FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 1
CA19/19 and CA29/19

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motions

in the causes of

GLASGOW CITY COUNCIL and WEST DUNBARTONSHIRE COUNCIL

Pursuers and Respondents

against

(First) VFS FINANCIAL SERVICES LIMITED; (Second) AB VOLVO (PUBL); (Third) VOLVO LASTVAGNAR AB; (Fourth) RENAULT TRUCKS SAS; and (Fifth) VOLVO GROUP TRUCKS CENTRAL EUROPE GmbH

Defenders and Reclaimers

and

(First) MAN SE; (Second) MAN TRUCK & BUS SE; (Third) MAN TRUCK & BUS DEUTSCHLAND GmbH; (Fourth) DAIMLER AG; (Fifth) IVECO SpA; (Sixth) IVECO MAGIRUS AG; (Seventh) FIAT CHRYSLER AUTOMOBILES NV; (Eighth) CNH INDUSTRIAL NV; (Ninth) PACCAR INC; (Tenth) DAF TRUCKS NV; and (Eleventh) DAF TRUCKS DEUTSCHLAND GmbH

Third Parties and Reclaimers

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Pursuers and Respondents: Moynihan QC, Irvine; Anderson Strathern LLP
Defenders and Reclaimers: Ross QC; MacGregor QC; Brodies LLP
Fourth third Parties and Reclaimers: Dean of Faculty (Dunlop QC), Welsh; Dentons UK and Middle East LLP
Fifth to Eighth Third Parties and Reclaimers: D Thomson QC; Levy & McRae LLP

18 January 2022

Introduction

[1] These actions arise from anti-competitive practices in relation to the sale of trucks to Scottish local authorities. The unlawful activity ended in January 2011. The actions were raised in February 2019. The defenders and third parties (collectively "the manufacturers") claim that the actions are barred by the passage of time; in particular that any obligation they may have owed to the pursuers has been extinguished by the expiry of the 5 year prescriptive period. It is an important element of the principle of legal certainty that a person cannot be asked to make reparation to another for an indefinite period of time. Although there are exceptions, there are statutory limits on how long a claim subsists. After that, it cannot be enforced. These reclaiming motions (appeals) raise a sharp issue of the correct application of section 6(4) of the Prescription and Limitation (Scotland) Act 1973. It pauses the running of the prescriptive period when certain conditions are met.

[2] Under section 6(1) of the 1973 Act, an obligation to make reparation is subject to the short negative prescription. Five years from the date upon which it becomes enforceable, an obligation is extinguished. Under section 6(4)(a), in calculating whether the five year period has expired, any period "during which by reason of – (i) fraud on the part of the debtor … the creditor was induced to refrain from making a relevant claim" is ignored. This exception is itself subject to a proviso. It does not take account of any period after which the creditor could "with reasonable diligence" have discovered the fraud. In short, to avoid the normal consequences of prescription, the court must find that the creditor did not know of, and could not with reasonable diligence have discovered, the fraud.

[3] The focus in the present actions on section 6(4) may have arisen as a consequence of recent clarification of the limits to the use of section 11(3) to extend prescriptive periods

because of a lack of awareness of objective facts on the part of the creditor (*WPH Developments* v *Young & Gault* 2021 SLT 905, following *David T Morrison* v *ICL Plastics* 2014 SC (UKSC) 222; and *Gordon's Trs* v *Campbell Riddell Breeze Paterson* 2017 SLT 1287). The limits, which were defined in these cases, are largely removed by the introduction of section 11(3A) of the 1973 Act, and associated amendments, by section 5 of the Prescription (Scotland) Act 2018. These changes are, somewhat surprisingly, not yet in force. The Scottish Law Commission's *Report on Prescription* (SLC No 247), which was published on 3 July 2017, made recommendations on commencement provisions (para 1.30 *et seq*). The Scottish Government's *Consultation on Commencement Regulations* closed on 14 October 2020.

[4] It is important to record *in limine* that the pursuers did not, at the stage of the reclaiming motions, seek to rely on any lack of awareness under section 11(3). The commercial judge rejected the pursuers' submissions under that provision on the basis that the purchase price of the manufacturers' trucks constituted "expenditure" of the type envisaged in *Gordon's Trs* (at para 21). The judge's determination, along with his decision on the applicability of the long negative prescription under section 7, was not challenged. The subsistence of the pursuers' claims, which would otherwise have prescribed, rested solely on the application of section 6(4). They contend that, until the publication of a report by the Commission of the European Union in July 2016, they did not know of, and could not, with reasonable diligence, have discovered, the unlawful activity, which was itself said to constitute the fraud.

[5] It is equally important to record that the manufacturers did not argue that section 6(4) could not apply to the facts in this case, because there had been no separate fraud perpetrated on the pursuers other than that inherent in the secretive nature of the wrongdoing itself (cf *BP Exploration Co* v *Chevron* 2002 SC (HL) 19). This concession was

said to have been based upon *Heather Capital* v *Levy & McRae* 2017 SLT 376 (see eg Lady Paton at para [67]). The argument from the manufacturers was essentially that the pursuers either were, or could, with reasonable diligence, have been aware, of the illegal activity at or about the time of press reports of investigations into that activity by the EU Commission in early 2011, and possibly even earlier at the time of press reports regarding enquiries by the Office of Fair Trading in late 2010.

Facts

[6] Between 22 July 1998 and 18 January 2012, several Scottish local authorities bought heavy and medium trucks from the manufacturers. In September 2010 the MAN group of companies informed the EU Commission that they and several other European truck manufacturers had engaged in anti-competitive practices. MAN applied for immunity, under the 2006 Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), for bringing the matter to light. They were granted conditional immunity in December 2010.

[7] In the following month the Commission carried out inspections at the manufacturers' offices. On 18 January 2011 they announced that they had commenced investigations into suspected anti-competitive practices in different EU states. Shortly afterwards, Volvo, Daimler and Iveco (but not DAF) also submitted applications for leniency. A condition of doing so was that they could not disclose the fact, or any content, of the application prior to the Commission initiating proceedings (Commission Notice on Immunity paras 12(a) and 24). On 20 November 2014 the Commission reported that they had informed the manufacturers that they were initiating proceedings. Settlement negotiations followed.

[8] On 19 July 2016, the Commission published the outcome of their investigations. A press release was issued. The Commission decision became final on 29 September 2016, with "provisional" and "final" non-confidential text of the decision being published on 6 April 2017 and 30 June 2020. The Commission found that, between January 1997 and January 2011, five groups of companies (MAN, Daimler, Iveco, Volvo/Renault and DAF) had breached Article 101 of the Treaty on the Functioning of the EU. They had unlawfully colluded in respect of: (i) the pricing of heavy and medium trucks; and (ii) the timing of the introduction of emission technologies; and (iii) the passing of associated costs to consumers. They were all subject to heavy fines, other than MAN. That imposed on Daimler exceeded €1 billion.

[9] This court is not entitled to make any decision which runs counter to that of the Commission (Council Regulation (EC) No 1/2003 Article 16(1)). At the relevant time, a person could claim damages by application to the Competition Appeal Tribunal in respect of an infringement of Article 101 of the TFEU (Competition Act 1998 s 47A(6)(d)). It could only do so once the EU Commission had determined that an infringement had occurred (s 47A(5)(a)). This was without prejudice to the person's right to bring an action in the ordinary courts (s 47A(10)) and was irrespective of any prescriptive period (s 47A(3)). Any claim had to be made within two years of either the Commission's decision or the date when the cause of action arose (Competition Appeal Tribunal Rules 2003 rule 31). The local authorities therefore could have initiated competent claims for damages in the CAT by 19 July 2018. None did so.

[10] Twenty two local authorities have raised actions seeking reparation for overpayments in respect of trucks purchased as a result of the collusive practices. Glasgow City Council's claim exceeds £10 million. West Dunbartonshire seek payment of about

£2 million. The present two actions have been selected as the lead cases. They were raised on 20 February 2019. The first action to be raised in the United Kingdom against the manufacturers was by the Royal Mail on 1 December 2016 in the High Court of Justice in London.

The Proof

Publications

[11] The commercial judge held a preliminary proof on prescription. The pursuers adduced evidence from four of their employees. The rest of the evidence consisted of documentation whose provenance was agreed by joint minute. The manufacturers called no witnesses. Although the material has been set out in relatively full terms by the commercial judge, given the focus upon it by the manufacturers in the reclaiming motion, it is necessary to repeat much of its content. It included, first, on-line press reports dated 16 and 17 September 2010 from the *BBC* and in the *Guardian*, the *Telegraph*, the *New Statesman*, the *Financial Times*, the *Herald* and *Bloomberg* as well as two on-line trade journals, namely *Transport Engineer* and *Logistics Manager*. The *BBC* headline was "OFT price-fix probe into leading vehicle makers". The Office of Fair Trading were said to have launched investigations into suspected price-fixing by major lorry manufacturers including Mercedes-Benz, Scania, MAN, Iveco, Renault and Volvo. They were looking at suspected cartel activity. They had visited Daimler's Mercedes-Benz premises near Milton Keynes in relation to alleged price fixing in the commercial vehicle market. One person had been arrested and released on bail.

[12] The *Guardian* recorded that the investigations were in respect of suspected cartel activities that may have "pushed up the price of trucks". The investigations were at an early

stage and any infringement would not be known until they were completed. The reports on the other on-line media outlets were all of a similar nature and appeared to derive from the same source. The *FT* and the *Telegraph* named the head of Daimler's UK Mercedes-Benz commercial vehicle division as the person who had been arrested. *Bloomberg* stated that the type of investigation was usually as a result of one cartel member acting as a whistle blower.

[13] Secondly, there was a memorandum from the EU Commission dated 18 January 2011, headed "Antitrust: Commission confirms unannounced inspections in the truck sector". This stated that they, too, were launching an investigation. They had reason to believe that companies who were active in the truck market may have violated EU antitrust rules that prohibit cartels. The investigations were a preliminary step and did not mean that the companies were guilty of any anti-competitive practices.

[14] Thirdly, the *FT*, *Reuters* and *Euractiv* reported the memorandum. The *FT* referred to surprise visits to Daimler, Scania, Volvo and MAN. It followed up on the story on 3 March 2011 under the headline "Truckmakers in Brussels antitrust probe". The EU Commission and truck manufacturers had declined to comment further, but "[p]eople close to the situation" had said that antitrust officials were alleging "rigged prices" in half a dozen European countries but not in the UK, where the OFT were carrying out their own investigation. On 22 December 2011, the *FT* and *Reuters* reported that the OFT's criminal investigation had concluded that there was insufficient evidence upon which to base any criminal charges. In terms of an OFT press release dated 15 June 2012, the civil investigation had been closed in deference to the Commission's work. This appeared on the OFT's website and in the print edition of *Commercial Motor*.

[15] Fourthly, there was a press release from the EU Commission on 20 November 2014 headed "Antitrust: Commission sends statement of objections to suspected participants in

trucks cartel". This said that a number of heavy and medium truck manufacturers were suspected of a breach of EU antitrust rules. This was reported in the *Telegraph* and by *Reuters*; the *Telegraph* adding that Volvo had made a €400 million provision in their accounts. Although *Reuters* named various manufacturers thought to have been involved, the Commission declined to do so.

[16] Fifthly, there were brief and general references taken from the annual reports and accounts of the manufacturers dated between 2010 and 2015. In Volvo's 2012 report, the fact of an investigation into the truck industry was mentioned. That, it was said, might affect Volvo's accounts and cash flow, but it was too early to assess. There was no contingent liability provision. In MAN's 2011 to 2013 reports, there was reference to the investigation which had started with a search of their premises. Daimler's 2010 and 2011 reports disclosed that the EU Commission were carrying out an investigation into commercial vehicle manufacturers, including themselves. Fines might follow depending upon the gravity of any infringement. Iveco's 2013 and 2014 reports were of a similar nature.

Witnesses

[17] Grant Montgomery was a procurement specialist with Scotland Excel. He first became aware of a possible claim against truck manufacturers on 19 July 2016, when he read a report on the *BBC*'s website about the fines which had been imposed by the EU Commission. This had, as the commercial judge described his testimony, "come out of the blue". He had not been aware of the OFT's 2010 raid or of their, or the EU Commission's, investigations. He had not seen any of the press releases or reports in 2010 and 2011, although he normally visited the *BBC* website and occasionally that of the *FT*. He would not routinely read company accounts. On 26 July 2016 he sent an email marked "For

information only – no action required at this time" to his contacts in local authorities. This drew their attention to the matter and suggested that they discuss it with their legal departments.

[18] Emil Laiolo was a transport manager with Glasgow City Council. He became aware of the possibility of a claim in late 2016 or 2017, as a result of conversations with other transport managers. He did not recall Mr Montgomery's email. He was not aware of anyone knowing about the investigations in advance of the imposition of the fines. He had not been aware of the 2010 and 2011 investigations. Even if he had seen the *BBC* or other media reports, he would not have done anything about them. They were just reporting something which might come to nothing. A local authority would not have the power or the resources to obtain the information necessary to understand what was going on. He would not have considered looking at company accounts for further information.

[19] Peter Hessett was a solicitor with West Dunbartonshire Council. He too had not seen Mr Montgomery's email. No-one within his council had acted upon it. He had not been aware of the OFT's raid or the Commission's investigations. He did not read the annual reports of truck manufacturers and was unaware of anyone in his council doing so. He did not recall seeing any of the press reports. The only source that he might have consulted was the *BBC* website. Had he seen the articles, he did not think that they would have been of much interest. They only reported the existence of investigations and not conclusions. A local authority would only consider taking action when an investigation had come to something. They could not be expected to carry out their own investigations. The media reports did not specify which trucks had been involved. He had first been told of a possible claim by a colleague in another local authority in August 2017.

[20] Alan Douglas was the manager of legal services with West Dunbartonshire Council. He was told of a possible claim by Mr Hessett in 2017. Prior to July 2016, no-one at the council had been aware of an investigation. He had not been aware of any announcements in 2010 or 2011. He had not seen any of the press reports. He would not normally have looked at any of them, apart from the *BBC*. If he had seen the reports, he would have waited until any investigation had reached a conclusion. He did not read the annual reports of truck manufacturers. Cartels were self-disguising. A local authority would not have the resources to investigate one. Until the investigation had reached a conclusion, there was no evidence of wrongdoing upon which a local authority could act.

The commercial judge

[21] On the interpretation of section 6(4), the commercial judge held that the reference to "fraud" had to be construed broadly, as a matter of policy. It encompassed any form of concealment by the debtor (*BP Exploration Co* v *Chevron* at para [67], following *Caledonian Railway Co* v *Chisholm* (1886) 13 R 773 at 776; Scottish Law Commission: *Reform of the Law Relating to Prescription and Limitation of Actions (1970)* (SLC Report No 15) at para 93). What was important was identifying when the concealment came to an end and the creditor discovered the truth.

[22] The commercial judge had regard to the provisions of section 32(1) of the Limitation Act 1980, which, he recognised, did not apply to Scotland. This extended the limitation period in England and Wales when any relevant fact had been deliberately concealed by a defendant. Following *dicta* in *Arcadia Group Brands* v *Visa Inc* [2014] EWHC 3561 (Comm) and *Granville Technology Group* v *Infineon Technologies* [2020] EWHC 415 (Comm), the judge held that, as in England and Wales, prescription could not run against a pursuer who was

unable to plead a relevant case because critical facts, that had to be pled in order to establish a *prima facie* case, had been concealed by the defender. In a case such as the present, those facts included the nature of the infringement and the identity of the wrongdoer.

[23] Applying that view of the law to the facts, the commercial judge did not consider that the manufacturers' concealment of the critical facts had ended in September 2010 or in early 2011. The information that had entered "the public domain" at that time was extremely limited. Several facts remained concealed. The first was the extent of the price fixing. The website reader would not have known whether any truck that he had bought fell within the scope of the investigation. The fact that it concerned medium and heavy trucks did not emerge until 2014. The timing of emission technology remained concealed until the publication of the decision in 2016. There was no confirmation that the allegations were well founded. No particular company was specified as a participant. No geographical extent was identified. The companies which had applied for leniency had been prohibited from revealing the circumstances. There was nothing of substance in the annual reports and accounts.

[24] The commercial judge accepted the pursuers' witnesses as credible and reliable. He accepted that they constituted a reasonably representative sample of persons with technical and legal expertise in local authorities. He accepted that they had not seen the press reports or the annual accounts. Even if they had, it would have made no material difference. There was nothing which would have led to the discovery of a cartel. There was nothing to prompt further inquiries which, if conducted with reasonable diligence, would have been likely to have led to the discovery of the fraud. He rejected the proposition that it was incumbent upon a local authority to carry out its own research into a price fixing cartel which was being investigated by the EU Commission. Had the local authorities embarked

upon an investigation, the companies involved would not have co-operated. It would have prejudiced their leniency applications to do so.

[25] The Commission's announcement in November 2014 had identified the general nature of the trucks involved but, despite the press reports, not the names of the manufacturers. There was still no finding against the manufacturers. There was no specification of the particular companies, the duration of any cartel or its geographical extent. The pursuers would not have been able to plead a *prima facie* case. There was no material change in circumstances from then until the publication of the decision on 19 July 2016. The period prior to that date was therefore not to be included when calculating the prescriptive period.

[26] The commercial judge reached his view without reliance on the principle of effectiveness in EU law, as encapsulated in article 19 of the Treaty on the European Union and article 47 of the Charter of Fundamental Rights. He observed that it was well settled that prescription did not conflict with the principle unless its effect was to render the obtaining of a remedy practically impossible or excessively difficult (*FII Group Test Claimants* v *Revenue and Customs Comrs* [2012] 2 AC 337 at para 93 (see also [2014] AC 1161), following *C33/76 Rewe-Zentralfinanz* v *Landwirtschaftskammer für Saarland* [1976] ECR 1989 at para 5). Citing C637/17 *Cogeco Communications* v *Sport TV Portugal* [2020] 5 CMLR 2 (at para 52), the judge noted that the appropriateness of a prescriptive period, in the context of the principle of effectiveness, was important both in connection with cases before a national competition authority and the courts. The suspension of the prescriptive period under section 6(4) was consistent with the EU jurisprudence. None of the material, which was publicly available before July 2016, would have enabled the pursuers to identify and to raise an action against the particular companies which had been involved in the cartel.

Submissions

Daimler

[27] Daimler submitted that the commercial judge erred in law by finding that there was no material difference between English and Scots law in this area. The terms of section 32 of the 1980 Act differed materially from section 6(4) especially in their reference to the concealment of "any fact relevant to the plaintiff's right of action". Section 6(4) was concerned only with inducement to refrain from making a relevant claim (*BP Exploration Co* v *Chevron* at paras [33] and [107] – [108]; *David T Morrison* v *ICL Plastics* at para [84]). The English law test involved a claimant being able to plead a complete cause of action. It was based on different legislation which should not have been taken into account (*McE* v *De La Salle Brothers* 2007 SC 556 at para [161]). There was no basis for the commercial judge applying English principles to Scots law. It tainted his subsequent consideration of section 6(4).

[28] Even if the commercial judge had been correct to follow the approach in England, he erred in holding that time only started when the pursuers could plead a *prima facie* case. In England the relevant time was when the claimant knew with sufficient confidence facts and circumstances to justify embarking on the preliminaries to the issue of a writ rather than the point at which he could plead a statement of claim. *FII Group Test Claimants* v *HMRC* [2020] 3 WLR 1369 had been decided after the commercial judge's opinion. It had superseded *Arcadia Brands* and *Granville Technology*. In *Test Claimants*, the battleground had lain between a starting point at which there was sufficient knowledge to start investigations and one when there was enough to plead a case. The court decided (at paras 180, 182, 184 and

190) that the former prevailed. The creditor then had five years "to get his ducks in a row". The preliminaries included taking advice and collecting evidence (*ibid* at para 193).

[29] On any view, a mass purchaser of trucks who knew or ought to have known of an alleged competition law infringement had enough information to take advice and to collate evidence. *FII Group Test Claimants* removed any foundation that there was a postponement until a relevant summons could be drafted.

[30] Once the competition law infringement was no longer concealed, the only basis for invoking section 6(4) ended. Scottish practice did not require a party to be able to plead a case which was ready to be sent to probation. Once a party could with reasonable diligence have become aware of the cartel, the drafting of a summons could have been instructed. It was not sufficient for the pursuers to say that it would have been too difficult or expensive for them to have carried out an investigation. Once the press reports had been published in 2010 and 2011, or at least once the Commission had made their announcement on 18 January 2011, a local authority ought to have: (a) taken legal advice on whether a claim might be available; and (b) begun to compile information which would have formed the basis of that claim. If they had not completed their investigations within five years they could have raised protective proceedings.

[31] It could not be right that a person had five years, from the point at which they were in a position to draft a summons on the basis of a *prima facie* case, to raise an action. It was for the pursuers to demonstrate that they had been unaware of the competition law infringement. The testimony of the witnesses came nowhere near showing that no relevant officer or employee of the pursuing local authorities had knowledge of what was in the public domain. There was no finding in fact that the pursuers as a whole were unaware of the alleged infringement.

[32] Reasonable diligence fell to be determined objectively. The commercial judge ought to have asked himself whether the pursuers should have been aware of anything that would have caused them to take advice. The test was what would a local authority with adequate, but not unlimited, staff and resources have done if motivated by a reasonable but not excessive sense of urgency (*FII Group Test Claimants* at para 203, following *Paragon Finance* v *Thakerar* [1999] 1 All ER 400 at 418). The pieces of information would have caused a reasonable local authority to investigate. The press coverage had identified most of the groups that were involved and MAN as the whistle-blower.

[33] The pursuers need only have identified one member of the group. EU law regarded all members of an infringing undertaking to be jointly and severally liable (*Pegler* v *European Commission (Re Copper Fittings Cartel*) [2011] 4 CMLR 34 at paras 100-101). EU law also permitted damages claims to be brought against a parent company (*ibid* paras 103-105).

Volvo and Renault

[34] Volvo and Renault adopted Daimler's submissions. They added that effectiveness was not an issue, given the alternative remedy of applying to the CAT (*Granville Technology Group* v *Infineon Technologies* at para 59). On reasonable diligence, reference was made to *Adams* v *Thorntons* 2005 SC 30 at paras [23] – [24]. On the ability to sue a parent company, (C-516/15 P) *Akzo Nobel* v *European Commission* (*Re Heat Stabilisers Cartel*) [2017] 5 CMLR 7 at paras 52 to 56 was cited.

Iveco, Fiat and others

[35] These parties also adopted Daimler's arguments.

Pursuers and respondents

[36] The pursuers submitted that the commercial judge did not misconstrue section 6(4). The hard application of this provision, which he had rejected, would result in the pursuers not being able to present a follow-on claim based on the binding decision of the Commission, even if they had commenced it on the day on which the decision had been published. That outcome was contrary to the policy imperative underpinning the right to an effective remedy for anti-competitive practices. It was contrary to the rationale of section 6(4) derived from *Caledonian Railway Co* v *Chisholm*. A wide purposive interpretation had to be applied to "fraud" in section 6(4) (Johnston*: Prescription & Limitation* (2nd ed) at paras 6.115-119). It included any situation in which the defender's conduct was unconscionable or such that it would be inequitable for him to avail himself of the lapse of time (McGee: *Limitation Periods* (8th ed) at paras 20.015-017). "Refrain" had to be construed in the same manner. Where the existence of an obligation or the identity of the debtor had been concealed, the debtor's conduct will be taken to have induced the creditor to refrain from making a claim as a matter of ordinary language (*BP Exploration Co* v *Chevron* at paras 31-32; *Caledonian Railway Co* v *Chisholm* at 776).

[37] The standard to be applied in judging reasonable diligence was settled. It was what an ordinary prudent person would do having regard to all of the circumstances (*Heather Capital* v *Levy & McRae* at para [72], citing *Peco Arts Inc* v *Hazlitt Gallery* [1983] 1 WLR 1315 at 1323). The objective standard had to be applied having regard to how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited resources and was motivated by a reasonable but not excessive sense of urgency (*Peconic Industrial Development* v *Lau Kwok Fai* [2009] HKCFA 16 at paras 30-31). It did not follow from the availability of material on the internet that such material would put a local authority on

notice of a claim or that it would result in a conclusion that it could, with reasonable diligence, have seen the particular documents (*DSG Retail* v *Mastercard* [2020] Bus LR 1360 at para 70).

[38] The commercial judge made a finding of fact that there was continuing deliberate concealment beyond November 2014. He held that the manufacturers' conduct was motivated by their financial interest in securing immunity or leniency. They did not contest these findings. They led no witnesses. On that basis, the judge was entitled to hold that the claims had not prescribed. The obligation on which the current proceedings was based did not concern a cartel in some generic sense or even price fixing in relation to commercial vehicles or trucks. It was constituted by specific secret, collusive acts by specific companies affecting specific products supplied in a specific geographical market over a specified period of time. Those essential details were first publically disclosed in the Commission's decision of 19 July 2016. The information in the public domain was, as the judge had noted, extremely limited. Prescription was about what the creditor knew or ought to have known. The combined efforts of the manufacturers had come up with very little published information.

[39] The manufacturers did not dispute the findings that the pursuers' witnesses: (i) had not seen any of the material; (ii) constituted a representative sample of local authority employees; and (iii) did not know of the infringement. The commercial judge determined that, even if the pursuers had known of the material, it would not have made a difference. Reasonable diligence did not require them to carry out internet searches (*DSG Retail* v *Mastercard* at para 70). In any event, the manufacturers did not suggest that an internet search would have thrown up more than they had produced.

[40] The commercial judge's finding that there was continuing deliberate concealment by the manufacturers was sufficient to satisfy section 6(4) and met the situation envisaged in *Caledonian Railway Co* v *Chisholm* and echoed in *BP Exploration Co* v *Chevron*. The manufacturers were contending that the pursuers could and should have taken protective action in advance of the Commission decision, before anyone else in the UK had done so. Given the finding that the manufacturers were engaged in positive concealment for their own financial benefit, it would be unjust to allow their arguments to succeed. It would have required the hindsight of a savant to pick out the limited parts of the published material in 2010 and 2011 that would in due course amount to an infringement of competition law. Those parts fell short of what was required to define or to constitute a specific infringement. It was not until later that the particular types of trucks had been identified and later still before the emissions technology aspect was disclosed.

[41] Although *FII Group Test Claimants* had post-dated the commercial judge's decision, it did not affect the result of the case on the facts. *Granville Technology* had been upheld in *OT Computers v Infineon Technologies* [2021] 3 WLR 61; it being emphasised (at para 22) that the duty of the court was to interpret a statute in a manner which gave effect to, rather than defeated, its purpose. There needed to be actual or constructive knowledge of the relevant fraud. The pursuers could not have collected any meaningful evidence. Even the OFT had been defeated in their search for proof of criminality. The reference to a relevant claim in section 6(4) meant that the suspension of prescription was related to the ability to commence an action for the enforcement of a particular obligation. The period only ended when the creditor discovered the truth (*BP Exploration Co* v *Chevron* at para [108]).

[42] A relevant claim assumed an ability to enforce it by bringing judicial proceedings. The terminus was not the date on which the pursuers might have begun collecting evidence on a speculative basis. *Cogeco Communications Inc* v *Sport TV Portugal* (at paras 38-44) emphasised that the right to claim compensation strengthened the working of competition law. That right had to be effective. It would be against that rationale to permit continuing deliberate concealment by the manufacturers to defeat the pursuers' claims for compensation. Section 6(4) could be construed in a manner that avoided that unjust result.

[43] The qualified ability to sue a holding company for an infringement by a subsidiary was not relevant. Although liability could attach to a parent company, that liability was derivative and assumed that a subsidiary was a participant in the relevant activity. A creditor would still have to identify a participant *(C-516/15 P) Akzo Nobel v European Commission (Re Heat Stabilisers Cartel)* at paras 46, 52 and 60). The creditor then had to be aware of the nature of the obligation, the types of vehicles involved and that an infringement had occurred in the UK.

Decision

[44] The issues which required resolution after proof were two-fold. First, did the pursuers know of the "fraud" (the operation of the cartel) prior to February 2014, being the date five years prior to the raising of these actions? Secondly, could the pursuers, using reasonable diligence, have discovered the operation of the cartel prior to that date? These were matters of fact. This court is not entitled to interfere with first instance findings of fact except upon well-known and closely defined grounds of challenge.

[45] The first recognised ground is that the decision was "plainly wrong", in the sense of it being one which cannot reasonably be explained or justified (*Woodhouse* v *Lochs and Glens*

(Transport) 2020 SLT 1203, LP (Carloway), delivering the opinion of the court, at para [31] and following *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203, Lord Reed at para 62). Secondly, there may be some other identifiable error, including "the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence" (*ibid*, para [31]). A material error of law is another ground for interfering with a first instance decision, but such an error may or may not require a review of the findings in fact. If such a review is required, the court will more easily reverse a finding of inferential, as distinct from primary, fact (*Woodhouse* at para [33]). A finding that the pursuers' employees were unaware of the published material is one of primary fact. Whether reasonable diligence could have discovered the cartel at a particular date is a matter of inference based on primary fact.

[46] On the first issue for proof, the commercial judge accepted the evidence of the four employees of the pursuers. Each witness said that he had not seen the various on-line reports from the *BBC* and the other news and trade media in the years 2010 and 2011. They had been unaware of the cartel allegations until the Commission's decision in 2016. The witnesses were unaware of the Commission's memorandum of January 2011, the press reports upon it and the later press release in November 2014. The fact that some piece of news has made its way into the media, or has been the subject of a report somewhere on the *BBC*'s website, does not necessarily make that news something which is known to the public generally, or even to those who might have an interest in the subject matter.

[47] The existence of information "in the public domain" does not carry with it an implication that it is public knowledge. The pursuers did not trade in trucks. They purchased trucks for their own use. There was no obvious reason for them to be alert to the financial or business pages of the news media to see what was happening in that sector of

the market. The published information does not seem to have been in any prominent part of the media. Certainly, the evidence indicated that it was not something which gained much traction. There was no reason for local authorities to search the annual reports and accounts of truck manufacturers to see what they might reveal. There would have to have been something which put the pursuers on notice, as it was well put in D*SG Retail* v *Mastercard* 2020 Bus LR 1360 (Sir Geoffrey Vos C at para 70), and meant that they ought to have carried out further research.

[48] The commercial judge found that the four employees were a representative sample of the pursuers' staff; coming, as they did, from their truck management, procurement and legal departments. He found that the pursuers were not aware of the published information. In any event, the information in "the public domain" was so limited that it would not have prompted any further enquiries by a local authority. Even then, any investigations would not have produced any significant information given the necessary silence imposed on those who had applied for leniency.

[49] The manufacturers led no contradictory evidence. They did not seek to adduce evidence from any local authority that they were aware of the investigations into truck cartels at any point in advance of the Commission's decision in 2016. This is a striking omission. A reasonable inference is that the manufacturers were unable to find anyone who could testify to his or her council's awareness of the activities of the OFT or the EU Commission in advance of the 2016 decision. This is confirmed by the further striking fact that no local authority or any other claimant in the United Kingdom raised an action against the manufacturers during the five year period which ran from the media disclosures in 2010 and 2011. This too is significant to the question of whether, judged objectively, a local authority or similar organisation purchasing trucks for its business ought to have been

aware of the media reports and acted upon them. The correct inference from all of the circumstances is, as the commercial judge found, that the pursuers could not, with reasonable diligence, have discovered the cartel until the Commission's decision.

[50] In these circumstances the commercial judge held, as a matter of law, that section 6(4)(a)(i) applied. That conclusion will require to be examined, but it cannot be said that he was plainly wrong or that he made any error in making the findings of primary and inferential fact which led to his conclusion, having applied the terms of the section.

[51] The commercial judge was, however, in error in applying *dicta* from *Arcadia Group Brands* v *Visa Inc* [2014] EWHC 3561 (Comm) and *Granville Technology Group* v *Infineon Technologies* [2020] EWHC 415 (Comm) for two reasons. First, they apply only to the law of limitation of actions in England and Wales, which has a markedly different statutory basis and historical origin. As was said in *McE* v *De La Salle Brothers* 2007 SC 556 (Lord Osborne at para [161]) "the use of cases decided in this area of the law in one jurisdiction as authorities in the other is most unwise and likely to lead to substantial confusion".

[52] There is no rule in Scotland that the suspension of prescription under section 6(4)(a)(i) occurs up to the point at which a pursuer is able to plead a relevant *prima facie* case; ie until he has those critical facts which have been concealed by the defender. It is sufficient that there has been a fraud, in this case concealment of facts (*Caledonian Railway Co* v *Chisholm* (1886) 13 R 773, LP (Inglis) at 776), which induced the creditor to refrain from raising an action. Once the concealment of the operation of the cartel was discovered, it could not be said to continue to induce the pursuers not to sue. Once knowledge of the cartel was imputed to the pursuers, they had the prescriptive period within which, as the manufacturers put it, to get their ducks in a row (ie to commence proceedings). There is no

need for the creditor to be in possession of all the relevant facts with which to establish a *prima facie* case.

[53] If the commercial judge had held that the pursuers knew, or could with reasonable diligence have discovered, that a cartel was operating in a market in which they had been significant consumers, prescription would have run from the time at which they were held to possess such actual or constructive knowledge. That is notwithstanding that the pursuers may not then have known that the cartel's operations applied to a particular truck which they bought or that they could not then identify a specific member of the cartel. They had five years to find out those details. They would have had the benefit of the EU law on the pursuit of parent companies had they been experiencing difficulty in identifying the appropriate defender (*Akzo Nobel* v *European Commission* (*Re Heat Stabilisers Cartel*) [2017] 5 CMLR 7 (p 331) at paras 52 to 56; and *Pegler* v *European Commission (Re Copper Fittings Cartel*) [2011] 4 CMLR 34 at paras 100 – 105). The pursuers' submissions in relation to potential difficulties in making that identification are not well-founded.

[54] Secondly, even if the principles of the English law of limitation had any relevance, *Arcadia Group Brands* and *Granville Technology Group* have been superseded by *FII Group Test Claimants* v *HMRC* [2020] 3 WLR 1369. In *FII Group Test Claimants* the court declined to follow the majority in *Deutsche Morgan Grenfell Group v Inland Revenue Comrs* [2007] 1 AC 558. Instead they adopted (Lords Reed and Hodge at paras 180 – 196) the dissenting view of Lord Brown in *Deutsche Morgan Grenfell* (at paras 165 and 167) and earlier *dicta* in *Halford* v *Brookes* [1991] 1 WLR 428, *Haward* v *Fawcetts* [2006] 1 WLR 682 and *AB* v *Ministry of Defence* [2013] 1 AC 78. Time begins to run, under English limitation provisions, when the creditor "knows, actually or constructively, the essential facts on which the cause of action is based, 'with sufficient confidence to justify embarking on the preliminaries to the issue of a writ,

such as submitting a claim to the proposed defendant, taking advice and collecting evidence' [*FII Group Test Claimants*, Lords Reed and Hodge at para 195 quoting from *Halford* v *Brookes*, Lord Donaldson MR at 443]".

[55] The commercial judge's error in law must result in this court reviewing his application of the law to the facts, but these facts, in so far as based upon the testimony of the witnesses, remain unchallenged. Returning to the wording of section 6(4)(a)(i), prescription would have run once the pursuers became aware, or could with reasonable diligence have discovered, that a cartel had been operating in a manner which was liable to have affected the prices which they had paid for their trucks. There is no requirement that they should have acquired, actually or constructively, knowledge of all the facts relevant to that matter. If they were, or ought to have been, aware of circumstances which disclosed the existence of a cartel, that is of facts which ought to have prompted investigations into whether the cartel had affected the price of their trucks, that would be sufficient to start the prescription clock ticking.

[56] When that formulation is adopted, the manufacturers' position advances no further. As a matter of fact, the pursuers did not know of the existence of the cartel until the publication of the Commission's decision in July 2016. There was nothing within their own knowledge which should have prompted them to embark on the preliminaries to a court action. That being so, the critical issue remains whether, objectively, they ought to have known of the operation of the cartel in the market in which they bought their trucks. The commercial judge, on this second matter requiring determination after proof, held that, as a matter of inferential fact, the pursuers could not, with reasonable diligence, have discovered the existence of the cartel. There is no basis upon which to interfere with that finding as

being plainly wrong or because of some other error in relation to a proper analysis of the evidence.

[57] The test is what a prudent person carrying on business of the type operated by the pursuers would do when faced with the knowledge that there might be a cartel operating in Europe amongst truck manufacturers (*Adams* v *Thorntons* 2005 1 SC 30, Lord Penrose at para [23], following *Glasper* v *Rodger* 1996 SLT 44, LP (Hope), delivering the opinion of the court at 46-47 and in turn following *Peco Arts Inc* v *Hazlitt Gallery* [1983] 1 WLR 1315, Webster J at 1322-1323; *FII Group Test Claimants*, Lords Reed and Hodge at para 203, following *Paragon Finance* v *Thakerar* [1999] 1 All ER 400, Millett LJ at 418). The commercial judge was entitled to find that, having regard to the limited information published, such a business would take the matter no further until such time as any regulatory investigation was complete. That is a readily explicable finding having regard to the resources of local authorities generally and the speculative and vague nature of what had been published in the news media.

[58] The manufacturers seek to re-open the commercial judge's findings of fact by arguing that, simply by looking at the published material, the pursuers ought to have known of the operation of a cartel which adversely affected their businesses. They assert that the pursuers, as mass purchasers of trucks, ought to have been aware of the allegations of cartel infringement and embarked on investigations in order to ascertain the nature of the cartel's operation and, with greater precision, the identity of its membership. Such an assertion involves holding that the judge's findings of fact on these matters cannot reasonably be explained or justified. That is not the case. They are readily explicable having regard to the testimony of the witnesses, the limited nature of the published material and the surrounding circumstances.

[59] The commercial judge found that the pursuers were not aware of the cartel and could not, using reasonable diligence, have discovered it. On this basis, as a matter of law, section 6(4)(a)(i) inevitably comes into operation. That being so the reclaiming motions must be refused.

[60] For completeness, the principle of effectiveness is of no direct relevance. Whether prescription operated or not, the pursuers had an alternative effective remedy by applying to the Competition Appeal Tribunal within two years of the Commission's decision. They also had the protection of sub-section 6(4)(a)(i). There was no issue of the available remedies being impossible or excessively difficult to access (*FII Group Test Claimants* v *Revenue and Customs Comrs* [2012] 2 AC 337 at para 93 following *C33/76 Rewe-Zentralfinanz* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989 at para 5).