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ARGUMENTS DELAYED ARE ARGUMENTS REJECTED—APPEAL REFUSED IN CARTEL CONTRIBUTION CASE (SAMSUNG ELECTRONICS V LG DISPLAY)

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Dispute Resolution analysis: This was an appeal against a Commercial Court judgment in LG v Samsung contribution proceedings arising ultimately from a cartel ruling by the competition authority. A unanimous court rejected Samsung's appeal against the first instance decision to set aside a service out order and upheld the ruling that England was not the appropriate forum. Lord Justice Males analysed the grounds of appeal in detail and explained that some of the arguments raised in them may have changed the course of events had they been made at first instance and supported by evidence. This included that the factors connecting the underlying claim to the jurisdiction could, if founded on sufficient supporting evidence, potentially be a powerful factor in the forum conveniens assessment of a contribution claim. Written by Anastasia Tropsha, associate at PCB Byrne LLP.

Samsung Electronics Co Ltd and others v LG Display Co Ltd and another [2022] EWCA Civ 423 (1 April 2022)

What are the practical implications of this case?

This decision, although ultimately unhelpful to the appellant, highlights a number of substantive and procedural points for litigants in proceedings subject to forum challenges. Arguments by Samsung were made too late to change the outcome of these proceedings, but strong enough to take note of:

- *a priori* factors in support of *forum conveniens* of underlying litigation can be relied upon in follow-on proceedings, such as contribution claims
- if connected proceedings have caused documents, translations, witnesses and knowledge to be accumulated in England, it would be more practical to continue here. Cambridgeshire style arguments (which were decisive in the *Spiliada* case[1]), when supported by evidence can be persuasive

Males LJ's judgment explains that the right types of evidence at first instance may have assisted in persuading the first instance judge that England is the appropriate forum and provides practical examples.

Separately, defendants to contribution claims in the competition context would do well to remind the court of any proportionately minor role they were found to have played by the sanctioning authority so as to deploy this binding decision to reduce quantum.

What was the background?

A claim was brought against the defendants (LG) for contributions (under the CL(C)A 1978) as a result of damages owed following an LCD panels cartel finding by the Commission as against the parties and follow-on English proceedings.

Following settlement of the English proceedings, the claimant (Samsung) sought contributions from LG and was given permission to serve out of the jurisdiction in Taiwan and Korea. LG argued that these proceedings should have been brought in the Far East and applied to set aside the order of Mr Justice Henshaw granting permission

[1] *Spiliada Maritime v Cansulex [1986] 3 All ER 843, [1987] AC 460*

to serve out. The two-year limitation period under the CL(C)A 1978 had by then expired, but no evidence was provided as to impossibility of or time bar on equivalent proceedings being brought in Korea or Taiwan.

The first instance judge, Sir Michael Burton GBE, agreed with LG that England was not the appropriate forum for these proceedings and set aside the service out order. This was an appeal against that decision.

What did the court decide?

Having identified the appropriate test as that England has to 'be clearly the appropriate forum' (para [3]), Males LJ continued to assess the circumstances in which an appeal would be granted. This would only be where 'the judge has made "a significant error of principle, or a significant error in the considerations taken or not taken into account"' (see for example *VTB Capital v Nutritek* at para [69][2] (para [4]). In general, an appellant may not normally adduce new evidence or arguments (para [5]).

Rejecting the appeal, the court ruled as follows on its three grounds:

- The factors connecting the underlying claim to the jurisdiction were potentially significant to the assessment of forum conveniens for a contribution claim, however, the first instance judge had not ruled on this point and so no appeal was possible based on a principled argument about where contribution claims should usually be heard. Further, practical Cambridgeshire considerations around existing legal teams and translations cannot be considered without evidence and would need to have been made at first instance.

- The second ground advanced was that the judge erred in his assessment of the way in which liability should be apportioned between co-cartelists either by examining LG's role (it being less culpable) or in relation to causative consequences. The first argument was significant and may have led to a different outcome, but was not made before the judge. The second was strong from a practical, if not legal point of view, but the decision reached was not unreasonable.

- The third ground, as a corollary of the first two, was that had the judge decided the above two points differently, he would have held that England was the appropriate forum. As Males LJ had dismissed the two previous grounds, the third did not arise.

Case details

- Court: Court of Appeal, Civil Division
- Judges: Lord Justice Lewison, Lord Justice Males and Lord Justice Snowden
- Date of judgment: 01 April 2022

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[2] *VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808*