Neutral Citation Number: [2024] EWCA Civ 1559

Appeal Nos: CA-2023-002572 and CA-2023-002574
Case No: 1517/11/7/22 (UM)

IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL

Sir Marcus Smith, Mr Justice Roth and Ben Tidswell
[2023] CAT 49

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2024

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
and
LADY JUSTICE FALK

- -

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS

Claimants/Appellants

and

UMBRELLA INTERCHANGE FEE DEFENDANTS

Defendants/Respondents

Philip Moser KC, **Philip Woolfe KC**, and **Oliver Jackson** (instructed by **Stephenson Harwood LLP** and **Scott+Scott UK LLP**) appeared on behalf of the Claimants (the claimants)

Simon Salzedo KC and **Tim Johnston** (instructed by **Linklaters LLP** and **Milbank LLP**) appeared on behalf of **the Visa Defendants**

Timothy Otty KC and **Naina Patel** (instructed by **Jones Day**) appeared on behalf of **the Mastercard Defendants** (the Mastercard Defendants and the Visa Defendants are together referred to as the "defendants")

Hearing dates: 3 and 4 December 2024

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Approved Judgment

This judgment was handed down remotely at 10:00am on Thursday 19 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This is an appeal in the continuing Multilateral Interchange Fees (MIFs) litigation from a decision on limitation made by the Competition Appeal Tribunal (the Tribunal) on 26 July 2023. The appeal raises a single central question as to the effect in England and Wales of decisions of the Court of Justice of the European Union (CJEU) that are delivered after 31 December 2020, the Implementation Period Completion Day (completion day). That question turns on the meaning and effect of the European Union (Withdrawal) Act 2018 (the Withdrawal Act). It may be noted that the Withdrawal Act was significantly amended with effect from the end of 2023, but those amendments are not relevant to what we have to decide.

2. The question as to the effect of post-completion day CJEU decisions arises in the context of claims by the claimants against the Visa and Mastercard defendants in respect of alleged multiple and continuous infringements of article 101 of the Treaty on the Functioning of the European Union (TFEU), Chapter 1 of the Competition Act 1998 and the domestic competition laws of other European Economic Area states. The claims relate to MIFs set and implemented by the defendants to be paid between issuers and acquirers since about 22 May 1992, which the claimant merchants (some 2,300) allege were passed on to them by their acquirers.

3. The claimants argued before the Tribunal that the EU law principle of effectiveness required that a limitation period for a claim founded on an alleged infringement of articles 101 (and 102) of the TFEU only began to run once the infringement had ceased. This alleged principle of EU law has been referred to by the parties as the "Cessation Requirement", and that is how I shall refer to it in this judgment.

4. The Cessation Requirement was included in what the CJEU said in the post-completion day case of *Volvo AB and DAF Trucks NV v. RM* (2022) (Case C-267/20) (*Volvo*) at [61]:

> … it must be considered that the **limitation periods applicable to actions for damages for infringements** of the competition law provisions of the member states and of the European Union **cannot begin to run before the infringement has ceased** and the injured party knows, or can reasonably be expected to know, (i) the fact that it had suffered harm as a result of that infringement and (ii) the identity of the perpetrator of the infringement [emphasis added].

5. The Tribunal decided, in essence, three things. First, it analysed the CJEU's decision in *Volvo*, concluding at [33] that the CJEU had **not** decided that, as a matter of EU law, limitation periods for competition law infringements could not start to run before the infringement of competition law had ceased.

6. Secondly, the Tribunal considered the matter on the premise that, contrary to its first conclusion, *Volvo* had decided that EU law imposed a Cessation Requirement. On that basis, the Tribunal held that it was not **bound** under the Withdrawal Act to follow *Volvo*. The Tribunal's two essential reasons were:

i) The claimants' causes of action which had accrued pursuant to EU law prior to completion day were translated into retained EU law pursuant to section 4(1) of the Withdrawal Act, subject only to section 6 of the Withdrawal Act, which did not make post-completion day CJEU decisions binding (see [44], and [68]-[69]).

ii) The Tribunal was bound to follow the Court of Appeal's pre-Brexit decision in *Arcadia Group Brands Ltd v. Visa Inc*. [2015] EWCA Civ 883, [2015] Bus LR 1362 (*Arcadia*) (see [28(4)]). *Arcadia* had decided that EU law did not impose any Cessation Requirement upon English law limitation rules.

7. Thirdly, even on the basis that the Tribunal could "have regard" to *Volvo* under section 6(2) of the Withdrawal Act, it decided that the EU law principle of effectiveness should not be held to incorporate a Cessation Requirement into the English limitation rules (see [28]). *Volvo*, therefore, had no effect on either the English or Scots law limitation regimes.

8. Since the Tribunal's decision, there have been two new cases that the parties agree are relevant to this appeal.

9. The first new case is *Heureka Group a.s. v. Google LLC* (2024) (Case C-605/21) (*Heureka*), decided by the CJEU on 18 April 2024. The claimants contend that *Heureka* decided that the Cessation Requirement had always been a binding rule of EU law arising out of the general EU law principle of effectiveness.

10. The second new case is *Lipton v. BA Cityflyer Ltd* [2024] UKSC 24, [2024] 3 WLR 474 (*Lipton*), decided by the UK Supreme Court (UKSC) on 10 July 2024. The defendants contend that the majority in *Lipton* (Lord Sales and Lady Rose, with whom Lord Burrows concurred and Lady Simler agreed) favoured what the UKSC called the "complete code analysis" of the Withdrawal Act. Under the complete code analysis, a claimant's right to pursue a cause of action that is based on facts which occurred before completion day, and having regard to EU law which was then applicable, is brought forward as part and parcel of the bringing forward of the law itself under whichever of sections 2, 3 or 4 of the Withdrawal Act is relevant. A pre-completion day cause of action is "retained EU law". Section 6 of the Withdrawal Act applies to such claims, so that the court is not bound by post-completion day CJEU case law, but may have regard to it. The majority of the UKSC in *Lipton* expressly considered the Tribunal's reasoning described at [6(i)] above. The defendants submit that *Lipton* binds us to decide that *Volvo* and *Heureka* are not binding on us.

11. The claimants advanced four grounds of appeal that will require some reinterpretation in the light of these two new cases. In essence, the four grounds were as follows:

i) Ground 1: The Tribunal misinterpreted *Volvo*. It should have held that *Volvo* decided that the Cessation Requirement was an existing (not a new) binding principle of EU law (as subsequently confirmed by *Heureka*), and a necessary corollary to the EU law principles of effectiveness and legal certainty.

ii) Ground 2: The Tribunal ought to have found that the Cessation Requirement applied to the claimants' accrued pre-completion day rights under sections 2(1) and 3(1) of the European Communities Act 1972 (ECA 1972), as preserved by section 16(1) of the Interpretation Act 1978. This was what the UKSC described

in *Lipton* as the "Interpretation Act analysis", which was favoured only by Lord Lloyd-Jones.

iii) Ground 3: Even if *Volvo* did not mandate the Cessation Requirement, the Tribunal ought to have given it effect by "having regard" to it under section 6(2) of the Withdrawal Act.

iv) Ground 4: The Tribunal should have enforced the Cessation Requirement by a conforming construction of sections 2 and/or 9 of the Limitation Act 1980, or by disapplying those limitation provisions.

12. In the light of *Heureka* and *Lipton*, and the way the appeal was actually argued by the claimants, it seems to me that the issues that we need to resolve are as follows: (i) Should this court follow *Lipton's* complete code analysis and decide that the Tribunal was right to think it was not bound by *Volvo* and *Heureka* as post-completion day CJEU decisions? (ii) If so, were the claimants nevertheless right to submit that *Volvo* and *Heureka* should be followed, because those cases simply declared that the Cessation Requirement had always been part of EU law? (iii) In any event, is the court bound by *Arcadia* to hold that the Limitation Act 1980, as it applies to competition claims, accords with the EU law principle of effectiveness, and that a Cessation Requirement (as required to be imported into English law on a prospective basis by article 10 of the Damages Directive (2014/104/EU)) is new law and was not part of EU law at the time of *Arcadia*?

13. The claimants' main oral argument was based on section 6(2) of the Withdrawal Act (section 6(2)), which provided that the court could "have regard" to post-completion day CJEU decisions. It was submitted that section 6(2) did not override or abrogate section 4(1) of the Withdrawal Act (preservation of pre-completion day rights, powers, liabilities, obligations, restrictions, remedies and procedures recognised by section 2(1) of the ECA 1972) or section 5(2) of the Withdrawal Act (supremacy of pre-completion day EU law). Sections 4(1) and 5(2) preserved the Cessation Requirement that had always been an essential element of the EU law principle of effectiveness, even if that was not entirely transparent before *Volvo* and *Heureka*. Since it was now clear that EU law had always required limitation periods in competition cases to run only from cessation of the infringement, this court should, in "having regard" to *Volvo* and *Heureka*, give effect to that principle. *Arcadia* was not binding in the face of CJEU authority declaring the Cessation Requirement to be part of pre-completion day EU law.

14. In summary, I have decided, for the reasons contained in the remainder of this judgment that: (i) This court should follow (without revisiting) *Lipton's* complete code analysis, and that we should leave it to the claimants to seek to persuade the UKSC to hear further debate between the complete code analysis and the Interpretation Act analysis so soon after *Lipton*. (ii) The Tribunal was right to think it was not **bound** by *Volvo* (or *Heureka*) as post-completion day CJEU decisions. (iii) *Volvo* and *Heureka* reflected a departure for EU law. There was no pre-completion day CJEU authority that made it clear that the EU law principle of effectiveness would always require that a limitation period for a claim founded on an alleged infringement of articles 101 and 102 of the TFEU only began to run once the infringement had ceased. (iv) The Tribunal was right to think that it was bound by *Arcadia* to hold that the Limitation Act 1980, as it applies to competition claims, accords with the EU law principle of effectiveness.

15. I shall now deal with the relevant statutory provisions and the three issues that I have identified at [12] above.

The relevant statutory provisions

16. There are a number of relevant statutory provisions, starting with the ECA 1972, including numerous provisions of the Withdrawal Act 2018, and extending also to the Competition Act 1998 and the Damages Directive. To make this judgment more readable, I have included most of the provisions to which the parties referred in the Annex to this judgment.

Issue 1: Should this court follow *Lipton's* complete code analysis and decide that the Tribunal was right to think that it was not bound by *Volvo* and *Heureka* as post-completion day CJEU decisions?

17. *Lipton* is a very recent decision of the UKSC. It directly considered the Tribunal's decision in this case and the provisions of the Withdrawal Act that are in issue before us. We indicated at the commencement of the oral argument that we would "take a lot of persuading" not to follow the majority's decision on the same points in *Lipton*.

18. The indication, which I have just referred to, prompted a concession by counsel for the claimants, which I asked should be reduced to writing. That concession included the following:

> 2. … it is conceded at this level as follows: since the majority and the minority in *Lipton* agreed that post-[completion day] CJEU decisions were not binding on UK Courts post-[completion day], even in relation to causes of action which had accrued while EU law was in force in the UK, *Lipton* may therefore be considered unanimous [UKSC] authority that a post-[completion day] CJEU decision is not binding on UK courts. In particular, neither the majority nor the minority considered themselves bound by the post-[completion day] CJEU decision [*TAP Portugal v. Flightright GmbH* (Joined Cases C-156/22 to C-158/22) [2023] Bus LR 875] on the 'extraordinary circumstances' issue [in *Lipton*], even though they had regard to it pursuant to s.6(2) [of the Withdrawal Act] which issue was *ratio*, not *obiter*.
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> 3. For the avoidance of doubt: whilst, as is common ground, the discussions in *Lipton* between the Complete Code vs Interpretation Act analysis were strictly *obiter*, the [claimants'] Ground 3 is an alternative argument that proceeds on the assumption that Ground 2 is decided against the [claimants], and thus necessarily on the basis of the Complete Code analysis.
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> 4. All that being so, the Appellants reserve all Ground 2 issues for any appeal to the Supreme Court.

19. That concession seems to me to be rather convoluted, since, whether or not the complete code analysis in *Lipton* was *obiter*, strictly *obiter* or even *ratio* (each of which is said to have a different meaning), we had said we were minded to follow it. In these circumstances, I can see no benefit in rehearsing the arguments that the claimants advanced as to the attractions of the Interpretation Act analysis. In the light of *Lipton*, I would hold that section 6(1) of the Withdrawal Act applies to the decisions in *Volvo*

and *Heureka*, and applied to the decision in *Volvo* when the matter was argued before the Tribunal (as it correctly held). Accordingly, neither the Tribunal nor this court was "bound by any principles laid down, or any decision made, on or after [completion day] by the [CJEU]" in those cases. I say nothing as to the claimants' attempt to salami slice Lord Lloyd-Jones's judgment in *Lipton*. That answers the first issue I have identified. It will, of course, be open to the claimants to seek permission to appeal this holding to the UKSC so as to argue that the Interpretation Act analysis is to be preferred.

Issue 2: If so, were the claimants nevertheless right to submit that *Volvo* and *Heureka* should be followed, because those cases simply declared that the Cessation Requirement had always been part of EU law?

20. As I have explained at [13] above, the claimants' argument under this head starts from the premise that section 6(2) applies to the court's consideration of *Volvo* and *Heureka.* Section 6(2) as shown in the Annex provides that "[s]ubject to [section 6(1)] and subsections (3) to (6), a court or tribunal may have regard to anything done on or after [completion day] by the [CJEU] … so far as it is relevant to any matter before the court or tribunal". Whilst acknowledging that section 6(2) allowed the court to "have regard to" *Volvo* and *Heureka*, the claimants argued that, in reality, we had to follow them, because sections 4(1) and 5(2) were not overridden by section 6, and they reflected pre-completion day EU law.

21. I will deal with these arguments (before considering *Arcadia*) by (i) considering the pre-completion day EU law position as to the Cessation Requirement, (ii) considering the post-completion day EU law position as to the Cessation Requirement, (iii) evaluating whether the claimants are right that this court ought to follow *Volvo* and *Heureka* under its section 6(2) powers, and (iv) considering whether, "having regard" to *Volvo* and *Heureka*, this court should apply the Cessation Requirement.

EU law as to the Cessation Requirement pre-completion day

22. The parties referred to three pre-completion day CJEU authorities that were said by the claimants to show that, even before *Volvo* and *Heureka*, the Cessation Requirement was seen as an element of the EU law principle of effectiveness in relation to the limitation periods applicable to competition law infringements. Those three authorities were *Courage Ltd v. Crehan* (Case C-453/99) [2002] QB 507 (*Courage*), *Manfredi v. Lloyd Adriatico Assicurazioni SpA* (Joined Cases C-295/04 to C-298/04) [2006] 5 CMLR 17 (*Manfredi*), and *Cogeco Communications Inc v. Sport TV Portugal SA* (Case C-637/17) [2020] 5 CMLR 2 (*Cogeco*).

23. *Courage* was not a limitation case. The Advocate General suggested at [55] that the rule of English law to the effect that one party to an illegal agreement could not claim damages from another party was contrary to the EU law principle of effectiveness, as it rendered "virtually impossible the protection to which a party to an unlawful agreement [was] entitled". The CJEU simply held at [2] of the ruling that article 85 of the TFEU (now article 101) precluded such a rule if it was on the sole ground that the claimant was a party to the anti-competitive contract. I can see nothing in the judgment of the CJEU in *Courage* that refers to or provides for the Cessation Requirement to be imported into limitation rules.

24. *Manfredi* was a limitation case. The third question in joined cases C-295 to C-297/04 and the fourth question in Case C-298/04 asked the CJEU whether the then equivalent of article 101 (which was article 81) meant that the limitation period for bringing claims for damages began to run from the day on which that prohibited agreement was adopted or from the day on which the agreement came to an end. The CJEU said this at [77]-[82]:

> … in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules observe the principles of equivalence and effectiveness.
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> 78. A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended.
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> 79. In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period will expire even before the infringement is brought to an end, in which case it is impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.
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> 80. It is for the national court to determine whether such is the case with regard to the national rule at issue in the main proceedings.
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> 81. The answer to the third question in Cases C-295 to C-297/04 and the fourth question in Case C-298/04 must therefore be that, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under article 81 EC, provided that the principles of equivalence and effectiveness are observed.
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> 82. In that regard, it is for the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under article 81 EC begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.

25. The CJEU was specifically asked if article 81 ought to be construed as importing a Cessation Requirement (see the questions I have recited at [24] above). Its answer pointed out at [79] that it was **possible** that the limitation period might expire even before the infringement ended, where there were continuous or repeated infringements, and that it would then be **impossible** for an individual who suffered harm after the expiry of the limitation period to bring an action. Even that comment was in relation to the first alternative mentioned in the question before the CJEU, namely: "[a] national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted". Moreover, at [81] and [82] the CJEU

did not mention the Cessation Requirement. It repeated that it was for the national court to decide if its national limitation rules rendered "it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered", mentioning only short limitation periods and the inability to suspend them.

26. In these circumstances, I think it is incorrect to say that *Manfredi* articulated a general conclusion that the EU law principle of effectiveness required that a competition damages limitation period should only begin to run once the infringement had ceased. It certainly provided guidance to national courts having given an example that involved a limitation period starting with the adoption of the anti-competitive agreement and terminating before the infringement had ceased. It seems likely that this passage was a step on the path towards the principle emerging in *Volvo* and *Heureka*.

27. *Cogeco* concerned restrictive limitation provisions applicable in Portugal before the implementation of the Damages Directive. Both Advocate General Kokott (see [AG72]-[AG86]) and the CJEU (see [42]-[55]) applied *Manfredi* saying that the national limitation provisions had to comply with the EU law principle of effectiveness. The CJEU concluded as follows at [55]:

> In the light of the foregoing considerations, the answer to [the questions] relating to the compatibility of national legislation … with EU law is that art. 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority.

28. There can be little doubt that *Cogeco* was a further step on the path towards the principle emerging in *Volvo* and *Heureka*.

EU law as to the Cessation Requirement post-completion day

29. The Tribunal considered *Volvo* in detail, concluding at [33] as follows:

> We conclude that [*Volvo*] does not stand as authority for the proposition that, as a matter of EU law, time must run from the time when the infringement of competition law has ceased for the purposes of claims asserting an infringement of EU competition law.

30. Now that we have the benefit of *Heureka*, it would be academic to consider whether or not the Tribunal was strictly correct. I have already cited [61] from the CJEU's decision in Volvo at [4] above. The question for us is only whether it is now clear from *Heureka* that the EU law principle of effectiveness requires a Cessation Requirement to be read into national limitation laws. In my judgment, it does. That much is clear from [55], [59], [81] and [89] of the CJEU's decision. [59] is, perhaps, the clearest exposition of the applicable principle as follows:

> In those circumstances, the requirement that the limitation period cannot begin to run before the infringement concerned has come to an end is necessary in order to enable the injured party to identify and prove its existence, its scope and its

duration, the extent of the harm caused by the infringement and the causal link between that harm and that infringement and thus to be effectively able to exercise its right to claim full compensation under Articles 101 and 102 TFEU.

31. It was suggested that even *Heureka* did not go so far as to express a general principle that the EU law principle of effectiveness requires the Cessation Requirement to be imported into national laws of limitation, even without a consideration of article 10 of the Damages Directive. In my judgment, it is clear from *Heureka* that that is precisely the principle that the CJEU was stating.

32. It is not necessary for us to reach a conclusion on the retrospective effect of the decision in *Heureka* as it affects current EU member states. The only question for us is whether the claimants are right to say that we ought now to follow *Heureka* under section 6(2). I turn now to that critical question.

Ought this court to follow Volvo and Heureka under its section 6(2) powers?

33. The starting point under this heading is the application of the complete code principle. The majority in *Lipton* explained the complete code analysis at [107] as follows (see also [116]-[119] as to its application to this case):

> The heading of section 6 indicates that it governs the interpretation of retained EU law. If the Liptons' cause of action counts as "retained EU law" as defined in section 6(7), as it would do according to the Complete Code analysis, then the provisions of section 6 apply without difficulty in determining the Liptons' claim:
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> (a) the court is not bound by post-Brexit CJEU judgments and cannot refer a question to the CJEU but it may have regard to such judgments: section 6(1)-(2);
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> (b) the court should decide the effect of their cause of action in accordance with pre-Brexit CJEU case law unless the court can and does decide to depart from it: section 6(3)-(5), as supplemented by regulations made under subsection (5A).

34. Applying the complete code analysis, this court is certainly not required to apply *Heureka* to the pre-completion day circumstances of this case. But that does not address the claimants' argument, which is that *Heureka* represents pre-completion day EU law, which would anyway have been applicable to this case had the court been sitting pre-completion day. In my judgment, the claimants are incorrect about this, because the Cessation Requirement was not an established principle of EU law before *Volvo* (as to which we need not decide) and *Heureka*.

35. My analysis at [25] above demonstrates that [79] of *Manfredi* could be construed as indicating that the absence of a Cessation Requirement might be a feature of a limitation system that could make it impossible for a claimant to bring an effective claim. It was necessary, however, to look at the limitation system as a whole and for the national court to make the decision as to how the EU law principle of effectiveness was to be applied to its national limitation rules. In these circumstances, it cannot be said, in my judgment, that *Courage*, *Manfredi*, and *Cogeco* (read fairly together) made the Cessation Requirement an established component of the application of the EU law principle of effectiveness to the limitation rules relating to competition law infringements. First, until *Volvo* and *Heureka*, the CJEU seems to have thought it

appropriate to leave the application of the EU law principle of effectiveness to the national court. The CJEU's recent approach in *Volvo* and *Heureka* seems more prescriptive. Secondly, the pre-completion day cases reflected specific national laws of limitation that were not identical to English law. Those national laws featured generally shorter limitation periods and an absence of the possibility of the period being suspended or interrupted in respect of an absence of knowledge. Since the CJEU emphasised the need to look at the limitation regime as a whole, there is no clear read across from the pre-completion day cases to the Limitation Act 1980. Thirdly, the existence of article 10 and the non-retrospective provisions of article 22 of the Damages Directive, in my judgment, point towards there being no existing principle of EU law relating to the Cessation Requirement prior to the EU legislature passing it.

36. Accordingly, I conclude that, even ignoring *Arcadia*, it would be wrong to say that either the pre-completion day EU law principle of effectiveness or the proper meaning of article 101 **required** a national court to apply a Cessation Requirement to the limitation periods applicable to competition law infringements. The claimants are, therefore, wrong to say that this court should, in having regard to the post-completion day authorities of *Volvo* and *Heureka*, work on the premise that what those authorities say reflected pre-completion day EU law. Pre-completion day EU law was rather more nuanced as I have explained.

37. In these circumstances, the claimants' argument described at [13] above does not get to first base. There was no clearly defined Cessation Requirement in EU law prior to *Volvo* and *Heureka*. There was, therefore, nothing for sections 4(1) and 5(2) of the Withdrawal Act to preserve, even if the claimants were right to argue that that was their effect (as to which I say nothing).

38. For these reasons, I do not agree with the claimants that this court is obliged under section 6(2) to follow *Volvo* and *Heureka*.

Should this court apply the Cessation Requirement in this case, "having regard" to Volvo and Heureka?

39. The next question is whether the Tribunal was right to say that it would not anyway have regard to *Volvo* and *Heureka* under section 6(2). For all the reasons I have already given and on the basis of the decision in *Arcadia*, it would I think be inappropriate for this court to apply those cases to the pre-completion day facts of this case.

Issue 3: Is the court bound by *Arcadia* to hold that the Limitation Act 1980, as it applies to competition claims, accords with the EU law principle of effectiveness, and that a Cessation Requirement is new law?

40. *Arcadia* was decided on very similar facts to the present case. It did not, however, involve the same claimants and it is not suggested that any issue estoppel arises. The only question is whether we are bound by the usual doctrine of precedent to follow previous decisions of this court.

41. Having dealt with limitation under domestic law, Sir Terence Etherton MR (with whom David Richards and Patten LJJ agreed) dealt with the EU law argument that a Cessation Requirement was required to be imported into the English law limitation rules. The Court of Appeal referred expressly to *Danske Slagterier v. Germany* (Case C-445/06)

[2010] All ER (EC) 74 (*Danske Slagterier*) which itself referred to *Manfredi*. At [73]-[79], Sir Terence Etherton said this under the heading "[l]imitation: EU jurisprudence":

> 73. The claimants 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.
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> 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 JJSC observed in *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2012] 2 AC 337, paras 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. …
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> 76. Mr Randolph referred to [*Danske Slagterier*] 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.
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> 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 claimants rely specifically on article 10(2) which provides: "Limitation periods shall not begin to run before the infringement of competition law has ceased."
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> 78. As the judge rightly concluded, that provision is of no assistance to the claimants. 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.
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> 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.

42. It could hardly be clearer from Sir Terence Etherton's judgment that he had held that the English law limitation periods applicable to competition law infringements did not, at that time, infringe the EU law principle of effectiveness. It was not suggested to us that the decision in *Arcadia* was *per incuriam Manfredi* or any other CJEU authority.

43. In my judgment, *Arcadia* is binding upon us. This court was not, even before completion day, bound by inchoate and unexpressed principles of EU law that were later enunciated in future EU law decisions. That would have made for impossible uncertainty. In the first place, section 3 of the ECA 1972 and the provisions of section 6 and Schedule 1 of the Withdrawal Act that I have set out in the Annex gave precedence to pre-completion day decisions of the CJEU, not to new post-completion day EU law, even if that new law could be argued to be a development of pre-completion day CJEU decisions. Secondly, *Arcadia* considered the very same argument as the one that was addressed to us. At [77], Sir Terence Etherton said that it had been submitted to them that article 10 of the Damages Directive (which encapsulates the Cessation Requirement) "merely [codified] longstanding EU jurisprudence even though it was only enacted in 2014". That was what the claimants submitted to us. At [78], it was decided that article 10(2) was "new law". Thirdly, it is irrelevant that article 10(2) has been imported non-retrospectively into English law by the amendments (given effect on 9 March 2017) contained in paragraph 19(1)(a) of Schedule 8A to the Competition Act 1998.

44. Even, therefore, if we were minded to follow *Volvo* and *Heureka*, it would not, in my judgment, be open to us to do so. In these circumstances, I need say nothing about the arguments addressed to us concerning the appropriate method of enforcing the Cessation Requirement (either by a conforming construction of sections 2 and/or 9 of the Limitation Act 1980, or by disapplying those provisions).

Conclusions

45. For the reasons I have given, I would dismiss this appeal.

Sir Julian Flaux, Chancellor of the High Court:

46. I agree.

Lady Justice Falk:

47. I also agree.

Annex to the judgment of the Master of the Rolls

The European Communities Act 1972 (as at 30.12.2020)

Section 2 (under the heading: "**General Implementation of Treaties**"):
(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies. …

Section 3 (under the heading "**Decisions on, and proof of, Treaties and EU instruments etc.**"):
(1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

Interpretation Act 1978

Section 16 (under the heading "**General savings**"):
(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, —
(a) revive anything not in force or existing at the time at which the repeal takes effect;
(b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.
(2) This section applies to the expiry of a temporary enactment as if it were repealed by an Act.

The European Union (Withdrawal) Act 2018 (as at 26.7.2023)

Section 1 (headed "**Repeal of the European Communities Act 1972**"):
The European Communities Act 1972 is repealed on exit day.

Section 2 (headed "**Saving for EU-derived domestic legislation**"):
(1) EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day. …
(3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation: supplementary) and section 5A (savings and incorporation: supplementary)].

Section 3 (under the heading "**Incorporation of direct EU legislation**"):
(1) Direct EU legislation, so far as operative immediately before IP completion day, forms part of domestic law on and after IP completion day. …

Section 4 (under the heading "**Saving for rights etc. under section 2(1) of the [European Communities Act 1972]**"):
(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day —
(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
(b) are enforced, allowed and followed accordingly,
continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly). …

Section 5 (under the heading "**Exceptions to savings and incorporation**"):
(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day.
(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day
(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after IP completion day of any enactment or rule of law passed or made before IP completion day if the application of the principle is consistent with the intention of the modification.
…
(6) Schedule 1 (which makes further provision about exceptions to savings and incorporation) has effect.

Section 6 (under the heading: "**Interpretation of retained EU law**"):
(1) A court or tribunal –
(a) Is not bound by any principles laid down, or any decision made, on or after IP completion day by the European Court, and
(b) cannot refer any matter to the European Court on or after IP completion day.
(2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.
(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it —
(a) in accordance with any retained case law and any retained general principles of EU law, and
(b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.
(4) But—
(a) the Supreme Court is not bound by any retained EU case law …
(7) In this Act — …
"retained EU case law" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they
(a) relate to anything to which section 2, 3 or 4 applies, and
(b) are not excluded by section 5 or Schedule 1,
(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
"retained EU law" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);
"retained general principles of EU law" means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they—

(a) relate to anything to which section 2, 3 or 4 applies, and
(b) are not excluded by section 5 or Schedule 1,
(as those principles are modified by or under this Act or by other domestic law from time to time).

SCHEDULE 1 (under the heading: "FURTHER PROVISION ABOUT EXCEPTIONS TO SAVINGS AND INCORPORATION"):
General principles of EU law
2. No general principle of EU law is part of domestic law on or after IP completion day if it was not recognised as a general principle of EU law by the European Court in a case decided before IP completion day (whether or not as an essential part of the decision in the case).
Interpretation
5(1) References in section 5 and this Schedule to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in Francovich are to be read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after IP completion day by virtue of section 2, 3, 4 or 6(3) or (6) and otherwise in accordance with this Act.
(2) Accordingly (among other things) the references to the principle of the supremacy of EU law in section 5(2) and (3) do not include anything which would bring into domestic law any modification of EU law which is adopted or notified, comes into force or only applies on or after IP completion day.

Damages Directive (2014)

Article 10 (under the heading "**Limitation periods**"):
1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.
2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
(a) of the behaviour and the fact that it constitutes an infringement of competition law;
(b) of the fact that the infringement of competition law caused harm to it; and
(c) the identity of the infringer.
3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.

Article 22 (under the heading "**Temporal application**"):
1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.

Competition Act 1998 (as amended)

Schedule 8A
Paragraph 19 (headed "**Beginning of limitation or prescriptive period**"):
(1) The limitation or prescriptive period for a competition claim against an infringer begins with the later of—
(a) the day on which the infringement of competition law that is the subject of the claim ceases, and
(b) the claimant's day of knowledge.