Neutral Citation Number: [2021] EWHC 1429 (Comm)

Case No: CL-2020-000500

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

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

Date: 28/05/2021

Before :

SIR MICHAEL BURTON GBE
Sitting as a Judge of the High Court

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Between :

1) SAMSUNG ELECTRONICS CO. LTD **2) SAMSUNG ELECTRONICS TAIWAN CO. LTD** **3) SAMSUNG ELECTRONICS (UK) LTD** **4) SAMSUNG SEMICONDUCTOR EUROPE LTD** **5) SAMSUNG DISPLAY CO LTD**	**Claimants/ Respondents**
- and -	
1) LG DISPLAY CO. LTD **2) LG DISPLAY TAIWAN CO.LTD**	**Defendants/ Applicants**

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Thomas Plewman QC, Robert O'Donoghue QC and Mr Tom Pascoe (instructed by **Covington & Burling LLP**) for the **Claimants/Respondents**
Daniel Piccinin (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the Defendants/Applicants

Hearing date: 18 May 2021

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Approved Judgment

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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 28 May 2021 at 12 noon

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Sir Michael Burton GBE :

1. This has been the hearing of an application by the Defendants (collectively "LGD") to set aside the Order of Henshaw J of 14 August 2020, by which he granted the Claimants (collectively "Samsung") permission to serve LGD out of the jurisdiction in Taiwan and Korea. The case arises out of the finding by the European Commission ("the Commission"), on 8 December 2010, that the First and Second Claimants and LGD and others were party to a cartel which infringed Article 101 TFEU in respect of price-fixing and information sharing, leading to sales in the EU, including the UK, at increased prices. On 9 July 2015, 42 UK Local Authorities issued proceedings in the Chancery Division against the first four Claimants, by way of a 'follow-on claim', relying upon the Commission's findings, alleging that they had suffered damage in the sum of over £5m by virtue of purchasing products at an overcharge. On 4 September 2018, Samsung entered into a (confidential) Settlement Agreement with the Local Authorities whereby the Fifth Claimant paid on their behalf a substantial sum in settlement of the Local Authorities' claims. For the purposes of today, it is accepted that the settlement compromised all claims of the 42 Authorities, including any against LGD.

2. The claim is made by reference to the Civil Liability (Contribution) Act 1978 ("the Act"), which provides in material part:

> *"1 - Entitlement to contribution.*
>
> *(1) subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).*
>
> ...
>
> *(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage… shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.*
>
> ...
>
> *(6) References in this section to a person's liability in respect of any damage or references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.*

> *2- Assessment of contribution.*
>
> > *(1)… in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that persons responsibility for the damage in question."*

Paragraph 38(2) of Part 9 of Schedule 8A to the Competition Act 1998 provides that *"The amount of contribution that one person liable in respect of the loss or damage may recover from another must be determined in the light of the relative responsibility for the whole of the loss or damage caused by the infringement."*

3. LGD contends that the proceedings should not be in England and Wales, but should have been brought in Taiwan or Korea (I shall refer generically to "the Far East") and there are contested arguments on gateway and on forum non conveniens. There is a limitation period of two years for the bringing of a contribution claim under the Act, and this claim was only just within the two year period from the Settlement Agreement, proceedings being issued on 17 August 2020. The limitation period has now expired. There is no evidence that contribution or similar proceedings cannot be brought in the Far East or that any relevant limitation period there has expired, and I decide the case on the basis that proceedings can be brought in the Far East if the Defendants are successful in this application. If there had been evidence that no such proceedings could be brought or could now be brought in the Far East, then the expiry of the limitation period for these proceedings would obviously have been a powerful factor in the proceedings continuing here, subject to an explanation of the delay, but such is not the case, and I shall decide the issue on the basis that there can be suitable proceedings brought in the Far East if necessary, and there is no dispute about the competence of those courts.

4. Before Henshaw J, Samsung rested their case upon the basis of the tort gateway – Practice Direction 6B paragraph 3.1(9), whereby:

> *"The claimant may serve a claim form out of the jurisdiction with the permission of the court… where… A claim is made in tort where – (a) damage was sustained, or will be sustained, within the jurisdiction; or (b) damage which has been or will be sustained results from an act committed.... within the jurisdiction."*

In the light of the Defendants' opposition in their applications to set aside service made on 8 December 2020 and 25 January 2021, the Claimants issued an additional notice of application dated 4 May 2021 to rely further or in the alternative on two other gateways, the restitution gateway (Practice Direction 6B paragraph 3.1(16)) and the 'statutory gateway' (Practice Direction 6B paragraph 3.1(20)). I shall set them out below when I come to consider them. For this course Samsung rely on the authority of **AES Ust-Kamenogorsk Hydroplant LLP v Ust-Kamenogorsk Hydropower Plant LLP** [2012] 1 WLR 920 (CA) as entitling the court to entertain an application on the basis of an alternative gateway on a subsequent challenge by a defendant, provided that there is not a change in the cause of action relied upon, as there is not here, and the Defendants have not disputed this. I shall accordingly consider each of the three gateways, Samsung

asserting that they only need the tort gateway, but that if the Court concludes that it is not available then they rely on the others in the alternative, while LGD asserts that none of them are available.

The tort gateway

5. The Claimants submit that the contribution claim in respect of the torts of which both Samsung and LGD were found guilty by the Commission is a "*claim in tort*" within the meaning of PD 3.1(9). The Defendants submit that it is not, and that the only gateway available is the restitution gateway (and that the claim does not qualify for it). Mr Plewman QC for the Claimants points first to claims under the Act for contribution against a joint or several tortfeasor which have successfully qualified within the tort gateway of the Brussels Regulation, of which he gave two examples: **Hewden Tower Cranes Ltd V Wolffkran GmbH** [2007] 2 Lloyds Rep 138, **Iveco SpA v Magna Electronics** [2015] 2 CLC 963, referred to in **XL Insurance Co SE v AXA Corporate Solutions Assurance** [2015] 2 CLC 983. The answer by Mr Piccinin for the Defendants is simply that the wording of the Brussels Regulation is different, the relevant Article, 7(2), (formerly 5(3)), providing for "*matters relating to tort, delict or quasi-delict".*

6. Claims within the Act for contribution against a joint or several tortfeasor were also entertained successfully through the tort gateway by reference to the predecessor rules to the CPR, namely the RSC, as for example in **Castree v ER Squibb & Sons Ltd** [1980] 1 WLR 1248, and in the Bahamas (a case coming to the Privy Council) which still used the RSC, **FFSB Ltd v Fortis Fund Services (Bahamas) Ltd** [2007] UKPC 16. Again Mr Piccinin gives the same answer: the words were different: Order 11 r. 1 (1) (f) (formerly (h)) referred to where "*the claim is founded on a tort"*. He also points out the different form of words used in respect of the contract gateway, PD 3.1(6), which is "*in respect of a contrac*t".

7. Mr Plewman QC refers to the words of Lord Sumption in paragraph 30 of his opinion in **Four Seasons Holdings Inc v Brownlie** [2018] 1 WLR 192 (SC), where he said: –

> *"The new rules of court expanded the tort gateway in RSC Order 11 so as to correspond with Article 5 (3) of the Convention… … Although the language changed when the gateways were transferred to a Practice Direction in 2000, the substance of the rule remained the same, except for the omission of the definite article before "damage". ... the result is that RSC Order 11 r 1 (1) (f) and the corresponding provisions of paragraph 3.1 (9) (a) of Practice Direction 6B have generally been construed in the light of the case law of the Court of Justice.….It would be strange if the effect of expanding the gateway to match the wider special jurisdiction authorised in Convention cases had been to make it very much wider than even the Convention authorised".*

Mr Plewman would add that it would be equally strange if the transfer to the Practice Direction had resulted in the tort gateway reducing, both as compared with the old RSC and with the Convention (i.e. the Brussels Regulation). He submits that the present PD should be construed as meaning the same as the tort gateway under the RSC and the Brussels Regulation.

8. Mr Plewman also points to:

   i) the Scottish position, which still accords with the RSC, as can be seen in a similar contribution claim under the Scottish Law Reform (Miscellaneous Provisions) Act 1940, falling within the tort gateway (using the RSC words) in **Comex Houlder Diving Ltd v Colne Fishing Co Ltd** [1987] SC (HL) 85.

   ii) the U.S. Second Restatement (Conflict of Laws) which provides, though by reference to choice of law, at Section 173: Contribution and Indemnity among Tortfeasors that "*the law selected by application of the rule of Section 145 [*relating to *"the rights and liabilities of the parties with respect to an issue in tort*"] *determines whether one tortfeasor has a right to contribution or indemnity against another tortfeasor*".

   iii) the only academic writer relied on by either side, Koji Takahashi in Claims for Contribution and Reimbursement in an International Context (OUP 2000), albeit written by reference to the RSC, which was the provision in place at the time, who gives his approbation at page 42 to the proposition that "*the place of the damage and the place of the causal act in respect of the tort from which a contribution claim arose are both sufficiently closely connected with the claim to justify imposing the burden of litigation in England on the tortfeasor served out of the jurisdiction*."

9. The only case referred to by Mr Piccinin as pointing towards the restitution gateway rather than the tort gateway is **Roberts v Soldiers, Sailors, Airmen and Families Association,** where at first instance [2020] QB 310 at [8] Soole J states "*whatever its correct classification, the claim for contribution is not a claim in tort*". However a footnote at page 335 records that "*the parties agree that it should be classified as a restitutionary claim*". In the Court of Appeal [2021] 1 WLR 87 (CA) at [43] Irwin LJ refers to the fact that Soole J "*noted that the claim for contribution in such cases is not a claim in tort"*. This was of course dealing with classification for the purpose of choice of law not gateway, but in any event there was no argument before the Court, because it was the subject of agreement between the parties, and I am plainly not bound by it.

10. Interestingly in **Twin Benefits Ltd v Barker** [2017] EWHC 1412 (Ch) Marcus Smith J at [109(ii)] states "*a restitutionary claim – a claim for unjust enrichment – is not a tortious claim. It is not necessary in this judgment to consider the precise borderline between tort and restitution. This is not a "difficult" case, where (for instance) restitution is claimed as a remedy arising out of a tort committed by the defendant*" and he refers to the discussion in Golf & Jones: The Law of Unjust Enrichment (9th Ed 2016) at 1–03 to 1–05 (where no particular conclusion is reached). I note that at [113(ii)] Marcus Smith J refers to the words of Mance LJ in **Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC** [2001] QB 825 at [26] as relevant to "*the process of determining the ambit of the gateways in the Practice Direction"*, that it "*falls to be undertaken in a broad internationalist spirit in accordance with the conflict of laws of the forum*".

11. I am persuaded that, notwithstanding the different wording used for the contract gateway, I should construe a "*claim in tort*" purposively in the light of the juridical history of the tort gateway, its proper assimilation to the Brussels Regulation and "*in a broad internationalist spirit*". I note that Lord Hoffmann in **FFSB**, though dealing with

the old RSC wording, concluded at [22] that "*there is no reason why it should matter whether the claim is made by the victim of the tort or by another tortfeasor seeking contribution*". Similarly in the Scottish case of Comex, the Lord President concluded at 104, again on the basis of the RSC language, that "*delict in Scotland forms the primary cause of this action* (for contribution)". The claim, in my judgment, is a "*claim in tort"*, albeit by a joint tortfeasor rather than by the original victim.

12. The next question is whether this contribution claim qualifies for the tort gateway. It must follow from the logic of what I have concluded about the gateway that the tort in question must be the underlying tort, as indeed is the case in for example the Brussels Regulation cases referred to above. The issues are (a) where damage was sustained and (b) whether the damage sustained resulted from an act committed within the jurisdiction. Plainly the damage was sustained within the jurisdiction on the basis of the Amended Particulars of Claim in the Authorities' proceedings at paragraphs 39 and 47 (importation and distribution in the UK at inflated prices) and as fully explained in Mr Leitch's witness statement on Samsung's behalf at paragraphs 17 to 22, with reference to the Commission Decision and the Authorities' proceedings. Further the acts were committed in the UK, as further discussed by Morgan J in another follow- on claim resulting from the same cartel in **iiyama v Samsung Electronics Co Ltd** [2016] 5 CMLR 16, to which Samsung and LGD were defendants, at [77], as to the tort of infringement of Article 101 occurring in the EU (including the UK).

13. That resolves the question. If, contrary to my view, it were necessary to look at the contribution claim itself, the loss was sustained by Samsung in the UK when they made themselves liable under the English law Settlement Agreement to pay more than their share: see Lord Bingham when he refers in **Royal Brompton Hospital NHS Trust v Hammond** [2002] 1 WLR 1397 at [3] to the 1934 Law Revision Committee Third Interim Report at paragraph 7: "*when two persons each contribute to the same damage suffered by a third, one who pays more than his share should be entitled to recover contribution from the other*." As is clear from **Re Eras EIL Actions** [1992] 1 Lloyds Rep 570 at 591, the loss was not the actual payment but the exposure to claims which, if successful, could result in enforceable judgments of the English Court, i.e. in this case the sum payable under the Settlement Agreement. As for whether the act which caused the loss was in the jurisdiction it does not seem to me that it matters that the Fifth Claimant paid the sum due under the Settlement Agreement on behalf of the other Claimants from a Korean bank account, but rather that it was again Samsung's act of entering into the English law Settlement Agreements and making themselves liable to an English judgment.

<u>The Other Gateways</u>

14. I do not therefore need to consider the restitution gateway, which provides:

> *"(16) A claim is made for restitution where –*
>
> *(a) the defendant's alleged liability arises out of acts committed within the jurisdiction; or*
>
> *(b) the enrichment is obtained within the jurisdiction; or*
>
> *(c) the claim is governed by the law of England and Wales."*

It is common ground that, if the tort gateway is not applicable, this gateway applies: Samsung relies on this as a fallback, and the Defendants assert that this is the only gateway, by analogy with the parties' agreement in **Roberts**. The unjust enrichment is that of Samsung by its agreement to pay and/or paying more than its fair share of its liability. Mr Plewman refers to **Sharab v Al-Saud** [2012] CLC 612, followed in **Bazhanov v Fosman** [2017] EWHC 3404 (Comm). In **Sharab** at [68] Sir William Blackburne said "*the focus of the gateway's wording is on the acts which give rise to the defendant's liability. The essence of a claim in restitution (at any rate of the kind with which this case is concerned) is the conduct of the claimant which has enriched the defendant. There is no requirement that the defendant should even have requested the actions which have enriched him, although that will frequently be the case*." Mr Piccinin refers to a dictum of Lawrence Collins J in **NABB Brothers Ltd v Lloyds Bank International (Guernsey) Ltd** [2005] IL. PR 37, referring to suggestions of Briggs and Rees in Civil Jurisdiction and Judgments (3rd Ed 2001) that "*the acts within the jurisdiction must have something to do with the defendant. I accept that there must be some link between acts committed within the jurisdiction and the defendant, but those acts in my judgment do not have to be those of the defendant*." There is plainly a sufficient link, because the act of enrichment was entered into to satisfy the liability of the Claimants and Defendants in respect of a tort infringement in the UK. As discussed above, that act of enrichment and the enrichment itself were by virtue of Samsung making themselves liable for more than their fair share of the loss caused by the infringement, by entering into the Settlement Agreement governed by English law in the UK.

15. The routes through the gateway are alternative, so that it is sufficient if either (a) or (b) are satisfied, as I conclude them to be. As to (c), the Claimants submit that it is satisfied by virtue of the fact that the Act is "*governed"* by English law, as is made clear in **Roberts**, particularly at [92] per Soole J: "*In my judgment it is implicit from the provisions of the 1978 Act that the statute does have overriding effect*", so as to override the impact of any underlying proper law, and this is approved by the Court of Appeal per Irwin LJ at [55] : *"Provided liability can be established against tortfeasor one and tortfeasor two, so as to gain judgment in an English court whether or not any issue or issues are decided by foreign law, the threshold condition for a contribution claim is fulfilled. If by its own terms the Act applies in relation to the principal liability for tortfeasors, even where the proper law of the tort is foreign law, then why should a consequential contribution claim where the proper law of the claim is foreign law, fall outside the ambit of the Act?*" Mr Piccinin submits that **Roberts** makes it clear that there is simply an "*overriding effect*" of the Act, which is a circular argument if the issue for the purpose of the gateway is what the law is: otherwise every contribution claim under the Act would automatically fall within (c). Of course a contribution claim is only one example of a restitution claim, so that it does not seem to me to matter if that is so, and the fact remains that (c) requires examination of what is the "*governing*" law, and if English law *governs*, by virtue of the fact that it is a contribution claim within the Act, then (c) would be satisfied. There would then be the issue, if Mr Piccinin were right, as to what the proper law of the restitution claim is without paying regard to the override of the Act. Both Counsel addressed the provisions of the Rome II Regulation 864/207 on the law applicable to non-contractual obligations, and reached conflicting conclusions as to what the proper law would then be. I do not propose to resolve this issue, as (c) is not necessary, given the availability, as I have concluded, of (a) and/or (b).

16. I am satisfied that Samsung's case falls within the tort gateway and, if not, then at least two of the three possible routes to the restitution gateway are available. It is not therefore necessary for me to consider the 'statutory gateway', which provides:

> *"(20) A claim is made –*
>
> *(a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph."*

There was some dispute between Counsel as to the applicability of the first part of this gateway, by reference to the tentative view of Nugee J in **Hamilton-Smith v CMS Cameron McKenna LLP** [2016] EWHC 1115 (Ch)) at [69] that the Act was such an "*enactment",* and there was discussion about **Orexim Trading Ltd V Mahavir Port and Terminal Pte Ltd** [2018] 1 WLR 4847. However, there was more or less agreement, each for different reasons, that this gateway was not in any event applicable by virtue of the second part of it. Mr Plewman says that as Samsung have succeeded on the tort gateway (and if necessary the restitution gateway) then they do not need the statutory gateway, and accept that the last words of (20) (a) rule them out from the statutory gateway. Mr Piccinin submits that Samsung have failed in relation to the tort gateway and have only failed in relation to the restitution gateway, by which their claim is otherwise "*covered*", because they have not qualified for it, and (20) cannot be available to a party simply because it has failed for some reason to fit within the gateway which is otherwise applicable, but it is only available if no other gateway is even arguably applicable. I agree, as I think did Counsel, that for either or both reasons the statutory gateway does not arise.

Forum non conveniens

17. I turn then to the question of forum non conveniens. There is no doubt that Lord Goff put this most succinctly in **The Spiliada** [1987] AC 460, recently re-emphasised by Lord Mance in **VTB Capital plc v Nutritek International Corpn** [2013] 2 AC 337 at [12] namely "*the effect is, not merely that the burden of proof rests on the plaintiff to persuade the Court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so".*

18. Mr Plewman put what he submitted to be such a clear case in paragraph 55 of his skeleton as follows: –

i) The claim is brought pursuant to English law (the Act):

ii) It concerns a settlement agreement concluded in England, governed by English law:

iii) The Third and Fourth Claimants are English companies:

iv) The Settlement related to claims brought in England by 42 UK Claimants, under English law, for damages arising out of a cartel that was alleged to have been implemented in or intended to affect England, and which caused loss to the UK Authorities arising out of goods purchased in the jurisdiction:

v) The English courts have already taken jurisdiction over a whole series of actions relating to the cartel, including a claim to which LGD was a party (**iiyama**).

19. Drilling more deeply, the Claimants submit as follows:

i) Just as in **iiyama**, relating to this same cartel, where LGD's contentions as to forum failed, the English Court is clearly the convenient forum, as it would have been if the contribution claim had been brought as a Part 20 claim/third party notice while the Authorities' proceedings were still pending.

ii) The Commission has decided that the tortfeasors were equally responsible: see paragraph 277 of the Decision: "An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period if its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement."

iii) In addressing the question to be asked pursuant to s2(1), namely "the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question", reference should be made to Recital (37) of the Directive 2014/104/EU of 26 November 2014 relating to damages under national law for infringements of competition law namely:

> *"Where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement. A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence."*

In the case of this cartel the proper approach is by reference to market share which, in the case of LGD, is, as particularised in a confidential Annex to the Particulars of claim, one which leads to a contribution of £900,000. Any dispute as to the market share can and should be best resolved by the Courts of England and Wales, where the infringement took place.

iv) Insofar as there needs to be reference to the events which occurred in the Far East and to documents, the Commission has produced and translated vast quantities of evidence of meetings and communications, and annexed them to the Decision, which are consequently fully available for consideration and assessment. Although Mr Leitch included no evidence in this regard in his witness statements, Mr Plewman emphasised in his submissions that if there were contribution proceedings in Korea all of the Commission's Decision would need to be translated into Korean and there would have to be expert evidence as to EU competition law.

v) He submitted that there is effectively a public policy in favour of the infringements being adjudicated in the court where they have occurred, referring to the words of the Court of Appeal in **iiyama** at [129] that " *it is far more appropriate for... claims for breach of Article 101 to be litigated in England and Wales than in Asia"*.

20. Mr Piccinin for the Defendants submits not only that Samsung have failed to satisfy the onus of proof, or certainly shown that England and Wales is clearly the more convenient forum, but that the Far East (Korea and/or Taiwan) is plainly the more appropriate forum:

i) **iiyama** was primarily dealing with the issues as to the commission of the infringement, causation and loss, and not at all the issue in these proceedings, which is responsibility inter se between the tortfeasors.

ii) The Commission can have reached no decision that all the tortfeasors were equally responsible inter se. Indeed, this is clear from paragraph 276: "*Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may even occur, but will not however prevent the arrangement from constituting an agreement.doc where there is a single common and continuing objective*." The relative responsibility of the tortfeasors was of no interest to the Commission.

iii) Insofar as the Defendants propose to contend that they played a less significant role in the cartel, that question was, as is clear from the Commission Decision, not decided by the Commission, and it must be, as Roth J concluded in **Epic v Apple** [2021] CAT 4 (a case in relation to American companies based in the USA) a dispute between two large companies where the factual witnesses would all or virtually all be (in this case) in the Far East.

iv) Recital (37) to the Directive cited by Samsung makes it entirely clear that market share is only one of the relevant issues to be assessed. That may be what the Claimants wish to rely on, but the Recital itself refers to the "*relative responsibility of a given infringer*" and criteria such as "*role in the cartel*". In **Downs v Chappell** [1997] 1 WLR 426 (CA) where responsibility fell to be apportioned between defendants, Hobhouse LJ said at 445H that "*it is just and equitable to take into account both the seriousness of the respective parties' fault and their causative relevance*."

v) Such a dispute must be resolved by an assessment of the documents, not limited to those attached to or translated by the Commission Decision. There will need to be consideration as to whether there are other documents, or other documents not translated into English. Analysis of the respective roles will be needed, as for example as to who was the "*ringleader*", as per paragraph 276 of the Decision. This would need cross-examination of witnesses and disclosure of documents. All this should be carried out in the Far East, and there was no suggestion whatever made by the Claimants that there could not be a fair trial of the issue of relative responsibility for the infringement. Mr Kelly in paragraph 30 of his witness statement asserted that there could be, and there was no response to that at all, just as there was no response to the suggestion in

paragraph 29 of the need for witness and documentary evidence. In **VTB** it was made entirely clear by Lord Mance at [62] that the factor of location of witnesses is "*at the core of the question of appropriate forum*".

21. Following a query from the Court in the light of Mr Plewman's submissions, Mr Piccinin on behalf of LGD gave undertakings to accept in any proceedings both that LGD are bound by the finding of infringement by the Commission Decision and that they are, in accordance with s1(1) of the Act, persons liable in respect of the same damage,

Conclusion

22. I accept Mr Piccinin's submissions. It is very clear to me that the courts of the Far East are, in order to resolve this issue, namely the relative responsibility between them of the tortfeasors, a more appropriate forum. It is suggested that such a decision may set a precedent for future cases, in that it may lead to Part 20 proceedings being issued and pursued before any settlement, in order that the gateway of 'necessary and proper party' can be achieved. In such a case the fact that the main action would still be continuing would be, whatever the gateway, a powerful if not overwhelming forum conveniens factor. But that is not this case.

23. As is almost standard practice in these cases, suggestions of non-disclosure were made, in this case by reference to the suggestion that the case in relation to the tort gateway was not adequately examined. I do not consider such contention well made. However it can be said that the Samsung witness statement was certainly inadequate so far as putting together a strong case on location of witnesses and documents is concerned, but then that was because Samsung did not then, and did not before me, accept the proposition, by which I have been persuaded, that the issue in this case was not the proof of the infringement but the analysis of responsibility as between the tortfeasors. Non-disclosure does not arise, but in any event, for the reasons I have given, I dismiss the Samsung notices, and on LGD's application, notwithstanding that I have found the issue of gateway in favour of Samsung, I set aside service of the proceedings.