist from setting Intra-EEA fallback interchange fees is sufficiently determined, necessary and proportionate to remove the competitive harm.

769. The obligation on MasterCard to publish the information referred to in Annex 5 [information which inter alia reflected Articles 1 and 3 of the operative part of the Decision] on the internet is also necessary and proportionate, because that information will enhance the information available to merchants



until the publication of a non-confidential version of the decision. This will in turn speed up the pass-on of the acquirers' resulting from the absence of MasterCard's Intra-EEA fallback interchange fees to merchants and their customers.”

161. I also agree with the submission on behalf of Mr Merricks that nothing in the CAT judgment in *Westover* assists Mastercard or supports the suggestion in the written submission by Mr Cook KC quoted at [120] that the requirement in Articles 3 to 5 of the operative part of the Decision is somehow limited only to dismantling of the Mastercard rules and decisions in so far as they relate to the actual EEA MIFs in place. Those Articles are clearly general in scope and relate to all EEA MIFs and nothing in *Westover* supports a contrary conclusion.
162. Accordingly, I consider that the CAT was correct in its conclusion at [136] of its judgment (quoted at [52] above) that the Decision did not simply hold that the particular level of Mastercard's EEA MIFs did not qualify for exemption, but that for the period covered by the Decision the relevant Mastercard rules and MIFs were not exempt.
163. That conclusion and construction of the Decision is not altered or affected by recital (13). As Ms Demetriou KC correctly submitted that is a prospective provision. As the CAT found at [138] of its judgment, it was simply saying that in future Mastercard could introduce other MIFs and seek to argue that they should be exempt under Article 101(3) based on solid empirical evidence, as indeed happened in 2009. Nothing in recital (13) qualifies what the Commission had found as regards the period from 1992 to 2007, that Mastercard had failed to justify its EEA MIFs at all, or suggests that some other lower level of MIF had been or could be justified. The fact that in 2009 the Commission did accept a lower level of EEA MIFs says nothing about the scope and effect of the Decision. Accordingly, in my judgment, the correct counterfactual by reference to which damages are to be assessed is that of no or zero EEA MIFs.
164. Given the conclusion which I have reached as to the correct construction of the Decision, Mr Merricks' alternative case that Mastercard's argument is an abuse of process does not need to be decided. As Ms Demetriou KC accepted, Mr Merricks' case would involve a novel extension of the doctrine of abuse outside the two main recognised categories. In the circumstances, although I can see force in the CAT's conclusion in [167] (quoted at [62] above) that to permit Mastercard to run its argument would bring the administration of justice into disrepute, it is best not to say more and to leave the point to be decided in a case where it is critical to the result.

## Conclusion

165. For the reasons set out in the Discussion section of this judgment:
  - (1) Whilst permission to appeal is granted to Mastercard on the applicable law issue, the appeal must be dismissed.
  - (2) Mr Merricks is refused permission to appeal on the limitation issue.
  - (3) Mastercard's appeal on the exemptibility issue must be dismissed.

## Lord Justice Snowden

166. I agree.

**Lord Justice Green**

167. I also agree.