[2014] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL **Case No: 1173/5/7/10**

BETWEEN:

13) DB SCHENKER RAIL (UK) LTD
14) LOADHAUL LIMITED
15) MAINLINE FREIGHT LIMITED
16) RAIL EXPRESS SYSTEMS LIMITED
17) DB SCHENKER RAIL INTERNATIONAL LIMITED
(formerly ENGLISH WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED)

Claimants

-v-

2) SCHUNK GMBH
3) SCHUNK KOHLENSTOFFTECHNIK GMBH
4) SGL CARBON SE (formerly SGL CARBON AG)
5) MERSEN SA (formerly LE CARBONE-LORRAINE SA)
6) HOFFMANN & CO ELEKTROKOHLE AG

Defendants

ORDER OF THE CHAIRMAN
(UK CLAIMS: DISCLOSURE AND OTHER DIRECTIONS)

UPON considering the joint statement filed, pursuant to paragraph 5 of the Order of 25 November 2013 ([2013] CAT 28), by the 13th-17th Claimants (the "UK Claimants") and the 2nd-6th Defendants (the "Defendants") on 15 January 2014 (the "Joint Statement"), and the skeleton arguments filed by those parties on 17 January 2014

AND UPON hearing the legal representatives of the UK Claimants and the Defendants at a case management conference on 20 January 2014

AND UPON considering that the legal representatives of Morgan Advanced Materials plc ("Morgan") were provided by the UK Claimants with a copy of the Joint Statement and invited to attend the case management conference but, by letter dated 17 January 2014, declined to attend or make any submissions

AND HAVING REGARD TO the confidentiality ring established for the purposes of the claims of the UK Claimants against the Defendants (the "UK Claims") by the Order made and drawn on 27 January 2014 (the "Confidentiality Ring")

IT IS ORDERED THAT:

Definitions

1. For the purposes of this Order:

    a. "disclose" means one party or parties providing to another party or parties a copy of a document for inspection (variations and derivatives of "disclose", such as "disclosed" and "disclosure", shall be read accordingly); and

    b. "document" means anything in which information of any kind is recorded.

Confidentiality and treatment of documents disclosed

2. All documents disclosed by one party to another for the purposes of the UK Claims be treated in accordance with the provisions of Civil Procedure Rule 31.22 (Subsequent use of disclosed documents and completed Electronic Documents Questionnaires), which shall apply *mutatis mutandis* to the UK Claims.

3. If necessary in the interests of time, any document disclosed for the purposes of the UK Claims may initially be disclosed into the Confidentiality Ring on grounds that it may contain "Confidential Information" as defined in the Order establishing the Confidentiality Ring.

4. Each document disclosed into the Confidentiality Ring in accordance with paragraph 3 above, save those for which specific provision is made below, shall be reviewed and a decision taken by the disclosing party (which may be subject to review by the Tribunal on application by another party), not later than four weeks after the date on which that document was disclosed into the Confidentiality Ring, as to whether that document should properly remain within the Confidentiality Ring, having regard to the definition of "Confidential Information" in the Order establishing the Confidentiality Ring.

5. Wherever a document, or part of a document, is to be treated in accordance with the provisions of the Confidentiality Ring, it shall be marked with the name of the party or parties asserting that it contains Confidential Information.

Time for disclosure

6. All disclosure to be given pursuant to paragraphs 7 to 18 of this Order be given by not later than 5pm on 17 March 2014.

Disclosure by the Defendants

7. The Defendants, other than the Fifth Defendant, disclose into the Confidentiality Ring a copy of the index to the European Commission's file in Case C.38.359 – *Electrical and mechanical carbon and graphite products* (the "File").

8. The Defendants cooperate with one another to, so far as possible, prepare and disclose into the Confidentiality Ring a single English-language version of the European Commission's Decision of 3 December 2003 (document number C(2003) 4457) in Case C.38.359 – *Electrical and mechanical carbon and graphite products* (the "Decision"), in which:

    a. all redactions, save those excepted by paragraph 9 below, are removed;

    b. those redactions that remain identify by name the party or parties that maintain that the redaction should remain; and

    c. the extent of the text that remains redacted is made clear.

9. The only redactions that may remain in the version of the Decision disclosed pursuant to paragraph 8 above are those redactions that:

    a. are necessary to protect from disclosure "leniency information", as defined in paragraph 12 below; and/or

    b. the Defendants are unable to remove because they do not have access to the unredacted information.

10. Morgan be provided with a draft of the version of the Decision that the Defendants propose to disclose pursuant to paragraph 8 above and, not more than five working days later, Morgan shall (if so advised) provide to the Defendants a

list of those redactions that the Defendants are proposing to remove, which Morgan considers should be maintained, together with brief supporting reasons for maintaining each redaction listed.

11. Any list of redactions that Morgan provides to the Defendants pursuant to paragraph 10 above shall itself be disclosed into the Confidentiality Ring by the Defendants and, where the Defendants accede to one or more proposals made by Morgan, the version of the Decision disclosed pursuant paragraph 8 above shall identify those redactions as being maintained at Morgan's request.

12. "Leniency information" means:

    a. information, documents or passages within documents specifically prepared for, and submitted to, the European Commission by Morgan or a Defendant for the purpose of seeking immunity from, or reduction of, any fine in the context of the investigation that resulted in the Decision; and

    b. those documents or other materials annexed to such submissions that were expressly created for that purpose,

    but no document, or information within a document, shall be treated as leniency information if it pre-dates 18 September 2001, unless otherwise ordered following an application by Morgan made pursuant to paragraph 15 below.

13. All documents (including those which reasonably appear not to be leniency information) in the possession or control of the Defendants that form part of the File be disclosed into the Confidentiality Ring, save for those documents that constitute leniency information but where it is possible to redact leniency information in a document and disclose the remainder of that document, this shall be done and those redactions shall be made in accordance with paragraph 8.b and 8.c above.

14. Where a document required to be disclosed pursuant to paragraph 13 above originates from:

    a. one of the Defendants, only that Defendant shall disclose it; and

b. a third party, the Defendants may agree between themselves which of them will disclose it,

with a view to securing, so far as possible, that only one copy of each document required to be disclosed is disclosed.

15. Morgan has permission to apply to the Tribunal, if so advised, to seek protection of any documents or information on the File that pre-date 18 September 2001 on the basis that they contain leniency information, and any such application is to be made as soon as possible, but in any event by not later than 5pm on 17 February 2014.

Disclosure by the UK Claimants

16. The UK Claimants give standard disclosure (within the meaning of Civil Procedure Rule 31.6(a) and (b) (Standard disclosure – what documents are to be disclosed)) of documents and information identifying purchases of relevant products that form the basis of the UK Claims, the products purchased, the quantities in which they were purchased, the identities of the entities purchasing and selling such products, the date of purchase and the price paid.

17. The disclosure ordered by paragraph 16 above shall include, but is not limited to, all documents and/or information on the basis of which the Witness Statement of Mr Paul Gold, dated 13 June 2013, was prepared.

18. The UK Claimants give standard disclosure (within the meaning of Civil Procedure Rule 31.6(a) and (b) (Standard disclosure – what documents are to be disclosed)) of documents relevant to their legal entitlement to bring the UK Claims, including relevant transfer and assignment documentation relating to the privatisation of the British Railways Board pursuant to the Railways Act 1993.

Disclosure statements

19. The UK Claimants and each of the Defendants file and serve, at the same time as disclosure is given, a disclosure statement (complying with Civil Procedure Rule 31.10(6) and (7)), setting out the steps taken to comply with the obligations imposed by this Order.

Disclosure requests

20. Initial requests for specific disclosure in respect of all documents, save for leniency information, shall be made at the time for disclosure provided for by paragraph 6 above, and shall be presented in the form of an electronic spreadsheet, the form of which is to be agreed between the parties at least four weeks prior to the deadline set by paragraph 6 above (subject to review and amendment by the Tribunal).

Further directions

21. A further case management conference be listed for the first available date on or after 31 March 2014 with a time estimate of one day.

22. The parties provide the Tribunal with indications as to their availability for the weeks commencing 31 March and 7 April 2014 for such a case management conference by not later than 5pm on 27 January 2014.

23. The parties provide the Tribunal with a proposal, or proposals, for an outline timetable and directions to trial of the UK Claims, including possible commencement dates for, and the estimated duration of, such trial, by not later than 5pm on 3 February 2014.

24. Costs be in the case.

25. There be liberty to apply.

REASONS

(1) At the case management conference that took place before us on 20 January 2014, we indicated that the approach suggested by the parties in the Joint Statement did not commend itself to the Tribunal. Having granted the UK Claimants' application to lift the stay as against the Defendants (by our Ruling of 15 August 2013 ([2013] CAT 18), the "Jurisdiction Ruling"), the Tribunal's expectation was that the UK Claims would be taken forward as expeditiously as possible, consistent with justice. Indeed, we had understood that that was the purpose of the application to lift the stay.

(2) We consider that the parties should have been under no illusions that this would be the Tribunal's approach. Several indications from the Tribunal, not only in the Jurisdiction Ruling itself, but also in a letter from the Tribunal to the parties dated

7 January 2014, seeking to focus the parties' minds – for example, encouraging the parties to identify at an early stage whether production of large quantities of documents (in hard- or softcopy) can be avoided by identification of the likely issues at trial and through the early involvement of experts to agree basic approaches or figures – appear to have gone largely, if not entirely, unheeded.

(3) By way of example, the UK Claimants sought to postpone the disclosure of documents relating to the purchases of relevant products that form the basis of the UK Claims, identifying the products purchased, the quantities in which they were purchased and the identities of the entities purchasing and selling such products, on grounds of practicality and timing. Miss Masters, Q.C. (for the UK Claimants) told us that her clients were willing to disclose these documents, but that it would be a very complex and time-consuming task, and that it would be one better addressed later in the proceedings. It seems to us, however, that in the absence of this disclosure, the UK Claims cannot sensibly proceed. Clearly, identifying matters such as the quantities of the cartelised products the UK Claimants purchased, and at what price and from whom, will be critical for the UK Claims and the Defendants have a right to see this material. Miss Masters also submitted that some of this information is in the hands of the Defendants, not the UK Claimants. That may be the case but since the UK Claimants cannot disclose information they do not have, we do not see that this is a valid objection. They should disclose what information they do have.

(4) We wish to be clear that we do not underestimate the complexity of the exercise that the UK Claimants will have to embark upon but this disclosure will have to be given whatever course these claims take, i.e. whatever the fate of Morgan's appeal to the Supreme Court, and simply postponing very difficult questions of disclosure is not a course that we consider appropriate.

(5) The provisions of this order reflect the proactive approach that is necessary to focus the efforts of the parties to bring the UK Claims to trial as expeditiously, efficiently and cost-effectively as possible.

(6) It is for these reasons that, as set out in paragraphs 21 and 23 of this Order, we will list a further case management conference in late March or early April 2014 (rather than in July 2014, as proposed by the UK Claimants, or at some point in time after the Supreme Court gives judgment on Morgan's appeal, as proposed by the Defendants) and have directed the parties to put together proposals for a timetable to trial of the UK Claims. It is to be hoped that the parties will now begin to focus on the necessary steps to actually bring the UK Claims to trial, including how they intend to make their respective cases, and the evidence and disclosure necessary for that purpose.

(7) Whilst the Defendants sought to limit their disclosure, at this stage at least, by application of some sort of 'temporal filter' – such that only 'pre-existing' documents contemporaneous with the operation of the cartel found in the Decision and on the File would be disclosed – we did not consider that to be appropriate. It seems clear that there may well be documents on the File that pre- or post-date the operation of the cartel (and which do not constitute leniency information) that may be relevant to the UK Claims and these should be disclosed.

(8) We concluded that it was appropriate to expressly apply CPR 31.22, and to establish a confidentiality ring, given the concerns about protecting the European Commission's leniency programme and taking account of the Defendants' concerns in relation to the possible use of information disclosed in the context of the UK Claims in other actions that may be, or already are being, brought against them in other EU Member States as a result of the Decision. The Defendants invited us to exclude from the confidentiality ring lawyers working for the Spanish firm Cuatrecasas, Gonçalves Pereira S.L.P., also engaged by the UK Claimants but not on the record before us. We decline that invitation, however, on the basis that the express application of CPR 31.22 by this Order, together with the form of undertaking that a Relevant Adviser (as defined by the Order establishing the Confidentiality Ring) is required to give, should provide adequate protection for the Defendants in this regard.

(9) As to the deadline for completion of the first round of disclosure, the UK Claimants initially proposed four weeks, while the Defendants argued that a minimum of ten weeks was required. We consider that, as we are now directing somewhat more extensive disclosure than that envisaged by the UK Claimants, four weeks would be rather ambitious but that, by the same token, ten weeks is unnecessarily lengthy. It seems to us that eight weeks will provide the parties with adequate time to comply with the obligations imposed on them by this Order.

(10) The other matters addressed by this Order were, broadly speaking, agreed between the parties and we do not, therefore, set out here our reasons for ordering them.

Marcus Smith Q.C. Made: 20 January 2014
Chairman of the Competition Appeal Tribunal Drawn: 27 January 2014