

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2012

Before :

THE HONOURABLE MR JUSTICE SALES

Between :

Nokia Corporation

Claimant

- and -

- (1) AU Optronics Corporation**
(2) AU Optronics (Czech) S.R.O.
(3) AU Optronics Europe B.V.
(4) Tatung Company
(5) Chungwha Picture Tubes Ltd
(6) LG Display Co Ltd
(7) LG Display Germany GmbH
(8) Samsung Electronics Co Ltd
(9) Samsung SDI Co Limited
(10) Samsung SDI Germany GmbH
(11) Samsung Semiconductor Europe GmbH
(12) Samsung Semiconductor Europe Limited
(13) Sharp Corporation
(14) Sharp Electronics (Europe) GmbH
(15) Toshiba Corporation
(16) Toshiba Electronics Europe GmbH
(17) Seiko Epson Corporation
(18) Epson Imaging Devices Corporation
(19) Epson Europe Electronics GmbH
(20) Hitachi Limited
(21) Hitachi Displays Limited
(22) Hitachi Europe Limited
(23) Royal Philips Electronics B.V.
(24) Philips Components B.V.
(25) Philips Components International B.V.

Defendants

Christopher Vajda QC, Paul Harris QC & Ben Rayment (instructed by **Bird & Bird**) for
the **Claimant**

Aidan Robertson QC (instructed by **Osborne Clarke**) for the **1-3 Defendants**

James Flynn QC & Robert O'Donoghue (instructed by **Covington & Burling**) for the **8, 11, 12 Defendants**

Paul Lasok QC & Alistair Lindsay (instructed by **Allen & Overy**) for the **9-10 Defendants**

Daniel Jowell QC & Sarah Love (instructed by **Simmons & Simmons**) for the **13-14 Defendants**

Thomas de la Mare (instructed by **White & Case**) for the **15-16 Defendants**

Nicholas Green QC & Tony Singla (instructed by **Allen & Overy**) for the **20-22 Defendants**

Hearing dates: 8-12/3/2012

Judgment

Mr Justice Sales :

1. There are before the court a number of inter-related applications. These relate to proceedings commenced in 2009 by the Claimant (“Nokia”) against a wide range of defendants, all of whom are involved in some way in the manufacture or supply of liquid crystal displays (“LCDs”). In this judgment, I refer to the individual defendants by their numbers as D1, D2 etc..
2. Nokia is the well-known mobile telephone manufacturer. It purchases small sized LCDs from a number of suppliers for incorporation into its mobile telephones. The proceedings it commenced in 2009 include allegations that the defendants have been involved in a cartel involving unlawful practices which contravene Article 101 of the Treaty on the Functioning of the European Union (“Article 101”, ex Article 81 TEC), which have had the effect of increasing the prices for mobile telephone LCDs above what they would have been had the worldwide market for LCDs, including in the European Union and the European Economic Area, been a properly competitive market.
3. Article 101(1) provides:

“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. Nokia obtained an order dated 15 December 2009 granting permission for service of the claims on defendants outside the jurisdiction.
5. The defendants are divided into distinct groups which are pleaded to be distinct “undertakings” for the purposes of application of Article 101. For present purposes

the following undertakings and groupings of defendants are relevant: AU Optronics (D1, D2 and D3, represented by Mr Robertson QC), Samsung (D8, D11 and D12, represented by Mr Flynn QC), Samsung SDI (D9 and D10, represented by Mr Lasok QC), Sharp (D13, D14 and a new proposed D23, Sharp Laboratories of Europe Limited – “Sharp Laboratories”, represented by Mr Jowell QC), Toshiba (D15 and D16, represented by Mr de la Mare) and Hitachi (D20, D21 and D22, represented by Mr Green QC). The other defendants have either settled with Nokia or have agreed continuing stays of the claims against them. Hereafter, I refer to the defendants appearing before me as “the represented defendants”.

6. The AU Optronics Defendants and the Sharp Defendants did not wish to be perceived to be submitting to the jurisdiction of the court, so Mr Robertson and Mr Jowell, respectively, appeared on a watching brief and did not play a part in the oral argument. The defendants they represent were supportive of the position adopted by the other represented defendants.
7. In its original Particulars of Claim lodged in support of the claim form dated 23 November 2009 (“the P/C”), no doubt because of the similarity in their names, Nokia made a mistake in identifying D9 and D10 as forming part of a single Samsung undertaking in conjunction with D8, D11 and D12, rather than as companies in a distinct “undertaking”, as Samsung SDI. That mistake has been corrected in the proposed Amended Particulars of Claim (“the Amended P/C”), which sets out very extensive amendments to the P/C which Nokia now seeks permission to make by one of the applications before me. I consider below whether this error in the P/C in treating D9 and D10 as part of Samsung and failing to identify them as members of the distinct Samsung SDI undertaking has a material impact in relation to any of the applications before me.
8. The P/C also contained another factual error. Nokia pleaded that D22 had made direct sales of (small quantities of) LCDs to it. In the Amended P/C it emerges that Nokia does not maintain that particular allegation. Mr Vajda QC, for Nokia, accepted that I should consider the claims set out in the P/C on the footing that they did not include this particular allegation of direct supply of LCDs by D22.
9. The Amended P/C have been drafted in light of certain disclosure obtained in related proceedings in the United States. In those proceedings, an order was made which limited the extent to which disclosed material could be used for other purposes, in particular with a view to preserving what is asserted to be commercial confidentiality in relation to some of the contents of that material. Material graded in the US proceedings as “Confidential” or “Highly Confidential” has been made subject to special restrictions as to the extent to which it can be released to other persons. The relevant US disclosure order has permitted disclosure of relevant material within a defined “confidentiality ring”, including to Nokia’s legal team in England. This has permitted the much extended pleading by Nokia of its claims in the form of the Amended P/C.
10. By order dated 17 January 2012 made by Master Bragge, provision was made for use of the US disclosure material in these proceedings, but reflecting the “confidentiality ring” arrangements contained in the US disclosure order. The Amended P/C plead by reference to the US disclosure material, but in certain cases it is made clear that details of some of the pleaded case (where it reflects “Confidential” or “Highly

Confidential” material) may not be provided to in-house personnel (including in-house lawyers) of certain of the defendants. There are procedures which would allow those defendants whose confidentiality is in issue in relation to any particular item of information set out in the Amended P/C to agree to the personnel of other defendants seeing the pleading in that respect; and the order of Master Bragge contains an express liberty to any party to apply for an amendment of his order if they wish to seek a variation of it to permit wider dissemination of the information in the Amended P/C. At the time of the hearing before me, some but not all of the affected defendants had agreed to the other defendants seeing the full pleading. The Samsung SDI defendants (D9 and D10) remain subject to restrictions against their in-house lawyers seeing the full text of the Amended P/C (under the relevant arrangements their external lawyers have been permitted to see the full text). Mr Lasok, on their behalf, therefore maintained a distinct argument that the court, in its discretion, should not permit the amendment of the P/C in the form of the Amended P/C subject to that restriction. After debate, a way through this particular difficulty, acceptable to Mr Lasok, was identified: see paras. [86]-[88] below.

11. This was a peripheral issue. The main issues between the parties related to the claims against D12 and D22 and the assertion of jurisdiction over other defendants.
12. Most of the defendants are domiciled outside England and the United Kingdom. However, D12 and D22 are companies registered and domiciled in England. At the hearing, these were referred to as “anchor defendants”, meaning that it is only because claims are made against them that under Regulation (EC) 44/2001 (“the Judgments Regulation”) and under English jurisdictional rules the English court may be entitled to assert jurisdiction over the other defendants as well. Nokia is entitled to sue D12 and D22 in England by virtue of Article 2 of the Judgments Regulation, because they are both domiciled here. Provided Nokia has valid claims against an anchor defendant, it may be entitled to join other defendants domiciled in other EU Member States in these proceedings on the basis that the claims against them “are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings” (Article 6(1) of the Judgments Regulation). Similarly, provided Nokia has valid claims against an anchor defendant, under English jurisdictional rules it may be entitled to join other defendants domiciled outside the EU in these proceedings on the basis of the close connection between the claims against them and the claims against an anchor defendant where each other defendant is “a necessary or proper party” to the claim against the anchor defendant (paragraph 3.1(3) of Practice Direction 6B – Service Out of the Jurisdiction; CPR paragraph 6BPD.3).
13. Although various of the defendants represented at the hearing before me maintain that the pleaded claims against them are defective in a number of ways, by virtue of the importance of the anchor defendants to establish the jurisdiction of the English courts in respect of the claims brought by Nokia against all the defendants the main thrust of the defendants’ submissions at the hearing was that the pleaded claims against the anchor defendants D12 and D22 were defective in each case, could not be saved by the proposed amendments in the Amended P/C and should be struck out. If the claims against both anchor defendants are struck out, that would leave no extant jurisdictional foundation for the claims against certain of the other represented

defendants to proceed in the English court, with the consequence that they should be struck out as well.

14. Sharp Laboratories is a company registered and domiciled in England and so is potentially a further anchor defendant for the purposes of these proceedings. Although an application by Nokia to amend the claim form to add Sharp Laboratories as a new D23 was listed for hearing at the same time as the other applications before me, by agreement between Nokia and Sharp Laboratories Nokia's application to join Sharp Laboratories in the action was adjourned to another time. In the event, it was agreed that if I came to the conclusion that the claims against the existing anchor defendants D12 and D22 should be struck out but that the claims against the other defendants passed muster in pleading terms, it would be appropriate to adjourn final consideration whether to strike out the claims in the P/C and whether to permit the amendments in the Amended P/C to be made until Nokia's application to join Sharp Laboratories could be heard.
15. As it transpires, however, it is unnecessary to do that, since I have come to the conclusion that the applications by defendants to strike out the claims in the P/C should be dismissed. I have also come to the conclusion that the amendments in the Amended P/C should be permitted.
16. The applications which are live before me are those contained in:
 - i) An application notice dated 19 October 2011 issued by the Samsung defendants (D8, D11 and D12) claiming that the P/C fail to disclose reasonable grounds for bringing a claim against D11 and D12, and that the claims against them in the P/C should be struck out pursuant to CPR Part 3.4(2)(a); that the claims against D22 in the P/C should be struck out on the same basis; and that (since if that is right there would be no anchor defendant) the court should set aside the order dated 15 December 2009 permitting service outside the jurisdiction on various defendants (including D8) and should declare that it has no jurisdiction in relation to the claim pleaded against D8;
 - ii) An application notice dated 24 October 2011 issued by the Hitachi defendants (D20, D21 and D22) claiming that the claim in the P/C against D22 should be struck out pursuant to CPR 3.4(2)(a) as disclosing no reasonable cause of action and/or that summary judgment should be given for D22 against Nokia under CPR Part 24.2(a)(i) in relation to that claim because Nokia has no real prospect of succeeding on the claim; and that the court should set aside the order dated 15 December 2009 permitting service outside the jurisdiction on D20 and D21 on the footing that (assuming the claims against the anchor defendants, D12 and D22, are struck out) there is no proper basis for the court to assume jurisdiction over them;
 - iii) An application notice dated 9 January 2012 issued by Nokia, to the extent that it included applications asking for permission to amend the P/C in the form of the Amended P/C and for an order that any non-party to the proceedings may not obtain a copy of the redacted portions of that pleading; and
 - iv) An application notice dated 27 February 2012 issued by Nokia asking the court to issue a formal request for information from the European Commission

relating to an investigation it is currently undertaking into the arrangements for the manufacture and supply of small sized LCDs for incorporation into mobile telephones. The basis for this application is explained in paras. [31]-[32] below. Whether such a request should or should not be made turns on whether the defendants are successful in striking out relevant claims resisting the amendments in the Amended P/C and in having the order for service of the proceedings on them out of the jurisdiction set aside. Since I have come to the conclusion that the defendants do not succeed, I consider that an appropriate request for information should be made. The parties should seek to agree the terms of the request in the light of this judgment; if they cannot be agreed, there will have to be further argument about the form of that request.

The relevant factual and legal background

17. Over a considerable period of time there have been concerns on the part of regulators and customers about possible anti-competitive, cartel based practices having been adopted by the manufacturers of LCDs to maintain prices at an artificially high level. The Department of Justice in the United States has conducted an investigation into this. In the EU, the Commission issued an announcement on 13 July 2009 in these terms:

“Antitrust: Commission confirms sending Statement of Objections to alleged participants in LCD panels cartel

The European Commission can confirm that in May 2009 it sent a Statement of Objections under EU antitrust rules to a number of companies active in the supply of liquid crystal display (LCD) panels, concerning their alleged participation in a cartel in violation of EC Treaty rules on restrictive business practices (Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area). The product under investigation is the main component of thin, flat monitors used for example in mobile phones, televisions, computers, digital watches and pocket calculators. ...”

18. I should mention that the Statement of Objections is a document which the Commission regards as confidential. Mr Flynn, in particular, sought to make points by reference to it and later correspondence from the Commission to D12, but when I asked to see a copy he said that it could not be produced because the Commission had not permitted that. It did not appear that any of the defendants who received the Statement of Objections had actually asked the Commission in advance of the hearing before me whether a copy of the Statement of Objections could be shown to me. At all events, this made it impossible for me to assess the submissions made by Mr Flynn about the Statement of Objections.
19. Also, as mentioned above, civil legal proceedings have been commenced in the United States by various claimants against groups of LCD manufacturers and suppliers, including the defendant undertakings. Those proceedings have resulted in

some disclosure to Nokia of documents bearing on Nokia's claims in these proceedings.

20. It seems that it was particularly in light of the Commission investigation that Nokia drew up the P/C and issued its claim form in November 2009. The P/C set out the background and referred to the Commission investigation, with the obvious intention that if the Commission issued a Decision finding that the defendants or any of them were guilty of violation of Article 101 that would be pleaded in due course and would found the basis for "follow on" claims by Nokia against those defendants, namely claims relying on the Decision to establish the fact of their breaches of Article 101 (and hence to establish a cause of action recognised in English law against them: see *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130) as permitted by Article 16(1) of Council Regulation (EC) 1/2003. However, the P/C also sought to plead "stand alone" claims against the defendants, under which – if no relevant Commission Decision was issued in relation to any particular defendant - Nokia would seek itself to establish in the proceedings that such defendant had indeed acted in breach of Article 101.
21. Since there appeared to be an on-going Commission investigation into similar or the same complaints of violation of Article 101, the parties promptly agreed that these proceedings should be stayed pursuant to Article 16(1) of Regulation 1/2003 pending the outcome of the Commission investigation.
22. In the event, no relevant Commission Decision has been issued. Accordingly, Nokia does not (at any rate, at the moment) have the benefit of a Commission Decision by reference to which it can maintain a follow on claim against any defendant. It is Nokia's stand alone claims which are under attack before me.
23. The Commission issued a Decision dated 8 December 2010 (C(2010) 8761 final) ("the Decision") in relation to its investigation in respect of possible infringements of Article 101 regarding manufacture and supply of LCDs. It confined that decision to findings of infringement of Article 101 in relation to the manufacture and supply of large LCDs, of 12 inch size and larger. Thus, as it transpired, the Commission simply did not address the question of possible infringements of Article 101 in respect of small LCDs for mobile telephones one way or the other in the Decision.
24. The Commission did not release the Decision into the public domain until 13 October 2011, which is when Nokia learned of it. It was in light of the announcement of the Decision that the Samsung and Hitachi defendants issued their application notices which are before me, seeking to strike out or set aside the claims in the P/C.
25. However, although Nokia's claims do not have the benefit of any relevant findings by the Commission in the Decision, Nokia has been able to develop its case against the defendants by reference to some of the disclosure given by various of them in the US proceedings. With the benefit of such disclosure, the Amended P/C expand considerably upon what was in the P/C. Far more detailed particulars are now given of Nokia's stand alone case against the defendants.
26. In the light of this, Mr Green, for Hitachi, accepts that if the Amended P/C are introduced into the proceedings, they contain properly pleaded claims against the defendants (in particular, against D22, and hence also against D20 and D21) which

could not be struck out and against which an application for summary judgment could not succeed. His complaint remained, however, that the P/C in their original form did not include properly pleaded claims against the defendant and so should be struck out. On that basis, he also resisted Nokia's application for permission to introduce amendments in the form of the Amended P/C, since he maintained that the Amended P/C plead new causes of action against the Hitachi defendants and if the court granted permission for those new claims to be made by amendment the claims would be treated as having been made (for limitation purposes) on the same date as the original action (section 35(1)(b) of the Limitation Act 1980), which would be unfair. Also, it would be wrong for Nokia to have obtained the permission of the court for service of the proceedings on defendants outside the jurisdiction on the basis of a defective and improper pleading in the P/C, only to be allowed to introduce new claims by way of amendment later on in support of its submission that the permission previously granted should be maintained. In that regard, he relied on *Parker v Schuller* (1901) 17 TLR 299. Mr Green submitted that though Nokia now proposes to plead proper claims against the Hitachi defendants, the original claim form should be struck out or set aside as against them and Nokia should be required to issue a new claim based on the Amended P/C (and then seek permission to serve that new claim outside the jurisdiction), with the effect that the Hitachi defendants would have the benefit of a period of limitation dating back from the issue of the new claim.

27. For Samsung, Mr Flynn did not accept that even the Amended P/C set out a proper cause of action against the Samsung defendants. In various respects, Mr Lasok for the Samsung SDI defendants and Mr de la Mare for the Toshiba defendants took the position that the Amended P/C did not set out proper causes of action against their clients. All of the Samsung, Samsung SDI and Toshiba defendants took the position, in line with the Hitachi defendants, that the P/C did not set out properly pleaded causes of action against them and, in particular, did not set out properly pleaded causes of action against the anchor defendants, D12 and D22.
28. Although the Commission in the Decision did not produce a result which assisted Nokia, Nokia made progress in obtaining material to assist it in presenting its claim in the course of the US proceedings. As explained above, the proposed amendments to the P/C, in the form of the Amended P/C, have been pleaded by Nokia with the benefit of that material. In my view, notwithstanding the criticism directed at the Amended P/C by Mr Flynn in particular, it is clear that it pleads proper causes of action against each defendant in proper form and with sufficient particularity as required at this stage in the proceedings.
29. The main issues between the parties, therefore, are (i) whether the claim form and the original P/C pleaded the same causes of action against the defendants as the Amended P/C with proper particularity (in which case the defendants would suffer no prejudice in terms of the law of limitation if the court permits the amendments in the Amended P/C now to be made, by way of providing better particulars of claims already made) or, if not, (ii) whether the amendments would add or substitute a new claim, but one which "arises out of the same facts or substantially the same facts" as the claims already made in the claim form and the P/C, so as to fall within the scope of CPR Part. 17.4(1) and (2), and the court in its discretion ought to permit the amendments to be made notwithstanding the fact that by virtue of section 35(1) of the 1980 Act the

new claims will relate back in time (for the purposes of the law of limitation) to the date when the original claim form was issued.

30. At the hearing, the parties agreed that I should determine these issues at this stage, so far as I was able. If I came to the conclusion that the original P/C did not include properly pleaded causes of action or that the Amended P/C added new causes of action, but not arising from the same facts or substantially the same facts, it was agreed that I should issue a judgment to that effect and that the parties would then take stock of their positions in the light of that judgment before the hearing resumed. In the event, that situation does not arise, since I have no hesitation in concluding that the claim form and the P/C set out proper causes of action under Article 101 against the defendants and that the Amended P/C do not add new causes of action, but rather provide further particulars of the causes of action already properly pleaded against the defendants in the claim form and the P/C.
31. After the main application notices before me were issued, the solicitors for Hitachi wrote to Nokia's solicitors by letter dated 13 February 2012 to say: "The European Commission has informed Hitachi that, notwithstanding its adoption of [the Decision], the Commission is continuing its investigations into LCDs." On that basis, Hitachi proposed that it would be appropriate for the court to stay the proceedings by reference to Article 16 of Regulation 1/2003 to allow the Commission investigation to proceed to a determinative ruling in relation to that sector of the LCD market.
32. Since, at the moment, this letter sets out the only information that the court or Nokia have about this further or continued investigation by the Commission into possible anti-competitive behaviour in the LCD market, it is appropriate – on the basis that Nokia's claims against the defendants remain on foot, as I conclude they should - for the court to make a formal request under Article 15(1) of Regulation 1/2003 asking the Commission for information about its investigation. Depending on the Commission's answer, it may be that the proceedings in this claim should be stayed pending the outcome of that investigation, in accordance with Article 16 of Regulation 1/2003.

The Claim Form

33. The claim form was issued by Nokia on 23 November 2009. The P/C were not endorsed on it, but were served as a separate document as permitted by CPR Part 7.4(1). The claim form listed the defendants and set out brief details of the claim as follows:

"The Claimant claims damages for losses in connection with purchases of Liquid Crystal Displays between January 1996 and December 2006 incurred as a result of the Defendants' infringement of Article 81(1) of the EC Treaty and Article 53 of the EEA Agreement."

The Particulars of Claim

34. The P/C are also dated 23 November 2009. It is clear from reading them that they do not purport to cut down or limit in any way the claim set out in the claim form and the cause of action asserted there. The structure of the pleading in the P/C is as follows.
35. Section A (paragraphs 1-2) explains LCDs and their uses in summary, uncontroversial terms.
36. Section B (paragraphs 3-39) describes the parties and the “undertakings” for the purposes of Article 101 (what was then Article 81 TEC) of which they formed part. It was in this part of the pleading that Nokia made an error in assigning D9 and D10 to the “Samsung” undertaking, rather than to a distinct “Samsung SDI” undertaking as it now seeks to do. D12 is described at paragraph 20, where it is alleged that it is “a wholly-owned *and controlled* subsidiary of [D8]” (emphasis added) and that during “the Cartel Period” it manufactured, marketed, sold and/or distributed LCDs throughout the European Union, including in England. D22 is described at paragraph 34, where it is alleged that it is “a wholly-owned *and controlled* subsidiary of [D20]” (emphasis added) and that during “the Cartel Period” it manufactured, marketed, sold and/or distributed LCDs throughout the European Union, including in England.
37. Section C (paragraphs 40-42) sets out allegations regarding the relevant market for LCDs and the participation of the defendants in that market.
38. Section D (paragraphs 43-62) is entitled “The Anti Competitive Agreements/Concerted Practices” and pleads Nokia’s case regarding breach of Article 101 by the defendants. It is pleaded with a view to proceeding with a follow on claim (if the Commission made relevant findings of breaches of Article 101 which, in the event, it did not) and also includes stand alone claims. It was this part of the P/C which was the main focus of the defendants’ criticism of the P/C. They claim that it does not set out in properly pleaded form any valid cause of action against them (and, in particular, does not set out any valid cause of action against the anchor defendants D12 and D22). Against this, Nokia submits that the P/C sets out properly pleaded causes of action against all the defendants, alleging both knowing participation in cartel agreements and practices which had anti-competitive objects directed to inflating the prices customers were charged for LCDs (“the participation case”) and/or relevant involvement in implementing the cartel’s anti-competitive agreements and practices (including in cases where the relevant defendant might itself have had no knowledge of the cartel or its agreements and practices – “the implementation case”).
39. It is necessary to set out certain of the paragraphs in Section D in full:

“43. The Defendants are all members of undertakings that have been parties to secretive anti-competitive agreements, or to concerted practices, in respect of the supply of LCDs throughout the world, including the European Union, during the Cartel Period (“the Arrangements”). The Defendants either participated in and/or implemented the Arrangements either because they were parties to the Arrangements or because they manufactured, marketed, sold and/or distributed LCDs that were the subject of the Arrangements.

44. The secret nature of the Arrangements was such that Nokia is currently unable to specify exactly when they began or the names of all the undertakings who were parties to them. The best particulars that Nokia can presently give are that the Arrangements began no later than 1 January 1996 and continued to around December 2006 (“the Cartel Period”), the latter date being the date on which the Commission of the European Communities (“the Commission”) commenced investigation of manufacturers of LCDs under Article 81(1) of the EC Treaty (“Article 81 EC”) and Article 53 of the EEA Agreement (“Article 53 EEA”).

45. The secret and complex nature of the Arrangements was also such that Nokia is presently unable to specify precisely their nature and content. The best particulars of the Arrangements that Nokia can presently give are that they involved:

(a) bilateral and group meetings and conversations between the Defendants or undertakings of which they formed part, including certain meetings held in Taiwan known as “Crystal Meetings,” to discuss the prices and supply of LCDs in the global market, including the United Kingdom and European Union;

(b) agreements and/or concerted practices between the Defendants or undertakings of which they formed part to fix the prices and limit the supply of LCDs sold in the global market, including the United Kingdom and European Union;

(c) the issuing by the Defendants or undertakings of which they formed part of price announcements and quotations in accordance with the aforesaid agreements and/or concerted practices.

46. The Arrangements form part of a wider complex of international agreements and concerted practices to fix the prices of LCDs which wider complex is under investigation in the United States by the Department of Justice (“DOJ”) Antitrust Division (as an illegal “conspiracy” contrary to § 1 of the Sherman Act), by the Commission of the European Union and elsewhere. One or more companies from each of the undertakings party to the Arrangements have during the Cartel Period either pleaded guilty in the United States to participating in agreements/concerted practices to fix the prices of LCDs, are under investigation in the United States for such agreements/concerted practices, or are under investigation by the Commission in the European Union for price-fixing, sharing markets or exchanging market information in relation to the supply of LCDs contrary to Article 81(1) EC.

47. On 13th July 2009 the Commission confirmed that, in May 2009, it had sent a Statement of Objections to a number of suppliers of LCDs. AU Optronics, Philips and LG Display have admitted to receiving the Statement of Objections. In addition, the remaining Defendants (Chunghwa, Hitachi, Seiko Epson, Samsung, Sharp and Toshiba) have admitted to being under investigation by the Commission. Other national competition authorities in Japan, South Korea, Taiwan and Canada are also investigating manufacturers of LCDs in respect of price fixing agreements/concerted practices. AU Optronics, Chunghwa, Hitachi, LG Display, Seiko Epson and Sharp have admitted to being under investigation by one or more of these authorities, while Samsung and Toshiba have admitted to being investigated by unspecified “other” authorities besides the DOJ and the Commission. Additionally, the Japan Fair Trade Commission has issued “cease and desist” orders to Sharp and Hitachi, and a surcharge payment order to Sharp.

...

62. The Arrangements infringed Article 81(1) EC and Article 53 EEA in that they:

(a) prevented, restricted and distorted competition between the undertakings of which the Defendants formed part in respect of the supply of LCDs throughout the world, including in the European Union and EEA;

(b) were capable of affecting trade between Member States of the European Union and EEA.”

40. Section E (paragraphs 63-71) is headed “Causation and Loss”. It includes the following:

“63. The overall effect of the Arrangements was unlawfully to inflate the prices at which Nokia purchased LCDs above those which would have prevailed had there been no such Arrangements (the difference being “the Overcharge”).

64. The secret nature of the Arrangements was such that Nokia was not informed of the amount of the Overcharge and cannot currently provide particulars of that amount. ...

67. Nokia also made purchases of LCDs from companies who, so far as Nokia is currently aware, were not parties to and or did not implement the Arrangements. Particulars of these purchases that Nokia can presently give are set out at Annex 2 hereto. However, the effect of the Arrangements, and in particular the Overcharge, was also to inflate the prices at

which the Claimants made such other purchases above those prices which would have prevailed in the absence of the Arrangements. This effect is referred to as the ‘Umbrella Effect’ and the inflation of the price is referred to as the ‘Umbrella Overcharge’.

68. Nokia has not been informed of the Overcharge and is therefore also unable to provide particulars of the amount of the Umbrella Overcharge. ...

70. As participants in the Arrangements (whether as parties to the Arrangements or implementing those Arrangements) and to the said infringement, and hence as joint tortfeasors, each Defendant is jointly and severally liable with each other Defendant for the entire amount of the loss and damage suffered by Nokia.

71. Further or in the alternative, the Arrangements have been made and/or carried out in the knowledge of and in wilful disregard of Nokia’s rights, in a calculating fashion and/or with the expectation of profiting therefrom by amounts exceeding the amounts of any compensation payable by them to Nokia as a result of such wrongful actions. Such wrongful actions are properly such as to evoke a sense of outrage. In such circumstances, Nokia claims exemplary damages from the Defendants and each of them. ...”

41. It has emerged from the Decision that the “Crystal Meetings” referred to in paragraph 45(a) of the P/C were meetings which involved discussion only of large LCDs, not the small LCDs used in mobile telephones. In the Amended P/C, therefore, reference to such meetings in the particulars of the cartel arrangements has been dropped. However, as Mr Vajda pointed out, the reference in paragraph 45(a) to the “Crystal Meetings” was put forward only as an example (introduced by the word, “including”) of what Nokia alleged had occurred by way of bilateral and group meetings between defendants to discuss the prices and supply of LCDs – it was not expressed to be the entirety of Nokia’s case in that regard.

The Amended Particulars of Claim

42. The Amended P/C follow a similar pattern to the P/C, but with the case being refined so as not to maintain a case that price fixing agreements as such were entered into by defendants, but to focus more on exchanges of information between defendants and undertakings regarding prices and other matters, with a view to charging higher prices to customers (including Nokia) for LCDs of the relevant size. The Amended P/C also contain much greater particularity than the P/C regarding the allegations against the defendants, derived from the disclosure given in the US proceedings.
43. Section A of the Amended P/C (paragraphs 1 to 3) describes LCDs.

44. Section B (paragraphs 4 to 57) describes the parties and other relevant entities said to have been involved in the cartel but who have not been sued or those defendants (the original Philips and Epson defendants) in respect of whom the proceedings have been settled or permanently stayed. The descriptions in Section B include descriptions of the undertakings for Article 101 purposes of which the defendants and relevant entities are said to have formed part. It is in this section that the mistaken allocation in the P/C of D9 and D10 to the Samsung undertaking has been corrected, and they are allocated to a distinct Samsung SDI undertaking. Paragraph 27 refers to D15, and introduces a further corporation, Toshiba Matsushita Display Technology Co. Ltd (“TMD”), a subsidiary of D15 through which D15 is said to have manufactured, marketed, sold and/or distributed LCDs for mobile wireless handsets.
45. Section C (paragraphs 58 to 79) describes the relevant market for LCDs.
46. Section D (paragraphs 80 to 112) is headed “The Anti Competitive Agreements/Concerted Practices”. Section E (paragraphs 113 to 201) is headed “Implementation of the Arrangements by the Defendants”. Sections D and E (and Annex 1, “Implementation of the Arrangements by LCD Projects”, to which Section E refers) contain far fuller particulars of allegations than the equivalent section D in the P/C. Many of the detailed particulars are given by reference to “Confidential” or “Highly Confidential” information derived from the US proceedings. Relevant paragraphs in the new Section D and Section E include those set out below.

“80. The Defendants are all members of undertakings (“Defendant Undertaking”) that have been parties to secretive agreements, and/or to concerted practices, whose overall object and effect was to prevent, restrict or distort competition in the EEA and elsewhere in the market for LCDs throughout the world, including the EEA, during the Cartel Period (“the Arrangements”). The Arrangements infringed Article 101 TFEU for the reasons set out below.

81. The best particulars of the Arrangements that Nokia can presently give are that they comprised an overall continuous agreement and/or concerted practice, which involved regular direct and indirect exchanges of confidential and/or commercially sensitive information (“Information”) between competitors via meetings, conversations or other communications between the Defendants or undertakings of which they formed part regarding LCDs for supply to customers including Nokia in the global market, including in the EEA and the United Kingdom. Such exchanges of Information had the object or effect of preventing, restricting and/or distorting competition between the Defendants in the supply of LCDs.

82. The Information regularly exchanged between the parties to the Arrangements, whether directly or indirectly, included detailed information on past, present and future prices and/or price parameters and volumes future capacity investments and strategies on product innovation in relation to the supply of

LCDs. This included Information on LCDs for customers for whom Defendants did not actually produce or supply LCDs themselves. This was because of the interrelationship between the prices of different LCD technologies particularised at paragraphs 62 and 63 above.

83. The Information was used by the Defendant Undertakings to prevent, restrict or distort price competition in supplies to Nokia and other customers. ...

106. The Arrangements comprised a single and continuous infringement of Article 101 TFEU between the Defendant Undertakings and other Relevant Entities which lasted from at least 1999 to at least 2006.

107. The Defendants and other Relevant Entities either participated in and/or implemented the Arrangements either because they were parties to the Arrangements or because they were involved in the manufacture, pricing, sale and/or distribution of LCDs that were the subject of the Arrangements.

108. Further, to the extent that the Defendant Undertakings or other Relevant Entities in engaging in the activities particularised herein were not all parties to the single and continuous infringement that pursued the common objective particularised at paragraph 100 above, they were, in the alternative, parties to individual agreements and/or concerted practices with other Defendant Undertakings in relation to the LCDs supplied to customers, which had as their object and effect maintaining the price of those LCDs above the competitive level. Those individual agreements and/or concerted practices also infringed Article 101 TFEU. Particulars of each of these individual agreements and/or concerted practices are as follows:

a) Epson and Sharp were parties to an agreement and/or concerted practice to exchange Information on a regular basis in relation to the supply of LCDs to customers including Nokia from at least 1999 until 2006.

b) Epson and Samsung SDI were parties to an agreement and/or concerted practice to exchange Information on a regular basis in relation to the supply of LCDs to customers including Nokia from at least 2003 until 2006.

c) Sharp had a market-sharing arrangement with Samsung during the Cartel Period on an ongoing basis from at least 2003 by which they agreed not to compete for certain types of TFT-LCDs. Through this arrangement, Sharp would manufacture, market, sell and/or distribute transfective TFT-LCDs while

Samsung agreed to manufacture, market, sell and/or distribute transmissive TFT-LCDs.

d) Samsung had a market-sharing arrangement with Samsung SDI during the Cartel Period by which they agreed that Samsung would manufacture, market, sell and/or distribute TFT-LCDs while Samsung SDI would manufacture, market, sell and/or distribute non-TFT-LCDs. Subsequently, in or around 2004 after Samsung SDI began selling TFT Modules incorporating TFT Panels produced by Samsung and others, Samsung agreed with Samsung SDI that it would not offer certain TFT-LCD Modules to Nokia.

e) Sharp and Samsung SDI were parties to an agreement and/or concerted practice to exchange Information on a regular basis in relation to the supply of LCDs to customers, including Nokia from at least 2004 until 2006.

f) Epson and Samsung were also parties to an agreement and/or concerted practice in relation to the regular exchange of Information, in relation to the supply of LCDs to customers, including Nokia from at least 2004 to 2006.

g) Samsung and AU Optronics were parties to an agreement and/or concerted practice in relation to the regular exchange of Information, in relation to the supply of LCDs to customers, including Nokia from at least 2005 to 2006.

h) Hitachi was party to an agreement and/or concerted practice in relation to the regular exchange of Information (from at least 2004) with Toshiba (and from at least 2005) with Samsung in relation to the supply of LCD Panels to Samsung SDI and Philips that were incorporated into LCD Modules sold to Nokia by Samsung SDI and Philips.

...

114. Although employees within an individual Defendant company within a Defendant Undertaking were either specifically designated or acted as principal contact points with competitors for the purposes of implementing the Arrangements this did not prevent other employees within that Defendant Undertaking from exchanging Information with competitors pursuant to the Arrangements.

115. These competitor contact points knew who the contact points were at the other Defendants and contacted each other freely whenever they wished or needed to exchange Information. If a competitor contact point left the company or changed their role he would introduce his successor to his contacts.

116. The Information exchanged between Defendants pursuant to the Arrangements was disseminated within the Defendant Undertakings and used by their employees with responsibility for setting their company's strategy in the market and setting prices, including giving instructions regarding pricing to sales staff involved in negotiating prices with customers.

117. Employees within each Defendant Undertaking knew that their competitors' prices were being taken into account in formulating their own prices for LCDs to customers. Further, or alternatively, even if employees within a particular company within a Defendant Undertaking did not know this they nevertheless implemented the Arrangements because they charged customers prices for LCDs that were so formulated.

118. Without prejudice to the generality of the foregoing in Section D above, particulars of the way in which the Defendants and the individual employees within the Defendants implemented the Arrangements that Nokia can presently provide are set out in sections E and Annex 1 below.

Samsung

153. Beginning in at least 2002, Samsung exchanged Information with competitors, including AU Optronics, Epson, LG Display, Hitachi, Sharp and Toshiba about LCDs marketed, sold and/or distributed to Nokia and other customers. These communications and meetings involved exchanges of Information about current and future prices, production, and capacity in relation to the supply of LCDs.

154. A competitor contact at Samsung was H.B. Suh who met and discussed LCD prices with representatives of, among others, Hitachi, Toshiba, Sharp, Epson, and LG Display. Mr. Suh supported Samsung's sales to Motorola and helped support Samsung's sales efforts to Nokia and communicated with employees of Sharp and Epson regarding LCD pricing and supply to Nokia on multiple occasions. These meetings and communications also included understandings about prices and supply of LCDs to customers, including Motorola.

155. In addition to Mr. Suh, competitor contacts at Samsung included Seisyu Arai in the marketing department and Patrick Han in charge of technology who worked with Arai. Mr Jin-Hyuk Yun a senior executive in Samsung's LCD business was also in contact with competitors (e.g. Sharp).

156. Beginning in at least 2003, Samsung manufactured, marketed, sold and/or distributed non TFT LCDs to manufacturers of mobile wireless handheld devices and other

small electronic devices, including Nokia, Motorola, Sony Ericsson, and Apple, in the EEA and elsewhere.

157. Samsung began competing with other suppliers for sales of TFT-LCDs directly to Nokia and other customers in or around 2005.

158. The exchanges of Information in which Samsung engaged also included exchanges in relation to the supply of LCD Panels to Samsung SDI and Philips for Nokia projects Amazon and Suez pursuant to the Arrangements.

159. During the Cartel Period Samsung and Samsung SDI were also parties to the market sharing agreement/concerted practice referred to at paragraph 108(d) pursuant to which Samsung would manufacture TFT-LCDs while Samsung SDI would manufacture Non-TFT-LCDs.

160. Samsung and Samsung SDI thereby effectively agreed not to compete with each other for these two types of business from customers. Moreover, in or around 2004, after Samsung SDI began selling TFT Modules incorporating TFT Panels produced by Samsung and others, Samsung agreed with Samsung SDI that it would not offer certain TFT-LCD Modules to Nokia.

161. During the Cartel Period, Samsung was also a party to the agreement or concerted practice with Sharp to allocate the market for certain types of TFT-LCDs as particularised above at paragraph 145.

162. The Samsung employees referred to above reported the Information they received to other employees within Samsung working on particular customer accounts (including Nokia and Motorola), who would consult them in relation to competitor pricing because they were known to be the main contacts with competitors. They also reported the Information they received to their superiors with general responsibility for the sale and/or marketing of LCDs who included JW Kim. They were also provided with Information by other Samsung employees who had obtained Information through exchanges with competitors.

163. In or around 2003 Mr. Suh introduced Mr. Arai to Mr. Kitayama of Sharp. Employees of Sharp that Messrs Suh, Arai and Jun knew included Messrs Kitayama and Iida of Sharp from the information exchanges they engaged in. Employees of competitors that Mr. Suh also knew from information exchanges with other undertakings included Messrs. Watanabe, Wakabayashi and Kumazawa of Hitachi and Messrs Chiba and Amano of Toshiba.

164. During the Cartel Period, Samsung also had sales or marketing representatives employed by or seconded to SSEL in the United Kingdom. During the Cartel Period individuals from other companies in the Samsung group, including Samsung Electronics, involved in the manufacturing, sale and/or distribution of LCDs visited, or were either employed at, seconded to, or otherwise worked at, SSEL. These employees either knew or should have known that Information they received in relation to the supply of LCDs to mobile wireless handset manufacturers was obtained from competitors pursuant to the Arrangements as such information was confidential or not in the public domain. Further these employees either knew or should have known that sales of LCDs were made pursuant to the agreements and/or concerted practices referred to at paragraph 108(c), (d) and (h) above.”

47. Section F (paragraphs 202 to 211) is headed “Loss and Damage”. Like the P/C, it refers to the “Overcharge” and to the “Umbrella Overcharge”. In this pleading, Nokia states that the best particulars it is able to give of both is that they were on average 17.6% during the Cartel Period. In the Amended P/C the “Cartel Period” has been shortened by comparison with the period pleaded in the P/C, to a period from 1 January 1999 to 31 December 2006: paragraph 105. It is also pleaded at paragraph 203 that a further effect of the Arrangements was to share markets, reduce and delay investment in LCD production and diminish efficiency of suppliers.

The issues

48. The principal issues for me to decide are whether the claim form and the P/C plead proper causes of action against the defendants, and whether the Amended P/C give particulars of the same causes of action or add to the causes of action. Obviously, if the claim form and the P/C set out valid, properly pleaded claims against the Defendants and the Amended P/C simply give further particulars of those claims already made, there would be no limitation or fairness problem involved in giving Nokia permission to amend the P/C in the form of the Amended P/C, because the relevant limitation period (whatever it is) for the pleaded claims (as particularised in the Amended P/C) will simply be taken to run back from the date of the issue of the claim form. Nokia submits that this is the true analysis on a proper reading of the claim form, the P/C and the Amended P/C. The defendants deny this.
49. If, on the other hand, the Amended P/C add new claims or causes of action, the question would arise whether those further claims arise out of the same facts or substantially the same facts as any claim in the claim form and the P/C so that the situation falls within the scope of CPR Part 17.4(2). If that is so, the result would be that the court “may allow” the amendments (which will then be treated as relating back to the time of the original claim for the purposes of the law of limitation) even though a relevant limitation period has elapsed in the period since the claim form was issued. If I concluded that the case fell into this category, the defendants argued that I should exercise my discretion against allowing the amendments. Various of the defendants (in particular, the Samsung defendants through Mr Flynn) objected that the

Amended P/C remain too vague and unspecific. All of the Samsung, Samsung SDI, Toshiba and Hitachi defendants sought to rely on the approach of the Court of Appeal in *Hancock Shipping Co. Ltd v Kawasaki Heavy Industries Ltd* [1992] 1 WLR 1025 and the suggestion that foreign limitation periods might have elapsed so that permission to amend ought to be refused (against which Mr Vajda relied on *Mitchell v Milford Haven Port Authority* [2003] EWHC 1246 (Admiralty)).

50. A general point was also taken by all the represented defendants that the parts of Nokia's case based on implementation of the Arrangements by defendants (as distinct from the case against them based on knowing participation) were bad in law, as disclosing no proper cause of action, and should be struck out for that distinct reason. This point was taken even though Aikens J (as he then was) in *Provimi Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm), the Court of Appeal in *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc.* [2010] EWCA Civ 864 and the Chancellor in *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2011] EWHC 2665 (Ch) had taken the view that it is arguable as a matter of EU law that a company might be liable to a claim based on breach of Article 101 where it is part of an undertaking which has participated in cartel arrangements in breach of that Article and the company itself, though ignorant of the existence of the cartel, has been used by the undertaking of which it forms part as a vehicle to implement those arrangements. I refer to this as the *Provimi* point. This part of the argument was left to Mr O'Donoghue (Mr Flynn's junior) to present. His submission was that the courts in *Provimi*, *Cooper Tire* and *Toshiba Carrier* had proceeded without reference to a relevant judgment of the ECJ, Case C-196/99 P *Siderurgica Aristrain Madrid SL v European Commission* [2003] ECR I-11005 ("*Aristrain*"), which showed that their analysis was wrong, to the *acte clair* standard.

Analysis

51. I say at once and without hesitation that I consider that the claim form sets out a cause of action which covers both follow on and stand alone claims against the defendants; that the P/C plead a proper stand alone cause of action against each of the defendants; and that the Amended P/C do not add new causes of action, but contain amendments which supply particulars of the stand alone case based on the causes of action already set out in the claim form and pleaded in the P/C. I reject the defendants' submission based upon *Aristrain*. Accordingly, I conclude that the applications to strike out the claims against the anchor defendants (and, in the case of D22, for summary judgment in its favour) fall to be dismissed; the applications to have the proceedings set aside as against other defendants also fall to be dismissed; and Nokia's application to amend in the form of the Amended P/C should be allowed. It is unnecessary to address Nokia's alternative contention and the arguments which might arise in respect of that, touched on in para. [49] above. Since Nokia's claims are valid claims and will proceed, it is appropriate to accede to Nokia's further application to issue a request to the European Commission to provide information about its investigation into the market for LCDs as referred to in the letter dated 13 February 2012 from Hitachi's solicitors.
52. There was no major difference between the parties regarding the general law in respect of identifying a cause of action, though they did take opposing positions regarding the application of that law to the circumstances of this case. I accept Mr Vajda's submission that the P/C plead a proper and clearly identifiable cause of action

against each defendant of violation of Article 101 causing loss to Nokia. I also consider that the relevant cause of action was set out in an appropriate way in the claim form. By reference to both the claim form and, distinctly, the P/C, the Amended P/C do not purport to introduce new causes of action, but rather are properly to be analysed as providing further particularisation of the claims already made by Nokia.

53. In his classic judgment in *Letang v Cooper* [1965] 1 QB 232, at 242-243, Diplock LJ said: “A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”. The selection of the material facts to define the cause of action “must be made at the highest level of abstraction” (see *Paragon Finance plc v DB Thakerar & Co.* [1999] 1 All ER 400, 405 per Millett LJ). Below that level, pleas of greater specific content will be regarded as providing particulars of the cause of action identified at the higher level of abstraction; and the addition of greater particularity in the pleading regarding the same basic allegation will not qualify as the addition of new causes of action.
54. In the context of arguments regarding the operation of the law of limitation, as here, it is relevant to observe that the critical event is the issue of a claim form. The question whether later particulars of claim or amendments to the statements of case plead new causes of action often has to be assessed by reference to the very summary description of a claim which is typically included in a claim form. This, it seems to me, is reflected in the reference by Millett LJ in *Paragon Finance* to identification of a cause of action at “the highest level of abstraction”. A claim form does not have to be endorsed with or accompanied by particulars of claim: under CPR Part 7.4(1)(b) they can be served on the defendant within 14 days after service of the claim form. As the notes on this provision in the White Book point out, this option “can be used where the claim form has to be issued quickly, for example for limitation purposes.”
55. CPR Part 16.2(1) stipulates what a claim form must set out, including “a concise statement of the nature of the claim” and “the remedy which the claimant seeks”. In a case where significant issues of limitation arise and a claim form is issued before particulars of claim are prepared, the question whether any later pleading adds new causes of action for the purposes of analysis whether such later pleading should be allowed has to be assessed by reference to the claim form: see e.g. *Biddle & Co. v Tetra Pak Ltd* [2010] EWHC 54 (Ch), esp. at [66]-[73]. The Civil Procedure Rules therefore contemplate that an effective assertion of a cause of action can be achieved by a concise statement of the nature of the claim. This was also a feature of the law of procedure and limitation before the Civil Procedure Rules were promulgated, when old-style generally endorsed writs could be issued and could be effective to assert a cause of action for limitation purposes.
56. In my view, the observations of Longmore LJ giving the lead judgment of the Court of Appeal in *Berezovsky v Abramovich* [2011] EWCA Civ 153, at [56]-[66], finding that “over-elaborate arguments” analysing causes of action pleaded in a statement of case were unpersuasive and emphasising that the focus should be upon looking at the “bare minimum of essential facts” to identify a cause of action, give further support to this approach. At para. [59], Longmore LJ said:

“A new claim, according to s. 35(2) of the 1980 Act is a claim involving the addition or substitution of a new cause of action. A cause of action is that combination of facts which gives rise

to a legal right. A cause of action in tort has, as its essential ingredients, a plea of duty, breach of duty and consequent damage to the claimant. If it happens to be the case that an element of one of those essential ingredients is misstated, misdescribed or omitted, it does not mean that a correct statement, description or inclusion is a new cause of action; even if the formal result of such a statement misdescription or omission might technically be that an unaltered claim would have to be dismissed, that still does not mean that a corrective alteration involves or constitutes a new cause of action.”

57. This indicates that some latitude is to be allowed to a claimant in spelling out what his claim is, without that being taken to prejudice the protection he thought he had achieved in issuing his claim form and setting out a statement of case which gives the defendant a fair idea of the nature of his claim, even if technically defective in its original form. Similarly, in *Toshiba Carrier*, at [39]-[41], the Chancellor held that particulars of knowledge of anti-competitive agreements and practices which were supplied by way of voluntary particulars in solicitors’ correspondence some time after the original particulars of claim were served were effective to remedy an initial failure to plead knowledge, and accordingly declined to strike out the claim. See also para. [39] of the judgment of the Court of Appeal in *Cooper Tire*, set out below.
58. In this case, although the defendants concentrated in elaborate detail on comparing the P/C and the Amended P/C, I can see no defect in the concise statement of the nature of the claim in the claim form: see para. [33] above. In my view, the claim form asserts the relevant cause of action against each defendant by accusing them of infringement of Article 81(1) TEC (now Article 101) and Article 53 of the EEA Agreement with respect to purchases of LCDs by Nokia in a defined period and claiming damages for its losses. I consider that, quite apart from analysis of the contents of the P/C, the proposed amendments in the Amended P/C all fall within the scope of the causes of action included in the claim form and do not add new claims or causes of action for the purposes of the law of limitation.
59. The defendants’ arguments were directed against the P/C. The P/C do not limit the ambit of the general claim set out in the claim form. In any event, even taking the P/C alone, they sufficiently set out causes of action against the defendants which cover the amendments proposed in the Amended P/C, so that the Amended P/C again cannot properly be said to add new claims or causes of action for the purposes of the law of limitation.
60. In the circumstances of this case, the relevant plea (on a stand alone basis) of a cause of action in the P/C is primarily that at paragraphs 43, 44 (which defines “the Cartel Period”) and 62, read with the allegations regarding loss caused to Nokia at paragraphs 63 to 71 (since damage is the gist of an action for breach of statutory duty). Paragraph 45 provides particulars of the allegation in paragraph 43, but (as it makes expressly clear) does not confine Nokia’s case or cause of action to those particulars. In my view, these paragraphs plead a proper cause of action against each defendant.

61. In view of submissions for the defendants regarding what they maintained was the addition of new causes of action in the Amended P/C, based on a distinction they sought to draw between a case under Article 101 based on price fixing agreements and a case under Article 101 based on exchange of information regarding prices and so forth, it should be observed that paragraph 43 of the P/C is drawn sufficiently widely to cover both such variants of an Article 101 claim and that paragraph 45(a) provides particulars which clearly cover a case based on exchange of information regarding prices and supply in addition to the references in paragraph 45(b) to agreements to fix prices and limit supply. Therefore, whatever one may think about the proposed distinction between the two aspects of breach of Article 101 (and I am sceptical about how rigidly such a distinction can be maintained - it will depend on the context in which and purposes for which the distinction might be sought to be drawn: cf the approach of the Commission, declining to draw such a hard and fast distinction, in *Case COMP/39188 – Bananas*, Decision C(2008) 5955 final, at paras. 311-312, 315 and 455 and Article 1 of its ruling), both aspects were properly pleaded by Nokia in the P/C.
62. In a case involving an allegation that a secret cartel has operated in breach of Article 101 there is an inevitable tension in domestic procedural law between the impulse to ensure that claims are fully and clearly pleaded so that a defendant can know with some exactitude what case he has to meet (and also so that disclosure obligations can be fully understood, expert witnesses given clear instructions and so on), on the one hand, and on the other the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from introducing a claim which may prove to be properly made out at trial, but which will be shut out by the law of limitation if the claimant is to be forced to wait until he has full particulars before launching a claim. In working out how that tension is to be resolved, it is important to bear in mind the general and long established approach referred to above and the existence of other protections for defendants within the procedural regime, including the following.
63. A claimant's counsel is subject to professional obligations in relation to what case may be pleaded (thus, e.g., a claim in fraud can only be pleaded in certain well-known circumstances, where there is sufficient material available to the pleader to justify such a plea). In the present case, none of the defendants suggested that Mr Vajda and the other counsel for Nokia had acted in breach of their professional obligations in pleading the case in either the P/C or the Amended P/C.
64. An application to strike out or for summary judgment may be made where, on the evidence about the facts, there is no reasonably arguable case on which the claimant could succeed. In the present case, none of the defendants put in evidence to demonstrate that this was the case.
65. Requests for further information may be put forward by a defendant to clarify exactly what case is being made where a general pleading is put forward. In the present case, that was not done in relation to the P/C (possibly because at an early stage the parties agreed that there should be a stay of proceedings pending the outcome of the Commission's original investigation – the Samsung SDI defendants made a request for further information, but only to ask why they were being treated as part of the Samsung undertaking), so the usual process of probing and clarification of the claim was not undertaken. Now, with the Amended P/C, Nokia is putting forward the fullest

particulars of its case it is able to in light of the material and evidence currently available to it.

66. If it became clear at some stage in proceedings that a claimant had further information available to him but failed to provide it when he ought to do so to clarify his case on the pleadings, it would be possible for the defendant to apply to strike out the claim on the grounds of abuse of process or to obtain an order (ultimately an unless order, threatening dismissal of the claim) for provision of particulars in response to a request for further information. In the present case, there is no suggestion that such a situation has arisen.
67. In my judgment, the availability of such procedural protections for a defendant to ensure that a claim is fully and properly explained in good time before trial (as against the possible loss to a claimant of an entire, potentially meritorious claim), indicates that in resolving the tension referred to above and determining whether a cause of action has been sufficiently pleaded in a statement of case (particularly in the claim form and/or the particulars of claim when an action is commenced), the balance is to be struck by allowing a measure of generosity in favour of a claimant. Such an approach is appropriate and in the overall interests of justice and the overriding objective set out in CPR Part 1.1. It is an approach supported by the authorities cited above.
68. An approach involving a measure of generosity to a claimant in the present context of allegations of a secret cartel is also particularly supported by the judgment of the Court of Appeal in *Cooper Tire*. In that case there was a European Commission decision finding violation of Article 101 directed to some, but not all, the defendants. Neither of the two anchor defendants domiciled in England was an addressee of the decision (see [6], [16(ii)] and [26]-[28]). The Court of Appeal had to consider whether the claims against the anchor defendants should be struck out. The Court construed the pleaded stand alone case against them, set out at [37] - which was in my view in terms similarly as general and unspecific as the case pleaded against D12, D22 and the other defendants in the P/C in the present case – as involving both a claim that they were involved as knowing participants in the arrangements said to violate Article 101 (a participation case equivalent to the participation case against the defendants contained in the P/C) and a claim that they were liable by reason of being involved (possibly not knowing about the cartel background) in implementing the arrangements which infringed Article 101 (an implementation case, equivalent to the alternative implementation case against the defendants contained in the P/C). The court held that the claims should not be struck out. A valid participation claim had been pleaded which should progress to trial. If the claim had only been one of implementation, the court would have regarded the claim as arguable in EU law (following in that regard the view of Aikens J in *Provimi*), and would have referred that question of law to the ECJ before coming to a conclusion on jurisdiction.
69. In relation to the participation case, the Court said this at paras. [38]ff:

“38. The judge may have been correct to say (para 39) that it is not clear whether it is being alleged that the Anchor Defendants were party to the alleged agreements or were aware of them when they made their sales. On the other hand, it would also be correct to say that it is not clear whether it is being alleged that,

even if the Anchor Defendants were neither a party to the alleged agreements nor aware of them, they are nevertheless still liable for infringement of Article 81.

39. But once it is alleged that representatives of (inter alia) Shell, Bayer and indeed Dow and others had discussions to co-ordinate their anti-competitive behaviour (para 41) and that those discussions led to “each of the Defendants” co-ordinating their anti-competitive behaviour (para 44) and that the arrangements were implemented by “each of the Defendants” with specific attention being drawn to sales by the First and Seventh Defendants (para 46), that to our mind constitutes a general plea of involvement in the arrangements rather than a narrower assertion of liability in the absence of knowledge or awareness of them. It would not in our view have been open to either of the Anchor Defendants to strike out the plea on the basis that knowledge or awareness was required and had not been pleaded. To the extent that the lack of clarity was embarrassing, it would always have been possible for any Defendant to enquire whether knowledge was being alleged and, if so, what facts and matters were relied on to establish such knowledge. To give an answer to that request would not be to plead a new cause of action. ...

41. We cannot agree with Mr Sanders that the claims were inadequately pleaded or that it was necessary at that stage that the Claimants should identify the claim which each individual claimant had against the UK domiciled subsidiaries beyond that which had already been identified in para 41-46 of the pleading. Enthusiastic litigants sometimes forget that jurisdiction applications are supposed to be dealt with swiftly and economically at the beginning of the case. It is quite wrong for unnecessary costs to be incurred in England when it is not even clear that the case will proceed in England at all (and when indeed the defendants are vigorously asserting that it should not).

42. Be that as it may, Mr Rabinowitz then sought to rely on the response to Mr Sanders' witness statement filed by the Claimant's solicitor Ms Farrell on 1st August 2008. Her witness statement contained 101 paragraphs in which she (to our mind unnecessarily) gave many of the particulars demanded by Mr Sanders and then in paragraph 45, before she even came to explain the basis on which the English court had jurisdiction, said this:—

“It is the Claimants' case, as pleaded in the Particulars of Claim, that the various Defendants, and also the groups of which they form part, are “economic undertakings” in the sense in which that term is used in EU competition law. More particularly, those companies which are

subsidiaries of, or in the same corporate group as, the various addressees of the Commission Decision, including those that are English companies, were used by the various “undertakings” to implement the cartel arrangements agreed on by those different undertakings. That implementation included the implementation of those arrangements in the United Kingdom.”

This, said Mr Rabinowitz, contained no allegation that anyone other than the Addressees of the Commission Decision was involved in any cartel. But it does not, to our mind, purport to narrow the particulars of claim in any way. It is still an open question whether it is going to be alleged that the subsidiaries domiciled in the United Kingdom were or were not parties to, or aware of, the cartel.

43. In these circumstances it seems to us that the particulars of claim encompass both the possibility that the Anchor Defendants were parties to or aware of the anti-competitive conduct of their parent company and the other Addressees and the possibility that they were not. It is only if they were not that what we have called the *Provimi* point will arise. But it is unnecessary to decide it on this application because it is open to the claimants on the pleadings to prove that the Anchor Defendants were parties to (or aware of) the Addressees' anti-competitive conduct. The strength (or otherwise) of any such case cannot be assessed (or indeed usefully particularised) until after disclosure of documents because it is in the nature of anti-competitive arrangements that they are shrouded in secrecy. But the case that the Anchor Defendants were parties to the cartel arrangements or were aware of them when they sold BR and ESR to the Claimants is not a case that is susceptible to being struck out at the present stage. ...”

70. In my judgment, these observations are equally applicable, *mutatis mutandis*, to the claims of participation in the anti-competitive “Arrangements” against the defendants (in particular, against D12 and D22, the anchor defendants) in the P/C. The P/C include participation claims against each Defendant which cannot be struck out and (in relation to D22) in relation to which summary judgment cannot be given against Nokia simply on the basis of alleged deficiencies in its pleading.
71. Mr Green, in particular, complained that in the P/C Nokia had “hedged their bets” in an illegitimate way by pleading alternative and rather unspecific claims against D22 in the P/C. In my view, there is nothing in this. It is completely normal pleading practice to plead alternative and multiple claims against a defendant, especially when the full detail of how the defendant participated in a legal wrong is not yet known to the claimant (indeed, it may only become fully clear after a court gives judgment at trial). For the reasons given above, the P/C are not vulnerable to attack on grounds of

lack of particularity. Further, now that Nokia is in a position to give better particulars, it is seeking to do so by means of the Amended P/C.

72. In their skeleton arguments, the defendants made reference to three competition law cases in which the courts had emphasised the importance of pleading matters with a reasonable degree of exactitude at the outset: *Esso Petroleum Co. Ltd v Gardner*, Neuberger J, unrep., 8 July 1998, cited with approval in *Parks v Esso Petroleum Co. Ltd* [2000] Eu LR 25 (CA), 37-39; and *Sel-Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch) at [17]-[18] per Roth J. However, Mr Vajda convincingly demonstrated that the relevant observations in those cases were directed to requiring a claimant to plead matters of which he ought to have knowledge, such as the state of the market in relation to a claim based on allegations of abuse of dominant position, and where expert evidence would be available to him. I do not read the observations in those cases as addressing the distinct question of what is required to be pleaded in relation to an alleged secret anti-competitive cartel, particularly at the time when proceedings are commenced.
73. The defendants made a number of subsidiary points designed to show that no claim in respect of a valid pleaded cause of action was contained in the P/C and/or that the additions in the Amended P/C in relation to the participation claims against the defendants constituted the addition of new causes of action. I do not accept any of these arguments, some of which turned on changes in the pleaded case which were very minor indeed. The main points put forward were that:
- i) The erroneous inclusion of D9 and D10 in the Samsung undertaking as set out in the P/C meant that a new cause of action was being pleaded against them in the Amended P/C when they were alleged to be part of a distinct Samsung SDI undertaking. However, the relevant causes of action against D9 and D10 were properly set out in the claim form, and this criticism relates simply to the mode in which Nokia would seek to make good that claim at trial. The criticism of the P/C is also misplaced. In the P/C D9 and D10 are alleged to be individual participants in the anti-competitive Arrangements (see in particular the second sentence of paragraph 43 and paragraph 70), and in my view a correction in the way in which they are grouped in the Amended P/C in an undertaking (Samsung SDI rather than Samsung) does not materially change the nature of the case against them as individual legal persons who participated in the anti-competitive Arrangements, which still remains essentially the same (see, in particular, paragraphs 80 and 107 of the Amended P/C);
 - ii) A new allegation is made in paragraph 106 of the Amended P/C that “the Arrangements” comprised “a single and continuous infringement” of Article 101. However, in my view, that is just to plead out what was already implicit in the claim set out in the claim form and in the description of the Arrangements in the P/C. In particular, by defining the anti-competitive practices of which complaint was made in the P/C as “the Arrangements” operating within a defined “Cartel period” and pleading that the defendants each participated in the Arrangements, a tolerably clear indication is given that the case against the defendants and each of them is one of involvement in “a single and continuous infringement” of Article 101 (that simply being the relevant label to be attached, as a matter of law, to the underlying facts which are pleaded);

- iii) The nature of the case has changed between the P/C and the Amended P/C, in that the P/C pleaded only a case of actual price-fixing whereas the whole thrust of the Amended P/C is to allege exchange of information rather than the making of price-fixing agreements. Again, however, the relevant causes of action were properly set out in the claim form, and this criticism relates simply to the mode in which Nokia would seek to make good that claim at trial. Moreover, this submission simply mischaracterises what is pleaded in the P/C: see para. [61] above;
- iv) The nature of the case has changed between the P/C and the Amended P/C, in that the P/C plead only a case based on the anti-competitive *effect* of the Arrangements whereas the Amended P/C plead that they also have an anti-competitive *object* (i.e. relies on a distinct limb of Article 101(1)). Again, I consider that this criticism relates simply to the mode in which Nokia would seek to make good the claim in the claim form at trial. I also consider that this submission mischaracterises what is pleaded in the P/C. The P/C alleges active participation by each defendant in Arrangements which are alleged to be anti-competitive (paragraphs 43 and 70), including by involvement in the specific practices set out in paragraph 45. That gives a tolerably clear indication that a case is being maintained against the defendants based both on the object and the effect of the Arrangements. That impression is also reinforced by paragraph 62 of the P/C, which does not limit the Article 101 claim to either object or effect, and therefore further indicates that both the object and effect limbs of Article 101 are being relied upon;
- v) In relation to the Amended P/C, Mr Flynn submitted that the particulars of involvement of the Samsung defendants are inadequate. I have set out above relevant parts of the Amended P/C in relation to the Samsung defendants. The particulars in the Amended P/C are a lot more detailed than in the P/C. Mr Flynn's point seemed to be that still more detailed particulars were given in relation to other defendants. I do not think he has raised a valid objection to these parts of the Amended P/C. There is nothing to suggest that Nokia and its counsel have done anything other than plead the most fully particularised case they can against the Samsung defendants at this stage. Even if still more specific details are pleaded against other defendants, that does not show that improperly detailed particulars are set out against the Samsung defendants;
- vi) Mr de la Mare for Toshiba objected to the introduction of TMD into the Amended P/C at paragraph 27. He suggested that it had in effect been made a new party to the claim in a way that was illegitimate and/or that claims by reference to it involved new causes of action. I do not agree with this. TMD is plainly not itself joined as a defendant. Nokia has already pleaded a participation case against D15 in the claim form and the P/C, and in paragraph 27 of the Amended P/C particulars are given of one of the ways in which it is said D15 participated in the relevant LCD market and hence in the Arrangements, which include doing so "via its subsidiaries throughout the EEA", which are said to include TMD. In my view that is a proper particularisation of the claim already made against D15, and does not involve the addition of a new cause of action;

- vii) Mr de la Mare also submitted that paragraph 203 of the Amended P/C involved pleading a new cause of action. I do not accept this. In my view, it particularises one possible mode in which the cause of action set out in the claim form and in the P/C may have arisen. It is a case which does not go beyond the causes of action already asserted against each defendant.
74. Mr Lasok for the Samsung SDI defendants took two further points. First, he sought to suggest that the Amended P/C included new causes of action because it might be necessary eventually to analyse whether the torts alleged were governed by foreign law (e.g. in order to determine whether some foreign limitation law applied to them). If a cause of action based on foreign law is alleged, he submitted, that is a new cause of action (see *Latreefers Inc. v Hobson* [2002] EWHC 1586 (Ch)) and the court should exercise its discretion not to allow it to be introduced at this stage.
75. In my judgment this submission is misconceived. Nokia is not seeking to introduce any claim based on foreign law by means of the Amended P/C, so reference to *Latreefers Inc. v Hobson* is nothing to the point. There is, simply, no new cause of action in the Amended P/C based on a new plea of foreign law (and see *Berezovsky v Abramovich* at [66]-[68]). In due course the defendants might seek to introduce issues of foreign law, in an effort to rely on foreign law limitation periods or to contend that by some other relevant foreign law no tort was committed; and if they do so Nokia might then plead an alternative claim under that law. Such a claim would be likely to arise out of the same or substantially the same facts as the existing claims: see *Berezovsky v Abramovich* at [70]. If that situation arises, the question of the grant of permission for such further amendment under CPR Part 17.4 would have to be addressed at that stage.
76. Secondly, Mr Lasok submitted that paragraph 46 of the P/C was not just particulars of a claim, but operated to define the intended defendants to the claim. According to him, any defendant which was not subject to the Commission's investigation was not to be regarded as an addressee of Nokia's complaints in the P/C.
77. In my view, this submission also is misconceived. The relevant stand alone claim based on Article 101 includes pleadings against each defendant of participation by it in the anti-competitive Arrangements contained, in particular, in paragraphs 43, 45 and 70 of the P/C. It is not possible to read those allegations as being limited in any way by what is said in paragraph 46.
78. It is worth emphasising that the arguments before me proceeded essentially by reference to pleading issues, particularly in relation to the anchor defendants D12 and D22. Where a defendant is properly sued within the jurisdiction, other defendants domiciled in the EU may be joined in the proceedings if appropriate defendants pursuant to Article 6 of the Judgments Regulation. There is no doctrine of "forum non conveniens" or the like to be applied in relation to that joinder. In relation to defendants domiciled outside the EU, the claimant may be required to show that it has an arguable case, that a proper basis for joinder in English proceedings exists and (if this is put in issue) that there is no other better forum in which the claim should be brought. None of the defendants domiciled outside England, either within the EU or outside it, has sought to show that the proceedings should be set aside on such wider grounds.

The Provimi point: the implementation case against the defendants

79. The defendants also maintained that the implementation claims against them in both the P/C and the Amended P/C were bad in law and set out no good cause of action, and so should be struck out and not allowed by way of amendment. I do not accept this submission.
80. In my judgment, the position is very far indeed from being *acte clair* in favour of the defendants, so that it can be said with confidence that EU law does not found a damages claim against a company which is part of an undertaking which has participated in an unlawful cartel which has violated Article 101 and has in fact implemented arrangements worked out in breach of Article 101 by the cartel (e.g. by selling goods at prices inflated because of the effects of the cartel), albeit without itself having knowledge of the cartel. *Aristrain* does not establish that to be the case.
81. In *Aristrain*, what was in issue was the attribution of the activities of one sister company to another sister company in the same undertaking or group for the purposes of the imposition by the Commission of a fine on the second company. The ECJ annulled the Commission's decision: see paragraphs [91]-[102]. There are potentially significant points of distinction from the present situation: (a) the Commission had simply failed to explain why the activities of the first company should be attributed to the second, whereas in the P/C and Amended P/C Nokia plead that the subsidiary companies in each group or undertaking were under the control of the parent or lead company in the undertaking, and (b) the case concerned the imposition of a penal fine on one person for the activities of another, where the sole issue was the just treatment of the fined party and there was no question of working out a balance of interests between an injured party claiming damages for its losses and the elements of an undertaking which has participated in a violation of Article 101 which has given rise to such losses. It is the latter situation which is the context for a *Provimi* type damages claim based on breach of Article 101. The issues of policy and legal principle are potentially very different in that situation from those which the ECJ had to address in *Aristrain* (for a domestic example of the different issues which may arise, one could cite the operation of the principle of vicarious liability in relation to the tort of deceit, whereby a party which is itself innocent of the deceit – and could not be punished for a crime in respect of it – may nonetheless be held liable in damages to the injured claimant for that deceit).
82. In my view, it is well arguable that as a matter of EU law a civil law damages claim can be maintained by a person who has suffered loss as a result of paying inflated prices by reason of cartel arrangements in breach of Article 101 against a member of a participating undertaking which implemented the arrangements, albeit without knowledge of the cartel – at least where there is some significant element of influence or control by a member of the undertaking which does have knowledge of the cartel over the activities of the implementing member of the undertaking (control within the relevant undertakings is pleaded in this case). That has been the reaction of a series of judges in this jurisdiction (Aikens J in *Provimi*, Teare J at first instance in *Cooper Tire*, the Court of Appeal in *Cooper Tire* and the Chancellor in *Toshiba Carrier*), and I agree with them.
83. As Aikens J put the point in *Provimi*:

“31. It seems to me to be arguable that where two corporate entities are part of an “undertaking” (call it “Undertaking A”) and one of those entities has entered into an infringing agreement with other, independent, “undertakings”, then if another corporate entity which is part of Undertaking A then implements that infringing agreement, it is also infringing Article 81 . In my view it is arguable that it is not necessary to plead or prove any particular “concurrence of wills” between the two legal entities within Undertaking A. The EU competition law concept of an “undertaking” is that it is one economic unit. The legal entities that are a part of the one undertaking, by definition of the concept, have no independence of mind or action or will. They are to be regarded as all one. Therefore, so it seems to me, the mind and will of one legal entity is, for the purposes of Article 81, to be treated as the mind and will of the other entity. There is no question of having to “impute” the knowledge or will of one entity to another, because they are one and the same.

32. In my view the fact that, in the Decision, the Commission identifies only one particular legal entity as the “infringing undertaking” does not detract from my conclusion. EU competition law has to bow to the practical fact that in national laws it is legal entities that exist; and it is legal entities that own the funds from which fines are paid. So particular entities need to be identified in order to enforce the Decision. But those practical considerations cannot determine a prior question which is whether, if one entity of an undertaking is an infringer by agreeing to fix prices, another entity that has implemented the same infringing agreement, is also an infringer.”

84. I therefore conclude that there is no proper basis on which I should strike out any part of the P/C or refuse to permit the amendments in the Amended P/C on the grounds that they disclose no reasonably arguable claim in relation to the alternative implementation case to be made against the defendants. It may be that at some point in the proceedings a reference to the Court of Justice of the European Union may be required, but that is by no means obvious at this stage and is not an issue which I have to decide.

Conclusion

85. For the reasons given above, the strike out applications and summary judgment application fall to be dismissed. In my view, the Amended P/C is a proper pleading which does not raise new causes of action and permission should be given for all the amendments in it.
86. At the hearing, there was debate about what should be done in relation to the difficulties experienced by the Samsung SDI defendants as a result of the confidentiality of parts of the Amended P/C. In my view, it is Nokia that is seeking to

plead a case against those defendants but subject to a departure from the usual rules as to the ability of a defendant to allow its in-house lawyers to see the case being put forward against it, and it is Nokia which should take the initiative in seeking to take steps to give the defendants that (usual) ability, as a matter of fairness to them. There is a mechanism, in the form of the liberty to apply provision in the confidentiality order dated 17 January 2012 made by Master Bragge, allowing for proper adjustments to be made to the confidentiality restrictions in that order.

87. In the event, no-one suggested that there was any insuperable impediment to securing an adjustment to meet the concerns of the Samsung SDI defendants. The argument was in relation to who should bear the burden of seeking to obtain that adjustment – Nokia (as the SDI defendants maintained) or the SDI defendants themselves (as Nokia maintained). As I have said, I think that it should be Nokia that bears that burden. It is primarily its responsibility to seek to ensure that it puts forward a case which can fairly be understood and addressed by the Samsung SDI defendants. In so far as it may prove to be necessary for those defendants to provide information, support or reasonable undertakings to maintain confidentiality of information more generally, Nokia is entitled to look to them for assistance in seeking such adjustment of the confidentiality arrangements as may be necessary.
88. In light of indications by me that this appeared to be the appropriate way forward, Mr Lasok did not seek to suggest that permission to Nokia to make the amendments in the Amended P/C should be refused on the grounds of this distinct confidentiality issue and counsel for Nokia did not seek to press the argument that the onus should be on Mr Lasok's clients to take the initiative to sort the problem out. Having regard to the position adopted on each side, I grant permission to Nokia to amend as against the Samsung SDI defendants in the form of the Amended P/C and I do not think it necessary to make any order directed against Nokia and those defendants to give effect to what I have said about resolving the impasse which had developed between them. If some difficulty arises in future, each side will have liberty to apply in case it transpires that some order of the court is required to take matters forward.
89. The parties should now seek to agree an appropriate form of order and an appropriate request for the European Commission.