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Case No: HP-2019-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/10/2019

Before :

HIS HONOUR JUDGE HACON
(Sitting as a Deputy High Court Judge)

- -

Between :

(1) VESTEL ELEKTRONIK SANAYI VE TICARET AS	
(2) VESTEL UK LIMITED	**Claimants**
- and -	
(1) HEVC ADVANCE LLC	
(2) KONINKLIJKE PHILIPS NV	**Defendants**

- -
- -

Colin West and **Maxwell Keay** (instructed by **EIP Europe LLP**) for the **Claimants**
James Segan (instructed by **Powell Gilbert LLP**) for the **First Defendant**
Meredith Pickford QC and **Andrew Scott** (instructed by) **Bristows LLP** for the **Second Defendant**

Hearing dates: 2 and 3 October 2019

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Approved Judgment

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

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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. In this action the second claimant ('Vestel UK') seeks relief for alleged abuse of a dominant position by the defendants. This is in a market relating to patents claiming inventions used in the manufacture of high definition televisions. The first claimant ('Vestel Turkey') is the parent company of the group of which Vestel UK forms part. I will refer to them collectively as 'Vestel'.

2. The first defendant ('Advance') is domiciled in Delaware. By an order dated 4 February 2019 Deputy Master Linwood gave Vestel permission to serve the claim form and particulars of claim on Advance at the address of its agent for service of process in Delaware. The second defendant ('Philips') is domiciled in the Netherlands and was served without the permission of the court under the terms of Regulation (EU) 1215/2012 ('Brussels I Recast').

3. Advance and Philips each seeks a declaration that this court has no jurisdiction over the claim against it in this action. There is also an application by the claimants for permission to amend their particulars of claim to deal with an argument raised by the defendants.

4. Colin West and Maxwell Keay appeared for Vestel, James Segan for Advance, and Meredith Pickford QC and Andrew Scott for Philips.

Background

5. Vestel form part of a Turkish-based group of companies ('the Vestel Group') which sells electronic consumer products, including televisions. The Vestel Group is one of the largest manufacturers of TVs in the world although the majority of its products are supplied to and sold under the brands of companies such as Toshiba, Hitachi, JVC, Telefunken, Bush and Panasonic.

6. In 2013 a new video compression standard was set up under the auspices of two standards setting organisations ('SSOs'): the International Telecommunications Union and the International Organisation for Standardisation. The standard is known as 'High Efficiency Video Coding', or more usually 'HEVC' and is sometimes referred to as 'H.265'. It allows significantly better data compression, thereby reducing the quantity of data required to maintain the same video quality or to improve video quality while using the same amount of data. TVs which are made to display high definition broadcasts, such as 4k sets, must in practice be compatible with HEVC.

7. Patents have been declared by their respective owners to be essential to the HEVC standard. Advance was set up to administer a patent pool for standard essential patents ('SEPs') relating to HEVC ('the Advance Pool'). Philips is one of the participating patentees.

8. Advance is used as a convenient means by which its member patentees can collectively license their SEPs under fair, reasonable and non-discriminatory ('FRAND') terms. In *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2018] EWCA Civ

2344; [2018] RPC 20, Lord Kitchin explained (at [3]) the value to consumers of the standards set up by SSOs, in that case the European Telecommunications Standards Institute ('ETSI') which promulgates standards used in the manufacture of mobile phones. He continued:

> "[4] As the European Commission has recognised, SEPs can be of great value to their holders. These holders can expect a substantial revenue stream from their SEPs as the standard for which they are essential is implemented in products sold to millions of consumers. This revenue stream is supported by the fact that alternative technologies which do not meet the standard may well disappear from the market. But the potential for anti-competitive behaviour is obvious. The owner of a SEP has the potential ability to 'hold-up' users after the adoption and publication of the standard either by refusing to license the SEP or by extracting excessive royalty fees for its use, and in that way to prevent competitors from gaining effective access to the standard and the part of the telecommunications market to which it relates. ETSI and other SSOs therefore require the owners of SEPs to give an irrevocable undertaking in writing that they are prepared to grant licences of their SEPs on fair, reasonable and non-discriminatory ('FRAND') terms. This undertaking is designed to ensure that any technology protected by a SEP which is incorporated into a standard is accessible to users of that standard on fair and reasonable terms and that its owner cannot impede the implementation of the standard by refusing to license it or by requesting unfair, unreasonable or discriminatory licence fees.
>
> [5] As we shall explain, the negotiation of licences for SEPs on FRAND terms may be far from straightforward, however. The owner of a SEP may still use the threat of an injunction to try to secure the payment of excessive licence fees and so engage in hold-up activities. Conversely, the infringer may refuse to engage constructively or behave unreasonably in the negotiation process and so avoid paying the licence fees to which the SEP owner is properly entitled, a process known as 'hold-out'."

9. Advance has drawn up the terms of the licence under which its members are willing collectively to license their SEPs. It has no authority to grant a licence on any other terms save with the permission of its members. However, potential licensees, sometimes referred to as 'implementers' of the standard, may approach any of the members of the pool and negotiate an individual licence.

10. There is another pool of SEPs relating to HEVC administered by another entity: the 'MPEG LA pool'. The two pools are not mutually exclusive; many patentees have their SEPs in both pools. There is at least one other HEVC patent pool, the Velos Media pool. It is referred to in the Particulars of Claim but did not figure in the arguments.

11. Vestel accept that companies in its group require a licence under the HEVC SEPs. Starting in April 2017 Vestel attempted to negotiate a licence from Advance. On 18 May 2018 Advance sent to Vestel a copy of Advance's draft Patent Portfolio Licence Agreement ('the PPL') which included the royalty rates.

12. In the meantime Vestel agreed licence terms with MPEG LA and thereby, according to Vestel, have a licence already in respect of about 81% of the SEPs in the Advance Pool.

13. Vestel say that the terms offered by Advance have royalty rates many times higher than the rates offered by MPEG LA even though MPEG LA has the larger patent pool and accordingly are non-FRAND. Advance, they say, has refused to offer a licence with lower royalties. Advance's PPL contains terms other than the royalty rates which are also objectionable to Vestel but such further terms were of peripheral relevance to this hearing.

14. In parallel with their negotiations with Advance, Vestel approached Philips to discuss a licence under the SEPs owned by Philips. In July 2018 Philips offered a royalty tied to that offered by Advance, scaled down according to the proportion of the Advance Pool SEPs owned by Philips but with an uplift associated with licences granted by individual SEP proprietors. Vestel say that the Philips terms are also non-FRAND. No agreement has been reached either with Advance or Philips.

15. In the passage from *Unwired Planet* quoted above Lord Kitchin identified the problem of 'hold-out' by a potential licensee of SEPs, with which that and other cases have been concerned. The present case is apparently the first to reach the English courts in which the reverse problem, as Vestel see it, has arisen. Vestel say that Vestel Turkey is willing to take a licence from Advance and/or Philips along with other individual owners of SEPs from which it has no licence through MPEG LA but it has been met with intransigence from both Advance and Philips: non-FRAND terms have been offered on the basis that Vestel can either take them or leave them.

16. On 18 January 2019 this action was brought, apparently to break the deadlock. The means chosen is a claim that Advance and Philips have abused their dominant position in breach of art.102 of the Treaty on the Functioning of the European Union (TFEU) and/or s.18 of the Competition Act 1998. For simplicity I will refer only to art.102.

17. On the same day, 18 January 2019, Vestel sent to Advance a counter-offer in the form of marked-up amendments to Advance's PPL. Vestel say that their amended version is FRAND. The counter-offer has not been accepted.

The claim

The relevant market

18. A convenient starting point in a claim for abuse of a dominant position is to identify the relevant market in which the defendant is said to be dominant. The Particulars of Claim state that each SEP in issue is a monopoly right. The pleading continues:

> "70. In the premises:
>
> (i) Each declared SEP incorporated within the HEVC standard constitutes its own market (or, to put the same point in different language, the market for licences for each such patent is a separate market to the market for licences for any other such patent); and
>
> (ii) The patentee of each such declared SEP holds a dominant position (in fact a legal monopoly) on the market for the granting of licences to each such SEP. In any event, each such patentee

holds such a dominant position prior to joining a patent pool whereby licences to SEPs incorporated within such standard are licensed on a collective basis.

71. The markets on which Vestel operates are the downstream markets for the various Products in question. The Defendants do not operate on these markets, but their conduct on the markets on which they do operate has the potential to affect the conditions of competition on such downstream markets."

19. It was explained in argument that the downstream market is the market in TVs which incorporate the HEVC standard. The upstream market is the market in licensing SEPs. The relevant market with regard to the allegation of abuse is the upstream licensing market; the alleged abuse in that market is said to affect competition in the downstream TV market.

20. Philips sought clarification of paragraph 70 by a request under CPR Part 18. This was the reply:

"1. It is not the Claimants' case that the geographic extent of the market for each declared SEP incorporated within the HEVC standard and the market for granting of licences to each SEP corresponds solely to the territory in respect of which each SEP is designated.

2. The Claimants' case does not place any particular reliance upon the geographic extent of the market(s) relied upon. The Claimants will say that the strict concept of the geographic extent of the market for SEPs individually is of limited application in the context of patent rights, and in particular SEPs, because of *inter alia* the unusual nature of the market in question (as described in <u>Unwired Planet</u> [2017] EWHC 2988 at [660]), the nature of global patent families, the nature of the relevant standards which apply across multiple jurisdictions, and the commercial practices of those who implement the relevant standards (where products are manufactured for sale across multiple jurisdictions). The detailed analysis of these factors and how they affect the nature and scope of the market(s) in respect of SEPs owned by the Claimants will be a matter for expert and factual evidence at trial.

For the avoidance of doubt, whatever the correct analysis of the geographical market, that does not detract from or otherwise affect the Claimants' case on dominance as pleaded at paragraphs 68-88 of the Particulars of Claim, for the reasons there set out."

21. This is the paragraph 660 from *Unwired Planet* at first instance, referred to in the reply:

"[660] Ultimately the determining factor is that what is being made available for sale is a licence. The market should be defined in that way. Nevertheless, this is an unusual sort of market. What the customers (implementers) really want is access to the standard, which they can obtain without paying SEP owners in advance. If they have to pay licence fees then they will of course do so, but the idea that implementers are all rushing to pay licence fees is fanciful. The

> structure of the market inevitably gives rise to the possibility of licensees holding out."

22. I think a fair summary of paragraph 2 of the reply to the Part 18 request is: the relevant market is of limited application in the context of this case and a detailed analysis can anyway be left for trial; whatever the relevant market may be, Advance and Philips are dominant in it for the reasons pleaded in the Particulars of Claim.

23. It was not satisfactory that the geographical extent of the market in the present case should be left unresolved until the trial. In the course of argument Mr West said that the relevant market is worldwide.

Dominance in the relevant market

24. Vestel's case on dominance is that each patent proprietor in the Advance Pool would be dominant in the worldwide market for licences under its SEPs, save that such dominance has now been transferred to Advance. Implementers must deal with Advance in order to obtain a licence under the SEPs in the pool. Advance exerts on a collective basis the dominant positions previously held by the patent proprietors.

25. There is an alternative argument: if the foregoing is wrong, Philips holds a dominant position in the market for licences under its own SEPs. Philips is sued on its own account and as a representative of all members of the Advance Pool.

26. There is a third alternative argument: Advance does not of itself hold a dominant position in the relevant market but it is liable as agent for all the proprietors of SEPs who collectively do.

Abuse

27. The alleged abuses pleaded are:

> "89. The First alternatively Second Defendant (by itself or together with all other members of the HEVC Advance patent pool) has abused its dominant position on the markets set out above in the ways set out above, and in particular by –
>
> (i) Failing to offer on FRAND terms a licence to the patents in the HEVC Advance Pool which it is in a position to licence;
>
> (ii) Offering to license such patents only on terms which are not FRAND for the reasons set out herein;
>
> (iii) Offering to licence such patents only on terms which result in rates which are excessive and which (if necessary so to aver) would result in harm to competition on the downstream market on which Vestel operates;
>
> (iv) Offering to license such patents on terms which discriminate against the Claimants for the reasons set out above and which (if necessary so to aver) would result in harm to competition on the downstream markets on which Vestel operates;

(v) Failing to provide sufficient information to enable the Claimants to satisfy themselves that they are not being discriminated against; and

(vi) Threatening to seek injunctions against the Claimants.

90. Further, in the event that, in accordance with their threats to do so as referred to above, the Defendants (or any of them) were in fact to seek injunctive or similar relief (such as the recall of products) against the Claimants (or any of them) in respect of their SEPs, based on the Defendants' conduct and licensing offers to date, that would constitute a further abuse of their dominant position."

Damage

28. The pleaded damage which Vestel would suffer as a result of those abuses has the merit of being short:

"91. Such conduct has resulted in loss and damage to the Claimants, or would do so if persisted in."

29. Clarification was provided by evidence. Before Deputy Master Linwood, it was expressly stated in the witness statement of Gary Moss, a partner in EIP Europe LLP which has conduct of these proceedings on behalf of Vestel, that Vestel have not suffered any damage so far. Matthew Jones, another partner at EIP Europe, said that same thing in his first witness statement.

30. Rasit Ciloglan, who is the Strategic Planning and Coordination Manager of Vestel Turkey, also gave evidence for the hearing before the Deputy Master. He explained that Vestel Turkey is the manufacturer of the TVs sold in the UK. It sells them to Vestel Ticaret AS (referred to by the parties as 'Vestel Trade' – *ticaret* is Turkish for trade) which sells them on to Vestel UK. Vestel UK then markets the TVs to wholesalers and retailers in the UK. Mr Ciloglan said that a cost increase, such as that due to royalties payable to Advance or Philips, would not be absorbed by Vestel Turkey, but passed down the chain to Vestel UK. He continued:

"It therefore follows that any royalties over and above that which can be categorised as FRAND will lead to Vestel UK suffering loss in the UK in that either:

a. The acquisition costs of the products will be higher than at present, but it will be selling at the same prices, leading to a reduction in the profits of Vestel UK; or

b. Vestel UK will be forced to seek to raise its prices to reflect the higher input costs but, in my view, this is likely to result in a reduction in sales, thereby also leading to reduction in profits of Vestel UK."

31. About two weeks before the present hearing Vestel filed a second witness statement from Mr Jones. On instructions from his clients Mr Jones identified another head of damage. Vestel UK did not know how much it would ultimately have to pay Advance

or Philips. Mr Jones said that Vestel could either set aside the amount it believes to be appropriate, in which case this may turn out to be an under-provision running to "millions of dollars". It would then have to pay a large sum when a licence was settled. Alternatively, it could set aside the royalties claimed by Advance or Philips, but this would have a very significant impact on Vestel's profitability and sales, including in the UK. Mr Jones stated that there was a "risk of potentially catastrophic losses, including in the UK".

The relief

32. Relief is sought only by Vestel UK. The particulars of claim state:

> "93. The Second Claimant seeks declarations as follows:
>
> (i) That the First alternatively Second Defendant (on its own or in common with all other members of the HEVC Advance patent pool) have abused their dominant position;
>
> (ii) That the terms of the HEVC Advance draft PPL are not FRAND;
>
> (iii) That the Defendants' conduct and licensing offers to date are not such as to entitle the Defendants to seek an injunction or similar relief (including the recall of any products) against the Claimants in respect of any alleged infringement of the declared SEPs in the HEVC Advance Pool (and that any attempt by the Defendants (or any of them) to seek injunctive or similar relief against the Claimants (or any of them) in respect of the SEPs, based on the Defendants' conduct and licensing offers to date, would constitute an abuse of their dominant position);
>
> (iv) That in its negotiations with the Claimants, HEVC Advance and/or its pool members have failed to comply with their FRAND obligations;
>
> (v) That the terms of the Claimants' counter-offer of 18 January 2019 are FRAND;
>
> (vi) Alternatively, a declaration as to the terms which are FRAND for the patents within the HEVC Advance patent pool (alternatively, such patents within that pool as are owned by the Second Defendant)."

Vestel's claim against Philips

33. The parties argued first the court's jurisdiction over the claim against Philips.

The law

34. Articles 4(1) and 7(2) of Brussels I Recast provide:

Article 4

> *1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*
>
> *…*
>
> *Article 7*
>
> *A person domiciled in a Member State may be sued in another Member State:*
>
> *…*
>
> *(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;*

35. Vestel relied on art.7(2). Damage arising from an abuse of a dominant position under art.102 TFEU may provide a basis for jurisdiction under art.7(2) of Brussels I Recast, see *AB 'flyLAL-Lithuanian Airlines' v Starptautiskā Lidosta 'Rīga' VAS* (Case C-27/17) EU:C:2018:533; [2018] ILPr 32 at [36].

36. It is well established that art.7(2) has an autonomous meaning accorded to it by EU law and as an exception to art.4(1) it must be interpreted restrictively, see for example *flyLAL* at [26] and [27].

37. The 'place' in art.7(2) covers both the place of the event giving rise to the damage and the place where the damage occurred, so the defendant may be sued, at the option of the claimant, in the courts of either place, see *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* (Case 21/76) EU:C:1976:166; [1976] ECR 1735 and *flyLAL* at [28].

38. Vestel relied only on the place where damage has occurred, or will occur, arising from Philips' alleged abuse.

39. The Court of Justice has ruled that where jurisdiction of a national court is founded under art.7(2) on the place where the damage occurred, it has jurisdiction to rule solely in respect of the damage in the Member State of the court seised, see *Shevill v Presse Alliance SA* (Case C-68/93) EU:C:1995:61; [1995] ECR I-415.

40. Jurisdiction is conferred on the place where the damage occurred only if the event giving rise to the damage directly produced its harmful effects upon the person who is the immediate victim of that event, see *Dumez France v Hessische Landesbank (Helaba)* (Case C-220/88) EU:C:1990:8; [1990] ECR I-49 at [20]. The distinction between an event giving rise to the damage directly as opposed to indirectly is sometimes more easily stated than applied.

41. In *Marinari v Lloyds Bank plc* (Case C-364/93) EU:C:1995:289; [1996] QB 217 Mr Marinari presented promissory bank notes to the Manchester branch of Lloyds Bank whose staff refused to return them to him. Mr Marinari sued the bank in the *Tribunale di Pisa*. The Court of Justice held (at [21]) that the 'place where the harmful event occurred' did not include the place where the victim claims to have suffered financial loss (Italy) consequential on initial damage arising and suffered by him (in England).

42. In *flyLAL* a Lithuanian Airline (flyLAL) operated flights to and from Vilnius airport in Lithuania. A Latvian airline (Air Baltic) started to offer rival flights from that airport at lower prices. FlyLAL was driven into liquidation. It brought an action against Air Baltic for applying predatory prices on certain of its flights departing from and arriving at Vilnius airport funded contrary to art.102 TFEU. FlyLAL also contended that the predatory pricing had been funded by a reduction in fees granted to Air Baltic by Riga Airport in Latvia in an agreement between them which was contrary to art.101 TFEU. The action was brought in the Regional Court in Vilnius, Lithuania.

43. The Regional Court referred three questions to the CJEU of which only the second is relevant here. It was whether art.5(3) of Regulation 44/2001 had to be interpreted to mean, in the context of an action seeking compensation for damage caused by anti-competitive conduct, the alleged loss of income incurred by the victim of such conduct may constitute damage capable of providing a basis for the jurisdiction of the courts of the Member State of the 'place where the harmful event occurred', more specifically in this case the place where the damage occurred.

44. The Court of Justice reiterated the distinction between initial damage and consequential damage (at [31]-[32]), stating that only the former was relevant to founding jurisdiction.

45. The Court also ruled that jurisdiction under art.5(3) of Regulation 44/2001, on facts such as those in *flyLAL*, was based on the alignment of two elements, namely the place of the initial damage suffered by the claimant and the place of the market affected by the anti-competitive conduct (at [40]):

> "[40] The Court finds that, where the market affected by the anti-competitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred for the purposes of applying art.5(3) of Regulation 44/2001. That approach, based on the alignment of those two elements, is consistent with the objectives of proximity and predictability of the rules governing jurisdiction, since, first, the courts of the Member State in which the affected market is located are best placed to assess such actions for damages and, secondly, an economic operator engaging in anticompetitive conduct can reasonably expect to be sued in the courts for the place where its conduct distorted the rules governing healthy competition."

46. The Court further held (at [43] and ruling 1):

> " … in the context of an action seeking compensation for damage caused by anticompetitive conduct, the 'place where the harmful event occurred' covers, in situation such as that at issue in the main proceedings, inter alia, the place where the loss of income consisting in loss of sales occurred, that is to say, the place of the market which is affected by that conduct and on which the victim claims to have suffered those losses."

47. The Court had found earlier (at [38]-[39]) that the market affected was that for flights to and from Vilnius Airport and the losses incurred by flyLAL were on flights in that market, which was located in Lithuania.

48. Thus, in the context of an allegation of anticompetitive conduct, jurisdiction will be conferred on the courts of the place where damage to the claimant arising from the conduct occurs if two requirements are satisfied. First, the damage must be initial, as opposed to consequential, i.e. it must be direct damage suffered by the claimant. Secondly, the market said to be distorted by the anticompetitive conduct must be in the Member State in which the direct damage to the claimant is alleged to have occurred (or in which it would occur).

49. *Tibor-Trans Fuvarozó és Kereskedelmi KFT v DAF Trucks NV* (Case C-451/18) EU:C:2019:635; [2019] ILPr 33 concerned an allegation of infringement of art.101 TFEU and art.53 of the EEA Agreement. Fifteen truck manufacturers, including DAF Trucks, had been found by the Commission to have engaged in a cartel resulting in an unlawful increase in the price of trucks in the EEA. The claimant brought an action against DAF Trucks in Hungary alleging that it had bought trucks at a price distorted by the collusive arrangements into which DAF Trucks had entered with other members of the cartel. The trucks had not been bought directly from DAF, but from a dealer in Hungary. The Hungarian court referred to the CJEU a question whether, in an action seeking compensation for damage caused by infringement of art.101 TFEU, 'the place where the harmful event occurred' within the meaning of art.7(2) of the Recast Brussels Regulation was the place where the victim claimed to have suffered damage, even where the claimant had no contractual relationship with the defendant cartel member.

50. The CJEU said:

> "[31] As regards the nature of the damage alleged, it should be noted that it is not merely a financial consequence of the damage that could have been suffered by direct purchasers, such as Hungarian vehicle dealerships, and which could have consisted of a loss of sales following the price increase. By contrast, the damage alleged in the case in the main proceedings results essentially from the additional costs incurred because of artificially high prices and, therefore, appears to be the immediate consequence of an infringement pursuant to art.101 TFEU and thus constitutes direct damage which, in principle, provides a basis for the jurisdiction of the courts of the Member State in which it occurred.
>
> [32] As regards the place where such damage occurred, it is apparent from the decision at issue that the infringement established in art.101 TFEU extended to the whole of the EEA . It thus entailed a distortion of competition in that market of which Hungary is also a member since 1 May 2004.
>
> [33] Where the market affected by the anti-competitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred for the purposes of applying art.7(2) of Regulation 1215/2012 (see, to that effect, judgment of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17) EU:C:2018:533; [2019] 1 W.L.R. 669; [2018] I.L.Pr. 32, [40]).
>
> [34] That approach is consistent with the objectives of proximity and predictability of the rules governing jurisdiction, since, first, the courts of the Member State in which the affected market is located are best placed to assess such actions for damages and, secondly, an economic operator engaging in anti-competitive conduct can reasonably expect to be sued in the courts having

> jurisdiction over the place where its conduct distorted the rules governing healthy competition (see, to that effect, judgment of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17) EU:C:2018:533; [2019] 1 W.L.R. 669; [2018] I.L.Pr. 32, [40]).”

The arguments

51. Mr Pickford had two overall arguments. First, he submitted that the case advanced by Vestel provided no coherent basis for an assertion that Vestel UK would suffer damage, whether in the UK or anywhere else. Secondly, if there was a prospect of any such damage to Vestel UK, it would have to be both direct and in the same Member State – the United Kingdom – as the market which would be distorted by the anticompetitive conduct complained of. Vestel’s case on damage did not satisfy those criteria. Since there was no relevant damage, art.7(2) did not apply.

52. As I have said, in Vestel’s evidence before the Deputy Master, the damage relied on would be consequent upon Vestel Turkey being forced to enter into a licence agreement with Philips (or Advance) on abusive terms. Philips and Advance responded to this first head of damage by saying that Vestel Turkey was a free agent and could never be forced into concluding any licence, so Vestel’s argument could have no basis.

53. Vestel then filed evidence identifying the second head of damage. In summary it is that Vestel’s uncertainty as to the royalty it will ultimately have to pay for a licence (from Advance, the evidence was not concerned with a licence from Philips) means that Vestel UK does not know how much money to set aside. Vestel UK fears that it may set aside too much or too little and will suffer damage accordingly.

54. Mr West also drew my attention to correspondence in which Vestel sought an undertaking from Philips not to bring proceedings for infringement of its SEPs against Vestel or alternatively not to enforce any injunction obtained in such proceedings before FRAND terms had been settled by the court and Vestel had had the opportunity to take them. Philips declined to give either undertaking.

55. Both sides argued the issue of direct/indirect damage solely by reference to what I have called the first head – the future loss to be caused by entering the licence on the assumption (disputed by Philips) that Vestel Turkey could be forced into a licence with Philips. Mr Pickford submitted alleged damage flowing from excessive royalties could only be suffered by Vestel Turkey. If Vestel Turkey chose to pass on the cost to Vestel UK via Vestel Trade, Vestel UK would sustain damage caused indirectly by the allegedly wrongful act.

56. Mr West pointed out that the predatory pricing by DAF Trucks in *Tibor* was directly imposed on a Hungarian truck dealer, not Tibor itself. The effect of the predatory pricing was passed on to Tibor in the form of an artificially high price being charged. That was held by the CJEU to constitute direct damage to Tibor. Further, the damage occurred in Hungary, part of the EEA-wide market which had been distorted by the predatory pricing of the cartel of which DAF Trucks formed part. Both requirements for founding jurisdiction in Hungary were satisfied. Mr West submitted that the analogy with the present case is close. Philips’ allegedly abusive offer was made directly to Vestel Turkey, which would be the contracting party if a licence were to be entered into. Vestel Turkey will be forced to accept the offer and so the effect of the

abuse would be passed on to Vestel UK. That would constitute direct damage to Vestel UK. The relevant market was a worldwide market in the licensing of Philips's SEPs. The direct damage to Vestel UK in the United Kingdom would therefore be in a Member State within the market distorted by the abuse. It follows that this court has jurisdiction.

57. Mr Pickford submitted in reply that Mr West had confused two markets, namely the upstream market for licences under the Advance SEPs and the downstream market for TVs. Vestel UK's alleged damage was only in the latter market – caused by either loss of profit on each TV sold or alternatively loss of sales if the extra cost was passed on to customers (and thereby loss of profit). In law, loss in a market which was different from the market relevant to the abuse must be indirect or consequential loss as explained by the CJEU in *Dumez* and subsequent cases. Such damage in England could therefore not confer jurisdiction on the English courts.

Whether an implementer can overcome an impasse in negotiations

58. I should clear away one matter which was developed by Mr West in argument, possibly prompted by a question to Mr Pickford from me. If proprietors of SEPs offer terms for a licence which an implementer of the relevant standard regards as non-FRAND and if further the proprietors decline to amend their offer, is there anything that the implementer can do about it, other than bringing an action such as the present one?

59. I think the answer is that there may or may not be, but that has nothing to do with whether any particular court has jurisdiction over such an action. The usual rules must be applied and if they confer jurisdiction on a court amenable to a claim such as the present one – whether in England, Delaware, the Netherlands or elsewhere – so much the better for the implementer. But the question whether the implementer is entitled to relief in the circumstances described is irrelevant to whether the court has jurisdiction in the first place.

60. Mr Pickford submitted that in any event an action for abuse under art.102 TFEU was never going to be the appropriate route to relief. He speculated that a court might be able to exercise an inherent jurisdiction to decide FRAND terms by means of declaratory relief equivalent to that exercised by the English courts in, for example, *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318. But that would be for another day and, in this instance, another jurisdiction. I express no view.

Discussion in relation to damage

<u>Whether Vestel UK will suffer any damage at all</u>

61. Vestel's case on future damage depends on what will happen. I must consider alternative possibilities.

62. The first is that Philips never does anything to enforce its SEPs before they and the limitation period expire. This was not raised by the parties, presumably because they dismissed it as too unlikely to be worthy of discussion.

63. The second overall possibility is that at some point Philips seeks to enforce the SEPs. The likelihood of an injunction, at least in the EU, would be limited. In practice the court before which the action for enforcement were brought would probably settle FRAND terms and Philips would be entitled to claim the royalties due under the terms settled. There was no evidence to suggest that the position would be any different outside the EU. Alternatively the parties may agree terms.

64. With regard to the first head discussed above – damage caused by entering a licence – Vestel's argument rests on Vestel Turkey being forced into a licence. There was no evidence of anything done by Philips which could have the effect of forcing Vestel Turkey to agree to anything.

65. Further, if Vestel Turkey were to enter into a licence with Philips, there could be no abuse and no consequent damage to either Vestel company if the licence were settled by a court. It must be assumed that whichever court settles the licence, the terms will be FRAND and therefore not contrary to art.102 TFEU. Nor could there be an abuse and consequent damage arising out of nothing more than the fact of a licence having been agreed between the parties.

66. Turning to the second head of damage, i.e. that resting on delay in the licence being settled, the evidence about this filed by Vestel was directed only to the claim against Advance. I did not understand Mr West to rely on the second head in respect of the claim against Philips. If I am wrong about that, I discuss this second head of damage below in the context of jurisdiction over the claim against Advance.

67. In my view none of the evidence filed discloses any credible basis on which to conclude that Vestel UK has suffered or will suffer any damage arising out of the alleged abuse of a dominant position by Philips, assuming that such abuse were proved at trial.

<u>Whether any damage would be direct</u>

68. The question whether the alleged damage under the first head would be direct or indirect is therefore academic. I will deal with it briefly.

69. Mr Pickford was not able to point to any judgment in which his proposition of law – that if damage is suffered by the claimant in a market other than the relevant market of the alleged abuse under art.102 it must be indirect damage – has been stated. His argument was that it was a necessary deduction from the line of cases beginning with *Dumez*.

70. I do not understand the judgments of the CJEU in *flyLAL* and *Tibor* to limit an action for anti-competitive conduct in that way. I accept Mr West's analogy with *Tibor*. If there had been any prospect of damage to Vestel UK, it would be direct damage.

71. As to the second head of damage, I have difficulty in resolving whether it would be direct damage to Vestel UK or not because it was never made sufficiently clear how this head of damage would work. I will discuss this further in relation to the Advance claim.

Conclusion regarding the claim against Philips

72. Mr West did not advance the argument that even if I were not satisfied that Vestel UK has suffered or will suffer damage from the pleaded abuse, this court could still have jurisdiction under art.7(2) of Brussels I Recast. I therefore find that this court does not have jurisdiction in relation to Vestel's claim against Philips.

Vestel's claim against Advance

73. By an order dated 4 February 2019 Deputy Master Linwood gave permission to serve the claim form and particulars of claim on Advance at the address of its agent for service of process in Delaware.

74. The application was supported by a witness statement from Mr Moss of EIP Europe. He identified four gateways of those set out in CPR Practice Direction 6B, each said to found a ground for service out of the jurisdiction.

The law

75. CPR 6.37 provides, so far as is relevant:

> *6.37 (1) An application for permission under rule 6.36 must set out –*
>
> *(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;*
>
> *(b) that the claimant believes that the claim has a reasonable prospect of success;*
>
> …
>
> *(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.*

76. The principles governing service out of the jurisdiction were summarised by Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192 in a passage with which the other Justices agreed:

> "[3] Before permission can be given for the service of originating process out of the jurisdiction, it is necessary for the claimant to establish (i) that the case falls within at least one of the jurisdictional gateways in paragraph 3.1 of Practice Direction 6B supplementing CPR Pt 6, (ii) that she has a reasonable prospect of success, and (iii) that England and Wales is the proper place in which to bring the claim."

The jurisdictional gateways

77. The first criterion identified by Lord Sumption has been the subject of some discussion by appellate courts in recent years: in *Brownlie* itself¸ again by the Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34; [2018] 1 WLR 3683 and by the Court of Appeal which reviewed those judgments in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 WLR 3514.

78. In *Brownlie* Lord Sumption pointed out (at [4]) that some of the gateways of Practice Direction 6B depend on the court being satisfied of some jurisdictional fact, for instance that relevant damage has been sustained in England. He referred to *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869, pointing out that Lord Simonds, with whom Lord Normand agreed, had:

> "… adopted from counsel the expression a 'good arguable case', which appeared to him to import more than a prima facie case but less than a balance of probabilities." (*Brownlie* at [5])

79. Lord Sumption noted that the criterion of a 'good arguable case' was endorsed by all their Lordships in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438. He went on to explain it (at [7]):

> "What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

80. Although Baroness Hale PSC, Lords Wilson and Hughes JJSC and Lord Clarke all agreed with this part of Lord Sumption's judgment, it was *obiter*. However it was endorsed unanimously by the Supreme Court in *Goldman Sachs* and is now binding (see *Kaefer* at [70]-[71]).

81. In *Kaefer* Green LJ, with whom Davis and Asplin LJJ agreed, explained Lord Sumption's three-limbed test:

> "Limb (i)
>
> [73] It is in my view clear that, at least in part, the Supreme Court confirmed the relative test in *Canada Trust* [1998] 1 WLR 547. This is plain from the express endorsement of that test in *Brownlie* [2018] 1 WLR 192 and nothing in *Goldman Sachs* [2018] 1 WLR 3683 detracts from that analysis but on the contrary operates upon the basis that *Brownlie* was correct. The reference to 'a plausible evidential basis' in limb (i) is hence a reference to an evidential basis showing that the claimant has the better argument. It is perhaps relevant that in the Court of Appeal in *Brownlie* [2016] 1 WLR 1814 Arden LJ expressly linked the formulation of Waller LJ in *Canada Trust* with a concept of relative plausibility: at para 23. The use of 'plausibility' as a guiding relative principle in *Brownlie* and in *Goldman Sachs* was not therefore a novelty plucked from a jurisprudential void.
>
> [74] What is the correct name for the test? In *Aspen Underwriting Ltd v Kairos Shipping Ltd (The Atlantik Confidence)* [2018] 1 All ER (Comm) 228, on appeal [2019] 1 Lloyd's Rep 221 ('*Aspen*'), the Court of Appeal at para 34 construed *Brownlie* as endorsing the 'good arguable case' test which boiled down to who had (relatively) the better of the argument. *Aspen* was however

heard before the judgment in *Goldman Sachs* was handed down, and, even though it was handed down afterwards, it does not take account of that judgment. It is notable that in *Goldman Sachs* the court does not use the terminology of 'good arguable case' save in respect of limb (iii) where it is combined with plausibility. In limb (i) – which is the basic test – the test is plausibility alone. Yet it is true (as the Court of Appeal accepted in *Aspen*) that in the Supreme Court judgments the court was seeking to restructure the good arguable case test. In my view, provided it is acknowledged that labels do not matter, and form is not allowed to prevail over substance, it is not significant whether one wraps up the three-limbed test under the heading 'good arguable case' and since this was the understanding in *Aspen* there remains currency in this rubric.

[75] Various points surrounding the test were not in issue in *Brownlie* or in *Goldman Sachs*. The burden of proof remains upon the claimant: see e g *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337, paras 90–91. For the avoidance of doubt the test under limb (i) is not balance of probabilities: see e.g. *Cherney v Deripaska (No 2)* [2009] 1 All ER (Comm) 333, para 44; and *Brownlie* in the Court of Appeal per Arden LJ [2016] 1 WLR 1814, paras 22–23. The expression 'balance of probabilities' is apt for use at trial when the court can weigh the evidence in its totality but is not therefore an appropriate expression for use at the interim stage. The test is context-specific and 'flexible': see e.g. *Canada Trust* [1998] 1 WLR 547, 555H, per Waller LJ; and *Brownlie* per Arden LJ in the Court of Appeal, at para 21.

[76] In expressing a view on jurisdiction, the court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits: see e.g. per Waller LJ in *Canada Trust*, at p 555F, Teare J in *Antonio Gramsci Shipping Corpn v Recoletos Ltd* [2012] 2 Lloyd's Rep 365 ('*Antonio Gramsci'*), para 39; and Aikens LJ in *JSC Aeroflot Russian Airlines v Berezovsky* [2013] 2 Lloyd's Rep 242, para 14.

[77] Next, the adjunct 'much' in the *Canada Trust* formulation must be laid to rest. This was the view expressed by a variety of judges prior to *Brownlie* (see for instance per Aikens LJ in the *JSC Aeroflot* case at para 14) and the word was, rightly in my view, deemed superfluous in *Brownlie* by Lord Sumption JSC. There is no discernible logic for saying that jurisdiction arises if the claimant, having established that it has the better case (relatively), then has to proceed upwards and onwards *and* show that it has 'much' the better case. A plausible case is not one where the claimant has to show it has "much" the better argument.

Limb (ii)

[78] Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it 'reliably' can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The court is not compelled to perform the impossible but, as any judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with

'due despatch and without hearing oral evidence': see per Lord Steyn in the House of Lords in *Canada Trust* [2002] 1 AC 1, 13; and per Lord Rodger of Earlsferry in *Bols* [2007] 1 WLR 12, paras 27 and 28. It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening up the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem. For instance, it might be possible to decide an evidential dispute in favour of a defendant on an assumed basis and ask whether jurisdiction is none the less established. Equally, where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses.

Limb (iii)

[79] The relative test has been endorsed 'in part' because limb (iii) is intended to address an issue which has arisen in a series of earlier cases and which has to be grappled with but which as a matter of logic cannot satisfactorily be addressed by reference to a relative test: see e g *Antonio Gramsci* [2012] 2 Lloyd's Rep 365, paras 39 and 44–48, per Teare J citing *WPP Holdings Italy Srl v Benatti* [2007] 1 WLR 2316, para 44 ('*WPP*') per Toulson LJ. This arises where the court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument.

[80] What does the judge then do? Given that the burden of persuasion lies with the claimant it could be argued that the claim to jurisdiction should fail since the test has not been met. But this would seem to be unfair because, on fuller analysis, it might turn out that the claimant did have the better of the argument and that the court should have asserted jurisdiction. And, moreover, it would not be right to adjourn the jurisdiction dispute to the full trial on the merits since this would defeat the purpose of jurisdiction being determined early and definitively to create legal certainty and to avoid the risk that the parties devote time and cost to preparing and fighting the merits only to be told that the court lacked jurisdiction. In *Antonio Gramsci* and in *WPP* the court recognised that a solution had to be found. In *WPP*, at para 44, Toulson LJ stated that the court could still assume jurisdiction if there were 'factors would exist which would allow the court to take jurisdiction' and in *Antonio Gramsci*, at para 48, Teare J asked whether the claimant's case had 'sufficient strength' to allow the court to take jurisdiction. The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits."

82. It is sufficient for this judgment if I summarise Green LJ's analysis as follows:

<u>Limb (i)</u>

(1) The test under limb (i) is relative: although it refers to a requirement that the claimant must establish a plausible evidential basis, the court must assess the relative merits of the competing arguments of the parties in order to decide whether the test has been satisfied (at [73]).

(2) The reference to 'a plausible evidential basis' in limb (i) is hence a reference to an evidential basis showing that the claimant has the better argument (at [73]).

(3) The burden of proof remains upon the claimant (at [75]).

(4) The test under limb (i) is not the balance of probabilities. It is context specific and flexible (at [75]).

(5) In expressing a view on jurisdiction, the court must be astute not to express any view on the ultimate merits of the case (at [76]).

(6) There is no discernible logic for saying that jurisdiction arises if the claimant, having established that it has the better case (relatively), then has to show that it has much the better case (at [77]).

Limb (ii)

(1) Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it reliably can; it is an instruction to use judicial common sense and pragmatism (at [78]).

(2) This may involve making evidential assumptions in favour of the defendant and asking whether jurisdiction is nonetheless established or focussing on documentary rather than witness evidence (at [78]).

Limb (iii)

(1) Limb (iii) arises where the court finds itself unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument (at [79]).

(2) To an extent limb (iii) moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. This is a more flexible test which is not necessarily conditional upon relative merits (at [80]).

83. The date for the assessment of whether the claim comes within one of the gateways is the date when proceedings were commenced, see *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34; [2018] 1 WLR 3683, at [9].

84. I will discuss the law in relation to each of the gateways in the context of considering each of them in this case.

Reasonable prospect of success

85. In *Brownlie* (at [5]) Lord Sumption endorsed what had been said earlier by the Privy Council with regard to the need for the claimant to establish a reasonable prospect of success:

> "This has been held to correspond to the test for resisting an application for summary judgment: *Altimo Holdings and Investments Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, para 71."

England and Wales is the proper place in which to bring the claim

86. Lord Sumption described this third criterion in *Brownlie* (at [31]) as "the court's overriding discretion jurisdiction as to forum conveniens". He continued:

> "The jurisdictional gateways and the discretion as to forum conveniens serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to forum conveniens authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on forum conveniens grounds is not the relationship between the cause of action and England, but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court's jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways. English law has never in the past and does not now accept jurisdiction simply on the basis that the English courts are a convenient or appropriate forum if the subject matter has no relevant jurisdictional connection with England."

87. This formed part of Lord Sumption's reasoning in support of his conclusion that 'damage' in the gateway provided by paragraph 3.1(9) of Practice Direction 6B, relating to claims in tort, is limited to direct damage, applying the same distinction between direct and indirect damage as has been applied by the CJEU in the context of art.7(2) of Brussels I Recast and its predecessor articles. Lord Hughes agreed with this conclusion; Baroness Hale, Lord Wilson and Lord Clarke did not. However I do not detect from the judgments of Baroness Hale or Lord Wilson (Lord Hughes did not deliver a judgment) any disagreement with the passage from paragraph 31 of Lord Sumption's judgment which I have just quoted. Baroness Hale referred (at [51]) to:

> " …the 'valuable safety valve' of discretion…which…can concentrate on the real question, which is 'the proper place for the resolution of the dispute' (as Professor Briggs puts it)."

and added:

> "[54] I do, of course, take the point that the claimant should not be in the position of choosing where to bring the claim. But in my view, the discretion should be robust enough to prevent that. It is looking for a substantial reason to allow a claim against a foreign defendant to be brought in the courts of this country and the courts have always treated such cases with caution."

The gateways

88. I will take the gateways in the order in which the parties took them.

Gateway 9

89. CPR 6 PDB paragraph 3.1(9) sets out the claims in tort in which a claim form may be served out of the jurisdiction:

"*Claims in tort*

(9) A claim is made in tort where –

(a) damage was sustained, or will be sustained, within the jurisdiction; or

(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction."

90. Vestel relied on subparagraph (a): a future loss to Vestel UK which will be sustained within England arising from Advance's alleged abuse of its dominant position. It was not in dispute that a 'tort' within the meaning of Gateway 9 encompasses an abuse contrary to art.102 TFEU (see *Apple Retail UK Ltd Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat); [2018] FSR 27 at [92]).

The law

91. The majority of the Supreme Court in *Brownlie* took the view that 'damage' in gateway 9 is not confined to direct damage in the sense of the distinction between direct and indirect damage which applies in the context of art.7(2) of Brussels I Recast, see the judgment of Baroness Hale PSC at [35]-[55], with whom Lord Wilson JSC and Lord Clarke agreed (Lords Sumption and Hughes JJSC took the other view). However, their judgments on this point were expressly *obiter*.

92. Mr Segan relied on *Eurasia Sports Ltd v Tsai* [2018] EWCA Civ 1742; [2018] 1 WLR 6089 in which Floyd LJ, with whom Gross and Longmore LJJ agreed, said (at [21]) that there *is* a relevant distinction between direct and indirect damage; it must be applied in the context of gateway 9 in a manner analogous to the distinction recognised in EU law as explained in *Dumez*. But this does not seem to have been part of the *ratio* of the judgment. *Brownlie* was not mentioned.

93. The discussion of the law in England and other common law jurisdictions by Lord Sumption in *Brownlie* suggests that as the law currently stands by way of binding judgments, the *Dumez* distinction, or something like it, may apply to gateway 9. Fortunately I need not explore the matter further since I have already found in the context of the claim against Philips that even if it does, the damage suffered by Vestel UK, at least under the first claimed head of damage, is direct.

94. I should also refer to *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat); [2018] FSR 27 on which Mr West relied. The facts in that case were in part similar to those here. The claimants were all members of the Apple group of companies, the first claimant being registered in England and Wales ('Apple England'). The defendants were members of the Qualcomm group, the first defendant being

registered in England ('Qualcomm England') and the second in Delaware ('Qualcomm Delaware'). One of the claims against Qualcomm Delaware was that it had abused its dominant position contrary to art.102 TFEU and s.18 of the Competition Act 1998. The alleged abuse was overcharging by Qualcomm Delaware for its products. The products were sold to an Apple claimant registered in Ireland ('Apple Ireland') and sold on to Apple England at a price which incorporated the overcharging element of Qualcomm's price to Apple Ireland. That overcharging element was also incorporated in Apple England's price to its customers in this country. The damage in this jurisdiction was alleged to be Apple England's loss of sales due to sales at a price which included the overcharging element. Morgan J adjourned the hearing to allow further evidence to be filed.

95. Although he reached no conclusion on gateway 9 in the circumstances of that case, Morgan J accepted that in principle the English courts had jurisdiction under that gateway if there was a good arguable case that Apple England had suffered lost sales in this jurisdiction:

> "[97] The first claimant is incorporated in England and Wales. The second claimant is incorporated in the Republic of Ireland. If the first claimant claims as a buyer who has paid an overcharge which it has not passed on, then the first claimant can say that it has suffered a loss in this jurisdiction. If the first claimant claims as a seller who has passed on an overcharge but has lost sales in this jurisdiction, then it can say that it has suffered a loss in this jurisdiction. The position of the second claimant is to be analysed in the same way but the difference will be that the second claimant as a buyer pays an overcharge in the Republic of Ireland but it may wish to say that it passes on the overcharge and loses sales in the market in this jurisdiction.
>
> …
>
> [99] As to where any such losses might be made, if the loss is paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought. If the loss comes from reduced sales then the loss would seem to be in the market where the seller suffers the loss of sales."

96. There is another principle of law to be mentioned: in *Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc* [1990] 1QB 391; [1989] 3 WLR 563 the Court of Appeal held that in order to satisfy gateway 9, the damage which has been or will be sustained must be significant (at [38]).

<u>Discussion</u>

97. The arguments were similar to those advanced in the claim against Philips and I reach the same view with regard to the issue of direct/indirect infringement and refer also to *Apple Retail*. The damage would be direct.

98. To rely on gateway 9 it was necessary for Vestel to establish either a good arguable case in support of future damage suffered by Vestel UK consequent upon being forced into a licence with Advance, or a good arguable case that Vestel UK will sustain damage caused by uncertainty as to the royalty Vestel Turkey will ultimately have to pay Advance. In either case that damage must be significant.

99. So far as damage arising from a concluded licence is concerned, I repeat what I said in respect of the claim against Philips with one addition. There was a suggestion by Mr West that Advance had imposed commercial pressure on Vestel Turkey which would force it to sign a licence on Advance's terms. This pressure was said to come from threats of an injunction made by Advance to Vestel and to their customers. The difficulty with the argument was that even assuming the communications from Advance on which Vestel relied were indeed threats, there was no evidence that they have had any effect at all either on Vestel Turkey, Vestel UK or any customer. I can give the argument no weight. I would add that no allegation under s.70 of the Patents Act 1977 has been made.

100. Moving to damage caused by uncertainty, in the case of Advance there was evidence to support such a claim, contained in Mr Jones' second witness statement. To recap: Mr Jones claimed that Vestel (no particular company was identified) would suffer financial harm consequent upon either not putting enough money aside to pay Advance's royalties, when finally settled, or alternatively putting aside sums equivalent to the royalties in Advance's draft licence. It would run to millions of dollars.

101. In a letter dated 30 September 2019, Bristows LLP, the solicitors acting for Philips pointed out that as at 30 June 2019 Vestel Turkey held the equivalent of $US 430 million in cash and cash equivalents. EIP Legal responded on 2 October 2019, the first day of the hearing. A copy of Vestel UK's accounts for 2018 were produced which show a profit for the year of £726,843, net assets of about £9 million and reserves of about £8.1 million. The letter stated that when Mr Jones had said that setting aside too little for future licence fees could cost millions of dollars, he had meant that this would be a cost to Vestel UK.

102. The prospect of such damage to Vestel UK is not self-evident. Mr Jones fears that Vestel UK will set aside a relatively small sum and then be hit with a claim for back-dated royalties at a higher rate. But if that higher rate is settled by the court, it will be FRAND. Vestel's claim for abuse under art.102 would anyway fail. In *Unwired Planet* Birss J said:

> "[757] It was common ground between the economists but I hold as a matter of law that the boundary of what is and is not a FRAND rate is different from the boundary of what is and is not an unfair price contrary to art.102(a). If the rate imposed is FRAND then it cannot be abusive. But a rate can be higher than the FRAND rate without being abusive too."

103. Damage could transpire only if the court were to settle a royalty lower than that claimed by Advance *and* the higher rate claimed by Advance found to be abusive *and* the money set aside by Vestel UK were less than the equivalent of the rate settled by the court. Vestel's evidence did not address this.

104. Besides, the financial hit feared could be avoided by going for Mr Jones' second option: setting aside the royalties claimed by Advance until the licence is settled. It need not be done by Vestel UK. Absent evidence to the contrary, I must assume that it could be done by any suitable member of the Vestel Group, including Vestel Turkey, in a manner that would earn interest in the meantime. Indeed, Vestel would be under a duty to mitigate their damage and if that were best achieved by Vestel Turkey putting aside the relevant sums, Vestel would be under an obligation to make such an arrangement. On

the information I have, there is no reason to believe that this would cause any significant damage to a company of Vestel Turkey's size. The net effect in due course, if Vestel's fears were realised, would be that Advance would be entitled to claim a sum equivalent to its back-dated royalties at the rate settled by the court, plus interest. More than that sum, plus interest, would have been accrued in the meantime in the fund set up by Vestel Turkey.

105. In my view, establishing a good arguable case under this gateway required Vestel to file evidence in which they explained not only why significant damage will be sustained by Vestel UK, but also why obvious ways to avoid such damage cannot be put in place. This evidence should have specified the sum to be set aside with an appropriate degree of accuracy. Vestel should also have explained why freezing the relevant sum pending settlement of the licence would cause damage to Vestel Turkey (if it would) and how that would impact on Vestel UK by way of significant damage. Instead Mr Jones' evidence was vague. No hard numbers were given. His assertion that Vestel UK risks "catastrophic losses" is, I think, best regarded as hyperbole.

106. Since Vestel did not identify with sufficient clarity the nature of the second head of alleged damage and how it would affect Vestel UK, I am unable to say whether, if it occurred, it would be direct or indirect damage to Vestel UK.

107. It seems to me that Vestel has not filed evidence on which to found a good arguable case that Vestel UK has suffered or will suffer significant damage should Vestel succeed in establishing an abuse of a dominant position at trial.

108. As in the context of art.7(2), it was not part of Vestel's case that even if I were not satisfied that Vestel UK will suffer significant damage from the pleaded abuse, gateway 9 could still be satisfied. In my judgment that gateway is not satisfied.

Gateway 11

109. Pursuant to CPR 6 PDB 3.1(11) a claim form may be served outside the jurisdiction where:

> "*(11) The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales.*"

<u>The law</u>

110. In *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd* [2018] EWHC 8708 (Pat); [2018] RPC 16, Henry Carr J ruled (at [108]-[110]) that European Patents designating the UK constitute property within the UK within the meaning of Gateway 11.

<u>Discussion</u>

111. Vestel argued that the present claim relates to the patents in the Advance Pool because it concerns the terms of the licence which Vestel is required to take under those patents.

112. Simon Ayrton, a partner at Powell Gilbert LLP, who act for Advance, gave evidence. He stated that as of July 2019 there were 7,113 SEPs in the Advance Pool of which UK designated European Patents accounted for 2.43% (I understand that there are no national UK patents in the pool). Mr Jones said the correct figure was 4.9%.

113. Vestel was clear that its claim related to all the patents in the pool. Advance's point was that the subject matter of the claim therefore related neither wholly nor principally to property within the jurisdiction. I agree. In my view an action which relates to property in the form of SEPs is not principally concerned with 2.43% or 4.9% of that property, whichever may be the correct number. Gateway 11 is not satisfied.

114. To deal with this difficulty, on 26 September 2019 Vestel filed an application seeking permission to amend their Particulars of Claim. The draft Amended Particulars added the following paragraph to the section on relief:

> "93A. In the alternative to paragraphs 93(ii) and 93(vi) above, the Claimants seek the following declarations:
>
> (i) That the terms of the HEVC Advance draft PPL in so far as they relate to any patents in the HEVC Advance patent pool which designate the United Kingdom are not FRAND.
>
> (ii) Alternatively, a declaration as to the terms which are FRAND for the patents within the HEVC patent pool which designate the United Kingdom. (Alternatively, such patents within that pool as are owned by the Second Defendant.)
>
> (For the avoidance of doubt, it is Vestel's case that the licence terms which would be FRAND for a licence for the patents which designate the United Kingdom would be the terms of a global licence.)"

115. Advance did not object to the proposed amendment on formal grounds but argued that the amended pleading would in effect change nothing. I agree. None of the existing pleading would be deleted. The relief sought under paragraph 93A is sought in the alternative which would still require the court to consider the original claim first. Therefore the subject matter of the claim as a whole would still relate to all the patents in the Advance Pool. Not only that, the last sentence of proposed paragraph 93A makes it clear that even if the court addressed only UK designated patents, Vestel would still seek a FRAND ruling on all the patents in the pool since the licence for the UK patents would be part of a global licence. It would just be an alternative way of inviting this court to settle a global licence. In reality the claim would relate to all the SEPs in the Advance Pool.

Gateway 3

116. CPR 6 PDB 3.1(3) permits service out of the jurisdiction where:

> "*(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –*

(a) *there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and*

(b) *the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.*"

117. Vestel's argument in relation to this gateway depended on a finding that the Court has jurisdiction over Philips. Vestel contended that if it does, Advance is a necessary and proper party to the claim against Philips. Given my finding that this court does not have jurisdiction over Philips, gateway 3 is not satisfied.

Gateway 4A

118. CPR 6 PDB 3.1(4A) allows service outside the jurisdiction where:

"*(4A) A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.*"

The law

119. Longmore LJ said this in *Eurasia Sports Ltd v Tsai* [2018] EWCA Civ 1742; [2018] 1 WLR 6089:

"[63] First, this case may well be the first appellate case to have considered the new 4A gateway which came into effect on 1 October 2015. The intention of this new gateway must be that claims arising out of the same or closely connected facts should be tried together. That is eminently sensible and should be encouraged. The fact that some defendants may now be capable of being sued as necessary or proper parties to claims which now pass the 4A gateway should not give rise to any concern because it is also eminently sensible that relevant claims against all defendants should be tried together. Any legitimate concern that there is no sufficient connection with England and Wales should be dealt with under the head of the third issue in this case namely whether England and Wales is the appropriate forum."

Discussion

120. Vestel argued that if I were to find that only part of their claim satisfied gateways 9 and/or 11 they could rely on gateway 4A to sustain the remainder of their claim. The example given by Vestel was a finding that the claim for abuse of a dominant position falls within either of gateways 9 or 11 but the claim for FRAND declarations did not. In that event, Vestel argued, the court would have jurisdiction to hear the latter claim under gateway 4A.

121. The short point is that I have not found that this court has jurisdiction, either under gateway 9 or 11. But if I had so found, I would have had difficulty in accepting Vestel's argument. It seems to me that a 'further claim' within the meaning of gateway 4A is a further cause of action, whether of the same type as the existing claim or of a different type. These proceedings consist of a claim for alleged abuse of a dominant position. A claim for settlement of FRAND terms is not a cause of action, at least not as presently

constituted, so it can neither be a further ground for alleging an abuse of a dominant position, nor can it be a different cause of action.

122. Putting this another way, the acknowledged purpose of Vestel's current claim of abuse of a dominant position is to serve as a means to invite the court to settle a global FRAND licence. If this court had jurisdiction under gateway 9 or 11, at the trial the judge may or may not accede to the invitation. It would depend on the view of the trial judge, not on gateway 4A.

123. I would also note that the declaration sought under paragraph 93(iii) (quoted above) is drafted in terms such that it appears to have intended effect outside this jurisdiction. I would not in any event have been prepared to allow Particulars seeking such a declaration to go forward. In *TQ Delta, LLC v ZyXEL Communications UK Ltd* [2019] EWCA Civ 1277 it was alleged that the implementer, ZyXEL, was culpable of holding-out in negotiations for a licence. Floyd LJ, with whom Lewison LJ agreed, said:

> "[52] These considerations force me strongly to the conclusion that the questions on which the court's declaratory judgment is sought are far better decided in the foreign court where those questions arise, if they ever do. It would be an exercise in jurisdictional imperialism to foist this court's view as to whether ZyXEL were unwilling licensees, or holding-out on an unknown foreign jurisdiction. Far less can it be said that it is in the interests of justice for it to do so."

Reasonable prospect of success

124. Mr Segan submitted, as a proposition of law, that damage was an essential element of the tort alleged against his client. Vestel had failed to establish that it would suffer any damage, so it had no reasonable prospect of success in its claim for abuse of a dominant position.

125. I do not believe that Mr West disputed the proposition of law, in which case I accept it as agreed. It would follow from my finding on damage that Vestel has no reasonable prospect of success, subject to the stricter burden of proof. In my view that stricter burden was met on the evidence before the court.

Whether England is the proper place in which to bring the claim

126. Mr West pointed to evidence that the UK is the largest market for Vestel TVs in the world. He said that this was enough to make England the proper place in which to bring the claim.

127. Mr Segan argued that England plainly was not the proper place since less than 3% of the SEPs in the Advance Pool are UK designated.

128. The question of *forum conveniens* is of no practical relevance to this case given my finding that Vestel's claim falls within none of the gateways. Lord Sumption stated that the purpose of this requirement is to provide the court with a discretion to limit the court's jurisdiction, not to enlarge it. Or, to adopt Professor Briggs' metaphor approved by Baroness Hale, the discretion provides a safety valve. It can only be a negative safety valve, one that has application where the court has found that at least one of the

jurisdictional gateways is satisfied but is of the view that the connection with England notwithstanding, the claim would be better heard in another jurisdiction.

Conclusion

129. The applications by Advance and Philips both succeed. This court has no jurisdiction over the claims against either of them in this action.