Neutral Citation Number: [2015] EWCA Civ 883
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE SIMON

Case No: A3/2014/3813

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2015

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE RICHARDS
and
LORD JUSTICE PATTEN

BETWEEN:

(1) ARCADIA GROUP BRANDS LIMITED and others
(2) ASDA STORES LIMITED
(3) B&Q PLC
(4) COMET GROUP LIMITED (in liquidation)
(5) DEBENHAMS RETAIL PLC and others
(6) HOUSE OF FRASER (STORES) LIMITED
(7) ICELAND FOODS LIMITED
(8) NEW LOOK RETAILERS LIMITED
(9) NEXT RETAIL LIMITED
(10) RECORD SHOP 2 LIMITED (in liquidation) and others
(11) WM MORRISON SUPERMARKETS PLC
(12) ARGOS LIMITED and others **Claimants/Appellants**

— and —

(1) VISA INC
(2) VISA INTERNATIONAL SERVICE ASSOCIATION
(3) VISA EUROPE LIMITED
(4) VISA EUROPE SERVICES INC
(5) VISA UK LIMITED **Defendants/Respondents**

Fergus Randolph QC, Christopher Brown, Max Schaefer (instructed by **Stewarts Law LLP**) for the **Appellants**
Dinah Rose QC and Brian Kennelly (instructed by **Milbank Tweed Hadley & McCloy LLP**) for the **First and Second Respondents**
Stephen Morris QC and Anneli Howard (instructed by **Linklaters LLP**) for the **Third to Fifth Respondents**

Hearing dates : 21 and 22 July 2015

Approved Judgment

The Chancellor of The High Court (Sir Terence Etherton) :

1. This is an appeal by the claimants from the order dated 11 November 2014 of Simon J by which he ordered on summary judgment applications by the defendants that (1) the claimants are not entitled to rely on section 32(1)(b) of the Limitation Act 1980 ("the 1980 Act"); and the claims are time barred pursuant to sections 2 and 9 of the 1980 Act insofar as they seek damages or restitution in respect of a period earlier than six years prior to the commencement of the proceedings and are dismissed; and (2) references to any earlier claims, dates and periods are struck out pursuant to CPR 3.4(2)(a) or amended pursuant to CPR 17.1(2).

The background

2. The twelve appellants are retailers who have each begun separate proceedings against five of the companies involved in the operation of the Visa credit and debit card schemes in Europe ("Visa") claiming damages and restitutionary relief for breaches of European and domestic competition law arising out of Visa credit and debit card transactions in the UK and Ireland.

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

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

5. In theory, Issuers and Acquirers may agree the level of interchange fees they will charge each other on a bilateral basis. Absent a bilateral agreement, the level defaults to one set by Visa. That default fee is the "multilateral interchange fee" or "MIF". Different MIFs apply for different territories and kinds of card. The Visa MIFs in issue in these proceedings are: (1) those applicable to cross-border transactions in the EEA (where the merchant is in one Member State and the card was issued in another), except for the period when they were exempted by the European Commission ("the EEA MIFs"); (2) those applicable where both the merchant and the Issuer are in the UK ("the UK MIFs"); and (3) those applicable where both are in Ireland ("the Irish MIFs").

6. The appellants' case is that the MIFs in issue, by setting effectively a minimum price that merchants had to pay to their acquiring banks to process payments by Visa card, unlawfully restricted competition. They say that, if there had been no unlawful restriction of competition, there would have been no MIFs or the MIFs would have been lower and so the MSC that the appellants paid their banks when accepting payments by Visa card would have been lower. Their claim is based on breaches of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") or the equivalent previous provisions in the European Community Treaty, Article 53 of the European Economic Area ("EEA") Agreement, section 2 of the Competition Act 1998 ("CA 1998") and section 4 of the Irish Competition Act 2002 ("ICA 2002"). The claim is primarily for damages based on the alleged overcharge of the MSC due to the MIFs.

7. The proceedings were begun in relation to Claims 2013 Folio Nos. 982-991 and 996 on 23 July 2013, and in relation to Claim number 2013 Folio No.1334 on 4 October 2013. The pleaded claims for damages date back to 1977 and so cover a period of some 37 years.

8. The first and second respondents, on the one hand, and the third to fifth respondents, on the other hand, have been separately represented and have served separate defences. There are several strands to their defences. They deny that any MIFs in issue had the object or effect of restricting competition. They aver that, if any did, they were exempt under Article 101(3) TFEU and analogous domestic provisions. Critically, for the purposes of this appeal, the respondents contend that in any event the claims for damages sustained more than six years before issue are time-barred. That is the limitation period for breach of statutory duty under section 9 of the 1980 Act (it being common ground on the appeal that the limitation point for tort in section 2 of the 1980 Act is irrelevant or, at any event, adds nothing to the issues).

9. By applications dated 17 March 2014 the third to fifth respondents, and by a further application dated 21 March 2014 the first and second respondents, applied to strike out those parts of the appellants' claims which allege infringements of competition law in the period prior to 23 July 2007 in the case of Claims 2013 Folio Nos. 982-991 and 996 and 4 October 2007 in the case of Claim 2013 Folio No.1334. Those dates ("the Limitation Dates") are six years prior to the issue of the relevant proceedings. The respondents applied, alternatively, for summary judgment under CPR Part 24 in relation to the limitation issue.

1980 Act section 32

10. The appellants contend that the limitation period in section 9 of the 1980 Act has not expired, and indeed has not yet begun to run, by virtue of section 32 of the 1980 Act. So far as relevant, section 32 provides as follows:

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

11. Section 38(9)(a) provides that references to a right of action shall include references to a cause of action.

The statements of case

12. It is alleged in paragraph 81 of the amended particulars of claim that the following facts and matters were deliberately concealed from the appellants:

> "a. The manner and mechanisms by which the EEA MIF, UK MIF and Irish MIFs were and are set are secret and have never been disclosed to the Claimants.
>
> b. At all material times, the precise nature and scope of the MIF arrangements were concealed from the Claimants.
>
> c. At all material times, the responsibility of the various Defendants for the breaches of statutory duty pleaded above were concealed from the Claimants.
>
> d. Until around 2009, the actual MIF levels which applied were concealed from the Claimants.
>
> e. ....[P]rior to [2006] ... the MIF rates were not available or visible to the Claimants. In any event... the relevant MIF rates have been imposed without negotiation and the mechanisms by which they are set have never been made available to the Claimants either via their Acquiring Bank or directly by the Defendants."

13. In paragraph 76 of the amended defence of the first and second respondents it is alleged that the appellants were aware of, or could with reasonable diligence have discovered, sufficient facts by 22 November 2002 at the latest to plead an adequate statement of claim against the first and second respondents. The matters relied on are set out in paragraph 77. It is alleged in paragraph 78 that, even if those matters were insufficient to issue proceedings in respect of the UK MIFs, the appellants had sufficient facts in respect of those MIFs by 19 October 2005. In paragraph 79 the first and second respondents assert that the appellants themselves admitted in paragraph 84(e) of the amended particulars of claim that that the appellants were aware of the applicable individual MIF rates since around early 2006. In paragraphs 81 and 82 of their amended defence the first and second respondents in any event deny that they concealed material facts within the meaning of section 32(1)(b) of the 1980 Act, and they further deny in paragraph 83 and 84 that, if there was any such concealment, such concealment was carried out deliberately within the meaning of section 32(1)b).

14. The amended defence of the third to fifth defendants contains similar assertions and denials.

15. In their reply to the amended defence of the first and second respondents and to the amended defence of the third to fifth respondents, the appellants deny that the matters alleged by the respondents as facts which were known or could with reasonable diligence have been discovered by the appellants were sufficient to establish a prima facie case against each respondent, and, without prejudice to that general denial, the appellants note that neither the Office of Fair Trading ("the OFT") nor the Commission had permitted access to their respective files to the appellants.

The judgment

16. The Judge heard the respondents' strike out and summary judgment applications ("the applications") over three days and subsequently handed down a substantial and carefully reasoned judgment on 20 October 2014. The respondents satisfied the Judge that all facts

relevant to the right of action were in the public domain before the Limitation Dates; there was no realistic prospect of the appellants succeeding in their argument under s.32(1)(b); and the claims should be confined to causes of action which arose after the Limitation Dates.

17. In his judgment the Judge, having set out the background, referred to the statements of case, the law applicable to the competition claims and the court's approach to applications under CPR 3.4 and 24, and addressed the proper interpretation of section 32(1) of the 1980 Act. He referred, in that connection, to *Johnson v. Chief Constable of Surrey* (CA, unreported, 23 November 1992); *C v. Mirror Group Newspapers Ltd* [1997] 1 WLR 131 (CA); *Gold v. Mincoff, Science & Gold* [2001] Lloyd's Rep PN 423 (Neuberger J); *AIC Ltd v. ITS Testing Services (UK) Ltd, The 'Kriti Palm'* [2006] EWCA Civ 1601, [2007] 1 All ER (Comm) 667, and *Williams v. Lishman, Sidwell, Campbell & Price Ltd* [2010] EWCA Civ 418, [2010] PNLR 25. He then set out the following seven principles (some of which overlap) which, he said, were established by those cases and were relevant to the applications: (1) section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly; (2) there is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case - section 32(1)(b) is concerned with the former; (3) the section is to be interpreted as referring to any fact which the claimant has to prove to establish a prima facie case; (4) the claimant must satisfy 'a statement of claim test', that is to say the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie case; (5) thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger; (6) the purpose of section 32(1)(b) is intended to cover the case where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action; (7) what a claimant has to know before time starts running against him under section 32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation.

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

19. The Judge rejected (at [38]) the submission of the appellants' counsel that "stand-alone" competition claims fall into a distinct and different category of claim to which the *Johnson* test should not be applied.

20. The Judge held that Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (which was in draft at the date of the Judge's judgment) ("the Damages Directive"), which contains provisions relating to limitation periods in Article 10, is inapplicable to the present proceedings by virtue of Article 22. Article 22 provides that national legislation to give effect to the Damages Directive shall not apply to actions for damages begun before 26 December 2014.

21. The Judge then referred to those parts of the particulars of claim which allege the four elements necessary to establish the appellants' claim to damages.

22. The Judge then set out in paragraphs [50] to [92] events and other matters relied on by the respondents to show what was known or discoverable in relation to each of those four elements. It is not necessary, for the purpose of this appeal, to set out all those events and matters. It is sufficient to refer to one general and five specific matters mentioned by the Judge.

23. First, as a general observation on the Judge's outline of the history, his account recorded and described the involvement of the regulatory authorities from at least 1992 on the issue whether MIFs imposed by Visa companies and by MasterCard gave rise to a restriction of competition.

24. Second, one of the many matters mentioned by the Judge was a decision of the Commission dated 24 July 2002, in which the Commission granted exemption (from 4 September 2002 until 31 December 2007) pursuant to Article 85(3) EC (now Article 101(3) TFEU) and Article 53(3) of the EEA Agreement for the Visa EEA MIF arrangements following modification by Visa (reducing the overall level of the MIF through the introduction of a fixed rate per debit transaction MIF and a phased reduction in the level of the *ad valorem* MIF for credit and deferred debit cards). At recitals 64-69, the Commission concluded that the Visa EEA MIFs had the effect of restricting competition within the meaning of Article 81(1) EC and Article 53 EEA Agreement. The Commission continued by concluding that the Visa EEA MIF restricted competition to an "appreciable extent".

25. Third, the Judge mentioned that the OFT issued a decision dated 6 September 2005 ("the 2005 OFT MasterCard decision") that MasterCard's UK MIFs infringed Article 81(1) EC and the Chapter 1 prohibition in CA 1998. That decision was appealed to the Competition Appeal Tribunal.

26. Fourth, the Judge mentioned that on 19 October 2005 the OFT issued a press release announcing that the OFT had opened a case against Visa, and proposed to issue an infringement decision against the Visa's domestic MIFs applicable to consumer credit card, charge card and deferred debit card transactions in the UK, on the basis that the collective agreement between Visa and its member banks in respect of Visa's UK MIFs restricted competition and infringed Article 81 of the EC Treaty and the Chapter I prohibition in CA 1998. The OFT said that the MIF led to an unduly high fee being paid to card issuing banks on every Visa transaction, the cost of which was passed on to retailers and ultimately to consumers. The OFT's provisional view was that the Visa UK MIF arrangements amounted to a restriction of competition under Article 81(1) EC.

27. Fifth, the Judge mentioned that on 20 June 2006 the OFT announced that it had agreed to the setting aside of the 2005 OFT MasterCard decision (effectively because of procedural irregularity connected with a change of case by the OFT) and would now focus on MasterCard's and Visa's current MIF arrangements, leaving it to third parties to take private action in relation to past arrangements

28. Sixth, another of the events mentioned by the Judge was an infringement decision of the Commission issued on 19 December 2007 against MasterCard ("the 2007 MasterCard decision"). The Commission found that from 22 May 1992 until 19 December 2007 MasterCard had infringed Article 101 TFEU and Article 53 EEA Agreement and had failed to prove that the conditions required for exemption under Article 101(3) TFEU and Article 53(3) EEA Agreement were satisfied. The Commission directed that MasterCard cease "determining in effect a minimum price merchants must pay for accepting payment cards by way of setting Intra-EEA fallback interchange fees." An appeal against that

decision was dismissed by the General Court on 24 May 2012. The Judge recorded that counsel for the appellants candidly acknowledged that it was the Commission's 2007 MasterCard decision which "gave comfort" to the appellants to commence the present proceedings, albeit they waited until 23 July 2013 and 4 October 2013 before issuing them.

29. The Judge accepted (at [101]) that the full picture was not available to the appellants. He concluded (at [108]), however, that the facts which were known, or discoverable by the exercise of reasonable diligence, by the appellants before 2007 were sufficient to enable them to plead a statement of claim which established a *prima facie* case and that the issue under section 32(1)(b) of the 1980 Act is not concerned with other facts which the appellants say they did not, or still do not, know. He said (at [109]) that the question was suitable for summary judgment and, for those reasons, granted the relief sought in the applications.

Discussion

Limitation: 1980 Act section 32(1)(b)

30. The first ground of appeal is that the Judge wrongly applied the 'statement of claim' test. I do not agree.

31. The statement of claim test was first formulated by the Court of Appeal in *Johnson*. That case concerned a claim for damages for false imprisonment by police officers in December 1974 and January 1975. The limitation period for the claim was six years from the date on which the cause of action in tort accrued. The writ was not issued until June 1991, some 16 or 17 years later. The case arose out of the prosecution and conviction of "the Guildford Four", who were convicted of offences related to the explosion of bombs in two public houses in Guildford on 5 October 1974. One of them was Carole Richardson. During the trial the plaintiff in *Johnson* gave evidence purporting to substantiate Carole Richardson's evidence. The statement of claim asserted that in December 1974 the plaintiff was arrested on suspicion of murder and placed in a cell overnight, and that on 21 January 1975 in Newcastle he was again placed in a police cell overnight and taken the following day to Guildford police station, where he was interrogated and remained in a cell for a further night. He was released on 23rd January. The statement of claim averred that this conduct by the officers was to induce him to resile from his statement that he had been with Ms Richardson on the evening of 5 October 1974 and to encourage him not to give alibi evidence on her behalf at her trial. The convictions of all of the Guildford Four were quashed by the Court of Appeal (Criminal Division) in 1989 on the basis that their confession statements might have been fabricated by police officers in the Surrey force.

32. The plaintiff relied upon section 32(1)(b) as postponing the commencement of the limitation period until the quashing of the convictions in 1989. His argument was that the crucial questions were whether the police had reasonable cause to suspect that Ms Richardson was guilty and whether they had concealed from him the material fact that her confession was unreliable. The Court of Appeal dismissed the plaintiff's appeal against an order striking out his claim as being statute-barred.

33. Rose LJ said that:

> "in construing [section 32(1)(b) of the 1980 Act], there is no middle ground between facts and evidence. It may be that the plaintiff's case following the quashing of the convictions would be evidentially stronger and have a better prospect of success. But I am unable to accept [the plaintiff's counsel's]

> submission that the quashing of the convictions adds anything to the plaintiff's knowledge of facts relevant to his right of action. Facts which improve prospects of success are not, as it seems to me, facts relevant to his right of action. ... [the plaintiff] knew the facts relevant to his claim in false imprisonment and in due course recited them ... in the statement of claim without, in relation to liability, any reference to the decision of the Court of Appeal (Criminal Division) or the matters which then emerged."

34. Lord Justice Russell said:

> "The wording of section 32(1)(b) of the Limitation Act 1980 in my judgment is such that a narrow interpretation is necessary. In order to give relief to the plaintiff any new fact must be relevant to the plaintiff's "right of action" and is to be contrasted with a fact relevant, for example, to "the plaintiff's action" or "his case" or "his right to damages". The right of action in this case was complete at the moment of arrest. No other ingredient was necessary to complete the right of action. Accordingly, whilst I acknowledge that the new facts might make the plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the "right of action" itself. They do not affect the 'right of action', which was already complete, and consequently ... are not relevant to it."

35. Neill LJ said:

> "In one sense it is true to say that the tort of false imprisonment has two ingredients; the fact of imprisonment and the absence of lawful authority to justify it. It is to be noted that in his speech in *Weldon v. Home Office* [1992] AC 58 at 162 Lord Bridge spoke of the tort as having those two separate ingredients. Indeed at a trial these two aspects of the tort are likely to be investigated. But as I understand the law, the gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious; he establishes a prima facie case if he proves that he was imprisoned by the defendant. The onus is then shifted to the defendant to prove some justification for it. If that be right, one looks at the words in section 32(1)(b) , "any fact relevant to the plaintiff's right of action". It seems to me that those words must mean any fact which the plaintiff has to prove to establish a prime facie case."

36. *Johnson* has been followed, and the principles in those judgments applied, in subsequent cases.

37. *C v Mirror Group Newspapers* [1997] 1 WLR 131 concerned postponement of the limitation period in an action for damages for libel pursuant to section 32A of the 1980 Act. The section, as then worded, provided as follows so far as relevant:

> "Where a person to whom a cause of action for libel or slander has accrued has not brought such an action within the period of three years mentioned in section 4A of this Act ... because all

> or any of the facts relevant to that cause of action did not become known to him until after the expiration of that period, such an action —
>
> (a) may be brought by him at any time before the expiration of one year from the earliest date on which he knew all the facts relevant to that cause of action; ..."

38. Section 32A has subsequently been amended but in the current section 32A(2)(b) it remains one of the conditions for postponement of the limitation period that "all or any of the facts relevant to the cause of action" did not become known to the plaintiff until after the end of the period mentioned in section 4A. That wording, common to both versions of section 32A, is to all intents and purposes identical to the wording "any fact relevant to the plaintiff's right of action" in section 32(1)(b) of the 1980 Act.

39. The facts in the *Mirror Group Newspapers* case were that the plaintiff was granted custody of her two children on her divorce. The father made an application to the High Court when the plaintiff, having taken the children abroad on holiday with the approval of the court, did not return to England. In the course of speaking to the press the father made defamatory allegations against the plaintiff, which were published in a number of newspapers, including the Daily Mirror. When the plaintiff complained to the Daily Mirror in March 1988 she was told that the newspaper had merely reported what had been said in court. In August 1993, following her return to England, she received a letter from the judge confirming that the allegations complained of had not been made in court. The plaintiff issued proceedings in March 1994 against the defendants, claiming damages for, among other things, libel. The plaintiff relied on section 32A of the 1980 Act and submitted that it was only on receipt of the judge's letter that she realised that the defamatory statement was not made in court and so was not privileged. The Court of Appeal dismissed the plaintiff's appeal from an order striking out the claim for being made outside the limitation period.

40. The plaintiff appeared in person in the Court of Appeal but the court had the benefit of leading counsel as *amicus curiae*. Neill LJ, who gave the lead judgment in the Court of Appeal, referred to and quoted the judgments in *Johnson*. He said (at p.137B) that Rose LJ in *Johnson* had accepted "the statement of claim test", which Neill LJ described as "knowledge of the facts which should be pleaded in the statement of claim". Neill LJ rejected (at p.137G-H) the submission of leading counsel appearing as *amicus curiae* that the court should give a broader construction to section 32A because the primary purpose of the cause of action in defamation, unlike that in other actions, is to obtain vindication; and that "facts relevant" should be held to include facts tending to prove malice, in cases where there was no cogent evidence of malice previously and where in consequence a defence of fair comment or qualified privilege would have succeeded, or facts tending to establish that the occasion of publication was not protected by privilege where previously it had appeared that the occasion was privileged.

41. Other arguments of policy and linguistic difference between section 32 and section 32A were also rejected by Neill LJ. He held (at p.138H) that the decision in *Johnson* should be applied to the relevant expression in section 32A as it applies to the expression in section 32(1)(b), and that "[t]he relevant facts are those which the

plaintiff has to prove to establish a prima facie case." The fact that the defamatory statement had not been mentioned in court was not such a fact.

42. Neill LJ said that, not only was the decision in *Johnson* binding on the court, but he agreed with it. He explained as follows (at pp.138H-139A):

> "In section 32A Parliament has for actions for libel or slander breached the protection which a period of limitation ordinarily gives to a defendant. I do not consider that Parliament has intended, in the words used in section 32A, to create a breach so wide as to enable facts relevant to possible defences to the action to be a relevant consideration. Given the public interest in finality and the importance of certainty in the law of limitation, I would have expected Parliament to use words different and more general had the broad construction, with the uncertainties it involves, been intended."

43. Both Morritt LJ and Pill LJ agreed with what Neill LJ had said on libel.

44. The statement of claim test, as formulated in *Johnson* and applied in the *Mirror Group Newspapers* case, was also endorsed by the Court of Appeal in *The Kriti Palm*. It is not necessary, for the purposes of this appeal, to recite the complex facts of that case. The following is sufficient. The case concerned, among other things, a claim for deceit in proceedings commenced more than six years after the deceit had taken place. The claim for deceit was based on a false statement alleged to have been made by the defendant's employee to the claimant's employee in a telephone conversation. The claimant also alleged that the statement of the defendant's employee in that telephone conversation constituted a deliberate concealment of causes of action in contract and negligence which the claimant asserted it had arising out of conduct more than six years before the commencement of the proceedings. On the appeal, there were two main issues, namely whether the first instance judge had been wrong to make a finding of deceit and whether the judge had been correct to find deliberate concealment within section 32(1)(b) of the 1980 Act. The Court of Appeal held that the judge had been wrong to find that there had been deceit. The majority also held that the judge had been right to find deliberate concealment of facts relevant to the other causes of action pleaded by the claimant.

45. Rix LJ dissented on the issue of deliberate concealment for the purposes of section 32(1)(b) of the 1980 Act, but he did not disagree on the correct approach to that statutory provision. He said (at [307]) that the purpose of section 32(1)(b) is designed to cater for the case where, because of deliberate concealment, "the claimant lacks sufficient information to plead a complete cause of action (the so-called 'statement of claim' test)". He also said (at [323]) that it was clear from *Johnson* that the statutory words "any facts relevant to a plaintiff's right of action" are to be given a narrow rather than a wide interpretation, and (at [325]) that the judge had erred in applying an evidential test rather than a 'statement of claim' test.

46. Sir Martin Nourse said (at [384]) that *Johnson* bound the court to interpret the words "a fact relevant to the plaintiff's right of action" as "denoting a fact without which the cause of action is incomplete".

47. Buxton LJ made the point (at [452]) that it had not been suggested that "right of action" in section 32(1)(b) is different from cause of action. As Ms Dinah Rose QC, for the first and second respondents, observed in the present appeal, what was assumed in that respect in *Johnson*, the *Mirror Group Newspapers* case and *The Kriti Palm*, is actually expressly provided in section 38(9)(a) of the 1980 Act.

48. Buxton LJ (at [453]) agreed with Rix LJ that *Johnson* stands as authority for the proposition that what must be concealed, to satisfy section 32(1)(b), is "something essential to the cause of action". He said:

> "It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it. The court therefore has to look for the gist of the cause of action that is asserted, to see if that was available to the claimant without knowledge of the concealed material."

49. *Johnson*, the *Mirror Group Newspaper* case and *The Kriti Palm* are clear authority, binding on this court, for the following principles applicable to section 32(1)(b) of the 1980 Act: (1) a "fact relevant to the plaintiff's right of action" within section 32(1)(b) is a fact without which the cause of action is incomplete; (2) facts which merely improve prospects of success are not facts relevant to the claimant's right of action; (3) facts bearing on a matter which is not a necessary ingredient of the cause of action but which may provide a defence are not facts relevant to the claimant's right of action.

50. Mr Fergus Randolph QC, for the appellants, has submitted that those cases and principles do not apply, or in any event do not apply without important modification, to claims for breach of competition law, such as are advanced in the present proceedings. He submitted that competition claims are far more complex, in terms of what has to be alleged and pleaded, than other claims, such as the claim for damages for false imprisonment in *Johnson* or for defamation in the *Mirror Group Newspapers* case. It is common ground that a claimant alleging a violation of Article 101(1) TFEU, or its domestic equivalent (including the Chapter 1 prohibition in CA 1998 s.2), must establish a "restriction of competition" that is "appreciable" and has an effect on trade, which lacks "objective necessity". So, Mr Randolph submits, in the case of the present proceedings the claimant has to know and be able to plead the primary facts which inform the economic contentions and assessments which form the basis of the claims under Article 101 and the domestic legislation. Mr Randolph described this as a 'multi-layered' position.

51. I do not agree that, so far as concerns the proper approach under section 32(1)(b), competition claims are to be treated in principle in any different way to other claims. There are many areas of the law where a cause of action is dependent not simply on the primary facts but rather on whether those primary facts give rise to a particular consequence or inference. Furthermore, the policy considerations of finality and certainty in the law of limitation, emphasised by Neill LJ in the *Mirror Group Newspapers* case, are as important to competition claims as to those under consideration in *Johnson*, the *Mirror Group Newspapers* case and *The Kriti Palm*.

52. As Ms Rose observed, the argument for distinguishing competition claims from other claims in the application of the 'statement of claim' test, may be said to be even

weaker than in the *Mirror Group Newspapers* case. Parliament has enacted in section 32A of the 1980 Act a special provision for postponing the commencement of the limitation period in defamation cases where, among other things, one of the reasons for the delay in commencing proceedings was that all or any of the facts relevant to the cause of action did not become known to the claimant until after the end of the relevant limitation period. There is, by contrast, no separate and specific provision for postponing the limitation period in competition claims either within section 32(1) itself or in some other provision in the 1980 Act.

53. It is perfectly plain that, if the 'statement of claim' test as formulated in *Johnson,* the *Mirror Group Newspapers* case and *The Kriti Palm* is applied in the present case, claims in respect of any period prior to the Limitation Dates are statute-barred. All the necessary ingredients for causes of action based on Article 101(1) TFEU, CA 1998 s.2 and ICA 2002 s.4 are included in the particulars of claim. In addition to describing how the MIFs and the MSCs arise under the Visa system and what are the relevant product markets (namely, the EEA, UK and Irish markets for acquiring relevant Visa payment card transactions and for issuing relevant Visa payment cards), the following facts and matters are pleaded. The MIFs have amounted to some 80% of the MSC. By setting and imposing a minimum price the appellants had to pay to their acquiring banks for accepting Visa payment cards by means of the applicable MIF, the respondents acted contrary to the pleaded EU and domestic law and in breach of statutory duty since the object and/or effect of the MIFs was unlawfully to restrict or distort competition in the acquiring market. The MIFs have had the effect of restricting or distorting competition between the acquiring banks by creating an important cost element common to all acquiring banks and thereby setting a floor under the MSC. In the absence of the MIFs, the prices set by the acquiring banks would have been lower. The agreements, decisions and concerted practices by which the MIFs have been set and operated have affected or had and have the potential to affect trade between Member States and the UK and, so far as relevant, within Ireland. The breaches of statutory duty have caused the appellants loss and damage in that the MSC has been inflated over and above the amount which would otherwise have prevailed. The amount of that overcharge is the full amount of the relevant MIFs paid as part of the MSC by the appellants on the basis that the MIFs should either not have existed as part of the Visa system or should have been set at zero. Further particulars are pleaded of many of those allegations.

54. The particulars of claim are endorsed with the usual statement of truth. Mr Randolph accepted that the proceedings cannot be struck out as failing to disclose reasonable grounds for bringing the claims or as abusing the court's process. Indeed, the proceedings are due to be tried at a lengthy trial listed to commence in the autumn of 2016. The appellants accept that no new material facts came to light in the six year period prior to the commencement of the proceedings. In particular, although they say that it was the 2007 MasterCard decision that gave them comfort to commence the proceedings, they accept that the decision did not disclose any new facts relevant to their causes of action within section 32(1)(b). On the face of it, that is the end of any possible case for postponement of the six year limitation period beyond the Limitation Dates.

55. Mr Randolph submitted, nevertheless, that there are facts relevant to the cause of action within section 32(1)(b) which were concealed at the date the proceedings were

issued and some of which are still concealed so that even now the limitation period has not begun to run in respect of claims prior to the Limitation Dates. As I understand Mr Randolph's submissions, he had a wider point and three narrower points in that connection. His wider point was that relevant facts within section 32(1)(b) are all facts "necessary and sufficient to enable the appellants to come to an informed view on the economic assessments". His three narrower points were that, in the absence of information as to how the MIFs were fixed by the respondents (what he described as "the manner and mechanisms by which the MIFs are fixed" and "the nature and scope of the MIF arrangements") and their levels and the appellants' ignorance of the amount of the overcharge of the MSC, the appellants were unable to assess prior to the commencement of the proceedings (1) whether or not there had been a restriction of competition, (2) whether or not the respondents would be able to obtain an exemption under Article 101(3) TFEU, and (3) what will be the likely amount of damages.

56. It is plain that, on a conventional application of the 'statement of claim' test, that is to say as formulated in *Johnson,* the *Mirror Group Newspapers* case and *The Kriti Palm,* none of those four points provides a ground for postponing the limitation period under section 32(1)(b).

57. So far as the three narrow points are concerned, I have set out critical parts of the particulars of claim bearing on the allegation of unlawful restriction of competition. They include the allegation that the MIFs amounted to some 80% of the MSC; they created a cost element common to all the acquiring banks and thereby set a floor under the MSC; the MIFs should either not have existed or should have been set at zero; and the consequence is that the appellants were overcharged to the full amount of the MIFs and have suffered loss equal to the overcharge. Those allegations about the MIFs are sufficient (in combination with the other allegations in the particulars of claim) to sustain a pleaded case that there has been a restriction of competition. They are also a sufficient allegation of damage to complete a cause of action for breach of statutory duty.

58. As to the right of the respondents to claim an exemption under Article 101(3), that is a matter for the respondents to allege in their defences and the onus of proving it lies on them. Disproof of a right to an exemption is not an ingredient of the appellants' causes of action. That point of principle is underscored on the actual facts of the present proceedings by the appellants' pleaded case that the MIFs should either not have existed or should have been set at zero. If the appellants succeed on that contention, no question of an exemption can arise.

59. The precise way in which the MIFs were fixed, over and above what is already pleaded in the particulars of claim, is in truth no more than something which goes to the strength of the appellants' claims and the commercial considerations bearing on the advantages and disadvantages of commencing the proceedings. As such, it is not a relevant fact within section 32(1)(b) on the 'statement of claim' test.

60. As I understood Mr Randolph's wider point, this went (1) partly to the argument that competition claims are to be treated differently to other claims for the purposes of the application of the 'statement of claim' test in the context of section 32(1)(b); (2) partly to a contention that mere "suspicion" of a relevant fact does not amount to discovery of that fact within section 32(1); (3) partly to a contention that, even where

a cause of action is properly pleaded in the sense that it is not incomplete as pleaded, there may be other facts which would also support the cause of action if pleaded, and (4) partly to a contention that facts may be relevant for the purposes of section 32(1)(b) if they provide a causal explanation as to why proceedings were not taken sooner and even though the cause of action as pleaded in current proceedings is not incomplete without them.

61. I have already addressed and rejected the first of those arguments.

62. As to the second contention in paragraph [60] above, what is sufficient knowledge to constitute discovery within section 32(1) depends on the particular facts. More importantly, for the purposes of this appeal, the point has no relevance to proceedings such as the present ones where a complete cause of action has been pleaded, the particulars of claim are endorsed with a statement of truth, and it is accepted that no new facts necessary to complete the cause of action have been discovered during the previous six years. I agree with the respondents' submission that it is logically inconsistent for the appellants both to assert that the particulars of claim plead a complete cause of action and cannot be struck out for failing to disclose reasonable grounds for bringing the claim or for otherwise being an abuse of the court's process and yet also to contend that, for the purposes of the 'statement of claim' test, the limitation period has not begun to run because there are concealed relevant facts within section 32(1)(b). Adapting Ms Rose's language in one of her submissions, the appellants' approach makes the most improbable assumption that the intention of Parliament in enacting section 32(1)(b) was that, even though a victim knows sufficient facts to be able to issue proceedings and plead a complete cause of action, the limitation period will nevertheless not commence until the victim discovered or could with reasonable diligence discover further facts.

63. Mr Randolph referred us to *Allison v Horner* [2014] EWCA Civ 117 (concerning the limitation period in a case of deceit) in support of his submission that "suspicion" is not enough but I cannot see that it is of any assistance. It turned on its own particular facts which are in no way analogous to those with which we are concerned on this appeal.

64. Insofar as I have been able to understand the third contention in paragraph [60] above, that falls foul of the established jurisprudence, binding on this court, that facts which merely strengthen a cause of action or weaken a defence are irrelevant to section 32(1)(b) on the 'statement of claim' test.

65. As I understand the fourth contention in paragraph [60], this turns on *obiter* statements made by Rix LJ and Elias LJ in *Williams v Lishman, Sidwell, Campbell & Price Ltd* [2010] EWCA Civ 418, [2010] PNLR 25, which, it is suggested by the appellants, qualify the strict and narrow approach of the 'statement of claim' test in *Johnson*.

66. I turn, therefore, to consider *Williams*. In that case the claimants, husband and wife, claimed damages for alleged negligent advice given by the defendants in connection with the claimants' pension arrangements. The claimants made new pension arrangements in November 1997 based on that advice which caused loss because (1) the new arrangements would result in a pension fund of far less value than the original arrangements, and (2) the claimants incurred a £38,000 redemption penalty in the

course of making the new arrangements, which the defendants had never mentioned. The claimants were aware of the first of those heads of loss by May 2003. They commenced their proceedings in October 2006. It was only in the course of the proceedings that they discovered the second head of loss. The first instance judge held that the claim was statute-barred because the proceedings had been brought more than three years after May 2003, which was the claimants' 'date of knowledge' for the purposes of section 14A of the 1980 Act. The claimants appealed on the ground that the redemption penalty was a loss that arose prior to and separate from the loss arising from the new pension arrangements; it had been deliberately concealed until 2007; and for that reason under section 32(1)(b) the claim would not become time-barred until July 2013.

67. The Court of Appeal dismissed the appeal on the ground that (following *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, [2008] PNLR 37) both heads of loss were incurred at the same time when the new pension arrangements were made as a result of the allegedly negligent advice.

68. Rix LJ and Elias LJ, nevertheless, went on to consider what the position would have been under section 32(1)(b) if the £38,000 penalty had preceded the more general head of loss and, in particular, whether it would have retained its status as "any fact relevant to the plaintiff's right of action" once the general head of loss had been incurred. Both of them referred in that context to *Johnson*, the *Mirror Group Newspapers* case and *The Kriti Palm*. Having considered the respective arguments each way in considerable detail Rix LJ concluded (at [49]) that the penalty would have been a fact relevant to the plaintiff's right of action within section 32(1)(b) and the claimants' appeal would have succeeded. He explained as follows:

> "If time in respect of a cause of action "shall not begin to run" until the concealment has been discovered, and "shall not apply" to an action to which deliberate concealment under s.32(1)(b) applies, ultimately I see no compelling reason why a defendant responsible for the deliberate concealment which marks the original accrual of a right of action should not have to take the rough with the smooth: and so find that he has to answer for a (second) loss which he has not concealed and about which his claimant has known for too long *together with* the (first) loss which he has deliberately concealed and about which his claimant has only more recently discovered."

69. Elias LJ also rehearsed the arguments in some detail and then said (at [70]) that since it was not in the event necessary to reach a conclusion on the point, and there had been no argument on some potentially material aspects of it, he preferred not to do so. He nevertheless immediately proceeded to speculate (at [71]) "whether the statement of claim test should be applied without qualification in a case of this nature" because he could not "think that justice is best served by fine distinctions such as whether the concealed loss is the first in time or not" since "[t]his may have very unfair consequences even where the first loss is not concealed." He gave as an example a situation where a claimant may suffer a small and unimportant first loss which is not worth litigating about, followed by a very much larger loss. He then said that, on reflection, it may be possible to modify the statement of claim test so as to reach a more satisfactory outcome, and "floated" (in [73]) the following argument:

> "The argument is that having regard to the purpose of s.32(1)(b), a fact is relevant to the claimant's right of action if it is causally relevant to the decision to pursue that right, i.e. ignorance of the fact explains why the claimant did not bring that particular right of action earlier. This involves a modification of the statement of claim test. If the fact of which he is ignorant is a necessary element in the right of action itself, i.e. if it satisfies the statement of claim test, then it will necessarily satisfy the requirement of causative relevance. Without knowledge of this fact, a claimant could not be expected to know that he had any right of action at all. But facts may be causally relevant to pursuing a cause of action even where a claimant knows enough to know that he could, in principle, pursue his right of action. To take the example I have already given, if a loss of which he knows is small it may not be worth litigating but once a much larger concealed loss is discovered, it fully explains why he only decided to pursue the legal action at that point. The concealed fact is relevant to this particular cause of action. But for ignorance of the second loss, he would have pursued the case earlier. By contrast, if the concealed fact does not explain why the action was not pursued earlier, it is not a relevant fact even though the claimant was in ignorance of it."

70. Elias LJ then (at [75]) said that such an argument had not been advanced by either of the parties at the appeal and that it might well be that after proper consideration it proves unsustainable. He doubted whether, even if correct, it would have made any difference in the case since the concealed loss was dwarfed by the non-concealed losses. Rix LJ declined (at [52]) to express any view about the argument "floated" by Elias LJ other than to express the same doubt as Elias LJ that it would have made any difference to the outcome of that case. The third member of the court, Moses LJ, said that he did not wish to make any comment on the views expressed *obiter* either by Rix LJ or Elias LJ.

71. I cannot see that *Williams* is of any assistance to the appellants. In the first place, the comments of Rix LJ and Elias LJ were *obiter* whereas the principles laid down in *Johnson*, the *Mirror Group Newspapers* case and *The Kriti Palm* are binding on this court. In the second place, the causation argument floated by Elias LJ was expressed in a most tentative way without the benefit of any argument on the point and without any endorsement by the two other members of the court. In the third place, Elias LJ's causation argument would appear to contradict the established principle binding on this court that facts which just add weight to the claim and improve its prospects of success are not for those reasons relevant facts within section 32(1)(b). In the fourth place, the factual situations under consideration in those *obiter* statements do not bear even a remote comparison with the facts of the present proceedings. Those statements focused primarily on a situation where a breach of duty gives rise to two separate heads of loss arising at different times and the question is whether a concealed earlier smaller loss remains a relevant fact for the purposes of section 32(1)(b) even though a larger second loss is known and, indeed, is sued for. There is a case for saying, as Rix LJ thought, that discovery of the first loss remains a relevant fact because it

completed the cause of action rather than the second loss. By contrast, there is no suggestion of the discovery of sequential losses in the present proceedings, and indeed, as the respondents have emphasised, there is no suggestion of the discovery of any new facts between the Limitation Dates and the commencement of the present proceedings. Finally, following on from that last point, the facts said to have been and to continue to be concealed from the appellants are not causally relevant to the appellants' decisions not to sue until 2013: the appellants have been able to commence proceedings and to plead a complete cause of action without reference to any such concealed facts.

72. It follows that, as a matter of domestic legislation, the Judge was correct to hold that claims for any period earlier than the Limitation Dates are statute-barred.

Limitation: EU jurisprudence

73. The appellants submit that, on that interpretation, the domestic law of limitation contravenes and must give way to the EU principles of effectiveness and full compensation. The first of those principles will be infringed if the operation of a domestic limitation period makes it practically impossible or excessively difficult to make claims for breach of EU legal rights. The second principle requires that victims are entitled to full compensation for the actual loss caused by breach of such rights, together with loss of profit and interest.

74. I cannot see any possible basis for saying that the decision of the Judge or my analysis above infringes either of those principles of EU jurisprudence. It is well established that domestic law imposing a limitation period is perfectly consistent with EU jurisprudence provided that it does not make the recovery of compensation practically impossible or excessively difficult and even though, where claims are barred by limitation, the consequence will be to restrict the recovery of full compensation. As Lord Sumption and Lord Reed observed in *FII Group Test Claimants v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 ACD 337, at [149] and [229] respectively, it is recognised that reasonable periods of limitation are necessary and desirable as part of the principle of legal certainty in EU law. Further, as Lord Sumption observed in the *FII* case at [151] there is no rule of EU law requiring the running of a limitation period to be deferred until the existence of a right to recover an unlawful charge has been judicially established. It is not uncommon, for example, for a claim to repayment to have become time-barred in national law while proceedings are still in progress to determine whether the member state was in breach of EU law.

75. I see no good reason why the barring of claims in respect of any period prior to the Limitation Dates in the present proceedings should be held to be an infringement of the EU principle of effectiveness. The appellants could have brought the present proceedings even prior to the 2007 MasterCard decision since it is conceded that no new relevant fact was disclosed in that decision or between that decision and the commencement of the proceedings. They could have brought them before 2007 in view of the events and matters mentioned in paragraphs [24] to [28] above. Further, there is no basis for concluding that a limitation period of six years for a competition law claim, with the benefit of the postponement provisions in section 32(1)(b) of the 1980 Act, is in principle incompatible with the EU principle of effectiveness.

76. Mr Randolph referred to Case C-445/06 *Danske Slagterier v Bundesrepublik Deustschland* [2009] 3 CMLR 10 on this issue but the factual situation under consideration in that case was so different from that with which we are concerned on this appeal that I cannot see that there is anything in that case which assists.

77. Mr Randolph submitted that, in the context of infringements of competition law, the relevant EU principles as to limitation periods are laid down in the Damages Directive, which, he said, merely codifies longstanding EU jurisprudence even though it was only enacted in 2014. In that connection, Mr Randolph referred to some of the recitals. The appellants rely specifically on Article 10(2) which provides that: "Limitation periods shall not begin to run before the infringement of competition law has ceased."

78. As the Judge rightly concluded, that provision is of no assistance to the appellants. Article 22 provides expressly that domestic legislation to give effect to the Damages Directive, which does not have to be transposed into national legislation until 2016, shall not have retrospective effect. That is in itself a good indication that the Damages Directive does not merely give effect to existing jurisprudence. I consider that it is plain that the provisions of Article 10(2), in particular, are new law.

79. The legal position as to the application of EU law to the limitation issue on this appeal is clear. I see no reason to direct a preliminary reference to the Court of Justice of the European Union.

New limitation point

80. During the course of the appeal, prompted by questions and observations from the Bench, Mr Randolph appeared to raise, as an alternative argument to the appellants' principal limitation points in their grounds of appeal, the contention that the limitation period did not begin to run until the 2007 MasterCard decision on 19 December 2007. That is not part of the appellants' statements of case, and the argument was not advanced before Simon J and is inconsistent with the concession made before him and maintained up until the hearing of the appeal that the 2007 MasterCard decision gave the appellants comfort to bring the present proceedings but did not disclose any new relevant fact for the purposes of section 32(1)(b) of the 1980 Act. It seems to me that such an argument ought to have been stated as a ground of appeal. It is unclear whether Mr Randolph formally applied to amend the grounds of appeal to raise it. If he did, I would refuse permission to amend. Even if it was not necessary to raise it expressly as a ground of appeal, I would refuse to permit the argument to be advanced. It was raised too late, is not contained in the appellants' currently pleaded case and would require an investigation into the 2007 MasterCard decision and the previously available material in the public domain.

81. For those reasons the appeal must fail on the limitation point.

Costs

82. The Judge ordered the appellants to pay the respondents' costs of the summary applications on the indemnity basis. The Judge ordered the assessment on that basis because "it ought to have been known to any reasonable litigator that the claim in respect of the period before July 2007 was bound to fail". He also said that his view

as to the appellants' conduct was reinforced by a letter dated 11 June 2014 from the respondents' respective solicitors offering a 'drop hands' agreement on costs if the appellants discontinued their section 32(1)(b) claims. The Judge said that he considered that the appellants' rejection of that offer was unreasonable and demonstrated the overall unreasonableness of their approach.

83. The Judge had a wide discretion as to costs but I consider that, in awarding costs on the indemnity basis rather than the standard basis, the Judge made an error in principle. The weakness of a legal argument is not, without more, justification for an indemnity basis of costs, which is in its nature penal. The position might be different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit.

84. The appellants' arguments on limitation have not been associated with culpable motive or improper purpose or otherwise such as to amount to an abuse. In those circumstances, the appellants' rejection of the offer in the letter of 11 June 2014 from the respondents' solicitors takes the matter no further.

Conclusion

85. For the reasons given above, I would dismiss the appeal against the Judge's summary judgment on the issue of limitation and his order for consequential striking out or amendment of the claim forms and the particulars of claim.

86. I would allow the appeal against the Judge's order for costs in so far as it provides for the respondents' costs payable by the appellants to be assessed on the indemnity basis. I would substitute an order that the respondents' costs of the applications, to be paid by the appellants, be assessed on the standard basis.

Lord Justice Richards

87. I agree.

Lord Justice Patten

88. I also agree.