Neutral Citation Number: [2022] EWHC 929 (Comm)

Case No: CL-2021-000208

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 April 2022

Before:

MR JUSTICE PICKEN

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Between:

JJH ENTERPRISES LIMITED (trading as ValueLicensing)	**Claimant/Respondent**
- and -	
(1) MICROSOFT CORPORATION **(2) MICROSOFT LIMITED** **(3) MICROSOFT IRELAND OPERATIONS LIMITED**	**Defendants/Applicants**

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Maya Lester QC and **Max Schaefer** (instructed by **Charles Fussell & Co LLP**) for the Claimant/Respondent.
Robert O'Donoghue QC and **Michael Armitage** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the Defendants/Applicants.

Hearing dates: 30 and 31 March 2022.
Judgment provided in draft: 12 April 2022.

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Approved Judgment

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

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Mr Justice Picken:

Introduction

1. There are two applications before the Court: first, an application by the Second Defendant ('Microsoft UK') seeking to strike out (alternatively obtain summary judgment dismissing) the claims which the Claimant ('ValueLicensing') makes against it; and, secondly, an application by the First and Third Defendants ('Microsoft US' and 'Microsoft Ireland' respectively) challenging the jurisdiction (alternatively seeking a stay) in respect of ValueLicensing's claims against them.

2. These applications are made in the context of proceedings in which ValueLicensing claims damages arising from alleged breaches of competition law by the Defendants (collectively 'Microsoft').

3. ValueLicensing purchases, resells and brokers the purchase and resale of pre-owned perpetual software licences in the UK and EEA, where purchasers of perpetual licences have statutory rights to resell them.

4. ValueLicensing alleges in its Particulars of Claim at paragraph 2 that Microsoft has engaged in a "*sustained – and ongoing – Campaign to stifle the sale of pre-owned licences for Microsoft software in the UK and EEA*", including by "*paying customers to restrict the supply of pre-owned licences to ValueLicensing and other competitors*" (paragraph 3).

5. The Claim Form puts matters in this way:

"This is a claim for damages and other relief caused by the breaches by the Defendants ('Microsoft') of sections 18 and/or 2 of the Competition Act 1998, Arts 102 and/or 101 of the Treaty on the Functioning of the European Union [the 'TFEU'], and/or Arts 54 and/or 53 of the Agreement on the European Economic Area.

The Claimant resells pre-owned perpetual licences for various software products, materially including for Microsoft Windows and Microsoft Office. In so doing, it competes with Microsoft, which sells new licences and subscriptions in the same markets. Microsoft, which is dominant in those markets, is in the course of a multi-year effort to convert users of its software from making one-off purchases of perpetual licences to paying recurring subscription fees. At the same time, it has undertaken a campaign to stifle the pre-owned segments of the markets for its software. This campaign has included effectively paying customers that switch to subscriptions not to resell their old perpetual licences. The Claimant's case is that such conduct is not competition on the merits and/or that such agreements with customers have the object and/or effect of restricting competition, and that Microsoft has thereby breached the statutory competition rules set out above.

The Defendants are jointly and severally liable for such breaches.

The Claimant claims damages; interest; declaratory relief; further or other relief; and costs."

6. At paragraphs 67 and 68 of the Particulars of Claim this is set out:

"Breach of the prohibitions against abuse

67. Contrary to the prohibitions against abuse, Microsoft has abused its dominant position in the relevant markets through the Campaign, including its use of the Impugned Terms (individually and/or taken together.) Paragraphs 52-56 above are repeated. Such conduct is not competition on the merits.

Breach of the prohibitions against anti-competitive agreements

68. The impugned Terms contravened (and continue to contravene) the prohibitions against anti-competitive agreements in that: (1) they were (and are) all agreements between undertakings, namely Microsoft on the one hand, and certain customers switching from perpetual licences to discounted User SLs on the other; (2) in light of the facts and matters set out in paragraphs 54-58 above the object and/or effect of the Campaign was to restrict and/or distort competition in the relevant market; and (3) such restriction and/or distortion of competition was (and remains) appreciable, particularly given Microsoft's dominance in the relevant markets."

7. ValueLicensing's case, then, is that the alleged *"Campaign"* infringes both Article 102 (which prohibits the abuse of a dominant position) and Article 101 (which prohibits anti-competitive agreements) of the TFEU (and the equivalent provisions of the EEA Agreement and the Competition Act 1998) and that this has caused ValueLicensing to be able to sell fewer pre-owned licences than would have been the case but for the alleged *"Campaign"*. ValueLicensing estimates that, as a result, it has suffered losses amounting to some £269 million.

8. As pointed out by Mr Robert O'Donoghue QC, on Microsoft's behalf, ValueLicensing's claim is a 'standalone' (as opposed to a 'follow-on') claim. This means that there is no underlying infringement decision of the European Commission (or any domestic competition regulator) on which ValueLicensing can rely to establish that an infringement of competition law has been committed. Mr O'Donoghue QC submitted that this ought to mean that ValueLicensing would bring forward a precise and well-founded case. Instead, however, Mr O'Donoghue QC suggested (echoing language used by Etherton LJ, as he then was, in ***KME Yorkshire Limited & Others v Toshiba Carrier UK Ltd & Others*** [2012] EWCA Civ 1190 at [23]), ValueLicensing's Particulars of Claim entail a "*blunderbuss of alternative allegations, not easy to disentangle*" without clearly distinguishing between the roles that each of the individual Defendants is said to have played in the alleged *"Campaign"*.

9. With this brief introduction, I turn to the two applications. As will appear, since I have reached the conclusion that the first application(s) should be dismissed, when I come on to deal with the jurisdiction/stay application made by Microsoft US and Microsoft Ireland, I will confine myself to addressing only the stay aspect of that application, namely the *forum non conveniens* issue.

Microsoft UK's strike-out/summary judgment application(s)

Applicable principles

10. The position under the CPR is well known. CPR 3.4(2)(a) provides that the Court *"may strike out a statement of case if it appears to the court … that the statement of case discloses no reasonable grounds for bringing or defending the claim"*. CPR 24.2 provides that *"the court may give summary judgment against a claimant … on the whole of the claim or on a particular issue if – (a) it considers that – (i) that claimant has no real prospect of succeeding on the claim or issue…and (b) there is no other compelling reason why the case or issue should be disposed of at a trial"*.

11. The applicable principles are the same in the competition law field as they are in other areas of the law, as demonstrated by ***Media-Saturn Holding GmbH v Toshiba Information Systems (UK) Ltd*** [2019] EWHC 1095 (Ch), [2019] 5 CMLR 7 at [75] and ***Sel-Imperial Ltd v The British Standards Institution*** [2010] EWHC 854 (Ch), a decision of Roth J. In summary and in line with the guidance given by Lewison J (as he then was) in ***Easyair Limited v Opal Telecom Limited*** [2009] EWHC 339 (Ch) at [15]: (i) the Court must consider whether the claimant has a *"realistic"* (as opposed to a *"fanciful"*) prospect of success; (ii) a *"realistic"* claim is one that carries some degree of conviction, which means a claim that is more than merely arguable; (iii) in reaching its conclusion the Court must not conduct a *"mini-trial"*, albeit this does not mean that the Court must take at face value and without analysis everything that a claimant says in statements before the court; and (iv) the Court may have regard not only to the evidence before it, but also the evidence that can reasonably be expected to be available at trial. Furthermore, where a summary judgment application turns on a point of law and the Court has, to the extent necessary, before it "*all the evidence necessary for the proper determination of the question*," it "*should grasp the nettle and decide it*" since the ends of justice are not served by allowing a case that is bad in law to proceed to trial.

12. Mr O'Donoghue QC submitted, additionally, that in competition law cases (and *a fortiori* 'standalone' claims such as the present) it is important that claims are properly pleaded. He cited in this regard both ***Sel-Imperial Ltd*** at [17] and also ***Forrest Fresh Foods Limited v Coca-Cola European Partners Great Britain Limited*** [2021] CAT 29, in which Bacon J had this to say at [30]:

> "*… the onus is on a claimant advancing a claim of infringement of competition law to identify (i) the relevant primary facts which are the foundation of that claim, (ii) the way in which those facts are said to infringe the relevant competition law provision(s) relied upon, and (iii) the way in which that alleged infringement is said to have resulted in the loss or damage claimed*".

13. Bacon J went on at [32] to add that it is "*not the function of this Tribunal or any court*" to "*speculate as to what case might potentially be advanced if it were repleaded*", but rather "*to assess the case on the materials before it*". That said, as Ms Maya Lester QC, on ValueLicensing's behalf, pointed out, in ***Media-Saturn*** (under the heading "*No pleading points taken"*) Barling J had this to say at [82]:

> *"In discussing the nature of the claim against the defendants, and in particular against TIS and PE, the arguments have not been confined precisely within the parameters of*

> *the allegations as presently formulated in the [Particulars of Claim], or indeed in the [consolidated amended Particulars of Claim]. Both Mr Singla and Ms Abram in their submissions have eschewed taking pleading points, and have challenged the case alleged against TIS and PE by reference to the arguments developed in the claimants' skeleton, and even by Mr Beal orally during the hearing. This approach is realistic and to be commended in a case of this complexity, where amendments to the claimants' pleading are being sought, and disclosure has not been carried out."*

I agree with Barling J that this is the right approach. In truth, Mr O'Donoghue QC did also in the submissions which he made.

Microsoft UK's argument

14. Mr O'Donoghue QC highlighted how the central allegations in the Particulars of Claim are made compendiously against *"Microsoft"* (defined in paragraph 1 as meaning *"the Defendants"*), without distinguishing between Microsoft US, Microsoft UK and Microsoft Ireland. Specifically, he pointed out that the claims concerning the alleged *"Campaign"* are said to have had two *"stages"*.

15. The first of these two stages entails ValueLicensing alleging that, from "*no later than 2016*", "*Microsoft*" began to offer "*certain large customers in the Relevant Territories*" discounted prices when switching from perpetual licences for software such as Windows and Word to subscription licences for a subscription offering currently known as Microsoft 365. ValueLicensing alleges that "*Microsoft*" required these customers "*in exchange to agree to terms expressly, and/or with the effect of, preventing or impeding those customers from offering for sale the perpetual licences they would no longer need as a result of the migration*" to a Microsoft 365 subscription. These are described in the Particulars of Claim as the "*Custom Anti-Resale Terms*".

16. The second sees ValueLicensing allege that in May 2020 "*Microsoft*" added a new eligibility condition (the *"New From SA Condition"*) for its "*From SA*" subscription terms (being subscription terms for Microsoft 365 that are available to customers with certain qualifying perpetual software licences), which "*purports to prevent customers from selling their perpetual licences into the pre-owned market, at least during the term of their From SA subscriptions*".

17. Together, the Custom Anti-Resale Terms and the New From SA Condition are described by ValueLicensing as the *"Impugned Terms"*.

18. Mr O'Donoghue QC submitted that, in the circumstances, insofar as it concerns Microsoft UK, ValueLicensing's pleaded case is deficient. He noted in this respect that the claim, at least as set out in the Particulars of Claim, does not specify what Microsoft UK *itself* is alleged to have done in relation to the alleged *"Campaign"*.

19. Nor, Mr O'Donoghue QC added, has it been pleaded by ValueLicensing why Microsoft UK is said to be liable (alongside Microsoft US and Microsoft Ireland) for infringements of both Article 101 and Article 102 since, again, the substantive allegations of breach of competition law are similarly advanced without distinction between the three Defendants.

20. It was Mr O'Donoghue QC's submission, in particular, that there is no basis for attributing liability to Microsoft UK since, in order to establish a breach of Article 102 on Microsoft UK's part, it would need to be shown that Microsoft UK *itself* holds a

dominant position in a relevant market and that it has contravened a *"special responsibility"* not to allow its conduct to impair genuine undistorted competition that applies in virtue of holding that dominant position (see ***Case 322/81 Michelin v Commission (EU:C:1983:313)*** [1985] 1 CMLR 282 at [57]). No such case, Mr O'Donoghue QC submitted, has been advanced as against Microsoft UK.

21. That, Mr O'Donoghue QC submitted, is a fundamental deficiency in what has been pleaded. This, he explained, is because what is being alleged is breach of a statutory tort and, as such, it is (as he put it) *"axiomatic"* that a claimant should specify why a particular defendant is liable. The more so, he submitted, in the competition law field given (again as Mr O'Donoghue QC put it) the *"burdensome"* nature of the pleading obligations applicable in that field.

22. Mr O'Donoghue QC pointed out that it has not been pleaded that Microsoft UK was even active on any of the markets identified in the Particulars of Claim (or by Mr Cohen), still less that Microsoft UK has played a dominant role on such markets. He submitted that it is not enough that Microsoft UK merely played some sort of supporting role in an abuse of dominance (if there was such abuse) committed by others.

23. This, Mr O'Donoghue QC submitted, is not a case which falls within the category of case described in ***Case C-333/94 P Tetra Pak International SA v Commission (EU:C:1996:436)*** [1997] 4 CMLR 662, where the CJEU found, exceptionally, that there were sufficient *"associative links"* between the dominant (in that case, aseptic carton) market and the non-dominant (in that case, non-aseptic carton) market to treat anti-competitive conduct on the latter market as an abuse of dominance since, to repeat, in the present case it is not alleged that Microsoft UK is dominant on *any* market, still less that it is leveraging its position from a dominant to a non-dominant market in a manner which would, exceptionally, engage Article 102 in the non-dominant market. This is not, in short, Mr O'Donoghue QC submitted, a case in which it would be appropriate (as he put it) to *"foist"* upon Microsoft UK a special responsibility notwithstanding its lack of dominance in any relevant market.

24. Mr O'Donoghue QC furthermore pointed out in this respect that Microsoft UK was not itself responsible for setting any of the Impugned Terms. Microsoft UK is not a party to any licensing agreements containing either the Custom Anti-Resale Terms or the From SA Condition. Mr O'Donoghue QC submitted that this is fundamental given that the alleged abuse in this case (at least as Mr O'Donoghue QC characterised it) entailed abuse which *"resides in a contract"* to which Microsoft UK is not itself a party. Indeed, the evidence before the Court, in the form of a witness statement from Mr Randall Levitt, Director of Business Programs at Microsoft US, was that Microsoft UK had "*no role*" in the process which saw such terms come into being. Marketing a licence, Mr O'Donoghue QC submitted, cannot amount to abuse of a dominant position; nor can negotiating or proposing a licence (see ***Humber Oil Terminals Trustee Limited v Associated British Ports*** [2011] EWHC 352 (Ch) per Sir Andrew Morritt C at [20]); nor can receiving payment in return for entry into a licence with another company.

25. The present case, Mr O'Donoghue QC submitted, is similar to ***Epic Games, Inc. & Others v Apple Inc. & Others*** [2021] CAT 4, in which one of the 'anchor' defendants (A2) provided services to other companies in the Apple corporate group but was neither a party to the allegedly infringing agreement nor responsible for making the allegedly abusive decisions. Roth J (then President of the Competition Appeal Tribunal) decided,

in such circumstances, that it was "*difficult on this basis to see that A2 can be liable for any of the breaches of competition law alleged*": see [101]-[104]. Microsoft UK, Mr O'Donoghue QC suggested, is in the same position as A2 in that case.

26. Secondly, as Mr O'Donoghue QC pointed out, although ValueLicensing alleges that the "*Impugned Terms contravened (and continue to contravene) the prohibitions against anti-competitive agreements*", Microsoft UK is not itself alleged to be a party to any of the agreements concerned. The Microsoft entity which is a party to the licences (as explained in paragraph 11 of the Particulars of Claim) is not Microsoft UK but Microsoft Ireland. Specifically, as explained by Ms Ingrid Johanson, a Senior Operations Program Manager – Commercial Sales at Microsoft US, under the so-called *"ROC"* ('Regional Operational Centers') model which was in force prior to February 2017 in the UK, Microsoft UK operated only as a marketing entity in relation to licence agreements which were entered into between Microsoft Ireland and the relevant customer, whereas under the *"LRD"* ('Limited Risk Distributors') model which was introduced from February 2017 onwards in the UK, Microsoft UK acts as a marketing and distribution entity, in which latter capacity it enters into agreements for the purchase of Microsoft licences where (again) Microsoft Ireland is the relevant licensor (not Microsoft UK).

27. In short, Mr O'Donoghue QC submitted, Microsoft UK is not alleged to be a party to any allegedly anti-competitive agreement; all that Microsoft UK has done is handle certain aspects of customer contact within its own territory. It follows, for these reasons, Mr O'Donoghue QC submitted, that the pleaded case against Microsoft UK is deficient in that it does not enable Microsoft UK to understand why it has been sued and instead leaves Microsoft UK (and, indeed, the Court) in the position described in ***Forrest Fresh Foods***: having to speculate as to what case might be advanced if it were to be repleaded.

28. On that basis, Mr O'Donoghue QC submitted, ValueLicensing's case should, without more, be struck out. Mr O'Donoghue QC went on, however, to extend (as he put it) *"a measure of generosity"* to ValueLicensing and so to address what was stated on ValueLicensing's behalf by Mr Jonathan Cohen, a partner in Charles Fussell & Co LLP, when seeking leave to serve the proceedings out of the jurisdiction in respect of Microsoft US and Microsoft Ireland. It was Mr O'Donoghue QC's submission that, even adopting this more generous approach, still the claim against Microsoft UK is deficient, hence the application for summary judgment dismissing the proceedings.

29. At paragraph 22 of that witness statement, which was dated 6 May 2021, Mr Cohen addressed what he described as Microsoft UK's "*role in the Campaign*". In doing so, he referred to Microsoft UK as acting as a "*distributor, negotiating and entering into agreements for the sale of Microsoft software licences including to customers in the UK*". Mr Cohen, then, went on to state that "*Microsoft UK has thus implemented the Campaign by selling licences subject to and including Impugned Terms*", before then adding:

> *"Further, while … many of the precise details of the Campaign are outside ValueLicensing's knowledge, ValueLicensing believes that Microsoft UK, in its role as determiner of pricing, is likely to have been responsible for persuading UK customers to enter into Custom Anti-Resale Terms in exchange for discounts"*.

Mr Cohen also added that Microsoft UK *"also implemented other parts of the Campaign, including advising UK customers that licences could not be resold"*.

30. Mr O'Donoghue QC submitted that this provides no proper basis for a claim, even assuming that it had been pleaded, since mere implementation of an infringement committed by another party (whether for Article 101 and, the more so, for Article 102 purposes) is not sufficient to establish liability for an infringement on behalf of the implementer. Since the claim against Microsoft UK is based solely on its purported implementation of the alleged *"Campaign"*, in particular through its activities as a distributor in relation to licences containing the Impugned Terms, so, Mr O'Donoghue QC submitted, the claim cannot succeed and should be dismissed. Mr O'Donoghue QC submitted, in particular, that, whilst acts of implementation alone can be capable of amounting to concerted practices, that is only so where they are carried out pursuant to an anti-competitive agreement made between others and with knowledge of that agreement.

31. In the present case, Mr O'Donoghue QC highlighted not only (again) how it is not alleged by ValueLicensing that Microsoft UK itself was a party to any agreements that were in breach of Article 101 but also that nor is it anywhere alleged that Microsoft UK's alleged acts of implementation were carried out pursuant to an anti-competitive agreement made by others and with knowledge of that agreement. It follows, Mr O'Donoghue QC submitted, that the claim against Microsoft UK under Article 101 is unsustainable. In this respect, Mr O'Donoghue QC acknowledged that, in the Article 101 context, there is support (in the form of ***Provimi Limited v Aventis Animal Nutrition SA and others*** [2003] ECC 29 and cases which have followed ***Provimi***) for the proposition that it is arguable that an entity that implements an agreement in breach of Article 101 to which a member of the same undertaking is a party can be held liable for the infringement even though the implementer itself does not know of the infringement. Mr O'Donoghue QC submitted, however, that since significant doubt has been cast on the correctness of this line of authority, including in ***Cooper Tire Europe Ltd v Bayer Public Co Ltd*** [2010] EWCA Civ 864, [2010] Bus LR 1697 at [45] (per Longmore LJ), and since it is now no longer possible for this Court to make a preliminary reference to the CJEU, so the Court should now (as Mr O'Donoghue QC put it) *"grasp the nettle"* and decide that ***Provimi*** was wrongly decided. On that basis, Mr O'Donoghue QC submitted, since (at least he suggested) ValueLicensing has not alleged that Microsoft UK had the relevant knowledge, the Court should decide that the claim under Article 101 must fail.

32. Thirdly, Mr O'Donoghue QC submitted, even if (unknowing) implementation of an infringement of Article 101 (or Article 102) is sufficient to establish liability for that infringement, Microsoft UK's activities do not constitute implementation in the sense which has been used in the relevant case law.

Discussion

33. I am unpersuaded by these various points. I am quite satisfied, on the contrary, that it would be inappropriate, applying the principles applicable to applications such as those before the Court, were either a strike-out order made or reverse summary judgment given in the present case. I say this for a number of reasons.

34. First and most fundamentally, the claim which ValueLicensing makes as against Microsoft UK (and, indeed, as against Microsoft US and Microsoft Ireland) is a claim which relies upon the fact that (along with Microsoft US and Microsoft Ireland) Microsoft UK is part of the same economic entity. It is that entity (or, in the language

of Articles 101 and 102, that *"undertaking"*) - not Microsoft UK alone - which is said in the present case to have infringed competition law and it is in respect of that infringement (by the *"undertaking"*) that all three Defendants are alleged to be jointly and severally liable. Thus, Article 102 prohibits abusive conduct by "*one or more undertakings*", whilst Article 101 prohibits "*agreements between undertakings, decisions by associations of undertakings or concerted practices*" (the latter being itself "*a form of coordination between undertakings*".

35. Critically, as Ms Lester QC pointed out, the concept of an undertaking was recently explained by the CJEU in ***Case C-882/19 Sumal SL v Mercedes Benz Trucks Espana SL*** [2021] Bus LR 1755 at [41], as follows:

"the concept of 'undertaking' … covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and thus defines an economic unit even if in law that economic unit consists of several, natural or legal."

36. The same point is made, indeed, Ms Lester QC observed, in *O'Donoghue & Perilla, The Law and Economics of Article 102 TFEU* (3rd Ed.) at page 36, where this is stated (under the sub-heading *"The single economic unit doctrine"*):

"Entities that form part of a 'single economic unit' cannot be found liable for violating Article 101 TFEU, e.g. restrictive agreements between a parent and a wholly-owned subsidiary. The rationale is that there is no meaningful scope for competition between a parent and a wholly-owned subsidiary, since the parent could always achieve the same result as the agreement by exercising its prerogatives as shareholder. By the same token, however, companies that belong to the same economic entity constitute a single 'undertaking' for purposes of Article 102 TFEU. This is presumably based on the fact that an undertaking should not be able to circumvent the obligations arising from Article 102 TFEU by means of internal re-structuring, e.g. by splitting its business between different subsidiaries in order to reduce the market share held by each separate legal entity. If not, an undertaking could in theory arrange for several of its subsidiaries to carry out aspects of the infringing conduct, and, once all rivals had been foreclosed, recombine the businesses of its separate subsidiaries, without intervention under Article 102 TFEU."

37. Secondly but no less fundamentally, Ms Lester QC was right (or at least, in my view, was sufficiently arguably right for present purposes bearing in mind the summary nature of the application(s) made by Microsoft UK) when she submitted that being part of an undertaking which has infringed competition law is sufficient in and of itself to fix a legal entity with liability; it is not necessary, therefore, to allege that Microsoft UK *itself* (as opposed to the *"undertaking"* of which it forms part) did anything to infringe. This was confirmed in clear terms in ***Sumal***. As the CJEU put it at [42]-[43]:

"When such an economic unit infringes article 101(1), it is for that unit, in accordance with the principle of personal responsibility, to answer for that infringement. In that regard, in order to hold any entity within an economic unit liable, it is necessary to prove that at least one entity belonging to that economic unit has committed an infringement of article 101(1), such that the undertaking constituted by that economic unit is to be treated as having infringed that provision …

Where it is established that the parent company and its subsidiary are part of the same economic unit and thus form a single undertaking, within the meaning of article 101, it is therefore the very existence of that economic unit which committed the infringement that decisively determines the liability of one or other of the companies making up that undertaking for the anticompetitive conduct of the latter."

38. Accordingly, the CJEU went on to explain at [51] and [67], the relevant question is whether the *"undertaking"* (not the companies which make up that entity) sought to be held liable has infringed competition law. That is for the victim of the infringement to prove, having regard both to the "*economic, organisational and legal links*" between the relevant entities, and to "*the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement*" for which the undertaking is responsible.

39. The fact that ***Sumal*** is a case, as Mr O'Donoghue QC pointed out, concerned with Article 101 rather than Article 102 is not a reason, in my view and certainly at this summary stage, to decide that it should, in effect, be disregarded, any more than is it critical (despite Mr O'Donoghue QC's insistence) that certain of the authorities relied upon by Ms Lester QC, such as ***Sumal*** itself as well as ***Media-Saturn*** and ***Biogaran***, are cases which involve cartels.

40. Thirdly, again as Ms Lester QC submitted, such liability is joint and several. Thus, in ***Sumal*** the CJEU said this at [44]:

"the concept of an 'undertaking' and, through it, that of 'economic unit' automatically entail the application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed."

41. These ingredients have all been alleged in the present case, whether in the Particulars of Claim or in Mr Cohen's witness statement dated 6 May 2021 or both. I agree with Ms Lester QC, therefore, that it is not incumbent upon ValueLicensing to allege more than has been alleged.

42. Specifically, it has been alleged that Microsoft constitutes a single economic entity (with Microsoft UK as part of that entity). The interrelationship between the Defendants is set out in paragraph 11 of the Particulars of Claim, as follows:

"Microsoft's software licensing terms are set on a global basis by Microsoft [US], which owns the copyright in the relevant software. Microsoft grants licences via local entities. In the Relevant Territories, the licensing entity is Microsoft Ireland. Microsoft UK acts as a distributor, negotiating and entering into agreements for the sale of such licences."

This has not been disputed by Microsoft. In any event, as Ms Lester QC submitted, Microsoft does not deny that the allegation that it forms one undertaking has realistic prospects of success in the ***Sumal*** sense. Nor, again as Ms Lester QC rightly observed, does Microsoft suggest that ValueLicensing's case that the conduct of Microsoft US and/or Microsoft Ireland has infringed competition law is not seriously arguable. It must follow, subject only to Mr O'Donoghue QC's objection to ***Sumal*** which I am about to address, that ValueLicensing's pleaded Article 102 case against Microsoft UK has reasonable prospects of success.

43. Mr O'Donoghue QC nonetheless sought to persuade the Court that this is not the case by inviting the Court to disregard ***Sumal*** on the basis that s. 6 of the European Union (Withdrawal) Act 2018 provides (by sub-section (1)) that courts and tribunals are not bound by EU case law which post-dates the end of the implementation period. There are three difficulties with this submission, however.

44. First, I agree with Ms Lester QC that, whatever the position as a matter of English law in the light of Brexit, ***Sumal*** will plainly be conclusive as to the principles governing Microsoft UK's liability under competition laws in the EU and EEA member states. This matters because, as made clear in the Particulars of Claim at paragraph 60, ValueLicensing's case has two aspects. Thus, for events giving rise to damage from the start of the infringement (2016 at the latest) to the end of the Brexit transition period, ValueLicensing's claims are governed by English law, which in that period included Articles 101 and 102 of the TFEU, as well as the corresponding EEA rules. As for the post-Brexit period, ValueLicensing's claims are governed by the laws of the countries where the market was (or was likely to be) affected through the application of Article 6(3)(a) of Rome II, namely the markets, and therefore the laws, of the UK and the EU and EEA member states. In short, ***Sumal*** applies to a substantial proportion of ValueLicensing's claims regardless of whether it also applies because the Court here considers it appropriate to apply it.

45. Secondly, as to that last point, under s. 6(2) of the 2018 Act, the Court here may still have regard to post-Brexit EU authority. The Court, therefore, has a choice whether to follow ***Sumal*** or not. However, as Ms Lester QC put it, the proposition that the Court should decide not to follow a decision such as ***Sumal*** (*"a liability case squarely consonant with EU principles"*), and so to diverge from EU law, on a summary judgment application rather than at trial on a full consideration of the evidence and with submissions also, quite possibly, by other interested parties, is somewhat unrealistic.

46. Thirdly, there is at least a realistic possibility that s. 6(1) of the 2018 Act does not apply to the interpretation of Articles 101 and 102 of the TFEU insofar as ValueLicensing relies on them (as part of English law) in its claims for the pre-Brexit period. This is an issue which was the subject of a recent article by Jack Williams, *'Accrued EU law rights: a guide for the perplexed'*, *EU Relations Law*, 5 January 2022 (https://eurelationslaw.com/blog/accrued-eu-law-rights-a-guide-for-the-perplexed); it is not an issue which is suitable for summary determination. However, in essence, the argument is that, insofar as ValueLicensing seeks to rely directly on Articles 101 and 102 in respect of the pre-Brexit period, those are rights which are to be regarded as having arisen under s. 2(1) of the European Communities Act 1972 (and, during the implementation period, s. 1A of the 2018 Act). The 1972 Act having now been repealed, then, pursuant to s. 16 of the Interpretation Act 1978, the rights that ValueLicensing had under the 1972 Act, whilst it was in force, fall to be treated as having now been accrued, so as to mean that ValueLicensing's claims for the pre-Brexit period are to be determined by reference to EU authority, whenever that authority is decided, since nothing in the Brexit legislation evinces a "*contrary intention*" and s. 6 of the 2018 Act is concerned only with the interpretation of *"retained EU law"* (i.e. such EU law as was incorporated, prospectively, into UK law on Brexit). If that is right, then, Microsoft UK cannot avoid ***Sumal*** for this further reason.

47. Fourthly, contrary to Mr O'Donoghue QC's observation when pressed by me as to whether he was suggesting that, in any event, irrespective of the case's applicability

post-Brexit, the decision was wrong, ***Sumal*** is a case in which the CJEU was asked directly whether the economic unit theory implied subsidiary liability and, if so, under what conditions. It is, accordingly, a decision which is directly on point. This is demonstrated by the introductory part of the Advocate-General's Opinion:

> *"1. In the request for a preliminary ruling which is the subject of the present Opinion, the Court is asked to clarify whether civil liability for the harm caused by an anticompetitive practice can be claimed, by the person alleged to have suffered it, against the subsidiary of the company which engaged in that practice and which was, for that reason, penalised by the Commission by a decision that does not include the subsidiary, in the case where those companies form an 'economic unit'.*
>
> *2. The economic unit theory is well established in the case-law of the Court of Justice and the General Court, in which it has been used to penalise the parent company for the anticompetitive conduct of its subsidiaries by means of a 'bottom-up' process from the subsidiaries to the parent company. In the case brought before the Court of Justice by the referring court, the question is whether that concept of 'economic unit' can justify a 'top-down' process for imputing liability, as a result of which the subsidiary is liable for the harm caused by the anticompetitive conduct of the parent company."*

48. The Advocate-General, then, went on to address the *"concept of undertaking in EU competition law and the 'economic unit theory'"* in terms which indicate that he was not limiting himself to Article 101: see the Opinion at [23]-[53]. In particular, having considered relevant case law, he went on at [32]-[46] to consider the issue as a matter of principle (or, as he put it, *"the exact legal basis"*). He said this at [33]-[35]:

> *"33. From an initial examination of the case-law, two answers seem theoretically possible.*
>
> *34. First, there are several passages in the judgments of the Court of Justice where it seems that the decisive factor for imputing liability to the parent company for the anticompetitive conduct of its subsidiary is the exercise by the parent company of decisive influence over the subsidiary, preventing the subsidiary from deciding independently upon its own conduct on the market and simply following, in all material respects, the instructions given to it by the parent company. …*
>
> *35. Second, several other aspects of the case-law suggest that it is the very existence of an economic unit that determines the liability of the parent company for the anticompetitive conduct of the subsidiary. The Court has consistently held that the formal separation between two entities, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market, and that, therefore, they constitute an economic unit – that is to say, a single undertaking – for the purposes of applying the rules on competition. …".*

49. He, then, went on at [38]-[40] to say:

> *"38. Conversely, if the basis of the joint liability of the parent company and the subsidiary is the economic unit acting as a single undertaking in the market, then there is no logical reason to prevent liability from being attributed either by*

applying a bottom-up process – as has happened in the cases decided thus far by the Court – or by applying a top-down process. If joint liability is based on unity of action in the market, all the parties that make up that unit may, in certain circumstances, be held liable for the anticompetitive conduct materially engaged in by one of them.

39. The choice between the two perspectives is complicated by the fact that, in the public enforcement of competition law, given the almost criminal nature of the penalties imposed, several fundamental principles come into play: first, the principle of personal responsibility, and its corollary according to which the imposition of a penalty and the identification of liability presuppose guilt ('nulla poena sine culpa'). The identification of the legal basis for the joint liability of the parent company and the subsidiary for the subsidiary's anticompetitive conduct must therefore take into account the need to respect that principle.

40. For the reasons set out below, I believe that the Court should adopt the second of the abovementioned perspectives, which, as has been seen and as I will explain in more detail below, has already been largely adopted in case-law."

50. Importantly, the Advocate-General, then, concluded as follows at [45]-[46]:

"45. It follows that the basis of the parent company's liability lies in economic unity, or in the existence of a single economic unit.

46. Since this basis is entirely independent of any fault on the part of the parent company, the only way to reconcile it with the principle of personal responsibility is to consider that this principle operates at the level of the undertaking within the meaning of competition law, or at the level of the economic entity that negligently or intentionally committed the offence. That entity, as an economic entity acting jointly on the market, is liable because one of its members acted in a way that infringes the competition rules."

51. The Advocate-General went on at [52]-[53] to say this:

"52. In this reconstructed model of the economic unit, there is no logical reason why liability cannot be attributed not only in the 'bottom-up' sense (from the subsidiary to the parent company), but also in the 'top-down' sense (from the parent company to the subsidiary).

53. Although this possibility has not yet been recognised in case-law, some signs of it do exist. Thus, several judgments of the General Court, including the recent judgment in Biogaran v Commission, cited by the referring court, seem to have considered the possibility of this process in the light of the concept of 'economic unit'. In Biogaran, against which an appeal is currently pending before the Court of Justice, the General Court held that the Commission could hold the subsidiary and the parent company jointly and severally liable for the infringement at issue, resulting in part from the conduct of the parent company and in part from the conduct of the subsidiary, even though the subsidiary claimed that it was unaware of the conduct of the parent company. The General Court held the joint and several liability to be justified because the respective conduct of each had contributed to the infringement and that, if the Commission had to prove that the *subsidiary was aware of the parent company's conduct in order to impute the infringement to the group, this would have an effect on the concept of economic unit. According to the General Court, the condition for the attribution of various anticompetitive acts constituting the cartel as a whole to all the parts of the undertaking is satisfied where each part of that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role. It is also interesting to note that the General Court held that, under those conditions, the Commission had not imputed liability to the subsidiary for the anticompetitive conduct of the parent company, but imputed all the conduct of each of those parties to the economic unit of which they were part."*

52. The CJEU itself approached matters in essentially the same way: see, in particular, [39]-[67]. At [67] specifically, the CJEU concluded:

"In the light of the foregoing, the answer to the first to third questions is that Article 101(1) TFEU must be interpreted as meaning that the victim of an anticompetitive practice by an undertaking may bring an action for damages, without distinction, either against a parent company who has been punished by the Commission for that practice in a decision or against a subsidiary of that company which is not referred to in that decision, where those companies together constitute a single economic unit. The subsidiary company concerned must be able effectively to rely on its rights of the defence in order to show that it does not belong to that undertaking and, where no decision has been adopted by the Commission under Article 101 TFEU, it is also entitled to dispute the very existence of the conduct alleged to amount to an infringement."

53. As Ms Lester QC submitted, there is nothing in ***Sumal*** to suggest that the reasoning applicable to Article 101 as there set out would not also apply to Article 102. Indeed, it should be noted that at [41] (as previously referred to) the CJEU referred to competition law's reference to undertakings in a general sense:

"In so doing, EU competition law, in targeting the activities of undertakings, enshrines as the decisive criterion the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition rules … . The concept of 'undertaking', therefore covers any entity engaged in an economic activity, irrespective of the legal status of that entity and the way in which it is financed, and thus defines an economic unit even if in law that economic unit consists of several persons, natural or legal …. That economic unit consists of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind in Article 101(1) TFEU … ."

54. In view of the above, it is clear that ValueLicensing's case against Microsoft UK not only is sufficiently pleaded (based on the ***Sumal*** approach at least) but also that it has reasonable prospects of success. In summary and to repeat, in line with ***Sumal***, there is no requirement that ValueLicensing should have to plead infringements of the competition rules by Microsoft UK itself. It is sufficient that ValueLicensing has alleged that Microsoft UK is a member of an infringing undertaking. If, ultimately, ***Sumal*** is not followed at trial, the single economic entity/undertaking case may well

fail. However, what matters for present purposes is that the case as pleaded, based on ***Sumal***, is both coherent in pleading terms and is a case which is *"realistic"*.

55. This conclusion makes it unnecessary to go further. However, in deference to the submissions made before me and because I am satisfied that there is an additional reason why it is appropriate that Microsoft UK's applications are dismissed, I now go on to consider the position on the assumption that ***Sumal*** is inapplicable.

56. In my view, ValueLicensing's alternative 'implementation' case also has a reasonable prospect of success in circumstances where it is Microsoft's *own* evidence that Microsoft UK negotiated contracts with customers containing the Impugned Terms in exchange for discounts which Microsoft UK afforded to those customers, there must be a realistic prospect that ValueLicensing will be able to establish at trial that Microsoft UK itself knowingly implemented the anti-competitive conduct which Value Licensing has alleged in these proceedings.

57. I have reached this conclusion even though I tend to agree with Mr O'Donoghue QC when he submitted, characterising the case as ValueLicensing's *"unpleaded oblique claim"*, that this is not a case which has been adequately pleaded. The implementation case is, instead, the case described by Mr Cohen in paragraph 22 of his witness statement dated 6 May 2021 to which I have previously referred. Notwithstanding this, however, in line with the approach described by Lewison J in ***Easyair*** at [15(v)] and anyway given my decision that it would not be appropriate to strike out ValueLicensing's primary case, I am clear that it would not be appropriate to decide, on a summary basis, that Microsoft UK did not implement the alleged infringements. As Barling J put it in ***Media-Saturn*** at [111]:

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

58. Similar considerations apply in the present case. Like Barling J, therefore, I consider that it would be wrong to decide at this stage that ValueLicensing's implementation case has no realistic prospect of success.

59. The more so, since I consider that Ms Lester QC was right when she submitted that Microsoft's evidence in support of these applications arguably strengthens the case that Microsoft UK is under a liability, arguably on the basis that Microsoft UK directly participated in the *"agreements between undertakings"* that contravene Article 101.

60. Ms Lester QC highlighted in this regard how in his witness statement Mr Steven Morgan explains that he works for Microsoft's Business Desk, which is *"empowered to deal with"* Custom Anti-Resale Terms, and that he has, in fact, negotiated and agreed such terms with Microsoft's customers under a negotiating mandate determined by Microsoft US, for eventual inclusion in a licensing agreement with Microsoft Ireland. Whilst Mr Morgan calls his role *"a Microsoft [US] function"*, as Ms Lester QC pointed out, he is formally employed by Microsoft UK and so there must be a realistic possibility that Microsoft UK was directly involved in imposing the Impugned Terms on customers in a way that contravenes Article 101(d) by making the conclusion of contracts subject to acceptance by the other party of supplementary obligations which have no connection with the subject of the contracts.

61. Furthermore, as Ms Lester QC put it, the notion that persuading customers to enter into contracts that are *themselves* anti-competitive is a lesser basis for liability than selling products whose prices are affected by anti-competitive agreements makes little sense given that Microsoft UK is being paid by customers for the licences which Microsoft Ireland are granting. The fact Microsoft Ireland is the licensor is not determinative since, even if the appropriate analysis for Article 101 purposes is contractual rather than (as Ms Lester QC submitted) somewhat broader, the linkage between the grant of the licences (by Microsoft Ireland) and the giving of the discounts (by Microsoft UK) in return for the customers entering into those licences is clear and close.

62. Nor do I accept, as previously indicated, that Mr O'Donoghue QC can be right (or at least I cannot be sufficiently confident for the purposes of the present applications that Mr O'Donoghue QC *is* right) when he submitted that the implementation doctrine is only available for breaches of Article 101. True it is that much of the case law is concerned with Article 101. However, Mr O'Donoghue QC was unable to point to any authority stating, in terms, that it is so limited. ***Tetra Pak***, in particular, is not a case which supports Mr O'Donoghue QC's submission and, indeed, in fairness, I am not entirely sure that he even suggested otherwise. Certainly no case was cited to me in which this has been spelt out. I also agree with Ms Lester QC when she submitted that, as a matter of principle, it is very hard to see why an entity that can be held liable under Article 102 for implementing an anti-competitive agreement made by the undertaking to which it belongs could not equally be held liable for implementing that undertaking's abuse of a dominant position.

63. As for ***Epic***, the decision of Roth J on which Mr O'Donoghue QC placed substantial reliance, that is itself a case in which an allegation that part of an undertaking had implemented an infringement of Article 102 was held to have reasonable prospects of success. Epic alleged that a Google subsidiary (G4) had been involved in implementing the decision of Google's (global) decision to remove Epic's game Fortnite from the Google Play Store (by removing it from the store in the UK), which was said *inter alia* to have infringed Article 102. That allegation gave rise to a serious issue to be tried against G4. In addition, the only apparent basis on which the anchor defendant (A2) was said to be liable for Apple's breaches was membership of the same undertaking. Roth J rejected that case but that was before ***Sumal***. No reference was made to there being any allegation of participation or implementation against A2. Furthermore, again as Ms Lester QC submitted, the decisive point for Roth J was that no relief was sought against A2, in that the only relief sought at all was an injunction and it was common

ground there was no scope for an injunction against A2. The present case is different since ValueLicensing claims damages from Microsoft UK on a joint and several basis.

64. This brings me to the question of 'knowing implementation'. As to that, Mr O'Donoghue QC made two points, the first of which is a pleading point rightly described by Ms Lester QC as *"hopeless"*.

65. ValueLicensing's case is: first, that Microsoft UK sold licences which included the Impugned Terms, including the New From SA Condition, which was published by Microsoft; secondly, that Microsoft UK persuaded customers to agree to the other category of Impugned Term in exchange for discounts; and, thirdly, that Microsoft UK advised customers that licences could not be resold. I agree with Ms Lester QC that, in such circumstances, it is an obvious inference that ValueLicensing is alleging that Microsoft UK was aware of both categories of Impugned Term and of its own conduct; it would make no sense for what has been alleged to be understood otherwise. In any event, whether the Particulars of Claim say it or, more relevantly in context, whether Mr Cohen said it in his witness statement, as Ms Lester QC pointed out, that knowledge is intended to be alleged has now been confirmed and that is sufficient, as the Court of Appeal, in effect, said in ***Cooper Tire*** at [39]:

"It would not in our view have been open to either of the anchor defendants to strike out the plea on the basis that knowledge or awareness was required and had not been pleaded. To the extent that the lack of clarity was embarrassing, it would always have been possible for any defendant to inquire whether knowledge was being alleged and, if so, what facts and matters were relied on to establish such knowledge. To give an answer to that request would not be to plead a new cause of action."

66. This means that Mr O'Donoghue QC's ***Provimi*** point, the second of the matters which he raised, does not arise: it is ValueLicensing's case that Microsoft UK had the requisite knowledge, and that is a factual matter which can only be determined at trial. It follows that there is no need, at least if ValueLicensing establishes knowledge on Microsoft UK's part, for ValueLicensing to have to invoke ***Provimi*** and invite the Court to decide that knowledge should be attributed: knowledge can be established without such attribution.

67. It follows that there is no need (or at least it is sufficiently realistically arguable that there is no need) for any nettle to have to be grasped and for the Court to have to decide (as Mr O'Donoghue QC invited) that ***Provimi*** was wrongly decided. As to that issue, however, I agree with Barling J in ***Media-Saturn*** who had this to say at [156], after at [139]-[154] reviewing the authorities which have considered ***Provimi*** (including ***Biogaran*** which he described at [149] as having given *"a boost"* to ***Provimi***):

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

Barling J added as follows at [157]:

"Therefore, provided that there is also an arguable case (1) that the relevant 'undertaking' existed, (2) that the entity in question (TIS) was a member of it, and (3)

that there was some participation/implementation by TIS, this basis of liability is unfit for summary disposal. Elements (1) and (2) are conceded for present purposes (at least insofar as TC and TIS are concerned), and I consider (3) to be clearly arguable on the basis of the largely uncontroversial facts relating to TIS's role and activities."

68. Like Barling J and regardless of whether Mr O'Donoghue QC was right to suggest that these observations were made on an *obiter* basis, I do not consider the ***Provimi*** point to be suitable for summary determination. As previously explained when addressing ***Sumal***, I consider it inappropriate, when dealing with applications such as the present, for the Court to decide on a summary basis that UK competition rules should henceforth diverge from (pre-Brexit, established) EU rules. It is telling, indeed, that in two important respects (***Sumal*** and ***Provimi***) and despite the summary nature of the application(s), Microsoft UK urges the Court to depart from authority (CJEU and High Court respectively) in a significant way. This, to my mind, underlines the somewhat ambitious nature of the application(s).

69. For these various reasons, Microsoft UK's strike-out/summary judgment application(s) must be dismissed.

The jurisdiction challenge

70. In view of my rejection of Microsoft UK's strike-out/summary judgment application, there is no issue that it was open to ValueLicensing to invoke the *"necessary or proper party"* jurisdictional gateway contained in paragraph 3.1(3) of PD 6B to the CPR in order to establish jurisdiction as against Microsoft US and Microsoft Ireland. Accordingly, it is unnecessary to address whether the alternative (*"tort"*) gateways to be found in paragraph 3.1(9) enable ValueLicensing to establish jurisdiction also. The only issue which needs, in such circumstances, to be grappled with concerns *forum non conveniens*.

71. It was Mr O'Donoghue QC's submission that ValueLicensing has failed to show that England and Wales is the appropriate forum for the trial of the action and, moreover, that this is "*clearly so*": see ***Spiliada Maritime Corp v Cansulex Ltd*** [1987] AC 460 at page 481E (per Lord Goff). Mr O'Donoghue QC made a number of observations in this connection.

72. First, he submitted that the fact that ValueLicensing and Microsoft UK are English is of limited (if any) weight given that there are also two parties who are domiciled outside the UK. That is especially so, he submitted, given that the focus of the claim is a policy set by Microsoft US in the United States (with no allegation that Microsoft UK was involved in setting the policy) and agreements to which Microsoft Ireland is a counterparty (with no allegation that Microsoft UK was a party to such agreements). This ignores the fact, however, that the UK is (or is at least alleged to be) a key affected market. Mr Henderson has estimated that the overwhelming majority of cases of which the Defendants are aware involve customers from whom licences were acquired by ValueLicensing who are not UK-based. However, looking at the relevant underlying material which was before me, it is apparent that some 48% of software licences there listed were to UK-based parties. This suggests, as Ms Lester QC put it, that, had ValueLicensing been able to sell more software licences, a substantial proportion of such sales would have been within the UK.

73. Secondly, although the point is related to the first point, Mr O'Donoghue QC cited the observation made by Lord Mance in ***VTB Capital Plc v Nutritek International Corp & Others*** [2013] UKSC 5, [2013] 2 AC 337 at [62] that location of witnesses lies "*at the core of the question of appropriate forum*". Mr O'Donoghue QC highlighted how Mr Cohen has referred to just one witness who lives in England, albeit that Mr Cohen also suggested that any expert witnesses who give evidence on behalf of ValueLicensing are "*very likely*" to be based in England. Mr O'Donoghue QC submitted that identification of a single specified witness who resides in the UK is hardly a powerful factor in favour of the trial being heard here, the more so given that the claim concerns a policy formulated centrally by Microsoft US and so, at least in Mr Henderson's assessment, "*documents and witnesses concerning the elaboration and implementation of this policy are overwhelmingly located in the United States, not England*". In truth, however, this is a non-point since it is clear that there will be witnesses from both the US and from this country, as demonstrated, indeed, by the locations of the witnesses from whom statements were obtained for the purposes of the present applications.

74. Furthermore, and significantly in this respect, during the course of oral submissions, Mr O'Donoghue QC clarified that the Defendants were not, in any event, contending that the US is a more appropriate forum but, rather, that Ireland would be. As Ms Lester QC pointed out, however, the Defendants have not adduced any evidence from any witness based in Ireland; and nor has any Ireland-based witness been identified as likely to give evidence at trial. It is, in fact, wholly unclear what any Ireland-based witness would have to say which might be relevant to the case given that Microsoft Ireland's role as licensor appears to have been somewhat formalistic.

75. There are, however, other reasons why England and Wales is very clearly the most appropriate forum.

76. First and perhaps most importantly, since the proceedings will continue even if the claims against Microsoft US and Microsoft Ireland were to be stayed, in circumstances where ValueLicensing can pursue its claim against Microsoft UK as of right, there would be an inevitable risk not only of duplication but also of inconsistent findings. These are risks which should be avoided.

77. Secondly, as previously explained, there is the fact that English law is applicable to a large part of ValueLicensing's claims, namely the claims relating to the period from the start of the alleged infringement (2016 at the latest, on ValueLicensing's case) to the end of the Brexit transition period and, importantly, the claims also in respect of the post-Brexit period insofar as those claims are concerned with the UK market (as opposed to other EU/EEA member state markets). I reject Mr O'Donoghue QC's suggestion that Irish law is the more apposite since that is the law of the various licence agreements into which Microsoft Ireland entered. That does not follow at all.

78. In any event, as to the post-Brexit period in particular, as demonstrated by the submissions which Mr O'Donoghue QC made in relation to authorities such as ***Sumal***, it is clear that Microsoft UK's position at trial will be that in certain material respects English law has taken a divergent path from EU law. In such circumstances, it would be wholly inappropriate, and certainly undesirable, for a court in Ireland to be determining whether Microsoft UK is right about this. On the other hand, there would be no difficulty with the Court here applying EU competition law, either as part of

English law (in respect of the pre-Brexit period and, if that is what the Court determines is the case, also in respect of the post-Brexit period) or as part of the laws of other EU/EEA member states, since the Court here is very experienced in doing just that.

79. Lastly and out of completeness, as to a particular matter which was raised by Mr O'Donoghue QC, namely the fact that the Court here can no longer make a preliminary reference to the CJEU, whereas a court in Ireland could do so, this not a point of any practical substance in this case given that the matter which Mr O'Donoghue QC had in mind when making this submission is not a matter which would, in practice, arise: the court in Ireland would be bound by ***Sumal***, and so there would be no need for it to make a preliminary reference.

80. It follows that Microsoft US/Microsoft Ireland's jurisdiction application must also be dismissed.