Neutral Citation Number: [2023] EWHC 203 (Comm)

Case No: CL-2021-000072

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2023

Before :

SIR NIGEL TEARE
Sitting as a Judge of the High Court

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Between :

SAMSUNG ELECTRONICS CO. LIMITED and others	**Claimants**
- and -	
LG DISPLAY CO. LTD and another	**Defendants**

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- -

Daniel Piccinin and Sarah O'Keeffe (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Defendants**
Robert O'Donoghue KC and Jonathan Scott (instructed by **Covington & Burling LLP**) for the **Claimants**

Hearing date: 16 January 2023

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Approved Judgment

I direct that 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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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 03 February 2023 at 10:00am.

Sir Nigel Teare :

1. On 8 December 2010 the European Commission issued a Decision in which it found that the Claimants and Defendants, both South Korean entities, had (along with other South Korean or Taiwanese entities) infringed Article 101 of the TFEU, the prohibition on anti-competitive agreements. The infringement concerned the market for thin transistor liquid-crystal display ("LCD") panels for IT and television applications. The object of the infringement was to increase and maintain the prices of LCD panels. The infringement consisted of agreements and exchanges of information on pricing and production levels. There were bilateral and multilateral contacts between the "Addressees" of the Decision including high-level multilateral "Crystal Meetings" that took place in Taiwan and, on occasion, in South Korea. Although the Addressees were located outside the EEA (in Korea and Taiwan) the arrangements were implemented within the EEA through sales of LCD panels, and products containing LCD panels, within the EEA.

2. The Claimants were not required by the European Commission to pay a fine on account of their successful application for immunity based upon their "blowing the whistle" on the cartel.

3. The Defendants were fined EUR 215 million for their participation in the infringement, a 50% reduction that took into account the Defendants' cooperation with the Commission's investigation under the EU leniency programme.

4. A number of "follow-on" claims have been made by purchasers of LCD panels. This case concerns a follow-on claim by Ingram Micro (UK) Ltd. brought against the Claimants on 7 December 2016. The Claimants settled that claim on 5 April 2019 and now bring a claim against the Defendants for a contribution (in the sum of £1.5 million) pursuant to the Civil Liability (Contribution) Act 1978. On 19 February 2021 the Claimants were granted permission to serve the Defendants out of the jurisdiction. On 9 April 2021 the Defendants indicated that they intended to contest the jurisdiction of the court to hear the claim. This is the hearing of that jurisdictional challenge.

5. There is no dispute as to the requisite jurisdictional gateway or that there is a serious issue to be tried. The dispute is whether the Claimants can establish that England is the proper place in which to bring the claim. That depends upon whether England is clearly the appropriate forum.

6. This dispute as to forum arises in unusual circumstances, namely, that there is a previous decision of this court in another contribution claim by the Claimants against the Defendants in respect of the settlement of another follow-on claim arising out of the same Decision of the European Commission in which this court held that England was not the proper place in which to bring the contribution claim. The Claimants place great reliance on that previous decision and so it is necessary to refer to it.

7. On 9 July 2015 42 English local authorities issued a follow-on claim based on the Decision against the Claimants. The claim was settled on 4 September 2018. On 6 August 2020 Samsung issued proceedings against the Defendants seeking a contribution in the sum of £900,000 in respect of the settlement. Permission was given to serve the proceedings out of the jurisdiction but jurisdiction was challenged by the Defendants.

8. That challenge was resolved by Sir Michael Burton sitting in this court on 28 May 2021; see [2022] 1 All E.R. 717. He upheld the jurisdictional challenge, holding that the courts of the Far East were the more appropriate forum to determine a dispute as to the relative responsibility between the Claimants and the Defendants. The Claimants appealed against that decision but the decision was upheld by the Court of Appeal; see [2023] 1 All E.R. 227. Males LJ, with whom Snowden LJ and Lewison LJ agreed, said at paragraph 48 that it had not been shown that, on the basis of the arguments presented to Sir Michael Burton, he had made any significant error of principle. It may be that other judges would have reached a different conclusion but that was not the question. It was also possible that if the arguments advanced before the Court of Appeal had been advanced before the judge the outcome would have been different. But that was not the question either.

9. Males LJ had earlier noted that the Court of Appeal had heard a "powerful argument" that the European Commission had rejected a submission by the Defendants that they had played a lesser role in the cartel than the Claimants and that that decision was binding upon the Defendants. But that argument had not been addressed to the judge. Males LJ said at paragraph 42:

> "If the Commission Decision is binding on the issue of relative culpability, evidence to contradict it will not be admissible, even if available. In that event the judge's view that the issue of relative culpability needs to be tried in the Far East, with the benefit of witness evidence and disclosure of documents there, would be mistaken. Moreover, the question whether the Commission findings are binding is itself a question of English or EU law, requiring careful analysis of the Commission Decision, which might well be better determined here rather than in the Far East……"

10. Males LJ also noted that a further submission made to the Court of Appeal had force, namely, that it was implausible to suggest, in circumstances where it could reasonably be assumed that the Defendants had deployed their best case before the Commission to the effect that they had played a lesser role than the Claimants, that more than 12 years after the Decision the Defendants would be able to adduce evidence painting a materially different picture on the issue of relative culpability from that set out in the Commission Decision. Males LJ said at paragraph 46:

> "In those circumstances many judges might have been sceptical about the suggestion that there needed to be witness evidence and disclosure of documents in the Far East in order for the issue of relative culpability to be determined. But I do not think it is possible to say that the judge's view was not rationally open to him. In particular, counsel then appearing for [the Claimant] appears expressly to have accepted that further relevant documents, not disclosed to the Commission, might be available."

11. The prior decision of this Court caused the Defendants to submit that the Claimants are estopped (by reason of the doctrine of issue estoppel) from alleging that England is clearly the appropriate forum for the determination of the Claimants' claim for a contribution. However, counsel preferred to rest his case on the related doctrine of abuse of process which prevents a party from mounting a collateral attack on an earlier decision of the court. In order to establish an abuse of process he had to show either that it would be "manifestly unfair" to a party to later proceedings that the same issue

should be re-litigated or that to permit such re-litigation would bring the administration of justice into disrepute; see *Hunter v Chief Constable of the West Midlands Police Force* [1982] AC 529 at 536B per Lord Diplock, *Secretary of State for Trade and Industry v Bairstow* [2004] Ch. 1 at paragraph 38 per Sir Andrew Morritt and *Laing v Taylor Walton (a firm)* [2008] PNLR 11 at paragraphs 11-12 and 25 per Buxton LJ.

12. The parties to the previous decision are also party to the present proceedings. (I am told that the Third Claimant was not party to the previous decision but that it is a wholly owned subsidiary of the First Claimant.) With regard to the issue of *forum conveniens* the issue in the previous decision appears to be identical to the issue in the present proceedings. The Claimants' claim is for a contribution pursuant to the Civil Liability (Contribution) Act 1978. The contribution sought is in respect of the settlement of a follow-on claim which was brought in England based upon the Decision of the European Commission regarding the same cartel in respect of the sale price of LCD panel units. In both proceedings the issue is whether England was clearly the appropriate forum. The only difference between the two sets of proceedings is that the follow-on claimant was different; in the earlier case the claimants were English local authorities and in the present case the claimant is an English company. But that difference does not appear to give rise to any material distinction between the two cases.

13. Is it "manifestly unfair" to the Defendants that the same issue as to *forum conveniens* be re-litigated in the present proceedings?

14. In support of the submission that it would be manifestly unfair it was said that the Defendants have incurred the substantial expense of litigating that issue in the Commercial Court and in the Court of Appeal. In circumstances where there is no material distinction between the two cases and yet the Claimants wish to re-litigate the very same issue it was said to be unfair that the Defendants should be obliged to incur, once again, the costs of arguing the *forum conveniens* issue. There is, it seems to me, obvious force in these submissions.

15. In *Laing v Taylor Walton (a firm)* (see above) it was said that the court should subject this question to "intense focus". I have therefore asked myself whether there is any reason why it could be said that it was not unfair to force the Defendants to re-litigate the question of *forum conveniens*. Counsel for the Claimants took two points in this regard. First, it was suggested that the point sought to be litigated was not the same issue as arose in the earlier proceedings. In the earlier proceedings the question was whether England was the appropriate forum for the contribution claim in respect of the Local Authorities claim. In the present claim the question is whether England is the appropriate forum in respect of the Ingram claim. This is true but the circumstances of each claim are identical. No material difference was identified. Second, it was suggested that, in circumstances where the Court of Appeal accepted that the decision of Sir Michael Burton did not set out some general or blanket approach as to where contribution claims should normally be tried but simply decided where the contribution claim in those proceedings should be decided, there is accordingly no collateral attack by the Claimants on anything in the judgment of Sir Michael Burton. But this submission again ignores the circumstance that there is no material difference between the issue before Sir Michael Burton and the issue before me.

16. In addition to those two points raised by counsel for the Claimants I have asked myself whether it is manifestly unfair to require the Defendants to re-litigate the *forum*

conveniens issue in circumstances where the Defendants are seeking in effect to avoid consideration of the two powerful and forceful arguments which were advanced by the Claimants before the Court of Appeal but which were not advanced before Sir Michael Burton. It could be said that this forensic advantage equals or outweighs the unfairness in requiring the Defendants to re-litigate the issue of *forum conveniens* such that there is no manifest unfairness to the Defendants. However, the choice not to advance such arguments before Sir Michael Burton was the choice of the Claimants alone. It was not in any way forced upon them by the Defendants. Further, this was not (understandably) a factor relied upon by counsel for the Claimants.

17. In my judgment it would be manifestly unfair for the Defendants to have to re-litigate the question whether England is the appropriate forum when there is no material distinction between the issue decided by Sir Michael Burton and the issue before me. The Defendants have already incurred the costs of litigating that issue with the Claimants and it would be unfair to require them to litigate that issue again with the Claimants and to incur the costs of doing so a second time.

18. Would re-litigation of that issue bring the administration of justice into disrepute?

19. The question whether England is the appropriate forum for determining a claim for a contribution to the costs of settling a follow-on claim brought by an English claimant and based upon the Decision of the European Commission regarding the LCD cartel has been determined by Sir Michael Burton with regard to the claim brought by the English local authorities. That determination was made in proceedings to which the Claimants and the Defendants were party. An appeal was brought against that decision by the Claimants but it was dismissed on the basis that Sir Michael Burton had committed no error of principle. The Claimants now wish to litigate that same issue with the Defendants but with regard to the claim brought by Ingram, an English company.

20. The purpose of litigation is to bring finality to a dispute between two parties. There is no doubt that by the decision of Sir Michael Burton and the review of that decision by the Court of Appeal finality has been brought to the dispute between the Claimants and the Defendants as to the appropriate forum in the context of the claim by the 42 English local authorities. The same dispute has now arisen between the Claimants and the Defendants in the context of the claim by Ingram. Since there is no material distinction between the two issues I consider that it would indeed bring the administration of justice into disrepute if the court were to consider that issue again. To do so would, I consider, offend the principle of finality. Where an issue has been determined in proceedings between two substantial concerns and the same issue arises in a subsequent case between the same parties and there is no material distinction between the issues in the two cases I consider that it would be disproportionate and unreasonable for the losing entity to be permitted to re-argue the same issue. For the court to permit a disproportionate and unreasonable challenge to the decision already made would bring the administration of justice into disrepute because the reasonable observer would expect the court not to permit such a challenge.

21. Four points were made orally in this context by counsel for the Claimants.

22. First, it was said that the Court of Appeal's reference to apportionment requiring a "broad brush approach" is a new development, to be contrasted with Sir Michael

Burton's understanding that relative culpability was in issue or, as it was put by counsel, that the "ins and outs" of blame were "up for grabs". I do not accept that there is any distinction between the assessment of relative culpability contemplated by Sir Michael Burton and the broad brush approach contemplated by the Court of Appeal. Sir Michael Burton accepted the submission of the Defendants that it was relevant to take into account both the seriousness of the respective faults and their causative relevance; see paragraphs 20(iv) and 22 of Sir Michael Burton's judgment. That is exactly what Males LJ said; see paragraphs 16-18 of his judgment. The proposition that apportionments of this nature are to be assessed with a relatively broad brush is not novel. It is the approach under the Law Reform (Contributory Negligence) Act 1945, see *Jackson v Murray* [2015] UKSC 5 at paragraph 20, and it is also the approach under the Merchant Shipping Act, section 187 (apportionment of damage caused by two or more ships), see *Evergreen Marine (UK) limited v Nautical Challenge Ltd* [2018] EWCA 2173 at paragraphs 120 and 124. (Although the decision of the Court of Appeal was overturned on other issues there was no appeal on this point.) The suggestion that a broad brush was appropriate would not have been regarded as novel by Sir Michael Burton.

23. Second, it was said that the Defendants were themselves mounting a collateral attack on the Decision of the Commission. However, counsel for the Defendants expressly accepted that the Decision of the Commission was binding and expressly affirmed that the Defendants were not seeking to challenge any of the findings made by the Commission. It will be necessary to comment on this particular dispute later in this judgment. But for the present it is sufficient to observe that the question whether it brings the administration of justice into disrepute to require the Defendants to re-litigate the issue of *forum conveniens* is a prior question. One only gets to the question whether the case which the Defendants wish to advance on apportionment is contrary to findings of the Commission if the Defendants have to re-litigate the question of *forum conveniens*.

24. Third, reference was made to the decision of the Court of Appeal in *Allsop v Banner Jones* [2022] Ch. 55. That was a case where an unsuccessful litigant sued his legal representatives for negligence. The Court of Appeal emphasised that the jurisdiction to strike out a case on the grounds that it was an abuse of process was exceptional but confirmed that the test was whether what was sought to be done was manifestly unfair to a party to litigation before the court or would otherwise bring the administration of justice into disrepute among right-thinking people. The mere fact of re-litigation is not enough; see paragraph 44 per Marcus Smith J. with whom Arnold LJ and Lewison LJ agreed. The point which counsel sought to extract from this case was not clear to me, despite having re-read pages 143-147 of the transcript. I accept that the judgment of Marcus Smith J. is a full and authoritative analysis but I was not persuaded that it took the argument in the present case any further. It is true that the Court of Appeal envisaged that in cases where the subsequent litigation was between the same parties the doctrine of issue estoppel comes into play but it was not submitted to me that the abuse of process doctrine could not also apply in such a case. Counsel's submission was that in the present cases the issues were not the same, a submission which I have already rejected.

25. Fourth, it was submitted the doctrine of abuse of process was not appropriate in the present case which did not involve a hard edged question of law but a discretionary decision. I accept that there may be few cases where it can be said that an issue in one

case as to what is the appropriate forum may be the same as an issue as to the appropriate forum in another case. But in this case the issue is effectively the same in both cases (for there is no material distinction) and it arises between the same parties.

26. Having considered these submissions I am not dissuaded from reaching the conclusion that to permit the Claimants to re-litigate the issue of the appropriate forum would bring the administration of justice into disrepute.

27. For these reasons I must allow the Defendants' jurisdictional challenge on the grounds that it would be an abuse of process to permit the Claimants to challenge the decision of Sir Michael Burton that England is not the appropriate forum.

28. In case I am wrong in that conclusion I shall consider the jurisdictional challenge on its merits and in particular whether the Claimants have established that England is clearly the appropriate forum.

29. Counsel for the Claimants stressed that the cartel was global and that LCD panels are a global product. Counsel also stressed that the Decision of the Commission was a "full infringement" decision which gave a detailed "blow-by-blow" account of the cartel, its formation and operation from 2001 to 2006, based upon contemporaneous documents, many of which, including notes of the Crystal Meetings, had been provided to the Commission by the Defendants. It was stressed that the meetings were conducted in English.

30. The submission of the Claimants was that there are "a myriad" of factors connecting the claim for a contribution to England. They were: (i) that the claim concerns a settlement agreement concluded in England and governed by English law, (ii) that certain of the Claimants are English companies, (iii) that the Ingram claim was brought by an English company, (iv) that the claim related to sales within the territorial scope of Article 101 of TFEU and (v) that Ingram procured a very large portion of its finished goods from UK-based suppliers.

31. But there are also factors connecting the claim to South Korea. The contribution claim is between two South Korean companies concerning their relative responsibility for cartel conduct in which they engaged in Taiwan and, on occasion, South Korea. None of the anti-competitive meetings took place in England. Prima facie, these factors connecting the contribution claim to South Korea appear to me to be stronger than those connecting the claim to England.

32. Counsel for the Claimants submitted however that upon analysis the factors connecting the claim to South Korea are insubstantial because the level of the Defendants' contribution will depend upon the Defendants' market share, which is to be found in the Commission Case File, and upon the Defendants' relative culpability, as to which binding findings have been made by the Commission. It will be necessary to consider later in this judgment whether there are indeed such binding findings but even if there are such findings the Commission Case File and the Commission's findings would also be available to the court in South Korea. The dispute will remain one between South Korean companies concerning cartel conduct in Taiwan and, on occasion, South Korea.

33. Counsel for the Claimants submitted that 4 factors made England clearly the appropriate forum.

34. First, reliance was placed on "the expertise of the English court and the parties' respective legal teams". This court does have familiarity with competition issues but given the principles of comity and mutual respect it would require very strong evidence to support the suggestion that the expertise of the English court in such matters is materially greater than that of the South Korean court. There is no such evidence. Mr. Camesasca has simply said that "it cannot seriously disputed that the courts of Korea have less (if any) experience of such matters." By contrast Mr Kelly has said that the Korean Fair Trade Commission is a respected and well-established competition authority in South Korea and that "South Korea is a jurisdiction with both pedigree and experience in competition law matters." I am unable to find that the courts of South Korea cannot adequately consider the relative responsibility of two South Korean entities in a cartel arising from meetings in Taiwan and, on occasion, South Korea. With regard to the parties' respective legal teams it is clear that the solicitors acting for them in this matter have considerable experience of LCD cartel litigation. But the evidence of Mr. Kelly demonstrates that it is likely that both parties also have South Korean lawyers who have represented them in relation to LCD cartel-related matters going back some years.

35. Second, reliance is placed on the fact that the Commission's decision is in English and that the majority of the documentation has been translated into English. Thus it can be said that the Decision would have to be translated into Korean were the claim to be heard in South Korea. But against that it can be said that the South Korean court will be able to consider the Korean contemporaneous notes of the relevant meetings in their original Korean.

36. Third, it is said that the presence of the material witnesses in South Korea is not a factor of weight because the Commission's Decision contains binding findings on the parties' relative culpability and in any event the Crystal Meetings were conducted in English. The latter point is true but the witnesses will be found in Korea and their contemporaneous notes were in Korean. The former point is more complicated. The Defendants do not dispute that the Commission's findings are binding but they dispute that any findings were made about relative culpability. The Claimants say that the Defendants submitted to the Commission that they should receive a lesser fine than the Claimants because their participation in the cartel was "more limited"; they did not collude in production limitation, they hosted no meetings, they attended via lower level employees and took measures to enforce compliance with competition law. This submission was rejected by the Commission. The Commission held that the Defendants' participation was as active as that of the other participants and did not warrant any reduction of the fine. There were therefore no mitigating circumstances. The Defendants accept that these findings are binding upon them but say that the case which they wish to advance is that the Claimants were the "ring leader". They say that no findings were made as to relative culpability. As Males LJ said in the Court of Appeal the Claimants' submission will require "careful analysis of the Commission Decision" (see paragraph 42). I am not sure that such analysis is possible on an application such as that before this court. However, having been taken to what are said to be the material or the most material passages in the Decision, two matters appear to me to be tolerably clear. First, it is likely that there is, at the very least, considerable overlap between the mitigating factors unsuccessfully advanced before the Commission and the "ring leader" argument sought to be advanced in defence of the claim to contribution. Thus the Defendants may face difficulty in advancing the "ring leader"

submission. Second, if there were a sustainable case, supported by evidence, that the Claimants were the "ring leader" one would have expected the Defendants to have raised it before the Commission as a mitigating circumstance. Yet on their own case they did not do so. That suggests that it is unlikely that any such case will be advanced in the present proceedings. Indeed, Mr. Kelly merely suggests that it is likely that there are documents outside the Commission File (referring to subsequent litigation in the USA) that "might indicate Samsung acted as ringleader". He does not say that he has been instructed by the Defendants that the Claimants were the ring leader or that the Defendants have any witness who says that Samsung were the ringleader. Since the cartel was in existence between 2001 and 2006 it is, it seems to me, exceedingly unlikely that any such instructions will now be given or that any such witness evidence will now emerge. It appears to me that Mr. Kelly wishes to investigate the possibility that the Claimants might have been the ringleader without having any instructions or witness evidence from his clients that that was the case. As I understand the case he wishes to investigate, it is that Samsung persuaded CPT, another member of the cartel, to enter the cartel. He says there is some evidence to this effect post the Commission Decision but it appears that evidence to that effect was also before the Commission (see CPT's response to questions from the Commission) and that such evidence was not accepted; see paragraph 458 of the Decision which states that "there was no evidence that the Claimants took any steps to coerce other undertakings to participate in the infringement." In these circumstances it is very likely that the debate between the parties on the level of contribution payable by the Defendants will be on the basis of the evidence before the Commission and on its findings. For this reason, the fact that those who participated in the cartel discussions and decisions are in South Korea is of less weight than appeared on first sight. The debate is unlikely to be assisted by witnesses' recollections of what happened at least 16 years ago. The reliable evidence will be the contemporaneous documentation in the Commission File. For this reason England may well be an appropriate forum for the resolution of the contribution claim (because the Decision is in English) but I am not persuaded that it makes England "clearly the appropriate forum".

37. Fourth, it was said that the contribution claim was governed by English law; see paragraphs 74-76 of the Claimants' Skeleton Argument. This was disputed by counsel for the Defendants who submitted that the governing law was likely to be South Korean or Taiwanese; see paragraph 46 of the Defendants' Skeleton Argument. It is unnecessary to resolve this issue because neither party has identified any material issues of law which would arise for determination in these proceedings. In those circumstances the identity of the governing law does not assist in determining the appropriate forum.

38. Having considered the factors relied upon by the Claimants I am able to accept that England is an appropriate forum. But is seems to me that South Korea is also an appropriate forum. Even if England were marginally the more appropriate forum that would not suffice; see Males LJ's judgment at paragraph 3.

39. There remains however a factor strongly relied upon by the Defendants, namely, the likelihood that the Claimants' claim for contribution from the Defendants in respect of the Local Authorities' action will be heard and determined in South Korea. By reason of the decision of Sir Michael Burton which was upheld by the Court of Appeal that claim cannot be determined in England and will have to be heard in South Korea. The Defendants say that that circumstance makes South Korea clearly the appropriate forum

for the determination of the Claimants' claim for contribution from the Defendants in respect of the Ingram action. For it would be clearly inappropriate for one claim to be determined in England and the other in South Korea. That would give rise to duplication of expense and a risk of inconsistent decisions.

40. The Claimants' answer to this is that no such proceedings have been commenced in South Korea and that speculation that there might be such proceedings takes matters no further. It was submitted that this is not a relevant consideration. I am unable to accept that submission. The Claimants were asked, shortly before this hearing, whether such proceedings will be commenced in South Korea and have simply said that no decision has been taken. That seems to me most unsatisfactory because it leaves open the very real possibility that such proceedings will be commenced in South Korea. If there were no possibility of such proceedings being commenced (because, for example, too much money had already been expended on the claim in trying to have the claim determined in England) it would have been easy for the Claimants to say so. But they have not said so. In those circumstances, and given that both the Claimants and the Defendants are South Korean, I agree that it is more likely than not that such proceedings will be commenced in South Korea. The court cannot close its eyes to that. For it is plainly relevant to the question as to what is the appropriate forum for the contribution claim in respect of the Ingram settlement. In my judgment consideration of that factor persuades me that England, if it were otherwise an appropriate forum, can no longer be regarded as an appropriate forum. Certainly it is impossible to say that England is clearly the appropriate forum.

41. For these reasons, upon the assumption (contrary to my view) that the Defendants are entitled to argue that England is clearly the appropriate forum, I would in any event have allowed the Defendants' jurisdiction application.

42. The Court will therefore set aside the *ex parte* decision of this court granting permission to serve proceedings out of the jurisdiction on the Defendants.