Neutral Citation Number: [2012] EWCA Civ 1190

Case No: A3/2011/2818

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
CHANCELLOR OF THE HIGH COURT
(2011) EWHC 2665 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th September 2012

Before :

LORD JUSTICE WARD
LORD JUSTICE ETHERTON
and
LORD JUSTICE TOMLINSON

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Between :

(1) KME YORKSHIRE LIMITED
(2) KME GERMANY AG
(3) KME FRANCE SAS
(4) KME ITALY S.P.A.
~~**(5) WIELAND-WERKE AG**~~
~~**(6) NEMCO METALS INTERNATIONAL LIMITED**~~
~~**(7) B. MASON & SONS LIMITED**~~
~~**(8) WIELAND-WERKE (U.K.) LIMITED**~~
(9) OUTOKUMPU OYJ

Appellants

- and -

(1) TOSHIBA CARRIER UK LTD
(2) CARRIER KÄLTETECHNIK AUSTRIA GES.M.B.H.
~~**(3) CARRIER REFRIGERATION OPERATION CZECH REPUBLIC S.R.O.**~~
(4) CARRIER S.C.S.
(5) CARRIER RÉFRIGÉRATION OPÉRATIONS FRANCE SAS
(6) CARRIER TRANSICOLD INDUSTRIES S.C.C
(7) CARRIER TRANSICOLD DEUTSCHLAND GMBH & CO. KG
~~**(8) CARRIER CR MAGYARORSZÀG HUNGARY KFT**~~
(9) CARRIER REFRIGERATION OPERATION ITALY S.P.A.
(10) CARRIER S.P.A.
(11) CARRIER HOLLAND HEATING BV
~~**(12) CARRIER SÜTRACK IBÉRICA S.A.**~~
(13) CARRIER KÄLTETECHNIK DEUTSCHLAND GMBH

(14) CARRIER BEDRIJFSKOELING NEDERLAND B.V.
(15) CARRIER ESPAÑA, S.L.
(16) CARRIER REFRIGERATION SWEDEN AB

Respondents

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Romano Subiotto QC, Daniel Beard QC and Paul Stuart (instructed by Cleary, Gottlieb, Steen & Hamilton LLP) for the 1st, 2nd, 3rd & 4th Appellants
Kassie Smith (instructed by Hogan Lovells International LLP) for the 9th Appellant
Jon Turner QC & Derek Spitz (instructed by Crowell & Moring LLP) for the Respondents

Hearing dates : 25th and 26th June 2012

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Etherton:

1. This is an appeal from the order of the Chancellor dated 19 October 2011, by which he dismissed (1) the applications of the first, sixth and eighth defendants, which are UK companies, to strike out the claim under CPR 3.4(2)(a) on the ground that there is no reasonable ground for bringing it, or alternatively to summarily dismiss the claim under CPR 24.2(a)(i) on the ground that no claimant has a real prospect of success; and (2) the applications of the second to fifth and ninth defendants, which are foreign companies, for an order under CPR Part 11 declaring that the courts of England and Wales do not have jurisdiction to try the claims against them.

2. The fifth to eighth defendants are no longer parties to the proceedings. We are concerned, therefore, only with appeals by the first defendant from the dismissal of its strike out and summary judgment application and the appeals of the second to fourth defendants and the ninth defendant from the dismissal of their applications challenging jurisdiction.

3. The claim is for, among other things, damages for breach of the anti-cartel provisions in Article 101 of the Treaty on the Functioning of the European Union ("Article 101") (which in substance was originally Article 85 of the Treaty of Rome ("Article 85") and then Article 81 EC Treaty ("Article 81")), and from 1 January 1994 Article 53(1) of the EEA Agreement, and equivalent breaches of statutory duty actionable under English law.

4. If the claim against the first defendant, KME Yorkshire Limited ("KME UK"), is struck out or summarily dismissed, then the remaining defendants claim that, by virtue of Council Regulation EC No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1, there is no jurisdiction. If the claim against KME UK is not struck out or summarily dismissed, then it is common ground that the courts of England and Wales have jurisdiction over the remaining defendants.

Article 101

5. Article 101 provides as follows, so far as material:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development, or investment;
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> (c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void."

The Commission's Decision

6. The background to the proceedings lies in a decision of the Commission of the European Union ("the Commission") published on 16th December 2003 ("the Decision"), which concluded that between 3rd May 1988 and 22nd March 2001 there were various agreements and concerted practices consisting of price fixing and market sharing in the industrial tubes sector. It is a substantial document which runs to 100 pages, 432 paragraphs or recitals and three Articles. In Article 1 of the Decision the Commission held, for the reasons given in the previous paragraphs, that various specified undertakings had infringed the provisions of Article 81 and from 1st January 1994 Article 53(1) of the EEA Agreement by participating in those agreements and concerted practices. By Article 2 the Commission imposed fines for that infringement. The undertakings named in Article 1 and the legal entities on which fines were imposed under Article 2 included the second, third and fourth defendants, each of which is a company in the KME group, and the ninth defendant, Outokumpu Oyj ("Outokumpu"). The second, third and fourth defendants are domiciled in Germany, France and Italy respectively. KME UK, which is domiciled in the UK, is the wholly owned subsidiary of the second defendant. Outokumpu is domiciled in Finland. KME UK was not named in either Article 1 or Article 2 or, indeed, in any other part of the Decision.

The proceedings

7. Over the period of infringement identified in the Decision the claimants, namely Toshiba Carrier UK Limited and various associated companies, bought substantial quantities of industrial copper tubes or goods incorporating such tubes.

8. They commenced these proceedings on 15th December 2009 for damages sustained as a consequence of breaches of duty consisting of participation in the unlawful cartel, as described and recorded in the Decision.

9. The defendants' applications to strike out the claim or for summary judgment and the applications challenging jurisdiction were issued on 4 January 2011.

The judgment of the Chancellor

10. The Chancellor gave a detailed judgment. It is sufficient, however, to say that he was satisfied that the amended Particulars of Claim are apt to raise against the UK defendants both a so-called "follow-on" claim (where liability is based on the findings in the Decision), and a so called "stand-alone" claim (where, so far as is necessary to establish liability, there is reliance on allegations and facts which are not to be found in the Decision itself): for the difference see *Enron Coal Services Ltd v English Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2 at paragraph [8] (Lloyd LJ). The Chancellor also found that, in so far as it was necessary to prove knowledge on the part of the UK defendants as to the cartel agreement or arrangements, an initial failure to plead knowledge had been remedied in correspondence between the parties' solicitors. Bearing in mind certain observations of Aikens J in *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm), [2003] 2 All ER (Comm) 683, and of Teare J in *Cooper Tire & Rubber Company Europe Ltd v Shell Chemicals UK Ltd* [2009] EWHC 2609 (Comm), the Chancellor said he had no hesitation in dismissing the applications of the UK defendants insofar as they were based on CPR 3.4(2)(a).

11. So far as concerns the applications for summary judgment against the claimants, the Chancellor examined the principal witness statements on behalf of the UK defendants and noted the absence of evidence from the claimants in response to some of them. He concluded as follows:

> "51. … But there has been no disclosure. As the Court of Appeal pointed out in *Cooper Tire* paragraph 43 the strength of the claimants' case cannot be assessed, let alone particularised, until after disclosure of documents. The fact that the claimants do not now have evidence to refute that of Mr Weyler or Mr Herold does not enable me to conduct a mini-trial, let alone, predict the outcome of the actual trial. The fact is that these defendants too were part of the same group and were involved in the same economic activity as the undertaking found by the Commission to have infringed Article 101. In my view these defendants have not shown that the claim against them does not have a real prospect of success."

The appeal

12. The original and supplementary "skeleton" arguments of the first to fourth defendants on this appeal run in aggregate to 200 paragraphs. There was a further written skeleton argument of the ninth defendant. Substantial oral submissions were made, on behalf of the first to fourth defendants, by Mr Daniel Beard QC and Mr Romano Subiotto QC, ably supported, on behalf of Outokumpu, by Ms Kassie Smith. The oral hearing lasted one and a half days. In the final analysis, I consider that the defendants' applications and this appeal turn on a short point of interpretation of the claim form, the amended Particulars of Claim and some correspondence and a short and clear point of law.

13. Stripped to its essentials the argument of the appellants is that (1) the respondents' statements of case do not disclose an arguable cause of action against KME UK, and (2) there is a complete lack of evidence to support key allegations against KME UK such that the proceedings have no real prospect of success. I do not accept the first limb of that argument. I reject the assertion underlying the second limb that the

Chancellor's refusal to grant summary judgment against the claimants was not a proper exercise of judicial discretion.

14. The appellants' pleading point rests upon their submission that an essential element of conduct which infringes Article 101 is a meeting of minds or concurrence of wills between rival parties to conduct themselves on the market in a specific way which gives rise to an unlawful agreement. They say that implementation of an unlawful anti-competitive agreement reached between others is not enough, even if the implementation is with knowledge of the agreement. The respondents' statements of case, they say, do not contain an allegation against KME UK of that essential element.

15. Mr Beard cited a number of cases in support of that proposition of law. His submissions on the point are perhaps best illustrated by the following passages from the judgment of the Court of First Instance in Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383:

> "66. The case-law shows that, where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 85(1) of the Treaty (Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 38; Joined Cases 25/84 and 26/84 *Ford and Ford Europe v Commission* [1985] ECR 2725, paragraph 21; Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 56).
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> 67. It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 86; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256).
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> 68. As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, *ACF Chemiefarma*, paragraph 112, and *Van Landewyck*, paragraph 86), without its having to constitute a valid and binding contract under national law (Sandoz, paragraph 13).
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> 69. It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.

> ….
>
> 71. That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers."

16. Mr Beard also laid considerable weight on the following passage in the judgment of the European Court of Justice (now the Court of Justice of the European Union) ("the ECJ") in Joined Cases 89, 104, 114, 116, 117 & 125 to 129/85 *A. Ahlström Osakeyhtiö and Os v Commission* [1988] ECR 5193 as showing that agreement and implementation are cumulative requirements for an infringement of Article 101:

> "16. It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented."

17. Both those submissions of Mr Beard require qualification. In the first place, it is well established that "concerted practices", which fall short of a complete agreement, can constitute infringement of Article 101. As the ECJ said in *Case 48-69 ICI v Commission* [1972] ECR 619:

> "64. Article 85 draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."

18. What amounts to concerted practices, for this purpose, was described by the ECJ in Case C-49/92 P *Commission v Anic Partecipazioni SpA*. [1999] ECR I-4125 as follows:

> "115 … it must be borne in mind that a concerted practice, within the meaning of Article 85(1) of the Treaty, refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (see *Suiker Unie and Others v Commission*, cited above, paragraph 26, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 63).
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> 116 The Court of Justice has further explained that criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the market (see *Suiker Unie and Others v Commission*, cited above, paragraph 173; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others v Commission*, cited above, paragraph 63; and *John Deere v Commission*, cited above, paragraph 86).
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> 117 According to that case-law, although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (see, to that effect, *Suiker Unie and Others v Commission*, paragraph 174; *Züchner*, paragraph 14; and *John Deere v Commission*, paragraph 87, all cited above)."

19. What appears from those passages is that even indirect and isolated instances of contact between competitors may be sufficient to infringe Article 101, if their object is to promote artificial conditions of competition in the market.

20. What is also clear, contrary to the appellants' case, is that acts of implementation alone are capable of amounting to concerted practices where they are carried out pursuant to an anti-competitive agreement made between others and with knowledge of that agreement. That is apparent not only from the passages in *Anic Partecipazioni* just cited but also from the following earlier passages in the judgment in that case:

> "79 Secondly, the agreements and concerted practices referred to in Article 85(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged.
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> 80 However, the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect.
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> 81 Thirdly, it must be remembered that Article 85 of the Treaty prohibits agreements between undertakings and decisions by associations of undertakings, including conduct which constitutes the implementation of those agreements or decisions, and concerted practices when they may affect intra-Community trade and have an anti-competitive object or effect. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 85 of the Treaty.
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> …
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> 87 When, as in the present case, the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk."

21. I do not accept Mr Beard's interpretation of paragraph 16 of the ECJ's judgment in *Ahlström Osakeyhtiö*, quoted above. What was under consideration in that passage was whether the fact that one of the parties to the cartel agreement was based in Finland, which was outside the Community, precluded the application of Article 85. It was held that it did not because implementation of the agreement took place within the Community. Far from contradicting the respondents' case, *Ahlström Osakeyhtiö* supports it by holding that both the cartel agreement and also the implementation of that agreement constituted infringements of Article 85.

22. Against that jurisprudential background, it is perfectly clear that the allegations in the claim form and paragraphs 42 and 43 of the amended Particulars of Claim, as

supplemented by correspondence between the parties' solicitors, are sufficient to ground a cause of action against KME UK for infringement of Article 101 and a corresponding breach of statutory duty. I readily accept that the case against KME UK is far from a model of clear and comprehensive drafting. The allegations seem to veer between a follow-on claim and a stand-alone claim, a claim that KME UK was a party to an alleged cartel agreement itself, a claim that it was a party to concerted practices, and a claim that it merely implemented such an agreement.

23. The claim form itself does not distinguish between any of the defendants. It fires the following blunderbuss of alternative allegations, not easy to disentangle:

> "… the Defendants participated in an unlawful cartel pursuant to which they agreed upon and/or acted in concertation with respect to target prices, coordination of percentage price increases, delivery and payment terms, allocation of customers and stabilisation of market shares and sales volumes, and/or implemented what was agreed including by sale and/or offer for sale of level wound coil (LWC) tubes at artificially inflated prices or subject to other anti-competitive terms and conditions and/or by other acts carried out in support of the aforesaid unlawful arrangements including by refraining from competing to supply LWC tubes at competitive prices (or at all) to customers with a view to allowing another cartelist to secure a customer's business on agreed terms and conditions, and/or exchanging confidential information with other participants in the cartel."

24. Paragraphs 42 and 43 of the amended Particulars of Claim set out clear allegations of unlawful conduct by KME UK, including, in particular,

> "43.2 refraining from selling or offering for sale LWC tubes to customers at all, in order to allow other members of the cartel to secure the business; and/or
>
> 43.3 exchanging confidential information with competitor companies, as part of the monitoring of the operation of the cartel arrangements to ensure their success."

25. I agree with Mr Jon Turner QC, for the respondents, that those allegations presuppose knowledge of, and an intention to implement, the cartel agreement and concerted practices described in the Decision, and amount to a stand-alone claim for conducting concerted practices contrary to Article 101.

26. Those allegations were in any event clarified and amplified in letters to the appellants' solicitors, following an earlier request pursuant to CPR 18 by the solicitors for the fifth to eighth defendants dated 27 August 2010 concerning the allegations in paragraphs 42 and 43 of the Particulars of Claim. The response to that request, which forms part of the respondents' statements of case by virtue of CPR 2.3(1), stated clearly that the respondents' case is that KME UK was involved in and party to the anti-competitive practices.

27. The respondents' solicitors sent a letter dated 28 June 2011 to the solicitors for the first to fourth defendants in response to the service of the first to fourth defendants' applications to strike out the claim or for summary judgment, which included the following:

> "For the avoidance of doubt, our clients' case is that the First Defendant was involved in, party to or aware of the anti-competitive cartel arrangements. The First Defendant is in any event liable as a result of the acts of implementation referred to in paragraphs 42 and 43 of the Amended Particulars of Claim, which, as we pointed out above, include any acts of implementation. In view of the elaborate steps taken to conceal and ensure the secrecy of the illegal activities of the cartel the Claimants are not in a position to further particularise their case until after the Defendants have made disclosure."

28. The respondents' solicitors also sent a letter to the solicitors for the first to fourth defendants dated 19 September 2011, which included the following:

> "You say that the pleadings do not contain any suggestion that our clients' case is that the First Defendant was party to or aware of any anti-competitive arrangements. This is wholly unmeritorious.
>
> (a) The Amended Particulars of Claim do encompass the allegations that your clients were aware of or involved in the anti-competitive cartel arrangements: see in particular, paragraphs 27.1, 36.4, 42.2, 43.3, and 45.
>
> (b) On 27 August 2010, Messrs Herbert Smith made a Part 18 request asking for clarification whether the Claimants' pleaded case included allegations of knowledge by their UK domiciled clients. There is no material difference in the pleaded allegations in relation to your clients. Our perfectly clear response, given more than a full year ago on 3 September 2010 (and copied to you), was that the case does include allegations that the companies concerned were involved in and parties to the cartel. Neither you nor Herbert Smith have contested this until your latest letters. The pleading point is wholly unmeritorious. You already have the clarification that you are requesting."

29. Taking, by way of example, the allegation in paragraph 43.3 of the amended Particulars of Claim, as amplified and clarified in that correspondence, what is plainly alleged by way of a stand-alone claim is that KME UK, with knowledge of the cartel agreement and arrangements described in the Decision, obtained and exchanged information with competitors with a view to promoting the cartel agreement and arrangements. I do not regard it as seriously arguable that such an allegation does not give rise to a cause of action for infringement of Article 101 and a corresponding breach of statutory duty.

30. Mr Beard complained that the allegation of KME UK's knowledge is still insufficiently particularised to comply with CPR 16PD 8.2, but I am satisfied that it is sufficiently pleaded to constitute a valid allegation of infringement of Article 101 by KME UK and, in the particular circumstances of the present case, to withstand an application to strike out the claim or for summary judgment in favour of the appellants.

31. So far as concerns the appellants' reliance on the lack of evidence to support the allegations against KME UK in paragraphs 42 and 43 of the amended Particulars of Claim, Mr Subiotto took us to various witness statements on behalf of the appellants in support of the applications to strike out or for summary judgment. I consider that the Chancellor was perfectly entitled to exercise his discretion by refusing summarily to dismiss the claim despite the current paucity of evidence to support the allegations against KME UK.

32. In their letter dated 28 June 2011 to the solicitors for the fifth to eighth defendants the respondents' solicitors said that "in view of the elaborate steps taken to conceal and ensure the secrecy of the illegal activities of the cartel the Claimants are not in a position to further particularise their case until after the Defendants have made disclosure." If the underlying allegation is true, that is a fair point. It is clear that KME UK was for a period of time, however short, involved in the supply of the relevant goods to the first claimant. There is exhibited to the 1st witness statement of Ronald McLean an "Agency Agreement" between KME UK and the third defendant, which is consistent with the allegation in paragraph 43.3 of the amended Particulars of Claim. There is no further direct evidence in relation to KME UK. As was stated by the Court of Appeal in *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc* [2010] EWCA Civ 864 at paragraph [43], however, it is in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anti-competitive conduct of members of the same group of companies. That same generous approach was for the same reason taken by Sales J in *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 in dismissing an application to strike out or to grant summary judgment against the claimant in proceedings for damages for infringement of Article 101. That approach is appropriate in the present case prior to disclosure of documents.

33. That is sufficient to dispose of this appeal.

34. Extensive written and oral submissions were made on other legal points, which do not arise. Considerable time was spent on the issue whether the anti-competitive acts and intentions of a parent company are to be imputed to its subsidiaries in the context of Article 101, and, in that connection, on the tension between views expressed by Aikens J in *Provimi* and those expressed by the Court of Appeal in *Cooper Tire*. Those cases both concerned private law claims for damages for breach of Article 81.

35. In *Provimi* Aikens J said (at paragraph [31]) that he considered it arguable that, where two corporate entities are part of an undertaking and one of those entities has entered into an infringing agreement, then, if the other corporate entity which is part of the infringing undertaking implements that infringing agreement, it is also infringing Article 81. He said that, in his view, it is arguable that it is not necessary to plead or

prove any particular "concurrence of wills" between the two entities within the same undertaking or to "impute" the knowledge or will of one entity to another, since, by definition, being part of one undertaking, they have no independence of mind or action or will and are to be regarded as all one.

36. *Cooper Tire* was, like the present, a case about jurisdiction in respect of a private law damages claim arising out of a decision of the Commission finding the addressees, some of whom were defendants to the English proceedings, guilty of infringement of Article 81. None of those defendants was domiciled in England or Wales. Jurisdiction depended on the claim against other (non-addressee) defendants who were domiciled in the UK. Teare J decided that the particulars of claim were to be interpreted as stating merely that the English defendants were subsidiaries who were not party to, and were not aware of, the anti-competitive practices agreed or adopted by other companies in the undertakings whose conduct was regulated by Article 81. He held, following the view expressed by Aikens J in *Provimi*, that the English defendants could nevertheless be liable, and he refused to strike out the claim. In the Court of Appeal, Lord Justice Longmore, delivering the judgment of the Court, expressed doubt (at paragraph [45]) about the view of Aikens J in *Provimi* which I have summarised above. The Court said that it was by no means obvious, even in an Article 81 context, that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. The Court's consideration of that point was, and was expressly acknowledged to be, obiter since, contrary to the view of Teare J, it took the view that the pleaded allegation was (as summarised in paragraph [39]) "a general plea of involvement in the arrangements rather than a narrower assertion of liability in the absence of knowledge or awareness of them." The Court dismissed the appeal for that reason even though the Court said (in paragraph [42]) that it was "still an open question whether it is going to be alleged that the subsidiaries domiciled in the United Kingdom were or were not parties to, or aware of, the cartel."

37. The *Provimi* point does not arise in the present case because, for the reasons I have given, the respondents have made a stand-alone claim against KME UK clearly alleging that it participated in, and implemented, the cartel arrangements with knowledge of the cartel agreement. Mr Turner accepts that the respondents must prove KME UK's knowledge of the cartel agreement and practices. Since the point was argued, however, I will express my own view that it is clear that, save in a case where the parent company exercises "a decisive influence" (in the language of EU jurisprudence) over its subsidiary or the same is true of a non-parent member of the group over another member, there is no scope for imputation of knowledge, intent or unlawful conduct.

38. The jurisprudence on this aspect is, in my view, plain and settled. Article 101 is concerned with agreements, decisions and concerted practices by and between undertakings. An undertaking for this purpose is any entity engaged in economic activity, regardless of its legal status and the way in which it is financed. Furthermore, in this context the concept of an undertaking includes an economic unit which may consist of more than one legal or natural person, such as a group of companies. Where, for example, a company does not decide independently on its own conduct on the market, but in all material respects carries out the instructions given to it by its parent company, having regard to the economic, organisational and legal links between them, the unlawful conduct of the subsidiary will be imputed to

the parent company. In such a situation, in the language of EU jurisprudence, the parent exercises a "decisive influence" over its subsidiary. The subsidiary is not absolved from its own personal responsibility, but its parent company is liable because in that situation they form a single economic entity for the purposes of Article 101. In EU jurisprudence, the (rebuttable) presumption is that a parent company exercises a decisive influence over the market conduct of a wholly owned subsidiary and that they therefore constitute a single undertaking within Article 101: Case C-97/08P *Akzo Nobel NV & Os v Commission* [2009] ECR 1-8247 (Advocate General Kokott at paras. 39-44, ECJ paras. 54-61 and 77); T-25/06 *Alliance One International Inc v Commission* 9 September 2011 (paras 80-85); Case T-43/02 *Jungbunzlauer AG v Commission* [2006] ECR II-3435 (para. 129).

39. By contrast, the mere fact that the share capital of two commercial companies is held by the same person or the same family is insufficient in itself to establish that those two companies are an economic unit with the result that, for the purposes of Article 101, the actions of one company can be attributed to the other. That was expressly held to be the position in Case C-196/99 P *Siderurgica Aristrain Madrid SL v Commission* [2003] ECR I-11005 at paragraph 99: see also Case T-358/06 *Wegenbouwmaatschappij J Heijmans BV v Commission* 4 July 2008 (Second Chamber) at paragraph 30. The views expressed by Aikens J in *Provimi* predated the judgment of the ECJ in *Siderurgica Aristrain Madrid* and were overtaken by it.

40. There was also considerable reference on the hearing of the appeal to the decision of the Competition Appeal Tribunal ("the Tribunal") in *Emerson Electric Co v Mersen UK Portslade Ltd* [2011] CAT 4. The issue in that case was whether the Tribunal had jurisdiction under section 47A of the Competition Act 1998 to hear a "follow-on" claim against a defendant (formerly known as Le Carbone (Great Britain) Limited) ("Carbone GB") said to arise out of a decision of the European Commission in which Le Carbone-Lorraine SA ("Carbone SA"), the 100 per cent owner of Carbone GB, was found to have participated in an infringement of Article 81 and was fined, but Carbone GB was not an addressee of the decision and there was no finding against Carbone GB. The Tribunal concluded it had no jurisdiction and struck out the claim. For the reasons I have given, I am quite satisfied in the present case that the respondents' allegations include a stand-alone claim against KME UK for infringement of Article 101. Whether or not the Decision gives rise to a follow-on claim by the claimants against KME UK is, therefore, irrelevant.

Conclusion

41. For those reasons I would dismiss this appeal.

Lord Justice Tomlinson

42. I agree

Lord Justice Ward

43. I also agree.