Neutral Citation Number: [2019] EWHC 1095 (Ch)

Case No's: HC 2017-001043
CP-2018-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: Thursday 2nd May 2019

Before :

The Honourable Mr Justice Barling

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Between :

MEDIA-SATURN HOLDING GMBH & OTHERS
Claimants/Respondents

-and-

(1) TOSHIBA INFORMATION SYSTEMS (U.K.) LIMITED
(2) TOSHIBA ELECTRONICS EUROPE GMBH
(3) TOSHIBA EUROPE GMBH
(4) PANASONIC EUROPE B.V.
Defendants/Applicants

AND

MEDIA SATURN HOLDING GMBH & OTHERS
Claimants/Respondents

-and-

(1) PANASONIC MARKETING EUROPE GMBH
(2) PANASONIC INDUSTRY EUROPE GMBH
Defendants/Applicants

Kieron Beal QC and Flora Robertson (instructed by **Mishcon De Reya**) for the **Claimants**
Tony Singla (instructed by **White & Case LLP**) for the **Toshiba Defendants**
Sarah Abram (instructed by **Morrison & Foerster LLP**) for the **Panasonic Defendants**

Hearing dates: 6 - 9 November 2018

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JUDGMENT

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

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GLOSSARY OF ABBREVIATED TERMS

ABBREVIATION	PARA WHERE FIRST DESCRIBED	EXPLANATION
"the Attribution Grounds"	**83**	The *Provimi* Ground and the Decisive Influence Ground
"Balmain 1"	**18**	The first witness statement dated 4 October 2017 of Mr Charles Balmain supporting TIS's strike out and summary judgment application in respect of the First Claim
"Balmain 2"	**18**	The second witness statement dated 25 May 2018 of Mr Charles Balmain supporting TIS's strike out and summary judgment application in respect of the First Claim
"CAPOC"	**2**	The draft Consolidated Amended Particulars of Claim
"CDTs"	**6**	Colour display tubes
"CPTs"	**5**	Colour picture tubes
"CTVs"	**4**	Colour TVs
"the Decision"	**5**	The decision of the European Commission of 5 December 2012 in the case of COMP/39437 - *TV and Monitor Tubes*
"the Decisive Influence Ground"	**84**	The ground of liability for infringement of Article 101 based on the proposition of EU law that where company X has "decisive influence" over company Y, and the two companies form the same "undertaking" or "single economic unit", company X will be liable for an infringement of Article 101 carried out by company Y. A rebuttable presumption of "decisive influence" arises where company X owns (directly or indirectly) all or most of the shares in company Y
"the First Claim"	**1**	Claim issued by the Claimants on 7 April 2017 against the Toshiba Defendants and PE for damages for losses said to have been incurred as a result of the alleged anti-competitive conduct of the Defendants in relation

		to the sales to the Claimants of colour TVs
"Gerrits 1"	**20**	The first witness statement dated 12 December 2017 of Mr Rony Gerrits supporting PE's strike out and summary judgment application in respect of the First Claim
"Gerrits 2"	**20**	The second witness statement dated 1 March 2018 of Mr Rony Gerrits supporting PE's strike out and summary judgment application in respect of the First Claim
"Gerrits 3"	**22**	The third witness statement dated 29 March 2018 of Mr Rony Gerrits supporting PME's and PI's application for a declaration that the Court has no jurisdiction over the Second Claim
"Gerrits 4"	**20**	The fourth witness statement dated 21 September 2018 of Mr Rony Gerrits replying to the Claimants' response to PE's strike out/summary judgment application
"the Latter Period"	**8**	The period between 1 April 2003 and 12 June 2006
"MDDG"	**40**	Matsushita Display Devices Germany GmbH
"Media-Saturn" or "the Claimants"	**1**	Media-Saturn Holding GmbH and about 360 other entities incorporated in a number of EU Member States
"MELUK"	**40**	Matsushita Electric (UK) Limited
"MTE"	**40**	Matsushita Television Central Europe
"MTPD"	**8**	MT Picture Display Co Ltd
"MTPDG"	**28**	MT Picture Display Germany GmbH
"Murray 1"	**18**	The first witness statement dated 19 January 2018 of Mr Robert Murray detailing the Claimants' response to TIS's strike out and summary judgment application in respect of the First Claim

"Murray 2"	**18**	The second witness statement dated 20 July 2018 of Mr Robert Murray detailing the Claimants' response to TIS's strike out and summary judgment application in respect of the First Claim
"Panasonic"	**129**	The name given to the single undertaking described in CAPOC at paragraph 19, comprising PC and its relevant Panasonic group entities
"the Panasonic Defendants"	**2**	PE, PME and PI
"PBN"	**45**	Panasonic Belgium N.V
"PC"	**8**	Panasonic Corporation
"PDG"	**47**	Panasonic Deutschland GmbH
"PE"	**Para. 2/Footnote 1**	Panasonic Europe Limited
"PI"	**2**	Panasonic Industry Europe GmbH
"PIEG"	**38**	Panasonic Industrial Europe GmbH
"PIEL"	**38**	Panasonic Industrial Europe Ltd
"PIS"	**47**	Panasonic Italia SPA
"PIUK"	**41**	Panasonic Industrial UK Ltd
"PME"	**2**	Panasonic Marketing Europe GmbH
"PoC"	**9**	The Particulars of Claim
"the *Provimi* Ground"	**86**	A suggested ground of liability for infringement of Article 101 in which company C can be held liable for a cartel infringement, regardless of whether C has any actual knowledge of the cartel, where (i) C is part of the same "undertaking" or "single economic unit" as company D, (ii) D is an infringer, and (iii) C implements the offending cartel in some way
"PUK"	**41**	Panasonic UK Ltd
"RBR"	**19**	Recast Brussels Regulation

"the Second Claim"	**2**	Claim issued by the Claimants on 27 February 2018 against PME and PI on grounds similar to those in the First Claim
"TC"	**8**	Toshiba Corporation
"TEG"	**1**	Toshiba Europe GmbH
"TEEG"	**1**	Toshiba Electronics Europe GmbH
"TIS"	**1**	Toshiba Information Systems (UK) Limited
"Toshiba"	**129**	The name given to the single undertaking described in CAPOC at paragraph 18, comprising TC and its relevant group entities
"the Toshiba Defendants"	**1**	TIS, TEEG and TEG, the First to Third Defendants in the First Claim
"Wheeler 1"	**20**	The witness statement dated 4 October 2017 of Mr Jonathan Wheeler supporting PE's strike out and summary judgment application in respect of the First Claim

Mr Justice Barling:

Introduction

1. Several applications are before me. The main applications are to strike out a claim ("the First Claim") brought by a group of companies in the Mediamarkt consumer electronics retail group, namely Media-Saturn Holding GmbH and about 360 other entities incorporated in a number of EU Member States, including Germany, Belgium, Hungary, the Netherlands, Greece and Italy ("Media-Saturn" or "the Claimants"). The First Claim is against the First to Third Defendants, Toshiba Information Systems (U.K.) Limited ("TIS"), Toshiba Electronics Europe GMBH ("TEEG"), and Toshiba Europe GMBH ("TEG") (together "the Toshiba Defendants"), and the Fourth Defendant, Panasonic Europe B.V.[1]

2. Media-Saturn also brought a claim on essentially the same grounds ("the Second Claim") against Panasonic Marketing Europe GmbH ("PME") and Panasonic Industry Europe GmbH ("PI"). PE[2], PME and PI are together referred to as "the Panasonic Defendants". Media-Saturn have applied to consolidate the two claims, and to serve a Consolidated Amended Particulars of Claim, a draft of which is before the court ("CAPOC"). It is the Panasonic Defendants' case that if the claims against PE in the First Claim are struck out or summarily decided in its favour, the Second Claim should also be struck out.

3. The First Claim (claim no HC 2017-001043) was issued on 7 April 2017, and the Second Claim (claim no CP-2018-000004) was issued on 27 February 2018.

4. In both claims Media-Saturn seeks to recover damages for losses said to have been incurred as a result of alleged anti-competitive conduct of the Defendants in relation to sales of colour TVs ("CTVs"[3]). Media-Saturn bought CTVs at various times between 1999 and 2006. Over 80% of the relevant CTV purchases are alleged to have taken place in Germany. No relevant purchases were made in the UK, and none of the Claimants has retail outlets here.

5. The claims have been brought following a Decision of the European Commission dated 5 December 2012 in Case COMP/39437 – *TV and Monitor Tubes* ("the Decision"). The Commission found that from at least 3 December 1997 until 15 November 2006 a cartel, fixing prices and other selling conditions in respect of colour picture tubes ("CPTs"), had been operated by a number of CPT manufacturers in breach of Article 101(1) TFEU and Article 53 EEA. A CPT is a type of cathode-ray tube used in televisions for many years prior to the development of flat-screen TVs. A CPT is a valuable component of a CTV, representing in the order of 40% of the latter's value.

[1] On 10 September 2018, the court approved a consent order providing for Panasonic Europe B.V., a Dutch company, to be substituted as the Fourth Defendant to the First Claim, with effect from 1 October 2018. That substitution was necessary because with effect from that date the original Fourth Defendant, Panasonic Europe Limited ("PE"), an English company, was merged into Panasonic Europe B.V., and ceased to exist without being liquidated. It is common ground that nothing turns on this substitution for the purposes of the present applications, including issues of jurisdiction. See Gerrits 4, paragraphs 56-59. The Fourth Defendant will be referred to as "PE" in this judgment.

[2] See footnote 1.

[3] Use of the abbreviation CTV in this judgment is almost always a reference to television sets incorporating the cartelised CPT.

6. The Commission also found that a cartel existed in respect of colour display tubes used in computer monitors ("CDTs"). This cartel is not relevant to the present proceedings.

7. None of the Defendants was an addressee of the Decision. The claims are, therefore, "standalone" rather than "follow-on" actions, and the Decision is not binding on the court so far as the claims against the Defendants are concerned, as it would have been had the Defendants been addressees. Nevertheless, the Claimants place considerable reliance upon the evidential effect of the Decision.

8. Toshiba Corporation ("TC"), the parent company of the First to Third Defendants, and Panasonic Corporation ("PC"), the parent company of the Fourth Defendant and of both the Defendants to the Second Claim, were addressees of the decision. Both TC and PC were fined. In addition, MT Picture Display Co., Ltd. ("MTPD") was found by the Commission to have participated in the infringement in the period from 1 April 2003 until 12 June 2006 ("the Latter Period"). MTPD was a joint venture between TC and PC into which both transferred their CPT businesses. At the time of MTPD's infringement, TC held 35.5% of its shares and PC held 64.5%. By the time of the Decision, MTPD was wholly owned by PC. MTPD was also fined by the Commission, jointly and severally with PC and TC.

9. The strike out applications are made by TIS and PE pursuant to CPR 3.4(2)(a) on the basis that the Claim Form and Particulars of Claim ("PoC") disclose no reasonable grounds for bringing the claim against them. The applications also seek an order pursuant to CPR 24.2(a)(i) granting summary judgment in those companies' favour, on the basis that the claim against them has no real prospect of success and there is no other compelling reason why the case should be disposed of at trial.

10. The primary submission of both TIS and PE is that the entirety of the claims against them should be summarily disposed of in their favour. However, each submits in the alternative that the English law economic torts pleaded at paragraphs 111-114 of the PoC should be struck out and/or should be subject to summary judgment in their favour. Other applications are also before me.

11. The Claimants are represented by Kieron Beal QC and Flora Robertson, the Toshiba Defendants are represented by Tony Singla, and the Panasonic Defendants are represented by Sarah Abram.

The Decision and subsequent appeals to the General Court and CJEU

12. Having held that TC and PC, with others, had operated a worldwide cartel for a significant period (July 1999 to June 2006), fixing prices and other selling conditions for CPTs, the Commission imposed a fine on each: for the period before 1 April 2003 €28.048m for TC and €157.478m for PC. A fine of €86.738m was imposed jointly and severally on MTPD, PC and TC in relation to the Latter Period (reduced on appeal). A separate fine of €7.885m was imposed on PC and MTPD on a joint and several liability basis, also in relation to the Latter Period. TC, PC and MTPD appealed to the General Court of the European Union.

13. In TC's appeal (Case T-104/13 *Toshiba Corp*[4]), the Decision was annulled in part, reducing the period for which TC participated in the cartel to the Latter Period, and reducing the fine correspondingly. A further appeal by TC to the CJEU was dismissed. TC unsuccessfully challenged the Commission's finding that, with PC, it had exercised decisive influence over MTPD, which had directly taken part in cartel meetings during the Latter Period: Case C-623/15 P *Toshiba Corp.*[5] In rejecting the appeal, the CJEU said:

> "…it must be noted that the question whether a parent company was in a position to exercise decisive influence over its subsidiary's conduct on the market, like the question whether that influence was actually exercised, ultimately comes within the scope of the assessment of the facts. In that respect, it follows from the case-law cited in paragraph 47 of the present judgment that such an assessment may be inferred from a body of consistent evidence."[6]

14. In relation to PC, the Commission had found that the company participated in the cartel uninterruptedly, during periods both before and after the transfer of its CPT business to MTPD on 31 March 2003. From 15 July 1999 until that transfer, PC was found to have participated both directly and through its subsidiaries; during the Latter Period, it had participated through MTPD.[7]

15. Such participation was found to involve, *inter alia*, meetings with other cartelists to discuss (and exchange detailed data in respect of): plans and timetables for the introduction of a specific type of CPT, European CPT prices and cost structures, pricing and production plans, production capacity, commitments to raising CPT prices, volume and value of sales and planned sales (generally and per customer), planned line closures, demand estimates, general market forecasts and analyses, CTV production, demand and sales.

16. The Commission found that the cartel was implemented in the EEA through direct sales of unincorporated CPTs, and "direct sales of CPT through transformed products", i.e. the cartelised product incorporated within a CTV.[8]

17. In PC and MTPD's appeal to the General Court the amount of the fine was reduced, but the appeal was otherwise unsuccessful: Case T-82/13 *Panasonic Corporation and MT Picture Display Co. Ltd.*[9] A further appeal to the CJEU was dismissed as manifestly unfounded: Case C-608/15 P *Panasonic Corp*.[10]

The several applications and the witness statements in support

18. TIS's strike out and summary judgment application dated 4 October 2017 in respect of the First Claim is supported by witness statements from Mr Charles Balmain,[11] dated 4 October 2017 ("Balmain 1") and 25 May 2018 ("Balmain 2"). The Claimants respond

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4 [2015] ECLI:EU:T:2015:610.
5 [2017] ECLI:EU:C:2017:21.
6 Paragraph 80 of the judgment.
7 See Recitals 918-922 to the Decision, and paragraph 45 of Case T-82/13 *Panasonic Corporation and MT Picture Display Co. Ltd* [2015] ECLI:EU:T:2015:612.
8 See Recitals 595 and 1020 to the Decision.
9 [2015] ECLI:EU:T:2015:612.
10 [2016] ECLI:EU:C:2016:538.
11 Mr Charles Balmain, Solicitor and Partner in White & Case (representing the First to Third Defendants in these proceedings).

by witness statements from Mr Robert Murray[12] dated 19 January 2018 ("Murray 1") and 20 July 2018 ("Murray 2"). Neither TEEG nor TEG have applied for summary judgment in respect of the claim against them.

19. TEEG and TEGs' application dated 4 October 2017 seeks an order that the English Court has no jurisdiction to hear the claims against them, and/or that service on them of the Claim Form and PoC should be set aside on the ground that Article 8(1) of Regulation (EU) 1215/2012, i.e. the Recast Brussels Regulation ("RBR") is inapplicable, as there is no arguable claim against the "anchor" defendant, TIS. Mr Singla stated that this jurisdiction application stands or falls with TIS's strike out/summary judgment application. His skeleton argument refers to both TIS and PE as anchor defendants for this purpose. It also raises a further refinement, in the form of a submission that if only the economic tort claims are struck out as against TIS and PE, then the court would have no jurisdiction against TEEG and TEG in respect of those claims. He did not elaborate on this point in oral argument.

20. PE's strike out and summary judgment application dated 4 October 2017 in respect of the First Claim is supported by a witness statement from Mr Jonathan Wheeler,[13] dated 4 October 2017 ("Wheeler 1") and two witness statements from Mr Rony Gerrits,[14] dated 12 December 2017 ("Gerrits 1") and 1 March 2018 ("Gerrits 2"). The Claimants' response is in Murray 1 and Murray 2, to which a further witness statement of Mr Gerrits on 21 September 2018 replies ("Gerrits 4").

21. The Claimants' applications of 27 February 2018, for permission to amend the PoC and to consolidate the First and Second Claims, are supported by Murray 1 and Murray 2.

22. The application by PME and PI of 29 March 2018 for a declaration that the Court has no jurisdiction over the Second Claim is supported by a witness statement from Mr Gerrits of 29 March 2018 ("Gerrits 3"). The Claimants' response is in Murray 2.

Corporate structure and roles of relevant companies

23. At this stage it is appropriate to provide an account of the position and role within their respective groups of each of the Defendants and of other relevant associated corporate entities.

24. The pleadings, witness statements, and other documentary material put in evidence, together with various organograms provided to the court, contain information about the corporate structure of the Defendants and their respective associated companies. There is also a certain amount of relatively high level information about the nature of the business activities of these entities. Although the interpretation, completeness and legal implications of the available data is the subject of dispute in certain respects, the following account is intended to be a substantially non-controversial overview of the factual position as known to and relied upon by the Claimants at this stage of the

[12] Mr Robert Paul Murray, Solicitor and Partner in Mishcon De Reya (representing the Claimants in these proceedings).
[13] Mr Jonathan Edward Wheeler, Solicitor and Co-Managing Partner of Morrison & Foerster (UK) LLP (representing the Fourth Defendant in these proceedings).
[14] Mr Rony Pierre William Gerrits, Belgian-qualified *advocaat* and Managing Partner of the Brussels office of Morrison & Foerster LLP (representing the Fourth Defendant in these proceedings).

proceedings. Nothing said by me in this section represents a finding of fact in relation to any matter which is in dispute.

TC

25. TC, an entity incorporated in Japan, is the parent company, directly or indirectly, of the Toshiba Defendants. TC is the 100% owner of TEG, the Third Defendant to the First Claim, a company incorporated in Germany. TEG is the parent company of TEEG, the Second Defendant to the First Claim, also incorporated in Germany. TC is also virtually[15] the 100% owner of TIS, the First Defendant to the First Claim.

26. TC, an addressee of the Decision, was found to have participated in the cartel during the Latter Period through MTPD, over whom TC was found to have had decisive influence along with PC. TC held a minority stake in MTPD during the Latter Period.

TIS

27. TIS, the First Defendant to the First Claim, is a company incorporated in England & Wales, the vast majority of whose shares were, during the Latter Period, owned by TC, with the balance owned by TEG.[16]

28. During at least part of that period[17] TIS carried on business as a manufacturer of CTVs, purchasing CPTs from various manufacturers, including TEEG and a German subsidiary of MTPD, MT Picture Display Germany GmbH (“MTPDG”). According to Mr Balmain,[18] purchases of CPTs from TEEG accounted for around 19% of total CPT purchases made by TIS during the Latter Period and purchases from MTPDG accounted for around 9%. After incorporating the CPTs into CTVs which it manufactured, TIS then sold the CTVs, primarily to TEG and other Toshiba entities. TEG sold such CTVs to the Claimants.[19] It is common ground that TIS sold no CTVs to the Claimants. During the Latter Period, TIS did not manufacture CPTs or sell them, other than as components of the CTVs which it manufactured and sold.

29. According to Companies House records, TIS was engaged in the wholesale of electronic goods as at 24 May 2003, 15 June 2003 and 15 June 2004. Annual Returns for 2003-7 show its business activities as "wholesale of electrical household goods", "wholesale of computers, equipment and software", "other wholesale" and "manufacture of electrical domestic appliances".

30. An agreement between TIS and Media-Saturn International GmbH (a wholly owned subsidiary of the First Claimant) existed in June 2003. A subsequent agreement between TIS and Media-Saturn Trade GmbH was entered into in September 2005. Both these agreements concerned the framework for international bonuses bases on total sales across Europe, including sales of CTVs. The latter agreement was made by Media-

[15] See footnote 16.

[16] Between 1 April 2003 and 23 March 2006, TC owned 98% of the shares and TEG owned 2%. From 23 March 2006 until the end of the Latter Period, TC owned 99.3% of the shares and TEG owned the remaining 0.7%.

[17] Recitals 69-70 of the Decision indicate that, between 1995 and 31 March 2003 and for a period thereafter, TIS manufactured and sold CTVs. See also Balmain 1, paragraph 27.

[18] Balmain 1, at paragraph 27, and Balmain 2, at paragraph 20. See also Murray 2, at paragraph 18.8.

[19] Balmain 1, at paragraphs 27 and 33.

Saturn Trade GmbH on behalf of certain of its subsidiaries. The agreement describes TIS as "marketing and distributing electronic products and …seeking to expand its product range." TIS is said to be "the central and/or supporting company for all Toshiba companies established in Europe." For the purpose of the agreement TIS is said to be

> "either acting on behalf of these national subsidiaries or related companies of Toshiba and the national subsidiaries; or related companies are selling the products to the outlets or Toshiba is acting for itself by selling the products directly or via third party distributors to the outlets".

31. According to Mr Balmain, there was some overlap between the directors of TIS and the directors of TEG during the Latter Period.[20] During that period no director of TIS held a position as a director of TC, MTPD or TEEG.[21]

TEEG

32. TEEG, the Second Defendant to the First Claim, is incorporated in Germany and is wholly owned by TEG. During the Latter Period, it carried on business as a distributor of CPTs, selling them to various purchasers, including TIS. TIS used the CPTs to manufacture CTVs, which were then sold to TEG, who sold them on to the Claimants. From 1995 to 31 March 2003, TEEG was the group's exclusive distributor of CPTs in Europe. TEEG is said to have stopped selling CPTs in July 2004. At all material times TEEG was the European headquarters of the Toshiba group's electrical component business.

33. During the Latter Period, no director of TEEG held a position as a director of TC, TIS, TEG or MTPD.

TEG

34. TEG, the Third Defendant to the First Claim, is also incorporated in Germany. During the Latter Period, TEG was wholly owned by TC, and (as stated in footnote 16) TEG owned a very small percentage of the shares in TIS. It also owned 100% of TEEG.

35. During the Latter Period, TEG sold CTVs (including sets manufactured by and purchased from TIS) to various customers in Europe including to the Claimants in Germany. It did not manufacture or sell any unincorporated CPTs during that period.

36. During the Latter Period no director of TEG held a position as a director of TC, TEEG or MTPD. There was, however, an overlap of directors between TIS and TEG in that period.[22]

PC

37. PC, an entity incorporated in Japan, is the parent company of the Panasonic Defendants. It was previously called Matsushita Electric Industrial Co. Ltd. It was an addressee of the Decision, and was found to have participated in the CPT cartel from 1999 to June 2006, in the Latter Period through MTPD, in which it held first a majority stake, and latterly (after the Latter Period) a 100% stake.

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[20] They shared two directors during that period. Two more overlapped outside that period.
[21] See Balmain 1, at paragraph 29.
[22] See paragraph 31 of this judgment.

PE

38. PE, the original Fourth Defendant to the First Claim, for whom Panasonic Europe B.V. has now been substituted,[23] was an English domiciled company, wholly owned by PC. PE's original corporate name[24] described the company as "Headquarters" in Europe. PE was the 100% parent of Panasonic Industrial Europe GmbH ("PIEG"). PI, the Second Defendant to the Second Claim, assumed the liabilities of PIEG in 2014. PE was also the 100% parent of Panasonic Industrial Europe Ltd ("PIEL"). PIEL was dissolved or became dormant in 2006.

39. It appears to be accepted[25] that PE did not itself sell *unintegrated* CPTs at any material time. However, its 100% subsidiaries, PIEG and PIEL, did so. PIEG sold such CPTs between 1999 and March/April 2004. PIEL, too, sold CPTs until April 2004. These sales of CPTs were to unrelated manufacturers of CTVs, who sold CTVs to the Claimants.

40. Until 31 March 2003 Matsushita Electric (UK) Limited ("MELUK") was wholly owned by PE, and Matsushita Television Central Europe s.r.o. ("MTE") was owned by PC. From 1 April 2003 until the end of the Latter Period, both MELUK and MTE were wholly owned by PE. Those subsidiaries of PE manufactured CTVs using Panasonic CPTs acquired from the manufacturer, a subsidiary wholly owned, directly or indirectly, by PC, namely Matsushita Display Devices Germany GmbH ("MDDG"). MELUK and MTE sold the CTVs to the national sales companies, which were wholly owned by PE.

41. PE was also the 100% owner of various national sales companies, who sold CTVs to the Claimants, and who were in contractual relations with one or more of the Claimants by means of agreements relating to the negotiation of bonuses and other conditions of their ongoing commercial relationship (see paragraphs 53ff below). In addition, PE was the almost[26] 100% (and, from November 2003, the 100%) owner of PME, the First Defendant to the Second Claim. PME was an official supplier of CTVs to the Claimants. PME's role is more fully described below. Reference is also made, in the PoC and in the Defendants' List of Relevant Persons, to Panasonic Industrial UK Ltd ("PIUK"), as a CPT sales company, said to have been dissolved on 19 June 1999. This company is said to have been 100% owned by Panasonic UK Ltd ("PUK"), which is said to have been a 100% subsidiary of PE. PIUK and PIEG are referred to in Recitals 61-63 to the Decision, as having handled sales of CPTs in the EEA.[27]

42. According to Mr Wheeler and Mr Gerrits,[28] from July 1999 until 31 March 2001, PE had an administrative role, invoicing (and receiving payment for) CTVs manufactured within the Panasonic group and sold by PC to the group's independent exclusive distributors (said by Mr Wheeler not to have included the Claimants). PE is said to have received a commission fee for this service, and to have charged the distributors the prices

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[23] See footnote 1 above.
[24] Matsushita Electric Europe (Headquarters) Ltd.
[25] Murray 2, at paragraph 27.3. See also Wheeler, at paragraph 46.2(a).
[26] 99.375%. PC owned the remaining 0.625%.
[27] This reference to PIUK in Recital 63 is said by the Fourth Defendant to be an error by the Commission: see Panasonic's Response to the Claimants' Request for Further Information, at paragraphs 15-16. See also Gerrits 2, paragraphs 16-19, and Gerrits 4, paragraphs 54-55. However, Ms Abram stated that it was unnecessary for this court to determine the true position, as the Panasonic Defendants accepted that PE was the parent of other entities that were selling CPTs during the relevant period: Day 2, page 54.
[28] Wheeler 1, paragraphs 38-43; Gerrits 4, paragraph 22.

for CTVs which they had agreed with PC. PE is said by Mr Gerrits to have had no role in the conclusion of the sale, or in pricing, manufacture or delivery of the products.

43. PE was also responsible for marketing activities (said to be limited to providing marketing funds to national sales companies) relating to sales in Europe of *inter alia* CTVs from July 1999 until 31 March 2002, and charged a service fee to each national sales company for this. In addition, PE concerned itself with issues of internal group management, such as HR, legal, risk management, training, finance, tax, accounting, environmental matters, corporate communications, marketing support, service support, SAP ("sale and purchase") system, logistics, and IT.

44. Companies House records show PE's principal business activity in 1998 to 2007 as "wholesale electric household goods". The company's consolidated accounts for March 2000 show its business activity as the sale of a "comprehensive range of [Panasonic and Technics branded] products, systems and components for consumer, business and industrial use", and its turnover as £3.5 billion, with a profit of £32 million and substantial sales in the UK. A substantial number of personnel are shown as employed in sales. The accounts for year ending 31 March 2004 include the first reference to the principal activities of the company being to act as a holding company and to provide marketing and support services to subsidiaries. In the financial statements for the year ended 31 March 2005, PIEG and PIEL are still included in the list of PE's subsidiaries.[29]

45. PE shared directors with PC, PIEL, PIEG, PUK, PME, and the Belgian national sales company, Panasonic Belgium N.V. ("PBN").

PME

46. PME, the First Defendant to the Second Claim, is a German-domiciled entity, almost[30] 100% (and, from November 2003, 100%) owned by PE. It is said by Mr Wheeler to be a "support company, a purchasing and marketing headquarters for a number of countries in Central and Northern Europe".

47. According to Mr Wheeler and Mr Gerrits[31] PME did not sell unintegrated CPTs. However, PME was involved in the sale of CTVs as follows: (1) throughout the period relevant to the claim, CTV sets were invoiced by manufacturing companies to PC, and by PC to PME. PME then sold them to the national sales companies for onward sale to external purchasers, including the Claimants; (2) in 2004, PME became a direct supplier of CTVs to customers, including the Claimants. This occurred when a national sales company, Panasonic Deutschland GmbH ("PDG"), previously wholly owned by PE, merged into PME (itself then 100% owned by PE) in October 2004. At about the same time, the businesses of two other national sales companies, PBN and the Austrian national sales company (both previously wholly owned by PE) were transferred to PME. When this occurred PME, as legal successor, inherited the liabilities of those companies. It also appears to have taken on the liabilities of the Italian national sales company,

[29] These accounts are consolidated for PE and its subsidiaries, and it is not therefore possible on their basis to isolate the specific role(s) of PE. The Claimants have apparently sought sight of PE's corporation tax statements but these have not yet been made available. (See Murray 1, paragraph 103.)
[30] 99.375%. PC owned the remaining 0.625%.
[31] Wheeler 1, paragraphs 46.6 to 46.8; Gerrits 3, paragraph 34.

Panasonic Italia SPA ("PIS"), which merged into PME in 2011. PIS apparently sold CTVs to the Claimants during the cartel period.[32]

48. The prices at which CTVs were sold to the Claimants were said to have been negotiated directly between the Claimants and PME and/or the national sales company in question.

49. According to Mr Murray, on or about 26 March 2004 Media-Saturn International GmbH[33] (a wholly owned subsidiary of the First Claimant), entered into an International Cooperation and Strategic Partnership Agreement with PME. This agreement dealt with negotiated international bonuses on sales. Another associated company, Media-Saturn Trade GmbH, and PME entered into an Agreement About International Sales Development, in relation to the period 1 April 2005 to 31 March 2006. This, too, concerned negotiated international bonuses. The First Claimant and PME entered into an Agreement about International Sales Development in relation to the period 1 April 2006 to 31 March 2007. Again, this related to negotiated international bonuses.

50. There was some overlap of directors between PME and PE.

PI

51. PI, the Second Defendant to the Second Claim, is a German-domiciled entity. It appears from the evidence of Mr Gerrits and from the Defendants' *dramatis personae* that PI became the legal successor to PIEG and inherited its liabilities following a merger in 2014.

52. Mr Gerrits acknowledges that PIEG (a company wholly owned by PE) sold CPTs until 31 March 2004, and that if the court has jurisdiction over the claim against PI, there is a triable claim against that company in respect of PIEG's CPT sales up to that date.[34] He states that PIEG's sales of CPTs then ceased. The Claimants allege that PIEG sold CPTs between 1999 and March 2004. They rely on Recital 63 of the Decision as evidencing that PIEG and PIUK[35] (the latter also said to be 100% owned by PE) handled PC's sales of CPTs in the EEA until the fiscal year 2000, and that PIEG handled such sales in the fiscal years 2001 and 2002. The Claimants do not concede that such sales ceased on 31 March 2004.

Panasonic national sales companies

53. The 7 or 8 Panasonic national sales companies, as well as PME, sold CTVs incorporating cartelised CPTs to the Claimants.

54. As stated earlier, the national sales companies were all 100% owned by PE, subject to certain mergers with, and transfers to, PE's wholly owned subsidiary PME (see paragraph 41 above).

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[32] Gerrits 3, paragraph 45.
[33] Media-Saturn International GmbH was also in contractual relations with TIS: see above at paragraph 30.
[34] Gerrits 3, at paragraph 50.
[35] See footnote 27 of this judgment.

55. When PDG, the German national sales company, merged with PME in October/November 2004, its business became an office of PME, continuing to sell CTVs to the Claimants as PDG had done before the merger.

56. PBN, PE's wholly owned subsidiary in Belgium, sold CTVs to the Claimants until the transfer of its business to PME in about November 2004, when PME opened a separate Belgian office through which sales continued.

57. PIS, PE's 100% subsidiary in Italy, sold CTVs to the Claimants. The company merged into PME in 2011.

58. In terms of contractual relations, it is alleged in the PoC that on 11 June 1997 PDG entered an Annual Condition Agreement with the First Claimant, that on 31 May 1999 PDG and the First Claimant entered an Annual Condition Agreement, and that on 24 August 2005 PDG and all associated companies of the Claimants' group entered an Annual Condition Agreement.

59. Mr Murray states that national bonuses were negotiated between the national entity of the Claimants and the Panasonic/Toshiba national sales companies, and that regional bonuses were negotiated between the Claimants' stores and national sales companies.

MTPD

60. MTPD, an addressee of the Decision, was the embodiment of a joint venture between TC and PC, created in March 2003. This joint venture operated during the Latter Period. TC held 35.5% of the shares in MPTD, and PC owned 64.5%. TC and PC transferred their respective CPT operations to MTPD on 31 March 2003. MTPD manufactured and sold CPTs in the EEA. Sales were primarily made through one of MTPD's subsidiaries, MTPDG.

The nature of the EU law claims

61. The Claimants are companies incorporated in European countries outside the UK, carrying on businesses selling electronic goods and/or services. None of the Claimants is incorporated in England & Wales (or the UK) or carried on business here at any material time.

62. The Claimants did not buy unintegrated CPTs but bought the downstream products, i.e. CTVs, which contained cartelised CPTs. These CTVs were bought from Toshiba and Panasonic group companies, as well as from third party wholesalers. The Claimants then sold the CTVs to customers throughout the EEA.

63. The Claimants contend that as a result of the operation of the cartel, the Claimants paid more for their purchases of CTVs containing CPTs than would have been the case in a competitive market; that in a competitive market, the price for the core component of the CTV (i.e. the CPT) would have been lower, and the lower cost of the CPT would have driven down the wholesale price of CTVs, for both vertically integrated CPT/CTV producers and for their non-vertically integrated competitors. The Claimants claim damages in respect of the overcharge, together with interest thereon.

64. The claim is brought in respect of sales made to any or all of the Claimants in the period from at least 15 July 1999 to at least 12 June 2006 in relation to the Panasonic Defendants, and from 1 April 2003 until 12 June 2006 for the Toshiba Defendants.

65. The Claimants allege that each of the Toshiba Defendants and each of the Panasonic Defendants participated in and/or knowingly implemented the cartel, and/or are to be treated as having done so by virtue of their being part of the same "undertaking" or "single economic unit" (as that concept is understood in EU law) with (a) one or more of the entities which the Commission in the Decision found to have participated in the cartel, viz TC, PC and/or MTPD; and/or (b) with one or more infringing entities over whom those Defendants had "decisive influence" (as that concept is understood in EU law).

66. I will need to refer in more detail to the EU law claim when dealing with the strike out/summary judgment applications of TIS and PE.

The nature of the economic tort claims

67. The Claimants' primary case is that all the claims are governed by German law. However, as one of the alternatives it is submitted that the claims are governed by English law. On that alternative basis, the Claimants rely upon English law economic tort claims against all the Defendants. These claims are for unlawful means conspiracy[36] and interference by unlawful means.[37]

68. The Claimants' allegation[38] of unlawful means conspiracy is, in essence, that by their conduct in implementing or participating in the cartel, the Defendants and others conspired to use unlawful means to harm the economic interests of the Claimants, intending to cause loss to them, and succeeding. It is alleged that the cartel was "targeted" at the Claimants.

69. The Claimants' allegation[39] of unlawful interference with business is that, by the same conduct, the Defendants and others deliberately took action which was targeted at the Claimants, was unlawful, was intended to and did cause the Claimants loss, and unlawfully interfered with the Claimants' businesses.

70. These economic tort claims, too, are the subject of the Defendants' strike out/summary judgment applications.

The strike out/summary judgment applications

The applications

71. TIS and PE seek orders striking out the claims against them on the basis that the PoC disclose no reasonable grounds for bringing the First Claim, or alternatively an order for summary judgment in their favour on the basis that the Claimants have no real prospect of success and there is no other compelling reason why the First Claim should be

[36] See CAPoC, paragraphs 111-112.
[37] See CAPoC, paragraphs 113-114.
[38] PoC, paragraph 111.
[39] PoC, paragraph 113.

disposed of at trial. In summary, both TIS and PE argue that there is no evidence that it participated in, implemented, or had knowledge of the cartel.

72. Alternatively, each applies for a strike out and/or summary judgment in respect of the English law economic torts of unlawful means conspiracy and unlawful interference with business, on the basis that they are not arguable.

Principles governing a strike out/summary judgment application

73. Applications to strike out a claim, or for summary judgment on a claim, are often brought as alternatives. Here, both sides have made submissions about the applicable principles for each category of application. Although there are, naturally enough, differences of emphasis, there is little real difference between the parties on the substance. The principles overlap and are very well known.

74. A claim is liable to be struck out under CPR 3.4(2)(a) where it does not disclose reasonable grounds for bringing a claim. Under this head there is usually more emphasis on the contents of the relevant pleading or proposed pleading, and the question is whether, even supposing the facts pleaded to be established, the claim is subject to a fatal defect. Thus, in *Bridgeman v McAlpine-Brown*, 19 January 2000, unreported, a decision of the Court of Appeal, Hale LJ (as she then was) commented that "the essence of a strike out is that one does not look at the evidence on the claim".[40] It is for this reason that, where a statement of case is found to be defective, the court is likely to consider whether that defect might be cured by amendment, and to give the party concerned an opportunity to amend where appropriate: *Kim v Park* [2011] EWHC 1781 (QB), per Tugendhat J, at paragraph 40.

75. In relation to applications for summary judgment under CPR 24(2), the principles have been summarised by Lewison J (as he then was) in an oft-cited passage from his judgment in *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]:

> "The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

[40] Paragraph 21.

> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

76. The Defendants also emphasised the following dicta of Lord Woolf in *Swain v Hillman*:

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

Application of principles to competition claims - information asymmetry

77. Both sides drew to my attention judicial statements touching on the application of these principles in competition claims. In that context, Mr Murray in his evidence[41] pointed out that what is termed “information asymmetry” is a common feature of cartel damages cases, resulting from the fact that the operation of a cartel is by its nature a clandestine activity. The creation, implementation and/or operation of the cartel here had been conducted in secret and the Defendants had deliberately taken steps to avoid detection of their conduct. Thus, he said, at the time of the drafting of the PoC the Claimants’ understanding of the Defendants’ conduct had been limited. In those circumstances the Claimants had been obliged to draft the PoC based only on a copy of the *non-confidential* version of the Decision, with parts of the text redacted, together with a limited amount of publicly available information. The Claimants submit that, judging from certain previously redacted passages, some of the claims for confidentiality appear to be unjustified. They refer to the EU Damages Directive[42] as recognising the problem of information asymmetry in claims such as this, and as providing a means by which allegedly confidential material can be disclosed to claimants.

78. The Claimants referred to recent *dicta* indicating that in such cases, the courts have been prepared to grant claimants a degree of latitude as regards the specificity of their pleading prior to disclosure and evidence: see for example *Bord na Mona v BPI and*

[41] Murray 1, paragraphs 31-37.
[42] Directive 2014/104/EU on antitrust damages actions issued on 26 November 2014.

others [2012] EWHC 3346 (Comm), per Flaux J (as he then was), at [30]-[31]; *Nokia Corp v AU Optronics Group* [2012] EWHC 731 (Ch), per Sales J (as he then was), at [62]-[68]; and *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 1190, [2012] EWCA Civ 169, per Etherton LJ (as he then was), at [32].

79. On the other hand, the Defendants emphasised that competition law claims, like any other claims involving allegations of serious wrongdoing, must be pleaded properly. Reference was made to *Sel-Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch), in which Roth J, at [17]-[18], stated that a defendant faced with a competition claim is entitled to know what specific conduct is complained of and how it is alleged to have infringed the law. The Defendants also relied upon the comments of Kitchin LJ (as he then was) when granting permission to appeal in *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 169, at [30]:

> "Thirdly, it is not at all clear to me that the decision of this court in *Cooper Tire* establishes that, in a case such as the present, where anchor defendants domiciled in the UK are said to be party to the cartel, it is never necessary to include particulars of knowledge until after disclosure. *Cooper Tire* was, as Mr Beard QC, appearing on behalf of the KME defendants, has emphasised this morning, a case concerned only with a strike-out application. I of course accept that in some cases the circumstances may be such that it is sufficient simply to allege that anchor defendants domiciled in the UK were parties to or aware of anti-competitive conduct. However, I do not accept that that is necessarily so in all cases. For example, if it appears that the allegations against anchor defendants are based on nothing more than mere speculation, then I think it at least arguable that the claim should not be allowed to proceed merely on the basis that something might turn up on disclosure."

80. In addition, the Defendants do not accept that here the information asymmetry is as acute as claimed. Whilst they acknowledge that the Claimants do not yet have access to a fully unredacted version of the Decision, the Claimants do have access to the non-confidential version. Further, TIS states that it has provided the Claimants with all those Recitals to the Decision which the Claimants requested in their Request of 29 November 2017. TIS does not accept that the Claimants need to see the remainder of the Decision for the purposes of this application. In any event, the Defendants cannot unilaterally disclose the full confidential version of the Decision, even within a confidentiality ring. Third parties named in the Decision have certain rights relating to the confidentiality of material in the Decision, and the disclosure of the full version would necessitate a procedure for obtaining the consent of those third parties, and also possibly the European Commission. In TIS's submission, it would be disproportionate for that exercise to be carried out "at this stage."[43]

81. Similarly, the Panasonic Defendants state that they have done everything reasonable to respond to the Claimants' questions, and to provide access to information. In particular, in its detailed response to a Request for Further Information in December 2017, PE had provided full answers to every question asked by the Claimants that appeared to PE to be "of arguable relevance at the present stage of the proceedings".[44]

No pleading points taken

82. In discussing the nature of the claim against the Defendants, and in particular against TIS and PE, the arguments have not been confined precisely within the parameters of the allegations as presently formulated in the PoC, or indeed in the CAPOC. Both Mr

[43] Toshiba Defendants' skeleton argument, paragraph 64.
[44] Panasonic Defendants' skeleton argument, paragraph 19.

Singla and Ms Abram in their submissions have eschewed taking pleading points, and have challenged the case alleged against TIS and PE by reference to the arguments developed in the Claimants' skeleton, and even by Mr Beal orally during the hearing. This approach is realistic and to be commended in a case of this complexity, where amendments to the Claimants' pleading are being sought, and disclosure has not been carried out.

The Attribution Grounds

83. As seen, the case for the Claimants is that TIS, PE and, indeed, each of the Defendants, participated in and/or knowingly implemented the cartel, and/or they are to be treated as having done so by reason of certain legal principles. During the hearing, the first two of these bases of liability were sometimes described by counsel as the *factual* case against the Defendants, as distinct from the purely legal case. I am content to adopt that as a convenient shorthand, although it is imperfect as there are obviously factual elements in each of the grounds. The third ("purely legal") basis of liability appears to be comprised of two separate but related grounds, each of which would require less by way of infringing acts or awareness of the cartel than would be required in respect of a direct participant in, or knowing implementer of, a cartel. I will call these grounds, collectively, "the Attribution Grounds". They require some explanation.

84. The first of the Attribution Grounds is based on the proposition of EU law that where company X has "decisive influence" over company Y, so that the two companies form the same "undertaking" or "single economic unit", company X will be liable for an infringement of Article 101 carried out by company Y. In this scenario, it is not necessary to establish actual knowledge or any specific implementing action on the part of company X (which is normally, but not necessarily, company Y's parent). I will refer to this basis of liability as "the Decisive Influence Ground". EU law provides that a rebuttable presumption of "decisive influence" arises where company X owns (directly or indirectly) all or most of the shares in company Y.

85. The Decisive Influence Ground is well-established in the case law of the CJEU and is accepted by the Defendants as, in principle, a potential basis of liability. The relevant principles of EU law are conveniently explained in Case C-155/14 P *Evonik Degussa GmbH* [2016] ECLI:EU: C:2016:446, at paragraphs 27-33:

> "27. …responsibility for the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. In such a situation, since the parent company and its subsidiary are part of the same economic unit and therefore form a single undertaking for the purposes of Article 101 TFEU, the Commission may address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.
>
> 28. …where a parent company holds, directly or indirectly, all or almost all of the capital in a subsidiary which has committed an infringement of the EU competition rules, there is a rebuttable presumption that that parent company actually exercises a decisive influence over its subsidiary...
>
> 29. …it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held, directly or indirectly, by the parent company in order to take the view that that presumption is fulfilled. Accordingly, the Commission will then be able to regard the parent company as responsible for its subsidiary's conduct and as jointly and severally liable for the payment of the

> fine imposed on that subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market…
>
> 31. Once the presumption of actual exercise of decisive influence is established, it is solely for the parent company holding all or almost all of the capital of its subsidiary to rebut it.
>
> 32. In order to rebut that presumption, a parent company must… adduce evidence relating to the organisational, economic and legal links between its subsidiary and itself which are such as to demonstrate that they do not constitute a single economic entity...
>
> 33. In order to assess whether that subsidiary decides independently upon its own conduct on the market or carries out, in all material respects, the instructions given to it by its parent company… the EU judicature must take into consideration all relevant factors, which may vary from case to case and therefore cannot be set out in an exhaustive list…"

86. The second of the Attribution Grounds is more controversial. It asserts that company C can be held liable for an infringement, regardless of whether C has any actual knowledge of it, where (i) C is part of the same "undertaking" or "single economic unit" as company D, (ii) D is an infringer, and (iii) C implements the offending cartel in some way. I will call this "the *Provimi* Ground", after the case in which liability on this basis was held to be arguable: *Provimi Limited v Aventis Animal Nutrition SA and others* [2003] ECC 29. At paragraph 31, Aikens J (as he then was) said:

> "31. It seems to me to be arguable that where two corporate entities are part of an "undertaking" (call it "Undertaking A") and one of those entities has entered into an infringing agreement with other, independent, "undertakings", then if another corporate entity which is part of Undertaking A then implements that infringing agreement, it is also infringing [Article 101(1) TFEU]. In my view, it is arguable that it is not necessary to plead or prove any particular "concurrence of wills" between the two legal entities within Undertaking A. The EU competition law concept of an "undertaking" is that it is one economic unit. The legal entities that are part of the one undertaking, by definition of the concept, have no independence of mind or action or will. They are to be regarded as all one. Therefore, so it seems to me, the mind and will of one legal entity is, for the purposes of [Article 101(1) TFEU], to be treated as the mind and will of the other entity. There is no question of having to "impute" the knowledge of one entity to another, because they are one and the same."

87. The existence of the *Provimi* Ground as a possible basis of liability for breach of Article 101 has been the subject of debate in subsequent case law in the English courts, and its existence is disputed by the Defendants. They argue that it has been laid to rest by the decision of the Competition Appeal Tribunal in *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11. The Claimants contend otherwise. I will return to the issue in due course.

Issues common to TIS and PE

88. Although the Toshiba Defendants and the Panasonic Defendants are separately represented, with each group raising discrete arguments, Mr Singla and Ms Abram have adopted each other's submissions on certain issues. Where Mr Singla and Ms Abram have each made submissions on such issues, I have naturally taken account of both, even if both counsel are not credited by name on every such occasion.

89. Common issues include: (i) an issue as to the quality of knowledge required on the part of a party who is alleged to have knowingly implemented; (ii) an issue as to what constitutes "participation" as a matter of law; and (iii) an issue whether activities other

than sales of the cartelised product to third parties (e.g. intra-group sales or sales of transformed products) can amount to "implementation" of a cartel.

(i) Quality of knowledge of the infringing activity

90. It is common ground that as a matter of law an entity can infringe Article 101(1) TFEU and Article 53 EEA if it participates in relevant cartel activity, in the sense of being a party to an agreement or concerted practice which falls within that Article, or if it *knowingly implements* a cartel to which it may not have been a party in that sense. Mr Singla submitted that there is no arguable case that TIS had the requisite knowledge. However, what is sufficient knowledge for this purpose is not common ground, and I have heard submissions on that question.

91. The dispute about the law on this aspect of "knowing implementation", as it emerged, is a narrow one. It appears to be common ground that for this purpose knowledge can be *actual* (i.e. express, implied, or inferred) or *imputed* by operation of law. However, Mr Singla takes issue with the proposition that knowledge could also be *constructive*, in the sense of "should have known" about the infringing conduct.[45]

92. In submitting that this can suffice, the Claimants rely upon, for example, the judgment of the CJEU in Case C 609/13 P *Duravit AG v Commission* [2017] ECLI:EU: C:2017:46, in which the court recognised that an undertaking may be liable for actions taken by co-cartelists as part of a common "overall plan", where

> "the undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, *or could reasonably have foreseen that conduct and have been prepared to take the risk.* In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole . . ." (Paragraph 119) (Emphasis added)

The Claimants point to the fact that in *Toshiba Carrier UK Ltd v KME Yorkshire* (above), at paragraph 20, Etherton LJ referred to this reasoning of the CJEU when considering the establishment of an infringement of Article 101 through implementation of anti-competitive arrangements with the requisite degree of knowledge.

93. However, Mr Singla submits that the Claimants are misinterpreting the "single continuous infringement" case law, and that the passage in *Duravit* relied upon has no bearing on the quality of the knowledge required for "knowing implementation". This is because *Duravit* is expressly dealing with a situation where the premise is that the undertaking in question has "participated directly" in some of the offending conduct, and the only question is whether it should also be liable for the *whole* of the "single continuous infringement". Mr Singla submits that actual/imputed knowledge is clearly required where an infringement consists of an agreement, and that there is therefore no justification for requiring an inferior quality of knowledge for an infringement based on knowing implementation.

[45] See, for example, Day 4, p.66.

94. In my view, it is highly questionable whether the quality of knowledge referred to in *Duravit* (and in the other CJEU cases to which I was referred on this point) really amounts to constructive knowledge as that concept is generally understood. The CJEU's accompanying reference to an entity being "prepared to take the risk"[46] smacks more of what is called "shutting one's eyes to the obvious", which is closer to actual awareness.

95. However, it is not necessary for me to resolve this issue. The Claimants' case against TIS in relation to participation and knowing implementation rests primarily on the contention that the requirement for knowledge is satisfied by actual knowledge (to be inferred from all the surrounding circumstances and/or *via* the shadow director argument) and/or by imputed knowledge in the *Provimi* Ground.[47] My conclusions at paragraphs 125-127 below are sufficient to get the Claimants over the summary judgment hurdle so far as the issue of TIS's knowledge of the cartel is concerned.

(ii) *What constitutes "participation"?*

96. In their submissions, Mr Singla and Ms Abram draw a distinction between two forms of infringement of Article 101(1), namely, participation in a cartel, and knowing implementation of it.

97. As to participation, Mr Singla submits that such an allegation requires a claimant to show actual attendance at meetings and/or contacts with competitors, together with an intention of coordinating with them. In his submission, none of the facts relied upon in support of the allegation that TIS participated shows that the company itself ever reached an agreement or engaged in a concerted practice with any of its competitors.

98. Further, it is submitted that in so far as the Claimants rely upon the CJEU's reference in *Duravit* and other cases to an entity making "a necessary contribution" to an infringement, that reliance is misplaced. Mr Singla submits, as he did in relation to the quality of knowledge issue, that in those cases the CJEU was dealing with a separate question relating to "a single continuous infringement". They are not, he submits, authority for the proposition that an undertaking which has *not* participated directly, by e.g. attending meetings with competitors or reaching a common understanding with them, may nevertheless be liable for an infringement by making a "necessary contribution" to a cartel. Mr Singla suggests that this is a "hard-edged point of law" between the parties.

99. I do not consider that the attempt to draw such a rigid distinction between an infringement by "participation" and an infringement by "knowing implementation" is helpful. The suggested distinction is in many respects artificial and confusing. Infringements of Article 101 can be by agreement, or by concerted practice, or by decision of an association of undertakings. In my view, there is no clear bright line between the various ways of infringing Article 101, and certainly not between "participating" and "implementing". For example, an undertaking which takes a step in furtherance of a concerted practice, with knowledge of that practice, can be said to be a participant in the practice in any normal sense of the word, as well as a knowing implementer of it. The same applies where, with knowledge of a cartel agreement, an undertaking takes a step in furtherance of it. "Participation" is a broad, non-technical

46 Paragraph 92 of this judgment.

47 As against TIS (cf.PE) there does not appear to be a case based on the Decisive Influence Ground.

word, as is "implementation". Neither is actually used in Article 101 itself. It was in the broad, inclusive, non-technical, sense that the Competition Appeal Tribunal in *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* (above), at paragraph 363(22), used the words "has in some way participated in [a] breach".

100. The elision between various types of infringing conduct was clearly expressed by the CFEU in Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125:

> "…it must be remembered that Article 85 of the Treaty prohibits agreements between undertakings and decisions by associations of undertakings, *including conduct which constitutes the implementation of those agreements or decisions and concerted practices*, when they may affect intra-Community trade and have an anti-competitive object or effect." (Paragraph 81) (My emphasis)

101. What matters is not whether a person who, with knowledge of a cartel, takes active steps to further its objectives, is to be regarded as a "participant" or as a "knowing implementer", but that in such cases the participant or implementer is intentionally substituting some form of coordination or cooperation in place of competitive conduct. The essential question for me is whether the Claimants' claim against TIS has no realistic prospect of success at trial. For this purpose, I do not consider it necessary to determine whether or not Mr Singla is right that the Claimants have once more misinterpreted the CJEU caselaw concerning "single continuous infringement".

(iii) *Can conduct other than sale of the cartelised product to third parties (e.g. intra-group sales or sales of transformed products) amount to "implementation"?*

102. Mr Singla referred to paragraph 83 of CAPOC where the Claimants plead that the Toshiba Defendants (including TIS) implemented the cartel through the sale in the EEA of CTVs which incorporated the cartelised CPTs,[48] and that in order to put into effect the objectives of the cartel, such sales were at higher prices than would otherwise have been the case.

103. Mr Singla submits that as a matter of principle "implementation" requires sale of *cartelised* products, i.e. CPTs, rather than transformed products, ie CTVs. Given that only 9% of CPTs used by TIS were purchased from the infringer's (namely MTPD's) subsidiary, and that TIS primarily sold CTVs to other Toshiba entities, its activities could not arguably be said to amount to implementation of the CPT cartel. To hold otherwise would be to cast the net far too wide, as it would mean that anyone who sold the transformed product would be an infringer.

104. This submission faces the problem posed by Recital 595 of the Decision,[49] in which the Commission expressed its conclusion that the CPT cartel was implemented in the EEA *"through direct sales of CPT and direct sales of CPT through transformed products"*. In seeking to deal with that problem, Mr Singla submitted that the Commission's finding concerned territorial jurisdiction relating to the Commission's power to impose fines, and did not bear on what conduct constitutes implementation for the purposes of civil liability. In addition, he contended that when the Commission spoke of direct EEA sales through transformed products, what it had in mind were sales of such products to third

[48] In the Decision, and during the hearing before me, such CTVs were called "transformed products".
[49] See paragraph 114 of this judgment.

party buyers. This, he argued, did not apply to TIS, as its customers were principally within the Toshiba group.

105. In relation to these submissions, I was referred by the Claimants to Joined Cases C-588/15 P and C-622/15 P, *LG Electronics and Philips v Commission* [2017] ECLI:EU:C:2017:679, CJEU, at paragraphs 65 to 70. That case involved an issue whether intra-group sales and/or sales of transformed products can form the "subject matter" of an infringement of Article 101, so that a fine imposed on the infringer can take account of the value of those sales. The CJEU answered the question in the affirmative. In doing so it pointed out that, in calculating the fine for an infringement, the Commission would value sales of the goods or services *"to which the infringement directly or indirectly…relates"*, as this had a bearing on the economic importance of the infringement and the infringer. The court clearly considered that goods/services which were the subject of intra-group transfers, and transactions relating to transformed goods, fall within that description.

106. I also note that the passing on of an overcharge, including *via* intra-group transactions relating to cartelised and transformed products (of the same description as here, as it happens), has been held by the Court of Appeal to be capable of giving rise to recoverable loss on the part of those who purchased cartelised products and transformed products at prices which were inflated by the cartel: *Iiyama (UK) Ltd v Samsung Electronics Co Ltd* [2018] 4 CMLR 23. (See per Henderson LJ, at paragraphs 2-5 and 100.) That case also confirms[50] that it is at least arguable that liability for loss can arise under Article 101 without a direct contractual relationship between the infringer and the claimant and, indeed, without the claimant having purchased any of the cartelised products from the infringer. (See also *Vattenfall AB and Others v Prysmian SpA [2018] EWHC 1694 (Ch D),* at paragraph 55.)

107. It is difficult to identify any convincing reason why, if intra-group sales and sales of transformed goods are to be regarded as forming part of the "subject matter" of an infringement or as "relating directly or indirectly" thereto for the purposes of fining the infringer, such sales should not be able to represent "implementation" of the infringement for the purpose of civil liability. That this is at least arguable is supported by the Court of Appeal's decision in *Iiyama* (above).

108. *Vattenfall* (above) was a decision of Mr Anthony Elleray QC, sitting as a Deputy High Court Judge. Mr Singla submitted that this is the only decision of an English court in which it has been held that an entity is arguably implementing a cartel even though it is not selling the cartelised product. Both he and Ms Abram submitted that it was wrongly decided.

109. The case concerned a damages claim following the Commission's decision in relation to a cartel in underground and submarine electricity cables. The claimants sought damages for the overcharge on purchases of cable products and services used in wind farms. The defendants, who were anchor defendants, were alleged to have knowingly implemented the cartel. They unsuccessfully applied for summary judgment. One of the anchor defendants had been selling cartelised products, the other had not. The latter had fulfilled a customer service and information role, and was directly involved in dealing with purchasers of cartelised goods and services on behalf of other members of

[50] See paragraphs 57-67.

its corporate group. The learned Deputy High Court Judge rejected a submission that this activity could not arguably amount to implementation of the cartel.

110. Both Mr Singla and Ms Abram criticised the *Vattenfall* decision in a number of respects. In particular, they argued that it stretched the concept of "implementation" beyond anything that was properly arguable. After the completion of the hearing, I allowed further written submissions to be made by all three parties, in the light of the supervening refusal of the Court of Appeal (Flaux LJ) to grant permission to appeal against the decision in *Vattenfall*. I have considered those submissions. In them Ms Abram pointed out, correctly, that the Deputy High Court Judge's decision on "implementation" had not been the subject of any challenge in the proposed appeal.[51]

111. In my view, whether there has been participation in or knowing implementation of a cartel is essentially a fact-dependent question which, except in very clear cases, is likely to be unsuitable for summary disposal. Usually a full investigation of the facts will be needed in order to determine whether a cartel was being "implemented" by the activities of an alleged infringer. It is not at all clear why intra-group sales or sales of transformed products or other activities which have the effect of furthering the objectives of a cartel could not in appropriate circumstances amount to "implementation" of it. If the Defendants' submissions were correct, it could lead to arbitrary distinctions between the liability of companies within vertically integrated groups and that of non-integrated companies. It could also encourage manipulation of group structures and activities in order to place the responsibility for infringement where it will least adversely affect the group, and it would leave an undesirable *lacuna* in the law. Nothing in the authorities shown to me requires or persuades me to accept those submissions.

Should the EU law claim against TIS be struck out?

The "factual" case against TIS

(i) The parties' respective positions

112. Mr Singla argues that, in the light of the weakness of their "purely legal case" based on the Attribution Grounds, the Claimants have developed a factual case in relation to both participation and knowing implementation. He submits that from neither a factual nor a legal point of view do the Claimants have an arguable case, or a real (as distinct from fanciful) prospect of establishing that TIS participated in the cartel or had knowledge of it or implemented it. He points out that TIS is not an addressee of the Decision and is barely mentioned in it. Therefore, it is submitted, the Decision has no binding effect so far as TIS is concerned, and a separate factual basis for the allegations against TIS is required. Yet, TIS submits, there is no direct evidence to support the allegations against TIS, and such serious allegations should not be allowed to proceed to trial on a speculative basis.

113. Mr Singla also suggests that when considering the strength of the case against TIS, I should have regard to what he contends is the only reasonable inference, viz that the

[51] The post-hearing written submissions of the parties also covered a recent decision of the General Court, to which I will refer when I come to consider the *Provimi* Ground.

company is being sued as an anchor defendant in order to establish the jurisdiction of the English court.

114. The Claimants refute the suggestion that the claim has been brought against TIS on a speculative basis in the hope that something may turn up on disclosure and/or simply to provide an anchor defendant for jurisdictional purposes. They point to the Commission's finding, at Recital 595, that the cartel was implemented in the EEA through sales of cartelised CPTs that had been integrated into the finished products, viz CTVs:

> "Finally, the European situation was explicitly discussed and analysed … during both bilateral and multilateral meetings…In these meetings, parties exchanged individualised data on their future intentions or reached agreements on European production capacities, supply and demand or prices. Therefore, it is concluded that the CPT cartel, like the CDT cartel, was implemented concerning Europe and that such implementation took place through direct sales of CPT and direct sales of CPT through transformed products in the EEA (that is, the Direct EEA Sales and the Direct EEA Sales Through Transformed products, see Recital (1020))."

(ii) TIS's role

115. In their submissions on behalf of the Claimants on this aspect, Mr Beal and Ms Robertson refer to the witness statements of Mr Murray and also those of Mr Balmain. Reliance is placed on, in particular, the following circumstances, which do not appear to be in dispute, and which are referred to in more detail at paragraphs 25ff above:

- that Recitals 69-70 to the Decision confirm that between 1995 and 31 March 2003 and for a period thereafter "[TIS]...manufactured and sold CRT TV sets";
- that TIS incorporated the cartelised CPTs into CTVs which it manufactured, having purchased those CPTs from, amongst others, TEEG and MTPDG, who were both either direct or indirect subsidiaries of established participants in the cartel and addressees of the Decision (viz TC and MTPD);
- that TIS's co-parent, TEG (amongst others), purchased such CTVs from TIS and sold them to the Claimants;[52]
- that during the period after MTPD had been formed by TC and PC as a joint venture vehicle for their respective cartelised CPT businesses, the Claimants and/or their subsidiaries were in direct contractual relations with TIS in respect of bonus payments on sales in the EEA, including sales of CTVs which incorporated cartelised CPTs;
- that, as Mr Balmain confirms,[53] TC (a direct participant in the cartel) owned 98% of the shares in TIS both during and before the Latter Period, and all the shares in TEG;
- that during the Latter Period, TIS shared directors with its co-parent TEG, which was wholly owned by TC (a direct participant in the cartel);

[52] It appears to be common ground that such sales to the Claimants were not made by TIS.
[53] Balmain 1, paragraph 28.

- and that TIS's Companies House reports covering that period refer to TIS having "significant transactions" with other Toshiba group companies.

116. In these circumstances, Mr Murray describes[54] TIS and other members of the Toshiba group as forming "part of a network of undertakings which the Claimants reasonably believe made the Cartel's operation possible". These factors are prayed in aid as evidence that TIS participated in and/or knowingly implemented the cartel.

(iii) Did TIS's activities arguably amount to "implementing"?

117. On the face of facts which are not essentially disputed, TIS was involved in activities which were important to the operation of the cartel from the Toshiba perspective. These included the manufacture of CTVs using the cartelised product acquired from an associated company which itself was one of the established cartelists, and the onward sale of the transformed product. TIS also had direct commercial dealings with the Claimants relating to bonuses on sales of, *inter alia*, the transformed products.

118. In my judgment there is an arguable case that those activities amounted to the *actus reus* of participation in and/or implementation of the cartel. The available material is sufficient to preclude the summary disposal of that issue.

(iv) TIS's knowledge: relevance of TC's awareness of the cartel

119. The Claimants argue that *actual* knowledge on the part of TIS can reasonably be inferred from the surrounding circumstances identified at paragraphs 115ff above, which are said to show TIS's important role and interaction with other Toshiba entities and the Claimants in the implementation of the cartel.

120. Also relied upon as evidence that TIS was aware of the cartel, and therefore played its part *knowingly*, is the allegation that during the Latter Period TIS's parent company, TC, was aware of the cartel, in respect of which it was held by the Commission to be a participant, along with MTPD and PC. TIS disputes that TC was aware. It also disputes that any finding of the Commission to that effect survived TC's appeal to the General Court.

121. The relevance of TC's awareness of the cartel to the issue of TIS's knowledge, is, as I understand the Claimants' case, threefold: first, TC's knowledge of the cartel, even if not imputable by law to TC's almost wholly owned subsidiary, TIS, is nevertheless one of the surrounding circumstances making up the general context in which TIS was operating, and as such would contribute to the likelihood that, directly or indirectly, TIS must have come to know of the cartel; second, if, as the Claimants submit and the Defendants dispute, TC was as a matter of English law a *de facto* and/or shadow director of TIS, then the former's knowledge of the cartel would at least arguably be imputed or attributed to TIS; and third, if, as alleged by the Claimants, TC and TIS are members of the same economic unit or "undertaking", then in the context of the *Provimi* Ground TC's guilty knowledge would suffice for the whole of that undertaking, including any participating or implementing companies within it, and in that way TIS (assuming it had

[54] Murray 1, paragraph 59. See also Murray 2, paragraphs 17-18.

in some way implemented) would be liable without it being necessary to establish its knowledge separately.

122. The Claimants contend that, in the light of all these factors and of the Decision, there is a sufficiently arguable case for the purposes of a summary judgment application that TC used its network of subsidiaries, including TIS, to control and implement the cartel (in conjunction with MTPD as a joint venture with PC), and that TIS made a "necessary contribution"[55] to the functioning of the cartel. This, they submit, suffices to establish an arguable (as distinct from a fanciful) case of participation and/or knowing implementation by TIS.

123. I return to the issue of TC's alleged knowledge of the cartel when considering the *Provimi* Ground. For present purposes, it is sufficient to record my conclusion that, for the reasons stated at paragraphs 130ff below, the Claimants' contention that TC knew of the cartel during the Latter Period cannot be dismissed as fanciful or groundless at this stage. The evidence upon which the Commission relied in concluding that TC had "decisive influence" over MTPD,[56] if accepted, indicates that TC was giving business instructions to, and exercising a supervisory and management role over its directly infringing co-subsidiary MTPD, as well as sharing personnel with it. These factors would clearly provide support for a contention that TC knew of the cartel, given that "decisive influence" means that the subsidiary (in this context MTPD) "*does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company*".[57]

124. Moreover, TC's giving such instructions to MTPD and exercising a supervisory and management role over it, is said to have been occurring at a time when MTPD (through its own subsidiary MTPDG) was selling the cartelised CPTs which it manufactured to, *inter alios*, TIS, and TIS was playing a not insignificant role within the group in acquiring the cartelised CPTs and using them to manufacture and sell the transformed products, in respect of which it had contractual bonus arrangements with the Claimants.

125. In the circumstances, I do not feel able to conclude that TC's knowledge of the cartel (if ultimately established), together with the evidence relating to the activities of TIS itself, could not represent circumstantial evidence supporting the likelihood that TIS was aware of the cartel. Whether such knowledge is established on the balance of probabilities is, of course, quite another matter. But that issue can only be determined at a trial. I should add that this conclusion is made independently of TC's alleged role as a shadow/*de facto* director of TIS, and of any imputation of knowledge to TIS under the *Provimi* Ground. It follows that the allegation that TIS was aware of the cartel during the material period cannot be dismissed as fanciful or groundless.

Conclusion on TIS's strike out application: the factual case

126. In view of my conclusions, the claim that TIS participated in and/or knowingly implemented the cartel is sufficiently arguable to preclude its summary disposal.

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[55] Case C-180/16 P *Toshiba v Commission* [2017] ECLI:EU:C:2017:520, CJEU at [81]-[82].
[56] The Commission's conclusion was upheld on appeal to both the General Court and the CJEU.
[57] See the citation from *Evonik Degussa*, at paragraph 85 of this judgment.

127. In these circumstances, regardless of whether knowledge and liability is arguably to be attributed to TIS under the *Provimi* Ground, and whether or not knowledge of the cartel is arguably to be attributed to TIS on the basis that TC was a shadow/*de facto* director of TIS, the application to strike out the EU law claim against TIS should be dismissed.

128. Nevertheless, I will consider the *Provimi* Ground against TIS, and the shadow/de facto director argument, as both have been argued.

The Provimi Ground

(i) The Claimants' Provimi argument

129. The way in which the *Provimi* Ground appears to have been formulated in CAPOC[58] against TIS and the other Toshiba Defendants is, in summary, as follows: By reason of the "decisive influence" of TC (an addressee of the Decision) over TIS, over the other Toshiba Defendants, and over any or all other relevant[59] subsidiaries and/or business divisions and units, these entities formed a single economic unit and therefore a single "undertaking" for the purposes of EU competition law. In CAPOC this undertaking is called "Toshiba".[60] From 1 April 2003 Toshiba (including TIS) is said to have participated with "Panasonic"[61] in the cartel via MTPD, their joint venture company. The Toshiba Defendants (and therefore TIS) are also said to have implemented the cartel from 1 April 2003 through Toshiba's (including TIS's) and MTPD's sales of CPTs and CTVs in the EEA at higher prices than would otherwise have been the case.[62]

(ii) Is it arguable that TC was aware of the cartel?

130. As to TIS's (and the other Toshiba Defendants') *knowledge* of the cartel, the Claimants rely upon *inter alia* the attribution to those Defendants of TC's knowledge under the *Provimi* principle. The assertion about TC's knowledge is based upon a finding, admitted[63] to have been made by the Commission in the Decision, that TC and PC were both aware of the cartel during the Latter Period i.e. from the start of MTPD's participation. The Claimants contend that nothing in the judgment of the General Court on TC's appeal[64] has disturbed that finding, because the error in the Decision identified by the General Court was only in respect of the Commission's finding of TC's awareness of the nature and extent of the cartel *prior to* that period. The Defendants, on the other hand, dispute that that finding has survived the General Court's decision.[65]

[58] See paragraphs 9, 18, 20, 44 ff.
[59] Mr Beal suggested the addition of the term "relevant" to the pleading in certain places, when making his oral submissions.
[60] I will use the same terminology to denote the "undertaking" for the existence of which the Claimants contend. The Defendants complain that the use of this general term creates uncertainty in the pleading. There does appear to be some inconsistent use of it in CAPOC. For example, the term "Toshiba", and the corresponding term "Panasonic", are used in paragraphs 64, 65 and 89.1 in a context where the reference is to the corporate entities TC and PC.
[61] The name given in CAPOC to the equivalent alleged "undertaking" comprising PC and its relevant Panasonic group entities: paragraph 19 of CAPOC.
[62] CAPOC, paragraph 83 (as modified in the course of the hearing).
[63] Transcript, Day 3, pp.92-3.
[64] See paragraph 13 of this judgment.
[65] For example, Transcript, Day 3, pp.91-96, and Day 4, pp.69-71.

131. However, it is unnecessary to resolve that controversy. For the Claimants also submit that TC's knowledge of the cartel during the Latter Period can be inferred from the Commission's finding on the evidence that TC (with PC) had "decisive influence" over MTPD. The Defendants do not dispute that finding, but Mr Singla submitted that the existence of "decisive influence" does not, as a matter of law, necessarily carry with it an awareness of cartel conduct by the subsidiary. Whether or not that submission is correct, it does not advance the Toshiba Defendants' case because, as the Claimants point out, TC was the *minority* shareholder in MTPD. Therefore, in determining whether TC had "decisive influence" over MTPD, the Commission did not (and could not) rely upon the rebuttable presumption which applies under EU law when a company owns all or most of a subsidiary's shares. It was on *the evidence* that the Commission found that TC exercised "decisive influence" over MTPD, and that TC and MTPD (with PC) formed a single "undertaking". This included evidence that TC had *in fact* exercised "decisive influence" over MTPD's commercial policy, and had actively played a supervisory and management role, formulating business instructions for MTPD.[66] The evidence before the Commission is also said to have contained references to individual personnel moving between MTPD and its parent companies,[67] and to the parent companies supplying raw materials to MTPD for the production of cartelised CPTs, which were then sold.[68]

132. Although TC challenged the Commission's finding of "decisive influence" over MTPD in both the General Court and the CJEU, those challenges were unsuccessful.

133. In the light of this, I can see no basis upon which a contention that TC was aware of the cartel during the Latter Period could be said to be fanciful or without evidential support.

(iii) Can TC's knowledge/liability be attributed to TIS under Provimi?

Summary of TIS's submissions

134. The direct attribution of TC's knowledge to TIS *by operation of law* (as distinct from its value as a factor in a case based on all the surrounding circumstances – as to which, see the discussion earlier in this judgment) is dependent upon (a) TIS being part of the same "undertaking" as TC, and (b) the validity and extent of the *Provimi* Ground.

135. Mr Singla indicated that for present purposes the arguability of proposition (a) was not disputed by TIS, given the rebuttable presumption of "decisive influence" which would apply as between TC and its almost wholly owned subsidiary TIS, and given the resultant need for TIS to produce evidence in rebuttal of that presumption. This is not a case where, for example, the subsidiary in question (TIS) was unarguably operating in an area of business entirely unrelated to that of its parent.[69] It is therefore clear that proposition (a) is not fit for summary disposal, and could only be resolved at a trial. Proposition (b) requires a consideration of the *Provimi* case law.

136. Mr Singla submits that, whilst the Commission found that TC exercised "decisive influence" over MTPD, and that TC and MTPD were components of a single

[66] For example, Recitals 946, 962ff, and 969. See also paragraphs 2.4 and 2.5 of the Confidential Annex to CAPOC.
[67] Recital 975.
[68] Recital 977.
[69] See, for example, *Cooper Tire and Rubber Company v Shell* [2009] 2 CLC 619, per Teare J at paragraph 56.

"undertaking" for the purposes of the cartel, the liability of TC cannot be attributed from TC to TIS. He interprets the Claimants' argument in this respect as being that the liability of MTPD is attributed *up* the corporate chain to TC, its parent with "decisive influence", and then *down* the corporate structure from TC to TIS, another subsidiary of TC, so that TIS is then liable for having itself participated in the cartel simply because TIS and TC were part of the same "undertaking" for the purposes of Article 101.

137. Mr Singla submits that this analysis is fallacious. He says that it was common ground that MTPD was found by the Commission to have participated in the cartel during the Latter Period, that TC was found by the Commission to have exercised "decisive influence" over MTPD, and that TC was the parent of TIS. However, in his submission the Claimants are in error in contending that this is sufficient to render TIS itself liable for the infringement, simply because TIS and TC were arguably part of the same "undertaking". He submitted that there is no legal basis on which MTPD's participation in the infringement can be attributed up the MTPD corporate structure to MTPD's minority shareholder, TC, and then down a separate corporate structure to a subsidiary of TC, namely TIS. The effect of this would be to hold TIS liable for MTPD's participation in the infringement simply by virtue of the fact that they had a common shareholder during the Latter Period. That would stretch the concept of an "undertaking" too far. It would mean that all entities within the same corporate group as a participant in an infringement could be held liable for the breach of Article 101. Such a proposition would be inconsistent with the case law, including Case C-196/99 *P Siderurgica Aristrain Madrid SL v Commission* [2003] ECR I-11005, and *Sainsbury's*. It would also be inconsistent with the rationale for attributing liability to a parent in respect of an infringement by a subsidiary over which it exercises "decisive influence". The rationale is:

> "since any gains resulting from illegal activities accrue to the shareholders, it is only fair that that those who have the power of supervision should assume liability for the illegal business activities of their subsidiaries".[70]

This does not justify attribution *from* a parent *to* a subsidiary over which the parent has "decisive influence".

138. Ms Abram made submissions consistent with, and also adopting, those of Mr Singla on the legal principles relating to this point.

The case law

139. In order to consider these submissions, it is necessary to examine some of the cases, both in the CJEU and the English Courts, to which counsel have referred. It is appropriate to begin with the well-known statement by Aikens J in *Provimi*, set out earlier in this judgment,[71] that it was *arguable* that where a company is a member of an economic unit or "undertaking", and that company implements, however innocently, an anti-competitive agreement entered into by another company within the same

[70] Case T-77/08 *Dow Chemical Company v* Commission [2012] ECLI:EU::T:2012:47, paragraph 101. This statement was the subject of an appeal to the CJEU, which said that it had been included in the General Court's judgment "purely for the sake of completeness": Case C-179/12 P *Dow Chemical Company v Commission* [2013] ECLI:EU:C:2013:605, CJEU, at paragraphs 62-3.

[71] See paragraph 86 of this judgment.

"undertaking", the first company can be held liable for breach of Article 101(1) TFEU. That is the pure *Provimi* issue.

140. The next case is *Cooper Tire v Dow Deutschland* [2010] EWCA Civ 864, in which the Court of Appeal said that the point was also arguable in the opposite direction. Longmore LJ said:

> "As to the *Provimi* point, we can readily agree that, as Aikens J said, it is "arguable". We would, however, add that it is also arguable the other way. Although one can see that a parent company should be liable for what its subsidiary has done on the basis that a parent company is presumed to be able to exercise (and actually exercise) decisive influence over a subsidiary, it is by no means obvious even in an Article [101 TFEU] context that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. Nor does the *Provimi* point sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible or their parent companies rather than to impose a fine on all the entities of the relevant undertaking. If, moreover, liability can extend to any subsidiary company which is part of an undertaking, would such liability accrue to a subsidiary which did not deal in rubber at all, but another product entirely? These and other difficulties have been ventilated by Mr Nicholas Khan in the 2003 volume of European Lawyer page 16 and Mr Brian Kennelly in the May 2010 issue of the CPI Anti-Trust Journal. " (See paragraph 45)

141. Thereafter, the CJEU decided Case C-196/99 P *Siderurgica Aristrain Madrid SL v Commission* (above), in which the Court held that:

> "The simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other." (Paragraph 99)

142. In an *obiter*[72] comment made in the light of *Aristrain*, Etherton LJ (as he then was) said in *KME Yorkshire v Toshiba Carrier* [2012] EWCA Civ 1190 that the law in this area was "plain and settled", and that *Provimi* had been "overtaken by" the decision of the CJEU in *Aristrain*:

> "… the mere fact that the share capital of two commercial companies is held by the same person or the same family is insufficient in itself to establish that those two companies are an economic unit with the result that, for the purposes of Article 101, the actions of one company can be attributed to the other. That was expressly held to be the position in Case C-196/99 P *Siderurgica Aristrain Madrid SL v Commission…*at paragraph 99: see also Case T-358/06 *Wegenbouwmaatschappij J Heijmans BV v Commission* 4 July 2008 (Second Chamber) at paragraph 30. The views expressed by Aikens J in Provimi predated the judgment of the ECJ in *Siderurgica Aristrain Madrid* and were overtaken by it." (Paragraph 39)

143. In *Sainsbury's* (above), the Competition Appeal Tribunal wondered why *Aristrain* was thought to have determined the *Provimi* issue against Aikens J's (and the Court of Appeal's in *Cooper Tire*) view that the point was arguable. At paragraph 363(16), the Tribunal said:

> "It is not clear why the Court of Appeal in *KME* thought that this decision decided the point against Aikens J's analysis. As the High Court has pointed out in a recent case, *Aristrain* decided a rather different point, namely that simply because separate companies are owned by the same person or family, they are not *ipso facto* to be treated as a single economic unit so that the actions of one can be attributed to the other. Indeed, if anything, *Aristrain* could be said to support the point Aikens J

[72] The *Provimi* point did not arise in that case.

> held to be "arguable", as in paragraph 99 the Court of Justice does not express the attribution of liability within a single "undertaking" in terms of parent/subsidiary, but in more general terms."

144. It is worth bearing in mind that in *Sainsbury's* the Tribunal was dealing with the following submission of MasterCard:

> "It was MasterCard's case that: (1) All of the legal persons who are members of an undertaking are liable for an infringement committed by any one of them. Thus, assuming A, B and C (each having distinct legal personality) are all part of one undertaking, and C (but only C) commits an infringement of competition law, a claimant can claim damages from A (without necessarily joining C to the proceedings) for that infringement. In effect, the liability is that of the undertaking, which liability (at least for the purposes of English proceedings) is translated into a claim against each and every one of the legal persons comprising that undertaking." (See paragraph 361)

145. Thus, MasterCard was contending for a more draconian liability than that which Aikens J had held to be arguable in *Provimi*. MasterCard was arguing for liability to be attributed to each and every member of an "undertaking" *simply by reason of that membership*, and regardless of whether the company in question had carried out any acts amounting to participation and/or implementation of the anticompetitive agreement/practice. *Provimi* liability, on the other hand, would require some (albeit innocent) participation/implementation by the company. It was the more draconian liability advocated by MasterCard that the Tribunal considered a step too far.

146. The Tribunal summarised its view of the legal position as follows:

> "(17) Support for a somewhat wider attribution of liability for infringements within a single economic unit is to be found in the decision of the Court of First Instance in Case T-43/02 *Jungbunzlauer AG v Commission* [2006] ECR II-3435. There the Court held that the Commission had been entitled to attribute liability for an infringement committed by one subsidiary (A) of a holding company to another subsidiary (B) of the same holding company. Although the Commission was held to be correct in not relying upon any presumption of "decisive influence" of B over A in such circumstances, it was entitled to find on the evidence that the holding company had devolved the management of the group business entirely to subsidiary B, so that subsidiary A "did not decide independently its own conduct on [the relevant] market, but carried out, in all material respects, the instructions given by" subsidiary B. In those circumstances, the Commission was held to have been right to attribute the infringement to B (see paragraphs 125-130 of the judgment).
>
> (18) It follows that there can be attribution of liability as between co-subsidiaries. However, in *Jungbunzlauer*, this was because subsidiary B had the equivalent of decisive influence over subsidiary A. We have not been shown any authority where liability has been held to be attributable to a company which does not have "decisive influence" over the other company, merely because they are both members of the same "undertaking". As far as we are aware, no court has yet determined the question which Longmore LJ said he might well have referred to the Court of Justice for a preliminary ruling (see above). This may well be because it is unlikely that, in the absence of decisive influence of one company over another in relation to conduct in the relevant market, the companies concerned will form the same, or a part of the same, economic unit.
>
> …
>
> (21) It is certainly tempting to apply the logic relied upon by MasterCard, and hold that each and every constituent person forming part of an 'undertaking' should be liable for an infringement for which that undertaking is responsible. Yet as we have seen, the Court of Justice has not stated the position in such wide terms. Nor in our view would it be appropriate to go so far. In our view the current state of the law in this regard is most clearly expressed in the Advocate General's Opinion (endorsed by the Court of Justice) in Case C-231/11P to C-233/11P, *Commission v. Siemens* (paragraph 363(8) above).

(22) On that basis a legal person may be liable for a breach of competition law:

(i) Because he, she or it has in some way participated in that breach, as a part of the single economic unit or "undertaking" that has infringed the law; and/or

(ii) Because he, she or it has exercised a decisive influence over one or more of the persons within the "undertaking" who have participated in the infringement.

(23) On the other hand, in our view a person is not *ipso facto* liable for an infringement of Article 101 by reason only of the fact that he, she or it is a member of an undertaking responsible as a matter of EU law for the infringement, in circumstances where the person in question neither participated in the infringement nor had decisive influence over the conduct in the relevant market of other member(s) of the undertaking who did participate. We appreciate that in such circumstances it may well be unlikely that the person in question would in fact be held to be part of that "undertaking"."

147. The Tribunal's reference to Case C-231/11P to C-233/11P, *Commission v. Siemens* [2014] 5 CMLR 1 was to the following passage in the Opinion of the Advocate General in that case (which was essentially endorsed by the CJEU):

"80. In that regard, I nevertheless consider that, in the case of an undertaking made up of various legal persons, the persons who have participated in the cartel, as well as the ultimate parent company which exercises a decisive influence over them, may be regarded as legal entities collectively constituting a single undertaking for the purposes of competition law which may be held responsible for the acts of that undertaking. Consequently, if the Commission establishes that the undertaking has, either intentionally or negligently, committed an infringement of EU competition rules, it may determine the personal and collective liability of all the legal persons who make up the economic unit and who, by acting together, have participated, directly or indirectly, in the commission of the infringement.

81. It is specifically for that reason that the Court has found it to be compatible with the principle of personal responsibility – as well as with the objective of the effective implementation of the competition rules – to require the legal persons who participated in the infringement and, along with them, the person who exercised decisive influence over them, to bear joint and several responsibility, specifically because those persons form part of a single economic unit and, therefore, form a single undertaking..." (See also the judgment of the CJEU at paragraphs 49 to 51.)

148. I do not accept the submission that *Sainsbury's*, or any other decision shown to me, has laid the *Provimi* point to rest. As explained above, the Tribunal in *Sainsbury's* was considering (and rejecting) a different, more draconian, basis of alleged liability than postulated in *Provimi*.

149. Further, the arguability of the *Provimi* point appears to have received a boost from a very recent judgment of the General Court, which was delivered after the hearing in the present case had ended. All the parties have sent me written submissions on this decision. I have also been sent an unofficial English translation of it, along with the original French version.

150. In Case T-677/14 *Biogaran v Commission* (Judgment of the General Court of the European Union dated 12 December 2018), the Commission held a parent (Servier) and its wholly owned subsidiary (Biogaran) jointly and severally liable to be fined for an infringement of Article 101 relating to the settlement of patent litigation, in circumstances where both companies' "respective actions had contributed to committing the infringement."[73] In upholding the Commission's decision, the General Court noted that the rebuttable presumption of "decisive influence" applied, and had not been

[73] Paragraph 220.

rebutted by evidence. Therefore, the parent and subsidiary constituted "one and the same undertaking" under EU law.[74]

151. The Court continued:

> "216. The Commission could therefore rightly and in line with the concept of "undertaking", consider that Servier and Biogaran were jointly and severally liable for the conduct of which they are accused, because the acts committed by any one of them are deemed to have been committed by one and the same undertaking (see, in this regard, the judgments of 20 March 2002, *HFB and others v. Commission*, T-9/99, EU:T:2002:70, points 524 and 525, and of 12 December 2007, *Akzo Nobel and others v. Commission*, T-112/05, EU:T:2007:381, point 62; see also, in this regard and by analogy, the judgments of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission*, 6/73 and 7/73, EU:C:1974:18, point 41, and of 16 November 2000, *Metsä-Serla and others v. Commission*, C-294/98 P, EU:C:2000:632, points 26 to 28).
>
> 217. The fact that, in the present case, the infringement of Article 101 TFEU found by the Commission results in part from the behaviour of the parent company and, in part, from the behaviour of the subsidiary, does not bring this conclusion into doubt. This is so even though in cases of joint and several liability between a parent company and its subsidiary, the offence is most often the result of the behaviour of the subsidiary.
>
> …
>
> 221. Biogaran vainly claims that it should not be recognized as jointly responsible of the offence, on the grounds that it had no knowledge of the actions of its parent company.
>
> 222. Firstly, this grievance is based on the erroneous assumption that Biogaran is held liable for an offence committed by its parent company. However, as has just been stated, this premise is wrong in fact as well as in law.
>
> 223. Secondly, it should be remembered that the decisive influence that a parent company exercises over its wholly-owned subsidiary permits the presumption that the subsidiary's acts are carried out for and on behalf of the parent company and, consequently, of the undertaking that they constitute. Given that the Court considered, as shown by the reply to the preceding objection, that Biogaran had not pursued a genuine economic interest by signing the Biogaran agreement, nor had it implemented an independent strategy, outside the control of its parent company, the Commission had good cause to consider that the Biogaran agreement, as an additional inducement for Niche to accept the amicable settlement, was one of the component parts of the infringement in which Biogaran had participated directly, with no need to demonstrate that Biogaran was aware of the actions of Servier or of an overall Servier plan or of the characteristics of the infringement.
>
> 224. Furthermore, the applicant wrongly relies on the judgement of 2 October 2003, *Aristrain/Commission* (Case C-196/99 P, UE:C:2003:529, point 99). In fact, this case did not concern the relationship between a parent company and its wholly-owned subsidiary, but the ownership of the share capital of two separate commercial entities by one person or one family; this circumstance was judged insufficient by the EU Court, as such, to establish the existence between these two companies of an economic unit, the consequence of which, under EU competition rules, could have been that the actions of both can be attributed to this economic unit. Similarly, the references to the judgments of 8 July 2008, *AC-Treuhand v. Commission* (T-99/04, EU:T:2008:256), of 30 November 2011, *Quinn Barlo and others v. Commission* (T-208/06, EU:T:2011:701), and of 10 October 2014, *Soliver v. Commission* (T68/09, EU:T:2014:867), are not relevant, because they are outside of the context of the parent-subsidiary relationship and a single economic unit.
>
> 225. Thirdly, if, as the applicant asserts, the Commission had to prove that the subsidiary was aware of its parent company's actions in order for the infringement to be attributed to the group, the notion of an economic unit would be affected. It would be necessary to establish, for each component part

[74] Paragraph 215.

> of the infringement resulting from the conduct of either of these two companies, that the subsidiary was aware of the objectives pursued by the parent company, whereas the very notion of an undertaking within the meaning of European Union competition rules supposes, in presuming that the parent company exercises a decisive influence on the wholly-owned subsidiary, that the subsidiary acts within the framework of the objectives pursued by the parent company, under its direction and control. As the Court has ruled, the condition for attributing to all the components of the undertaking the various types of infringing conduct constituting the whole of an agreement is met when each component of the undertaking has contributed to its implementation, even if that be in a subordinate, accessory or passive manner (see, in this regard, the judgments of 26 January 2017, *Duravit and others v. Commission*, C-609/13 P, EU:C:2017:46, points 117 to 126, and of 8 July 2008, *ACTreuhand v. Commission*, T-99/04, EU:T:2008:256, point 133).
>
> 226. If the applicant's argument were to be accepted, it would become more difficult to establish infringements of competition rules in groups of companies, while the presumption that a parent company controls its wholly-owned subsidiary is intended to avoid the situation where infringing conduct is attributed solely to the subsidiaries directly responsible for it, and thus avoiding punishment of the group as a whole. It would, in fact, suffice for a parent company to share the infringing conduct between itself and its subsidiary and to plead that its subsidiary was not aware of the parent company's actions in order for the component of the infringement resulting from the subsidiary's direct participation in the infringement to be attributed to the subsidiary alone. The result of this would be reduced effectiveness in the fight against anticompetitive practices, which could not be justified by respect for the principle of personal responsibility for infringements.
>
> 227. It follows from the foregoing that the applicant's argument that the Commission wrongly attributed to it, in violation of the principle of personal responsibility, liability for the infringing actions of its parent company is thus defective both in law and in fact. Not only did the Commission not attribute to Biogaran the infringement of which its parent company is accused, given that the infringement is attributed only to the Servier group, but the Commission also, and rightly, considered that it was not necessary to establish that Biogaran was aware of the actions of its parent company…"

152. Thus, where both parent and subsidiary were members of a single economic unit or "undertaking" and by their conduct contributed to the implementation of an infringement of Article 101, liability for the infringement was attributable to both, even if the subsidiary had no knowledge of the parent's actions and its own contribution was made "in a subordinate, accessory or passive manner". The Court also made clear that the Commission had adopted the correct analysis in attributing the infringement to the whole "undertaking". It was not a case of the subsidiary being held liable for the infringing conduct of the parent.

153. Mr Singla and Ms Abram sought to distinguish *Biogaran*. Both submitted that, whereas in *Biogaran* the subsidiary had "participated directly" in the infringement, that was not the case here so far as TIS and PE are concerned.

154. In fact, Biogaran had not been party to the infringing settlement agreement between its parent and a third party. It had entered into a separate agreement, found by the Commission to have been an added inducement to the third party to enter the settlement agreement. That was the subsidiary's "contribution".

Conclusion on Provimi Ground

155. For reasons given earlier, I do not consider that use of the word "participated" should be understood in the rigidly restrictive way advocated by the Defendants. In *Biogaran* the General Court refers also to "implementation" and "contribution". Further, I consider that Mr Singla has to some extent misinterpreted the Claimants' argument. The *Provimi* Ground claim, as I understand it, is not that liability passes up one corporate chain from

MTPD to TC and then down a different corporate chain from TC to TIS. It is rather that TC, MTPD, TIS, and the other Toshiba Defendants formed a single economic unit or "undertaking" which (along with PC and others) infringed Article 101, and whose knowledge is "one and the same". To the extent that any one or more of those entities in some way participated in and/or implemented the cartel in question, that entity is *ex hypothesi* liable, regardless of its knowledge of the cartel. As I have said, *Biogaran* provides some support for this analysis of the law and for the validity of the *Provimi* Ground.

156. However, I do not consider it necessary or appropriate to decide the point of EU law in this summary judgment application. Since the legal basis of liability is in my view arguable, it would be better for it to be determined, if necessary, against the background of relevant findings of fact at a trial.

157. Therefore, provided that there is also an arguable case (1) that the relevant "undertaking" existed, (2) that the entity in question (TIS) was a member of it, and (3) that there was some participation/implementation by TIS, this basis of liability is unfit for summary disposal. Elements (1) and (2) are conceded for present purposes (at least insofar as TC and TIS are concerned), and I consider (3) to be clearly arguable on the basis of the largely uncontroversial facts relating to TIS's role and activities.

The shadow/de facto director argument against TIS

The issue

158. Also relied upon by the Claimants as a feature from which TIS's actual knowledge of the cartel (as well as its participation in and/or implementation of it) is said at least arguably to be inferred, is a contention which is proposed to be introduced by amendment to the Claimants' Statement of Case. This contention is that, as a matter of English law, TC (or its Board or any director of TC) was a shadow or *de facto* director of its subsidiaries, including TIS, and that applying the rules of agency, TC's knowledge of the cartel is properly attributable to the Toshiba Defendants.[75] A corresponding contention is made in relation to PC and its subsidiaries, in particular PE.

159. The proposed amendment is opposed by TIS and PE. In order to be permitted, the argument must have a real prospect of success, and must therefore cross the summary judgment threshold.

160. TIS raises the following issues:

(1) The Claimants' primary case is that their claim is governed by German law, but they do not explain how the entirety of that claim can be established by reference to the English law principles in question.

(2) In any event, the allegation that TC (or its Board or any director of TC) was a *de facto* or shadow director of TIS in relation to the infringement is hopeless.

[75] Murray 1, paragraphs 52, 71 and 76, and paragraphs 92A-D of CAPOC (which cross-refer to the Annex); Murray 2, paragraph 17.3.

161. Issue (1) was not argued out before me, and no evidence was called to suggest that German law was different from English law on this point. I therefore propose to say no more about it, and to consider only issue (2).

The legal principles

162. The relevant legal principles appear uncontroversial:

- **A *de facto* director** is a person who has simply acted as a director on occasions, and who is held out by the company as a director, although not validly appointed as such. An assessment of whether or not an individual is a *de facto* director is a question of degree; there is no one decisive test and the court will take into account all relevant factors: See *Smithton Ltd v Naggar* [2014] EWCA Civ 939, at paragraph 16, *Secretary of State for Trade and Industry v Tjolle and Others* [1998] BCC 282, per Jacob J at p. 290. One must look at what was actually done by the alleged *de facto* director: *Revenue and Customs Commissioners v Holland* [2010] UKSC 51, [2010] 1 WLR 2793, SC, at paragraph 39.
- **A shadow director** is "a person in accordance with whose directions or instructions the directors of the company are accustomed to act" (see section 251(1) of the Companies Act 2006). A shadow director "does not claim or purport to act as director and is not held out by the company as a director; rather such a person shelters behind the directors of the company but becomes liable because of the directions or instructions which he or she is accustomed to give to the directors and which they are accustomed to follow" (see Palmer's Company Law Looseleaf, 10 September 2018, paragraph 8.225). Whether any particular communication from the alleged shadow director, by words or conduct, is to be classified as a "direction or instruction" is a matter which has to be "objectively ascertained by the court in light of all the evidence": (see *Secretary of State for Trade and Industry v Deverell* [2001] Ch. 340, per Morritt LJ, at page 354).

- The two categories are not mutually exclusive, and a person may be both a shadow director and a *de facto* director at the same time: *Revenue and Customs Commissioners v Holland* (above), per Lord Saville at paragraph 110; *In re Mea Corpn Ltd* [2006] EWHC 1846 (Ch), [2007] 1 BCLC 618, per Lewison J, at paragraph 89.

- The actions of a shadow director or a *de facto* director of a company may in appropriate circumstances be attributable to the company: see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, PC, per Lord Hoffmann at p. 506-507; and *DGFT v Pioneer Concrete* [1995] 1 AC 456, HL, per Lord Templeman at pp. 464-465, and per Lord Nolan pp. 474-475.

- A parent company can be a shadow director of a subsidiary: *In Re Hydrodan (Corby) Ltd* [1994] BCC 161, at p. 163E-F. (That being so, I can see no reason in principle why a parent company cannot be a *de facto* director of its subsidiary.)

- A key test for identifying a shadow or *de facto* director is whether he or she was part of "the corporate governing structure" or "exercised real influence (otherwise than as a professional adviser) in the corporate governance of a company": see *In re Kaytech International plc* [1999] 2 BCLC 351, CA per Robert Walker LJ at p. 402; and *Smithton Ltd v Naggar* (above), per Arden LJ at paragraph 37. The fact that a person is consulted about directorial decisions or his approval is sought does not in general make him a director because he is not making the decision: *Smithton Ltd v Naggar* (above), at paragraphs 38-45.

- The role of a shadow (or *de facto*) director need not extend over the whole range of a company's activities: *Smithton v Naggar* (above), at paragraph 32.

- The question whether or not a person acted as a director is to be determined objectively and irrespective of his/her motivation or belief: *Smithton Ltd v Naggar* (above), per Arden LJ, at paragraph 39.

- The court must look at the cumulative effect of the activities relied on, and should consider all the circumstances "in the round" and in context: *Smithton Ltd v Naggar* (above), per Arden LJ, at paragraph 40.

The Claimants' argument

163. The Claimants point, first, to the presumption of "decisive influence" which, subject to any evidence in rebuttal, applies as between TC and TIS. From that they argue that it is presumed that TIS has no commercial independence and is governed by its parent. The Claimants submit that this is more than enough to satisfy the definition of a shadow director, namely "a person in accordance with whose directions or instructions the directors of the company are accustomed to act"[76] They submit that, on any view, that definition is *arguably* satisfied.

164. In addition, the Claimants contend that it is reasonably to be inferred from the material in CAPOC and the Confidential Annex that TC ran TIS during the Latter Period,[77] and that the corporate structure adopted by TC, coupled with the Commission's findings, raise at least an arguable inference that TC's subsidiaries in the EEA were accustomed to act in accordance with TC's overall plan.

165. In so far as TC was a shadow or a *de facto* director of TIS, the Claimants argue that TIS is fixed with TC's knowledge of the cartel, on the basis that directors are agents of their companies and a principal is generally imputed with its agent's knowledge relating to the subject matter of the agency. For that proposition reference was made to *Bowstead on Agency*, 21st ed., paragraph 1-028 and *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, HL at pp. 198-199.

TIS's submissions

166. TIS submits that the Claimants do not have an arguable case that TC or its Board or any director of TC was a *de facto* or shadow director of TIS in relation to the cartel. The fact that TC held a majority shareholding in TIS during the Latter Period is insufficient.

[76] Section 251(1) of the Companies Act 2006.
[77] See also Murray 1, paragraphs 53-55.

If sufficient, it would drive a coach and horses through the principle of separate corporate personality. Further, the Claimants do not allege that TC (or its Board or any director) was ever held out to third parties as a director of TIS, or was considered by third parties to be such. In the context of a major international corporate group such as Toshiba, it would be fanciful to suggest that TC was a *de facto* director of TIS. The Claimants have put forward no real factual basis for alleging that TC or any director of TC gave instructions to TIS's directors or that TIS's directors were accustomed to act in accordance with such instructions. In addition, even if such instructions were given by TC (its Board or its director) to TIS, it would still be necessary to show that the instructions were given in such a way as to make clear that the "director" was specifically assuming relevant obligations to TIS, such as fiduciary duties.

167. TIS submits that, in so far as reliance is being placed on the Confidential Annex to CAPOC, the matters referred to there were largely taken from the Decision, which does not mention TIS, save in Recital 70 and footnote 109, and, possibly (albeit not by name), in the Recitals identified in Balmain 3. None of these references take the matter further. Indeed, the latter merely refer to TIS as a *customer* of participants in the cartel. Similarly, nothing in the passages of Murray 1 relied upon in this connection specifically relates to TIS. Accordingly, it is submitted, nothing in the Decision could be relevant to a *de facto*/shadow director allegation in relation to TC and TIS.

168. In her submissions on behalf of PE, Ms Abram additionally argued that the presumption of "decisive influence" was just that - a presumption, requiring no evaluation of the facts, other than a 100% (or nearly 100%) shareholding. By contrast, a *de facto*/shadow directorship had to be established on the evidence. Therefore, the presumption could not help the Claimants so far as TIS or PE is concerned. In any event, the presumption was a creature of EU law designed to serve a particular purpose. It was not clear why an English company law overlay was required in order to render EU law more effective.

Conclusion on shadow/de facto director amendment - TIS

169. I ask myself whether the allegation that TC was a *de facto*/shadow director of TIS during the Latter Period is bound to fail. In my view the answer is no. I accept that any connection between the presence of "decisive influence" (with its concomitant absence of autonomy on the part of the subsidiary) and the concept of a *de facto* or shadow directorship, may at first sight have more traction in a case where the presumption is not applicable, with the result that an assessment of the evidence has had to be made (as occurred, for example, in the Decision with regard to TC/MTPD). However, the same situation can arise where the presumption applies, and a party seeks to rebut it by adducing evidence. Thus, in the present matter both TIS and PE may well seek to rebut the presumption at a trial. The issue of autonomy, which would then be live, would not be unrelated to the directorship question, and it would be odd if the Claimants had been unable to plead the latter point.

170. Further, it cannot be said that the allegation that TC "ran" its subsidiaries (including TIS) is entirely without substance. It is clear that TC was actively involved in the decision-making process of its subsidiary (and co-infringer) MTPD, and that TIS bought CPTs from MTPD's subsidiary and also from TEEG. The Commission considered TEEG to have been used as a sales agent or intermediary of MTPD.[78] TEEG was itself

[78] Confidential Annex, paragraphs 2.4-2.5.

an indirect 100% subsidiary of TC. Further, TIS sold the CTVs containing cartelised CPTs to TEG, its co-parent with TC and a 100% subsidiary of TC.

171. In the circumstances, the corporate structure adopted by TC, along with the Commission's findings, the role and activities of TIS itself, and TC's so far unrebutted "decisive influence" are sufficient to raise an arguable inference that TIS was accustomed to act in accordance with TC's instructions. Such a suggestion cannot be described as fanciful, bearing in mind, too, that the court is required to have regard not just to evidence available at the summary judgment stage but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* (paragraph 75 above).

172. If and in so far as TC was a *de facto*/shadow director of TIS, it is also arguable, in the light of the principles of agency referred to earlier, that TIS was fixed with TC's knowledge of the cartel.

173. I do not say anything about the strength of these contentions in the case against TIS, save that they are not in my view bound to fail, and are not fit to be struck out at this stage. They are not without some factual basis, including a reasonable prospect of further supporting evidence emerging. In those circumstances I would give permission for the proposed amendment so far as TIS is concerned.

Should the EU law claim against PE be struck out?

Preliminary observations

174. As mentioned earlier, Ms Abram and Mr Singla adopted each other's submissions on certain issues. However, Ms Abram emphasised that the case against PE was distinct, and needed to be considered on its own merits separately from the claim in respect of any other defendants. She urged me not to shrink from reaching a different conclusion in respect of PE from that in respect of TIS, if that was appropriate. The outcome for PE could, she said, have a bearing on the jurisdiction challenge of PME and PI. Further, if the claim against PE were to be struck out, there would be important cost implications.

175. Ms Abram pointed out that when the Claimants issued the First Claim, the only defendant from the Panasonic corporate group was the Fourth Defendant, PE, an English company. She submitted that PE's function was essentially as a holding company within the group; it is not mentioned in the Decision, and had no involvement in the CPT cartel; it neither manufactured nor sold the cartelised product, and it did not make or sell CTVs. Ms Abram contended that in these circumstances the claim against PE has no arguable basis and should be struck out at this stage.

The role of PE

176. As with TIS,[79] the following bullet points represent an endeavour to summarise, as non-controversially as possible, the position and role of PE within the Panasonic group at the material times. I have drawn on the fuller account set out at paragraphs 37ff above, which is in turn based on the witness statements (in particular, those of Mr Wheeler and

Mr Gerrits), the two organograms provided by Ms Abram, and the documents shown to me.

177. PE's position and role included these features:

- PE was wholly owned by PC, the parent company of the Panasonic Defendants. PC was an addressee of the Decision, and was found to have participated in the CPT cartel from July 1999 until June 2006, in the Latter Period through MTPD, in whom it held initially a majority stake, and latterly a 100% stake.

- PE's original corporate name[80] described the company as a "Headquarters" in Europe.

- PE was the 100% parent of PIEG, whose liabilities PI, the Second Defendant to the Second Claim, assumed in 2014.

- PE was also the 100% parent of PIEL, which was dissolved or became dormant in 2006.

- PE did not itself sell unintegrated CPTs at any material time. However, PE's 100% subsidiaries, PIEG and PIEL, did. It appears to be accepted by the Panasonic Defendants that PIEG sold cartelised CPTs between 1999 and March/April 2004, and they also apparently accept[81] that (subject to jurisdiction issues in respect of the Second Claim against PI, who assumed liability for PIEG's conduct), there is a triable issue whether PIEG knowingly implemented the cartel in that period based on PIEG's CPT sales. The Claimants do not concede that PIEG's sales of CPTs ceased in March/April 2004. PIEG is referred to in Recitals 61-63 to the Decision, as having handled sales of CPTs in the EEA. PIEL, too, sold cartelised CPTs until April 2004. These sales of CPTs were to unrelated manufacturers of CTVs, who sold CTVs to the Claimants.

- PE was the almost[82] 100% (and, from November 2003, 100%) owner of PME. PME is the First Defendant to the Second Claim. It was involved in the sale of CTVs containing cartelised CPTs throughout the claim period. CTVs were invoiced to PME by PC. PME then sold the CTVs to the national sales companies. From 2004, PME became a direct supplier to external customers, including the Claimants. PME was an official supplier of CTVs to the Claimants, entering into a number of commercial relationships with them or their associated companies.

- PE was the 100% owner of 7 or 8 national sales companies, who, like PME, sold CTVs (incorporating cartelised CPTs) to the Claimants, and who were party to contracts for sales bonuses and other contractual arrangements with one or more of the Claimants or their subsidiaries.

[80] Matsushita Electric Europe (Headquarters) Ltd.
[81] Gerrits 3, paragraphs 49-51.
[82] 99.375%. PC owned the remaining 0.625%.

- PE wholly owned MELUK and MTE, who manufactured and sold CTVs using CPTs acquired from and manufactured by, among others, MDDG, a wholly owned subsidiary of PC. MELUK sold these sets to the national sales companies which, as seen, were wholly owned subsidiaries of PE.

- PE is said to have been the 100% owner of PUK, which was apparently the 100% owner of PIUK. Reference is made, in the PoC and in the Defendants' List of Relevant Persons, to PIUK as a CPT sales company, said to have been dissolved on 19 June 1999 (i.e. before the claim period). PIUK is referred to in Recitals 61-63 to the Decision, as having handled sales of CPTs in the EEA.[83]

- From July 1999 until 31 March 2001, PE had an administrative role, invoicing (and receiving payment for) CTVs manufactured within the Panasonic group and sold by PC to the group's independent exclusive distributors (said not to include the Claimants).

- PE is said to have received a commission fee for the invoicing service, and to have charged the distributors the prices for CTVs which they had agreed with PC.

- PE is said by the Panasonic Defendants to have had no role in the conclusion of the sale, or in pricing, manufacture or delivery of the products.

- PE was responsible for marketing activities (said by the Panasonic Defendants to be limited to providing marketing funds to national sales companies) relating to sales in Europe of *inter alia* CTVs from July 1999 until 31 March 2002.

- PE is said to have charged a service fee to each national sales company for this marketing service.

- PE appears to have had responsibilities in respect of internal group management, such as HR, legal, risk management, training, finance, tax, accounting, environmental matters, corporate communications, marketing support, service support, SAP system, logistics, and IT.

- PE's principal business activity in 1998 to 2007, as shown in Companies House records, was "wholesale electric household goods". The company's consolidated accounts for March 2000 show its business activity as the sale of a "comprehensive range of [Panasonic and Technics branded] products, systems and components for consumer, business and industrial use", and its turnover as £3.5 billion, with a profit of £32 million and substantial sales in the UK. A substantial number of personnel are shown as employed in sales. The accounts for year ending 31 March 2004 include the first reference to the principal activities of the company being to act as a holding company and to provide marketing and support services to subsidiaries. In the financial statements for

[83] This reference to PIUK in Recital 63 is said by the Fourth Defendant to be an error by the Commission: see Panasonic's Response to the Claimants' Request for Further Information, at paragraphs 15-16. See also Gerrits 2, paragraphs 16-19, and Gerrits 4, paragraphs 54-55.

the year ended 31 March 2005, PIEG and PIEL are still included in the list of PE's subsidiaries.[84]

- PE shared directors with PC, PIEL, PIEG, PUK, PME, and the Belgian national sales company, PBN.

The claim against PE[85]

178. I note at the outset that, whilst there appear to be two bases of claim against TIS, viz a so-called "factual" case and a case based on the *Provimi* Ground, the claim against PE relies, in addition, upon the Decisive Influence Ground. This is because, unlike TIS, PE was the 100% (or almost 100%) owner of a number of subsidiaries which are alleged to have participated in and/or knowingly implemented the cartel. By operation of EU law, the infringing conduct and knowledge of those subsidiaries are said to be imputable to PE, as a consequence of the rebuttable presumption of PE's "decisive influence" over the subsidiaries.

179. The Claimants refer to the role and activities of PE as central within the corporate structure deployed by PC in the EEA. They contend that in the light of this it can reasonably be inferred that PE was actively involved in managing or overseeing the activities of its subsidiaries in manufacturing, marketing and/or selling cartelised CPTs and/or transformed products, (i.e. CTVs containing such CPTs) in the EEA. It is the Claimants' case that the activities of PE and its subsidiaries within the EEA (including PIEG, PIEL, PIUK, PME and the national sales companies) contributed to the effective implementation of the cartel there and are, at least arguably, capable in all the circumstances of amounting to participation in the cartel and/or knowing implementation of it.

180. In this regard, the Claimants submit that PE's participation and/or implementation and/or knowledge are capable of being inferred from all the surrounding circumstances. These include all the bullet points in paragraph 177 above, not least the fact that directors of PE simultaneously acted as directors of other group entities. For example, the Claimants refer to Mr Tomikazu Ise, who was a director of PE when also a director of PC, its parent, which had admittedly been aware of and participating in the cartel throughout the claim period. Further, as seen, PE also shared directors with its subsidiaries PIEL, PIEG, PUK, PME, and PBN – each of whom was involved (either itself and/or through a subsidiary) in the sale of cartelised CPTs or transformed products. The Claimants also suggest that, in view of the nature and extent of PE's and its subsidiaries' relevant activities, PE is likely to have attended meetings in which cartel arrangements were discussed, although they recognise that there is presently no evidence of such attendance.

181. In addition, an inference or imputation of knowledge from PC to PE is said to be achieved *via* the shadow/*de facto* director argument to which I have referred in relation to the case against TIS.

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[84] These accounts are consolidated for PE and its subsidiaries, and it is not therefore possible on their basis to isolate the specific role(s) of PE. The Claimants have apparently sought sight of PE's corporation tax statements but these have not yet been made available. (See Murray 1, paragraph 103).

[85] The relevant passages in CAPOC are at paragraphs 57ff, and in particular 84-89 and 91-92D. However, these passages are likely to be subject to further amendment if the claim goes ahead.

182. Thus, the Claimants allege that there is an arguable case against PE, both on the basis of its own actual conduct and knowledge, and/or under the Decisive Influence Ground on the basis of the conduct and knowledge of PE's wholly owned subsidiaries, over whom PE is rebuttably presumed to have exercised decisive influence.

183. Further, in connection with imputation of knowledge, and liability generally, the Claimants pray in aid the *Provimi* Ground, as they did with TIS. This is closely related to the Claimants' allegation that PC used its network of subsidiaries, including PE, to control and operate the cartel, and that PE made a "necessary contribution" to its implementation. I have already concluded that as a matter of law the *Provimi* Ground liability remains open to argument, and that the Claimants' case on this basis cannot be struck out at this stage provided there is an arguable case that the entity in question (here PE) satisfies the criteria identified earlier, i.e. provided it is a member of an infringing "undertaking", and has itself in some way participated in and/or implemented the cartel, albeit innocently and even if "in a subordinate, accessory or passive manner" (see paragraph 152 above).

184. The Claimants' case against PE based on the *Provimi* Ground appears to proceed as follows: (1) The Commission found that PC was aware of and a participant in a single continuous infringement of Article 101 in relation to the cartel. (2) PE was wholly owned by PC. (3) There is, therefore, a rebuttable presumption that PC exercised "decisive influence" over PE, so that (4) PC and PE, together with other relevant entities over whom PC also exercised "decisive influence", formed a single economic entity or "undertaking". (5) The knowledge of the constituent members was one and the same and therefore does not have to be separately established in respect of any entity which took steps to implement the cartel.

PE's submissions

185. In their submissions, the Panasonic Defendants summarised the activities and role of PE as follows: During the claim period PE was principally a holding company for the investments of the Panasonic group in Europe. In that capacity, PE performed a range of corporate support and administrative functions, including at various times functions relating to human resources, training, tax and accounting, the development and purchase of the European SAP system, logistics and IT.

186. It was submitted that PE was not involved in the core business of the group. It was not involved in manufacturing or selling CPTs. It did not produce or sell CTVs, although from the start of the claim period until 31 March 2001, PE had an administrative role in the invoicing of a small minority of CTVs containing the cartelised CPTs to independent exclusive distributors of Panasonic products. It was not involved in the conclusion of those sales, which were arranged by PC, and it had no role in the pricing, manufacture or delivery of the CTVs. All PE did was to invoice the distributor for the sum agreed with PC (which had presumably notified that price to PE), and collect and account for the payments, after deducting commission in an amount determined by PC.

187. In addition, at some point between the start of the claim period and 31 March 2002, PE was responsible for collecting "service" fees from national sales companies and then using these funds to provide marketing resources to the national sales companies for their sales of CTVs in Europe. The marketing activities in question were arranged and performed by the national sales companies, not by PE.

188. Ms Abram contended that in the light of this, the allegation that PE participated in and/or implemented the cartel is not arguable. Like Mr Singla, she submitted that *Vattenfall* represented the high water mark of "implementation". She did not need to go as far as to submit that it was wrongly decided, as PE's position was entirely different from that of the anchor defendant in that case. Unlike in *Vattenfall* where the defendant was doing everything short of selling the cartelised product, in the present case there was no activity by PE in the market place. The most PE did was to send out an invoice on another company's instructions and collect the money; even that was not done in respect of the cartelised product, but a downstream "transformed" product. PE's activity was just too far away from the cartel to make the company even arguably liable.

189. As to PE's knowledge, the allegation of *actual* knowledge is said to be hopeless because PE did not participate in the cartel, is not mentioned in the Decision, and was not an addressee of it. It is said that the Decision does not refer to any individual who was a director of PE during the claim period, and that there is no suggestion that any representative of PE attended any of the meetings of the cartel. Given its lack of involvement in the group's CPT business, and the limited nature of PE's invoicing function in relation to CTVs (not CPTs), there is no basis for any suspicion that PE may have known about the cartel. Nor, PE submits, does Tomikazu Ise's overlapping directorship of PC and PE from 1 April 2001 until 31 March 2003 advance the case for the Claimants. PE's invoicing role ended in March 2001, and Mr Ise did not become a director of PC until April 2001. It therefore cannot be suggested that PC's knowledge of the cartel can be attributed to PE *via* Mr Ise while carrying out its CTV invoicing function.

190. As to any *attributed* knowledge and/or liability of PE under the Decisive Influence Ground, i.e. by reference to the knowledge and activities of PE's wholly owned subsidiaries (including, in particular, PIEG), it is disputed that PE was part of the same "undertaking" as its subsidiaries. However, Ms Abram accepted that no attempt had been made to rebut the presumption of "decisive influence". She was therefore prepared to accept, for the purposes of this summary judgment application, that "decisive influence" of PE over its wholly owned subsidiaries was arguable. However, she submitted that as far as participation was concerned, there was no evidence that any of the subsidiaries in question, still less PE itself, attended cartel meetings. Therefore, participation on PE's or its subsidiaries' part was not arguable.

191. Nor, it was submitted, did the Decisive Influence Ground assist the Claimants as regards "knowing implementation". Ms Abram drew the same distinction as Mr Singla between "participation" and "implementation", but she sought to extend it even further. In her submission, the Decisive Influence Ground was only capable of applying in respect of a subsidiary's "participation" in a cartel. She submitted that there was no authority for the proposition that a parent company could be rendered liable under that ground for a *knowing implementation* infringement by its subsidiary.[86]

192. As to any attributed knowledge of PE under the *Provimi* Ground (as discussed at paragraphs 134ff above), Ms Abram submitted as follows:

[86] Day 2, pages 74-75.

(a) She adopted the submission of Mr Singla that *Provimi* liability has not survived the decision of the Competition Appeal Tribunal in *Sainsbury's*. I consider this argument is wrong for the reasons given earlier.[87]

(b) She did not challenge steps (1), (2) and (3) in paragraph 184 above. However, it was disputed that PE was part of the same economic unit or "undertaking" as PC or MTPD for the purposes of the subject matter of the CPT cartel.[88] PE was principally a holding company, playing the role of a back-office functionary, with no connection to the Panasonic group's trade in the cartelised CPTs, other than its "minor facilitative role" carried out only in respect of downstream products, namely CTVs. The position, she submitted, was the same as Teare J's example of the hypothetical shoe polish subsidiary which he said would arguably not be liable for the synthetic rubber cartel.[89]

(c) Even if PE was part of the same undertaking as PC and MTPD for the purposes of the cartel, knowledge cannot be attributed *down* the corporate chain from the parent, PC, to a subsidiary, in circumstances where the subsidiary has not itself been found to have infringed Article 101, simply because the parent exercises "decisive influence" over the subsidiary such that the two are members of the same undertaking. Further, in regard to MTPD, there is no presumption that a company has "decisive influence" over its "sister" company, such that the two are part of the same undertaking. This must be determined by reference to whether the two companies were *in fact* part of a single economic unit.

193. Finally, Ms Abram disputed the inference or imputation to PE of PC's guilty knowledge under the shadow/*de facto* director principles. She adopted Mr Singla's submissions so far as the law is concerned. Specifically in relation to PE, she submitted that the passages in the Decision relied upon by the Claimants[90] relate only to the relationship between PC, MTPD and the subsidiaries referred to in the Recitals in question, and have no bearing on their relationship with subsidiaries not mentioned there, such as PE. So, those extracts could not arguably support the contention that PC was a shadow/*de facto* director of PE. Next, Ms Abram pointed out that the Claimants' reliance on the EU law presumption of PC's "decisive influence" over PE in aid of the shadow/*de facto* director argument, was misplaced if, as she submitted, they were not part of the same "undertaking" for the purpose of the cartel. Third, she pointed out that the EU law presumption operated automatically on the basis of the requisite shareholding, whereas the shadow/*de facto* director principles required a factual analysis. Fourth, once the EU law "decisive influence" concept had fulfilled its role of passing liability up the corporate chain, it was, as it were, *functus officio*. Its role was not to assist in establishing a concept of domestic company law. Finally, Ms Abram submitted that even if the application of the principles were arguable, it is incumbent on the Claimants to explain why the knowledge of the "director" should be attributed to the principal, i.e. in what way the agent (PC) was said to have acted on behalf of the principal (PE) so that the former's knowledge of the cartel is to be attributed to the latter. This they had not done, other than to make the assertion.

[87] See paragraph 148 of this judgment.
[88] See Case 170/83 *Hydrotherm* [1984] ECR 2999, at paragraph 11.
[89] See footnote 69 above.
[90] The Recitals in question are contained in the Confidential Annex to the PoC.

194. Thus, in summary, PE contends that there is no arguable case of participation or knowing implementation against it, whether in respect of its own conduct or that of its wholly owned subsidiaries. It is submitted that there is no factual basis for PE's own direct participation or implementation, and the (so far unpleaded) Decisive Influence Ground alleging PE's liability for its subsidiaries' participation and/or implementation is equally lacking an arguable basis. Even if the sale by PE's subsidiaries of CPTs and CTVs for part of the claim period rendered those subsidiaries arguably liable for knowing implementation, it is submitted that that liability could not be attributed to PE. As far as PE's knowledge is concerned, the allegation that *actual* knowledge existed is without a basis in fact and unarguable. Attributed knowledge under the *Provimi* Ground is also said to be unsustainable because that basis of liability has not survived *Sainsbury's*, and in any event because PE was not part of the same "undertaking" as PC. The shadow/*de facto* director route to PE's knowledge is also hopeless and the relevant amendment to CAPOC should therefore not be allowed.

Conclusions on arguability of EU law case against PE

195. Attractively and skilfully as these arguments were presented for PE, I am unable to accept them. In my view there is clearly an arguable case against PE on each of the three Grounds relied upon.

196. The allegation of participation and/or knowing implementation of the cartel based on PE's own activities and knowledge cannot be dismissed as without an arguable factual basis. PE's submission is based, in part, on the contention that PE was little, if anything, more than a "holding company". However, on the basis of the material before me at this stage, as encapsulated in the bullet points in paragraph 177 above, I consider that that characterisation must be treated with considerable caution. The same applies to the suggestion that PE's active function was limited to a "minor facilitative role". In my view it is at least an arguable inference, given PE's position and activities within the corporate structure of the Panasonic group in Europe (see above), that the company was actively and knowingly involved in contributing to the implementation of the cartel, not just through, for example, its invoicing and marketing services, but also by controlling and/or overseeing the operations of those of its subsidiaries who were directly involved in marketing and selling cartelised CPTs and/or transformed products within the EEA.

197. The circumstances currently available are sufficient to give rise to an arguable case that PE must have known about the cartel. It is not irrelevant that PE at times shared director(s) not only with its own parent, PC, but also with its subsidiaries PIEL, PIEG, PUK, PME, and PBN – each of whom was involved in the sale of cartelised CPTs or transformed products.

198. In my view the activities within Europe of PE, together with its subsidiaries PIEG, PIEL, PIUK, PME and the national sales companies, are, at least arguably, capable in all the circumstances of amounting to participation in the cartel and/or knowing implementation of it. Summary disposal of the "factual" case would not be appropriate.

199. Turning to the Decisive Influence Ground, in my view the allegations made on this basis cannot properly be struck out as unarguable, hopeless or wrong in law.

200. As seen, Ms Abram accepts for present purposes (i.e. in the context of this summary judgment application and in the absence of rebuttal evidence) that it is arguable that PE

had "decisive influence" over its wholly owned subsidiaries, such as PIEG, PIEL, PUK/PIUK, PME and the national sales companies. This implies acceptance that PE, together with one or more of those subsidiaries, arguably formed a single economic unit or "undertaking". She nevertheless submits that there is no arguable case of *participation* in the cartel in the absence of evidence that PE or any of those subsidiaries attended cartel meetings. As to *knowing implementation*, the argument is that no authority supports the application of the Decisive Influence Ground other than in relation to *participation* in the rigid sense espoused by Ms Abram and Mr Singla.

201. Neither of those submissions can be accepted. I have already explained why I consider the postulated distinction between participation and implementation to be artificial and misleading. In any event, I can see no good reason (and a good many countervailing reasons) why a parent with "decisive influence" over a subsidiary with whom it forms a single "undertaking" should not be liable for the infringement where the subsidiary knowingly implements a cartel.

202. In the present case the factual material (effectively undisputed) relating to the sales by PE's subsidiaries of the cartelised products and transformed products is sufficient to get the Claimants over the summary judgment hurdle. Indeed, as seen, it is apparently conceded[91] that PIEG's sales of cartelised CPTs between 1999 and at least March/April 2004 make it arguable that PIEG knowingly implemented the cartel in that period. In my view that concession is realistic. A similar point can be made in respect of PIEL's sales of cartelised CPTs until April 2004. The rebuttable presumption of PE's decisive influence over those subsidiaries extends the effect of that concession to PE.

203. As to the *Provimi* Ground, the main objection taken by Ms Abram is to dispute that PE was part of the same economic unit or "undertaking" as PC or MTPD for the purposes of the subject matter of the CPT cartel. Again, the argument is based on the contention that PE was principally a holding company, playing the role of a back-office functionary, with no connection to the group's trade in the cartelised CPTs, other than a "minor facilitative role".

204. I have already indicated why this characterisation of PE's role is not so clearly correct that the contrary can be regarded as unarguable. For the reasons discussed earlier, PE's role and activities cannot properly be dismissed as equivalent to Teare J's example of the hypothetical shoe polish subsidiary which would arguably not be liable for the synthetic rubber cartel. In my view it is arguable that PE was a significant cog in the implementation of the cartel in Europe on the part of the Panasonic group, and that PE was a member of the same economic unit or "undertaking" as PC and MTPD (as well as its own subsidiaries) for the purposes of the cartel. This issue, as Ms Abram acknowledged, was likely to be characterised by the Claimants as pre-eminently an intense question of fact. That characterisation is accurate. The issue must be determined at trial in the light of the evidence.

205. Ms Abram's alternative argument that, even if this is so, the guilty knowledge of the parent cannot be attributed *down* the corporate chain from PC to PE, in circumstances where PE has not itself been found to have infringed Article 101, has already been dealt with.[92] It is based on a false premise as to the nature of the *Provimi* Ground. The *Provimi*

[91] See paragraph 177 above, 5th bullet.
[92] See paragraph 192 of this judgment.

analysis is that where there is a relevant single "undertaking", each member of it who has to some extent participated in and/or implemented the cartel, even without knowledge of the cartel, bears responsibility for the infringement committed by that "undertaking". Therefore, it is not, as I understand it, any part of the Claimants' *Provimi* case that PE's co-subsidiary, MTPD, had "decisive influence" over PE so as to render the two companies part of the same "undertaking" by that route. The presumed "decisive influence" relied upon by the Claimants for this purpose is that which PC (an infringer) exercised over its relevant subsidiaries, including PE and MTPD.

206. For these reasons I consider there is an arguable case that PE is a member of an infringing "undertaking", and has itself in some way participated in and/or implemented the cartel, whether or not with guilty knowledge and whether or not "in a subordinate, accessory or passive manner" (see paragraph 152 above). Accordingly, the *Provimi* Ground claim is not fit for summary disposal.

The shadow/de facto director argument against PE

207. When dealing with this issue in relation to TIS, I have already described the Claimants' basic contention, the relevant legal principles, and some of the points made by Ms Abram (see paragraphs 158-173 above). Her submissions on behalf of PE are summarised at paragraphs 193-4 above. Much of what has already been discussed in respect of TIS also applies *mutatis mutandis* to the Claimants' argument that PC acted as a *de facto*/shadow director of PE. For much the same reasons, I have concluded that this issue cannot be dismissed at this stage as hopeless and bound to fail in relation to PE.

208. PC was an addressee of the Decision and participated in the cartel throughout the claim period. The Commission also found that after the joint venture was formed PC "continued uninterrupted …[its]… participation in the cartel", exercised "decisive influence" over MTPD and determined MTPD's business plan, along with TC.[93] We have seen that there is admittedly a presumption that PC also had "decisive influence" over PE, its 100% subsidiary, and it is undisputed that for at least part of the claim period PE implemented PC's instructions as to the prices to be charged for transformed products sold to independent distributors. At the upstream stage, PE's wholly owned subsidiaries were, as seen, selling the cartelised product. These circumstances, together with the presumption of "decisive influence" of PC over PE are, in my view, sufficient to avoid summary disposal of the contention that PC was a shadow/*de facto* director of PE for all or part of the claim period.

209. If and in so far as PC was a *de facto*/shadow director of PE, it is also arguable, in the light of the principles of agency referred to earlier, that PE was fixed with PC's knowledge of the cartel.

210. As with TIS, the strength of the Claimants' contentions on this particular issue is quite another matter, on which I do not need to say more than that the relatively low summary judgment hurdle is surmounted. It is also reasonable to suppose that further evidence touching on the factual issues relating to the possible role of PC as a shadow/*de facto* director of PE may emerge in advance of a trial. In those circumstances I would give

[93] Recitals 531, and 930-933.

permission for the proposed amendment to the Claimants' statement of case also so far as PE is concerned.

Conclusions: strike out applications against TIS and PE on EU law claims

211. For these reasons the applications to strike out the claims against TIS and PE based on breach of Article 101 TFEU fail.

Should the economic tort claims against TIS be struck out?

Introduction

212. The Claimants' pleaded case[94] of unlawful means conspiracy is as follows:

> "By the said conduct, in implementing, operating and/or participating in the Cartel, the Defendants and/or the undertakings of which they formed part, or any two or more of them, by their directors, servants or agents have combined together and/or participated in a conspiracy to use unlawful means to harm the economic interests of the Claimants in a manner which was intended to, and has, caused them to suffer loss and damage"

It is also pleaded[95] that the cartel was targeted at the Claimants "as a matter of design and as a matter of necessary implication".

213. The Claimants' pleaded[96] case on unlawful interference with business is as follows:

> "By the said conduct the Defendants and/or the undertakings of which they formed part, by their directors, servants or agents, deliberately took action targeted specifically at the Claimants which was unlawful, and which was intended to and did cause the Claimants to suffer loss and damage and which constitutes a deliberate and unlawful interference with the Claimants' businesses".

214. In relation to the unlawful interference claim, the Claimants' pleaded[97] case as to third party involvement is that:

> "By the said conduct, each of the Defendants and/or the undertakings of which they formed part interfered with the ability of the other Defendants and/or the undertakings of which they formed part to deal with the Claimants on the terms which otherwise would have applied to such sales transactions. The anti-competitive agreements and/or arrangements entered into were, by their terms, that each of the Defendants and/or the undertakings of which they formed part restricted, or abnegated, their freedom to deal with the Claimants."

215. TIS and PE wish to pursue the strike out/summary judgment applications with respect to these claims even if (as is the case) the claims based on EU law survive.

216. There is a considerable overlap in the submissions of TIS and of PE. This means that, as with the EU law issues, wherever appropriate I have taken account of the arguments of both Mr Singla and Ms Abram when considering each of the individual applications.

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[94] PoC, paragraph 111.
[95] PoC, paragraph 34.
[96] PoC, paragraph 113.
[97] PoC, paragraph 114.4.

The legal principles

(i) Conspiracy to injure by unlawful means

217. The following description of the tort of unlawful means conspiracy, taken from Clerk & Lindsell on Torts (21st edition), was cited with approval by Arden LJ (as she then was) in *W.H. Newson Holdings Ltd v IMI Plc and others* [2014] 1 All ER 1132, [2013] EWCA Civ 1377, at paragraph 32:

> "This form of the tort is committed where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage. It is not necessary for the injured party to prove that causing him damage was the main or predominant purpose of the combination but that purpose must be part of the combiners' intentions."

See also *Lonrho Plc v Fayed* [1992] 1 AC 448, HL, at pp. 464-466.

218. *Newson* was a "follow-on" claim for damages brought under section 47A of the Competition Act 1998 by Newson against IMI from whom Newson had purchased copper plumbing pipes which were the subject of a cartel. A finding of infringement of Article 101 TFEU on the part of IMI, together with relevant findings of fact, had been made by the Commission. Newson sought to recover losses which they contended the cartel had caused them to incur in making those purchases. The question for the Court of Appeal was whether the claimant was entitled to bring a claim for unlawful means conspiracy under section 47A,[98] and if so whether, in considering if that cause of action was made out, the national court was restricted by that section to the Commission's infringement findings. The Court gave an affirmative answer to both questions. There was no issue in that case as to the existence of "unlawful means", given the finding of infringement. However, the court held that since the Commission had not made a finding that the defendant had the requisite intent to injure the claimant, and since it was not possible to infer such intent from the findings made, the conspiracy claim was not within the scope of section 47A.

219. In the course of her judgment, with which the other members of the court agreed, Arden LJ considered the nature of the requisite intent to injure. At paragraphs 38-41 she said:

> "38. Essentially what the judge did was to infer intent to injure flowing from the fact that the cartelists intended to benefit their own businesses. He held:
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> > "In my judgment, although the Defendants' purpose in entering into the cartel was to promote their own economic interests, it is wholly unrealistic to regard this as divorced from the causation of loss to purchasers of copper plumbing tubes, even if the loss caused to the Claimants might not correspond to the Defendants' gain. On the basis of *OBG*, I consider that this element of the tort can be established on the basis of the finding of infringement in the Decision alone."
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> 39. However, in my judgment, the court cannot draw that inference since it does not necessarily follow. IMI group may have absolutely no intent as regards Newson group. They may have expected Newson group to pass the price increase on. It may well be that all purchasers of copper tubes would have been in the same position, so that they were able to pass the extra prices on.

[98] The case had started in the Competition Appeal Tribunal. It was transferred to the High Court with the consent of the parties. The jurisdiction of the High Court was limited to the CAT's jurisdiction under section 47A of the Competition Act 1998.

> 40. In my judgment, the passage which Lord Nicholls cites from Lord Sumner in *Sorrell v Smith…*, and on which the judge must have relied, does not on analysis support the judge's approach. It uses the word "ensuing" in the sense of a transitive verb (meaning "following"), which is now obsolete. However, the sense is clear. Lord Sumner is taking the situation where loss to the plaintiff must follow from the object of the conspiracy. He was taking the case where the proved facts exclude every other inference. As Lord Nicholls puts it, the gain and the loss are inseparably linked. But it does not follow in this case that Newson group would inevitably suffer loss. That would not be so if they were able to pass on the price increases to their customers. They might even have made a profit if they were able to raise their prices in advance of becoming liable to pay price increases to IMI group.
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> 41. Mr de la Mare seeks to meet this difficulty by submitting that it matters not if IMI group were simply indifferent whether the victims were the direct or the indirect purchasers of pipes and that it is sufficient that IMI group intended to make a profit at the expense of a class of persons to whom the wrongful acts were targeted. I would reject this argument. It deprives the requirement of intent to injure of any substantial content. It is tantamount to saying that it is sufficient that the conspirators must have intended to injure anyone who might suffer loss from their agreement. If I might say so, the submission is reminiscent of the circularity of the words in The Gondoliers that "when everyone is somebody, then no-one's anybody.
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> 42. As a further argument, Mr De la Mare submits that it was enough that Newson group paid the higher prices before they passed them on. But that is speculation: Newson group may have raised its prices enough to compensate for this. It does not follow from the fact that Newson group expended cash to pay IMI group's inflated prices that IMI group thereby intended them to make a loss."

220. It is to be noted that *Newson* was a case involving a *direct* purchaser from the infringer. *Emerald Supplies v British Airways* [2015] EWCA Civ 1024, [2016] Bus LR 145, another decision of the Court of Appeal, concerned *indirect* purchasers. The Commission had made a finding in a formal infringement decision that BA and other airlines had participated in a cartel relating to air freight services. The claimants, who were shippers of air freight, purchased air cargo services through freight forwarders. As in the present case, the claimants sought damages from BA on the basis of unlawful means conspiracy and unlawful interference. The claims were struck out on the ground that the requisite intention to injure was not satisfied. The Court of Appeal held that the Court's ruling on intent in *Newson* was not *obiter,* was binding on the Court, and was in any event one with which they agreed.[99]

221. On the specific case before them, the Court said:

> 167. The critical point, in our view, is whether Mr Milligan is right to say that the possibility of laying off the cost goes solely to damage and not to intent. That is not a fact sensitive issue and the court would not in our view be assisted by further evidence. As to the legal merit of the submission, in our judgment the authorities demonstrate clearly that the possibility of passing on the loss goes to intent. Lord Nicholls made it plain in *OBG* that the intent to injure the particular claimant must be the cause of the defendant's conduct. An intention to harm the claimant cannot properly or sensibly be described as a cause of the defendant's conduct if the defendant is not even sure that the claimant will suffer loss at all. In this context, as Lord Nicholls said in terms, it is not enough that the defendant foresees that the claimant will probably suffer harm.
>
> 168. We would accept, as Mr Milligan contends, that if a defendant intends to cause harm to the members of a particular class, but in fact only some suffer harm, then those actually damnified can sue. He gives as an example a variation on the facts in *Tarleton v McGawley,* positing that there were two boats seeking to trade with the natives rather than one who were affected by the firing of the cannon from the Othello. He submits that it would be absurd if the mere fact that there were two

[99] Paragraph 151-2 of the judgment in *Emerald*.

of them meant that neither could sue the defendant simply because it was not known which would bear the loss. Either boat should be entitled to sue if it could show loss.

169. We would accept that in that example there is the intent to damage the identifiable and known class of two boats; it is effectively a zero-sum game and the defendant would be seeking to gain at their expense. The fact that one of them could not establish loss in fact would not alter the analysis of intent. But that is not this case. It is not known whether anyone from the alleged class (whether that be the shippers or the shippers and freight forwarders together) will in fact suffer at all. BA is not seeking to gain at their expense, even if it is foreseeable that this is in fact what may happen. Even if one expands the class to anyone in the chain down to the ultimate consumers (which is not in fact how the case is put), this opens up an unknown and unknowable range of potential claimants. It cannot be said that there is, to use Lord Nicholls' emphasised words, an intent to injure the particular claimant. Moreover, to fix liability in these circumstances is in our view directly at odds with the binding decision in *Newson*.

170. Mr Milligan also relied upon the explanatory gloss of Lord Nicholls to the effect that, if the defendant benefits himself at the expense of the claimant, so that "in the very nature of things" he injures the claimant, that will provide the necessary intent. In this context he relied upon some observations of Mance J in the case of *Grupo Torras SA v Al Sabah (No 5)* [1999] CLC 1469 in which he said this:

> "..in circumstances where persons combine to abstract monies from a group and then to cover up and account for the abstraction in any way they can, an intent to injure or defraud any company which, as a result of their operations, ends up bearing the loss, may readily be inferred."

That formulation of intent would indeed assist the claimants, but in our view it can no longer stand with the speeches in *OBG*. For reasons we have given, it cannot be said to be inherent in the nature of the arrangements that the shippers will suffer the loss in circumstances where it might be passed down the chain. Moreover, the logic of this argument is that anyone in the chain would be able to sue, provided they could show that they had actually suffered loss. That is not what the claimants have asserted and again would be inconsistent with *Newson*. We would in fact have rejected this particular submission even in the unlikely event that a claimant was able to show that BA somehow knew that the claimant did not think he could commercially pass on the extra cost. That decision would still not be one which was inherent in the nature of the arrangements."

222. Further, the Court of Appeal expressly rejected the claimants' arguments that the point could be affected by further disclosure.[100]

223. The Supreme Court has recently commented on the two varieties of intention, the applicability of which depends on whether the conspiracy to injure is by lawful or unlawful means. In *JSC BTA Bank v Khrapunov* [2018] UKSC 19, a judgment of Lord Sumption and Lord Lloyd Jones (with whom Lord Mance, Lord Hodge and Lord Briggs agreed),[101] the court said, referring to *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174:

> "13. The leading speech was delivered by Lord Walker, with whom Lord Scott, Lord Mance and Lord Neuberger agreed. Lord Hope, without agreeing so in terms, proposed an analysis of this point which was consistent with Lord Walker's. The first point to be derived from the speeches concerns intention. The distinction between cases where there is and cases where there is not a predominant intention to injure the claimant, is an inadequate tool for determining liability because it does not exhaust the possibilities. The emphasis in the authorities on cases in which the predominant purpose was to injure the claimant has diverted attention from the fact that both lawful means and unlawful

[100] Paragraphs 160-161 of *Emerald*.

[101] I do not believe this case was amongst those cited to me. I have not thought it necessary to reopen submissions so that the parties can comment on it. The decision is merely of interest, and does not cast doubt on *Newson* and *Emerald*, which are the leading cases on intent in the economic torts in question.

> means conspiracies are torts of intent. But the nature of the intent required differs as between the two. This is because a conspiracy may be directed against the claimant notwithstanding that its predominant purpose is not to injure him but to further some commercial objective of the defendant. This point had been made, some years earlier, by the Supreme Court of Canada in *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd* [1983] 1 SCR 452. After a careful analysis of the (mainly English) authorities, Estey J, delivering the judgment of the Court, concluded at pp 471-472 that "whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if: (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or, (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result. In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff." Likewise, in *Total Network*, Lord Walker, at para 82, recognised the "clear distinction between the requirement of predominant purpose under one variety of the tort of conspiracy and the lower requirement of intentional injury needed for the other variety."
>
> 14. These two varieties of intention were to be contrasted with a situation in which the harm to the claimant was purely incidental because the unlawful means were not the means by which the defendant intended the harm to the claimant: see paras 93, 95…"

224. In *Total Network* (above) the House of Lords recognised that the unlawful means adopted did not have to be actionable *per se* at the suit of the claimant. For example, they can consist of purely criminal conduct (as in *Total Network*) or even acts or omissions amounting to contempt of court (as in *JSC BTA Bank v Khrapunov* (above)).

(ii) Unlawful interference with business

225. The tort of unlawful interference with business comprises: (a) unlawful interference with the actions of a third party in which the claimant has an economic interest; and (b) an intention thereby to cause loss to the claimant: *OBG Ltd v Allan* [2008] 1 AC 1, HL, per Lord Hoffmann, at paragraph 47. In addition, the acts representing interference with a third party must be actionable by that third party, or must be such that they would be actionable if the third party suffered loss as a result: *OBG* (above) at paragraph 49, where Lord Hoffman said:

> "In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which would have been actionable if the third party had suffered loss. Likewise, in *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 the defendant intentionally caused loss to the plaintiff by fraudulently inducing a third party to act to the plaintiff's detriment. The fraud was unlawful means because it would have been actionable if the third party had suffered any loss, even though in the event it was the plaintiff who suffered. In this respect, procuring the actions of a third party by fraud (*dolus*) is obviously very similar to procuring them by intimidation (*metus*)."

This analysis was approved by the majority of the House of Lords (Lord Walker, Baroness Hale, and Lord Brown) and was applied by the Court of Appeal in *Emerald*.[102]

226. As to the nature of the requisite intention to injure, it is well established and apparently common ground that the intent is the same as applies in the tort of conspiracy to use unlawful means: see *Emerald* (above) at paragraph 133 of the judgment.

TIS's submission

227. TIS contends that neither of the economic tort claims has a real, as distinct from fanciful, prospect of success and both should therefore be struck out and/or summary judgment should be granted in favour of TIS. In reliance on the decisions of the Court of Appeal in *Newson* and *Emerald*, TIS submits, first, that both unlawful means conspiracy and unlawful interference with business require a claimant to prove that the defendant had an intention to injure it, and that the Claimants have no arguable case that TIS (or any of the Defendants) had the requisite intention to injure the Claimants. Second, TIS submits that the unlawful interference claim is misconceived and bound to fail in any event, because the Claimants cannot prove that the Defendants have interfered with the freedom of a third party to deal with the Claimants.

The intention issue: TIS

228. TIS submits that it is implicit in the Claimants' own case that the Defendants participated in and/or knowingly implemented the cartel so as to create a benefit for themselves by imposing higher prices on customers than would otherwise be the case. This, TIS submits, presents a fundamental difficulty for the Claimants, since causing damage to the business of any particular customer was not a necessary means for the Defendants to achieve that benefit. Further, as in *Newson* and *Emerald*, the Defendants could not know whether any particular customer would suffer loss as a result of the alleged infringement. As in *Newson* and *Emerald*, for all the Defendants knew, any overcharge might well be passed on by their customers, and onwards down the chain to the final consumer. The case law made clear that that could not give rise to the requisite intention to injure the Claimants.

229. Nor could the Claimants' allegation[103] that the Defendants "specifically targeted" the Claimants, and that the Defendants knew, or could not have been unaware, that the Claimants would have been unlikely to be able to pass on any overcharge,[104] assist the Claimants. These were unsuccessful attempts to distinguish *Newson* and *Emerald* by suggesting there were factual issues which needed to be determined at trial. In any event, it was clear in the light of the nature of TIS's business that it could not, even arguably, have had the requisite intent. In this connection Mr Singla emphasised the fact that TIS did not sell the unincorporated CPT but merely the transformed product, that such sales were within the Toshiba group rather than to third parties, and that only a relatively small proportion of the CPTs purchased by TIS were from MTPD and therefore cartelised. In these circumstances the Claimants could not possibly establish

[102] See paragraphs 126-7 of the judgment. See also the judgment of Roth J in *Secretary of State for Health v Servier Laboratories Ltd* [2017] EWHC 2006 (Ch).
[103] Paragraphs 11, 34, 39, 93, 96.1.1, 112-114 of the PoC.
[104] Ibid., paragraphs 112.4.2 and 114.5.2.

that they were "specifically targeted" and that the Defendants (let alone TIS) necessarily gained at the Claimants' expense.

230. In response, the Claimants submit, first, that the Court of Appeal in *Newson* and *Emerald* did not decide that no claim for liability under the economic torts in question can ever be brought against participants in a cartel. What the Court held was that a cartel which did not expressly or by necessary implication target any particular recipient of the cartelised product would not have the necessary intention to injure which the domestic case law requires.

231. The first sentence of that submission may, strictly speaking, be accurate, but in the light of the way the Court of Appeal expressed itself in both cases, it is difficult to see much if any scope for the requisite intention to be present in the typical cartel situation. For example, in *Emerald* the Court said:

> "It is not known whether anyone from the alleged class (whether that be the shippers or the shippers and freight forwarders together) will in fact suffer at all. BA is not seeking to gain at their expense, even if it is foreseeable that this is in fact what may happen. Even if one expands the class to anyone in the chain down to the ultimate consumers (which is not in fact how the case is put), this opens up an unknown and unknowable range of potential claimants. It cannot be said that there is, to use Lord Nicholls' emphasised words, an intent to injure the particular claimant. Moreover, to fix liability in these circumstances is in our view directly at odds with the binding decision in *Newson*."

It is to be noted that this comment encompassed both direct (freight forwarders) and indirect (shippers) purchasers, as well as the whole potential chain of purchasers down to the final consumer.

232. Mr Beal seeks to meet this problem by submitting that, when setting prices for the CPTs with its competitors, Toshiba must have known that it would be extracting a higher price from the Claimants in the purchase of the transformed products - CTVs. The overcharge was the mirror image of the loss inflicted on the Claimants, and the Claimants would necessarily have been within the contemplation of the Toshiba Defendants because of the large volume of business conducted by the Claimants in the EEA. He also points to a number of factors in relation to the possibility of passing on any overcharge which are referred to in witness evidence[105] and/or on the Claimants' pleading. He submits that these are not matters which can be resolved prior to disclosure and evidence.

233. The factors relied upon include: that the Claimants had entered into agreements with Toshiba entities for the purchase of CTVs; that an increase in CPT price, as the most valuable component of a CTV, would inevitably increase the price of CTVs to purchasers such as the Claimants; that it was known by Toshiba that the Claimants bought large quantities of CTVs, the most valuable component of which was cartelised; that in the circumstances the cartelised prices for CPTs would be incorporated in the final sale price of the CTVs; that the Claimants' market position as CTV retailers was such that any cartel which did not target them would have been ineffective; and that Toshiba must have been aware that the Claimants were unlikely to pass on any or all of the overcharge.

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[105] For example, at Murray 1, paragraph 80.

234. The last factor, relating to the Defendants' alleged knowledge that pass on was unlikely, is stated by Mr Murray to follow from the other factors. However, no reason is given for this, and on its face the proposition is a *non sequitur*.

235. Quite apart from that, in my judgment these factors, even if established, would not satisfy the criteria for the requisite intention, as identified and explained by the Court of Appeal in *Newson* and *Emerald*. The factors go to the likelihood of knowledge or constructive knowledge on the part of the Defendants that the CPT cartel would be likely to result in an increase in the price of CTVs sold to the Claimants, and that the Claimants would be unlikely to pass on the overcharge or any of it. In other words, they go to foreseeability of pass on. In my view there is no material distinction between this and the situation postulated by the Court of Appeal in *Emerald*, where the cartelist was "not seeking to gain at [the claimants'] expense, even if it is foreseeable that this is in fact what may happen." Similarly, the existence of such foreseeability does not mean that it is "inherent in the nature of the arrangements that the shippers will suffer the loss in circumstances where it might be passed down the chain." (See the passages cited above, at paragraph 221.) There the Court of Appeal also said that in such circumstances a claimant would not succeed "even in the unlikely event that a claimant was able to show that BA somehow knew that the claimant did not think he could commercially pass on the extra cost."

236. In relation to foreseeability of loss resulting from the actions of a cartel, including loss caused by the so-called "volume effect" where loss is suffered because the increase in prices results in a reduced volume of business, the Court in *Emerald* also said this, at paragraphs 173-4:

> "…we do not accept that these complexities about potential loss affect the question of intent. These more indirect losses may, or may not, have been incurred, but in our view it cannot be said that BA would either be intending that they should be incurred or would, in the language of Lord Nicholls' explanatory gloss, know that in the very nature of things they were likely to occur.
>
> We are not unhappy to reach this conclusion. It seems to us that if these economic tort claims could be advanced, it would have two results, both of which seem to us to be undesirable. First, it would extend the effect of competition law and upset the balance which the draftsman had thought appropriate when framing the rules for unfair competition… Second, it would in reality dilute the concept of intention and bring it unacceptably and perilously close to a concept of foreseeability."

237. I do not understand the Court of Appeal to have meant that foreseeability must in all circumstances be irrelevant to intention. For example, if a cartelist knew of circumstances making it inevitable that the overcharge would not be passed on, the position might conceivably be different. However, such a situation is likely to be rare, and there is nothing to justify a suggestion that it could be the present case.

238. Thus, even if the Claimants would or should have been within the Toshiba Defendants' contemplation as liable to pay a higher price for the CTVs by reason of the CPT cartel, and even if the Toshiba Defendants would or should have known that the Claimants were unlikely to pass on the overcharge, that does not mean that a corresponding loss to the Claimants was "inherent in the nature of the arrangements" or that the overcharge *necessarily* reflected their loss – the so-called zero-sum situation. It is not a case where, to use the words of Arden LJ in *Newson*, "loss to the plaintiff must follow from the object of the conspiracy" or where, as Lord Nicholls put it in *OBG*, "the gain and the loss are inseparably linked".

239. Contrary to the Claimants' submissions, I do not consider there is any prospect of disclosure changing this landscape. Neither the existence of bonus and other contractual arrangements between Toshiba entities and the Claimants, nor any of the other features which the Claimants rely upon, are sufficient materially to distinguish the present case from the cartel arrangements discussed in *Newson* and *Emerald*.

Conclusion on the intention issue: TIS

240. Therefore, I conclude that there is no arguable case that TIS had the requisite intention to injure the Claimants, for the purpose of either the conspiracy tort or the unlawful interference tort.

The additional issues relating to unlawful interference: TIS/PE

241. My conclusion on the intention issue is sufficient to dispose of both economic tort claims against TIS. However, in case the matter goes further I will express my views briefly on the other objections raised by TIS, and also by PE, to the unlawful interference claim.

242. The elements of this tort have been described earlier.[106] As well as the requirement of intent on the part of a defendant to injure the claimant by unlawful conduct, that conduct must be such as to interfere with a third party's business dealings with the claimant, and must be actionable at the suit of the third party (or potentially actionable, depending on whether loss is suffered).

243. I have also set out above how the case has been pleaded by the Claimants. The essence of the claim is that by reason of their infringement of Article 101, the Defendants and/or the undertakings of which they formed part interfered with the freedom or ability of the other Defendants and/or the undertakings of which they formed part to deal with the Claimants on the pricing terms which would otherwise have applied.

244. TIS and PE submit that this claim is legally unsustainable, in that it involves an argument that, by their involvement in the cartel and infringement of Article 101, all the Defendants interfered with each other's freedom to deal with the Claimants, thereby committing an actionable wrong against each other, as well as against the Claimants. TIS and PE submit that the flaw in that analysis is the assertion that the Defendants interfered with each other's freedom to deal. In their submission each of the Defendants voluntarily restricted its own ability to deal with the Claimants by choosing to participate in or knowingly implement the cartel. It is inconsistent and artificial to argue that TIS/PE interfered with the other Defendants' ability to trade on competitive terms with the Claimants.

245. The point was briefly touched on, but not decided, by the Court of Appeal in *Emerald*. At paragraph 129 of their judgment, the Court said:

> "We are very doubtful whether action which simply increases the price at which freight services can be acquired by the claimants can be said to affect the freedom of freight forwarders to deal with the shippers. It may affect the way in which that freedom can be exercised if, say, the shippers choose not to purchase the services because they are too expensive, but that does not seem to be an interference with the freedom itself. However, this issue is not directly before us and we did not hear any detailed argument about it, so it would be wrong to express any concluded view. Accordingly, for the purposes of this appeal we will assume that the claimants would be able to

[106] Paragraph 225 of this judgment.

> establish that the means employed by BA, including the breaches of the foreign competition laws, were unlawful for the purposes of these two torts and that as a consequence BA interfered with the liberty of the freight forwarders to deal with the claimants."

246. There the position was different, as the postulated restriction on freedom was being imposed, not on one cartelist by another cartelist as in the present case, but by the cartelist on one innocent trader (the freight forwarder) at the expense of another innocent trader (the shipper). That said, I do not see why, in principle, entry into a price fixing/capacity limiting cartel should not be regarded as a restriction on the freedom of the cartel members to trade competitively. The case law does not suggest that the interference with freedom needs to be one which is legally enforceable. If effective, a cartel does in a sense affect the freedom of members to price and trade competitively. I do not see why, in principle, the fact that a member enters a cartel voluntarily necessarily means that that member is not subject to a restriction of its freedom, based at least in part on the agreement of the members to adhere to the cartel. In my view this is at least arguable.

247. A further objection to this cause of action, raised by PE and adopted by TIS, turns on the nature of the unlawful conduct relied upon, and whether it is actionable at the suit of the Defendants (or, presumably, any of the cartelists) who are in the position of the "third party" for this purpose. PE submits that even if any Panasonic Defendant arguably participated in and/or knowingly implemented the cartel, such infringement of Article 101 would not be unlawful as against any other party to the cartel, and would not be actionable by any such party, not least because such action would be excluded by the *ex turpi causa* principle.

248. In so far as it is argued by the Defendants that a price fixing/capacity limiting cartel would not represent unlawful means *as against a co-cartelist*, I would disagree as a matter of principle. Further, the decision of the CJEU in Case C-453/99 *Courage v Crehan* [2001] ECR I-6314 appears to have determined that point in favour of the Claimants' argument, both as a matter of EU competition law and also, in view of section 60 of the Competition Act 1998, UK domestic competition law. The same decision has also confirmed the actionability in principle of such conduct as between co-infringers.

249. In Case C-453/99 *Courage v Crehan* (above), the CJEU held that there was no absolute bar on an action for damages brought by a party to an agreement which infringed Article 101.[107] On the other hand the Court also held that national law was entitled to deny a party to such an agreement the right to recover damages from another party to it, where the former "is found to bear significant responsibility for the distortion of competition". This was because a "litigant should not profit from his own unlawful conduct, where this is proven."[108] The Court continued:

> "32. In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.
>
> 33. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found

[107] Paragraph 28 of the judgment in that case.
[108] Ibid., paragraph 31.

> himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him."

250. Although the context of *Courage v Crehan* was admittedly very different from the present, in that it did not concern an horizontal price fixing cartel but a "vertical" exclusive purchasing agreement between a large brewer and an individual pub tenant, the broadly formulated nature of the CJEU's decision indicates that it cannot simply be assumed that actionability in a cartel case is barred by the principle of *ex turpi causa*. There must be an assessment of the degree to which the claimant bears responsibility for the restriction on competition, based on the relevant economic and legal context, including, where appropriate, the respective bargaining power of the parties in question. In a case such as the present it would not, perhaps, be appropriate to assess relative *bargaining* power as between the various cartelists. On the other hand, there may well be differing degrees of individual responsibility for the infringement, for example as between parents and subsidiaries, and there may be a relationship between such individual responsibility and "decisive influence" to be considered.

251. Although in many, perhaps in most, cases the principle of *ex turpi causa* would ultimately defeat the actionability of a claim as between co-cartelists, the required assessment is not suitable for summary disposal in the present case. It is inevitably heavily fact-dependent,[109] and it is not clear that all relevant material is before the court at this stage. This conclusion applies equally to PE as to TIS.

Should the economic tort claims against PE be struck out?

252. As seen, several of the points raised by TIS in respect of the economic torts are also relied upon by PE, and each of these parties has adopted the other's submissions. In those respects, my conclusions above apply to both TIS and PE.

The intention issue: PE

253. It remains to consider whether it is arguable that PE had the requisite intention to injure the Claimants, for the purposes of both these economic torts. The legal principles and relevant case law are described at paragraphs 217 - 226 of this judgment.

254. PE's submissions on this issue are essentially the same as those of TIS. In summary, PE submits that a defendant must be shown to have intended to harm the claimant, either as a desired end in itself or as a necessary means of attaining the defendant's aim of enriching itself. Mere foreseeability that loss will be caused to the claimant is not sufficient, even if the probability of loss is high. Like TIS, PE relies, in particular, on the Court of Appeal's judgment in *Emerald* (above). PE submits that neither PE nor any of the Panasonic Defendants even arguably intended to injure the Claimants within the meaning and effect of the relevant case law.

255. PE argues that the Panasonic addressees of the Decision were clearly intending to make a profit for themselves in relation to the manufacture and sale of CPTs. But they were not seeking to gain at the expense of the Claimants as an end in itself. It was absurd to

[109] See, in this respect, the exercise carried out by the Competition Appeal Tribunal in *Sainsbury's* (above), at paragraphs 309-346 of the judgment in that case.

suggest that participation in the CPT cartel was motivated by a desire to harm the Claimants or that damage to them was a necessary means to the Panasonic addressees' end, or that the cartel "targeted" the Claimants in view of their large market share in the downstream CTVs. Even if it was foreseeable that the cartel would cause loss to someone in the sales chain, there would have been no way of knowing where that loss would fall. It was not enough to allege that the Panasonic Defendants "knew, or could not have been unaware, that the Claimant was unlikely to pass on any or all of the overcharge it suffered to its customers", for that was simply an allegation that it must have been *foreseeable* that the Claimants would be unlikely to be able to pass on any overcharge, which was not the required test of intention.

256. The Claimants' response is, in essence, the same as made in respect of TIS's submissions on this point. They contend that the requirement of "intention to injure" is a question of fact rather than law, and is arguably satisfied by virtue of the Panasonic Defendants' knowledge of the Claimants' substantial market position in the purchase and sale of transformed products, the contractual arrangements relating to such products between the Claimants and Panasonic entities, the relative value of the CPT component in the transformed product, the likely incorporation of the cartelised CPT price in the CTVs sold to the Claimants, and the Panasonic Defendants' awareness that pass on by the Claimants of the overcharge was unlikely or that, if it was passed on, a loss by volume effect was likely.

257. In my view, the issue of intention to injure in this context is a mixed question of fact and law. The nature of the test to be applied is laid down in the case law as a matter of legal principle. The test is then to be applied to the facts of the case.

Conclusion on the intention issue: PE

258. I conclude that there is no material distinction between the position of TIS and that of PE for the purposes of this issue. For the same reasons as discussed in the case of TIS,[110] in the light of the material before the court I do not consider there to be an arguable case that PE had the requisite intention to injure the Claimants for the purposes of the economic torts in question. Nor do I consider that it is realistic to suppose that disclosure or witness statements prepared for trial will affect that conclusion.

PME's and PI's challenge to the jurisdiction

Introduction

259. PME and PI are the Defendants to the Second Claim. They are both companies domiciled in Germany. Their application of 29 March 2018, supported by Gerrits 3, seeks a declaration that the Court has no jurisdiction over the Second Claim. The Claimants respond in Murray 2. There are three limbs to the application. Before indicating what these are, it is convenient to set out Article 8(1) of the RBR, the provision pursuant to which the Claimants submit that the English court has jurisdiction over the claims against PME and PI. Article 8(1) provides:

> "A person domiciled in a Member State may also be sued:

[110] See paragraphs 228-240 of this judgment.

> (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

260. The first limb of the application is based on the premise that the claims against PE and TIS, the UK anchor defendants, are to be struck out. It is submitted that in those circumstances Article 8(1) is not engaged, with the consequence that the English court does not have jurisdiction over the claims against PME and PI. This limb is not available to PME and PI, in view of my conclusion that the EU law claims against the anchor defendants, TIS and PE, are not fit for summary disposal. In these circumstances I do not need to examine the interesting debate between the parties as to whether the approach of the court to the application of Article 8(1) should be different where there is a *merits* bar to the claim against the anchor defendant (such as one reflected in a strike out or summary judgment order), as distinct from a *procedural* bar.

261. An alternative limb of the application is the contention that, even if the Court were to consider all or some of the claims against PE and/or TIS to be arguable, Article 8(1) does not provide a basis for jurisdiction over the claims against PME and PI, because (1) it was not reasonably foreseeable to either company that it would be sued in the English court and/or (2) the sole purpose of the claim against PE was to remove PME and/or PI from their jurisdiction of domicile (i.e. Germany).

262. In the further alternative, even if there is an anchor defendant and Article 8(1) confers jurisdiction over the claims against PME and/or PI, the EU law claim against PME, and the EU law claim against PI relating to any purchase of CTVs on or after 1 April 2004, as well as the economic tort claims against both PME and PI, lack any prospect of success. In those circumstances the Court should refuse to accept jurisdiction over these aspects.

Claims not foreseeable and/or for "sole purpose" of removing PME/PI

Legal principles

263. The test to be applied by the court in deciding whether there is a basis for service out of the jurisdiction under one of the jurisdictional gateways of the Practice Direction supplementing CPR Part 6 was discussed by the Supreme Court in *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192. At paragraph 7, Lord Sumption said:

> "An attempt to clarify the practical implications of these principles was made by the Court of Appeal in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547. Waller LJ, delivering the leading judgment observed at p 555:
>
> "'Good arguable case' reflects … that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."
>
> When the case reached the House of Lords, Waller LJ's analysis was approved in general terms by Lord Steyn, with whom Lord Cooke and Lord Hope agreed, but without full argument: [2002] AC 1, 13. The passage quoted has, however, been specifically approved twice by the Judicial Committee of the Privy Council: *Bols Distilleries (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd* [2007] 1 WLR 12, para 28, and *Altimo Holdings*, loc cit. In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in

> *Vitkovice*. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

264. Lady Hale added, at paragraph 33:

> "As we agree that this action cannot continue against the current defendant, everything which we say about jurisdiction is *obiter dicta* and should be treated with appropriate caution. For what it is worth, I agree (1) that the correct test is "a good arguable case" and glosses should be avoided; I do not read Lord Sumption's explication in para 7 as glossing the test;…"

265. I do not understand it to be disputed that the applicable test for present purposes is that identified by the Supreme Court, namely, "a good arguable case", as explained by Lord Sumption and Lady Hale.

266. It is also apparently common ground that claims may in principle be sufficiently "closely connected" for the purposes of Article 8(1) even where they are brought in separate sets of proceedings.

267. Ms Abram referred to Case C-103/05 *Reisch Montage* [2006] ECR I-6840, in which (with respect to the predecessor provision to Article 8(1)) the CJEU said:

> "23 … it is settled law that those special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by Regulation 44/2001 [i.e. the original Brussels Regulation]….
>
> 24 It is for the national courts to interpret those rules having regard for the principle of legal certainty, which is one of the objectives of Regulation 44/2001….
>
> 25 That principle requires, in particular, that the special rules on jurisdiction be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the state in which he is domiciled, he may be sued….
>
> 32 However, the special rule on jurisdiction provided for in [now Article 8(1) RBR] …cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled."

268. Thus, it is not controversial that Article 8(1) contains a "special rule" derogating from the basic position that jurisdiction is based on the defendant's domicile, and must therefore be "strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by" the RBR. (See also Case C-352/13 *CDC v Akzo Nobel NV* [2015] QB 906, at paragraph 18.) Article 8(1) must also be interpreted having regard to the principle of legal certainty, which requires an interpretation which enables "a normally well-informed defendant reasonably to foresee before which courts, other than those of the state in which he is domiciled, he may be sued." However, the provision "cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled."

Foreseeability of being sued in England

269. The Panasonic Defendants submit that neither PME nor PI could reasonably have foreseen that they might be sued in the English courts in relation to the CPT cartel. In support of this they refer to the following features: the Decision had no UK addressee; the only Panasonic addressees were Japanese companies, as were the Toshiba addressees; the anchor defendant, PE, had not participated in the cartel, had not sold the cartelised product or CTVs, and had not been made a party to any other regulatory process or civil claim relating to the cartel. In these circumstances, there was no reason for PME or PI to think that they might be sued in the English courts in a claim in which PE was used as an anchor defendant. Nor could PME and PI have foreseen that they would be sued in England in proceedings with TIS, an unrelated party, as an anchor defendant. TIS was not an addressee of the Decision, and did not sell the cartelised product during the relevant period. In addition, none of the Claimants is UK-domiciled; they do not have retail outlets in the UK; and all the relevant CTV purchases were made outside the UK.

270. Ms Abram submitted that, although one could have a debate about whether the foreseeability criterion is part of the "close connection" condition or is a separate hurdle in addition to that condition, such a debate would be arid: in either case the foreseeability criterion had to be satisfied on its own merits, albeit that it fed into the "close connection" requirement. She also contends that the Claimants are wrong to suggest that the question of foreseeability only arises in cases where the claims against the anchor and the non-anchor defendants have different legal bases. Their reliance on *CDC* (above) for that proposition is, she submits, misplaced: the case law in question decides that Article 8(1) can apply even where the claims have different legal bases; it does not decide that the foreseeability requirement is inapplicable where the claims have the same legal base.

271. The relevant passages in CDC are as follows:

> "22 As regards, finally, the risk of irreconcilable judgments resulting from separate proceedings, since the requirements for holding those participating in an unlawful cartel liable in tort may differ between the various national laws, there would be a risk of irreconcilable judgments if actions were brought before the courts of various Member States by a party allegedly adversely affected by a cartel.
>
> 23 Nevertheless, the Court points out that, even in the case where various laws are, by virtue of the rules of private international law of the court seised, applicable to the actions for damages brought by CDC against the defendants in the main proceedings, such a difference in legal basis does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001, provided that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (see judgment in *Painer*, C‑145/10, EU:C:2011:798, paragraph 84 [It appears that this reference should in fact be to paragraph 81 of *Painer*]).
>
> 24 That latter condition is fulfilled in the case of a binding decision of the Commission finding there to have been a single infringement of EU law and, on the basis of that finding, holding each participant liable for the loss resulting from the tortious actions of those participating in the infringement. In those circumstances, the participants could have expected to be sued in the courts of a Member State in which one of them is domiciled.

272. I accept Ms Abram's submission that foreseeability is not only relevant in cases where different legal bases for claims are in play. The statement of the CJEU in *Reisch Montage* (cited above) is quite general in that regard, and that decision is expressly

referred to by the CJEU in *CDC*. It is perhaps understandable that the Court should have emphasised foreseeability when referring to a case in which different legal bases for the claims existed, as in such a situation it might be less likely to be satisfied.

273. However, it seems to me that Ms Abram's wider argument is in danger of treating the statement of the CJEU in *Reisch Montage* as adding a free-standing and *distinct* criterion of foreseeability to the preconditions of application expressly set out in Article 8(1). If that criterion were to be applied generally, and without reference to those express pre-conditions, there would be a risk of the EU law principle of legal certainty being compromised, instead of respected as *Reisch Montage* expressly requires. That case states that the special rule in Article 8(1) must be interpreted so as to ensure legal certainty. The special rule's express precondition is that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments..." Therefore, by virtue of *Reisch Montage*, it is those words that must be interpreted strictly so as to respect legal certainty and *thereby ensure foreseeability*. In other words, foreseeability is inextricably linked to the closeness of the connection between the two sets of claims, and the criterion will be satisfied if a sufficiently close connection of the kind described in Article 8(1) exists.

274. Subject to the "sole purpose" issue raised by the Panasonic Defendants,[111] I am satisfied that the claims against PME and PI are sufficiently closely connected with the claims against PE and/or TIS to satisfy the requirements of Article 8(1). In particular, I consider it to be reasonably foreseeable to PME and PI for this purpose that they might be sued in the English court.

275. I do not understand the Panasonic Defendants to be contending that there is any question of different legal bases as between the claims against the anchor defendants, PE and TIS, and the claims against PME and PI. All the claims against the Defendants stem from the cartel which was the subject of the Decision, and which was found to be a single and continuous infringement of Article 101. In so far as certain national laws are relied upon, these appear to be few in number and all give effect to Article 101, which is itself of "direct effect" in the national law of each Member State, thereby producing rights and obligations which national courts are required to protect. Further, there has been no specific contention by the Panasonic Defendants that if the EU law claims against PE/TIS and the EU law claims against PME/PI were heard in separate proceedings, there would be no risk of irreconcilable judgments.

276. It is correct that the anchor defendants were not addressees of the Decision and that there were no UK addressees. However, there is no reason why this should be significant. Article 8(1) is capable of applying in a competition claim regardless of whether a Commission infringement decision exists. What matters is that there is a claim that the anchor defendant is guilty of an infringement, and that the case against the non-anchor defendant is sufficiently "closely connected" to that claim within the meaning and for the purposes of Article 8(1). The fact that neither entity is an addressee of a Commission decision (if there is one) and that neither is the subject of any other regulatory process or civil claim relating to the cartel, is, if not immaterial, then of marginal relevance.

277. The Panasonic Defendants' argument that PE (PME's, and possibly PI's, parent company) did not arguably participate in the cartel and had not sold the cartelised

[111] As to which, see paragraph 279ff of this judgment.

product or any CTVs, has been dealt with earlier in this judgment, in the context of PE's strike out application. Since I have concluded that the EU law claim against PE is arguable, this point falls away in the context of the foreseeability issue too. The same applies *mutatis mutandis* to the points made by Ms Abram with respect to the merits of the claim against TIS.

278. Finally, I do not consider that the Claimants' non-UK domicile nor the fact that their retail outlets and relevant sales were outside the UK, makes any difference. The basic rule is that a defendant is sued where he or she, not the claimant, is domiciled, and it is not in dispute that both the anchor defendants here are domiciled in the UK, as envisaged by Article 8(1). Article 8(1) only comes into play when other defendants are *not* so domiciled, so this can hardly be a significant argument against the application of that provision to PME/PI. One of the anchor defendants, PE, was, in terms of its business activities and its place in the corporate structure of the Panasonic group, closely associated with its subsidiaries PME and PIEG/PI, and, at least in relation to PE/PME, there was an overlap of directors.

The "sole purpose" point

279. As has been seen,[112] the CJEU made clear in *Reisch Montage* that Article 8(1) cannot be interpreted so as to allow a claim to be made against a number of defendants "for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled". The Court has also explained that this is not a separate, free-standing pre-condition for the application of Article 8(1), but is subsumed within the express terms of that provision. Thus, if there is a sufficiently close connection between the two claims, so that it is expedient to hear them together to avoid the risk of irreconcilable judgments, there is no need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled. See Case C-98/06 *Freeport v Arnoldsson* [2007] ECR I-8391, [2008] QB 634, paragraph 54, and *CDC* (above), at paragraph 28.[113] The latter decision also makes clear, at paragraph 29, that:

> "…where, when proceedings are instituted, claims are connected within the meaning of [Article 8(1) of the RBR] …, the court seised of the case can find that the rule of jurisdiction laid down in that provision has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision's applicability."

280. The Panasonic Defendants submit that the sole purpose of the claim against PE is to remove PME and PI from the jurisdiction of the courts of Germany, and therefore that Article 8(1) does not apply. They argue that the Claimants' motivation is clear when one has regard to the history of the present proceedings. First, they point, once more, to the absence of a connection between the Claimants/their CTV purchases and the UK, and the fact that over 80% of the relevant sales took place in Germany. They also note that, on the Claimants' primary case, German law governs the claims. Next, they submit that, for the reasons already discussed, there is no cogent reason for having sued PE, and they attribute this decision to (1) a "misconception" by the Claimants that PE sold CPTs

[112] Paragraph 267 of this judgment. See also *CDC*, at paragraph 27 of the judgment of the CJEU in that case.
[113] See also Case C-616/10 *Solvay SA v Honeywell* EU:C:2012:445, paragraph 22, which is in less clear terms.

and/or CTVs – in which respect they refer to the PoC, at paragraph 88,[114] and (2) a determination to bring proceedings in England. They then contend that bringing the Second Claim against PME and PI is an implicit recognition that PE's summary judgment application has force, because the Claimants said in evidence that the purpose of the Second Claim was "to avoid unnecessary argument" as to PE's liability. Yet, they point out, the Claimants have not in fact discontinued against PE. Thus, they contend, it is clear that the sole purpose of the claim against PE is to provide an anchor defendant and a jurisdictional basis for the claims against PME and PI, and that the sole purpose of the claim against PE is to oust the jurisdiction of the German courts in respect of PME and PI.

281. There is an apparent fallacy in this submission. The above account cannot show that the First Claim was *brought against PE* for the sole purpose of removing PME and PI from the jurisdiction of the German courts, whatever the motivation for its continuation. In fact, on the Defendants' own argument the claim was brought for reasons (1) and (2) in the previous paragraph. However, this probably does not matter. It may well be sufficient for the Panasonic Defendants to establish that the Second Claim (i.e. the claim against PME and PI) was brought, and the First Claim maintained against PE, for the impermissible purpose. In other words, it may well be appropriate to consider the two sets of proceedings as, in effect, one composite set for this purpose.

282. In any event, I do not accept that the impermissible sole purpose in bringing and/or continuing the claims against the Panasonic Defendants has been sufficiently shown. There is certainly no "firm evidence" to support that contention. The above argument of the Panasonic Defendants is somewhat contrived and at best speculative. Further, for the reasons I have given, there is an arguable claim that PE participated in and/or knowingly implemented the cartel. That strongly militates against the sole purpose of the (two sets of) proceedings being to oust the jurisdiction of the German courts in relation to PME and PI.

283. In my view there is, to borrow Lord Sumption's words, a plausible evidential basis for the application of Article 8(1) so far as the claims against PME and PI are concerned; the Claimants have the better of the argument about whether the English court has jurisdiction under that provision; and there is a "good arguable case" to that effect.

Prospects of success against PME and PI

284. The Panasonic Defendants' final objection to the jurisdiction of the English court is that all or some of the claims against PME and PI lack any real prospect of success, so that the court should decline jurisdiction over the relevant claims or aspect of claims (see *Ryanair Ltd v Esso Italiana* [2013] EWCA Civ 1450, at paragraph 20, per Rix LJ). Therefore, in effect, this aspect of the case amounts to a strike out application in respect of these Defendants.

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[114] In their skeleton argument, the Claimants indicated that they would seek permission to amend the wording of paragraph 88 of CAPOC so as to read: "The Fourth Defendant implemented the Cartel by selling, or being involved in the sale of, televisions with integrated CPTs within the EEA at higher prices than it would otherwise have done, in order to put into effect the objectives of the Cartel. The Fifth to Sixth Defendants [i.e. PME and PI] and/or the National Sales Companies and/or PIEG implemented the Cartel by selling CPTs and/or colour televisions with integrated CPTs within the EEA at higher prices than they would otherwise have done, in order to put into effect the objectives of the Cartel."

285. However, in her oral submissions, Ms Abram indicated that for the most part the claim against these companies is very similar to that against PE, and that therefore many of the submissions made by her in respect of PE apply also to PME and PI. I took this to be acceptance that in reality the strike out submissions made in the one case would stand or fall with those in the other. In my view this was a realistic approach and I will therefore deal with this aspect of the case more briefly than if it had been fully argued.

286. I have already set out more or less uncontroversial details of both these Defendants' positions in the Panasonic corporate structure and of their functions within the group's business.[115] I do not repeat this detail here, but it is relevant.

EU law claim against PI

287. PI is the corporate successor to (and inheritor of the liabilities of) PIEG, a wholly owned subsidiary of PE which merged into PI in 2014. Whilst the Panasonic Defendants state that prior to that date PI *itself* did not have any involvement in the manufacture and/or sale of CPTs or CTVs, they accept that from the start of the claim period in July 1999 until the end of March 2004, PIEG sold the cartelised products, namely CPTs. The Panasonic Defendants contend that (but it is not conceded by the Claimants) from 1 April 2004 onward, PIEG did not sell CPTs, and no longer carried on any relevant activity. They also contend that PIEG did not at any relevant time sell CTVs. In the light of this, Mr Gerrits acknowledges that if the court has jurisdiction over the claim against PI, there is a triable claim against that company in respect of PIEG's CPT sales up to 31 March 2004.[116]

288. In her skeleton argument Ms Abram appeared to suggest that I should decline jurisdiction in relation to the period after 31 March 2004. I do not consider this is warranted. There is an arguable case against PI on the EU law competition claim. That is sufficient to dispose of this particular objection to the court accepting jurisdiction.

EU law claim against PME

289. It is acknowledged that PME, described by Mr Wheeler as a "purchasing and marketing headquarters", was involved in the sale of CTVs in Europe throughout the claim period. PME purchased CTVs, in which the cartelised product was incorporated, from PC (an addressee of the Decision), and sold them to the Panasonic national sales companies for onward sale to external purchasers, including the Claimants. Further, in 2004 PME acquired the businesses of three of the national sales companies. Thereafter, PME was a direct supplier of CTVs to customers including the Claimants, with whom it entered into contracts relating to sales bonuses.[117]

290. Ms Abram submitted that the case of participation in the cartel against PME is as hopeless as that against PE, and for more or less the same reasons. As to the allegation of knowing implementation of the cartel, Ms Abram submitted, as she did in respect of PE, that the fact that PME did not at any time sell the cartelised product, but only CTVs incorporating those products, precluded an infringement by knowing implementation.

[115] See paragraphs 46-52 of this judgment.
[116] Gerrits 3, at paragraph 50.
[117] See paragraph 47ff of this judgment.

291. For the reasons I gave earlier,[118] I do not accept (1) the rigid distinction drawn between participation in, and knowing implementation of, a cartel, and (2) the submission that only cartelised products, and not "transformed" products which incorporate cartelised products, are capable of being the subject of an infringement of Article 101 TFEU by knowing implementation.

292. Ms Abram submitted that, in relation to the knowledge criterion, the Claimants' case against PME was much the same as against PE. It included allegations of both inferred direct knowledge of the cartel and attributed knowledge - in the latter case based on the *Provimi* Ground and also on the shadow/*de facto* director route.

293. In my view there is no material distinction to be drawn for present purposes between the arguability of these and related issues against PME and their arguability against PE. I do not propose to render this judgment still longer by unnecessary repetition of my reasoning. It follows that in respect of the EU law claim against PME, I consider there is an arguable case on the merits.

Economic tort claims against PME and PI

294. Ms Abram submits that the English law economic tort claims, i.e. unlawful conspiracy to injure and interference by unlawful means, are made against PME and PI on the same basis as against PE. She submits that they are unarguable for the same reasons that the claim against PE is submitted to be unarguable. Her primary submission is that the unlawful means relied upon is, in each tort, an alleged breach of Article 101 by PME and PI; in view of her contention that the whole of the EU competition law claim against PME has no real prospect of success, and that "the bulk" of the EU competition law claim against PI is similarly unarguable, the economic tort claims against both companies must also fall away.

295. In view of my finding that the EU law claims against PME and PI are not unarguable, the economic tort claims are not liable to be struck out on this ground.

296. However, Ms Abram submits that those claims against PME and PI are in any event bound to fail for the same reasons as the claims against TIS and PE, viz that it is not arguable that there was any intention on the part of PME or PI to injure the Claimants as such intention is to be understood in the light of the relevant case law, and also (so far as unlawful interference is concerned) that the Claimants have no prospect of establishing that PME and/or PI interfered with the freedom of a co-cartelist to deal with the Claimants in a way that is unlawful as against, and actionable by, that co-cartelist.

297. So far as these issues are concerned, the Claimants did not add to the written and oral submissions they made in respect of PE and TIS.

298. The conclusions I have reached in respect of PE and TIS apply equally to the economic tort claims against PME and PI. It follows that I do not consider there to be an arguable case that PME or PI had the requisite intention to injure the Claimants for the purposes

[118] See paragraphs 99-101 of this judgment.

of the economic torts in question. Nor do I consider that it is realistic to suppose that disclosure or witness statements prepared for trial will affect that conclusion.

299. Ms Abram submitted that if this was my conclusion, the court should refuse to accept jurisdiction over the economic tort claims. As far as I am aware, there was no discussion during the hearing about whether the appropriate relief in this event would be a strike out or a declaration that jurisdiction was declined or some other order. Accordingly, if necessary, I will hear further submissions on that question.

Further written submissions after the hearing

300. I have referred to the further written submissions I allowed after the hearing had ended, on the effect of the supervening decision of the General Court in Case T-677/14 *Biogaran v Commission* (see above, at paragraphs 149ff), and on the Court of Appeal's decision to refuse permission to appeal against the High Court's decision in *Vattenfall* (above).

301. Later, when the draft judgment was almost ready to be sent to the parties, the Panasonic Defendants requested permission to file yet further written submissions, this time on a new decision of the CJEU in Case C-724/17 *Vantaan kaupunki v Skanska* EU:C:2019:204 of 14 March 2019. The Claimants did not object, and so I received submissions on this case from the Panasonic Defendants and from the Claimants. The Toshiba Defendants did not wish to comment.

302. The case concerned a cartel on the asphalt market in Finland. Some of the participants in the cartel had been dissolved since the infringing conduct took place, and their assets had been absorbed into their parent companies. The Finnish competition authority decided there had been an infringement of EU law, and imposed fines on (amongst others) the parent companies, both for their own conduct and for the conduct of their dissolved subsidiaries - in the latter case on the basis of the EU law "economic continuity test". A damages claim was then brought against the former parent companies. Under Finnish law, the parent companies could only be held liable for damages which they themselves caused, and the "economic continuity test" was not applicable to damages, because of the doctrine of separate corporate personality. The Finnish Supreme Court made a preliminary reference to the CJEU, asking whether EU law required that the parent companies should be held liable for the dissolved subsidiaries' infringements.

303. In its judgment the CJEU stated that:

- EU law governs the question of which legal entity can be held liable in a damages action for breach of Article 101: paragraph 28;
- EU law uses the concept of an "undertaking" to designate the perpetrator of an infringement of the competition rules: paragraph 29;
- it is the "undertaking" (not a specific legal entity within the undertaking) which infringes those rules and must answer for the damage caused by the infringement: paragraphs 31, 32 and 35;

- the concept of an "undertaking" covers any entity engaged in an economic activity, i.e. an economic unit, even if in law that unit consists of several natural or legal persons: paragraphs 36-37;

- when an undertaking is restructured by legal or organisational changes, and an infringing entity within it ceases to exist, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules if, from an economic point of view, the two are identical: paragraph 38;

- it is therefore not contrary to the principle of individual liability to impute liability for an infringement to a company which has taken over the company which committed the infringement, where the latter has ceased to exist: paragraph 39;

- the purchaser of the infringing undertaking may be liable for the infringement if the infringer ceases to exist, by reason of the fact that the purchaser has taken over its assets and liabilities, including its liability for breaches of EU law: paragraph 40;

- if an undertaking responsible for damage caused by an infringement of the EU competition rules could escape liability by simply changing its identity through restructurings, sales or other legal or organisational changes, the objective of deterrence would be jeopardised: paragraph 46;

- the use of the EU law concept of "undertaking" has the same scope in relation to actions for damages for breach of the EU competition rules as it has when the Commission imposes fines for such breaches: paragraph 47;

- in the light of this, in a case such as the one under consideration, in which all the shares in the companies which participated in a cartel were acquired by other companies which have dissolved the former companies but continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel: paragraph 51.

304. For the most part these propositions of EU law are familiar ones relating to the nature and potential responsibility of an "undertaking" in EU law. The judgment also addresses the circumstances in which, by virtue of the EU law "economic continuity" doctrine, an entity may be liable in damages for an infringement of Article 101, where it has acquired all the shares in a company which participated in a cartel, and which has then been dissolved by the parent which then continued its former subsidiary's commercial activities.

305. It is common ground that *Skanska* does not address the *Provimi* Ground - the question of subsidiary liability (i.e. the basis upon which two or more subsidiary or associated companies are to be treated as a single "undertaking" along with their parent company, and as liable in law for an infringement of Article 101 for which the "undertaking" bears responsibility), and that *Skanska* is therefore not directly applicable to this case.

306. However, in the course of its judgment the CJEU confirmed that the scope of an "undertaking's" private law damages liability for breach of Article 101 is no different from the scope of an "undertaking's" liability to be fined by the Commission for such a breach, pursuant to Article 23(2) of Regulation No 1/2003. This is not a surprising statement, given that both civil liability for damages and liability to be fined both require an infringement of the relevant competition rule.

307. The Panasonic Defendants submit that if *Skanska* were relevant to subsidiary liability, then in order successfully to resist summary disposal of their claim against PE the Claimants must have an arguable case (1) that PE was part of the same "undertaking" as PC and/or MTPD for the purposes of EU law; and (2) that PE could itself have been fined by the Commission in respect of the cartel. They submit that the Claimants do not have an arguable case under either head.

308. As to both (1) and (2), they essentially repeat the arguments with which I have already dealt. As to (2), the Panasonic Defendants argue that *Skanska* shows that damages liability is co-extensive with the Commission's fining powers; that those powers relate to "direct cartel participants and their parent companies (and appropriate successor entities)"; that there is no arguable case that PE participated in the cartel; and that there is no arguable case that PE knowingly implemented it. In this regard the Panasonic Defendants once more rely upon a rigid distinction between "participation" and "knowing implementation" which, for the reasons given earlier, I consider artificial and untenable.

309. Therefore, I am not persuaded that *Skanska* affects any of my conclusions in respect of the case against PE.

Application to amend and to consolidate the First and Second Claims

310. I have already dealt with the contested application to amend the PoC to include the shadow/*de facto* director argument.

311. The remaining proposed amendments are not, as I understand it, opposed, or not opposed in the light of my findings on the other applications.

312. Similarly, given my findings on jurisdiction in relation to the Second Claim, I understand that the application to consolidate the two claims is unopposed.

Miscellaneous

313. In the course of argument certain criticisms about the clarity and consistency of expression and definition in the PoC/CAPOC were made by the Defendants (see, for example, footnote 60 of this judgment). I was not asked to make any order in relation to that. I would simply say that as there is to be a consolidated pleading, it may assist all concerned in this litigation hereafter if the Claimants were to give some consideration to whether the specific bases of liability alleged in respect of the individual Defendants could be further clarified, and whether any inconsistencies in definitions could be resolved.

314. I invite the parties to agree the terms of an order which reflects this judgment.

315. Finally, I would like to commend all counsel for their skilful and helpful submissions.

Postscript

316. On Maundy Thursday (18 April 2019) the Claimants' solicitors sent my clerk an email to which was attached the judgment of the Supreme Court in *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20, delivered on 10 April 2019. The judgment concerned *inter alia* an alleged abuse of EU law in the context of the predecessor provision to Article 8(1) RBR. The Court gave consideration to the test for the "sole purpose" issue.

317. I can see no basis on which my conclusions in that regard are affected by this decision.