



Neutral Citation Number: [2022] EWHC 156 (Ch)

Claim No: CP-2019-000027

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

28 January 2022

Before :

MRS JUSTICE BACON

Between :

(1) GEMALTO HOLDING BV
(2) THALES DIS FRANCE SA
and others

Claimants

- and -

(1) INFINEON TECHNOLOGIES AG
(2) INFINEON TECHNOLOGIES UK LIMITED
(3) RENESAS ELECTRONICS CORPORATION
(4) RENESAS ELECTRONICS EUROPE LIMITED
(5) RENESAS ELECTRONICS EUROPE GMBH

Defendants

Jon Turner QC and Rob Williams QC (instructed by Stewarts Law LLP) for the Claimants
Sarah Ford QC, Tim Johnson and Emma Mockford (instructed by Freshfields Bruckhaus
Deringer LLP) for the First and Second Defendants
Daniel Jowell QC and David Bailey (instructed by Latham & Watkins (London) LLP) for
the Third to Fifth Defendants

Hearing dates: 13–14 January 2022

Approved Judgment

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

Mrs Justice Bacon:

Introduction

1. This is the hearing of a preliminary issue in a claim brought by the Claimants (collectively “Gemalto”) for damages for an infringement of competition law by the Defendants in relation to the supply of Smart Card Chips (“SCCs”). The claim is a follow-on claim based on an infringement found by the European Commission in its decision dated 3 September 2014 in Case AT.39574 *Smart Card Chips* (“the Decision”), in which the Commission found that between 2003–2005 various suppliers of SCCs had unlawfully coordinated their pricing behaviour and exchanged competitively sensitive information.
2. The issue to be determined at this hearing is whether the claim is time-barred, on the basis that when the claim was issued on 19 July 2019, that was more than six years after the date on which the cause of action accrued pursuant to s. 32(1)(b) of the Limitation Act 1980.
3. The essential question raised by the preliminary issue is a short one: whether (as Gemalto contends) time only started running under s. 32(1)(b) when the Commission announced the adoption of the Decision, or whether (as the Defendants contend) time started running at the latest by April 2013 when the Commission announced that it had sent a Statement of Objections to suspected participants in an SCC cartel.
4. At the hearing, submissions were made by Mr Turner QC for Gemalto, and by Ms Ford QC and Mr Jowell QC for Infineon and Renesas respectively. Although separate skeleton arguments had been filed for the two Defendants, the position taken by them was essentially the same, and certainly by the time of the hearing it was not suggested that there was any difference between the positions taken by the Defendants. Ms Ford and Mr Jowell therefore sensibly divided submissions on the various issues between them at the hearing, although there was inevitably some degree of overlap. In this judgment I will therefore refer to their submissions together, without distinguishing between the particular points on which they each addressed me during the hearing.

The parties

5. The Claimants are all undertakings in the Gemalto group, whose activities include the manufacture and supply of smart cards. Each of the Claimants purchased SCCs during and following the infringement period identified by the Commission, or have derivative claims based on the manufacture and/or sale of SCCs and/or products incorporating SCCs by companies within the Gemalto group. In April 2019 the Gemalto group was acquired by the French company Thales.
6. Within the Claimant companies, the Second Claimant was the operating company for Gemalto’s global business during the time relevant for the purposes of this preliminary issue trial. Gemalto agreed that if the Second Claimant had sufficient knowledge for time to start running under s. 32(1)(b), then the other Claimants

would also have had such knowledge. It was therefore common ground that the inquiry for the purposes of that section should focus on the Second Claimant.

7. The First, Third and Fourth Defendants were addressees of the Decision. The Second and Fifth Defendants were not addressees of the Decision, but are undertakings within (respectively) the Infineon and Renesas groups. I will refer to the First and Second Defendants collectively as “Infineon” and the Third to Fifth Defendants as “Renesas”.
8. The Decision was also addressed to undertakings in the Philips and Samsung groups, and three companies in those groups have been joined as third parties to the present proceedings. The third parties have not, however, participated in the present preliminary issue hearing.

Witnesses

9. Gemalto called four witnesses as to its knowledge at the relevant time:
 - i) Mr Rémi de Fouchier, a former Chief Procurement Officer at the Second Claimant, said that he became aware of the Commission’s investigation from press reports in January 2009. He asked internally for further information about this, but did not thereafter have anything to do with the investigation before he left the procurement team in March 2009, handing over to Mr Chanay.
 - ii) Mr Xavier Chanay, a former Chief Technology Officer and then Senior Vice President of purchasing and intellectual property at the Second Claimant, likewise became aware of the Commission’s investigation from press reports in January 2009, but recalled that Infineon representatives had dismissed it as being of no concern. He was also aware of the Commission Requests for Information (“RFIs”) in 2012 and further press reports in March/April 2013, but was not otherwise involved in the Commission’s investigation.
 - iii) Mr Edouard Roqueplo, a former Purchasing Director for the second Claimant, who reported to Mr de Fouchier and subsequently Mr Chanay, had been aware of the Commission investigation from press reports in January 2009, and was subsequently involved in responding to the 2012 RFIs. He also recalled being told by Infineon that the investigation was not a concern to them.
 - iv) Mr François Dupré, a former Purchasing Strategy Director at the Second Claimant, was aware of the Commission investigation from press reports in January 2009, and participated in an internal email discussion at the time. He also provided some information to assist with the response to the 2012 RFIs. Otherwise he did not recall having any involvement in the Commission’s investigation.
10. The witnesses were cross-examined by videolink, with an interpreter assisting in the case of Mr Roqueplo. It was clear that they had very little independent recollection of the events of 2009–2013, such that considerable caution is

required in relation to their attempts, when questioned, to interpret emails written at the time. It was also apparent that Mr Dupré was attempting to advance Gemalto's case rather than giving straight answers to the questions put to him. As discussed further below, I do not consider that the witness evidence added anything of material relevance to the contemporaneous documents.

Factual and procedural background

11. On 7 January 2009 the Commission announced that it had carried out unannounced inspections (i.e. dawn raids) in connection with a suspected infringement of competition law in relation to the supply of SCCs. The announcement was widely reported in the press, and it is common ground that it was the subject of internal discussion within Gemalto.
12. Gemalto received two RFIs from the Commission on 3 July 2012 and 25 September 2012, to which it responded on 24 July and 20 August 2012 (first RFI) and 9 October 2012 (second RFI).
13. On 22 April 2013 the Commission announced in a press release that it had issued a Statement of Objections in connection with the investigation. Again, that was widely reported in the press and discussed within Gemalto.
14. The Decision was adopted on 3 September 2014. On the same day the Commission published a press release as well as a summary decision naming the addressees of the Decision and the precise duration of the infringement. The summary decision stated that Infineon, Renesas, Samsung and Philips had bilaterally discussed pricing and pre-pricing components for SCCs (such as production capacity and capacity utilisation), future market conduct, and contract negotiations with common customers, and had exchanged competitively sensitive information. The infringing contacts were found to have taken place from September 2003 to September 2005, with Infineon's participation ending in March 2005, six months before that of the other participants.
15. As is often the case, some time then elapsed during which the Commission considered the redactions that would be necessary to publish a non-confidential version of the Decision. The full non-confidential version was eventually published on 16 December 2016. The Decision was the subject of appeals to the European Court by Philips and Infineon on both liability and the amount of the fine. The findings on liability were upheld, but Infineon's fine was reduced by the General Court.
16. Gemalto's claim form was issued on 19 July 2019, with the particulars of claim following on 26 July 2019.
17. The defences originally pleaded by the Defendants in November 2019 did not raise the limitation issue that is now before me. That issue was first put forward in draft amended defences, for which the Defendants sought permission at the first case management conference before me on 31 March 2021. Gemalto did not oppose those applications, nor did it oppose the Defendants' proposal that there should be a separate preliminary issue trial to deal with the limitation issue.

Accordingly, I gave directions for the present hearing at that case management conference.

18. Those directions included orders for disclosure regarding the preliminary issue, and directions permitting the parties to serve specific supplemental pleadings relating to the preliminary issue. Gemalto duly served a statement of case on limitation on 30 April 2021, and the Defendants served responsive statements of case on 28 May 2021.

The statutory test

19. It is common ground that since the infringement came to an end in 2005 the claim would be time-barred under the ordinary six-year period applicable to claims in tort in s. 2 of the Limitation Act 1980. Gemalto relies, therefore, on the application of s. 32 of that Act.

20. Section 32 provides (insofar as material) as follows:

“(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either –

- (a) the action is based upon the fraud of the defendant; or
- (b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or
- (c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

...

- (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.”

21. In the present case, as is typical in cartel damages cases, Gemalto relies on s. 32(1)(b). As such, it bears the burden of proving the facts necessary to bring the case within that section: *Cave v Robinson Jarvis* [2002] UKHL 18, [2003] 1 AC 384, §60.

The issues

22. A number of points were common ground between the parties, which substantially narrowed the issues in dispute.
23. Both Defendants accepted that there had been deliberate concealment such that s. 32(1)(b) was in principle engaged in the present case. The disputed question was when time started to run under that section.

24. That turns on the date on which Gemalto discovered or could with reasonable diligence have discovered the facts that were essential to establish a prima facie case against the Defendant. In the context of a case such as the present where the claim is for damages arising from a cartel, it was common ground that the essential elements of Gemalto's cause of action were and are: (i) an agreement or concerted practice between undertakings; (ii) having as its object or effect a prevention or distortion of competition that is appreciable; (iii) which affects trade between Member States, or within the UK; and (iv) which has caused loss and damage to the claimant.
25. As to the first two of those elements, the parties agreed that the essential identifying elements of the cartel, in relation to which the state of Gemalto's knowledge had to be considered, were: (i) the identity of the undertakings who had participated in the agreement; (ii) the fact that the agreement involved the coordination of market behaviour for SCCs in breach of the EU competition rules; (iii) the fact that the geographic scope of the agreement extended to the EEA; and (iv) the time period covered by the agreement (although there was a dispute as to how precise that had to be).
26. If it was established that Gemalto had sufficient knowledge of those identifying elements of the cartel, Gemalto accepted that it would also have had sufficient knowledge that the cartel would affect trade between Member States. It was also not disputed that loss and damage to Gemalto could be inferred from the fact that Gemalto had made purchases of the products subject to the cartel from suppliers within the groups of undertakings who had participated in the cartel.
27. As to Gemalto's knowledge, the Defendants confirmed at the hearing that their position was that there was actual knowledge of the relevant facts on the part of Gemalto, and they did not rely on a contention that there was additional material that Gemalto could with reasonable diligence have discovered.
28. With those points of agreement, the dispute before me ultimately came down to the following issues:
 - i) whether Gemalto's knowledge could in principle be established on the basis of the Commission's announcement of its investigation and adoption of the Statement of Objections, taken together with the press reports concerning the investigation and the RFIs addressed to Gemalto;
 - ii) whether the material available to Gemalto was sufficient for it to plead all of the identifying elements of the cartel, in particular the time period of the infringement; and
 - iii) the relevance of the belief of Gemalto's witnesses as to the existence of a cartel.
29. Before considering these issues, it is necessary to summarise the material available to Gemalto by the time of the announcement of the Statement of Objections. I also need to consider, as a preliminary matter, the relevant test for the determination of whether Gemalto's knowledge was sufficient to amount to "discovery" for the purposes of s. 32(1)(b).

The material available to Gemalto

30. On 7 January 2009, the Commission published a press-release in which it said

“Antitrust: Commission confirms inspections in the smart card chip sector

The European Commission can confirm that on 21 October 2008 Commission officials carried out unannounced inspections at the premises of several smart card chips producers in several Member States. These chips are used for the production of smart cards, such as telephone SIM cards, bank cards and identity cards. The Commission has reason to believe that the companies concerned may have violated EC Treaty rules prohibiting practices such as price fixing, customer allocation and the exchange of commercially sensitive information (Article 81).

...

Surprise inspections are a preliminary step in investigations into suspected cartels. The fact that the Commission carries out such investigations does not mean that the companies are guilty of anti-competitive behaviour; nor does it prejudge the outcome of the investigation itself. The Commission respects the rights of defence, in particular the right of companies to be heard in antitrust proceedings.”

31. That announcement was picked up by major news outlets, and quickly came to the attention of Gemalto. A number of internal emails sent on 7 January 2009 between various senior employees of Gemalto, including Gemalto’s CEO, Executive General Counsel and Deputy General Counsel forwarded the Commission press release and/or a news articles reporting on the announcement, including some that named Infineon as confirming that it had been among the companies that had been dawn-raided by the Commission.
32. Mr de Fouchier sent an email asking Mr Roqueplo and Mr Dupré to “use your and KAB [key account buyer] network and fish for serious information on this”, in response to which Mr Dupré commented that Infineon had already been caught “red-handed” (“*la main dans le sac*”) for the same kind of collusion in the DRAM sector. Slightly later on the same day Mr Dupré forwarded to Mr de Fouchier and Mr Roqueplo a Reuters news report identifying Renesas, STM, and NXP as having confirmed that they had been subject to the Commission’s dawn raids, in addition to Infineon.
33. By 16 January 2009 there were discussions within Gemalto as to whether to consult a law firm with “heavyweight” competition law experience, in case the Commission investigation “turns sour and we consider suing our suppliers”.
34. On 3 July 2012, Gemalto received the first of two RFIs from the Commission. The opening paragraph read:

“The Commission is currently investigating alleged anti-competitive behaviour relating to smart card chips in the European Union/European Economic Area (EU/EEA). If the existence of such behaviour were to be confirmed, it might constitute an infringement of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) and Article 53 of the EEA Agreement. The present request for information is addressed to you as a customer on the relevant market, which may have knowledge of facts thought to be useful for the investigation of the Commission.”

35. The RFI went on to ask Gemalto to reply to various questions “with regard to the period 2003–2006”.
36. A second RFI was sent on 25 September 2012, with the same opening paragraph. The RFI went on to ask specific questions about particular SCCs supplied by Philips, Samsung, Renesas and Infineon, again covering the period 2003–2006.
37. As noted above, the Statement of Objections was announced on 22 April 2013. The Commission’s press release read:

“Antitrust: Commission sends statement of objections to suspected participants in smart card chips cartel

The European Commission has informed a number of suppliers of smart card chips of its preliminary view that they may have participated in a cartel, in breach of EU antitrust rules. The sending of a statement of objections does not prejudice the outcome of the investigation.

... The Commission has concerns that certain chips suppliers may have agreed or coordinated their behaviour in the European Economic Area (EEA) in order to keep prices up. That would breach Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the Agreement on the EEA, which prohibit cartels and restrictive business practices.”

38. Again, this announcement was reported in the press and discussed in internal Gemalto emails. Bloomberg reported on the same day that while the Commission press release did not identify the companies, Philips, Infineon, Samsung and Renesas had confirmed that they had received the Statement of Objections, and the Bloomberg article was forwarded internally within Gemalto. The CEO of Gemalto sent an email to Mr Rick Clemmer, CEO of NXP asking for his views on the Commission’s announcement, and on 24 April 2013 the minutes of a Gemalto board meeting recorded:

“We had to explain to third parties that Gemalto was not manufacturing chips, and consequently was not involved in the investigation recently launched by the European Commission against chip manufacturers. We could only be victims of unlawful activities, if any.”

39. A Statement of Objections is, however, regarded by the Commission as a confidential document. The full Statement of Objections was therefore not published by the Commission and has not been disclosed by the Defendants to Gemalto. (Prior to the case management conference on 31 March 2021 Gemalto had sought disclosure of the Statement of Objections, but that application was not ultimately pursued.) The Defendants' case on limitation is therefore not founded upon the content of the Statement of Objections itself, but rather on the announcement of the Statement of Objections taken together with the other materials set out above, including the two RFIs.

The meaning of “discovery” under s. 32(1)(b)

40. The interpretation and application of s. 32(1)(b) in the context of claims for damages for breaches of competition law has been considered in numerous recent cases. These include, in particular, three decisions of the Court of Appeal: *Arcadia Group Brands v Visa* [2015] EWCA Civ 883, *DSG Retail v Mastercard* [2020] EWCA Civ 671 and *OT Computers v Infineon Technologies* [2021] EWCA Civ 501. Reference was also made to the first instance decision of Foxton J in the last of those cases, then known as *Granville Technology Group v Infineon Technologies* [2020] EWHC 415 (Comm).
41. It is also necessary to consider the recent judgment of the Supreme Court in *Test Claimants in the Franked Investment Group Litigation v HMRC* [2020] UKSC 47 (“*FII*”). While the specific facts of that case concern tax claims relying on s. 32(1)(c), the judgment addresses in some detail the general approach to be taken to the running of the limitation period under s. 32(1).
42. As the Supreme Court observed in *FII* at §193, the purpose of the postponement of the limitation period under s. 32(1) is to ensure that a claimant is not disadvantaged, so far as limitation is concerned, by being unaware of the circumstances giving rise to its cause of action as a result of fraud, concealment or mistake.
43. Equally, however, the object of the Limitation Act is to set a time limit for the bringing of claims. A balance must therefore be struck between the need to ensure that the claimant is not disadvantaged by circumstances of which they are unaware, and the public interest in finality in litigation. As Rose LJ put it in *Canada Square Operations v Potter* [2021] EWCA Civ 339, §29, the Limitation Act “strikes a balance between the competing aims of protecting defendants from stale claims but allowing claimants to overcome the expiry of the ordinary time limit where the statute so provides”. Section 32(1), specifically, does so by starting time running from when the claimant either does discover or could with reasonable diligence have discovered the fraud, concealment or mistake.
44. The question of what constitutes “discovery” of the relevant fraud, concealment or mistake is a nuanced issue which as matters currently stand is governed by two lines of authority.
45. Prior to the decision of the Supreme Court in *FII*, the test generally applied was the “statement of claim” test of whether the claimant had sufficient knowledge to

be able properly to plead its claim. That test was applied in *Arcadia v Visa, DSG v Mastercard* and *Granville*.

46. In *FII*, however, where the issue concerned a mistake of law, the Supreme Court said that time should begin to run from the point when the claimant knows, or could with reasonable diligence know, about the mistake with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence: see §§190 and 193, adopting a formulation first set out by Lord Donaldson MR in *Halford v Brookes* [1991] 1 WLR 428, 443.
47. The Supreme Court expressly declined to consider whether that approach should also apply in fraud cases under s. 32(1)(a) (§191), and did not comment on whether the test that it had set out should apply in s. 32(1)(b) concealment cases. Five months later in *OT Computers* the Court of Appeal likewise left open the question as to the appropriate test to apply in s. 32(1)(b) cases, in circumstances where Foxton J at first instance in *Granville* had applied the statement of claim test, and there had been no appeal on that point.
48. Whether or not the *FII* test should now be extended to s. 32(1)(b) concealment cases is therefore an unresolved issue, which was addressed in the skeleton arguments for this hearing. Mr Turner contended that the appropriate test in the present case remained the statement of claim test. Mr Jowell and Ms Ford submitted that the *FII* test should be applied, and noted (as the Court of Appeal also commented in *OT Computers*, §26) that the consequence might be that time started to run earlier than under the statement of claim test. At the hearing, however, none of them were able to identify any practical difference that they said would result from the application of one or other of the two tests. Mr Turner's position was that Gemalto had insufficient knowledge, prior to the Decision, either to plead its claim or to embark on the preliminaries to issuing proceedings; and the Defendants' position was that on either formulation time started to run from at the latest the adoption and announcement of the Statement of Objections.
49. In those circumstances I will apply the statement of claim test for consistency with the approach taken in *Arcadia, DSG* and *Granville/OT Computers*, without expressing a view on whether that should now be displaced by the *FII* test for s. 32(1)(b) cases; that is a matter that is best decided on the facts of a case where it makes a difference to the outcome. (I note that essentially the same approach was adopted by Miles J in relation to a s. 32(1)(a) fraud claim in *European Real Estate Debt Fund (Cayman) v Treon* [2021] EWHC 2866 (Ch), §769(i).)
50. Applying the statement of claim test, it was common ground that time will start to run when the claimant's state of knowledge is such that it and its professional advisors can properly plead a claim that would not be liable to be struck out as unarguable or lacking sufficient evidential basis.
51. In order to plead a claim, the claimant must have sufficient material to be able properly to plead the relevant facts: *Granville* §28. That does not require the claimant to be certain of the relevant facts. As the Supreme Court emphasised in *FII*, §192, the limitation period is not postponed until the claimant has completed its investigations or is certain that the claim will succeed. Mere suspicion will not,

however, be enough, particularly if it is vague and unsupported: *Halford*, at 443. Rather, the standard is one of “reasonable belief” of the facts giving rise to the relevant cause of action: *Halford*, *ibid*, cited in *FII* §196.

52. In considering the question of whether the available material does give rise to a reasonable belief, it is well-established that s. 32(1) requires an objective approach. That is why the section puts the claimant who could with reasonable diligence have discovered the fraud, concealment or mistake on the same footing as the claimant who does in fact discover the relevant matter. It must also follow that an objective approach is required to the question of whether the material available to the claimant (or which would be available to the reasonably diligent claimant) at the relevant time supported a reasonable belief as to the facts giving rise to the cause of action. A claimant cannot be placed in a favourable position, as regards the application of s. 32(1), simply because it subjectively takes the view that the material before it does not suffice to plead a claim, in circumstances where objectively that material is sufficient for a proper claim to be pleaded.
53. Accordingly the question is whether at the relevant point in time the claimant had (or could with reasonable diligence have obtained) material that was objectively sufficient to support a reasonable belief as to the facts giving rise to the relevant cause of action. That is a fact-sensitive question which will turn on the circumstances and context of each individual case.

The sufficiency of the Commission’s pre-decision materials in principle

Submissions of the parties

54. Prior to the hearing there were some suggestions in the Defendants’ statements of case and skeleton arguments that they considered that the two RFIs provided Gemalto with sufficient knowledge to plead its damages claim. By the time of the hearing, however, Mr Jowell and Ms Ford both put their case on the basis of the information available by the time of the announcement of the Statement of Objections. Their submission was that, at least by then, Gemalto had sufficient information to identify all of the essential elements of the cartel which it was agreed had to be established in the present case for a claim in damages to be pleaded.
55. Mr Jowell and Ms Ford were careful to emphasise that they were *not* contending that an announcement of a Statement of Objections would, in every case, be sufficient for a claim in damages to be pleaded by a purchaser of a product that was alleged to be subject to a cartel. Their position was, however, that in the present case there was enough information before Gemalto through the combination of the content of the Commission’s press releases, the accompanying news reports and the two RFIs which had been sent to Gemalto in 2012.
56. Mr Turner in response pointed out that, as is set out in §§77 and 82 of the Commission’s Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU, [2001] OJ C308/6, a Statement of Objections sets out only the Commission’s preliminary position on the alleged infringement of the competition rules, the purpose of which is to inform the parties of the objections against them in order to enable them to exercise their

rights of defence and comment on the allegations. It does not prejudice the final outcome of the investigation and may well lead to the closing of the case without the adoption of an infringement decision.

57. In those circumstances, Mr Turner submitted, the announcement of a Statement of Objections is merely a preparatory step in the Commission's decision-making process which sets out suspected wrongdoing, and cannot in itself provide a *prima facie* basis for inferring that an infringement has occurred.
58. Mr Turner's conclusion was that a claimant cannot in principle rely on the announcement of a Statement of Objections (with or without related documents such as an RFI), without more, as the basis for pleading a claim in damages. Either the claimant would have to have independent evidence of the existence of the cartel, or the claimant would have to wait until the adoption of the Commission's final decision following its investigation. In the present case, he said, if Gemalto had filed a claim following the announcement of the Statement of Objections and before the adoption of the Decision, it would have been liable to be struck out.

Discussion and analysis

59. While Mr Turner is obviously correct to say that a Statement of Objections is a preparatory stage of the Commission's decision-making process, which will not inevitably result in an infringement decision, I do not consider that this in principle excludes reliance on the Statement of Objections as a basis for pleading a claim in damages. As §82 of the Best Practice Notice makes clear, a Statement of Objections constitutes the preliminary position of the Commission after an in-depth investigation. A potential claimant can properly infer that such a position does not represent merely speculation or suspicion, but is founded upon evidence that has been gathered during the course of the investigation.
60. That investigation will have necessarily included the gathering of information and evidence from the undertakings under investigation and any relevant third parties (such as purchasers of the products alleged to have been subject to a cartel). In many cases, including the present, the investigation will include dawn raids of the premises of one or more undertakings.
61. Paragraph 82 of the Best Practice Notice emphasises that one of the purposes of the Statement of Objections is to provide the parties with "all the information they need to defend themselves". It is thus not a partial or summary statement of the Commission's position, but a full statement of the evidence which the Commission considers provisionally establishes an infringement of the parties concerned. That is underscored by the fact that if the Commission ultimately wishes to rely on any further evidence in its decision, it is required to notify the parties in a Supplementary Statement of Objections or letter of facts: see §§109–112 of the Best Practice Notice.
62. By the time that the Commission adopts a Statement of Objections, therefore, it will have a far fuller evidence base for the infringements alleged than would normally be available to an individual claimant who brings a standalone cartel damages claim, who will not have the extensive investigatory powers of the

Commission and will not have had (by the time of pleading the Particulars of Claim) the benefit of disclosure.

63. In those circumstances, it would in my judgment be entirely reasonable for a claimant to rely upon the Commission's announcement of a Statement of Objections as a basis for a belief as to the existence of the cartel described in that Statement of Objections. If the Commission decides that the evidence in its possession is sufficient to form a preliminary view that an infringement has occurred, it is very difficult to see why a claimant cannot rely upon that decision as giving rise to a *prima facie* case that can be pleaded in a claim in domestic proceedings – subject of course to the question of whether the Commission's press release and any other available information contains enough material for the cartel to be pleaded with sufficient particularity, especially as to the identifying elements set out above.
64. Mr Turner objected that this conclusion would allow a claimant to rely on an inference of an infringement, without direct knowledge of any primary facts that would support the existence of that infringement. As the authorities make clear, however, the assessment of what a proper pleading requires will take account of the level of information that might reasonably be expected to be available to the claimant at that stage of the litigation. That is why in a case involving an alleged secret cartel, where by its nature the facts will be largely within the exclusive knowledge of the defendants, it is established that the courts will take a generous approach to the sufficiency of a pleading: *Nokia v AU Optronics* [2012] EWHC 731 (Ch), §§62–69; *Bord Na Mona Horticulture v British Polythene Industries* [2012] EWHC 3346 (Comm), §§30–31; *Granville* §§33–34.
65. In particular, it follows from the nature of a cartel claim that at the stage at which it is first pleaded the allegation of the facts of the cartel will typically rely largely or even entirely on second-hand information rather than direct knowledge on the part of the claimant of the underlying facts. There is nothing inherently objectionable about that. As Lord Phillips commented in a different context in *Ministry of Defence v AB* [2012] UKSC 9, §115, “Where some of the primary facts are in the exclusive knowledge of the defendant, reasonable belief in the existence of those facts will necessarily be founded on other secondary facts.” (While Lord Phillips dissented in relation to the main conclusions that he reached in that case, I do not understand this comment to have been controversial.)
66. It is striking that in the present case Gemalto's plea of loss and damage caused by the cartel does not rely on any direct evidence of loss and damage suffered by Gemalto, but rather relies exclusively on the conclusion of a 2009 Oxera study carried out for the Commission, which identified that the average international cartel overcharge was 26%. On that basis, Gemalto says that its best estimate of the level of the overcharge is 26%. In addition, it pleads loss and damage arising during an “overhang period” after the infringement came to an end, again without any direct evidence whatsoever, but on the basis that the length of the overhang period will be the subject of expert economic evidence in due course.
67. Mr Turner unsurprisingly did not suggest that this aspect of Gemalto's pleading was liable to be struck out for lack of direct evidence. He could not, however, offer any convincing reason why the courts should permit an inference of loss and

damage based on an average figure drawn from experience in other completely different cartel cases as reported in a 2009 study, while excluding a claim as to the existence of the cartel based on the far more concrete fact of a Commission Statement of Objections concerning precisely that cartel.

68. Mr Turner's other main objection relied upon the judicial policy objective of avoiding the filing of speculative claims, referring in particular to the comments of Sales LJ in *Playboy Club London v Banca Nazionale del Lavoro* [2018] EWCA Civ 2025, §46, cited by Snowden J in *Federal Deposit Insurance v Barclays Bank* [2020] EWHC 2001 (Ch), §§36–41. Those comments concerned the need for “a solid foundation in the evidence” supporting a claim of fraud or deceit, which Snowden J considered was also relevant to a competition law claim alleging the manipulation of USD LIBOR. In the present case, however, a claim brought following the announcement of the Statement of Objections would not have been a speculative claim with no solid evidential foundation, but would have relied on the provisional findings made by the designated EU regulator after an in-depth investigation. That would have been far less speculative than a claim brought without reference to any Commission investigation, on the basis of the sort of fragmentary evidence that may be available to a cartel damages claimant prior to disclosure.
69. A claimant might of course prefer as a matter of litigation strategy to wait for the final Commission decision before progressing its claim, in order that the claim might be pursued as a follow-on claim rather than a standalone claim. (That was what the claimants in the *Nokia* case – discussed below – obviously intended to do, as the judge recorded at §20.) In the present case the Decision was adopted on 3 September 2014, just over 17 months after the announcement of the Statement of Objections, and 26 months after the first RFI sent to Gemalto. Accordingly, even if time had started to run in this case from the first RFI, Gemalto could have waited to serve proceedings until the announcement of the Decision. In a case where that was not possible because the Commission's investigation was considerably more protracted, it would be open to a claimant to seek a stay of the proceedings once issued, pending adoption of the Decision.
70. Finally, in my judgment both *Nokia* and *Granville* support the analysis set out above. In *Nokia* a claim for damages arising out of an alleged cartel in the LCD screen sector was brought largely on the basis of a Commission investigation, which by the time of filing the claim had reached the stage of adoption of a Statement of Objections but had not resulted in a final decision. As it transpired, the decision that was ultimately adopted by the Commission (a year after *Nokia* had issued its claim) did not concern the size of LCDs used by *Nokia*. *Nokia*'s claim was therefore a standalone claim, and the essential issue before the court was whether it should be struck out. Sales J found in favour of *Nokia* and dismissed the defendants' strike out applications.
71. It was apparent from the paragraphs of *Nokia*'s original particulars of claim extracted at §39 of the judgment that while *Nokia* was able to set out, in very broad terms, the nature of the collusive arrangements that it alleged, it was unable to plead any precise particulars as to the parties to the cartel or its duration. Instead, *Nokia* had said:

“The secret nature of the Arrangements was such that Nokia is currently unable to specify exactly when they began or the names of all the undertakings who were parties to them. The best particulars that Nokia can presently give are that the Arrangements began no later than 1 January 1996 and continued to around December 2006 (‘the Cartel Period’), the latter date being the date on which the Commission ... commenced investigation of manufacturers of LCDs under Article 81(1) of the EC Treaty ...”

72. Sales J found at §51 “without hesitation” that those particulars of claim had pleaded a proper standalone cause of action against each of the defendants. He went on to explain that by reference, among other things, to the generous approach to the pleading of cartel claims, to which I have already referred.
73. Mr Turner sought to distinguish that ruling on the basis that Nokia had available to it additional material going beyond the Commission’s Statement of Objections, including in particular the fact that the cartel was part of a complex of international agreements which was also under investigation by the US Department of Justice and elsewhere, and the fact that it appeared that one or more undertakings party to the arrangements had pleaded guilty in the United States to participating in agreements or concerted practices to fix the prices of LCDs.
74. That does not, however, undermine the relevance of the judge’s analysis for the present proceedings. While Sales J did not specifically consider the issue before me as to the probative force of the announcement of a Statement of Objections, his judgment made clear that the particulars of claim were drafted “particularly in light of the Commission investigation” and the announcement of the adoption of a Statement of Objections in that investigation (§§17–20).
75. More importantly, the essential issue was the sufficiency of the pleaded case, in circumstances where – as was apparent from the extracts set out in the judgment – Nokia was in its original particulars of claim unable to provide more than the barest outline of the nature of the cartel that it alleged, drafted on the basis of inferences from what was known about the regulatory investigations. That was, however, found to be a sufficient pleading that did not fall to be struck out.
76. Similarly in *Granville* where (unlike *Nokia*) the specific issue before the court was limitation under s. 32(1)(b), the judge concluded that *Granville* had been able to plead viable claims before the announcement of the Commission’s decision (in that case a settlement decision). In particular, it is clear from the judge’s reasoning that he considered that appropriate inferences could and should have been drawn from materials relating to investigations by both the US Department of Justice and the Commission, as well as a draft class action complaint in the US. As he pointed out, these were the sorts of inferences that are routinely drawn by pleaders in cartel cases (see e.g. §§97, 114, 117, 123).
77. Again, while Mr Turner said that *Granville* should be distinguished on the basis of the existence of a parallel investigation in the US, in which two undertakings had admitted their involvement, the point made by Foxton J was that even if the facts relevant to the establishment of the cause of action in the domestic

proceedings were not known by Granville, including from the material available from the US proceedings, it could have drawn appropriate inferences so as to plead a viable claim before the adoption of the Commission's decision.

78. Mr Turner also pointed out that *Nokia* and *Granville* were decisions of courts of coordinate jurisdiction, so not strictly binding upon me. However, as a matter of judicial comity, the established practice is that I should depart from the reasoning of another judge of the High Court only if I am convinced that it was wrong: see e.g. *Lornamead Acquisitions v Kaupthing Bank* [2011] EWHC 2611 (Comm) §§53–56. For the reasons set out above, I do not consider the reasoning in *Nokia* and *Granville* to be wrong; on the contrary, I have reached effectively the same conclusions as the judges in those cases did, albeit on the basis of submissions that in this case focused on the specific relevance of a Statement of Objections, without the addition of materials from investigations by other regulators.
79. In principle, therefore, I consider that Gemalto could properly have pleaded a claim following the announcement of the Statement of Objections, if the content of that announcement combined with the other material then available to Gemalto allowed Gemalto to identify the essential elements of the cartel.

Gemalto's knowledge of the time period of the infringement

80. That raises Mr Turner's further argument, which was that even if in principle the Statement of Objections could have been relied upon by Gemalto in pleading its claim against the Defendants, the information available to Gemalto as to the content of the Statement of Objections was incomplete and did not include all of the essential identifying elements of the cartel.
81. Mr Turner did not dispute that the Commission's press release announcing the suspected infringement set out the general nature of the agreement in sufficient detail to form the basis of a pleading, and also confirmed that the geographic scope of the agreement extended to the EEA. While the press release did not itself identify the undertakings who had participated in the agreement, Philips, Infineon, Samsung and Renesas all confirmed that they had received the Statement of Objections, and this was reported in a Bloomberg article circulated within Gemalto.
82. However neither the Commission's press releases nor the accompanying news reports identified the time period of the infringement. The only material available to Gemalto as to that was the two RFIs which identified a relevant time period of 2003–2006 for the purposes of the questions put to Gemalto. That was, Mr Turner said, an insufficient basis for Gemalto to plead the time period of the infringement, since the Commission did not thereby indicate that its allegations related to the whole of that time period, and the RFI was in any case historic. Indeed, the Decision ultimately found an infringement that took effect solely from September 2003 to September 2005.
83. Mr Jowell and Ms Ford's response was that it was sufficient that an approximate time period could be pleaded. That is, in my judgment, plainly correct. Any standalone cartel damages claim (which the present claim would have been, if pleaded prior to the adoption of the Decision) is likely to rest on substantially

incomplete information; indeed it is very unlikely that, prior to disclosure, a claimant bringing a standalone claim will be able to identify with precision all of the essential elements of the cartel. The claimant may well not be aware, for example, of all of the undertakings who participated in the cartel; nor is the claimant likely to have sufficient material to be able to identify precisely the time period of the alleged infringement. In the same way, the precise mechanics and scope of the cartel are very unlikely to be known at that stage.

84. A requirement for a precise pleading as to those elements of the claim would therefore place an impossible burden on a standalone claimant. Sales J rejected such an approach in *Nokia*, and in my judgment he was entirely right to do so. The result was that in *Nokia* the pleading of a very approximate time period, based on the material available to the claimant, was held to be sufficient. The same applies in the present case.
85. Gemalto could, therefore, legitimately have pleaded a cartel covering the time period 2003–2006, on the basis of the period identified in the two RFIs. That would of course have required drawing an inference from the RFIs that this was the period during which the Commission suspected an infringement had taken place. As I have already discussed, however, the reliance by a cartel claimant on inferences drawn from the material available to it, in order to plead its claim, is not only acceptable in principle but is likely to be inevitable in most standalone cartel claims, at least prior to disclosure.

The subjective views of Gemalto's witnesses

86. The final question is the relevance of the views of Gemalto's witnesses regarding the Commission's investigation and whether an infringement would likely be found.
87. All four witnesses gave evidence to the effect that they had no information to confirm that there was a cartel and/or believed that the investigation would probably come to nothing, particularly given that the prices of SCCs were going down. That remained their view even after Gemalto received RFIs from the Commission. Mr Chanay said that even after the announcement of the Statement of Objections, he did not consider that Gemalto could bring a claim.
88. In addition, Mr Roqueplo said that he recalled asking Mr Bernd Meier, who was the Infineon Sales Director and his main contact within Infineon at the time, about the Commission investigation, most likely in early 2009 after Gemalto had first heard about the investigation. According to Mr Roqueplo, Mr Meier had responded by saying that Infineon was not concerned about the investigation and had nothing to hide from the Commission. Mr Chanay also recollected that the investigation had been mentioned by Infineon at a meeting, with the comment there was nothing behind the allegations so there was no concern.
89. Mr Turner submitted that this evidence was relevant and should be taken into account in determining whether Gemalto could properly have pleaded its claim prior to the adoption of the Decision. I disagree. As I have already discussed, the question of whether the material before a claimant is sufficient to give rise to a reasonable belief of the facts required to plead a claim is to be judged by an

objective standard. The limitation period is not postponed simply because individuals within the claimant do not themselves consider that they have a basis to bring a claim.

90. As for Infineon's denials of wrongdoing, as the Supreme Court observed in *FII*, §§196 and 202, it is in the nature of litigation that facts and law are commonly disputed, and it is the function of the court to resolve those disputes. The fact that a defendant disputes an element of the cause of action does not, therefore, mean that the commencement of the limitation period is postponed until that dispute has been resolved.

Conclusion

91. For the reasons set out above, my conclusion is that by the time of the announcement of the Statement of Objections, taking account also of the other information available to it, Gemalto had sufficient material before it to be able to form a reasonable belief as to the essential elements of a claim for damages arising from the cartel, sufficient to plead a claim at that stage without waiting for the Decision. It follows that time started to run, for the purposes of s. 32(1)(b), from at least around the end of April 2013. The limitation period therefore expired prior to the date on which Gemalto's claim was brought in the present proceedings.
92. I do not, in the circumstances, need to express a view on whether Gemalto could have pleaded its case at an earlier date, for example following receipt of the two RFIs. As I have noted above, the Defendants did not ultimately put their case on that basis at the hearing.