Neutral citation [2017] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1248/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

26 January 2017

Before:

THE HONOURABLE MR JUSTICE GREEN
(Chairman)

Sitting as a Tribunal in England and Wales

B E T W E E N:

PEUGEOT S.A. AND OTHERS

Claimants

-v-

(1) NSK LTD.
(2) NSK EUROPE LTD.
(3) NTN CORPORATION
~~(4) JTEKT CORPORATION~~
(5) AB SKF
~~(6) INA-HOLDING SCHAEFFLER GMBH & CO. KG~~
~~(7) SCHAEFFLER HOLDING GMBH & CO. KG~~
~~(8) SCHAEFFLER AG~~

Defendants

RULING (DISCLOSURE)

APPEARANCES

Mr. Tristan Jones (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants

Mr. David Bailey (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the First and Second Defendants

Mr. Tony Singla (instructed by White & Case LLP) appeared on behalf of the Third Defendant

Mr. Josh Holmes (instructed by Macfarlanes LLP) appeared on behalf of the Fifth Defendant

A. Introduction

1. A number of issues arose for determination at the Case Management Conference ("CMC") convened in this case and heard on 12th January 2017. One particular issue concerned what the Claimants argued was a point of principle of some wider significance. I ruled upon this issue at the culmination of the hearing and indicated that I would give reasons later. In this ruling I set out my reasons.

2. The issue focuses upon a particular aspect of disclosure in a follow-on claim for damages in the light of a decision ("the Decision") on the part of the European Commission imposing substantial fines for price fixing (bid rigging in respect to requests for quotations ("RFQs")). The decision was predicated upon the price fixing being illegal by object; there are no findings in the Decision as to the effects of the cartel upon, *inter alia*, purchasers. In the present case two key issues are (i) the extent (if any) of the overcharge arising by reason of the cartel and (ii) the extent (if any) of the passing-on (to their customers) by purchasers of any overcharge found to exist.

3. The procedure adopted in this case has entailed expert economists instructed by the parties engaging at a very early stage with the issues with the express intention of seeking to agree and thereby reduce the number and scope of the disputes arising to their maximum degree. In this connection the experts have already embarked upon the work needed to perform relevant econometric and regression analyses with a view to formulating their respective cases on, *inter alia*, overcharge. It is a feature of this case that a very great deal of the evidence and the argument will centre upon complex statistical modelling by those experts.

4. The Defendants now seek disclosure of two categories of information and data from the Claimants. These relate to the process whereby the Claimants procured the product the subject of the cartel (bearings used in the automotive industry). It is argued that the experts need this evidence/data to perfect their modelling.

5. The Claimants however argue that in principle such evidence is irrelevant and, in any event, that it would be wholly disproportionate (in terms of cost, time and benefit) to search for.

6. In considering this issue three points arise. First, by the very nature of the data and evidence being sought the Tribunal is not in a position (at this juncture) to form even a provisional view on the factual merits of the competing arguments; the most that can be expected is that the Tribunal forms a view in the abstract ie whether the category of evidence sought is capable in principle of being relevant and useful. Second, the dispute raises the issue of whether evidence in the hands of a victim of a cartel can *ever* be relevant to an assessment of the overcharge inflicted by the perpetrators of the cartel. Third, if the view the Tribunal forms is that in principle evidence in the hands of victims/purchasers might be relevant and useful how a disclosure exercise can then be devised which is proportionate given the risk that the exercise could turn out to be costly and time consuming yet futile.

7. I have arrived at the following conclusions on these issues. First, even though the Tribunal cannot at this stage say with confidence on the facts of the case that the disclosure sought *will* be relevant and useful it is possible in the abstract to form a view that as a category it is capable of being relevant and useful and that is sufficient to justify ordering disclosure. Second, that documents and data etc in the hands of a victim / purchaser may in principle (albeit dependent upon the facts of the case) be relevant to issues of overcharge. Third, that to ensure that the disclosure exercise to be ordered is proportionate a two stage procedure is to be undertaken with the first stage comprising disclosure of a sample of documents and the exercise to be conducted in a highly focused and speedy manner. In the light of the results of the first stage exercise the parties (and the Tribunal if called upon) will then be far better placed to know whether it is proportionate to proceed to a second and more extensive disclosure stage and, if it would be proportionate to proceed, what further searches might yield relevant documents.

8. The efficacy of this process involves close and sensible cooperation between the parties and the experts. In this ruling I have set out the broad principles to be

applied. I have left it to the parties, cooperating fully, and subject to supervision by the Tribunal if needs be, to work out the precise details of how the two stage process is to be implemented and then to implement the exercise.

B. The disputed disclosure

9. The disputed disclosure concerns documents relating to the procurement process for the product in issue (category 7) and contract renegotiations and amendments (category 8). In an early version of the disclosure sought the Claimant's sought "*all*" documents in relation to these categories. However in a reformulated, and narrowed down, version the Claimants sought the following:

> "7. Each Defendant shall by 27 January 2017 identify 10 Requests for Quotations ("RFQ") from the Claimants. In respect of each RFQ identified by the Defendants, the Claimants shall disclose:
>
> a. The documents comprising the RFQ;
>
> b. Responses received to the RFQ;
>
> c. Documents relation to the criteria for shortlisting tenderers;
>
> d. Evaluation of responses from successful tenderers;
>
> e. Documents relating to the criteria for awarding a contract to a particular tenderer or tenderers; and
>
> f. Documents relating to the negotiation of the final price with the successful tenderer or tenderers.
>
> 8. Documents evidencing the reasons for price renegotiation or other contract amendments to contracts relating to the RFQs identified by the Defendants in paragraph 7, above."

C. The Commission Decision

10. The Decision relates to a single and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement in the sector of automotive bearings. The infringement consisted of price coordination between bearings manufacturers

vis-à-vis customers of automotive bearings. It covered the entire European Economic Area (EEA). The infringement lasted for all participants from 8 April 2004 until 25 July 2011, except for NFC, whose participation in the infringement started on 6 May 2004 and ended on 25 July 2011. The Decision describes the product in the following way:

> "2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS
>
> 2.1. The product
> (3) The products concerned by the anticompetitive conduct are bearings for automotive applications ('automotive bearings'), comprising bearings supplied to automotive original equipment manufacturers ('OEMs'), which are car, truck and automotive component manufacturers (together also referred to as 'automotive customers'). Bearings are machine parts with rolling elements used in rotating parts of such cars, trucks and automotive components.
>
> (4) Automotive bearings are usually customer-specific products. To select the suppliers, the automotive customers generally issue requests for quotations (RFQs). An RFQ can be issued for a new contract or platform but also in the context of an existing contract or platform when a customer requires a change in the design of the bearings, wishes to increase production or seeks to obtain a reduction in the price of bearings. The whole selection process may last several months to one year. Automotive customers often request yearly discounts from the bearings suppliers, usually referred to as annual price reduction (APR) requests, to reflect yearly production efficiencies over the course of the contract.
>
> (5) Steel is a major cost element common to all bearing manufacturers. It is a cost item that is generally addressed in the price negotiation process with the automotive customers. During certain periods of the infringement steel prices increased significantly."

11. In relation to modus operandi of the cartel the Decision finds:

> "4. DESCRIPTION OF THE EVENTS
>
> 4.1. Nature and scope of the activities
> (28) JTEKT, NSK, NFC, SKF, Schaeffler and NTN participated in a cartel the overall aim of which was to coordinate the pricing strategy vis-à-vis automotive customers. This included to varying degrees:
>
> (1) the coordination of the passing-on of steel price increases to automotive customers;

(2) the coordination of responses to certain RFQs issued by automotive customers, in particular with respect to determining the undertakings that would quote, the price at which they would quote and the moment at which quotes would be submitted in response to such RFQs;
(3) the coordination of responses to certain APR requests from automotive customers;
(4) the exchange of commercially sensitive information, in particular on the status of negotiations with customers on the passing-on of steel price increases, on prices quoted or to be quoted to specific customers in the context of a RFQ, on APR requests or on general or specific contract terms.

(29) There was in general a common understanding among participants not to undercut the other competitors' prices when prices increased as a result of an increase in the steel price so as to maintain existing shares of supply. Occasionally, the participants discussed complaints about non-compliance with the anti-competitive arrangements.

(30) The evidence shows that the participants engaged in various anti-competitive practices through multilateral, trilateral and bilateral contacts.

4.1.1. Multilateral meetings
(31) In multilateral meetings (also called by some participants "steel" or "club" meetings) the participants coordinated the pass-on to automotive customers of increases in the steel price. In that context, the participants exchanged information on:

- which customers had (not yet) accepted a price increase due to the steel price increase,
- the amount of the requested or accepted increase,
- the timing of the increase, as accepted by the OEMs, and
- the status of the negotiations with their respective automotive customers, if still pending.

(32) At these multilateral meetings, the participants also coordinated certain upcoming RFQs or APR requests from customers and/or the response to be given to a specific customer request relating to the re-negotiation of contract terms.

4.1.2. Bi- and trilateral discussions
(33) The participants engaged in bi- or trilateral discussions through meetings as well as emails and/or telephone contacts, which took place when cartel members had a common

interest in discussing specific customers and/or platforms either alongside the multilateral meetings or on an ad-hoc basis. In such bi- or trilateral discussions, the participants coordinated, to varying degrees, inter alia quotations to be submitted in response to specific RFQ, supply shares to specific customers of common interest, percentages of discounts to be negotiated with certain customers, and the passing-on of steel price increases with respect to specific customers."

12. In respect of geographic and temporal scope the Decision states:

"4.2. Geographic scope
(34) The cartel covered the entire EEA. The anti-competitive contacts of the participants concerned supply to automotive customers' production facilities in the EEA, no matter where exactly these facilities were located within the EEA.

4.3. Temporal scope
(35) The evidence demonstrates that a continuous set of anti-competitive contacts started on 8 April 200430. Hence the Commission takes this date as the starting date of the infringement for JTEKT, NSK, SKF, Schaeffler and NTN, which attended the multilateral meeting held on that date. NFC's involvement in the cartel is deemed to have started on 6 May 2004 as there is evidence that it was aware on that date of the 8 April 2004 meeting and of the conclusions reached at that meeting.

(36) In the period from 26 January 200831 until 20 July 201032, there were no multilateral meetings between JTEKT, NSK, SKF, Schaeffler and NTN. However, bilateral/trilateral anti-competitive contacts among the participants, including NFC, continued (in the form of meetings, emails or telephone calls). These were significantly less frequent, concerned fewer customers and fewer instances of price coordination, compared to the period where multilateral meetings took place.

(37) Based on the available evidence, it is considered that the cartel continued until 25 July 2011, the date of the inspections by the Japanese Fair Trade Commission. On the same day, or within a few days thereafter, several participants submitted leniency applications, or applications for a marker, to the Commission. In the absence of evidence of on-going collusion after 25 July 2011, it is considered that the infringement ended for all parties on that date."

D. Claimants submissions

13. Mr Tristan Jones, for the Claimant, argued that neither category should be made the subject of an order for disclosure. He commenced his analysis by contending that in principle there was no reason to order disclosure at all.

14. With regard to the question of disclosure of documents relating to procurement Mr Jones argued that it was the conduct of the Defendants, and not that of the victim of the cartel, which was relevant to overcharge. Further, whether or not a victim was a good or a bad negotiator was beside the point. The Defendants had not pleaded or advanced a case that by engaging in (alleged) sub-standard negotiating the Claimant had failed in its duty to mitigate its loss. Mr Jones cited from the European Commission Staff Working Document, Practical Guide, "*Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*" (accompanying the communication from the Commission on Quantification of Harm) Strasbourg 11th June 2013. At paragraph [30] the Commission, in a section on methods and techniques, explains that whilst an identified method for computing loss might seek to construct how a market would evolve in the absence of the infringement "*… more direct evidence available to the parties and to the court (for instance, internal documents of the infringing undertakings on agreed price increases) may also provide… useful national information for assessing quantum…*". Mr Jones pointed out that the focus of attention was upon disclosure of documents from the infringers, not the victim. He also pointed out that at paragraphs [38ff] the Commission, once again, focussed upon the conduct of the Defendants and not that of the victims. Equally, in relation to the analysis of regression analysis, he pointed out that the evidence required was not purchaser driven.

15. So far as the issue of disclosure of amendments (category 8) is concerned, Mr Jones complained that the request entailed an enormous exercise which would take an inordinate amount of time and cost and which could very well be unproductive of materially useful information. He pointed out that for each RFQ there could be hundreds or thousands of amendments and that the basic information had already been provided/incorporated. He also pointed out that

the data set provided contained approximately 16,000 amendments and that the reasons for the amendments were given in approximately 11,000 cases. He accordingly argued that the request was irrelevant, otiose and disproportionate.

E. Defendants submissions

16. The position advanced by the Defendants was largely articulated by Mr Holmes. I can boil down his submissions to the following propositions. First, the extent to which individual procurement exercises involved bids from suppliers outside of the cartel would be highly relevant to the question whether the cartelists were able to rig prices at a supra-competitive level. He pointed out that significant volumes of the relevant product were purchased from non-cartelists. He said that the RFQ procurement processes would identify this, critical, issue. Second, he argued that the Claimant was a large and sophisticated purchaser who knew a lot about input costs. He argued that documents relating to the procurement process would enable the Defendants to see whether the purchaser was able to exert any countervailing buyer power which would negate, wholly or partially, the ability of the cartelists to impose supra-competitive prices. He argued that documentation which evaluated responses from successful tenderers might show whether and if so how Peugeot understood and influenced tendering processes by virtue of intelligence gained from historical procurement exercises.

17. Mr Holmes also relied upon various expert commentaries which underscored the importance of background context in the process of quantifying antitrust damages. In particular he cited from the Oxera study (December 2009) "*Quantifying anti-trust damages – towards non-binding guidance for courts*". He drew the Tribunal's attention, by way of illustration, to the observation of the authors (at page 15) to the following:

> "In certain circumstances, if the bid-rigging cartel fails to include one firm, it is possible that this would undermine the bid-rigging behaviour in the auctions, bringing prices down to competitive levels. At the same time, the clearer rules in such auctions may make it more straightforward to analyse what would happen in the absence of the bid-rigging cartel; in other words, the counterfactual may be somewhat more straightforward to determine in bid-rigging cases than for other types of cartel."

18. Mr Holmes also cited a reference to a judgment of the Federal Court of Justice in Germany (19th June 2007) cited in the Oxera Report at page 83 where the Bundesgerichtshof is reported as having taken into account buyer power when determining quantum. Finally, Mr Holmes also cited from the Commission Staff Document (*ibid*, at page 9) which emphasised the need for "*pragmatic approaches*" to the collection of evidence from the parties as part of the exercise in determining quantum.

19. In relation to category 8, Mr Holmes, argued that the issue of amendments was a pleaded one upon which the Claimants relied and that for the reasons already given the ability of the Claimant to renegotiate contracts once concluded could be significant to the question of overcharge.

F. Analysis and conclusion

20. I turn now to consider my conclusions in relation to the above disputes.

21. In principle I start from the proposition that it is desirable for econometric analysis to be capable of being benchmarked, or capable of being placed into context, by internal disclosure. Many econometric analyses involve the making of assumptions about how markets work. If those assumptions turn out to be incorrect, wholly or partially, then the resultant statistical analysis may be materially flawed. It is also commonplace that the very best experts, and those most versed in market knowledge, are the middle and senior managers employed from within the affected companies who on a daily basis live with the intricacies of their markets. If, to take a hypothetical situation, an expert generated an econometric model which then turned out in court to collide with the inferences properly to be drawn from internal disclosure then it would have been far better for the expert to have grappled with that inconsistency and attempted a reconciliation at the earliest possible stage in preparation for litigation. This, in my view, is preferable to the expert being subsequently challenged in cross examination at trial upon the basis that the econometric modelling was theoretical, artificial and divorced from reality. Early engagement with the underlying facts including disclosed material will, in my view, generate a more robust and defensible final analysis. My starting point

therefore is that disclosure of this sort, if relevant and useful, should be given sooner rather than later.

22. There are two reasons in particular why I consider that disclosure of categories 7 and 8 should be given.

23. First, I accept the Defendants' analysis that in principle disclosure from a victim/purchaser which potentially casts light on the extent, if at all, to which the purchaser could play the cartelists off against other non-cartel suppliers may be important in establishing whether the cartel was effective in raising prices above the competitive level and, even if they were, whether this was mitigated to any degree by external constraints imposed by non-cartelists. Accordingly, documents which address matters such as: the identity of potential bidders; the extent to which they participated in the cartel; the extent to which they placed bids; the extent to which they succeeded in obtaining contracts; the prices they tendered; and evidence as to whether non-collusive bids were themselves affected by the existence of (higher) collusive prices (e.g. through price following), etc., may all be relevant.

24. Second, I accept that disclosure might also be relevant as to whether the Claimants were able to exert some degree of pressure or constraint upon the cartelist suppliers. The Defendants argue that disclosure might shed light upon the existence of "*countervailing buyer power*" which operated to suppress the cartel's ability to raise prices above a competitive level. As I understood the argument it was being contended that (quite apart from the ability of the purchaser to exploit options outside the cartel) the Claimants may be big enough to constrain the exercise of market power by the cartel. At one level countervailing buyer power may be a function of buyers who exercise monopsony or oligopsony power; it is intrinsically less likely where a buyer lacks such purchasing power or influence. In the present case it is not, at least at this stage of proceedings, clear that there will be an argument that the Claimants do in fact enjoy such a degree of market power. But at another level I can see that disclosure might reveal that the Claimants, through iterative procurement exercises performed over an extended period of time, became seised of market intelligence which they were then able to use to create some degree of

purchasing power or influence or were able to use other negotiating devices to limit the power of the cartel to set supra-competitive prices. I am less persuaded of this as a rationale for disclosure than the first reason, but I cannot discount it.

25. If categories 7 and 8 do disclose information which is of material relevance to the ability of the Defendant's to set and maintain prices above the competitive level then this may be relevant to the experts in the assumptions they make and in their modelling. For these reasons I accept that categories 7 and 8 should be disclosed.

26. The next question concerns the proportionality of the searches to be performed. My reasoning for ordering disclosure is, as I have explained above, based upon an acceptance that in principle the disclosure might be relevant. This is not, however, a case where inculpatory documents have *already* been placed before the Tribunal establishing or suggesting that there are *other* relevant documents held by the Claimants such that the Tribunal can be confident that there are more of the same yet to be disclosed. Accordingly, in this case the Tribunal should take into account the Claimant's concerns that the disclosure exercise could be lengthy, expensive and ultimately futile and the Tribunal should hence seek to devise a process which balances the respective interests in a proportionate manner.

27. In this respect I have ordered that disclosure of categories 7 and 8 should take place in stages.

28. In relation to category 7 in the first stage the parties will adopt a highly focused and expedited sampling exercise whereby the Claimants will disclose sections of the material only. If the exercise proves to be fruitful then the parties will proceed to a second, and more comprehensive, stage. 12 RFQs are to be selected at the option of the parties (they may therefore be before, during or after the cartel period). Each Defendant is to select 2 RFQs; and the Claimant is to select 6 broken down into 2 RFQ per Defendant. In relation to each RFQ the parties are to cooperate to focus on key documents relating to strategy and the process of negotiation. This exercise does not preclude narrowly focussed searches of the emails of one or more key individuals. There is to be mutuality of disclosure

so that if documents relevant to the issues are discovered by the Defendants these are also to be disclosed. However it is recognised that the real burden in this connection will lie with the Claimant.

29. So far as category 8 is concerned I, again, adopt two-stage procedure. In stage one the Defendant is to produce a witness statement setting out explanations for the codes which describe the reasons for the changes or amendments to the contracts. As I have already observed there are approximately 16,000 data points and there is the possibility of some form of reasoning having been already given in relation to 11,000. As I understand matters the modifications may frequently be for technical or accounting reasons unrelated to price. However, they may be significant for instance having been negotiated on an ad-hoc basis in circumstances which might, arguably, shed light upon the bargaining power of the Claimant. The purpose of the witness statement is to enable the parties to isolate those amendments which are most likely to contain some relevant information. The Witness Statement should also identify who the key individuals are who might be in possession of emails which could be searched. Further, the Claimant should provide an explanation of how the amendment process operates in practice. I do not propose to be prescriptive in this regard. The Claimant is expected to set out in appropriate detail information which will enable the parties, and their respective experts, to thereafter engage in the second stage, which is to identify a sample of the data points which would then generate relevant disclosure. I expect the parties to focus the disclosure exercise upon key documents and key individuals.

30. The directions given during the hearing and repeated in this ruling are deliberately limited to broad principles governing the disclosure exercise. The parties collectively are better placed, having now been given guidance by the Tribunal, to work out the details of this exercise. I indicated at the CMC that, in so far as difficulties arose the Tribunal would be prepared to rule upon them on paper without the need for a further oral hearing. In the event the parties have managed to reach agreement on the terms of the order without needing to refer matters to the Tribunal. However, the Tribunal will, if necessary, address

matters arising out of implementation of the Order to ensure that the objectives set out in this ruling are observed.

The Honourable Mr Justice Green
Chairman of the Competition Appeal Tribunal

Charles Dhanowa O.B.E., Q.C. *(Hon)*
Registrar

Date: 26 January 2017