Neutral Citation Number: [2020] EWHC 873 (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
Strand, London, WC2A 2LL

Date: 9 April 2020

Before :

MR JUSTICE FOXTON

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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

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RULING ON COSTS

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 9 April 2020 at 10.00am.

Mr Justice Foxton:

Introduction

1. This judgment addresses the various costs issues which have arisen in the light of my judgment on two preliminary issues on limitation. The judgment is reported at [2020] EWHC 415 (Comm) ("the Judgment"). Due to the current COVID-19 crisis, the costs issues have been dealt with in written submissions. I am grateful to all involved for their work on these submissions.

2. In the Judgment, I found that the claims of the First and Second Claimants ("Granville" and "VMT", together the "Granville Companies") against both the First Defendant ("Infineon") and the Second Defendant ("Micron") were time-barred, but that the claims of the Third Claimant ("OTC") against Infineon and Micron were not time-barred.

The matters which are agreed and the matters which arise for determination

3. The following matters were common ground between the parties:

   i) any award of costs should be the subject of detailed assessment;

   ii) the Granville Companies shall be liable to pay part of the costs of the Defendants arising out of and occasioned by the claims; and

   iii) the Defendants shall be liable to pay OTC's costs of the preliminary issues trial.

4. The issues which arise for determination:

   i) what proportion of the Defendants' costs should be paid by the Granville Companies and what proportion of the Claimants' costs is OTC entitled to;

   ii) whether there should be a percentage reduction to the Defendants' costs;

   iii) whether Infineon should be liable for OTC's costs on the indemnity basis;

   iv) the amount of any interim payments; and

v) whether an interim payment should be made to any party immediately, and if so, what conditions if any should attach to such payment.

The proportion of recoverable costs

The Claimants' submissions

5. The Claimants submit that the Granville Companies should pay 50% of the Defendants' costs and OTC should be entitled to recover 50% of the Claimants' costs from the Defendants for the following reasons:

   i) The Granville Companies constitute a *de facto* single claimant and the costs borne by the Defendants are the same as if the Granville Companies Claim had only been brought by one of the Granville Companies.

   ii) The 50% split reflects the basis on which the Claimants' own costs have been shared.

   iii) VMT was named as a party to cater for the possibility losses incurred by Granville were passed on to VMT as a purchaser of DRAM from Granville. It is said that to the best of the liquidators' knowledge, VMT made no purchases of DRAM from third parties.

   iv) The Granville Companies were treated as a single entity throughout proceedings. No separate issues have arisen as a result of VMT's participation in proceedings. The pleadings of the Defendants do not make any specific pleadings in respect of VMT.

   v) No additional costs have been incurred as a result of the inclusion of VMT.

   vi) The disputed issues unique to the OTC claim outnumbered those unique to the Granville Companies' claim, which were in a narrow compass. The OTC issues included wider issues pertaining to "reasonable diligence" and the import of press articles and trade publications, had they been known or knowable to OTC.

The Defendants' submissions

6. The Defendants' primary submission is that the Granville Companies should pay 66% of the Defendants' costs and for the same reasons OTC should recover no more than 33% of the costs incurred by the Claimants. They submit that:

i) The 66% split would reflect the fact that the Defendants had successfully defeated two of three claims made against them.

ii) Contrary to the Claimants' position in their Costs Submissions that VMT was added solely as a purchaser of DRAMs from Granville (and hence its losses were merely those passed on by Granville), the Claimants' pleaded case was that VMT purchased DRAMs both from Granville and from third parties. This meant some separate factual investigations were required into their purchases.

iii) The Granville Claims consumed more time and costs than the OTC claims. This was put in various ways by Infineon and Micron:

a) The issue of constructive knowledge was common to the three claims but the question of actual knowledge only arose in the Granville Companies' claims.

b) The only disclosure that was forthcoming came from the Granville Companies (and it was this that raised the additional legal and factual issues).

c) As a result of these matters, even if the claim by VMT had not been issued, Granville being the party whose claim raised additional issues, ought to have been entitled to more than 50% in any event.

d) Some of the work undertaken with respect to the Granville and VMT claims (including in relation to the volume and price of DRAM purchased) was not undertaken with respect to the OTC claim.

7. Infineon also notes the costs incurred as a result of the disclosure exercise associated with OTC were considerably smaller than that associated with the other two parties such that it was surprising that nearly a quarter of the costs provided by OTC's solicitors related to "CMC and Disclosure". This, Infineon contends, made an award of 33% generous, and if anything, a lower costs award was appropriate to reflect these matters.

8. Alternatively, Micron suggested the proportion of costs to be attributed to each claim should be left to detailed assessment, with a broad brush 50/50 division made at this stage for the purpose of an interim payment. The Claimants opposed this suggestion on the basis the trial judge has the knowledge of the issues arising in the hearing such that he is best placed to deal with this issue appropriately and efficiently.

Analysis and conclusion

9. I agree with the Claimants' case that as the trial judge, I am best placed to determine this issue, given the greater familiarity with the evidence and arguments which follows from having conducted the trial.

10. Before dealing with the issue, it is necessary to record the basis on which OTC has paid costs. I have been told that the costs billed to OTC are either joint and common costs with Granville (e.g. preparation of case management information sheet, and trial bundles), shared 50-50 by agreement, or are specific to OTC (e.g. an interview with a former OTC employee) which are billed solely to OTC.

11. So far as costs billed just to OTC or just to the Granville Companies are concerned, no issue of allocation arises. However, so far as common costs are concerned, I have concluded that the agreement OTC has entered into cannot bind the court in its determination of the amount which it is reasonable to ask the Defendants to pay to OTC.

12. I have concluded that a 60/40 allocation between the Granville Companies and OTC is appropriate for the following reasons.

13. I was unpersuaded by the Defendants' contention that the fact the Defendants were successful against two out of three Claimants, warrants a 66/33 division. As the Claimants pointed out, the Granville Companies were treated as *de facto* a single claimant in this case. The addition of VMT did not create new legal issues and all the legal teams treated the Granville Companies in substance as the same entity.

14. While Micron are correct to point out that the Claimants' pleading is inconsistent with their subsequent contention in their Costs Submissions that VMT only suffered losses passed on to it by Granville, this did not take the Defendants' case any further. At most this only meant they had to perform additional inquiries to check whether they had sold DRAMs direct to VMT. In my view, this would not justify treating the Granville Company claims as two distinct claims, given that the entirety of the rest of the work created by each claim appears to have been coextensive.

15. The real issue is how the Granville Companies' claim compared to OTC's claim in terms of the amount of work (and concomitant costs) that each created.

16. I accept the Defendants' contention that the Granville Companies' claim raised legal and factual issues not present in the OTC claim, and involved additional work arising from the

disclosure given. While constructive knowledge was in issue in both claims, the Granville Companies' claim raised issues of actual knowledge which were significant and were not present in the OTC claim.

17. By way of example, while all the press articles relied on by the Defendants in respect of the OTC claim set out at [139] to [141] of the judgment were relevant to the Granville Companies' claim, the matters which are set out at [77] to [79] of the Judgment, concerning information known to the Granville Companies and which ended up being decisive, were not relevant to the OTC claim. The Claimants are correct that the fact of those matters was largely admitted by the Granville Companies. However, the question of whether, by virtue of, *inter alia*, those matters, the Granville Companies had either constructive or actual knowledge of Infineon's or Micron's SEC filings, or various of the press or specialist legal articles on which the Defendants relied were significant issues which required work which was unique to the Granville Companies claim.

18. I do not accept the Claimants' submission that issues pertaining to "reasonable diligence" were more extensive in the OTC claim than in the Granville Companies claim. Further, while the press releases and articles relied on by the Defendants took on a greater significance in the OTC claim, I do not consider this can have created a significant amount of additional work.

19. For these reasons, I accept that the Granville Companies' claim must have involved more work than the OTC claim. While the relative split of work done is inevitably a matter of impression, I have concluded that it is fairly reflected in an allocation whereby 60% of the Defendants' costs are to be paid by the Granville Companies and 40% of the Claimants' common costs are allocated to the OTC claim and hence are to be paid (together with those costs billed only to OTC) by the Defendants.

Should there be a percentage reduction in the Defendants' costs?

20. The Claimants submit that the Defendants' recoverable costs should be reduced by 40% on various grounds. In particular, and for present purposes, they alleged:

    i) that the Defendants' case was duplicative;

    ii) that the Defendants relied on an unnecessarily wide range of documents;

iii) that the Defendants' costs are unnecessary and disproportionate as a result of (i) and (ii);

iv) the Defendants allege significant and unnecessary costs were incurred in respect of the "David Ward evidence issue" such that Micron's fees should be reduced to take account of this. As with the previous issue, they contend the trial judge is best placed to determine this issue.

The Defendants' case

21. Infineon accepts that to the extent the Claimants' case on this issue concerns the manner in which the parties conducted the litigation, this might in principle provide a basis for a percentage reduction.

22. However, Infineon and Micron's primary submission is that this issue is concerned with the proportionality of costs and as such is a matter for detailed assessment which the Court need not consider at this stage. In this regard, Infineon refers to my direction of 10 March 2020 which stated that I was going to determine the "incidence of costs (i.e. who must pay costs to whom and/or what proportion of costs will any party recover)". Micron also makes an alternative submission that if a percentage reduction is to be made in respect of the Defendants' costs, then a percentage reduction should also be made in respect of OTC's costs which it contends are unreasonable.

23. Should that primary submission be rejected, the Defendants make detailed submissions in respect of the Claimants' submissions as follows.

24. As to the Claimants' contention that the Defendants duplicated each other's work, creating a large adverse costs risk for a party suing a cartel, the Defendants contend that their work was not duplicative, and that they are competitors who cannot have been expected to have joint representation. They contend that it was up to the Claimants to determine how many addressees of the Commission Decision to sue. They submit that the Defendants sought to avoid duplication wherever possible including by corresponding jointly and splitting oral submissions; that at the hearing there was little duplication; that duplication by way of pleadings has limitedly increased costs; and that the solicitors' teams took steps to allocate common tasks to avoid duplication.

25. As to the Claimants' contention that the Defendants unnecessarily relied on every document that referred to the US DRAM cartel on the internet, in newspapers and in trade

publications, no matter how obscure, rather than just the key documents, Infineon claims that this lacks reality because it presumes the outcome of the hearing and ignores that the wide ranging enquiry into documents in the public domain, such as newspapers, was necessary to answer the issue of whether there was a relevant trigger which might cause a Claimant to recognise it had a claim. Micron further submits that the Claimants' criticism ignores that the Defendants' Documents were provided in response to the Claimants' RFI. The Claimants' disclosure revealed specialist trade press in their possession, so it was reasonable to conclude these might be relevant. Micron also contends that much of the work was done by non-lawyers.

26. As to the Claimants' submission that the Defendants' costs claimed are excessive and disproportionate, pointing to the level of costs incurred by the Defendants jointly, Infineon submits that this is a matter for assessment and notes that the Claimants spent £763,000 on the preliminary issue trial alone and contends that against that background its total fees of £1,327,938 are not excessive. Infineon also denies that the proportionality of the Defendants' costs should be assessed jointly. The Claimants brought a claim against two defendants, in circumstances where the two defendants could not be expected to have the same legal team, and hence caused them to incur two sets of costs. Infineon refers in this connection to the following passage in Dau Chi Chong v Funafloat and British Waterways Board [2013] EWCA Civ 212, [19] – [21]:

> "The claimant was not obliged to have second thoughts; he was not obliged in any way to make the second defendant a party to the action. He could have pursued his action against the first defendant, leaving the second defendant in a battle with the first defendant."

27. Micron also denies that its costs were excessive, saying that it spent less defending the claims in their entirety (£675,000) than the Claimants spent on the preliminary issue trial.

28. As to the Claimants' suggestion that the issue of whether Mr Ward informed Mr Hosking of the existence of, and invitation to participate in, the US class action resulted in significant unnecessary costs, Micron says that it incurred minimal costs on this issue, which is not a basis for reducing Micron's recoverable costs.

29. Micron also advances a number of criticisms of OTC's costs including (a) a disproportionate amount of work done as partner and senior associate level; (b) an unreasonable amount of time

spent on disclosure; and (c) the costs claimed in respect of witness evidence are disproportionate.

Analysis and conclusion

30. I do not believe that a percentage reduction is the appropriate way of addressing the issues raised by the Claimants, which appear to be matters which should be raised on detailed assessment. This is equally true of the counter-criticisms which Micron has made of OTC's costs. In particular, I do not think a percentage adjustment to the total level of costs recovered is the appropriate means of addressing specific criticisms of the reasonableness of particular charges in a case in which there is going to be specific consideration of the extent to which those charges are recoverable in the context of a detailed assessment.

31. However, I have concluded that I should provide the following guidance to assist the costs judge.

32. First, in my view Infineon and Micron were entitled to separate legal representation at the trial. Not only are they competitors (indeed the thrust of the Claimants' claim is that they had been insufficiently competitive in the past) but they had independent interests to pursue (both the prospect of achieving individual settlements as other defendants had done, and the issues which arise between the defendants as regards any claims for contribution *inter se*). However, as with any case in which two parties with common interests as against one another have separate teams, the proportionate conduct of litigation requires co-operation to avoid so far as possible any duplication of effort or costs. It is not possible for me as the preliminary issues judge to evaluate how far such efforts have been made in the pre-trial phase, but I can confirm that reasonable efforts were taken at trial to avoid duplication in submission and in cross-examination.

33. Second, I accept the Claimants' submission that the Defendants relied on an unnecessarily wide range of press cuttings, citing extensive reports from a journal which it could not credibly be suggested that the Claimants would reasonably have had access to (namely English and international editions of non-English newspapers). The costs judge will want to consider carefully the level of costs incurred in accessing press articles and including them within the bundles.

34. Finally, I addressed in my judgment the unsatisfactory position so far as Mr Ward is concerned. It is not clear to me whether Micron did incur any costs in dealing with Mr Ward. However, I

direct that the costs were not reasonably incurred and should not be recoverable on assessment.

Should Infineon be liable on the indemnity basis to OTC?

35. I have concluded that the appropriate order at this stage is one for costs on a standard basis, but with liberty to OTC after the trial has been completed to apply to vary the basis of assessment of costs or to seek supplementary orders.

The applications for payments on account

36. CPR r 44.2(8) provides “(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.”

The parties’ positions

37. OTC has incurred total costs in the preliminary issue of £762,938. As I have stated, that figure reflects costs specific to OTC, and 50% of the common costs of the Claimants. However I have held that the appropriate allocation of common costs is 40% to OTC, for the purposes of determining the amount which the Defendants are liable to pay.

38. Infineon’s total costs of the action are £1,327,938.30. I have held that the Granville Companies are obliged to pay 60% of Infineon’s assessed costs. I also note that Infineon’s costs of the action are significantly higher than Micron’s costs. I have reflected this in my interim payment award.

39. Micron’s costs of the action are £675,000. I have held that the Granville Companies are obliged to pay 60% of Micron’s costs, save that the costs of the David Ward issue are not recoverable.

40. The parties have generally agreed that 50% is an appropriate figure for calculating an interim payment on account of costs. However, the appropriate figure will need to reflect my conclusions on the matters set out above.

Conclusion

41. I have decided as follows:

    i) the Granville Companies shall pay £350,000 on account of Infineon’s costs;

    ii) the Granville Companies shall pay £200,000 on account of Micron’s costs;

iii) the Defendants should pay £300,000 on account of OTC's costs;

by way of an interim payment on account.

42. The Defendants seek to impose conditions on the payment on account to OTC.

43. The first, which is not opposed and which should be incorporated in an undertaking in the order, is that OTC should undertake to hold funds separately from the funds available to creditors while there remains the possibility of the Defendants succeeding on an appeal.

44. The second, which is opposed, is that Micron seeks a delay in payment to OTC pending the Granville Claimants making a payment to it. Micron says this will enable Allen & Overy to use the funds received to make the payment to OTC which is "administratively more straightforward". OTC does not agree to this. It argues it is not legally connected to them and is entitled to payment in the same time frame as the Defendants.

45. I have concluded that this second condition is not justified. The fact that a delay in payment would be administratively more convenient for Micron is not a reason to extend the time for Micron's payment.

46. The parties are asked to draw up an order to reflect my conclusions.