Neutral citation [2013] CAT 18

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1173/5/7/10

Victoria House
Bloomsbury Place
London WC1A 2 EB

15 August 2013

Before:

MARCUS SMITH QC
(Chairman)
MARGOT DALY
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) **DEUTSCHE BAHN AG**
(2) **DB NETZ AG**
(3) **DB ENERGIE GMBH**
(4) **DB REGIO AG**
(5) **S-BAHN BERLIN GMBH**
(6) **S-BAHN HAMBURG GMBH**
(7) **DB REGIO NRW GMBH**
(8) **DB KOMMUNIKATIONSTECHNIK GMBH**
(9) **DB SCHENKER RAIL DEUTSCHLAND AG**
(10) **DB BAHNBAU GRUPPE GMBH**
(11) **DB FAHRZEUGINSTANDHALTUNG GMBH**
(12) **DB FERNVERKEHR AG**
(13) **DB SCHENKER RAIL (UK) LTD**
(14) **LOADHAUL LIMITED**
(15) **MAINLINE FREIGHT LIMITED**
(16) **RAIL EXPRESS SYSTEMS LIMITED**
(17) **ENGLISH WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED**
(18) **EMEF - EMPRESA DE MANUTENÇÃO DE EQUIPAMENTO FERROVIÁRIO SA**
(19) **CP - COMBOIOS DE PORTUGAL E.P.E.**
(20) **METRO DE MADRID, S.A.**
~~(21) **ANGEL TRAINS LIMITED**~~
(21) **NV NEDERLANDSE SPOORWEGEN**
(22) **NEDTRAIN B.V.**
(23) **NEDTRAIN EMATECH B.V.**
(24) **NS REIZIGERS B.V.**
(25) **DB SCHENKER RAIL NEDERLAND N.V.**
(26) **TRENITALIA, S.P.A.**
(27) **RETE FERROVIARIA ITALIANA, S.P.A.**
(28) **NORGES STATSBANER AS**
(29) **EUROMAINT RAIL AB**

(30) **GÖTEBORGS SPÅRVÄGAR AB**

Claimants

- and -

(1) **MORGAN ADVANCED MATERIALS PLC (FORMERLY MORGAN CRUCIBLE COMPANY PLC)**[1]
(2) **SCHUNK GMBH**
(3) **SCHUNK KOHLENSTOFFTECHNIK GMBH**
(4) **SGL CARBON AG**
(5) **MERSEN SA (formerly LE CARBONE-LORRAINE SA)**
(6) **HOFFMANN & CO ELEKTROKOHLE AG**

Defendants

Heard at Victoria House on 29 July 2013

RULING (JURISDICTION)

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[1] The Tribunal was notified that Morgan Crucible Company plc had changed its name to Morgan Advanced Materials plc on 26 June 2013.

APPEARANCES

Mr Jon Turner QC and Mr Rob Williams (instructed by Hausfeld & Co LLP) appeared for the Thirteenth to Seventeenth Claimants.

Ms Kim Dietzel (of Herbert Smith Freehills LLP) appeared for the Second, Third and Sixth Defendants.

Mr Mark Hoskins QC (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Fourth Defendant.

Ms Kassie Smith QC (instructed by Hogan Lovells LLP) appeared for the Fifth Defendant.

The other Claimants and the First Defendant did not appear, and were not represented.

I. INTRODUCTION

1. By a decision of the European Commission (the "Commission") dated 3 December 2003 in Case No C.38.359 – "Electrical and mechanical carbon and graphite products" (the "Decision"), the Commission found that the seven addressees of the Decision had participated in a single and continuous infringement of Article 81(1) of the EC Treaty (now Article 101(1) of the Treaty for the Functioning of the European Union, the "TFEU") and, from January 1994, Article 53(1) of the Agreement on the European Economic Area.

2. The seven addressees of the Decision were:

   (1) C Conradty Nürnberg GmbH ("Conradty");

   (2) Hoffmann & Co Eltekrokohle AG ("Hoffmann");

   (3) Le Carbone Lorraine SA. Le Carbone is now known as Mersen SA ("Mersen");

   (4) Morgan Crucible Company plc ("Morgan"; Morgan is now known as Morgan Advanced Materials plc);

   (5) Schunk GmbH and Schunk Kohlenstofftechnik GmbH; and

   (6) SGL Carbon AG ("SGL").

   The Commission imposed fines on these addressees totalling €101.44 million.

3. As appears from the title of this action, six of these seven addressees are defendants in the present claim, which is a claim for "follow-on" damages made pursuant to section 47A of the Competition Act 1998, based upon the Decision. Conradty is not named as a defendant to these proceedings.

4. By an application dated 23 February 2011, Morgan (a company incorporated in England and the first defendant in these proceedings) sought an order pursuant to Rule 40 of the Competition Appeal Tribunal Rules 2003, SI 2003 No 1372 (the "2003 Rules"), rejecting the claims against it on the grounds that they had not been brought within the time limit laid down by Rule 31 of the 2003 Rules.

That application succeeded before this Tribunal, and accordingly the claims against Morgan were struck out: see the Judgment of 25 May 2011, [2011] CAT 16.

5. The Tribunal gave the claimants permission to appeal that decision to the Court of Appeal on 11 July 2011 ([2011] CAT 22) and, in a judgment handed down on 31 July 2012 ([2012] EWCA Civ 1055), the Court of Appeal allowed the claimants' appeal, holding that the claimants could proceed against Morgan, as well as the other defendants.

6. Although the Court of Appeal declined Morgan's application for permission to appeal to the Supreme Court, by an order dated 21 December 2012, the Supreme Court itself gave permission to appeal. That appeal is due to be heard on 11 and 12 March 2014.

7. By an order dated 26 July 2011 (shortly after permission to appeal to the Court of Appeal was given), the Tribunal ordered that the claims in these proceedings "be stayed generally until further order". The reason for this stay appears in the second recital of this order:

> "**AND UPON** the Claimants and the Second to Sixth Defendants agreeing a stay of these proceedings pending the determination by the Court of Appeal of the Claimants' appeal against the May Judgment".

8. By an order dated 13 September 2012 ([2012] CAT 24), the Tribunal extended the stay until five working days after the Supreme Court hands down judgment in the appeal. Unlike the order of 26 July 2011, this stay was not by consent. Having successfully reinstated Morgan as a defendant to the proceedings, the claimants were anxious to progress the action, and opposed any further stay. Because this order was not by consent, the Tribunal briefly gave its reasons for extending the stay in what was a "reasoned" order.

9. Both stay orders contained a liberty to apply.

10. The thirteenth to seventeenth claimants (the "UK Claimants") now apply for a limited lifting of the stay imposed by the orders of 26 July 2011 and 13 September 2012. Essentially, the UK Claimants seek to lift the stay in relation to their claims against the second to sixth defendants (i.e. all defendants apart

from Morgan), on the following grounds (quoting from paragraph 1 of the UK Claimants' application, the "Application"):

> "a. the Tribunal has jurisdiction over their [the UK Claimants'] claims, which were commenced 2½ years ago in December 2010, regardless of any other challenge to the Tribunal's jurisdiction in these proceedings (and irrespective of the First Defendant's ongoing appeal to the Supreme Court);
>
> b. the Overriding Objective (which is applied by analogy in the Tribunal) requires, so far as practicable, dealing with the claims expeditiously and fairly; and engaging in active case management;
>
> c. the protracted general stay of the proceedings imposed in relation to all Claimants risks causing material, non-financial prejudice to the [UK Claimants], and is unjust. The value of these claims is substantial. They have not even advanced to the stage of exchange of pleadings, let alone the giving of disclosure or further steps; and
>
> d. there is no compelling countervailing reason why the [UK Claimants] should remain subject to a general stay."

The UK Claimants argue that the Tribunal has jurisdiction to hear these claims pursuant to Article 5(3) of Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Regulation"), a provision to which we return below.

11. The Application is opposed by the second to sixth defendants. The second to sixth defendants were represented in three groups:

    (1) The second, third and sixth defendants, namely Schunk GmbH, Schunk Kohlenstofftechnik GmbH, each incorporated in Germany, and Hoffmann, an Austrian company (collectively, "Schunk & Hoffmann");

    (2) The fourth defendant, SGL, which is incorporated in Germany; and

    (3) The fifth defendant, Mersen, a French-incorporated company.

    We refer collectively to these defendants (i.e. all the defendants except for Morgan) as the "Defendants".

12. In their written Responses to the Application, the Defendants opposed the Application on the following grounds:

(1) First, it was said that the jurisdictional basis for the claim on which the UK Claimants now sought to rely, namely Article 5(3) of the Brussels Regulation, had not been properly pleaded or articulated by the UK Claimants: paragraphs 4(a) and 5 to 12 of the Response of Schunk & Hoffmann and paragraph 10 of the Response of the Mersen.

(2) Secondly, it was said that were the Defendants compelled to enter an appearance in order to respond to the claims in respect of which the UK Claimants seek a lifting of the stay, this would constitute, or at least risk, a submission to the Tribunal's jurisdiction in respect of all aspects of the claims brought by all the claimants: paragraphs 4(b) and 13 to 24 of the Response of Schunk & Hoffmann; paragraphs 34 and 35 of the Response of SGL; paragraphs 4.1(b) and 6 of the Response of the Mersen.

(3) Thirdly, it was said that lifting the stay in the manner suggested by the UK Claimants would be inefficient and wasteful as a matter of case management, and unfair to the Defendants: paragraphs 4(c) and 25 to 36 of the Response of Schunk & Hoffmann; paragraphs 28 to 30 of the Response of SGL; paragraphs 4.1(c), 7 and 8 of the Response of Mersen.

(4) Fourthly, it was submitted that the UK Claimants would suffer no prejudice that cannot be compensated for in interest were the stay in its present form to remain in place: paragraphs 4(d) and 37 to 45 of the Response of Schunk & Hoffmann; paragraphs 9 to 27 of the Response of SGL; paragraphs 4.1(a) and 9 of the Response of Mersen.

(5) Fifthly, it was suggested that there has been no change in circumstances since the stay was imposed that would justify revisiting the Tribunal's prior orders: paragraphs 4.1(d) and 5 of the Response of Mersen.

13. The Defendants very helpfully allocated these submissions between them, and we are grateful for their co-operation in managing their oral submissions so efficiently. The oral submissions we heard took all of the above points, but (in addition) took issue with the UK Claimants' assertion that the Tribunal had jurisdiction.

14. We should note that all of the Defendants stressed that, in making their Responses, and in appearing before the Tribunal to the contest the Application, none of them was waiving any jurisdictional point nor in any way submitting to the jurisdiction. We received their Responses, and heard their submissions, on this basis. Indeed, as appears more clearly below, the Defendants have all filed applications challenging the jurisdiction of the Tribunal to hear the claims against them. These applications remain unheard, pending the determination of Morgan's appeal by the Supreme Court. It was not the purpose of this hearing to deal with these applications, and we expressly do not do so.

II. APPROACH

15. The stays imposed by the Tribunal by way of the orders of 26 July 2011 and 13 September 2012 were "case-management" stays (to use the terminology of Professor Fentiman, *International Commercial Litigation*, 1st ed (2010), at [13.05]*ff*). The stays were imposed because a decision by the Tribunal – namely to strike out the proceedings as against the "anchor" defendant, Morgan, a company incorporated in England, the presence of which would have secured jurisdiction under the Brussels Regulation – had significant case-management implications, and was being reviewed by higher courts. In short, purely domestic, procedural considerations underlay the decision to stay the proceedings.

16. In the circumstances, we agree with the submission that we must consider whether or not the stay imposed should be (partially) lifted in the light of, and by analogy with, the overriding objective laid down in Part 1 of the Civil Procedure Rules, which is also reflected in rule 44 of the 2003 Rules. In doing so, we are concerned here with a balancing exercise, weighing the consequences (both adverse and beneficial) of lifting or not lifting the stay in the manner sought by the UK Claimants, both to the UK Claimants, on the one hand, and to the Defendants, on the other.

17. Clearly, there are a number of factors that are relevant to this balancing exercise. They are as follows:

(1) Whether there is jurisdiction enabling the UK Claimants to bring claims against the Defendants: Plainly, if there is no jurisdiction absent the presence of the anchor defendant, Morgan, in these proceedings, there is no point in lifting the stay that has been imposed. If there is no jurisdiction apart from with the joinder of Morgan, the future conduct of this action turns on the decision of the Supreme Court as to whether Morgan is, or is not, a party to these proceedings. On this application, the UK Claimants contend that, whatever Morgan's fate, the Tribunal has jurisdiction over their claims against the Defendants by virtue of Article 5(3) of the Brussels Regulation. The Responses of the Defendants were somewhat unclear on the issue of jurisdiction, as is described further below. However, in oral argument before us – in particular, in the submissions of Ms Kassie Smith QC for Mersen – it was clear that the assertion of the existence of Article 5(3) jurisdiction by the UK Claimants was contested, and the point was fully argued.

(2) Whether the jurisdictional basis for the claims being advanced for the purposes of the Application had been properly pleaded or articulated by the UK Claimants: The Defendants argue that the basis on which the claimants contended for a United Kingdom jurisdiction has never been clearly articulated, and that the Article 5(3) jurisdiction contended for by the UK Claimants has never been stated.

(3) Whether lifting the stay, and requiring the Defendants to take substantive steps in these proceedings, would result in a submission to the jurisdiction wider than the limited lifting of the stay sought by the UK Claimants: This, so say the Defendants, amounts to a very real prejudice to their interests. Whether there is, in fact, prejudice to the defendants' interests turns on the true effect of Article 24 of the Brussels Regulation.

(4) Whether lifting the stay would actually give the UK Claimants a real advantage that cannot be compensated for in interest: This point is very clearly put in paragraph 4(d) of the Response of Schunk & Hoffmann: essentially, it is there said that the UK Claimants "have failed to demonstrate how their interests in respect of the [claims in respect of

which they seek a lifting of the stay] would be prejudiced by having to wait for such claims to be heard as part of the [entire claim]".

(5) Whether lifting the stay, in the manner proposed by the UK Claimants, gives rise to adverse case management issues: It is accepted by the UK Claimants that lifting the stay now will require active case management on the part of the Tribunal. The Defendants contend, however, that the issues would, in fact, be so far-reaching as to outweigh any advantage that might accrue from allowing the claims to progress. In essence, this turns on the practicability of allowing limited claims (those of the UK Claimants) against limited defendants (the Defendants) to proceed when, in the future, a decision may be made enabling all pleaded claims against all named defendants (including Morgan) to be brought.

(6) Whether there is anything in the prior conduct of the UK Claimants in relation to the stay to preclude a lifting of the stay now: In this regard, the Defendants rely upon the fact that this is the first time that a "limited" lifting of the stay has been raised by the claimants (specifically, the UK Claimants); that the UK Claimants have been aware of the Article 5(3) argument since, at least, 25 March 2011; that, in the past, this Tribunal has been prepared to order a stay; and, in the case of the 13 September 2012 order, did so in the face of the claimants' objections.

18. We consider these various points in turn below. We then conclude with a balancing of these factors, in order to determine whether or not the stay should be lifted in the manner contended for by the UK Claimants.

III. JURISDICTIONAL BASE

(1) The parties' positions

19. This paragraph does no more than state the position of the UK Claimants, which may be summarised as follows:

(1) The jurisdictional questions arising out of the Application are governed by the Brussels Regulation.

(2) Jurisdiction against Morgan was founded on Article 2(1):

> "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

As a defendant domiciled in the United Kingdom, the Tribunal had jurisdiction in respect of the whole of the claim made against Morgan.

(3) Morgan's presence in the proceedings also provided a jurisdictional base as against all of the other defendants – who are all domiciled in a Member State, but not in the United Kingdom – by virtue of Article 6(1) of the Brussels Regulation, which provides:

> "A person domiciled in a Member State may also be sued:
>
> (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

(4) Morgan was, therefore, the so-called "anchor" defendant in these proceedings. Since Morgan was the only defendant domiciled in the United Kingdom, it follows that, for the purposes of these proceedings, Morgan was the only anchor defendant. It was, of course, Morgan which succeeded in having the claims against it struck out on grounds of limitation before the Tribunal, which decision (as we have noted) was successfully appealed to the Court of Appeal.

(5) Since the judgment of the Court of Appeal overruling the decision of the Tribunal, Morgan is a party to these proceedings, but – depending on what the Supreme Court decides – that position may change again. The application of the UK Claimants is based on the contention that, even if Morgan succeeds in its appeal, and the anchor defendant is lost to the claimants in these proceedings for good, there is a (limited) alternative jurisdictional base as against the Defendants.

(6) That alternative jurisdictional base is Article 5(3) of the Brussels Regulation, which provides:

> "A person domiciled in a Member State may, in another Member State, be sued:
>
> ...
>
> (3) in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur".

20. Mersen (by an application dated 21 March 2011), Schunk & Hoffmann (by an application dated 7 April 2011) and SGL (by an application dated 10 June 2011) have all challenged the jurisdiction of the Tribunal to hear the claims against them. We say nothing about these applications, save to note that they were premised on the understanding that the jurisdictional base for the claims being made by the claimants against the defendants was Article 2 (in the case of Morgan) and Article 6(1) (in the case of the Defendants).

21. Since the Article 6(1) jurisdictional base against the Defendants is contingent on the outcome of Morgan's appeal to the Supreme Court (in the sense that there can only be such jurisdiction with an Article 2 anchor defendant, i.e. if Morgan is a party), the question of whether – assuming Morgan is a party – there is Article 6(1) jurisdiction is for another day. We were not addressed on the point by any party and we say, and decide, nothing on this point.

22. The question of jurisdiction now arises in relation to the alternative jurisdictional base put forward by the UK Claimants alone which, as we have noted, is based on Article 5(3) of the Brussels Regulation.

23. In the Application, the UK Claimants say as follows as regards this alternative jurisdictional base:

> "13. ...The Second to Sixth Defendants have been asked at least to confirm whether they do in fact contest the Tribunal's jurisdiction over the [UK Claimants claims].
>
> 14. Whilst it is clear that the Second to Sixth Defendants oppose the lifting of the stay, none of them has stated clearly whether they accept that the Tribunal has jurisdiction over the [UK Claimants' claims] in any event (and if not, why not). The [UK Claimants] infer that, in fact, [the Defendants] have no substantial argument for contesting the Tribunal's jurisdiction over these claims.
>
> 15. That is consistent with the applications challenging jurisdiction filed by the Fourth Defendant (paragraph 31) and the Second, Third and Sixth Defendants

> (paragraph 19), which implicitly accept that the Tribunal has jurisdiction in relation to claims for losses suffered in the UK."

24. In response to the Application, the Defendants complain that the jurisdictional basis on which the UK Claimants now rely was not properly pleaded or articulated by the UK Claimants (see paragraph 17(2) above, a complaint which is also made in their applications challenging jurisdiction), but are otherwise remarkably coy about the UK Claimants' Article 5(3) jurisdiction. As to this:

    (1) In their jurisdictional challenges, Schunk & Hoffmann (jurisdictional challenge, paragraph 19) and SGL (jurisdictional challenge, paragraph 31) appear to acknowledge that there is jurisdiction in the Tribunal under Article 5(3) in relation to claims for losses suffered in the United Kingdom. However, since this is plainly not how the claimants were understood to be articulating their jurisdictional base at that time, we attach no weight to these acknowledgements.

    (2) In their Responses to the present application:

        (i) The Response of Schunk & Hoffmann says nothing about jurisdictional base.

        (ii) The Response of the SGL repeats (in paragraph 33) its acceptance that "jurisdiction may be founded on the place where damage occurred, but such jurisdiction is limited to the damage actually suffered in that territory".

        (iii) The Response of Mersen suggests that the UK Claimants have no jurisdictional base deriving from Article 5(3) because (on the evidence as it stands at present) there is no evidence that the claimants have suffered damage in the United Kingdom. The point is also made that the UK Claimants' reliance on Article 5(3) has only recently emerged (see paragraph 10.4). The Response of the Mersen then goes on to state (at paragraph 10.5):

> "Quite apart from the evidential matters which have only just been raised, there is a serious flaw in the [UK Claimants'] contentions on jurisdiction which they do not appear to have considered. Whilst

> these will need to be the subject of full submissions in due course, in outline: the [UK Claimants] appear to acknowledge that the purchases allegedly made were *not* purchases directly from any Defendant, but from non-Defendant entities, who may themselves have acquired Products from one or more Defendants."

In these circumstances, Mersen urged the Tribunal to make no determination as to jurisdiction, even as regards Article 5(3). Indeed, Mersen went so far as to say – in paragraph 10.4 – that "[i]t would plainly be unfair to deal with the jurisdiction application in any event".

25. In the event, neither Ms Smith, nor any of the other Defendants' representatives, pressed this point. Rather, Ms Smith presented a full argument as to why Article 5(3) jurisdiction did not exist in this case, which the representatives of the other parties adopted, and to which Mr Jon Turner QC responded on behalf of the UK Claimants.

26. The Defendants were well-advised to take this course. For the reason given in paragraph 17(1) above, the existence of a jurisdictional base for the UK Claimants' claims is relevant for the purposes of this Application to lift the stay, and this is something that the Tribunal made clear in its letter to the parties dated 18 June 2013. It was, therefore, necessary to deal substantively with the existence or otherwise of Article 5(3) jurisdiction. It is to that question that we now turn.

(2) Article 5(3) of the Brussels Regulation

27. All of the parties accepted that, according to Article 5(3) of the Brussels Regulation, in matters relating to tort, the Tribunal would have jurisdiction if the United Kingdom was the place where the harmful event occurred. According to Case 21/76, *Bier v Mines de Potasse d'Alsace SA* [1976] ECR 1735, [1978] 1 QB 708, the place where the harmful event occurred is:

    (1) The place where the event which gave rise to the damage occurred; and/or

    (2) The place where the damage occurred.

The UK Claimants accepted that they could not rely on the first of these two limbs (essentially, because of the reasoning of Teare J in *Cooper Tire & Rubber Company v Shell Chemicals UK Limited* [2009] EWHC 2609 (Comm) at [65]); but they did rely on the second limb (Application, paragraph 18).

28. Article 5(3) – like all of the "special jurisdictions" enumerated in Articles 5 and 6 of the Brussels Regulation – constitutes a derogation "from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively" (to quote from paragraph 19 of the Court of Justice's decision in Case 189/87, *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst International SA*).

29. It was common ground between the parties (subject to the Defendants' arguments in relation to Article 24 of the Brussels Regulation) that, in accordance with the restrictive treatment of the "special jurisdictions", a court having jurisdiction pursuant to Article 5(3) only has jurisdiction in respect of damage, if any, actually suffered in that territory: Case C-68/93, *Shevill v Press Alliance* [1995] ECR I-415, [1995] 2 AC 18.

(3) Establishing whether this is an Article 5(3) case: the need for a "good arguable case"

30. The test for establishing whether a claimant has a given jurisdictional base is that of a "good arguable case". In *Cooper Tire*, Teare J expressed matters as follows at [36]:

> "It is common ground that the Claimants must establish a good arguable case that this Court has jurisdiction. However, it is clear from *Kolden Holdings Limited v Rodette Commerce Limited* [2008] EWCA Civ 10 at [47]-[53] but in particular [50]-[52] that the test is flexible and that what is required depends upon the nature of the issue in question. Thus where a fact must be alleged and proved it will usually be sufficient that there is evidence to support it. But where there is a disputed issue of law which the trial judge will be in no better position to resolve than the judge dealing with the jurisdictional challenge, the latter may have to determine that issue of law in order to have the required degree of assurance that the Court has jurisdiction."

31. In *Kolden Holdings Limited v Rodette Commerce Limited* at [50], Lawrence Collins LJ stated:

> "The 'good arguable case' test is a flexible one, depending on the issue: *Canada Trust Co v Stolzenberg (No. 2)* [1998] CLC 23, at 31; [1998] 1 WLR 547, at 558, per Waller LJ. That is a lower threshold than proof on a balance of probabilities: ibid. In *Bols Distilleries BV v Superior Yacht Services Ltd* [2006] UKPC 45; [2007] 1 CLC 308 (a case involving a disputed jurisdiction agreement) Lord Rodger of Earlsferry agreed with Lord Steyn in endorsing the approach of Waller LJ in *Canada Trust Co v Stolzenberg (No. 2)*, and said (at [28]) that 'in practice, what amounts to a "good arguable case" depends on what requires to be shown in any particular situation in order to establish jurisdiction.'"

32. This is the approach we take in the present case.

(4) Do the UK Claimants have a "good arguable case" that damage was actually suffered in the UK?

33. The Decision found a "a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products" between October 1988 and December 1999 (see Article 1 of the Decision). We shall refer to this complex of agreements and concerted practices as the "Cartel", and to the products whose prices were fixed by the Cartel as the "Products".

34. The Cartel, of which the Defendants formed the majority, covered the whole of the territory of the European Economic Area, including the United Kingdom. Quite how prices were calculated by the Cartel for Products in specific territories is not a matter that we need trouble ourselves with for present purposes. It is sufficient to note that the Decision establishes that prices were fixed for Products in the United Kingdom.

35. The Claim Form served by the claimants pleads (in Table A and Annex 5, Schedule 1n) an estimated total value of purchases of Products by the UK Claimants of £10,050,386, and alleges (in Table B) an overcharge of £2,010,077 to £2,512,597. The Claim Form does not distinguish between overcharges caused by Morgan and overcharges caused by the Defendants, and it may be that the damages the UK Claimants would seek to recover from the Defendants would be rather less than this. On top of any damages, would come interest. Given the effluxion of time, interest might well be substantial. With interest at base plus 1%, compounded, the UK Claimants claim is worth maximally in the range of £5,516,887 to £6,896,108 (maximally, because – as noted – this sets out the claim as against Morgan and the Defendants). Obviously, we say

nothing about this claim at the present time, save to note that (if the claims of the UK Claimants are well-founded) these are potentially quite large claims.

36. The Application was supported by a witness statement made by Mr Paul Gold, who is employed by, and general counsel of, the thirteenth claimant. Mr Gold is also general counsel of each of the other UK Claimants and his statement was made in support of the Application, on behalf of all the UK Claimants. In his statement, Mr Gold sought to make good the point that damage had occurred in the United Kingdom, in the sense that the overcharge pleaded in respect of the UK Claimants had been incurred in the purchase of Products by the UK Claimants "for use in their business in Great Britain from companies located and domiciled in England and Wales, and the Products were supplied directly or indirectly to the [UK Claimants and/or their predecessor corporations] by members of the Cartel through companies located and domiciled in England and Wales (almost exclusively by companies within the groups of the First [Morgan] and Fifth Defendants [Mersen])" (see paragraph 31 of the statement of Mr Gold).

37. At the outset, it is important to note two things regarding the evidence before the Tribunal:

    (1) First, and unsurprisingly given the effluxion of time since the Cartel ended, the evidence available to the UK Claimants was limited in terms of the Products they had purchased. There were no paper records at all for the period in which the Cartel operated (see paragraph 18 of Mr Gold's statement). As is described in paragraphs 18 to 23 of Mr Gold's statement, the only sources of information available about Product purchases derived from "systems information" of the thirteenth claimant (essentially, information on all movements of materials purchased and used by the thirteenth claimant which might impact upon the company's stocks), supplemented by information from the Parts and Drawing System (which, during the period of the Cartel, was fed information from the engineering departments of, amongst others, the UK Claimants).

(2) Secondly, Mr Gold's evidence was not challenged by the Defendants: they served no evidence in response to the Application, although (as is described further below) the Defendants did seek to contend that, for a number of reasons, Mr Gold's evidence was insufficient to establish Article 5(3) jurisdiction in the United Kingdom.

38. In essence, Mr Gold's evidence may be summarised as follows:

(1) At the time of the commencement of the Cartel (in 1988), none of the UK Claimants existed in their present form. The rail freight business that they now conduct was operated exclusively by the British Railways Board (the "BRB"). The BRB was a public authority established by section 1 of the Transport Act 1962.

(2) The BRB was privatised pursuant to the Railways Act 1993 and the UK Claimants – which were all incorporated in 1994 – had transferred to them parts of BRB's business and – in a period spanning 1995 to 1997 – were then sold. It is unnecessary to describe the chain of ownership of these companies, their name changes, or their corporate consolidations and re-organisations for the purposes of this Application, but these details appear in Mr Gold's statement.

(3) Prior to privatisation, Products were acquired for BRB by a division of BRB known as "Railpart". Railpart subsequently (after privatisation) became Railpart (UK) Limited and then Unipart (UK) Limited. We shall refer to this post-privatisation company as "Unipart". After privatisation, Unipart continued to acquire Products for – amongst others – the UK Claimants as an intermediary.

(4) Railpart, and Unipart thereafter, acquired Products:

(i) Indirectly from the makers of the Products, the direct source being UK suppliers incorporating Products into equipment or rolling stock they manufactured themselves. It is to be inferred that the Products purchased by such manufacturers were purchased from UK manufacturers of the Products, but Mr Gold's statement is not

entirely clear on the point. He suggests, in paragraph 26, that the ultimate source of these Products were subsidiaries of Morgan and Mersen, which are described as the "sole manufacturers of the Products supplied to" the UK Claimants. It is clear, however, that Mr Gold has very little evidence to support this assertion – and this is unsurprising, given that the manufacturer of equipment or rolling stock is scarcely likely to notify its customers of the origin of each and every part or component comprising that equipment or rolling stock.

(ii) From 1998, and in limited volumes, the thirteenth claimant began purchasing Products directly from these subsidiaries of Morgan and Mersen.

39. Ms Smith led the Defendants' charge in contending there was no Article 5(3) jurisdiction in the Tribunal. The essence of her attack (which was supported by the other Defendants) was that – apart from "the very small unquantified damages that are suffered as a result of some purchases from Le Carbone UK" (Mersen's United Kingdom subsidiary) (Transcript, page 51) – all of the claims advanced by the UK Claimants were "indirect", in that:

(1) Purchases of Products were from subsidiaries of Morgan and Mersen, and not from Morgan and Mersen themselves.

(2) Purchases of Products were by Unipart, which was a company separate from the UK Claimants. It was Unipart which supplied the UK Claimants post-privatisation.

(3) When in public ownership, BRB (through Railpart) purchased only from manufacturers which had incorporated Products into their own goods.

40. The Defendants relied upon Case C-220/88, *Dumez France SA v Hessische Landesbank (Helaba)* [1990] ECR I-49. In this case, the claimants had brought proceedings in France seeking compensation "for the damage which they claim to have suffered owing to the insolvency of their subsidiaries established in the Federal Republic of Germany, which was brought about by the suspension of a

property-development project in the Federal Republic of Germany for a German prime contractor, allegedly because of the cancellation by the German banks of the loans granted to the prime contractor" (paragraph [3]). The Cour de cassation referred the following question to the Court of Justice for a preliminary ruling:

> "Is the rule on jurisdiction which allows the plaintiff, under Article 5(3) of the Convention, to choose between the court for the place of the event giving rise to damage and the court for the place where that damage occurs to be extended to cases in which the damage alleged is merely the consequence of the harm suffered by persons who were the immediate victims of damage occurring at a different place, which would enable the indirect victim to bring proceedings before the court of the State in which he is domiciled?"

41. The "Convention" is a reference to the Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (done at Brussels) (the "Convention"), which preceded the Brussels Regulation. Articles 5(3) of the Convention and the Brussels Regulation are in materially the same terms. The Court of Justice answered the Cour de cassation's question in the following way:

> "13. …The harm alleged by the parent companies, Dumez and Oth, is merely the indirect consequence of the financial losses initially suffered by their subsidiaries following cancellation of the loans and the subsequent suspension of the works.
>
> 14. It follows that, in a case such as this, the damage alleged is no more than the indirect consequence of the harm initially suffered by other legal persons who were the direct victims of damage which occurred at a place different from that where the indirect victim subsequently suffered harm.
>
> 15. It is therefore necessary to consider whether the expression 'place where the damage occurred' as used in the judgment in *Mines de potasse d'Alsace* may be interpreted as referring to the place where the indirect victims of the damage ascertain the repercussions on their own assets."

The Court of Justice then emphasised the importance of the primacy of Article 2 as a basis for jurisdiction, and the fact that Article 5(3) was a derogation from this. The Court was concerned to "avoid the multiplication of courts of competent jurisdiction", and also concerned to avoid a situation where a claimant could determine with excessive freedom the competent court to determine the litigation. The Court concluded:

> "20. It follows from the foregoing considerations that although, by virtue of a previous judgment of the Court (in *Mines de potasse d'Alsace*, cited above), the expression 'place where the harmful event occurred' contained in Article 5(3) of the Convention may refer to the place where the damage occurred, the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortuous, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event.
>
> 21. Moreover, whilst the place where the initial damage manifested itself is usually closely related to the other components of the liability, in most cases the domicile of the indirect victim is not so related.
>
> 22. It must therefore be stated in reply to the question submitted by the national court that the rule on jurisdiction laid down in Article 5(3) of the Convention cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets."

42. The decision in Case C-364/93, *Marinari v Lloyds Bank plc* [1995] ECR I-2719 at [14] expressed the principle in *Dumez* as follows:

> "Whilst it has thus been recognised that the term 'place where the harmful event occurred' within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere."

We find this a helpful formulation of the principle.

43. The Defendants cited Professor Briggs and Mr Rees QC's book *Civil Jurisdiction and Judgments*, 5th ed (2009) at [2.184]:

> "The jurisprudence of the European Court establishes that the reference to "damage" in *Bier v Mines de Potasse d'Alsace* means the damage which is the immediate consequence of the harmful event. This excludes, as jurisdictionally insignificant for this purpose, damage which was done to indirect victims, or damage which may be seen as consequential upon an earlier occurrence of damage. This also means that special jurisdiction is given to the courts at the place where the damage occurred, as distinct from where it was later suffered, felt, reflected or where its financial consequences were recorded."

44. Applying these principles to the present case, we find that the Tribunal does have jurisdiction pursuant to Article 5(3). We reach this conclusion for the following reasons:

(1) First, we consider the fact that purchases were made from subsidiaries of the Defendants not to render any purchases by the UK Claimants from those subsidiaries to be "indirect". This was a suggestion advanced by Ms Smith in oral submissions (see Transcript, page 51) – it does not appear in Merson's Response – and it is a point that we do not consider to be well-founded. The general principle is that it is the "undertaking" that infringes competition law, and that where, for example, a parent company is found to have infringed the prohibition against cartels, it is liable for the actions of its subsidiaries that implement the cartel: *Roche Products Limited v Provimi Limited* [2003] EWHC 961 (Comm) at [31]-[32]; *Emerson Electric Co v Mersen UK Portslade Limited* [2012] EWCA Civ 1557 at [73], [76] and [82]. In short, we consider purchases by the UK Claimants from undertakings of which the Defendants were a part to be "direct" purchases. Were it otherwise, a cartelist could effectively avoid liability in damages by implementing the cartel through a number of its national subsidiaries.

(2) Secondly, it follows that this is a case where there are at least some "direct" purchases: see paragraph 38(4)(ii) above. What is more, we are very conscious that whilst it might fairly be said of Mr Gold's evidence that "[a]ll we have…are the very small unquantified damages that are suffered as a result of some purchases from Le Carbone UK, the UK subsidiary [of Mersen]" (per Ms Smith, Transcript, page 51), Mr Gold's evidence is based upon extremely limited evidence, and represented the best that the UK Claimants can say given the information asymmetry that exists between the UK Claimants and the Defendants at present.

(3) Thirdly, we do not consider, on the facts as set out in Mr Gold's statement, that this is a case where the principle stated in *Dumez* should apply so as to prevent Article 5(3) from conferring jurisdiction on the Tribunal. That is for the following reasons:

    (i) It is an open question – and one that we certainly do not intend to consider or determine now – whether English law recognises a "passing on" defence. Whether it does, is a matter of enormous

significance to the UK Claimants: unless such a "passing on" defence exists, the UK Claimants will be confined to their "direct" claims. The reason for this is straightforward and is well explained by Professors Whish and Bailey in *Competition Law*, 7th ed (2012) at 300:

> "Suppose that members of a widget cartel have been fixing prices for the last five years. Their immediate customers, who purchase widgets in order to produce widget dioxide, will have paid more for the widgets than they would have done in the absence of the cartel. However it may be the case that some – or even all – of the increased price will be 'passed on' to their own customers, the purchasers of widget dioxide. Indeed those purchasers may themselves be able to pass on all or some of the increased price further down the distribution chain. Two questions arise in this situation: first, if the producers of widget dioxide sue the members of the widget cartel for damages, can the latter raise as a defence that the widget dioxide producers have passed on their loss to their customers? And if the answer to the latter question is 'yes', does it follow that sub-producers (also referred to as indirect purchasers) can bring an action for damages for the increased price that has been passed on to them? These are far from simple questions."

We agree that these are far from simple questions. Although, at the end of the day, a question of law, we consider that it would be entirely inappropriate to answer this question in the context of a jurisdictional dispute like this. Jurisdiction is supposed to be determined swiftly and efficiently at the outset of proceedings, and such determinations should, so far as possible, avoid pre-judging the substantive issues that will arise at trial, should jurisdiction be found to exist. As Collins LJ stated in *Kolden,* the "good arguable case" test is a flexible one, and it is not one that requires us, at this stage, to determine this question one way or the other. Instead, we find that there is a good arguable case (although we put it no higher at this stage) for holding that a claim by indirect purchasers will succeed under English law, and we proceed on this basis.

(ii) On this basis, we consider that it is extremely debatable whether this is truly a case where the UK Claimants are seeking to recover for the indirect consequences of harm initially suffered by others. The nature of passing on is that loss is <u>either</u> suffered by the direct

purchaser from the Cartel or it is suffered by the indirect purchaser. The same damage is not suffered by both. Of course, there may be a partial passing on by the direct purchaser, in which case some damage will be sustained by the direct purchaser and some by the indirect purchaser. But these losses will, nevertheless, be distinct. Clearly, much depends upon how the claim of the indirect purchaser is framed, which (for the reasons we have given) is a matter we decline to consider substantively at this juncture.

(iii) We are also wary of regarding this as a case of "indirect" loss within the *Dumez* principle. In a case where the direct purchasers and the indirect purchasers were situated in different jurisdictions, we can see that extremely difficult questions might arise. This is not such a case: on the evidence of Mr Gold, it is clear (certainly to a standard of "good arguable case") that direct and indirect purchasers equally suffered their losses in the United Kingdom. There is, in this case, no risk of the term "place where the harmful event occurred" being construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere, to apply the test laid down in *Marinari*.

45. For these reasons, we consider that the Tribunal does have jurisdiction to hear the claims of the UK Claimants against the Defendants.

IV. FAILURE TO PLEAD JURISDICTION

46. It is fair to say that the UK Claimants did not, when proceedings were commenced, intend to rely on Article 5(3) of the Brussels Regulation. As has been described, the jurisdictional base that all claimants were relying on was Article 2 combined with Article 6(1).

47. The (before this Tribunal) successful application against Morgan put paid to this and so, in time, the UK Claimants have identified an additional/alternative jurisdictional base. Does the fact that this jurisdictional base has been identified late matter? We hold that it does not.

48. In marked distinction to the Civil Procedure Rules – which contain many provisions as to what must be done when serving out of the jurisdiction, even in those cases where permission to serve out is not required – the Tribunal's rules adopt a relatively informal course, whereby a claimant seeking to serve a defendant out of the jurisdiction, applies to the Tribunal to do so. In this case, by an order dated 20 December 2010, permission to serve out of the jurisdiction was given. Obviously, that order cannot – and does not – preclude the defendants from contesting jurisdiction; but that is a different matter from in some way asserting that the claimants have failed properly to state in their originating claim, the basis on which jurisdiction is asserted.

49. It is the UK Claimants' case – which we accept – that the facts pleaded in the Amended Claim Form (amended pursuant to the Tribunal's Order of 19 April 2011) are quite sufficient to ground jurisdiction under Article 5(3) of the Brussels Regulation, even though that provision is not expressly referred to in the pleading.

V. SUBMISSION TO THE JURISDICTION

(1) The parties' respective positions

50. Article 24 of the Brussels Regulation provides:

> "Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22."

51. Clearly, the conclusion that we have reached in relation to Article 5(3) – that, as regards damage in the United Kingdom, there is jurisdiction – means that the Defendants cannot "submit" to Article 5(3) jurisdiction. Such jurisdiction is derived, not from submission, but from the provisions of the Brussels Regulation itself.

52. The Defendants, however, say that, were they to be compelled to take steps in defending only the UK Claimants' Article 5(3) claims, this would constitute a submission to the Tribunal's jurisdiction in respect of all aspects of the claims pleaded in this action.

53. Mersen put the point as follows in its Response:

> "6.3 The Fifth Defendant's jurisdictional challenge relates to the entire claim, meaning both that part of the claim that the [UK Claimants] now seek to progress and the remainder of the claim.
>
> ...
>
> 6.5 The [UK Claimants] attempt to imply into the wording of Article 24 the possibility of a partial submission to the jurisdiction of the courts of a Member State relying on the opening words of the provision and "common sense".
>
> 6.6 Neither argument avails the [UK Claimants].
>
> 6.7 The opening words of Article 24 serve to clarify that, if a court does not have jurisdiction pursuant to any other provision of the Regulation, it may – nevertheless – have jurisdiction, where a party enters an appearance. The same is made plain by the text of the relevant provision in the other languages in which it is published. In this respect, the German language text is particularly clear:
>
> *"Sofern das Gericht eines Mitgliedstaats nicht bereits nach anderen Vorschriften dieser Verordnung zuständig ist, wird es zuständig, wenn sich der Beklagte vor ihm auf das Verfahren einlässt. Dies gilt nicht, wenn der Beklagte sich einlässt, um den Mangel der Zuständigkeit geltend zu machen oder wenn ein anderes Gericht aufgrund des Artikels 22 ausschließlich zuständig ist."*
>
> 6.8 The operation of Article 24, and in particular the notion of entering an appearance, is not restricted to specific parts of a claim. As is made particularly clear by the German language text (which is equally authentic and required to be considered in construing the Brussels Regulation), the contemplated appearance relates to the proceedings ("*das Verfahren*") and not to any claim or part claim." (emphasis in original)

54. The UK Claimants contended that this was a misreading of the provision, and that it is possible to progress those parts of the claim over which the Tribunal has jurisdiction by virtue of Article 5(3) of the Brussels Regulation, with the Defendants not submitting to the claims within the meaning of Article 24 and maintaining, without prejudice to them, their jurisdictional objections.

(2) Analysis

55. The Brussels Regulation is a comprehensive code allocating jurisdiction amongst the courts of the Member States. In some cases, this allocation will be in relation to all claims contained in a given set of proceedings. Thus, for instance, when a defendant is sued in the Member State where he is domiciled

(pursuant to Article 2 of the Brussels Regulation), the courts of that Member State will have jurisdiction in respect of all claims comprising those proceedings.

56. By contrast, where a defendant is sued in another Member State, where he is not domiciled, pursuant to (say) Article 5(1)(a), the jurisdiction is more limited. Article 5(1)(a) provides:

> "A person domiciled in a Member State may, in another Member State, be sued:
>
> 1(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question" (emphasis added).

As the wording of Article 5(1)(a) makes clear, the jurisdiction is limited in respect of "matters relating to a contract", just as here (where the jurisdictional base is Article 5(3)), the jurisdiction is limited in respect of "matters relating to tort, *delict* or *quasi-delict*". As we have noted in the case of Article 5(3) (see paragraph 29 above), a court does not – by virtue of these provisions – obtain jurisdiction over the entire proceedings, unless all claims comprising those proceedings are (in the case of Article 5(1)(a)) "matters relating to a contract" or (in the case of Article 5(3)) "matters relating to tort".

57. This reading of the Brussels Regulation has been plain since the decision in *Kalfelis*, where the Court of Justice stated (at [19]) that "a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based".

58. The position on principle is clearly supported by the authorities and in academic writing:

(1) In *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153, Lord Goff noted as follows (at 166-7):

> "In *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co* (Case 189/97) [1988] ECR 5565, a case concerned with article 5(3) of the Convention, it was proposed by Advocate General Darmon that, where there are overlapping (concurrent) claims in contract and tort, only article 5(1) will determine the jurisdiction of the court, since the matters relating to contract will "channel" all the aspects of the dispute. In that connection he stressed the manifest practical advantages of this course, since the court dealing with the contract is best placed to understand the context and the implications as

> regards legal proceedings...This proposal was however rejected by the Court of Justice, which held...(a) that the term "matters relating to tort, delict or quasi-delict" in article 5(3) must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to contract under article 5(1); and (b) that a court which has jurisdiction under article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based. In so holding, the court stressed (see paragraph 19) that the "special jurisdictions" in articles 5 and 6 must be interpreted restrictively; and further stressed (see paragraph 20) that, while disadvantages may arise from different aspects of the same dispute being adjudicated upon by different courts, the plaintiff is always entitled to bring his action in its entirety before the courts of the defendant's domicile."

(2) In *Domicrest Ltd v Swiss Bank Corp* [1999] 1 QB 548, Rix J, as he then was, cited Lord Goff, and noted (at 568-9) that (in the case before him) the claimant "cannot pursue both its contract and its tort claims altogether in one action in England".

59. The point is that, where jurisdiction is founded on an "alternative" basis – such as one of those grounds listed in Article 5 – that jurisdiction is to be narrowly construed and confined to the claims falling within the precise scope of the article.

60. Given this approach, it is clearly necessary to distinguish between a "claim" (or a "cause of action") and "proceedings". It is possible to have jurisdiction over proceedings (e.g. Article 2) or over particular claims (as in the case of Article 5).

61. The intention is that the Court seised should decide – quickly – over which claims it has jurisidiction and over which claims it does not have jurisdiction. It is obliged to retain jurisdiction over the former, and should relinquish jurisdiction over the latter. Until, in the latter case, it does so, no other court in a Member State can consider the matter (see Article 27 of the Brussels Regulation).

62. Let us suppose proceedings which contain separate claims "relating to a contract" and "relating to tort", and that the indicated courts having jurisdiction pursuant to Articles 5(1)(a) and 5(3) are different, being the courts of Member State *A* in the case of the contractual claims, and Member State *B* in the case of the tortious claims. But let us further suppose that the entire proceedings are

brought in Member State *B*. On the Defendants' reading of Article 24, a defendant must comprehensively object to jurisdiction and avoid taking any step in the proceedings until the contractual claims are deleted from the proceedings, even though there is (*ex hypothesi*) clear jurisdiction in respect of the tortious claims. And that is so, no matter how long it takes for the jurisdictional issues in relation to the contractual claims to be resolved.

63. The question is, what happens where there is clear jurisdiction in respect of some claims, and disputed jurisdiction in respect of others? Obviously, no court of any other member state can get involved in either type of claim. The question is whether the Regulation permits a court to proceed substantively in respect of claims where there is clearly jurisdiction, whilst the determination, one way or the other, of whether there is jurisdiction in respect of the others is still pending. Clearly, there will be case management questions in relation to whether this is a sensible course: the claims may be so connected, as to render such a course undesirable or impractical. But that is not the point being considered here. Here, we are simply considering whether such a course can be pursued without inevitably causing a defendant to submit to the entirety of the proceedings.

64. Ms Smith contended that submission was binary and, in effect, operated at the level of *proceedings* and not *claims*. In other words, an appearance in respect of one claim, even where there is a pending objection to jurisdiction, would amount to a submission to the proceedings as a whole and all claims made therein. Conversely, if a defendant was minded to take a jurisdictional point, taking that point implied not taking <u>any</u> step in the proceedings, apart from resisting jurisdiction. Although most persuasively put, we cannot accept Ms Smith's argument.

65. Mr Turner contended that it was perfectly possible to make a partial submission, and that this was not only more consistent with the drafting of Article 24, but also plain "common sense". Paragraph 59 of the UK Claimants' Reply submissions asserted that "[a] party must be entitled under the scheme of the Brussels Regulation to accept the Tribunal's jurisdiction over <u>part</u> of the claims in the proceedings, without accepting the Tribunal's jurisdiction over the <u>whole</u> of the claims in the proceedings". The only authority cited in support of this

proposition was the book of Professor Briggs and Mr Rees QC, *Civil Jurisdiction and Judgments*, 5th ed (2009), which noted that whilst "a defendant does not have a right to pick and choose which claims in a substantial writ he is prepared to submit to if there is no basis for a jurisdictional challenge" (at [2.83], emphasis added), a defendant "can object to individual claims as being ones over which the court has no jurisdiction" (at [2.83], fn 2). The book cites no authority for this proposition.

66. In fact, the true position is not as either party contended:

(1) In Case 150/80, *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, the Court of Justice considered Article 18 of the Convention, which is the predecessor provision to Article 24 of the Brussels Regulation. The English version of Article 18 (as scheduled to the Civil Jurisdiction and Judgments Act 1982) provided:

> "Apart from jurisdiction derived from other provisions of this Convention, a Court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16" (emphasis supplied).

(2) In *Elefanten Schuh*, the Court of Justice considered various language versions of the Convention, namely the four authentic texts (the French, German, Dutch and Italian versions) and two soon-to-be-authentic texts (the English and the Irish). It noted a difference between the French version (and, to an extent, the Irish version) and the other versions of the Convention, in that the French version did not have any requirement that solely jurisdiction be contested (at 1678). The determinative part of the judgment stated:

> "13. The Hof van Cassatie [the Belgian Court of Cassation] first asks if Article 18 has application where the defendant makes submissions as to the jurisdiction of the court as well as on the substance of the action.
>
> 14. Although differences between the different language versions of Article 18 of the Convention appear when it is sought to determine whether, in order to exclude the jurisdiction of the court seised, a defendant must confine himself to contesting that jurisdiction, or whether he may on the contrary still achieve the same purpose by contesting the jurisdiction of the court as well as the substance of the

> claim, the second interpretation is more in keeping with the objectives and spirit of the Convention. In fact under the law of civil procedure of certain Contracting States a defendant who raises the issue of jurisdiction and no other might be barred from making his submissions as to the substance if the court rejects his plea that it has no jurisdiction. An interpretation of Article 18 which enabled such a result to be arrived at would be contrary to the right of the defendant to defend himself in the original proceedings, which is one of the aims of the Convention.
>
> 15. However, the challenge to jurisdiction may have the result attributed to it by Article 18 only if the plaintiff and the court seised of the matter are able to ascertain from the time of the defendant's first defence that it is intended to contest the jurisdiction of the court.
>
> 16. The Hof van Cassatie asks in this regard whether jurisdiction must be contested *in limine litis* [at the start of the proceedings]. For the purposes of interpreting the Convention that concept is difficult to apply in view of the appreciable differences existing between the legislation of the Contracting States with regard to bringing actions before courts of law, the appearance of defendants and the way in which the parties to an action must formulate their submissions. However, it follows from the aim of Article 18 that if the challenge to jurisdiction is not preliminary to any defence as to the substance it may not in any event occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised."

(3) Thus, *Elefanten Schuh* is clear that it is, at least, permissible under the Convention and under the Regulation to contest jurisdiction whilst <u>at the same time</u> contesting the merits, provided the intention to contest jurisdiction is evinced at the outset. In order to reflect this, the word "solely" does not appear in Article 24 of the Brussels Regulation. This is obviously a highly significant drafting change to the English text of the Regulation.

(4) This would appear to determine matters in favour of the contentions of the UK Claimants: the Defendants, having made clear at the outset their intention to contest jurisdiction, should not be prejudiced if they <u>also</u> (especially at the express direction of the Tribunal) contest certain of the merits or take other steps in the proceedings. Ms Smith, however, contended that this would overlook the role allocated by the Court of Justice in *Elefanten Schuh* to the courts of the Member States. It was for the courts of the Member States to determine if and when a submission to the jurisdiction had occurred and, in English proceedings, it is the practice

to determine jurisdiction at the outset. Until that question had been determined, *pace* Ms Smith, any step beyond that would amount to a submission to the jurisdiction.

(5) We do not consider that it was open to Ms Smith to make these submissions to us. A decision of the Court of Appeal – which was not cited to us but on which we invited written submissions after the hearing – is binding on this Tribunal and conclusively determines the point against the Defendants. In *Harada Limited v Turner* [2003] EWCA Civ 1695, the Court of Appeal considered a case where a defendant in proceedings (Harada) had – at the outset – contested jurisdiction and continued to do so whilst the case was determined on the merits (it having been ordered that, notwithstanding the jurisdictional objection, the case should be tried on the merits). Harada declined to participate in anything other than the jurisdictional aspects of the case. When, ultimately, the question of jurisdiction had been determined against it, Harada sought to contend that the judgment against it on the merits, which had been entered in the meantime, should not stand, and that there had to be a re-hearing, because Harada had had no option (given its jurisdictional objection) but to absent itself from the hearing on the merits. The Court of Appeal rejected this argument in trenchant terms. Simon Brown LJ, as he then was, stated:

> "26. The starting point for the argument is, of course, Article 18 itself which provides:
>
> "Apart from jurisdiction derived from other provisions of this Convention, a court of the Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction..."
>
> 27. The effect of that provision and in particular what is meant by "appearance [being] entered solely to contest the jurisdiction" was considered by the ECJ in the *Elefanten* case…"

Simon Brown LJ considered *Elefanten*, which we have considered in sub-paragraphs (1)-(3) above. He went on:

> "29. In other words, the court does not have jurisdiction even if the defendant makes submissions on the merits provided only that the challenge to jurisdiction is made either before or at the same

time as (and not merely after) the argument on the merits. There is nothing there to have given Harada cause for concern: it clearly has contested jurisdiction from the outset; it raised its jurisdictional objection in its very first appearance.

30. True it is, as Sir Gordon Slynn stated in his opinion as Advocate-General in *Elefanten*, that "in principle ... the *lex fori* must determine the stage and manner in which any plea is to be raised", but, as the First Chamber of the ECJ (under the presidency of Sir Gordon Slynn) said in *Kongress Agentur* [1990] ECR 1-1845, whilst "the Court has consistently held that, as regards procedural rules, reference must be made to the national rules applicable by the national court", "it should be noted, however, that the application of national procedural rules may not impair the effectiveness of the Convention"

…

35. It seems to me nothing short of absurd to suggest that, having failed (before the Morison EAT and Mummery LJ) to stop the merits hearing being listed, and then failed again, once it was listed, to have it adjourned, Harada could conceivably have been held to have submitted to the jurisdiction and thereby abandoned its outstanding appeal against the earlier jurisdictional ruling had it, under continued protest, participated in the merits hearing.

36. Mr de la Mare [counsel for Harada] submits that the Morison EAT's reason for refusing to delay the merits hearing, namely "having regard to" the Roose tribunal's decision on jurisdiction, was not a very convincing one and not, therefore, likely to assuage its concerns about being deemed to have submitted to liability. One can only assume, however, that any supposed shortcomings in this reasoning were brought out in the skeleton argument (not before us) put before Mummery LJ when seeking permission to appeal to this court. In any event it is the fact that the merits hearing was being forced upon Harada rather than the detailed reasons why that would not compromise its jurisdictional objection which is of importance here.

37. That, to my mind is the short and conclusive answer to this application. There was no good reason for Harada not to attend the merits hearing and it could not realistically have thought there was.

38. Harada submits that there is no clear authority to the effect that a party can participate in a full trial on the merits and still maintain his objection to the court's jurisdiction. Following *Elefanten* I find that unsurprising: it is surely obvious. If authority be needed, however, let this be it."

Mance LJ, as he then was, took a similar view:

"48. Simon Brown LJ has referred to the principle stated in *Elefanten Schuh GmbH v Pierre Jacqmain* (Case 150/80) [1981] ECR 1671. It

appears from page 1674 that it was, as a matter of fact, not until over nine months after its original defence on the merits that the defendant there challenged the jurisdiction. The European Court was, however, concerned solely with the issue of legal principle. In some countries, like England, it is normally either mandatory or at least possible to raise any challenge to the jurisdiction in advance of presenting any answer on the merits. But there are, as the European Court pointed out at paragraph 14 of its judgment, other European countries in which

"a defendant who raises an issue of jurisdiction and no other might be barred from making submissions as to the substance if the court rejects his plea that it has no jurisdiction"

49. The Court went on:

"An interpretation which enabled such a result to be arrived at would be contrary to the right of a defendant to defend himself in the original proceedings which is one of the aims of the Convention."

50. The European Court's answer to the issue of principle was, accordingly, that, in countries whose procedure does not require any challenge to the jurisdiction to be made before any defence on the merits, a defendant's right to challenge the jurisdiction is preserved, as long as it has raised its challenge no later than the time of its first defence on the merits. The rationale being that any other result could be contrary to the defendant's right to defend itself, it is absurd to suppose that the European or any other court would hold that a defendant was, after raising its initial challenge, unable to continue to defend itself to any extent necessary to avoid judgment being entered against it on the merits, pending final resolution of its challenge to the jurisdiction.

51. Here, Harada had raised and was at the time of the hearing before the Ryan tribunal in May 1999 still pursuing its challenge to the jurisdiction, by an appeal on grounds of bias and incorrectness against the decision of the Roose tribunal of 10 September 1998. In those circumstances, it could not possibly have constituted a submission to the jurisdiction for Harada to exercise its right of self-defence and to argue the merits before the Ryan Tribunal, in order to avoid a decision on the merits being given against it without hearing its side.

52. For good measure, it seems to me that this was probably also what Morison J had in mind when, giving the judgment of the EAT on 23 March 1999, he said that

"it does not seem to be a sustainable proposition [that Harada would suffer if it participates], having regard to the decision of the [Ryan] Employment Tribunal on the jurisdiction issue".

In other words, once the Ryan Tribunal had decided that it had jurisdiction, no-one could hold it against Harada that it had participated on the merits, because the Ryan tribunal's decision left Harada with no other alternative if it was to exercise its rights of self-

defence and avoid the risk of a decision being given against it on the merits without its side being heard.

53. That is sufficient to decide this case, and it is the basis on which I have reached my judgment. However, subsequent to reaching it, there has come to my attention further European authority which follows the *Elefanten Schuh* case, and which in the interests of completeness and for future reference I take this opportunity to record. I have to say that its effect in my view is to make yet more explicit, if that were possible, the inevitability of the result already expressed by Simon Brown LJ as well as by myself in the preceding paragraphs.

54. The European Court has expressly affirmed the principle of the *Elefanten Schuh* case in the following series of decisions: *Ets. Rohr SA v Dina Ossberger* (Case 27/81) [1981] ECR 2431; *C.H.W. v G.J.H.* (Case 25/81) [1982] ECR 1189; and *Gerling Konzern v Amministrazione del Tesoro dello Stato* (Case 201/82) [1983] ECR 2503. The first is of most interest, for its facts. In proceedings brought against it in the Landgericht Ansbach, Ets. Rohr SA ("Rohr") confined itself to challenging the jurisdiction, with the result that, after deciding that it had jurisdiction, the Landgericht went on to give judgment against Rohr on the merits. Rohr failed in an appeal against the Landgericht's decision on jurisdiction and in an attempt to take that point (out of time) to the Bundesgerichtshof. The successful claimant ("Ossberger") sought to enforce its judgment on the merits in France, where Rohr argued that its recognition would be contrary to public policy, submitting (page 2433) that:

"since Article 18 of the Convention made it impossible for Rohr to submit a defence on the substance before the German courts without losing the right to raise an objection of lack of jurisdiction, the fact that those courts did not restrict themselves to giving a ruling on jurisdiction but also give [sic] judgment on the substance of the case constituted a manifest infringement of the rights of the defence and thereby of public policy in France".

Ossberger in contrast argued (page 2433) that:

"...Article 18...does not prohibit the submission of a defence as to the substance in the alternative and subject to the objection of lack of jurisdiction but that Rohr voluntarily refrained from pursuing the appropriate procedures".

The situation therefore presents a considerable factual analogy to the present.

55. It was in this context that the Cour d'Appel of Versailles (at page 2434):

".... considered that the outcome of this case depended upon a question of the interpretation of the Brussels Convention"

and submitted to the European Court a preliminary question raising for consideration whether Article 18:

> "'prohibits the simultaneous submission in the alternative' of defences going to the merits and to the jurisdiction, or allows the same 'in order to permit the court before which the action is brought to give a decision in a single judgment, if that is appropriate, on both the objection and the substance of the action on the pattern of the express provisions of Article 76 of the Nouveau Code de Procédure ... together with the detailed procedures for the protection of the rights of the defence?'"
>
> 56. The European Court said in answer in paragraph 7 of its judgment that it had "had occasion to give a preliminary ruling on a similar question in its judgment of 29 June 1981" in the *Elefanten Schuh* case, and went on to cite the paragraph in that case ending with the passage which I have set out in paragraph 48 above. It continued in paragraph 8:
>
> "This case has disclosed no factor of such a kind as to affect these findings. Accordingly, the answer to the question submitted must be that Article 18 of the Convention of 27 September 1968 must be interpreted as meaning that it allows the defendant not only to contest the jurisdiction but to submit at the same time in the alternative a defence on the substance of the action without, however, losing his right to raise an objection of lack of jurisdiction."
>
> 57. The European Court would have had to give a different answer, if it had thought that it was *not* open to a defendant who had raised a challenge to jurisdiction with his defence to pursue "all the detailed procedures for the protection of the rights of the defence" (including the production of any necessary documents or witnesses) so far as necessary to avoid the entry of any judgment on the merits whilst a challenge to the jurisdiction remained outstanding.
>
> 58. Far from Harada navigating uncharted waters, the beacon of the *Elefanten* case was in my judgment by itself clearly sufficient to guide Harada home. But the other European Court authorities to which I have referred show that Harada would also have enjoyed the benefit of a favourable tide."

67. The decision in *Harada* not only accords with common sense (it seems in principle wrong for jurisdictional disputes inevitably and without reference to the needs of justice or principles of case management to hold up the conduct of litigation), but is clearly binding on us.

68. In its written submissions dated 7 August 2013 (which the other Defendants supported), Mersen submitted that *Harada* was distinguishable and that – even if a submission under Article 24 was not inevitable – there was a "substantial risk that if the Defendants are ordered to take the steps requested by the UK Claimants, they will enter an appearance in the proceedings as a whole for the purposes of Article 24" (paragraph 18). Mersen contended that:

(1) *Harada* should be limited to its own "unique facts" (paragraph 3). In particular, this case differed from *Harada* in that the jurisdictional point which Harada was appealing had already been determined against it, and that it was only in this context that a party should be obliged to take part in a merits hearing. Here, by contrast, the Defendants' jurisdictional argument is yet to be determined. Obviously, this is a distinction between *Harada* and the present case, but we do not consider it to be a material one. The Court of Appeal, in *Harada*, was plainly stating a general rule ("If authority be needed, however, let this be it", *per* Simon Brown LJ at [38]), plain from the jurisprudence of the Court of Justice. The whole thrust of the decision in *Harada* is that a defendant cannot use a jurisdictional objection to avoid engaging in the merits of a dispute, and (provided the jurisdictional objection is made clear at the outset) is not prejudiced if it does engage in the merits. That must be so, whether the jurisdictional objection has been determined against the objector, and is subject to appeal (as in *Harada*), or where the jurisdictional objection is yet to be determined (as here). Indeed, this appears to be beyond question given that Simon Brown LJ expressly acknowledged (at [29]) the possibility of filing an objection to jurisdiction and a substantive defence simultaneously. Plainly, that rules out the possibility of determining the jurisdictional objection prior to the lodging of a defence to the merits.

(2) There remained – notwithstanding *Harada* – a substantial risk of submission under Article 24 (paragraph 11). We fail to see how such a risk can arise, given the jurisprudence of the Court of Justice, and the extremely clear guidance given in *Harada*.

(3) The approach under English procedural law is to determine jurisdictional objections first, before engaging with the merits of a case (paragraph 16). So far as it goes, that is correct. But – given the law as we have stated it, and leaving on one side the fact that the Tribunal's procedure is not the High Court's – it does not follow that if a case proceeds on the merits, pending the resolution of a jurisdictional objection, there will be a submission or even a risk of submission under English procedure. Indeed,

if this were the case – and we do not consider that it is – there would be a real risk of English procedural rules impairing the effectiveness of the Regulation.

69. Accordingly, we hold that – given the very clear objections to jurisdiction lodged by the Defendants – there is no danger that they will submit to the jurisdiction in respect of the non-UK Claimant claims if the claims of the UK Claimants proceed.

70. On that basis, we must decide whether, as a matter of case management, the UK Claimants' claims should be permitted to proceed, taking account of our obligation, under rule 44 of the 2003 Rules, to manage cases "with a view to ensuring that the case is dealt with justly", which expressly includes *inter alia* dealing with cases expeditiously.

VI. WHETHER LIFTING THE STAY WOULD ACTUALLY GIVE THE UK CLAIMANTS A REAL ADVANTAGE THAT CANNOT BE COMPENSATED IN INTEREST

71. In the Tribunal's order of 13 September 2012, the Tribunal stated (at paragraph 3) that:

> "The Tribunal considers that any prejudice to the Claimants in this regard is capable of being compensated in interest, and is not such as to outweigh the potential prejudice to the Defendants of requiring them to take steps in the Tribunal proceedings pending the outcome of the Supreme Court proceedings, which may cause them to incur unnecessary costs and carries the risk of prejudicing any challenge they may wish to make to the Tribunal's jurisdiction to hear the claims."

72. This, of course, was said when *all* the claimants were seeking to have the stay lifted, and when the jurisdictional basis contended for by the claimants was a combination of Article 2 and Article 6(1) of the Brussels Regulation. Given the critical importance of Morgan to this jurisdictional basis, and the continuing uncertainty about whether Morgan would or would not be party to the proceedings, it seems to us that this order was rightly made – and the UK Claimants do not seek to contend otherwise.

73. Rather, as has been described, the UK Claimants now assert a different jurisdictional base, which does not turn on the presence or absence of Morgan.

That, in our view, is sufficient to render the terms of 13 September 2012 order of historical interest only in the context of the present Application.

74. The UK Claimants advanced essentially two reasons as to why it was important that the stay be lifted:

(1) First, it was suggested that this would allow the case to proceed, at least in part, with defences being filed by the Defendants, and with staged disclosure following. We accept this point: it is actually trite. Of course, if we lift the stay, the case will progress. The real question is what benefits accrue if the case is allowed to progress now, as opposed to later.

(2) This leads to the UK Claimants' second point. It was suggested that the UK Claimants had received insufficient assurances from the Defendants that documentary evidence that might be disclosable in these proceedings was being appropriately protected. It was also suggested – somewhat in the abstract – that it was necessary to bring the action on because critical witnesses might pass on, become otherwise unavailable or their recollections of events might deteriorate. We do not accept these points:

(i) As regards the protection of relevant documents, the gravamen of the UK Claimants' complaint was that the Defendants had failed to "give adequate assurances that the relevant evidence has been identified, isolated and preserved" (paragraph 33 of the Application). Yet the Defendants have all provided assurances along the lines of that given by Herbert Smith, solicitors for Schunk & Hoffmann, in a letter dated 15 August 2011:

> "As regards the preservation of relevant documents, our clients have confirmed that they have taken the necessary steps in accordance with English litigation procedure. Our clients will disclose such documents as and when required in the Proceedings."

We do not consider that the UK Claimants are entitled – at this stage at least – to look behind such assurances.

(ii) As regards witnesses, even assuming in the UK Claimants' favour that an action like this will turn significantly on witness evidence,

given the water that has flowed under the bridge since the Cartel ended in 1999 (some 14 years ago), we are sceptical as to whether the further passing of time will make any material difference.

75. Accordingly, we continue to be of the view expressed in our order of 13 September 2012 that the UK Claimants will not, to any great extent, be prejudiced by a continuation of the stay in a manner than cannot be compensated for in interest.

76. That said, where a claimant has a claim with a clear jurisdictional base, then, as a matter of basic right, that claim should be progressed with a view to advancing to a substantive hearing as soon as possible, unless there are good case management grounds for denying the claimant that basic right. In other words, it is not for the claimant to have to explain why he wants a hearing. He is entitled to one, and that hearing should be as early as possible, consistent with considerations of justice and case management convenience. In short, as Mr Turner emphasised, justice delayed is justice denied, and *prima facie* the UK Claimants – as any claimant – are entitled to have their claims determined expeditiously and fairly, with active case management. This, in short, is the "benefit" that arises if the stay is lifted now.

VII. WHETHER LIFTING THE STAY, IN THE MANNER PROPOSED BY THE UK CLAIMANTS, GIVES RISE TO UNACCEPTABLE ADVERSE CASE MANAGEMENT ISSUES

77. Clearly, if Morgan's appeal before the Supreme Court succeeds, and the claims against it are struck out, then the only claims before the Tribunal will be the claims of the UK Claimants. Were this to be the outcome of the appeal, then there would obviously be no reasons not to lift the stay now. The case management difficulties of having the claims of the UK Claimants proceed, with the remaining claims being stayed for the present, only arise if the Supreme Court holds that Morgan is properly a defendant to these proceedings, with the effect that the claims against Morgan (by the UK and non-UK Claimants respectively would be out of sync).

78. The outcome of Morgan's appeal will not be known until the summer of 2014 at the earliest (and it may be significantly later in the event that the Supreme Court refers a question to the Court of Justice for a preliminary ruling under Article 267 TFEU). We are, therefore, considering a situation where the stay will continue for another year, at least, during which time the UK Claimants will be denied their right to take their claims forward. As matters stand, no progress at all will be made in relation to the UK Claimants' claims, which were registered in December 2010. It is necessary to identify the factors that need to be weighed in the balance in order to determine whether the stay should be (partially) lifted or continue.

79. The factors identified by the Defendants were:

(1) The risk of an "inadvertent" submission to the jurisdiction. For the reasons given in Section V.(2) (paragraphs 55-69, above) we do not consider there to be such a risk, and we consider this point no further.

(2) The suggestion that any defences served by the Defendants would add little. We are very sceptical as to whether this would be the case. We anticipate that any well-advised defendant (and the Defendants have all instructed extremely capable legal teams) would seek to grapple substantively with the claims of the UK Claimants. Again, this is a factor to which we attach no weight.

(3) The problem of splitting a single set of proceedings – deliberately commenced by the claimants under a single claim form – into two or more distinct sets of claims, that might run in parallel. We accept, of course, that a partial lifting of the stay would involve some form of splitting of claims, and we consider the case management implications of this below.

80. Ms Kim Dietzel, appearing for Schunk & Hoffmann, suggested that the case management difficulties rendered it "impossible for the Tribunal to exercise its functions in the way it is required to do" (Transcript, page 57). In our view, this is a considerable overstatement. Mr Mark Hoskins QC, appearing for SGL, put the point more persuasively, without going so far. He suggested that the logistical and case management difficulties of such a bifurcation (or even

"trifurcation") would be considerable and – critically – that these would outweigh the benefits of lifting the stay (Transcript, pages 24-25):

> "Before I get to the detail, let us remind ourselves that it is the claimants who chose to bring the claim in the manner that they did, i.e. 30 claimants in one claim. Of course, the normal way for dealing with a claim, regardless of the number of claimants, is to deal with it as a whole, because that is procedurally efficient, it saves time and costs to do it that way, so that is the norm.
>
> What this application is seeking to do is to depart from the norm – I will come on to the detail – Mr Turner [for the UK Claimants] is looking to have a two-speed procedure for different categories of claimant, depending on what happens to the Morgan appeal. In fact, if Morgan loses its appeal we are actually going to have three speeds, because Morgan will have to catch up with the other defendants, so you will have this set of defendants, UK claimants, this set of defendants, non-UK claimants, and then you have Morgan coming in potentially to catch up, so I will use the phrase 'bifurcation' – I am not sure the word 'trifurcate' exists, but you understand the fragmentation point.
>
> Mr Turner comes before you and really he has the burden to convince you that there are good reasons for departing from the norm, and to convince you that there are not real problems of efficiency and cost involved in it. My submission is there are no good reasons, certainly nothing we have heard this morning passes the threshold. As one would expect, given what the norm is, Mr Turner's approach would simply serve to complicate the resolution of these proceedings, and it would increase the cost and effort involved in doing so, not just for the parties but for the Tribunal as well."

81. These problems may be listed as follows:

(1) There would be difficulties in dealing with amendments to the Claim Form filed by the claimants. Would these amendments relate to the claims of the UK Claimants only, or would they relate to all claims advanced by all claimants?

(2) In terms of disclosure, the Defendants would have to review the documents in their possession once for relevance as regards the claims of the UK Claimants, and once (assuming Morgan remains a party) for relevance to the other claims.

(3) The Defendants would be put to the expense of pleading once to the claims of the UK Claimants, and once to the rest of the claims, assuming that the Supreme Court dismisses Morgan's appeal.

(4) If Morgan remained a party, the action would have to be delayed to allow Morgan to "catch-up".

(5) There would be a risk of multiple applications trawling the same ground (e.g. hearings dealing with disclosure by the Defendants, followed, a few months later, with similar hearings dealing with Morgan's disclosure).

(6) There would be the difficult question of how to deal with Morgan documents held by the Defendants. How should Morgan be represented in such cases?

82. Although Mr Hoskins' submissions were attractively made, they were also to a large extent premised on the contention that Article 24 of the Brussels Regulation posed a problem for the Defendants. Now that it is clear that the risk of prejudice to the Defendants of an Article 24 submission is illusory, we consider that the case-management impact of these points will be considerably less formidable than Mr Hoskins' submissions suggested. For instance: the difficulty of whether amendments to the Claim Form are "global" or limited to only some claims within that Claim Form resolves itself. The amendments should obviously relate to the entire set of claims:

(1) Morgan is not prejudiced. It has taken no jurisdictional point, and (depending on what the Supreme Court decides) it will either have to deal with these claims or it will escape them; and

(2) The Defendants are not prejudiced, because they have made their position on jurisdiction clear, and are protected by *Elefanten Schuh* and *Harada*.

83. Equally, we consider that the risk of repeated trawlings of documents in the Defendants' possession for disclosure purposes to be an unwarranted one. These days, defendants – especially those represented by large, international solicitors' firms such as those acting for the Defendants – use document management systems to classify, under many heads, the documents in their control. Assuming the Defendants and their legal teams adopt a sensible and structured approach to the task, it should undoubtedly be possible to identify whether a document is disclosable now, or only if Morgan becomes a party, on a single review of the relevant evidence.

84. Given that we are only lifting the stay so far as the UK Claimants are concerned, it would obviously be a waste of time to require the Defendants – still less Morgan – to serve a full defence to these claims. The damages claims of the non-UK Claimants may never be heard in this jurisdiction. But there is real benefit in at least dealing with the claims of the UK Claimants. It must be borne in mind that this is a case where liability is a given, and that the damages claims of the various claimants essentially stand alone, in so far as each of the claimants will have to establish causation and its loss. Granted, it will be necessary for the parties to grapple with the manner in which the Cartel affected the prices of Products, but thereafter, it will be a question of assessing, as regards each UK Claimant, what (if anything) that claimant over-paid for the Product it purchased. Should all of the claims proceed in the Tribunal (i.e. should Morgan remain a defendant) then the action will have progressed in that:

(1) The general operation of the Cartel will have been pleaded; and

(2) The specific claims of the UK Claimants will have been dealt with.

In this way, without duplication, the entire action – should Morgan remain a defendant – can efficiently be progressed.

85. We accept that if Morgan remains a defendant some "catch-up" time would be required. In particular, Morgan would be required to plead its defence, and make disclosure after the Defendants had filed their defences and made their disclosure. It may be that the action would be delayed again, but that is not certain at this stage and at least some progress can be made in the intervening period. As Mr Hoskins submitted, the issue of quantum will be complicated and will almost certainly require expert evidence (see Transcript, page 26) – at least if some disclosure has been given, that process could be begun while the "catch up" takes place. Furthermore, it has been the experience of courts dealing with competition cases that disclosure can take a long time, and that the disclosure of the Defendants will not necessarily be resolved quickly. If Morgan's appeal to the Supreme Court succeeds, such that it is not a defendant to this action, we will simply have delayed an exercise that will inevitably have to take place.

86. We also rather doubt whether there would be duplicative applications in respect of disclosure. As a (for the present) defendant, Morgan has the right to appear on any disclosure application. Given that many disclosure applications will involve Morgan documents held by the Defendants, we anticipate that, whether or not it is a party, Morgan will wish to be represented at such hearings. Of course, we are seeking to predict the future conduct of this action, and nothing is certain: but we would be surprised if a partial lifting of the stay would, of itself, serve to complicate or render less efficient the disclosure process.

87. In short, attractive though Mr Hoskins' submissions were, we reject them.

VIII. WHETHER THERE IS ANYTHING IN THE PRIOR CONDUCT OF THE UK CLAIMANTS IN RELATION TO THE STAY TO PRECLUDE A LIFTING OF THE STAY?

88. Clearly, the time it took for the Decision to be reached cannot be laid at the UK Claimants' door. Equally, given that there is a statutory period within which section 47A claims must be brought, the claimants cannot properly be criticised for bringing their claims at the end of that period. They had a statutory right to bring the claims against the Defendants when, and where, they did (we say nothing about this as regards Morgan of course).

89. The UK Claimants may, however, be criticised for failing to make this application sooner. As Mr Hoskins submitted, it is plain from a letter sent by the UK Claimants' solicitors that the UK Claimants have been aware of the Article 5(3) jurisdiction since, at least, 25 March 2011. This Application for the partial lifting of the stay imposed by the Tribunal could, and possibly should, have been made much earlier. Certainly, it could have been made at the time the 13 September 2012 stay was imposed.

90. However, these criticisms can be overstated. One of the consequences of the regime laid down by the Brussels Regulation is that claimants have the right (albeit heavily circumscribed) of bringing claims in one or other of the various jurisdictions mandated by the Regulation. In this case, the claimants aimed for a United Kingdom jurisdiction for <u>all</u> defendants. That strategy – for which we do not consider the claimants can be criticised – depended on Morgan's position as

the anchor defendant. It came unstuck, however, when Morgan's position came to be scrutinised.

91. It is perhaps understandable that the claimants' preferred option was to seek to uphold their initial strategy. True it is, that this Application could have been made sooner but the potential for an appeal to the Supreme Court only crystallised on 21 December 2012, and no doubt it took some time for the claimants – and the UK Claimants in particular – to appreciate just how much of a delay this appeal would impose, given the listing before the Supreme Court.

92. The Tribunal must consider whether – given the state of the proceedings as at today's date – the stay should be lifted. Whilst the force of the UK Claimants' Application may very well have been greater had it been made sooner, we do not consider that that can preclude the granting of the Application now. In other words, although the UK Claimants' delay is a relevant factor to take into account, it is not one that by itself causes the Application to fail. In this case, we consider the UK Claimants' delay in making the Application to be a relatively minor factor, given the liberty to apply in the orders staying the proceedings, and given the state of the proceedings as matters stand at the moment.

IX. DETERMINATION AND CONSEQUENTIAL ORDERS

93. Weighing matters in the balance, we consider that it is plainly better for the stay to be partially lifted, in the manner contended for by the UK Claimants. Not only does this accord with the UK Claimants' interest in having, and indeed right to have, their claims expeditiously determined, but also the work involved in dealing with the limited claims of the UK Claimants will likely enable the rest of the claims – should they proceed in this jurisdiction – to proceed more quickly, than if the stay were not to be lifted. In particular, it seems likely that a number of interlocutory skirmishes relating to disclosure, which Mr Hoskins averted to, could be addressed in the period before the Supreme Court gives judgment in relation to Morgan's position.

94. Accordingly, we grant the Application.

95. Pursuant to rules 58(1)(b) and 19(2)(i) of the 2003 Rules, we also abridge time for filing any application for permission to appeal this Ruling and direct that any such application must be made within two weeks of the date of this Ruling. We consider this is appropriate and desirable to give effect to the purpose of granting the Application, namely is to ensure that the UK Claimants' claims can begin, albeit slowly, to progress. We recognise that this places an extra burden on any party that may wish to lodge an application for permission to appeal, but we consider that, given how fully the submissions on the Application have been set out, both orally and in writing, there will be little actual prejudice caused by abridging time.

96. For the reasons given in this Ruling, it is ordered that:

    (1) The Application is granted; and

    (2) The time for filing any application for permission to appeal this Ruling is abridged to two weeks of the date of this Ruling, so that any such application must be made by 5pm on 30 August 2013.

97. This Ruling does not deal with further directions in these proceedings. Rather, a draft order setting out such directions will be circulated for the parties' comments.

Marcus Smith QC Margot Daly Dermot Glynn

Charles Dhanowa OBE, QC
(Hon)
Registrar Date: 15 August 2013