Neutral citation [2023] CAT 77

Case No: 1537/5/7/22 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29 December 2023

Before:

ANDREW LENON K.C.
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

~~**(1) GRANVILLE TECHNOLOGY GROUP LIMITED (IN LIQUIDATION)**~~
~~**(2) VMT LIMITED (IN LIQUIDATION)**~~
(3) OT COMPUTERS LIMITED (IN LIQUIDATION)

Claimant

- v -

~~**(1) INFINEON TECHNOLOGIES AG**~~
(2) MICRON EUROPE LIMITED
~~**(3) MITSUBISHI ELECTRIC EUROPE BV**~~
~~**(4) SK HYNIX UK LIMITED**~~
~~**(5) TOSHIBA ELECTRONICS EUROPE GMBH**~~

Defendant/Part 20 Claimant

- and –

SAMSUNG SEMICONDUCTOR EUROPE LIMITED

Part 20 Defendant

Heard at Salisbury Square House on 28 November 2023

RULING (SECURITY FOR COSTS)

APPEARANCES

Andrew Bartlett (instructed by Osborne Clarke LLP) appeared on behalf of OT Computers Limited (in liquidation) ("OTC")

Daniel Jowell KC and Joshua Pemberton (instructed by Allen & Overy LLP) appeared on behalf of Micron Europe Limited ("Micron")

Kristina Lukacova instructed by (Covington & Burling LLP) appeared on behalf of Samsung Semiconductor Europe Limited) ("Samsung")

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A. INTRODUCTION

1. Micron has applied for an order that OTC provide security for its costs. The context is as follows. OTC is claiming damages from Micron arising out of a cartel in the supply of dynamic random-access memory computer memory chips ("DRAM") to certain PC manufacturers (referred to as the "OEMs"). The cartel operated from 1 July 1998 until 15 June 2002. The claim relies on a decision adopted by the European Commission (the "Commission") on 10 May 2010 establishing the existence of the cartel in which Micron and Samsung and the former defendants were participants. OTC was a UK personal computer manufacturer in the 1990s and early 2000s, trading under the name "Tiny" until it became insolvent and entered into administration and ceased trading in January 2002. It was not itself an OEM but claims that the prices it paid for DRAM were affected by the cartel. Micron has brought a Part 20 claim against Samsung.

2. Micron originally applied for an order that OTC provide security for both its own incurred and future budgeted costs and those of Samsung, on the basis that, if OTC's claim against Micron failed, so too would Micron's claim against Samsung and Micron would inevitably be liable for Samsung's costs. However, by an ex tempore ruling at the case management conference on 28 November 2023, I ruled that the Part 20 claim brought by Micron against Samsung is to be tried separately from the main claim brought by OTC against Micron. Following that ruling, Micron restricted its application to an supplication for security in respect of its own costs, excluding Samsung's.

3. OTC has set aside a cash sum of £2 million which is held by its solicitors for the purpose of meeting an adverse costs order in this case. According to Micron's cost budget, its incurred and estimated future costs total £5.9 million. Micron requested security in the sum of £3.9 million, being the difference between £2 million and £5.9 million.

B. LEGAL FRAMEWORK

4. Applications for security for costs are governed by Rule 59 of the Competition Appeal Rules 2015 which provides, so far as relevant to the application, as follows:

> **"Security for costs**
>
> 59.—(1) A defendant to a claim may seek security for its costs of the proceedings.
>
> (2) A request for security for costs shall be supported by written evidence.
>
> (3) Where the Tribunal makes an order for security for costs, it shall—
>
> (a) determine the amount of security; and
>
> (b) direct—
>
> (i) the manner in which, and
>
> (ii) the time within which,
>
> the security must be given.
>
> (4) The Tribunal may make an order for security for costs under this rule if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and—
>
> (a) one or more of the conditions in paragraph (5) *[...]* applies;
>
> *[...]*
>
> (5) Where a defendant seeks security for costs against the claimant, the conditions are that—
>
> *[...]*
>
> (b) the claimant is a company or other body (whether incorporated in or outside the United Kingdom) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

5. Micron's application is made pursuant Rule 59(4)(a) and 59(5)(b) on the grounds that OTC is a company and there is reason to believe that it will be unable to pay Micron's costs if ordered to do so.

6. Paragraph 5.158 of the CAT Guide to Proceedings 2015 states that when considering whether it is just to order security for costs the Tribunal must have regard to all the circumstances, including:

> " *[...]* (a) whether it appears that the application is made in order to stifle a genuine claim, or would have that effect; (b) the stage of the proceedings at which the application is made and the amount of costs which the claimant has incurred to the date of the application; (c) the claimant's financial position, whether it is impecunious and if so why it is impecunious and particularly, whether the impecuniosity can be attributed to the defendant's infringement; (d) the likely outcome of the proceedings and the relative strengths of the parties' cases if that can be discerned without prolonged examination or voluminous evidence; (e) any admissions by the defendant and, for example open offers - but the defendant should not be adversely affected in seeking security because it had attempted to resolve the matter using alternative dispute resolution; and (f) the provisions in the Tribunal's rules as to orders for costs: see BCL Old Co v Aventis [2005] CAT 2, at [27]."

7. In deciding whether to order security for costs, the Tribunal carries out a balancing exercise between, on the one hand, the potential injustice to the claimant if it does not have the means to comply with the order, leaving the claimant unable to pursue its claim, and, on the other hand, the potential injustice to a defendant if no security is ordered, leaving the defendant unable to recover costs from the claimant even if successful at trial and prejudiced in settlement negotiations with the claimant because of this prospective inability to recover costs, even if successful.

8. In *Keary Developments Ltd v. Tarmac Construction Ltd* [1995] 3 All ER 534 ("*Keary*"), at [2], it was said by Peter Gibson LJ that the probability of a claimant company being deterred from pursuing its claim by an order for security for costs was not, without more, a sufficient reason for declining to order security. However, in *Goldtrail Travel Limited (in liquidation) v Onur Air Taşimacilik AŞ* [2017] UKSC 57, it was held by Lord Wilson , at [12] and [25], by reference to Article 6 of the European Convention of Human Rights and Fundamental Freedoms, that it would be wrong in principle to impose on an appellant a condition which had the effect of preventing him from bringing it or continuing the appeal as this would deprive the appellant of a fair hearing. That principle would seem to be equally applicable to the imposition of an order for security which has the effect of preventing a claimant from pursuing a valid claim.

9. A claimant resisting an application for security on the ground that an order for security would stifle a genuine claim has the burden of establishing that this would be the effect of the order. In *Keary*, Peter Gibson LJ held as follows:

> "6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal. However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 Lloyd's Rep 27)."

10. In *Hearst Holdings Inc v AVELA Inc and others* [2015] EWCA Civ 470, Rimer LJ ordered the provision of security in circumstances where the claimant company had failed to show it would have a stifling effect:

> "25. If I were to believe that the making of an order for the giving of security would have the effect of stifling AVELA's appeal, I would be concerned as to the justice of making an order for security. The problem with that consideration as far as AVELA is concerned is, however, that it has made no effort to show that the making of an order for the giving of security would in fact have such a stifling effect. It has certainly asserted that it will have that effect, but it is by now well-established that an appellant who wishes the court to conclude that a security order will have such effect must put before the court full and frank evidence as to its means; and, to that end: "That means that in all but the most unusual cases, the burden lies on the appellant to show, quite apart from the question of whether the company's own means are sufficient to meet an order for security, there will be no prospect of funds being available or forthcoming from any outside source such as a creditor, principal shareholder or other party whose interests are affected. That seems to me to be the principle effect of the rule as stated in Keary." See Kufaan Publishing Elements v Al-Warrack Publishing Limited [2000] WL, at paragraph 34 per Potter LJ, his reference to Keary being to Keary Developments Ltd v Tarmac Constructions Limited and Another [1995] 3 All ER 534."

11. As noted by the Tribunal in *Commercial Buyers Group* [2023] CAT 17, at [13], contested applications for security for costs are not a regular feature of hearings

before the Tribunal and it is rarely ordered although this rarity is not in itself is not a good reason for refusing a properly founded application for security. It was accepted by the Tribunal in *BCL Old Co v Aventis* [2005] CAT 2, at [40], that as the Tribunal's jurisdiction to order security under, then, Rule 45 only applies to damages claims under section 47A of the Competition Act 1998 ("the 1998 Act") and accordingly must be available in principle to a party who has been found to infringe the competition rules.

C. SUBMISSIONS

12. Micron submitted that OTC should be ordered to provide security for the following reasons:

(1) The application was not being made in order to stifle the claim but rather because significant costs have been and will continue to be incurred in defending the claim and because there is good reason to believe that OTC will be unable to pay Micron's costs if ordered to do so. The £2 million cash sum currently held by OTC's solicitors for the purposes of satisfying any adverse costs order is quite clearly inadequate. Micron's incurred costs already come to £1.4 million. OTC says that its own incurred and estimated future costs amount to some £4.425 million.

(2) The question of whether an application for security will have the effect of stifling a claim is for OTC to prove by reference to its financial position. A party seeking to rely on its own impecuniosity must make full and frank disclosure as to their financial position, including by providing evidence to show that there will be no funds forthcoming from outside sources such as creditors. OTC has provided no evidence that it would be unable to meet an order for security on the terms sought. Furthermore, OTC could obtain an After The Event insurance policy ("ATE") to cover an adverse costs order for a sum in the region of 15% of the sum insured. On this logic the £2m sum that is being held could easily purchase adequate ATE insurance coverage, and OTC gives no reason as to why this option cannot be pursued. Further, OTC has not provided any evidence as to the unavailability of other funds, including

settlement funds it has received in other claims. I note in this context that OTC is engaged in a parallel claim for damages in respect of the LCD cartel in *Granville Technology Group Limited (in liquidation) and others v. Innolux Corporation and others* (CL-2016-000758) ("the LCD Proceedings") as heard recently in the Commercial Court, with judgment awaited.

(3) This is not a case where the likely outcome of the proceedings and the relative strengths of the parties' cases can be discerned without prolonged examination or voluminous evidence. Although OTC relies on the Commission Decision dated 19 May 2010 establishing the existence of the cartel in the supply of dynamic random-access memory computer memory chips, this is not a conventional follow-on claim in that OTC was not one of the customers who were the victims of the cartel as found by the Commission Decision. OTC relies instead on an allegation, not contained in the Commission Decision, that the cartel had a wider, knock-on effect of generally inflating prices paid by buyers, including OTC, on the spot market. The present case is not the sort of follow-on damages claim where it cannot reasonably be suggested that OTC has suffered no loss nor where the only issue is as to quantum of loss. It would therefore be inappropriate to have regard to the merits when determining the present application.

(4) There was no basis for suggesting that Micron's insolvency was attributable to Micron's infringements of competition law or that the application was made at the wrong stage of the proceedings.

(5) For all these reasons, the Tribunal should order OTC to provide security in the amount sought or on such terms as it sees fit.

13. OTC submitted that the Tribunal should decline to order security for the following reasons:

(1) Micron has failed to show that the £2 million which it has set aside is insufficient to meet an adverse costs order in these proceedings.

Micron's costs budget is excessive. The Tribunal cannot assume that Micron's recoverable costs would exceed £2 million even if OTC's claim failed entirely. Micron's incurred disbursements are more than twice as much as OTC's and its incurred costs overall match OTC's although a claimant would be expected to incur higher costs in the early stages of bringing a claim than a defendant. Micron's estimated future budget of £4.5 million is almost 50% higher than OTC's and the estimated hourly rates are significantly in excess of the "London – Band 1" guideline rates, which are a useful starting point in assessing what is reasonably recoverable.

(2) OTC would be unable to provide security in the sum claimed by Micron. The effect of the order sought by Micron would be to stifle the claim. OTC does not have significant available funds that could be ring-fenced in addition to the £2 million already set aside. Micron's complaint that no evidence has been put forward by OTC as to the financial position of its backers or creditors is misplaced. The application is made against OTC not its creditors. It is not for the Tribunal to go behind the funding decisions of the liquidator or to investigate the availability of funding from creditors; see *Absolute Living Developments Limited (In Liquidation) v DS7 Limited & ors ("Absolute Living")* [2018] EWHC 1432 (Ch) at [33]. The cost of obtaining ATE insurance would be prohibitive.

(3) There are policy considerations weighing against the grant of security. First, there is the public interest in a working insolvency regime, including liquidators' ability to pursue claims on behalf of insolvent companies. Second, the specialist jurisdiction under section 47A of the 1998 Act has been created by Parliament with a view to facilitating claims for competition law damages. Where liability is established by a decision of a relevant competition authority, the probability of success is high and the risk of an adverse costs order low. Although OTC bought on a market separate from the market that was directly subject to the cartel, it is essentially a follow-on claim. The question before the Tribunal is largely one of causation.

(4) In all the circumstances, Micron's application for security for costs should be refused as a thinly veiled attempt to stifle a genuine claim. It would not be just to order OTC to provide more security than it already has, balancing the clear risk of bringing this claim to an end against the limited prejudice against Micron in light of the substantial security already provided.

D. ANALYSIS

14. Certain matters were common ground between the parties. OTC did not dispute that the Tribunal has jurisdiction to order OTC to provide security for costs on the basis that there is reason to believe that OTC will be unable to pay Micron's costs if ordered to do so. Although OTC submitted that Micron's costs budget was plainly excessive and that the £2 million which it has set aside should suffice to cover all Micron's reasonable costs, it did not contend that there was not at least a real risk that the sum set aside would be insufficient to meet Micron's recoverable costs.

15. Furthermore, OTC did not challenge Micron's contention that OTC's insolvency was not attributable to Micron's infringements of competition law or Micron's contention that the application was made at an appropriate stage in the proceedings.

16. The main disputed issue on the application was as to whether OTC had established that an order for security would stifle the claim. OTC's evidence as to its financial circumstances was exiguous. Mr Bartlett's fourth witness statement made on behalf of OTC contained the following information:

> "87. I understand from the Liquidator that the Claimant does not have significant available funds that could be ringfenced as security for costs (in addition to the £2 million already ringfenced) taking into account the Liquidator's obligations."

17. After explaining that obtaining ATE insurance cover for would be prohibitively expensive, Mr Bartlett's witness statement continued as follows:

> "89. In these circumstances, I consider that requiring the provision of further security, as requested, would prevent the Claim from being pursued. Furthermore, the grant of an order requiring the provision of security for a lesser amount, but still a significant amount, would (i) still risk stifling the claim; (ii) increase the Claimant's costs of the litigation by requiring the obtaining of an ATE policy, or some other form of finance; and (iii) put commercial pressure on the Claimant to settle the matter on significantly worse terms than would otherwise be expected."

18. Micron submitted that this evidence was insufficient to discharge the burden of showing that an order for security would have the effect of stifling the claim. Micron pointed, in particular, to the absence of any evidence as to any approach by the liquidators to OTC's creditors, who were not identified to the Tribunal. More generally there was no evidence as to OTC's financial position generally, as to the nature or quantum of the "obligations" referred to in Mr Bartlett's witness statement, as to the source of the £2 million fund which it has ring-fenced or as to the source and quantum of the funds which it is using to pay its own costs.

19. I agree with Micron's submission that, in so far as it is intended to show that an order for security would stifle OTC's claim, OTC's evidence is unsatisfactory. First, it does not address the possible availability of funding from third parties. I do not accept OTC's submission, based on the judgment in *Absolute Living,* that evidence about the financial position of an insolvent company's creditors or backers is necessarily irrelevant to the question of whether security should be ordered. As Counsel for Micron submitted, there was evidence in *Absolute Living* as to the financial position of the claimant's creditors and an explanation in the liquidator's witness statement for his decision not to approach them for funding which the judge (Marcus Smith J) took into account in declining to order security. Mr Bartlett informed me, however, in the course of his submissions, that OTC has no funder, that it has a large number of creditors and that, as twenty years have elapsed since OTC's insolvency, the creditors are not focused on the proceedings. It may therefore be inferred that there is no realistic possibility of funding for additional security from OTC's creditors or any other third party.

20. OTC's evidence was also unsatisfactory in that, whilst it was stated that provision of the amount of security requested by Micron would stifle the claim,

it did not make clear whether an order for security for a lesser amount than that requested would have the same stifling effect. The assertion that an order for a lesser amount would "risk stifling the claim" implies that it would not necessarily do so but it was not clear how much OTC could afford to provide. Mr Bartlett informed me that the £2 million ring-fenced funds and the funds used to enable pay for OTC's own costs of are derived from settlement payments made to OTC from other defendants in these proceedings. He submitted that it was difficult for the liquidator to go into details because of the confidentiality of the settlements. I consider that OTC could nevertheless have provided more information about its financial position. A similar criticism can be made about OTC's evidence as to the availability of ATE insurance. There was evidence that OTC had previously obtained ATE insurance to enable it to bring proceedings but that it had ceased to do after receiving settlement payments. According to Mr Bartlett's witness statement, based on his own experience and discussions with an ATE insurance broker, an ATE premium would cost in the region of 15% of the sum insured, i.e. £1.02 million (15% of £6.8 million) but there was no guarantee that insurance would be available in any given case and insurers would consider the legal risks and the commerciality of a proposal before making a decision. There was no evidence that the liquidator had made enquiries as to the availability going forward of ATE insurance in respect of Micron's costs.

21. I consider that, if the liquidator does, now or in the future, have funds available which could be added to the £2 million funds as security for Micron's costs, albeit not to the level requested by Micron, without stifling the claim, it would in principle be appropriate to require the liquidator to provide that additional security. It would not be unfair to OTC to require it to mitigate the risk of Micron being unable to satisfy a costs order in its favour, if OTC can afford to do so without prejudicing its ability to pursue its claim. OTC has itself recognised, by setting aside £2 million, that this case is in principle a suitable one for the provision of security. As submitted by Micron, this is not an entirely straightforward follow-on case in which the Tribunal can, without prolonged examination or voluminous evidence, confidently predict the outcome of the case and treat the risk of a costs order in Micron's favour as minimal. Whilst I

agree with OTC that Micron's costs claimed in its budget are excessive and that its recoverable costs, if it is successful at trial, would be substantially reduced on assessment, it is likely that its recoverable costs would nevertheless be significantly higher than £2 million.

22. Without more complete evidence as to OTC's financial position, it is, however, unclear whether the liquidator is in a position to provide any additional amount by way of security, and, if so, how much. I understand that judgment is expected in the near future in the LCD Proceedings in the Commercial Court, in which OTC is a claimant, which may affect the level of funds available to the liquidator. Following that judgment, OTC should provide Micron with more detailed information as to its finances and its ability to set aside a further amount by way of security for Micron's costs after which Micron may, if necessary, renew its application for security.

E. DISPOSITION

21. For the reasons given, my ruling is as follows:

(1) I refuse Micron's application for security in the amount requested of £3.9 million. I am satisfied on the evidence before me that an order for security in this amount would unfairly stifle OTC's claim and that the level of costs claimed by Micron is excessive.

(2) I consider, however, that if OTC could afford to provide some additional security without its claim being stifled, it may well be appropriate to require it to do so. The £2 million fund set aside by OTC would probably be insufficient to cover an adverse costs order in Micron's favour at trial if OTC's claim fails.

(3) It is not possible for the Tribunal to determine, on the basis of the evidence before it, whether OTC could afford to provide additional security and, if so, how much. OTC should provide Micron with further information about its financial position when judgment has been issued in the LCD proceedings after which Micron may renew its application.

Andrew Lenon K.C.
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 29 December 2023