Neutral Citation Number: [2018] EWCA Civ 220

Case No: A3/2016/2765, A3/2016/4232, A3/2016/4238 & A3/2016/4246

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
THE HONOURABLE MR JUSTICE MANN
[2016] EWHC 1207 (Ch)
THE HONOURABLE MR JUSTICE MORGAN
[2016] EWHC 1980 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2018

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE HENDERSON
and
THE RIGHT HONOURABLE LADY JUSTICE ASPLIN DBE

- -

THE LCD APPEALS

Between:

1) IIYAMA (UK) LIMITED **2) IIYAMA DEUTSCHLAND GMBH** **3) IIYAMA BENELUX BV** **4) IIYAMA POLSKA SP Z.O.O.** **5) IIYAMA FRANCE S.A.R.L.** **6) MOUSE COMPUTERS CO. LIMITED**	**Appellants/ Claimants**
- and -	
1) SAMSUNG ELECTRONICS CO. LTD. **2) SAMSUNG ELECTRONICS LIMITED** **3) SAMSUNG ELECTRONICS (UK) LIMITED** **4) SAMSUNG SEMICONDUCTOR EUROPE LIMITED** **5) LG DISPLAY CO. LTD.**	**Respondents/ Defendants**

THE CRT APPEAL

And between:

1) IIYAMA BENELUX BV **2) IIYAMA DEUTSCHLAND GMBH** **3) IIYAMA (UK) LIMITED** **4) IIYAMA POLSKA SP Z.O.O.** **5) IIYAMA FRANCE S.A.R.L.**	**Appellants/ Claimants**

6) MOUSE COMPUTERS CO. LIMITED
- and -
1) SAMSUNG SDI CO LTD
2) SAMSUNG SDI (MALAYSIA) BERHAD
3) LG ELECTRONICS INC
4) LG ELECTRONICS UK LIMITED
5) LG ELECTRONICS WALES LIMITED (IN LIQUIDATION)
6) KONINKLIJKE PHILIPS NV
7) PHILIPS ELECTRONICS UK LIMITED

Respondents/ Defendants

- -
- -

In the LCD Appeals
Mr Neil Calver QC & Mr Colin West (instructed by **Stewarts Law LLP**) for the **Appellants**
Mr Paul Stanley QC & Mr Robert O'Donoghue QC (instructed by **Covington & Burling LLP**) for the **First to Fourth Respondents**
Mr Daniel Piccinin (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Fifth Respondent**

In the CRT Appeal
Mr Aidan Robertson QC and Mr Gerard Rothschild (instructed by **Stewarts Law LLP**) for the **Appellants**
Mr Daniel Beard QC and Mr James Bourke (instructed by **Allen & Overy LLP**) for the **First and Second Respondents**
Mr Daniel Jowell QC and Mr David Bailey (instructed by **Simmons & Simmons LLP**) for the **Third to Fifth Respondents**
Ms Marie Demetriou QC (instructed by **Slaughter & May**) for the **Sixth and Seventh Respondents**

Hearing dates: 12, 13 and 14 December 2017
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Approved Judgment

Introduction

1. This is the judgment of the court (drafted by both Henderson and Asplin LJJ with whom Longmore LJ has agreed) on four closely related appeals which we heard together. They have numerous facets but, in essence, they are all concerned with the same central issue, namely the territorial scope of Article 101 of the Treaty on the Functioning of the European Union ("Article 101") and/or of Article 53 of the Agreement on the European Economic Area ("Article 53" and the "EEA" respectively).

2. The main questions which we have to decide may be encapsulated as follows: do the claimants have a real prospect of success in claiming that Article 101 and/or Article 53 have been infringed, and losses suffered by them as a result, following the purchase of products at inflated prices through the operation of worldwide cartel agreements, the products having been first supplied to entities outside the EU and the EEA, then to a claimant holding company also outside the EU and/or the EEA, which then supplied the products to claimant subsidiary companies within the EU and/or the EEA, and in some cases within the United Kingdom, for onward sale and distribution within the EU and/or the EEA; and (if so) can those alleged losses be recovered in the present proceedings commenced in England and Wales?

3. The appeals arise out of two orders in relation to interlocutory applications for summary judgment/strike out and challenges to the jurisdiction/service out. The first was made by Mann J on 24 June 2016 ("Mann J's Order"). The second order was made by Morgan J on 24 October 2016 ("Morgan J's Order"). Mann J's Order was made in proceedings concerning claims for damages for the alleged effects of alleged infringements of Article 101 and/or Article 53 and/or Chapter I of the Competition Act 1998 in relation to cathode ray tubes ("CRTs"). We shall refer to that action and the appeal arising from Mann J's Order respectively as the "CRT Action" and the "CRT Appeal". Morgan J's Order was made in relation to proceedings concerning similar claims for damages for the alleged effects of alleged infringements in relation to liquid crystal displays ("LCDs"). We shall refer to that action and the three appeals arising from Morgan J's Order as the "LCD Action" and the "LCD Appeals" respectively.

4. CRTs were, and LCDs are, components in televisions and computer monitors. In both the CRT and the LCD Actions, it is claimed that substantial loss was suffered as a result of the alleged infringements because the conduct complained of resulted in an increase in the price of CRTs and LCDs respectively, which were a major component in the computer monitors ultimately sold by companies in the iiyama group within the EU and/or EEA and which the claimants say account for some 70% of the cost of such monitors.

5. The claims for damages in the CRT and LCD Actions are each based upon a Decision of the European Commission. Those Decisions are binding on this court pursuant to Article 16 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1. At present, both Decisions are available only in redacted form. The first was delivered on 8 December 2010 (Case AT/39.309 – LCD – Liquid Crystal Displays) ("the LCD Decision") in which the Commission decided that from 5 October 2001 to 1 February 2006, Samsung Electronics Co Ltd ("SECL") and LG

Display Co Ltd ("LGD") (the first and fifth defendants in the LCD Action), amongst others, had entered into a worldwide price fixing cartel in relation to LCDs and had implemented the LCD cartel within the EU and EEA, thereby infringing Article 101 and Article 53. The second was delivered on 5 December 2012 (Case AT/39437 – TV and Computer Monitor Tubes ("the CRT Decision")) in which the Commission determined that there had been a worldwide cartel operating in the CRT market, that some of the former sixth to twelfth defendants in the CRT Action had been in the cartel, and that Article 101 and Article 53 had been infringed.

6. The CRT Action was also based upon a further Decision of the European Commission concerning the glass for CRTs. As that part of the CRT Action against the former first to fifth defendants, which concerned the CRT glass cartel, is no longer pursued, that Decision is no longer relevant.

7. Amongst other things, Article 101 prohibits price fixing cartels "which have as their object or effect the prevention, restriction or distortion of competition within the internal market." Article 53 also prohibits price fixing cartels in so far as they affect competition in the territory covered by the Agreement on the European Economic Area and trade between the Contracting Parties to that Agreement. Chapter I of the Competition Act 1998 is in similar terms to Article 101, save that it refers to trade and competition within the United Kingdom. As the same principles apply in relation to Article 101 and Article 53, and for present purposes nothing further is added by the Competition Act 1998, we will in general henceforth refer solely to Article 101 and to the EU.

The parties and relevant procedural history

8. The claimants in both the CRT and the LCD Actions are the same. They are all companies within the iiyama group. It is involved in the manufacture, distribution and sale of electronic goods including televisions and computer monitors which originally contained CRTs and now contain LCDs. The first to fifth claimants are the main European subsidiaries of the iiyama group and were each incorporated in an EU Member State. iiyama (UK) Limited, which is the first claimant in the LCD Action and the third claimant in the CRT Action, as its name suggests, was incorporated in England and Wales. Mouse Computers Co. Ltd ("Mouse"), which is the sixth claimant in both the CRT and the LCD Actions, is a Japanese company. It supplied the iiyama products containing CRT or LCD components to its European subsidiaries, either directly or through one subsidiary for onward transmission to the others. The subsidiaries then distributed and sold the products within the EU. Prior to May 2006, Mouse's role was performed by iiyama Corporation ("Corporation"), another Japanese company. Corporation makes no claim in either action.

9. The defendants in both the CRT and the LCD Actions were either addressees of the CRT or the LCD Decisions, or are affiliated companies within the same corporate group as one or more of the addressees and are alleged to have participated or been involved in or implemented the relevant cartel. As we have already mentioned, SECL and LGD (respectively, the first and fifth defendants in the LCD Action) were addressees of the LCD Decision. The second, third and fourth defendants in the LCD Action, Samsung Electronics Limited, ("SEL"), Samsung Electronics (UK) Ltd

("SEL(UK)") and Samsung Semiconductor Europe Limited ("Semiconductor") were each incorporated in England and Wales and are wholly owned subsidiaries of SECL, which was incorporated in South Korea. They were each concerned with the distribution and sale of products containing LCDs. LGD was also incorporated in South Korea.

10. The claim form and the particulars of claim in the LCD Action were served on SEL, SEL(UK) and Semiconductor within the jurisdiction. Permission to serve the proceedings on SECL and LGD out of the jurisdiction was granted by Master Price on 13 May 2015 pursuant to CPR 6.40(3)(b) and CPR 6.42, under Article 5 of the Hague Convention, on the basis, amongst other things, that the claim had a reasonable prospect of success, and England and Wales was the proper place in which to bring the claim. The application was supported by two witness statements both dated 11 May 2015 which were made by the claimants' solicitor, Mr Scott Campbell.

11. As we have already mentioned, the CRT Action and hence the CRT Appeal is now pursued only against the former sixth to twelfth defendants, all of which were either addressees or associated with addressees of the CRT Decision. They were each involved whether directly or indirectly in the business of manufacturing, selling and/or distributing a type of CRT known as colour display tubes ("CDTs") which are used in the production of computer monitors. Samsung SDI Co Ltd ("Samsung SDI") and Samsung SDI (Malaysia) Berhad ("Samsung SDI Malaysia"), the sixth and seventh defendants in the CRT Action, were incorporated and operated in South Korea and Malaysia respectively. Samsung SDI is the ultimate parent of the Samsung SDI group and its main shareholder is SECL. Samsung SDI has a CRT division. The group manufactured and sold CRTs. Samsung SDI Malaysia manufactured and sold CDT products and for part of the relevant period was majority owned by Samsung SDI.

12. The eighth, ninth and tenth defendants, LG Electronics Inc ("LG Inc"), LG Electronics UK Limited ("LG UK") and LG Electronics Wales Limited (in liquidation) ("LG Wales") are referred to together as the "LG defendants". LG Inc was incorporated in South Korea. It sold CDTs. On 1 July 2001, it transferred its business in relation to CDTs/CRTs into a joint venture company with the Philips group of companies. Koninklijke Philips N.V., the eleventh defendant, ("Philips NV") is a company incorporated in the Netherlands and is the parent company of the group. Philips Electronics UK Limited, the twelfth defendant, ("Philips UK") was incorporated in England and Wales and is wholly owned by another subsidiary which is itself wholly owned by Philips NV. To return to the LG defendants, LG UK is a wholly owned subsidiary of another LG company which in turn is wholly owned by LG Inc. LG Wales is a wholly owned subsidiary of LG Inc. Both LG UK and LG Wales imported and distributed electronic products including CRT products.

13. The claim form and the particulars of claim in the CRT Action were served on LG UK and LG Wales within the jurisdiction. On 11 May 2015, Master Price gave the claimants permission to serve Samsung SDI, Samsung SDI Malaysia and LG Inc out of the jurisdiction on the same grounds as led to his subsequent order in the LCD Action. The application was supported in the same way, by two witness statements, in this case both dated 8 May 2015, made by Mr Campbell.

The Interlocutory Applications in more detail

14. On 22 September 2015, in the LCD Action, SECL applied for an order declaring that the court had no jurisdiction in relation to the claim against it or that the court should not exercise any such jurisdiction, and for the proceedings and the order for service out of the jurisdiction upon it to be set aside. SECL contended that the claim did not fall within any relevant gateway for the court's jurisdiction and that permission to serve out on it should not have been granted because the courts of England and Wales were not the appropriate forum for the claim. On 2 October 2015, LGD made a similar application to that of SECL. LGD also raised the contention that Master Price's order should be set aside on the ground that there had been material non-disclosure on the application made without notice to the Master. Similar applications were made on 30 October 2015 in the CRT Action, by Samsung SDI, Samsung SDI Malaysia and LG Inc, on the basis that the claims had no reasonable prospect of success against them and that there had been material non-disclosure.

15. In the meantime, on 22 September 2015, in the LCD Action, SEL, SEL(UK) and Semiconductor applied for orders that the proceedings be struck out as against them pursuant to CPR 3.4(2)(a) or alternatively that they be granted reverse summary judgment pursuant to CPR 24.2(a)(i). A similar application was made on 23 November 2015 in the CRT Action, by Philips NV and Philips UK, and then by LG UK and LG Wales on 9 December 2015.

The decisions of Mann and Morgan JJ

16. Mann J heard the applications in the CRT Action and gave judgment before the similar applications in the LCD Action came before Morgan J. Mann J decided that all of the defendants were entitled to summary judgment and/or to have the claim against them struck out, and that the court had no jurisdiction to try the claims against some of the defendants including Samsung SDI, Samsung SDI Malaysia and LG Inc. Master Price's order of 11 May 2015 was also set aside, on the ground of non-disclosures which Mann J described at [171] of his judgment as "so serious, going as they did to the heart of jurisdiction" that no lesser sanction would be appropriate.

17. In summary, Mann J held that the activities complained of by the iiyama claimants in the CRT Action were outside the territorial scope of Article 101 and therefore could not become the foundation of the claim for damages. His reasoning in this regard is succinctly and helpfully summarised by Morgan J in his judgment in the LCD Action at [29] and [30] as follows:

> " 29. I can summarise the essential reasoning of Mann J in relation to the territorial scope of Article 101 as follows (references to numbers in square brackets are to the paragraphs of his judgment):
>
> (1) Article 101, which expressly refers to a cartel which has as its object or effect competition within the internal market, is set out at [3];
>
> (2) there are territorial limits on the scope of Article 101: [110];
>
> (3) the leading authority as to the territorial scope of Article 101 is Woodpulp I: [114]-[118];

(4) cartelists cannot avoid an infringement of Article 101 merely by entering into the relevant agreement outside the EU: [115];

(5) the decisive matter is whether the cartel is implemented in the EU: [116];

(6) if the cartel, wherever made, is implemented in the EU then Article 101 is infringed: [116];

(7) there is room for discussion as to what amounts to implementation; direct sales into the EU are a way of implementing in the EU a cartel wherever made: [119];

(8) there is no decision that the concept of implementation is wider than the normal meaning of that word: [120];

(9) sales by cartelists outside the EU are not an implementation within the EU: [140];

(10) even if sales outside the EU have an indirect effect (an "end of the road effect") within the EU, those sales are not an implementation of the cartel within the EU: [140];

(11) Gencor was a case about a proposed merger: [122];

(12) Gencor referred to it being "foreseeable that a proposed concentration will have an immediate and substantial effect in the Community": [125];

(13) there is room for debate whether the formulation in Gencor was a different test from the implementation test or whether it was a justification for imposing a duty under Article 101: [127] and [131];

(14) if the Gencor formulation did identify a test which was different from the implementation test, then there was no sign of an even wider test as to the territorial scope of Article 101: [130];

(15) if the Gencor test is different from the implementation test, then whilst there might be room for argument on the facts of a case whether the effect was foreseeable or substantial, the effect must be "immediate": [143];

(16) the reference to "immediate" does not extend to "knock on" effects e.g. from direct sales outside the EU: [148].

30. In the case before Mann J, the Claimants claimed damages because the cartelists had made sales at cartel prices which contained an element of overcharge made possible by the existence of the cartel and the overcharge was passed on to the Claimants. However, Mann J rejected these claims because:

(1) the cartel in question was entered into outside the EU;

(2) the sales which involved the overcharge were outside the EU;

(3) sales outside the EU were not the implementation of the cartel in the EU;

(4) accordingly, those sales were not an infringement of Article 101;

(5) the effect of those sales in the EU was not an immediate effect (if one were to apply the test in Gencor)."

18. As the territorial scope of Article 101 was central to Mann J's decision and to the CRT Appeal, we will set out some of his reasoning in more detail:

> "114. . . . European courts have set limits to define the circumstances in which cartel conduct outside the EEA can be held to give rise to an actionable infringement in the EU so as to fall within the wording and jurisdictional limits of Article 101. In *Woodpulp* (*Ahlstrom Osakeyhtio v The Commission* [1988] ECR 5193), the case heavily relied on by the Commission in the CRT Decision, the Commission had to consider a cartel formed outside the EEA which sold cartelised products (wood pulp) to customers in the EEA with the benefit of prices affected by the cartel conduct. The Commission held that it had jurisdiction to act in relation to such conduct. Before the ECJ the addressees took the jurisdictional point that the Commission was seeking to exercise jurisdiction over entities outside the EEA contrary to international law (and Article 85, the then equivalent of Article 101):
>
> > "6. All the applicants which have made submissions regarding jurisdiction maintain first of all that by applying the competition rules of the Treaty to them the Commission has misconstrued the territorial scope of Article 85. They note that in its judgment of 14 July 1972 in Case 48/69 (ICI v Commission [1972] ECR 619) the Court did not adopt the "effects doctrine" but emphasized that the case involved conduct restricting competition within the common market because of the activities of subsidiaries which could be imputed to the parent companies. The applicants add that even if there is a basis in Community law for applying Article 85 to them, the action of applying the rule interpreted in that way would be contrary to public international law which precludes any claim by the Community to regulate conduct restricting competition adopted outside the territory of the Community merely by reason of the economic repercussions which that conduct produces within the Community."
>
> 115. The Court ruled against those submissions under the heading: "Incorrect assessment of the territorial scope of Article 85 of the Treaty and incompatibility of the decision with public international law." In paragraph 12 it noted that the main sources of supply were outside the

Community, but there was still an infringing effect on competition within the Community:

> "12. … Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market.
>
> 13. It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty.
>
> 14. Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article 85."

116. The Court went on to reject the complaint that assuming jurisdiction was contrary to international law in terms which also provided a test as to when extra-Community conduct could give rise to an infringement in the EEA:

> "16. It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.
>
> 17. The producers in this case implemented their pricing agreement within the common market . It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.
>
> 18. Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law."

117. The Court then went on to reject other grounds for saying such conduct was contrary to international law and principles of comity.

118. The important paragraph for present purposes is paragraph 16. It makes the whereabouts of the formation of the offending conduct subsidiary. What is important is "the place where it is implemented". Thus, on the facts of that case, the foreign cartel, conducted by foreign (ie extra-EEA) entities outside the EEA, was "implemented" in the EEA when the cartelised goods were sold into the EEA by the cartel participants (sold "directly to purchasers established in the Community" - paragraph 12). The test is said to be implementation. There is no suggestion that infringement can be found where the effects of the cartel are somehow felt in a more indirect way.

119. This sort of directness in "implementation" is supported by the CFI in *Innolux*. That was a case of direct sales of the cartelised products, or transformed products, by the cartelists into the EEA. The Court considered the question of territoriality in the context of an appeal about the fine, because it was said that the calculation of the fine (which invoked the same two heads as the fines in the present case, rejecting the third) involved the Commission exceeding its territorial jurisdiction. In the course of its deliberations the court rejected the place of the cartel as being the appropriate criterion.

> "What counts is therefore the place in which it [ie the infringement] is implemented." (para 59).

120. This is a clear implementation of *Woodpulp*. The Court went on to determine that *Woodpulp* was followed in *Gencor* (see below) and reflected further on the effects of the direct sales into the EU which were the subject of consideration. While the decision does not consider whether there are any limits to what is meant by "implementation", it clearly espoused it as a concept and there is not a hint that it should be widened beyond a normal meaning of that word. It is true that whether or not the word (or test) should be widened was not in issue. In fact the point in that case concerned whether there should be a narrowing of the territorial scope of infringement (for fining purposes) but the whole tenor of the judgment is to apply *Woodpulp* in a non-extended way."

19. The crux of Mann J's decision was that there was no case for saying that the cartel activities relied upon were implemented in the EEA or that there were "qualified effects" within the territory of the EEA. He expressed his conclusion in relation to implementation in this way:

"140. In my view, taking Mr Robertson's factual case at its most favourable, and ignoring the absence of a properly pleaded case, there is no arguable case for saying that the cartels relied on were implemented in the EEA. They were foreign cartels implemented, probably, in Asia, but in any event not in the EEA. The mere fact that, even if true, there is some end of the road effect in the pricing of iiyama purchases in Europe does not mean

> that the cartel was implemented there. The proper analysis and balancing of the principles of Article 101 and principles of international law and comity require a closer connection than that before intervention by the Commission can be justified under the Article."

20. The Judge went on to consider whether it was sufficiently arguable that the offending behaviour had an immediate, substantial and foreseeable effect in the EU (the "qualified effects principle") at [142] to [150] of his judgment. He noted at [147] that "the case on substantiality and foreseeability (particularly the latter) is very thin" but that in the light of his conclusion on "immediacy" he did not have to consider them further. We will return to that aspect of Mann J's judgment in our discussion of the substantive issue: see [103] below.

21. Morgan J's Order in the LCD Action was more nuanced. It was declared that: (i) the claim based upon the implementation of the LCD cartel in the EU/EEA to recover alleged loss suffered as a result of that implementation would not be struck out despite the defendants' arguments as to the scope of Article 101 /Article 53, remoteness and lack of proximity; but that (ii) in so far as the claimants wished to contend that the implementation of the LCD cartel in Asia (as distinct from its implementation in the EU/EEA) had caused them loss, it was not recoverable pursuant to Article 101 and Article 53. Save to the extent required as a result of the latter declaration, the applications for summary judgment/strike out and to set aside the service of the proceedings out of the jurisdiction and/or to declare that the court had no jurisdiction over the relevant defendants or should not exercise it, were dismissed.

22. Morgan J addressed the territorial scope of Article 101 at [40] to [54] of his judgment. His conclusion that the implementation of the LCD cartel in Asia (as distinct from its implementation in the EU/EEA) was outside the scope of Article 101 was based on the claimants' basic supply chains: see [40]. His conclusion in this regard was much the same as that of Mann J. His refusal, however, to strike out the claims or grant reverse summary judgment and set aside the service out of the jurisdiction based upon the implementation of the LCD cartel in the EU/EEA was founded upon a wider analysis at [43] to [45], and specifically upon the way in which the claim was pleaded in paragraph 75 of the draft amended particulars of claim to which he referred at [49], as follows:

> "43. This analysis would suggest that the claims brought by C1 to C6 ought to fail because the supply chains on which they rely did not involve the implementation of the cartel within the EU. However, the basic flaw in this analysis is that it has regard only to the supply chains in this case. It is true that those supply chains did not involve the implementation of the cartel [*within*] the EU. However, the Commission has decided that the cartel was implemented in the EU and therefore there was an infringement of Article 101, within the territorial scope of that Article. It is true that the conduct and activity which amounted to implementation within the EU did not involve the supply chains in this case but that does not matter. The real question which needs to be addressed is: can the Claimants show that they suffered harm by reason of the implementation of the cartel in the EU? Based on the above analysis, it is not enough for the Claimants to say that

they are indirect purchasers downstream from the implementation of the cartel in Asia, at Step 1 above.

44. I also point out that the application of the test in Gencor as to the territorial scope of Article 101 does not depend upon an analysis of the individual steps in the supply chain and where those steps took place. Instead the test in Gencor focusses upon the foreseeable effect of the cartel and how immediate that effect in the EU will foreseeably be. The findings of the Commission which I have summarised earlier make it clear that there was a foreseeable immediate and substantial effect of the cartel in the EU.

45. In view of the fact that the Commission has held that the worldwide cartel in this case was implemented in the EU, I am not able to accept the Defendants' submission that I should adopt the approach which was adopted in the United States decisions to which I referred earlier and therefore conclude that the worldwide cartel in this case did not involve an infringement of Article 101 on the grounds that the cartel fell outside the territorial scope of Article 101.

. . . .

49. However, one paragraph of the draft amended pleading in particular does identify how the damages are said to flow from the implementation of the cartel within the EU, as the Commission held had occurred. This is paragraph 75 of the draft amended pleading. This follows an earlier plea that the cartel was implemented in, and had a foreseeable immediate and substantial effect in the EU (as the Commission held). It is then said that if the cartel had not been implemented within the EU then LCDs and products incorporating LCDs would have been available within the EU at prices which were not inflated by the worldwide cartel. It is then pleaded that if that had been the situation, purchasers of LCDs and LCD products could have bought the same within the EU at non-cartel prices and would have done so. Accordingly, when the LCDs and LCD products were sold outside the EU at an overcharge, the purchasers and indirect purchasers all suffered loss and damage (subject to any defence of passing on). That way of putting the case is pleadable. There is not much evidence which specifically supports that plea. The furthest the matter is taken in the Claimants' evidence is that Mr Takeichi, the managing director of C3, has prepared a witness statement in which he refers to the fact that some of the Claimants bought LCD monitors from OEMs in the EU and he adds that if LCD panels had been offered for sale in the EU at prices below those fixed by the cartelists, then those OEMs in the EU would have purchased LCD panels in the EU at prices below the cartel price. I imagine that the evidential basis for this plea will be closely scrutinised by the Defendants but at this stage the plea does raise an arguable case against D1 and D5. It was also submitted by the Claimants that if the cartel had not been implemented in Europe then it would have collapsed and would have not had effect, or would have ceased to have effect, elsewhere in the world."

23. Morgan J concluded therefore, at [51], that the claimants had pleaded in paragraph 75 of the draft amended particulars of claim that the infringement of Article 101 which was within the scope of that Article had caused loss and damage of a kind which was recoverable by them for such an infringement. He explained this (also at [51]) in the following way:

> ". . . Although the monitors were bought by Corporation or C6 [Mouse] outside the EU, the price paid was said to have been influenced by the fact that there was a worldwide cartel increasing prices throughout the world, including the EU. If the prices in the EU had not been increased by reason of the cartel, then the Claimants say that they would have been able to buy in the EU without paying the overcharge and that on the balance of probabilities they would have done so. Accordingly, they suffered loss and damage by buying outside the EU at a price greater than the price that would have been available in the EU if the cartel had not been implemented in the EU. Further, if the cartel had not been implemented in the EU, then it may very well not have succeeded elsewhere so that Corporation or C6 [Mouse] could have bought in Asia without paying the overcharge."

24. Morgan J also decided that the points of law which arose from arguments that the losses were not sufficiently direct or proximate raised important questions of policy as to the operation of Article 101 and were not suitable for summary judgment: see his judgment at [52] and [53].

25. He also concluded that SECL and LGD were proper parties to be joined to the claims against SEL, SEL(UK) and Semiconductor for the reasons he set out at [73] of his judgment, and that there was at least an arguable case against SEL, SEL(UK) and Semiconductor. His reasoning in that regard was as follows:

> "63. The above findings show that the Claimants have at least an arguable case for the following propositions:
>
> (1) D1 and others were parties to the relevant cartel;
>
> (2) D4 was a wholly owned subsidiary of D1;
>
> (3) D4 was under the control of D1;
>
> (4) D1 directed D4 as to the prices to be charged by D4 on its sales of LCD monitors and D4 complied with that direction;
>
> (5) the prices charged by D4 were cartel prices.
>
> 64. The law is not wholly settled as to what a claimant needs to allege and prove to establish liability under Article 101 on the part of a subsidiary company such as D4. If D1 is a party to the relevant cartel and causes the cartel to be implemented by directing its wholly-owned subsidiary, D4, to

charge cartel prices, it seems fairly clear that D1 is liable for that implementation: see KME Yorkshire Ltd v Toshiba Carrier UK Ltd [2012] EWCA Civ 1190 at [38] and Sainsbury's Supermarkets Ltd v Mastercard Inc [2016] CAT 11 at [363(7)]. The Sainsbury's case contains a full review of the relevant authorities both European and domestic. What is perhaps not established is what is needed to establish liability on the part of D4. Are the facts stated above sufficient to render D4 liable for infringement of Article 101 or must it be shown in addition that D4 charged cartel prices with knowledge of the existence of the cartel? However, what is not in doubt is the proposition that D4 will be liable if it does charge cartel prices under the direction of its parent, a member of the cartel, and D4 knows of the existence of the cartel: see KME Yorkshire Ltd v Toshiba Carrier UK Ltd [2012] EWCA Civ 1190 at [20].

65. In the present case, the Claimants contend that, in law even if not in fact, D4 did know of the existence of the cartel at the time that it charged cartel prices. It is said that D4 had the requisite knowledge as a matter of law because the knowledge of D1 as to the existence of the cartel is to be attributed to D4 under the ordinary English law principles as to attribution of knowledge. In particular, it is said that D4 wholly delegated to D1 the decision which D4 would otherwise have to make for itself as to the prices it charged for the relevant goods. Accordingly, the knowledge of the person to whom the decision was delegated is to be attributed to the person who delegated the decision. I consider that as a matter of English law, that proposition is at least arguable.

66. It follows that the Claimants have an arguable case that D4 is liable for its participation in the infringement of Article 101. Therefore, it is not appropriate to strike out the claim against D4 nor to give D4 summary judgment dismissing the claim against it.

67. I take the same view in relation to the claims against D2 and D3. I have already drawn attention to the unclear position on the evidence as to whether D2 and D3 did sell products incorporating LCD panels. However, the case was argued before me on the assumption that D2 and D3 did sell such products. As to the relationship between D1 on the one hand and D2 and/or D3 on the other and the way in which D2 and D3 set their prices for such products, the evidence at present is not as clear as in the case of D1 and D4. However, on the material at present available, it is inherently likely that the position in relation to D2 and D3 was much the same as in relation to D4. Accordingly, as I have indicated, I will treat D2 and D3 in the same way as I have treated D4. The claims against D2 and D3 will not be struck out and I will not give D2 and D3 summary judgment dismissing the claims against them."

Grounds of appeal

26. In the CRT Appeal, the iiyama claimants, now appellants, contend that Mann J erred as a matter of law: (a) in finding that there is no arguable case for saying that the CRT

cartel was "implemented" in the EEA; and/or (b) in finding that there is an insufficiently arguable case of "immediacy" of effect of the CRT cartel within the EEA; and/or (c) because the CRT claim has a sufficiently arguable territorial connection with the EEA which he did not address in his judgment. In addition, by way of amendment to the grounds of appeal, it is said that (d) Mann J further erred as a matter of law in holding that the EU jurisdiction rules apply to private damages claims and in failing to find that the appellants only need to establish the infringement and the causal link between the infringement and the loss to sue any CRT cartel participant for the full amount of the loss on the basis of joint and several liability. It is said, therefore, that Mann J erred in striking out the CRT Action generally, and (in relation to Samsung SDI, Samsung SDI Malaysia and LG Inc) in his assessment of the materiality of non-disclosure when deciding to set aside service out of the jurisdiction.

27. The grounds of appeal in the LCD Appeals are similar but more complex. In the LCD Appeal numbered 4232, the iiyama claimants appeal against the second declaration contained in Morgan J's Order that in so far as they wished to contend that the implementation of the LCD cartel in Asia (as distinct from its implementation in the EU/EEA) had caused them loss, it was not recoverable pursuant to Article 101 and Article 53. In summary, their grounds of appeal are that: (a) the judge erred in law in holding that the rules of EU law which determine whether the Commission has jurisdiction to proceed to an investigation or infringement finding apply to civil damages proceedings; (b) if, contrary to the first ground, those rules do apply, the test of implementation and effect should be applied to the cartel as a whole and not to the particular sales chain in which the claimants participated; (c) the judge erred in holding that it would be necessary at trial to establish a causal link between the implementation of the cartel in the EU and the losses suffered, it being necessary only to establish the infringement and a causal link between it and the loss, and having done so the claimants can sue any cartel participant for the full amount of the loss on the basis of joint and several liability; (d) the judge erred in holding that the EU jurisdictional test of implementation and the requirement that the cartel produced immediate effects in the EU can only be satisfied by direct sales by the cartelists in Europe and not by indirect sales; and in relation to each of the grounds, (e) the judge erred in deciding that the points could be decided on a strike out basis without a trial, particularly in view of the fact-specific nature of concepts such as "implementation" and "immediacy", the novelty of the arguments being advanced, and the developing nature of the relevant jurisprudence.

28. In the LCD Appeal numbered 4246, the Samsung parties, SECL, SEL, SEL(UK) and Semiconductor, appeal against the first declaration at paragraph 1(i) of Morgan J's Order that the claim based upon the implementation of the LCD cartel in the EU/EEA to recover alleged loss suffered as a result of that implementation would not be struck out despite the defendants' arguments as to the scope of Article 101 /Article 53, remoteness and lack of proximity. The grounds of appeal are that the judge erred in law: (a) in holding that paragraph 75 of the draft amended particulars of claim contained an arguable claim in law for breach of Article 101, because it is necessary to prove that such a claim falls within the territorial scope of Article 101 by reason of the implementation of an anti-competitive agreement within the territory of the EU and the way in which the matter was put at paragraph 75 was insufficient, artificial, hypothetical, did not reveal a proximate cause within the EU, and artificially circumvents the "implementation" requirement; (b) in allowing the matter to proceed

on the basis that the claimants might be able to plead a sufficiently arguable cause of action, when he should either have allowed the defendants' applications or adjourned to enable the claimants to attempt to plead such a claim; (c) in holding that it is sufficient for a subsidiary to be liable for breach of Article 101 if it has wholly delegated to its parent company the decision it would otherwise have made about pricing; (d) for the purposes of applying section 11 of the Private International Law (Miscellaneous Provisions) Act 1995, the judge erred in failing to have regard to the actual circumstances in which the claimants allegedly suffered loss and instead focussed on hypothetical facts, and to the extent he concluded that damage suffered in the EU was the most significant element of the alleged tort, he was wrong to do so; and lastly, (e) the judge's conclusion on forum conveniens rested on a misconception that English law, or the law of another EU Member State under which Article 101 was similarly applied, would apply.

29. In the LCD Appeal numbered 4238, LGD appeals against paragraph 2 of Morgan J's Order dismissing its application save to the extent of paragraph 1(ii) of the order. The grounds are: that the claims under paragraph 75 of the draft amended particulars of claim are unsustainable as a matter of law because they are too remote, fall outside the scope of the defendants' duty and/or infringe the principle of comity. Those principles require a claimant for damages under Article 101 to show that the implementation of the cartel or its qualified effects in the EU were the proximate cause of the losses. If the implementation of the cartel in the claimants' supply chains did not amount to implementation or qualified effects within the EU, any "but for" causal connection between the implementation or qualified effects in the EU and the claimants' claims is not a sufficiently proximate connection; and the court should not or cannot take jurisdiction over a claim against LGD if the claims against SECL, SEL, SEL(UK) and Semiconductor are struck out or jurisdiction over them is declined.

The LCD and CRT Decisions in more detail

30. We gratefully adopt Morgan J's concise summary of the findings of the Commission in the LCD Decision which he set out at [20] of his judgment, as follows:

> "For present purposes it is sufficient to give a highly abbreviated summary of the recitals in the decision. In what follows, numbers in square brackets are the paragraph numbers of the recitals. The decision includes the following findings:
>
> (1) the suppliers of LCDs and their major customers are global actors; LCD panels are sold world-wide and prices are set on a world-wide basis: [48];
>
> (2) from October 2001 to January 2006, LCD panels were sold directly by the addressees of the decision to customers in the EEA (Direct EEA Sales): [49];
>
> (3) a number of panels were incorporated and transformed in the final IT and TV products for sale in the EEA by the addressees and/or their subsidiaries (Direct Sales through Transformed Products); this was particularly the case in relation to Samsung which owned and supplied

factories in the EEA which later distributed the final products mostly within the EEA: [50];

(4) in addition, LCD panels produced by the addressees could also be purchased by customers in the EEA as part of IT and TV final products sold in the EEA by third parties (Indirect Sales): [51];

(5) the parties to the infringement engaged in bilateral and multilateral meetings and other contacts in relation to LCD panels for IT and TV applications from 5 October 2001 until at least 1 February 2006: [70];

(6) anti-competitive practices included price-fixing at world-wide and EEA level, directly or indirectly, and were not restricted to specific geographic or shipment destinations: [72];

(7) the agreement between the cartelists did not target any specific geographic area; participants were aware of and sought effects on the European market: [94];

(8) the arrangements applied at world-wide level and therefore covered the entire EEA territory and were therefore liable to affect competition in the whole of the internal market and the territory covered by the EEA agreement: [228];

(9) the application by the EU of its competition rules is governed by the territoriality principle as a universally recognised principle of international law: [230];

(10) in determining the territorial scope of Article 101, the decision of the Court of Justice in Ahlström Osakeyhtiö v Commission, ("Woodpulp I") [1988] ECR I-5913 established that the decisive factor was whether the relevant arrangement or practice was implemented within the territory of the EU: [230];

(11) the test in Woodpulp I was supplemented by the decision of the General Court in Gencor Ltd v Commission ("Gencor") [1999] ECR II - 753, a decision on the first Merger Regulation on the control of concentrations between undertakings, which established that those rules applied if the conduct at issue had immediate, foreseeable and substantial effect in the EU: [231];

(12) the relevant agreements related to the world-wide sales of LCD panels, without geographical limitations, affecting prices globally; the agreement related to direct sales of LCD panels to undertakings seated in the EEA and Europe was also targeted by substantial indirect sales in which the parties had a very high joint market share: [235];

(13) applying the test in Woodpulp I, the agreements and practices were implemented in the EEA by direct sales into the EEA: [236];

(14) the participants in the cartel sought to implement their agreement and to have effect within the EEA, even if the negotiation of the price took place outside the EEA: [237];

(15) further, the test in Gencor was satisfied in that the Direct EEA Sales and the Direct EEA Sales through Transformed Products had foreseeable, immediate and substantial effect with the EEA: [238];

(16) the Commission had jurisdiction to apply both Article 101 of the TFEU and Article 53 of the Agreement on the EEA: [243];

(17) Article 101 of the TFEU and Article 53 of the Agreement on the EEA had been infringed: [273];

(18) the arrangements had an appreciable effect on trade between Member States and between contracting parties to the EEA Agreement: [321];

(19) D1 was fully aware and regularly involved in the everyday conduct of its subsidiaries: [351]; [the Claimants have obtained an unredacted version of this paragraph and the unredacted version refers to D1 setting the prices for its subsidiaries];

(20) the Samsung subsidiaries were dependent on their headquarters in relation to the prices charged and the Samsung group as a whole must be considered as a single economic undertaking for the purposes of Article 101: [352]; [again, the Claimants have obtained an unredacted version which provides more detail in this respect];

(21) it was appropriate to set the starting date for the arrangements as 5 October 2001: [368];

(22) the end date of the infringement should be taken (in respect of D1 and D5) as 1 February 2006: [369];

(23) given the secrecy with which the cartel arrangements were carried out, it was not possible to declare with absolute certainty that the infringement had ceased so that it was necessary to require the addressees to bring the infringement to an end, if they had not already done so: [373];

(24) in determining the basic amount of the fine to be imposed, the Commission started with the value of the undertaking's sales of the goods or services to which the infringement directly or indirectly related in the EEA: [379];

(25) the sales of LCD panels directly or indirectly concerned by the infringement in the EEA were Direct EEA Sales, Direct EEA Sales Through Transformed Products and Indirect Sales (in the latter case, the value of the LCD panels sold by one of the addressees of the decision to another undertaking outside the EEA, which would then incorporate the panels into final IT or TV products and sell them in the EEA): [380];

(26) for the purpose of establishing the value of sales in this case, the relevant EEA turnover consisted of those sales where the first real sale of the LCD panel, as such or in a final IT or TV product, was made into the EEA by one of the addressees of the decision; although the Indirect Sales referred to above could have been included, this was not to be done in this case as sufficient deterrence was achieved without including them: [381];

(27) the value of the LCD panels delivered into the EEA should be taken into account: [383];

(28) D1 was granted immunity from the fines otherwise appropriate: [459];

(29) D5's fine was reduced by 50%: [463]."

31. The content of the CRT Decision is considered in paragraphs [52] to [89] of Mann J's judgment. He noted a number of recitals and paragraphs to which he had been referred. In summary, the Decision includes the following findings (the numbers in square brackets are the paragraph numbers of the recitals in the CRT Decision itself):

(1) During the cartel period the participants sold CRTs produced in Germany, the United Kingdom, Austria, Spain, France, Poland, the Czech Republic, Hungary, as well as in Korea, Taiwan, China, Japan and elsewhere to customers established in numerous Member States and in the Contracting Parties to the EEA Agreement: [90];

(2) Wider activities were also engaged in by CDT producers which participated in meetings and other contacts with the aim of fixing prices worldwide, allocating market shares and customers and restricting output at least in the period from 24 October 1996 to 14 March 2006 during which period they also exchanged commercially sensitive information: [108]; and agreed on target prices, on what to tell customers about the reason for the price increase and, in addition, on which producer would communicate the price increase to which customer: [109];

(3) Price fixing arrangements also concerned customers within vertically integrated groups, such as Philips, and evidence suggests that the price increases in CDTs were, at times, passed on to the downstream market of production of computer monitor tubes; [109];

(4) arrangements applied at worldwide level or at least EEA wide level and were liable to affect competition in the whole of the common market and the territory covered by the EEA Agreement: [582];

(5) the Commission was the competent authority to apply Article 101/Article 53 because the cartel had an appreciable effect on trade between Member States: [585];

(6) the fact that some of the undertakings concerned, at the time of the infringement, were based outside the EU/EEA did not rule out the applicability of both Article 101 and Article 53 as for these provisions to

be applicable it suffices that the anti-competitive conduct in question affects trade within the Community and the EEA: [586];

(7) the decisive factor in the applicability of Article 101/Article 53 where participants in the cartel are situated outside the EU, is whether the agreement, decision or concerted practice is implemented within the EU: *Woodpulp*: [587];

(8) EU competition law is also applicable if the conduct in issue has immediate, foreseeable and substantial effect in the EU: [588];

(9) The CDT cartel related to sales without geographical limitations: [592];

(10) In line with the criteria set by the Court of Justice in the *Woodpulp* case, the Commission had jurisdiction to establish an infringement in this case where CRT suppliers established in third countries concerted on the prices and sales volumes (via market share, capacity and sales coordination) impacting their customers in the EEA and put that concertation into effect in their sales to those customers. Even when the cartel arrangements were formed outside the EEA, the cartel participants, through their sales into the EEA or measures impacting their sales to the EEA (specifically market sharing and capacity and sales limitation), implemented their agreements and concerted practices relating to the EEA: [593];

(11) the CPT cartel whilst being worldwide was implemented in Europe by direct sales by the cartelists of transformed products: [595];

(12) the cartel contacts had immediate, foreseeable and substantial effect in the EU in the sense of the *Gencor* case and those effects were also present in the case of integrated suppliers such as Philips: [597];

(13) for the purpose of establishing jurisdiction, all that matters is whether the cartel as a whole was implemented and had immediate, foreseeable and substantial effects in the EEA. It is irrelevant whether those effects were limited for a given party, in a given period of time, as compared to the world-wide effects of the cartel. In any event, the parties had significant Direct EEA Sales and Direct EEA Sales Through Transformed Products and the Commission had jurisdiction under Article 101 and Article 53: [598] and [599];

(14) the conduct of the cartelists was capable of having an appreciable effect upon trade between Member States and between Contracting Parties to the EEA Agreement and worldwide arrangements to fix prices, allocate regional market shares and customers, restrict the capacity of entities across the world must have resulted or were likely to result in the diversion of trade patterns from the course they would otherwise have followed in the EEA: [711] and [714];

(15) although a large part of the cartel arrangements took place at world-wide level, CDTs and CPTs were delivered and/or billed directly to customers in Europe, including various producers of downstream equipment, and to European entities connected to the undertakings that participated in the infringement. The existence of agreements and concerted practices in the present case resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed. The cartel arrangements were implemented in the EEA and their impact in the EEA unavoidably affected price levels, production and consumption within the EEA and thus had an effect on trade between Member States: [715];

(16) the cartel arrangements produced effects within the EEA not only through the direct sales of CDTs and CPTs but also indirectly through inter-state trade of incorporated CDTs and CPTs: [716];

(17) based on those circumstances, it could be established that the cartel arrangements could and did have a substantial impact on the patterns of trade between Member States and on the EEA market through direct EEA sales and direct EEA sales through transformed products in which CDTs and CPTs were incorporated: [717];

(18) insofar as the activities of the cartel related to sales in countries that are not Member States or Contracting Parties to the EEA Agreement, they lie outside the scope of the Decision: [719];

(19) the Commission may impose fines where undertakings have either intentionally or negligently infringed Article 101 and/or Article 53 and for each undertaking the fine shall not exceed 10% of its total turnover in the preceding business year: [1006];

(20) in fixing the amount of the fine, regard is had both to the gravity and to the duration of the infringement: [1007];

(21) the basic amount of the fine to be imposed is set by reference to the value of sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA: [1014];

(22) the sales directly or indirectly concerned by the infringement in the EEA were: (a) Direct EEA Sales (that is CDT or CPT sold directly to customers in the EEA by one of the addressees of the Decision); (b) Direct EEA Sales Through Transformed Products (that is CDT or CPT incorporated intra-group into a final computer monitor or colour television and subsequently sold to customers in the EEA by one of the addressees of the Decision); and (c) Indirect Sales (that is the value of the CDT or CPT sold by one of the addressees of the Decision to customers outside the EEA, which would then incorporate the CDT or CPT into final computer monitor or colour television products and sell them in the EEA): [1020];

(23) for the purpose of establishing the value of sales for (a) and (b) in [1020], the relevant EEA turnover consists of those sales where the first "real" sale of CDT or CPT as such or integrated in a final computer or colour television product was made into the EEA by one of the addressees of the Decision: [1021];

(24) although the value of all indirect sales referred to in (c) of [1020] could have been included in the relevant value of sales, it was not necessary to do so: [1021];

(25) "Recitals (1014) and (1020) explain the sales that the Commission may use under the 2006 Guidelines on fines, which could normally include indirect sales, which means both Direct EEA Sales Through Transformed Products and Indirect Sales (points (b) and (c) of Recital (1020)). On this issue, it has to be recalled that the Statement of Objections already pointed out that indirect sales could eventually be taken into account in the setting of fines. However, it has to be stressed that, as already stated in Recital (1021) above, the Commission does not, in this case, take into account Indirect Sales as defined in point (c) of Recital (1020). By focusing on the value of Direct EEA Sales as well as the value of Direct EEA Sales Through Transformed Products, the purpose is to consistently include in the 'value of sales' the cartelised products only when they are sold for the first time to a customer which is external to the cartelists' undertakings and is located in the EEA. . . When the first sale of the cartelised product is made to an independent customer in the EEA, a direct link with the EEA Territory is established.": [1026];

(26) " . . . Being participants in a world-wide cartel and colluding on volumes and prices in general, including production volumes, the suppliers' knowledge on the final shipment destination or centre of interest of the customer has no bearing on the geographical coverage of the anti-competitive objective. Similarly, implementation of the cartels necessarily produced immediate and foreseeable effects in the EEA as a whole irrespectively of whether the parties had any knowledge of the actual place of delivery or billing of the specific CDTs or CPTs. Moreover, the approach suggested by Samsung would result in a situation in which sales for which the place of delivery and the place of billing is not the same, would end up not being taken into account in any competition proceedings, thereby allowing general impunity for the cartelists concerned. It follows from Recital (1034) that by using the delivery criterion for the establishment of the value of sales a strong nexus to the EEA is assured.": [1037];

(27) Samsung SDI was fined 69,418,000 Eur for the infringement of Article 101 and Article 53 in respect of CDTs, Philips NV was fined 73,185,000 Eur and LG Inc was fined 116,536,000 Eur.

The relevant supply chains in more detail

32. There is no dispute about the way in which LCDs reached the EU. They were all made in Asia. The basic supply chain was set out in a helpful diagram, a copy of which is annexed to this judgment. In addition, Morgan J set out a simplified summary of the basic supply chain, which operated in relation to LCDs until 30 April 2006 and applied to at least 90% of the value of the claim, at [35] of his judgment, which we gratefully adopt:

> "The basic supply chain up to 30 April 2006, somewhat simplified, was as follows:
>
> (1) D1 and D5 [SECL and LGD] and other suppliers of LCDs sold LCDs to OEMs [original equipment manufacturers] based in Asia ("Step 1");
>
> (2) Step 1 took place outside the EU;
>
> (3) The OEMs sold monitors incorporating LCDs to Corporation ("Step 2");
>
> (4) Step 2 took place outside the EU;
>
> (5) Corporation sold monitors to C1 to C5 [the iiyama claimants other than Mouse] ("Step 3");
>
> (6) Step 3 took place (presumably) in the EU;
>
> (7) C1 to C5 [the iiyama claimants other than Mouse] sold monitors to dealers ("Step 4");
>
> (8) Step 4 took place inside the EU."

33. The first variation upon the basic model applied to only 39,136 monitors, perhaps some 2% of the whole. They were purchased by Corporation, by-passing the OEMs. This variation is also depicted in graphic form in the diagram. It was explained by Morgan J at [37] of his judgment in the following manner:

> "There was a variation ("the first variation") on the basic supply chain in operation up to 30 April 2006. This variation is said to have involved some 39,136 LCDs/monitors. This variation involved the elimination of the step of sales to OEMs. Instead, Corporation acquired LCDs and used them for the purpose of its own manufacture of monitors at its factory in Japan. As before, there is the point, which may later be relevant, that D1 [SECL] did not make direct supplies of LCDs to Corporation but made indirect supplies to its Japanese subsidiary which then supplied independent distributors and they then supplied Corporation. Corporation then sold the monitors, incorporating LCD panels, to C1 to C5 [the iiyama claimants but for Mouse]. As before there may have been more than one transaction between C1 to C5 [the iiyama claimants]."

34. The second variation, which applied after 1 May 2006 and related to the supply of 15% of monitors after that date, is also depicted on the diagram and is summarised at [39] of Morgan J's judgment in the following way:

> "There was also said to be a variation ("the second variation") to the basic supply chain on and after 1 May 2006. This variation accounted for 15% of the purchases from all OEMs during that period. This 15% was bought from OEMs in Europe. The Claimants say that C3 [iiyama Benelux BV] (not C6 [Mouse]) bought monitors incorporating LCDs from three OEMs operating in Europe. These were BenQ operating in the Czech Republic (which joined the EU in 2004), TPV operating in Poland and Novatech Technology operating in Germany. It seems to be alleged that C3 [iiyama Benelux BV] then sold such monitors to dealers in the EU. The Claimants do not plead that the LCDs for these monitors came from D1 or D5 [SECL or LGD] but assert that the prices for the LCDs were affected by the worldwide cartel. The parties made submissions as to where the LCDs were sold and whether the sales were inside or outside the EU. In particular, the Defendants submitted that BenQ, TPV and Novatech Technology were European subsidiaries of Asian parent companies and that I should infer that the LCDs were bought by the parent companies in Asia and then provided by the parents to their subsidiaries, rather than the LCDs being sold within the EU to the three European subsidiaries."

35. The basic supply chain which applied to the remainder of purchases of monitors after 1 May 2006 is described at [38] of Morgan J's judgment as follows:

> "The basic supply chain on and from 1 May 2006 (accounting for 85% of the purchases of monitors from all OEMs in that period), somewhat simplified (i.e. subject to similar comments to those made in paragraph 35 above), was as follows:
>
> (1) D1 and D5 [SECL and LGD] and other suppliers of LCDs sold LCDs to OEMs based in Asia ("Step 1");
>
> (2) Step 1 took place outside the EU;
>
> (3) The OEMs sold monitors incorporating LCDs to C6 [Mouse] ("Step 2");
>
> (4) Step 2 took place outside the EU;
>
> (5) C6 [Mouse] sold monitors to C1 to C5 [the iiyama claimants other than Mouse] ("Step 3");
>
> (6) Step 3 took place (presumably) in the EU;
>
> (7) C1 to C5 [the iiyama claimants other than Mouse] sold monitors to dealers ("Step 4");
>
> (8) Step 4 took place inside the EU."

36. The chains of supply for CRTs were similar to those which applied to LCDs. They too were all made in Asia. As Mann J pointed out at [42] of his judgment, no glass which ended up in iiyama monitors in the EEA was made in the EEA or sold by the cartelists in or into the EEA. He summarised the chains supply at [43] of his judgment as follows:

> "(i) CRT glass was made in Asia (or otherwise outside the EEA).
>
> (ii) It was supplied to CRT manufacturers outside the EEA (in Asia) who turned it into tubes (CRTs).
>
> (iii) The tubes were then sold to a monitor manufacturer or in some cases to dealers who sold on to monitor manufacturers. This step was generally in Asia (but in any event outside the EEA), save that in one chain the manufacturer was a UK subsidiary of a Japanese group (Mitsubishi).
>
> (iv) The completed monitors were then sold to iiyama Corporation, a Japanese company (and therefore in Asia).
>
> (v) iiyama Corporation then sold the monitors to one of the claimant companies. At this point the monitors entered the EEA.
>
> (iv) The claimants then sold the monitors within the EEA."

The relevant tests

37. Before turning to the complex submissions in the appeals, it is necessary to bear in mind that both Mann and Morgan JJ were considering strike out/reverse summary judgment applications together with questions of forum conveniens and whether the test for service out of the jurisdiction had been met. It is important, therefore, to keep the relevant tests in mind.

38. The court may strike out a statement of case if, amongst other things, it appears that it discloses no reasonable grounds for bringing the claim: CPR 3.4(2)(a). It may grant reverse summary judgment where it considers that there is no real prospect of the claimant succeeding on the claim or issue and there is no other compelling reason why the case should be disposed of at trial: CPR 24.2(a)(i) and (b). In order to defeat an application for summary judgment it is only necessary to show that there is a real as opposed to a fanciful prospect of success. Although it is necessary to have a case which is better than merely arguable, a party is not required to show that they will probably succeed at trial. A case may have a real prospect of success even if it is improbable. Furthermore, an application for summary judgment is not appropriate to resolve a complex question of law and fact.

39. The relevant considerations were helpfully set out in passages from <u>Easyair Ltd v Opal Telecom Ltd</u> [2009] EWHC 339 (Ch) per Lewison J (as he then was) and from the

judgment of Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 94 which were quoted by Mann J at [8] and [9] of his judgment, as follows:

> "8. . . . It was accepted that the most relevant authority was *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 Ch, where Lewison J said:
>
> > "15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. 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;
> >
> > 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 3;
> >
> > 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."

9. To that summary Mr Beard QC for the sixth and seventh defendants added the following from Lord Woolf in *Swain v Hillman* [2001] 1 All ER 91 at 94:

> "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 objective as 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 the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position.""

40. The principles upon which permission to serve out of the jurisdiction is granted are set out in CPR 6.36 and 6.37, read with paragraph 3.1 of Practice Direction 6B. The "gateways" set out in paragraph 3.1 relevantly include the following:

> "(3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
>
> . . ."

41. The principles were considered by the House of Lords in Spiliada Maritime Corp v Cansulex Ltd, sub nom The Spiliada [1987] AC 460. Although the wording of the present rules is different from those under consideration in that case, the principles remain the same. Further, the principles applicable to paragraph 3.1 of Practice Direction 6B were restated by the Privy Council in AK Investment CJSC v Kyrgyz Mobile Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804, at [71], [81] and [88], as summarised by the Court of Appeal in VTB Capital Plc v Nutritek International Corp [2012] EWCA Civ 808, [2012] 2 Lloyd's Rep 313, at [99]:

> "There was no dispute between the parties on the general principles to be applied when deciding whether permission should be granted to serve proceedings on a defendant who is out of the jurisdiction, under the terms of paragraph 3.1 of Practice Direction 6B of the CPR. The three basic principles were recently restated by Lord Collins of Mapesbury in giving the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7, 1 CLC 205 at paragraphs 71, 81 and 88. They can be summarised as follows: first, the claimant must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of Practice Direction 6B. "Good arguable case" in this context means that the claimant has a much better argument than the foreign defendant. Further, where a question of law arises in connection with a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction (e.g. whether a claim falls within one of the classes set out in paragraph 3.1 of Practice Direction 6B), then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law."

Our consideration of the issues

42. Having set out the necessary background, we will now consider the issues which we have to determine under the following headings:

(a) choice of law: are the claims governed by EU law?
(b) jurisdiction: the territorial scope of Article 101 and indirect effects;
(c) the application of the CRT claimants to amend their particulars of claim;
(d) causation and joint and several liability; and
(e) service out of the jurisdiction and related matters.

Choice of law: Are the claims governed by EU law?

43. By the end of the hearing, it had become common ground that logically the first question which needs to be considered is whether the claims are at least arguably

governed by EU law, or more accurately by the law of a Member State or territory within the EU which itself incorporates EU law. If it were clear that the claims are exclusively governed by a foreign law, by which in this context we mean a law other than EU law, the claims would fall at the first hurdle because they are framed as claims for damages for breach of Article 101 which is a provision of EU law.

44. The main submissions on this issue were addressed to us by Paul Stanley QC on behalf of the Samsung defendants in the LCD appeal. In his submissions in reply, Neil Calver QC for the LCD claimants pointed out that the issue had not been addressed by Morgan J in his judgment, except in relation to the separate question whether the English court should decline jurisdiction on the ground of forum non conveniens. Nor did it feature in the LCD defendants' grounds of appeal. Nevertheless, Mr Calver was content to deal with the issue, and in answer to questions from us he expressly accepted that it was necessary to go through the analysis required by section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"), and he did not contend that such an analysis was overridden, or otherwise made unnecessary, by the paramount effect of EU law in this jurisdiction.

45. In the light of this clarification, it is unnecessary for us to consider whether the question of the applicable law is at least arguably answered in favour of English law (or the law of another Member State) merely by virtue of the facts that the forum in which the claims have been brought is England, Article 101 forms part of English law, the provisions of Article 101 have direct effect, the majority of the claimants in each case are domiciled in England or another Member State, and it is the duty of the English courts to provide an effective remedy for breaches of Article 101. Nevertheless, these considerations form an important part of the context in which the issue under the 1995 Act has to be considered. We should add that it is common ground that the choice of applicable law is governed by the 1995 Act, and not by the Rome II Regulation, because the relevant facts occurred before the coming into force of the Rome II Regulation on 11 January 2009.

46. Part III of the 1995 Act deals with the choice of law in tort. Private actions for damages for infringements of Article 101 are characterised in English law as tort claims for breach of statutory duty: see <u>Garden Cottage Foods Limited v Milk Marketing Board</u> [1984] AC 130 at 141 per Lord Diplock, and <u>Cooper Tire & Rubber Company Europe Limited v Dow Deutschland Inc</u> [2010] EWCA Civ 864 at [17] per Longmore LJ. By virtue of section 9(4), the applicable law chosen in accordance with the rules in Part III "shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort…has occurred".

47. So far as material, sections 11 and 12 of the 1995 Act provide as follows:-

> "11. **Choice of applicable law: the general rule.**
>
> (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort…in question occur.

> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being-
>
> …
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
>
> …
>
> 12. **Choice of applicable law: displacement of general rule**.
>
> (1) If it appears, in all the circumstances, from a comparison of-
>
> (a) the significance of the factors which connect a tort… with the country whose law would be the applicable law under the general rule; and
>
> (b) the significance of any factors connecting the tort…with another country,
>
> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort…with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort…in question or to any of the circumstances or consequences of those events."

48. The principles which the court should follow in applying section 11(2)(c) of the 1995 Act were set out by this court in VTB Capital plc v Nutritek, loc.cit.,_at [148], as follows:-

> "(l) Section 11 of the 1995 Act sets out the general rule for ascertaining the applicable law of a tort. It adopts a geographical approach to that question. (2) Where the elements of the events constituting the tort or delict occur in different countries and the cause of action relates to something other than personal injury or damage to property, then section 11(2)(c) requires an analysis of all the elements of the events constituting the tort in question. (3) In carrying out that exercise, it is the English law constituents of the tort that matter. (4) The analysis requires examination of the 'intrinsic nature' of the elements of the events constituting the tort. It does not, at this stage, involve an examination of the nature or

> closeness of any tie between the element and the country where that element was involved or took place. This latter exercise is only relevant if section 12 is invoked. (5) Once the different elements of the events and the country in which they occurred have been identified, the court has to make a 'value judgment' regarding the 'significance' of each of those 'elements'. 'Significance' means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation. (6) Under section 11(2)(c), (ie in relation to causes of action other than in respect of personal injury or damage to property where the elements of the events constituting the tort occur in different countries) the applicable law of the tort in question will be that of the country where the significance of one element or several elements of events outweighs or outweigh the significance of any element or elements found in any other country."

49. The correctness of these principles was accepted when the case went to the Supreme Court: see [2013] UKSC 5, [2013] 2 AC 337, at [199] per Lord Clarke of Stone-cum-Ebony JSC. Lord Clarke added (ibid.) that "two further and important points emerged" from one of the four cases from which the principles were derived:-

> "The first was that, if, as here, the exercise is being carried out at an interlocutory stage as part of an overall exercise to determine whether the English court should have jurisdiction to determine the claim in tort in question, the court cannot finally determine the applicable law of the tort. The second was that it is "quintessentially" for the judge to make an assessment of the significance of the elements of the events constituting the tort for the purposes of section 11(2)(c) and that the Court of Appeal would not interfere with that assessment unless it was satisfied that the judge made such an error in his assessment as to require the Court of Appeal to make its own assessment."

50. Application of these principles, submits Mr Stanley, first requires the court to identify the events which constitute the tort, and where they occurred. In relation to the main way in which the LCD claimants put their case, he invites us to identify the relevant events, and their location, broadly as follows:-

(a) The formation of the anti-competitive cartel agreement, which occurred in Taiwan.

(b) The overcharge for the LCD panels incorporated into the goods which the claimants ultimately bought, which occurred when the panels were first sold by cartel members to the OEMs in Asia.

(c) The onward sale of the finished products by the OEMs to Corporation (or, after May 2006, to Mouse), which occurred principally in Japan.

(d) The further onward sale of the finished products, within the iiyama group, to the claimants, whose financial resources may reasonably be assumed to have been depleted where each of them was based and operated (and thus, for each of the first to fifth claimants, within the EU).

51. The intrinsic nature of the tort, says Mr Stanley, is that it consists of an anti-competitive agreement or concerted practice, giving rise to a restriction or distortion of competition, which in turn must have caused damage to the claimant. Although the tort is correctly to be identified as the alleged breach of Article 101, the fact that English law provides a remedy for it in the form of an action for breach of statutory duty means that actual damage caused to the claimant is an essential ingredient. Until damage has been suffered, the cause of action in English law remains incomplete.

52. The next question is to assess the significance of these elements in relation to the tort, by forming a value judgment as to which is the country where the significance of one or more elements outweighs the significance of any elements found in other countries.

53. In his oral submissions, Mr Stanley identified three possible candidates as the country in which the most significant elements of the tort took place. The first was the place where the agreement was made, namely Taiwan. The second was the place where the restriction operated, which Mr Stanley initially identified as Japan, although he later accepted that it might be elsewhere in Asia. The third was the place where the damage was suffered, which would be England or some other EU Member State. Mr Stanley invited us to discard Taiwan, because in the modern world the place where a cartel agreement happens to be made is of little significance, and it is far more important to concentrate on where the cartel was intended to be implemented. Mr Stanley acknowledged that the third possibility, the place where the damage was suffered, might at first sight appear more attractive, because damage is an essential element of the tort. He submitted, however, that it is not particularly useful as a connecting factor, particularly in cases which are dealing with economic loss, and especially where (as in the present case) the steps by which the finished goods moved from Japan to the claimants were all intra-group transactions which in themselves had no competition law significance.

54. By contrast, says Mr Stanley, the place where the relevant restriction on competition was first implemented lies at the very heart of the tort. That occurred in Asia, whether one identifies the relevant country as Japan, where the finished products were first put on the market at cartelised prices, or the Asian country in which the relevant LCD panels were first sold by a cartel member to an OEM. This was the place where the market was affected in a way that is relevant to the present case. The subsequent sales or transfers within the iiyama group have nothing to do with competition law, and merely reflect the manner in which the group chooses to organise its activities.

55. In answer to these submissions, Mr Calver emphasised the numerous factors which connect the present claims with the EU. Apart from those to which we have already drawn attention at [45] above, he stressed that this was a worldwide cartel which was always intended to have effects on the European market, either because it was specifically targeted, or because such effects were anyway an inevitable consequence of a worldwide conspiracy. He relied on the findings made by the Commission in the two Decisions, and on the central point that the damage actually suffered by the claimants (subject to any passing-on defence) was within the EU. He further submitted that the chain of transactions within the iiyama group whereby the finished products

reached the claimants could not be disregarded, because the internal sales or transfers had full legal effect between the parties to them, and each claimant could only recover any losses which it had individually suffered in its separate corporate capacity.

56. Mr Calver also placed some reliance on paragraph [77] of Morgan J's judgment in the LCD Action, where, albeit in the context of the issue of forum non conveniens, he said that he had been addressed "in detail" on sections 11 and 12 of the 1995 Act, and continued:-

> "I would apply those provisions to this case in the following way. The tort of infringement of Article 101 occurred in the EU, when the worldwide cartel was implemented in the EU. The damage resulting from that tort, which is a necessary part of the cause of action arising under Article 101, was suffered by the Claimants in their respective countries of incorporation. In relation to C1, a company incorporated in England and Wales, its cause of action will be based on Article 101 having direct effect in England and Wales and the legal principles as to causation of loss will be English law principles (although overlaid by EU law as to the principles of effectiveness and equivalence). I provisionally conclude, not having been addressed on this point, in relation to the other Claimants, that the legal principles as to causation of loss will be the law of their countries of incorporation."

To the extent that Morgan J here reached a conclusion on the applicable law, Mr Calver submitted that we should not depart from it unless satisfied that it was clearly wrong.

57. There is undoubted force in some of Mr Stanley's submissions, but we have reached the firm conclusion that it would be wrong to determine this issue adversely to the claimants on an application for summary disposal of their claims, whether by strike-out or reverse summary judgment. Except in a very clear case, the court cannot safely make the value judgment required by section 11(2)(c) of the 1995 Act without a full examination of all the facts at trial. The same applies to the further question whether English law, or the law of any other EU Member State, assuming it to be prima facie the applicable law under section 11, is displaced by section 12. Assessment of the various elements which constitute the intrinsic nature of the private law claims for infringement of Article 101 brought by these particular claimants is not in our view a question suitable for summary determination, unless the court considers it incapable of argument with any real prospect of success that the applicable law will be found at trial to be EU law.

58. As matters now stand, the claimants have been able to plead a case largely based on the findings made in the two Commission Decisions, but those Decisions are available only in a redacted and incomplete form, and the claimants have not yet had access to most of the confidential documents which underlie the Decisions, let alone to the extensive disclosure which will ensue (subject to appropriate case management) if the claims are allowed to proceed. Without the further information and wider perspective which full disclosure and trial of the actions will bring, it seems to us quite impossible to say at this early stage that the applicable law under section 11 of the 1995 Act must

be the law of Japan or some other Asian country. Such a conclusion could only safely be reached after the full facts have been found, and the planned implementation of the cartel has been assessed as a whole in the light of what actually happened.

59. We think it is also important to remember that, although for domestic law purposes the claims are treated as ones for breach of statutory duty, the tort in question is infringement of Article 101, which is a creature of EU law and has direct effect throughout the EU. Against that background, the fact that the pleaded damage has all occurred within the EU and the internal market may well give that factor more weight in the value judgment which has to be performed than it would have in relation to other economic torts with no EU law dimension. Indeed, although we do not say it could never happen, we have some difficulty in imagining a case where a private law claim for damages for breach of Article 101, brought by a claimant domiciled within the EU in respect of loss allegedly suffered in the EU as a consequence of a worldwide cartel, could properly be prevented from going forward to trial on the basis that the applicable law of the claim was clearly a foreign law.

60. Although we have dealt with the matter at rather greater length than Morgan J did, and it is not clear to us that the issue of applicable law was argued before him separately from the question of forum non conveniens, we think that our conclusions are in line with those which he briefly expressed in paragraph [77] of his judgment. We consider that the judge's instincts were sound, and for the fuller reasons which we have given we are satisfied that the claims will at least arguably fall to be determined at trial on the basis that the applicable law is either English law or the law of some other Member State, thereby incorporating EU law.

Jurisdiction: the territorial scope of Article 101 and indirect effects

61. We now turn to what we regard as the central issue in the case. On the assumption that the claims are governed by EU law, do they lie outside the territorial scope of Article 101? As before, we emphasise that it is only necessary for the claimants to show that they have an arguable case on the issue which is fit to go to trial. The remedy of summary judgment, as Lord Hope of Craighead said in Three Rivers District Council v The Governor and Company of the Bank of England (No 3) [2003] 2 AC 1 at 261, is "to deal with cases that are not fit for trial at all."

62. Mann J concluded that the CRT claimants could not satisfy this test, so he made declarations (as we have seen) that (a) the court had no jurisdiction to try the CRT claims against the relevant defendants, and (b) they were entitled to summary judgment or to have the claims against them struck out. In the LCD case, Morgan J followed the reasoning of Mann J in relation to the LCD claims as originally pleaded, but granted permission to the claimants to amend their claims so as to introduce the two additional ways of putting their case which relied on alleged implementation of the cartel within the EU: see [22] above. On the basis that these alternative pleas were properly arguable, Morgan J declared (in paragraph 1(i) of his order) that:-

> "At this stage, the Claimants' claim to recover an alleged loss caused by the implementation of the LCD cartel in the EU/EEA will not be struck out."

63. The main argument for the claimants on this part of the case was addressed to us by Mr Calver on behalf of the LCD claimants. Aidan Robertson QC for the CRT claimants adopted Mr Calver's submissions. He also drew our attention to the many factual similarities between the two cases, and to the broadly equivalent approach and analysis adopted by the Commission in the two Decisions. The main argument for the defendants was addressed to us by Daniel Beard QC. His submissions were adopted on behalf of the LCD defendants by Mr Stanley and Mr Piccinin.

64. We have the benefit, denied to the courts below, of the recent judgment of the Grand Chamber of the CJEU in the Intel case delivered on 6 September 2017 (Case C-413/14P, Intel Corporation Inc v European Commission, [2017] 5 CMLR 18). The claimants submit that this decision provides strong support for their case on jurisdiction and the territorial scope of Article 101, while the defendants contend that for present purposes it takes matters no further, because the one new point clearly established by the case (namely the availability of an alternative test for jurisdiction based on the doctrine of "qualified effects") had already been foreshadowed in Gencor and in the opinions of several Advocates General, and had been assumed to be correct for the purposes of both hearings below. We will deal with these submissions in due course, but first we need to introduce the issue and trace the evolution of the European jurisprudence before Intel. It will also be necessary for us to say a little about the US authorities, on which we were addressed by Mr Robertson for the claimants and Daniel Jowell QC and Mr Piccinin for the defendants.

65. The starting point has to be the wording of Article 101 itself, which relevantly provides as follows:-

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:-
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> …"

The focus of the Article is therefore on the internal market, and the effect on trade between Member States of anti-competitive agreements or concerted practices "which have as their object or effect the prevention, restriction or distortion of competition within the internal market."

66. In a similar way, Article 102 states:-

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

67. By way of introduction to the territorial issue which arises, we would refer to paragraph 1.114 of Bellamy & Child, European Union Law of Competition, 7th edition, where the authors say this:-

> "The question of substantive, or subject-matter, jurisdiction under EU competition law arises not only as regards Article 101 but also in connection with the application of Article 102 and the Merger Regulation. When a non–EU undertaking engages in conduct directly within the EU, such conduct is clearly subject to EU law on the basis of territorial jurisdiction. It is the application of EU competition law to activity carried on outside the EU (and the European Economic Area), especially by non-EU undertakings, that gives rise to a potential problem. How far a State may properly apply its laws to conduct carried out beyond its territory is a controversial issue under public international law. On the one hand, the application by one State, or a group of States, of their law to conduct on the territory of another State can be regarded as an infringement of the latter State's sovereignty. On the other hand, in an increasingly interdependent world, competition law that is based primarily on economic consequences becomes stunted and artificial if it cannot reach any conduct engaged in beyond the legislating State's territorial boundaries."

68. As the authors of Bellamy & Child go on to state at paragraph 1.115, the application of Article 101 to agreements or concerted practices involving undertakings located outside the EU was the principal issue arising in the case generally referred to as Woodpulp I (Joined Cases C-89/85 and others, Ahlström v Commission [1988] ECR 5193, [1988] 4 CMLR 901). The issue in this seminal case, shortly stated, was whether the Commission had jurisdiction to act in relation to a cartel formed outside the EU

which sold wood pulp directly to customers in the EU at prices affected by the cartel conduct. The Commission held that it had such jurisdiction, but this was challenged by the addressees of the Commission's decision on the basis that it involved an exorbitant assertion of jurisdiction contrary to the principles of public international law. In particular it was argued that the Commission had misconstrued the territorial scope of Article 85 of the EEC Treaty, the then equivalent of Article 101.

69. This argument was rejected by the ECJ, for the reasons which it gave under the heading "Incorrect assessment of the territorial scope of Article 85 of the Treaty and incompatibility of the decision with public international law":-

> "12. It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the Common Market.
>
> 13. It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually co-ordinated, they are taking part in concertation which has the object and effect of restricting competition within the Common Market within the meaning of Article 85 of the Treaty.
>
> 14. Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article 85.
>
> 15. The applicants have submitted that the decision is incompatible with public international law on the grounds that the application of the competition rules in this case was founded exclusively on the economic repercussions within the Common Market of conduct restricting competition which was adopted outside the Community.
>
> 16. It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the Common Market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

> 17. The producers in this case implemented their pricing agreement within the Common Market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.
>
> 18. Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law. "

70. Woodpulp I is therefore authority for at least three key propositions. First, the territorial scope of Article 101 is not confined to anti-competitive agreements made within the EU. Secondly, wherever such an agreement is made, it falls within the scope of Article 101 if it is implemented in the EU. Thirdly, it accords with the territorial principles of public international law to apply the competition rules of EU law to the implementation within the EU of anti-competitive agreements, wherever they are made. The implementation within the EU took the form of direct sales by members of the cartel to customers in the EU, at inflated prices. That aspect of the matter, however, was not considered by the Court, because the issue before it related to the territorial scope of the Commission's decision, and not (as in the present case) to a private law action for damages. Further, since the implementation consisted of direct sales to customers within the EU, it was unnecessary for the Court to consider what the position would have been if the wood pulp had moved through a longer supply chain, including in particular an initial sale at cartelised prices to an innocent purchaser outside the EU. It may at least be said, however, that there is nothing in the reasoning of the Court which precludes the possibility of Article 101 applying to indirect, as well as direct, effects on competition within the internal market caused by a global cartel. That issue was simply not before the Court, or the Commission which in its decision had concluded that the effect of the cartel on prices and the resale of pulp within the EEC was "not only substantial but intended, and was the primary and direct result of the [*concerted*] agreements and practices": see paragraph 3 of the judgment.

71. In his opinion in Woodpulp I, Advocate General Darmon referred to the "object or effect" wording in what is now Article 101, and said:-

> "In the light of that provision, the vast majority of academic writers take the view that it is neither the nationality nor the geographical location of the undertaking but the location of the anti-competitive effect which constitutes the criterion for the application of Community competition law."

([1988] 4 CMLR 901 at 918). He also referred, at 919, to a suggestion made by Advocate General Mayras in the so-called "Dyestuffs" cases (including Case 48/69, Imperial Chemical Industries v Commission [1972] ECR 619), that the Court should adopt the criterion of "qualified effects" in order to establish the extra-territorial jurisdiction of the EU. As Advocate General Darmon noted, the Court had not adopted that suggestion, but had preferred to base such jurisdiction in the Dyestuffs cases on the unity of the undertaking, adding:

> "But that certainly does not mean that the location of the effects would not constitute a sufficient basis for jurisdiction."

72. Although it was not included in the ten volumes of authorities placed before us, Mr Beard showed us the opinion of Advocate General Mayras in the Imperial Chemical Industries case, where under the heading "The conditions for the application of the criterion of territorial effect" he said:-

> "(a) I think that the first condition lies in the fact that the agreement or the concerted practice must create a *direct and immediate* restriction on competition on the national market or, as here, on the Community market. In other words, an agreement only having effects at one stage removed by way of economic mechanisms themselves taking place abroad could not justify jurisdiction over participating undertakings whose registered offices are also situated abroad.
>
> I would suggest that the American Restatement of Foreign Relations Law should be interpreted in this way insofar as it states that jurisdiction over conduct occurring abroad may be admitted when the effect occurs as a *direct result of that conduct*.
>
> (b) Secondly, the effect of the conduct must be *reasonably foreseeable*, although there is no need to show that the effect was intended.
>
> (c) Thirdly and lastly, the effect produced on the territory must be *substantial*."

We find here what appears to be the first description in the EU jurisprudence of the doctrine of "qualified effects", that is to say the principle that extra-territorial jurisdiction may properly be asserted where it is reasonably foreseeable that a foreign cartel will have effects in the EU which are both immediate and substantial. It may also be necessary for those effects to be, at least in some sense, direct.

73. Although the qualified effects test was canvassed by the Advocates General in both Imperial Chemical Industries and Woodpulp I, it formed no part of the reasoning of the Court in either case. The next stage in the evolution of the doctrine came with the decision of the Court of First Instance ("the CFI") in Gencor Ltd v E.C. Commission (Case T-102/96), [1999] 4 CMLR 971 ("Gencor"). The issue here was whether a proposed merger between various companies in the Gencor and Lonrho groups, all of which were based in South Africa apart from the UK holding company of the Lonrho group, Lonrho Plc, would be contrary to Article 2(3) of the Merger Regulation 4064/89 on the basis that it "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it". Having investigated the matter, the Commission concluded that the merger would create an anti-competitive duopoly in platinum and rhodium, and declared that the merger would infringe Article 2(3).

74. This decision was then challenged in the CFI by Gencor. One of Gencor's arguments was that the decision fell outside the Commission's territorial jurisdiction, in accordance with the general principles of public international law which the EU must observe in the exercise of its powers: see the judgment in Woodpulp I at paragraph 18. In its judgment, the CFI dealt first with the territorial scope of the Regulation, at paragraphs 78 to 88. At paragraph 87, the Court rejected Gencor's reliance on Woodpulp I, pointing out that the criterion of implementation of an agreement was satisfied by the mere fact of sales within the EU, "irrespective of the location of the sources of supply and the production plant". It was "not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter."

75. The CFI then considered the compatibility of the decision with public international law, at paragraphs 89 to 111. For present purposes, the most important paragraphs are 90 to 92, where the CFI stated:-

> "90. Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.
>
> 91. In that regard, the concentration would, according to the contested Decision, have led to the creation of a dominant duopoly on the part of Amplats and Implats/LPD in the platinum and rhodium markets as a result of which effective competition would have been significantly impeded in the Common Market within the meaning of Article 2(3) of the Regulation.
>
> 92. It is therefore necessary to verify the three criteria of immediate, substantial and foreseeable effect are satisfied in this case."

It can thus be seen that paragraph 90 contains a clear and unqualified statement of the qualified effects principle, albeit without any discussion of its pedigree.

76. The CFI then went on to consider the three criteria in turn. In relation to the criterion of immediate effect, they said at paragraph 94:-

> "It is true that the concentration would not necessarily lead to abuses immediately, since that depends on decisions which the parties to the duopoly may or may not take in the future. However, the concentration would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned."

And in relation to the criterion of foreseeability, they said at paragraph 100:-

> "As for the criterion of foreseeable effect, it follows from all the foregoing that it was in fact foreseeable that the effect of

> creating a dominant duopoly position in a world market would also be to impede competition significantly in the Community, an integral part of that market."

77. On the basis of the decision of the CFI in Gencor, which was not the subject of any further appeal to the Court of Justice, Mann J in the CRT Action was prepared to proceed on the assumption that the qualified effects test was available as a potential alternative to the implementation test laid down in Woodpulp I as a justification for imposing liability for breaches of Article 101 on non-EU entities: see his judgment at [127].

78. The next case which needs to be considered is the claim brought by InnoLux Corp against the European Commission seeking annulment of its decision in relation to the same LCD cartel with which we are concerned. InnoLux (under a previous name) was one of the six addressees of the LCD Decision. One of the grounds of challenge raised by InnoLux before the General Court (as the CFI had by then become) related to alleged discrimination compared with Samsung as to the sales which were taken into account by the Commission in fixing the fines levied on the two undertakings. The details of this particular challenge need not concern us, but Mr Beard fastens on a comment made by the General Court in paragraph 87 of its judgment, where it said:

> "In the present case, however, the Commission was entitled to define the category of "direct EEA sales through transformed products" by restricting that category solely to sales of cartelised LCD panels which were incorporated in finished products sold in the EEA. Indeed, if that first sale of the cartelised products to a third party had not taken place in the EEA, the link between the internal market and the infringement would have been too weak."

The implication of this comment, submits Mr Beard, is that if the first sale of a cartelised product to a third party takes place outside the EEA, the link between the internal market and the infringement of Article 101 would be too weak to satisfy the qualified effects test. We observe, however, that the comment was made in the context of an argument about discrimination in the fixing of fines, not an argument about the territorial scope of Article 101.

79. The case then went on appeal to the Court of Justice. Advocate General Wathelet discussed the territorial scope of EU law in paragraphs 35 and following of his opinion, delivered on 30 April 2015. Mr Beard drew our attention to the relatively restrictive approach which the Advocate General adopted in this passage, where he contrasted the geographical limitations inherent in the wording of Articles 101 and 102 with the wording of the general prohibition, without any express territorial limit, in section 1 of the Sherman Act 1890 in the USA. Advocate General Wathelet concluded his discussion by saying, at paragraph 42:-

> "The foregoing demonstrates that, in the present case too, a broad interpretation of the territorial scope of EU competition law would entail the risk of conflicts of jurisdiction with foreign competition authorities and of double penalties for undertakings."

He also said, at paragraph 44:-

> "It seems to me that, unless further evidence can be furnished that the cartel creates qualified effects in the EEA, the Commission goes too far if it fines cartels relating to products manufactured and sold outside the EEA for the sole reason that those products are subsequently "transformed" or incorporated into other products which (either wholly or in part) arrive in the EEA."

80. The judgment of the Court in InnoLux was delivered on 9 July 2015. The judgment casts no further light on the problems with which we are now concerned, except perhaps by reinforcing the point that the criteria which the Commission may properly take into account when imposing a fine for breach of Article 101 are not necessarily the same as those which govern the issue of territoriality. So far as InnoLux itself was concerned, there could be no dispute but that the Commission had jurisdiction to apply Article 101 to its involvement in the cartel, because InnoLux had itself made direct sales of relevant goods to third parties within the EU.

81. We now come to the case of Intel. The case first came before the General Court in 2014, on a challenge by Intel to a decision of the Commission which found that Intel had committed a single and continuous breach of Article 82 EC (now Article 102) by implementing a strategy aimed at foreclosing a competitor, AMD, from the worldwide market for certain CPU (central processing unit) microprocessors. Intel is a global company based in the USA, and it operates in the market sector for CPUs. The Commission found that Intel held a dominant position in that market, which it had abused by two types of conduct: first, the grant of rebates to certain of its trading partners which were made conditional on their purchasing all CPUs from Intel; and secondly, by making payments to certain competitors to induce them to postpone or cancel the launch of competing products based on CPUs manufactured by AMD. The Commission imposed a fine on Intel of a little over €1.06 billion.

82. In the General Court's judgment, the question of the Commission's jurisdiction was dealt with at paragraphs 221 to 321. As the Court observed, the challenge on jurisdiction was limited to two of the companies to which inducement payments had been made, namely Acer (in Taiwan) and Lenovo (in China). The argument was that the manufacturing facilities of Acer and Lenovo were outside the EU, they did not purchase their CPUs in the EEA from either Intel or AMD, and the conduct at issue concerned sales of CPUs to customers in Asia. The fact that a certain number of Acer and Lenovo computers might subsequently have been sold within the EU was said to be irrelevant to the question of the implementation of the infringing conduct complained of.

83. In its preliminary observations directed to this issue, the General Court first observed that two approaches had been followed in the case law of the Court of Justice and the General Court in order to establish that the Commission had jurisdiction under the rules of public international law. The first approach was based on the principle of territoriality, as exemplified by Woodpulp I. The second approach was based on the

"qualified effects" of the offending practices in the EU, and had been followed by the CFI in Gencor. The General Court clearly regarded these as alternative approaches, either of which would suffice to ground jurisdiction.

84. In considering the doctrine of qualified effects, the General Court observed at paragraph 251 that the Commission was "not obliged to establish the existence of actual effects in order to justify its jurisdiction under public international law." It was the Commission's duty to ensure that competition within the common market was protected against threats to its effective functioning. Accordingly, the Commission could intervene in cases where the threat had not yet materialised: see paragraph 255. Furthermore, the conduct of Intel in relation to Acer and Lenovo had been intended to produce effects within the common market, by ensuring that certain AMD-based computer models would not be available anywhere in the world, including in the EU. At paragraph 257, the General Court reiterated that: "the effects of conduct on competition do not necessarily have to be actual in order to constitute a sufficiently close link with the European Union capable of founding the Commission's jurisdiction."

85. The General Court went on to examine whether the three criteria of substantial, immediate and foreseeable effect were satisfied in relation to Acer and Lenovo. With regard to the issue of "substantial effect", the Court emphasised the need to view the infringement as a whole when assessing its consequences for the competition structure of the common market: see paragraphs 267 to 272. In relation to "immediate effect", the Court then said:-

> "277. Intel's conduct was intended to produce an immediate effect in the EEA and was capable of doing so.
>
> 278. That conduct was intended to induce Acer and was capable of inducing it to delay the launch of an AMD-based notebook worldwide, including in the EEA. The delay in the launch means that, during a certain period, a certain AMD-based computer model is not available, including in the EEA. It is a direct effect and not merely a knock-on effect.
>
> …
>
> 280. Moreover, the single and continuous infringement committed by the applicant, viewed as a whole, was capable of having the immediate effect of weakening the applicant's sole significant competitor by foreclosing it from the most important sales channels and therefore of changing the effective competition structure in the common market."

86. The General Court therefore dismissed Intel's action for annulment of the Commission's decision. Intel then appealed to the Court of Justice. Advocate General Wahl delivered his opinion on 20 October 2016, some five months after Mann J had handed down his judgment in the CRT Action on 23 May 2016. The Advocate

General discussed the issue of jurisdiction at some length, in paragraphs 278 to 327 of his opinion. He was critical of various aspects of the General Court's approach and reasoning on this issue. We will not refer in any detail to his criticisms, however, because they were not followed by the Court of Justice, but will merely record what he said at paragraph 303:-

> "The wording of Articles 101 and 102 TFEU does not justify the application of EU rules by the Commission with respect to conduct that has no "qualified" effect in the territory of the European Union. To hold the contrary would also be problematic under the rules of public international law. An over-reach of EU competition rules would risk encroaching upon the sovereign interests of other States and be legally and practically difficult to enforce. It would also considerably increase the overlaps in the jurisdictions of different States or polities and thereby create great uncertainty for undertakings and increased risks of conflicting rules (or judgments) applying to the same conduct. Lastly, but no less importantly, it may raise questions under the principle of good administration: what would be the interest in enforcing EU rules with respect to conduct that has no significant effect in the European Union? Would that be a valid and effective use of the European Union's limited resources?"

87. The Court of Justice, as we have already said, delivered its judgment on 6 September 2017, some three months before the present hearing.

88. The Court dealt with the issue of jurisdiction at paragraphs 32 to 65 of its judgment, concluding that the fifth ground of appeal (which alleged that the General Court had misapplied the tests relating to the Commission's jurisdiction in relation to the agreements concluded between Intel and Lenovo in 2006 and 2007) should be "rejected in its entirety" (paragraph 65). The arguments on this issue, presented to the Court (as it happens) by Mr Beard for Intel, included the following:-

a) the conduct in question was not implemented in the EU, and Intel did not sell products to Lenovo in the EU;

b) the General Court erred in law by accepting the qualified effects test in order to determine the Commission's jurisdiction, because the implementation test "is the only test allowed by the case-law";

c) even if the qualified effects test were applicable, it could not be satisfied on the facts because the link between the internal market and the infringement was too weak (see the judgment of the CFI in <u>InnoLux</u> at paragraph 87), and it was not foreseeable that the agreements with Lenovo regarding CPUs for delivery in China "would have an immediate and substantial effect within the EEA";

d) even if indirect effects could be sufficient to establish jurisdiction, the 2006 and 2007 agreements with Lenovo could not have had a substantial effect within the EEA; and

e) the Commission's approach "would give rise to jurisdictional conflict with other competition authorities and create a real risk of double jeopardy."

(See paragraphs 33 to 37 of the judgment).

89. The Court rejected all of these arguments, beginning with the question whether the qualified effects test could serve as a basis for the Commission's jurisdiction. After describing the purpose of Articles 101 and 102, and briefly referring to two cases (including <u>Woodpulp I</u>) which establish that anti-competitive agreements made in a third country may fall within the scope of Article 101 if the agreement is operative on the territory of the internal market, the Court stated its conclusion:-

> "45. The qualified effects test pursues the same objective, namely preventing conduct which, while not adopted within the EU, has anti-competitive effects liable to have an impact on the EU market.
>
> 46. The argument put forward by Intel, supported by ACT, that the qualified effects test cannot serve as a basis for the Commission's jurisdiction is therefore incorrect.
>
> 47. Accordingly, that argument must be rejected as unfounded."

The Grand Chamber has accordingly now made it clear, beyond argument, that the qualified effects test provides an alternative basis for grounding the territorial jurisdiction of the Commission.

90. The Court then proceeded to deal with Intel's remaining arguments, in a passage which we need to cite in full:-

> "48. In the second place, it is necessary to examine the argument put forward in the alternative by Intel, according to which, even if the qualified effects test were applicable in the present case, the General Court wrongly considered that the agreements concluded with Lenovo in 2006 and 2007 would have foreseeable, immediate and substantial effects in the EEA. Intel emphasises, in that respect, the allegedly limited number of products affected.
>
> 49. It must be noted, first of all, that, as the General Court held, in paragraphs 233 and 258 of the judgment under appeal, the qualified effects test allows the application of EU competition law to be justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.

50. It must be pointed out, as the General Court did in paragraphs 268 and 280 of the judgment under appeal, that it is necessary to examine the conduct of the undertaking or undertakings in question, viewed as a whole, in order to determine whether the Commission has the necessary jurisdiction to apply, in each case, EU competition law.

51. Next, in so far as Intel criticises the General Court for considering that it was foreseeable that the agreements concluded with Lenovo concerning CPUs for delivery in China would have an immediate effect in the EEA, it must be pointed out, first, that the General Court rightly held, in paragraphs 251, 252 and 257 of the judgment under appeal, that it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied.

52. Secondly, since in paragraph 255 of the judgment under appeal, the General Court found, in essence, that Intel's conduct vis-à-vis Lenovo formed part of an overall strategy intended to ensure that no Lenovo notebook equipped with an AMD CPU would be available on the market, including in the EEA, the General Court did not err in considering, in paragraph 277 of the judgment under appeal, that Intel's conduct was capable of producing an immediate effect in the EEA.

53. That argument must therefore be rejected as unfounded.

54. Lastly, Intel submits that the General Court wrongly considered that the agreements concluded with Lenovo concerning CPUs for delivery in China could have a substantial effect on the EEA market even though the effects of those agreements were negligible.

55. It suffices, in that respect, to note that the General Court held that Intel's conduct vis-à-vis Lenovo formed part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels, which, moreover, Intel does not dispute in its appeal.

56. Accordingly, in view of the considerations set out in paragraph 50 above, the General Court did not err in law in holding that, faced with a strategy such as that adopted by Intel, it was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to assess the substantial nature of its effects on the market of the EU and of the EEA.

57. As the Commission emphasises, to do otherwise would lead to an artificial fragmentation of comprehensive anti-competitive conduct, capable of affecting the market structure

> within the EEA, into a collection of separate forms of conduct which might escape the European Union's jurisdiction.
>
> 58. Consequently, the argument mentioned in paragraph 54 of the present judgment must be rejected as unfounded."

91. In considering the relevance and significance of the Court's judgment in Intel, we begin by acknowledging that there are some obvious points of distinction between it and the present cases. Intel concerns the territorial jurisdiction of the Commission, rather than the territorial scope of Article 101 or Article 102; and it was a case about Article 102, not Article 101. Furthermore, it concerned anti-competitive conduct which was intended to have a direct effect in the EU, by excluding a competitor from the relevant market. The first two of these distinctions, however, do not seem to us significant. We cannot accept that the territorial scope of the Commission's jurisdiction differs in principle from the territorial scope of the two Articles, except possibly in relation to foreign transactions which the Commission may legitimately take into account when levying fines. Nor are we aware of any authority which draws a distinction for jurisdictional purposes between the two Articles, and we can see no basis for such a distinction since they both contain similar references to the internal market and trade between Member States.

92. As to the third point, the different factual context is self-evident, but more important, in our view, is the express acceptance by the Court (in paragraph 52 of its judgment) that Intel's conduct in making the anti-competitive arrangements outside the EU "was capable of producing an immediate effect" in the EU, and its endorsement of paragraph 277 of the General Court's judgment. This endorsement must extend to the explanation given by the General Court of why "Intel's conduct was intended to produce an immediate effect in the EEA and was capable of doing so". That explanation, which we have quoted at [85] above, was given in relation to Acer's conduct, not Lenovo's. The fact that the Court endorsed it in relation to Lenovo's conduct shows that the explanation was considered to be correct in principle, and capable of application to different factual scenarios. The points of particular significance which we extract from the General Court's explanation are:

a) the recognition that conduct intended to delay the launch of a competing product worldwide could constitute a direct effect in the EU, "and not merely a knock-on effect";

b) the absence of sales by Intel of CPUs to Acer in the EU did not mean that the effect in the EU of Intel's conduct could only have been indirect; and

c) viewed as a whole, the infringement was capable of "changing the effective competition structure in the common market".

93. Furthermore, the need to take account of the offending conduct *as a whole* is a theme repeatedly emphasised by the Court in its judgment in Intel. It applies to all three elements of the qualified effects test. In relation to foreseeability, the Court said at paragraph 50 that it is necessary to examine the relevant conduct "viewed as a whole", in order to determine whether the Commission has jurisdiction to apply EU

competition law. In relation to immediate effect, the Court (as we have seen) endorsed the approach of the General Court. And on the question whether the effect would be substantial, the Court said in paragraph 56, again agreeing with the General Court, that "it was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to access the substantial nature of its effects on the market of the EU".

94. Finally, it is important that recognition of the qualified effects test as a separate route to establishing jurisdiction, and the need to examine the offending conduct as a whole in order to decide whether the three components of the test are satisfied, now have the imprimatur of the Grand Chamber of the Court, and can therefore be expected to provide a solid foundation for further incremental development of the Court's jurisprudence in this difficult area of law. The situation is thus very different from that which confronted Mann J, at a time when the status of the qualified effects test was still uncertain, and at least two Advocates General had recommended a relatively narrow and cautious approach to the issue of territorial jurisdiction.

95. For all these reasons, we agree with the claimants that Intel is an important decision in the context of the present cases, and that it provides substantial support for the argument that a worldwide cartel which was intended to produce substantial indirect effects on the EU internal market may satisfy the qualified effects test for jurisdiction. Whether or not the test is satisfied will depend on a full examination of the intended and actual operation of the cartel as a whole. Such an examination can only take place in light of the full facts as they emerge and are assessed at trial. The exercise is not one suitable for summary determination on the basis of assumed facts.

96. We should say a little more about the elusive concept of "indirect" effects. Mr Beard submitted that the purchase of cartelised goods by the claimants within the EU had to be characterised as indirect effects in every instance where the supply chain included a prior sale by a cartel member outside the EU at an inflated price to an innocent third party (typically an OEM in Asia), and that the existence of such a prior sale precluded EU law from taking account of subsequent indirect effects in the EU, even if the inflated price had been passed on down the chain to the claimants. Such indirect effects, he said, were merely knock-on or ripple effects, and fell outside the territorial scope of EU competition law.

97. The only remedy open to the claimants in such a situation, submitted Mr Beard, was to bring proceedings under the local competition law in whichever Asian country the first sale outside the cartel had taken place. The fact that such claims might now be time-barred, because they would be subject to a shorter limitation period than the six-year period applicable to the present claims brought in England, was irrelevant. Furthermore, unless the territorial reach of EU law were curtailed in this way, there would be a risk of multiple proceedings in different jurisdictions, double recovery by those who had suffered from the cartel, and double jeopardy for the defendants.

98. While there may be force in some of these points when the position is fully examined at trial, we are unable to agree with Mr Beard that the legal position is as stark as he would have us accept. The European case law which we have reviewed shows it to be at least arguable with a real prospect of success that intended effects within the EU internal market of a worldwide cartel fall within the scope of Article 101, and that the production of such effects on the EU market, if substantial and of a systemic nature,

may properly be characterised as immediate effects of the offending agreements. The test is one of substance rather than terminology, and in the context of the qualified effects test we do not consider that directness of effect should be treated as an additional requirement to immediacy of effect. The relevant criterion is that the effects produced in the EU should be immediate, and the European Court has now given authoritative guidance on how that concept should be understood. We are unable to accept the proposition that the mere existence of even one prior sale to an innocent third party outside the EU at an early stage of the supply chain must, without more, lead to the conclusion that the test of immediacy cannot be satisfied. Like the other criteria, it requires an overall assessment in light of the offending conduct viewed as a whole.

99. Nor are we impressed by arguments based on the possible multiplicity of proceedings, or the risk of double jeopardy to the defendants. Those who participate in a worldwide cartel cannot complain if their conduct gives rise to proceedings in different jurisdictions, or if they have to meet possibly overlapping claims. Any developed legal system will have mechanisms in place to deal with problems of this nature, and so far as the present proceedings are concerned, no realistic risk of double recovery has been drawn to our attention. Furthermore, it is axiomatic that no claimant can recover more than the loss which it can show it has actually suffered as a result of the offending agreements. If the present claims were to remain struck out, there would instead be a very real risk of the "artificial fragmentation of comprehensive anti-competitive conduct" which, as the Court warned in paragraph 57 of its judgment in <u>Intel</u>, might thereby escape the European Union's jurisdiction.

100. Similarly, we are unimpressed by the point that the purchases by the claimants within the EU come at the end of an intermediate series of intra-group transactions. It is true that sales or transfers within an undertaking do not normally have independent significance for the purposes of EU competition law, but that is not the point. What matters is that the cartel was always intended to have worldwide effect, including in the EU, and it must have been contemplated that the supply chains whereby cartelised goods ended up being purchased within the EU might include intra-group transactions. The important point is that purchases are ultimately made, at an inflated cartel price, within the territory of the EU. The existence of such purchases, on any substantial scale, must therefore have an effect on the operation of the internal market.

The decision of Mann J on territoriality

101. It will by now be apparent that we respectfully differ from the analysis and conclusions of Mann J on the issue of territoriality, and consider that the present cases should be permitted to go to trial. As we have already pointed out, Mann J did not have the benefit of the decision of the Court of Justice in <u>Intel</u>, although he was referred to the decision of the General Court. Since we consider that the judgment of the Grand Chamber of the Court in <u>Intel</u> marked an important new stage in the evolution of the EU jurisprudence on this issue, it is clear that it would anyway have been necessary for us to reconsider the question. For that reason, we do not propose to examine Mann J's judgment in detail. We will, however, briefly indicate our main points of disagreement with him. We will also confine our discussion to the part of his judgment where Mann J considered whether the jurisdictional tests of either

implementation within the EU or qualified effects within the EU were at least arguably satisfied, running from [133] to [150].

102. In relation to implementation, the judge cited an extensive passage from the judgment of the General Court in Intel (paragraphs 301 to 309), but concluded at [138] that it did not assist the claimants at all. He said that, on the very different facts of that case, the anti-competitive practices were designed to produce an effect in the EU (as elsewhere), and Intel's customers, who were complicit in the offending conduct, would deliberately not sell the relevant products in the EU. It was therefore "entirely accurate" to describe the behaviour as being "implemented" in the EU. We agree, but observe that it does not follow from this that the purchases by the claimants, in the very different circumstances of the present case, could not also properly be described as implementation within the EU of the worldwide cartel. The judge thought this to be unarguable, for the reasons which he gave at [140] and [141]. We can understand why he took that view, but in the light of the Grand Chamber's judgment we do not agree with the judge that "[t]he situation is clear enough to allow a determination to be made at this interlocutory stage."

103. The judge then turned to the principle of qualified effects at [142]. He began by considering the claimants' apparent case on the three criteria of immediacy, substantiality and foreseeability. He considered their case on the two latter criteria to be "thin", at [147], although he had agreed with Mr Robertson (ibid) "that in most cases this sort of issue will be a fact-sensitive one which it will be impossible to evaluate properly on a summary judgment application or the like". The judge found it unnecessary, however, to consider the point further, in the light of his decision on the requirement of immediacy, in relation to which he said this:-

> "148. My decision on immediacy is that the claimants have not made out a sufficiently arguable case. Immediacy is a concept which is capable of flexible application, depending on the facts, but it is clear to me that it cannot be made out in this case. The consequences of the non- EU cartels fixing their prices for glass and CRTs will have been felt in the market into which they were sold, which is not the EU market. Even if the effect of those sales is ultimately felt in the EU in the manner which the claimants would like to rely on, that is not an immediate effect. If a label is required, it is a "knock-on effect", and it is apparent from *Intel* that that is not sufficient."

The judge then quoted paragraph 278 from the judgment of the General Court, which drew the distinction between "a direct effect" and "merely a knock-on effect": see [85] above.

104. For the reasons which we have already given, we respectfully think that this was an over-simplified approach to a complex problem, and the description of something as a "knock-on effect" should be reserved, if it is used at all, for a statement of the conclusion which is reached after a full analysis of the infringing conduct viewed as a whole, rather than as a diagnostic tool in its own right.

The US authorities

105. Although we heard some interesting arguments about the US authorities, we have ultimately found them of little assistance. The main reason for this is that there are profound differences between the competition law of the USA and the competition law of the EU, notably including the availability of treble damages under the Sherman Act 1890. Thus, although US federal law provides the origin of the doctrine of qualified effects, and it now has statutory recognition in the Foreign Trade Antitrust Improvements Act 1982, it by no means follows that the test will be applied in the same way under EU law as it would be applied under US law. In particular, the availability of treble damages for claims which satisfy the requirements of the 1982 Act is clearly a potent factor in favour of a relatively restrictive application of the territorial effect of US competition law. As Circuit Judge Richard Posner said in one of the cases to which we were referred, <u>Motorola Mobility LLC v AU Optronics Corp.</u> 775 F.3d 816 (2014):-

> "The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and "resentment at the apparent effort of the United States to act as the world's competition police officer", a primary concern motivating the Foreign Trade Antitrust Improvements Act."

106. Similarly, it cannot in our view safely be assumed that the relatively restrictive approach to causation adopted by the US Court of Appeals (DC Circuit) in <u>Empagran S.A. v F. Hoffmann-La Roche, Limited</u> (417 F.3d 1267 (D.C. Cir. 2005)) would be followed in applying the qualified effects test as a matter of EU law. The US authorities would no doubt have some persuasive force, and the parties will of course be free to deploy them at trial; but they have not been incorporated into EU law, and although they have been fruitfully discussed in various Advocate General opinions, those discussions have notably not yet been adopted by the Court itself. It follows that the US case law, interesting though it is, cannot play a decisive role in a summary determination of the jurisdiction issue. Indeed, this was rightly recognised by Mann J at [113] of his judgment.

Conclusion on jurisdiction

107. To conclude, we are satisfied in principle, and subject to the further subsidiary issues which we will now consider, that the issue of territorial jurisdiction cannot be determined adversely to the claimants in either case on a summary basis.

The application of the CRT claimants to amend their particulars of claim

108. In the light of our conclusions on jurisdiction, we now turn to the question whether the CRT claimants should be permitted to amend their particulars of claim so as to plead that the CRT cartel was implemented within the EU on grounds similar to those which led Morgan J to conclude in the LCD Action that the claims of the LCD claimants should not be struck out. The relevant paragraphs of Morgan J's judgment are [49] and [51], which we have already quoted at [22] and [23] above. Those paragraphs refer to paragraph 75 of the draft amended particulars of claim in the LCD Action, which

included an averment that, if the corporate cartel members who were responsible for supplying LCD panels in Europe had not participated in the cartel by selling such products at inflated prices, but had instead sold them in Europe at the lower, competitive price, "it is likely that such panels would have been purchased by iiyama or its OEMs for incorporation into iiyama-branded LCD products".

109. The present application is made pursuant to an application by the CRT claimants dated 3 April 2017 to amend their grounds of appeal in such a way as to permit all issues in both appeals to be considered together, and to avoid the risk of inconsistency between the results of the two appeals. The proposed third amended ground of appeal is that Mann J erred in law "because the CRT Claim has a sufficiently arguable territorial connection with the EEA" which he did not address in his judgment. If permission to make that amendment is granted, the CRT claimants now wish to rely on the following further amendments to paragraph 29 of their draft amended particulars of claim:

> "In particular, but without prejudice to the generality of the foregoing:
>
> (a) The cartel in Europe was essential to sustain the cartel price in Asia. If there had been no cartel in the EEA, the cartel price in Asia would have collapsed.
>
> (b) The Claimants would have bought in the EEA if there had been CRTs/transformed products available at a non-cartelised price which they could have purchased."

These further amendments, it is said, would permit the CRT claimants to advance essentially the same arguments as persuaded Morgan J not to strike out the LCD claims.

110. The significance of this issue is greatly reduced, now that we have decided that the claims in both actions should go forward to trial in any event. Our decision involves rejection of the narrower approach to jurisdiction espoused by Mann J, and does not depend on any supposed need to establish a direct link between the operation of the CRT cartel in the EU and the losses claimed by the CRT claimants. Furthermore, it seems to us that there is an air of contrivance about the proposed new amendments, in the sense that we suspect nobody would have thought of them had there not been a perceived need to demonstrate the existence of such a direct causal link (either on the basis that the operation of the cartel in Europe was necessary to sustain the cartel price in Asia, or because the claimants would have bought their CRTs or transformed products in the EU if they had been available at non-cartel prices). Nevertheless, Morgan J clearly considered that the similar contentions advanced in the LCD Action were sustainable in law and had a sufficient evidential basis to support them, at least for the purposes of granting permission to amend, and there is no appeal in the LCD Action from that part of his reasoning. In general, we consider that at this very early stage in the litigation, and where the relevant principles of law are still evolving, the claimants should be allowed to plead their case as they see fit, provided that the minimum requirements for permitting an amendment are satisfied.

111. The CRT defendants argued before us that the CRT claimants' proposed amendments to paragraph 29 of their particulars of claim (as set out above) were indeed

unsustainable, both in law and on the facts, with the consequence that permission to amend should be refused. These submissions were presented to us by Mr Jowell (for the LG defendants) on the law, and by Marie Demetriou QC (for the Philips defendants) on the facts. As we shall briefly explain, however, we were unpersuaded by these submissions.

112. Mr Jowell realistically accepted that we could not at this early stage determine the factual question whether or not it is correct that, had there been no cartel in the EU, the cartel price in Asia would have collapsed. Assuming that to be established, however, he submitted that the claim could not give rise to an actionable claim for damages in English law for two reasons. First, implementation of the cartel in England could not properly be characterised as the effective cause of the losses claimed; and, secondly, such losses would anyway fall outside the scope of the relevant duty in tort. As to the first of those points, it seems to us, for the reasons we have already given, that questions of causation of this nature are not suitable for summary determination, but must depend on an examination of the facts as a whole at trial. Similarly, we consider that the precise scope of the duty owed by the cartel members under Article 101 to purchasers of cartel products in the EU cannot be determined until the full facts have been found.

113. So far as the facts are concerned, Ms Demetriou submitted that the only support in the evidence for the proposed paragraph 29(b) was to be found in paragraph 18 of the witness statement of Shinji Takeichi (the managing director of iiyama Benelux BV) dated 14 January 2016, where he said this:

> "From discussions I have had with Jeffry Pettinga, I understand that the manufacture of iiyama CRT monitors in the EEA, containing CRTs manufactured in the EEA, for sale by the Claimants would have had potential advantages compared to CRTs manufactured in Asia. It would probably have meant that the lead time was shortened between placing orders and the Claimants receiving delivery of the monitors in Europe. It is also likely that there would have been transport cost advantages for the Claimants. CRTs are larger than replacement technologies such as LCD panels and the transport costs were relatively high. A 40 foot-long shipping container travelling from Asia could typically contain only 300 to 400 CRTs, whereas it can contain 1600 to 1700 LCD panels. Had the Claimants been able to source CRTs from a country in the EEA at a lower price than the price fixed by the cartelists, and been able to make suitable manufacturing arrangements with an OEM in the EEA, in principle the Claimants would have sourced CRTs which were manufactured in the EEA, including England and Wales."

114. Ms Demetriou submitted that this evidence was both hypothetical and speculative. She pointed out that Mr Takeichi did not purport to give direct evidence, nor did he refer to any contemporaneous evidence or documents. That, however, is hardly surprising, because he was of necessity addressing a hypothetical situation. Ms Demetriou also

submitted that his evidence was inconsistent with iiyama's pleaded case, according to which iiyama did not buy CRTs at all, but instead bought computer monitors incorporating CRTs from third parties. In other words, iiyama was not in the business of buying CRTs as separate components, but only as part of a finished product. In our judgment, however, there are at least two answers to this objection. The first is that the proposed paragraph 29(b) extends to the hypothetical purchase by the CRT claimants of "transformed products" as well as CRTs. The second is that Mr Takeichi's evidence expressly envisaged the possibility of iiyama purchasing CRTs within the EEA and then making "suitable manufacturing arrangements with an OEM in the EEA". No doubt this evidence would be carefully scrutinised at trial, but it comes from a very senior executive within the iiyama group and is verified in the usual way by a statement of truth. In our view, it provides an adequate foundation for the proposed amendments.

115. For these reasons, we conclude that the CRT claimants should be granted permission to make the proposed amendments to paragraph 29 of their particulars of claim. We also grant permission to the CRT claimants to rely on their amended grounds of appeal, since it seems to us plainly desirable that they should be able to rely on the same arguments of law in these combined appeals as the LCD claimants, provided that no injustice is thereby caused to the defendants. Given that these proceedings are still in their infancy, any suggestion of such prejudice would in our view be fanciful.

Causation and joint and several liability

116. Submissions were also addressed to us by the claimants on issues of causation, and the extent to which it would be necessary at trial for the claimants to establish a causal link between the implementation of the cartel in the EU and the losses they claim to have suffered. They argued that it would only be necessary for the claimants to establish (a) an infringement of Article 101, and (b) a causal link, on a "but for" basis, between the infringement and the loss. Once those elements had been established, the claimants would then be free to sue any participant in the cartel for the full amount of their loss under the principle of joint and several liability.

117. In view of the conclusions which we have already reached, we do not consider it necessary to examine these submissions in any detail. It is enough to say that all questions of causation must in our view be reserved to trial, and that the principle of joint and several liability of cartel participants, although well established, cannot assist in establishing whether an infringement of Article 101 has taken place, or whether a particular claimant is entitled to damages for such an infringement. The principle of joint and several liability does not come into play until liability has been established. At that stage, but not before, it permits a claimant to recover its loss in full from any participating member of the cartel.

118. Without formally determining the point, we should also say that we remain wholly unpersuaded by the submission that the territorial limits on the scope of Article 101 can somehow be circumvented in the context of private law claims for damages for its infringement, with the result that a claimant can succeed merely by showing an infringement and a causal link on a "but for" basis to the loss sustained. We regard these contentions as implausible, and not supported by the authorities to which we were referred. We do not, however, consider the position to be so clear cut that the

claimants should be prevented from running these arguments at trial, when the full factual context has been established.

Service out of the jurisdiction and related matters

119. The remaining issues concern service out of the jurisdiction on the non-EU resident defendants, alleged non-disclosure on the applications for permission to serve out, and whether England and Wales is the appropriate forum for resolution of the claims. In the light of our earlier conclusions, we can again deal with these issues relatively shortly.

120. It follows from our conclusions in relation to choice of law and jurisdiction that, in agreement with Morgan J, we consider that there is a good arguable case against the UK-based "anchor" defendants in the LCD Action, namely SEL, SEL(UK) and Semiconductor, and that the same is true of the claims in the CRT Action against LG UK and LG Wales. In relation to SEL, SEL(UK) and Semiconductor, we gratefully adopt Morgan J's reasoning in this regard at [63] to [67] of his judgment, which we have already set out at [25] above. In our view very similar reasoning applies in relation to LG UK and LG Wales. Both companies imported electronic products including CRT products into the UK (and therefore, into the EU) and distributed them, and both were wholly owned subsidiaries (directly or indirectly) of LG Inc, a party to the relevant cartel.

121. We are also satisfied that Morgan J was correct to conclude that the two South Korean companies, SECL and LGD, were and are proper parties to have been joined to the existing claims against SEL, SEL(UK) and Semiconductor in the LCD Action, for the reasons he gave at [73] of his judgment. In the same way, Samsung SDI, Samsung SDI Malaysia and LG Inc were in our judgment proper parties to be joined to the claims in the CRT Action against LG UK and LG Wales. They were all parties to the relevant cartel, were either addressees or associated with addressees of the CRT Decision, and were involved directly or indirectly in the manufacture, selling and distribution of CDTs. Furthermore, just as in the LCD Action, the claims against Samsung SDI, Samsung SDI Malaysia and LG Inc involve the same or substantially the same issues as would be raised in a trial elsewhere, such a trial would involve substantially the same witnesses and experts (if any), and it would be undesirable to require the parties to litigate the claims against LG UK and LG Wales in England and Wales and the claims against the other defendants elsewhere. The conditions of "gateway 3" contained in paragraph 3.1(3) of CPR PD 6B are therefore satisfied. It is unnecessary to consider "gateway 9" in paragraph 3.1(9) in addition.

Non-disclosure

122. At this stage, we need to deal with Mann J's finding at [170] and [171] of his judgment that there was serious non-disclosure in relation to the application for service out of the jurisdiction in the CRT Action which went to the heart of the case and justified setting aside the order for service out in that action. Mann J summarised the complaints at [158] of his judgment, as follows:

> "(a) A failure to disclose the cartels relied on were external to the EU and not within the EU.

> (b) A failure to point out that the cartel sales relied on by the claimants were not in fact in or into the EU but took place elsewhere.
>
> (c) (Having seen how the matter is now put by the claimants) that the claims are not the follow-on claims that they purported to be, but were standalone claims of a different nature."

For the reasons which he then gave at [160] to [169], Mann J found these complaints to be established.

123. Mr Robertson on behalf of the relevant claimants in the CRT Action accepted that the alleged non-disclosure had occurred, but submitted that Mann J's decision in the exercise of his discretion to set aside the order to serve out of the jurisdiction was too draconian and should be re-visited. He agreed when it was put to him by Longmore LJ that, if the court were with him on the central issue of jurisdiction, then the appropriate course to take in relation to the non-disclosure would be to penalise his clients in costs. For his part, Mr Jowell, who argued this part of the case on behalf of the CRT defendants, emphasised the seriousness of the non-disclosure and submitted that in all the circumstances Mann J had been right to set aside the order for service out of the jurisdiction. He referred us to a helpful summary of the relevant principles given by Warby J in Sloutsker v Romanova [2015] EWHC 545 (QB), at [51].

124. The issue of non-disclosure in relation to the service out application also arose in the LCD Action. Morgan J considered the matter at [84] to [94] of his judgment and the complaints were summarised at [88] and [89]. First, seven reasons why England and Wales was allegedly not the appropriate forum for the claim against LGD were set out in a witness statement of Ms Jinhee Kim and it was submitted that full and fair disclosure had not been given of those matters. Secondly, two further suggested non-disclosures were put forward by counsel for LGD at the hearing before Morgan J. They both went to the territorial scope of Article 101. It was said that the claimants had failed to disclose: (1) the fact that they had not made any purchases of monitors containing LCDs made or sold in the EU; and (2) "obvious defences" that LGD would be likely to raise "in light of that fact." In the circumstances of that case, Morgan J found that it was not strictly correct to say that the claimants had not purchased "any" monitors in the EU, and that the alleged failure to identify "obvious defences" in the light of that was therefore not made out: [90]. He went on to decide that there was no breach of the duty of full and frank disclosure, and that "there is an important distinction between disclosing material facts known to a claimant and disclosing arguable defences known to a claimant on the one hand and anticipating all of the points that might be raised in opposition to the claim": see [93]. He concluded, at [94], that even if the points had been put to the Master he would have been likely to have given permission to serve out in the same way.

125. Reverting to the non-disclosure in the CRT Action, Mann J stated his conclusions at [169] to [171]. He recorded Mr Robertson's acceptance that the witness statement in support of the application had wrongly stated that for the period from 1 May 2006 to

31 March 2008 iiyama Benelux had purchased 15% of the iiyama Products from OEMs that were located in Europe, and continued:

> "169… He accepted that the application proceeded on the basis of the purchase of some monitors from OEMs in the EU, and that that turned out to be incorrect. The correct position did not become apparent until further instructions were taken after Part 18 requests were made, whereupon the 15% point was withdrawn from the Particulars of Claim. He accepted that the description of the claim as a "follow-on" claim put the matter too narrowly, and that it required further explanation. That admits non-disclosure - something that requires further explanation does not make a complete disclosure.
>
> 170. I therefore find this aspect of non-disclosure made out. The non-disclosure is serious – it is a mis-statement of important facts about European purchases (the 15% point), a misdescription of the intended nature of the action, and a non-disclosure of facts which go to jurisdiction even if the claimants claim to have an answer to the point (I got the strong impression throughout that they were not actually live to it, though that is no answer). All these go to the heart of the case.
>
> 171. Mr Robertson submitted, and Ms Ford did not gainsay, that non-disclosure did not necessarily require setting aside of the permission. He pointed out that proportionality had a part to play. Alternative remedies were available, such as disallowing the costs of the service out application (see *Masri*). I accept all that, but lesser remedies would only be appropriate for lesser transgressions. In my view the non-disclosures in this case were so serious, going as they did to the heart of jurisdiction, that the familiar sanction of setting aside the service out order would be justified by these transgressions alone. I would so order."

126. Nothing that we say should be taken to detract in any way from the importance of the principle of full and frank disclosure on applications for permission to serve out of the jurisdiction, and we also have well in mind that this court should in general not interfere with an exercise of discretion by the judge below. Nevertheless, since we have taken a different view from Mann J on the central issue of territorial jurisdiction, and since there is no suggestion that there was any intention on the part of the relevant claimants to mislead the court in the context of a difficult, uncertain and developing area of the law, and also bearing in mind that (as Morgan J pointed out) it is not necessary to anticipate all the points that may be raised in opposition to a claim, we agree with Mr Robertson that Mann J's decision to set aside the order for service out in the CRT Action should be re-visited. In particular, our conclusions on jurisdiction mean that the mistake made about the 15% point no longer has anything like the significance which Mann J clearly attached to it. In our view, if all of the matters described at [158] of Mann J's judgment had been disclosed together with an outline

of the arguments put to us in relation to the scope of Article 101 and jurisdiction, the Master would still have granted the order.

127. In all the circumstances, we consider that the order for service out should not be set aside, but that (as Mr Robertson accepted) it would be appropriate for the CRT claimants to be ordered (at least) to bear all the costs of and incidental to that application in any event. If the CRT defendants wish to argue that any further costs sanctions should be imposed, the question can be dealt with (in default of agreement) in written submissions after this judgment has been circulated in draft to the parties. Finally, we should say that we consider our approach on this issue to be consistent with the approach adopted by Morgan J in the LCD Action in relation to failures of a less serious nature.

The appropriate forum

128. Lastly, we come to the issue of the appropriate forum for resolution of the claims. Technically, in relation to the CPR Part 6 defendants served out of the jurisdiction, the burden would be on the claimants to show that England and Wales is the appropriate forum. In our view, however, nothing turns on the burden of proof. As will already be apparent, we have little difficulty in agreeing with Morgan J in the LCD Action and concluding that, in relation to both SECL and LGD, England and Wales is the more appropriate forum for trial of the claims against them for breach of Article 101. For essentially the same reasons, we would reach the same conclusion in relation to the claims against the Part 6 defendants in the CRT Action if it were necessary for us to do so (the question was not considered by Mann J, and it has not been raised by any respondent's notice).

129. As Morgan J noted at [75] of his judgment in the LCD Action, SECL and LGD did not contend that England and Wales was an inappropriate forum because it would be more appropriate to pursue the claim against them in the courts of another EU Member State. Rather, it was submitted that they should be sued in Taiwan or Japan where there was arguably an infringement of Taiwanese or Japanese competition law, but where any such claim (they averred) would fail as a result of a limitation defence. As Morgan J stated at [76] and [77] of his judgment, the primary claim which the LCD claimants wish to advance is for damages for breach of statutory duty by infringement of Article 101. We agree with his conclusion at [78] of his judgment that it is far more appropriate for their claims for breach of Article 101 to be litigated in England and Wales than in Asia. Prima facie, the tort of infringement of Article 101 occurred in the EU and the damage resulting from it was suffered in the respective countries of incorporation of the five claimants which are based in the EU. In relation to the sixth claimant, Mouse, it was not contended that a different result should follow if the claims of the five EU-based claimants were allowed to proceed in this jurisdiction.

130. Article 101 has direct effect in England and Wales. As Morgan J concluded at [80] of his judgment, it would not be satisfactory if the claimants were forced to sue some of the defendants in England and Wales (because they were served here as of right) and others in the Far East. They would then have to try to prove their case at two different trials, would be at risk of inconsistent findings of fact, and the courts of Taiwan or Japan would have to apply EU law as a foreign law. As we have already mentioned,

both trials would involve the same or substantially the same issues and substantially the same witnesses and experts (if any).

131. We are satisfied that the same reasoning would in principle apply in the CRT Action in relation to a trial in South Korea. As we have said, Mann J did not consider the question of the appropriate forum, and it is not raised as a separate issue in the CRT appeal, but we have no doubt that the result must be the same in each case and we therefore do not consider it necessary to remit the question to him.

132. In all the circumstances, we have no hesitation in concluding that England and Wales is the more appropriate forum for the claims under Article 101 in each action and against all the defendants.

Conclusions

133. For the reasons which we have given, we consider that the claimants' appeal in the CRT Action should be allowed on all grounds.

134. The position in the LCD Action is less straightforward, but in general terms our conclusion is that:

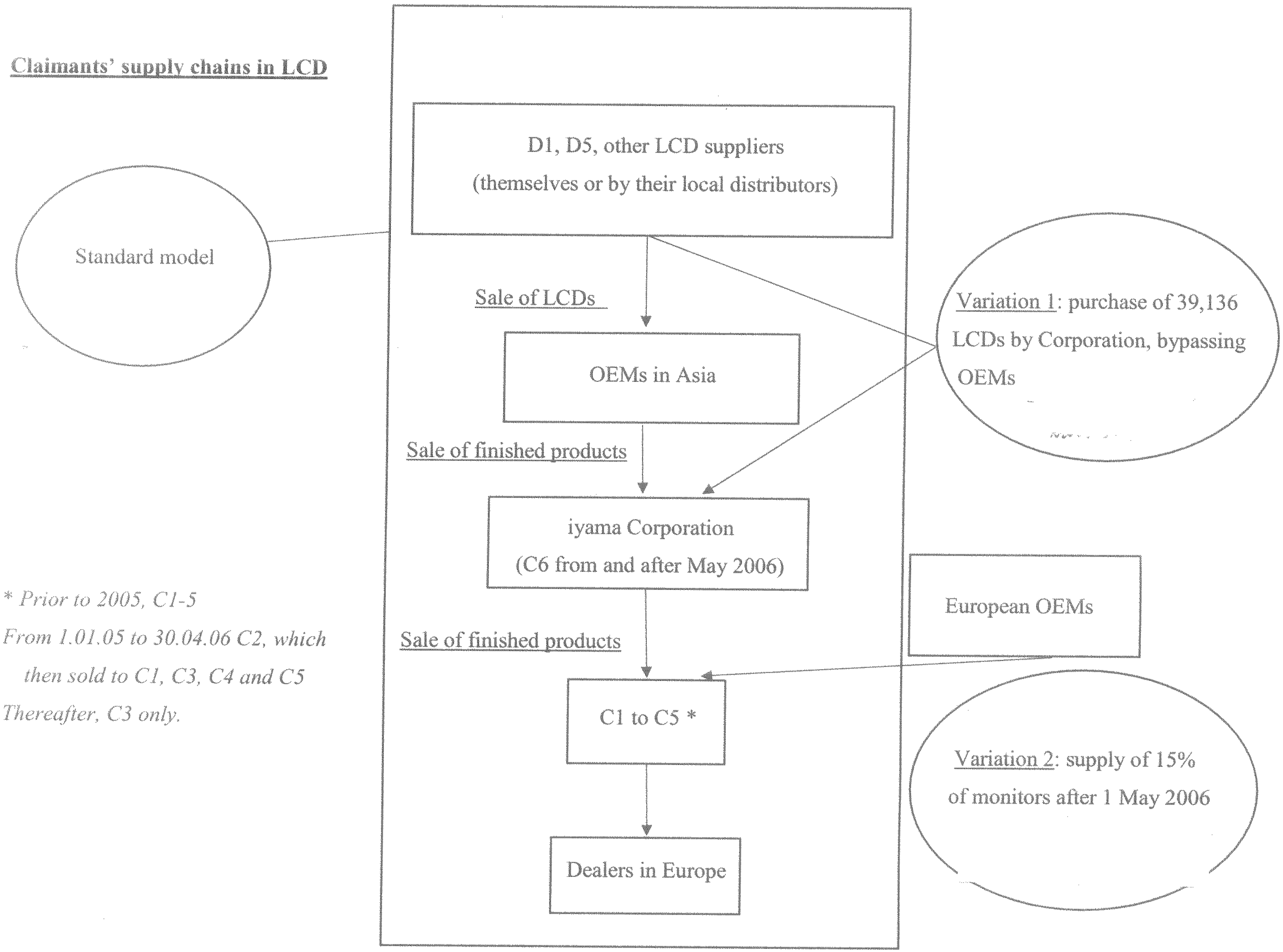
(a) the claimants' appeal against the second declaration contained in paragraph 1(ii) of Morgan J's Order should be allowed on all grounds;

(b) both declarations in paragraph 1 of Morgan J's Order should be set aside; and

(c) the cross-appeals of the Samsung defendants and LGD should be dismissed.

135. The parties must do their best to agree appropriate orders in each appeal in the light of this judgment. Any matters on which agreement cannot be reached will be dealt with in the usual way on the basis of written submissions.

Claimants' supply chains in LCD



** Prior to 2005, C1-5*

From 1.01.05 to 30.04.06 C2, which then sold to C1, C3, C4 and C5

Thereafter, C3 only.