

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Pro-Sys Consultants Ltd. v. Microsoft
Corporation (No. 2),
2006 BCSC 1738

Date: 20061124
Docket: L043175
Registry: Vancouver

Between:

Pro-Sys Consultants Ltd. and Neil Godfrey

Plaintiffs

And

**Microsoft Corporation and Microsoft
Canada Co./Microsoft Canada CIE**

Defendants

Before: The Honourable Mr. Justice Tysoe

Reasons for Judgment

Counsel for the Plaintiffs:

R. Mogerman
and D. Jones

Counsel for the Defendants:

N. Finkelstein, J. Sullivan,
and C. Beagan-Flood

Date and Place of Hearing:

October 24, 2006
Vancouver, B.C.

Introduction

[1] On July 6, 2006, I issued Reasons for Judgment herein (cited as 2006 BCSC 1047) (the "July Reasons") dealing with the Defendants' application under Rule 19(24) of the *Rules of Court* to strike out all or portions of the Further Further Amended Statement of Claim (the "Statement of Claim"). The parties had agreed in advance that my decision would also serve as a determination of the requirement of s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, that the pleadings disclose a cause of action.

[2] In ordering that certain portions of the Statement of Claim be struck out, I left open one issue for further submissions and I indicated that the Plaintiffs could avoid the striking out of some of the portions of the Statement of Claim if it could be amended to contain proper pleadings in connection with the claim of unjust enrichment and the remedy of a constructive trust. I contemplated, but did not articulate, that the Plaintiffs may want to apply to make other amendments as a result of my rulings. I also gave leave to the Plaintiffs to file an amended Statement of Claim to set out facts relating to certain foreign proceedings to take the place of paragraphs which I had struck (i.e., paragraphs 83 to 100). In addition, I stated that the Plaintiffs should particularize the identity of certain persons referred to in the Statement of Claim.

[3] Counsel for the parties appeared before me on September 5, 2006. Counsel for the Plaintiffs wanted to make submissions on proposed amendments to the Statement of Claim, while counsel for the Defendants was only prepared to make submissions with respect to the changes required to be made to the Statement of Claim as a result of the rulings in the July Reasons. I indicated that it would not be appropriate for me to consider proposed amendments to the Statement of Claim in the absence of a notice of motion seeking leave to make the amendments. I also indicated that it appeared to be more expeditious to have one hearing to consider the changes flowing from the July Reasons and the proposed amendments, as opposed to having a hearing for each of those two purposes.

Counsel then agreed that the hearing should be adjourned in order to allow counsel for the Plaintiffs to prepare and serve a notice of motion seeking leave to further amend the Statement of Claim. That has now occurred.

The Proposed Amendments

[4] The proposed Third Further Amended Statement of Claim attached to the Plaintiff's Notice of Motion contains the following proposed amendments:

- (a) amendments to remove portions of the Statement of Claim alleging that conduct of the nature described in Part VIII of the *Competition Act*, R.S.C. 1985, c. C-34, was illegal or unlawful (in accordance with my ruling that such conduct does not constitute illegal or unlawful means for the purpose of a claim of interference with economic relations);
- (b) amendments to remove the portions of the Statement of Claim alleging conduct of the nature described in Part VIII of the *Competition Act* as being unlawful for the purpose of the second branch of the tort of conspiracy as described in *Canada Cement LaFarge Ltd. v. Ocean Construction Supplies Limited*, [1983] 1 S.C.R. 452 at 471-2 (in accordance with my ruling that the pleadings of Part VIII did not disclose unlawful conduct);
- (c) amendments to allege that the contracts between the Defendants and the manufacturers of computers purchased by the Plaintiffs are void and unenforceable (in response to my rulings that the claim of unjust enrichment and the remedy of constructive trust be struck from the Statement of Claim unless there is a proper pleading alleging that such contracts are void);
- (d) amendments to remove the portions of the Statement of Claim advancing the claim of spoliation (in accordance with my ruling that spoliation is not an independent tort under the laws of British Columbia);
- (e) removing paragraphs 83 through 100 of the Statement of Claim (in accordance with my ruling that those paragraphs improperly pleaded

evidence) and replacing them with one paragraph describing the decisions issued in proceedings against Microsoft in the United States and the European Union and containing findings of fact and law upon which the Plaintiffs assert they are entitled to rely;

- (f) amendments to provide particulars of the parties other than Microsoft Canada with whom Microsoft is alleged to have agreed and conspired in violation of Part VI of the *Competition Act* (in accordance with my ruling that particulars should be provided and in response to my ruling that the previous pleading of Part VI did not disclose unlawful conduct for the purpose of the second branch of the tort of conspiracy);
- (g) amendments to plead that Microsoft's conduct constituted (i) an illegal violation of United States and European antitrust law, and (ii) conduct prohibited by Microsoft's Articles of Incorporation and corporate policies, and asserting that such conduct represents unlawful or illegal means or conduct for the purposes of the tort of interference with economic relations and the second branch of the tort of conspiracy (in order to properly place before the court the issue which I left open for further submissions);
- (h) an amendment in the portion of the Statement of Claim relating to the claim of unjust enrichment to allege that even if the contracts between Microsoft and the manufacturers of the computers purchased by the Plaintiff are valid, there is no juridical reason for the Defendants to retain the Overcharge because they were guilty of illegal conduct; and
- (i) some housekeeping amendments.

[5] The Defendants say that I should not grant leave to make any of the proposed amendments. In their written submissions, counsel for the Defendants argue that the Statement of Claim should be struck out with the exception of the paragraphs I left standing in the July Reasons. In oral submissions, counsel for the Defendants go further and say that I should strike out the Statement of Claim in its entirety because the pleaded facts do not properly relate to the surviving causes of action.

The Appropriate Test

[6] There is no disagreement between counsel for the parties with respect to the test to be applied on this application, and it is essentially the same test as I applied on the Rule 19(24) application. In order to obtain leave to amend the Statement of Claim, the Plaintiffs must show that the proposed amendments, when coupled with the existing provisions of the Statement of Claim, disclose reasonable claims. Leave will be refused if it is plain and obvious that the proposed amendments disclose no reasonable claim. See *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) (C.A.) and *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[7] Counsel for the Plaintiffs also refer to *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.*, [1991] B.C.J. No. 4082 (QL) (C.A.), where the B.C. Court of Appeal approved a statement to the effect that, whether or not the issues are weak or unlikely to succeed, the court should allow them to be pursued at trial if they are complex and novel. They point out that in the reply submissions for the September 5 hearing, counsel for the Defendants submitted that they could not properly respond to, among other things, the proposed amendments raising the issue I left open in the July Reasons without the notice afforded by a notice of motion because the issue is novel and complex.

Amendments Pleading Unlawful or Illegal Means or Conduct

[8] The main point to be decided on this application is the issue which I left open in the July Reasons. If I do not allow the proposed amendment relating to this issue, then it may be that the Statement of Claim should be substantially re-drafted as counsel for the Defendants contend.

[9] I ruled in the July Reasons that, in the absence of an order of the Competition Tribunal, conduct of the nature described in Part VIII of the *Competition Act* does not represent unlawful or illegal means for the purposes of the tort of interference with economic relations and the second branch of the tort of conspiracy.

As I understood that most of the conduct in question occurred in the United States, I left open the issue of whether it is plain and obvious that illegal conduct under the laws of the United States cannot found the requirement of the tort of interference with economic relations for illegal or unlawful means despite the fact that the conduct was not illegal or unlawful under Canadian law. I left the issue open because no submissions were made on the point and because the Statement of Claim did not specifically rely on the findings of illegal conduct in the United States (and the European Union) when alleging the commission of these torts. I also implicitly left open the issue of whether it is plain and obvious that such conduct cannot found the requirement of the second branch of the tort of conspiracy for unlawful conduct. The proposed amendments described in clause (g) of paragraph 4 above now form a basis for deciding this issue for the purposes of the two torts.

[10] Counsel for the Plaintiffs say that there are two grounds for concluding that the Defendants' conduct found to be illegal in the United States and the European Union can found the requirement for unlawful or illegal means or conduct for the purposes of the tort of interference with economic relations and the second branch of the tort of conspiracy. First, they say that British Columbia courts will not recognize acts that are illegal under foreign law and that, as a result, British Columbia courts should view such acts as unlawful. On this point, the Plaintiffs rely on *Frischke v. Royal Bank of Canada* (1977), 17 O.R. (2d) 388 (C.A.) and *Gillespie Management Corp. v. Terrace Properties* (1989), 62 D.L.R. (4th) 221 (B.C.C.A.).

[11] In *Frischke*, the Ontario Court of Appeal held that Ontario courts will not ordinarily make an order requiring a person to compel another person in a foreign jurisdiction to break the laws of the foreign jurisdiction. In my opinion, this decision does not advance the Plaintiffs' position because this action does not involve a request that the Defendants break the laws of another jurisdiction.

[12] In *Gillespie Management*, a Washington limited partnership sued a British Columbia company for wrongful termination of their contract, which provided

for the Washington limited partnership to manage the B.C. company's apartment building located in Washington. The Washington limited partnership was not a licensed real estate broker in Washington, and the laws of Washington provided that it was unlawful for a person to act as a broker in negotiating rental of real estate if the person was not licensed to do so. The B.C. Court of Appeal held that it would not enforce the contract on the basis that it provided for the Washington limited partnership to perform acts in Washington which were illegal under Washington law. In reasons concurring with the majority decision, Southin J.A. said the following at p. 222:

The doctrine of illegality is founded on considerations of public policy – not foreign policy but the domestic public policy of not enforcing unlawful bargains or requiring unlawful conduct. I leave open the question whether this court must always defer to the law of the foreign state and hold that that which is unlawful there is unenforceable here as contrary to public policy. But, as a matter of our own public policy, I think we should give effect, in these circumstances, to foreign legislation which is of the same order as domestic legislation.

[13] *Gillespie Management* was cited with approval in *Vasquez v. Delcan Corp.*, [1998] O.J. No. 2833 (QL) (Ct. of Jus. (Gen. Div.)). In that case, the Ontario Court of Justice considered whether an employment contract, which was governed by the laws of Ontario, had been improperly terminated on the basis that its termination was illegal under the laws of Venezuela, the place where the contract was to be performed. The Court concluded that its termination did not contravene Venezuelan law.

[14] The second ground upon which the Plaintiffs say that conduct of the Defendants found to be illegal in the United States and the European Union can form the basis of the unlawful element of the two torts is that such conduct was contrary to Microsoft's Articles of Incorporation and corporate policy. The proposed amendments plead that Microsoft's Articles of Incorporation state that Microsoft was organized for the purpose of transacting any and all lawful business for which a corporation may be incorporated under the *Washington Business Corporation Act*.

The proposed amendments plead that Microsoft's corporate policies, as contained in its Standards of Business Conduct, state that (i) Microsoft manages its business in compliance with laws and regulatory requirements, and (ii) Microsoft conducts its global business in compliance with laws designed to promote fair competition and to encourage ethical and legal behaviour among competitors, and specific reference is made to antitrust and fair competition laws.

[15] In the July Reasons, I relied upon the decision in *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.), where the Ontario Court of Appeal adopted the broader view expressed in *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 1 All E.R. 522 (C.A.) that illegal or unlawful means extends to an act that the defendant is not at liberty to commit. A trade association was found liable for incorrectly advising its members that advertising in the plaintiff's calendar would contravene the association's code of marketing practices. The Ontario Court of Appeal held that the making of the ruling by a committee of the association, which it was not authorized to make, fell within the broader view of illegal or unlawful means.

[16] On this application, counsel for the Plaintiffs also cite *Drouillard v. Cogeco Cable Inc.*, [2005] O.J. No. 3166 (QL) (Sup. Ct. of Jus.), which followed *M.D. Reach* in holding that a breach by the defendant of its own corporate policy constituted an illegal act for the purpose of the tort of interference with economic relations.

[17] During the hearing of this application, I inquired whether the Plaintiffs could sue Microsoft in the United States and I was referred to the case of *F. Hoffman – La Roche v. Empagran S.A.* (2004), 542 U.S. 155. In that case, the U.S. Supreme Court held that the effect of the limitation of the scope of the *Sherman Act* by the *Foreign Trade Antitrust Improvements Act of 1982* was that U.S. courts cannot redress foreign antitrust injury which is wholly independent from any domestic injury.

[18] Counsel for the Defendants submit that activities that are unlawful under the antitrust laws of the United States or the European Union, but not under the competition laws of Canada, cannot form the unlawful means underlying the torts of interference with economic relations or conspiracy for two reasons. First, they say a Canadian court enforcing foreign antitrust laws would undermine the legislative authority of the Parliament of Canada. Counsel quote the following comment on the July Reasons contained in a July 27, 2006 newsletter of the law firm, Davies Ward Phillips & Vineberg LLP:

Particularly until the Court's speculation about the implications of foreign illegal conduct for tort claims in Canada is resolved, this decision raises the prospect of increased litigation in Canada based on conduct found to be illegal in the U.S. or the E.U., for example, even though such conduct is not illegal in Canada. Such conduct could include not only monopolization which is illegal in the U.S. but not in Canada, but also price fixing and market allocation among competitors, which is *per se* illegal in the U.S. but requires a showing of undue influence or market power to be illegal in Canada.

[19] I disagree with the submission that the proposed pleading would mean that a Canadian court would be enforcing foreign antitrust laws. Rather, the Canadian court would simply be determining whether a tort had been committed in circumstances where the unlawful conduct or means is represented by illegal acts in the jurisdictions in which it took place. The concern raised in the above newsletter can be addressed by the approach articulated by Southin J.A. in *Gillespie Management*. The Canadian court could consider domestic public policy and decline to utilize illegality under foreign legislation which is not of the same order as Canadian legislation.

[20] The second reason proffered by counsel for the Defendants is that this approach would be inconsistent with choice of law rules. In this regard, counsel rely on the following passage from *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1049-50:

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are

situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues.

Counsel argue that the Plaintiffs have brought a claim under Canadian tort law on the basis that the alleged consequences, and thus the wrong, occurred in Canada and that they cannot simultaneously claim that the wrong also occurred in the United States and/or in Europe such that each element of the tort is assessed under whichever legal regime is most favourable to the Plaintiffs.

[21] I would agree with counsel for the Defendants if the conduct in question occurred in Canada. In that circumstance, it would be plain and obvious that a plaintiff could not pursue the torts of interference with economic relations and conspiracy on the basis of conduct that would have been illegal in a foreign jurisdiction if it had occurred in that jurisdiction. However, as I understand it, most of the conduct of Microsoft found to be illegal in the United States took place in the United States (I do not know if the findings in the European Union were based on activities in Europe or the United States). It is not a situation where the Plaintiffs can choose whichever legal regime is most favourable to them. Rather, the court would be assessing the illegality or unlawfulness of the conduct on the basis of the laws of the jurisdiction in which it occurred.

[22] It may also be argued that it is consistent with the doctrine of comity for a British Columbia court to have regard to the laws of the foreign jurisdiction in which the conduct took place when determining whether the conduct is illegal or unlawful for the purposes of the two torts. The Supreme Court of Canada has very recently held that the traditional common law rule limiting the recognition and enforcement of foreign orders to monetary judgments should be changed in order to allow for the recognition and enforcement of foreign non-monetary judgments in certain circumstances: see *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52.

[23] It is not plain and obvious to me that conduct which is illegal in the jurisdiction in which it occurred cannot constitute the element of illegal or unlawful

means or unlawful conduct for the purposes of the torts of interference with economic relations and civil conspiracy. I do not believe that the Statement of Claim, as it is proposed to be amended, contains a pleading that the alleged illegal conduct of the Defendants took place in the United States (or the European Union). Such a pleading is necessary to potentially support the claims that the Defendants committed these torts.

[24] It is also not plain and obvious to me that the plea that Microsoft acted contrary to its corporate policy cannot qualify under the broader view of illegal or unlawful means (or unlawful conduct) as discussed in *Reach M.D.* and applied in *Drouillard*. On the other hand, it is plain and obvious that the Plaintiffs cannot rely on the plea relating to Microsoft's Articles of Incorporation. The statement in the Articles is simply expressing the capacity of Microsoft to carry on business. The fact that Microsoft may have committed unlawful acts does not make its business unlawful.

[25] Accordingly, I grant leave for the Plaintiffs to make the amendments referred to in clause (g) of paragraph 4 above, subject to the following two qualifications:

- (a) in order to rely on an illegal violation of United States or European Union antitrust law, the Statement of Claim must contain a pleading that the illegal conduct took place in the United States or the European Union, respectively;
- (b) I do not grant leave to amend the Statement of Claim to make reference to conduct prohibited by Microsoft's Articles of Incorporation.

I wish to emphasize a point in view of the concern expressed in the newsletter of Davies Ward Phillips & Vineberg LLP about the prospect of increased litigation in Canada. I should not be interpreted as holding that conduct of the Defendants which is illegal in a foreign jurisdiction does found the illegal or unlawful means/unlawful conduct elements of the torts of interference with economic relations

and conspiracy even though such conduct was not illegal or unlawful under Canadian law. All I am ruling is that it is not plain and obvious that such conduct cannot satisfy those elements and that the Plaintiffs should be allowed to pursue their claims at trial.

The Other Amendments

[26] Counsel for the Defendants submit various other arguments as to why I should not grant leave to the Plaintiffs to make the proposed amendments. For example, they argue that the Plaintiffs have not alleged facts that could constitute a restraint of trade and that the Plaintiffs have not pleaded all elements of the tort of interference with economic relations. They also say that the proposed amendments do not comply with the July Reasons because the Statement of Claim, as amended, will continue to rely on factual allegations directed at Part VIII of the *Competition Act* and I ordered the claims based on Part VIII to be struck out. With two exceptions, it is my view that the Defendants' other arguments are not responsive to the proposed amendments (and would more appropriately be made on a Rule 19(24) application) or have lost their force in light of my decision to grant leave to the Plaintiffs to make the amendments referred in clause (g) of paragraph 4 above.

[27] The first exception relates to a point which is essentially conceded by counsel for the Plaintiffs. In the July Reasons, I ordered that the portions of the Statement of Claim advancing the claim of unjust enrichment be struck out unless the Plaintiffs were able to properly amend the Statement of Claim to assert that the contracts between the Defendants and the manufacturers of the computers purchased by the Plaintiffs are void. My reasoning was that, unless those contracts are void, they would constitute a juristic reason for the Plaintiffs' deprivation and the Defendants' enrichment.

[28] In the proposed amendment described in clause (h) of paragraph 4 above, the Plaintiffs want to allege that even if the contracts are valid, there is no juridical reason for the Defendants to retain the Overcharge because they were

guilty of illegal conduct. This is inconsistent with the July Reasons, and I refuse leave to make this proposed amendment.

[29] The second exception relates to the pleading that the Defendants breached s. 45(1) of Part VI of the *Competition Act*. The pleading in paragraph 86 of the Statement of Claim (as proposed to be amended) is that the Defendants "combined or agreed with others, including IAPs, ISVs, OEMs, Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. Microsoft and Microsoft Canada dictated the terms of these combinations and agreements, and were aware or ought to have been aware that the effect of the agreements would be to prevent or lessen competition unduly".

[30] Counsel for the Defendants take the following three objections to this proposed pleading:

- (a) an agreement must be alleged for a Part VI conspiracy claim;
- (b) any plea of an agreement is irrational; and
- (c) the plea of conspiracy is not sufficiently particularized.

[31] In support of the plea of the Part VI conspiracy claim, counsel for the Plaintiffs cite the following passage from *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at para. 121:

In summary then, the Crown must establish the subjective fault elements that the accused had the intention to enter into the agreement and was aware of its terms. As well, the Crown must demonstrate that the proof, viewed objectively (i.e., by a reasonable business person), establishes that the accused was aware or ought to have been aware that the effect of the agreement entered into by the accused would be to prevent or lessen competition unduly.

Counsel then go on to assert that this is the same conclusion reached under the California antitrust legislation to the effect that while a conspiracy requires both an agreement and an unlawful purpose, a combination requires only some association, even a coerced one, between two or more entities.

[32] In my opinion, I need not decide on this application whether a coerced association can result in a combination for the purposes of s. 45(1) of the *Competition Act*. This application is restricted to the amendments the Plaintiffs propose to make to the Statement of Claim. The wording of the proposed pleading ("combined or agreed") is consistent with the wording of s. 45(1) (i.e., "[e]very one who conspires, combines, agrees or arranges with another person"). My function on this application is to determine whether the words of the proposed pleading support a claim for a cause of action, and it is not appropriate for me at this stage to interpret the words or determine whether the Plaintiffs will be able to prove the allegation.

[33] The second objection is that the allegation that OEMs, IAPs, ISVs and/or Intel conspired with the Defendants is irrational because those persons would not conspire with the Defendants to drive up the prices of their products with no financial benefits to themselves. In my opinion, this objective requires me to speculate about the motives of these other parties, something that is not appropriate on this type of application. They may have been motivated by market share or other business considerations. I do not consider the plea to be irrational.

[34] The third objection relates to particulars, and this objection extends to the proposed amendment to paragraph 12 of the Statement of Claim (which I stated in the July Reasons should be particularized with respect to the participants who were alleged to have combined with Microsoft). The proposed amendments describe these other persons as "IAPs, ISVs, OEMs, Intel". The first three terms are defined in the Statement of Claim as follows:

"IAP" means internet access provider;

"ISV" or "independent software vendors" are firms that develop applications and other software. They are "independent" in as much as they are not part of a vertically integrated hardware and software company. Examples of ISVs include Adobe, Lotus, Novell, and, in Canada, Corel;

"OEMs" or "original equipment manufacturers" means PC manufacturers such as Dell, Gateway, Hewlett Packard and, in Canada, Budgetron;

The term "Intel" is not defined.

[35] In my opinion, there are two deficiencies in the proposed amendments. The first is that paragraph 12 of the proposed Statement of Claim asserts that Microsoft combined and agreed with "other participants, including ..." and paragraph 86 of the proposed amended Statement of Claim asserts that the Defendants combined or agreed "with others, including ...". The Defendants should not be put in a position to have to guess who the "other participants" and "others" may be.

[36] The second deficiency is that the definitions of "IAPs", "ISVs" and "OEMs" in paragraphs 12 and 86 of the proposed amended Statement of Claim describe categories of persons and do not disclose the identity of the actual parties with whom it is alleged that the Defendants combined or agreed. The reference to "Intel" is not adequate to determine the actual corporation to which reference is made. In my view, the proposed pleadings do not contain sufficient particularization of the identity of these parties.

[37] Rule 19(11.1) provides that particulars need only be pleaded to the extent that they are known at the date of pleading and that further particulars may be delivered after they become known. Counsel for the Plaintiffs advises me that the documents in the class actions commenced in approximately 20 states of the United States are subject to protective orders and that they have requested access to the documents. In the circumstances, I am prepared to allow the proposed amendments without requiring other particulars of the alleged combinations or agreements, such as their dates, objects and means, (but without prejudice to the right of the Defendants to subsequently apply under Rule 19(16) for further and better particulars), but the proposed amendments should properly identify at least one person with whom it is alleged that the Defendants combined or agreed. If the Plaintiffs learn of the identity of other such persons in the future, they can apply to further amend the Statement of Claim.

[38] I grant the Plaintiffs leave to amend paragraphs 12 and 86 of the proposed amended Statement of Claim subject to the conditions that (i) paragraph 12 cannot contain the phrase "other participants, including", (ii) paragraph 86 cannot

contain the phrase "others, including" and (iii) at least one other person with whom it is alleged that the Defendants combined or agreed must be properly identified.

Conclusion

[39] I grant leave to the Plaintiffs to make the proposed amendments to the Statement of Claim subject to the following exceptions and qualifications:

- (a) leave is granted to make the amendments referred to in clause (g) of paragraph 4 above alleging an illegal violation of United States or European Union antitrust law only if there is also an amendment alleging that the illegal conduct took place in the United States or the European Union, respectively;
- (b) I do not grant leave to amend the Statement of Claim to make reference to conduct prohibited by Microsoft's Articles of Incorporation;
- (c) I do not grant leave to make the proposed amendment described in clause (h) of paragraph 4 above;
- (d) paragraph 12 of the proposed amended Statement of Claim cannot contain the phrase "other participants, including";
- (e) paragraph 86 of the proposed amended Statement of Claim cannot contain the phrase "others, including"; and
- (f) the proposed amendments to paragraphs 12 and 86 of the proposed amended Statement of Claim must properly identify at least one other person with whom it is alleged that the Defendants combined or agreed.

[40] I order that the costs of this application be in the cause of the action.

"D. Tysoe, J."