Neutral Citation Number: [2014] EWHC 3561 (Comm)

Claim Nos: 2013-982 to 991, 2013-996 and 2013-1334

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 October 2014

Before: The Honourable Mr Justice Simon

Between:

(1) Arcadia Group Brands Limited and others *2013-985* **(2) Asda Stores Limited** *2013-984* **(3) B&Q Plc** *2013-989* **(4) Comet Group Limited (in liquidation)** *2013-990* **(5) Debenhams Retail Plc and others** *2013-983* **(6) House of Fraser (Stores) Limit ed***2013-991* **(7) Iceland Foods Limited** *2013-996* **(8) New Look Retailers Limited** *2013-982* **(9) Next Retail Limited** *2013-988* **(10) Record 2 Shop Limited (in liquidation)** *2013-987* **(11) WM Morrison Supermarkets Plc** *2013-986* **(12) Argos Limited and others***2013-1334*	Claimants
- and -	
(1)Visa Inc **(2) Visa International Service Association** **(3) Visa Europe Limted** **(4) Visa Europe Services Inc** **(5) Visa UK Limited**	Defendants

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Stephen Morris QC, **Daniel Jowell QC** and **Anneli Howard** (instructed by **Linklaters LLP**) for the 3rd to 5th Defendants (**Applicants**)
Brian Kennelly (instructed by **Milbank**, **Tweed**, **Hadley & McCloy LLP**) for the 1st and 2nd Defendants (**Applicants**)
Fergus Randolph QC, **Christopher Brown** and **Max Schaefer** (instructed by **Stewarts Law LLP**) for the Claimants (**Respondents**)

Hearing dates: 28-30 July 2014

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE SIMON

Mr Justice Simon:

Introduction

1. In these actions the Claimants seek damages for breaches of European and domestic competition law in relation to the Defendants' imposition of multilateral interchange fees ('MIFs') in the course of operating the Visa payment-card system.

2. Payments made with Visa cards in Europe generally involve four parties: (1) a merchant; (2) the merchant's bank (known as the 'Acquirer'); (3) a cardholder; and (4) the cardholder's bank (the 'Issuer'). Both Acquirer and Issuer are licensed by Visa and are contractually required to comply with its rules and procedures.

3. When the cardholder makes a payment with a Visa credit or debit card, the Acquirer pays the merchant the payment amount less a Merchant Service Charge (the 'MSC'), and passes details of the transaction to the Issuer. The Issuer then collects payment from the cardholder, and pays the Acquirer the payment amount less a transaction fee, known as the 'interchange fee', which the Issuer retains. The MSC paid by the merchant to the Acquirer is made up of (1) a fee for the Acquirer's services, (2) a card network scheme fee payable to Visa, and (3) the interchange fee.

4. For the purposes of this application it is accepted that the general level of interchange fees is set by Visa, and comprises the VISA MIFs.

5. The Claimants are or were all well-known high street retailers. Their case is that the MIFs, by setting (in effect) a minimum price that merchants had to pay to their acquiring banks to process payments by Visa card, restricted competition and, but for the illegality, either no MIFs or lower levels of MIFs would have applied. It is said that the Defendants' conduct inflated the MSC which the Claimants paid to their banks when accepting payments by Visa card, and their claim is primarily for damages based on this overcharge.

6. The proceedings were begun in relation to Claim numbers 2013 Folio Nos.982-991 and 996 on 23 July 2013, and in relation to Claim number 2012 Folio No.1334 on 4 October 2013. The claims are founded on breaches of various provisions of European and domestic competition law for a period going back to 1977.

7. By applications dated 17 March 2014 the 3rd to 5th Defendants, and by a further application dated 21 March 2014 the 1st and 2nd Defendants, applied to strike out those parts of the Claimants' claims which allege infringements of competition law in the period prior to 23 July 2007 (and, in the case of Claim No. 2013 Folio 1334, in which the 12th Claimant brings the claim, 4 October 2007) under CPR Part 3.4(1)-(2). These dates ('the Limitation Dates') are six years prior to the issue of the relevant proceedings. Alternatively, the Defendants apply for summary judgment under CPR Part 24 in relation to that issue.

8. The Defendants contend that s.2 of the Limitation Act 1980 (the '1980 Act') provides a defence to tort claims which are brought 'after the expiration of six years from the date on which the cause of action accrued'. Section 9 of the 1980 Act applies to claims for breach of statutory duty in materially similar terms. It therefore follows that the primary limitation period for the present claims (whether viewed as claims in tort

or for breach of statutory duty) is six years, and that in so far as the Particulars of Claim raise matters of complaint which occurred before the Limitation Dates they are time barred.

9. In answer the Claimants rely on s.32 of the 1980 Act which provides (so far as relevant) as follows:

> (1) where in the case of any action for which a period of limitation is prescribed by this Act -
>
> ...
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;
>
> ...
>
> the period of limitation shall not begin to run until the plaintiff has discovered the … concealment … or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

10. The present Applications are not directly concerned with whether facts were concealed but with whether there were any facts 'relevant to [the Claimants'] right of action' that they did not know, or could not with reasonable diligence have discovered, before the Limitation Dates. In many cases the concealment of facts will mean postponement of the discovery of those facts. The Defendants say that this is not so in the present case. It is their case that all facts relevant to the right of action were in the public domain before the Limitation Dates, there is no realistic prospect of the Claimants succeeding in their argument under s.32(1)(b), and the claim should be confined to causes of action which arose after the Limitation Dates.

The pleadings

11. The Claimants address the limitation issue in §76 of the Amended Particulars of Claim which the parties used as illustrative, Record Shop 2 Limited (in liquidation). The 'initial claim period' is described as six years immediately preceding the date of the issue of the claim. Paragraph 77 asserts that the infringements of competition law concerning the UK MIF are continuous in nature, and that the Claimants are entitled to recover in respect of the continuing breach of statutory duty. The issue under s.32 of the Limitation Act 1980 is raised in §78, where it is contended that the claim extends back to 31 January 1977. In §§79-80 reliance is placed on s.32(1)(b) and what

is said to be the deliberate concealment of facts which could not have been discovered with reasonable diligence.

12. Paragraph 81 reads as follows:

> Key facts relevant to the breaches of statutory duty pleaded above were deliberately concealed from inter alia the Claimants. The Claimants will rely on the following facts and matters in this respect:
>
> a. The manner and mechanisms by which the EEA MIF, UK MIF and Irish MIFs were and are set are secret and have never been disclosed to the Claimants.
>
> b. At all material times, the precise nature and scope of the MIF arrangements were concealed from the Claimants.
>
> c. At all material times, the responsibility of the various Defendants for the breaches of statutory duty pleaded above were concealed from the Claimants.
>
> d. Until around 2009, the actual MIF levels which applied were concealed from the Claimants.

It will be necessary to consider some of the words and phrases used in §96 later in this judgment.

13. The 3rd to 5th Defendants deny that any of these four matters were necessary to plead a completed cause of action (see §85 of the Amended Defence) and that, even if they were, the Claimants either had, or could with reasonable diligence have acquired, such knowledge in the light of the history summarised at §84 of the Amended Defence.

14. In §37 of the Amended Reply the Claimants take issue with this plea and the availability of the relevant facts.

> It is denied that the facts and matters there listed made sufficient facts publicly available (or available to the Claimants given reasonable diligence) to establish a prima facie case against each Defendant. Without prejudice to that general denial, and in respect of both paragraph 84 and paragraph 88, the Claimants note that neither the OFT nor the Commission have permitted access to their respective files.

Similar points are made by the Claimants in relation to the EEA and Irish MIFs.

The applicable law

15. It is convenient at this stage to summarise the law in five areas: (1) the statutory basis for the claims, (2) the Court's approach to applications under CPR Part 3.4 and CPR Part 24, (3) s.32(1) of the 1980 Act, (4) pleading in competition cases and (5) the effect of the Directive of the European Parliament and the Council on Certain Rules

Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, approved by the European Parliament on 17 April 2014, and approved in a form incorporating technical corrections by lawyer-linguists on 21 October 2014 ('the Directive').

(1) The basis for the claim for breach of statutory duty

16. The claim is based on breaches of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') or the equivalent previous provisions in the European Union Treaty and the European Community Treaty, Article 53 of the European Economic Area ('EEA') Agreement and s.2 of the Competition Act 1998 (the 'CA 1998').

17. Article 101 is in the following terms

> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market …
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> - any agreement or category of agreements between undertakings,
>
> - any decision or category of decisions by associations of undertakings,
>
> - any concerted practice or category of concerted practices,
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

18. For present purposes it is common ground that, upon proof of loss, a breach of Article 101 may give rise to a claim for breach of statutory duty.

(2) The Court's approach to applications under CPR Parts 3.4 and 24

19. The relevant principles on applications under CPR Rule 3.4(2) to strike out statements of case, and under Rule 24(2)(a)(i) for summary judgment are not controversial. On an application to strike out the question is whether the whole or the material part of a Statement of Case discloses reasonable grounds for bringing the claim. In relation to a summary judgment, the principles have been summarised in a passage of the judgment of Lewison J in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], which has often been cited and approved, see for example Etherton LJ in *A C Ward & Son v. Catlin (Five) Limited* [2009] EWCA Civ [24]. For present purposes it is sufficient to identify 8 points which are of potential relevance to the present applications.

(1) The Court must consider whether the Claimants have a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v. Hillman* [2001] 1 All ER 91, 92.

(2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472 at [8].

(3) The court must avoid conducting a 'mini-trial', without the benefit of disclosure and oral evidence: *Swain v. Hillman* (above) at 95.

(4) The Court should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, Mummery LJ at [17].

(5) In reaching its conclusion, the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v. Hammond (No. 5)* [2001] EWCA Civ 550 at [19].

(6) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the *Easyair* case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].

(7) The overall burden of proof remains on the Defendants,

> ... to establish, if it can, the negative proposition that the [Claimants have] no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial,

see *Apvodedo NV v. Collins* [2008] EWHC 775 (Ch), Henderson J at [32].

(8) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see: *Miles v. Bull* [1969] 1 QB 258 at 266A. In that case Megarry J was satisfied that there were grounds for scrutinising what appeared on its face to be a legitimate transaction; see also *Global Marine Drillships Limited v. Landmark Solicitors LLP* [2011] EWHC 2685 (Ch), Henderson J at [55]-[56].

20. Mr Randolph QC made two submissions in relation to the present case. First, he argued that the Court should also have in mind the overriding objective of dealing with the case justly and at proportionate cost, adding that the effect of allowing the Defendants' applications would be significantly to reduce the Claimants' claim for damages by an amount of the order of £500 million. There are two answers to this point. First, the amount at stake cannot of itself be a material consideration if all other factors point to striking out or giving judgment under Part 24. Secondly, disposing of a case (or part of a case) summarily is not inconsistent with the overriding objective. As Lord Woolf made clear in *Swain v. Hillman* at p.94:

> It is important to note that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position.

21. Mr Randolph's second submission was that the Court should be particularly cautious in exercising its summary powers in a case where the law is in a state of transition. He pointed out that this is the first case in which the Court has had to consider the effect of s.32 of the 1980 Act in the context of a competition claim. He referred in this context to a passage in the judgment of Chadwick LJ in *Independents' Advantage Insurance Co Ltd v. Cook (Personal Representatives)* [2003] EWCA Civ 1103 at [15]:

> The difficulty for the courts, in a field where the law is in a state of transition, lies in identifying those cases in which the exercise of the powers of summary disposal is appropriate. In cases which - on the basis of the facts presented at the time for the exercise of those powers - are perceived to be at or near to the margin of existing decisions, the court is invited to take a view whether the law will be developed in one directions or the other ... would it not be more satisfactory to allow the law to develop on the basis of a fuller appreciation of the facts than can be obtained from a bare consideration of the pleaded statement of case.

22. This is a convenient restatement of warnings which are often issued about the dangers of deciding preliminary issues on assumed facts, for example, as to the existence and extent of duties of care. The present case raises rather different issues.

(3) The proper interpretation of s.32(1) of the 1980 Act

23. There are a number of cases which throw light on the proper interpretation of s.32(1) of the 1980 Act: *Johnson v. Chief Constable of Surrey* (CA, unreported, 23 November 1992); *C v. Mirror Group Newspapers Ltd* [1997] 1 WLR 131 (CA); *Gold v. Mincoff, Science & Gold* [2001] Lloyd's Rep PN 423 (Neuberger J); *AIC Ltd v. ITS Testing Services (UK) Ltd, The 'Kriti Palm'* [2006] EWCA Civ 1601 and *Williams v. Lishman, Sidwell, Campbell & Price Ltd* [2010] EWCA Civ 418.

24. These cases establish a number of principles which are relevant to the present applications.

(1) Section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly, see Rose LJ in *Johnson*. In this context Neill LJ referred to 'the public interest in finality and the importance of certainty in the law of limitation,' in *C v. MGN* at p.139A.

(2) There is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case. Section 32(1)(b) is concerned with the former, see Rose LJ in *Johnson*.

(3) The section is to be interpreted as referring to 'any fact which the [claimant] has to prove to establish a prima facie case', see Neill LJ in *Johnson* and in *C v. MGN* at p.138H, and Rix LJ in *The 'Kriti Palm'* at [323].

(4) The claimant must satisfy 'a statement of claim test': in other words, the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie case, see Rose and Russell LJJ in *Johnson*, and Neill LJ in *C v. MGN* at 137B-C. As Buxton LJ expressed it in *'Kriti Palm'* at [453]:

> … what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it.

(5) Thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger, see Russell LJ in *Johnson*:

> Accordingly, whilst I acknowledge that new facts might make the plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the 'right of action' itself. They do not affect 'the right of action,' which was already complete, and consequently in my judgment are not relevant to it.

Nor does the sub-section apply to newly discovered evidence, even where it may significantly add support to the claimant's case, see Rix LJ in the *'Kriti Palm'* at [325], nor to facts relevant to the claimant's ability to defeat a possible defence, see Neill LJ in *C v. MGN* at 139A.

(6) As expressed by Rix LJ in *The* ‘*Kriti Palm*’ at [307], the purpose of s.32(1)(b) is intended to cover the case,

> where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action (the so-called ‘statement of claim’ test). It is therefore important to consider the facts relating to an allegation of deliberate concealment vis a vis a claimant’s pleaded case.

(7) What a claimant has to know before time starts running against him under s.32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation, see for example Neuberger J in *Gold v Mincoff* at [75] in the different context of s.14A of the 1980 Act, but referring to *Johnson* and *C v. MGN*.

25. Some of these points overlap or reinforce each other, but the general approach is clear.

26. At the heart of the Claimants’ case is the submission that s.32(1)(b) of the 1980 Act extends the limitation period where a concealed fact has not been discovered prior to the commencement of the proceedings and is still concealed. Mr Randolph argued that s. 32 should not be interpreted as confining the time of the discovery of relevant facts to the time of the issue of proceedings. Since not all of the relevant facts are known even now, the limitation clock had not started and no limitation bar has accrued; the fact that the Claimants have been able to plead their case did not mean that they had discovered all the relevant facts for the purpose of s.32. The surprising consequence of this argument, as Mr Randolph readily accepted, is that in relation to pleaded claims which go back to 1977 time has still not begun for the purposes of limitation.

27. I will deal later with the four concealed facts which are pleaded; but it is convenient to deal at this stage with the broad argument that facts that are still unknown at the time the Court is considering the issue of limitation may be ‘relevant’ within the meaning of s.32(1)(b)..

28. Were it not for the clear and binding authority to which I have referred, the Claimants’ argument has its attractions. The words ‘any fact relevant to the [claimant’s] right of action’ seem broad enough to encompass facts which are material to the claim and which are concealed. However it is clear that the sub-section is to be construed otherwise. If a claimant is in possession of facts which are sufficient to enable a cause of action to be pleaded and which cannot be struck out for want of some essential averment, then the limitation period is not suspended. Put another way, if there are ‘facts relevant to the cause of action’ as interpreted in *Johnson*, which cannot be pleaded, then the cause of action is necessarily incomplete, and can be struck out on conventional grounds. Facts which are still unknown and are not essential to complete the cause of action cannot amount to relevant facts for the purpose of s.32(1)(b). In the present case the Claimants have pleaded a detailed claim (in the Record Shop 2 Ltd (in liquidation) Particulars of Claim running to 86 paragraphs) which (it is now clear, if not common ground) cannot be struck out.

29. Mr Randolph's answer was to submit, first that the mere fact that a party may have pleaded a sufficient case does not mean that it has 'discovered' everything relevant to it. This is plainly true: disclosure may be crucial. However, the trigger for the running of time for limitation purposes is not the discovery of every potentially relevant fact in the broadest sense.

30. Secondly, he argued that the mere fact that something is not pleaded does not mean that it is not relevant. He relied on a passage from *The Kriti Palm* at [457-8] where Buxton LJ, in the context of information coming to the attention of a claimant at a late stage, emphasised the importance of analysing what may be different causes of action. However, this way of looking at the matter does not assist the Claimants since what they would have to rely on, in addition to the causes of action set out in the Particulars of Claim, is some spectral unpleaded new claim.

(4) Pleading in Competition cases.

31. It is common ground that, in order to establish a claim for damages based on Article 101(1) TFEU, s.2 of the CA 1998 and/or s.4 of the Irish Competition Act 2002, four elements must be shown: (1) an agreement or concerted practice between undertakings, (2) having as its object or effect the prevention or distortion of competition which is (a) appreciable and (b) not objectively necessary, (3) which affects trade between Member States (Article 101), or within the United Kingdom (s.2 of the Competition Act 1998) or within Ireland (s.4 of the Irish Competition Act 2002), and (4) which has caused some loss and damage to the claimant.

32. One of the issues which arises when considering the 'statement of claim test' is the extent to which 'stand-alone' competition claims fall into a distinct and different category of claim to which the *Johnson* test should not be applied. Mr Randolph submitted that there were particularly exacting standards in such claims and referred to a passage in the judgment of Sir Andrew Morrit C in *P&S Amusements*, [2006] EWHC 1510 (Ch) at [15]:

> The general requirement for the party to plead the facts on which he relies applies to claims or defences under [sections 2 and 18 of the Competition Act 1998] as to any others. Thus, as with claims or defences under Articles 81 or 82 EC Treaty, so with claims or defences under ss. 2 or 18 of the Competition Act 1998 the party relying on the same must plead the primary facts on which he relies for the relevant conclusion, see per Neuberger J in *Esso Petroleum v Gardner* (8th July 1998 unreported) approved by the Court of Appeal in *Parks v Esso Petroleum Co Ltd* [1999] EWCA Civ 1942. For example it is insufficient merely to aver that a given concerted practice has as its effect the distortion of competition within the United Kingdom. This is a mere recitation of the statutory condition or conclusion imposed or required by s.2(1)(b) without alleging any primary facts from which it might be inferred or found. In any event such claims or defences require careful scrutiny so as to prevent cases lacking in sufficient merit going to long and expensive trials, see *Intel Corporation v Via Technologies*

> [2002] AER(D) 346 para 32 and *Adidas v The Lawn Tennis Association* [2006] EWHC 1318 (Ch) para 24.

33. I accept that the Court insists on the proper particularisation of competition claims, not least because the allegations are serious, require details of the specific conduct relied on and how this is alleged to have infringed the law, see for example Roth J in *Sel-Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch) [17]. On the other hand, it is clear from the decision of the Court of Appeal in *KME Yorkshire Ltd and others v. Toshiba Carrier Ltd (UK) and others* [2012] EWCA Civ 1190, Etherton LJ at [32] that on a strike out application the Court recognises that,

> ... it is in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anti-competitive conduct of members of the same group of companies.

34. This ‘generous approach’ towards claimants (as it is described in the cases) when applications are made to strike out competition claims has two consequences. First, the Court will be less inclined to strike out a claim or enter summary judgment on the basis of the insufficiency of the pleading than it might in other types of case. Secondly (and for similar reasons), a claimant cannot wait until litigation risks are reduced to a level which it considers to be commercially acceptable before bringing proceedings or, if it does so, it must accept the confinement of the claim to losses within the primary limitation period.

35. Mr Randolph drew attention to the Defences in which (taking the Defence of the 1st and 2nd Defendants as an example) the Defendants purported to,

> Reserve their right to apply for summary judgment in respect of some or all of the Particulars of Claim pursuant to CPR Parts 3.4 or 24 or both.

36. He relied on the threat to strike out ‘all of the Particulars of Claim’ as showing that the Defendants were reserving the right to contend that the cause of action was incomplete. The Defendants have now made it clear in their evidence and submissions that this is not their intention. Mr Randolph is entitled to tease the Defendants with their overreaching forensic threat, but ultimately it is quite clear (if not common ground) that the Particulars of Claim cannot be struck out other than in relation to time barred claims.

37. He also submitted that a claim for breach of Article 101(1) involved an analysis of a number of economic and factual matters, including (in the present context) the restriction of competition, which is part legal and part economic. The complex nature of this analysis (including reliance on primary facts which are relevant to the economic assessment) distinguishes a competition claim from the more straightforward claim exemplified by *Johnson*. Claims under Article 101(1) fall within a developing area of the law, and this was another reason for not acceding to the Defendants’ applications, since there have been repeated and potent warnings about deciding cases in developing areas of the law on a summary basis, see for

example, *Three Rivers DC v. Bank of England (No.3)* [2003] 2 AC 1, Lord Steyn at 237.

38. While I accept that caution should be exercised where the Court is considering issues at the margins of the developed law, I reject the submission that this is such a case. The law is clear and, in my judgment, competition cases (for all their potential complexity) do not fall within an exceptional category calling for a different approach to the application of s.32(1)(b).

39. Two further points may be noted. First, Article 101(3) TFEU, s.9 of the CA 1998 Act and s.4 of the Irish Competition Act 2002 provide for an exemption from the primary prohibition, with the burden of proof lying on a person seeking to rely on the exemption. It is not necessary (nor desirable as a matter of pleading practice) for a claimant to plead to such matters which will normally be dealt with, if raised by a defendant, in a Reply. Secondly, the Claimants have also advanced a claim under s.35(1)(b) of the Restrictive Trades Practices Act 1976 against the 2nd to 5th Defendants. It is unnecessary to deal separately with this claim since the Claimants do not rely on any facts in relation to this claim beyond those relied on in relation to the other competition law claims.

(5) The Directive

40. The current version of Article 10 of the Directive provides:

> 1. Member States shall, in accordance with this article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which the period is interrupted or suspended.
>
> 2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows. or can reasonably be expected to know:
>
> > (a) of the behaviour and the fact that it constitutes an infringement of competition law;
> >
> > (b) of the fact that the infringement of competition law caused harm to him; and
> >
> > (c) the identity of the infringer.
>
> 3. Member States shall ensure that the limitation period for bringing actions for damages are at least 5 years.
>
> 4. Member States shall ensure that the limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the

> infringement decision has become final or after the proceedings are otherwise terminated.

41. Mr Randolph pointed out that the (recently corrected) Directive will be adopted following formal confirmation by the Council (which is expected shortly), and that it will then come into force as a matter of English law within 2 years, so as effectively to provide (by Article 10.2) that time will not run against a claimant in a competition claim until the infringement has ceased. In these circumstances he submitted that it would be highly unsatisfactory to strike out the claim in the present case in so far as it relates to the period before the Limitation Dates since, if it were struck out now, it could be resurrected later when the Directive came into force.

42. The answer to this point is contained in Article 22 which, under the heading ‘temporal application’, provides:

> 1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.
>
> 2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to [the date of entry into force of the Directive].

43. I agree with Mr Kennelly that the terms of the Directive show that a balance has been struck between the interests of claimants and defendants, and that the effect of Article 22 is to preclude reliance on Article 10 in relation to actions which have been begun before the coming into force of the Directive. It follows that the terms of Article 10 of the Directive would provide no proper basis for allowing the case to go to trial on the claims which came into existence prior to the Limitation Dates.

The Particulars of Claim

44. So far as the first element of the present claim is concerned (the existence of an agreement or concerted practice), the Particulars of Claim allege that each of the Visa MIFs constituted and remain decisions of an association of undertakings and/or agreements and/or concerted practices. In each case the pleaded basis for the allegation is the existence and nature of the Defendants, the existence of the MIF itself and its basic nature (see for example the Record Shop 2 Ltd (in liquidation) Particulars of Claim §§49 to 51).

45. As to the second element (whether the agreements or concerted practices constituted a restriction of competition), the Particulars of Claim allege that the mere existence of a MIF, or at least a MIF greater than zero, is itself a violation of Article 101(1) TFEU. Thus the Claimants allege that (see Particulars of Claim §48):

> By setting and imposing a minimum price the Claimants had and remains bound to pay to their Acquiring Bank for accepting Visa payment cards ... by means of the EEA MIF, UK MIF and

Irish MIF the Defendants acted contrary to Article 81(1) EC Treaty (now Article 101(1) TFEU), Article 53 EEA Agreement, s.2 Competition Act 1998 as amended and the relevant Irish competition law.

46. The Particulars of Claim further allege that the relevant Visa MIFs:

(1) have as their 'object' the restriction of competition because, in particular, they 'fix' a substantial part of the price charged by Acquirers to merchants (see Particulars of Claim §58), and

(2) have as their 'effect' the restriction of competition because, in particular, they create a 'floor' or 'common cost' for all Acquirers since, in the absence of MIFs, the prices set by Acquiring Banks would have been lower, to the benefit of the Claimants (see Record Shop 2 Ltd (in liquidation) Particulars of Claim, §59).

47. So far as the third element of the claim is concerned (the effect on trade between Member States (or within the UK or Ireland)), the Particulars of Claim allege that the Visa EEA MIFs covered cross-border payments and applied to domestic transactions in a number of EEA Member states, and the Visa UK and Irish MIFs applied to all payment card transactions within their respective countries (see Particulars of Claim §64).

48. As to the fourth element of the claim (the causation of loss and damage) the Particulars of Claim allege that the overall effect of the breaches was unlawfully to inflate the level of MSC paid by the Claimants over and above the amount which would otherwise have prevailed (see Particulars of Claim §67). This 'overcharge' is said to be recoverable as damages.

Chronology

49. It is convenient at this point to summarise chronologically some of the events and material relied on to show the extent (or lack) of contemporaneous knowledge about facts relevant to the Claimants' right of action. The Defendants rely on these matters to show what was known or discoverable in relation to each of the four elements of the claim.

The EEA MIFs

50. Although the Commission issued a comfort letter as long ago as 29 April 1985, confirming that arrangements notified by (what later became) the 2nd Defendant did not appear to contain any restrictions of competition that would justify the application of (what is now) Article 101(1) TFEU, the parties in the present litigation were in substantial agreement that the relevant chronology begins in 1992. On 30 March 1992 the British Retail Consortium ('BRC') submitted a complaint to the Commission against (what became) MasterCard and Visa, alleging that the cross-border MIF arrangements amounted to a restriction of competition (the 'BRC Complaint').

51. On 23 May 1997 a complaint was filed with the Commission by EuroCommerce (a European retailers' association of which the British Retail Consortium was a member). The complaint covered a number of aspects of the Visa Europe System,

including the EEA MIFs. Again, the complaint alleged that the cross-border MIF arrangements for Visa-branded payment cards restricted competition.

52. On 16 October 2000 the Commission issued a press release ('**the 2000 Press Release**') about its preliminary Statement of Objections to Visa International in relation to its interchange fee, on the grounds that it was a restrictive collective price agreement:

> The Commission ... doubts whether another controversial Visa provision, namely the interchange fee, is acceptable under EC competition law. The interchange fee is paid by the bank of the merchant to the bank of the cardholder for each card transaction. The amount of this fee is set by Visa International and amounts to an agreement between the member banks of Visa. In practice the banks which have to pay the interchange fee pass it on to their clients, the merchants. On average the interchange fee is about 80% of the overall amount paid by the merchant to his bank each time he accepts payment by a Visa card.
>
> Eurocommerce, a trade association representing European retailers, formally complained to the Commission about the Visa rules on interchange fees as well as those of other payment card systems.
>
> In the Statement of Objections which has now been sent to Visa International, the Commission states that the interchange fee for international operations amounts to a collective price agreement, which is restrictive of competition. In the Commission's view, Visa International has not so far put forward any convincing reasons showing that the interchange fee fulfils the cumulative conditions for an exemption under the EC antitrust rules, such as that it would be indispensable for the functioning of the Visa payment card scheme. As has also been pointed out by Eurocommerce, other payment card schemes, such as ec-Karte in Germany, may function without interchange fees.

53. These remarks in relation to the Visa EEA MIFs show at least that European retailers were taking an interest in the issue.

54. In a decision dated 9 August 2001 (published in the Official Journal on 10 November 2001) ('**the 2001 Negative Clearance Decision**') the Commission issued its formal decision in which it found that there were no grounds for action under Article 85(1) EC (now Article 101(1) TFEU) and/or Article 53 EEA Agreement. Although it was issued in relation to other rules of the Visa system (in particular the HACR and NDR) the Commission referred to Visa's EEA MIFs.

55. The existence of the Visa EEA MIFs was explained in general terms:

> The Visa multilateral interchange fee is a fee per payment transaction that has to be paid according to the Visa rules between the two banks involved in a Visa card payment. Currently it is paid by the merchant's bank to the cardholder's bank.

56. The Commission also set out and justified its conclusions that the Visa system (although not the EEA MIFs in particular) amounted to an agreement or decision of an association of undertakings:

> Visa and each of its members, whether credit institutions or entities owned by credit institutions, engage in an economic activity and are hence undertakings within the meaning of Article 81(1) of the Treaty and Article 53 of the EEA Agreement. In addition, both Visa (a non-stock corporation which is controlled by its member banks in particular by their representation in the international and regional boards of directors) and its national group members are associations of undertakings within the meaning of Article 81(1) of the Treaty and Article 53 of the EEA Agreement. Hence, the rules governing the Visa payment card systems can be regarded either as decisions of an association of undertakings or as agreements between undertakings. The decisions/agreements in question are the by-laws and the (international and EU) operating rules, the association/undertaking is Visa; and the constituent members of the association/undertakings are the licensees under the Visa payment systems.

57. The Defendants contend that both the 2000 Press Release and the 2001 Negative Clearance Decision contained factual statements which were relevant to the Claimants' right of action and which predated the Limitation Dates by a considerable period.

58. On 11 August 2001 the Commission issued a further Article 19(3) Notice ('**the 11 August 2001 Notice**') inviting interested parties to submit representations on the Commission's stated intention to adopt a favourable position towards modifications which had been proposed by Visa to its EEA MIF arrangements.

59. In a decision dated 24 July 2002 (published on 22 November 2002) ('**the 2002 Exemption Decision**') the Commission granted exemption pursuant to Article 85(3) EC (now Article 101(3) TFEU) and Article 53(3) of the EEA Agreement) for what was a modified version of the Visa EEA MIF arrangements. The 2002 Exemption Decision (which was in force from 4 September 2002 until 31 December 2007) addressed the Visa EEA MIFs as they applied to cross-border transactions within Europe, as well as certain default MIF arrangements within Member States.

60. It specifically referred to the 'Visa EU intra-regional interchange reimbursement fee scheme [which was] applicable to cross border Visa consumer card transactions at merchant outlets in the EEA', and contained detailed information about the Visa EEA MIFs (at recitals 10-12). The Commission repeated its view that:

the Visa Rules can be regarded either as decisions of an association of undertakings or as agreements between undertakings within the meaning of Article 81 of the EC Treaty/Article 53 of the EEA Agreement.

61. At recitals 64-69, it concluded that the Visa EEA MIFs had the effect of restricting competition within the meaning of Article 81(1) EC and Article 53 EEA Agreement in particular because:

> (64) For the reasons given below, the Commission considers that the MIF in the Visa system restricts competition within the meaning of Article 81(1) EC/Article 53 EEA by restricting the freedom of banks individually to decide their own pricing policies. Moreover the MIF has a restrictive effect on competition among Visa issuers and among Visa acquirers.
>
> (65) As concerns the arguments put forward by Visa, the Commission does not accept that the MIF is a transfer of costs between undertakings which are cooperating in order to provide a joint service in a network characterised by externalities and joint demand. The Commission does accept that a four-party payment scheme is characterised by externalities, and that there is interdependent demand from merchants and cardholders, but not that there is joint supply of a single product. Visa card issuers and acquirers each offer a distinct service to a distinct customer. Issuing and acquiring are fundamentally different activities, involving different specialisations and costs. Thus the MIF cannot be considered as an exchange of costs between partners in a production joint venture.
>
> (66) Rather, according to the Commission, the MIF is an agreement between competitors, which restricts the freedom of banks individually to decide their own pricing policies, and distorts the conditions of competition on the Visa issuing and acquiring markets. All Visa banks issue Visa cards and are thus competitors on the Visa issuing market. Some Visa banks are also acquirers, and compete with each other on the Visa acquiring market. Both these activities are affected by the MIF, and the Visa member banks are thus competitors as concerns their agreement on the MIF. In particular, the agreement on a collective MIF between the banks involved is likely to have an effect on price competition at the acquiring and issuing level since the MIF agreement will fix a significant part of the parties' final costs and revenues respectively.
>
> (67) The Commission in earlier decisions has also concluded that a MIF amounts to a restriction of competition under Article 81(1) EC/Article 53(1) EEA. Issuing banks are required to charge acquiring banks a certain fixed fee and are therefore prevented from developing at wholesale level an individual pricing policy vis-à-vis acquiring banks in so far as

they provide services to them (for example a 'payment guarantee' for most transactions).

(68) The MIF moreover has as its effect to distort the behaviour of acquiring banks vis-à-vis their customers (at resale level), because it creates an important cost element (according to EuroCommerce on average approximately 80 % of the merchant fee) which is likely to constitute a de facto floor for the fees charged to the merchants they acquire, since otherwise the acquiring bank would make a loss on its acquiring activity.

(69) However, the Commission does not consider the MIF agreement to be a restriction of competition by object, since a MIF agreement in a four-party payment system such as that of Visa has as its objective to increase the stability and efficiency of operation of that system (see section 8.1.1 below), and indirectly to strengthen competition between payment systems by thus allowing four-party systems to compete more effectively with three-party systems.

62. The Commission continued by concluding that the MIF restricted competition to an 'appreciable extent':

(71) As concerns the acquiring market, even though the MIF may not be the only component of the MSC, it is by far the main cost component, representing according to EuroCommerce about 80 % of the MSC. The MIF therefore effectively imposes a floor to the MSC. Moreover, the economic impact of the MIF is very substantial. With over 145 million Visa cards in the EU region, over four million merchants accepting Visa cards and about 5250 million Visa transactions a year, of which [about 10%] are intra-regional transactions, the revenue for issuing banks arising from the Visa intra-regional MIF amounts to [...]. As far as the impact on the issuing market is concerned, the MIF may discourage innovation and efficiency on the issuing market and may lead to the oversupply of cards …

...

(80) Prior to the modifications described above in section 3.2.3 the Visa MIF was considered by the Commission (in its Supplementary Statement of Objections of 29 September 2000) as not satisfying in particular the condition of Article 81(3), notably because the Visa EU Board was free to set the MIF at any level it wished, independently of the costs of the specific services provided by the issuing banks to the benefit of merchants.

63. A number of conclusions of fact relevant to the Claimants' cause of action would be apparent to sophisticated retail operators or could, with reasonable diligence, have been discovered by them before the Limitation Dates.

64. First, there was the existence and basic nature of the Visa EEA MIFs. Secondly, that (having investigated the matter) the Commission regarded the Visa Arrangements establishing the MIF as an agreement or decision of an association of undertakings, within the meaning of Article 101(1) and Article 53; and that from 2002 it regarded the MIF as a restriction of competition falling within Article 101(1). The main facts on which the Commission had reached that conclusion were also set out. Thirdly, the issue in relation to the EEA MIF went back to 2000 and was sufficient to found the complaint that the EEA MIF was too high. It was for this reason that Visa had to agree to reduce the level of the MIF (by 50% in relation to the debit card MIF and 20% overall) in order to obtain the exemption. Fourthly, the fact that the 2nd Defendant had recently adopted a modified scheme under which it would reduce the overall level of the Visa EEA MIFs through the introduction of a fixed rate per-transaction MIF for debit cards, and a phased reduction of the level of the *ad valorem* per transaction MIF application to credit and deferred debit cards. It also set out the maximum rates for Visa EEA MIFs that would be applicable in the future.

65. The Commission issued a Press Release in relation to the 2002 Exemption Decision on 24 July 2002 ('**the 2002 Press Release**'). This summarised the Commission's decision.

> The European Commission has exempted under the European Union competition rules certain multilateral interchange fees (MIF) for cross-border payments with Visa cards, after the card organisation made major changes to the system. The new MIF will not only be reduced in absolute terms, but will also be capped at the level of relevant costs, significantly improving the situation for retailers and, ultimately, the consumer …
>
> After long discussions with Visa and consultation of interested parties, a package of reforms was submitted by Visa to the Commission, which enables it to grant an exemption under Article 81(3) of the EU treaty.
>
> First, Visa will reduce the level of its MIFs for the different types of consumer cards. As concerns Visa's deferred debit card and credit card payments, the weighted average MIF rate will be brought down in stages, to a level of 0.7% in 2007. For debit card transactions Visa will introduce immediately a flat-rate MIF of €0.28 …

66. The reference to the reduction of the weighted average MIF rate to a level of 0.7% was another matter which was highly material to the Claimants' right of action which could have been discovered with reasonable diligence (if it was not in fact already known), since the Claimants' claim is that anything more than a rate of zero is objectionable. The information that Visa was reducing the MIF rate from some higher rate to a rate of 0.7% demonstrated that both before and after the change the rate was more than zero.

67. It also appears that those involved in the Visa EEA MIFs were identified in various other documents published by the Commission during this period. The 2000 Press Release had identified Visa International Service Association (the 2nd Defendant) as the body responsible for the Visa EEA MIFs. The 2001 Negative Clearance Decision had identified the 2nd Defendant as the body responsible for operating the Visa card payment network and described its membership composition. It also explained how decision-making in the Visa EU region had been delegated to the Visa EU regional board of directors, elected by the 5,000 Visa members in the EU, and set out the board's powers and responsibilities. The 11 August 2001 Notice included similar information about the 2nd Defendant and the Visa EU region at §§3-5, and continued at § 7:

> Pursuant to the Visa rules, the acquiring bank has to pay to the issuing bank an interchange reimbursement fee for each transaction with a Visa card where issuer and acquirer are different. In the EU region, this interchange fee is set by default by the Visa EU Regional Board, which according to Visa has currently broadly even representation of net issuers and net acquirers. The multilateral interchange fee (MIF) is currently always an ad valorem fee; it is set as a percentage of net sales.

68. The 2002 Exemption Decision gave similar details at §§4-6.

69. Although I have summarised the factual material in relation to the identity of the potential defendants, I do not consider that there should have been any significant difficulty in identifying the appropriate Defendants in the present action. If other elements of the cause of action had been identified to the point where they could be pleaded, the Claimants' legal advisors by the exercise of ordinary standards of diligence could have discovered the identity of the proper defendants in the course of correspondence or by the use of the Court process. In fact, it seems that the Claimants never asked for details either of the relationship between the Defendant companies or which of them set the relevant MIFs in the pre-action correspondence. In short they knew no more about this aspect of the case in 2013 than they did in 2007.

70. So far as the third and fourth elements of the Claim are concerned, the Commission repeatedly found in its public decisions that the Visa Europe arrangements, including the Visa EEA MIFs, were cross-border in nature and comprised a substantial proportion of transactions, and were thereby capable of affecting inter-state trade.

71. I note that the Claimants have not argued that they were unaware of the relevant facts relating to an effect on trade by the Visa EEA MIFs, nor that they were unaware of potential loss caused by the matters of complaint.

The UK MIFs

72. On 1 September 2000 the BRC (and a number of other trade associations representing traders in the UK) submitted a complaint to the Office of Fair Trading ('OFT') challenging (among other things) the compatibility of the Visa UK MIFs with the Chapter 1 prohibition in the CA 1998. The nature of the complaint was that the Visa UK MIF was an appreciable restriction of competition which was not capable of justification or exemption under s.9 of the CA 1998.

73. Recitals 9 and 11 of the 2002 Exemption Decision distinguished between Visa EEA MIFs, which applied to cross-border transactions between Member States in the EEA, and 'domestic interchange fees set by national Visa members' in respect of domestic transactions. It listed the five Member States for which the Visa EEA MIFs applied by default. Country-specific domestic MIFs were set for all other Member States, including the United Kingdom.

74. It follows that there was information, at least from 22 November 2002, that separate MIF arrangements applied for domestic Visa card payments in the United Kingdom.

75. On 1 May 2004, in response to a BRC complaint, the OFT began an investigation under the CA 1998 and Article 101 TFEU into Visa's MIF arrangements for UK domestic point-of-sale transactions.

76. In a decision dated 10 November 2004, the OFT set out its provisional views that the MIFs under the UK domestic rules in MasterCard's UK Members Forum infringed Article 81(1) EC and the Chapter 1 prohibition. These views were set out in a final decision of the OFT dated 6 September 2005 ('**the 2005 OFT MasterCard decision**').

77. In the 2005 OFT MasterCard Decision, the OFT referred to the Visa UK MIFs. At §§235- 238 (and Table 10) details were set out of the structure of the Visa UK MIF rates, as well as the standard Visa UK MIF rates and rates for other (non standard) Visa UK MIFs, as they evolved from 2000 to 2003, and a numerical range for the UK MIF rates for 2004.

78. This decision set out information (at p.25) about the value of Visa credit card transactions on UK issued cards over the period 2000-2004 (£70 billion). It also recorded (at p.32) Visa's argument that the OFT should conclude that MasterCard's UK MIFs were exempt from Article 81(1) and the Chapter 1 prohibition if similar conditions were applied to those MIFs as had been laid down in respect of Visa's EEA MIFs by the Commission in the 2002 Exemption Decision. The reason the OFT did not accept the argument was that the costs which might justify the level of MIF in cross-border transactions were not incurred in purely domestic arrangements (p.36-37). The OFT 2005 MasterCard decision also set out the actual level of the Visa UK MIF for the period 2000-2004 (1.3% up to October 2003). The figures could be contrasted with the figure of 0.7% to which the EEA MIF would be reduced under the 2002 Exemption Decision by 2007.

79. The 2005 OFT MasterCard decision was appealed to the Competition Appeal Tribunal (the 'CAT') on 2 November 2005. The existence of the Visa UK MIFs was also referred to in those appeal proceedings. Visa Europe Limited (the 3rd Defendant) and Visa UK Limited (the 5th Defendant) publicly intervened in that appeal in support of its own domestic UK MIFs. On 19 June 2006 the CAT announced its decision that the appeal would not proceed further, and that the 2005 OFT MasterCard decision would be set aside.

80. In the meantime, on 19 October 2005, the OFT issued a press release ('**the 19 October 2005 OFT Press Release**') announcing that the OFT had opened a case against Visa, and proposed to issue an infringement decision against the Visa agreement on domestic MIFs applicable to consumer credit card, charge card and

deferred debit card transactions in the UK. It identified the parties to the agreement as (among others) 'Visa and its members', and identified Visa specifically as 'Visa UK' (the 5th Defendant), 'Visa Europe' (the 3rd Defendant), and 'Visa International' (the 2nd Defendant). It stated that the OFT would object to the Visa UK MIFs on the basis that it was of the view,

> that the collective agreement between Visa and its member banks on the interchange fee charged between card issuing banks and merchant acquirers, on Visa card transactions taking place in the UK, restricts competition and infringes Article 81 of the EC Treaty and the Chapter I prohibition of the Competition Act.
>
> The OFT believes that, like the MasterCard MIF agreement (see press release 168/05), the Visa MIF agreement leads to an unduly high fee being paid to card issuing banks by merchant acquirers on every Visa transaction. The cost of these fees is passed on to retailers and ultimately to consumers.

81. Although the precise value of a claim in relation to the Visa UK MIF may not have been known, it was clear in 2005 that it was potentially very high.

82. The OFT's provisional view was that the Visa UK MIF arrangements amounted to a restriction of competition under Article 81(1) EC. These provisional views were withdrawn by the OFT on 19 June 2006, after the successful appeal against the 2005 OFT MasterCard Decision and following the intervention in that appeal by Visa, as noted above.

83. On 20 June 2006, the OFT announced ('**the 2006 OFT Press Release**') that it had agreed to the setting aside of the 2005 OFT's MasterCard decision and would now focus on MasterCard's and Visa's current MIF arrangements, leaving it to third parties to take private action in relation to past arrangements. The terms of the 2006 OFT Press Release included:

> Interchange fees set by MasterCard and Visa could still infringe competition law, the OFT announced today.
>
> The OFT today consented to the Competition Appeal Tribunal (CAT) setting aside the OFT's September 2005 decision concerning MasterCard's historic interchange fee arrangements. The OFT will now focus its resources on tackling both MasterCard's and Visa's current UK interchange fee arrangements, leaving it to affected third parties to contest the lawfulness of the old arrangements, if they choose to, in private court actions.

84. In the Notes to the 2006 OFT Press Release, the OFT observed that**,**

> [i]nterchange fees are payments made between banks on virtually all purchases in the UK made using Visa and MasterCard cards. These are passed on to merchants and

> ultimately, in OFT's view, to all consumers through higher prices.

85. The 2005 OFT MasterCard decision showed that Visa cards account for a significant proportion of credit cards issued, and credit card transactions in the UK, and had done so for several years.

86. Again, the Claimants cannot realistically assert that they were unaware of the essential facts relating to an effect on trade by the Visa UK MIFs, nor that they were unaware of the potential loss caused by the matters of complaint.

The Irish Default MIFs

87. Recital 9 of the 2002 Exemption Decision explained that the Visa intra-regional interchange fee scheme was applicable,

> by default to domestic Visa card payment operations within a Member State, in cases where no distinct Visa interchange fee has been set by the national Visa member for that Member State.

88. In Footnote 10 to the 2002 Exemption Decision, the Commission further clarified that Member States that applied the Visa EEA MIF rate by default included (amongst others) Ireland.

89. To this extent it was in the public domain that the Visa EEA MIFs applied by default to Visa-branded card payment transactions in Ireland. It follows that no separate issue arises in relation to the Irish Default MIFs.

The EEA MIFs

90. As already noted, 23 July and 4 October 2007 are the relevant Limitation Dates.

91. On 19 December 2007 the Commission issued an infringement decision against MasterCard ('**the 2007 MasterCard Decision**'). It found that from 22 May 1992 until 19 December 2007 MasterCard had infringed Article 101 TFEU and Article 53 EEA Agreement and had failed to prove that the conditions required for exemption under Article 101(3) TFEU and Article 53(3) EEA Agreement were satisfied. The Commission directed that MasterCard cease 'determining in effect a minimum price merchants must pay for accepting payment cards by way of setting Intra-EEA fallback interchange fees.' An appeal against this decision was dismissed by the General Court on 24 May 2012.

92. Mr Randolph candidly acknowledged that it was the Commission's 2007 MasterCard Decision which gave comfort to the Claimants and allowed them to plead the present claim, albeit they waited until 23 July and 4 October 2013 before issuing the present proceedings.

Discussion

93. Subject to the points I have already addressed, Mr Randolph did not substantially dispute the relevant principles which apply to the interpretation of s.32(1)(b) of the

1980 Act. The Claimants' case was that there were four key facts which were neither discovered nor discoverable with reasonable diligence at the time the proceedings were commenced and which were highly relevant to the issue of whether the MIFs in issue restricted competition.

94. For the reasons I have already set out above, this is no answer to the application unless the concealed facts disabled the Claimants from pleading the cause of action which the Court is considering. The Claimants have not identified any such facts. On the contrary the Defendants were able to demonstrate by reference to the chronology set out above how the Particulars of Claim derived from material which was available before the Limitation Dates.

95. I accept that it would be prudent as a matter of business commonsense to see whether the MIFs qualified for exemption under Article 101(3) before embarking on expensive litigation. However the cases make clear that there is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of success, and, as Mr Morris submitted, it would be for the Defendants (who bear the burden) to prove the conditions for exemption under Article 101(3) or s.9 and not for the Claimants to disprove them. Matters which may be relevant to disproving a defence are not relevant for the purposes of s.32(1)(b).

96. I turn then to consider the four 'key facts' in §81 in the Amended Particulars of Claim which are relied on (see [12] above).

97. The first point to note is that, simply as a matter of impression, the words 'manner', 'mechanisms', 'precise nature', 'actual nature' tend to indicate that what was concealed were matters of detail rather than core issues. It is difficult to see why, for example, the 'manner' and 'mechanisms' by which the MIFs were set is an essential matter of proof which has to be established in order to found the cause of action. The essence of the cause of action is object and effect, not means; and it is not clear how the 'precise nature' or even the 'scope' of the MIF arrangements are facts which meet the *Johnson* test.

98. Nor (for the reasons already set out above) do I accept that the Claimants were somehow disabled from discovering the identity of the relevant Defendants 'at all material times'. The Claimants have contended that they had to plead 'blind' that the 4th Defendant had a role in setting the UK MIFs, and that they faced the risk that their pleading might be struck out. Mr Randolph relied on what he characterised as 'equivocation' in the inter-solicitor correspondence: denials, followed by an acceptance of the position for the purpose of the present hearing. I am not persuaded by this point. It was known that the 4th Defendant existed, was a subsidiary of the 3rd Defendant and acquired the assets of the former Visa Regional Board of the 2nd Defendant. From these facts, the Claimants were able to raise a prima facie case that the 4th Defendant had some role in setting the UK MIFs. They pleaded this case in 2013 and have not alleged that they discovered any new facts after 2007 which are relevant to this plea. In any event, the proposition that sophisticated claimants (and their legal advisors) in modern commercial litigation are unable to identify the tortfeasor who is alleged to have caused damage running to hundreds of millions of pounds over a period of six years is unrealistic. Nor am I persuaded that the denial of a fact in a Defence has significance when considering the *Johnson* test.

99. Finally, this is a price-fixing claim. Although the MIF levels may have been concealed, the actual MIF levels are not material to the existence of the claim (although they are potentially relevant to the measure of recoverable damage). The basis of the claim is the existence of <u>any</u> MIF setting the minimum charge since any MIF is characterised as an overcharge forming the basis for recovery. It follows that the actual MIF level is immaterial provided it is more than zero. Again, I accept that it is material to the quantum of the claim and therefore to the commercial sense in bringing proceedings, but such matters are not relevant facts for the purpose of s.32(1)(b).

100. The Claimants submit that the material relied on by the Defendants to show that the relevant facts were known to (or could have been discovered by), the Claimants on the Limitation Dates do not go as far as the Defendants say. They accept that the 2002 Exemption Decision established a number of material facts, in particular that (1) the EEA MIF applied by default in Ireland; (2) there was a separate UK MIF, (3) the 2nd Defendant set the EEA MIF; (3) the EEA MIF was not objectively necessary for the operation of a four-party payment scheme; (4) the EEA MIF restricted competition by setting an effective floor for the MSCs charged to Merchants and (5) the restriction of competition was appreciable. Nevertheless, they argue, it (a) did not shed light on whether the UK MIF restricted competition or whether the EEA MIF had an anti-competitive object or effect, (b) made no reference to the 1st, 3rd or 4th Defendants and (c) did not throw any light on earlier versions of the EEA MIF prior to the 2002 Exemption Decision. They point out that, in any event, the 2002 Exemption Decision did not apply to the UK MIF which forms the basis for 95% of the claim.

101. I accept that the full picture was not available. However, the lack of information on the issues identified at (a)-(c) does not mean that the Particulars of Claim are defective either as a matter of form or analysis. It is clear that the 2002 Exemption Decision at recital 80 (also at recitals 64, 66 and 68) set out the Commission’s reasoned and authoritative view that the pre-2002 EEA MIFs constituted a restriction of competition within Article 81(1) which did not benefit from an exemption under Article 81(3). Furthermore, the principles adopted in the 2002 Exemption Decision and the primary facts found by the Commission applied, by analogy, to the Irish Default MIFs and to the UK MIFs, as the OFT found in the 2005 MasterCard decision.

102. The Claimants were bound to accept that the 2005 OFT Press Release set out the OFTs informed view that (1) the 2nd, 3rd and 5th (and possibly the 4th) Defendants were involved in setting the UK MIF, (2) the UK MIF was a collective agreement and (3) retailers’ prices were increased as a result of the UK MIF. They nevertheless argued that (a) the summary in the Press Release was no substitute for a proper explanation of the arrangements for the UK MIF and (b) there was insufficient material to support the contention that the UK MIF had an anti-competitive object or effect.

103. Again it seems to me that the Claimants are focussing on matters about which they might want reassurance before bringing a claim, but which do not constitute matters which are essential to pleading it. I also note that the 2005 OFT Press Release gave a summary of the OFT findings that the UK MIF was a collective agreement which restricted competition, by inflating the price paid by retailers and resulting in an ‘unduly high fee’ being paid on every transaction.

104. Mr Morris invited specific attention to the fact that in June 2006 (seven years before the commencement of these proceedings) the OFT expressly drew attention to the rights and powers of those who had been adversely affected by Visa's historic UK MIF arrangements (which had been in place from 1992 to 2006) to challenge their legality by way of private actions. The Claimants took no action to bring such proceedings for a further seven years.

105. The current proceedings were not brought following the discovery of some new fact relevant to the Claimants' right of action. The trigger for the proceedings was (as the Claimants accept) the dismissal of the appeal against the 2007 MasterCard Decision by the General Court in May 2012. The Claimants specifically accept (see the 2nd witness statement of Scott Campbell at §45) that neither that decision nor the General Court's judgment revealed 'to the Claimants specific factors that the Defendants had previously concealed'.

106. This is not a case of a 'secret cartel' operating over many years without the knowledge of victims and the authorities, and which has been discovered long afterwards. On the contrary, the existence and operation of the Visa four-party card payment system and the multilateral interchange fees were matters of public knowledge, which had been notified to the competition authorities.

Conclusion

107. The Claimants' present claims cover all payments of merchant service charges from 1977, a period of approximately 37 years. There is plainly an important public interest that claimants should not be prejudiced where they lack sufficient information to advance a claim. Against this is the general policy of limitation legislation: the public interest in ensuring certainty and finality in litigation, avoiding difficulties for the Court in adjudicating claims where, because of the passage of time, evidence may be unavailable or less reliable, protecting defendants from having claims hanging over them indefinitely and encouraging claimants to act promptly to enforce their rights. The weighing of these interests is carried out by the proper application of section 32(1)(b).

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

109. The question is suitable for summary disposal since all the matters relevant to the Applications are before the Court. If the Applications are well founded, the limitation issues in the case can be disposed of without the need for a trial of factual issues either as to what other matters the Claimants knew or did not know from time to time, or on the distinct allegations of 'concealment.' Documents which might be disclosed and evidence which might be given have no bearing on the outcome.

110. For these reasons I will grant the relief sought in the Defendants' applications.