IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1440/7/7/22

BETWEEN:

CLARE MARY JOAN SPOTTISWOODE CBE

Applicant/
Proposed Class Representative

- v -

(1) NEXANS FRANCE S.A.S.
(a company incorporated under the laws of France)
(2) NEXANS S.A.
(a company incorporated under the laws of France)
(3) NKT A/S (formerly NKT HOLDINGS A/S)
(a company incorporated under the laws of Denmark)
(4) NKT VERWALTUNGS GMBH (formerly NKT CABLES GMBH)
(a company incorporated under the laws of Germany)
(5) PRYSMIAN CAVI E SISTEMI S.R.L.
(a company incorporated under the laws of Italy)
(6) PRYSMIAN S.P.A.
(a company incorporated under the laws of Italy)

Respondents/
Proposed Defendants

REASONED ORDER

UPON reading the Proposed Class Representative's collective proceedings claim form filed on 9 May 2022, treated as filed on 10 May 2022 pursuant to Rule 111(4)(c) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules") ("the Claim Form")

AND UPON reading the application filed on 9 May 2022, treated as filed on 10 May 2022 pursuant to Rule 111(4)(c) of the Tribunal Rules, made pursuant to Rule 31(2) of the Tribunal Rules for permission to serve the Claim Form (and accompanying documents) on the Second

Proposed Defendant ("Nexans S.A."), the Third Proposed Defendant ("NKT A/S"), the Fourth Proposed Defendant ("NKT Verwaltungs GmbH"), the Fifth Proposed Defendant ("Prysmian Cavi e Sistemi S.r.l.") and the Sixth Proposed Defendant ("Prysmian S.p.A.") out of the jurisdiction (the "Rule 31 Application")

AND UPON reading the clip of correspondence filed in support of the Rule 31 Application

AND UPON reading the letter dated 20 June 2022 from Scott+Scott UK LLP to the Tribunal on behalf of the Proposed Class Representative, NKT A/S and NKT Verwaltungs GmbH (together, "the NKT Proposed Defendants") withdrawing the Rule 31 Application in respect of the NKT Proposed Defendants due to agreement obtained from Addleshaw Goddard LLP to accept service on behalf of the NKT Proposed Defendants within the jurisdiction

IT IS ORDERED THAT:

1. The Claimants be permitted to serve the Second Proposed Defendant, the Fifth Proposed Defendant, and the Sixth Proposed Defendant outside the jurisdiction at their respective addresses provided at paragraph 12 of the Rule 31 Application.

2. This Order is made without prejudice to the rights of the Second Proposed Defendant, the Fifth Proposed Defendant and the Sixth Proposed Defendant to apply pursuant to Rule 34 of the Tribunal Rules to dispute the Tribunal's jurisdiction. Any such application should take account of the observations set out in *Epic Games, Inc. v Apple Inc.* [2021] CAT 4 at [3].

REASONS

(1) Background to the Claim

1. The claims which it is proposed to combine in these collective proceedings brought pursuant to the regime in section 47B of the Competition Act 1998 ("the Act") are follow-on claims arising out of the Decision of the European Commission ("the Commission") in Case AT.39610 *Power Cables* dated 2 April 2014 (the "Decision").

(a) The Decision

2. In the Decision, the Commission determined that the Proposed Defendants had infringed Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Article 53 of the Agreement on the European Economic Area ("EEA Agreement"). According to the Claim Form, the central finding of the Commission is that there was an unlawful cartel between February 1999 and January 2009 concerning the high-voltage underground and submarine power cables market, in which the Proposed Defendants (amongst others) participated ("the Cartel"). The Commission found that the Cartel arrangements were in place for an uninterrupted period between 18 February 1999 and 29 January 2009. During this time, the Claim Form describes that members of the Cartel: (i) allocated power cables projects according to geographic region or customer, and (ii) exchanged information on prices and other commercially sensitive information, in order to ensure that the designated power cable supplier would be able to present the most attractive offer to the customer.

3. Each of the Proposed Defendants is an addressee of the Decision and each has been found liable on a joint and several basis for the infringement described in the Decision. It is said by the Proposed Class Representative that the collective duration of the Proposed Defendants' liability covers the entire period of the Cartel. The Proposed Defendants brought appeals against the Decision, which were ultimately dismissed by the Court of Justice of the European Union ("CJEU") in a series of judgments handed down between November 2019 and January 2021.[1] In consequence, the Proposed Class Representative claims that the Decision became final as against Nexans S.A.S. and Nexans S.A. ("the Nexans Proposed Defendants") on 16 July 2020; as against the NKT Proposed Defendants on 14 May 2020; and as against Prysmian Cavi e Sistemi S.r.l. and Prysmian S.p.A ("the Prysmian Proposed Defendants") on 24 September 2020.

[1] Cases C-591/18 P – Brugg Kabel (28 November 2019), C-607/18 P – NKT (14 May 2020), C-611/18 P – Pirelli (28 October 2020), C-582/18 P – VISCAS (19 December 2019), C-589/18 P – Furukawa Electric (19 December 2019), C-590/18 P – Fujikura (19 December 2019), C-596/18 P – LS Cable (28 November 2019), C-601/18 P – Prysmian (24 September 2020), C-606/18 P, C-607/18 P – Nexans (16 July 2020), C-593/18 P – ABB (28 November 2019), C-599/18 P – Silec Cable SAS and General Cable Corp (14 November 2019), C-595/18 P – Goldman Sachs (27 January 2021).

(b) The Parties

4. The Proposed Class Representative seeks to represent individuals who suffered loss and damage as a result of the impact of the Cartel on domestic electricity bills in Great Britain ("the Proposed Class"). The Proposed Class comprises all people alive (and representatives of deceased people) who bore the cost of paying for domestic consumption of electricity supplied via the distribution network in Great Britain on or after 1 April 2001. The Proposed Class Representative describes in detail in the Claim Form her extensive experience in regulated markets and in defending consumer rights in support of her ability to act fairly and adequately in the interests of the class members.

5. The Proposed Defendants are producers and suppliers of high-voltage submarine and underground power cables worldwide. Each was named as an addressee of the Decision. Each is said by the Proposed Class Representative to form an undertaking (or part of an undertaking) for the purposes of Article 101 of the TFEU.

(c) The Claim

6. The loss and damage alleged by the Proposed Class Representative to have been suffered by the Proposed Class is said to have been caused as follows:

   (a) Purchasers of high-voltage power cables, including electricity transmission and distribution companies in Great Britain, and offshore windfarms serving Great Britain, paid increased prices for such cables as a result of the Cartel.

   (b) That overcharge has been (and continues to be) passed on to electricity retailers through the charges which transmission and distribution companies levy on retailers, and via payments made by retailers in respect of offshore windfarms pursuant to the Renewables Obligation (as defined and explained in the Claim Form).

   (c) In turn, the overcharge was passed on by electricity retailers by way of increased electricity bills, thereby causing loss and damage to those who bore the cost of such bills – the Proposed Class.

7. At paragraph 30 of the Claim Form, the Proposed Class Representative sets out the evidence in support of her case that there was an overcharge which was then passed on to consumers, referring in particular to (i) the report of expert economist Richard Druce of NERA Economic Consulting and (ii) the report of industry expert Peter Bennell of Sohn Associates.

(2) Application under Rule 31(2) of the Tribunal Rules

8. I note that the Proposed Class Representative has served the Claim Form (and supporting documents) on the First Proposed Defendant, Nexans France S.A.S., on the basis that permission of the Tribunal to serve out of the jurisdiction was not required since Nexans France S.A.S. could be served at the address of its UK establishment, pursuant to section 1139(2) of the Companies Act 2006. Directions for service have already been given on this basis by the Tribunal.

9. Similarly, I understand from the letter dated 20 June 2022 from Scott+Scott UK LLP on behalf of the Proposed Class Representative and the NKT Proposed Defendants that the latter have instructed solicitors based in the UK to accept service on their behalf. The Tribunal notes that this is without prejudice to the right of the NKT Proposed Defendants to contest jurisdiction; however, for present purposes, the Proposed Class Representative has served the Claim Form on the NKT Proposed Defendants through their solicitors in the UK. I therefore do not address the Rule 31(2) Application in so far as it pertains to the NKT Proposed Defendants, this having been expressly withdrawn by the Proposed Class Representative by reason of subsequent events. The remainder of this Reasoned Order therefore decides the position with respect to Nexans S.A. and the Prysmian Proposed Defendants, "the Foreign Proposed Defendants".

10. I think it is likely, as the PCR contends, that the proceedings are to be treated as taking place in England and Wales. Accordingly, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court by reference to the relevant principles in the Civil Procedure Rules 1998 ("CPR") (*DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18]).

11. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, they involve determinations of whether:

(a) There is a serious issue to be tried on the merits of the claim. This is a test of whether there is a real as opposed to fanciful prospect of success on the claim.

(b) There is a good arguable case that the claim falls within one of the "gateways" set out in CPR Practice Direction 6B at paragraph 3.1.

(c) In all the circumstances, England and Wales is clearly or distinctly the appropriate forum for the trial of the claim.

12. The burden is on the Proposed Class Representative to satisfy the Tribunal that all three requirements are satisfied.

(a) Serious Issue to be Tried

13. I consider that there is a real prospect of success of the claim in that it combines follow-on claims arising from the Decision of the Commission of which each of the Proposed Defendants is an addressee. The losses claimed are said to arise as a result of the infringements of competition law established by the Decision.

14. I note that the Proposed Class Representative brings to the Tribunal's attention several matters with respect to her duty of full and frank disclosure, notably, in respect of the substantive merits of the claim. She raises the possibility of the Proposed Foreign Defendants seeking to argue that the Cartel had no effect on prices and, therefore, that there was no overcharge. In anticipation of this, she preliminarily responds as follows:

(a) The existence of the Cartel overcharge and its pass-through to the members of the Proposed Class have both been addressed by the economic and industry expert reports filed with the Claim Form, which she considers demonstrates a reasonable basis for alleging that the members of the Proposed Class suffered loss and damage.

(b) The Proposed Class Representative is in a position of asymmetric information as regards the participants in the Cartel, particularly as she contends that each has declined to engage with her requests for the voluntary provision of information and disclosure prior to issue. The Proposed Class Representative contends that it is to be inferred from the fact that the Cartel persisted successfully for a prolonged period that it was profitable for the cartelists to engage in the Cartel and that the only realistic source of such profit can have been inflation of the prices which the cartelists were able to charge their customers.

(c) The quantification of prospective damages likely to be suffered by the Proposed Class is likely to be a complex matter, and it will require a methodology to be developed to estimate to what extent and over what time period the Cartel overcharge is likely to continue to be passed-on to households. The Proposed Class Representative is confident that her experts and the Tribunal will be able to carry out this assessment. In any event, she contends that the threshold for service out will have been met in respect of past losses, which are more straightforward to quantify than the ongoing losses.

(d) Whereas it appears that the NKT Proposed Defendants object that the "vast majority of high voltage power cable supplies in Great Britain have already been litigated", she contends that this objection is immaterial, since the pre-existing litigation concerns claims brought by transmission and distribution companies in respect of their losses caused directly by the Cartel overcharge on high-voltage power cables projects. Further, the judgments and settlements in that litigation cannot bind the members of the Proposed Class who were not party to them.

15. In terms of potential grounds of opposition to certification of the proposed collective proceedings, the Proposed Class Representative adds that:

(a) She considers that the claims are eligible for inclusion in the proposed collective proceedings;

(b) The present claim bears many similarities with the mass consumer claim brought in *Merricks v. Mastercard* [2020] UKSC 51. Further, on the basis of the decision in *Mark McLaren Class Representative Ltd v. MOL (Europe Africa) Ltd* [2022] CAT 10, the present claim is suitable for certification on an opt-out basis; and

(c) The Proposed Class Representative's characteristics and the arrangements which she has put in place in order to bring the claim counter any potential objection to her suitability to act as a Proposed Class Representative.

16. At this stage of the proceedings, given the expert evidence that has been adduced, I am content to find that there is a real prospect of an expert economist being able to test empirically the extent to which an overcharge existed and to which the Proposed Class have suffered loss as a result of the infringements identified in the Decision. However, I appreciate that this is an area that may well be controversial, and in relation to which further expert evidence may be adduced. Nothing in this order is intended to fetter any such later review. On the basis of the material before me, I consider there to be a real prospect of the quantum aspect of the proposed collective proceedings being established.

17. I am mindful of the existence of a claim in the Tribunal (brought under section 47A of the Act) against Nexans S.A.S. and Nexans S.A. arising out of the cables cartel and the Decision.[2] The existence of this claim is not presently addressed by the Proposed Class Representative; however, I accept that complex issues as to pass-on cannot be resolved at this preliminary stage, and it is not a reason to refuse permission for service out of the jurisdiction.

18. In the premises, I accept that there is a serious issue to be tried.

19. As regards the "gateways" under CPR PD6B, I consider there to be a good arguable case that the claim falls within gateway 3.1(3) on the basis that permission to serve out is not required in respect of Nexans S.A.S., which has a UK establishment, and there is

[2] Case No: 1518/5/7/22 *London Array Limited & Others v Nexans France SAS & Others*.

a real issue which it is reasonable for the Tribunal to consider against Nexans S.A.S. The Foreign Proposed Defendants are necessary and proper parties to the proposed proceedings because like Nexans S.A.S, each is an addressee of the Decision and is therefore jointly and severally liable to compensate members of the Proposed Class for loss caused by the Cartel.

20. I accept that if the claims against the Foreign Proposed Defendants were raised in separate proceedings, elsewhere from those against Nexans S.A.S, such proceedings could be anticipated to involve substantially the same witnesses, experts and issues. This point applies with particular force in the case of Nexans S.A., which is part of the Nexans group and hence part of the same undertaking as Nexans S.A.S.

21. Given this finding, I do not have to decide whether gateway 3.1(9)(a) or (9)(b) is available to the Proposed Class Representative; however, I am content to add that even if I were wrong about gateway 3.1(3), I consider there to be a good arguable case that the claim falls within gateway 3.1(9) (the tort gateway) on the basis that damage is sustained within the UK. Firstly, in respect of gateway 3.1(9)(a), the claim concerns losses sustained arising from the payment of domestic electricity bills in Great Britain, and in respect of gateway 3.1(9)(b), it is said by the Proposed Class Representative (with the support of expert evidence) that the Proposed Defendants and other cartelists engaged in bid-rigging and other anticompetitive behaviours in respect of high-voltage power cables projects in Great Britain (or in UK territorial waters).

22. Finally, the Proposed Class Representative invites the Tribunal to find that the proceedings should be treated as proceedings in England and Wales for the purposes of Rule 18 of the Tribunal Rules. This is because:

    (a) The First Proposed Defendant has a branch registered as a United Kingdom establishment under the Companies Act 2006.

    (b) The claims combined in the collective proceedings are governed by English and Scots law.

(c) The claim relates in its entirety to losses associated with consumption in the United Kingdom, since it concerns losses sustained arising from the payment of domestic electricity bills in Great Britain.

(d) Although the Proposed Representative proposes that persons otherwise falling within the definition of the Proposed Class but who are no longer domiciled in the UK should be permitted to opt in, the claim relates principally to persons domiciled in the United Kingdom.

23. The Proposed Class Representative adds that the Tribunal is the proper place within the United Kingdom to bring the claim because of its procedures allowing for collective proceedings.

24. The task of the Tribunal is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. I am satisfied that the UK (and this Tribunal) is the proper place in which to bring the proposed collective proceedings. The case involves losses sustained arising from the payment of domestic electricity bills in Great Britain, and the Proposed Defendants and other cartelists allegedly engaged in bid-rigging and other anticompetitive behaviours in respect of high-voltage power cables projects in Great Britain (or in UK territorial waters). Altogether, I therefore consider that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction.

Sir Marcus Smith Made: 19 August 2022

President of the Competition Appeal Tribunal Drawn: 19 August 2022