JUDGMENT : The Hon Mr Justice Cooke: Commercial Court. 31st March 2006.

The Applications:

1. There are two applications before the court.
   i) The first is an application by the claimants seeking an extension of time for the filing and serving of further detailed particulars of the grounds of challenge to an arbitration award and of evidence (including evidence of German Law) relating to those grounds of challenge. The ground of application is expressed to be because Details of Claim were served on 6 December, attached to the Arbitration Claim Form, which were put in short form in order to facilitate compliance with the time limit under Section 70(3) of the Arbitration Act 1996 whilst stating that the claimants would thereafter seek the court's permission to put in more detailed grounds of challenge within such further time as the court might allow.

   ii) The second application is an application by the defendant for the claimants' statement of case to be struck out in its entirety pursuant to CPR 3.4(2) because, as stated in the application, two of the jurisdictional challenges which the claimants seek to make have already been determined in favour of the defendant by a judgment of the German Court of Appeal dated 21 July 2005 and because the statement of case discloses no reasonable grounds for bringing the claim by reason of the absence of any written evidence served with the Claim Form as required by CPR 8.5(2). It is said that the claimants' details of claim provide no evidence or insufficient evidence to support the claim and there is therefore no reasonable prospect of success in the action.

2. As appears from the above, the claimants' application arises under Section 67 of the 1996 Act which allows a party to an arbitration to apply to the court to challenge any award of a tribunal as to its own substantive jurisdiction. The Award in question by which the tribunal held that it had jurisdiction was, on its face, made in London and dated 8 November 2005 so that time for bringing a Section 67 challenge expired on 6 December 2005 in accordance with the terms of Section 70(3) of the 1996 Act. Section 80(5) provides that the rules of court "relating to… the extending or abridging of periods and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement." As the Claim Form was issued on 6 December, no extension of time is required for that but as the Part 8 Procedure applies to Arbitration Claim Forms, the claimants were required by CPR 8.5(2) to serve evidence on the defendant with the Claim Form itself. Furthermore, CPR 8.6(1)b provides that no written evidence may be relied on at the hearing unless evidence has been served in accordance with the earlier rule or the court gives permission. Hence the need in the present case for the claimants to apply to the court for permission to rely on Particulars of Claim provided on 6 February 2006 and evidence in the shape of two witness statements and a report on German Law all dated 30 January 2006.

3. The defendants says that there is no good reason for allowing this and that the claim is in any event doomed to fail, not only because of the points raised in their own application but because the grounds put forward are hopeless in themselves as a matter of English Law.

4. Additionally, although there is no application, it is accepted by both parties that by reason of the exchanges of correspondence between solicitors, there is a challenge by the defendant to the permission obtained by the claimants to serve their arbitration claim out of the jurisdiction. The essential basis of this is that the claimants failed to tell the court about the existence of the German proceedings, in which an earlier challenge by them to the jurisdiction of the arbitrators had failed, but which are now the subject of appeal in Germany.

The Claim Form:

5. In the Claim Form, the claimants seek an order declaring that the arbitral tribunal does not have substantive jurisdiction to determine the dispute sought to be arbitrated before it by the defendant. Attached to it are Details of Claim in which the grounds of challenge are set out as follows:- *"The claimants adopt as their grounds of challenge substantially the same points as were made to the Arbitral Tribunal. Without prejudice to the generality of the foregoing, and in short:*

a. The defendant is not entitled under the Agreement to bring a claim in its own right in the absence of Pfizer Inc.

b. The tribunal was not properly constituted by reason of the nationality of the arbitrators and the identity of the appointing parties."

6. There then followed a paragraph to which I have already referred, stating that the Details of Claim were put in short form in order to facilitate compliance with the statutory time limits and seeking permission to put in more detailed grounds of challenge within such further time as the court might allow.

7. Attached to the Claim Form was a copy of the Arbitration Award which recited the various arguments which had been put to the arbitrators by the claimants in support of their contentions that the arbitrators had no jurisdiction. In essence, four points were taken in the arbitration which mirrored three points already put forward by the claimants in the German Court. Those three points were spelt out in the Details of Claim but the fourth point could only be ascertained by a perusal of the Award.

The Arbitration Agreement:

8. The Arbitration Agreement was made between the two claimants and a Mrs Adelheid Leibinger who were described as "sellers" on the one hand and two companies on the other, one of which was the defendant and the other of which was Pfizer Inc, its then indirect parent company. Each was referred to by name. A further party to the Agreement was the company Leibinger GmbH which was the company being sold by the claimants to the defendant. The Arbitration Agreement itself recited as background that *"simultaneous with the execution and delivery of this Agreement, Pfizer and [the defendant] entered into a share purchase agreement recorded in Part B of this notarial deed… with the shareholders of Leibinger GmbH…"* The relevant wording went on as follows:- *"Terms*

The parties, now, hereto agree to the following:

1. Any dispute, controversy or claim between Pfizer, Howmedica and/or Leibinger GmbH on the one side and Karl Leibinger, Franz Leibinger and/or Adelheid Leibinger on the other side arising from or relating to any of the Purchase Agreements shall be resolved only by arbitration, which may be commenced at any time by notice given by any party to this Agreement. Arbitration shall be conducted pursuant to the Rules of Arbitration of the United Nations Commission on International Trade Law in effect at the time of such arbitration. There shall be three arbitrators, selected as follows: (i) each of the arbitrators shall be qualified lawyers who have significant legal experience involving major corporate acquisitions and divestitures; (ii) in no event shall there be two arbitrators who are citizens of either the United States of America or the Federal Republic of Germany; and (iii) one arbitrator shall be selected by Pfizer, one arbitrator shall be selected by a majority of the Sellers and the third arbitrator shall be selected jointly by the first two arbitrators, except that if the parties to this Agreement fail to select an arbitrator within sixty (60) days after initiation of arbitration or if the first two arbitrators fail to select the third arbitrator within one hundred twenty (120) days after initiation of arbitration, then the President of the Law Society of England and Wales shall make such selection.

2. The venue of the arbitration shall be London, England. All arbitration proceedings shall be conducted in the English language and all foreign language documents filed, submitted or exchanged during the arbitration proceedings shall be translated into English. "

9. In essence five issues now arise in relation to this Arbitration Agreement:-

i. **The Joint Claim point**: The claimants argue that the defendant (previously known as Howmedica) is not entitled to pursue an arbitration against the claimants because the requirement is that it and Pfizer have to do so together.

ii. **The Arbitrator's Nationality point**: The claimants argue that, as two of the arbitrators are German, contrary to Clause 1(ii), the tribunal is improperly constituted.

iii. **The Appointing Party Point:** Because Clause 1(iii) provides for one arbitrator to be selected by Pfizer, the claimants maintain that the defendant cannot appoint an arbitrator at all and therefore the tribunal is improperly constituted.

iv. **The Appointment of Chairman point**: It is argued that the appointment by the two selected arbitrators of the third arbitrator (the chairman) after 120 days from the initiation of arbitration is

null and void since only the President of the Law Society of England and Wales could make such an appointment after that time.

v. **The Proper Law point**: It is now said in these proceedings, for the first time, that the governing law of the arbitration agreement is English Law and not German Law which was the basis upon which challenges were made to the arbitrators' jurisdiction, both in the German Court and before the arbitrators themselves.

The background history:

10. On 12/13 September 1995 the claimants and the defendant entered into the Share Purchase Agreement whereby the defendant purchased from the claimants the entire issued share capital of Leibinger GmbH. That Agreement was expressly governed by German Law and provided by Clause 9.11(b) "for all disputes arising out of or in connection with this Agreement" to be submitted to "an arbitration procedure in accordance with the Arbitration Agreement concluded separately in this notarial deed." The reason for a separate Agreement, albeit part of the same notarial deed, was to cater for a German Law issue of enforceability of an Arbitration Agreement between individuals and a corporation – presumably to show that specific attention and consent was being given to this procedure for determination of disputes, as opposed to it being enshrined in a complex document which might escape an unsophisticated individual's attention.

11. Following the sale, issues arose and the defendant commenced arbitration proceedings against the claimants seeking damages of just under €4m for loss of corporate imputation tax credit due to hidden profit distributions which the claimants had received in the two years prior to the sale of the company. The notice of arbitration contained the appointment of a German citizen, as the defendant's appointed arbitrator. On 17 March 2004 the claimants objected to the appointment of an arbitrator by the defendant (as opposed to Pfizer) and further objected to the appointment of a German national by the defendant. On 26 April 2004, the claimants, without prejudice to their challenge to the defendant's appointed arbitrator, appointed their own arbitrator who was also a German national. The party appointed arbitrators jointly appointed a third arbitrator/chairman of the tribunal on 26 July 2004, which was after the period of 120 days from the commencement of arbitration.

12. The claimants objected to the jurisdiction and constitution of the arbitral tribunal by issuing proceedings in the Schleswig German Court of Appeal under Section 1032(2) of the German Code of Civil Procedure (ZPO) seeking a declaration that the arbitration proceedings were "inadmissible". The arbitration continued in the meantime with the claimants filing a statement of defence in the arbitration under protest as to the tribunal's jurisdiction and constitution. The arbitrators then decided that they would deal with the procedural issues first and the claimants applied for a stay of the arbitration "until final and binding decisions of the competent courts have been issued in the pending proceedings according to Section 1032(2)".

13. On 21 July 2005 the German Court of Appeal gave judgment dismissing the claimants' challenge to the jurisdiction/constitution of the arbitral tribunal in terms to which I shall refer later. In August 2005 the claimants appealed against that decision to the German Supreme Court which has not yet determined the matter.

14. On 8 November 2005 the arbitral tribunal issued a partial award rejecting the claimants' challenge to its jurisdiction/constitution and dismissing the claimants' application for a stay. Following that, on the 6 December 2005 the claimants launched proceedings in this jurisdiction and on 15 December Mr Justice Langley granted permission to serve the Claim Form out of the jurisdiction. On 21 December the claimants then wrote to the arbitral tribunal requesting a stay of the arbitration pending the hearing of the challenge in the English Court. On 23 February 2006 the arbitral tribunal rejected that application to stay.

Issue Estoppel on the Joint Claim and Appointing Party points:

15. It was in June 2004, before the third member of the tribunal had been appointed by the two arbitrators, that the claimants commenced pre emptive legal proceedings in the German Court under Section 1032(2) ZPO. The decision of the court records the claimants' objections to the appointment by the defendant of an arbitrator at all and additionally maintained that such an arbitrator could not be

German, since it was their prerogative to appoint a German arbitrator and there was an express prohibition in the Arbitration Agreement to having two arbitrators who were German citizens. In translation, the decision reads that "claimants consider the arbitral proceedings as inadmissible because without Pfizer's co-operation the arbitration became not feasible. Under the Arbitration Agreement the respondent is neither authorised to commence arbitral proceedings nor is it authorised to appoint independently an arbitrator."

16. It is clear therefore that the German Court was faced with the arguments on the Joint Claim point, the Appointing Party point and the Arbitrator's Nationality point. The claimants applied on those grounds for a determination that the arbitration proceedings commenced were "not admissible".

17. It was common ground that section 1032 (2) ZPA applied to foreign seat arbitrations by reason of section 1025 ZPO. An examination of Section 1032(1) and ***(2) shows that the word "admissible" in sub section 2 must be read in the light of the word "***inadmissible" in sub section 1 which provides that the court must stay its own proceedings if there is an Arbitration Agreement because such action is *"inadmissible unless the court finds that the Arbitration Agreement is null and void, inoperative or incapable of being performed"*. In determining therefore whether or not arbitration is "admissible" the court is looking to determine whether there is an Arbitration Agreement between the parties and whether it is null and void, inoperative or incapable of being performed. It is clear that the claimants were arguing that the Arbitration Agreement was ***"inoperative"*** or ***"incapable of being performed"*** without Pfizer's presence, both because it was needed to bring a valid claim in arbitration and because an arbitrator had to be appointed by it. Those two points went together and were decided by the German Court against the claimants in the context of Section 1032(2). The court specifically said (in translation) that "it must only be examined whether a valid Arbitration Agreement exists, whether it is capable of being performed and whether the subject matter of the arbitral proceedings corresponds to the Arbitration Agreement. These requirements have been met".

18. The court refused to decide the Arbitrator's Nationality point because it did not fall within Section 1032(2) ZPO since it related to the composition of the arbitral tribunal rather than the existence of a valid Arbitration Agreement.

19. In my judgement, applying the principles of issue estoppel to a foreign judgement, as set out in ***Carl Zeiss v Rayner & Keeler Limited (No 2)*** [1967] AC853 and ***The Sennar (No 2)*** [1985] 1LLR 521, there is no doubt that the decision of the German Court on the two points it did decide is a decision by a court of competent jurisdiction which is final and conclusive and is a decision on the merits of the issues which it did decide.

20. It was argued that the Appointing Party point was in truth not a decision about admissibility which fell within Section 1032(2) at all but a decision on the composition of the tribunal. There is no doubt that the German Court treated itself as being capable of deciding that point because the way in which the point was used was to make the argument that the Arbitration Agreement was inoperable or incapable of performance without an appointment by Pfizer. In those circumstances the point plainly went to "admissibility" as opposed to simply "constitution of the tribunal." Moreover, in the context of the Joint Claim argument where it was being said that the defendant could not bring a claim on its own without Pfizer, reliance was placed upon Clause 1(iii) of the Arbitration Agreement and the power of selection given to Pfizer, the defendant's then indirect parent company, rather than the defendant itself. In deciding the Joint Claim point therefore, it was necessary for the German Court to decide the Appointing Party point as a necessary step in the chain of reasoning.

21. For these reasons it is in my judgment clear that the German Court decided both the Joint Claim point and the Appointing Party point and was competent to do so under its own jurisdictional rules. More importantly, the claimants themselves invoked the German Court's jurisdiction, thus submitting to it for the purpose of determination of these issues. As a matter of English Private International Law, the German Court was therefore competent to decide these issues between the claimants and the defendant.

22. As those matters have already been decided by the German Court, it is an abuse of process for them to be raised again in any challenge in this country to the arbitrators' jurisdiction. The fact that the decision is subject to appeal is neither here nor there for these purposes since there is a wealth of authority to show that a decision which is subject to appeal is still final and binding between the parties until that appeal alters the position. Moreover, in any event, should the German Supreme Court decide that there was no Arbitration Agreement capable of being formed, then that would be effective as between the parties and any arbitration award would fall with that decision. It is worth pointing out that the claimants persist in Germany in arguing that the Arbitration Agreement is governed by German Law whilst, for the first time and inconsistently arguing here that it is governed by English Law.

23. It is of course neither here nor there that the German Court made its decision in accordance with German Law. That decision creates an issue estoppel regardless of any suggestion that the proper law of the Arbitration Agreement is English Law. The application of a particular system of law to a dispute does not prevent the operation of the principles of issue estoppel, as the authorities make clear. (See e.g. the ***Sennar No 2***). It is therefore not open to the claimants to raise the same two points here in this country which have already been decided against them in Germany by a competent court applying German Law, whether by reference to English Law or at all.

Service out of the jurisdiction:

24. There was little argument as to the principles which apply where permission for service out of the jurisdiction is obtained on the basis of a serious non-disclosure. Here there was a failure to make any reference at all to the existence of the German proceedings when seeking such permission. It is not suggested that the non-disclosure here was deliberate or dishonest but it is of a grave nature since it was of obvious importance to any judge giving permission to serve out to know that there had been German proceedings where a challenge had been raised to the jurisdiction and had failed on two of the three or four points which had been raised in the Details of Claim. This is not a point which goes to the merits of the Application only but a point which goes to the exercise of jurisdiction, involving as it does considerations of forum non conveniens and lis alibi pendens.

25. No adequate explanation is given for this omission. It is clear that the Arbitration Claim Form was compiled at the last moment, as appears from its terms, but the Application for service out was made a week later and, whether for lack of thought or consideration or for whatever other reason, no mention was made of a point which was fundamental in the context of the Arbitration Claim, as the previous section of this judgment shows.

26. Whilst bearing in mind the factors prayed in aid by the claimants in this context I am unable to overlook this aspect which appears to me to go to the heart of the exercise of the court's jurisdiction. I doubt whether any judge who had been properly informed of the terms of the German Court judgment would have given permission to serve proceedings out of the jurisdiction on the two grounds which had been already determined by the foreign court. In these circumstances it seems to me that I have no alternative but to set aside the permission granted by Langley J for such service out.

The Claimants' Application:

27. CPR62.4(1)(b) requires an Arbitration Claim Form to *"give details of any arbitration award challenged by the claimant, identifying which part or parts of the award are challenged and specifying the grounds for the challenge"*. This requires a degree of specificity so that the other party and the court knows exactly what is the subject of challenge. The Details of Claim were deliberately framed in the way they were because of the last minute nature of the decision taken to launch proceedings in this country. The claimants adopted as their grounds of challenge substantially the same points as were made to the "Arbitral Tribunal" and "in short" then raised the Joint Claim point, the Arbitrator's Nationality point and the Appointing Party point (as defined in 9(iii). No express reference was made to the Appointment of Chairman point (as defined in 9(iv)) although a perusal of the award would have revealed that it was a point taken there and rejected by the arbitrators. I do not consider that this was sufficient, notwithstanding the words "without prejudice to the generality of the foregoing" which

appeared in paragraph 9 of the Details of Claim. It seems to me that the Details of Claim did not fairly and squarely raise the Appointment of Chairman point.

28. Nor did the Details of Claim suggest that the Arbitration Agreement was governed by English Law and that this was a point upon which the claimants wished to rely as a ground for challenging the decision of the tribunal on its own jurisdiction. That cannot be spelt out of the Arbitration Claim Form and in a letter of 19 January 2006, the claimants' solicitors made it plain that German Law was the operative law and sought the defendant's indulgence in relation to the provision of evidence on the basis that evidence of the German Law position was required for the purposes of their application.

29. Thus it was incumbent upon the claimants to obtain the permission of this court to specify new grounds for challenge which did not appear in the Details of Claim, namely the Appointment of Chairman point and the Proper Law point (as defined in 9(v)).

30. Equally, if the claimants wished to rely upon evidence not served with the Claim Form, the permission of the court was once again required. In this case the important evidence was contained in a report on German Law which is relied on by the claimants for the Arbitrator's Nationality point. Oddly, the claimants argue for English Law in relation to every point save the Arbitrator's Nationality point, although before the arbitrators and the German Court it has always been German Law that applied.

31. As the defendant points out, the claimants seek to undermine and circumvent the statutory time limits provided by Section 70(3) of the 1996 Act by issuing a Claim Form without detailed particulars and without evidence and then making an application to file and serve detailed particulars and written evidence 72 days after the statutory deadline, after serving those particulars and evidence some eight weeks after that deadline. These are not short periods in the context of the 28 day period allowed by statute. The public policy which underlies arbitration and the finality of awards means that extensions of time, particularly on a retrospective basis, are not lightly given. Section 73(2) of the 1996 Act provides that where an arbitral tribunal decides that it has jurisdiction and a party who could have questioned that ruling by challenging the award does not do so within the time allowed by the statute, *"he may not object later to the tribunal substantive jurisdiction on any ground which was the subject of that ruling"*. Whilst this is not a case where the Claim Form was issued out of time (as in ***Kalmneft JSC v Glencore International AG*** [2001] 2AER (Comm) 577), the principles to be applied are not dissimilar as appears from the decision of Colman J in ***Westland Helicopters Limited v Sheikh Salah al – Hejailan (1)*** [2004] 2LLR 523 at paragraphs 38-42.

32. The arbitrators did decide the Appointment of Chairman point and it was some eight weeks after the time limit before this argument was raised by the claimants in these proceedings in a form which was recognisably a ground upon which they relied.

33. Whether considering this ground or the new evidence upon which the claimants wish to rely, there is no adequate reason for these matters not being included in the Arbitration Claim Form. In his witness statement, the solicitor acting for the claimants makes the point that his firm was only instructed a short time before the 28 day period was due to expire. Although Section 80(5) of the 1996 Act allows extensions of time to be given, the burden is upon the claimant to justify it. The cause of the delay and the merits of the proposed challenge are relevant factors and the policy of finality in the 1996 Act, in particular in regard to jurisdictional issues, is of paramount importance in the context of the usual CPR considerations and objectives to which CPR 3.1(2)(a) applies as the decisions in ***Kalmneft*** (ibid) and ***Peoples' Insurance Co. of China v Vysanthi Shipping Co. Ltd*** [2003] 2LLR 617 make plain. Reliance was not placed on Section 79(3)b of the 1996 Act, which states that the court's power to extend time limits should only be exercised where the court is satisfied that a substantial injustice would otherwise be done, but this suggests something of the policy which underlies the granting of extensions under the Act. In this case I do not think that a substantial injustice would be done if no extension was granted and I do not see any sufficient reason for granting an extension under s 80(5).

34. All the history which I have previously related militates against the granting of any indulgence to the claimants who have taken every step they possibly could to frustrate the arbitration, not only in

applying to the German Courts and the arbitrators themselves on the jurisdictional issues but now seeking the assistance of this court. Furthermore in seeking the assistance of both German and English Courts, they have sought to persuade the arbitrators to stay the arbitration proceedings. Whilst the arbitrators have refused to do so, the claimants appear keen to procrastinate and to prevent determination of the substantive dispute by any argument available.

35. Here the claimants instructed English solicitors on 23 November 2005, two weeks before the deadline of 6 December but it is clear from evidence before me that the claimants only decided to pursue their jurisdictional challenge in this country on 3 December. It was the last minute nature of this application which meant that the Details of Claim took the form that they did and which resulted in the absence of any evidence in support. Moreover the English Law argument i.e. the Proper Law point only came to mind in late January 2006. The reality is that there is no good reason for the late advancement of these points and this evidence. The Appointment of Chairman point was known to the claimants as it had been argued in the arbitration (although not in the German Court), whilst the English Law point was one which was plain to see from a reading of the Arbitration Agreement with the Clause which specified venue, English language and appointment in default of the third arbitrator/chairman by the President of the Law Society.

36. Furthermore, for reasons which appear below, it seems to me that the grounds raised by the claimants are in any event mostly doomed to fail and have no realistic prospect of success. This also I am entitled to take into account in deciding whether or not to exercise my discretion. If I had not already set aside the order for service out of the jurisdiction, I would not have been prepared to extend time for the submission of the evidence or the Particulars of Claim, nor to allow reliance upon the evidence supplied so long after the statutory deadline.

The Arbitrator's Nationality point:

37. I can see no basis upon which this point could succeed. The defendant appointed a German arbitrator and the claimants subsequently also appointed a German arbitrator with the result that there were then two arbitrators who were citizens of Germany. Notwithstanding the arguments raised in Germany that the defendant was not entitled to appoint a German arbitrator, there is nothing in the Agreement which prevents it from doing so. In consequence, in asserting a lack of jurisdiction on the part of the arbitrators, the claimants rely upon their own later act in appointing someone of that nationality. In so doing they plainly waived any reliance upon that Clause, putting all their reliance upon their argument that the defendant's appointment was invalid. This was the conclusion at which the arbitrators arrived and is clearly right both as a matter of German Law and English Law, notwithstanding the German Law evidence adduced before me (albeit out of time).

English Law:

38. If the Arbitration Agreement is viewed in isolation, Clause 2 and the reference to the President of the Law Society of England and Wales indicate English Law is the curial law. When however the Arbitration Agreement is viewed together with the sale and purchase agreement, as it undoubtedly should be, the position is altogether different. There is a proper law clause in the sale and purchase agreement and the Arbitration Agreement is an adjunct to it. Notwithstanding the individual pointers upon which the claimants wish to rely, once it is seen that the Arbitration Agreement is really part and parcel of the sale agreement and is only in a separate document for particular German Law reasons, the inference of German Law is overwhelming. Moreover at no time prior to the end of January 2006 did it even cross the minds of the claimants to argue the contrary.

The Appointment of Chairman ground:

39. On a literalistic reading of Clause 1 of the Arbitration Agreement, the two arbitrators' power to appoint the third arbitrator ceases after 120 days and devolves upon the President of the Law Society. The arbitrators held that the Clause did not mean that two of them could not appoint a third at any stage prior to any application to the President of the Law Society. Their conclusion is a commercial conclusion albeit not one which sits happily with the wording of the Clause. On this one point, I am not able to say the claimants' position is so hopeless that it has no realistic prospects of success and, if I

had not already decided all the other matters against the claimants, this is an issue which would fall for determination by this court.

Conclusion:

40. For the reasons given, the claimants' action is an abuse of process in relation to the Joint Claim point and the Appointing Party point. The Arbitrator's Nationality point has no prospect of success at all nor has the argument that English Law is to apply. Furthermore there is no basis for allowing the claimants to rely upon grounds of challenge which were not set out specifically in their Details of Claim on 6 December, namely the Appointment of Chairman point and the Proper Law point. Furthermore, the order for service out of the jurisdiction is set aside on the ground of material non-disclosure in failing to inform the court of the German Court proceedings which gave rise to issue estoppel on two of the three grounds set out in the Details of Claim.

41. It appears to me in these circumstances that the claimants must bear the costs of this action unless there are any factors of which I am unaware, upon which the parties can address me.

James Dingemans QC, Thomas Roe (instructed by Charles Russell) for the Claimants
Stephen Houseman (instructed by Baker & McKenzie) for the Defendant