UK Competition Litigation – Key Recent Developments

Competition Law Association, 12 July 2018

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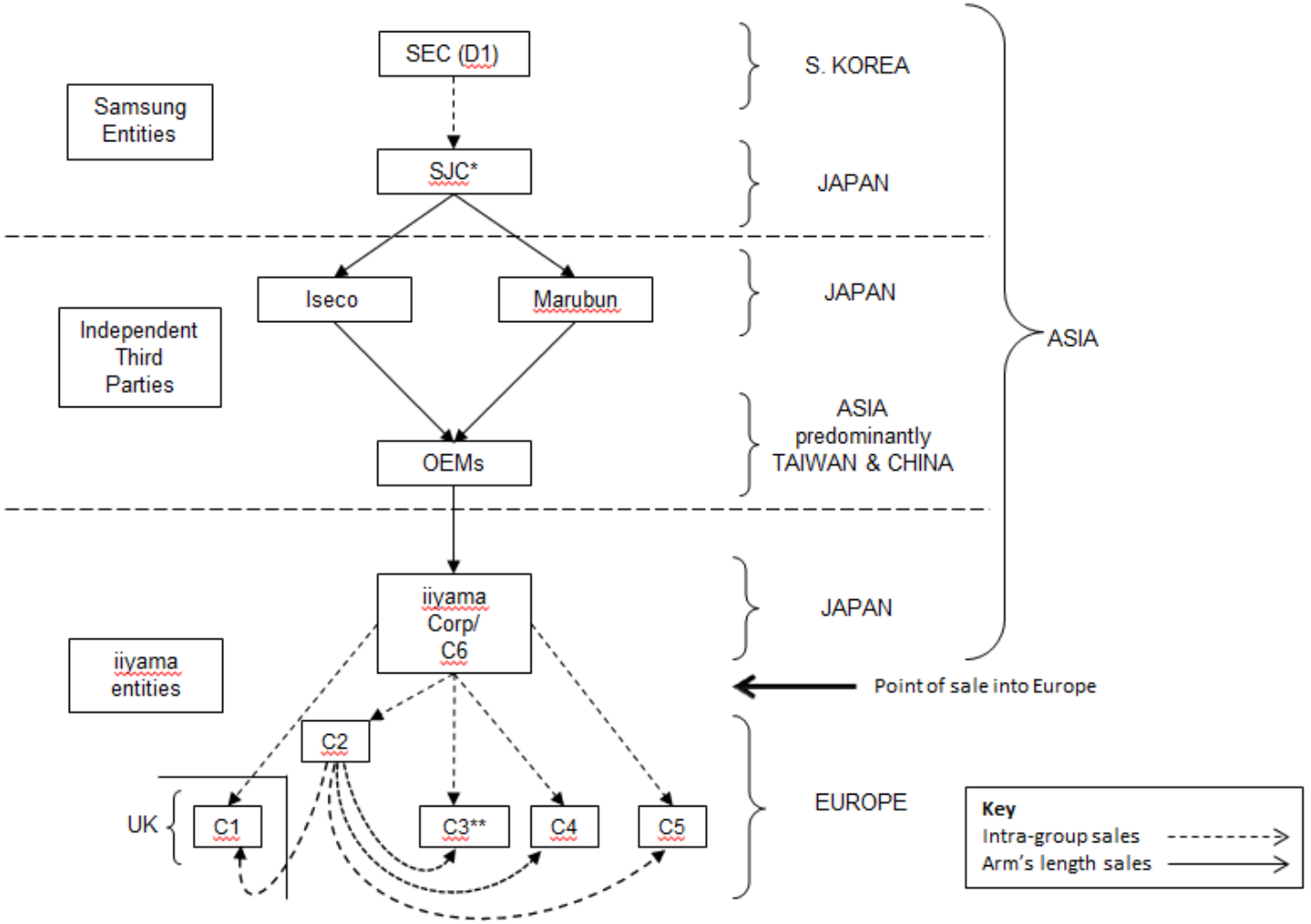
Agenda

- Jurisdiction of English courts
- CAT v High Court, inc Cost Management
- Follow-on actions
- Collective actions

Securing jurisdiction (1)

- *Iiyama UK Limited v Samsung Electronics Ltd*. [2018] EWCA Civ 229 (Defendants seeking PTA to Supreme Court)
  - 1st (logical) question: what is the applicable law?
    - "*Except in a very clear case, the court cannot [strike out Cs' applicable law claim] without a full examination of all the facts at trial*" (§57) But cf *Deutsche Bahn AG v MasterCard Inc* [2018] EWHC 412 (Ch) (most significant element of tort = place of the restriction of competition (not place(s) of loss or Cs' domicile) which can be struck out)
  - 2nd question: if applicable law is EU law (in one or more Member States), does EU law apply (*Woodpulp, Intel*)?
    - Once effects are "foreseeable," arguable that they have been "intended" and then arguable that they are "immediate" (§100). Ds say robs immediate of any real meaning.
  - 3rd question: anchor defendants

Iiyama LCD Supply Chain



Securing jurisdiction (2)

- *Vattenfall v Prysmian and NKT* [2018] EWHC 1694 (Ch)
  - *Provimi et al* revisited: jurisdiction challenge to anchor defendants dismissed
  - Cs – which included UK entities - sued UK subsidiaries of Prysmian/NKT (not addressees of *Power Cables* decision)
  - For Prysmian UK entity:
    - £8K of direct supplies of repair kits/testing considered direct implementation of cartel
    - Indirect supply of accessories by UK entity to contracting defendant
    - Overlapping directors
    - No need to particularise knowledge pre-disclosure
  - For NKT UK entity:
    - Not involved in sales outside the UK and did not in the UK sell directly or indirectly cartel products
    - Admin and marketing support in relation to cartelised projects considered direct implementation
    - Not satisfied pre-disclosure that it was “shoe polish” subsidiary

Securing jurisdiction (3)

- Case C-27/17 *AB 'flyLAL-Lithuanian Airlines,* 5 July 2018*.*
  - 'place of harmful event' (Art 7(2) RBR)
    - Place where loss of income consisting in loss of sales occurred
    - Place of conclusion of anti comp agreement; or place in which predatory prices were offered and applied
  - 'dispute arising out of the operations of a branch' (Art 7(5) RBR)
    - Where branch of dominant undertaking actually and significantly participated in the abusive practice
  - AG §75: "strong reservations" about Case -352/13 *CDC*, §§52, 56.

Securing jurisdiction (4)

- More specific (IP) examples:
  - *Apple v Qualcomm* [2018] EWHC 1188 (Pat)
  - *Conversant Wireless Licensing SARL v Huawei Technologies Co. Ltd.* [2018] EWHC 808 (Pat); [2018] EWHC 1216 (Ch):
    - Even where a challenge to the validity of a foreign patent is pending in other jurisdictions, the English court has jurisdiction to set a global FRAND licence
    - Followed Birss J in *Unwired Planet v Huawei* [2017] EWHC 2988
    - Some interesting points on *forum conveniens* and Chinese courts

High Court vs CAT

- Business and Property Courts Competition List
- *Sainsbury's v MasterCard* [2018] EWCA 1536, §357 – should all claims raising only competition issues be transferred to the CAT?
- *Huawei v Unwired Planet* [2016] EWHC 958 (Pat)- mixed issues – no transfer.

High Court vs CAT: Fast track v expedition

- Fast Track procedure (r 58 CAT Rules)
  - If FT conditions satisfied (essentially hearing of 3 days or less; scale and complexity of claim) then CAT must:
    - Hear (not issue judgment) within 6 months
    - Impose cap on recoverable costs: [2016] CAT 10
  - Only one case to trial so far: *Socrates v Law Society (Liability)* [2017] CAT 10. But see also *UKRS* (preliminary issue) and *Unlocked v Google* (High Court interim injunction in May 2018, then expedited in CAT for September trial (since vacated))
- What does FT add over and above High Court expedition?
  - Cost capping
  - CAT less busy generally so timetable quicker (not obvious)
  - More likely to get competition judge in CAT (maybe…)

Costs management (1)

- **High Court** - costs management rules but CPR 3.12(1)(a) provides that costs management regime n/a in claims over £10 million

- *CIP Properties v Galliford* [2014] EWHC 3546 (TCC), discretion to apply CMgt over £10 million (§§16-24).

- *Napp v Sandoz* [2017] EWHC 1433 (Pat), Birss J. Same approach to a claim to which the new version of rule 3.12 applied

Costs management (2)

- **CAT** - apart from FT cost capping powers in r58(2)(b) of CAT Rules) no explicit power to make costs management orders
- *Gascoigne Halman* [2016] CAT 15 – CPR costs management regime should apply (but CPR potential limitation on £10 million+ claims)
- CAT rule 104 “make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.”

Costs management (3)

- PD3E, para 7.3, the Court will “consider whether the budgeted costs fall within the range of reasonable and proportionate costs”.

- r.3.12(2) - aim of costs management “to further the overriding objective”, deal with cases “justly and at proportionate cost”, with regard to the amount involved; importance of the case; complexity of the issues; financial position of each party” (CPR r1.1(1)-(2)).

Costs management (4)

- Approach to proportionality in costs mngt orders in lower value cases.

  Red & White Services Ltd v Anslow Ltd & anor [2018] EWHC 1699 (abuse of dominance claim)

  Willis v Rundell [2013]-6-Costs-L.R.-924-1

  Wright v Rowland [2016]-5-Costs-L.R.-713

Follow-on actions (1)

- Greater recognition that follow-on claims are “just” a species of commercial litigation
  - Follow-ons now falling more into line with commercial litigation on applicable law, jurisdiction, quantum
  - Analogy with civil fraud cases?
- Consistency of approach?
  - Much depends on which judge(s) you get, often unknowable
- Some consistency of approach between competition judges:
  - Recognition of need to balance asymmetry of information with onerous data requests
  - NB: some pressure to commit to (common) economic/econometric methodology at an early stage, even pre-disclosure
  - Personnel?

Follow-on actions (2)

- Disclosure:
  - Standard to get Commission File and, eventually, Decision
  - Staged disclosure overwhelming preference.
  - Proportionality:
    - Value of claim
    - Costs, current and projected
    - Incremental value: See *Vodafone v Infineon and others* [2017] EWHC 1383 (Ch), §31 per Birss J:

> *"At the end, the estimation of quantum in this case is always just that, an estimate. It is not always worthwhile or proportionate to improve the accuracy of an estimate. If an estimate is good to plus or minus £10 million, then improving the accuracy of the estimate to plus or minus £5 million sounds sensible. But if it costs £30 million to achieve that end then it is highly questionable whether that would be a rational exercise at all. In other words, while of course more can be better, especially when one is dealing with an issue of quantum, it is relevant to ask how much more would it be and how much better would it make the result."*

Follow-on actions (3)

- Economic evidence at trial:
  - Even “techy” judges do not find econometrics easy
  - “Rubbish in rubbish out”: see Green J in *Tobacco* [2016] EWHC 1169 (Admin), §325: “*econometric modelling can be useful but it inherently involves simplification and reliance upon multiple assumptions and rarely, if ever, is it conclusive in and of itself. It must therefore be verified against the evidence it relies upon and the real life facts of the markets in which it operates*.”
  - Do model assumptions accord with market/facts?

Follow-on actions (4)

- Economic evidence and process:
  - The rise and rise of the hot tub (particularly in CAT (*Paroxetine*, *Socrates*))
    - Pros
    - Cons
  - A hybrid model (*BritNed*)
    - 1-day teach-in at start of trial
    - Triangulated process
    - Cross-examination
    - Pros and cons

Follow-on actions (5)

- Interaction factual and economic evidence:
  - Major strategic and tactical decision on whether to call cartel participant evidence at trial. Issues:
    - Do you need to: if statistics is main approach to quantum what do factual witnesses add?
    - May be essential for certain lines of defence (*BritNed*)
    - Does absence give Cs a “free kick” or look cowardly?
    - Opening up company to further follow ons?
      - Once in box witness cannot be controlled
    - Possible to restrict scope of factual evidence to bolstering assumptions in econometric model?
    - Practicalities given long tail of cartels

Damages Directive & disclosure

- **Practice Direction 31C (Disclosure in Competition Act Claims)**
  - 1.5 The court may only permit disclosure or inspection that is proportionate.
  - 1.6 In order to determine proportionality, the court must in particular consider the factors set out in article 5(3) of the Damages Directive ("DD").
  - 1.7 Where this paragraph applies, Part 31 applies to the extent that it is consistent with this paragraph.
- Cf CAT Disclosure PD 14 March 2017
- Note recital 22 DD; Paras 71 & 81 of Response to Consultation.
- C'ion letter in *Trucks* suggests concerns re proportionality.

Collective actions (1)

- A difficult birth ....
  - *Gibson v Pride* [2017] CAT 9
  - *Merricks v MasterCard* [2017] CAT 16 (PTA granted)
- But not dead … latest attempt:
  - *UKTC v Fiat and others* (2018)

Collective actions (2)

- Key conditions
  - Claims raise same, similar or related issues of fact or law ("common issues") and be **suitable** to be brought in collective proceedings (s47B(6) CA98)
  - The proposed class representative must be authorised by the CAT on the basis that it is just and reasonable for that person to act (s47B(8)(b)

Collective Actions (3)

- Common issues / suitable for a CPO?
  - In *Pride* problem was that the classes defined in the application did not raise common issues in light of the nature of the infringement
  - Fact that not all issues are common to class not necessarily fatal to CPO (MC [67]) (cf USA)
  - But if not (1) is there a sustainable basis for an aggregate sum; (2) a reasonable/practicable way of estimating the individual loss for distribution

Collective Actions (4)

- Common issues / suitable for CPO?
  - *MasterCard*
    - The purchases for which the opt out class claimed were across a myriad of sectors for 16 years with different characteristics and potential pass on rates.
    - Other issue was how would aggregate damages be distributed among the class?
    - No indication that data would allow sufficiently sound calculation of pass through to class (high claim value)
    - No way of identifying individual loss

Other litigation cases not discussed

- *Air Cargo* [2017] EWHC 2420 (Ch) (temporal application of competition law to airline sector)
- *Ping* [2018] CAT 8 (admissibility of evidence)
- *Ping* [2018] CAT 7 (in camera witness evidence)
- *Paroxetine* [2018] CAT 4 (pay for delay) (1st ever CJEU reference by CAT)
- *Phenytoin* [2018] CAT 11 (excessive pricing) (all parties seeking PTA)
- *Servier* [2017] EWHC 2006 (Ch) (economic torts and competition law)
- *Peugeot v NSK* [2018] CAT 3 (disclosure follow on) (case settled)
- *Balmoral v CMA* [2017] CAT 23 (information exchange) (currently on appeal to CA)
- *Interchange (Court of Appeal)* [2018] EWCA 1536 (Civ) (remitted to CAT)
- *Silentnight v Recticel* (Foam cartel follow-on (settled))
- *Gallaher and Somerfield v OFT* [2018] UKSC 25 (fines and early resolution agreements)