Neutral Citation Number: [2023] EWHC 2418 (Comm)

Case No: CL-2016-000758

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

Date: 04/10/2023

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) LG DISPLAY CO LTD
(2) LG DISPLAY TAIWAN CO LTD **Respondents**

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Thomas Raphael KC and **Stefan Kuppen** (instructed by **Osborne Clarke LLP**) for **the Claimants**
Hanif Mussa KC and **Sarah O'Keeffe** (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for **the Defendants**

Hearing date: 28 September 2023
Draft Judgment Circulated: 29 September 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 04 October 2023 at 10:00am.

The Honourable Mr Justice Foxton:

1. An issue has arisen at the PTR in these proceedings, in which the Claimants seek follow-on damages arising out of the cartel that the European Commission found had existed in LCD panels between October 2001 and February 2006 ("the Infringements").

The Background

2. The Claimants' case was pleaded by reference to principles of English/EU law. In their Defence, the Defendants admitted that "if and in so far as English law applies", the Infringements established by the Commission would constitute a breach of statutory duty (if and insofar as proximate loss is established) (paragraphs 6 and 33). Paragraph 36 pleaded that the applicable law of the claim for overcharge was the law of the place where the relevant LCD panel (or product incorporating an LCD panel) was first put on the market. Pending disclosure, the Defendants contended that "a substantial proportion of the Claim is subject to the laws of Japan, Taiwan, China and South Korea." The Defendants then pleaded:

   "In so far as the Claim is subject to the law of a country outside the EEA, the Claimants are put to proof that the pleaded breach of Articles 101 TFEU and Article 53 of the EEA Agreement give rise to any cause of action known to those laws and/or is not time barred under any such applicable law."

3. Elsewhere in the Defence, the Defendants pleaded a positive case that the claims were time-barred under Japanese, South Korean, Taiwanese and Chinese limitation law.

4. In their Reply, the Claimants challenged the Defendants' case as to the applicable law, but did not address the issue as to the content of any allegedly applicable law.

5. At CMCs in January and July 2022, neither party sought expert evidence of foreign law.

6. On 27 January 2023, the Defendants served notice on the Claimants asking them to admit the Defendants' pleaded case as to the foreign law of limitation. In response, on 20 February 2023, the Claimants stated that the Defendants would need to provide expert evidence as to the contents of the law of limitation relied upon before any response could be given. The Defendants then obtained reports which addressed the law of limitation in South Korea, Taiwan and China (in terms which went beyond the pleaded case) which were provided to the Claimants on 9 June 2023. The Claimants responded, refusing to admit the matters pleaded or consent to the reports being adduced in evidence.

7. On 14 July 2023, the Defendants brought an application for permission to adduce expert evidence as to the South Korean, Taiwanese and Chinese law of limitation. On 20 September 2023, the Claimants served evidence stating that, on the basis of preliminary enquiries, the content of the foreign law of limitation raised by the Defendants was likely to be in dispute.

The Issue

8. The Defendants have not pursued their application to adduce evidence of foreign law. However, in their skeleton argument for this PTR, the Defendants have indicated their intention to run an argument based on applicable law as follow:

    i) There is a pleaded issue between the parties as to whether the claims are governed by foreign law pursuant to English rules of private international law.

    ii) If foreign law is found to be applicable to the Claimants' claims, the Court is under a duty to apply foreign law: see *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995, [116].

    iii) Where foreign law is applicable, the Court may nonetheless presume that the content of foreign law is similar to domestic law.

    iv) However, the presumption of similarity does not apply unless it is a fair and reasonable assumption to make in a particular case. If foreign law is applicable to the claims, and the presumption of similarity does not apply, the Claimants will not have discharged the burden of proving their claims.

    v) Implicitly, the Defendants intend to contend at trial that the presumption of similarity is not appropriate in this case.

9. In response, the Claimants contend that this approach is not open to the Defendants on their pleading, and, given the obvious case management implications, ask me to resolve the issue of whether the Defendants can advance this argument at trial.

Brownlie v FS Cairo

10. In approaching this issue, it is important to keep in mind the distinction between two separate legal principles drawn Lord Leggatt in *Brownlie*.

11. The first is the "Default Rule" which permits the court to apply English domestic law if neither party contends that another system of law applies, even if, as a matter of English private international law, the claim or issue is governed by some other system of law: [111]-[116]. However, a party can displace the operation of the Default Rule by advancing a case that foreign law is applicable ([116]). If that happens, and the applicable law is not English law,, then "the burden is on the party who is making or defending a claim, as the case may be …. to show that it has a good claim or defence under that law" ([116]). If they fail to do so, "the ordinary consequence must follow that … the claim is dismissed or the defence rejected ([117]). In this case, the Defendants have clearly pleaded that aspects of the Claimants' claim are governed by the laws of South Korea, China, Taiwan and Japan (by reference to the jurisdiction where the relevant product first entered the market). It is common ground that in relation to these parts of the Claimants' claim, the Defendants have displaced the operation of the Default Rule.

12. The second is the "Presumption of Similarity". Where the Default Rule does not apply, and the law applicable to an issue before the court is some other system of law, the party who must establish its claim under that system of law can, in some circumstances, prove

the content of that law by inviting the court to infer that it is materially the same as English law: [119]-[124]. So formulated, the Presumption of Similarity forms part of the law of evidence (*Brownlie*, [119]) which, when it applies, provides one way in which a party may prove part of its case (as an alternative to adducing evidence of the facts which must be proved). To that extent, it resembles other presumptions of fact such as *res ipsa loquitur*, the presumption of regularity and the presumption of continuance (which I note Lord Leggatt contemplated might also be used to establish the content of foreign law: [148]).

13. Lord Leggatt gave the following guidance as to the application of the Presumption of Similarity:

i) The Presumption applied "where there is good reason to think that the applicable foreign law is different in a material respect from English law", noting that "the common law has never required unrealistic or unreasonable assumptions to be made about the content of foreign law" ([122]).

ii) "There is no warrant for applying the presumption of similarity unless it is a fair and reasonable assumption to make in the particular case. The question is one of fact: in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning that any differences between the two systems are unlikely to lead to a different substantive outcome)" ([126]).

iii) The application of the Presumption "may often be uncertain so that it is difficult to predict whether a judge will consider that the presumption can be relied on in a particular case" but this was not problematic because "reliance on the presumption is always a matter of choice. It is always open to the party who is asserting a claim or defence based on foreign law to adduce direct evidence of the content of the relevant foreign law rather than take the risk of relying on the presumption. Equally, it is always open to the other party to adduce such evidence showing that the foreign law is materially different from the corresponding English law rather than take the risk that the presumption will be applied" [146].

iv) "To rest solely on the presumption to seek to prove a case on foreign law at trial may be a much more precarious course" ([147]).

v) "The presumption of similarity is only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence" ([149]).

Must a party who argues that the Presumption of Similarity is not engaged plead that assertion?

14. Lord Leggatt's judgment does not directly address the issue of whether a party who wishes to contend that the presumption of similarity is not appropriate is required to plead that fact. I was referred by Mr Raphael KC to the decision of Mr Justice Andrew Baker in *Iranian Offshore v Dean* [2019] 1 WLR 82, a pre-*Brownlie* decision which does consider

that issue, but did so when the distinction between the Default Rule and the Presumption of Similarity had not been so clearly drawn.

15. In that case, the fifth and sixth defendants had pleaded that the claims against them were governed by Iranian law, but had not sought to plead or prove the content of that law. Nor had they advanced a case that the Presumption of Similarity (referred to in that case as "rule 25(2)", by reference to the passage in *Dicey, Morris & Collins on the Conflict of Laws* (15th ed) dealing with that issue) did not apply, or why. The issue arose for determination at the Pre-Tria Review as to whether, in those circumstances, it was open to those defendants at trial to submit that the Presumption of Similarity did not arise, with the result that (if the claims were governed by Iranian law) the claims must fail.

16. Mr Justice Andrew Baker held that it was not open to the defendants to do so on two grounds:

i) By way of "a determinative ruling", on the issue of principle.

ii) On case management grounds, on the particular case.

17. So far as his determinative ruling is concerned, the Judge summarised the applicable principles at [11]:

> "I was referred to a substantial number of authorities concerning rule 25(2) but none decides what was to my mind the decisive point in the present case. My analysis is as follows:
>
> (i) It is not necessary for a claimant to plead the existence of, or an intention to rely at trial upon, rule 25(2). It goes without saying that it will apply—otherwise it would not be the default rule that it is—unless reason not to apply it be demonstrated.
>
> (ii) It follows that even a plea as to applicable law, let alone a plea as to the content of some possibly applicable foreign law, is not a material averment a claimant is required to make if the matters, as pleaded, that it says create liability do not involve or imply the advancing by it of any case as to the content of some foreign law.
>
> (iii) A claimant might of necessity plead some matter of foreign law, but for which it would fail to disclose any cause of action (imagine, for example, a negligence claim for bad advice about possible US tax liabilities); or a claimant might choose, whether or not it would have a claim by reference to English law, to base its claim upon a system of foreign law it said was applicable. In either type of case, different considerations would arise.
>
> (iv) Where, however, as in this case, a claimant neither needs nor chooses to plead foreign law, in order to plead what would be a complete and viable cause of action if the claim be determined under English law, as by default it will be, a contention

that it is inappropriate to determine the claim by reference to English law, so that it should fail come what may, is a reasoned denial of liability. Since determination of the claim under English law is the default rule in English proceedings, even where (in principle) the law governing a claim is or might be a foreign law, any contention that it is inappropriate to apply that rule must necessarily be founded upon matters particular to the claim in question.

(v) In principle, therefore, and in line with CPR r16.5(2)(a), it is for a defendant, if it wishes to raise any such contention at trial, to plead it as a reasoned denial of liability, setting out the matters particular to the claim said to render it inappropriate to judge it by reference to English law. If it does not do so, then no such contention will be open to it at trial, subject to (vi) below. The particular matters said to render the default application of English law inappropriate might well include, and perhaps often will include, relevant propositions of foreign law, but not necessarily.

(vi) There is no absolute rule precluding the possibility of relying at trial on a contention that ought to have been pleaded, whether in support of or in defence of a claim. There could be a late amendment, or the grant of indulgence at trial to rely on an unpleaded case, or perhaps even the raising of the point of the court's own motion at trial. Of course, it will be a rare case where it will be fair for that to occur only at (or on the eve of) trial, assuming proper pre-trial case management. But the existence of those procedural possibilities means, as I say, that there is no absolute rule of preclusion".

18. CPR 16.5(2), to which Mr Justice Andrew Baker referred, provides:

> "Where the defendant denies an allegation-
>
> (a) they must state their reasons for doing so; and
>
> (b) if they intend to put forward a different version of events from that given by the claimant, they must state their own version."

19. As a supplementary ground for his decision, the Judge noted that "the clear message conveyed" by the terms of the defendants' pleading was that "though the fifth and sixth defendants would say that the claimants' claims were governed by Iranian law, that was an immaterial point unless and until some case as to the content of Iranian law was pleaded", which it had not ([24]), and the management of the case had been conducted on that basis ([25]). The Judge stated:

> "I do not think it significant that the applicability of rule 25(2) was not identified in the list of issues as a matter of common ground derived from the pleadings. As I said in my primary analysis, its applicability (unless some issue in that regard is raised) goes without saying—it is a default rule for trial. Similarly, therefore, I do not regard it as significant that the defendants do not appear, during case management, expressly to have assented to the proposition that the default rule would apply. It was made plain on behalf of the claimant, expressly, that it would

> be relying on that rule. Given its nature as the default rule for trial, what is significant, then, is that no objection was raised or challenge suggested to the proposition that it would apply—its applicability was not an issue unless a defendant made it an issue (or the court took the point of its own motion)."

20. Inevitably, that analysis does not reflect the distinction subsequently drawn by Lord Leggatt between the Default Rule and the Presumption of Similarity, and the different legal nature of those principles. Further, the recognition that it would be open to the court to take the point of its own motion would suggest that the terms of the parties' statements of case do not render the Presumption of Similarity falls to be applied in circumstances in which, on its own terms, the Presumption would have no persuasive power. This is not an instance where the court would be required to take a point of its own motion because of some supervening consideration of public policy or a limitation as to the court's jurisdiction.

Analysis

21. With the benefit of Lord Leggatt's analysis in *Brownlie*, I am unable to accept that a party who wishes to contend at trial that an evidential presumption on which the other side may wish to rely is not applicable on its own terms must always plead that assertion.

22. First, as Mr Justice Andrew Baker noted, it is not necessary for a party wishing to rely upon the Presumption of Similarity to plead its intention to do so. That is consistent with the position of a claimant who wishes to rely upon the maxim *res ipsa loquitur* (*Bennett v Chemical Construction Ltd* [1971] 1 WLR 1571, 1575) and, I strongly suspect, the other evidential presumptions I have referred to. It would, in those circumstances, be surprising if the party who wished to dispute the application of an (unpleaded) presumption would be precluded from doing so if they had not pleaded its non-application first.

23. Second, as formulated by Lord Leggatt, the Presumption of Similarity is simply the drawing of a reasonable inference, and its application limited to circumstances where the drawing of that inference is reasonable. The suggestion that a judge must draw the inference even where it would be unreasonable to do so, simply because the other party has not pleaded that it would be unreasonable to draw the inference, is a surprising one. It could involve the Presumption of Similarity being applied "in circumstances where there is good reason to think the applicable foreign law is different" ([122]), to require the judge to make "unrealistic or unreasonable assumptions … about the content of foreign law" ([122]) and result in the presumption being applied where it is not "a fair and reasonable assumption to make in the particular case" ([126]), all things Lord Leggatt states the Presumption of Similarity does not do.

24. Third, I do not accept, as Mr Raphael KC submitted, that the contrary position "would not do us credit internationally." This issue will only arise where one party has done sufficient to displace the application of the Default Rule. Where they have done so, the other party is on notice as to the different ways in which it might try to prove its case if the other side's case on applicable law us upheld, and the risks and costs of each. On Mr Raphael KC's submission, there would never be any point in pleading the application of

foreign law without more, because the Presumption of Similarity would continue to operate, and there would be no practical alteration in the parties' positions.

25. Finally, I am not persuaded that CPR 16.5(2) provides the answer. The Defendants have pleaded a positive case that the applicable law is a law other than English law, and put the Claimants to proof that the matters complained of are actionable under that law. The Claimants had various options as to how they might go about satisfying the burden of proof, which were not fixed when the Particulars of Claim were served. Generally, it is facts which are pleaded, and not the means by which the party who seeks to establish those facts seek to prove them (cf. the former RSC O.18 r.7 providing that a party is not to plead "the evidence by which [the pleaded] facts are to be proved"), and where the other party has put the claimant to proof of those facts, I am not persuaded that CPR 16.5(2) requires that party also to plead that one of the means by which the alleging party might seek to do so is not available.

The application to exclude the argument on case management grounds

26. The Claimants also seek to exclude the argument on case management grounds. In short, Mr Raphael KC submits that the case proceeded from the service of the Defence until the service of the Defendants' skeleton for this PTR without anyone suggesting that the trial judge might have to consider an argument as to the applicability of the Presumption of Similarity, and had any such suggestion been raised, it would have been open for the Claimants to seek to address it, by a preliminary issue, or by adducing expert evidence as to foreign law.

27. Mr Raphael KC is right to submit that there was no suggestion that the Presumption of Similarity did not apply. Nor, if it matters, was there any suggestion that it was being relied upon until 20 February 2023, when the Claimants referred to the Presumption of Similarity in the specific context of the Defendants' request that the Claimants admit their case as to the foreign law of limitation. The Defendants did not respond by saying that the Presumption of Similarity did not apply, but they did serve reports which they sought to admit seeking to prove that the content of the foreign limitation law did indeed differ from English law (which would have displaced the operation of the Presumption of Similarity, even if otherwise applicable: *Brownlie*, [125]). I am unable to spell out of these events any clear message that it was accepted that the conduct complained of by the Claimants was actionable under the foreign systems of law which the Defendants contended applied, such that the "putting to proof" in paragraph 36 of the Defence had fallen away.

28. Nor, given its legal nature as an evidential presumption, do I find the absence of reference to the application of the Presumption of Similarity in the List of Issues significant. It is correct that this point was not referred to in a very short summary of the issues given in an introductory paragraph of one of Mr Kelly's witness statements, but that could not reasonably have been understood as manifesting that the clear statement requiring the Claimants to prove the actionability of the actions complained of under the applicable law had been superseded.

29. The reality is that the issue of the Presumption of Similarity has received little focus in the case to date, because it is far from the centre of events at the trial. Mr Raphael KC had briefly summarised the reasons why the Claimants say that the Defendants' case on applicable law is bad, and why the Presumption of Similarity is applicable. The merits of those arguments are a matter for the trial judge, but they are forcefully and persuasively put, and only one of them needs to succeed. It may turn out that, whatever the wider importance of the issue raised, it is of no real importance in this case.

30. Mr Raphael KC argued that, if the court rejected his argument that the Defendants should not be permitted to challenge the application of the Presumption of Similarity, then it should bifurcate the proceedings so that, if the Presumption of Similarity was held not to apply, there would be a further hearing at which the Claimants could adduce evidence of foreign law. Given the highly contingent nature of the point, and the matters referred to in the previous paragraph, I have decided that that issue is best left to the trial judge. I would simply note that had the issue arisen at an earlier stage, I would have seen a very strong attraction in resolving the matters which currently form part of the trial, and any issue of the application of the Presumption of Similarity, first, before putting the parties to the expense of obtaining expert evidence of foreign law.

31. Finally, for the same reasons, I propose to adjourn any application for permission to appeal, and extend time for bringing such an application, until judgment is handed down following the trial, to avoid committing the parties to an appeal which may prove wholly unnecessary. However, on their own merits the issues raised have a real prospect of success.