

## **MICROSOFT MOBILE (OY) LTD –v- SONY EUROPE LIMITED & OTHERS**

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The High Court's detailed judgment in Microsoft contains a number of points of real practical significance for competition practitioners that merit close consideration, particularly when considering the myriad of jurisdictional issues that can arise at the outset of claims for damages against multiple defendants allegedly involved in international cartels.

*References to the judgment are given below in the form "Judgment, §x".*

### **The underlying damages claim**

The Claimant ("**Microsoft**"), a manufacturer of mobile telephone handsets, is a subsidiary of the well-known international technology company, the Microsoft Corporation.

In this High Court damages claim, Microsoft alleges that, between 1999 and 2011, there was a worldwide price-fixing cartel in relation to the sale of lithium ion batteries (an important component of mobile telephone handsets). Microsoft seeks damages relating to both its own purchases of such batteries (for integration into its handsets and for sale in an "after-market" for spare batteries) and purchases by the mobile devices business of Nokia Corporation ("**Nokia**"), which Microsoft acquired in September 2013.

As is usual in cartel damages claims, Microsoft's claim rests on the allegation that the cartel had the effect of inflating the price of the cartelised products above competitive levels, causing Microsoft to incur an "overcharge", as well as various related heads of damage such as additional costs incurred in order to finance the overcharge.

Microsoft originally brought claims against six defendants. It subsequently withdrew its claims against two defendants, leaving claims against:

- a) Sony Europe Limited ("**Sony Europe**"), a company established in England;
- b) Sony Corporation, a company established in Japan, and the parent company of Sony Europe;
- c) LG Chem Limited ("**LG**"), a company established in South Korean;

d) Samsung SDI Co Limited ("**Samsung**"), another South Korean company.

These entities are referred to collectively below as the "**Defendants**".

The international scope of the alleged cartel gives rise to complex questions of applicable law which are summarised in the Judgment at §16. For present purposes, it is sufficient to note that Microsoft advances a number of tortious causes of action against the Defendants, all arising out of the alleged cartel, comprising claims based on the infringement of applicable competition laws (including Article 101 TFEU) and claims in the so-called "economic" torts (e.g. the tort of unlawful means conspiracy).

### **The applications**

a) The Stay Applications. Sony Europe and Sony Corporation applied for a stay of the High Court proceedings against them under section 9 of the Arbitration Act 1996 (the "**1996 Act**"), contending that the claims against them were precluded by a valid arbitration clause.

b) The Jurisdiction Applications. Each of the Defendants other than Sony Europe (i.e. Sony Corporation, LG and Samsung) is domiciled outside the EU/EEA. Permission to serve proceedings outside the jurisdiction in respect of those Defendants, under CPR Part 6.36, was initially granted by Order of Master Clark dated 19 January 2016, following (in the ordinary way) a without notice application by Microsoft. Those Defendants subsequently made applications to set aside the Master's Order.

The Stay and Jurisdiction Applications were heard by Marcus Smith J over four days in January 2016. Each of the Applications was successful, meaning that (absent a successful appeal) Microsoft is unable to continue with its claims in the High Court. The Judgment is detailed and merits close reading. A summary of the Judge's reasoning on the key issues is set out below, followed by a discussion of some specific points of interest.

### **The Stay Applications**

#### ***Section 9 of the 1996 Act***

Where Court proceedings are issued against a party to an arbitration agreement "*in respect of a matter which under the agreement is to be referred to arbitration*", section 9(1) of the 1996 Act permits the party concerned to apply to the Court for a stay of the proceedings. On such an application, if satisfied that the proceedings do indeed concern a matter that is subject to the arbitration agreement in question, the Court must grant a stay unless it is satisfied that the arbitration agreement is "*null and void, inoperative or incapable of being*

performed” (s. 9(4)).

### *The arbitration clause*

In support of the Stay Applications, Sony Europe and Sony Corporation (together “**Sony**”) relied on a Product Purchase Agreement (the “**PPA**”) from 2001 between Sony Corporation and Nokia, which provided as follows (so far as is relevant):

*“Any disputes related to this Agreement or its enforcement shall be resolved and settled by arbitration in the English language in United Kingdom, in accordance with the Arbitration Rules of the International Chamber of Commerce in United Kingdom....The decision of the arbitrators shall be final, binding and executable. The arbitration shall be the exclusive remedy of the Parties to the dispute.”*

(the “**Arbitration Clause**”)

Although the PPA was between Sony Corporation and Nokia (not Microsoft), it was common ground between the parties that the assignment of Nokia’s rights to Microsoft (when the latter purchased the former’s mobile devices business in 2013) did not enable Microsoft to escape from the “*binding*” nature of the Arbitration Clause: see Judgment, §36.

### *Microsoft’s response to the Stay Applications*

Microsoft nevertheless mounted a twofold response to the Stay Applications (see Judgment, §40), contending:

- a) first, that none of Microsoft’s pleaded claims fell within the scope of the Arbitration Clause; and
- b) second, that even if some or all of its claims fell within the scope of the Arbitration Clause, the Arbitration Clause should nevertheless be disapplied on the grounds that it was contrary to EU law.

### *The construction of the Arbitration Clause*

On the first issue, the Judge had little hesitation in deciding that it was for the Court to determine the scope of the Arbitration Clause, and not a matter to be referred to the arbitral tribunal: see Judgment at §41, 82 – 84.

### *The proper approach to the construction of arbitration clauses*

As the Judge emphasised at §43, the “*starting point*” when construing

arbitration clauses is the decision of the House of Lords in *The Fiona Trust* [2007] UKHL 40. In that case, Lord Hoffmann emphasised that “*the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to have entered to be decided by the same tribunal*” (*Fiona Trust* at §13).

This “one-stop” shop principle was considered by the Court of Appeal in *Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1450, where the question (as in the present case) was whether tortious competition law claims fell within the scope of a contractual arbitration clause. In that case:

a) Ryanair had sued Esso in England, advancing (i) a claim in contract based on an alleged breach of a fuel supply contract arising from Esso's involvement in a jet fuel cartel and (ii) a tortious claim based on an alleged infringement of Article 101 TFEU, again arising from Esso's involvement in the cartel.

b) The question for the Court of Appeal, applying the *Fiona Trust* approach, was whether an arbitration clause in the fuel supply contract covering the resolution of “*disputes under this agreement*” encompassed the tortious claim.

c) The Court of Appeal considered that Ryanair's contention that the tortious claim fell within the scope of the arbitration clause rested on the “edifice” that Ryanair also had a related claim in contract. The Court of Appeal's view, however, was that the contractual claim actually advanced by Ryanair had no prospects of success. In those circumstances, the tortious claims fell outside the scope of the arbitration clause, there being no reason to assume that rational businessmen would intend that breach of statutory duty claims under Article 101 TFEU should only be pursued by arbitration in circumstances where there was no parallel contractual dispute.

Marcus Smith J considered the critical point from *Ryanair* to be “*an obvious one*”: while the starting assumption from *Fiona Trust* is that rational businessmen are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal, “*it is difficult to see how a tortious claim can arise out of a contractual relationship when the only claim in contract that can be said to be related is unarguable*”: Judgment, §54.

### *An arguable contractual claim?*

In light of the Judge's interpretation of the *Ryanair* judgment, it fell to the

Court in the present case to consider whether there was an arguable contractual claim available to Microsoft such as to engage the one-stop shop presumption and bring Microsoft's tortious claims within the scope of the Arbitration Clause. In that regard, Sony (seeking to enforce the Arbitration Clause) placed particular emphasis on a provision of the PPA which provided that any "*changes*" in the prices charged for the sale of lithium ion batteries under the PPA had to be "*negotiated in good faith*" (the "**Good Faith Clause**").

Having considered certain arguments concerning the proper construction of the Good Faith Clause (see Judgment, §§60-69<sup>1</sup>), the Judge observed that it was difficult to see how a party to the PPA, like Sony Europe could knowingly participate in a cartel as alleged by Microsoft without also breaching the Good Faith Clause (Judgment §70). The question was then whether a contractual claim for breach of the Good Faith Clause "*would be sufficiently closely related to the tortious claims actually advanced by the Claimant so as to render rational businessmen likely to have intended such a dispute to be decided (like a contractual dispute) by arbitration pursuant to [the Arbitration Clause] of the PPA*". The Judge's conclusion was in the affirmative (see Judgment §72). In that regard:

- a) It was irrelevant that Microsoft had not actually pleaded a contractual claim. To hold otherwise would mean that a claimant could "*circumvent the scope of an arbitration or jurisdiction clause by selectively pleading or not pleading certain causes of action*".
- b) The real issue, in the Judge's view, was not whether a contractual claim was pleaded but whether such a claim would be "*pleadable*". The more "*strained, recondite, convoluted or plain outlandish*" the postulated contractual claim, the less likely that rational businessmen would expect "related" tort claims to be within the scope of the relevant arbitration clause. The Judge's view was that this explained the result in *Ryanair*, where the Court of Appeal was faced with an "*unarguable*" contractual claim. But it is not only unarguable contractual claims that indicate that the arbitration clause does not bite, but also "*strained*" claims.
- c) In the present case, in contrast, the claim for breach of the Good Faith Clause was "*certainly well-arguable*".
- d) In *Ryanair*, the Court of Appeal had accepted the "*powerful*" submissions of Counsel for Esso as to the of idiosyncratic consequences that would flow from a finding that the arbitration clause in that case

<sup>1</sup> Those arguments turn on the specific wording of the PPA and are unlikely to be of wider relevance, although the Judge's view that the PPA was a contract of "simple exchange" rather than a "relational" contract (as described by Leggatt J in *Yam Seng Pte. Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB) at §142), such that no implied duty of good faith arose, may be of interest in the context of other cases involving similar contracts for the sale of goods allegedly subject to a cartel.

comprehended tortious claims under Article 101 TFEU, including the fact that such claims are likely to relate to arrangements with third parties (other cartelists) without any connection to the particular contract between buyer and seller. Marcus Smith J agreed, but only “*in the context of a case where no contractual claim analogous to the tortious one being advanced is possible*”. In the present case, however, a failure to act in good faith may indeed have been actuated by the seller’s dealings with third parties, in the form of a cartel or other illegal combination. The overlap between the contractual claim and the tortious claims would be considerable in those circumstances: both claims would sound in damages; examining the extent to which the price paid was above the “good faith” price would involve an examination of dealings between Sony and the other cartelists; and Microsoft’s damages would have to be reduced to take account of any “pass-on” of loss in the form of higher prices charged to its own customers. While a contractual claim (unlike a tortious one) against Sony would be limited to purchases from Sony, with no question of any contribution from other cartelists, it would remain open to Microsoft to select a claim against a different defendant.

The Judge accordingly concluded that the Arbitration Clause extended the tortious claims advanced by Microsoft, save to the extent (if any) that they predated the PPA (Judgment, §73).

*Should the arbitration clause be applied in this case?*

Microsoft also contended, in the alternative, that EU law required the Court to decline to give effect to the Arbitration Clause in any event. Sony accepted that this was possible in principle, but denied there was any such incompatibility in the present case (Judgment, §§74 – 75).

Microsoft’s argument, in essence, was that effective protection of the right to damages for infringements of competition law could not, compatibly with EU law, be “*fragmented*” by operation of an arbitration clause (Judgment, §76). It was common ground that a degree of fragmentation would arise if the Court enforced the Arbitration Clause, because Microsoft’s claims against the two Sony defendants would then have to be determined separately in an arbitration without joinder of the other parties (absent their consent), and because Microsoft would lose Sony as an “anchor” defendant (see further below in relation to the Jurisdiction Applications).

In support of the submission that this kind of fragmentation was contrary to EU law, Microsoft relied heavily on the Opinion of Advocate-General Jääskinen in Case C-352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa* [2015] QB 609: see the discussion of the Advocate-General’s Opinion at §78 of the Judgment. However, Marcus Smith J considered that the Court of

Justice had taken a different approach from the Advocate-General in the CDC case, and that it had placed “*little (if any) weight on the concerns regarding the fragmentation of actions in competition claims that so troubled AG Jääskinen*” (Judgment, §80)<sup>2</sup>. In the Judge’s view, nothing in the judgment of the Court of Justice required him to displace the effect of the Arbitration Clause.

### ***The Jurisdiction Applications***

Sony Corporation, LG and Samsung (the “**Foreign Defendants**”) are all domiciled outside the EU. The jurisdiction of the English Courts over the claims against them was accordingly a matter for English national law: see Article 6 (1) of the Brussels I Regulation (Recast).

#### ***The essential requirements of a jurisdiction challenge***

As set out by the Judge at §88, three cumulative criteria must be satisfied before the Court will permit service of claims outside the jurisdiction (these requirements are mirrored in CPR Part 6.37(1)(a)-(b) and (3)):

- a) First, the Claimant must satisfy the court that there is a serious issue to be tried on the merits in relation to the foreign defendant.
- b) Second, the Claimant must satisfy the Court that there is a “*good arguable case*” that the claim falls within one or more of the “gateways” in paragraph 3.1 of CPR Practice Direction 6B.
- c) Third, England and Wales must be “*clearly and distinctly the proper forum for the trial of the claim*”.

The question for the Court hearing a jurisdiction challenge is whether it was proper to grant permission to “serve out” on the date upon which the order granting permission to serve out was made: see the Judgment at §§92-93, citing Hoffmann J (as he then was) in *ISC Technologies Ltd v Guerin* [1992] 2 Lloyd’s Rep 430 at 434 and Evans LJ in *Mohammed v Bank of Kuwait and the Middle East KSC* [1994] 1 WLR 1483 at 1492.

#### ***Serious issue to be tried?***

The parties agreed to “park” the issue of whether there was a serious issue to be tried as against the Foreign Defendants: Judgment, §§97 – 98. Marcus

<sup>2</sup> Inter alia, the Court of Justice recognised at [36] of its judgment that an entity (such as CDC) bringing claims against multiple defendants with registered offices in different jurisdictions, would “*need to bring separate actions for the loss suffered by each of those undertakings before the courts with jurisdiction for their respective registered offices*”. The Court of Justice went on to observe that a domestic court could not refuse to take into account a jurisdiction clause solely on the grounds that it considered that doing so would “*not give full effect to the requirement of effective enforcement of the prohibition of cartel agreements*”: [63].

Smith J proceeded on the basis that this criterion was made out, while being careful to emphasise that he was making no determination of the point.

*Good arguable case on the “gateways”*

In its application to serve the claim form on the Foreign Defendants outside the jurisdiction, Microsoft relied upon Gateways 3 and 9(a) of paragraph 3.1 of Practice Direction 6B.

Gateway 3 is satisfied where:

*“A claim is made against a person (“the defendant”) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –*

- (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and*
- (b) the claimant wishes to serve the claim form on another person who is a necessary and proper party to the claim.*

Gateway 9(a) concerns a claim made in tort where “*damage is sustained, or will be sustained, within the jurisdiction*”.

Gateway 3 and “anchor” defendants

Gateway 3 arises in circumstances where there is an existing claim against a person within the jurisdiction. That person then acts as a so-called “anchor defendant”, who provides the basis for the Court’s jurisdiction over the claim against the foreign defendant.

The Gateway incorporates two distinct requirements: (i) the claim against the “anchor” defendant must give rise to “*a real issue which it is reasonable for the court to try*” and (ii) if so, the foreign defendant(s) must be “*necessary or proper parties*” to that claim.

*Issue (i): real issue which it is reasonable for the court to try against the anchor defendant*

The Judge considered that it was not open to him to debate the existence of a “*real issue*” to be tried between Microsoft and Sony Europe (the putative “anchor” defendant in this case), given the parties’ agreement that there was a serious issue to be tried (see above). However, Requirement (i) goes beyond “*mere arguability*” and requires the Court to consider wider issues regarding the reasonableness of the claim: see Judgment, §108, citing *Erste Group Bank AG, London Branch v JSC “VMZ Red October”* [2015] EWCA Civ 379 at [41] – [42].



The Foreign Defendants contended that Microsoft’s claim was not “*reasonable for the court to try*” on a number of grounds:

a) First, the Foreign Defendants contended that the sole reason for suing Sony Europe was to found jurisdiction against the other Defendants. The Judge agreed that this was the sole reason that Sony Europe had been joined, but considered that this did not render the claim against Sony Europe unreasonable, citing Lord Collins’ dictum in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 that the fact that a defendant is sued only for the purpose of bringing in foreign defendants (i.e. as an “anchor”) is “*a factor in the exercise of the discretion and not an element in the question whether the action is “properly brought” against D1*”<sup>3</sup>.

b) Second, the Foreign Defendants alleged that since the claim against Sony Europe had been stayed under section 9 of the 1996 Act, there was no longer any claim against the “anchor” defendant that it was reasonable for the Court to try. Although the stay of the proceedings against Sony Europe post-dated the Master’s order for service out, Marcus Smith J held that the Arbitration Clause was in evidence before the Master and that it “*should have been assumed that any point on jurisdiction properly available to [Sony Europe] would be taken by it*”: see Judgment at §116, citing *The Brabo* [1949] 2 AC 32. The Master should therefore have been invited by Microsoft to determine the interpretation of the Clause at the time of deciding whether to grant permission to serve out.

c) In light of his conclusion on the Stay Applications, and having found that this was a point that could properly be taken into account in relation to the Jurisdiction Applications, the Judge held that the question of reasonableness (in the context of Gateway 3) was “*straightforward to answer*”. There was no real issue between Microsoft and Sony Europe to try, let alone one that it was reasonable to try, and Gateway 3 accordingly was not satisfied: Judgment, §117.

d) In the event that he was wrong on that point, the Judge went on to consider the hypothetical scenario in which proceedings against Sony Europe were to continue. The Foreign Defendants contended that, in that event, the claims against Sony Europe were still unreasonable given the way in which they had been “*aggregated*” by Microsoft. In that regard:

i. As set out above, Microsoft is seeking damages both in its own right and as assignee of the rights of Nokia. “Nokia”, in this context, is not a single entity but encompasses both the Nokia Corporation and multiple subsidiaries each of whom purchased the

<sup>3</sup> Notably, the Court of Appeal in *Erste Bank* (cited above) expressed “reservations” about this point, but considered that only the Supreme Court could revisit the position established by earlier authorities: see the extract from *Erste Bank* cited in the Judgment at §111.

products that are the subject of the alleged cartel.

ii. In relation to Nokia purchases, the damages claim is pleaded in general terms, without distinguishing between specific Nokia entities. In the course of the hearing, it emerged that Microsoft was unable to identify any specific link between sales of lithium-ion batteries by Sony Europe in the UK and purchases of such batteries by any single Nokia entity. Nor could Microsoft identify the extent to which the Nokia subsidiaries had acquired batteries directly from Sony Europe (either themselves or via a “purchasing agent”) or whether batteries had been acquired indirectly (i.e. purchased from Sony Europe by one Nokia entity, and then “on-sold” to another Nokia entity): see the discussion in the Judgment at §§17 – 21.

iii. However, while Microsoft’s claims were “*in this sense vague*”, the Judge did not consider that this rendered them “*unreasonable*” for the purposes of the Gateway 3, noting that it was “*perfectly proper*” to advance claims in the alternative: Judgment, §121.

iv. The Judge accepted (by reference to the pleadings) that Microsoft had alleged that Sony Europe participated directly in the cartel, or at least knew of its existence. Accordingly, the so-called “*Provimi*” point, concerning allegations of liability that rest solely on defendant’s membership of the same corporate group as a cartelist (see further below), did not arise: see Judgment, §§123 – 125.

v. Accordingly, the Judge considered that, but for the arbitration clause, the claim against Sony Europe would have given rise to real issues which it was reasonable for the Court to try.

#### *Issue (ii): necessary or proper parties*

The next question which arose (leaving aside the effect of the Arbitration Clause) was whether the Foreign Defendants were “*necessary or proper parties*” to the claim against Sony Europe. These requirements are disjunctive.

Microsoft did not contend that the Defendant were necessary parties to the action (there being no need to sue every member of a cartel, the participants in which are “jointly and severally” liable for all resulting losses): Judgment, §127.

Microsoft did, however, contend that the Foreign Defendants were “*proper*” parties to its claim against Sony Europe. In response, the Foreign Defendants’ invoked the test formulated by Lindley LJ in *Witted v Galbraith* [1893] 1 QB 577 at 599, which asks: “*Supposing that both the defendant firms were resident*

*within the jurisdiction, would they both have been joined in the action?*" The Judge agreed with Microsoft, however, that the applicable test was "*significantly wider*" than this "counter-factual" approach, and simply involved asking whether the foreign defendant could, if within the jurisdiction, properly have been joined under CPR Part 19: see Judgment at §§130 – 135, relying on an earlier judgment of Lord Esher MR in *Massey v Haynes* (1888) 21 QBD 330. The Judge also noted that the Foreign Defendants' approach sought to raise precisely the same considerations (concerning the propriety of the claim against the anchor defendant) which he had rejected at the first stage of the analysis (whether there was a reasonable issue for the court to try in respect of Sony Europe): Judgment, §§136 – 138.

Applying the wider test, the Judge had "*no doubt*" that the Foreign Defendants were proper parties, noting in particular the evidence that Microsoft would proceed against Sony Europe in this jurisdiction even if its claims against the Foreign Defendants were not permitted to continue, and the real advantages associated with the joinder of the Foreign Defendants (which would, for example, avoid the risk of inconsistent findings in other jurisdictions): Judgment, §139.

#### Gateway 9(a): damage within the jurisdiction

The Judge also gave detailed consideration to Gateway 9(a). Microsoft's reliance on this Gateway rested solely on the allegation that damage had been sustained within the jurisdiction (as opposed to the alternative basis of damage resulting from acts committed within the jurisdiction): Judgment, §143.

Before considering the various alternative bases advanced by Microsoft in support of the allegation that it had sustained damage within the jurisdiction, the Judge made a series of remarks on the correct legal approach to the Gateway:

- a) *First*, in relation to the question of the system of law by reference to which it is to be determined whether damage has been sustained within the jurisdiction, the Judge held that in a complex case involving millions of transactions around the world, it was "*simply not possible to make any determination [at this stage] as to what might be the applicable law in the present case*". However, this was not "*fatal*" to Microsoft's case. Rather, applying the "*broad internationalist spirit*" described by Lord Mance in *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC* [2001] QB 825 at §27, the requirements of Gateway 9(a) would be satisfied if Microsoft could show damage sustained within the jurisdiction on the basis of any of the bases it had advanced. These included: the place where each contract of sale for a Relevant Product was concluded; the place where Relevant Products were delivered; the place where a Nokia entity which purchased Relevant Products was located; the place where payment for Relevant Products was made; or the place where products

incorporating Relevant Products were ultimately sold: Judgment, §152-154.

b) Second, as to the well-established requirement that each claim advanced against a defendant outside the jurisdiction must have the attributes referred to in the Gateway relied upon, the Judge held that it was necessary (in cases of assignment) to look at the position of the “*original holder*” of the claim, and not that of a subsequent assignee: see Judgment, §§155 – 160.

c) Third, as to the similarly well-established requirement of substantial damage within the jurisdiction, the Judge considered that it was necessary (in cases where multiple claims are aggregated) to assess that requirement by reference to the particular claims advanced. Further, the test of “substantial damage” is not an absolute one. The question is whether the amount of damage sustained within the jurisdiction is substantial relative to that sustained outside the jurisdiction: Judgment, §§161 – 163.

d) Fourth, for the purposes of this Gateway, the damage that needs to be established is “*direct, and not indirect or consequential*”: see Judgment, §164, citing the Court of Appeal’s judgments in *Erste Group AG, London Branch, v JSC “VMZ Red October”* [2015] EWCA Civ 379 per Gloster LJ at [106] – [107] and *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665 per Arden LH at [91].

The Judge then proceeded to consider four alternative contentions advanced by Microsoft in support of its argument that it had sustained damage within the jurisdiction.

*First contention: damage on the basis of purchases from Sony Europe*

Microsoft’s evidence was that 12.1 million units of lithium-batteries were purchased from Sony Europe (an English company) by one or more companies within the Nokia group and/or Microsoft, but without differentiating between these entities: Judgment, §167. The Judge held that Microsoft had not made out the requisite good arguable case that this evidence satisfied the requirements of the Gateway:

a) Even if Microsoft had been able to show that a single entity within Nokia had sustained losses as a result of purchases from Sony Europe in the UK, its position would be difficult enough, given that sales of 12.1 million units within the jurisdiction were “*but a tiny proportion of [Sony Europe’s] overall sales*”.

b) However, Microsoft could not show which Nokia entity made those purchases, such that the pleaded damage may have been suffered by

“multiple” Nokia entities. Nor could Microsoft say whether the purchases in question were made directly from Sony Europe or whether there was a “chain” of sales and purchases within the Nokia group. In the latter case, any damages further down the chain would very likely be “indirect” (and hence they could not count towards the satisfaction of the Gateway).

*Second contention: damage because the PPA is governed by English law*

It was common ground that the PPA between Sony Corporation and Nokia referred to above was governed by English law, as were a number of other relevant PPAs.

In that regard, Microsoft relied on Article 4 of the “Rome II” Regulation. The general position under that Article is that the law applicable to a tort claim is that of “the country in which the damage occurs” (save that, where both claimant and defendant have their “habitual residence” in the same country, the law of that country applies). However, Article 4(3) provides an exception where it is “clear from all the circumstances of the case that the tort...is manifestly more closely connected with [another country]”, in which case the law of that other country applies. Article 4(3) adds that a manifestly closer connection “might” be based on a “pre-existing relationship between the parties, such as a contract, that is closely connected with the tort...in question”.

The Judge rejected Microsoft’s reliance on Article 4(3) as “entirely unpersuasive”. In particular, reliance on the governing law of the PPAs did not assist in overcoming the factual deficiencies in Microsoft’s evidence: whatever the applicable law, the material Microsoft had adduced was too insubstantial to show that damage had been sustained in the jurisdiction: see Judgment, §§173 – 176.

*Third contention: damage on the basis of “volume” effects*

The third contention advanced by Microsoft was that Nokia and/or Microsoft sold substantial quantities of handsets in England and Wales, and that Nokia and Microsoft therefore potentially suffered loss through volume effects (i.e. lost sales resulting from the need to charge their own customers higher prices to offset any “overcharge” arising from the cartel).

The difficulty for Microsoft was that there was no evidence before the Court of any “pass-on” to Microsoft’s or Nokia’s own customers, or of any loss arising by reason of fewer handsets being sold. Indeed, Microsoft’s own evidence (and its primary pleaded case) was to the effect that there had been no pass-on. In those circumstances, it was unable to show a good arguable case that damage arising from volume effects had been sustained within the jurisdiction: Judgment, §§177 – 181.

*Fourth contention: damage because of purchases by Nokia UK*

Finally, Microsoft contended that the entities within Nokia that purchased lithium-ion batteries included Nokia UK Ltd, a company with its registered office within the jurisdiction. However, a “*bare assertion*” to this effect in the pleadings was insufficient to satisfy the requirement of showing substantial damage within the jurisdiction, at least in the absence of any supporting evidence as to how many units were purchased, from whom they were purchased, whether they were direct or indirect purchases, and at what prices. Indeed, the material before the Court as to the location of Nokia’s “manufacturing centres”, all of which were outside the UK, suggested that Nokia UK Ltd did not purchase batteries directly from Sony: see Judgment, §§182 – 183.

*Conclusion on the Gateways*

Microsoft was therefore unable to show that its pleaded claims fell within either Gateway 3 or Gateway 9(a): Judgment, §185.<sup>4</sup> Nonetheless, the Court went on to consider the separate jurisdictional requirement that England and Wales must be clearly and distinctly the proper forum for the trial.

*The proper forum for the trial*

The test for the proper forum derives from the well-known decision of the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 at 481, which requires the claimant to show that England is “*clearly*” the proper forum. This involves consideration of a range of factors such as the personal connection between the parties and England, the factual connection between the events and England, considerations of applicable law, and so on: see Judgment: §§186 – 187.

As set out above, the Judge was not satisfied that Microsoft’s pleaded claims fell within either Gateway 3 or Gateway 9(a), and in any event considered that its claims were precluded by operation of the Arbitration Clause. Accordingly, considerations of the proper forum did not arise but, given his findings as to the Arbitration Clause and the Gateways, Microsoft had anyway failed to show (“*let alone show clearly*”) that the English Court was the proper forum (Judgment, §191).

Matters would “*take on a different complexion*” if the Judge were wrong about the effect of the Arbitration Clause or its relevance to the application of Gateway 3. Two possibilities arose:

- a) If the Judge was right that the Arbitration Clause covered Microsoft’s

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<sup>4</sup>Although, in relation to Gateway 3, it was only the discrete finding on the Arbitration Clause that prevented Microsoft from satisfying the Gateway.

pleaded claims, but wrong that this was relevant to the operation of Gateway 3 as regards the Foreign Defendants, then the Master's decision to permit service outside the jurisdiction would still stand, although it would be open to the Foreign Defendants (by way of separate applications) to seek a stay of the proceedings against them on the basis that there is a more appropriate forum elsewhere. However, in light of the variety of factors relied upon by the Foreign Defendants as pointing away from England as the proper forum (see Judgment, §189), including the stay of the proceedings against the anchor Defendant, the Judge indicated that he would have acceded to such applications had it been necessary for them to be made: Judgment, §192(i).

b) If he was wrong on the more fundamental question of the stay itself, then the claim would have been commenced as of right against Sony Europe; the requirements of Gateway 3 would not have been met; and, importantly, there would have been no power to stay the proceedings against Sony Europe following the Court of Justice's decision in *Owusu v Jackson* [2005] QB 801 (which established – in outline – that where a national court has jurisdiction over a defendant domiciled in the jurisdiction under the Brussels Regulation, it cannot decline jurisdiction in favour of third country on *forum non conveniens* grounds). In those circumstances, the prospect that further parties would have been dragged into the proceedings by reason of Sony Europe making CPR Part 20 claims, and of inconsistent outcomes due to duplicative proceedings taking place in other jurisdictions, were “*powerful points*” pointing in favour of this jurisdiction being the proper forum for the claims against the Foreign Defendants: Judgment, §193.

c) In this context, the Judge rejected a suggestion from the academic literature that if the Court would have set aside service but for the decision in *Owusu*, then it should still generally set it aside notwithstanding *Owusu*. However, the Judge did not consider that the continuation of proceedings against the anchor defendant should automatically determine what would happen in relation to foreign defendants. Rather, these are factors to be weighed in the balance when considered issues of *forum non conveniens*, and even though the scales are “*skewed*” in favour of proceedings continuing in this jurisdiction alongside a claim against an anchor defendant, these “*weighty*” factors can be outweighed in particular cases (of which the Judge gives several examples): see Judgment, §§194 – 198.

d) Applying this approach, and on the assumption that the proceedings against Sony Europe (*qua* anchor defendant) had been permitted to proceed in this jurisdiction, the Judge held that he would have concluded that England and Wales was clearly and distinctly the proper forum for the claims against the Foreign Defendants, albeit that the considerations

pointing each way were “*finely balanced*”. The particular factor that would have tipped the balance in favour of allowing proceedings to continue against the Foreign Defendants was that Sony Europe is a “*substantial entity in its own right [that is] well-able to pay significant damages and well-worth suing in its own right*”, as well as being able to bring in other parties under Part 20: Judgment, §199.

e) Given his conclusions on the Stay Applications, however, the Judge set aside the order of Master Clark and with it the service of the proceedings on the Foreign Defendants.

### *Full and frank disclosure*

The Judge concluded by considering the requirement of full and frank disclosure when applying for permission to serve out, citing Warby J’s summary of the relevant principles in *Sloutsker v Romanova* [2015] EWHC 545 (QB) as well as certain helpful dicta in *BP Exploration v Hunt* [1976] 3 All ER 879 at 894 and *DSG Retail Ltd v Mastercard Inc* [2015] CAT 7 at [44] – [45].

Although this issue did not strictly arise given his conclusions on the main issues set out above, the Judge had heard full argument on the point and therefore dealt with it, and ultimately held that Microsoft’s evidence in support of its application for permission to serve out had “*wrongly downplayed*” the fact that, in reality, the “*centre of gravity of the Cartel was actually Asian*”, e.g. by failing to mention the fact that there were chains of purchasers within the Nokia group: see generally Judgment, §§207 - 208. Accordingly, applying the approach described in *The Arena Corporation Ltd v Schroeder* [2003] EWHC 1089 (Ch) at [213], the Judge held that he would have set aside the Order granting permission to serve outside the jurisdiction even if he had otherwise taken the view that the Court had jurisdiction over the claims against the Foreign Defendants: Judgment, §§209 – 210.

### *Discussion*

The judgment of Marcus Smith J is a comprehensive analysis of many of the plethora of jurisdictional issues that can arise in cartel damages claims. Given that the disposition of such issues can have dramatic ramifications for the shape of such proceedings (and, as in this case, can even result in such claims being “knocked out” at the outset), the Judgment warrants careful scrutiny. This discussion does no more than pick out a number of points of particular interest.

### *A two-stop shop?*

The Court of Appeal’s judgment in *Ryanair* was widely considered to raise serious obstacles to attempts to bring competition law claims within the scope of contractual arbitration clauses, despite the “one-stop shop” principle that applies when construing such provisions. The judgment in *Microsoft* seems



to mark a return to the more orthodox position, avoiding the kind of “fussy distinctions” deprecated by Lord Hoffmann in *The Fiona Trust*. Notably, Marcus Smith J’s approach is consistent with the earlier observation of Aikens J (as he then was) in the well-known *Provimi* case [2003] EWHC 961 (Comm), which pre-dated *Ryanair*, to the effect that an English Court would “almost certainly” consider that claims under Article 101 TFEU fell within the scope of a contractual jurisdiction clause (see *Provimi* at §122). However, it is important to bear in mind that Marcus Smith J’s conclusion rested on the existence of a contractual “good faith” clause which was, at least arguably, contravened by Sony’s involvement in a cartel. Absent a clause of a similar nature, the approach in *Ryanair* is likely to continue to apply.

There is one strange potential consequence of the approach in *Microsoft*. The party seeking to obtain a stay will be the defendant, who will be contending that there is an arguable contractual claim against it so as to bring the competition law claim within the scope of the arbitration clause relied on. Once the claim has been referred to arbitration, however, it is perfectly conceivable that the claimant will supplement any competition law claim with the very contractual claim that the defendant has invoked, with attendant ramifications for the arguments available to the defendant in resisting that claim in the arbitration (including the risk of eliciting abuse of process complaints if the defendant were to seek to run arguments in the arbitration that ran contrary to those it had utilised in order to obtain a stay of the court proceedings). There is, accordingly, a careful balance to be struck by defendants seeking to rely on arbitration clauses to avoid High Court litigation.

### *Gateway to heaven*

Although the net effect of the Judgment is that *Microsoft* cannot proceed with any of its claims in the High Court, it is important to note that it was only because of the Judge’s finding that the claims against Sony Europe fell to be stayed under section 9 of the 1996 Act that *Microsoft* failed to establish jurisdiction against the Foreign Defendants. Marcus Smith J’s view was that, absent the stay, Gateway 3 would have been satisfied. In relation to the requirement that there be a good arguable case against the “anchor” defendant that it was reasonable for the Court to try, it was sufficient that *Microsoft* had clearly pleaded a case that Sony Europe (the relevant “anchor” defendant in this case) had participated directly in the cartel, or at least that it was aware of its existence. This contrasts with the Court’s more exacting approach to Gateway 9(a), where it required some evidence of substantial damage within the jurisdiction, and not merely assertions in the pleadings to that effect.

All of which suggests that the “necessary or proper parties” gateway is likely to remain the jurisdictional gateway of choice for those seeking to bring cartel claims against multiple defendants in this jurisdiction, at least where there is a case to be made that the English “anchor” defendant participated in, or

was aware of, the cartel. The question of whether a claim against an anchor defendant can be founded solely on its membership of the same “undertaking” as a cartel, without any knowledge of the cartel – a point regarded as arguable by Aikens J (as he then was) in *Provimi* at §31 - remains to be determined.

### *Aggregation aggravation*

An important thread running throughout the Judgment was the fact that Microsoft was seeking to aggregate claims which included purchases by myriad Nokia entities, in circumstances where Microsoft was unable to identify which purchases had been made by which specific entity; or from which specific defendant. The Judge appeared to regard this as a defect which could properly be held against Microsoft, for example in rejecting the contention that Microsoft had suffered substantial damage within the UK on the grounds that purchases had been made by the UK-based Nokia subsidiary. This approach might, at first blush, appear difficult to reconcile with the line of authorities that emphasise that the Court should take a generous approach to vaguely-pleaded claims by alleged cartel victims, at least prior to disclosure by the alleged cartelist: see e.g. *KME Yorkshire Limited & Ors v Toshiba Carrier UK Ltd & Ors* [2012] EWCA Civ 1190 at §32. However, there is a logic to this difference in approach. It is one thing for the Court to be sympathetic to a cartel victim that is unable (prior to disclosure) fully to particularise the details of the activities of the cartel, where those details will invariably be in the hands of the cartelists; it is quite another for the Court to be lenient to a claimant that is unable to provide basic details about matters such as its own purchases, particularly when that claimant is seeking to demonstrate that it has suffered “substantial damage” within the jurisdiction. Following the judgment in *Microsoft*, claimants should certainly be cautious about assuming that high-level pleadings will be sufficient, at least in the context of the “substantial damage” Gateway.

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*The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.*

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