



Neutral Citation Number: [2016] EWHC 1207 (Ch)

Case No: HC-2014-001979

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
London, EC4A 1NL

Date: 23/05/2016

Before :

MR JUSTICE MANN

Between :

- (1) IYAMA BENELUX BV
(2) IYAMA DEUTSCHLAND GMBH
(3) IYAMA (UK) LIMITED
(4) IYAMA POLSKA SP. Z O O
(5) IYAMA FRANCE S.A.R.L
(6) MOUSE COMPUTERS CO LTD

Claimants

- and -

- (1) SCHOTT AG
(2) SCHOTT GLASWERKE
BETEILIGUNGS UND EXPORT GMBH
(3) SCHOTT UK LIMITED
(4) NIPPON ELECTRIC GLASS CO LTD
(5) SAMSUNG CORNING PRECISION
MATERIALS CO LTD
(6) SAMSUNG SDI CO LTD
(7) SAMSUNG SDI (MALAYSIA) BERHAD
(8) LG ELECTRONICS INC
(9) LG ELECTRONICS UK LIMITED
(10) LG ELECTRONICS WALES LIMITED
(IN LIQUIDATION)
(11) KONINKLIJKE PHILIPS NV
(12) PHILIPS ELECTRONICS UK LTD

Defendants

Mr Aidan Robertson QC and Mr Gerard Rothschild (instructed by **Stewarts Law LLP)
for the **Claimants****
Mr Timothy Ward QC and Mr Robert Williams (instructed by **Travers Smith LLP) for the
1st to 3rd Defendants**
Mr Daniel Jowell QC and Mr Daniel Piccinin (instructed by **Simmons & Simmons LLP)
for the 4th Defendant**
Ms Sarah Ford (instructed by **Hogan Lovells International LLP) for the 5th Defendant**
Mr Daniel Beard QC and Mr Tony Singla (instructed by **Allen & Overy LLP) for the 6th
& 7th Defendants**
Mr Brian Kennelly QC and Mr David Bailey (instructed by **Linklaters LLP) for the 8th to
10th Defendants**
Ms Marie Demetriou QC (instructed by **Slaughter and May) for the 11th & 12th
Defendants**

Hearing dates: 2nd, 3rd, 4th and 7th March 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. Before the widespread use of flat panel displays, televisions and computer monitors generally had cathode ray tubes (CRTs) as their display mechanism. Those tubes are made of glass. Certain glass manufacturers make that glass and supply it to the tube manufacturers who incorporate it in their products. On 19th October 2011 the European Commission delivered a (non-confidential) decision (Case Comp/39605-CRT Glass - “the CRT Glass Decision”) which found that certain manufacturers of the glass had engaged in a cartel (“the CRT Glass cartel”) which restricted competition within the EEA contrary to Article 101 of the Treaty on the Functioning of the EU and Article 53 of the EEA Agreement. Those cartelists included some of the 1st to 5th defendants, whom I shall compendiously call the Glass defendants. Not all of those defendants were companies to whom the decision was addressed, but those who were not in that category are subsidiaries of related companies and, for present purposes, I will generally not have to distinguish between them and their cartel parent. All the points made in the applications before me apply equally in relation to Articles 101 and 53, and to avoid pointless verbiage I shall refer only to Article 101.
2. On 5th December 2012 the Commission delivered another (non-confidential) decision (Case Comp/39437 – TV and Computer Monitor Tubes (“the CRT Decision”)) in which it determined that there had been a cartel operating in the CRT market, and some of the 6th to 12th defendants were those in the cartel (“the CRT cartel”). Those defendants who were not addressees of the decision are nonetheless associated with addressees in such a way as induces the claimants to treat them as part of the same undertaking. Again, I will generally not have to distinguish between the entities within such an alleged undertaking. I shall, as a group, call them the CRT defendants or parties.
3. Article 101, on which both Decisions depend, provides:

“Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

4. The claimants are sellers of computer monitors which incorporated CRTs at the relevant time and, using those decisions as a starting point, they make a claim for damages for infringement of Article 101 on the footing that they paid too much for their components as a result of cartels. It is in dispute as to whether the claim falls to be treated as a pure follow-on claim (that is to say a claim which relies only on infringements which have been found by the Commission and seeks damages only for those) or as a claim which has that plus a standalone element (in which the claimants will seek to establish further infringements going beyond those found by the Commission). That is an issue which I shall have to resolve in the course of this judgment. It is also in dispute what cartels they are claiming in respect of. So far as it is a follow-on claim then the claimants are entitled to proceed on the footing that the infringements found in the Decisions actually occurred, and proceed (by and large) to assess the damages flowing. So far as it is not a follow-on claim, the claimants would have to establish the infringements.
5. The present applications are made by the defendants with the object of bringing these proceedings to an end. Some of the defendants are defendants in respect of whom the court has granted permission to serve out of the jurisdiction. Those defendants say that permission should not have been given, because the claimants do not have an arguable case against them. Those who have been validly served say that there is no arguable case against them so the claim should be struck out or summary judgment granted against the claimants. That gives rise to the biggest issue before me - do the claimants have a sufficiently arguable case? That point has a lot of common factors across the defendants, but some defendants have their own additional points. There are also applications to set aside the service out orders for non-disclosure and (at least in the case of some defendants) on the footing that there is a more appropriate forum.

6. The defendants have divided themselves in to 6 separate sets. They are the Schott defendants (defendants 1 to 3), NEG (defendant 4), Corning (defendant 5), the Samsung defendants (defendants 6 and 7), the LG defendants (defendants 8 to 10) and the Philips defendants (defendants 11 and 12). It is unnecessary to go into the parts that each is said to have played in the cartels relied on. Where relevant, discrete points affecting individual defendants or groups of them will be identified and dealt with. The Schott defendants, Corning and NEG are all Glass defendants. The rest are CRT defendants.

7. These applications were originally not well presented. Each of the sets of defendants prepared skeleton arguments. Because the central points in this application are common to all of them, and because they had apparently not liaised about the presentation of their applications at that stage, each of the skeletons reproduced a lot of arguments which may or may not have been quite the same; at least, differences were not readily detectable without considerable detailed study. I was also invited to read a large number of witness statements, some of which were prepared for earlier applications, and all of which were detailed, without any guidance as to what I was supposed to be reading them for (it was not always obvious from their content and, as it turned out, much of it was irrelevant). That was not a sensible way to go about an invitation for pre-reading. Where, in this sort of litigation, there are multiple parties, they owe a duty to the court (in the absence of a prior case management conference) to liaise amongst themselves in order to ensure that common points are dealt with in a sensible manner which avoids heavy and unnecessary duplication (or whatever the six-times equivalent of “duplication” would be in this case) and in order to make sure that unnecessary passages in evidence are not read. In fact it appeared that the parties had liaised at some stage before the hearing, but unfortunately they did not tell me until I had spent a significant amount of time pre-reading and protested at the way in which it seemed things were being presented. They had agreed that counsel for the various parties should divide up the issues between them, so it was not, after all, intended that I would receive 6 subtly different versions of the truth. That is what in fact happened. Where issues were common to more than one party, I received (in the main) submissions from just one counsel, with any particular variations applicable to individual sets of defendants being dealt with separately (there were not many). Each set of defendants adopted the submissions made by the others, where relevant to their cases. My attention was drawn to just specifically relevant passages in the evidence (which were few and short). Thus, in the end, the applications were efficiently (and very well) argued. It is very regrettable that the defendants had not started the liaison process earlier, at the skeleton argument stage.

The primary hurdle for the defendants

8. At the heart of the summary judgment/strike-out applications, and the applications to set aside the permission for service out of the jurisdiction, is whether the claimants have a sufficiently arguable case on certain factual and legal points. The defendants say they do not, so those who have been served without the need for permission say the claim should

be struck out and/or they should have summary judgment, and those who have been served out of the jurisdiction say that the first requirement of service out (a properly arguable case) cannot be made out. There was no dispute as to the test to be applied. It was accepted that the most relevant authority was *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 Ch, where Lewison J said:

“15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or

successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

9. To that summary Mr Beard QC for the sixth and seventh defendants added the following from Lord Woolf in *Swain v Hillman* [2001] 1 All ER 91 at 94:

“It is important to note that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position.”

10. I shall adopt the approach set out in those cases in relation to matters of law and fact that arise in this case. In doing so I would observe that some of the points of law and construction that arise cannot quite be regarded as "short", but I do not think that that necessarily disqualifies them from consideration in this manner. In relation to those points the real question is whether or not there is anything in them which means that they should really be investigated at a trial whether the position has been rendered clear enough at the hearing for the court to be satisfied that the claimant does not pass the test of having a realistic prospect of success.
11. It was also not disputed that, in the context of this case, those approaches should be applied to the question of whether there is a sufficiently arguable case for the purposes of service out of the jurisdiction.

The pleaded case, amplified by further particulars

12. Much of the attack on the claim in this case turns on exactly what is pleaded by way of cartels, whether (and to what extent) the claim is, or is pleaded as, a pure follow-on case (one which seeks damages in respect of infringements found by a Commission decision) as opposed to one which is, or also contains, a stand alone claim (a claim independent of a Commission decision in respect of which the claimant has to establish infringement); and whether the case which the claimants seem to make, taking due account of incontrovertible facts, is not arguable as a case known to English (and EU) law. It is therefore necessary to consider the content and nature of the pleading in a little detail. It has also been supplemented, in an important way, by further information provided in correspondence and further information pursuant to requests.
13. The claimants have sought to amend their Particulars of Claim. The application to do so is one of the applications before me. There originally seem to have been some issues about the amendments, but all defendants now accept that I should view the Particulars of Claim as if they had been amended, and they all accept that, if the action survives, the claimants should be allowed formally to carry out their amendments.
14. In the claim form, under the usual heading “Brief details of claim” the claimants plead:

“The Claimants claim compensatory damages, alternatively restitutionary relief, from Defendants 1 to 5 arising from and in relation to purchases of glass supplied to manufacturers of Cathode Ray Tubes the prices of which were affected by agreements and concerted practices unlawfully entered into and/or implemented by Defendants 1 to 5 and others between 23 February 1999 and 27 December 2004, identified without limitation in the European Commission Decision [the CRT Decision]. The agreements and concerted practices infringed [Article 101 and Article 53]... (my emphasis)

The Claimants claim compensatory damages, alternatively restitutionary relief, from Defendants 6 to 12 arising from and in relation to purchases of Cathode Ray Tubes the prices of which were affected by agreements and concerted practices unlawfully

entered into and/or implemented by Defendants 6 to 12 and others at least between October 1996 and November 2006, identified without limitation in the [CRT Glass Decision]. The agreements and concerted practices infringed [Articles 101 and 53]...” (my emphasis).

15. Mr Aidan Robertson QC, for the claimants, submitted that that claim form pleaded cartels wider than those established by the Decisions and that therefore allowed a claim wider than a follow-on claim. He submitted that that was the effect of the words “without limitation” in both of the passages which I have extracted (and which I have emphasised). I do not agree with him about that. The words “without limitation” refer to that which is identified in the two Decisions. He would wish to have the claim form read as though it relied on agreements and practices which were described in part in the Decisions, but which were not limited to those set out in the Decisions.
16. I find that the words “without limitation” are in the wrong place to achieve that. They purport to say that the Decisions contained a description which somehow did not have limits as to the cartels which they have apparently identified. That, of itself, is not a particularly clear pleading either, but whatever meaning one would wish to give those words in their actual context, I do not consider that they can be given the meaning relied on by Mr Robertson, which is a meaning which relies on matters beyond what the Commission found. Mr Robertson therefore fails at that first hurdle.
17. However, the Particulars of Claim are really the more important document in this case because that document can be expected to set out the real case relied on by the claimants as opposed to a summary of it. It is the function of Particulars of Claim to set out “a concise statement of the facts on which the claimant relies” – CPR 16.4(1)(a). If the claim set out there goes wider than the wording of the claim form then it would be a faulty pleading. If it is narrower than the claim form then, for the purposes of the applications before me, the defendants would be entitled to treat the claim as the claim which is actually advanced in the Particulars of Claim – that is what they are for. Furthermore, if they are narrower then the claimants cannot look to the claim form somehow to say that the overall claim remains broader. In terms of claims pursued they nail their colours to the mast of the Particulars of Claim – see *Chandra v Brooke North* (2013) 151 ConLR 113. If they are coterminous with the claim form then there is no particular issue. If the claim form is equivocal, then again a defendant is entitled to assume that the claim advanced against him is that set out in the Particulars of Claim.
18. I therefore turn to the Particulars of Claim to see what they say in respect of other matters relevant to the applications before me and in particular whether they advance a purely follow-on claim. It is necessary to refer to fairly extensive portions of that document.

19. Paragraph 1 appears under the heading “Introduction”. It reads:

“1. This claim arises out of the Defendants’ respective participation and involvement in two separate cartels, which have each been the subject of a finding of infringement of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) by the Commission of the European Union (“the Commission”):

a. The first Commission decision... was [the CRT Glass Decision]. The Commission made a finding of a substantial cartel operating as a single and continuous infringement of Article 101 TFEU from early 1999 to December 2004 (“the CRT Glass Decision”). The affected market was the CRT Glass sector in the European Economic Area (“EEA”).

b. The second decision, issued on 5 December 2012, was [the CRT Decision]. The Commission found two separate markets were cartelised – colour display tubes (used in computer monitors – “CDTs”); and colour picture tubes (used in colour televisions – “CPTs”). The CDT cartel lasted from October 1996 until March 2006. The CPT cartel lasted from December 1997 until November 2006.”

20. This seems to be a strong indication that the claimants are basing themselves on the findings of the two Decisions, and in particular the “finding[s] of infringement” therein (paragraph 1).

21. Paragraph 2 points out that the claimants will refer to the full contents of the Decisions for their true meaning and effect, and paragraph 3 points out that the Decisions in their current form have been redacted and only a provisional version published. It goes on:

“3. ... While the Defendants are of course well aware of the organisation and operation of the CRT glass and CRT cartels, the Claimants will not be in a position to particularise the detailed operation and implementation of those cartels pending disclosure

of an unredacted version of the Commission Decisions and/or disclosure. The Claimants reserve their right to amend the Claim Form and the Particulars of Claim in the light of the Defendants' disclosure.”

22. The expressions “CRT glass cartels” and “CRT cartels” are not formally defined in the pleading, though they are used from time to time. Taking paragraphs 1 and 3 together, I find that the terms are intended to be a reference to the cartels referred to, relied on and identified by the Commission in its decisions. Nothing in the later parts of the pleading indicates otherwise. This point might be thought to be obvious, but it is necessary to clarify it because the claimants actually seek to rely on wider or further cartels, as will appear.
23. Paragraphs 4 to 15 describe the claimants and a Japanese company in the same group, namely iiyama Corporation. The details of the description do not matter. What is important for present purposes is that, as now pleaded, one or other of the claimants is said to have bought in finished monitor products and was the first point of introduction of finished monitors into the EU during the relevant period, where they sold them on. None of them is pleaded to have bought in CRT glass, and none of them is pleaded to have bought in bare CRTs (unincorporated into a finished monitor). The manufacture of CRTs and the glass had already happened up the supply chain (which I elaborate on below). The express pleading is that the claimants designed monitors, but they outsourced their production to OEMs (Original Equipment Manufacturers) who in turn acquired the components necessary for their manufacture (including glass).
24. Paragraphs 16 to 31 describe the defendants.
25. Section C sets out “The Claim”. Paragraphs 32 and 33 summarise it:

“32. The Claimants bring claims for damages arising from anti-competitive cartel conduct in breach of Article 101 TFEU and/or Article 53 of the EEA Agreement which was carried out by the CRT Glass and CRT Defendants in the CRT Glass Cartel and the CRT Cartel respectively. The prices of CRT and CRT Glass were affected by unlawful agreements and/or concerted practices.

33. Each cartel was a single and continuous infringement of the prohibition contained in Article 101 TFEU (formerly Article 81(1) EC) and Article 53 of the EAA Agreement.”

26. Although the first reference to anti-competitive conduct by cartels in paragraph 32 is general, the allegation is limited by the subsequent reference to “CRT Glass Cartel” and “CRT Cartel” (this time with capitals), which must be intended to be a reference back to paragraph 3, which in turn must be a reference to the cartels relied on by the Commission. That makes sense when measured against the Decisions, as will appear.

27. Paragraphs 34 and 35 identify the addressees of the Decisions. This can only be relevant on the footing that the Decisions are relied on as establishing the cartels and anti-competitive behaviour which is relied on. Schott AG, Corning and NEG are identified as addressees of the CRT Glass Decision. Dates are given for Schott’s participation and it is said:

“Nippon Electric and Samsung Corning participated throughout the CRT Glass Cartel period.”

Again, this is an apparent reference back to the cartel established and relied on by the Decision.

28. Paragraph 35 identifies the 6th and 7th defendants, the 8th Defendant and the 11th defendant as addressees of the CRT Decision and “their dates of involvement in the CRT Cartel” are given. The same reference back to the relevant Decision is thereby imported.

29. Paragraphs 36 and 37 are preceded by the heading “The relevant product and geographical markets”, and describe the “product market” for CRT glass and CRTs in general terms, which do not describe any geographical limitation. Each paragraph cross-references to paragraphs in the Decisions which identify the products involved.

30. Paragraph 38, under the same heading, is obviously intended to describe the geographical market:

“38. The relevant geographic market for the supply of both CRTs and CRT Glass is in each case the EEA. CRT Glass and CRTs were at all material times supplied into the EU and/or the EEA, both directly and indirectly. They were supplied indirectly into the EU/EEA in particular when they were incorporated into other products which were then supplied into the EU/EEA. The Defendants are all undertakings and members of undertakings which between them accounted for a substantial proportion of sales of CRTs and/or CRT glass within the EEA and in other parts of the world during the CRT and CRT Glass Cartel periods. Accordingly, cartel conduct involving some or all of the Defendants in relation to such products was liable to have affected trade between EU member states and/or trade between Contracting Parties to the EEA Agreement. Further, such conduct was liable to have had the object and/or effect of preventing, restricting or distorting competition within the EU/EEA.”

I have shown it as amended, with deletions struck through and additions underlined. It can be seen that an express statement as to the relevant market has been struck through, but no alternative has been substituted.

31. Section E summarises the CRT Glass cartel. Paragraph 39 summarises the CRT Glass Decision in 11 lettered paragraphs.

“39. By way of summary, the Commission made the following findings in the CRT Glass Decision:”

32. It does so by cross-referencing to paragraphs of the Decision. The following aspects of the pleading are, or are said to be, relevant:

“a. Schott AG, Nippon Electric and Samsung Corning, pursuant to the settlement procedure under Article 10a of Commission Regulation 773/2004/EC, clearly and unequivocally acknowledged their liability for the single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement, as well as for the behaviour of their relevant subsidiaries (recital 15).

b. By means of regular repeated contacts [and other specified activities], the CRT Glass Cartel participants engaged in ...

[activities] with the aim of restricting price competition within the EEA in the CRT glass sector (recitals 20 to 27)

....

h. The cartel covered the entire EEA. The cartel members at cartel meetings discussed their prices and supplies to specific customers located in the EEA and exchanged sensitive commercial information concerning the CRT Glass market as regards the EEA, including EEA sales, capacities, stock levels and major customers. Cartel meetings and other anti-competitive contacts were arranged to coordinate, or led to the coordination of, pricing to major EEA-customers, (recital 30)."

33. Paragraph 40 positively relies on the binding nature of the CRT Glass Decision:

"40. The findings of fact and of infringement contained in the CRT Glass Decision are binding on this Court pursuant to Article 16(1) of Regulation (EC) 1/2003, together with general principles of European Union law given effect through sections 2 and 3 of the European Communities Act 1972."

34. Paragraph 43 reserves a right to amend the Particulars of Claim to give further particulars following disclosure of a non-confidential version of the Decision and/or disclosure.

35. Section F deals with the CRT Cartel. Paragraph 44 pleads that the conduct took the form of two separate infringements, one in relation to CDTs and the other in relation to CPTs (television tubes, with which this case is not concerned). Paragraph 45 sets out particulars of the creation, implementation and continuation of the cartel and the conduct of the CRT Defendants which is said to be set out in the CRT Decision. A summary is contained in fourteen paragraphs of which the following are the most relevant:

"b. The CRT Cartel Decision took account of CDTs sold directly to customers in the EEA and direct EEA Sales through transformed products. That is, CDTs incorporated intra-group into a final computer monitor and subsequently sold to customers in the EEA (recital 1020).

...

g. The scope of the CDT Cartel was worldwide (recital 483).

...

k. The agreements and/or concerted practices in relation to the CDT Cartel had the object and effect of restricting competition in the EU and the EEA (recital 689). The various collusive activities engaged in by the participants in the CDT Cartel were aimed at (and succeeded in) inflating prices for the benefit of the participants and above the level which would be determined by conditions of free competition (recitals 695 to 698).”

36. Paragraph 47 relies on and avers the binding effect of Article 16(1) as above, and also reserves the right to amend when a full version of the CRT Decision is published.
37. Section G contains some more specific averments as to the participation in and responsibility for the cartels. Section H refers to Causation and Loss, of which it is said full particulars cannot be given, but the best particulars that can be given then follow. There is then a heading "The Overcharge and the Run-off Charges" under which the following is pleaded:

“66. The overall effect of the CRT and CRT Glass Cartels was unlawfully to inflate the prices at which the Claimants purchased CRTs and CRT glass above those which would have prevailed had there been no such arrangements (the difference being the “Overcharge”).

67. A series of indirect purchases of CRTs and/or CRT glass was made by the Claimants during the CRT and CRT Glass cartel periods from companies that are either Defendants or part of a Defendant undertaking.

68. The Claimants also made purchases of CRTs and/or CRT glass indirectly from companies who, so far as the Claimants are aware, were not parties to and did not implement the arrangements of either cartel. The effect of the CRT and CRT glass arrangements, and in particular the Overcharge, was also to inflate the prices at which the Claimants made such other purchases above the prices which would have prevailed in the absence of the arrangements. This effect is referred to hereinafter as the “Umbrella Effect” and the inflation of price is referred to as the “Umbrella Overcharge”. “

38. The whereabouts of the sales which are referred to in these paragraphs is one of the matters which was clarified as a result of subsequent requests for information. For the moment it is sufficient to observe that these paragraphs do not identify where the sales were made (and in particular whether they were made within the EEA or not).
39. Damages are then particularised. Damages are calculated by reference to the number of products that the claimants purchased during a material cartel period containing CDTs (over 3.5 million) and containing CRT glass (over 2.8 million). Losses are then claimed in the sum of over €667m in respect of the CRT Cartel and over €267m in respect of the CRT Glass Cartel. Other claims follow, but I do not need to deal with those.
40. This pleading contains so many references to the two Decisions that a final decision on what the claim is for in terms of whether it is pure follow-on or whether it contains standalone elements has to await my setting out and considering the terms of the Decisions, but prima facie the claims made in this pleading seem to be made in respect of the cartels for which the participants were found liable, and therefore to be pure follow-on claims. That is the overall tenor of the pleadings, arising out of the strong links to the Decisions (particularly by reference to the binding effect created by Article 16), the almost total absence of reference to any other cartels and the heavy emphasis on the EEA. I will return to make a final finding about this when I have considered the terms of the two Decisions.
41. First, however, it is necessary to consider the amplification of this claim which took place after the Particulars of Claim were served. The defendants were concerned to understand how it was their participation in the cartels was said to have affected the claimants bearing in mind how it was that the claimants acquired the cartelised products. They therefore sought some further particulars of the supply chain, and followed up

correspondence with formal applications. The result was particulars given partly in correspondence and then in a witness statement, amplified by helpful flow charts.

42. The central thing to emerge from this process is that the sales of the allegedly cartelised products which ended up in iiyama products sold in the EEA were all made in Asia. No glass which ended up in iiyama monitors in the EEA was made in the EEA, or was sold by the cartelists in or into the EEA; no CRTs which ended up in iiyama monitors in the EEA were made or sold by the cartelists in or into the EEA. In each case there were intervening sales.

43. The chains of supply can be summarised as follows.

- (i) CRT glass was made in Asia (or otherwise outside the EEA).
- (ii) It was supplied to CRT manufacturers outside the EEA (in Asia) who turned it into tubes (CRTs).
- (iii) The tubes were then sold to a monitor manufacturer, or in some cases to dealers who sold on to monitor manufacturers. This step was generally in Asia (but in any event outside the EEA), save that in one chain the manufacturer was a UK subsidiary of a Japanese group (Mitsubishi).
- (iv) The completed monitors were then sold to iiyama Corporation, a Japanese company (and therefore in Asia).
- (v) iiyama Corporation then sold the monitors to one of the claimant companies. At this point the monitors entered the EEA.
- (vi) The claimants then sold the monitors within the EEA.

44. Thus no claimant purchased any of the cartelised products from any of the defendants. The most that can be said is that they were purchasers of products which incorporated those cartelised products; but the sales of those cartelised products by the cartelists all took place in Asia and did not involve the EEA, save where the chain involved the UK manufacturer, and even then the product was then sold outside the EEA (to Japan) before it was then sold back into the EEA. The facts of the case therefore do not support an allegation that the claimants purchased products from the cartelists (or their undertakings), and they did not purchase on any European market which was found by the Decisions to have been rigged by the cartelists. The involvement of the cartelists was too remote for that. All sales by the cartelists were some way down the supply chain from the ultimate purchase by the claimants. This is a point of great significance to the defendants' cases on this application.

What the Commission found - the CRT Glass Decision

45. This was a settlement decision. The addressees did not dispute their liability and there will be no appeal from it. Since it was a settlement decision it is much shorter than the CRT Decision. The following points are material.

46. The addressees were Schott AG, Corning, NEG (all defendants in this action) and Asahi Glass Co Ltd. Recital 20 records the general description of the cartel in important terms (all emphases in these citations being my own).

“20. AGC, NEG, SCP and Schott engaged in direct and indirect price coordination with a view of restricting price competition within the EEA in the CRT Glass sector. Overall, the cartel lasted from 23 February 1999 until 27 December 2004.

21. First, the cartel members directly coordinated prices for CRT Glass at bilateral and trilateral cartel meetings. Throughout the duration of the cartel, they used a variety of means, including coordination of CRT Glass prices for specific customers and, occasionally, setting target prices for certain types of CRT Glass.

...

23. Furthermore, all cartel members supplemented their price coordination activities by exchanging, through their marketing staff, on an ad hoc basis, confidential and sensitive market information, such as EEA sales, stock levels, customer developments, raw material costs and estimates of the demand and sales."

47. The following paragraphs describe the activities of co-ordinating prices, disclosing information, checking compliance with the cartel and the like.

48. Recital 30 deals with the geographic scope, and again it is important:

“30. The cartel covered the entire EEA. The cartel members present at the cartel meetings discussed their prices and supplies to specific customers located in the EEA and exchanged sensitive

commercial information concerning the CRT Glass market as regards the EEA (EEA sales, capacities, stock levels and major customers). Cartel meetings and other anti-competitive contacts were arranged to coordinate, or led to the coordination of, pricing to major EEA-customers.”

The Glass defendants draw attention to my emphasised words.

49. Section 5 deals with how Article 101 of the Treaty and Article 53(1) of the EEA Agreement applied, and recitals 43 and following noted that the infringement was single and continuous. Recital 50 records:

“50. The parties coordinated their behaviour to remove uncertainty between themselves in relation to pricing and ultimately to restrict competition in the CRT Glass market. The conduct at stake, done with an anti-competitive spirit, was a sufficient basis for the parties to concert on their market behaviour and thus to substitute practical cooperation between them for competition and the risks entailed.

Recital 70 is the beginning of a consideration of the amount of the fine to be imposed:

“70. The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of their sales, that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area within the EEA. In this case the relevant value of sales is each party's sales of CRT Glass in the EEA.”

50. In relation to “Gravity” recital 77 records that “The infringement covered the entire EEA.” The Decision then ends by formally concluding:

“Article 1

The following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the

periods indicated below, in anti-competitive practices with a view to restricting price competition within the EEA in the CRT Glass market: [Addressees listed.]”

From this it is apparent that the CRT Glass Decision determined (effectively without opposition, but that does not matter for present purposes) that there was liability in the following manner:

- (i) There was a cartel which was intended to operate in the European market.
- (ii) It was intended to affect prices in the European market, and did so.
- (iii) The sales that were affected by it were sales into the European market, by the addressees, of CRT Glass to European customers.

51. It can be observed at this stage that the cartel thus described, and the sales achieved under it, did not (at least directly) affect the claimants. As they have now conceded, they did not buy any of the cartelised product (CRT Glass) at all, whether in Europe or elsewhere. The significance of this to this action will appear later.

What the Commission found - the CRT Decision

52. Having identified the players, section 2.3 seeks to set out a “Description of the market”. Recital 85 deals with supply and refers to the geographic scope of “the CRT business”, but confidentiality considerations have led to a redaction of what that scope is.
53. The scope of the findings of the Commission is in issue in this case - there is an issue as to the extent to which the Commission made determinations, on which the claimants might be entitled to rely, as to cartel activity being carried on outside the EEA, and that also potentially affects the scope of the pleading. It is therefore necessary to consider a number of recitals which go to this point.
54. Recital 90 is a paragraph which seems to be EEA-centric. It reads (under the heading “Inter-state Trade”):

“90. During the cartel period (see Recitals (986) and (1003)), the participants sold CRTs produced in Germany, the United

Kingdom, Austria, Spain, France, Poland, the Czech Republic, Hungary, as well as in Korea, Taiwan, China, Japan and elsewhere to customers established in numerous Member States and in the Contracting Parties to the EEA Agreement. Therefore, during the cartel period, there were important trade flows of CRTs between Member States and between the Contracting Parties to the EEA Agreement.”

55. On the other hand recitals 108 and 109 (on which Mr Robertson relied) refer to wider activities:

“108. The Commission has evidence that CDT producers addressed by this Decision participated in meetings and other contacts with the aim of fixing prices worldwide, allocating market shares and customers and restricting output at least in the period from 24 October 1996 to 14 March 2006 (see Section 4.3.2). During that period, the CDT producers also exchanged commercially sensitive information.

109. More specifically, concerning price fixing, the cartel participants agreed on target prices, on what to tell customers about the reason for the price increase and, in addition, on which producer would communicate the price increase to which customer. Price fixing arrangements also concerned customers within vertically integrated groups, such as Philips (see for example Recitals (198) - (199)). Contemporaneous evidence also suggests that the price increases in CDT were, at times, passed on to the downstream market of production of computer monitor tubes.”

Some of that evidence, about passing on price increases, appears in a footnote to recital 109.

56. There then follows a long recitation of evidence before one gets to Part 5, headed “Application of Article 101 of the Treaty and Article 53 of the EEA Agreement”. Following the sub-heading “Relationship between the Treaty and the EEA Agreement”, recital 582 refers to worldwide activity:

“582. The arrangements described in Section 4 above applied at worldwide level or at least EEA wide level covering thus the entire EEA territory. They were therefore liable to affect competition in the whole of the common market and the territory covered by the EEA Agreement.”

57. There then follow a number of paragraphs which were relied on by Mr Beard (who appeared for the 6th and 7th Samsung defendants) as supporting his submissions on the jurisdiction under Article 101. I shall not set out those paragraphs. It is sufficient to note that the Commission applied a case to which I will come (*Woodpulp*), acknowledged that Article 101 could be applied to entities situated in, and reaching agreements in, territories outside the EEA, and held that what mattered was where the agreement was *implemented*. Thus the Decision said:

“586. The fact that some of the undertakings concerned, at the time of the infringement, were based outside the Community does not rule out the applicability of both Article 101 of the Treaty and Article 53 of the EEA Agreement to them, as for these provisions to be applicable it suffices that the anti-competitive conduct in question affects trade within the Community and the EEA.”

58. Paragraph 587 refers to *Woodpulp* and says it determined:

“The decisive factor is therefore the place where the agreement, decision or concerted practice is implemented. Accordingly, the jurisdiction of the Union to apply its competition rules to such conduct is covered by the territoriality principle.”

59. The consequence of that is referred to in recitals 592 and 593:

“592. In this case, it can be established that both the CDT and the CPT cartel arrangements related to sales of CDTs and CPTs without geographical limitations. Regarding the geographic scope of the CPT cartel, which Toshiba contests, it was shown in Section 4 that, while cartel discussions were taking place both in Asia and Europe there was no separation between the geographic areas. On the contrary, the cartel had world wide scope and the European cartel contacts emerged as an extension of what initially started as

purely Asian cartel contacts, with top meetings continuing to be held in Asia.

593. In line with the criteria set by the Court of Justice in the *Woodpulp* case, the Commission has jurisdiction to establish an infringement in this case where CRT suppliers established in third countries concerted on the prices and sales volumes (via market share, capacity and sales coordination) impacting their customers in the EEA and put that concertation into effect in their sales to those customers. Even when the cartel arrangements were formed outside the EEA, the cartel participants, through their sales into the EEA or measures impacting their sales to the EEA (specifically market sharing and capacity and sales limitation), implemented their agreements and concerted practices relating to the EEA.” (The underlining is my emphasis)

60. Thus while the Commission found that the cartel was worldwide, it was considering its implementation in Europe by sales into Europe by the cartelists. This is emphasised by recital 595:

“595. The evidence on the CPT cartel also shows clearly that the interconnection and equilibrium between Asian and European prices was an important issue in the market and therefore in the collusive discussions, including those in SML or ASEAN meetings. Finally, [confidentiality claim pending] [confidentiality claim pending]. In these meetings, parties exchanged individualised data on their future intentions or reached agreements on European production capacities, supply and demand or prices. Therefore, it is concluded that the CPT cartel, like the CDT cartel, was implemented concerning Europe and that such implementation took place through direct sales of CPT and direct sales of CPT through transformed products in the EEA (that is, the Direct EEA Sales and the Direct EEA Sales Through Transformed products, see Recital (1020)).”

61. This case is not concerned with the CPT cartel (TV tubes), but recital 595 indicates that the findings of the Commission make it clear that the CDT cartel was the same in this respect - it was implemented by direct sales of the cartelised products by the cartelists into the EEA, or sales of transformed products by them - transformed products are products into which the cartelised products have been incorporated (in this case, computer monitors).

62. The scope of its findings was made clear in the following further recitals:

“597. As a consequence, the cartel contacts concerned by this Decision had immediate, foreseeable and substantial effect in the Union in the sense of the *Gencor* case...

598. As regards parties' arguments regarding the low level of EEA sales as compared to their overall sales of CRTs, it should be noted that, for the purpose of establishing jurisdiction, all that matters is whether the cartel as a whole was implemented and had immediate, foreseeable and substantial effects in the EEA. It is irrelevant whether those effects were limited for a given party, in a given period of time, as compared to the world-wide effects of the cartel. In any event, the parties had significant Direct EEA Sales and Direct EEA Sales Through Transformed Products.

599. In conclusion, the Commission has jurisdiction to apply both Article 101 of the Treaty and Article 53 of the EEA agreement (on the basis of Article 56 of the EEA Agreement) to both the CDT and the CPT cartel.”

63. After a while the Commission returned to consider how Article 101 applied to the case before it. Recital 711 contained its conclusion:

“711. The complex of agreements and concerted practices between the producers of each of CDT and CPT is capable of having an appreciable effect upon trade between Member States and between Contracting Parties to the EEA Agreement.”

And that was backed up by the following further recitals:

“715. Although a large part of the cartel arrangements which are the subject matter of this Decision took place at world-wide level (see Recital (85) above), CDTs and CPTs were delivered and/or billed directly to customers in Europe, including various producers

of downstream equipment, for example, [confidentiality claim pending] and to European entities connected to the undertakings that participated in the infringement. The existence of agreements and concerted practices in the present case resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed. The cartel arrangements were implemented in the EEA and their impact in the EEA unavoidably affected price levels, production and consumption within the EEA and thus had an effect on trade between Member States.”

716. The cartel arrangements produced effects within the EEA not only through the direct sales of CDTs and CPTs but also indirectly through inter-state trade of incorporated CDTs and CPTs. As was demonstrated in Recitals (109) and (234), the parties aimed to and took note of the passing-on of the surcharge to final consumers and the effects thereof on demand.

717. Based on those circumstances, it can therefore be established that the cartel arrangements could and did have a substantial impact on the patterns of trade between Member States and on the EEA market through direct EEA sales of CDT and CPT and direct EEA sales through transformed products (products in which CDTs and CPTs were incorporated) on the patterns of trade between Member States and on the EEA market.

718. After the accession of Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia on 1 May 2004, Article 101 of the Treaty became applicable to the cartel insofar as it affected those markets.

719. Insofar as the activities of the cartel related to sales in countries that are not Member States or Contracting Parties to the EEA Agreement, they lie outside the scope of this Decision.”

Again, the emphasis is mine.

64. Thus again the Commission was making its determination on, and in relation to, infringements of Article 101 by virtue of direct sales into the EEA of cartelised products or of transformed products. Mr Beard also pointed to recital 719 as indicating that sales to non-EU countries were outside the scope of the Decision. Mr Robertson disagreed - he said that recitals 718 and 719 were merely reflecting the enlargement of the EU which happened during the lifetime of the cartel, and nothing more. I consider that Mr Beard is right. These paragraphs appear in a section which considers the applicability of Article 101 and it is plain that the Commission was making it explicit that it was not making a finding of infringement in relation to activities which resulted in sales to or in countries which were neither Member nor Contracting States.

65. Section 8 deals with remedies, and it is in this section that Mr Robertson finds a paragraph on which he makes heavy reliance in his submissions as to what the liability was that the Commission found. The Commission started its consideration by referring to Article 23 of Regulation 1/2003, which gives a power to fine. That Article reads:

“Article 23

....

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101]... of the Treaty ...

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

...

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.”

66. Recital 1008 states that the Commission will refer to principles laid down in its Guidelines and recital 1013 refers to a calculation based on sales. Recital 1014 occurs after the heading "Determination of the value of sales" and it reads:

“1014. The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales, that is, the relevant value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA.”

67. This is apparently elaborated in recital 1020 (preceded by the words “Sales related to the infringement”):

“1020. The sales of CDT and CPT directly or indirectly concerned by the infringement in the EEA (duly taking into account its enlargement in 2004) are:

(a) Direct EEA Sales (that is CDT or CPT directly sold to customers in the EEA by one of the addressees of this Decision);

(b) Direct EEA Sales Through Transformed Products (that is CDT or CPT incorporated intra-group into a final computer monitor or colour television and subsequently sold to customers in the EEA by one of the addressees of this Decision); and

(c) Indirect Sales (that is the value of the CDT or CPT sold by one of the addressees of this Decision to customers outside the EEA, which would then incorporate the CDT or CPT into final computer monitor or colour television products and sell them in the EEA).

1021. However, for the purpose of establishing the value of sales in this case, the relevant EEA turnover consists of those sales where the first "real" sale of CDT or CPT – - as such or integrated in a final computer or colour television product – - was made into the EEA during the period of the infringement by one of the addressees of this Decision. This refers only to points (a) and (b) of Recital (1020). Although the value of all indirect sales made into the EEA (point (c) of Recital (1020)) could have been included in the relevant value of sales, this is not necessary in this case.”

68. Mr Robertson relies strongly on this paragraph as demonstrating that the Commission found an infringement in relation to activities going beyond direct sales of cartelised products or transformed products by the cartelists into the EEA - see point (c) in recital 1020. The point is specifically pleaded in paragraph 45(b) of the Particulars of Claim, where there is an express cross-reference to the paragraph. The defendants say this

paragraph is dealing with the setting of fines, not the establishment of liability (which has already been dealt with in the Decision). I resolve this dispute below.

69. The relevance of point (c) is in part dealt with in recital 1026:

“1026. Recitals (1014) and (1020) explain the sales that the Commission may use under the 2006 Guidelines on fines, which could normally include indirect sales, which means both Direct EEA Sales Through Transformed Products and Indirect Sales (points (b) and (c) of Recital (1020)). On this issue, it has to be recalled that the Statement of Objections already pointed out that indirect sales could eventually be taken into account in the setting of fines. However, it has to be stressed that, as already stated in Recital (1021) above, the Commission does not, in this case, take into account Indirect Sales as defined in point (c) of Recital (1020). By focusing on the value of Direct EEA Sales as well as the value of Direct EEA Sales Through Transformed Products, the purpose is to consistently include in the 'value of sales' the cartelised products only when they are sold for the first time to a customer which is external to the cartellists' undertakings and is located in the EEA. It must be highlighted that the Commission does not take into account the value of the transformed product as a whole, but only the value of the tubes within it. When the first sale of the cartelised product is made to an independent customer in the EEA, a direct link with the EEA Territory is established.”

70. In considering the amounts relevant to the fining criteria the Commission went through a process described as “Identifying the value of Direct EEA Sales and Direct EEA Sales Through Transformed Products by place of delivery” (section 8.4.2.3). Mr Robertson relied on a particular paragraph in this part of the Decision in connection with an argument he had about foreseeability. It will be convenient to set it out here:

“1037. Regarding Samsung's arguments in favour of the billing criterion, whereby the location of the customer to which the sales are invoiced is taken into account, the following is noted. Being participants in a world-wide cartel and colluding on volumes and prices in general, including production volumes, the suppliers' knowledge on the final shipment destination or centre of interest of the customer has no bearing on the geographical coverage of the anti-competitive objective. Similarly, implementation of the cartels necessarily produced immediate and foreseeable effects in the EEA

as a whole irrespectively of whether the parties had any knowledge of the actual place of delivery or billing of the specific CDTs or CPTs. Moreover, the approach suggested by Samsung would result in a situation in which sales for which the place of delivery and the place of billing is not the same, would end up not being taken into account in any competition proceedings, thereby allowing general impunity for the cartelists concerned. It follows from Recital (1034) that by using the delivery criterion for the establishment of the value of sales a strong nexus to the EEA is assured.”

71. The final formal determinations at the end of the Decision do not advance the debate at the hearing before me, but for the sake of completeness I will set one of them out briefly. Article 1 determines:

“1. The following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous complex of agreements and concerted practices in the sector of colour display tubes used in computer monitors: [entities identified] ...”

72. Thus what the Commission decided was that there was a world-wide cartel which operated so as to affect European sales. It is plain (and not disputed) that what it decided was (at least) that the cartel was intended to operate so as to rig prices for products sold by the cartelists to their European customers either in the form of the product (tubes) itself or in the form of monitors into which the tubes had been incorporated. That is at least part of the infringement of Article 101 which the Commission found (the CRT defendants say it is the whole scope of that infringement). It is also accepted that as part of its reasoning the Commission determined that there was a “worldwide cartel”. What is not agreed is whether the Commission found a liability for (and therefore an infringement in respect of) tubes sold outside Europe (in Asia), made into monitors which were then sold outside Europe (in Asia, again) and which were then sold into Europe by non-cartelists (which is the factual position on the claimants’ supply chains - see above). This dispute turns largely on the effect of recital 1020, and I deal with it in the next section.

The dispute about recital 1020

73. The dispute about this recital is a dispute as to the extent to which the Commission should be taken to be making a determination of liability in this recital in relation to goods that were not sold into the EEA by the addressees (either in their original or transformed state) but which were sold by them upstream and sold into the EEA by third parties. This is important in that it may define the scope of the claim. If it is a finding of liability as against the cartelists then it is part of the liability which can found a follow-on claim or a liability which is pleaded by incorporation. If it is not, then such sales cannot be the basis of a claim thus formulated.

74. It will be useful to set out recital 1020 again:

“1020. The sales of CDT and CPT directly or indirectly concerned by the infringement in the EEA (duly taking into account its enlargement in 2004) are:

(a) Direct EEA Sales (that is CDT or CPT directly sold to customers in the EEA by one of the addressees of this Decision);

(b) Direct EEA Sales Through Transformed Products (that is CDT or CPT incorporated intra-group into a final computer monitor or colour television and subsequently sold to customers in the EEA by one of the addressees of this Decision); and

(c) Indirect Sales (that is the value of the CDT or CPT sold by one of the addressees of this Decision to customers outside the EEA, which would then incorporate the CDT or CPT into final computer monitor or colour television products and sell them in the EEA).”

75. There is no dispute about liability having been found in respect of (a) and (b). That appears from previous parts of the Decision, as already identified. Mr Robertson says that the introductory words coupled with (c) mean that there is also a finding of infringement by virtue of the sort of indirect sales referred to in (c). On analysis Mr Robertson relies on this paragraph as demonstrating two things - first, that the Commission made a finding of liability in relation to such sales, and second (I think) that

it supports his argument that it was entitled to make such a finding under Article 101. The defendants challenge both limbs. They say that on a proper analysis of the Decision first the Commission was not making a finding of infringement in relation to such conduct (it went to the amount of the fine only), and second that such a finding would be beyond the proper scope of Article 101 in any event (which in turn reflects on whether the Commission should be taken as making a finding of liability in the first place).

76. The first of those points is a question of construing the Decision. I have reached the clear view that the Decision does not contain a finding of infringement in relation to the sales in (c), for the following reasons.
77. Obviously the words used are a starting point in this debate. Mr Robertson relies on the opening words of section 1020 - “The sales of CDT ... directly or indirectly concerned by the infringement ...” which seem to link the sales in (c) to the infringement. I agree that those words might be at least a starting point of his argument, but even taken by themselves there is a degree of equivocation about them. They talk about “sales ... directly or indirectly concerned by the infringement”, which is a curious form of wording if what is meant is that they are sales which amount to, or give rise to, an infringement. They are, however, all that Mr Robertson has got to rely on in terms of the wording, and when placed in the context of the rest of the Decision it is, in my view, impossible to read them as broadening the scope of the established infringement beyond the scope of the conduct referred to in (a) and (b).
78. I start by noting the positioning of recital 1020. It occurs in section 8, with an overall heading of “Remedies”. Before then the Commission has, at great length, set out its deliberations on infringement and its findings of fact, and how the law applied to them. I have set out the material recitals above when considering the CDT Decision. Those paragraphs demonstrate a finding of liability which is apparently confined to the activities which can be described as those referred to in sub-paragraphs (a) and (b) of recital 1020. None are of the type referred to in (c). See for example recital 717 and the paragraphs leading up to it. In all this, while a worldwide cartel is referred to, there is no suggestion that liability is being found for anything other than direct sales of cartelised products, or transformed products, in or into the EEA by the cartelists. Recital 719 points firmly away from any wider finding of the kind that Mr Robertson seeks to rely on.
79. The section which immediately follows on from recital 719 considers each of the addressees in turn, to “determine the legal entities to which responsibility for the infringement should be attributed”. Nothing in that section expands the nature or extent of the infringement which has previously been determined. Section 7 deals with duration, and the same applies.

80. One thus arrives at section 8, with its heading “Remedies”. In the light of what has gone before this would be an odd section in which to find further findings of infringement. The Decision starts the section by setting out its powers of fining under Article 23(2) where an infringement of Article 101 is found (recital 1006) and develops the point. At Section 8.4 it starts a section headed “Calculation of the fines”, with headings “Methodology for setting the fine amount” and then “Determination of the value of the sales”. Recitals 1013 and 1014 deal with these points:

“8.4.1 Methodology for setting the fine amount

1013. In applying the Guidelines on fines, the basic amounts for each party result from the addition of a variable amount and an additional amount (also known as "entry fee") . The entry fee is calculated as a proportion of the relevant value of sales of goods or services to which the infringement relates. The variable amount results from a proportion of the relevant value of sales multiplied by the number of years of the company's participation in the infringement. The resulting basic amount can then be increased or reduced for each company if either aggravating or mitigating circumstances are retained. The fine may not exceed 10% of the worldwide turnover of an undertaking concerned pursuant to Article 23 of Regulation No 1/2003. The fine may be reduced in application of the 2006 Leniency Notice, where applicable.

8.4.2 Determination of the value of sales

1014. The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales, that is, the relevant value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA.”

81. All this makes clear that this is a section which is dealing with the amount of the fine. The Decision is no longer dealing with the question of infringement. It can be said that recital 1014 echoes part of recital 1020 when it refers to “sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area...” but in its context those words do not support the idea that this section of the Decision somehow enlarges the finding of infringement which has previously been clearly and firmly made.

82. There are no other parts of the Decision itself which would support Mr Robertson in his submission that recital 1020(c) extends the findings of infringement. The next recital following on from recital 1020 would tend, if anything, to point the other way.

“However, for the purpose of establishing the value of sales in this case, the relevant EEA turnover consists of those sales where the first "real" sale of CDT or CPT – - as such or integrated in a final computer or colour television product – - was made into the EEA during the period of the infringement *by one of the addressees of this Decision*. This refers only to points (a) and (b) of Recital (1020). Although the value of all indirect sales made into the EEA (point (c) of Recital (1020)) could have been included in the relevant value of sales, this is not necessary in this case.”

83. The emphasis is that of the Commission. The Commission seems to be positively disclaiming the third category of sales as being relevant in this case. It would hardly have done so if it was making a finding of infringement in relation to them.
84. Therefore, just taking the Decision, it would seem to be highly unlikely that the Commission intended this sub-paragraph to extend the finding of infringement which it had spent so many hundreds of paragraphs dealing with already.
85. Mr Robertson went on to draw what he said were links between fining and infringement. He said that Article 23 created an inextricable link between fines and infringement. I agree that it plainly contemplates a link, because without an infringement there can be no fine. But it does not necessarily follow that the amount of a fine has to be inextricably linked to infringement as a matter of calculation. For example, it would be rational to take into account the size of an offender’s worldwide operation in deciding the amount of a fine - it is rational to fine wealthy people more than poor people - but calculating a fine in that manner would not be to relate it directly to infringement. Accordingly, a fine-determination factor cannot necessarily be read back into a finding of infringement, which is what Mr Robertson is trying to achieve.
86. Mr Robertson also sought to pray in aid parts of the Opinion of AG Wathelet in *InnoLux v European Commission* (2015) Case C-231/14P. This case involved the principles of fining when a cartel had been found. As in the present case, the Commission indicated that 3 elements, corresponding to those set out in recital 1020 of the CRT Decision, could be relevant, but only relied on (a) and (b). The Advocate-General considered the position of internal sales within the cartellists of products which were then incorporated into

transformed products which were then sold by the cartelists in the EEA (the equivalent of head (b)). In his Opinion AG Wathelet touched on territorial competence and said:

“30. Notwithstanding, the fact remains that the methodology adopted by the Commission in this case entailed its taking account of (internal) sales of the product concerned that were made entirely outside the EEA. Consequently, that methodology must, in my view, be regarded as an extension of the Commission’s territorial competence with regard to a cartel formed and implemented in third countries for the sole reason that it ‘assumed’ that the cartel had an impact in the EEA as a result of the sale within the EEA to independent third-party undertakings of finished products incorporating the product in question.”

That does not help Mr Robertson by itself, but he points out a footnote to this paragraph (footnote 10):

“10. The same question, in substance, is raised in *Intel v Commission* (C-413/14 P), currently pending before the Court. The appellant’s fifth ground of appeal in that case concerns precisely the Commission’s jurisdiction to apply Article 102 TFEU to sale contracts between Intel, a company established in the United States of America, and Lenovo, a Chinese undertaking, relating to components, namely microprocessors, to be delivered in China for incorporation into computers assembled by Lenovo in China and potentially sold in the EEA. In principle, in addressing this particular issue, the same approach should be taken to the territorial application of EU law in so far as concerns the calculation of the fines at issue in the present case as to the Commission’s jurisdiction to apply Articles 101 TFEU and 102 TFEU.”

87. Mr Robertson relies on this as demonstrating the co-extensive territorial requirements for infringement and for fining. I agree with him that it seems to do so, but it does not assist him in the present case. What the Advocate-General seems to be saying is that when one has found infringement one should then apply the same territorial considerations to the activities to be taken into account for fining purposes. It goes no further than that. What he is not saying is that one can work backwards from the fining function to find out what the infringements were, territorially speaking.

88. In any event, the CJEU itself did not adopt the idea that the same territorial considerations necessarily applied to both infringement and fining. It did not comment on the cited part of the Advocate-General's Opinion, but it did draw a contrast between the finding of infringement and the determination of a fine.

“72 Admittedly, as the General Court noted in paragraph 58 of the judgment under appeal, it is apparent from the case-law of the Court of Justice that when undertakings which are established outside the EEA, but which produce goods that are sold within the EEA to third parties, collude on the prices they charge to their customers in the EEA and put that collusion into effect by selling at prices which are actually coordinated, they are taking part in collusion which has the object and effect of restricting competition within the internal market within the meaning of Article 101 TFEU and which the Commission has territorial jurisdiction to proceed against (see, to that effect, judgment in *Ahlström Osakeyhtiö and Others v Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraphs 13 and 14).

73 In the present case, it not disputed, however, that the Commission had jurisdiction to apply Article 101 TFEU to the cartel at issue, since as is apparent from paragraphs 42 and 66 of the judgment under appeal, the cartel participants, including InnoLux, implemented that worldwide cartel in the EEA by making sales in the EEA of the goods concerned by the infringement to independent third parties.

74 By contrast, the present ground of appeal concerns a separate question, namely the calculation of the amount of the fine to be imposed on InnoLux for that infringement of Article 101 TFEU. In that regard, it is important, in accordance with the case-law referred to in paragraphs 46 to 51 above, to determine the value of sales to be taken into account, so that the amount of that fine reflects the economic importance of the infringement as well as the relative weight of InnoLux in the infringement. As is apparent from paragraphs 52 to 70 above, the General Court was fully entitled to find that the Commission could, to that end, when the internal sales of the goods concerned by the infringement were made by InnoLux outside the EEA, take into account the sales of finished products by it in the EEA to independent third parties.”

This does not explicitly contradict Mr Robertson's submissions, but it definitely does not support them. Nor does it clearly support the Advocate-General's Opinion.

89. In all the circumstances, therefore, Mr Robertson is not entitled to rely on recital 1020 as being something which expands the scope of the infringement which he is entitled to rely on in the Commission decision.

What is pleaded - conclusion

90. Having set out the important elements of those Decisions I turn back to the question of what it is that is pleaded.

91. I have already identified some points of closeness between the pleading and the Decisions. Paragraph 1 links the cartels referred to to the findings of infringement of Article 101 in the two Decisions. The expressions “CRT cartel” and “CRT Glass cartel” are used throughout in a way which suggests not only that they are cartels referred to in the Decisions, but that they are the cartels which were “the subject of a finding of infringement of Article 101” (paragraph 1). Paragraphs 40 and 47 rely on the binding nature of the findings of fact made by the Commission. That would be a relevant averment only if (and insofar as) the claim is a follow-on claim. Paragraphs 39 and 45 introduce the setting out of findings made by the Commission in the CRT Glass and CRT Decisions respectively, and express them to be findings by the Commission. The exercise of going through the Decisions which I have carried out makes it clear just how closely geared the pleading is to the Decisions. In my view this claim is phrased as, and is intended to be, a follow-on claim, proceeding from the liability (and the relevant facts) found by the Commission. Nothing is pleaded in the liability section which indicates that it is anything else.

92. Although it is not determinative, it is not without significance that that appears to have been the view of the claimants when they started these proceedings. In order to serve certain of the defendants the claimants had to obtain permission to serve the claim form outside the jurisdiction. In support of the application which the claimants made their solicitor Mr Campbell (who also signed the Particulars of Claim as an original pleader) said:

“12. The essence of the Claimants’ claims is a “follow-on” claim for damages under EU competition law resulting from the [CRT Glass and CRT] Decisions.”

93. That is what he apparently intended, and that is what in my view he has achieved. If what was intended was a claim which relied on cartels going beyond those that the Commission found to have infringed then one would have expected further pleadings clearly alleging such cartels. If there was a difficulty in pleading such matters before discovery then there are well-established pleading techniques for setting out the best pleading that can be provided pending disclosure (or other steps).
94. That does not occur in the Particulars of Claim. The closest one gets is the pleading in paragraph 45(g) that “The scope of the CDT Cartel was worldwide”, with a cross reference to recital 483 of the Decision. It is correct that that paragraph makes a finding of a world-wide cartel - “the geographic scope of the CDT cartel was world-wide” - but it does not follow that the pleading is a pleading of a case of a world-wide cartel giving rise to a liability beyond that identified and established in the Decision. The pleading is a case based on Article 101 (paragraph 1), and the finding in the CRT Decision is a finding of liability under Article 101. Paragraph 47 anticipates further particulars being provided when an unredacted form of the Decision is published, but those further particulars would be likely to be related to the Commission decision, which does not remove the follow-on nature of this claim. It is true that the same paragraph also threatens further particulars on disclosure, but disclosure should relate only to the claim as currently pleaded, and as currently pleaded it looks like, and in my view is, a follow-on claim.
95. As appears above, Mr Robertson sought to invoke the wording of the claim form in support of his submission that the claim was not just a follow-on claim. The answer to that appears above. The wording is inapt for that purpose, and in any event his claim has been limited by his Particulars of Claim.
96. I have not overlooked the fact that it might be said that the damages claimed in paragraphs 64 and following might be said to go wider than those appropriate to a follow-on claim. Indeed, the defendants say that they do, and that that is a vice. However, even if they do then that does not expand the nature of the claim. It would mean that they go beyond the scope of the claim. Damages can only flow from a properly pleaded case on liability, and in my view the liability claim is a follow-on claim.
97. If I am wrong about that then, on a proper construction of the pleading, it pleads a liability which is co-extensive, and no more, with the liability which the Commission found. For the reasons appearing above, it does not plead a liability going beyond the Commission-found liabilities.

The pleadings and the case against the Glass defendants

98. That conclusion has a particular significance so far as the Glass defendants are concerned, as Mr Jowell for NEG pointed out. The pleaded case against the Glass defendants bases itself on the CRT Glass Decision. That Decision found a European cartel, in which glass (or perhaps transformed products into which glass was incorporated) was sold into the European market by the cartelists to their European customers. It is a claim based on that infringement that the claimants seek to pursue in their Particulars of Claim.
99. However, their elaborated case goes off in a different direction. It alleges sales outside Europe to people who were not their European customers (and who were not the claimants either). That sort of claim is not within the infringement found by the Commission, and there is no pleaded suggestion as to how price fixing by a cartel in Europe in relation to European pricing and European customers (which is what the Commission found and what the pleading ostensibly relied on) would have an effect on pricing in Asia of components manufactured in Asia and which passed down a chain outside Europe before ending up in monitors bought into Europe by the claimants. The two things are fundamentally different.
100. At the hearing the claimants sought to rely on a global cartel. That is not pleaded by them. Paragraph 38 of the Particulars of Claim originally pleaded that the relevant market was the EEA. That has now been deleted, and words added, with the result that the geographic extent of the cartel is not clearly articulated in that paragraph. The thrust of the pleading is therefore one of an EEA cartel with effects in the EEA. The pleading still closely tracks the CRT Glass Decision, which (as the cited passages show) finds only an EEA cartel with no reference to any wider one, and relies on sales which are made by the cartelists in the EEA of their products or their transformed products.
101. The allegation of a global cartel is therefore not open to the claimants as against the Glass defendants. Nor do the sales chains that they now rely on fit in with the pleading of the effects of the CRT Glass Decision from which their claim is said to proceed. The new claim is not a follow-on claim; if a claim is discernible it is a different claim altogether.
102. The effect of that is that the claim which the claimants say they now seem to make against the Glass defendants is one which is not made in their pleading, and which has no logical connection with the claim made in the pleading, both in terms of its wording and in terms of its reliance on the CRT Glass Decision. It fails for that reason alone.
103. I add by way of explanation that this point cannot be made by the CRT defendants in the same way, because there is a plea of a world-wide cartel made against them (paragraph 45(g)). They have other points which they advance, as appears below.

The pleaded cases and the expanded cases made against the defendants

104. Having reached that conclusion it is now necessary to consider whether the claimants are entitled to make the claims that they apparently seek to make on the back of the liability that they rely on as established or that the coextensive claim that their pleading entitles them to make. In this context it is useful to remind oneself of what the nature of that claim is, in the light of the further information or particulars provided in the manner referred to above.
105. Mr Robertson confirmed that the case that the claimants seek to run was as follows. So far as the Glass cartel was concerned, he sought to say that suppliers of the glass which was ultimately incorporated into the claimants' products were either members of a cartel extending beyond the EEA or were non-cartel members. So far as they were cartel members then the effect of the cartel was to drive up the price of the cartelised products, and thereafter the products into which they were incorporated, leading to the claimants paying a higher price than they should have paid for their monitors when they ultimately bought them from the non-cartelists. So far as the original glass suppliers were not members of the cartel, the effect of the cartel was to bring about an increase in the general price for similar products, with similar effects on the downstream market and on the price that the claimants paid for their monitors - an "umbrella" claim.
106. So far as the CRT cartel is concerned, the reasoning was the same, and in the case of this cartel he claimed the benefit of a finding by the Commission that there was a worldwide cartel.
107. The first difficulty for Mr Robertson in this is the one that I have just dealt with, namely that this case is not open to him on his pleadings in relation to the CRT Glass cartel. I have determined above that his pleaded case in relation to this cartel is one in which the cartel is an EEA cartel only. There is no allegation of a wider cartel. Furthermore, it is a case which is a follow-on case from (or which makes the same case on liability as) the CRT Glass Decision, and it is plain from that Decision that it was considering only an EEA cartel. Yet further, the finding of liability in the Decision was in relation to sales (a) by the cartelists (b) in the EEA of (c) either their cartelised products or of transformed products containing their cartelised products. That is a finding of the products which were the subject of the cartel. It is not a finding which covers the much wider allegation that Mr Robertson wishes to make. He wishes to rely on sales of glass outside the EEA to persons other than EEA customers, which eventually made their way down the supply chain to the claimants in the EEA. So far as the Glass defendants are concerned, that is not a pleaded case, whether one takes either the original or the amended pleading. That, by itself, would be an end of the claim against the CRT Glass cartel.

108. The pleading position is slightly different in relation to the CRT defendants in that there is positive pleading of a worldwide cartel, which gives a slightly more confusing aspect to the claim against them. However, those defendants, as well as the Glass defendants (so far as necessary) take the point that whatever may be pleaded, the claimants cannot have a claim of infringement of Article 101 in respect of the factual situation which they now rely on, where the supply chain starts with non-EEA sales of cartelised products, as those products go through several non-EEA sales and then ends up with cartelised products being sold into the EEA by non-cartelists, even if the original sales by the cartelists were pursuant to a cartel operating in Asia. It is their submission that foreign cartelists cannot infringe Article 101 unless either their cartel is “implemented” in the EEA (the “implementation” test) or there are effects in the EEA which are immediate, substantial and foreseeable (the “qualified effects” test). To be more precise, they said that the relevant test is really the implementation test. However, they accepted that while the qualified effects test was not yet clearly established as an alternative test, they were content for these applications to be decided on the footing that it was an alternative test if that might assist the claimants (though they submitted that it did not).
109. I therefore move on to consider these attacks on the claim. These attacks do not proceed from the pleadings. They assume take a broader point, independent of the pleadings. They seek to say that as a matter of EU law the claimants are not entitled to run the cases that Mr Robertson says they now seek to run, working more from what he says the case is than what the pleadings say the case is. It should be borne in mind that this cannot be a follow-on case because the claim on this footing does not proceed from infringements found by the Commission. To recapitulate – the Commission found a Glass cartel operating in the EU in relation to sales to customers in the EU. Mr Robertson’s case has neither of those elements. The Commission found a CRT cartel which was worldwide (Mr Robertson’s case does at least have that) but infringements of Article 101 only in relation to sales by cartelists into or in the EU. Mr Robertson’s case does not have that. So Mr Robertson’s case turns into a standalone case. The defendants say it cannot be sustained.

Territoriality – are there territorial limits to the application of Article 101 and if so what are they?

110. The starting point in determining this question is the wording of Article 101, which refers to actions affecting “trade between Member States” and which distort “the internal market”. That requires some clear link to the EEA. When it comes to assessing the geographical or territorial scope of the Article the need to acknowledge limits required by international law and comity has been acknowledged in the case law. In *A Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-03655 the ECJ said:

“45. It should be noted in that respect that, as is demonstrated by the Court's judgment in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I – 6019, paragraph 9, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.”

111. So there are territorial limits. Mr Jowell QC for NEG drew parallels with the position in US federal law, which acknowledged the need to respect the principles of comity, and he drew to my attention *F Hoffman-La Roche Ltd v Empagran SA* (2004) 542 US 155 in which the Supreme Court reflected on matters of comity in relation to US competition law in the Sherman Act, as amended. He drew to my attention expressions such as:

“First, this court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations... This rule of construction reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow... This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world.”

112. On that basis, and construing amendments to the Sherman Act, the Supreme Court held that foreign harm done pursuant to foreign anti-competitive conduct, was not actionable in the United States.
113. Interesting though it is, I did not find this citation particularly helpful. It shows the Supreme Court having regard to the same sort of notions and constraints as European courts, but it does not particularly help me to decide on the reach of European competition legislation.
114. I therefore obtain most assistance from European cases which have considered the point. European courts have set limits to define the circumstances in which cartel conduct outside the EEA can be held to give rise to an actionable infringement in the EU so as fall

within the wording and jurisdictional limits of Article 101. In *Woodpulp (Ahlstrom Osakeyhtio v The Commission)* [1988] ECR 5193, the case heavily relied on by the Commission in the CRT Decision, the Commission had to consider a cartel formed outside the EEA which sold cartelised products (wood pulp) to customers in the EEA with the benefit of prices affected by the cartel conduct. The Commission held that it had jurisdiction to act in relation to such conduct. Before the ECJ the addressees took the jurisdictional point that the Commission was seeking to exercise jurisdiction over entities outside the EEA contrary to international law (and Article 85, the then equivalent of Article 101).

“6. All the applicants which have made submissions regarding jurisdiction maintain first of all that by applying the competition rules of the Treaty to them the Commission has misconstrued the territorial scope of Article 85. They note that in its judgment of 14 July 1972 in Case 48/69 (*ICI v Commission* [1972] ECR 619) the Court did not adopt the "effects doctrine" but emphasized that the case involved conduct restricting competition within the common market because of the activities of subsidiaries which could be imputed to the parent companies. The applicants add that even if there is a basis in Community law for applying Article 85 to them, the action of applying the rule interpreted in that way would be contrary to public international law which precludes any claim by the Community to regulate conduct restricting competition adopted outside the territory of the Community merely by reason of the economic repercussions which that conduct produces within the Community.”

115. The Court ruled against those submissions under the heading: “Incorrect assessment of the territorial scope of Article 85 of the Treaty and incompatibility of the decision with public international law.” In paragraph 12 it noted that the the main sources of supply were outside the Community, but there was still an infringing effect on competition within the Community:

“12. ... Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market.

13. It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually

coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty.

14. Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article 85.”

116. The Court went on to reject the complaint that assuming jurisdiction was contrary to international law in terms which also provided a test as to when extra-Community conduct could give rise to an infringement in the EEA:

“16. It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

17. The producers in this case implemented their pricing agreement within the common market . It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.

18. Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.”

117. The Court then went on to reject other grounds for saying such conduct was contrary to international law and principles of comity.
118. The important paragraph for present purposes is paragraph 16. It makes the whereabouts of the formation of the offending conduct subsidiary. What is important is “the place where it is implemented”. Thus, on the facts of that case, the foreign cartel, conducted by foreign (ie extra-EEA) entities outside the EEA, was “implemented” in the EEA when the cartelised goods were sold into the EEA by the cartel participants (sold “directly to

purchasers established in the Community” - paragraph 12). The test is said to be implementation. There is no suggestion that infringement can be found where the effects of the cartel are somehow felt in a more indirect way.

119. This sort of directness in “implementation” is supported by the CFI in *Innolux*. That was a case of direct sales of the cartelised products, or transformed products, by the cartelists into the EEA. The Court considered the question of territoriality in the context of an appeal about the fine, because it was said that the calculation of the fine (which invoked the same two heads as the fines in the present case, rejecting the third) involved the Commission exceeding its territorial jurisdiction. In the course of its deliberations the court rejected the place of the cartel as being the appropriate criterion.

“What counts is therefore the place in which it [ie the infringement] is implemented.” (para 59).

120. This is a clear implementation of *Woodpulp*. The Court went on to determine that *Woodpulp* was followed in *Gencor* (see below) and reflected further on the effects of the direct sales into the EU which were the subject of consideration. While the decision does not consider whether there are any limits to what is meant by “implementation”, it clearly espoused it as a concept and there is not a hint that it should be widened beyond a normal meaning of that word. It is true that whether or not the word (or test) should be widened was not in issue. In fact the point in that case concerned whether there should be a narrowing of the territorial scope of infringement (for fining purposes) but the whole tenor of the judgment is to apply *Woodpulp* in a non-extended way.
121. I return to the scope of the meaning of “implementation” when I consider the parties’ submissions on its application to the present case. Before doing so I consider the possible alternative “qualified effects” test which has been propounded in these applications. It arises from *Gencor Ltd v The Commission* [1999] ECR II-753.
122. In *Gencor* the Commission and the Court of First Instance had to consider the different situation of a merger of groupings of companies. The companies were all non-EU companies save for one holding company. It was thought that the merger would create an anti-competitive duopoly in platinum and rhodium, and the Commission acted against that under Regulation 4064/89. It eventually declared the merger to have an effect under which “effective competition would have been significantly impeded in the common market”. That decision was challenged in the CFI. The addressees of the decision took the point that the principles of territoriality and comity should have been observed with the effect that the Regulation did not confer jurisdiction on the Commission (see paragraphs 48 and following). The Commission countered by drawing a parallel with Article 85 and *Woodpulp*, submitting that while the concentration would be carried out in South Africa, it would be implemented throughout the world, including the EC (paragraphs 67 and following). The Court considered the submissions under two headings.
123. The first was an “Assessment of the territorial scope of the Regulation”, starting at paragraph 78. The Court recorded:

“79. Article 1 does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory.”

124. And in paragraphs 87 and 88 it went on to apply *Woodpulp* to this question, doing so against the addressees:

“87. The applicant cannot, by reference to the judgment in *Wood pulp*, rely on the criterion as to the implementation of an agreement to support its interpretation of the territorial scope of the Regulation. Far from supporting the applicant's view, that criterion for assessing the link between an agreement and Community territory in fact precludes it. According to *Wood pulp*, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter.

88. Accordingly, the Commission did not err in its assessment of the territorial scope of the Regulation by applying it in this case to a proposed concentration notified by undertakings whose registered offices and mining and production operations are outside the Community.”

125. Thus the Court applied the “implementation” test at this stage of its reasoning. It then went on to consider “Compatibility of the contested decision with public international law”. It determined:

“90. Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.”

126. On the facts those criteria were fulfilled:

“94. ... the concentration would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned.

95. Accordingly, the concentration would have had an immediate effect in the Community.”

127. This section of the judgment proposes a test of a foreseeable, immediate and substantial effect in relation to acts committed outside the Community but which have an effect in it - the “qualified effects” test. As Mr Beard pointed out, this test seems to be posed not as a test for the scope of Article 85 (now 101), but as a justification for imposing that jurisdiction on non-EU entities as a matter of international law. However, since it is proposed in these applications as a different test for defining the scope of Article 101, and in case it matters, I consider it on the facts as if it were such a test. As I have recorded, the defendants are content so to treat it for the purposes of these applications.
128. What these cases say was not in dispute. What seemed to be in dispute was the result of applying these cases to the facts, and whether the *Woodpulp* test should be regarded as the last word on the topic such that an extension can be ruled out which would cover the present claims (as they are now to be formulated). Mr Robertson took me to Whish and Bailey on Competition Law, 8th edition, where the point is said to be referred to. At p526 the authors turn to “The Extraterritorial Application of EU Competition Law” and at p528 they identify the implementation test in *Woodpulp*. At the foot of the page the authors comment:

“The Court of Justice in *Wood Pulp I* did not comment on what the position would have been if the agreement had been formed *and implemented* outside the EU, but had produced economic effects within it; an example would be a collective boycott by members of a non-EU cartel, whereby they refused to supply customers within the EU: could one argue in such circumstances that this agreement is ‘implemented’ within the EU either refusal to supply there? Linguistically this seems hard to sustain; however there is no doubt in this situation that the *effects* of the agreement would be felt within the EU. This is the issue to which we now turn.”

129. Mr Robertson drew attention to the point that the authors say was not decided (actually it was not “commented on”) and submitted that such matters were an open question which it would not be right to resolve on this application. What was required was a full consideration of the facts so that the point could be considered. He was, of course, approaching this on the footing that there was a cartel outside the EU whose members did not sell directly into the EU – see above. He sought to submit that the authors supported his submission that there was an open question worthy of review at a trial.

130. I do not think that that is a proper reading of the textbook. It is plainly true that the authors considered what the approach would be to the question that they pose, but they go on to answer it at the top of the next page (529) under the heading "The qualified effects doctrine". They then go on to consider this doctrine in terms which make it plain that it is the principle which arises from *Gencor*. They refer to authority which apparently applies the test – *Intel v The Commission* Case T-286/09. It is apparent that the authors consider that the answer to the question that they pose on the preceding page lies in the application, or potential application, of the qualified effects principle, not some further test or an extension of the implementation test.
131. The authorities do not propose any other test for establishing jurisdiction in the sort of situation which exists in the present cases, and nor does Whish and Bailey. There is no suggestion that the law might be developed in some other way. In other circumstances there might have been a debate as to whether or not the qualified effects principle was a true alternative to the implementation principle, but since all the defendants are content for me to proceed (in this application) on the footing that each is a separate test available to the claimants, and that the claimants would be entitled to succeed if they fell within either, I do not have to resolve that point or leave it to a trial. I can, and should, proceed on the footing that one or other of the tests could provide a gateway for the claimants.
132. In those circumstances I pass on to consider whether the claimants have an arguable case on either of them. The factual basis of my doing so should be clearly reiterated. The claimants do not rely on the sort of facts which the Commission held to amount to an infringement of Article 101. There was no direct sale by any of the cartelists to a customer in the EU of either the basic product or a transformed product. The claimants seek to rely (so far as their pleadings would allow them to do so) on a cartel formed outside the EU pursuant to which their products, and then transformed products, were sold to undertakings outside the EU under the cartel arrangements, who themselves sold down a chain until they ended up with an EU customer. This is said to have raised the price of comparable products in the EU market, thus increasing the price that the claimants had to pay in that market. That is a different state of affairs from that on which the Commission made its infringement findings.

Implementation

133. As pointed out above, this principle imposes liability where a cartel is implemented within the EEA. In *Woodpulp* the implementation was by sales directly into the EU.

134. The case of the defendants on this point can be easily stated. It is that the facts which have been demonstrated to exist, and which are said to be the basis of the case (albeit not properly pleaded) cannot be said to demonstrate an arguable case which fulfils the implementation test. Both cartels are alleged to have been outside the EU. They related to prices charged in sales outside the EU. Those sales were effected outside the EU. In some cases transformed products were also sold outside the EU. Then at the end of the relevant supply chain the cartelised products or transformed products were sold to the claimants in the EU. That is said to fall short of implementing the cartel in the EU. It was implemented (on these facts) outside the EU. Contrast *Woodpulp*, where the target of the cartel was EU pricing, and sales were made into the EU by the cartelists. Attention was drawn to the decision of the CFI in *Innolux* (supra), which is said to be another example of the same sort of implementation with no hint that a wider view could be taken which would encompass the sort of claim made by the claimants based, as it is, on a more extended supply chain.
135. Mr Robertson's case is that the concept of "implementation" is capable of being wider than just direct sales into the EEA. He submits that *Woodpulp* does not express any views about the situation which he says we have in this case. He relied, in a manner which I confess I did not understand, on the Court's determination that there was no infringement on the part of the trade association in that case (KEA), as opposed to its members. That aspect of the case seems to me to be a decision going to identities, not territoriality.
136. Then he submitted that *Intel v The Commission* Case T-286/09 supported a wider reading of the concept which could encompass this case. In that case Intel was found (inter alia) to have made payments to computer manufacturers in exchange for them slowing down deployment of or not fully exploiting products which had certain non-Intel chips in them. This was held by the Commission to have harmed competition and the General Court upheld that view. Mr Robertson relied on what was said in the following paragraphs as supporting the view that sales other than direct sales into the EEA could found an infringement:

"301 It should be borne in mind that the implementation of the practices at issue in the European Union is sufficient to justify the Commission's jurisdiction under public international law (see, to that effect, *Woodpulp*, paragraph 232 above, paragraph 16).

302 It is true that, in the case which gave rise to *Woodpulp*, paragraph 232 above, the Court of Justice found that the agreement in question had been implemented in the common market by

means of direct sales, at prices which were actually coordinated, by the participants in the agreement with purchasers established in the European Union (paragraphs 12, 13, 16 and 17 of that judgment).

303 However, it does not follow from this that direct sales by addressees of the Commission's contested decision are the only means of implementing a practice in the European Union. The mere fact that the applicant did not sell CPUs to subsidiaries of Acer and Lenovo located in the EEA does not therefore preclude implementation of the practices at issue in the EEA.

304 In the present case, the Commission did not refer, in the contested decision, to action initiated by the applicant itself in the territory of the EEA in order to implement the naked restriction concerning Acer.

305 Nevertheless, the abuse of a dominant position consisted in the present case in the grant of a financial incentive in order to encourage Acer to postpone the launch of a certain notebook worldwide. The condition to which the payments granted by Intel were subject, namely the postponement of a certain AMD-based notebook, was therefore intended to be implemented worldwide by Acer, including in the EEA.

306 In such circumstances, it would be artificial merely to take into consideration the implementation of the practices at issue by the undertaking in a dominant position itself. On the contrary, it is also necessary to take into consideration the implementation of those practices by the customer of that undertaking.

307 In that context, the fact that the customer of the undertaking in a dominant position refrains from selling a certain computer model in the EEA for a certain period must be regarded as implementation of the naked restriction.

308 Moreover, it is apparent from the evidence cited in the contested decision that Acer took action in the EMEA region to postpone the launch of the computer at issue. It is apparent from the email cited in paragraph 1247 below, which was relied on in that respect by the Commission at the hearing, that the [*confidential*] at Acer was instructed to 'drop' the AMD CPU concerned for 2003, and that he would give effect to that instruction in the EMEA region.

309 It follows from the foregoing that the Commission's jurisdiction was justified also on account of the implementation of

the infringement in the territory of the European Union and the EEA.”

137. Mr Robertson points to the fact that this case did not involve direct sales by Intel, and therefore relies on it in support of his case which relies on indirect sales.
138. I do not consider that this case assists him at all. In the paragraphs just cited it is plain that the CFI were considering a different form of effect on competition than the effect of price-fixing. The anti-competitive practices were designed to produce an effect in the EEA (and elsewhere), because it was intended that Intel’s customers (the computer manufacturers) would deliberately not sell products there. Those customers were complicit in the behaviour, and their complicity had, and was intended to have, an effect in the EEA. It was therefore entirely accurate to describe the behaviour as being “implemented” in the EEA, which was what the Commission and CFI found. Sales made by Intel were part of the background, but were irrelevant to that analysis. What is significant about that passage is the frequent references to implementation within the EEA.
139. As Mr Robertson pointed out, that decision is under appeal at present, but I do not think that that fact assists him in his argument. The Court’s decision is what it is, and it was not made apparent to me what the grounds of appeal were or how an appeal might, in reality, produce a decision more favourable to Mr Robertson’s clients.
140. In my view, taking Mr Robertson’s factual case at its most favourable, and ignoring the absence of a properly pleaded case, there is no arguable case for saying that the cartels relied on were implemented in the EEA. They were foreign cartels implemented, probably, in Asia, but in any event not in the EEA. The mere fact that, even if true, there is some end of the road effect in the pricing of iiyama purchases in Europe does not mean that the cartel was implemented there. The proper analysis and balancing of the principles of Article 101 and principles of international law and comity require a closer connection than that before intervention by the Commission can be justified under the Article.
141. I am alive to the point that the question of where a cartel is implemented is likely to be a fact-sensitive matter usually requiring a review of a range of evidence. That will usually require a trial. However, the facts relied on in this case are clear enough. A cartel is assumed (against the the defendants) and the allegations as to its operation are treated as proved. Taking all those matters against the defendants it does not require a trial to determine the question of implementation on the authorities. The same arguments would be made at trial (assuming the same facts were proved) with the same result. The situation is clear enough to allow a determination to be made at this interlocutory stage. I determine it against the claimants.

Qualified effects

142. I have set out above the genesis of the qualified effects principle. Assuming that it is a separate test for these purposes (in line with the defendants' concessions), the question in these applications is whether it is sufficiently arguable that the offending behaviour had an immediate, substantial and foreseeable effect in the EU. Again, I ignore any possible shortcomings in the pleaded case about this.
143. The short submissions of the defendants are that those criteria are not met on the basis of the thinly suggested facts of the claimants' apparent case. The immediate effect of the cartel in this case was on the sales of products by the cartelists to the OEMs who made equipment with them. All that happened outside the EU. The effect on pricing down the line in relation to products purchased by iiyama in the EU was anything but immediate. The effect, if any, was by then remote. Nor has an arguable case on foreseeability been propounded. It is not obviously foreseeable that sales to Asian purchasers as a result of an Asian cartel would have an effect on prices paid by iiyama when buying products in the separate European market. It should not be treated as even arguably foreseeable merely because the claimants assert baldly that it is so. Nor is the substantiality properly vouched for.
144. Mr Robertson submitted that it was sufficiently arguable that all three requirements were fulfilled in this case, and it could not be seen that they would inevitably fail. He pointed to how the Court dealt with the three factors in *Intel*. The concept of "immediacy" need not involve direct sales into the EEA; otherwise the whole phrase would add nothing to the implementation test. It must therefore be capable of catching the effect of sales originally made outside the EEA. He drew attention to the views of the Advocate General in *Woodpulp*. Advocate-General Darmon considered the US authorities, which apparently propounded an equivalent test to the qualified effects test, and was prepared to contemplate that the trading association itself (as opposed to its members) could be liable notwithstanding that it did not itself engage in economic activities and did not trade in the EEA (see paragraph 62). In *Gencor* itself, at paragraphs 94-5, the Court found an "immediate" effect where the consequence of the merger was to create conditions for abuse which were "not only possible but economically rational". That was said to assist Mr Robertson in his averment that the consequences of the worldwide cartels that he relied on were "immediate" in the EEA.

145. On the “substantial” requirement he pointed to various large figures in the Commission decisions as to market share and volume and submitted that it was at least arguable that if there was an effect it must be substantial. And he submitted that the effects of the cartels in the EEA were “foreseeable”, based on a paragraph of the CRT decision (recital 1037, which is in the section dealing with fining criteria) which refers to the foreseeability of the effects of the worldwide cartels in the EEA. He also relied on evidence from his principal witness (Mr Takeichi, managing director of iiyama Benelux) said to show that Samsung, at least, would have known that monitors were destined for a European market because the specification document said the product met safety standards for Germany and the sample product label was in various European languages. He submitted (albeit without a firm evidential foundation) that if you fix prices, then that will have an effect on the price of products and some of those products would find their way on to the European market with their price affected.
146. Overall, Mr Robertson submitted that the qualified effects doctrine required a factual investigation in an area of evolving law, and this was not the right stage in these proceedings to deal with the point.
147. I agree with Mr Robertson that in most cases this sort of issue will be a fact-sensitive one which it will be impossible to evaluate properly on a summary judgment application or the like. Issues such as the substantiality and foreseeability of the effect of a cartel are particularly likely to fall into that category. However, the context in which the point arises is important, and where a claimant is faced with a challenge of the kind raised in the present case, and in its context, it cannot simply take such a generalised point without necessarily providing any particularisation. It must be borne in mind that my ruling on the pleading means that the claimants cannot really succeed on their pleaded case. They advance the case they now advance as a case which develops their pleaded case, and indeed changes that which was described in their applications to serve out. The explanations as to how the case is now put, as given in submissions, require a factual background which is not apparent from the pleading but which has had to be teased out via requests for further information. In all those circumstances, and bearing in mind the challenges which have been made on this application and the requirement on the claimants to show a certain level of case, it is right to say that the case on substantiality and foreseeability (particularly the latter) is very thin. However, in the light of my decision on the immediacy requirement I do not need to consider that point further.
148. My decision on immediacy is that the claimants have not made out a sufficiently arguable case. Immediacy is a concept which is capable of flexible application, depending on the facts, but it is clear to me that it cannot be made out in this case. The consequences of the non-EU cartels fixing their prices for glass and CRTs will have been felt in the market into which they were sold, which is not the EU market. Even if the effect of those sales

is ultimately felt in the EU in the manner which the claimants would like to rely on, that is not an immediate effect. If a label is required, it is a “knock-on effect”, and it is apparent from *Intel* that that is not sufficient. In considering the application of the immediacy concept in that case the Court observed:

“278. That conduct was intended to induce Acer and was capable of inducing it to delay the launch of an AMD-based notebook worldwide, including in the EEA. The delay in the launch means that, during a certain period, a certain AMD-based computer model is not available, including in the EEA. It is a direct effect and not merely a knock-on effect.”

149. The last sentence contains the useful dichotomy. If the effect on EU pricing was as Mr Robertson said it was, then it was in my view plainly a knock-on effect and not immediate. Accordingly that aspect of the qualified effects test is not fulfilled. I would also add that the pricing effect was little more than an averment on the part of Mr Robertson, and was not backed up by any particular piece of evidence. The point could fail for that sort of evidential reason too, but I prefer to rely on the remoteness of the effect.
150. In the circumstances the application of the qualified effects test does not generate a sufficient EU connection to allow the conduct relied on by the claimants, whether properly pleaded or not, to be an Article 101 infringement. The conduct lacks a sufficient territorial connection with the EU.

Possible sales into the EU

151. If the analysis set out above is correct then the claimants fail against all the defendants. They have not pleaded a proper case against the CRT Glass defendants, and cannot make a sustainable factual and legal case against both sets of defendants on their unpleaded case because any cartel has not been shown, or pleaded, to have a sufficiently close connection with the EU. That means there is no good arguable case (the service out defendants) or the defendants are entitled to summary judgment or striking out (the other defendants).
152. In argument the claimants sought to meet these points by new suggestions. Mr Robertson’s skeleton argument says that if the claimants could point to a single direct

sale by one of the cartelists' undertakings into or from the EU of CRT Glass or of a CRT which was subsequently used in a monitor sold by the claimants, then that would be within the scope of Article 101 (and Article 53). He said that there may have been such a sale though the claimants have not been able to identify it on the basis of the information available, and he prayed in aid the understandable lack of knowledge of the claimants as to the relevant supply chain data.

153. In my view the claimants are not entitled to seek to make such an assertion to save their case if it needs saving. That sort of suggestion is not pleaded, and it is not apparent that there is any material which would make such a pleading proper. It is an act of speculation, done in argument. If the claimants wished to run such a case then they would have to plead it properly and have some factual material which would support it. This applies even if they would need an investigation, via disclosure, to make their case good. They are not entitled to speculate their way into an action so as to get as far as disclosure. Their present pleaded case goes off in another direction.

Conclusion on the pleaded and factual cases

154. I therefore find that the defendants are variously entitled to have the case against them struck out, or have summary judgment in their favour, or to have service out of the jurisdiction set aside on the basis of an absence of a good arguable case.
155. However, the defendants also have claims to have service on them set aside on other grounds. It might be said that those points need not arise if service is set aside anyway, but they were argued and would arise if there were a successful challenge to my decision on the factual and pleaded merits of the case. I will deal with one of them.

Non-disclosure on the applications to serve out

156. All the defendants against whom permission to serve out of the jurisdiction take non-disclosure points. The non-disclosure points were advanced by Mr Kennelly QC (who appeared for the 8th, 9th and 10th defendants - they were relevant to the 8th defendant) and Ms Ford (who appeared for the 5th defendant), and the other relevant defendants (against whom permission to serve out was obtained) adopted the submissions made by those two counsel.

157. There was no dispute as to the obligation to make full and frank disclosure in an application to serve outside the jurisdiction. It is by now too well known to require me to embark on an extensive citation of authority. It is sufficient to cite merely one paragraph of the judgment of Burton J in *Masri v Consolidated Contractors* [2011] EWHC 1780 (Comm):

“58. The law as to non-disclosure is of course well established: the 'golden rule' is that, on an ex parte application - it seems to me particularly where this is made on paper where the judge is left to consider on his own in his or her room what may often be a pile of undigested exhibits - the party making the application must identify any material facts, and in particular any which may constitute a defence or some ground for not granting the order sought. The most significant consequence is where an ex parte injunction, such as a drastic freezing order with immediate effect and possibly long-lasting consequences, is made which might not have been made if material facts had been disclosed. But the duty arises on any ex parte application, and certainly so on one for service out of the jurisdiction, where what is being sought is the exercise of an exorbitant jurisdiction, bringing a foreign defendant within the jurisdiction even if only to incur the cost and inconvenience of fighting a jurisdiction application successfully.”

158. Ms Ford complained of non-disclosure under what amounted to three heads, which are probably conceptually related:

(a) A failure to disclose the cartels relied on were external to the EU and not within the EU.

(b) A failure to point out that the cartel sales relied on by the claimants were not in fact in or into the EU but took place elsewhere.

(c) (Having seen how the matter is now put by the claimants) that the claims are not the follow-on claims that they purported to be, but were standalone claims of a different nature.

159. I consider that those non-disclosures are made out.

160. So far as the pleadings are concerned, they do not disclose that the cartels were all outside the EU, and that the first sets of sales of cartelised products were made outside the EU and before sales into the EU by non-cartel members. The picture painted by the Particulars of Claim appears above, and is not the same as the claims now made. Worse than that, the evidence in support of the application to serve out makes what amounts to a misrepresentation about the nature of the claim.

161. The witness statement deployed in support of the application to serve out of the jurisdiction was that of Mr Scott Campbell, a partner in Stewarts Law, solicitors to the

claimants. It is identified above. In paragraph 4 of that statement he acknowledged the duty of full and frank disclosure. He goes on to introduce the parties and in paragraph 11 he says:

“For the period from 1 May 2006 to 31 March 2008, iiyama Benelux was the sole Claimant who purchased the iiyama Products for sale in the European Economic Area ("EEA"). iiyama Benelux purchased approximately 85% of the iiyama Products from Mouse Computers, who in turn had purchased the iiyama Products from OEMs. During this time iiyama Benelux purchased the remaining 15% of the iiyama Products directly from OEMs that were located in Europe.”

162. Mouse Computers is not a European entity. It is an Asian company which purchased from Asian (or non-European) companies. The statement about the 15% was later accepted to be wrong – iiyama Benelux did not purchase 15% of its products from OEMs located in Europe.
163. This is a significant paragraph. First, it contains an erroneous statement about the purchase from OEMs in Europe. That is mis-statement as to a material fact. For the reasons given above, it is of importance that purchases be made by iiyama companies in Europe if it is to have an Article 101 claim, and it did not do so. Neither this paragraph, nor any other paragraph, alludes to that difficulty, or to the facts underpinning it as they are now known to be - facts which are all within the knowledge of the claimants. This paragraph goes further - it actually contains a wrong statement (as Mr Robertson conceded) as to sales into Europe (the 15% point). It therefore disguises the difficulty. The relevant non-disclosure is not a failure to disclose, in terms, that there is no claim. The non-disclosure is a failure to allude to the possible legal difficulties in making the present claim (under Article 101) in a case where the cartels are outside Europe, it sells outside Europe and makes no sales into Europe, or to draw attention to the facts which give rise to the question.
164. Next the witness statement goes on to make categorical statements about the nature of the claim. At paragraph 12 Mr Campbell says:
- “12. The essence of the Claimants' claims is a "follow-on" claim for damages under EU competition law resulting from two European Commission Decisions.
- a. The first decision ("the CRT Glass Decision") ... shows the operation of a significant cartel from 23 February 1999 to 27 December 2004 affecting the sale of specialist glass ("CRT glass") for the manufacture of cathode ray tubes used in the production of

computer monitors and televisions. The affected market was the CRT Glass sector in the EEA.

b. The second decision ("the CRT Decision") ... found two separate markets were cartelised - CDTs used in computer monitors; and CPTs used in colour televisions. The CDT cartel lasted from October 1996 until March 2006. The CPT cartel lasted from December 1997 until November 2006."

165. The witness statement goes on:

"13. The infringements were breaches of Article 101 TFEU, which is directly effective under EU law ... Those findings may be relied upon by each of the claimants, since they are established in the Member States of the EU ..."

166. At paragraph 20 and following Mr Campbell addresses the question of whether there is a serious issue to be tried. At paragraph 22 he reinforces the apparent (according to his witness statement) follow-on nature of the claim, saying:

"22. The findings of fact and of infringement contained in the CRT Glass and CRT Decisions are binding on the Court pursuant to Article 16(1) of [the Modernisation Regulation] ..."

And paragraph 23 states his belief that the cartels have caused the claimants to suffer very substantial losses. Those two paragraphs therefore impliedly present the case as being one in which there were sales by the cartelists into Europe and not one in which none of them sold into Europe. It is a non-disclosure of plainly relevant facts; indeed it presents the case on a false assumption.

167. The only paragraph which might be said to touch upon the sort of difficulties which ought to have been referred to is paragraph 37, which deals with the extent to which England is the proper place of trial. It refers to the requirement that damages be available in national courts for persons who have suffered damage by reason of a breach of Article 101 and goes on:

“This applies even where the cartel activity took place outside the EU, but causes loss to be sustained in the EU markets: [*Woodpulp*] at [11] to [18].”

168. This paragraph suggests some sort of straightforward application of what can be gleaned from *Woodpulp* without any suggestion that there are contrary arguments. It does not, of course, have to accept that the contrary arguments are correct but not to refer them at all is, in my view, a serious non-disclosure.
169. Mr Robertson did not really have a good answer to these points. He accepted that the witness statement was wrong in making its 15% point. He accepted that the application proceeded on the basis of the purchase of some monitors from OEMs in the EU, and that that turned out to be incorrect. The correct position did not become apparent until further instructions were taken after Part 18 requests were made, whereupon the 15% point was withdrawn from the Particulars of Claim. He accepted that the description of the claim as a “follow-on” claim put the matter too narrowly, and that it required further explanation. That admits non-disclosure - something that requires further explanation does not make a complete disclosure.
170. I therefore find this aspect of non-disclosure made out. The non-disclosure is serious - it is a mis-statement of important facts about European purchases (the 15% point), a misdescription of the intended nature of the action, and a non-disclosure of facts which go to jurisdiction even if the claimants claim to have an answer to the point (I got the strong impression throughout that they were not actually live to it, though that is no answer). All these go to the heart of the case.
171. Mr Robertson submitted, and Ms Ford did not gainsay, that non-disclosure did not necessarily require setting aside of the permission. He pointed out that proportionality had a part to play. Alternative remedies were available, such as disallowing the costs of the service out application (see *Masri*). I accept all that, but lesser remedies would only be appropriate for lesser transgressions. In my view the non-disclosures in this case were so serious, going as they did to the heart of jurisdiction, that the familiar sanction of setting aside the service out order would be justified by these transgressions alone. I would so order.
172. Mr Kennelly’s submissions were not based on non-disclosure. They were based on a case that there were other jurisdictions which were more appropriate than England and Wales. He pointed to what he said were sufficiently established jurisdictions in which cartel cases could be run against the defendants against whom service out was permitted (principally South Korea and Japan), and they would be more appropriate jurisdictions in which to assert the claim made.

173. I do not think it necessary to determine this point. The service out defendants have got home on two other bases already. They do not need this additional point, and this judgment is already long enough without it.

Conclusion

174. It follows that, insofar as may be necessary, those defendants against whom permission to serve out of the jurisdiction was obtained are entitled to have that permission, and service, set aside, and all defendants are entitled to summary judgment or striking out of the claim against them.