



Neutral Citation Number: [2022] EWCA Civ 423

Case No: CA-2021-000656 (formerly A4/2021/1107)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Sir Michael Burton GBE
[2021] EWHC 1429 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before:

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LORD JUSTICE SNOWDEN

Between:

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

Robert O'Donoghue QC & Tom Pascoe (instructed by **Covington & Burling LLP**) for the
Appellants/Claimants

Daniel Piccinin (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the
Respondents/Defendants

Hearing date: 16 March 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be at 10.30 a.m. on Friday 1st April 2022.

Lord Justice Males:

1. The judge below, Sir Michael Burton GBE, was not persuaded that England is clearly the appropriate forum for the trial of this action. Accordingly he set aside the order for service on the defendants out of the jurisdiction. The only issue on this appeal is whether he was wrong to do so. That is not usually an issue suitable for an appeal to this court, involving as it does an evaluative judgment by the first instance judge which requires the weighing of a number of factors, but I was persuaded to give permission to appeal on the basis that a question of principle arose as to the approach to be taken to contribution proceedings in competition claims.
2. It is generally the case, when an issue about appropriate forum arises, that there will be a range of factors to be considered, some of which will point in favour of English jurisdiction, while others will be neutral or will point to the appropriateness of proceedings elsewhere. It is for the parties to identify the connecting factors on which they rely. It is then for the judge to decide how much weight to give to the various factors and to decide where the balance lies. The test to be applied in a case involving permission to serve out of the jurisdiction is whether the court is satisfied that England and Wales “is the proper place in which to bring the claim” (CPR 6.37(3)).¹ As explained in such well-known cases as *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 and *VTB Capital Plc v Nutritek International Corpn* [2013] UKSC 5, [2013] 2 AC 337, this means that the burden is on the claimant to satisfy the court that England is clearly the appropriate forum for the claim.
3. Accordingly it is not enough that the issue is finely balanced, or even that proceedings in England are marginally more appropriate than proceedings elsewhere. England must be clearly the appropriate forum.
4. Often the question whether this test is satisfied will not have a single right answer. Views may reasonably differ as to the weight to be attributed to the different connecting factors relied on. The fact that this court might (or even would) have reached a different conclusion from the judge below is not in itself a reason to allow an appeal. Rather, this court may only interfere if the judge has made “a significant error of principle, or a significant error in the considerations taken or not taken into account” (*VTB Capital v Nutritek* at [69]: similar formulations to much the same effect can also be found in other cases).
5. Further, it is important to say that the function of this court is to review the decision of the court below. The question is whether the judge has made a significant error having regard to the evidence adduced and the submissions advanced in the lower court. Just as the trial of an action is not a dress rehearsal for an appeal (see the well-known metaphor of Lord Justice Lewison in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]), neither is an application to set aside an order for service out of the jurisdiction. In general an appellant will not be permitted to rely on material which the judge was not invited to consider or to advance an entirely new basis for saying that the judge’s evaluation on the issue of appropriate forum was wrong. A judge can hardly be criticised for not taking something into account if he was never asked to do so. Although no doubt this principle will be applied with some flexibility, bearing in mind that the

¹ The rule refers to England and Wales, although in practice Commercial Court cases with an international element involving foreign defendants are invariably tried in London.

ultimate *Spiliada* question is concerned with “the interests of all the parties and ... the ends of justice”, good reason will be required for taking a different approach.

Background

6. The parties to this action were participants in a price-fixing cartel leading to sales of liquid crystal display (“LCD”) panels in the European Union, including the United Kingdom, at inflated prices, contrary to Article 101 of the Treaty on the Functioning of the European Union. LCD panels are the main components of thin, flat monitors used for (among other things) televisions, computers, digital watches and pocket calculators.
7. The participants in the cartel were mainly based in the Far East, in South Korea and Taiwan. Samsung Electronics Co Ltd and LG Display Co Ltd, respectively the first claimant/appellant and the first defendant/respondent, are both Korean companies. They are the ultimate parent companies of groups operating worldwide in the manufacture and sale of (among other things) LCD panels. I will refer to the appellant claimants as “Samsung” and the respondent defendants as “LG” without distinguishing between companies in the respective groups. There is no need to do so for the purpose of this appeal.
8. The cartel operated between October 2001 and February 2006. It did so through monthly meetings of senior representatives of the participants which took place in Taiwan. The meetings were conducted in the English language.
9. Between 2006 and December 2010 the European Commission carried out an investigation into the operation of the cartel. That resulted in a Decision dated 8th December 2010 (“the Commission Decision”) addressed to (among others) the first two claimants and both defendants. The Commission found that the addressees had infringed Article 101 “by participating ... in a single and continuous agreement and concerted practice in the sector of Liquid Crystal Display panels for TV, notebook and monitor application” and ordered them to bring the infringement to an end immediately insofar as they had not already done so. Fines were levied on the participants, although in Samsung’s case immunity was granted on the ground that Samsung had sought leniency pursuant to the Commission’s Leniency Notice (Commission Notice 2002/C 45/03) and had co-operated with the investigation. LG had also sought immunity, but this was not granted as it was Samsung which had made the first disclosure to the Commission. However, as a result of LG’s co-operation, which included extensive disclosure of documents including records of the cartel meetings in Taiwan, its fine was reduced by 50%.
10. On 9th July 2015, 42 UK local authorities issued a follow-on claim against Samsung for damages for breach of Article 101, relying on the findings in the Commission Decision. They claimed damages of approximately £5.4 million consisting of the “overcharge” on products containing LCD panels purchased by them from participants in the cartel, including Samsung and LG. They held the Samsung companies jointly and severally liable for all of the losses caused to them by the cartel’s excessive pricing, i.e. including losses caused by purchases at excessive prices from other cartel participants.
11. On 4th September 2018 the Samsung companies concluded a settlement agreement with the local authorities by which they settled the claim for £1.6 million plus costs. They

did so without, by that stage, having sought contribution from any of the other participants in the cartel.

12. On 17th August 2020 (i.e. very shortly before the expiry of the two-year limitation period for contribution claims in section 10 of the Limitation Act 1980) Samsung issued a claim for contribution under the Civil Liability (Contribution) Act 1978 against LG. It did so on the basis that the settlement sum was paid in a *bona fide* settlement with the local authorities; that LG was liable for the same damage under section 1 of the 1978 Act; and that LG's just and equitable share of the damage was £900,000, assessed by reference to its market share. Permission to serve out of the jurisdiction was given by Mr Justice Henshaw.
13. LG contested the jurisdiction of the English court, submitting that none of the service gateways in paragraph 3 of CPR Practice Direction 6B was applicable and that in any event Samsung had failed to show that England was clearly the appropriate forum for the claim.

The claim for contribution

14. The 1978 Act provides as follows:

"1 - Entitlement to contribution.

(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

...

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage ... shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

...

(6) References in this section to a person's liability in respect of any damage or references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

2- Assessment of contribution.

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

15. Although it applies only to infringements occurring after March 2017, and therefore does not apply here, paragraph 38(2) of Schedule 8A to the Competition Act 1998 provides that:

"The amount of contribution that one person liable in respect of the loss or damage may recover from another must be determined in the light of their relative responsibility for the whole of the loss or damage caused by the infringement."

16. Two factors have generally been regarded as important in determining what amount of contribution it is just and equitable to award, namely (1) culpability and (2) causation. Thus it has been said that a fraudulent wrongdoer should pay more than a wrongdoer who is merely negligent, as should a wrongdoer whose conduct causes a greater part of the loss or has a greater causative effect than a wrongdoer whose conduct is less causatively potent. This was explained by Lord Justice Hobhouse in *Downs v Chappell* [1997] 1 WLR 426, 445, where one defendant had been fraudulent and the other negligent, but on the facts it was the latter's conduct which had the greater causative effect:

"The extent of a person's responsibility involves both the degree of his fault and the degree to which it contributed to the damage in question. It is just and equitable to take into account both the seriousness of the respective parties' faults and their causative relevance. A more serious fault having less causative impact on the plaintiff's damage may represent an equivalent responsibility to a less serious fault which had a greater causative impact. The present case is such a case. The judge was entitled to decline to distinguish between the responsibility of the two defendants for the damage to the plaintiffs."

17. European law leaves the assessment of contribution to national law, provided that national law respects the EU law principles of effectiveness and equivalence. Recital (37) to Directive 2014/104/EU on certain rules governing actions for damages under national law states that:

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

applicable national law, while respecting the principles of effectiveness and equivalence.”

18. Thus although a party’s turnover or market share (which correspond broadly to factors relevant to the causation of damage) are expressly referred to as relevant criteria, so too is a party’s role in the cartel, which may be more relevant to questions of culpability. In general, what is just and equitable will be assessed with a fairly broad brush, as *ex hypothesi* both parties are wrongdoers and an unduly granular approach would be a disproportionate use of the court’s resources to the prejudice of other litigants.
19. It is Samsung’s case that both parties should be regarded as equally culpable and that the amount of contribution should be determined by reference to the parties’ share of the relevant market, that being the best available measure of the causative effect of each party’s participation in the cartel on the damage suffered by the UK local authorities. On that basis, although there might be room for debate about what is the relevant market and each party’s share of that market, the claim for contribution would be within a relatively narrow compass. LG, in contrast, says that it played a lesser role in the cartel, that it was therefore less culpable than Samsung, and that its share of the damages should be reduced to reflect this. It wishes to adduce witness and documentary evidence to demonstrate that this is so, which would considerably expand the scope of the proceedings. However, LG has not contended that it should not be held liable to make any contribution at all.

The judgment

20. The judge dealt first with the applicability of the service gateways in paragraph 3 of CPR Practice Direction 6B. He held that the tort gateway (“a claim is made in tort”) and, if necessary, the restitution gateway (“a claim is made for restitution”) applied. There is no challenge to those conclusions.
21. The judge noted that there was no evidence that contribution proceedings could not be brought in the Far East, either in South Korea or Taiwan, or that any relevant limitation period had expired there. Accordingly the case had to be decided on the basis that proceedings could be brought in the Far East. That approach has not been challenged and is clearly correct. If Samsung wished to submit that England was the appropriate forum because proceedings could not be brought in South Korea or Taiwan, it would have had to adduce evidence to that effect. In the event it made no such submission.
22. The judge recorded the parties’ submissions on the issue of appropriate forum at [18] to [21] of his judgment:

“18. Mr Plewman [then lead counsel for Samsung] put what he submitted to be such a clear case in paragraph 55 of his skeleton as follows: –

- i) The claim is brought pursuant to English law (the Act):
- ii) It concerns a settlement agreement concluded in England, governed by English law:
- iii) The Third and Fourth Claimants are English companies:

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

v) The English courts have already taken jurisdiction over a whole series of actions relating to the cartel, including a claim to which LGD was a party (*iiyama*) [*iiyama v Samsung Electronics Ltd* [2016] EWHC 1980 (Ch), 2016] 5 CMLR 16; [2018] EWCA Civ 220, [2018] 4 CMLR 23].

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

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

ii) The Commission has decided that the tortfeasors were equally responsible: see paragraph 277 of the Decision:

‘An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement.’

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

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

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

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

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

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

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

ii) The Commission can have reached no decision that all the tortfeasors were equally responsible *inter se*. Indeed, this is clear from paragraph 276:

'Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may even occur, but will not however prevent the arrangement from constituting an agreement/concerted practice where there is a single common and continuing objective.'

The relative responsibility of the tortfeasors was of no interest to the Commission.²

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

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

v) Such a dispute must be resolved by an assessment of the documents, not limited to those attached to or translated by the Commission Decision. There will need to be consideration as to whether there are other documents, or other documents not translated into English. Analysis of the respective roles will be needed, as for example as to who was the 'ringleader', as per paragraph 276 of the Decision. This would need cross-examination of witnesses and disclosure of documents. All this should be carried out in the Far East, and there was no suggestion whatever made by the Claimants that there could not be a fair trial of the issue of relative responsibility for the infringement. Mr Kelly [the defendants' solicitor] in paragraph 30 of his witness statement asserted that there could be, and there was no response to that at all, just as there was no response to the suggestion in paragraph 29 of the need for witness and documentary evidence. In *VTB* it was made entirely clear by Lord Mance at [62] that the factor of location of witnesses is 'at the core of the question of appropriate forum'.

21. Following a query from the Court in the light of Mr Plewman's submissions, Mr Piccinin on behalf of LGD gave undertakings to accept in any proceedings both that LGD are bound by the finding of infringement by the Commission

² In fact this was the judge's phrase, not Mr Piccinin's. Mr Piccinin made the narrower (and, as I shall explain, correct) submission that the paragraphs of the Commission Decision relied on by Samsung were not concerned with the relative responsibility of the parties for the purpose of contribution.

Decision and that they are, in accordance with s1(1) of the Act, persons liable in respect of the same damage.”

23. The judge then stated his conclusion briefly:

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

24. The judge went on at [23] to reject a submission that Samsung had failed to make proper disclosure at the *ex parte* stage. In the course of doing so he commented that “the issue in this case was not the proof of the infringement but the analysis of responsibility as between the tortfeasors”.

25. Although the judge could usefully have expanded somewhat on this brief statement of his conclusion, it is a reasonable inference that he considered the factors relied on by Samsung as connecting the claim with English jurisdiction to be outweighed by the factors relied on by LG as pointing to the Far East. In particular, the judge clearly regarded the relative culpability of the parties for the infringement of Article 101 as an important issue arising in the contribution claim, which would require cross-examination of witnesses and disclosure of documents, and considered that this would best be carried out in the Far East. It is also apparent that the judge accepted the submission of Mr Daniel Piccinin for LG that the relative responsibility of the parties “was of no interest to the Commission” and had not been decided by it.

Grounds of appeal

26. There are three grounds of appeal. I will deal with them in turn.

Ground 1 – an issue of principle?

27. The first ground is that the judge was wrong to find that, in cases based on tortious acts committed abroad, (1) a contribution claim commenced after settlement of the main action should usually be heard in the jurisdiction where those acts took place, rather than the forum of the main claim, and (2) the fact that the *forum conveniens* for the main claim was England was of little or no relevance to identifying the *forum conveniens* for the contribution claim. It is this ground which is said by Samsung to give rise to an issue of principle.

28. For Samsung Mr Robert O’Donoghue QC submitted that the factors connecting the underlying claim to this jurisdiction were highly significant in determining the appropriate court to hear the contribution claim and that it was unprincipled and undesirable for contribution claims to be heard in a different forum from that where the

underlying claim was to be heard. The judge's conclusion meant that England will generally not be the appropriate forum for contribution claims based on torts committed abroad which cause damage in England, unless they are included as Part 20 claims in the underlying proceedings. Further, the judge's conclusion created an arbitrary distinction between contribution claims commenced before settlement of the underlying claim and those commenced after settlement or judgment, would incentivise defendants to serve unnecessary contribution claims before settling the underlying claim, and would act as a disincentive to settlement of the underlying claim contrary to the policy behind section 1(4) of the 1978 Act.

29. The short answer to this ground of appeal is that the judge made no decision about where contribution claims should *usually* be heard. His brief judgment on the issue of appropriate forum does not read as if he were deciding some question of principle intended to set a precedent for other cases. He focused entirely on where *this* contribution claim should be held. He recognised that if the underlying claim is proceeding here, either because there are English defendants or because England is the natural forum for the claim, that will be a powerful and sometimes overwhelming factor in favour of hearing the contribution claim here. I would endorse that view. But if the underlying claim has been settled before the contribution claim is commenced, the only question will be what is the appropriate forum for the trial of the contribution claim. Factors going *only* to the appropriateness of this jurisdiction for the trial of an underlying claim which will never take place because it has been settled are at most of marginal relevance to that question. That said, I would accept that the connecting factors relied on by Samsung, including that the infringing sales took place and the damage was suffered here, may be relevant to the contribution claim. However, their weight must be a matter for the judge. If this has the consequence that defendants sometimes issue contribution proceedings before settling the underlying claim, so be it. As Mr Piccinin submitted, that is often what they do anyway.
30. Mr O'Donoghue submitted in writing that the separation of contribution proceedings from the underlying claim, with contribution proceedings dispatched to a different jurisdiction, created a disincentive to bringing contribution claims where the claim value is relatively modest, and is therefore contrary to the EU law principle of effectiveness: infringers have a right to pursue their co-infringers for contribution (see Recital (37) to Directive 2014/104/EU); and national law must be such as to render that right effective. No such submission was made below and the argument was not developed at the hearing of the appeal. Even assuming that the point is open in this court, I would reject it. It was always open to Samsung to issue contribution proceedings before settling the underlying claim, while as already noted Samsung adduced no evidence to suggest that it could not obtain an effective remedy in South Korea or Taiwan.
31. Finally on this issue, Mr O'Donoghue submitted that Samsung and LG had been involved in litigation in England arising out of the Commission Decision for over a decade, including the *iiyama* litigation to which the judge referred, as well as a number of other cases. Both firms of solicitors acting in this claim had represented their clients in litigation going back many years concerning this cartel, including the proceedings before the Commission, even if the personnel dealing with these matters may have changed from time to time. As a result English legal teams and experts had built up a substantial bank of knowledge and expertise which would be highly relevant to the

contribution claim by Samsung against LG, while all of the documents which had been before the Commission were available here and were either in English or had been translated into English. It would therefore be wasteful to start effectively from scratch in South Korea or Taiwan. This was essentially “the *Cambridgeshire* factor” which had proved decisive in the *Spiliada* case and was a further reason why the contribution proceedings ought to be heard in the same forum as the underlying claim.

32. I would accept that this was capable of being a powerful factor in favour of English jurisdiction. However, it was not supported by evidence, as it needed to be if it was to be a factor to which the judge was invited to give weight; and it was only during the hearing of the appeal that some of the points going to this factor were first made. For example, we were only told during the hearing that the same firms of solicitors had been acting for the parties since the Commission Decision. If Samsung had adduced evidence about the knowledge and expertise built up over the years by the English legal teams and the extent to which new lawyers would have to be instructed for proceedings in South Korea, it would have been open to LG to respond with evidence about the extent to which equivalent knowledge and expertise had already been built up by lawyers acting for it over the years in South Korea or elsewhere. As it was, these matters were scarcely touched on before the judge and were only addressed in submissions at the appeal without supporting evidence. I would accept Mr Piccinin’s submission that this was not satisfactory. The evidence does not need to descend to minute detail, but does have to be sufficient to lay a proper factual foundation for matters to which the judge is invited to give weight as supporting the exercise of jurisdiction by the English court.
33. Indeed it does not appear that this “*Cambridgeshire* factor” point was made at all before the judge, as distinct from a related point concerning the availability here of documents on the Commission file and the inconvenience of having to translate the Commission Decision into Korean.

Ground 2 – the issues in the contribution claim

34. The second ground of appeal is that the judge made an error of principle which vitiated his conclusion: he erred in his assessment of the way in which liability should be apportioned between co-cartelists under the 1978 Act in circumstances where the cartel has been the subject of a detailed and binding decision of a competition authority. As developed by Mr O’Donoghue, there were two aspects to this submission.

Is the Commission Decision binding?

35. The first was that, contrary to the judge’s assumption, it is not open to LG to revisit in these proceedings the question of its precise role in the cartel. That was because LG’s role in the cartel was the subject of findings by the Commission which would be binding in an English court.
36. Thus LG had expressly raised the issue of its role in the cartel before the Commission, submitting that “its participation in the infringement was more limited than that of other parties, as it did not participate from the outset, did not collude on production limitation, hosted no meetings, attended via lower-level employees and took measures to enforce compliance with competition law” (see recital 428), and that as a result it should receive

a lower fine. The Commission had expressly dealt with and rejected this submission at recitals 438, 447 and 448:

“438. ... As regards [LG’s] claim concerning its limited role, it can be established that although it did not host meetings itself, it actively participated at the meetings from the first meeting held on 5 October 2001 being rarely if ever absent. It was often represented by high level officials who were, anyway, regularly informed about the meetings.

447. It should be noted that [LG] participated in the infringement from the beginning of [the] infringing period. Its participation was as active as that of the other participants, and does not warrant any reduction of the fine just because the Korean companies were not themselves hosting meetings in Korea. It is also established that high-level management of [LG] was involved and participated in CEO meetings. As the nature of the agreement is, in line with the [Statement of Objections], qualified as a price fixing agreement (see recital 297), the alleged non-participation in an output limitation cannot be considered as a mitigating circumstance. Moreover and in any event, the Commission has established that the parties, including [LG] colluded on production volumes (see for example recitals 102, 107, 120, 149, 154, 156, 171, 192 and 222).

448. Based on the above, it must be concluded that there are no mitigating circumstances applicable in this case. In the absence of aggravating and mitigating circumstances, the basic amounts of the fines to be imposed on each undertaking should not be adjusted.”

37. Accordingly, Mr O’Donoghue submitted, the rejection of LG’s case that it had played a lesser role in the cartel was “an essential basis or the necessary support for a determination in the operative part, or necessary to understand the scope of the operative part” of the Commission Decision, and was therefore binding in follow-on proceedings, including contribution proceedings. The language quoted is taken from the Competition Appeal Tribunal decision in *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 7, [2020] Bus LR 1795 (see also *Britned Development Ltd* [2018] EWHC 2616 (Ch) at [67], describing “a recital constituting part of the essential basis for a decision” as binding on the English court).
38. This is a powerful argument, but it was not addressed to the judge. Although the Commission Decision was before the judge, he made clear (correctly) that he had not been invited to read it and would need to have his attention drawn to anything of relevance. In response counsel for Samsung invited him to skim-read (over the lunch adjournment) section 4 of the Decision, headed “Description of Events”, which contains a very detailed factual account of the meetings of the cartel, where they took place, who attended and what was discussed, but draws no conclusions; and to focus on section 5, headed “Application of Article 101 of the Treaty and Article 53 of the EEA Agreement”. It is this latter section which sets out the Commission’s finding that there

was a single, complex and continuous infringement and which includes the paragraphs quoted by the judge in his judgment:

“276. Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may even occur, but will not however prevent the arrangement from constituting an agreement/concerted practice where there is a single common and continuing objective.

277. The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk.”

39. The judge was not invited to read section 8 of the Decision, headed “Remedies”³, which included the recitals set out above which deal with and reject LG’s argument that it should receive a lesser fine on account of its lesser role in the cartel. Indeed, if this section of the Commission Decision had been drawn to the judge’s attention, he could not possibly have concluded that “the relative responsibility of the tortfeasors was of no interest to the Commission” (see footnote 2 above).
40. It is true that counsel then appearing for Samsung did submit that the Commission Decision was binding on an English court, and submitted that the Commission had decided that the tortfeasors were equally responsible (see the submission recorded at [19(ii)] of the judgment, by reference to recital 277). It is not surprising that the judge was unimpressed by that submission. Recitals 276 and 277 do not deal with the relative culpability of infringing parties as between themselves. They address a separate point, namely that undertakings which take part in a common unlawful enterprise are equally responsible *to the victims of the infringement*, that is to say they are each jointly and severally liable to victims for the infringement as a whole. Those recitals, therefore, are entirely consistent with the judge’s view that “the relative responsibility of the tortfeasors was of no interest to the Commission”.
41. In the result we do not know what view the judge would have taken if faced with a submission that the Commission Decision was binding on the issue of relative culpability because of the rejection of LG’s argument that it had played a lesser role and should therefore receive a lesser fine. It is at least arguable that the Commission

³ Apart from one recital not material to the question of relative responsibility.

Decision is binding on this issue, applying the criteria in *Trucks* and *Britned*. Those cases are not binding on this court, but they appear to represent the clearest statements in this jurisdiction of the extent to which findings (or recitals) in Commission Decisions are binding on national courts. (When *Trucks* came on appeal to this court (*AB Volvo v Ryder Ltd* [2020] EWCA Civ 1475, [2021] 4 CMLR 7), it proved unnecessary to decide what test applied in order to ascertain when a recital is binding on the court).

42. If the Commission Decision is binding on the issue of relative culpability, evidence to contradict it will not be admissible, even if available. In that event the judge's view that the issue of relative culpability needs to be tried in the Far East, with the benefit of witness evidence and disclosure of documents there, would be mistaken. Moreover, the question whether the Commission findings are binding is itself a question of English or EU law, requiring careful analysis of the Commission Decision, which might well be better determined here rather than in the Far East. Indeed, it seems unlikely that the question whether particular recitals are binding would arise in a South Korean or Taiwanese court at all, although there is no evidence about this.
43. I would therefore accept that if the argument developed before us had been made to the judge, that might have led to a different outcome. But it would be unfair and wrong to say that the judge had made a significant error of principle, or a significant error in failing to take the relevant paragraphs of the Commission Decision into account, when he was not asked to do so. He dealt with the issue whether the Commission Decision was binding on the question of relative culpability on the basis of the submissions made to him and it cannot be said that he reached a conclusion not rationally open to him.

Is it realistic that there is further material available?

44. The second aspect of Mr O'Donoghue's submission was that, at least in the case of a cartel that has been found to constitute a single and continuous infringement, comprising regular meetings over many years between intentionally participating parties, the primary and only realistic method of apportioning responsibility must relate to causative consequence, assessed by share of relevant purchases or market share or some similar metric. To the extent that this submission is a proposition of law, i.e. that in such a case contribution *must* be assessed in this way, I would reject it. The principles summarised earlier in this judgment demonstrate that relative culpability is a relevant consideration.
45. However, as a matter of practicality, the submission has more force. It can reasonably be assumed that LG deployed before the Commission (where it faced a fine of several hundred million Euros) the best case it was able to deploy in order to suggest that it should pay a reduced fine on account of its lesser role in the cartel. Moreover, it had been a condition of seeking immunity that LG "co-operate fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provide the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement" (see the Commission's Leniency Notice). It is therefore implausible to suggest that, more than 12 years later, LG will be able to adduce evidence painting a materially different picture on the issue of relative culpability from that set out in the Commission Decision. No witness has been identified who would be able to do so. No document or source of documents has been identified which was overlooked when LG was seeking to persuade the Commission to reduce its fine.

46. In those circumstances many judges might have been sceptical about the suggestion that there needed to be witness evidence and disclosure of documents in the Far East in order for the issue of relative culpability to be determined. But I do not think it is possible to say that the judge's view was not rationally open to him. In particular, counsel then appearing for Samsung appears expressly to have accepted that further relevant documents, not disclosed to the Commission, might be available.

Ground 3 – striking the balance

47. The third ground of appeal, which as I understand it is really the corollary of the first two grounds, is that if the judge had approached the question of *forum conveniens* correctly, he would have found that England was clearly the most appropriate forum for the contribution claim. As I have concluded on ground one that the judge did not make the error of principle attributed to him and on ground two that he was entitled to regard the question of relative culpability as an important issue arising in the contribution proceedings, ground three does not really arise.
48. It is therefore sufficient to say that it has not been shown that, on the basis of the arguments presented to him, the judge made any significant error of principle. It may be, even on the basis of those arguments, that other judges would have reached a different conclusion, but that is not the question. It is also possible that if the arguments made in this court had been advanced before the judge and supported by evidence, the outcome would have been different. But that is not the question either.
49. As I said at the outset, I was persuaded to give permission to appeal because it appeared that a question of principle might arise. With the benefit of argument, I doubt whether that is so. However, this appeal will have served a useful purpose if it underlines the importance, in this context as elsewhere, of getting it right first time.

Disposal

50. I would therefore dismiss the appeal.

Postscript – confidentiality

51. The parties were united in urging upon us that the Commission Decision is confidential and that reference to its recitals should not be made in open court. I have to say that, as a general proposition, this seems paradoxical. I find it hard to see how a Decision can at the same time be both confidential and binding in public follow-on proceedings. To that extent it appears that any requirement of confidentiality may be in tension with the fundamental constitutional principle of open justice. Moreover, this particular Commission Decision deals with events which are now in the distant past and has been extensively litigated in the years since it was made. It is hard to think that there is any real confidentiality left.
52. Nevertheless I have been careful to confine my citation from the Decision to what is necessary to explain the submissions made to us and the conclusions which I have reached. I have referred only to recitals which were alleged to explain and support the operative part of the Decision (cf. *Emerald Supplies Ltd v British Airways Plc* [2015] EWCA Civ, [2016] Bus LR 145 at [68]) and have omitted any reference to other participants in the cartel who were not represented before us.

Lord Justice Snowden:

53. I agree.

Lord Justice Lewison:

54. I also agree.