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Case No: CL-2022-000487

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2023

Before :

THE HON MR JUSTICE BUTCHER

Between :

(1) MERCEDES-BENZ GROUP AG
(2) MERCEDES-BENZ AG

Claimants

- and -

(1) CONTINENTAL TEVES UK LIMITED
(2) CONTINENTAL AG
(3) CONTINENTAL AUTOMOTIVE GMBH
(4) CONTINENTAL AUTOMOTIVE
TECHNOLOGIES GMBH
(5) ZF AUTOMOTIVE UK LIMITED
(6) ZF FRIEDRICHSHAFEN AG
(7) ZF ACTIVE SAFETY GMBH (formerly known
as LUCAS AUTOMOTIVE GMBH)

Defendants

Mark Hoskins KC and Philip Woolfe (instructed by Wilkie Farr & Gallagher (UK) LLP)
for the Claimants

Marie Demetriou KC and Matthew Kennedy (instructed by Freshfields Bruckhaus
Deringer LLP) for the First to Fourth Defendants

Josh Holmes KC and James Bourke (instructed by Travers Smith LLP) for the Fifth to
Seventh Defendants

Hearing date: 27 April 2023

Approved Judgment

This judgment was handed down remotely at 2pm on Friday 12 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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MR JUSTICE BUTCHER

Mr Justice Butcher :

1. There are before me two applications. One is brought by the First to Fourth Defendants, to whom I will refer when it is unnecessary to distinguish between them as ‘the Continental Defendants’. The other is brought by the Fifth to Seventh Defendants, to whom in like manner I will refer as ‘the ZF Defendants’.
2. The application brought by the Continental Defendants seeks an order: (1) staying the Claimants’ (‘Mercedes’) claims against the First Defendant (‘CTUK’); and (2) declaring that the court has no jurisdiction in respect of Mercedes’ claims against the Second, Third and Fourth Defendants on the basis that the appropriate forum for Mercedes’ claims is Germany, and setting aside the permission which was granted to serve those Defendants out of the jurisdiction.
3. The application brought by the ZF Defendants is an equivalent one. It seeks an order: (1) staying Mercedes’ claims against the Fifth Defendant (‘ZFUK’); and (2) declaring that the court has no jurisdiction in respect of Mercedes’ claims against the Sixth and Seventh Defendants on the grounds that the appropriate forum for those claims is Germany, and setting aside the permission which was granted to serve those Defendants out of the jurisdiction.

The Parties

4. Mercedes is a multinational automotive manufacturer, incorporated and with its headquarters in Stuttgart, Germany. Its business, as far as is relevant to these proceedings, is manufacturing and distributing luxury passenger cars.
5. The Continental Defendants are part of a group which is a global supplier of advanced automotive technologies. Its group headquarters is in Germany. CTUK is a company incorporated under the law of England and Wales with its registered office in Wales. CTUK manufactures automotive brake parts. The Second Defendant (‘CA’) is a company incorporated under German law with its registered office in Hanover, Germany. It is the ultimate parent company of the Continental group of companies. The Third Defendant (‘CAG’) is a company incorporated under German law with its registered office in Hannover, Germany. It is a holding company. The Fourth Defendant (‘CATG’) is a company incorporated under German law with its registered office in Hanover, Germany. Its activities include the development, manufacture and sale of electrical, electronic, mechatronic and mechanical components, modules and systems and the provision of related services in the field of automotive technology.
6. The ZF Defendants are part of a group which is a global supplier of advanced automotive technologies, systems and components. ‘ZF’ stands for Zahnradfabrik. The group is headquartered in Friedrichshafen, Germany. The Fifth Defendant (‘ZFUK’) is a company incorporated under the law of England and Wales with its registered office in England. The Sixth Defendant (‘ZFF’) is a company incorporated under German law with its registered office in Friedrichshafen, Germany. ZFF is the ultimate parent company of the ZF Group. The Zeppelin Foundation, administered by the City of Friedrichshafen owns 93.8% of the shares in ZFF, and the Dr Jürgen and Irmgard Ulderup Foundation, which is based in Lemförde, Germany, owns the rest. The Seventh Defendant (‘ZFAS’) (formerly known as Lucas Automotive GmbH) is a

company incorporated under German law with its registered office in Koblenz, Germany.

The Cartel and the Decision

7. As I will explain in more detail below, Mercedes' claim in these proceedings is a 'follow on' claim for damages, in the light of a decision of the European Commission under its Settlement Procedure.
8. That decision is a Settlement Decision dated 21 February 2018 (C(2018) 925) in Case AT.39920 ('the Settlement Decision'). Relevantly, the Commission determined that the ZF, Continental and Bosch undertakings participated in an exchange of sensitive business information with a view to reducing competitive uncertainty for the sales of Hydraulic Braking Systems (or 'HBS') components for passenger cars to Mercedes and to BMW.
9. The nature of the collusive conduct is described in the Settlement Decision as follows:

'The collusive conduct consisted of bilateral exchanges of competitively sensitive business information between the three suppliers. With the aim of coordinating their market conduct relating to [Mercedes] and BMW, the participants exchanged information regarding their willingness to accept [Mercedes'] 3-year policy and BMW's 4-year-policy clause, respectively, and discussed the purchasing terms and conditions of [Mercedes] and BMW. The exchanges concerning [Mercedes] also related to raw material cost compensation, cost transparency and volume reductions.'
10. The reference to Mercedes' 3-year policy was a reference to Mercedes' policy of asking for a supply of components for 3 years after the end of the production of a vehicle model at the same price as during the active series production phase of that model. These have been referred to as 'after-series parts'. BMW's 4-year-policy led to a similar request.
11. In the case of the Continental undertaking, the infringing conduct occurred in the period 13 February 2007 and 19 March 2010; in the case of the ZF undertaking, its infringement as regards Mercedes was in the period 13 February 2007 until 18 March 2011. It was, as recorded in recitals 53-57, conduct which had as its object the prevention, restriction or distortion of competition in the internal market, and because of that there was no need for proof, for the purposes of finding an infringement, that it had had an actual effect on the market.
12. The geographical scope of the infringement was described as follows, in recitals 36-37 of the Settlement Decision:

'(36) In the Union, braking systems are produced notably in Germany, France, United Kingdom, Poland and the Czech Republic. The customers concerned are large car producing multi-nationals which are present across the whole of the EEA.

(37) The geographical scope of [the relevant] infringements is EEA-wide, given that the anti-competitive contacts concerned the supply of certain parts of braking systems for passenger cars to production facilities of [Mercedes] [and] BMW in the EEA, no matter where exactly in the EEA these facilities were located.'

13. The addressees of the Settlement Decision included CA, CAG and Continental Teves AG & Co. oHG ('CTAG'), ZFAS (under its former name), and an entity (TRW KFZ Ausrüstung GmbH) of which ZFF is, Mercedes contend, the legal successor. All the addressees of the Settlement Decision were German entities, with the exception of ZF TRW Automotive Holdings Corp, a US company, which was found liable as a parent company, and not a direct participant. It is not one of the parties to the present action.

The Commencement of the Present Action

14. The evidence shows that there has been a formal mediation process in which Mercedes and the ZF Defendants have sought to resolve their differences. It was conducted in Germany, with a German mediator and German lawyers, but without prejudice to Mercedes' ability to commence proceedings in any jurisdiction. It was not successful.
15. The present action was begun by the issue of a Claim Form on 13 September 2022. On 21 September 2022, the Claimants made a without notice application to serve the Claim Form on the Defendants other than CTUK and ZFUK, pursuant to CPR 6.36 and 6.37.
16. In the application for permission to serve out, the claim against CTUK and ZFUK was explained as follows: (1) that each of CTUK and ZFUK was at the relevant times part of the same economic unit as addressees of the Settlement Decision; (2) that CTUK and ZFUK had 'knowingly implemented the Unlawful Arrangements' established by the Settlement Decision (viz. the unlawful information exchanges); and (3) that CTUK (as well as CATG) had inherited liability for the Unlawful Arrangements from CTAG.
17. The application relied on only one 'gateway' under paragraph 3.1 of Practice Direction 6B, namely paragraph 3.1(3), which provides:

'A claim is made against a person ("the defendant") on whom the claim form has been ... served (otherwise than in reliance on this paragraph) and –

 - (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
 - (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.'
18. Accordingly this is a case in which the basis for service out was solely the fact that CTUK and ZFUK could be served within the jurisdiction, and were thus what is often called 'anchor defendants'.
19. In addressing the question of whether England and Wales was the proper forum for the claim, amongst the points made in the witness statement of Mr Bronfentrinker of the Claimants' solicitors, were that this jurisdiction has considerable experience in dealing with litigation involving Europe-wide cartels. In addition, Mr Bronfentrinker suggested that the disclosure which would be available in this jurisdiction would be more extensive than that available in Germany; that 'this makes it far more difficult for Mercedes to gather evidence to assist in proving their claim in Germany'; and that

this was ‘a particularly important factor for the Court to consider in making its decision.’

20. Waksman J made an order on the papers granting permission to serve the Claim Form out of the jurisdiction on the Second to Fourth and Sixth and Seventh Defendants, which was sealed on 23 September 2022. CTUK and ZFUK were served with the Claim Form, within the jurisdiction, on 1 November 2022. The other Defendants were subsequently served. They have issued the applications which are currently before me.

The Legal Principles

21. While Mercedes said that it reserved its position in higher courts, should there be an appeal from my decision, there was no dispute that the relevant principles which I have to apply are those enunciated in Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460. That case establishes the principles applicable both to applications to stay proceedings brought ‘as of right’ by service within the jurisdiction (‘service in cases’) and to set aside service of process outside the jurisdiction (‘service out cases’). The principles enunciated in Lord Goff’s well-known speech may be summarised thus:

(1) The question in both service in and service out cases is to identify the forum in which the case can be suitably tried for the interest of all the parties and the ends of justice (480G).

(2) In service in cases, the burden is on the defendant to show that England and Wales is not the natural or appropriate forum for the trial and that there is another available forum which is clearly or distinctly more appropriate than England and Wales. If the court is satisfied that there is another available forum which is prima facie the appropriate forum, the burden shifts to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nonetheless take place in England and Wales. This is often described as the ‘second stage’ of the Spiliada approach.

(3) In service out cases, the burden of proof is on the claimant not just to show that England and Wales is the appropriate forum for the trial of the action, but that this is clearly so.

(4) In determining which of the competing fora is the appropriate forum, the court will look to see what factors point in the direction of this, and of the other forum. As Lord Goff put it (at 477G-478B):

Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend,

Lord Keith of Kinkel, in The Abidin Daver [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Credit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(5) As a general rule, the court will not be deterred from granting a stay or refusing permission to serve out simply because the claimant will be deprived of a 'legitimate personal or juridical advantage', such as damages on a higher scale or a more generous disclosure regime, unless it is shown through cogent evidence that there is a risk that substantial justice will not be done in the natural forum.

22. In addition, the parties agreed that the approach which the court should adopt where there are multiple defendants, some of which have been served without the need for permission and some with, is that it should recognise that it is 'addressing a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried' (see Lungowe v Vedanta Resources plc [2019] UKSC 20 at [68]).

The Parties' respective positions

23. The parties' essential positions can be very simply stated. The Defendants contended that Germany was an available forum for the claims, which was clearly more appropriate and the natural forum.
24. Mercedes did not accept that Germany was an available forum at least for part of the claim. In any event, Mercedes submitted that the Spiliada principles had to be applied in the light of the realities of the third decade of the twenty-first century. These realities, including in particular the international scope of the operations of the parties to the present dispute, the availability in various fora of relevant economic expert evidence, the ease of travel for witnesses, the transmissibility of modern documents, the near-ubiquity of the English language in business dealings, and the ease of translation in any event, meant that Germany, even if available, was not a more, or clearly more appropriate forum. The English court was familiar with this type of case, and the present claims should proceed here.
25. Mr Hoskins KC, for Mercedes, made clear that the various matters, which may be called juridical advantages, which were relied on in Mr Bronfentrinker's first witness statement, such as the wider disclosure available in England and Wales, and added to in his second witness statement, were not being relied upon for the purposes of resisting the Defendants' applications. This was realistic, in light of the approach to such issues in the Spiliada, but it did constitute an abandonment of some matters which had been relied on as 'particularly important' when seeking permission to serve out. Equally realistic was the fact that there was no suggestion before me that substantial justice could not be done in Germany, if it was an available forum.

Analysis

26. In my judgment, and with little hesitation, I conclude that Germany is an available forum, with which the dispute has its closest and most real connexion, and which may be described as the natural forum for the present dispute.

Available forum

27. The evidence submitted on behalf of the Continental Defendants is that: (1) the local courts of Mercedes' seat of incorporation in Stuttgart, Germany, would have jurisdiction over the German Continental Defendants on the basis that the allegedly harmful event on which Mercedes rely occurred in Germany; (2) the local court of Hanover, Germany, would also have jurisdiction over those Defendants on the basis that they are domiciled in Germany; and (3) both those courts would have international and local jurisdiction over CTUK on the basis that the claims against CTUK are so closely connected with the claims against the German Continental Defendants that it would be expedient to hear and determine them together.
28. The evidence on behalf of the ZF Defendants is similar, namely that the Regional Court of Stuttgart would have jurisdiction over Mercedes' claims against ZFF and ZFAS because the Claimants are incorporated in Stuttgart. The ZF Defendants say that there is no reason why Mercedes should need to sue ZFUK. They point out that in the protective proceedings which Mercedes has commenced, to which I will turn, Mercedes has not included CTUK as a defendant.
29. Mercedes disputes that Germany is an available forum only in respect of the claims against the Continental Defendants, and only on one limited ground. This is said to arise as follows. Mercedes has, on 28 December 2022, commenced proceedings in the Regional Court of Hanover against CA, CAG and CATG, seeking damages for some of the infringements the subject of the Settlement Decision, but only in respect of purchases made in 2008 and 2009. These proceedings are said to have been commenced to protect Mercedes from a limitation defence in the event that this court declines jurisdiction. Those Continental Defendants which are party to that action have filed a defence dated 28 March 2023. That defence, having referred to the proceedings brought in this court, says, in paragraph (45):

‘The defendants attack the jurisdiction of the UK High Court as the facts of the case are German and can be judged much more efficiently by the German courts. For the UK claim, the claimant seeks to artificially create such a nexus by co-suing a Continental Group company based in the UK. However, this company is not the addressee of the decision and was – presumably for good reason – not included in the German declaratory action’.

Then, in paragraphs (46-47) it is said that the action (ie the German action) ‘is already inadmissible due to other lis pendens in the UK.’

30. Mercedes, which does not accept that the German proceedings are inadmissible for that reason, nevertheless contends that because CA, CAG and CATG have put in that plea in the German proceedings, there is a risk that the German court may decide that it has no jurisdiction on lis pendens grounds before a decision by this court on whether to decline jurisdiction or, at least, while an appeal is pending here; and that this risk means that Germany should not be regarded as an available forum.

31. I do not regard there as being any appreciable risk of the type conjectured by Mercedes. There is no indication that the German court will make a decision on jurisdiction before this court decides the present applications. Instead, the only indication of when a hearing on the issue might - absent a stay of those proceedings - be heard, is before the end of the year. On a decision by this court to decline jurisdiction, then the *lis pendens* point in Germany would fall away. In relation to the position if there were to be an appeal here, this could be dealt with by asking the German court to stay its proceedings or not to proceed to deal with this issue pending the outcome of such appeal. The Continental Defendants have undertaken to ask the German court to stay or defer a consideration of this point. It is reasonable to infer that such a request would be given weight by the Hanover court, especially given the terms of Dr Schmidt's witness statement of 24 April 2023, which comments on Continental not having, as at that date, written to the Hanover Court applying for or requesting a stay. As Ms Demetriou KC submitted, that would have been an odd point to have made, if such a request would not have been likely to carry weight.

The Factors pointing in favour of the different jurisdictions

The identity of the parties and where they reside or carry on business

32. Both Mercedes Claimants are domiciled in Germany. During the relevant period Mercedes had no production facilities in the UK. All the Defendants, save for CTUK and ZFUK, are domiciled in Germany. CTUK and ZFUK are far from central to the dispute. They were not addressees of the Settlement Decision, nor are they identified in it as having had any relevant role. Their alleged liability is essentially derivative from the liability of other Defendants. It seems clear that they have been sued in order to seek to found jurisdiction here. Their joinder would not appear to add either to the damages recoverable, or to the possibility of enforcement of any judgment. As already mentioned, in the proceedings which Mercedes have brought in Hanover, CTUK is not named as a defendant.

Where the infringements occurred

33. The infringing conduct identified in the Settlement Decision took place in Germany. In the case of the Continental Defendants, the evidence is that all the employees who were involved in the unlawful conduct resided in Germany, and the relevant conduct was commonly in the German language. Similarly in the case of the ZF Defendants, the evidence is that the infringing conduct occurred in Germany and the relevant communications were primarily conducted in German. None of the infringing conduct took place in England or Wales.

Where competition was restricted

34. Mercedes' case is that the unlawful conduct affected the terms of the contracts (and in particular the prices) which were negotiated between it and its relevant suppliers, namely the Continental and ZF Defendants for HBS and after-series components. As Mercedes has itself said in draft Particulars of Claim in this action (para. 39), it conducted the procurement of HBS and relevant parts 'in Germany, specifically from its offices in Stuttgart, where its central procurement function is based. In addition, so far as relevant to the present case, Mercedes' separate negotiations with Continental

and ZF/TRW in respect of HBS and the 3-Year-Policy were conducted in Germany, from its offices in Stuttgart.’

35. The evidence for the Continental Defendants is that agreements for HBS parts were negotiated between individuals employed by German-domiciled companies with employees of German-domiciled Mercedes companies. It is further said that to the best of the Continental Defendants’ understanding, no prices in relation to such parts were negotiated in the UK. The ZF Defendants’ evidence is similar. The negotiation of sales of HBS for vehicle manufacture between ZF companies and Mercedes took place centrally in Germany, and were conducted largely in German. The ZF Group’s HBS sales team was located in Koblenz, Germany. Mercedes also required the ZF HBS sales team to visit Mercedes’ manufacturing plants in Rastatt, Hamburg and Esslingen, and other locations in Germany for meetings. The negotiation of sales of after-series components for HBS during the infringement period took place in Germany. ZF’s after-series components head office was in Neuwied, Germany, and Mercedes’ team was in Sindelfingen, near Stuttgart.
36. The Defendants are, I consider correct to say that the fact that the Settlement Decision found that the infringement was EEA-wide, because the anti-competitive contacts concerned the supply of certain parts of braking systems for passenger cars to production facilities no matter where in the EEA those facilities were located, does not establish any significant connexion with England and Wales. As I have said, during the relevant period, Mercedes had no production facilities in England or Wales.

Where damage was suffered

37. It appears very likely that the great majority of any damage suffered by Mercedes was suffered in Germany. More than 99% of sales of components of HBS by Continental companies to Mercedes in the EU/EEA during the relevant period were made to a German-domiciled Mercedes entity. Only some 4.5% of such products were manufactured by CTUK, and all or almost all of those were exported by CTUK for delivery in Germany and paid for in Germany. The position in relation to the ZF Defendants was similar. Over 95% of the ZF Defendants’ spare part sales for braking systems to Mercedes were delivered to Mercedes’ central logistics base in Gernersheim, Germany. No after-series components for HBS were, during the infringement period, delivered by ZF Defendants to Mercedes in England and Wales. ZFUK’s sales of HBS represented some 4.1-6% of the ZF Group’s global sales of HBS during the infringement period, and none of ZFUK’s such sales were made to Mercedes whether within or outside England and Wales.

The Contractual Documents

38. The evidence is that the relevant products were supplied by Continental companies to Mercedes pursuant to a contractual framework which involved: (1) Framework Agreements, which consisted of Mercedes’ national (ie, in general, for supply from within Germany) and, separate, international ‘Terms and Conditions for the Purchase and Production Material and Spare Parts’, and of ‘Mercedes-Benz Special Terms’. The national ‘Terms and Conditions’ were in German, governed by German law, and contained a jurisdiction clause in favour of the courts of Stuttgart. The international ‘Terms and Conditions’ were in English, but in the version which was produced to the

court also included German law and jurisdiction provisions. (2) Purchase Contracts for specific categories of HBS products, which incorporated some or all of the overarching Framework Agreements. An example the court was shown was in German and referred to Mercedes' national 'Terms and Conditions'. (3) Individual purchase orders. These would be addressed to different entities within the Continental Group. During the relevant period, they were addressed to companies based in at least the following: the Czech Republic, Germany, Slovakia, Portugal and the UK.

39. In relation to ZF, its evidence is that during the infringement period, only Mercedes' national 'Terms and Conditions', in German, were applicable and that ZF had not agreed to the international 'Terms and Conditions'. There were also Mercedes' Special Terms, which regulated the flow of information and processes between Mercedes and its suppliers. These were typically available in German and in English but only the former was binding in the event of a conflict.

The Issues in the Action and the Relevance of the Settlement Decision

40. Mercedes contended that various of the matters which had occurred in Germany, and in particular the location of the infringing conduct, were not significant links connecting the present claim with Germany, because liability had been established by the Settlement Decision and was not in issue, and what was actually involved in the claim was the issue of the quantum of damages.
41. I do not accept, even if it were right that, in the trial of the present claim, there would be no investigation of the facts constituting the infringement, that would entirely remove the significance of the location of those matters as a pointer towards Germany being the natural forum for the present dispute. In any event, it appears to me clear that the adjudication of Mercedes' claims in this action will involve an investigation into the nature of the infringing conduct, as well as to what, if any, were its effects.
42. This is because causation of loss is clearly going to be a central issue in the present proceedings. Particularly in a case involving an infringement which consisted of information sharing, as opposed for example to price-fixing, the fact of the infringement may well not establish whether it had any and if so what effect on the terms of the contracts which were then negotiated with Mercedes. The Settlement Decision, being the product of a settlement after an admission of liability, is in relatively short form, being only 26 pages, and does not include nearly as much detail as a full infringement decision, which might run to hundreds of pages. It does not set out either the precise nature of the infringing contacts, and nor does it establish what effect there was on the terms which Mercedes agreed for the supply of HBS and after-series components.
43. As was said by Green J in Peugeot SA v NSK Ltd and Others [2018] CAT 3, at [28], 'in any quantum case it must surely be an elementary starting point that the court or tribunal has a full and comprehensive understanding of the detailed workings of the cartel in question'. Econometric modelling will not be a substitute for an examination of the facts of the infringement and how it affected specific negotiations, though it may complement and add to such an investigation.

44. To obtain a full and comprehensive understanding of the workings of the cartel, and to understand its effects, involves an investigation of matters which occurred in Germany, between the employees of entities domiciled in Germany, and largely conducted in German.
45. There may also be other issues, including as to whether any price effects of the infringement were passed on by Mercedes. This might involve factual evidence relating to a number of countries, including Germany. It would not appear to relate particularly or especially to the UK.

Convenience of factual witnesses, Location of documents; Expert evidence

46. Most if not all the factual witnesses relevant to issues of the nature of the infringing conduct and as to causation are likely to be in Germany. It is likely to be rather easier for them to give evidence in Germany than in London. I would not accept that all such witnesses could give evidence as satisfactorily by video link, though of course that might be suitable in some cases. It is still often an advantage to receive evidence from witnesses in person.
47. I recognise, as Mr Hoskins KC submitted, that any advantages to the witnesses in having to travel within Germany rather than to London, may be marginal, or in some cases non-existent, given the frequency of flights between Germany and the UK. Nevertheless, I would expect there to be some additional inconvenience and expense to witnesses having to give evidence in London. On any view, the location and convenience of the witnesses is not a factor pointing in favour of England and Wales as the appropriate forum.
48. Most of the potential witnesses speak German as their native language. The evidence is, furthermore, that many of the potentially relevant Continental witnesses would not feel comfortable in giving evidence in English. Here again, I recognise that, to the extent that witnesses are not able to give evidence in English, there can be translation (if necessary simultaneous translation) and that the English courts are very well used to hearing evidence given in this way. Nevertheless, other things being equal, there is an advantage in witnesses giving their evidence in their native tongue to a tribunal whose native tongue it is. Again, on any view, the native language of the witnesses is not a factor pointing in favour of England and Wales.
49. It appears likely that the relevant documents are located in Germany. The evidence suggests that the majority will be in German, though some will be in English. I accept, as Mercedes submitted, that it is likely to be easy to transfer documents from Germany to the UK, and that it is possible and routine to have documents translated. These points mean that the location and language of the documents are not, on their own, very weighty factors. Nevertheless, they appear to me still to be connecting factors with Germany; and not to be ones with England and Wales.
50. As to expert economic evidence, it is likely that the same consultancy firms will be instructed if this claim progresses in England or in Germany and will be capable of giving equivalent quality evidence in either. I regard this point as essentially neutral.
51. Before parting from issues of the convenience of witnesses and the location of documents, I should mention an argument advanced by Mr Hoskins KC. This was to

the effect that, given that the Defendants were admitted participants in an unlawful cartel their convenience and the convenience of their witnesses should not be a relevant consideration, or at least should be one of very little weight. I do not consider that this is a correct approach. In relation to the matters which will be in issue, there has been no finding that Mercedes are right, or the Defendants wrong, and the court cannot take any view one way or the other at this stage on those matters. Points relating to the convenience or inconvenience of adducing witness or documentary evidence in relation to such issues remain relevant for the court to consider at the jurisdictional stage.

Applicable Law

52. The English courts are very used to applying foreign law to many disputes before them. Generally, however, it is preferable that a case should be tried in the country whose law applies to the dispute in question (see VTB Capital plc v Nutritek International Corp [2013] UKSC 5 at [46]).
53. In the present case, the parties have not finalised their positions as to what the relevant governing law(s) may be. However, no party pointed to any issue which would be governed by the law of England and Wales, other than by reference to the possibility that that law might apply if the proceedings continued here and the issue was a procedural one, or where the default rule or a presumption of similarity (see FS Cairo (Nile Plaza) LLC v Brownlie [2021] UKSC 45) applied.
54. It is apparent that there is at least one contentious issue to which German law will be applicable. That is the question of whether CTUK and CATG are liable for the unlawful infringement of Art 101 TFEU by reason of having been partners in CTAG. This raises a question of German partnership law.
55. In addition, it is apparent that there is an issue between the parties as to whether the Settlement Decision applies to after-series components other than HBS components. Mercedes contends that it does (and has made clear that if, on its proper interpretation it does not, it does not intend to bring any stand alone claim in respect of such other components). The Defendants contend that it does not. That is a question of EU law, as being an issue of the interpretation of an instrument of an EU body.
56. While the courts of England and Wales are obviously very used to applying EU law, and until recently did so as being directly applicable, it is the case that since the UK's withdrawal from the EU, UK courts cannot make preliminary references to the CJEU in respect of questions of the interpretation of EU law. While the Claimants say that a reference to the CJEU in respect of the interpretation of a Settlement Decision would be unusual, it cannot be said to be unprecedented. I was shown the decision in Landkreis Northeim v Daimler AG (1.8.2022 – Case C-588/20), which was just such a reference.
57. I consider that the fact that the courts of England and Wales could not, but the courts of Germany could, make a preliminary reference to be a pointer towards Germany, and away from England and Wales as the appropriate forum. I should state, however, that I do not regard this factor as decisive. My conclusion on the natural forum would have been the same without it.

Conclusions on forum conveniens

58. Having regard to these matters, I am of the clear view that the forum with which the dispute has its closest and most real connexion is Germany, which is the natural forum for the dispute. The case has, in reality, very limited connexions with England and Wales, and it is not one, unlike very many which come before this court, where the parties have consensually chosen England and Wales as the forum for their disputes. The case has, by contrast, strong (and certainly much stronger) connexions with Germany.
59. If I were applying the service in and service out Spiliada guidelines separately, I would conclude that there is another forum which is clearly more appropriate for the determination of the claim against CTUK and ZFUK; and England and Wales has not been shown to be more appropriate, and still less to be clearly more appropriate, for the determination of the claim against the other Defendants.
60. As I have said, however, the better approach is to consider the case as one piece of multi-defendant litigation and, doing so, in my judgment the case, as a whole, should be tried in Germany.

Disposal

61. I will grant an order which sets aside service on the Second to Fourth and Sixth and Seventh Defendants, and which stays the action against the First and Fifth Defendants.