Neutral Citation Number: [2018] EWHC 2711 (Ch)

Case No: HP-2017-000015

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: Tuesday 16th October 2018

Before :

Mr Justice Morgan

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Between :

Apple Retail UK Limited and others	**Claimants**
- and -	
Qualcomm (UK) Limited and others	**Defendants**

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Marie Demetriou QC and Colin West (instructed by **Boies Schiller Flexner (UK) LLP**) for the **Claimants**
Mark Howard QC, Nicholas Saunders QC, Gerard Rothschild (instructed by **Quinn Emanuel Urquhart & Sullivan, LLP**) for the **Defendants**

Hearing dates: 16th October 2018

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JUDGMENT

Mr Justice Morgan Tuesday, 16th October 2018

Ruling by MR JUSTICE MORGAN

1. I handed down judgment in this case on 22 May 2018. The neutral citation of that judgment is [2018] EWHC 1188 (Pat). I will assume that anyone reading the current judgment will be fully aware of all of the issues considered and the conclusions reached in my earlier judgment.
2. Accordingly, I will not repeat matters of background, although I will need to refer to certain paragraphs in that judgment in due course.
3. The issue I am now considering is whether the claimants have done what is required to establish that this is a case where the court should assume jurisdiction in relation to a particular claim against Qualcomm Incorporated, a company incorporated in a state of the United States. In particular, the claim, and the only claim I am considering at the present point, is a claim in tort by the first claimant, a UK company.
4. The claim in tort is a claim that the US defendant has abused its dominant position, contrary to Article 102 of the Treaty on the Functioning of the European Union.
5. The gateway for jurisdiction which is relied upon is Gateway 9, and the relevant part of Gateway 9 is paragraph (a), which refers to a claim being made in tort where damage was sustained or will be sustained within the jurisdiction.
6. The relevant legal test as to whether there is a serious issue to be tried, whether there is a good arguable case that the case comes within the gateway, and as to forum, is described in detail in my earlier judgment, and it suffices to say that at the present time the sole point which divides the parties is whether there is a good arguable case that the first claimant's claim in tort is a claim where damage was sustained within this jurisdiction.
7. I discussed Gateway 9 in sufficient detail at paragraphs 92 to 116 of my earlier judgment. As it transpired, the application of Gateway 9 was left unresolved in that I made no final

determination as to the application of Gateway 9. Instead, in paragraph 116, I indicated I would give directions which, if they had been followed through, would have resulted in the defendant filing evidence relevant to this point and the claimant filing evidence in reply, resulting in a further hearing at which a final determination would be reached.

8. I was reminded of the order I made on 22 May 2018 following the hand-down of judgment. It is paragraph 5 of the order to which my attention is drawn. I was particularly asked to note that paragraph 5(b) was in these terms:

9. "The claimants file any further evidence on the issue of loss suffered by the first or second claimant within the jurisdiction, strictly confined to replying to any evidence served pursuant to (a) above by a specified date and time."

10. What was contemplated by paragraph 116 of the earlier judgment and what was contemplated by the order did not happen. Instead, the defendant assessed its position and found encouragement in what I had said in paragraph 115 of the judgment, where I had tentatively indicated that on the pre-existing evidence I had come very close to forming the opinion that the claimants had not established what needed to be established.

11. The defendants took the view that they would rely upon that indication, seek to persuade me to cross the line into reaching a final determination in their favour without putting in further evidence. Whilst I do not pretend to know exactly what the defendants thought, that stance is certainly consistent with them thinking that if they put in further evidence there would be a reply and the claimants might conceivably persuade me that there was a plausible evidential case, albeit contested, for the proposition that damage had been suffered within the jurisdiction.

12. Accordingly, the defendants invited me, by correspondence in July 2018, to take the view that the matter should be decided in their favour. When they invited me to take that view, I had already received a witness statement of a Mr Roman served on behalf of the claimants, and an application by the claimants for permission to re-amend the particulars of claim. In the light of

all that material, I took the view that the hearing which was contemplated by the earlier order should take place and that hearing has taken place today.

13. At the hearing today, I have been asked to consider the witness statement of Mr Roman, to which I will refer in more detail in a moment, and I have also been asked to consider a witness statement from Ms Prevezer Queen's Counsel served on behalf of the defendant, and indeed two further witness statements of a Ms Harrison served on behalf of the claimants.

14. Before considering the correct response in accordance with the procedural rules that apply, I will appraise the evidence which is contained in the witness statement of Mr Roman. I will not read out that statement or summarise all of its contents, but I have taken into account everything that is said.

15. Mr Roman is a finance director for Apple. He makes his statement to reply to a witness statement of Ms Prevezer which had been made and which the defendants were aware of before the hearing in March, which led to the judgment in May of this year. He also makes the statement in order to reply to submissions made at the hearing in March. He refers to a number of matters which perhaps are by way of background and introduction to what follows.

16. I was invited to look in particular at paragraph 11 where he refers to the relevance of the wholesale cost when fixing a retail price. That continues in paragraphs 12 and 14. Then he moves to discuss a topic under the heading "Counterfactual", which relates to what Apple would have done if the alleged tort had not been committed.

17. He explains his thinking in such a case. Inevitably he is dealing with something that has not actually happened, because he is seeking to describe what would have happened. However, it is established that a witness can give evidence as to what he or his company would have done. And, indeed, in my earlier judgment I indicated that I would have expected Apple to have tendered that evidence. So that is the character of the evidence being put forward by Mr Roman.

18. I think what is of particular importance for present purposes is what Mr Roman says in paragraphs 17 and 18, supplemented perhaps by paragraph 20(c).

19. Mr Howard Queen's Counsel on behalf of the defendant subjects that statement to critical analysis. He has identified a number of things that the statement does not attempt to deal with, and he submits that the statement could have dealt with those other things, and he goes further and submits that the statement should have dealt with those other things so that, in the absence of it doing so, the statement itself is not adequate to deal with the issue currently before me.

20. This is an interlocutory stage. It is a stage where the evidence one expects to see is very, very different and certainly much more limited than the evidence that would be expected and predicted at any trial.

21. In my earlier judgment, citing from paragraph 7 of Brownlie v Four Seasons Holdings Inc [2018] 1 Weekly Law Reports 192, I indicated that what I was required to look for was a plausible evidential basis for the allegation which is to go forward if the court assumes jurisdiction.

22. I am persuaded that the evidence of Mr Roman, if it is to be considered at this stage, does provide a plausible evidential basis for the case that is to go forward if I assume jurisdiction.

23. In a sense, I have gone to the evidence before considering the procedural challenges to this evidence being considered, and indeed Mr Howard has put forward formidable arguments as to why the court should not receive this evidence, should not act upon it, and so that the outcome today should not be affected by the existence of that witness statement.

24. Mr Howard has forcefully reminded me of the procedural history. He has taken me to the pleadings, and the earlier witness statements of Ms Harrison. I have that procedural history well in mind. I went into it in some detail in my earlier judgment and I reached the conclusion then, at paragraph 111, that the way the claimants had gone about seeking to establish what they had to establish for Gateway 9 was "distinctly unimpressive". I remain of that view.

25. Mr Howard says in a case where the claimants have done so little to such an inadequate effect all the way up to the hearing in March and the judgment in May, it is an abuse of process for them to take the opportunity of this hearing, which was not an opportunity given to them but effectively given to the defendant to answer the claimant, and taking that opportunity to put in evidence which now crosses the line which they had not crossed before or arguably had not crossed before.

26. As always, when one considers a submission as to what should be done, it is important to see what are the options and then, once in that position, to select the appropriate option.

27. If I allow in Mr Roman's witness statement, then consistently with my earlier appraisal I will hold that Gateway 9 has been established, and the court will assume jurisdiction in relation to the claim in tort. That will leave matters such as the costs up to date and any other consequential matters that are to be dealt with.

28. If, on the other hand, I shut out Mr Roman's witness statement on the grounds that it is simply too late or that it is proper to say that the claimants are abusing the process of the court, then I will have to decide the question I left open in paragraph 115, which is whether the earlier evidence, without Mr Roman, did cross the line for the claimants as they continue to submit, or did not cross the line. It may be that if I decide that one way or the other, there will be an appeal. I am not in any sense intimidated by the prospect of an appeal; it is an entirely proper use of our system. But it will mean that there will be scope for the matter to continue, involving procedural delay and cost, although at the end of the day no doubt one party will pay and the other will receive.

29. If I held that the earlier evidence did not cross the line for the claimant, then there is a real question as to whether the claimant can start again.

30. Ms Demetriou, on behalf of the claimant, says there is no procedural bar to the claimant starting again, and when they start again they will rely on Mr Roman. And it is to be expected, certainly

I should form the view, that a judge who considers the new application will take the same view of Mr Roman as I have taken. So, by making them start again there will be further delay and further cost.

31. Mr Howard says, well, it is possible the claimants can start again, but before one considers the result of starting again there will be a procedural challenge to them starting again. Can they or can they not will have to be decided, and that may itself have to be the subject of a further appeal.

32. On this question of starting again, by reference to an authority to which I will refer in a moment, it is clear enough that there is a real possibility the claimants can start again, and indeed something might depend on precisely how I found against the claimants, if I were to find against them, but my own assessment is the probability is the claimants can start again.

33. Mr Howard fired three procedural arrows at the heart of the claimants' case. He fired what I think he accepted was probably an ineffective arrow based on Parker v Schuller (1901) 17 Times Law Reports 299, but he followed up that arrow with reliance on Denton v TH White Limited [2014] 1 Weekly Law Reports 3926, and finally he referred me to Tibbles v SIG Plc [2012] 1 Weekly Law Reports, 2591.

34. Let me indicate succinctly my reaction to the citation of those authorities. Mr Howard very fairly and comprehensively referred me to the later decision of the Supreme Court in NML Capital Limited v the Republic of Argentina [2011] 2 Appeal Cases 495, on the earlier decision of Parker v Schuller. That earlier decision received very detailed analysis and scrutiny, and the upshot, I take it, from the decision of the Supreme Court is that insofar as Parker v Schuller laid down a rule, it should no longer be applied.

35. Instead, the position was described in paragraph 75 of the judgment of Lord Phillips in NML Capital. He discusses there the question of amending pleadings and whether a different approach is taken, where the context is an application as to jurisdiction, from the general

approach. In short, he holds that there is no difference in the approach. Obviously, the circumstances and the facts have to be fully considered.

36. But he added this at the end of paragraph 75, talking about a case where the application for permission to serve out had been put on one basis which later appeared to be a false basis, but it also later appeared that there was a valid basis for seeking that permission.

37. What he said was this:

"But if this is done on a false basis in circumstances where there is a valid basis for subjecting him to the jurisdiction, it is not obvious why it should be mandatory for the claimant to be required to start all over again, rather than that the court should have a discretion as to the order that will best serve the overriding objective."

38. So I take from that, something that is not in dispute, that it is possible that the claimant might be able to start again, and whether they should be allowed to start again should really be judged by the overriding objective.

39. Turning then to the reliance on the Denton case, the Denton case is very well known. The essential ruling in the case is set out in the headnote in the Weekly Law Reports. In brief summary, I am to consider the seriousness and significance of the failure to comply with a rule, I am to consider why the default occurred, and then I am to evaluate all the circumstances of the case so as to enable the court to deal justly with the application including those two factors.

40. The claimants say that this is not a Denton case because there has not been a failure to comply with the rules. I will proceed on the assumed basis that it is a Denton case, that the evidence they now wish to put in in the form of Mr Roman's evidence ought to have been put before the court in accordance with earlier directions as to evidence, and it should have been before the court at the hearing in March to allow a more effective and final disposal of the matter at that point in time.

41. I will also assume against the claimants that their failure to put this evidence in earlier was significant and was serious. As to why the default occurred, I have not been given an explanation; it is not said that there was some supervening difficulty which the claimants laboured under. It does appear to have been a deliberate choice by the claimants that they would argue the case in March on the basis of the material they chose to assemble and rely upon, and it is only because the inadequacies of that approach have been brought home to them that they now wish to do something they had chosen not to do earlier. That is not a good reason for the relevant default which I am assuming has occurred.
42. I therefore have to assess all the circumstances and consider what is the just outcome here, and I very much bear in mind the philosophy of the Civil Procedure Rules, I bear in mind the matters of principle emphasised in Denton, I give considerable thought to the need to have finality in litigation and to adopt procedures which save costs rather than increase costs.
43. The procedural context in which this arises is unusual. In May of this year, I made an order providing for this hearing to take place. So the fact that this hearing is taking place is a given, is a constant. Rightly or wrongly, I made that order.
44. What was contemplated in May was that the defendants would serve their evidence, the claimants would reply and the court would decide finally about Gateway 9. That has not happened. Instead, what has happened is that the claimants have served evidence not in accordance with any permission they were given to do so; the defendant has replied, but not by addressing the facts spoken to in the evidence, but instead dealing with the procedural history. And today I am being asked, as I always envisaged I would, to deal finally with Gateway 9.
45. So the fact that Mr Roman's witness statement has been served in this previously non-permitted way has not actually altered the matter from a procedural point of view. I am able today, as was always envisaged, to deal with Gateway 9. I am able to receive all the evidence that the two sides want to put before the court. It is not suggested that the defendant is in some way unable

to reply to Mr Roman. They have replied to Mr Roman making procedural points, but not making points as to the content of his statement. Mr Howard has, however, made submissions as to the appropriate reaction to his statement, but I have not been persuaded by those submissions.

46. So looking at it from the point of view of the criteria in Denton, it seems to me that there is not a procedural reason for me to shut out Mr Roman's witness statement in order to advance the principles and policies identified in that case.

47. Then Mr Howard says that the order I made on 22 May, in particular paragraph 5(b), said that the claimants' evidence should be strictly confined to replying to the defendant's evidence. Plainly, Mr Roman's witness statement is not strictly confined to a reply because the defendants did not put in the contemplated evidence. What that means is that the claimants do not have permission as yet to rely on Mr Roman's evidence. However, it would be surprising if applying the approach in Tibbles by reference to the variation of previous orders would produce a different procedural result from the result arrived at by applying the decision in Denton.

48. Denton is a strict case. It fully identifies and emphasises the policy considerations behind that strictness, but yet applying that strictness I have taken the view that this is a proper case for me to consider Mr Roman's evidence. It may be that strictly I am not varying the earlier order, but what I am doing instead is giving further directions about evidence in the light of the circumstances which are today different from the circumstances on 22 May of this year.

49. Having considered the arguments, I come to my conclusion, which is that it is procedurally better to admit Mr Roman's statement. I have identified the alternatives to admitting it. They seem to me to be procedurally far worse in terms of delay and cost. They seem to me to be an expensive and slow way of probably reaching the result which I do reach, which is that the court should assume jurisdiction in this case.

50. I have deliberately left over the question of the application for permission to amend. It is being said that there are in fact two applications: one to make the red amendment and the second to make the green amendment. I have deliberately left that over because I wanted to consider what I should do about Mr Roman's evidence without being painted into a corner of giving permission to make the green amendments and then it being said that I had to admit Mr Roman's evidence because all that it was doing was supporting the green amendment.
51. It seemed to me that a much fairer way to assess the overall procedural merits or demerits of the argument was to go straight to Mr Roman's evidence, as I have done. But having done that, then the court being prepared to assume jurisdiction, it seems to me that there is no longer any remaining argument as to why I should not permit the red amendments and the green amendments.
52. I had said in my earlier judgment that the red amendments were in principle pleadable. The same applies to the green amendments, and I will give permission to make those amendments.
53. I believe that deals with all of the applications which are before me, although I expect there will be matters consequential upon that.