Neutral citation [2025] CAT 14

Case No: 1632/5/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 March 2025

Before:

JUSTIN TURNER KC
(Chair)
LESLEY FARRELL
TONY WOODGATE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ASDA STORES LIMITED
(2) ICELAND FOODS LIMITED
(3) MARKS AND SPENCER P.L.C.
(4) MARKS AND SPENCER GROUP P.L.C.
(5) OCADO RETAIL LIMITED
(6) WM MORRISONS SUPERMARKETS LIMITED
(7) INTERNATIONAL SEAFOODS LIMITED
(8) ALDI STORES LIMITED
(9) CO-OPERATIVE GROUP LIMITED
(10) CO-OPERATIVE GROUP FOOD LIMITED

Claimants

- v -

(1) BREMNES SEASHORE AS
(2) CERMAQ GROUP AS
(3) GRIEG SEAFOOD ASA
(4) GRIEG SEAFOOD UK LTD
(5) LERØY SEAFOOD GROUP ASA
~~**(6) LERØY SEAFOOD UK LIMITED**~~
(7) SALMAR ASA
(8) MOWI ASA
(9) MOWI CONSUMER PRODUCTS UK LIMITED
(10) MOWI SCOTLAND LIMITED
(11) SCOTTISH SEA FARMS LIMITED

(12) SSF HJALTLAND UK LIMITED
(13) SSF SHETLAND LIMITED

Defendants

Heard at the Rolls Building on 4 and 5 February 2025

JUDGMENT

APPEARANCES

Anneli Howard KC, Julian Gregory and Alastair Holder Ross (instructed by Stephenson Harwood LLP) appeared on behalf of the Claimants.

Emma Mockford (instructed by Freshfields LLP) appeared on behalf of the First, Third and Fourth Defendants.

Tim Johnston (instructed by Clifford Chance LLP) appeared on behalf of the Second Defendant.

Paul Luckhurst and Rayan Fakhoury (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Fifth and Sixth Defendants.

Charlotte Thomas (instructed by Schjødt LLP) appeared on behalf of the Seventh Defendant.

Daniel Jowell KC and Gerard Rothschild (instructed by Skadden, Arps, Slate, Meagher & Flom LLP) appeared on behalf of the Eighth to Tenth Defendants.

Conor McCarthy (instructed by Shepherd & Wedderburn) appeared on behalf of the Eleventh to Thirteenth Defendants.

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A. INTRODUCTION

1. This claim concerns the alleged manipulation of the price of farmed Atlantic salmon. The Claimants carry on business operating well-known UK supermarkets. The First, Second, Third, Fifth, Seventh and Eighth Defendants are Norwegian companies engaged in the business of farming and supplying farmed Atlantic salmon raised in Norway (hereafter the "Norwegian Defendants"). The Fourth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defendants (hereafter the "UK Defendants") are engaged in the business *inter alia* of farming and supplying farmed Atlantic salmon raised in Scotland. Proceedings against the Sixth Defendant, being Lerøy Seafood UK Limited, have been discontinued.

2. The Claimants say that over 50% of the global production of farmed Atlantic salmon comes from Norway and approximately 7% from Scotland. The Defendants are said by the Claimants to supply more than 50% of the global production of farmed Atlantic salmon.

3. It is said that there is a distinction to be drawn between salmon which is farmed in Norway (hereafter "NFAS") and salmon which is farmed in Scotland (hereafter "SFAS"). SFAS is said to be a premium product which commands a higher price.

4. The Claimants contend that the Defendants engaged in anticompetitive cartel activities from at least 2011 to 2019. They claim damages under section 47A of the Competition Act 1998. The claim was filed on 7 February 2024 following the issue of a Statement of Objections by the European Commission (the "Commission") in Case AT.40606, ("*Farmed Atlantic Salmon*") on 25 January 2024, which concerns matters related to this claim.

5. The particulars of claim allege that the Defendants were engaged in a single and continuous infringement contrary to section 2 of the Competition Act 1998, and, prior to 31 December 2020, Article 101(1) Treaty on the Functioning of the European Union ("TFEU") and Article 53(1) European Economic Area ("EEA") Agreement. The Defendants are said to have been party to an unlawful

agreement and/or concerted practice in relation to the coordination of the sale price for farmed Atlantic salmon in the EEA and the UK and the manipulation of the NASDAQ Salmon Index. This index, it is said, provides an international benchmark for the pricing of farmed Atlantic Salmon and derived products globally, and therefore in the UK.

6. On 2 February 2024 the Claimants made an *ex parte* application for permission to serve out of the jurisdiction against the Norwegian Defendants. In support of the case that there is a serious issue to be tried in the UK the Claimants pointed to the Commission investigation in case AT.40606, and the statement of objections which was issued against the First, Second, Third, Fifth, Seventh and Eighth Defendants on 25 January 2024. The Application for service out was supported by a witness statement from Genevieve Quierin, a partner at the law firm representing the Claimants, which explained that in due course the Commission will issue an infringement decision "which will be binding on the Norwegian Defendants and the Court for the purposes of establishing liability". The statement that the decision would be binding on the Defendants and this Tribunal was wrong.[1]

7. Permission to serve out was granted by the President of this Tribunal in a reasoned order of 7 February 2024. Service has been complicated by a dispute over whether it could be effected by post under a 1931 Convention between the UK and Norway (the "1931 Convention between the UK and Norway regarding Legal Proceedings in Civil and Commercial Matters"). We declined to resolve, at this stage, this dispute because service has now been, or is being, effected under the Hague Service Convention. With the exception of the First Defendant the Norwegian Defendants have each acknowledged service, and the Claimants anticipate that service on the First Defendant will take place within the next few weeks. We will resolve the question of whether the Norwegian Defendants were served under the 1931 Convention if, and when, it becomes necessary so to do.

8. The Issues which arise on this application are:

[1] It is suggested by the Claimants that a novel point of law may arise as to whether the Defendants should be precluded from contesting the Commissions findings.

(1) Whether we should decline jurisdiction over this claim in favour of Norway.

(2) Whether the claim against the UK Defendants should be struck out.

(3) Whether the order for service out of the jurisdiction should be set aside because of a material non-disclosure by the Claimants.

9. We have concluded that the UK is the proper place for this claim, irrespective of whether the application to strike out the claim against the UK Defendants succeeds. We have refused to strike out the claims against the UK Defendants. We find that there was no material non-disclosure.

B. THE CLAIM

10. The Commission Press Release relating to the Statement of Objections, dated 25 January 2024, reports that it is the preliminary view of the Commission that the Norwegian Defendants have breached EU antitrust rules by colluding to distort competition in the market for spot sales of NFAS. It is said to concern "sales on the spot market into the EU, as opposed to sales based on long-term contracts". There is no reference to SFAS. The Commission's investigation is ongoing and is anticipated to conclude in 2025/2026. The same or related alleged cartel activities have also been the subject of regulatory investigations and private damages claims in the US and Canada (the latter of which have been settled).

11. The Claimants identify the relevant products at paragraph 11 of the particulars of claim:

> "11. The Cartel affected the prices of Atlantic salmon (*Salmo salar*) that has been farm-raised as opposed to caught in the wild. Farmed Atlantic salmon is part of the *Salmonidae* species but is distinguishable from wild Atlantic salmon (primarily from Norway and Scotland) and wild Pacific salmon (primarily from Canada and Chile). Over 50% of the global production of farmed Atlantic salmon is from Norway and approximately 7% from Scotland.
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> 12. According to the terms of the EC SO press release, the product immediately affected by the Cartel is fresh, whole and "head-on gutted" or "primary processed" Atlantic salmon farmed in Norway. It is averred that the Cartel also

> affected supplies of Atlantic salmon farmed in Scotland, Iceland, Faroe Islands, and Ireland (and elsewhere within Europe), whether directly by reason of the Defendants' unlawful conduct or indirectly as a result of the price effects of the Cartel. For the purpose of these proceedings, primary processed farmed Atlantic salmon from Norway, Scotland and elsewhere in Europe are together referred to as "farmed Atlantic salmon"."

12. It is notable that the product to which reference is made is farmed Atlantic salmon, which is distinguished from wild salmon and Pacific Salmon. The product is not defined by reference only to salmon produced in Norway (NFAS).

13. It is averred by the Claimants that the Defendant groups colluded to reduce price competition by engaging in various anticompetitive practices in a single and continuous infringement including coordinating sales prices or exchanging confidential information to fix, raise, skew or stabilise spot prices of farmed Norwegian salmon through the NASDAQ Salmon Index which is said to be the global price benchmark for prices of farmed Atlantic Salmon and derived products. The index is described in the following terms in the particulars of claim:

> "18. On 10 April 2013, the largest salmon farmers and exporters (including the Norwegian Defendants) announced a new spot price index based on their weekly sales prices (this is what is now known as the "NASDAQ Salmon Index"). Since that time and at least until the end of the Cartel Period, a panel of ten Norwegian salmon producers and/or exporters (the "Advisory Panel") report their weekly transaction prices for "Fresh Atlantic Superior Salmon, Head on Gutted" to the European market; the resulting spot price is known as "NQSALMON". The producers and/or exporters on the Advisory Panel, which included at the material time, amongst others, representatives from the Mowi, SalMar, Bremnes and Grieg Groups and Cermaq, represent 50-60% of all Norwegian salmon exports. The NASDAQ Salmon Index provides the baseline benchmark for wholesale prices of farmed Atlantic salmon globally, including in the UK."

14. The Claimants say that the infringement had an effect that extended beyond Norway and impacted the UK through its effect on prices of both Norwegian and Scottish farmed Atlantic Salmon.

> "69. Although the collusion took place in Norway, the infringement had an effect on (i) prices for exports of the farmed Atlantic salmon (and other Relevant Products) from Norway to the UK, (ii) prices for Scottish-farmed Atlantic salmon (and other Relevant Products) produced in the UK, and (iii) prices of farmed Atlantic Salmon (and other Relevant Products) produced and/or processed elsewhere in the EEA and sold to the Claimants. According to the EC SO press release, Norway accounts for over half of the production of farmed Atlantic salmon worldwide, where the EU (including the UK during

> the Relevant Period) is the main importer. Together, the Cartelists' conduct affected approximately 80% of sales of farmed Atlantic salmon from Norway to the EU. Further, it is averred that approximately 57% of Scottish salmon production is owned by the Norwegian Defendants. Each of the Defendant Groups has, or had during the Relevant Period, subsidiaries and/or farming, processing, sales, and/or distribution facilities in the UK, where they made direct sales to the Claimants; and/or each of the Defendant Groups has sold their farmed Atlantic salmon to intermediary wholesalers and processors, who sold them on to the Claimants."

15. The Claimants drew attention to a pleading in the US District Court of the Southern District of Florida entitled "Third Consolidated Amended Direct Purchaser Class Action Complaint" which makes reference to an email by which Jim Gallagher of the Eleventh Defendant is said to have stated that "SSF would make sure its prices were ahead of NASDAQ prices on a week-to-week basis". It is also said that he directly asked Mr Witzøe of the Seventh Defendant to contact Mr Beltestad of the Fifth Defendant to confirm what prices Lerøy was offering. The Claimants are yet to obtain copies of the relevant emails but say these allegations indicate that the tentacles of the cartel reached beyond Norway to other states including Scotland. That may or may not turn out to be the case, but that is not the current state of the pleadings, and it is not a matter which we need to resolve.

16. From paragraph 69 of the particulars of claim it is clear that the Claimants' case is that the alleged collusion in Norway had an impact on the UK market. The alleged collusion is said to have impacted not only prices of NFAS exported into the UK but also of SFAS sold in the UK because of its impact on the NASDAQ Salmon index. It is also alleged that the effects extended beyond spot prices and impacted contract prices fixed annually, weekly or ad hoc. See paragraph 91:

> "91. As an intended and/or foreseeable consequence of the breach or breaches of statutory duty pleaded above, the Defendants, and all of them, or the undertakings of which they formed part, caused the Claimants and/or Claimant Groups loss and damage, in that:
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> a. The Cartel had the effect of raising the prices that the Defendants, and any of the undertakings of which they form a part, and/or independent wholesalers, processors, distributors, and/or third-party suppliers, charged for the supply of Relevant Products. Without prejudice to the generality of the foregoing:

i. The reported prices on the NASDAQ Salmon Index were affected by the Defendants' unlawful collusion and manipulation as pleaded above, such that any increase in the Norwegian "spot" prices tended to increase or maintain the level of weighted average prices reported on the NASDAQ Salmon Index (such that they were higher than they would otherwise have been) and ultimately had a direct influence on the prices for the Relevant Products charged to the Claimants.

ii. The Defendants negotiated contract prices for the Relevant Products, which were fixed, annual, weekly, spot or ad hoc but in all cases, either expressly used the Norwegian spot prices or the weekly weighted average prices reported by the NASDAQ Salmon Index as a reference benchmark, or those prices otherwise influenced the prices they quoted and concluded with the Claimants."

C. FORUM NON CONVENIENS

17. Each of the Defendants contend that Norway is the appropriate forum for these proceedings. The Defendants accept that the Claimants have reasonable prospects of success on the claim and that they have a good arguable case that one of the gateways in paragraph 6.1 of Practice Direction 6B of the CPR is engaged. The dispute relates to the identification of the proper place for these proceedings.

18. Mr Jowell KC, who represents the Eighth, Ninth and Tenth Defendants, made submissions on behalf of all the Defendants on the issue of *forum non conveniens* with additional submissions from Mr Johnston for the Second Defendant, Mr Luckhurst for the Fifth and Sixth Defendants, Ms Thomas for the Seventh Defendant and Mr McCarthy for the Eleventh, Twelfth, and Thirteenth Defendants.

19. In support of the Defendants' case that Norway is the proper jurisdiction in which to hear this dispute Mr Jowell identified four key allegations. The *first* was the allegation that alleged collusion had taken place in Norway in relation to the Norwegian spot market. The *second* was that this alleged collusion was to increase the spot price for Norwegian salmon. The *third* is the allegation that the increase in the spot price increased prices globally, and the *fourth* is that the Claimants purchased farmed salmon at inflated prices. Mr Jowell submitted that this case, properly analysed, was a case about Norwegian companies allegedly

colluding in Norway, that the alleged tort was committed in Norway and that consequently Norway is the appropriate forum. The Defendants also relied upon the practical advantages of hearing the case in Norway given it would involve, principally, Norwegian documents and witnesses who speak Norwegian, submitting that this of itself is a strong factor in favour of the case being heard in Norway before a Norwegian-speaking tribunal.

20. The Defendants contend that the fact that UK defendants are served in these proceedings (and on the assumption those claims are not struck out) does not mean that the UK is the appropriate forum. As Mr Jowell submitted, the rule in *Owusu v Jackson*[2] no longer applies now that the UK is not a member of the EU and is not bound by the Brussels Regulation or the Lugano Convention, and consequently this Tribunal can decline to exercise jurisdiction over the UK defendants if Norway is the proper place for resolution of this dispute. In *Vedanta Resources PLC v Lungowe* [2019] UKSC 20 Briggs JSC explained the position:

> "38. Prior to *Owusu v Jackson* (although, as is now recognised, illegitimately once the UK had become a member state) the English courts took a two-handed approach to any attempt to use the ability to serve an anchor defendant (domiciled in England) as of right, coupled with invocation of the necessary or proper party gateway as the basis for obtaining permission to serve a foreign defendant out of the jurisdiction in cases where, leaving aside the risk of irreconcilable judgments, the natural forum was the jurisdiction where the foreign defendant was domiciled. With one hand, the court could refuse (or set aside) permission to serve the foreign defendant out of the jurisdiction. With the other hand the court could stay the proceedings against the anchor defendant, in both cases on the basis that the foreign jurisdiction was the *forum conveniens* (or using the CPR English equivalent, the "proper place") for the conduct of the litigation as a whole. By dealing with the claims against both defendants, the English court thereby neatly avoided the risk of irreconcilable judgments or multiplicity of proceedings.
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> 39. Following *Owusu v Jackson* the English court has one hand tied behind its back. No more can it stay the proceedings against the anchor defendant on *forum conveniens* grounds. This is the precise ratio of *Owusu v Jackson*, and the Court of Justice was fully aware of the difficulties which that conclusion would be likely to cause in the traditional exercise of the English court's *forum conveniens* jurisprudence in such cases. The result is, in a case (such as the present) where the English court is persuaded that, whatever happens to the claim against the foreign defendant, the claimants will in fact continue in England against the anchor defendant, the risk of irreconcilable judgments becomes a formidable, often insuperable, obstacle to the identification of any

[2] (C-281/ 02) EU:C:2005:120; [2005] Q.B. 801, ECJ.

> jurisdiction other than England as the *forum conveniens*. Thus not only is one of the court's hands tied behind its back, but the other is, in many cases, effectively paralysed. In the context of group litigation about environmental harm, the defendants say that it has the almost inevitable effect that, providing a minimum level of triable issue can be identified against an English incorporated parent, then litigation about environmental harm all around the world can be carried on in England, wherever the immediate cause of the damage arises from the operations of one of that group's overseas subsidiaries."

21. It was common ground that the approach this Tribunal should adopt in determining the appropriate forum was that set out by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460 as summarised by Butcher J in *Mercedes-Benz Group AG v Continental Teves (UK) Ltd* [2023] EWHC 1143 (Comm); [2023] 5 CMLR 21. Butcher J described the approach in the following way (at [21]):

> "(1) The question in both service in and service out cases is to identify the forum in which the case can be suitably tried for the interest of all the parties and the ends of justice (480G).
>
> (2) In service in cases, the burden is on the defendant to show that England and Wales is not the natural or appropriate forum for the trial and that there is another available forum which is clearly or distinctly more appropriate than England and Wales. If the court is satisfied that there is another available forum which is prima facie the appropriate forum, the burden shifts to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nonetheless take place in England and Wales. This is often described as the 'second stage' of the *Spiliada* approach.
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> (3) In service out cases, the burden of proof is on the claimant not just to show that England and Wales is the appropriate forum for the trial of the action, but that this is clearly so.
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> (4) In determining which of the competing fora is the appropriate forum, the court will look to see what factors point in the direction of this, and of the other forum. As Lord Goff put it (at 477G–478B):
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> > 'Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's case* [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz case*, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The *Abidin Daver* [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial

> connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Credit Chimique v. James Scott Engineering Group Ltd* 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.'
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> (5) As a general rule, the court will not be deterred from granting a stay or refusing permission to serve out simply because the claimant will be deprived of a 'legitimate personal or juridical advantage', such as damages on a higher scale or a more generous disclosure regime, unless it is shown through cogent evidence that there is a risk that substantial justice will not be done in the natural forum."

22. *Mercedes-Benz* involved multiple defendants, some of which had been served without permission and some with. The Defendants agree that the broad overarching principle in such a case is that described by Butcher J in *Mercedes-Benz* at paragraph 22, that "… [the court] should recognise that it is 'addressing a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried'".

23. A court in a particular jurisdiction may provide certain advantages to a claimant but that will not ordinarily be a decisive factor. In *Spiliada* Lord Goff observed that an advantage to one party will be a disadvantage to the other. He stated (at p 482):

> "The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried 'suitably for the interests of all the parties and for the ends of justice.' Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas."

24. Whereas procedural advantage will not usually be a relevant factor, a caveat to that is, in the words of Lord Goff, "provided that the court is satisfied that substantial justice will be done". Ms Howard KC, who represented the Claimants, drew our attention to the decision of the House of Lords in *Lubbe v Cape* [2000] 1 WLR 1545. Their Lordships had to consider whether the courts of England and Wales were the appropriate forum to hear a case relating to the defendant's breach of duty of care to employees who, it was said, were wrongfully exposed to asbestos in South African mines resulting in injury and death. The Court of Appeal had held that the factors pointing towards South Africa as the appropriate forum were "overwhelming". Lord Bingham, following *Spiliada,* explained that generally speaking the plaintiff must take the foreign jurisdiction as he finds it, even if it is in some respects less advantageous and that it is only if "substantial justice will not be done in the appropriate forum that a stay will be refused" (see p 1554). At page 1559 D to F he stated:

> "The clear, strong and unchallenged view of the attorneys who provided statements to the plaintiffs was that no firm of South African attorneys with expertise in this field had the means or would undertake the risk of conducting these proceedings on a contingency fee basis. The defendant suggested that financial support and professional assistance might be given to the plaintiffs by the Legal Resources Centre, but this suggestion was authoritatively contradicted. In a recent affidavit the possibility was raised that assistance might be forthcoming from the European Union Foundation for Human Rights in South Africa, but the evidence did not support the possibility of assistance on the scale necessary to fund this litigation.
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> If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion provides a compelling ground, at the second stage of the *Spiliada* test, for refusing to stay the proceedings here."

25. Plainly the facts in *Lubbe v Cape* are materially different, but the Claimants rightly make the point that a relevant consideration is whether or not litigation can proceed in the alternative forum under consideration, in this case Norway, due to the availability of funding: a topic to which we return below.

26. Mr Jowell placed reliance upon a decision of the Supreme Court in *VTB Capital v Nutritek International Corporation* [2013] UKSC 5; [2013] 2 AC 337, in

which it was held that the UK was not the proper place for the hearing of a dispute notwithstanding the applicable law was said to be English law. VTB, the Claimant, was regulated as a bank in England but was majority owned by JSC VTB Bank, a Russian State-owned bank in Moscow. The Defendant was a Russian company.

27. It was contended that the Claimant VTB was induced to enter into a facility agreement in London on the basis of a misrepresentation. Under the facility VTB advanced $225 million to a Russian company (Russagroprom LLC) in order that it might purchase six Russian dairy companies from the Defendant. The misrepresentation was said to originate in Russia but reached VTB in London.

28. Lord Mance held at paragraph 51:

> "The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors."

29. And at paragraph 57-58:

> "VTB's case is that deceitful representations emanated from the respondents in Russia, but were communicated to VTB, and relied upon by VTB, in London where VTB also suffered its loss. This analysis is important when considering where the tort was committed and what law governs it. But a wider view is necessary when considering the appropriate forum. The respondents' denials of any liability raise as issues whether the representations were inaccurate, whether, if so, any or all of the respondents knew of their inaccuracy and whether they joined together by 'common design' to make the alleged representations and what impact any inaccuracy of such representations had.
>
> Taking the Ernst & Young 2007 report, the factual focus will be on the dairy companies and on the respondents' understanding of their affairs and financial position, matters which are clearly likely to be more appropriately examined in Russia, where the companies, their records and any relevant company witnesses are. Ernst & Young examined the companies through their Moscow office, and the same is probably true of VTB's expert accountants, Deloittes. …"

30. And at paragraph 62:

> "This is a factor at the core of a question of appropriate forum. It was covered fully and helpfully by Mr Justice Arnold in…his judgment. In summary, it is clear that the issues in evidence will be focused overwhelmingly on matters which happened in and concern Russia, and that the documentary evidence, on both factual and expert matters, is likewise likely to be overwhelmingly Russian and to be found in Russia, where it could be heard in Russian without translators."

31. The Defendants contend that this case is analogous to the current dispute and that we should follow it. The exercise of the discretion to decline jurisdiction turns on the application of principles to the facts of a particular case. We see some important factual distinctions between the issues in *VTB Capital v Nutritek* and this case. *VTB* was concerned with a dispute which was entirely centred on Russia, with Russian interests on both sides and with the dispute arising from the acquisition of Russian dairies. We consider the facts of this case to be quite different. The allegation concerns the prices of Atlantic farmed salmon in the UK.

D. ANALYSIS

32. We disagree with the Defendants that this claim relates to a tort committed in Norway. Although collusion is said to have taken place in Norway, the damage said to have been suffered by the Claimants, which damage is an element of the tort, has occurred in the UK. In cartel cases the geographical location where the collusion takes place does not necessarily define the natural or appropriate forum. In the context of international business, collusion might take place in a number of different locations (and in the case of telephone calls and emails, in more than one location at the same time). In this case it is understood that the Norwegian companies are alleged to have largely or entirely colluded in Norway, but it is difficult to see how the position would change if they had colluded at meetings in other countries.

33. We consider the natural and appropriate forum for this case, being a case which is concerned with the price of a commodity on the UK market, is the UK. The two factors which tie it to the UK most firmly in our opinion are that we are concerned with an alleged breach of UK competition law and that these

proceedings concern the impact of any such breach on the price of salmon in the UK.

34. We see force in the submissions by the Defendants that these proceedings will require this Tribunal to review documents in Norwegian, and the hearing of witnesses who speak Norwegian as their first language, and that this is a factor which points to Norway as the appropriate forum. The Defendants reinforce this point by submitting that in the proceedings before the Commission there have been disputes over the accuracy of translations of documents from Norwegian into English and that the nuance of translation is likely to be important in doing justice between the parties. Those submissions are broad-based and we are sceptical that the nuance will be as important as the Defendants suggest. A number of the relevant documents have already been translated into English for the Commission and insofar as there remain disputes as to the accuracy of translation these are matters which can be addressed in UK proceedings, with evidence from suitably qualified translators. For this reason we do not consider the need for translation is a dominant consideration.

35. It should be kept in mind that relevant documents are also likely to be in English. This Tribunal will no doubt need to consider documents relating to sales of salmon in the UK with evidence from English-speaking witnesses as to the extent to which the NASDAQ Salmon Index impacted the price of NFAS and SFAS in the UK.

36. As to witnesses, insofar as key witnesses are not fluent in English evidence can be given through a translator.

37. Two further matters were urged upon us by the Claimants. The first concerned the desirability of having these proceedings heard at the same time as a class action against the Defendants. An application to commence collective proceedings was filed on 20 June 2024 against six proposed defendants, five of which are defendants to these proceedings. Those proceedings have not yet been authorised. We agree with the Claimants that *prima facie* it is advantageous that there be an opportunity to hear any class action on behalf of consumers in the same court and at the same time as these proceedings. This will enable a holistic

view to be taken on the question of pass on, thereby reducing the possibility of irreconcilable judgments. The Claimants contend that hearing these matters together will not be possible in Norway because an opt out class action in Norway will not attract litigation funding. It is said this mitigates in favour of the courts of England and Wales as being the proper place.

38. The Claimants point to the third expert report of Ole Tokvam, a lawyer and partner at the Norwegian firm of Raeder Bing, to support this submission. They rely in particular on the following conclusion as to the funding of opt out class actions in Norway:

> "While third party funding is permissible, the recovery of a funder's investment in opt-out actions is considerably restricted in practice since class members cannot be made liable, directly or indirectly, for costs. Moreover I am unaware of any case law relating to the entitlement of a funder to undistributed funds."

39. The meaning and relevance of this conclusion was discussed with Ms Howard KC on the first day of this hearing. The following day Ms Howard complained to the Tribunal that she did not have a "fair opportunity" to make certain observations in relation to this matter. At the same time she attempted to introduce a letter from Simmons and Simmons, solicitors for the proposed class representative in the proposed collective proceedings, to which the Defendants objected. Having read the transcript we do not agree with Ms Howard that she was not given an opportunity to make submissions in relation to Mr Tokvam's third expert report. Nevertheless, she was given an opportunity to repeat her submissions.

40. Mr Tokvam based his conclusion on a decision of the Norwegian Supreme Court in Ruling HR 2023-1034-A. The Supreme Court held that the costs of financing an opt out class action cannot be preauthorised by the Norwegian courts to permit the funder to recover costs from class members through a reduction in awarded compensation. As Mr Tokvam notes, no decision has been made as to whether funders can recover from undistributed damages.

41. As the Defendants point out, it is premature, prior to the authorisation of the collective proceedings, to hold that that is a reason for concluding that the UK

is the proper place for *these* proceedings to take place. We agree and do not place reliance upon this factor. If this factor *had been* decisive the proper course would have been to adjourn the question of whether these proceedings should be stayed in favour of Norway until after the question of certification of the collective proceedings had been determined.

42. Ms Howard's submissions on the second day of this hearing went even further. She submitted that not only would an, as yet, uncertified collective proceeding not be able to proceed in Norway, but that *these* proceedings would not be able to proceed either. This was not a point which had been advanced in the Claimants' skeleton argument and for this reason we treat the submission with circumspection. It was submitted that the only way that the Claimants could bring these proceedings is with litigation funding and that the Claimants would not be prepared to fund the case otherwise. That is a matter for the Claimants. We do not consider that a freely made choice for litigants not to fund litigation is a relevant factor in deciding whether or not Norway is the proper forum. We assume for present purposes that the Claimants are quite capable of funding these proceedings should they choose to do so.

43. The second additional point raised concerns the UK Defendants. We explain below why we have not struck out the claim against the UK Defendants. Notwithstanding the UK Defendants are arguably part of the same undertaking as the respective Norwegian Defendants the position is that as currently formulated, the principal allegations of collusion are levelled against the Norwegian Defendants. We accept Mr Jowell's submission that it is open to us to decline to exercise jurisdiction in respect of the UK Defendants in favour of Norway. In those circumstances the inclusion of UK Defendants in the claim has not been a dominant reason for our forming the view that the proper place for this case is the UK.

44. A further matter which was ventilated was the relevance of the Commission decision to this case. It is anticipated that the Commission will have reached a decision before the Tribunal hears this matter. It is now common ground that the Commission decision will not be binding on this Tribunal but that it will be persuasive. What persuasive means, as a practical matter, may be subject to

further argument. The position with respect to Norway is said to be essentially the same. In the event that these proceedings are before the Norwegian courts they will not be bound by any decision of the Commission. Again, it is common ground between the parties that the decision will be persuasive in the Norwegian courts. There was no exploration as to whether the quality of persuasiveness will differ between the two tribunals and consequently this is not a relevant factor in considering the appropriate forum.

E. THE APPLICATION TO STRIKE OUT THE CLAIM AGAINST THE UK DEFENDANTS

45. In addressing the strike out we have had regard to the well-known approach described by Lewison J in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15 in relation to summary judgment, which is applicable in this case.

46. The principal submissions on the question of the strikeout, on behalf of the UK Defendants, were ably made by Ms Mockford who represented the Fourth Defendant. She submitted that the Fourth Defendant (the other UK defendants largely adopting her submissions) would only be liable for the tort in the event that they formed part of the same undertaking as the Third Defendant. She contended that it was unarguable that the Fourth Defendant was not dealing in the same product because it was principally dealing in SFAS not NFAS and that consequently it was not part of the same undertaking, and therefore could not be liable for the alleged tort.

47. The Claimants put their case essentially two ways. First it was said that, as a matter of law, a subsidiary will be jointly and severally liable for an infringement committed by a parent company as a result of it being part of the same undertaking as the parent. Second it was contended that a subsidiary is jointly and severally liable for a cartel in which its parent participated where it knowingly and intentionally participated in and/or implemented the cartel by selling goods at prices inflated by the effects of the cartel.

48. Ms Mockford, for the Defendants, submitted that these alternatives, identified by the Claimants, had been subsumed into a two part test as identified by the CJEU in *Sumal SL v Mercedes Benz Trucks España SL* C-882/19 ("*Sumal*"): that the subsidiary be engaged in the same economic activity and deal in the same product as the parent; and that the parent exert decisive influence over the subsidiary. If these conditions were not satisfied, then the subsidiary was not part of the same undertaking and was not liable.

49. Sumal acquired two trucks from a subsidiary of Daimler, being Mercedes Benz Trucks España, via a dealership. Daimler had been found to be party to a cartel and Sumal sought to claim damages from the Spanish subsidiary on the basis it was part of the same undertaking. The court explained that in targeting the activities of undertakings – undertakings being an autonomous concept of EU law – the decisive criterion is the existence of unity of conduct on the market. It stated from paragraph 44:

> "On that basis, the concept of an 'undertaking' and, through it, that of 'economic unit' automatically entail the application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed (see, to that effect, as regards joint and several liability for fines, judgments of 26 January 2017, *Villeroy & Boch v Commission*, C-625/13 P, EU:C:2017:52, paragraph 150, and of 25 November 2020, *Commission v GEA Group*, C-823/18 P, EU:C:2020:955, paragraphs 61 and the case-law cited).
>
> However, it is also appropriate to observe that the organisation of groups of companies that may constitute an economic unit may be very different from one group to another. There are, in particular, some groups of companies that are 'conglomerates', which are active in several economic fields having no connection between them.
>
> Therefore, the possibility for the victim of an anticompetitive practice of invoking, in the context of an action for damages, the liability of a subsidiary company rather than that of the parent company cannot automatically be available against every subsidiary of a parent company targeted in a decision of the Commission punishing conduct that amounts to an infringement. As the Advocate General observes, in essence, in point 58 of his Opinion, the concept of an 'undertaking' used in Article 101 TFEU is a functional concept, in that the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue (see, to that effect, judgments of 12 July 1984, *Hydrotherm Gerätebau*, 170/83 EU:C:1984:271, paragraph 11, and of 26 September 2013, *The Dow Chemical Company v Commission*, C-179/12 P, EU:C:2013:605, paragraph 57)."

50. It then stated at paragraph 52:

> "It follows from the foregoing considerations that such an action for damages brought against a subsidiary presupposes that the claimant must prove, in order for it to be found that the parent company and the subsidiary form an economic unit within the meaning of paragraphs 41 and 46 of this judgment, the links uniting those companies referred to in the preceding paragraph, as well as the specific link, referred to in the same paragraph, between the economic activity of that subsidiary company and the subject matter of the infringement for which the parent company has been held responsible. **Thus, in circumstances such as those at issue in the main proceedings, the victim should in principle establish that the anticompetitive agreement concluded by the parent company, for which it has been punished, concerns the same products as those marketed by the subsidiary**. In so doing, the victim shows that it is precisely the economic unit of which the subsidiary, together with its parent company, forms part that constitutes the undertaking which actually committed the infringement found earlier by the Commission pursuant to Article 101(1) TFEU, in accordance with the functional interpretation of the concept of 'undertaking' identified in paragraph 46 of this judgment." (emphasis added).

51. In this passage the court distinguishes conglomerates, where associated companies are engaged in unrelated activities, from those where there is a link between the economic activity of the subsidiary and the parent. Reference is also made to the need to show the activity of the subsidiary concerns the "same products". The scope of what is meant by the "same products" did not arise in that case. It is not clear that the court required the subsidiary to be concerned with *identical* products. Paragraph 58 of the AG's opinion to which reference is made, refers to "activity unrelated to the economic sector":

> "If, therefore, a subsidiary – including in the case of a 100% or virtually 100% shareholding – carries out an activity unrelated to the economic sector in which the parent company has engaged in anticompetitive conduct, the 'functional' concept of an undertaking no longer applies. As a result, the subsidiary cannot be held jointly liable for the anticompetitive conduct of the parent company."

52. The reasoning in *Sumal* was approved by the Court of Appeal in *BMW v CMA* [2023] EWCA Civ 1506; [2024] Bus LR 1108, it being described as an important judgment, although in that case the Court of Appeal was concerned with the reasoning in relation to the influence of the parent over the subsidiary rather than the question of identity of economic activity.

53. It was common ground that for a subsidiary to form part of the same undertaking as the parent, it was necessary to show that the parent exercises decisive influence over the relevant subsidiary. As stated in *Sumal* (paragraphs 43-44 cited in *BMW v CMA*):

> "It is thus clear from the case-law that the conduct of a subsidiary may be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities, with the result that, in such a situation, they form part of the same economic unit and, hence, form one and the same undertaking responsible for the conduct that constitutes an infringement … Where it is established that the parent company and its subsidiary are part of the same economic unit and thus form a single undertaking, within the meaning of Article 101 TFEU, it is therefore the very existence of that economic unit which committed the infringement that decisively determines the liability of one or other of the companies making up that undertaking for the anticompetitive conduct of the latter … On that basis, the concept of an 'undertaking' and, through it, that of 'economic unit' automatically entail the application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed."

54. Submissions on the strike out application, for the Claimants, were persuasively made by Mr Gregory. He submitted that there was uncertainty as to whether the two part test, as advanced in *Sumal*, was the correct legal test to be applied in this jurisdiction and that other considerations may apply in the light of earlier case law, including the decision of Sales J in *Nokia v AU Optronics* [2012] EWHC 731. He submitted that as this concerned a developing area of law this was a particular reason for not acceding to this application. For present purposes we have adopted the test advanced in *Sumal*. Given the Defendants adopt this test they have to succeed on this strike out application when that test is applied.

55. Ms Mockford accepted that it was arguable that the Third Defendant exerted decisive influence over the Fourth Defendant. Her point was a short one: that the Fourth Defendant dealt principally with a different product, being SFAS. The reason for calling SFAS a different product from NFAS was said to be its different characteristics. Reliance was placed on evidence given on behalf of the Eleventh to Thirteenth Defendants by Mr James Gallagher, Managing Director of the Eleventh Defendant.

> "9. On pricing, Scottish salmon is a premium product, and I can charge more because of its premium status. It is in a different market to Norwegian salmon (or indeed any other salmon sourced from other countries). My customers generally expect to buy Scottish salmon and would not readily interchange this with Norwegian – not least because many consumers in the shops will specifically seek out and purchase Scottish salmon as opposed to salmon farmed in other places.

> 10. There are also a number of important differences in the way Scottish and Norwegian salmon is produced and marketed.
>
> 11. In terms of production, Scottish salmon is generally produced in lower stocking densities (typically 15KG per m3 compared to 25KG per m3), in accordance with RSPCA accredited or equivalent standards. Scottish salmon also generally follow a different dietary regime, normally with a lower fat content. Scottish farms are often smaller, leading to a higher cost base.
>
> 12. Scottish salmon has protected status under the UK Protected Geographical Indication Scheme. For salmon to be marketed as Scottish, it must meet the specifications and requirements of this Scheme. I am not aware of Norwegian salmon benefiting from similar status in the UK.
>
> 13. From a marketing perspective, in my experience UK retailers will almost always use Scottish salmon in their premium offerings within their product range. Many supermarkets will make provenance claims on their Scottish salmon to reinforce its Scottish origin. This is particularly true at the 'premium' end of the market. As far as I am aware, Waitrose and Sainsbury's sources the majority of their salmon from Scotland and markets it as such. Marks & Spencer sources Scottish salmon exclusively from dedicated farms operated by SSF."

56. It is plainly arguable that SFAS and NFAS are the same product. There may be scope for argument as to the circumstances where two products are to be considered "the same" as a matter of law, and how that is to be assessed. But even on the narrowest construction of the meaning of "same product" it is plainly arguable that SFAS and NFAS are the same. They are the same species of fish being *Salmo salar*. It is not suggested they are different strains, or that they are genotypic or phenotypic variants. The fact that they are raised at different stocking densities or "generally" receive a different diet does not mean that they are necessarily materially different. It is not suggested that when looked at on the plate they would be understood to be different products either by someone in the trade or by a typical consumer. As to their "normally" having a different fat content, this phrasing implies that sometimes they do and sometimes they do not. It cannot therefore be said that when looked at from the perspective of the notional biologist, nutritionist or consumer NFAS and SFAS are unarguably different products. Such matters are properly to be determined at trial.

57. As to the fact that they are marketed in different ways, with Scottish salmon being marketed as "Scottish" and commanding a higher price (about 10% higher) it does not automatically follow that the product is different for the

purposes with which we are concerned. We invited Ms Mockford to draw our attention to any authority which identifies that the way a product is marketed is relevant or determinative of whether it is the same as another product and she was unable to point to one.

58. In the premises we have no hesitation in holding that it is arguable that NFAS and SFAS are the same product.

59. It is also relevant that the Fourth Defendant actually sells NFAS although the quantities are said to be *de minimis*. To be clear, *de minimis* in this context did not mean absolutely *de minimis*, with sales in the region of one million kilos of NFAS. The submission was that it was *relatively* small, being about 2% of the Fourth Defendant's business. We were referred to no relevant case law to support the Fourth Defendant's position. In the circumstances we have no hesitation in rejecting the submission that it is unarguable that the Fourth Defendant did not deal in the same product as its parent.

60. Mr McCarthy made able submissions on behalf of the Eleventh to the Thirteenth Defendants (the Scottish Defendants). The Eleventh Defendant (SSF) is the parent company of the Twelfth and Thirteenth Defendants. It was established in 1969 and was acquired by Norskott Havbruk AS which is a 50/50 joint venture between the Fifth and Seventh Defendants. It acquired the Twelfth and Thirteenth Defendants (respectively SSFH and SSFS) on 15 December 2021 from the Third Defendant.

61. It is not pleaded that the Scottish Defendants were directly engaged in the alleged collusion which took place in Norway. It is not suggested that SSFH or SSFS dealt in NFAS.

62. The same point arises in that the Scottish Defendants deal with SFAS which we have held arguably is the same product as NFAS. SSF has engaged in what was said to be *de minimis* amounts of trade in NFAS being in the region of 20,000 tonnes. We do not consider this to be unarguably *de minimis* and irrelevant.

63. It is also said that it is unarguable that the Norwegian Defendants do not exert a decisive influence over SSF. We do not agree. Evidence was given by Mr Gallagher who explained that day to day management of the business is conducted by him and his team and that they deal with price negotiations for long term contracts. However, he also explained that the Fifth and Seventh Defendants each have two seats on the board (out of six) which meets twice a year (in addition to *ad hoc* communications) to determine the strategic direction of SSF. Even though the Fifth and Seventh Defendants may not be making day to day operational decisions it does not mean they are not exerting a decisive influence. As stated in Case T-451/14 *Fujikura v Commission* at paragraph 48:

> "As regards the relevant factors, the case law indicates that the decisive influence of the parent company does not necessarily have to result from specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities or similar aspects essential to market conduct. Such instructions are merely a particularly clear indication of the existence of the parent company's decisive influence over its subsidiary's commercial policy. By contrast, the parent company's influence over its subsidiaries as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters may have indirect effects on the market conduct of the subsidiaries and of the whole group. In the end, the decisive factor is whether the parent company exercises an influence that is sufficient to direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit (see, to that effect, *EI du Pont de Nemours* (T-76/08) at [62])."

64. A further point was taken with respect to SSFH. It is said that it is not in the salmon farming business but is the holding company for SSFS. The fact that SSFH is a holding company does not mean it is unarguably not part of the same undertaking as the Third Defendant or the Eleventh or Twelfth Defendants. It is holding the assets of SSFS for the single purpose of trading in SFAS.

65. For these reasons the strike out application against the Scottish Defendants fails.

66. Mr Jowell KC for the Ninth and Tenth Defendant adopted the submissions of Ms Mockford in relation to this issue. The Tenth Defendant has sold only SFAS but the Ninth Defendant has sold relatively small quantities of NFAS. For the same reasons the application to strike out these claims fails.

F. MATERIAL NON-DISCLOSURE

67. The Defendants contend that the application for service out of the jurisdiction should be set aside because of a material non-disclosure by the Claimants when they incorrectly stated that the Commission decision would be binding on this Tribunal.

68. A party who makes a without notice application to the Tribunal, including for permission to serve out of the jurisdiction, is required to make full and frank disclosure of all matters relevant to the Tribunal's decision. The Tribunal's Guide to Proceedings at paragraph 5.44 states:

> "Applications for permission need not be served on the defendants and will usually be determined on the papers. Since the Tribunal will not at that stage generally hear submissions from the defendants, the claimant is under duty to make full and frank disclosure of matters material to the application: see *DSG Retail v Mastercard Inc* [2015] CAT 7 at [44]-[45]."

69. In *DSG v Mastercard* Roth J stated (at [44]):

> "This application was heard without notice, as is usually the case for an application for permission to serve out. As on any application without notice, the applicant is under a duty to make full and frank disclosure of matters material to the application. That means not only that care needs to be taken in setting out the factual basis for the application, but also that the Tribunal's attention should be drawn to any significant objections to the application that the defendants could reasonably be expected to raise if they were before the Tribunal. The duty does not require disclosure to the same degree as on an application for a without notice injunction, such as a freezing order, where granting the application has immediate and potentially serious consequences for the defendant. The factors relevant to an application to serve out are only those which relate to the limited inquiry the Tribunal carries out in determining whether to grant such permission. Nonetheless, within the limited scope of that inquiry, if the claimant is aware of such factors as might cause the Tribunal to doubt whether permission should be granted, they should be clearly disclosed. This approach is well established on the authorities: see, eg, *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), [2004] 1 Lloyd's Rep 731, per Toulson J at [23]-[29]; *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, per Lawrence Collins J at [180]-[182]."

70. The Defendants contend that the obligation of full and frank disclosure is a strict one and that the same principles apply to service out as they do to the obtaining of a freezing order. That is correct up to a point, but as Roth J observed in this passage, the extent of that obligation will depend upon the nature of the application.

71. The question of what investigations an applicant must make in order to comply with their duty of full and frank disclosure was considered by Carr J in *Tugushev v Orlov* [2019] EWHC 2031 (Comm). *Tugushev* concerned the grant of a freezing order. The learned judge made clear that the duty of full and frank disclosure extends to an obligation to make reasonable enquiries. See paragraph 7(iv):

> "An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on."

72. The jurisdiction is penal in nature. The Defendants drew attention to the following statement by Popplewell J in *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) (another case concerning a freezing order) at paragraph 45:

> "The importance of the duty of disclosure has often been emphasised. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. … It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in *Re OJSC ANK Yugraneft v Sibir Energy PLC* [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

73. The nature of an application to serve out of the jurisdiction is different to an application for a freezing order or an application for *ex parte* injunctive relief. Defendants, or potential defendants, have an opportunity to set aside the order before any consequences arise, other than nuisance of the application itself. We invited the Defendants to draw our attention to cases which concerned a material non-disclosure in the context of an application to serve out.

74. One case to which the Defendants made reference, which concerned the setting aside of an application for service out for material non-disclosure, was a decision of Nugee J in *EasyGroup Ltd v EasyFly* [2020] EWHC 40 (Ch); [2020] ETMR 23 ("*EasyGroup*"). In that case the defendant was a Colombian domestic airline which was being sued inter alia for infringement of European and UK trademarks arising from its presence on the web. The services it provided were in Colombia. The material non-disclosure concerned a statement made in evidence and the particulars of claim that services were offered for persons wishing to travel from London to Colombia suggesting that EasyFly was offering flights in the UK. The learned judge held that it was not made clear to Morgan J, who granted permission to serve out, that this dispute was about services operated in Colombia which may have been marketed in Europe and the UK. The judge drew attention to the discretion he had, making reference to *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, and stated:

> "114. I can now revert to the question whether the Order should be set aside for failure to make full and frank disclosure. It is clear on the authorities that the Court has a discretion in this respect: see *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 (**"**NML**"**) at [136] per Lord Collins JSC. The court can either: (a) set aside the order for service and require a fresh application; or (b) treat the claim form as validly served and deal with the non-disclosure if necessary by a costs order….
>
> 116. But although it is clear that the discretion exists, I was given no real help, and shown no authorities, as to when it is appropriate to exercise the discretion one way or the other. Ms McFarland referred me to a note in the *White Book* at §6.37.4 to the effect that where there had been deliberate withholding of information that the applicant knew would or might be material, the order "should be set aside"; I am willing to accept that in principle, but I have not found any deliberate non-disclosure here. The same note indicates that the mere fact that non-disclosure is innocent does not deprive the court of its discretion to set aside an order for service out if the applicant has failed to make sufficient disclosure of material facts. Again however that does not provide any guidance as to how the discretion should be exercised….
>
> 120. Unlike *NML* where Argentina would not be any better off if NML were required to start again, it can indeed be said that the effect of requiring easyGroup to start again will be that they will only be able to claim damages for six years back from the date of any fresh proceedings rather than six years from the date of the existing proceedings. It is true that the claim for damages is not the primary relief that easyGroup seek; what they really want is for Easyfly to change its name, and they hope to achieve that by obtaining suitable injunctions against the use of the name in the UK and EU. But they do have a claim for damages, and as already referred to (para.82 above), that is not confined to identifiable financial loss (which might indeed be difficult to establish) but to damages on the user principle. I have no evidence as to what the quantum of such a claim might be, but if such a claim is worth pursuing, it

> is worth resisting, and I must assume that it might be reasonably substantial. I therefore do not think I can regard the benefit to the defendants of escaping potential liability for two years' extra damages as nugatory. In those circumstances I do not think it can be said, as it was in NML, that requiring easyGroup to start again would simply be a waste of time and money that would achieve nothing of practical value.
>
> 121. There is also this consideration. This is not a case where the causes of action and facts now relied on by EasyGroup are the same as they were before Morgan J. On the contrary many of the facts now relied on did not feature in the case as presented to him; and the facts relied on before him (the sale through kiwi.com) were no longer relied on before me. In a very real sense the case is a new and different case from that started two years ago. That, on the authority of *NML*, does not prevent the Court from granting permission to amend and dealing with the case as newly presented, but it is in my judgment a factor which points towards making easyGroup start again. This is not a case, as *NML* was, where if the original permission were set aside the claimant would simply issue an identically worded duplicate set of proceedings. In the present case easyGroup wishes to make very substantial changes to the case as originally presented to Morgan J, and indeed Mr Bloch accepted that even the amended Particulars of Claim he put before me would benefit from some tidying up in the light of the evidence on this application. I think there is in those circumstances something to be said in any event for requiring EasyGroup to start again, so that it can put forward the case it now wishes to put forward as a fresh start.
>
> 122. In those circumstances I propose to set aside the Order of Morgan J granting permission to serve the Defendants out of the jurisdiction."

75. Although there was a serious issue to be tried Nugee J set aside the permission. The material non-disclosure struck at the heart of the jurisdictional dispute in that case and the subsequent justification for bringing proceedings in the UK did not feature before Morgan J on the application for service out. That is different to the circumstances in this case.

76. In the event of a material non-disclosure we have a discretion whether or not to set aside the application for service out: *NML* at [136] per Lord Collins JSC. Relevant factors include whether the breach was deliberate and whether the judge granting permission would have made the order anyway. Such matters are not however determinative. In *EasyGroup* the non-disclosure was highly material notwithstanding there were further grounds for granting the order.

77. Here the complaint is that the Claimants' Service Out Application and related documents stated that any eventual infringement decision adopted by the Commission would be binding on the Tribunal. The point was also pleaded in the particulars of claim: see paragraphs 2, 4 and 62. This was incorrect. The

error arose because the Claimants wrongly interpreted public statements made by the Commission before the end of the Brexit implementation period.

78. Ms Quierin is a partner at Stephenson Harwood who has conduct of this action for the Claimants. She accepts that an error was made and has apologised for that error. She wrongly understood that the Commission's investigation was formally commenced before the end of the Brexit implementation period on 31 December 2020. This was based *inter alia* on statements made by the Commission dating from 2020 which referred to the investigation as ongoing prior to the end of the Brexit implementation period, including:

(1) Correspondence from the Directorate-General of Competition of the Commission to the Third, Fifth, Seventh and Eighth Defendants dated 29 April 2020 and 18 May 2020, which referred to "on-going proceedings in case AT.40606 Farmed Atlantic Salmon".

(2) A questionnaire issued by the Commission to purchasers of NFAS in June 2020, which noted that the Commission was "currently investigating alleged anti-competitive behaviour relating the production of Farmed Norwegian Atlantic salmon".

79. The Commission has explained, in a letter dated 15 July 2024, that the above statements made were "non-technical reference[s] to the fact that at that point in time a European Commission investigation in this case was on-going". A formal investigation was only initiated on 25 January 2024 with the institution of formal proceedings. The Claimants have applied to make appropriate amendments to the particulars of claim.

80. The Defendants submit that the error was careless, indeed they say "extremely careless", and that consequently the order for service out should be set aside and that this should be the end of these proceedings. Whether fresh proceedings are commenced, they say, is a matter for the Claimants. The Claimants accept there was an error but do not accept this amounted to a material non-disclosure.

81. Permission to serve out was granted by the President in a reasoned order of 7 February 2024. The President noted that the alleged facts on which the claim was grounded were under investigation by the Commission. That is the correct position. He made no reference to any future decision of the Commission being binding.

82. An error was made. Ms Quierin should not have advanced a position before this Tribunal, in a pleading, and in evidence, which was inaccurate. Ms Quierin recognises this and has apologised for that error. Although that error was material to the way the trial of this action may be conducted we need to consider whether the error was material to the grant of permission to serve out. As Roth J stated "factors relevant to an application to serve out are only those which relate to the limited inquiry the Tribunal carries out in determining whether to grant such permission".

83. The Defendants contend that the statement was material to whether there was a serious issue to be tried. It is common ground that there is a serious issue to be tried as against the Norwegian Defendants. As yet the Commission has made no findings so there are no findings which are capable of being binding. If the Commission does make findings before the trial of this action (which seems likely) then that may narrow considerably the scope of the dispute between the parties. But the future scope of that dispute is distinct from the merits of the case as viewed by the President. It was the Commission investigation itself which was relied upon in contending there was a serious issue to be tried, not the, as yet, unknown result.

84. The other point the Defendants make in relation to materiality is the fact that the submission that the decision would be binding in the UK would be a relevant factor in considering whether the UK was the proper place for this case. If the point had been made that the Commission decision would be binding in the UK but <u>not</u> binding in Norway then that may have been material. But that submission was not made (see paragraphs 72 to 88 of the First Statement of Ms Quierin) and no reference is made to it in the President's reasoned order.

85. We conclude that although this statement was incorrect it did not amount to a material non-disclosure for the purpose of obtaining permission to serve out. In the event we are wrong about this and the incorrect information amounts to a material non-disclosure then we would not have set aside the order. The reasons for this are the fact that it was innocently made, and was of little relevance to the decision the President made in determining whether permission should be given.

86. This is a unanimous decision of the Tribunal.

Justin Turner KC
Chair

Lesley Farrell

Tony Woodgate

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

Date: 5 March 2025