Neutral Citation Number: [2020] EWHC 415 (Comm)

Case No: CL-2016-000304

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 25 February 2020

Before :

MR JUSTICE FOXTON

- -

Between :

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

Claimants

- and -

(1) INFINEON TECHNOLOGIES AG
(2) MICRON EUROPE LIMITED

Defendants

- -
- -

David Scannell and Stefan Kuppen (instructed by **Osborne Clarke LLP**) for the **Claimants**
Sarah Ford QC and Tim Johnston (instructed by **Slaughter and May**) for the **First Defendant**
Daniel Jowell QC and Emily MacKenzie (instructed by **Allen & Overy LLP**) for the **Second Defendant**

Hearing dates: 20th, 21st and 22nd January 2020.

- -

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.

.....

Mr Justice Foxton:

Introduction

1. This is the trial of two preliminary issues in proceedings brought by three companies who were engaged in the assembly and sale of desktop personal computers ("PCs") and notebook computers ("Notebooks"). The claims arise from a price-fixing cartel ("the Cartel") which was the subject of findings by the European Commission ("the Commission") in its decision COMP/38511 adopted on 19 May 2010 ("the Decision"). The Cartel concerned the market for direct random access memory ("DRAM") and Rambus DRAM used in the manufacture of PCs and Notebooks.

2. The Decision confirmed the involvement of a number of entities, including the First Defendant ("Infineon") and the Second Defendant ("Micron Europe"), in the Cartel, and fines amounting to €331 million were imposed on the participants.

3. On 18 May 2016, just under six years from the date of the Commission's press release announcing the Decision, the Claimants commenced these proceedings, claiming compensatory damages or alternatively restitutionary relief arising from and in relation to the infringements established by the Decision. Following the discontinuance by the Claimants of claims against the third, fourth and fifth defendants, Infineon and Micron Europe are the sole remaining defendants.

4. Both Infineon and Micron Europe have pleaded, among other defences, that the Claimants' claims are time-barred under s.2 Limitation Act 1980 and/or s.9 Limitation Act 1980 (it being common ground that the claims for infringement of Article 101 of the Treaty of the Functioning of the European Union, Article 53 of the Agreement on the European Economic Area and Chapter 1 of the Competition Act 1998 advanced by the Claimants are subject to one or other of those sections). Those sections provide for a limitation period of six years from the date when the cause of action accrues. In response, the Claimants rely on the postponement of the primary limitation period provided for by s.32(1)(b) of the Act, where any fact relevant to the claimant's right of action has been deliberately concealed from the claimant by the defendant.

5. By an order of Jacobs J made with the consent of the parties on 4 June 2019, it was directed under CPR 3.1(2)(i) that the following issues would be tried as preliminary issues:

    i) whether each of the Claimants' claims against the First Defendant is time-barred; and

    ii) whether each of the Claimants' claims against the Second Defendant is time-barred.

6. On 11 December 2019, the Claimants applied to adjourn the preliminary issues trial. The basis of that application was the contention that Micron Europe's witness evidence raised issues which went beyond those with which the Claimants could reasonably have anticipated they would have to deal from the terms of the statements of case, and which would effectively require the court on the hearing of the preliminary issues to determine matters which were the preserve of the main trial.

That application was refused by Knowles J on 19 December 2019, and the issue of admissibility was left to the trial judge to resolve. The Claimants' objection to Micron Europe's evidence has been renewed before me, albeit in modified form.

The parties and their representatives

7. As I have mentioned, the three claimants were all companies who were engaged in the assembly or sale of PCs and Notebooks, which were manufactured and sold under the brand names "Time" and "Tiny". The past tense is appropriate because the claimants are all now in liquidation, and have brought the proceedings through their respective liquidators, individuals from Grant Thornton UK LLP. The First Claimant ("Granville") and the Second Claimant ("VMT") were at all material times in common ultimate beneficial ownership, and I will refer to them as the Granville Companies.

8. The Third Claimant ("OTC") was a distinct legal entity and competitor of the Granville Companies, which ceased trading in January 2002 (at which point its business and assets, but not its share capital, were sold to the Granville Companies). There is an issue between the parties, which was not debated before me, as to whether or not the sale of OTC's assets to the Granville Companies included the right to bring the claims asserted in these proceedings. In the event that OTC and the Granville Companies stand in different positions so far as the issue of limitation was concerned, that issue might prove to be highly significant.

9. The Claimants were represented by David Scannell and Stefan Kuppen, instructed by Osborne Clarke LLP. Mr Kuppen shared the oral closing with Mr Scannell, and did so admirably.

10. Infineon is a company registered in Germany, which was established on 1 April 1999 when Siemens AG divested its semiconductor operations to an independent company. It manufactured DRAM until 2006. It was represented by Sarah Ford QC and Tim Johnston, instructed by Slaughter and May.

11. Micron Europe is a company registered in England, and a subsidiary of Micron Technology Inc ("Micron Inc"), a US corporation and one of the largest global producers of DRAM. It was represented by Daniel Jowell QC and Emily MacKenzie, instructed by Allen & Overy LLP.

The witnesses

The Claimants' witnesses

12. As I have mentioned, the Claimants are all companies in liquidation. OTC stopped trading in January 2002 and Granville and VMT entered into administration in July and August 2005 respectively and liquidation in January 2007. In these circumstances, it is unsurprising that there was no factual evidence from witnesses with contemporaneous involvement in the Claimants' purchases of DRAM. The Claimants' evidence comprised two witness statements from Mr Bartlett of Osborne Clarke LLP and two witness statements from Mr Wood, the current sole liquidator of the Granville Companies and OTC.

13. Mr Bartlett's statements exhibited a number of documents and commented upon them, but did not contain any first-hand evidence. In these circumstances, Infineon and Micron Europe did not cross-examine Mr Bartlett. The documents he had exhibited form part of the corpus of documentary evidence before me, and Mr Scannell was able to adopt the points made by Mr Bartlett as part of his submissions.

14. Mr Wood is a very experienced liquidator and administrator with Grant Thornton UK LLP. He was not involved in the administrations or liquidations of any of the Claimants during the period relevant to the issues before me. In his evidence, he reported on the results of the enquiries which had been made of other individuals who had acted in the administration and liquidation of the Claimants, identified the documents which had been located, and on the basis of those documents, and his own experience, set out his own views as to what was known and what information might have been obtained by exercising reasonable diligence.

15. Mr Wood was a conspicuously fair witness, but the timing of his involvement in the affairs of the Claimants limited the extent of the relevant evidence he was able to give.

The Defendants' witnesses

16. Infineon did not serve any witness statements.

17. Micron Europe served one witness statement from Mr Bokan, who described in general terms its sales channels and pricing practices. Mr Bokan was knowledgeable on the subject-matter of his statement, and sought to assist the Court where he could. However, his evidence was ultimately of limited relevance to the issues which it was necessary for me to decide.

18. Micron Europe also served two witness statements from Mr Ballard, who had been a regional sales manager for Micron Europe from 1997 to 2005, and a Distribution Manager from 2005 to 2017. In his role as regional sales manager, Mr Ballard was responsible for the sale of DRAM to the Claimants. Mr Ballard addressed his relationship with the Claimants and expressed his opinion as to what the Claimants ought to have understood about the nature of the DRAM market.

19. I found Mr Ballard to be a credible witness, doing his best to assist the Court. However, when producing his witness statement in 2019, it was understandably difficult for him to recall any detail of conversations and exchanges with the Claimants which would have taken place 14 to 17 years before, and which would have been relatively routine matters at the time. Mr Ballard's task was not made any easier by the fact that, if any documents had ever existed recording his interactions with the Claimants, they were no longer available.

The law

20. Section 32 of the Limitation Act 1980 provides:

> "(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either-

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in the subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty".

21. On first view, s.32(1), and in particular s.32(1)(b), might be thought opaque as to precisely what it is that must be concealed from the claimant, and precisely what it means for a claimant to "discover" (or be capable with reasonable diligence of "discovering") that matter. However, a number of potential uncertainties as to the operation of s.32(1)(b) have been resolved by the substantial body of case law on the subject.

What must be concealed?

22. All parties before me were content to adopt the following statement of the applicable principles by Simon J in Arcadia Group Brands Limited and others v Visa Inc and others [2014] EWHC 3561 (Comm); [2015] Bus LR 1362 at [24]:

"These cases establish a number of principles which are relevant to the present applications.

(1) Section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly, see Rose LJ in Johnson . In this context Neill LJ referred to 'the public interest in finality and the importance of certainty in the law of limitation,' in C v. MGN at p.139A.

(2) There is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case. Section 32(1)(b) is concerned with the former, see Rose LJ in Johnson.

(3) The section is to be interpreted as referring to 'any fact which the [claimant] has to prove to establish a prima facie case', see Neill LJ in Johnson and in C v. MGN at p.138H, and Rix LJ in The 'Kriti Palm' at [323].

(4) The claimant must satisfy 'a statement of claim test': in other words, the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie case, see Rose and Russell LJJ in Johnson, and Neill LJ in C v. MGN at 137B-C. As Buxton LJ expressed it in 'Kriti Palm' at [453]:

> …what must be concealed is something essential to complete the cause of action. It is not enough that evidence that might enhance the claim is concealed, provided that the claim can be properly pleaded without it.

(5) Thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger, see Russell LJ in Johnson :

> Accordingly, whilst I acknowledge that new facts might make the plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the 'right of action' itself. They do not affect 'the right of action,' which was already complete, and consequently in my judgment are not relevant to it.

Nor does the sub-section apply to newly discovered evidence, even where it may significantly add support to the claimant's case, see Rix LJ in the 'Kriti Palm' at [325], nor to facts relevant to the claimant's ability to defeat a possible defence, see Neill LJ in C v. MGN at 139A.

(6) As expressed by Rix LJ in The 'Kriti Palm' at [307], the purpose of s.32(1)(b) is intended to cover the case,

> where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action (the so-called 'statement of claim' test). It is therefore important to consider the facts relating to an allegation of deliberate concealment vis a vis a claimant's pleaded case.

(7) What a claimant has to know before time starts running against him under s.32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation, see for example Neuberger J in Gold v Mincoff at [75] in the different context of s.14A of the 1980 Act, but referring to Johnson and C v. MGN".

23. In a case such as the present in which the claimant contends it has been the victim of a price-fixing cartel, it is clear from the decision of the Court of Appeal in Arcadia Group Brands Ltd v Visa Inc [2015] Bus LR 1362 at [18], read together with the observations in DSG Retail Limited v Mastercard Incorporated [2019] CAT 5 at [97], that the four essential matters which the claimant needs to be in a position to plead are as follows:

i) an agreement or concerted practice between the undertakings;

ii) having as its object or effect the prevention or distortion of competition which is appreciable;

iii) which affects trade between member states, or within the United Kingdom, or within Ireland; and

iv) which has caused some loss and damage to the claimant.

What constitutes discovery?

24. In addition to the issue of what must be concealed (viz a fact essential to pleading the cause of action), a question arises as to what level of knowledge a claimant must have (or could with due diligence, have had) of a particular matter for it to be said that the claimant has or could have "discovered" it. There will be cases (for example Johnson v Chief Constable of Surrey [1992] Lexis Citation 2286) where the facts necessary to plead a case will all be in the claimant's direct experience: in that case, the fact that the claimant had been falsely imprisoned. However, there will be other cases (of which the present is one) where the essential facts are matters of which the claimant has no direct and immediate knowledge, but will seek to establish at trial by relying on disclosure or admissions by the defendant, evidence derived from third party sources and inferences from other facts.

25. If the concept of "discovered" in s.32(1) is to be equated with "knowledge", it might be suggested that a claimant cannot have knowledge of material facts unless and until the existence of those facts had been established by a judicial process (cf. in another legal context Lord Hope's observation in R v Montila [2004] 1 WLR 3141 at [27] that "a person cannot know that something is A when in fact it is B"). This approach would have the very surprising consequence in some cases that the limitation period prescribed by s.32(1) for a particular cause of action might not begin to run until sometime after the claimant had already pleaded that cause of action. However, it is clear from the authorities that this is not how s.32(1) is to be interpreted.

26. In Law Society v Sephton [2005] QB 1013 at [110], Neuberger LJ stated:

> "As the judge said, a claimant does not `discover' a fraud until he has `material sufficient to enable him properly to plead it'".

27. In Allison v Horner [2014] EWCA Civ 117 (a case concerned with reliance on s.32(1)(b) in the context of the tort of deceit), Aikens LJ formulated the issue as whether the claimant had "proved that he could not, with reasonable diligence, have discovered that the 13 January 2003 statements were false, or, at the least, have discovered enough so as to be able reasonably to plead that they were false". In Arcadia Group Brands, Simon J summarised the effect of the authorities as follows: "if a claimant is in possession of facts which are sufficient to enable a cause of action to be pleaded, and which cannot be struck out for want of some essential averment, then the limitation period is not suspended" ([28]). In the Court of Appeal, Sir Terence Etherton (C) noted that one of the claimants' arguments appeared to be that "'mere suspicion' of a relevant fact did not amount to discovery of that fact within section 32(1)" (at [60]). Addressing this point, the Chancellor stated at [62]:

> "As to the second contention in paragraph [60] above, what is sufficient knowledge to constitute discovery within section 32(1) depends on the particular facts. More importantly, for the purposes of this appeal, the point has no relevance to proceedings such as the present ones where a complete cause of action has been pleaded, the particulars of claim are endorsed with a statement of truth, and it is accepted that no new facts necessary to complete the cause of action have been discovered during the previous six years."

28. Reflecting the generally pragmatic and purposive approach to the interpretation of s.32(1)(b), therefore, the authorities establish that a claimant can be said to have discovered a fact when the claimant is aware of sufficient material to be able properly

to plead that fact. This conclusion avoids the improbable interpretation of s.32(1)(b) by which a claimant who has in fact pleaded a particular fact might be said not yet to have discovered that fact for s.32(1)(b) purposes.

29. In order to be able to properly plead a claim:

i) any professional obligations which attach to making allegations of a particular kind must be satisfied;

ii) the pleaded case must be one which would not be struck out on the basis that it has no sufficient evidential basis or was not sufficiently arguable; and

iii) the pleading must be one capable of being supported by a Statement of Truth.

30. These second and third requirements were the subject of some debate between the parties.

31. So far as the second is concerned, Mr Scannell for the Claimants drew my attention to the observations of Roth J in Sel-Imperial Limited v The British Standards Institution [2010] EWHC 854 (Ch) at [17]:

> "… It is important that competition claims are properly pleaded. To contend that a party has infringed competition law involves a serious allegation of breach of a quasi-public law, which can lead to the imposition of financial penalties as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct or agreement is complained of and how that is alleged to violate the law".

32. He relied on this passage in support of an argument that there was, in effect, a heightened pleading standard for cartel cases, which had to be taken into account in the application of s.32(1).

33. While I accept the importance of ensuring that competition claims (as with other claims) are properly pleaded, it is clear from subsequent authorities that the level of detail which a "proper" pleading requires will take account of the level of information which might reasonably be expected to be available to the claimant at the relevant stage of the litigation. Mr Jowell QC referred me to the judgment of Sales J in Nokia Corporation v AU Optronics Corporation and other companies [2012] EWHC 731 (Ch), a case in which a claim for damages caused by a cartel had been pleaded without the benefit of a decision of the Commission, and met with an application to strike out the claim on the basis that it was inadequately pleaded. Sales J rejected that application, stating:

> "62. In a case involving an allegation that a secret cartel has operated in breach of Article 101 there is an inevitable tension in domestic procedural law between the impulse to ensure that claims are fully and clearly pleaded so that a defendant can know with some exactitude what case he has to meet (and also so that disclosure obligations can be fully understood, expert witnesses given clear instructions and so on), on the one hand, and on the other the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from

introducing a claim which may prove to be properly made out at trial, but which will be shut out by the law of limitation if the claimant is to be forced to wait until he has full particulars before launching a claim. In working out how that tension is to be resolved, it is important to bear in mind the general and long established approach referred to above and the existence of other protections for defendants within the procedural regime, including the following.

63. A claimant's counsel is subject to professional obligations in relation to what case may be pleaded (thus, e.g., a claim in fraud can only be pleaded in certain well-known circumstances, where there is sufficient material available to the pleader to justify such a plea). In the present case, none of the defendants suggested that Mr Vajda and the other counsel for Nokia had acted in breach of their professional obligations in pleading the case in either the P/C or the Amended P/C.

64. An application to strike out or for summary judgment may be made where, on the evidence about the facts, there is no reasonably arguable case on which the claimant could succeed. In the present case, none of the defendants put in evidence to demonstrate that this was the case.

65. Requests for further information may be put forward by a defendant to clarify exactly what case is being made where a general pleading is put forward. In the present case, that was not done in relation to the P/C (possibly because at an early stage the parties agreed that there should be a stay of proceedings pending the outcome of the Commission's original investigation – the Samsung SDI defendants made a request for further information, but only to ask why they were being treated as part of the Samsung undertaking), so the usual process of probing and clarification of the claim was not undertaken. Now, with the Amended P/C, Nokia is putting forward the fullest particulars of its case it is able to in light of the material and evidence currently available to it.

66. If it became clear at some stage in proceedings that a claimant had further information available to him but failed to provide it when he ought to do so to clarify his case on the pleadings, it would be possible for the defendant to apply to strike out the claim on the grounds of abuse of process or to obtain an order (ultimately an unless order, threatening dismissal of the claim) for provision of particulars in response to a request for further information. In the present case, there is no suggestion that such a situation has arisen.

67. In my judgment, the availability of such procedural protections for a defendant to ensure that a claim is fully and properly explained in good time before trial (as against the possible loss to a claimant of an entire, potentially meritorious claim), indicates that in resolving the tension referred to above and determining whether a cause of action has been sufficiently pleaded in a statement of case (particularly in the claim form and/or the particulars of claim when an action is commenced), the balance is to be struck by allowing a measure of generosity in favour of a claimant. Such an approach is appropriate and in the overall interests of

> justice and the overriding objective set out in CPR Part 1.1. It is an approach supported by the authorities cited above."

34. In Bord Na Mona Horticulture Limited and ors v British Polythene Industries plc & ors [2012] EWHC 3346 (Comm) at [30]-[31], Flaux J made similar observations, referring to "a more generous ambit for pleadings, where what is being alleged is necessarily a matter which is largely within the exclusive knowledge of the defendants".

35. Mr Scannell for the Claimants submitted that the "generous approach" to pleading in secret cartel cases was intended to avail the victims of cartels in formulating their claims, and it cannot have been intended, as he put it, that it could be used as a "sword" against those parties for limitation purposes. If this submission is intended to suggest that a claimant who (with the benefit of the "generous approach") is capable of properly pleading a claim for damages for an unlawful cartel without being struck out, may nonetheless not have discovered the material facts for bringing such a claim for the purposes of s.32(1)(b), I reject it. If a claimant is able properly to plead a viable claim, it cannot be said that the claimant has yet to discover the material facts necessary to do so. Mr Scannell's argument is inconsistent with the judgment of Simon J in Arcadia Group Brands Limited, who clearly contemplated that the "generous approach" had implications for s.32(1)(b) purposes. Thus at [34], Simon J observed:

> "This 'generous approach' towards claimants (as it is described in the cases) when applications are made to strike out competition claims has two consequences. First, the Court will be less inclined to strike out a claim or enter summary judgment on the basis of the insufficiency of the pleading than it might in other types of case. Secondly (and for similar reasons), a claimant cannot wait until litigation risks are reduced to a level which it considers to be commercially acceptable before bringing proceedings or, if it does so, it must accept the confinement of the claim to losses within the primary limitation period."

36. Similarly, in Arcadia Group Brands in the Court of Appeal, the Chancellor at [62] stated:

> "I agree with the defendants' submission that it is logically inconsistent for the claimants both to assert that the particulars of claim plead a complete cause of action and cannot be struck out for failing to disclose reasonable grounds for bringing the claim or for otherwise being an abuse of the court's process and yet also to contend that, for the purposes of the "statement of claim" test, the limitation period has not begun to run because there are concealed relevant facts within section 32(1)(b) . Adapting Ms Rose's language in one of her submissions, the claimants' approach makes the most improbable assumption that the intention of Parliament in enacting section 32(1)(b) was that, even though a victim knows sufficient facts to be able to issue proceedings and plead a complete cause of action, the limitation period will nevertheless not commence until the victim discovered or could with reasonable diligence discover further facts".

37. So far as the requirement for a Statement of Truth is concerned, for s.32(1)(b) purposes the issue is to be tested by reference to the material that could have been available had reasonable diligence been exercised. Further, where the matters alleged

are not within the direct knowledge of the party on whose behalf the Statement of Truth is to be made, but involve drawing inferences and assumptions on the basis of the pleaded facts, a Statement of Truth can be given provided there are proper grounds for pleading the facts, and the inferences drawn from those facts are reasonably open. In this context, therefore, I do not believe that the Statement of Truth requirement adds any further element over and above that for a properly formulated pleading, where the pleader has sufficient grounds to make the averments and draw the inferences on which the cause of action depends.

38. In the remainder of this judgment, I will refer to a pleading that is not susceptible to a strike out or otherwise incapable of being pleaded on one of the bases considered above as a viable claim.

"Reasonable diligence"

39. The question of what constitutes "reasonable diligence" has also been considered in a number of cases.

40. In Peco Arts Inc v Hazlitt Gallery [1981] 1 WLR 1315, 1323, Webster J concluded that "reasonable diligence means not the doing of everything possible, not even necessarily the doing of anything at all; but it means the doing of that which an ordinary prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase". While reasonable diligence may not require "the doing of everything possible", the enquiry involves more than simply the question of whether the claimant has acted reasonably (or what would have happened if it had). Millett LJ put the matter in the following way in Paragon Finance plc v D B Thakerar & Co [1989] 1 All ER 400, 418:

> "The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud without exceptional measures which they could not reasonably have been expected to take".

(It will also be apparent from this passage, and as was common ground before me, that the burden of establishing that the claim is not time-barred lies on the claimant).

41. This passage was cited with approval by Neuberger LJ in Law Society v Sephton & Co (a firm) [2005] QB 1013, [110]. At [116], he continued:

> "There must be an assumption that the claimant desires to discover whether or not there has been a fraud. Not making any such assumption would rob the effect of the word `could', as emphasised by Millet LJ, of much its significance. Further, the concept of `reasonable diligence' carries with it, as the judge said, the notion of a desire to know, and indeed, to investigate".

42. There are two aspects of the reasonable diligence requirement which merit further discussion.

43. The first is whether it is to be assumed, for the purposes of the section, that the claimant is on notice that there is something to investigate, or whether the existence or

absence of such a trigger is a matter to be established on the evidence. In Gresport Finance Limited v Battaglia [2018] EWCA Civ 540, [46], Henderson LJ referred to the passage from Sephton set out above and said:

> "Another way of making the same point … might be that the `assumption' referred to by Neuberger LJ is an assumption on the part of the draftsman of section 32(1), because the concept of `reasonable diligence' only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake (as the case may be)".

44. This passage was interpreted by the Competition Appeal Tribunal in DSG Retail Limited and ors v Mastercard Incorporated and ors [2019] CAT 5 as entailing that the court should assume, for the purposes of the s.32(1) enquiry, that the claimant has been put on notice that there is something to investigate, and the reasonable diligence test should be applied on the basis of that assumption. Delivering the judgment of the Tribunal, Roth J held at [106]:

> "On the basis of the authorities as explained by the Court of Appeal in Gresport Finance …, we consider that the concept of `reasonable diligence is to be applied on the assumption that the claimant is on notice of the need to investigate".

45. If s.32(1) did involve a statutory assumption that the claimant was on notice of something meriting investigation, it would make it very difficult for many claimants to satisfy the s.32(1) test. Further, the application of s.32(1) in a number of the authorities has involved an enquiry into whether the claimant was on notice of something which merited investigation, with the courts holding that in the absence of such a "trigger", the claimant could not be said to have failed to exercise reasonable diligence in its investigations. Thus in Allison v Horner [2014] EWCA Civ 117, Aikens LJ at [35] held that "on the assumption that it was not self-evident that the statements … were false …, it would only have been reasonable for Mr Horner to take action to investigate the truth (or otherwise) of those statements if he needed to do so". Aikens LJ framed the issue for the court at [42] as whether Mr Horner was "put on enquiry that Ms Allison might have made such fraudulent representations so that he ought to have followed the matter up". Similarly, Henderson LJ in Gresport Finance Limited at [52] rejected the contention that reasonable diligence had not been made out in that case because the matters relied upon would not have "triggered an obligation to investigate" or put the claimant "on enquiry as to Mr Battaglia's honesty". In these circumstances, I believe that Henderson LJ in Gresport Finance at [46] was stating that the drafters of s.32(1) were assuming that there would in fact be something which (objectively) had put the claimant on notice as to the need to investigate, to which the statutory reasonable diligence requirement would then attach (and which involved an assumption that the claimant desired to investigate the matter as to which it was or ought to have been put on enquiry).

46. I note that this is consistent with the view of Lewison J in JD Wetherspoon Plc v Van De Berg & Co. Ltd [2007] EWHC 1044 (Ch) at [42]. He was referred to the passage from Millett LJ's judgment in Paragon set out above, and stated that "if there is no relevant trigger for investigation, then it seems to me that a period of reasonable diligence does not begin". It is also consistent with the interpretation of s.32(1) which Bryan J adopted in Libyan Investment Authority v JP Morgan & ors [2019] EWHC 152 (Comm), [30] when he stated:

> "It was held by Henderson LJ that the concept of `reasonable diligence' only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake".

47. However, the issue of whether there was something to put the claimant on such notice must be determined on an objective basis.

48. There will be many claims when it will be objectively apparent that something "has gone wrong" – where the claimant has lost property, failed to receive something it expected to receive, or suffered an injury of some kind – which event ought itself to prompt the claimant to ask "why?" and investigate accordingly. However, where a claimant purchases goods on a market which has been rigged by a cartel, there may be nothing which ought reasonably to prompt the claimant to further enquiry. It is not necessary to explore what kinds of events might act as trigger in all such cases. In this case, the Defendants contend that it was the US and EU regulatory investigations into the sale of DRAM to major OEMs, and the response to those investigations, which put the Claimants on notice of the need to investigate further.

49. The second issue is how far the test of reasonable diligence falls to be qualified by the particular circumstances of the claimant, and in particular by the fact that OTC went into administration in January 2002 and into liquidation in February 2004, and that the Granville Companies went into administration in July and August 2005 respectively, and into liquidation in January 2007. There is relatively little discussion in the authorities of how far the particular circumstances of the claimant are relevant to the reasonable diligence enquiry under s.32(1). The issue of how far an objective test of reasonableness should be qualified in its application by reference to the circumstances of a particular claimant has been considered in the context of the special limitation period for personal injury claims provided for by ss.11 and 14, Limitation Act 1980. While early cases on the statutory predecessor of this section lent some support to a subjective test, in Adams v Bracknell Forest Borough Council [2005] 1 AC 76, the House of Lords endorsed a qualified objective test. Lord Hoffmann framed the issue as follows (at [33]):

> "Section 14(3) uses the word 'reasonable' three times. The word is generally used in the law to import an objective standard, as in 'the reasonable man'. But the degree of objectivity may vary according to the assumptions which are made about the person whose conduct is in question. Thus reasonable behaviour on the part of someone who is assumed simply to be a normal adult will be different from the reasonable behaviour which can be expected when the person is assumed to be a normal young child or a person with a more specific set of personal characteristics. The breadth of the appropriate assumptions and the degree to which they reflect the actual situation and characteristics of the person in question will depend upon the reasons why the law imports an objective standard."

50. In the context of s.14, Limitation Act 1980, Lord Hoffmann at [47] held that "the plaintiff must be assumed to be a person who has suffered the injury in question and not some other person" but he did "not see how his particular character or intelligence can be relevant". Lord Scott at [71] held that the test was to be applied to "a person in the situation of the claimant", and that "personal characteristics such as shyness and embarrassment, which may have inhibited the claimant from seeking advice … but

which would not be expected to have inhibited others with a like disability, should be left out of the equation". Baroness Hale was prepared to contemplate some role for the personal characteristics of the claimant in the s.14 enquiry. As Lord Walker noted (at [77]), the distinction between the circumstances and personal characteristics of a claimant may be helpful in many cases, but difficult to draw in others.

51. The treatment of constructive knowledge in s.14 cannot be directly transposed to s.32(1)(b). The language of s.14 is noticeably different to that of s.32 (although in similar terms to s.14A which addresses the issue of latent damage more generally), and, as it is directed to personal injury claims, it is concerned only with claims by natural persons, and by individuals who have suffered unexpected harm to their person (which harm provides an obvious trigger for an investigation into the cause of that harm). Further, s.33 of the Act gives the court a discretion to disapply the limitation period for personal injury claims (a factor which both Lord Hoffmann at [43] and Lord Scott at [73] referred to in upholding a substantially objective test for s.14).

52. There has been much less consideration of the issue of constructive knowledge in the s.32(1) context. Sitting in the Court of Final Appeal in Hong Kong in Peconic Industrial Development Ltd v Lay Kowk Fair [2009] HKCFA 17, Lord Hoffmann NPJ discussed the issue in the following terms:

> "30. What does "the plaintiff ... could with reasonable diligence have discovered [the fraud]" mean? The word "reasonable" denotes an objective standard. But that is not the end of the matter. It is the plaintiff who is supposed to have shown reasonable diligence. This leaves open to argument the extent to which the personal characteristics of the plaintiff are to be taken into account in deciding what diligence he could reasonably have been expected to have shown. It does not follow that because an objective standard is applied, he must be assumed to have been someone else. The extent to which the characteristics of the actual plaintiff are ignored depends upon the reason for invoking an objective standard. (Some of these questions are discussed in the context of the postponement of the running of the limitation period in personal injury cases in Adams v. Bracknell Forest Borough Council [2005] 1 AC 76 and A v. Hoare [2008] 1 AC 844).
>
> 31. There can be no doubt, I think, that for the purposes of the inquiry into what the plaintiff could have done, he must be assumed to have suffered the loss which he actually suffered. In this case, one assumes the plaintiff to be a bank which has lost some HK$400 million. When it discovered (or could reasonably have discovered) that it had suffered the loss, it must be assumed to have displayed some curiosity about why this should have happened. The question is then what steps it could reasonably have taken to try to obtain a remedy. In some cases it may be necessary to decide whether the plaintiff must be assumed to have had only the resources and other opportunities for investigation which he actually had or whether this too must be determined according to some objective standard. In Paragon Finance plc v. DB Thakerar & Co. [1999] 1 All ER 400, 418, Millett LJ said (apparently at the suggestion of May LJ) that the test was —

> "How a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency."

32. For my part, I would prefer to leave this question open, because in the present case it does not arise. There is no dispute that the bank had access to adequate resources and expertise to make any investigations which reasonable diligence would have suggested. The bank must be assumed not merely to have employed its own expertise, but to have engaged whatever specialist services reasonable diligence would have suggested, in the same way that a victim of personal injury is expected to seek medical advice. And in the same way that the plaintiff in a personal injury case is assumed to have told the adviser his symptoms, so the bank instructing advisers is expected to have told them what it knew about the facts of the case".

53. As Lord Hoffmann noted, in Paragon Finance Millett LJ had stated that the test of reasonable diligence should be applied to reference to how a person "carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources", a test which Neuberger LJ applied in Sephton at [116] and which was also endorsed by Henderson LJ in Gresport Finance at [41].

54. Mr Jowell QC for Micron Europe (supported by Ms Ford QC) submits that the test requires the assumption that the claimant is still carrying on a business of the kind it was carrying on when the cause of action arose. Mr Scannell for the Claimants submits that it is permissible when applying s.32 to take account of the fact that the claimant is in administration or liquidation, and that the issue of what constitutes "reasonable diligence" and what constitutes an "exceptional measure" fall to be assessed in that context. In the paragraphs which follow, I address the issue by reference to a company in liquidation, but the analysis is intended to apply equally to a company in administration.

55. I have not found this an altogether straightforward question, and it is an issue which potentially presents a number of difficulties. Mr Jowell QC was prepared to accept that where a tort was committed against a company in liquidation, it would be appropriate to apply the reasonable diligence test to a company with that characteristic (perhaps by analogy with the maxim that a tortfeasor must take its victim as it finds him). However, it is not particularly satisfactory for the relevance of the company's liquidation to depend on the happenstance of whether the company is already in liquidation on the day of the tort or enters liquidation a day later, particularly when (as is the case with OTC), the date of discoverability comes after both of those dates. In any event, s.32(1) is not limited to claims in tort. It might also be said that the position for which Mr Jowell QC contends would operate particularly harshly if it was the defendant's actionable conduct which had been the cause of the claimant's liquidation (although it may fairly be said that attempts to formulate legal rules to cater for this situation have not proved particularly satisfactory – cf. the fate of the so-called Giles v Rhind exception to the rule against the recovery of reflective loss). Nor is the contrary position free from difficulty, particularly where the continuum of constructive knowledge which cumulatively constitutes discoverability spans the company's entry into liquidation.

56. Given the stringency of the s.32(1) test – which involves an enquiry into what the claimant *could* rather than *should* have discovered – the fact that the claimant is a company in liquidation is likely to be most significant in determining whether it can be said that the claimant was reasonably put on enquiry that there was something which merited investigation (rather than when determining whether a claimant who had been put on enquiry had exercised reasonable diligence in following matters up). Certainly, this is the context in which the issue arises most acutely in this case. In this regard, I am not persuaded by Mr Jowell QC's submissions that in determining whether the Claimants were reasonably on notice of the need to enquire into whether they had suffered loss from a price-fixing cartel, I am required (for example) to assume that OTC was still a trading company buying and selling DRAM in and after June 2002 when in fact it had ceased to trade in January of that year. In my view, this is to read too much into Millett LJ's statement that the reasonable diligence test is to be measured in a business context by considering "how a person carrying on a business of the relevant kind would act". However, I accept that when it comes to considering the ability of a claimant to investigate matters of which, objectively, it has been put on notice, the question of what constitutes reasonable diligence is unlikely to admit of any substantial distinction between companies which are, and are not, in liquidation.

The relevance of EU law?

57. When making submissions on s.32(1)(b), Mr Scannell referred in passing to principles of EU law on the requirement for national law to afford an effective remedy for breaches of EU competition law and the need for legal certainty. I asked him to identify the relevance of this material to the issue before the Court, expressing my understanding that "no one is suggesting that section 32 of the Limitation Act as it falls to be applied bears other than the meaning it has as a matter of accumulated English authority and principles of statutory construction". Mr Scannell confirmed that he was not challenging the accepted meaning of s.32(1)(b) by reference to principles of EU law:

> "The Claimants' case in these proceedings insists on nothing more than that, that the wording of section 32(1)(b) be applied as it appears and as it has been interpreted in the core authorities".

58. I was therefore surprised, after the conclusion of the hearing, to receive a letter from the Claimants' solicitors enclosing a decision of the Amsterdam Court of Appeal of 4 February 2020 in the Kemira case. This decision held that time limits arising under Spanish, Finnish and Swedish law did not give the claimants in that action an effective remedy in a follow-on damages case. The Amsterdam Court of Appeal case relied on the decision of the European Court of Justice in C-637/17 Cogeco v Sport TV and others. That decision was handed down on 29 March 2019, but had not been relied on by Mr Scannell at the hearing.

59. It is unclear to me what use Mr Scannell wanted to make of the Kemira or Cogeco decisions. If the Claimants are seeking to advance an argument that s.32(1)(b) on its conventional construction would deprive them of an effective remedy for the Defendants' conduct, I reject it. An argument to this effect was rejected by the Court of Appeal in Arcadia at [73]-[79]. S.32(1) of the Limitation Act, by postponing the running of time until a claimant could with reasonable diligence have discovered the

matters necessary to bring a viable claim, and then providing a 6 year period to begin that claim, cannot be said to leave the Claimants without an effective remedy. Further, the issue of whether an effective remedy is afforded for breaches of EU competition law is to be determined having regard to the whole of national law. If the Claimants' claim is that time should not begin to run for limitation purposes until the Commission Decision became final, s.15 and Schedule 4 of the Enterprise Act 2002, together with rule 31 of the Competition Appeals Tribunal Rules 2002, gave the Claimants the benefit of a two-year limitation period after the Decision became final to bring a follow-on claim in the Competition Appeals Tribunal. However, no such claim was brought.

The background facts

60. I can state the background facts which are relevant to the issue of discoverability relatively shortly.

61. The Decision establishes that the Defendants participated in a price-fixing cartel for the sale of DRAM to major original equipment manufacturers ("OEM"s) from 1 July 1998 to 15 June 2002.

62. On 17 June 2002, Micron Inc (the parent of Micron Europe) received a subpoena from a US grand jury, and on 19 June 2002 there were press reports that Micron was being investigated by the US Department of Justice ("the DOJ") for "anti-competitive practices" in sales of DRAM. This was soon followed by reports that other companies, including Infineon, Hynix Semiconductor Inc ("Hynix") and Samsung Inc ("Samsung"), were similarly under investigation. Among other places, such reports appeared in the London editions of the Financial Times and The Times on 20 June 2002.

63. On 17 December 2003, the DOJ issued a press release reporting that a Micron Inc employee had agreed to plead guilty to obstructing the grand jury's investigation of a suspected conspiracy to fix the prices of DRAM, and by the end of December 2003, it was reported in the London edition of the Financial Times that Micron Inc was prepared to admit its involvement in such a conspiracy. From July 2004, there were references in press reports to the fact that the Commission was investigating the conduct of the same companies in relation to DRAM pricing, and had issued requests for information. For example, the London edition of the Financial Times on 21 July 2004 contained an article referring to price-fixing investigations in the US and Europe, to Infineon's increase in its provision for fines resulting from such investigations to €212 million and to requests for information made by the Commission for the purposes of its own investigation into price-fixing which had commenced in April 2003. Infineon's 2003 annual report referred to the receipt of a request for information from the Commission in relation to "certain practices of which the Commission has become aware in the European market for DRAM memory products".

64. On 15 September 2004, Infineon agreed with the DOJ to plead guilty to involvement in a cartel, and to pay a fine of $160 million, then the third largest fine in US anti-trust history. That plea was reported in the press, and reference was made to it in Infineon's Annual Report for the year-ended 30 September 2004. That Annual Report also referred to the Commission investigation and stated that Infineon had re-assessed their

exposure following the plea deal with the DOJ, and made provision for a probable minimum fine that may be imposed as a result of the Commission's investigation.

65. Infineon's formal plea agreement was entered into on 20 October 2004. It noted that Infineon was charged with "participating in a conspiracy in the United States and elsewhere to suppress and eliminate competition by fixing prices" for DRAM. The factual basis for the charges was Infineon's engagement in "the sale of DRAM in the United States and elsewhere" and its participation "in a conspiracy in the United States and elsewhere" to fix the price of DRAM sold to major OEMs. The agreement recorded the co-operation of Infineon and its subsidiaries in "the current federal investigation of violations of federal antitrust and related criminal laws involving the production or sale of DRAM in the United States and elsewhere". The DOJ's "Description of the Offense" referred to Infineon and its co-conspirators selling DRAM "to customers located in states or countries other than the states or countries in which the defendant and its co-conspirators produced DRAM". The accompanying DOJ press release stated that Infineon had pleaded guilty to "participating in an international conspiracy to fix prices in the DRAM market".

66. Micron Inc issued a press release on 11 November 2004 stating that it was "cooperating fully and actively" with the DOJ, pursuant to the terms of the DOJ's Corporate Leniency Policy. That admission was picked up in the UK trade press such as The Register in an article of 12 November 2004 and Electronics Weekly on 15 November 2004.

67. On 2 December 2004, four Infineon executives, two of whom worked from Infineon's headquarters in Munich, pleaded guilty to involvement in an international conspiracy to fix prices in the DRAM market. The accompanying press release issued by the DOJ referred to an "international conspiracy to fix prices in the DRAM market". Those pleas were reported in the London edition of the Financial Times on 3 December 2004. Between 2005 and early 2006, three more companies admitted price-fixing and entered into plea deals with the DOJ, which were widely reported: Hynix (on 11 May 2005), Samsung (on 30 November 2005) and Elpida Memory Inc ("Elpida") (on 22 March 2006). These plea agreements were in substantially the same terms as the plea agreement entered into by Infineon, as were the accompanying DOJ press releases. On 1 March 2006, the DOJ issued a press release reporting that four Hynix executives, including a Mr CY Choi who was general manager, marketing and sales support for Hynix's German subsidiary, had pleaded guilty to "participating in a global conspiracy to fix DRAM prices". On 22 August 2006, a plea agreement was entered into with a Samsung employee who was employed by Samsung's German subsidiary as its sales director, and "in that position … responsible for DRAM sales to regional accounts in Europe".

68. A substantial number of civil law suits in the US soon followed the DOJ investigation. Both Micron Inc and Infineon's annual reports record a burgeoning number of such law suits in the years 2004 and following.

69. On 2 March 2005, the Granville Companies were approached by a US law firm to discuss participating in a class-action for non-US purchasers of DRAM against Micron, Samsung, Infineon, Hynix, Elpida and others. Mr Scott Shepherd of Shephard, Finkelman, Miller & Shah, LLC emailed Mr Tahir Mohsan, a senior executive of the Granville Companies, and referred to a conversation which Mr

Mohsan had previously had with Mr Keith Warburton of the Professional Computing Association (a trade body for computer manufacturers) on the subject of the US DRAM price-fixing litigation. Mr Shepherd offered to speak to Mr Mohsan, saying he understood that Mr Mohsan might be interested in participating in a US action. In a follow-up email of 10 March 2005, Mr Shepherd explained the contingency fee basis on which his firm would act, and in that context suggested that the damages for Granville "would presumably be a number of millions of dollars, given the dramatic inflation of the price of DRAM during the relevant time period as a result of the price fixing".

70. The Granville Companies' in-house legal adviser, Mr David Ward, had a call with Mr Shepherd on 30 March 2005 to discuss the class action. Mr Ward was sent a draft retainer agreement and copies of a draft complaint after the call. The following features of draft complaint should be noted:

    i) The complaint alleged a long-running international conspiracy beginning no later than 1 July 1999 and ending no earlier than 30 June 2002 to fix the price of DRAM "throughout the world", leading the members of the class to pay artificially inflated prices for DRAM (paragraph 2).

    ii) The members of the plaintiff class were purchasers of DRAM outside of the US (paragraph 62).

    iii) The Defendants included various Micron companies and Infineon. The draft complaint referred to Infineon's guilty plea to charges that it participated in an international conspiracy (paragraph 15).

    iv) The complaint alleged that DRAM was a "readily transportable commodity product with multiple firms offering essentially identical parts" (paragraph 31).

    v) The complaint contained a number of detailed allegations as to how the conspiracy had been put into effect. It referred to reports on industry websites and in the press of meetings of executives of DRAM manufacturers for the purpose of co-ordinating prices (paragraphs 45) and quoted from a document exchanged between DRAM manufacturers in relation to efforts to lift the price paid by major OEMs (paragraph 46).

    vi) The complaint noted dramatic rises in the price of DRAM following those efforts in both the contract and spot markets (paragraph 47).

    vii) Importantly, given the emphasis that Mr Scannell places on this point, the complaint refers to specific efforts taken by the conspirators to shore-up the spot price, referring to quotations in the press from one executive of a DRAM manufacturer to the effect that there had been an agreement "to restrict spot market sales, aiming to boost chip prices", and an agreement involving Hynix and Samsung to push DRAM spot prices to $3 a chip by stopping the dumping of chips, following which the spot price of DRAM increased by 62% (paragraphs 48 to 49).

71. The Granville Companies' disclosure included an undated word document, created on 14 April 2005, which is a draft of an email from Mr Ward to Mr Shepherd. While no

copy of the email as sent survives, the draft refers to the fact that a partially completed version of the email had accidentally been sent already, from which I conclude that the likelihood is that an email in the terms of the draft was sent. The document refers to internal enquiries which were underway within the Granville Companies to establish the proposed defendants from whom DRAM was purchased and in what quantities, noting such purchases may have been made from European subsidiaries of those proposed defendants. The letter expressed the view that the principal issue on the question of the retainer was likely to be the contingency fee.

72. In May 2005, the UK computer manufacturer Centerprise filed a class action in the US against Micron Inc and others on behalf of all those who had purchased DRAM from Micron and others outside the US including companies, like Centerprise itself, which had made purchases of DRAM in this jurisdiction. A copy of the final version of the Centerprise complaint was found in the Granville Companies' papers, in a folder bearing the name of the Finance Director Kieran Crowley, marked with a date of 6 May 2005.

73. By mid-2005, the Granville Companies were in financial difficulties, and they entered into administration in July and August 2005 respectively. Mr Hosking of Grant Thornton UK LLP was appointed as the administrator. There is a dispute as to whether Mr Ward told Mr Hosking about the US law suit which I will have to resolve. For whatever reason, Granville did not join the Centerprise class action.

74. That action was dismissed for lack of jurisdiction by the United States District Court for the Northern District of California on 1 March 2006, and that dismissal was upheld on appeal by the US Ninth Circuit Court of Appeals in a judgment handed down on 14 August 2008 and amended on 9 October 2008.

75. From June 2007, there were reports in specialist competition law subscription services that the Commission was expected to send Statements of Objections to various companies in connection with their investigation into price-fixing of DRAMs, including Micron. Infineon's quarterly report for the three months ending 1 December , reported that in January 2009, the Commission had indicated that it would open formal proceedings against it and the other DRAM producers, and had invited them to consider a settlement of the case. It noted that Infineon had increased its provision for EU fines, and a risk that the actual fines imposed on Infineon by the Commission might be materially higher.

76. The Commission investigation culminated in a settlement decision announced in a press release on 19 May 2010. The confidential version of the Decision was published the following year. The Claimants commenced these proceedings on 18 May 2016, that is the last day of a 6-year period starting on the date when the settlement decision was announced.

The position of the Granville Companies

What did the Granville Companies know or could they have discovered by the exercise of reasonable diligence?

77. In considering the position of the Granville Companies, it is helpful to record the following matters which were sensibly accepted by Mr Scannell:

i) The documents pertaining to the Centerprise class action and the existence of other civil claims in the US relating to the DOJ investigation were known to the Granville Companies.

ii) Certain other documents relating to the class action documents were or are to be treated as being known to the Granville Companies, which Mr Scannell described as "documents pertaining to the conspiracy investigated by the Department of Justice and documents relating to other civil claims in the United States".

iii) Reasonable diligence would have involved the Granville Companies ascertaining "what is going on in the United States, what is the allegation that is being made, what are the admissions that are being made and what are the companies that are being investigated".

iv) In particular, Mr Scannell accepted that the Granville Companies could with reasonable diligence have become aware of "documents relating to various DRAM manufacturers which were published on the DOJ website, and press releases and articles relating to those proceedings in the United States to the extent that they were publicly accessible in or around March 2005, and in any event before [they] went into liquidation".

v) Had reasonable diligence been exercised, the Granville Companies could have become aware of the various plea agreements.

78. However, he disputed that the Granville Companies had actual or constructive knowledge of Infineon's or Micron Inc's SEC filings, or various of the press or specialist legal articles on which the Defendants relied.

79. In his evidence for the Claimants, Mr Bartlett referred to the following further documents found in the possession of the Granville Companies, the contents of which were also known to Granville:

i) A press article from the "EETimes.com" website referring to the agreement by Hynix to pay a fine of $185m in the DOJ proceedings, dated 21 April 2005, and printed on 26 April 2005.

ii) Two "Memory Market Update" emails from March 2004 referring to probes into DRAM price-fixing and "allegations that major DRAM markets were involved in a price fixing scheme".

80. I am satisfied on the basis of the knowledge which Mr Scannell rightly accepts that the Granville Companies must be treated as having, that reasonable diligence on their part could have ascertained the matters which appeared from Infineon's and Micron's filed accounts, from reasonable internet searches by reference to key-words relevant to the DRAM cartel, and from specific enquiries to ascertain what was happening in Europe. I have reached this conclusion for the following reasons:

i) The evidence of Mr Ballard of Micron Europe, which is consistent with what I would in any event have expected to be the case, was that the DOJ investigation was a topic of interest to purchasers from Micron Europe, and

frequently raised by representatives of buyers of DRAM in conversations with him from mid-2002 onwards.

ii) In this regard, it is noteworthy that Mr Shepherd appears to have contacted the Granville Companies because Mr Mohsan had already expressed an interest in the US litigation to the PCA. This fact, and the two "Memory Market" emails, are indicative of at least some knowledge and interest on the Granville Companies' part of developments in the US even before Mr Shepherd had made contact. That level of knowledge would only have improved following provision of the draft complaint by Mr Shepherd.

iii) It was clear from the level of fines imposed by the DOJ on the cartel participants that this was a serious and extensive cartel, and that the alleged cartelists had essentially admitted their involvement. It was also clear that these matters were forming the basis of a large number of law suits in the US.

iv) DRAM was a significant component in the Granville Companies' manufacturing process, and DRAM purchases would have represented a significant cost to them over the years. Having made purchases from companies which had admitted their involvement in a cartel in dealings with the DOJ, the Granville Companies would naturally have been curious as to whether they had been victims of price-fixing. The serious interest shown by the Granville Companies in the Centerprise class action demonstrates exactly that curiosity.

v) This was particularly the case when US lawyers were willing to undertake a substantial class action alleging that the cartel to fix DRAM prices for major OEMs had been implemented in Europe, and that European purchasers of DRAM, including purchasers on the spot market, had suffered substantial losses.

vi) The draft complaint included significant detail, including of the alleged effects of the cartel on the spot market price, supported in some instances by press reports of what appeared to be inculpatory statements by individuals involved.

vii) In these circumstances, reasonable diligence would have involved enquiries on the part of the Granville Companies not simply as to the subject-matter of the draft complaint, but also as to whether there was any similar investigation in Europe. It would also have involved ascertaining what the key DRAM manufacturers (who were prominent in the US litigation, few in number and whose identities were known to the Granville Companies) were saying about the issue of market fixing in their corporate filings. This was an obvious, publicly available, source of relevant information.

viii) Finally, against this background, reasonable diligence required at least some attempt to see what material relevant to the price-fixing cartel was available on the internet (over and above the specific press reports referred to in the draft complaint itself).

81. On this basis, I am satisfied that with the exercise of reasonable diligence, the Granville Companies could have discovered not simply the US developments which

Mr Scannell acknowledges they had constructive knowledge of, but also the fact and progress of the Commission investigation, and the significant provisions which Infineon had made for a fine resulting from that investigation.

Does the entry of the two Granville Companies into administration make any difference?

82. As I have mentioned, Granville entered into administration in July 2005 and VMT in August 2005. In each case, this was after the date when I have found that the Granville Companies were reasonably aware of matters which required investigation into whether they had been victims of a price-fixing cartel.

83. Mr Scannell rightly did not suggest that the entry into administration had the effect of wiping the Granville Companies' corporate memory clean. For limitation purposes, a matter which is once known remains known, even if forgotten (Ezekiel v. Lehrer [2002] EWCA Civ 16), a proposition which must be as true for institutional memory as it is for human memory. In these circumstances, even if the fact of a company's administration was capable of being relevant to the issue of what constitutes a reasonably diligent response to a matter which merits investigation, it would not make any difference on the facts of the case. It was not seriously argued before me that, if the administrators had personally been on enquiry of the matters which the Granville Companies are taken to have known upon entering into administration, the administrators would have been in any different position from the pre-administration management of the Granville Companies when it came to investigating those matters. In any event, I find that there was no material difference here.

84. In these circumstances, it is not strictly necessary for the purposes of the Granville Companies' claims to resolve a further issue of fact which emerged shortly before the start of the trial, namely whether Mr Ward informed Mr Hosking, one of the administrators of the Granville Companies, of the existence of the US class action, and of the invitation to the Granville Companies to participate in it, shortly after the companies entered into administration. However, as this issue may be relevant to the claims of OTC (for reasons I explain below), I address it here.

85. The issue emerged in somewhat unsatisfactory circumstances. Witness statements for the purpose of the preliminary issue were exchanged on 22 November 2019. The effect of the witness statements of Mr Bartlett and Mr Wood was that:

    i) The administrators of the Granville Companies had had no knowledge of the materials concerning the US class action before finding documents on those topics during searches conducted for the purpose of this litigation.

    ii) After finding those documents in November 2018, attempts were made to contact Mr Ward. Mr Bartlett spoke to Mr Ward on 12 December 2018, when Mr Ward said he had "only a very limited recollection of the events at that time", that he vaguely recalled the approach from Mr Shepherd but "could not recall the detail" and he had not kept any documents.

    iii) The Claimants' representatives made several attempts to arrange a further discussion with Mr Ward but he did not respond, save to indicate he would be away for certain periods.

iv) Mr Wood had contacted each of the primary practitioners who had acted as administrators or liquidators during the pre-Decision period, including Mr Hosking, and informed them of the knowledge which the Granville Companies had derived of a potential US claim, and each had stated that they had no knowledge of these matters. Emails of these contacts were produced, including an email from Mr Hosking stating that he had not been told about the US class action and that, "in relation to Mr Ward, my meeting with him was in relation to unauthorised recordings made by his company of myself, my staff and bank officials" and "missing stock".

v) A review of the documents disclosed no evidence that Mr Ward had mentioned the US action to the administrators.

86. Micron Europe served reply evidence on 11 December 2019, but it did not address what Mr Ward may or may not have told the administrators about the US class action.

87. The emails between Mr Ward and Osborne Clarke LLP establish that Mr Ward and Mr Bartlett had an exchange on 18 December 2018, and that Osborne Clarke LLP sought to contact Mr Ward, without response, immediately after that exchange and again in January and August 2019, once again without response. However on 10 January 2020, Mr Ward sent a lengthy email referring to "our brief telephone call in late 2018 and Penny's subsequent attempts to arrange a follow up call". That email contained a detailed description of the communications with the US lawyer, information which was consistent with the documents which had been disclosed in the action (although Mr Ward did not state whether he had been provided with those documents and, if so, who had provided them). The email referred to various conversations that Mr Ward said he had had with Mr Hosking, stating:

> "I also remember him asking me about litigation matters. I feel sure that we would have covered the documents relating to the US class action during those discussions.
>
> I am also confident that the administrators would have been aware of the potential US class action and that they had access to the documents provided by the US lawyers.
>
> I also have a vague recollection about a European Commission investigation into countervailing measures relating to Korean DRAM and Granville being required to provide certain information to the Commission about DRAM purchases from Korean manufacturers. I am not sure whether this is relevant to the matters you are dealing with, but I thought I should mention it".

This last paragraph appears to be a reference to a Commission investigation which resulted in a provisional anti-dumping regulation imposing duty on all DRAMs coming into the EU from Korea. That regulation, and the Granville Companies' role in providing information to the Commission for the purposes of the investigation, had been referred to in the Claimants' reply evidence served on 3 January 2020, which might be thought to explain why Mr Ward "thought [he] should mention it".

88. On receipt of this email, Osborne Clarke LLP asked a number of pertinent questions about it: what had prompted Mr Ward to write now after not responding to three

previous attempts at contacting him; and whether he had received "any assistance in the drafting of [the] email". Mr Ward chose to give a partial answer to those questions, saying he became aware "that Mr Mohsan had been contacted by Allen & Overy in relation to this matter and that prompted me to write to you". He did not answer the question of whether he had received assistance in drafting the email, or explain whether he himself had been approached by Allen & Overy. Micron Europe claimed privilege on the issue of whether Mr Ward had been provided with any assistance in preparing the email.

89. In response, the Claimants produced a witness statement from Mr Hosking re-iterating his earlier statement that he had not been told about the US class action. Micron Europe resisted the introduction of that witness statement, contending that it was necessary for the Claimants to seek relief from sanctions for its late service, and that the Claimants should already have Mr Hosking (who no longer works for Grant Thornton UK LLP) as one of their witnesses for the trial, because they should have anticipated the possibility that what Mr Jowell QC described as their "unfinished communications" with Mr Ward might subsequently produce evidence which Mr Hosking would need to answer. Mr Scannell did not pursue any application to adduce Mr Hosking's witness statement. However, I reject the suggestion that the Claimants should have called Mr Hosking in anticipation of the possibility that Mr Ward might suddenly renew contact after 11 months and give evidence as to his contact with Mr Hosking (or, for that matter, any other member of the Grant Thornton UK LLP team with whom he might have had dealings) as wholly unreal. I would note that if Micron Europe had asked Mr Ward to provide them with a witness statement in January 2020, it is Micron Europe which would have found itself making an application to adduce witness evidence out of time, and for that purpose explaining when Mr Ward was first approached, and why he had been approached at that time and not before.

90. In all the circumstances, I do not feel able to place any reliance on the reference in Mr Ward's email to an alleged conversation with Mr Hosking:

    i) The suggestion of such a conversation came forward for the first time over 14 years after the period in question.

    ii) Mr Ward had previously informed Osborne Clarke LLP that he had "only a very limited recollection" of events, a state of affairs which, on its face, is difficult to reconcile with the comparatively detailed account coming forward for the first time in January 2020.

    iii) The contents of Mr Ward's email strongly suggest he had access to documents from the litigation, and that his email came forward at the instigation of one of the parties.

    iv) However, because Mr Ward was not a witness at trial, there was no opportunity to cross-examine him on any of these matters nor, if this was proved to be the case, why he had been willing to send a lengthy email to assist the Defendants' case in January 2020 when he had failed to respond to three attempts by Osborne Clarke to contact him.

91. In these circumstances, I have resolved the issue of whether Mr Hosking was told of the US complaint by Mr Ward on the inherent probabilities. On the basis of those

inherent probabilities, I am not satisfied that any such communication took place. While Mr Jowell QC is entitled to submit that the issue of possible claims against third parties is something which is likely to have been raised by the administrators at the start of the administration, it is entirely possible that the US claim was not a matter in the forefront of Mr Ward's mind at what he described as a "very busy and difficult time", and in circumstances in which Mr Ward remained in the employment of the Granville Companies for only a week after the companies entered into administration. Had Mr Ward raised the issue, I think it likely that Mr Hosking would have recorded it in some form of document, and undertaken some follow-up to learn more about it. However, there is no evidence that this took place.

On the basis of the information which the Granville Companies are treated as knowing, could the Granville Companies have pleaded a viable claim against Micron Europe and Infineon?

92. It is easiest to answer this question by considering those matters the Granville Companies contend that they did not have sufficient knowledge to plead, but which they needed to plead in order to produce a viable statement of case.

93. The matters relied upon by Mr Scannell are considered below. I should note at the outset that in the context of the limitation preliminary issues, there was an understandable forensic desire to identify in retrospect potential points of distinction as to the scope of the cartel which it can be said were only clarified in the Decision, and then to contend that these were matters which the Claimants needed to be able to plead, but could not plead before the Decision. In considering how far these matters would in fact have presented an obstacle to the Claimants pleading a viable claim had the issue arisen in prospect, I have derived assistance from considering the terms of the Claimants' Particulars of Claim and the basis on which the Claimants have in fact been able to advance their case.

Did the Granville Companies have sufficient material to plead that the territorial requirements for an Article 101 claim were satisfied?

94. It is clear that before the Granville Companies would have been able to plead a viable case under Article 101, they had to be in a position to plead anti-competitive conduct which affected trade within the EEA. That required the Granville Companies to be able to plead either:

    i) that the cartel was implemented in the EU (applying Ahilström v Commission (Woodpulp I) [1988] ECR 5193); or

    ii) that the cartel had effects on trade within the EU which satisfied the "qualified effect" test, i.e that it was reasonably foreseeable that a foreign cartel will have effects in the EU which are immediate, substantial and (perhaps) in some sense direct: see the recent summary of the doctrine in Iiyama(UK) Ltd v Samsung Electronics Co Ltd (Re the LCD Appeals) [2018] EWCA Civ 220.

95. However, on the material of which they are to be taken to have constructive knowledge, the Granville Companies have not persuaded me (the burden being on them) that they were not in a position to plead a viable claim with regard to these territorial criteria before 19 May 2010.

96. First, there is nothing in the materials concerning the DOJ investigation which suggested that the price-fixing activities were limited to sales by major DRAM manufacturers to major OEMs within the US, as opposed to sales to major OEMs wherever effected. Rather the general flavour of that material is suggestive of an international conspiracy, not simply in the location of the conspirators, but in the implementation of the conspiracy. While Mr Scannell submitted that the references to an "international conspiracy" or a conspiracy in the US and "elsewhere" might be read as referring to a conspiracy concocted worldwide but limited in its scope and effect to pricing in the US, this is not the natural sense of these documents, and not the conclusion a reader would draw unless approaching the documents with a studied determination to interpret the material in that limited sense.

97. Second, there was nothing in the material before me that suggested that the price movements of DRAM in the European market followed any different course to those which occurred in the US during the period when it was clear that cartel activities were operating there, or which otherwise suggested that price movements in the US were indicative of a localised cartel which had not had an appreciable effect in Europe. Nor was there anything to explain why it would have been reasonable to proceed on the basis that the cartel participants, who were all international companies, would engage in a cartel to fix the price paid for DRAM by major OEMs (who were also international companies) in the US, but not the price paid by those same OEMs to the same DRAM manufacturers for DRAM purchased in Europe. The suggestion, therefore, that the major DRAM manufacturers had entered into an international conspiracy against major OEMs which was limited in its object and effect to sales of DRAM in the US market would not have been the most obvious inference to draw from the known facts, still less the only inference which could properly have been drawn.

98. The Claimants rely in this context on the Commission Regulation (EC) No 708/2003 which imposed protection in response to what it found to be subsidised imports (or "dumping") of Korean manufactured DRAM in the EU. Mr Scannell relied on the statement in Recital (163) when describing the Community industry that "the existing Community producers … are now considered to be very competitive in world terms" and at Recital (166) that the adoption of anti-dumping measures by the EU "would re-establish fair competition in the DRAM market in the Community by preventing further price depression caused by unfairly subsidised Korean imports". Mr Scannell submitted that this involved a finding that the European market for DRAM was operating fairly, and that this was something which weighed strongly against any suggestion that the cartel behaviour which major DRAM manufacturers had admitted to in their dealings with the DOJ had crossed-over in implementation or effect to the European market.

99. I do not accept that the terms of Regulation No 708/2003 lead to the conclusion that the Granville Companies, following the exercise of reasonable diligence, were unable to plead a viable claim of anti-competitive behaviour or effects in the European market. The focus of the Commission regulation was clearly the effects of subsidised Korean imports on European DRAM manufacturers, rather than an enquiry into the pricing of DRAM within the European market. In any event, the Regulation was if anything supportive of a global price (or, at least, globally connected prices) for DRAM: Recital (145) noted that Korean import prices and Community prices moved

together which reflected the fact that "the DRAM market is fully transparent" and Recital (153) referred to "the worldwide DRAM market", overcapacity in which had caused the current downturn from which the industry was suffering, including in the EU. Finally, the Regulation was issued on 24 April 2003. If the Granville Companies had exercised reasonable diligence, they would have become aware that in April 2003 the Commission had begun and then sustained over many years an investigation into anti-competitive behaviour by DRAM manufacturers in Europe (something scarcely consistent with the Commission having made an informed determination in April 2003 that pricing in the European DRAM market was fair). They would also have become aware of Infineon's substantial provision for the outcome of that investigation.

100. The Claimants also point in this connection to the fact that the Centerprise class action was dismissed, and to the decision of the Ninth Circuit Court of Appeals that:

> "Centerprise's complaint suggests that super-competitive DRAM prices in the United States may have facilitated the defendants' scheme to charge super-competitive prices abroad, but it does not sufficiently allege a theory that the higher U.S. prices proximately caused Centerprise's foreign injury of having to pay prices outside of the United States".

101. However, it is important to note the basis for that decision. Following the Foreign Trade Anti-Trust Improvement Act ("FTATIA"), the Sherman Act under which the Centerprise claim was brought required foreign consumers wishing to claim under US anti-trust legislation to establish that the cartel as applied in the US was the proximate cause of their loss (rather than, for example, the position where an international cartel was implemented both in the US and in the jurisdiction of the foreign consumer, in which case it would be the cartel as implemented in that foreign jurisdiction which would be the proximate cause of the consumer's loss). The Court of Appeals noted that Centerprise was asserting that the defendants had "engaged in a global conspiracy to fix DRAM prices, raising the price of DRAM to customers in both the United States and foreign countries" and that they claimed the jurisdictional requirement of FTATIA was satisfied because "the defendants could not have raised prices worldwide and maintained their global price-fixing arrangement without fixing the DRAM prices in the United States" (546 F.3d 981, 984). This was held to be insufficient, the Ninth Circuit Court of Appeals holding (at 988):

> "The defendants' conspiracy may have fixed prices in the United States and abroad, and maintaining higher US prices might have been necessary to sustain the higher prices globally, but Centerprise has not shown that the higher US prices proximately caused its foreign injury of having to pay higher prices abroad … In particular, that the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad".

The judgment recorded that Centerprise had recourse under its own country's antitrust laws, and it recorded that in oral argument Centerprise had acknowledged that it could bring suit in the United Kingdom against the defendants for their anticompetitive conduct.

102. The reason, therefore, why it was held that there was no jurisdiction over Centerprise's claim was that, in circumstances in which Centerprise was alleging an international conspiracy to fix the price of DRAM, both that sold internationally and in the US, it could not be said that it was the implementation of that conspiracy in the US that had proximately caused the higher prices paid by Centerprise in the UK (rather than the implementation of that international conspiracy in the UK).

103. Third, with the exercise of reasonable diligence, the Granville Companies could have become aware that the Commission had opened an investigation into DRAM prices in the EU which had continued over a number of years, and for the results of which Infineon had made a substantial provision in its accounts, and that European-based employees of Infineon and of two other DRAM manufacturers had pleaded guilty to involvement in the price-fixing under investigation by the DOJ.

104. This material on its own provided a sufficient basis for a viable plea that the cartel activities to which the major DRAM manufacturers had admitted in their dealings with the DOJ had been implemented, or had had qualified effects on the pricing of DRAM, in the European market.

105. In these circumstances, it is not strictly necessary to resolve the issue which led to the Claimants' application to adjourn the trial, namely Micron Europe's evidence that prices in DRAM were global. However, given the time which the parties spent on this issue both before and at the trial, I should record that I reject the Claimants' contention that the evidence of Mr Bokan that DRAM prices were global (in the sense that prices for DRAM in the US would impact on prices for DRAM in Europe) was inadmissible because it fell outside the scope of the Defendants' pleaded case. Micron Europe had pleaded reliance on the DOJ investigation into the effects of cartel activity on prices in the US. Implicit in that plea was the contention that the cartel activities in the US had either been implemented or had effect in Europe. Micron Europe also pleaded reliance on the Centerprise complaint, and the allegation in that complaint that "prices in the United States were the source of, and substantially affected, worldwide DRAM prices". Infineon expressly pleaded that prices of DRAM were global prices.

106. Against that background, and having regard to the fact that the burden of bringing themselves within s.32(1) of the Limitation Act 1980 rests on the Claimants, the Defendants were entitled to adduce evidence that the price of DRAM in the US market would impact on the price for DRAM in Europe. When the preliminary issues were ordered, there was no suggestion that they would be determined on the basis of assumed or limited facts, and it was clearly contemplated that the limitation issues would be determined once and for all at this hearing, without any second opportunity for the parties to adduce additional evidence on the limitation issues after this hearing had concluded. In these circumstances, if the Claimants wished to contend that they could not with reasonable diligence have discovered the matters necessary to bring this claim, inter alia, as a result of the DOJ materials because the DRAM market was, or might be, a regional market, it was for the Claimants to adduce that evidence.

107. I therefore accept Mr Bokan's evidence that each major OEM manufacturer would expect to and did pay Micron broadly the same price for DRAM whether purchased in the US or elsewhere, which accords with the position which I would expect to prevail as a matter of common sense (not least because if a significant difference opened up

in the price charged by, say, Samsung, to, say, Dell in the US and Europe, rational economic actors would switch their purchasing to the cheapest region). Mr Bokan's evidence to this effect was not undermined by his acceptance that there could be price differences as between different OEMs and indeed different types of DRAM.

108. However, as I have made clear, this evidence was not decisive, nor is it necessary for me to reach any concluded view as to whether, and to what extent, the market for DRAM is a global one. I have concluded that the material which could with reasonable diligence have been available to the Granville Companies would have allowed them to plead a viable case that the cartel activities which had essentially been admitted by the major DRAM manufacturers in the US had been implemented in or had qualified effect in Europe.

Were the Granville Companies in a position to plead anti-competitive effects on the spot market

109. The cartels found by both the DOJ and the Commission involved an agreement with the object of fixing the prices paid by major OEMs for DRAM under long-term contracts (so-called contract sales) rather than DRAM purchased by other computer manufacturers (such as the Claimants) in the spot market. Mr Scannell submitted that it was not until receipt of the Decision that the Claimants were in a position to plead an effect on the spot market, and in this context, he placed considerable emphasis on Recital (28) of the Decision:

> "Changes in intensity and conduct were made in reaction to new situations happening in the market … In another example, on specific instances/periods, contacts among certain suppliers took place relating to output/capacity/strategy as well as to spot pricing, exclusively in order to support and/or favour price coordination regarding major PC/server OEMs".

110. It was only this paragraph, Mr Scannell submitted, which put the Claimants in a position to plead an effect of the Cartel on the spot market in which they made their purchases.

111. I do not accept that the Claimants were not in a position to plead an effect on the spot market before the Decision.

112. First, as I have set out above, the draft class action complaint which was provided to the Granville Companies did plead an effect of the cartel relating to major OEMs on the spot market price, referred to a press report of an inculpatory statement by one DRAM manufacturer of steps being taken by members of the cartel to influence the spot market price, and pleaded evidence of the spot market price moving upwards in response to those efforts. I do not accept that Recital (28), which Mr Scannell says provides the basis for pleading the impact on the spot market now, provided a better basis for pleading such a case than the materials already available on this issue in the draft complaint.

113. Second, it is noteworthy that the Claimants' case now is not confined to the effects of those "specific instances/periods" when contracts took place "among certain suppliers" on spot pricing. While Recital (28) does feature in both the Claimants' Particulars of Claim and Reply, it does not have anything like the prominent place

which it did in Mr Scannell's submissions. Paragraph 48 of the Particulars of Claim alleges:

> "Without prejudice to the generality of the claims arising from the aforesaid expert evidence, the Claimants aver that it follows naturally from the findings in the Decision relating to the Defendants' collusive coordination of prices charged to major OEMs that the same collusion/infringements and/or Cartel Arrangements caused or contributed to an increase in the prices charged on the Spot Market to resellers and to other Non-Major OEMs, such as the Claimants".

114. The readiness to infer such a "natural" effect of a cartel directed at prices for major manufacturers is typical of the type of inference readily and rightly drawn by pleaders in cartel cases. There is no reason why the Claimants could not have pleaded a similar inference before the Decision became available, bolstered by the specific instance of conduct in relation to the spot market which had featured in the draft complaint.

115. In a variant of this argument, Mr Scannell submitted that it was not until the Decision that the Granville Companies knew that the cartel had affected all types of DRAM, rather than merely the higher quality DRAM sold to major OEMs, relying in this connection on Recitals (9) and (10) of the Decision. However, this simply re-formulates the argument that the material available to the Granville Companies did not put them in a position to plead a cartel impacting the spot market (as opposed to the contracts market) in which the non-major OEMs made their purchases. I note that there was no suggestion in the materials surrounding the DOJ investigation which suggested the unlawful behaviour was limited to particular types of DRAM, and that no distinctions were drawn between different types of DRAM when the Granville Companies were considering whether to participate in the US class action or in the passages in Infineon's accounts addressing the various price-fixing enquiries which were underway. This was a good example of an issue which has only assumed retrospective significance, in the context of the limitation issues which have arisen, but which would not have proved an obstacle to the Granville Companies pleading a viable claim before the Decision had they been minded to do so.

Were the Granville Companies in a position to plead a single and continuous infringement?

116. Recital (58) of the Decision records the Commission's conclusion that the cartel involved a "single and continuous infringement". Mr Scannell submitted that this was significant, because "had this decision merely referred to desultory instances of collusion in the major OEM channel, perhaps fixing prices on particular days, with no collusion in between to tie it altogether, it couldn't be readily concluded that the cartel might have had effect beyond the major OEM channel".

117. Once again, I am unable to accept the suggestion that it only became possible for the Claimants to plead the cartel as a single continuous infringement, rather than "desultory instances of collusion" once the Decision was available. The reports of the DOJ investigation, and the response of the investigated DRAM manufacturers to that investigation, were all suggestive of a continuing state of affairs, and the draft class action complaint was pleaded on the same basis. There was more than enough material here to plead a single cartel continuing over a period of time, and indeed the inference that the cartel was of this nature seems distinctly more probable than a

series of separate and independent attempts to fix the price of DRAM over a period of time.

Were the Granville Companies able to plead the conduct of the conspirators in sufficient detail?

118. Mr Scannell also submitted that it was only on receipt of the Decision that the Granville Companies were in a position to plead the conduct of the conspirators in sufficient detail to plead a viable claim, submitting:

> "One cannot tell from the plea agreements the individual actions that the conspirators actually took, there is some high level reference to meetings that took place but nothing like the detail that is contained in the Commission decision".

119. I cannot accept this submission for two reasons.

120. First, given the essentially secretive nature of cartel arrangements, it is frequently the case that purchasers in the market will be unaware of the detail of the operations of a cartel, even when on notice as to its existence. As I have set out above, this practical difficulty is recognised by the courts in the so-called "generous approach" which is adopted to pleadings in cartel cases when it comes to setting out the detailed steps taken to implement the cartel.

121. Second, it is clear from the terms of the draft complaint, which is a notably detailed document, that there was material which was in the public domain and known to the Granville Companies, which would have allowed for a more than sufficient degree of specificity in any Particulars of Claim.

Were the Granville Companies able to plead a case against Micron Europe?

122. As I have noted, the defendants to the claim before the Court are Infineon and Micron Europe. While Infineon is the same corporate entity who made admissions to the DOJ, it was Micron Inc, rather than Micron Europe, which was involved in the DOJ investigation and which was the defendant in the draft complaint. On this basis, Mr Scannell submits that even if the Court found that the Granville Companies could, with reasonable diligence, have discovered the matters necessary to plead a viable complaint against Infineon, this is not the case so far as Micron Europe is concerned.

123. Once again, I am unable to accept this submission. Having found that if they had exercised reasonable diligence the Granville Companies could have been in a position to plead a viable claim that the major DRAM manufacturers had been involved in a cartel which had been implemented or had qualified effects in Europe, it follows that there was sufficient material to plead a case against Micron Europe, through which Micron-manufactured DRAM was sold in the European market. Such an inference is readily and routinely drawn by pleaders in cartel cases, when advancing a case against an anchor-defendant in one jurisdiction on the basis of a cartel in which the wider corporate group or undertaking is involved. In Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd [2010] EWCA Civ 864 at [43], for example, the Court of Appeal held that the pleading in that case "encompassed the possibility that the

anchor defendants were parties or aware of the anti-competitive conduct of their parent company" and noted that:

> "The strength (or otherwise) of any such case cannot be assessed (or indeed usefully particularised) until after disclosure of documents because it is in the nature of anti-competitive arrangements that they are shrouded in secrecy."

124. A plea that Micron Europe had been involved in implementing the cartel to which major DRAM manufacturers, including Micron Inc, had been parties derived support from a number of factors. First, it was inherently probable that Micron Europe, as the subsidiary through which Micron sold and sells DRAM in Europe, was involved in any DRAM cartel involving Micron which was implemented in Europe. Second, another cartelist, Infineon, was based in the European market, two of its European based executives had pleaded guilty to involvement in a price-fixing cartel, Infineon had made substantial provision for a fine for anti-competitive behaviour in the EU and European-based executives of other DRAM manufacturers had been involved. All of this was indicative of cartel-activity in Europe. Third, the major OEMs who were the object of the cartel established by the DOJ were also major purchasers of DRAM in Europe, which was suggestive of the involvement in the cartel of Micron Europe as the company selling Micron DRAM in Europe. For these reasons, a pleaded case as to Micron Europe's participation in the cartel would have involved a great deal more than mere speculation (cf Toshiba Carrier UK Ltd v KME Yorkshire Ltd [2012] EWCA Civ 169, [30]). In addition, it would have been open to the Claimants to plead a viable claim based on the "single undertaking" principle first identified by Aikens J in Provimi Ltd v Aventis Animal Nutrition [2003] ECC 29 at [31] alleging that Micron Inc and Micron Europe were part of a single undertaking which made its sales in Europe through Micron Europe, and accordingly Micron Europe could be sued on that basis. The Provimi theory of liability has consistently survived strike-out attempts (the relevant authorities are addressed by Barling J in Media Saturn v Toshiba Information Systems [2019] 5 CMLR 7, 134ff).

Were the Granville Companies able to plead a case in respect of a cartel prior to April 1999?

125. Mr Scannell's final point was that even if the Granville Companies had been in a position to plead a viable claim based on materials relating to the DOJ investigation, and the consequences of that investigation, they were not in a position to plead a cartel in respect of the period before 1 April 1999. This issue arises because the terms of Hynix, Samsung and Elpida's plea deals with the DOJ use a relevant period for the cartel's operation beginning "on or about 1 April 1999", whereas the Decision finds a cartel to have been in operation from 1 July 1998 (albeit in the case of Infineon, for example, that it was a participant only from 14 November 1998).

126. However, had the Granville Companies exercised reasonable diligence, I am satisfied that they could have been in a position to plead a viable claim of a single continuous infringement which ran from "at least" April 1999, encompassing the possibility that that single continuous infringement may have begun at an earlier point in time. There was clearly some uncertainty in the DOJ material as to the precise start date of the cartel (for example the Infineon plea deal used a start date of 1 July 1999). No doubt for this reason, the draft complaint prepared for the US class action referred to a "long-running international conspiracy beginning no later than July 1, 1999". Had the Claimants pleaded a single continuous infringement from "at least" 1 April 1999, that

would have been a satisfactory pleading to cater for the possibility that the cartel may in fact have begun for certain participants prior to that date.

The position of OTC

127. OTC stands in a very different position from the Granville Companies. It had ceased treading nearly 6 months before any reports of the DOJ investigation began circulating. It never received an invitation to join the US class action. As a result, the Defendants put their limitation case against OTC on a different basis from the case advanced against the Granville Companies.

128. Infineon put the case in the following way:

> "It is not Infineon's case that an insolvency practitioner would have engaged in speculative searching through newspapers and journals seeking out a basis for a possible claim. Rather it is Infineon's case that the considerable volume of publicly available material – both within mainstream newspapers and specialist trade journals – could have alerted a reasonably diligent practitioner to the possibility of a claim. Once that possibility had been identified, a reasonably diligent practitioner would have carried out further searches and would have identified a sufficient proportion of the materials now before the Court to identify that the company had a claim".

129. This formulation acknowledges the need for some objective factor which might be said to prompt or trigger an investigation, and suggests that it is the volume of publicly available material which provides that trigger. Infineon suggests that the issue of whether OTC was reasonably on inquiry as to the possibility of a claim involves applying Millett LJ's test in Thakerar and asking whether OTC *could* have become aware of matters prompting such an inquiry. If that formulation is intended to suggest, for example, that the need for an investigation would arise if it was within the realms of possibility that the claimant could have become aware of facts which merited such an enquiry, even though, acting perfectly reasonably, the claimant did not become aware of those facts, I am unable to accept it. If, for example, someone in the position of the claimant could reasonably be expected to attend one of three trade fairs a year, or subscribe to one of three trade publications, I do not believe it could be said that the claimant should be treated as having the knowledge which would have been available from only one of the fairs or publications, on the basis that it "could" have become aware of it, if in fact, acting perfectly reasonably, it had adopted one of the other alternatives.

130. Micron Europe put their case against OTC on a number of alternative bases. Its first argument was as follows:

> "If the correct test of reasonable diligence is applied (ie assuming that the Claimants are a large manufacturing company rather than insolvency practitioners) … then OTC must also be taken to be aware of the DOJ Documents and the Centerprise claim. It is clear from Mr Ballard's evidence that in particular that companies like OTC took an active interest in the DOJ proceedings and were following their developments …"

131. This case is essentially premised on the legal argument, which I have rejected, that in ascertaining whether OTC ought to have been aware of matters which merited further investigation for s.32(1)(b) purposes, I should assume that OTC was still trading, with the means of knowledge and the engagement which a trading computer manufacturer still involved in the acquisition of DRAM would have had.

132. If I am wrong in my conclusions as to the assumptions I am required to make for the purposes of the s.32(1)(b) test, and in particular if Mr Jowell QC is correct in his submission that the issue should be approached on the assumption that OTC was still a trading entity buying DRAM, then I would not have been persuaded by OTC that it should not be treated as reasonably on notice of these matters. It is apparent from the evidence of Mr Ballard, and supported by the internal documents available from the Granville Companies, that the DOJ's price-fixing investigation and its developments were matters known to and of obvious interest to computer manufacturers purchasing from the manufacturers involved in that investigation, and I have seen no material to persuade me that, had OTC continued to trade, interacting with other DRAM purchasers in trade contexts and continuing to negotiate for the purchase of DRAM, it would have been in any different position to the Granville Companies (who were continuing OTC's business in its place) in this respect. However, this illustrates the artificiality of the assumption which Mr Jowell QC suggests I am required to make.

133. In closing, Micron Europe's case against OTC was largely premised on Mr Ward's email assertion that he would have told Mr Hosking of the existence of the US class action, which knowledge it was contended was attributable to OTC by reason of the common administrator. However, I have not felt able to conclude that Mr Ward alerted Mr Hosking to the existence of the US complaint in 2005, and accordingly this argument cannot succeed.

134. Micron Europe's final formulation was as follows:

> "In any event, in light of the plethora of press coverage of these matters … it is implausible that a company in the position of OTC would not have come across at least one report of the DOJ proceedings and the Centerprise claim which would have put them on a train of inquiry".

135. On this issue, Mr Wood of Grant Thornton UK LLP accepted that a reasonably diligent insolvency practitioner would take steps to keep up-to-date with current business affairs, and, perhaps over-generously, would "read widely printed newspapers such as the Times and the Financial Times". However, Infineon rightly disclaimed any suggestion that "an insolvency practitioner would or should have read each and every item of news in a print newspaper in full". Rather what was suggested was that "over the eight-year period in question it is implausible to suggest that a reasonably diligent team of insolvency practitioners … could not have identified any of the material now in the bundles".

136. It was not suggested by the Defendants that, for the purpose of determining whether OTC was reasonably on notice of the need to investigate the prices paid for DRAM, the administrators or liquidators should be assumed to have been accessing the international press. And while there was much debate before me as to the prevalence of the use of the Internet during the period in question, I do not believe that the ability to conduct online searches is relevant to the preliminary question of whether OTC

was reasonably on notice of matters requiring further investigation, as opposed to the issue of what such an inquiry conducted with reasonable diligence could have revealed. I also reject the suggestion that administrators of a company which has sold its assets should be following the trade press for the market in which that company had traded six months and more after trading had ceased.

137. For these reasons, the Defendants' case that it is "implausible to suggest that a reasonably diligent team of insolvency practitioners …. could not have identified" the relevant material falls principally to be determined by considering the material which the Defendants point to which was published in the Financial Times and the Times. I therefore turn to consider that material.

138. The Defendants do not rely on any press articles before June 2002, nearly some 6 months after OTC entered into administration, with no prospect of continuing trading, and after it had sold all of its business and assets. I accept Mr Wood's evidence that the principal focus of an administrator in identifying possible claims would have been brought to bear in the period immediately following the administration. While, an administrator would of course be expected to follow up any potentially significant claims which did or ought to have come to its intention thereafter, any expectation of further matters coming to light would naturally diminish with the passage of time.

139. The articles in the London print version of the Financial Times on which the Defendants relied were as follows:

    i) An article on page 30 of the print edition of 20 June 2002, in the "Companies & Finance: The Americas" section under the headlines "D-Ram investigation seen as madness" and (for the third edition) "US probes anti-competitive chipmakers".

    ii) An article on page 20 of the print edition of 31 December 2003 in the "Companies: International" section under the headline "Rambus given boost on damages claim".

    iii) An article on page 31 of the print edition of 6 May 2004, in the "Companies Europe" section under the headline "Rambus sues memory chip companies".

    iv) An article on page 32 of the print edition of 16 September 2004 in the "Companies International" section under the headline "Infineon fined $160m over chip cartel" (although it was not clear to me if this appeared in the London edition).

    v) An article on page 30 of the print edition on 3 December 2004 in the "Companies Asia-Pacific / International" section under the headline "Infineon execs plead guilty to price fixing".

    vi) An article on page 21 of the print edition of 21 February 2005 in the "Companies International" section under the headline "Rambus prepares for battle with Infineon" (which was largely concerned with a patent dispute but did refer to an anti-trust claim, as did an article on page 25 of the same section on 22 March 2005 under the heading "Rambus, Infineon to settle").

vii) An article on page 12 of the print edition of 22 April 2005, in the "International Economy" section under the headline "Hynix is fined $185m for role in chip plot".

viii) An article on page 9 of the print edition of 14 October 2005, in "the Americas" section under the headline "Samsung to pay $300m fine in D-Ram case".

ix) An article on page 25 of the print edition of 2 June 2006 in the "Companies Europe" section under the headline "Infineon in class action".

140. In addition, the Defendants referred to online Financial Times articles, and articles in the USA edition. However, the Defendants' case that it was "implausible" that the administrators would not have come across one of the articles relied upon should be tested by reference to one publication format (and not the cumulative content of all versions, as the Defendants submitted). It would require exceptional steps of the administrators to follow the same publication in multiple formats and editions. The London print version represents the Defendants' best case for establishing that information on the DOJ and Commission investigations ought to have come to the administrators' attention.

141. So far as the Times is concerned, the Defendants pointed to the following:

i) An article on page 27 in the Business section on 20 June 2002 under the headline "Computer Chip Suppliers drawn into US enquiry".

ii) An article on page 59 in the Business section of what I assume to be the print edition on 3 December 2004 under the headline "Infineon four admit price fixing".

iii) An article on page 56 in the Business section on 14 July 2006 under the heading "Spitzer lawsuit".

iv) An article on page 66 in the Business section on 15 July 2006 (a Saturday) under the heading "Samsung stays calm as lawyers draw up price-fixing charges".

142. In addition, there was an online article on 16 September 2004 under the heading "Samsung faces price fixing probe".

143. It will be apparent that over an 8 year period, press reports relevant to these claims were infrequent, episodic, and in many cases appeared in sections of the newspaper or under headlines which, on their face, would not have been of any obvious interest to the administrator of an English computer company which had gone into administration in January 2002. After the two reports of June 2002, a considerable period of time passed before further reports appeared. If the administrators had read the Times rather than the Financial Times, the number of reports in that 8 year period is an even smaller number. In any event, I find the suggestion that the issue of whether the administrators were reasonably on notice of the need to investigate a potential claim relating to DRAM pricing should be approached on the assumption that one or other (or perhaps both) papers were religiously scanned cover-to-cover on a daily basis (perhaps including weekends) for headlines of potential interest, for

years after the company had stopped trading and sold its assets, to be wholly unreal, and one which, were it to gain traction, would add materially to the cost of many administrations. This would involve the assessment of the issue of constructive knowledge for s.32(1)(b) purposes on the assumption that the administrators were required to take "exceptional measures which it was not reasonable in the circumstances to expect [them] to take" (adopting the language of Aikens LJ in Allison v Horner [2014] EWCA Civ 117, [19]).

144. I have concluded, therefore, that OTC was not reasonably on notice of matters meriting further enquiry such that it can be said that had it exercised reasonable diligence, it could have discovered matters sufficient to enable it to plead a viable claim.

Conclusion

145. Accordingly, the answers to the preliminary issues which I have been asked to decide are as follows:

i) The First and Second Claimants' claims against the First Defendant are time barred.

ii) The Third Claimant's claim against the First Defendant is not time-barred.

iii) The First and Second Claimants' claims against the Second Defendant are time barred.

iv) The Third Claimant's claim against the Second Defendant is not time-barred.

146. I will hear further from the parties on any consequential matters arising from this judgment.