Neutral Citation Number: [2025] EWCA Civ 677

Case No: CA-2024-001850/001861/001884/001885/001886/001896

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Andrew Lenon KC, Professor Anthony Neuberger, Paul Lomas
[2024] CAT 42

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2025

Before :

THE CHANCELLOR OF THE HIGH COURT
(Sir Julian Flaux)
LORD JUSTICE GREEN
and
LORD JUSTICE PHILLIPS

- -

Between :

(1) The Secretary of State for Health and Social Care **(2) The National Health Services Business Services Authority** **(3) The Welsh Ministers** **(4) Swansea Bay University Health Board** **(5) Cwm Taf Morgannwg University Health Board** **(6) Aneurin Bevan University Health Board** **(7) Hywel Dda University Health Board** **(8) Betsi Cadwaladr University Health Board** **(9) Powys Teaching Health Board** **(10) Cardiff & Vale University Health Board**	**Claimants / Respondents**
- and -	
(1) Lundbeck Limited **(2) H.Lundbeck A/S** **(3) Generics (U.K.) Limited** **(4) Merck KGaA** **(5) Arrow Generics Limited** **(6) Arrow Group ApS** **(7) Resolution Chemicals Limited** **(8) Xellia Pharmaceuticals ApS** **(9) Alpharma LLC** **~~(10) A.L. Industrier AS~~** **(11) Sun Pharmaceutical Industries Limited** **(12) Sun Pharma UK Limited**	**Defendants / Appellants**

George Peretz KC & David Drake (instructed by **Peters & Peters Solicitors LLP**) for the **Claimants/Respondents**
Sarah Ford KC, Paul Luckhurst & Tim Johnston (instructed by **Clearly Gottlieb Steen & Hamilton LLP, Skadden, Dentons, Macfarlanes, CMS, Clifford Chance & Pinsent Masons**) for the **Defendants/Appellants**

Hearing date: Wednesday 26th March 2025

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Approved Judgment

This judgment was handed down remotely at 12 noon on Friday 23rd May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Green :

A. Introduction/the issue

1. This appeal is brought by pharmaceutical companies who entered into a series of unlawful agreements in breach of the prohibition on agreements restricting competition (the "*Defendants*" or the "*Appellants*"). In March 2021 the European Court of Justice ("*CJEU*") dismissed appeals against a 464 page decision of the European Commission ("*the Commission*") dated 19th June 2013 finding infringements of Article 101 TFEU on the part of the Defendants: See, Case AT.39226 *Lundbeck* ("*the Decision"*). The Decision found that the Danish pharmaceutical company Lundbeck, and four generics competitors, had concluded unlawful agreements which allowed Lundbeck to keep the price of its blockbuster drug citalopram artificially high across the EU. Prior to the agreements Lundbeck's basic patent for citalopram had expired. However, it still held a number of process patents which provided limited protection. Producers of generic equivalents were preparing for market entry with cheaper versions of the drug. To forestall this Lundbeck paid the producers to stay out of the market. The Commission imposed a fine of €93.8 million on Lundbeck and fines totalling €52.2 million on the four generics competitors: Generics UK, Arrow, Alpharma, and Ranbaxy.

2. The Claimants, and Respondents to this appeal, are all bodies within or involved in the funding of the NHS ("*the Claimants*"). They allege that by virtue of these illegal agreements the price of citalopram was inflated to the NHS. They have brought proceedings in the Competition Appeal Tribunal ("*CAT*") to recover damages which they say exceed £500m. In accordance with sections 47A and 58A Competition Act 1998 ("*CA 1998*") and the Competition Appeal Tribunal Rules 2015 (2015 No. 1648) ("*the Rules*"), the Claimants have commenced what is termed a "*follow-on*" action. It is a "*follow-on*" in the sense that the Claimants are entitled to treat the Decision as determinative of breach with the consequence that the only live issues are causation and damage.

3. Under the Rules a limitation period of two years applies starting upon the date on which a decision finding infringement becomes final, which it does when all appeal routes have been exhausted. The appellate procedure ended in March 2021. Accordingly, the Claimants had until March 2023 to bring a follow-on claim in the CAT.

4. In March 2023, prior to expiry of the two year limitation period, the Claimants commenced proceedings in the CAT seeking recovery of damages by issuing a Claim Form in accordance with the Rules. It is common ground that, subject only to the Appellants' arguments herein, the claim brought in the CAT is validly constituted and within limitation as a follow-on claim.

5. The Appellants however say that notwithstanding that the claim is, *prima facie,* fully in accord with the Rules, it is nonetheless time-barred. Their argument is as follows. In 2019 the Claimants, before the appellate procedure at the European level was completed, issued proceedings for damages in the High Court. These were "*stand-alone*" proceedings in the sense that to succeed the Claimants had to establish not just causation and damage, but breach as well. The parties agreed that the proceedings should be stayed pending the outcome of the appeals against the Decision at the EU level. Following the dismissal of the Defendants' appeals in March 2021 the Claimants agreed with the Defendants that the proceedings should be transferred to the CAT. An

order by consent ("*the Transfer Order*") transferring the proceedings was made by the High Court pursuant to section 16 Enterprise Act 2002 ("*EA 2002*"), which empowers such transfers to be made.

6. The Defendants argue that the effect in law of the Transfer Order is that the stand-alone proceedings before the High Court continue before the CAT and remain subject to limitation rules applicable to stand-alone claims under the Limitation Act 1980 ("*LA 1980*"). As to limitation, in 2022 in *Gemalto Holdings BV v Infineon Technologies AG and others* [2022] EWCA Civ 782 ("*Gemalto*") this Court clarified that the normal limitation period under the LA 1980 of six years for a tortious competition law claim started, in cases of postponement under section 32 not when the formal decision of the Commission was adopted, but at the earlier point of time when, upon the facts in the public domain, the Claimants could reasonably have known that there was a real possibility of a claim for damages. In the light of this judgment it is, now, common ground that the stand-alone proceedings before the High Court are time-barred. It follows, say the Defendants, that steps taken by the Claimants to initiate entirely new and in time proceedings in the CAT were ineffective and irregular and failed to alter the nature of the transferred proceedings before the CAT as stand- alone High Court proceedings, which are time barred.

7. Following the transfer the Defendants applied to the CAT for the determination of two preliminary issues: (i) that the proceedings in the CAT were not properly or regularly constituted as a follow-on action but, instead, amounted to the continuation of the prior High Court stand-alone action where the rules for limitation were those set out in the LA 1980, not those under the Rules of the CAT, and this meant, in the light of the judgment in *Gemalto,* that the proceedings were time barred; and (ii), in the alternative, even if the Claims were in time, that under the terms of the Transfer Order the Claimants had expressly agreed that the limitation defence that had accrued to the Defendants in the High Court subsisted and was carried over into the CAT proceedings and that, accordingly, the Claimants were estopped from arguing that their claim was not time-barred (even though it was not).

8. The CAT acceded to the application to determine these issues upon a preliminary basis but in the judgment under appeal, dated 21st June 2024 ("*the Judgment*"), dismissed both defences. It described the issues in the following terms:

> "2. The issue turns on which limitation period is to be applied to the claim and arises in the following circumstances. The Claimants brought stand-alone proceedings in the High Court claiming damages for breaches of Article 101 of the Treaty on the Functioning of the European Union ("Article 101"). The proceedings were transferred to the Tribunal before Particulars of Claim had been served. Following the transfer, and pursuant to a specific provision in the Transfer Order, the Claimants filed a Claim Form in the Tribunal. The Defendants contend that the relevant limitation period is the period applicable to High Court proceedings pursuant to the Limitation Act 1980 ("LA 1980"). If so, it is common ground that the claim is time-barred. The Claimants, on the other hand, contend that the relevant period is the period applicable pursuant to the Competition Appeal Tribunal Rules 2015 ("the 2015 Rules") to claims made under

> section 47A of the Competition Act 1998 ("CA 1998"). If so, subject to an estoppel argument advanced by the Defendants, it is common ground that the claim is not time-barred and may proceed."

9. The CAT distinguished a judgment of the High Court in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2015] EWHC 3472 (Ch) ("*Sainsbury's*") upon which the Defendants had relied as dispositive of the limitation issue in their favour. The CAT granted permission to appeal upon the basis that the issue of limitation was novel and there was doubt as to the scope and effect of the relevant legislative provisions in the light of the judgment in *Sainsbury's*.

B. Grounds of Appeal and Respondents' Notice

10. The Appellants raise two discrete Grounds of Appeal:

> Ground 1:
>
> The Tribunal erred in law in concluding (Judgment, §52) that the claim in these proceedings is one to which the limitation period under Rule 119 of the CAT Rules 2015 and Rule 31 of the CAT Rules 2003 applies and that the claim is therefore not time-barred. The Tribunal should have concluded that the claim is time-barred under the Limitation Act 1980.
>
> Ground 2:
>
> The Tribunal erred in law in concluding (Judgment, §62) that the Claimants are not contractually estopped by the parties' agreement contained in the Transfer Order dated 2 July 2021 from relying on Rule 119 and Rule 31 to contend that their claim is in time. The Tribunal should have held that the Claimants' arguments in these proceedings to the effect that their claim is not time barred are irreconcilable with the parties' agreement in the Transfer Order and the Claimants are estopped from relying on them to defeat the Defendants' accrued limitation rights under the Limitation Act 1980.

11. An additional ground for supporting the Judgment is raised by the Claimants in a Respondents' Notice. This concerns the position of the 12th Defendant who was not the subject of the original stand-alone proceedings in the High Court and who was added to the follow-on proceedings in the CAT in March 2023 by way of amendment to the Claim Form which had been issued there in accordance with the relevant rules, all before the expiry of the two year limitation period. The Claim against the 12th Defendant is therefore an entirely new follow-on claim brought within time under section 47A. Accordingly, the Claimants say that, even if the Defendants are correct that the proceedings against all of the other Defendants are a continuation of the High Court stand-alone claim and are time barred, that is not the case against the 12th Defendant.

C. The legislative framework

12. I start by setting out the legislative background.

The Competition Appeal Tribunal Rules 2015: Scope and effect / General Principles

13. The point of departure is an explanation of the legal effect of the rules of the CAT. The Rules were made on 7th September 2015, laid before Parliament on 8th September 2015, and came into effect on 1st October 2015. They are subordinate legislation adopted by the Secretary of State, following consultation in accordance with section 15(1) EA 2002, in the exercise of powers conferred by section 15(1)-(3) of, and Part 2 of Schedule 4 EA 2002 and sections 192(3), (4) and 193(1), (2)(b) and (3), of the Communications Act 2003. Subject to various saving provisions set out in the Rules (including on limitation) they replaced The Competition Appeal Tribunal Rules 2003 ("*the 2003 Rules*").

14. Ground 1, on limitation, requires the Court to interpret the Rules in their particular context. It is common ground that the Rules are comprehensive and self-contained. Rule 3 sets out which parts of the Rules apply to different types of proceedings:

    i) Parts 1 and 6 apply to all proceedings. These include the Governing Principles in Rule 4 (in Part 1) and, Rule 114 (in Part 6) on the curing of irregularities. They therefore apply to follow-on claims under section 47A CA 1998.

    ii) Part 4 comprises Rules 29-72 which set out specific and detailed procedural rules governing claims under section 47A CA 1998. It includes Rules 30, 32 and 72 which concern respectively: the manner of commencing proceedings; amendments to Claim Forms; and transfers of claims from the High Court to the CAT.

15. Rule 4, which is in Part 1 and therefore applies to the present case, entitled "*Governing Principles*", sets out general or governing principles focusing upon the need to ensure fairness, justice and proportionality. Rule 4(1) provides that the Tribunal: "… *shall seek to ensure that each case is dealt with justly and at proportionate cost*". Under Rule 2(2) (which is also in Part 1): "*These Rules are to be applied by the Tribunal and interpreted in accordance with the governing principles set out in rule 4*." The combined effect of Rules 2(2) and 4 is, in relation to section 47A claims, to create: (i) governing principles of interpretation binding upon the CAT; and (ii), an independent, freestanding, duty imposed upon the CAT to fulfil those principles (cf "*shall seek to ensure*").

16. Rule 4 in full provides:

> "(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;

(c) dealing with the case in ways which are proportionate— (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal.

(3) Each party's case shall be fully set out in writing as early as possible.

(4) The Tribunal shall actively manage cases.

(5) Active case management includes—

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) identification of and concentration on the main issues as early as possible;

(c) fixing a target date for the main hearing as early as possible together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case;

(d) adopting fact-finding procedures that are most effective and appropriate for the case;

(e) planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument; and

(f) ensuring that the main hearing is conducted within defined time-limits.

(6) The Tribunal may— (a) encourage and facilitate the use of an alternative dispute resolution procedure if the Tribunal considers that appropriate; (b) dispense with the need for the parties to attend any hearing; and (c) use technology actively to manage cases.

(7) The parties (together with their representatives and any experts) are required to co-operate with the Tribunal to give effect to the principles in this rule."

17. It is inherent in the Appellants' case that the purported initiation by the Claimants, in March 2023, of section 47A proceedings by the filing of a Claim Form under the Rules was ineffective to achieve that object and the follow-on proceedings were, necessarily, therefore irregular and of no effect. Rules 114 and 115 concern irregularities and the general power of the Tribunal. They provide:

> "Irregularities
>
> 114 - (1) Any irregularity resulting from failure to comply with any provision of these Rules before the Tribunal has reached its decision does not of itself render the proceedings void.
>
> (2) Where any such irregularity comes to the attention of the Tribunal, the Tribunal may, and shall if it considers any person may have been prejudiced by the irregularity, give such directions as it thinks just, to cure or waive the irregularity before reaching its decision.
>
> (3) Clerical mistakes in any document recording a direction, order or decision of the Tribunal, the President, a chairman or the Registrar, or errors arising in such a document from an accidental slip or omission, may be corrected by the President, that chairman or the Registrar, as the case may be, by— (a) sending notification of the amended direction, order or decision, or a copy of the amended document, to each party; and (b) making the necessary amendment to any information published on the Tribunal website in relation to the direction, order or decision.
>
> General power of the Tribunal
>
> 115.- (1) Subject to the provisions of these Rules, the Tribunal may regulate its own procedure.
>
> (2) A power of the Tribunal under these Rules to make an order or direction includes a power to vary or revoke the order or direction.
>
> (3) The President may issue practice directions in relation to the procedures provided for by these Rules."

The creation of a follow-on jurisdiction in the CAT: Section 47A CA 1998

18. Sections 18 and 20(1) EA 2002 introduced sections 47A and 58A into the CA 1998 with effect from 20th June 2003. As from 1st October 2015, the relevant version of section 47A provided that: "… *a person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.*" Section 47A, as originally drafted and as it applied in the present case, permitted

follow-on actions upon the basis of final decisions of the EU Commission, as well as of the CMA in the United Kingdom[1].

19. Section 58A(2) and (3) CA 1998 provide for the binding effect of an infringement decision identified in section 47A upon the completion of all appeal processes, at which point it becomes "*final*":

> "(2) The court or the Tribunal is bound by the infringement decision once it has become final.
>
> (3) An infringement decision specified in section 47A(6)(a) or (b) becomes final—
>
> (a) when the time for appealing against that decision expires without an appeal having been brought; or
>
> (b) where an appeal has been brought against the decision, when—
>
> (i) the appeal and any further appeal in relation to the decision has been decided or has otherwise ended, and
>
> (ii) the time for appealing against the result of the appeal or further appeal has expired without another appeal having been brought.
>
> …
>
> (5) This section applies to the extent that the court or the Tribunal would not otherwise be bound by the infringement decision in question."

The limitation rules for follow-on actions

20. Neither of sections 47A or 58A lay down specific limitation periods. These were originally set out in the 2003 Rules. Rule 31 thereof set out the two year time limit for the making of a follow-on claim for damages under section 47A, running from the "*relevant date*", which is when the decision in question becomes final:

> "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 –

[1] Section 47A has subsequently been changed to take account of the exit of the UK from the EU.

> (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."

21. Rule 119, on "*Savings*", provides that Rules 31(1) to (3) of the 2003 Rules continue to apply to claims made on or after 1 October 2015, subject to the two conditions set out in Rule 119(3):

> "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."

22. I record that (subject to the Appellants' arguments) it is common ground that the Claimants' action before the CAT satisfies the conditions in Rule 119(2) and (3) in that: the claim was made after 1st October 2015; it is a claim under section 47A; and, it arose before 1st October 2015.

How follow-on actions are commenced and made in the CAT: Rule 30

23. Part 4 of the Rules governs the making of claims under sections 47A CA 1998. Rule 30(1) is entitled "*COMMENCEMENT OF PROCEEDINGS*" and has the subheading "*Manner of commencing proceedings under section 47A of the 1998 Act*". It provides:

> "A claim under section 47A of the 1998 Act (proceedings before the Tribunal: claims for damages etc.) shall be made by filing a claim form".

Rule 30(2)-(7) then sets out detailed rules governing the content and form of the Claim Form. Paragraph [5.16] of the 2015 CAT Guide to Proceedings ("*the CAT Guide*")

provides that a claim for damages under section 47A should be made by sending a Claim Form to the Registrar. Paragraphs [5.19] – [5.35] set out in detail what must be contained in the Claim Form. The requirements under Rule 30 and the CAT Guide are significantly more demanding than those for a Particulars of Claim under the CPR.

The power to transfer a High Court claim to the CAT: Section 16 EA 2002

24. Section 16(1) EA 2002 empowered the Lord Chancellor by regulation to make provision enabling the High Court to transfer cases (whether stand-alone or follow-on) to the CAT:

> "Transfers of certain proceedings to and from Tribunal
>
> (1) The Lord Chancellor may by regulations—
>
> (a) make provision enabling the court—
>
> (i) to transfer to the Tribunal for its determination so much of any proceedings before the court as relates to an infringement issue; and
>
> (ii) to give effect to the determination of that issue by the Tribunal; and
>
> (b) make such incidental, supplementary, consequential, transitional or saving provision as the Lord Chancellor may consider appropriate."

25. Section 16(3) provides that rules of court may prescribe the procedure to be followed in connection with such a transfer. Section 16(4) empowers the Court to transfer to the CAT, in accordance with relevant rules of court, so much of any proceedings before it as relates to a claim to which section 47A CA 1998 applies:

> "(4) The court may transfer to the Tribunal, in accordance with rules of court, so much of any proceedings before it as relates to a claim to which section 47A of the 1998 Act applies."

Nothing in section 16 EA 2002 empowers rules to be made whereby the High Court, upon a transfer, can: give binding directions to the CAT as to the future conduct or progress of the transferred case; or otherwise alter or waive any of the Rules. PD30 8.1-8.6 and 8.10 – 8.13 sets out procedural rules relating to transfers to the CAT. These provide that the only obligation upon the transferring court is: (i) to send to the CAT a notice of transfer containing the name of the case and the papers related to the case; and then (ii), to notify the parties of the transfer: See PD30 [8.5] and [8.12].

What the CAT does to a case transferred to it

26. Once the notice of transfer and case papers have been delivered to the CAT the Rules take over. Rule 72 governs the applicable procedure. It imposes an obligation upon the parties to file with the CAT various papers including "*any directions sought for the further progress of the claim*":

> "Transfer of claims to the Tribunal
>
> 72.— (1) This rule applies where any court has ordered the transfer to the Tribunal of all or part of any proceedings.
>
> (2) The person bringing the claim shall within seven days of the order of the court transferring the claim or such other period directed by that court, file— (a) a certified copy of the order of the court transferring the claim to the Tribunal; (b) any pleadings and documents in support of the claim filed with the court in which the claim was begun; and (c) any directions sought for the further progress of the claim.
>
> (3) As soon as practicable after receipt of the documents referred to in paragraph (2) a case management conference shall be held in accordance with rule 54."

27. Paragraphs 5.164-5.167 of the CAT Guide set out the practicalities of such transfers:

> "Transfer of claims to the Tribunal
>
> 5.164 The Section 16 Enterprise Act 2002 Regulations 2015 enable the High Court in England and Wales, the Court of Session or a Sheriff Court in Scotland and the High Court or the county court in Northern Ireland to transfer to the Tribunal for its determination so much of any proceedings as relates to "an infringement issue".
>
> 5.165 Section 16(6) of the 2002 Act defines an infringement issue as any question relating to whether or not an infringement of the Chapter I or Chapter II prohibition or Article 101 or 102 TFEU has been or is being committed.
>
> 5.166 Within seven days of the order of the court transferring the proceedings, the claimant must file with the Registrar the documents specified in Rule 72(2). The claimant should also be prepared to provide these documents to the Tribunal in electronic form.
>
> 5.167 Following such a transfer, the Tribunal will usually convene a CMC at which it will discuss the future conduct of the case with the parties. It would therefore assist the Tribunal if the parties could work together on a plan for the future conduct of the case that can be submitted to the Tribunal in advance of the CMC."

D. The relevant facts / chronology

The Commission Decision of 19th June 2013 and the appeals

28. Paragraphs [2]-[6] of the Decision summarises the agreements that were found to be unlawful and which form the basis of the follow-on claim in the CAT:

"(2) The product concerned by each of the agreements was the anti-depressant citalopram, whether in the form of an active pharmaceutical ingredient (hereafter also referred to as 'API') or in the form of a medicinal product (hereafter also referred to as 'medicine').

(3) At the time the agreements were concluded, Lundbeck's patents and data protection on the citalopram compound and the two original production processes had expired, meaning that Lundbeck no longer had complete blocking power against production and sales of citalopram by generic undertakings. Lundbeck did still have a number of process patents, which gave Lundbeck exclusivity rights on certain (but not all) new ways of producing citalopram to the extent such patents would be found to be valid and infringed. But any undertaking using either the original production processes or any production process not covered by valid Lundbeck process patents could in principle freely enter EEA markets with generic citalopram, provided the product and its production process met regulatory requirements applicable in the EEA at that time.

(4) Each of the agreements was concluded in the context of at least a potential patent dispute between Lundbeck and the generic undertaking concerned regarding the (intended) marketing by the generic undertaking of citalopram API or medicine in the geographic area concerned by the agreement. Prior to the agreements concerned, Lundbeck had usually claimed infringement of one or more of its process patents and the generic undertaking concerned had usually claimed non-infringement of the patent(s) concerned or invalidity of the patent(s) Lundbeck invoked. Each of the agreements was concluded before a court ruling on these issues was given, even by way of interim measures, and all except one (Lundbeck's agreement with Alpharma regarding the EEA) were concluded before any litigation had started.

(5) The Commission wants to emphasise that it is not, of course, as such illegal to settle patent disputes. Patent dispute settlements are, in principle, a generally accepted, legitimate way of ending private disagreements. They can also save courts or competent administrative bodies such as patent offices' time and effort and can therefore be in the public interest. Lundbeck in fact concluded several patent settlements on citalopram that are not the subject of this Decision.

(6) What is important from the perspective of Union competition law is that each of the agreements covered by this Decision prohibited entry by a potential competitor. Each agreement was characterised by the fact that it contained a transfer of value from Lundbeck to a potential or actual generic competitor, which was related to the latter's agreement not to market generic citalopram

> in the geographic area concerned for the duration of the agreement. The value which Lundbeck transferred, took into consideration the turnover or the profit the generic undertaking expected if it had successfully entered the market. The agreements in question did not resolve any patent dispute; they rather postponed the issues raised by potential generic market entry. It was also established that the agreements contained no commitment from Lundbeck to refrain from infringement proceedings if the generic undertaking entered the market with generic citalopram after expiry of the agreement. Finally, the agreements concerned obtained results for Lundbeck that Lundbeck could not have achieved by enforcing its process patents before the national courts: Each of the agreements in question prevented the generic company concerned from selling generic citalopram, irrespective of whether such citalopram would be produced in infringement of Lundbeck's process patents."

The stand-alone action in the High Court for damages

29. In August 2013, the Defendants applied to annul the Decision. On 4th July 2014, the Claimants wrote to certain of the Defendants putting them on notice that they intended to issue proceedings in the High Court in the event that appeals against the Decision failed. On 19th June 2019, the Claimants issued a stand-alone claim for damages in the High Court. This was exactly 6 years to the day after the Decision was issued (on 19th June 2013). It was agreed that the deadline for the service of Particulars of Claim would be extended pending determination of the appeals.

The Decision became "final" upon the dismissal of the appeals on 25th March 2021

30. The appeals failed before the General Court on 8th September 2016. Appeals thereafter to the European Court of Justice ("*CJEU*") were dismissed on 25th March 2021: See e.g. Case C-591/16P *Lundbeck v Commission* ECLI:EU:C:2021:243. The Decision thus became "*final*" upon this date. The two year limitation period for the bringing of follow-on claims in the CAT therefore expired on 25th March 2023.

31. Upon the appeals being dismissed the Claimants wrote to the Defendants suggesting that the High Court proceedings be transferred to the CAT. The Defendants agreed but without prejudice to their rights *"... including as to any defence or argument based on limitation*". On 9th June 2021 the Claimants wrote explaining that they would not serve particulars prior to transfer to avoid unnecessary duplication.

The Transfer Order of 2nd July 2021

32. With the consent of the parties, the Transfer Order was made by Deputy Master Linwood on 2nd July 2021 transferring the proceeding from the High Court to the CAT in order that a new procedure under Rule 30 could be initiated and so that applications to serve the new Claim Form out of jurisdiction could be made under Rule 31. The Transfer Order included the following:

> "TRANSFER

> 2. The Claimants shall serve the High Court Claim Form within 7 days of receipt of a sealed copy of this Order, at which point these Proceedings shall be transferred to the Competition Appeal Tribunal (the "CAT") pursuant to section 16(4) of the Enterprise Act 2002. […]
>
> 6. The requirements for the Claimants to file Particulars of Claim in the High Court and for the Defendants to file Acknowledgements of Service in the High Court are hereby dispensed with.
>
> 7. The Claimants shall in due course instead file a claim form with the CAT in accordance with rule 30 of the CAT Rules. The Claimants shall also apply to serve the claim form referred to in this paragraph out of the jurisdiction and to effect service of such claim form on any Defendants out of the jurisdiction in accordance with rule 31 of the CAT Rules. This Order shall not be deemed to involve submission to the jurisdiction or acceptance of service by any Defendant for these purposes.
>
> […]
>
> 9. For the avoidance of doubt:
>
> (1) Neither this Order giving effect to the said transfer, nor the transfer itself, is intended to alter, limit or exclude in any respect any element of the Claimants' Claim as constituted in this Court prior to the transfer taking effect. If and to the extent that any element of the Claimants' Claim as constituted in this Court prior to the transfer taking effect is not capable of falling within the jurisdiction of the CAT on a transfer, or would be altered, limited or excluded by this Order or the transfer, it is not subject to this Order and remains within the jurisdiction of this Court.
>
> (2) Neither this Order giving effect to the said transfer, nor the transfer itself, is intended to alter, limit or exclude in any respect any element of the Defendants' accrued rights in respect of defence to the Claimants' Claim as constituted in this Court prior to the transfer taking effect, including, but not limited to, applicable law, process for service, jurisdiction, liability (including as to any defence or argument based on limitation, time bar, laches, delay, or related issue), or the existence of a duty of care, or otherwise howsoever in relation to the Claim."

The communication of the Transfer Order to the CAT and the conferral of a case registration number by the CAT

33. On 4th August 2021, the Claimants wrote to the Registrar of the CAT enclosing a copy of the Transfer Order and the High Court papers explaining, consistent with paragraph [7] of the Transfer Order, that it was the Claimants' intention: *"… to file a claim form with the CAT in accordance with the Tribunal rules, Rule 30 (this replacing the need*

to serve full particulars in the High Court only to transfer the case in near-parallel)." On 10th August 2021 the CAT replied giving the case reference number: 1415/5/7/21(T). The "*T*" indicated that the case had been received as a transfer from the High Court. The letter from the CAT recorded the intention of the Claimants in due course to issue a Claim Form in accordance with Rule 30.

The application for joinder of the 12th Defendant to the CAT proceedings

34. On 28th February 2023 the Claimants applied under Rule 38 for permission to add Sun Pharma UK Limited ("*SPUL*"), formerly Ranbaxy (UK) Limited, as a 12th Defendant to the section 47A CA 1998 claim.

The Claim Form under section 47A CA 1998

35. On 28th February 2023 the Claimants filed a Claim Form in the CAT. On 14th March 2023, the CAT, by order, gave permission for SPUL to be added as 12th Defendant. The order records that the Rule 38 application had been consented to by SPUL. The Claim Form was amended on 17th March 2023. All these events occurred within the two year limitation period running from the Decision becoming final.

36. For details of the claim, I refer to the amended Claim Form. It is headed: "IN THE COMPETITION APPEAL TRIBUNAL AND IN THE MATTER OF SECTION 47A OF THE COMPETITION ACT 1998". It is also stated that "… *these proceedings were originally issued in the High Court of England and Wales before being transferred to this Tribunal*". The Claim Form stated that the relevant limitation period, pursuant to section 47A CA 1998 and Rule 31 of the 2003 Rules, was two years from the date of the judgment of the CJEU dismissing the appeals of the Defendants. The claim is for damages. Annex A3 is entitled "*Overall quantum*". Table 9 in Annex A3 quantifies the total claim, together with interest, at £511.5m.

37. Section A is entitled "*Overview*". It explains that the action is a follow-on claim pursuant to sections 47A and 58A CA 1998. It identifies the decision relied upon to establish breach:

> "A.1 A CLAIM FOR DAMAGES UNDER SECTION 47A OF THE COMPETITION ACT 1998 BASED ON AN EU COMMISSION DECISION THAT HAS BECOME FINAL UNDER SECTION 58A OF THE COMPETITION ACT 1998
>
> 1 This is a follow-on claim for damages, pursued as a breach of statutory duty, under s 47A of the Competition Act 1998 (the "1998 Act") for damages caused by the Defendants' breaches of Article 101 TFEU identified in the European Commission's decision in Case AT.39226 Lundbeck, dated 19 June 2013 (reported as Lundbeck C (2013) 3803 final, of 19 June 2013) (the "Decision").
>
> 2 The Claimants are parties in England and Wales (or their predecessors) that were responsible for and made payments for NHS prescriptions in England and Wales at all relevant times,

> and thereby suffered the damages/loss in this claim arising from the unlawful agreements between the Defendants.
>
> 3 The European Commission (the "Commission") found the Defendants (or their predecessor companies, treated as five undertakings in the Decision: Lundbeck, Merck (GUK), Arrow, Alpharma and Ranbaxy), had acted in breach by object of Article 101 TFEU (and Article 53 of the EEA Agreement). They had done so by concluding and implementing a number of reverse-payment agreements (also known as "pay for delay" agreements).

38. In paragraphs [4] and [5] the Claimants summarise the unlawful agreements as found by the Commission in the Decision:

> "4 The Commission found that in each case Lundbeck (as the originator of the pharmaceutical citalopram, an anti-depressant of the SSRI class, which it marketed as Cipramil) agreed with each of the other Defendant undertakings that Lundbeck would pay the other (potentially competing) undertaking not to enter either the EEA (thus including the UK) and/or specifically the UK market by marketing or selling generic citalopram. Each agreement thus involved a "pay for delay" of generic entry: Lundbeck paid generic manufacturers not to sell (competing) generic citalopram in the UK and/or (by way of part payment to the generics) to sell Lundbeck product at set prices (the "Lundbeck Agreements") for a period of nearly two years.
>
> 5 The Commission found that the Lundbeck Agreements as concluded and implemented were part of a strategy by Lundbeck to distort competition by excluding/delaying the entry of generic competition to enable Lundbeck to obtain higher revenues from its citalopram "franchise". This included creating a "window of opportunity" (both "franchise" and "window of opportunity" are terms used by Lundbeck in internal documents, as cited in the Decision, at recitals (123)–(141), for S-citalopram/escitalopram. It is the Claimants' case that the Lundbeck Agreements significantly elevated the price of citalopram "as high as possible" (recital (130)), and in any event until generic entry in October 2003, also being after the launch by Lundbeck of the therapeutically equivalent product escitalopram (recitals (133)–(134) and (135)–(143)).."

39. In Section A.2 (paragraphs [12]-[15]) the Claimants aver that the Decision is final under section 58A CA 1998. Paragraph [13] states:

> "13. For the avoidance of doubt, any reference in this claim to s 47A as the basis for jurisdiction in this claim is a reference to that provision in the terms preserved on a transitional basis (in particular this is relevant for limitation purposes). The position of the Lundbeck Decisions is thus: a Decision of the European

> Commission, the Decision, was taken prior to (and thus a "claim arose" prior to) 1 October 2015; this retains the two-year limitation period provided by r 31 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) (the "2003 CAT Rules") and the unamended s 47A (that is, prior to the Consumer Rights Act 2015)".

40. In paragraphs [14] and [15] the Claimants set out what they consider to be the consequential legal effect:

> "14. The result is that whilst the right to an action arose from the Commission Decision (in 2013):
>
> 14.1 the permission of the Tribunal would have been required to bring a follow-on claim prior to it becoming final under s 58A;
>
> 14.2 once that Decision became final, proceedings were able to be commenced without permission of the Tribunal (in this litigation, a bare protective claim was transferred to the Tribunal by Order, including a requirement to file a Claim Form and not to serve particulars in the Chancery Division);
>
> 14.3 as the original limitation provisions are preserved, the relevant period is two years from the date on which the decision became final (unamended s 47A(3) provided that any limitation rules applicable to claims which may be made in civil proceedings are to be disregarded; s 47A(4) provided that the Tribunal Rules shall establish the limitation periods; r 31(2) of the 2003 Rules provides for the later of two specified periods to apply which, as relevant to the facts of this claim, provides at (a) a reference back to s 47A(8) – namely the final determination of proceedings against the Decision or findings).
>
> 15. As such, the Decision became final only after the Court of Justice rulings, and is binding on any court or Tribunal (the extent of what is binding is considered further below)."

The raising of the limitation defence

41. On 5th June 2023, the Defendants wrote to the Claimants suggesting that limitation be determined as a preliminary issue. The Claimants responded on 9th June 2023 in the following terms:

> "It remained open to our client to issue fresh proceedings in the CAT up to 25 March 2023 but, instead, we agreed with all defendants that the proceedings would be transferred to the CAT. The Transfer Order sealed on 9 July 2021, and CPR PD 30, make clear that the CAT will deal with the Claim from that date. The Claim was registered with the CAT, and assigned the case number set out above, on 10 August 2021. The CAT Rules

> applied from transfer (see too sections 15 and 16 of the Enterprise Act 2002)."

42. On 16th June 2023, the Defendants' solicitors replied citing the judgment in *Sainsbury's (ibid)* which they argued precluded the Rules from applying to cases transferred from the High Court to the CAT. The CAT in the present case (Judgment paragraphs [15] and [16]) described the point arising in the following way:

> "15. The judgment of Barling J in Sainsbury's Supermarkets Ltd v Mastercard Inc and others ("Sainsbury's") considered the application of Rule 119 and Rule 31 to proceedings transferred to the Tribunal from the High Court. Whether or not Barling J's reasoning applies to this case is, as set out later in this judgment, in dispute. Barling J had proposed the transfer following the, then recent, expansion of the Tribunal's jurisdiction to include stand-alone proceedings. The parties' solicitors (the point was not argued by counsel at a hearing) had asked for guidance about the possible impact of Rule 119 on the claim and in particular as to whether the effect of Rule 119 would be that the Tribunal would only have jurisdiction in relation to that portion of the claim for which the cause of action arose less than two years prior to the commencement of the proceedings.
>
> 16. Barling J held that Rule 119 did not apply to the transferred proceedings. His reasoning was as follows:
>
> > "27. Whatever the precise ambit of Rule 119, in my view it could have no application to proceedings such as the present if they were transferred in whole or in part to the CAT pursuant to section 16 of the 2002 Act. The present proceedings have been commenced in the High Court. Therefore what would be transferred to the CAT in such a case would be all or part of an existing claim, whereas it is in my view clear that Rule 119 is only dealing with claims originating in the CAT.
> >
> > 28. Rule 119(1) makes reference to proceedings "commenced before the Tribunal before 1st October 2015". That part of the rule is obviously not relevant to the present proceedings.
> >
> > 29. Similarly with Rule 119(2). It has the effect of applying Rule 31(1) to (3) of the 2003 Rules "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 […] proceedings under section 47A of the 1998 Act …". That has no application here for at least the following reasons. First, the present claim is not a claim "made on or after" that date. Second, it is in my view not a claim "made …..in …. proceedings under section 47A of the 1998 Act" within Rule 119(2). New Section 47A concerns "the right to make a claim in proceedings under this section"

> (see subsection 47A(5)). That is not an apt description of the present claim, which was made, not in proceedings under that section, but in the High Court under the latter's own jurisdiction, which is not dependent on New (or Old) Section 47A. Third, it is clear from the wording of Rule 31 of the 2003 Rules that that rule too applies only to claims originating in the CAT. Thus: "The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a)…." (Rule 31(3)), and "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…." (Rule 31(4)). (original italics)
>
> 30. Therefore, regardless of whether Rule 119 (and Rule 31 of the 2003 Rules) applies only to follow-on (and not to stand-alone) claims, which the claimant's solicitors say is the subject of current debate, it would have no application to the present proceedings if they were transferred in whole or in part to the CAT under section 16. I can see no grounds on which it could reasonably be argued that a different limitation period would apply by reason of a transfer in circumstances such as the present."

43. On 17th August 2023, the Claimants filed a Reply maintaining that the claim was in time but in the alternative reserving the right to rely on section 32 LA 1980 on deliberate concealment.

44. On 29th September 2023 the CAT granted the application of the Defendants for limitation to be heard as a preliminary issue and gave directions for relevant disclosure. On 25th January 2024, the day before the date upon which the Claimants' disclosure was due in relation to limitation issues under the LA 1980, the Claimants notified the Defendants that their position was that by filing the Claim Form in the Tribunal within two years of 25th March 2021 the claim was in time and that it would now not be argued that the High Court proceedings were in time.

45. This meant that the only issue for determination by the CAT was whether the claim was validly constituted in the CAT under sections 47A and 58A CA 1998 and the Rules. The Defendants' response was that the issuance of a Claim Form issued under and in conformity with Rule 30, and in time under Rule 119, could not rescue a claim that was (now by common accord) already time barred in the High Court; but in the alternative the Claimants were contractually estopped from asserting that the effect of the transfer was to render the claim in time, even if it was under the relevant legislation and rules.

E. The Judgment under appeal

The judgment on limitation

46. The CAT dismissed the objection based upon limitation. The relevant reasoning is in paragraphs [41]-[52] of the Judgment. In summary the CAT held as follows.

47. First, it was common ground that the issue turned upon the interpretation of the words "*made a claim*" in Rule 30 which stipulated that a claim under section 47A CA 1998 "*shall be made by filing a claim form*". It then mandated the information to be included and the other requirements to be satisfied when filing the Claim Form. The "*natural corollary*" of the description in Rule 30 of the steps to be taken in order to make a claim was that, if those steps were taken, a claim was "*made"* for the purposes of the Rules, including Rule 31 of the 2003 Rules which incorporated the concept of making a claim. It followed that since a Claim Form had been filed in accordance with the Rules a valid claim had been initiated in the CAT which was in time. All of this flowed from the natural meaning of the words used in the Rules in their proper context.

48. Secondly, the CAT rejected the suggestion that the apparent intention of the High Court in transferring proceedings, or the position of the parties in correspondence, was relevant. These were matters extraneous to the operation of the Rules which were to be construed objectively, independently and according to their own lights:

> "49. The fact that the filing of the Claim Form was envisaged in the Transfer Order as being by way of substitution for the Particulars of Claim in the High Court, and more generally the fact that the parties appear from the correspondence and court documents referred to above to have understood the filing of the Claim Form to be a continuation of transferred proceedings rather than as the making of a free-standing claim, do not affect the legal consequences of the filing as regards limitation periods, which are contained in the Rules themselves. We accept the Claimants' submission that, in the interests of legal certainty, rules on limitation should be construed objectively and the question of whether the filing of a Claim Form has successfully interrupted the running of time should not turn on a state of affairs extraneous to the form itself or on the parties' understanding."

49. Thirdly, the argument that references in Rules 30 and 119 to the making of a claim were to be read restrictively to exclude the filing of a Claim Form carried out as the continuation of proceedings transferred from the High Court, was wrong. The headings to Rule 30 ("*COMMENCEMENT OF PROCEEDINGS*" and "*Manner of commencing proceedings*") did provide some support for a restrictive construction. However, that overstated the position. Paragraph [19.7] of Bennion on *Statutory Interpretation* (8th Edition) ("*Bennion*") stated that a heading was treated as part of an Act and could be considered in construing any provision of the Act, provided however that proper account was taken of the fact that it served merely as a brief guide to the material to which it related and that it might not be entirely accurate. The CAT cited Bennion in similar vein in relation to subordinate legislation: "*As with Acts, when interpreting delegated legislation the significance to be attached to each component should be determined according to its function. … Headings may be referred to in interpreting delegated legislation, but it is important to bear in mind that the function of a heading is merely to serve as a brief guide to the material to which it relates and may not be comprehensive*." It held:

> "46. Whilst some limited weight is to be given to the references in the headings of Rules 30 and Rule 31 and in the body of Rule

> 119 to "commencement", "commencing" and "commenced", the use of these words does not, in our view, mean that a Claimant who files a Claim Form in accordance with Rule 30 has failed to make a claim for the purposes of the Rules. Plainly the filing of the Claim Form will in most cases be at the commencement or initiation of proceedings. It does not, in our view, follow that "commencement" is to be read in an exclusionary sense so as to deprive the filing of a Claim Form, in proceedings that have previously been transferred from the High Court, of the significance which this step would otherwise have for the purposes of the Tribunal Rules. No cogent reason was put forward by the Defendants as to why the filing of a Claim Form in transferred proceedings should be treated differently from the filing of a Claim Form unconnected to a transfer. Moreover the filing of the Claim Form in proceedings transferred from the High Court is the commencement of proceedings in the Tribunal; it is the necessary first step in a different jurisdiction, sufficient to set in train a process, in that jurisdiction, that leads to a decision establishing a legal liability."

50. Fourthly, the CAT rejected the argument that the Claimants' construction of Rule 31 of the 2003 Rules would lead to arbitrary consequences depending upon whether Particulars of Claim had been served in the High Court prior to transfer. The CAT considered that, to the contrary, it was the Defendants' analysis that would lead to arbitrary results:

> "50. … . If Particulars of Claim had already been served, there would be no need for a separate Claim Form in the Tribunal and no issue would arise as to the application of Rule 31. It would be open to the Claimant to file a separate Claim Form in the Tribunal, if needed, in order to ensure that the claim was not time-barred or to obtain a waiver of the limitation defence. The fact of the first set of proceedings would not render the Claim Form or the second set of proceedings a nullity even if the claimant in the position of making two separate claims in the same matter would be at risk of having one or other of those proceedings struck out for abuse of process. In the Tribunal's view, it would be arbitrary and anomalous if, as the Defendants submitted, the filing of a Claim Form by reference to proceedings transferred from the High Court would have no effect on the running of time for limitation purposes whereas an identical Claim Form filed on the same day but without reference to the transferred proceedings would stop time running. It would mean that a purely procedural choice being exercised for convenience as to the nature and standing of otherwise substantively identical filings would provide a complete defence to a claim which either no party had intended or one party had intended but had allowed the other to do."

The CAT further rejected the argument that Rule 31 of the 2003 Rules would prejudice Claimants in that a claim commenced within time in the High Court risked becoming time barred as a result of the transfer and the consequential application of Rule 119 which excluded limitation periods under the LA 1980. The argument was "*misconceived*" (Judgment paragraph [51]).

51. Finally, in relation to *Sainsbury's*, the judgment provided "*some apparent support*" for the Defendants' case in so far as the High Court held that Rule 119 had no application to the transferred proceedings in that case upon the basis that the proceedings were "*made*" in the High Court, not in the CAT: Judgment paragraph [47]. The Court had held that Rule 31 applied only to claims "*originating*" in the CAT. The CAT held that this judgment was "*clearly distinguishable from the present case*". The issue there was whether proceedings brought *within* limitation periods under the LA 1980 would be rendered time-barred upon transfer of proceedings to the CAT by virtue of the operation of Rule 119 and Rule 31 of the 2003 Rules to claims under section 47A CA 1998 arising more than two years before the transfer and hence outside the period laid down in Rule 31. The High Court held that, in such circumstances, the Rules did not serve to apply a limitation period which would not otherwise apply, save by virtue of the transfer, and which would frustrate what was a validly constituted claim in the High Court.

The judgment on contractual estoppel

52. The CAT (Judgment paragraphs [56]-[62]) rejected the contractual estoppel argument:

    i) As of the date of the Transfer Order in July 2021, and for nearly two years afterwards, it was common ground that the Claimants could bring a valid, in time, claim by filing a Claim Form in the Tribunal. It followed that the Defendants had no "*accrued right*" to defeat a prospective claim made within the Rule 31 period. Such accrued rights as the Defendants possessed were to defeat the existing claim "*as constituted in this Court*" i.e. in the High Court. The reference to "*accrued rights*" in paragraph 9(2) of the Transfer Order did not include a right to defeat a future claim which at the time of the Transfer Order could properly be made under different rules.

    ii) Moreover, there was no inconsistency between the Claimants' reliance on the period in Rule 31 of the 2003 Rules and their agreement that neither the Transfer Order nor the transfer itself would affect the Defendants' accrued rights. This was because the Claimants' reliance on the Rule 31 period did not entail an assertion that the Transfer Order or the act of transfer itself had any effect on accrued rights.

    iii) Paragraphs 6 and 7 of the Transfer Order, which provided for the Claimants to file a Claim Form in the Tribunal in accordance with Rule 30 "*instead*" of Particulars of Claim, did not evidence an agreement that the Claim Form would have no function other than that of Particulars of Claim in the High Court.

    iv) Particularly clear wording would have been required to support an argument that the effect of paragraph 9(2) was that the Claimants were agreeing to give up the right to bring a claim within the Rule 31 period: see S*tocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75 at paragraph [23]; *Bahamas Oil Refining International Ltd v Owners of the Cape Bari Tankschiffahrts [2016]*

> *UKPC 20* ("*The Cape Bari*") at paragraph [33]; and *First Tower Trustees Ltd v CDS Superstores International) Ltd* [2018] EWCA Civ 1396 ("*First Tower Trustees*") at paragraph [94]. There was no clear wording that the Claimants were intending, by agreeing to the Transfer Order, to give up the valuable right to bring a claim within the two year limitation period. Paragraph 9 was a "*boilerplate*" clause the purpose of which was to ensure that the transfer did not affect the parties' substantive rights. There was "… *no conceivable reason why the Claimants would have agreed to give up their prospective right to bring a claim within the Rule 31 period*" and there was nothing in the Transfer Order to suggest that this was intended.

F. Ground 1: Limitation

The submissions of the Appellants

53. In their written submissions the Appellants encapsulated their criticism of the Judgment in the following terms:

> "It is submitted that the Tribunal has fundamentally erred in its construction of the 2015 Rules. The Tribunal rightly recognised that the Claimants' claim was the continuation of proceedings commenced in the High Court rather than a new claim. It was always open to the Claimants to file a new claim in the Tribunal but they did not do so. In those circumstances, the Claimants' claim was not "made" in the Tribunal under s. 47A CA 1998; it was "made" in the High Court and then transferred to the Tribunal. As was previously rightly held by Barling J in Sainsbury's Supermarkets Limited v Mastercard Incorporated [2015] EWHC 3472 (Ch) ("Sainsbury's"), the time limits in the 2015 Rules have no application to transferred claims. It would be extraordinary if the consequence of transferring a claim from one forum to another would be to render in time a claim which had previously been out of time. Moreover, such a construction of the 2015 Rules could, in other cases, operate to the detriment of Claimants by rendering out of time under the 2015 Rules a transferred claim which had been in time in the High Court under the LA 1980. The wording of the legislation, legal certainty and common sense militate against the Tribunal's conclusion."

54. In oral argument, Ms Ford KC for the Appellants reduced the point to its basics: "*This [was] not a claim made within the CAT within the two year limitation period provided for in Rule 31. It was made in the High Court in 2019, and we say transferring the already constituted claim over from the High Court to the CAT doesn't constitute making a claim*… [in the CAT]". The Appellants support this submission with a more detailed exegesis of the relevant statutory provisions.

55. First, sections 2 and 9 LA 1980 govern limitation and preclude tortious claims, such as the present, upon the expiration of six years from the date on which the cause of action accrued. Section 32 LA 1980 extended limitation where the defendant had deliberately concealed any fact relevant to the claimant's right of action. In *Gemalto* (*ibid*) it was held that: (i) time ran from the point at which "… *the claimant recognises that it has a*

worthwhile claim, and that a worthwhile claim arises when a reasonable person could have a reasonable belief that (in a case of this kind) there had been a cartel." (paragraph [45]); and (ii), the claimant knew enough (on the facts of that case) to hold an objectively reasonable belief that there had been an unlawful cartel in which the defendants had participated at the time that the relevant Statement of Objections had been published (paragraph [55]). On the facts it was "… *obvious that, once the regulator publicises the fact that it believes, subject to defences, that there is a prima facie case that certain persons have participated in an unlawful cartel, a claimant knows that it has a worthwhile claim*" (paragraph [58]). It followed from *Gemalto* that, in the present case, because of the publication of the Commission Press Release announcing the Statement of Objections in July 2012, the Claim Form was issued in June 2019 outside the limitation period, and the High Court proceedings were time-barred. This was now common ground.

56. Secondly, Rule 119 was correctly analysed in *Sainsbury's* where it was held that it had no application to proceedings transferred to the CAT pursuant to section 16 EA 2002. It applied only to entirely new claims initiated in the CAT. The present proceedings had been commenced in the High Court and the CAT was dealing only with that part of the High Court claim which had been transferred, not a new claim. Rule 30 and Rule 31 of the 2003 Rules applied only to new claims initiated in the CAT. The attempt by the CAT to distinguish *Sainsbury's* led to arbitrary results.

57. Thirdly, the above conclusions were supported by recourse to Parliamentary intent. The Defendants had an accrued right under the LA 1980. In *Merricks v Mastercard* [2023] CAT 15 at paragraphs [31]-[32] and [39] ("*Merricks*") the CAT rightly declined to interpret the CAT's transitional provisions on limitation in a manner that overrode accrued limitation rights. This Court ([2024] EWCA Civ 759) at paragraphs [153]-[154]) agreed referring to Parliamentary intent:

> "153. … 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 …"

The effect of the Judgment under appeal deprived the Appellants of their accrued defence by permitting the claim filed in the High Court and transferred to the CAT to proceed notwithstanding that the High Court claim was admittedly out of time when it was made, which was contrary to the Parliamentary intent to preserve accrued rights.

58. Fourthly, it followed from all of this that under Rule 119 and Rule 31 of the 2003 Rules a claim was "*made*'" when proceedings were first commenced, which in this case was in the High Court. When they were transferred, they were a continuation of High Court proceedings and were not new proceedings. Accordingly, no new limitation period applied. This conclusion was supported by a natural reading of the legislative wording.

The Rules equate '*making*' a claim with '*commencing*' a claim and in this case the claim was commenced in the High Court, not the CAT:

i) Rule 30, setting out the steps to be taken to make a claim, is found in the section of the Rules headed "*Commencement of Proceedings*" and is itself headed "*Manner of commencing proceedings under section 47A of the 1998 Act*".

ii) Rule 119 draws a chronological distinction between claims "*commenced*" before the Tribunal before 1 October 2015 and claims "*made*" after 1 October 2015 thereby equating the two concepts and treating them as coterminous.

iii) Rule 31 of the 2003 Rules appears under the heading "*Commencement of proceedings*" and then a sub-heading "*Time limit for making a claim for damages*" which also equates commencement of proceedings with making a claim. The headings to sections are admissible guides to construction.

Conclusion on limitation

Introduction – the nature of the argument

59. In my judgement the CAT did not err. The Claim Form is expressed as, and purports to be, a section 47A claim filed in the CAT under Rule 30 to engage a jurisdiction that is discrete from the High Court, to hear a follow-on claim for damages. It was issued in time and in full compliance with the Rules. Upon being pressed by the Court as to what it was that rendered the Claim Form irregular and invalid as an instrument engaging the follow-on jurisdiction of the CAT, the Appellants accepted that: (i) had the Claimants abandoned the High Court proceedings before filing the Claim Form no limitation defence could arise; and/or (ii), had the Claimants issued (for the avoidance of doubt and upon a protective basis) two identical Claim Forms in the CAT one would have served validly to initiate in time section 47A proceedings in the CAT.

60. The issue arising upon this appeal is odd. I question whether the defence is, properly analysed, a limitation defence at all. Limitation defences are based upon the effluxion of time. But that is not the case here since the Defendants seek to oust the operation of the two year limitation period in Rule 119 solely upon the basis of an alleged procedural omission (to abandon the prior proceedings), a matter which has nothing to do with the passage of time. It is that procedural omission alone which, the Appellants say, maintains the nexus between the old High Court proceedings and the CAT proceedings and thereby renders the section 47A proceedings invalid and boot straps the LA 1980 limitation period into the CAT proceedings to oust the otherwise applicable limitation period under Rule 119.

The ordinary and natural meaning of the CAT Rules

61. First, there is the natural and ordinary meaning of the Rules to consider. Under Rules 30 and 119 the concept of the making of a claim and the commencement of a claim are interlinked with the filing of a Claim Form. Rule 30 states: "*A claim under section 47A of the 1998 Act … shall be made by filing a claim form*". Once the Claim Form is filed the claim is therefore "*made*". And "*made"* can only mean a claim made *in* the CAT under section 47A CA 1998 to be brought to trial in and by the CAT. The reference to commencement in the heading must be seen in this context such that a claim is

commenced when the Claim Form is filed at which point in time the claim is made, and therefore commenced. It is perhaps a statement of the obvious that the Rules govern proceedings "*in*", and only *in,* the CAT. When proceedings are *in* the CAT they are proceedings *of* the CAT and not of some other Court. Verbs such as to commence, and to make, cannot sensibly be construed by reference to the conduct of parties in different Courts over which the CAT has no jurisdiction and no control and to which the Rules do not apply. The CAT was correct to hold (Judgment paragraph [75]):

> "As a matter of the ordinary meaning of the legislation, the Claimants' interpretation is clearly incorrect. The 2015 Rules equate 'making' a claim with 'commencing' a claim (see §41 above). It is unsustainable to treat the references to "made" in Rule 31 (of the 2003 CAT Rules) and Rules 30 and 119 (of the 2015 CAT Rules) as meaning simply transferring an already existing claim to the CAT."

62. Secondly, the above conclusion is consistent with the proper approach to construction:

i) The Appellants' interpretation renders the operation of the Rules dependent upon arbitrary prior events. In my judgement the Rules must be construed as self-contained, comprehensive and forward looking. They cannot be interpreted by reference to facts and matters which are outside their purview. Ms Ford KC, for the Appellants, was at pains to confirm that their submission rested exclusively upon an objective analysis of the language of the Rules and that it was wrong to say that it relied upon bringing prior events into play. With respect this rather papered over the cracks in the argument since, as became clear during oral argument, the pivot upon which the Appellants' case depended was the fact that the prior High Court proceedings had not been formally abandoned. In response to the Claimants' argument that in law their section 47A proceedings had to be analysed exclusively under the Rules and not by reference to anything else, Ms Ford KC countered that this was not "…*what was actually going on*" and was "… *not what the Tribunal found to have been going on*". In other words, it was the history that mattered. I agree with the CAT (Judgment paragraph [49], set out at paragraph [48] above) which observed that in the interests of legal certainty, rules on limitation should be construed objectively and should not turn upon a state of extraneous affairs or upon the parties' subjective understanding.

ii) The only provisions of the Rules that do contemplate extraneous events are Rules 71 and 72, on transfers. However, these do not alter the essential premise that the Rules are forward looking. Rule 72 governs transfers *to* the CAT from other courts and addresses what happens when the statutory power of transfer under section 16 EA 2002 is exercised. There is no support in section 16 EA 2002, or in Rule 72, for the Appellants' argument that in some way once a case is transferred *to* the CAT it remains a High Court case. As already set out (paragraphs [25] and [26] above) the process of transfer is legally complete, and the role of the High Court at an end, when the Court deposits on the counter of the CAT Registry the notice of transfer and the relevant case documents. Nothing contemplates that such strictly limited, bare minimum, acts of transmission mean that the High Court then stages a takeover of the CAT or that the CAT then takes on the burden of trying a High Court case which includes an ouster of its own limitation rules. To the contrary the assumption

underpinning section 16 EA 2002 and Rule 72 is that, upon the act of transfer having taken place, the proceedings are henceforward CAT proceedings subject to its Rules and the procedures set out therein, which includes provisions on limitation.

iii) The Rules are also to be construed in the light of Rule 4 (General Principles - see paragraphs [15] and [16] above) which eschews formality and does not allow form to triumph over substance. The Appellants' case however does just that. It proceeds upon the basis that an ostensibly regular claim is irregular because of a procedural omission which is external to and uncontemplated by the Rules. That omission is the failure to take a wholly unnecessary procedural step, namely the abandonment of a prior High Court claim. The Appellants' interpretation of Rules 30 and 119 collide, in my view violently, with the General Principles of fairness, justice and proportionality, which guide the construction and operation of the Rules. The conclusion that the Appellants' argument is purely procedural and amounts to form over substance is reinforced by the fact that had the Appellants laid bare before the High Court their argument that the act of transfer would, *itself*, generate a new limitation argument, the High Court could (and probably would) have nipped the argument in the bud. The Court could have: made transfer conditional upon a waiver of the argument; resolved the issue itself because it was relevant to the exercise of its discretion under section 16 EA 2002; or even, declined to make the order leaving the Claimants to go ahead (as in any event they intended) to issue a Rule 30 Claim Form in the CAT without however the accompanying baggage of a judicial act of transfer.

63. Thirdly, the above conclusion is also supported by reference to legislative intent. This can be considered by reference to the legislative purpose behind: (i) section 16 EA 2002 on transfers to the CAT; and (ii), sections 47A and 58A CA 1998 on the use of the CAT as a forum of choice for competition claims, including follow-on actions:

i) ***Section 16 EA 2002***: Section 16 is silent and neutral about limitation. It does not purport to affect claims in the CAT which are within limitation. Whether a claim can proceed is considered by applying the two different rules on prescription under the LA 1980 and Rule 119. If it is in time under one or other or both then it can be heard in either the High Court or the CAT as the case may be[2]. Ms Ford KC for the Appellants accepted in argument that it was "… *absolutely right that Parliament envisaged there would be parallel and different limitation provisions in both the High Court and in the CAT"*. However, she also argued that this did not mean that if proceedings were transferred, they stopped being High Court proceedings and thereby became subject to a different limitation rule. She argued that Parliament intended under the LA 1980 that a claim commenced in the High Court that was time-barred under that regime conferred an accrued limitation right to defeat that claim, wherever it might seek to re-emerge, and whether or not it recast itself as a follow-on action. The Rules should not be construed, she argued, to defeat that accrued right unless that was

[2] If a claim can be brought within limitation in the High Court (stand-alone) *and* the CAT (follow-on) then steps would no doubt be taken to ensure that there was no duplication of proceedings. Given the legislative importance attached to the role of the CAT, the assumption must be that follow-on proceedings in the CAT will take precedence over parallel proceedings in the High Court.

"*unavoidable*" as a matter of interpretation. I respectfully disagree. Parliament cannot have intended that the pragmatic and sensible but essentially procedural process of transfer under section 16 EA 2002 could undermine the quite different fundamental right of access to a Court by the stifling of a legitimate, in time, statutory right to bring a claim. Parliament knew when it enacted sections 47A and 58A CA 1998 and Rule 119 (because it flows inexorably from the statutory language) that it was creating a parallel and different system of limitation governing tortious follow-on claims, to that under the LA 1980. It will have been equally obvious that under these parallel regimes there would be circumstances where a claim was time barred under the LA 1980 but not under section 47A, and possibly even *vice versa*. Had Parliament wished to legislate that a claim time-barred under one regime became automatically time-barred under the other regime, to remove the possibility of different or overlapping limitation periods, it could have done so. But it did not, for the reason that the two limitation periods addressed different situations and policy objectives. In the case of section 47A, Parliament allowed for claims to be filed for two years from the day upon which a regulatory decision became final in order to enhance the legal vigour of the regulatory process, to ease the burden on claimants who were the victims of proven, proscribed, illegal, anti-competitive behaviour, and to increase the *ex-ante* incentive on undertakings to comply with the law. In section 47A CA 1998 Parliament created a form of statutory *res judicata*. None of these considerations apply to stand-alone claims under the LA 1980. I therefore reject the submission, by reference to Parliamentary purpose, that there is a logic based upon legal certainty and accrued rights in the limitation rule in the LA 1980 ousting the limitation rule in Rule 119, simply by reason of a procedural transfer of a case to the CAT. It is relevant that the LA 1980 expressly contemplates, in section 39, that it does not apply "… *to any action … for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act)*…". Rule 119 is just such an "*other enactment*". There is no legislative intent reflected in the LA 1980 to accord precedence to a specific rule under the LA over other limitation periods adopted for other policy reasons in other measures.

ii) ***Sections 47A and 58A CA 1998***: The Appellants' submission should be also considered against the objective of Parliament in instituting the CAT as a specialist forum for the resolution of competition law claims. It is a preferable forum (to the courts) because it: sits with specialist judges (which includes High Court judges), economists, accountants and others with relevant business experience; is subject to a regime of specialist rules designed to facilitate the management of complex antitrust claims; and is supported by a specialist administration. These advantages were adverted to by Barling J in *Sainsbury's* as cogent reasons why the claim before him should be transferred from the Chancery Division of the High Court to the CAT. Since the setting up of the CAT, Parliament has further decided that jurisdiction for follow-on claims under section 47A can lie in the CAT. Given this, if Parliament had contemplated that High Court actions transferred to the CAT should nonetheless remain to be tried by the CAT as High Court claims, or that the CAT should somehow become the High Court upon a transfer, that would have involved a major policy shift away from the legislative objective that the CAT should be an independent, self-standing and separate, forum of choice for competition law claims. Had this

> been contemplated by Parliament it would, assuredly, have been writ large on the face of the legislation, covered by the rules of both the CPR and the CAT, and would be described in the PD and the CAT Guide. Further, there would, somewhere in (admissible) material preparatory to the relevant legislation have been a discussion of such a novel procedural development. But there is none of this.

The judgment in Sainsbury's – the exercise of the power to transfer proceedings under section 16 EA 2002 cannot affect existing rights to bring an in time claim.

64. The Appellants rely heavily upon the judgment in *Sainsbury's*. The claim was for an alleged breach of competition law where the claim in the High Court was within limitation for a stand-alone claim (6 years). In the course of a case management hearing the judge (Barling J - who was simultaneously President of the CAT) raised of his own motion with the parties whether, in view of the recent expansion of the jurisdiction of the CAT pursuant the Consumer Rights Act 2015 to hear damages claims, it was appropriate to transfer the claim to the CAT under section 16 EA 2002. He pointed out (judgment paragraph [15]) that Parliament had recognised that competition law was an area justifying a specialist court given the "*almost ubiquitous*" presence of complex expert economic, accounting and other evidence. The judge intended that upon transfer the case would come to him, *qua* CAT President, to case manage. In correspondence with the Court the parties indicated agreement subject to clarification on two points, one of which concerned limitation. The concern of the claimant was that upon transfer, Rule 119 and Rule 31 of the 2003 Rules might time-bar all or part of this otherwise valid claim because it might be contended that the two year limitation period applied to stand-alone claims as well as follow-on claims.

65. The Judge did not hear oral argument, nor did he receive written submissions. But he was manifestly loath to interpret the law in a manner which would lead to such a result. He issued a judgment making clear that a transfer under section 16 EA 2002 could not lead to the extinction of a valid claim. He declined to express a definitive view upon the scope of Rule 119 and Rule 31 of the 2003 Rules. In paragraph [27] he prefaced his observations on section 16 EA 2002 with the words "*whatever the precise ambit of Rule 119…*" Then in paragraph [30] he stated:

> "Therefore, regardless of whether Rule 119 (and Rule 31 of the 2003 Rules) applies only to follow-on and not to stand-alone claims, which the claimants solicitors say is the subject of current debate, it would have no application to the present proceedings if they were transferred in whole or in part to the CAT under section 16. I can see no grounds on which it could reasonably be argued that a different limitation period would apply by reason of a transfer in circumstances such as the present."

66. The logic underlying the judgment was that the CAT was a superior forum in which to litigate, in time, competition law claims. I agree with Barling J that a transfer under section 16 EA 2002 is incapable of extinguishing an in time claim upon receipt by the CAT. Had the judge been confronting the converse situation, such as arises here, where the parties invited the Court to transfer an out of time stand-alone claim to become an in time follow-on claim in the CAT, I conclude the judge would have endorsed the use

of section 16 EA 2002 to achieve just such an end. His view was that section 16 conferred upon him the power to engage the independent jurisdiction of the CAT to hear the claim but that questions of limitation were discrete matters unaffected by the transfer.

67. Attached to the judgment is the order of transfer. It provided that unless the CAT ordered otherwise the filing with the CAT of the High Court trial bundles would satisfy the requirement of Rule 72(2)(1). The order also directed that the requirement to hold a case management conference under Rule 72(3) be dispensed with save that all future proceedings scheduled to be heard in the High Court should henceforward proceed in the CAT before the Chair of the CAT, which just happened to be Mr Justice Barling.

68. The judge made plain his imperative to preserve the claim. In paragraph [34] he stated:

> "For the avoidance of doubt I also record that my intention is that neither the order which I propose to make to give effect to the transfer, nor the transfer itself, should in any way alter, limit or exclude in any respect any element of the claimant's claim as constituted in this court prior to the transfer taking effect. I will make this clear in the order itself."

To give effect to this in the Order he added the following:

> "For the avoidance of doubt neither this Order giving effect to the said transfer, nor the transfer itself, is intended to alter, limit or exclude in any respect any element of the claimant's claim as constituted in this court prior to the transfer taking effect. If and to the extent that any element of the claimant's claim as constituted in this court prior to the transfer taking effect is not capable of falling within the jurisdiction of the CAT on a transfer, or would be altered, limited or excluded by this Order or the transfer, it is not subject to this Order and remains within the jurisdiction of this court. This court may give such further directions or make such further order as it thinks fit in connection with the transfer and/or with any such element as referred to above."

69. The judgment turns upon the scope and effect of section 16 EA 2002. The judge was correct that the exercise of that power could not invalidate an otherwise valid claim. The judge did not consider Rule 30 and he was not seeking to lay down a definitive view on the scope and effect of Rule 119 and Rule 31 of the 2003 Rules. The Appellants say that the judge held that the time limits in the Rules had no application to a transferred claim (stand-alone or follow-on): See paragraph [53] above. I do not however read the judge as suggesting (cf paragraphs [27]-[30] set out above at paragraph [42]) that the Rules did not apply to a transferred claim; but if he did, I respectfully disagree. To interpret the Judgment in this manner is, in my view, an extrapolation too far. Such a conclusion is inconsistent with the tenor of the judgment which was related to the scope and effect of section 16 EA 2002, not to the Rules, and would also be inconsistent with the view of the judge that a section 16 transfer could not undermine an otherwise valid claim. I draw from the judgment a single minded judicial intention to ensure that a transfer under section 16 EA 2002 did not extinguish

an otherwise valid claim. In my judgement the Appellants gain scant, if any, support for their argument from the judgment in *Sainsbury's.* I also agree with the analysis of the CAT:

> "48. Sainsbury's was not concerned with a case such as the present one in which proceedings were transferred and a Claim Form filed in the Tribunal within the Rule 31 period. In so far as Barling J held that Rule 31 only applies to claims "originating" in the Tribunal, there is no reason to assume that Barling J had such a case in mind. We do not read his judgment as excluding from the category of proceedings "originating" in the Tribunal proceedings in which a claim form has been filed there. We do not consider that Sainsbury's was incorrectly decided."

Arbitrary consequences

70. As to the Appellants' contention that the CAT's interpretation of the legislation creates arbitrary consequences depending upon whether Particulars of Claim have been served in the High Court prior to the transfer, I disagree. Once it is understood that the rules on transfer are intended to increase efficiency in the determination of a dispute, and are not capable of extinguishing otherwise valid claims, and that a claim which is in time under at least one set of legislative provisions can proceed, the consequences of the legislation are reasonable and logical. Further the jurisdiction of the CAT under section 47A does not turn *only* upon a new Rule 30 Claim Form being filed in the CAT (as it was in this case). It could also arise, for example, upon a transfer where no new Rule 30 Claim Form was filed but where pre-existing Particulars of Claim were deemed or directed by the CAT to suffice for Rule 30 purposes. Form does not triumph over substance or fetter the case management powers of the CAT, including its ability to ensure that procedural irregularities do not hinder the efficient conduct of a case. I agree with the CAT (see paragraph [50] above) that it is the analysis of the Appellants that leads to unacceptable consequences.

A postscript on High Court practice

71. It is apparent from a review of cases on the CAT website that there have been a number of in time transfers of cases from the High Court and that various boilerplate terms have been deployed in transfer orders pursuant to which the Court: (i) directed that the transferred proceedings continue to be regarded as having been commenced in the High Court; and (ii), has given directions which, *prima facie*, purport to bind the CAT. Such directions would appear to have no legal basis and do not flow from an exercise of jurisdiction under Section 16 EA 2002. However, nothing in this judgment is intended to indicate that any excess of power on the part of the High Court has any prejudicial or adverse effect upon any existing or future proceedings in the CAT. Once a case is in the CAT it has ample power to adopt a High Court direction as its own, ignore the direction and substitute its own, or otherwise take such case management decisions to enable the case to proceed as it sees fit. Anything which indicates that proceedings before the CAT might be irregular, as not in accordance with the Rules, can be waived or cured by the CAT under Rule 114, but in any event do not, without more, render the CAT proceedings void. I note, in passing, that in *Sainsbury's* Mr Justice Barling, in his capacity as a High Court judge, gave directions as to how the case should proceed in

the CAT *but* his order was rightly made subject to any overriding direction given by the CAT itself.

72. For all the above reasons the appeal on Ground 1 does not succeed.

G. Ground 2: Contractual Estoppel

The issue

73. Ground 2 arises in the event that Ground 1 fails. If the proper construction of Rule 119 and Rule 31 of the 2003 Rules is that the Claimants made a valid claim, then it is argued that, upon the true construction of the Transfer Order, the parties nonetheless agreed that the accrued rights of the Defendants in the High Court are carried over into the CAT proceedings and serve to extinguish the claim there. In written submissions the argument was put in the following way:

> "Further and alternatively, the parties expressly agreed in the Transfer Order that the transfer was without prejudice to the Defendants' accrued limitation rights. Such express agreement gives rise to a contractual estoppel precluding the Claimants from asserting that the effect of the transfer was to rescue their time-barred claim. The Claimants' limitation arguments are an inequitable attempt to circumvent their express promise to that effect and the Tribunal should have found that the Claimants were estopped from seeking to do so."

Relevant principles of law

74. The relevant principles of law are not in dispute. *Chitty on Contracts* (35th edn. Paragraph [7-029]) ("*Chitty*") explains contractual estoppel in the following terms:

> "This form of "estoppel" is said to arise when contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist. The effect of such "contractual estoppel" is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract."

There is no requirement for there to be a representation, reliance, or unconscionability: Chitty paragraph [7-030]. A summary of the leading authorities is found in the judgment of the Court of Appeal in *First Tower Trustees* at paragraphs [47]-[48] and [91]-[93].

75. The Appellants say that under the doctrine parties may bind themselves to a statement they know to be false. Analysing the matter from first principles, Aikens LJ in *Springwell Navigation Corp v JP Morgan Chase Bank & Ors* [2010] EWCA Civ 1221 (itself cited in *First Tower Trustees*) thus explained at paragraph [143]:

> "…there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the

> contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties... A 'conclusive evidence' clause in a sale contract, viz. that a report on e.g. the amount or condition of a commodity sold under a contract between A and B shall be 'conclusive evidence' of the matters stated in the report is to the same effect. The parties are agreeing that the statements in the report shall be the case for the purposes of the contract of sale and the parties cannot go behind that agreement."

Appellants' submissions

76. The Appellants say that properly construed the Transfer Order was consensual and estops the Claimants from denying that the effect of transfer would be to preserve the existing position as regards limitation. They point out that: (i) a consent order, being contractual in nature, can create an estoppel: e.g. *National Westminster Bank v De Kment* [2016] EWHC 3875 (Comm) at paragraph [5]; and (ii), it is possible to alter the applicable limitation period by contract: see *Ofulue v Bossert* [2009] 1 AC 990 at paragraph [55]. By paragraph [9(2)] of the Transfer Order (see paragraph [32] above), or alternatively by the preceding exchange of correspondence, the parties agreed that the transfer of the proceedings to the CAT would not have effect so as to alter, limit, or exclude in any respect any element of the Defendants' accrued rights in respect of any limitation defence. The parties agreed that the Claimants would "*instead*" file a Claim Form in the CAT, as a substitute for the requirement to file Particulars of Claim in the High Court. Since it is (now) common ground that the proceedings before the High Court were time barred the agreement reflected in the Transfer Order binds the Claimants before the CAT.

Conclusion on contractual estoppel

77. I do not accept the Appellants' submission. I agree with the analysis of the CAT summarised at paragraphs [52] above. The nub of the argument is that if the Claimants had no right to proceed in the High Court, then by virtue of the Transfer Order, they agreed that they <u>also</u> had no right to proceed in the CAT, *even though they did*. And moreover the Claimants agreed to this in circumstances whereby it is common ground that: (i) had the Claimants abandoned the High Court proceedings and then filed a Claim Form in the CAT, no estoppel argument could arise; and (ii), under the Transfer Order the Claimants had to perform *every* step required under the Rules to start a claim *de novo* in the CAT and there was therefore no procedural gain to be had in agreeing to the transfer.

78. In contract law theory parties can bind themselves to incorrect and even counterintuitive propositions - *pacta sunt servanda.* This includes agreeing to the treating of states of affairs as true which the parties know to be untrue. But where a Court has to determine whether this is so, it can at least ask whether rational claimants properly advised would agree to such an outcome. In this case why would the Claimants agree, unnecessarily, to run headlong down a blind alley in order to dash a valuable asset to destruction on a brick wall? If the answer is that there is no reason why they would, then this is a strong factor against such an interpretation of a contractual instrument intended to be construed in accordance with business efficacy.

79. The interpretation of the Transfer Order as a judicial instrument is also surely relevant to how it might be construed as a contract. The Transfer Order explicitly contemplates in paragraph 7 (see paragraph [32] above) that the intention of the Claimants was to initiate follow-on proceedings by issuing a Claim Form under Rule 30. Since Rule 30 is concerned with follow-on actions in the CAT the order, properly construed, indicates that the transferring Court intended that new, valid, proceedings be instituted in the CAT. It is hence hard to comprehend why the High Court would countenance the transfer of a claim to a specialist tribunal so that a follow-on action could be commenced and then expertly tried there, but at the same time intend that the order it made thwart that very result coming about. What the Court intended must be of some material relevance to how the order, *as a contract*, should be interpreted. Why else would the parties seek to reflect their agreement in a court order?

80. At all events, as a matter of contractual construction, the short answer to the Appellants' case is, as the CAT correctly concluded, that the "*accrued*" rights specified in paragraph [9] refers to such rights as the Defendants had in the High Court i.e. in a stand-alone claim under the LA 1980 prior to the transfer, and not to a claim that had not yet been commenced in an entirely different forum which all parties accepted could be legitimately commenced by the Claimants. This is buttressed by references in paragraph [9] to the accrued right being "*in respect of a defence as constituted in this court*", ie in the High Court. For these reasons I reject Ground 2.

H. The Respondents' Notice

81. It is strictly unnecessary to address the Respondents' Notice since the two Grounds of Appeal fail. However, for the sake of completeness I address the principal argument advanced. The Claimants seek to rely upon an additional ground which the CAT did not rule upon. If they are correct, then even if the Grounds of Appeal were sound and the claims against the 1st to 11th Defendants fell away, the claim against the 12th Defendant would remain valid.

82. The Claimants argue as follows. The action against the 12th Defendant was commenced by means of the amended Claim Form filed in the CAT on 17th March 2023, after the transfer of proceedings to the CAT. Permission to amend was given by the CAT under Rule 38, on 14th March 2023. It was unopposed. The claim had never before been advanced in the High Court. The claim was made after 1st October 2015 so that the time limit in Rule 31 of the 2003 Rules applied and the claim was made before limitation expired. Whatever the position *vis-à-vis* the other Defendants, the action against the 12th Defendant is valid.

83. The 12th Defendant disagrees. It argues that, for the purposes of applying relevant limitation rules, the proper unit of analysis is the overall "*set of proceedings*" i.e. the High Court proceedings into which the 12th Defendant was inserted. The claim against the 12th Defendant thus remains in a claim started in the High Court. The 12th Defendant relies also upon section 35 LA 1980 and the concept of "*relation back*" which, it is said, means that when the amendment was made it related back to the original action, which (again) was the High Court stand-alone action to which the prescription rules in the LA 1980 applied.

84. I propose to deal with this point briefly. In my judgement the point raised by the Claimants in the Respondents' Notice is correct. The premise underlying the

Appellants' main argument is that the proceedings in the CAT remain High Court proceedings *because* they were not severed (by abandonment) from the prior High Court proceedings against the Defendants. But that is not the case in respect of the 12th Defendant who was not a party to the High Court proceedings and against whom there was nothing to be abandoned or severed. The essential logic behind the Appellants' (*ex hypothesi* valid) case on limitation simply does not apply.

85. I agree with the analysis of the Respondents that the "*language and architecture*" of all the relevant legislative measures on limitation "… *require analysis at the level of individual claims and the individual causes of action to which they correspond.*" Rule 119 is framed by reference to an individual claim, its particular subject matter (Rule 119(3)(a)), when it arose (Rule 119(3)(b)), and when it was made (Rule 119(2). It also encompasses a claim *within* a set of proceedings (Rule 119(2)(a)). Rule 31(1)-(3) of the 2003 Rules equally treats a "*claim*" as corresponding to a single cause of action (Rule 31(1), (2)(b) of the 2003 Rules). This is consistent with the LA 1980, which, in providing time limits for bringing "*actions*" (section 1(1)), treats an "*action*" as corresponding to a single cause of action (subsections (2) and (9)). "*Action*" is defined in section 38(1) as including "*any proceedings in a court of law*". None of this implies or suggests that limitation under the LA 1980 is determined by reference to a set of proceedings *as a whole*, without reference to individual causes of action.

86. The Appellants refer to the concept of "*relation back*" in section 35 LA 1980, which provides that:

> "… any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced …
> (b) … on the same date as the original action".

The Appellants also cite *Viegas v Cutrale* [2024] EWCA Civ 1122, at paragraphs [16(i)] and [31]-[32], which discusses the scope of section 35. However, the facts were very different, and the analysis therein is not on point. Section 35 in fact makes clear that a new claim introduced by amendment is a "*separate action*". The concept of separateness must mean that in a case such as the present the claim against the 12th Defendant is separable (i.e. severable) from that against other Defendants in respect of whom (on the present hypothesis) the claims are time barred. Being "*separate*", the claim against the 12th Defendant is, as drafted and as constituted under the Rules, a new claim *in* the CAT pursuant to section 47A CA 1998 which is legally discrete from any other claim. The "*original action*" referred to in section 35, which is the benchmark for the relating back, can only mean the section 47A proceedings initiated against the 12th Defendant in the CAT. It cannot mean the action in the High Court to which the 12th Defendant was never privy and where it therefore had no *lis* with the Claimants.

I. Disposition

87. For all of the above reasons I would dismiss the appeals

Lord Justice Phillips :

88. I agree.

Sir Julian Flaux, The Chancellor of the High Court :

89. I also agree.