

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
COMPETITION LIST (ChD)  
[2018] EWHC 1694 (Ch)  
BEFORE MR ANTHONY ELLERAY QC SITTING AS A DEPUTY JUDGE OF  
THE CHANCERY DIVISION ON 5<sup>TH</sup>, 6<sup>TH</sup> AND 7<sup>TH</sup> FEBRUARY AND JUNE  
2018

**BETWEEN:**

- (1) VATTENFALL AB
- (2) VATTENFALL ELDISTRIBUTION AB
- (3) VATTENFALL VINDKRAFT AB
- (4) GOTLANDS ELNAT AB
- (5) GOTLANDS ENERGI AB
- (6) YS NAT AB
- (7) VASTERBERGSLAGENS ELNAT AB
- (8) THANET OFFSHORE WIND LIMITED
- (9) KENTISH FLATS LIMITED
- (10) ORMONDE ENERGY LIMITED
- (11) VATTENFALLS A/S
- (12) VATTENFALL VINDKRAFT A/S
- (13) DOTI DEUTCSHE OFFSHORE-TESTFELD-UND-  
INFRASTRUKTUR-GMBH & CO.KG
- (14) STROMNETZ BERLIN GMBH
- (15) NOORDZEE WIND C.V.

Claimants

and

- (1) PRYSMIAN SPA
- (2) PRYSMIAN POWERLINK S.R.L.
- (3) PRYSMIAN CABLES & SYSTEMSLTD
- (4) PRYSMIAN FINLANDOY
- (5) PRYSMIAN KABEL UNO SYSTEME GmbH
- ~~(6) DRAKA KABEL SVERIGE AB~~
- ~~(7) PIRELLI & C SPA~~
- (8) PRYSMIAN CAVI E SISTEMI SRL
- (9) NKT HOLDING A/S
- (10) NKT CABLES GmbH
- (11) NKT CABLES VERWALTUNGS GmbH
- (12) NKT CABLES LIMITED
- (13) NKT CABLES A/S
- ~~(14) NKT CABLES AB~~

Defendants

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## JUDGMENT

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### INTRODUCTION

1. This is a cartel damages claim.
2. Before me have been applications by the Defendants challenging the Court's jurisdiction and seeking to strike out the claim or summary judgment on it in favour of the Defendants.
3. There are two sets of Defendants. The first set comprises the "Prysmian Defendants", namely D1 to D5 and D8. The claims against D6 and D7 have been discontinued. The second set comprises the "NKT Defendants". The claim against D14 has been discontinued.
4. The live Prysmian Defendants have been represented before me by Mr Moser QC, Ms Howard and Ms Banks.

5. The live NKT Defendants have been represented before me by Ms Demetriou QC and Mr Armitage.
6. The Respondent Claimants have been represented before me by Mr Robet1son QC and Ms Abram. The applications are resisted.

### **Cartel**

7. On 02 April 2014 the European Commission ("the Commission") found that 11 producers of power cables had been parties to an illegal market sharing "cartel" which was almost global in scope ("the Power Cables Cartel"). The power cables in point were submarine and underground power cables and associated products, works and services ("Power Cables P&S"). I shall call that finding "the Decision".
8. A summary of the Decision was then produced by the Commission. It appeared in the Official Journal of the European Union on 17 September 2014. In summary, at 2.1 it described the products concerned as:

"The cartel arrangements covered all types of underground power cables of 110 kV and above and submarine power cables of 33 kV and above including all products, works and services sold to the customer related to the sale of power cables, when such sales are part of a power cable project."

At 2.3 was the "Summary of the infringement":

"(6) The main producers participated in a network of multilateral and bilateral meetings and contacts aimed

at restricting competition for underground and submarine power cable projects in specific territories by agreeing on market and customer allocation and thereby to distort the normal competitive process.

- (7) From February 1999 onwards, the main producers allocated projects according to the geographic region or customers. In addition, they exchanged information on prices and other commercially sensitive information in order to ensure that the designated power cable supplier or 'allottee' would make the lowest price while the other companies would either submit a higher offer or refrain from bidding or submit an offer that was unattractive to the customer. Reporting obligations were established to allow monitoring of the agreed allocations. Finally, additional practices were implemented to reinforce the cartel such as the collective refusal to supply accessories or technical assistance to certain competitors in order to ensure the agreed allocations.
- (8) The cartel had two main configurations:
  - (a) On the one hand, it had as its objective the allocation of territories and customers. This configuration is referred to as the 'A/R cartel configuration'. Pursuant to this configuration Japanese and Korean producers refrained from competing for projects in the European home territory while European producers would stay out of Japan and Korea. They also allocated projects in most of the rest of the world and made use of a quota arrangement for a certain period of time.
  - (b) On the other hand, the 'European cartel configuration' involved the allocation of territories and customers by the European producers for projects inside the European home territory or allocated to the European producers."

9. The summary at 2.4 identified legal entities held liable for indicated periods for a single and continuous infringement of Article 101 of the Treaty (on the functioning of the European Union) and Article 53 of the EEA Agreement. Such entities were "addressees".
10. The Prysmian addressees are D1 and D8. D8 was an addressee for the period 18 February 1999 to 28 January 2009. D7 was an addressee as parent of D8 for the period 18 February 1999 to 28 July 2005. D1 was an addressee as successor parent of D8 for the period 29 July 2005 to 28 January 2009 (as was its parent, "the Goldman Sachs Group, Inc"). In relation to the former such period, D8 with its then parent were held liable jointly and severally to a fine of EUR 7,310,000. In relation to the latter period, D8 and D1 (and its parent) were held jointly and severally to a fine of EUR 37,303,000. I understand that the discontinuance against D7 may have resulted from the fact that it was not part of the Prysmian group.
11. D10 was an addressee, as was D9 as its parent, for the period 3 July 2002 to 17 February 2006. They were found liable jointly and severally to a fine of EUR 3,887,000. I understand the discontinuance against D14 was because it was not part of the NKT Group at the relevant time.
12. On 16 and 17 June 2014 respectively the NKT and Prysmian addressees filed applications for annulment of the Decision with the General Court of the

European Union. I have been told that such applications have been heard but have yet to be determined. In the meanwhile, the Decision stands. Materially, if it becomes final, its addressees will be jointly and severally liable in damages for any losses shown to have been caused by for Power Cable Cartel.

13. On 8 November 2017 the Commission published a provisional non-confidential version of the Commission Decision. In Recital 66 it recorded:

"The main producers of UG and SM power cables participated in a network of multilateral and bilateral meetings and contacts aimed at restricting competition for SM and UG power cable projects in specific territories by agreeing on market and customer allocation and thereby to distort the normal competitive process."

14. At Recitals 692 to 706 the Decision records principles relating to addressees. Subjects of EU competition rules are "undertakings", a concept which is not identical with that of corporate legal personality (Recital 693). EU competition law recognises that different companies belonging to the same group form an economic unit and therefore an "undertaking" (within the meaning of Articles 101 and 102 of the Treaty), if the companies concerned do not determine independently their own conduct on the market (Recital 696). According to settled case law of the Court of Justice and of the General Court a parent company that owns 100% (or almost 100%) of a subsidiary has the ability to exercise decisive control over such subsidiary. In such a case, there exists a rebuttable presumption that the parent also in fact exercises that control without

the need for the Commission to adduce further evidence on the actual exercise of control (the "parental liability presumption") (Recital 697):

"Where such exercise of decisive influence cannot be presumed it has to be demonstrated on the basis of factual evidence, including in particular the management powers that the parent companies have on the subsidiary." (Recital 698)

15. Recital 707 states:

"Applying the above principles, this Decision shall be addressed to those legal entities whose representatives participated in cartel meetings and their performance of anti-competitive contacts with competitors. In addition, this Decision shall be addressed to the parent companies of those legal entities in as far as it is presumed or shown that they exercised decisive influence over the commercial policy of their wholly owned subsidiaries."

16. Recital 708 records:

"The names and the employment records of individuals relevant for this Decision are provided in Annex II to this Decision."

That annex is redacted, in the provisional non-confidential version of the Decision.

17. The Decision provides as its Article 1 that a number of undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuous infringement in the (extra) high voltage underground and/or submarine power cable sector.

18. Paragraph 4 of Article 1 refers to NKT as D9 and D10 for the period from 3 July 2002 to 17 February 2006. Recital 594 of the Decision addressed why NKT was considered a fringe player as opposed to a core or middle player (such as, inferentially, Prysmian).
19. Paragraph 5 of Article 1 refers to the relevant Prysmian defendants, thus D8, for the period 18 February 1999 to 28 January 2009, and D1 as its parent from 29 July 2005 to 28 January 2009. It also referred to D7 for the earlier period 18 February 1999 to 28 July 2005 but as I have noted D7 was not a Prysmian Defendant.

### **This Claim**

20. This claim was issued on 6 March 2017. The Particulars of Claim ("POC") bear that date.
21. C1 is incorporated under the laws of Sweden. It is an energy company wholly owned by the Swedish state. Its group is one of Europe's largest generators of electricity and one of the largest producers of heat. The other Cs are either wholly owned subsidiaries of C1 or companies in which C1 has a substantial shareholding. As Mr Robertson QC submits in relation to a witness statement of Mr Nielsen, the Vattenfall groups' production and sale of electricity and heat comes from a number of sources including wind power. It supplies energy to



six main European markets including the UK. In relation to wind power, it operates numerous wind turbines grouped into windfarms either on-shore or off-shore. In context, as Mr Robertson submits in reliance on Mr Nielsen, power cables are a crucial part of windfarms. They are used to connect individual wind turbines in a windfarm to carry power from off-shore and on-shore windfarms to an on-shore electricity grid and to distribute power on shore. When a windfarm is developed, the power cables themselves are generally provided as part of a bundle of products, works and services. In addition to the manufacture and delivery of the cables themselves, the bundle of goods and services apparently normally include design of the power cables, supply of parts and tools ("accessories") that are required to install and connect the power cables, the supply of spare accessories and length of cable as back-up and sometimes also installation of the power cables. Mr Robertson also notes that where, as is common in large projects, additional work supplies are needed as the project progresses, they may be added to the original contract or supplied on an ad hoc basis under a separate contractual arrangement.

22. The Prysmian Defendants include D3 which is incorporated under the laws of England and Wales. Its registered office is in Eastleigh (SO50 6YU). The NKT Defendants include D12, which is also incorporated under the laws of England and Wales with a registered office in Harrogate (HG3 1GY).

23. Neither 03 nor 0 12 are addressees or mentioned in the 2014 summary of the Decision or the 2017 redacted version of the Decision. Under the "Liability" section of the POC it is pleaded at Paragraph 47:

"By participating in and/or being involved in and/or selling products knowingly produced as a result of the Cartel Arrangements and/or being engaged in acts of implementation of the Cartel Arrangements, each of the Defendants infringed Article 81(1) of the Treaty establishing the European Community ("Article 81 EC") and Article 101(1) of the Treaty on the Functioning of the European Union ("Article 101 TFEU") and/or breached the statutory duty imposed by Article 81 EC and Article 101 TFEU and/or through Section 2(1) of the European Communities Act 1972."

24. At Paragraph 51 of the POC it is pleaded:

"The Claimants reserve the right to amend these Particulars of Claim to give further particulars of the infringement of Article 81 EC, Article 101 TFEU and the Chapter I prohibition and the involvement of the Defendants and each of them following publication of the Decision and/or disclosure."

25. C8, C9 and C10 are each incorporated in England and Wales and each involved in particular off-shore windfarms off the coast of the UK. C1 to C7 are Swedish companies, C11 and C12 are Danish companies, C13 and C14 are German companies and C15 is a Dutch company.

26. In relation to causation of loss, Cs refer to the need for full disclosure from each D (POC paragraph 55). The POC gives particulars of "cartel overcharge losses" (supplies by cartelists), umbrella losses (purchases from third parties who did

not implement the Cartel Arrangements, defined in paragraph 1 of the PoC as "the defendants' and others' unlawful agreements and/or concerted practices", but where the effect of the Cartel Arrangements was to inflate prices in the market) and charges in an overhang period (up to two years after the cartel period).

27. The POC estimated loss at nearly €36 million and also has sought compound interest.
28. The estimated loss of nearly €36 million (Annex B to the POC) sets out relevant purchases by Cs from cartelists or group members during the cartel period and the overhang period and purchases affected by the umbrella overcharge. The current estimate of total losses is over €45 million.
29. On 5 June 2017 each of the Prysmian and NKT Defendants issued the current applications.
30. The application of the then live Prysmian Defendants sought summary judgment in favour of D3 against Cs pursuant to CPR 24; alternatively a strike-out of the claims against D3 pursuant to CPR 3.4(2)(a). Alternatively it sought pursuant to CPR Part 11 a declaration that the Court does not have jurisdiction over any of the claims against D4, D5 and D6 and/or no jurisdiction in relation to the claims by C1 to C7 and C11 to C15 (they are not UK companies) against

D1, D2 and D8 (the Italian Prysmian Defendants). The application accepts that jurisdiction can be established against the Prysmian Italian Defendants in respect of supplies made to the UK Claimants in respect of losses suffered in the UK (for the purpose of Article 7(2) of Regulation 125/2012 (the "Recast Brussels Regulation" or "RBR")). The summary position of D3 was that though domiciled in England and Wales there was no arguable basis for a claim that it had participated in the alleged Cartel Arrangements or was engaged in acts of implementing the alleged Cartel Arrangements. The application makes the point that if D3 cannot be relied upon as an "anchor" Defendant under Article 8(1) RBR, other non-UK domiciled Prysmian Defendants could not be sued in this Court.

31. The application of the NKT Defendants seeks an order that the claim against D12 be struck out pursuant to Rule 3.4(2)(a) of the CPR and/or that summary judgment be granted in favour of D12 pursuant to CPR Rule 24.2(a)(i) and Rule 24.2(b). It asserts in summary that the POC disclosed no reasonable grounds for bringing a claim against NKT UK; alternatively that the claims against it had no real prospect of success and there was no other compelling reason why they should be disposed of at trial. The application also seeks a declaration on behalf of the other "EU NKT Defendants" under the RBR. It had been asserted that neither Article 8(1) nor Article 7(2) of the RBR provides a basis for departing from the usual rule under Article 4(1) of that Regulation that persons

dom iciled in an EU Member State should be sued in a Court of the Member State concerned.

### **Civil Procedure Rules ("CPR")**

32. CPR Rule 3.4(ii)(a) provides for striking out a s tatement of case which "discloses no reasonable grounds". It is sufficie nt for my purposes that I shou ld be satisfied that the case is unwinnable against 03 and D12 (with consequences where other Os are concerned). Mr Moser and Ms Demetriou do not contend that the rule adds to their cases for summary judgment under CPR 24.

33. Rule 24(a)(i) provides for summary judgment against a claim nt when the Comt considers that the claimant has "no real prospects of success on the claim."

34. Each of Mr Moser, Ms Demetriou and Mr Robertson has cited first instance summaries of relevant s ummary judgment points applicable to the case then ' before the Court.

35. Mr Moser cites from a decision of Lewison J (as he then was) in *Easyair Ltd . (Ila OpenaM v. Opal Telecom Ltd* (2009] EWHC 339 (a case which flowed from disconnections of sims from a phone network). At Paragraph 15 Lewison J observed:

"The correct approach on applications by defendants is, in my judgment, as follows:

- (i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v. Hillman* [2001] 2 All ER 91;
- (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *EDM & F Man Liquid Products v. Patel* [2003] EWCA Civ 472 at [8];
- (iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v. Hillman*;
- (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *EDM & F Man Liquid Products v. Patel* at [10];
- (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v. Hammond (No.5)* [2001] EWCA Civ 550;
- (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceulica/ Co 100 Ltd* [2007] FSR 63;
- (vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction, and, if the court is satisfied that it has before it all the evidence necessary for the proper

determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v. ITE Training Ltd* [2007] EWCA Civ 725."

36. The case before Lewison J did involve the construction of a contract and his point (vii) may have limited relevance on the applications before me. But his other points may have real point on these applications.
37. Ms Demetriou cites from the decision of Roth J in *SEL-Imperial Ltd v. The British Standards Institution* [2010] EWHC 854 (Ch) at paras.16-18. There Roth J cited from a summary by Lewison J of relevant points in *The Federal Republic of Nigeria, v. Santolius Investment Corp and Ors* [2007] EWHC 437 (Ch) at 4. He cited six points there made by Lewison J which are the first six points that he also made in the *Openair* case which I have cited. Roth J did not cite a seventh point made by Lewison J in the *St Helena Investment* case which

related to allegations of fraud or dishonesty as not relevant to the case before

Roth J. But Roth J did however continue at 16:

"But I would add, with regard in particular to competition law claims (or defences), that where the area of law is in the course of development the court should be cautious 'to assume that it is beyond argument with real prospect of success that the existing case law will not be extended or modified' so as to encompass the basis of argument advanced; per Merritt V-C in *Intel Corp v. Vlc1 Technologies Inc* [2002] EWCA Civ 1905, (2003) FSR 33 at (32). Such an extension might involve a reference to the European Court of Justice under Article 267 TFEU (formerly Article 234 EC) but that will not be appropriate at this stage since, depending on how the facts may be found, a decision on that point may prove unnecessary for resolution of the case.

17. Moreover, it is important that competition claims are pleaded properly. To contend that a party has infringed competition law involves a serious allegation of breach of a quasi-public law, which can indeed lead to the imposition of financial penalties as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct or agreement is complained of and how that it is alleged to violate the law. As Laddie J observed in *BHB Enterprises pie v. Victor Chandler (International) Ltd* [2005] EWHC 1074 (Ch), [2005] EU LR 924 at [43]:

"These are notoriously burdensome allegations, frequently leading to extensive evidence, including expert reports from economists and accountants. The recent history of cases in which such allegations have been raised illustrate that they can lead to lengthy and expensive trials."

Subsequent experience only reinforces the accuracy of that observation.

18. This is not to adopt an over-technical approach to pleadings. It is consistent with the overriding objective to enable the case to be dealt with expeditiously and fairly. It is only through the clear articulation of each party's position in its statement of case, with



appropriate factual detail, that the other side can know what case it has to meet and what issues any experts have to address, and that the court can effectively exercise its case management powers."

38. Ms Demetriou also cites from Briggs J (as he then was) in *Lexi Holdings (in administration) v. Pannone & Partners* [2009] EWHC 2590 (Ch) when he observed: "It is necessary to do more than say that some evidence currently unavailable might turn up in time for the trial" to defeat a summary judgment application.

39. Mr Robertson cites the summary by Simon J (as he then was) of the principles relevant to strike-out and summary judgment applications in *Arcadia Group Brands v. Visa Inc* [2014] EWHC 3561 (Comm) at 19. That summary was not questioned or affected by an appeal (2015J EWCA Civ 883, [2015] Bus LR 1362. After emphasising at points (1) and (2) the points about the claimant needing to have a "realistic" as opposed to a "fanciful" prospect of success and that a "realistic" prospect is one that carries some degree of conviction, not one that is merely arguable, Simon J continued:

- "(3) The court must avoid conducting a 'mini-trial' without the benefit of disclosure and oral evidence . . .
- (4) The court should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by a trial process...
- (5) In reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial ...

- (6) Some disputes on the law or the construction of a document are suitable for summary determination since (if it is bad in law) the sooner it is determined the better. On the other hand, the court should heed the warning of Lord Collins in *AK Investments CJSC v. Kyrgyz Mobil Tel Ltd* [2011] UK PC 7, [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration....
- (7) The overall burden of proof remains on the Defendants, "... to establish, if it can, the negative proposition that the [Claimants] have no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial", see *Apvodedo NV v. Collins* [2008] EWHC 775 (Ch), Henderson J at [32].
- (8) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see *Ivlliles v. Bull* [1969] 1 QB 258 at 266A. In that case, Megarry J was satisfied that there were grounds for scrutinising what appeared on its face to be a legitimate transaction

40. Simon J's points at (7) and (8) pick up on Rule 24.2(b): "There is no other compelling reason why the case or issue should be disposed of at a trial." I do not understand Mr Robertson for Cs to raise on these applications a Part 24.2(b) "other compelling reason" why the matter should be disposed of at a trial.

41. CPR Part 11 provides for a procedure for disputing the Court's jurisdiction. CPR 11(1) enables a defendant to apply to the Court for an order declaring that it has no jurisdiction. CPR 11(2) provides for such a defendant to file an

Acknowledgement of Service. CPR 11(4) provides for the application to be made within 14 days *of* filing the Acknowledgement of Service and for it to be supported by evidence. CPR 11(6) provides for the order containing a declaration that the Court has no jurisdiction to make other provisions including setting aside the Claim Form. As I have noted, the Prysmian Defendants' application seeks a declaration under Part 11. As I understand the submissions of Mr Moser, the entitlement to such a declaration would in effect flow from the summary judgment that is sought. In other words, if there is no realistic prospect of success in the claims against D3 and D12 ("anchor defendants") or one of them (see 52 below), as a matter of principle or discretion the Court should not have jurisdiction to deal with claims against the non-UK domiciled defendants.

42. Under Article 4(1) of the Recast Brussels Regulation, it is provided that:

"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

43. Article 7 provides that a person domiciled in a Member State may be sued in another Member State including:

"(2) In matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."

44. The three Italian Prysmian Defendants (D1, D2 and D8) accept that the Court has jurisdiction over certain claims brought against them by two English incorporated and resident companies (the UK Claimants, C8 and C10), claims relevant to windfarms operated by them in the UK. There is an alternative argument raised by Cs that the English Court has jurisdiction pursuant to Article 7(2) over the claims of the UK Claimants against all Prysmian Defendants because England is the place where the harmful event suffered by them occurred.

45. RBR Article 8 provides that:

"A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

46. Recital 15 to the RBR provides:

"The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor."

To that end, Article 4(1) RBR establishes the general rule that a defendant domiciled in a Member State should be sued in the Courts of that Member State.

Articles 7 and 8 are derogations from the general rule in favour of domicile.

Recital 16 to the RBR explains in relation to Article 8(1) that:

"In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen."

47. A special rule on jurisdiction, such as Article 8(1), must be strictly interpreted as a derogation from the general principle in which jurisdiction is generally based on a defendant's domicile. The CJEU in *Reisch Montage AG v. Kiesel Baumaschinen Handels GmbH* [2007] IL PR 10 made these observations:

"23. In that regard it is settled case-law that those special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by Regulation 44/2001 (see, in relation to the Brussels Convention, *Kronhofer v Maier* (C-168/02) [2004] E.C.R. I-6009; [2004] i.L.Pr.27 at [14] and the case law cited).

24. It is for the national courts to interpret those rules having regard for the principle of legal certainty ...

25. That principle requires in particular that the special rules of jurisdiction be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued ...!"

48. In *Roche Nederland BV and Ors v. Primus, Goldenberg* [2007] IL PR 9 the CJEU expressed concerns that the extension of the special jurisdiction now contained in Article 8(1) RBR to cases where there was no sufficiently close

connection could undermine the predictability of the rules of jurisdiction and legal certainty and encourage the practice of forum shopping, which the RBR and the Comt have specifically sought to prevent (***Roche Nederland* at 37 & 38**).

49. Mr Moser identifies CJEU case law which identify for the purposes of the close connection needed by Article 8(1) to extend jurisdiction, a "single factual situation" and "sufficient legal connection". He submits that in the context of a single factual situation a minimum requirement is that it must be clear to a defendant that he may be sued as the co-defendant of an anchor defendant at a Court in the place where the anchor defendant is domiciled. A starting point according to Mr Moser in relation to sufficient legal connection is whether it is so close that the applicant could not be reasonably expected to seek to have the claim decided by two Courts and the legal connection between the claims is so close that inconsistencies between them would not be acceptable. Mr Moser cites in particular from the opinion of AG Trstenjak in her opinion in *Eva Maria Pailler v. Standard Verlags GmbH and Ors* (2012) EC DR 6.

50. In *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV and others (Evo nik Degussa GmbH and others intervening)* (2015) QB 906 the CJEU was considering a reference of questions relating to a cartel damages claim in the German Comt:

"15. By its first question, the referring court asks, in essence, whether [the predecessor Article 8(1)] must be

interpreted as meaning that it may, under that provision, be expedient to hear and determine applications together to avoid the risks of irreconcilable judgments resulting from separate proceedings in the case of an action for damages, and for disclosure in that regard, brought jointly against undertakings which have participated in different places and at different times in a single and continuous infringement, as found by the decision of the Commission, of the prohibition of anti-competitive agreements, decisions and concerted practices provided for in EU law, even where the applicant has withdrawn its action against the sole co-defendant domiciled in the same State as the court seised ...

17. The rule of jurisdiction laid down in [the predecessor Article 8(1)] provides that a person may, where he is one of a number of defendants, be sued in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings ...
18. That special rule, because it derogates from the principle ... that jurisdiction is based on the defendant's domicile, must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by [the predecessor Article 8(1)] ...
20. Therefore in order for [the predecessor Article 8 (1)] to apply, it is necessary to ascertain whether, between various claims brought by the same applicant against various defendants there is a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings ... In that regard, in order for judgments to be regarded as irreconcilable, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of fact and law
21. The requirement that the same situation of fact and law must arise is satisfied in circumstances such as those of

the case in the main proceedings. Despite the fact that the defendants participated in the implementation of the cartel at issue by concluding and performing contracts under it, in different places and at different times, according to [the decision] upon which the claims in the main proceedings are based, the cartel agreement amounted to a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement. That decision does not, however, determine the requirements for holding the defendants liable in tort, jointly and severally as the case may be, since this is to be determined by the national law of each Member State.

22. As regards, finally, the risk of irreconcilable judgments resulting from separate proceedings, since the requirements for holding those participating in an unlawful cartel liable in tort may differ between the various national laws, there would be a risk of irreconcilable judgments if actions were brought before the courts of various Member States by a party allegedly adversely affected by a cartel.
23. Nevertheless, the court points out that even in the case where various laws are, by virtue of the rules of private international law, of the court seised, applicable to the actions for damages brought by [the applicant] against the defendants, such a difference in legal basis does not, in itself, preclude the application of [the predecessor Article 8(i)] ... provided that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled ...
24. That latter condition is fulfilled in the case of a binding decision of the Commission finding there to have been a single infringement of EU law and, on the basis of that finding, holding each participant liable for the loss resulting from the tortious actions of those participating in the infringement. In those circumstances, the participants could have expected to be sued in the courts of a Member State in which one of them is domiciled.
25. It must therefore be considered that determining separately actions for damages against several



undertakings domiciled in different Member States which, contrary to EU competition law, participated in a single and continuous cartel, may lead to irreconcilable judgments within the meaning of [the predecessor Article 8(1)].

26. That said, it remains to be considered to what extent the applicant's withdrawal of its action against the sole co-defendant domiciled in the same Member State as the court seized is capable of rendering the rule of jurisdiction provided for in [the predecessor Article 8(1)] inapplicable.
27. According to settled case law, that rule cannot be interpreted as allowing an applicant to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled ...
28. The court has nevertheless stated that, where claims brought against various defendants are connected within the meaning of [the predecessor Article 8(1)] when the proceedings are instituted, the rule of jurisdiction laid down in that provision is applicable without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled ...
29. It follows that where, when proceedings are instituted, claims are connected within the meaning of [the predecessor Article 8(1)], the court seized of the case can find that the rule of jurisdiction laid down in that provision has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision's applicability.
30. In case in the main proceedings, some of the parties allege that, before the action in the proceedings was brought, an out-of-court settlement was reached between the applicant and Evonik Degussa, whose seat is in Germany, and that the parties purposefully delayed the formal conclusion of that settlement until

proceedings had been instituted, for the sole purpose of securing the jurisdiction of the court seised of the case as against other defendants.

31. In order to be able to exclude the applicability of the rule of jurisdiction laid down in [the predecessor Article 8(1)] an allegation of that nature must nevertheless be supported by form evidence that, at the time the proceedings were instituted, the parties concerned had colluded to artificially fulfil, or prolong the fulfilment of, that provision's applicability.
32. Although it is for the court seised with the case to assess such evidence, it must nevertheless be made clear that simply holding negotiations with a view to concluding an out-of-court settlement does not in itself prove such collusion. However, it would be otherwise if it transpired that such a settlement had, in fact, been concluded, but that where it had been concealed in order to create the impression that the conditions of the application of [the predecessor Article 8(1)] had been fulfilled.
33. In the light of the above, the answer to the first question is that [the predecessor Article 8 (1)] must be interpreted as meaning that the rule on centralisation of jurisdiction in the case of several defendants, as established in that provision, can apply in the case of an action for damages, and for disclosure in that regard, brought jointly against undertakings which have participated in different places and at different times in a single and continuous infringement, which has been established by a decision of the Commission, of the prohibition of anti-competitive agreements, decisions and concerted practices provided for under EU law, even where the applicant has withdrawn its action against the sole co-defendant domiciled in the same State as the court seised, unless it is found that, at the time the proceedings were instituted, the applicant and that defendant had colluded to artificially fulfil, or prolong the fulfilment of, that provision's applicability."

51. Mr Moser points out that in the *Akzo Nobel* case there was a finding that the requirement that there was the same situation of fact and law was satisfied given the claim was against six addressee chemical undertakings that had been found by the Commission to have participated in a single and continuous infringement regarding the supply of hydrogen peroxide sodium perborate. He submits that *Akzo Nobel* did not address the situation where a non-addressee is to be used as an anchor defendant for a claim which includes other addressees and non-addressees domiciled in other Member States. But, by contrast, Mr Robertson submits that the ruling in *Akzo Nobel* is applicable in this case because the Prysmian addressees and NKT addressees have been found to have participated in the Power Cables Cartel which was a single and continuous infringement of competition law. For the purposes of these applications, it appears to me that such participation Decision makes it properly arguable that D3 and D12 should have foreseen that they might become anchor defendants to a claim against such addressees brought in England, if they knowingly implemented the cartel. In other words it is properly arguable that there would have been a sufficiently close connection for Article 8(1) RBR to be engaged.

52. Mr Robertson also submits that a consequence of the ruling in *CDC* in relation to "so closely connected" is that if either D3 or D12 is a valid anchor defendant the claim against the other Defendants can be made. Thus if the claim against NKT UK was struck out, Prysmian UK could be a valid anchor against the

remaining NKT Defendants. Both Ms Demetriou and Mr Moser accepted that submission for the purpose of these applications.

### **Implementation/Knowledge**

53. For a defendant to be liable for a cartel damages claim it appears that it must have implemented the cartel with knowledge of it. D3 and D12, the UK Defendants, are sued on the basis of knowing implementation of the Power Cables Cartel (POC, Paragraphs 45 and 47).
54. In the context of implementation, selling the cartelised product can amount to implementation. In *Cooper Tire & Rubber v Dow Deutschland* [2009] EWHC 2609 (Comm), [2009] 2 CLC 619 at 56 Teare J at first instance said this as to implementation:

"However, I did not understand the Claimant's argument to require the shoe polish subsidiary to be liable in the same way as the subsidiary which sold BR or ESR [products the subject of the cartel]. Indeed, Counsel for the Claimants argued that the shoe polish subsidiary would not be so liable. In my judgment the shoe polish subsidiary would not be liable. In order to be liable a subsidiary must be part of the undertaking which has infringed Article 81. An undertaking 'covers any entity engaged in an economic activity'; see *Akzo Nobel* at paragraph 54. There is a good arguable case that the Anchor Defendants are a part of the undertaking involved in the economic activity of producing and selling BR and ESR because they sell those products. The same cannot be said of the sellers of shoe polish."

The appeal in that case did not bear on the implementation point. The concept of implementation may, however, be broader than mere sale. In *Toshiba*

*Carrier v. M E Yorkshire* [2011] EWHC 2665 (Ch) at para.49 the then Vice-Chancellor rejected a submission that a given defendant who acted as an agent for a disclosed principal would not have been part of the undertaking found to have infringed Article 101 or to have committed any of the offending agreements or concerted practices:

"I do not accept that these contentions assuming them to be prove in due course would absolve KME Yorkshire from liability under Article 101. It is clear that KME Yorkshire was a company in the KME Group and engaged in the same economic undertaking. It is accepted that it sold LWC to one or more of the claimants. The fact, if it be one, that it did so only as agent for these second defendant would, at least arguably, amount to implementation of the agreement or concerted practice even if it was not contractually liable on the contract of sale. Contractual liability and implementation of an illegal cartel are distinct concepts. In my view, KME Yorkshire has not shown that the claim against it does not have a real chance of success."

There was an unsuccessful appeal in that case and the Court of Appeal did not doubt the views just cited.

55. Implementation to any purchaser can give rise to joint and several liability. Thus the defendant does not need to have sold the cartelised products to a claimant entity in order to be liable. In e.g. *Iiyam a v. Samsung Electronics (LCD)* [2016] EWHC 1980 (Ch), [2016] 5 C MLR 16, paragraphs 57 - 67 identify a real prospect that a given defendant who made sales of the cartelised product to third parties but not to the claimants, could be held jointly and severally liable for the cartel.

56. In the context of knowledge, there has been some greater controversy in authorities relevant to strike-out and summary judgment. In *Provimi Ltd v. Aventis Animal Nutrition* [2003] ECC 29 Aikens J (as he then was) was concerned with vitamin cartel claims and was concerned with the issue of a claim against another member of the same group as the cartelist:

"It seems to me to be arguable that where two corporate entities are part of an 'undertaking [sic]' (call it "Undertaking A") and one of those entities has entered into an infringing agreement with other, independent, "undertakings", then if another corporate entity which is part of Undertaking A then implements that infringing agreement, it is also infringing Article 81. In my view it is arguable that it is not necessary to plead or prove any particular "concurrence of wills" between the two legal entities within Undertaking A. The EU competition law concept of an 'undertaking' is that it is one economic unit. The legal entities that are part of the one undertaking, by definition of the concept, have no independence of mind or action or will. They are to be regarded as all one. Therefore, so it seems to me, the mind and will of one legal entity is, for the purposes of Article 81, to be treated as the mind and will of the other entity. There is no question of having to 'impute' the knowledge or will of one entity to another, because they are one and the same."

57. That *Provimi* point fell to be considered by the Court of Appeal in *Cooper Tire & Rubber v. Dow Deutschland* (2010) EWCA Civ 864, [2010] 2 CLC 104 at **para.45**. On the given appeal, it was decided that the Particulars of Claim were relevant and sufficiently arguable at (45). The appeal had raised issues about whether claims could be made against another member of the group of companies of a cartelist. At Paragraph 45 Longmore LJ observed:

"As to the *Provimi* point, we can readily agree that, as Aikens J said, it is 'arguable'. We would, however, add that it is also arguable the other way. Although one can see that a parent

company should be liable for what its subsidiary has done on the basis that a parent company is presumed to be able to exercise (and actually exercise) decisive influence over a subsidiary, it is by no means obvious, even in an Article 81 EC context, that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. Nor does the *Provimi* point sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible for their parent companies rather than to impose a fine on all the entities of the relevant undertaking. If, moreover, liability can extend to any subsidiary company which is part of an undertaking, would such liability accrue to a subsidiary which did not deal in rubber at all, but in another product entirely?"

58. In the Court of Appeal in the *Toshiba v. KME Yorkshire Ltd & Ors* case, Lord Justice Ethelton giving the leading judgment observed obiter as follows:

"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.

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 ... The views

expressed by Aikens J in *Provimi* predated the judgment of the ECJ in [*Aristrain*] and were overtaken by it."

59. Mr Robetison cites the expression of the basis on which a legal person can be liable for breach of competition law made by the Competition Appeal Tribunal in *Sainsbury's Supermarkets Ltd v. Mastercard Inc* [2016] CAT 11. The judgment of Barling J set out in paragraph 363 the following matters:

"(15) In *Aristrain*, at Paragraph 99 of its judgment the Court of Justice said:

'The simple fact that the share capital of two separate 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, under Community competition law, the action of one company can be attributed to the other and that one can be held liable to pay a fine for the other.'

- (16) It is not clear why the Court of Appeal in *K/M/E* thought that this decision decided the point against Aikens J's analysis. As the High Court has pointed out in a recent case, *Aristrain*, decided a rather different point, namely that simply because separate companies are owned by the same person or family, they are not ipso facto to be treated as a single economic unit so that the actions of one can be attributed to the other. Indeed, if anything, *Aristrain* could be said to support the point Aikens J held to be 'arguable' as in paragraph 99. The Court of Justice does not express the attribution of liability within a single 'undertaking' in terms of parent/subsidiary, but in more general terms ...
- (21) It is certainly tempting to apply the logic relied upon by Master Card, and hold that each and every constituent person forming part of an 'undertaking' should be



liable for an infringement for which that undertaking is responsible. Yet as we have seen, the Court of Justice has not stated the position in such wide terms. Nor in our view would it be appropriate to go so far. In our view the current state of the law in this regard is most clearly expressed in the Advocate General's opinion (endorsed by the Comt of Justice) in Case C-231/1 IP to C-233/1 IP , *Commission v. Siemens* (paragraph 363(8) above).

- (22) On that basis, a legal person may be liable for breach of competition law:
- (i) Because he, she or it has in some way participated in that breach, as a part of the single economic unit or 'undertaking' that has infringed the law; and/or
  - (ii) Because he, she or it has exercised a decisive influence over one or more of the persons within the 'undertaking' who have participated in the infringement.
- (23) On the other hand, in our view a person is not *ipso facto* liable for an infringement of Article 101 by reason only of the fact that he, she or it is a member of an undertaking responsible as a matter of EU law for the infringement, in circumstances where the person in question neither participated in the infringement nor had decisive influence over the conduct in the relevant market of other member(s) of the undertaking who did participate. We appreciate that in such circumstances it may well be unlikely that the person in question would in fact be held to be part of that 'undertaking'."

60. Ms Demetriou cites *Team Relocations NV v EC* [2013] 5 C.M.L.R. 38 at 51 and 53, for approval of points that it must be shown that the undertaking intentionally contributed to the plan to restrict competition and had awareness (proved or presumed) of the offending conduct of other participants.

61. Cs' ca~~se~~ against D3 and D12 is of implementation in the cartel as part of the "undertaking" that infringed the law. It accepts that such implementation must be "knowing".

### **D3**

62. D3 is an English domiciled company. From 26 May 2005 it has been a 100% subsidiary of D8, one of the addressees of the Commission Decision. There is a presumption (at least in connection with Commission fines, see paragraph 89 below) that a subsidiary does not determine its own conduct independently of a 100% parent company and therefore the two entities are part of a single undertaking. The evidence in support of Prysmian's application does not include anything to rebut that presumption. On 15 December 2017 C wrote to Prysmian's solicitors to enquire about the corporate relationship between D3 and D8 during the earlier period of D8's involvement in the Power Cables Cartel. By a statement from Mr Briggs, an in-house Counsel at the Prysmian group of companies, it is explained that D8 had an "indirect" shareholding equivalent to 22% in D3 from 27 November 2001 (when D8 was incorporated) increasing to 39.2% in 2002 and remaining at that level until 26 May 2005 and that there was one or more overlapping directors between D8 and D3 for all but two and a half months of that period. In that earlier period D3 and D8 were part of the same corporate group. As Mr Robertson submits, there is no evidence before me that D3 determined its own conduct on the market independently of

D8 or any other member of the Prysmian corporate group. Indeed, there is evidence of the sharing of employees and legal support staff between D3, D2 and D8 in that period. It appears to me arguable that D3 was part of the same undertaking in the earlier period as well as the period in which it was the 100% subsidiary of D8.

63. The POC alleges that D3 implemented the cartel by making sales of Power Cables P&S to Cs. The claim relies by reference to the POC, Annex B on seven invoices.
64. Mr Moser makes the point that D3 did not sell a single power cable to any C. In relation to five of the particularised invoices, they relate to resin for repair kits on the Thanet Windfarm project. They were supplied during the overhang period. The other two invoices apply to resistivity testing again in relation to the Thanet project. Those invoices only totalled about £8,000 in value.
65. However, as Mr Robertson submits, there is no value below which a cartel damages claim may not be brought.
66. Further, the fact that the particular supplies related to cables supplied by D8 does not appear to make the case on implementation unarguable.
67. But there are wider points made by Cs against D3.

68. D3 is the eighteenth defendant to a claim relating to cable cartel damages brought by National Grid Electricity Transmission plc. It is claim number HC-2015-000269 ("the National Grid proceedings"). D3 is apparently also a defendant to a similar Scottish Power claim. It is alleged in the National Grid proceedings that D3 was at all relevant times engaged or involved, directly or indirectly, in the manufacture, sale and/or installation of power cables " ... for use in electricity transmission". In its defence to that claim, Prysmian UK admits that it was engaged or involved in, directly or indirectly, the manufacture, sale and/or installation of power cables. It denies knowing implementation of the cartel.

69. The point is made by Cs that there has been no application to strike out the claim against D3 in the National Grid proceedings, but as Mr Moser observes the relevant supplies were in the UK to UK claimants. It does not appear to me that a decision not to apply to strike out that claim has particular weight against D3 in the Prysmian Defendants' application before me, but I do consider it of moment that other claimants have considered D3 to be part of the implementation of the Power Cables Cartel. Further, by letter dated 21 December 2017 from the solicitors for the Prysmian Defendants it is stated that the National Grid proceedings involve "projects in relation to which there is no dispute that they were supplied to UK based claimants pursuant to contracts entered into with Prysmian UK and other UK-domiciled entities within the

Prysmian group." It does appear to me arguable that D3 in selling cartelised products implemented the cartel.

70. In relation to D3, it appears to me arguable as Mr Robertson says that the modest direct supplies that I have recorded were Power Cables P&S and thus direct sales implementing the cartel. Further, in addition to the modest direct sales in relation to the Thanet and Ormonde projects within the UK there is evidence of supply of substantial accessories. In relation to Thanet, D3 supplied through D8 (the contracting party) accessories with a total value over €1.6 million. In relation to the Ormonde project, D3 supplied through D2 (the contracting party) accessories to the total value of almost €2 million. Those are examples of the indirect supply of services to relevant Cs.
71. Further, the evidence before me is that a number of UK based personnel were 'involved in the Prysmian group's Power Cables P&S business. A Mr Knowles who has made statements in support of the application was employed by a subsidiary of D3 (another UK company Pirelli Cables Limited) between 2002 and 2012 and appears to have been involved throughout in the sale of Power Cables P&S. He referred to Prysmian UK as the "UK office" in an e-mail discussing the thermal resistivity testing that was carried out for the Thanet project. He was also the Sales Manager for the Ormonde project. Further, he refers in his first witness statement to Vince Barry who had been based in the UK and had worked in Prysmian's "centrally run submarine (cable) unit." He

was apparently an employee of D3 between 2003 and 2009. He appears to have been working on projects within the scope of the Power Cables Cartel (between 2003 and 2008 land cable systems and from 2008 until 2009 submarine projects). Mr Guy was an Engineer responsible for designing the power cable system for the Thanet project and appears to have been employed until 2008 under a similar arrangement to that under which Mr Knowles was employed. Further, D3's in-house legal Counsel appears to have advised the Prysmian group and thus D2 and D8 in Italy in relation to the contracts with C8 and C10 that were governed by English law and related to the Thanet and Olmo de projects.

72. Further, as Mr Robertson points out, in a number of invoices of D8, D3 was identified as D8's fiscal representative for supplies of Power Cables P&S by D8. That supply fell within the cartel. A witness for the Prysmian Defendants, Mr Casserta, has considered the references on the invoices a result of a "clerical error" as D3 does not believe it was in fact appointed D8's fiscal representative, but that appears to me an obvious matter for trial. There is no obvious reason why D8 would have named D3 as its fiscal representative which would be a contact point with HM Revenue and Customs by a non-UK entity that imports goods into the UK if D3 had no connection to the relevant transactions.

73. As Mr Robertson points out, in a trial damages claims there is stark information asymmetry between the parties. The Prysmian involvement in the Power

Cables Cartel was secret. Since no disclosure exercise has yet been conducted, Cs only have access to the information that Prysmian has chosen to reveal and which is limited to dealings with Cs. Mr Robertson points out the redaction in the Commission Decision of the identity of relevant individuals involved in the Power Cables Cartels.

74. As a rather discrete point, the Prysmian Defendants have been alleging that the POC invoices do not relate to 05 and thus it is not linked by invoices to implementation of the cartel. However, on 7 February 2018 (thus at the very eleventh hour) Cs have produced a Geiman invoice which may show that D5 may have made a relevant supply.
75. In relation to the knowledge of D3 relating to implementation in the Power Cables Cartel, I have already noted its ownership by D8, an addressee, from 25 August 2005 and its partial ownership by D8 and the overlapping of directors in earlier times. I accept Mr Robertson's submission that in a cartel damages claim Cs have difficulty at the outset of the claim to plead relevant knowledge with particularity. The claim here was issued in the light of the summary of the Commission Decision and D8 being an addressee together with the joinder of D3 in the National Grid proceedings. Mr Robertson submits, and I accept, that Cs may not be able to more fully particularise the knowledge until there is disclosure of contemporaneous documents or access to the unredacted decision. In the latter context, he has explained the practice in cartel damages claims for

a confidentiality ring to be established with the Judge and lawyers relating to the unredacted decision. The Prysmian Defendants have not persuaded me that Cs have no reasonable prospect of establishing both knowledge as well as implementation in the case of D3.

76. NKT, D12, was incorporated on 23 August 2004. Between then and 17 February 2008, the end of the period in respect of which the NKT Defendants are sued, NKT, D12, was a 50% indirect subsidiary of D9, one of the addressees of the Commission Decision, which found that D9 participated in the Power Cables Cartel until 17 February 2006. The other 50% share in NKT UK was owned by Ericsson Network Technologies AB. Mr Scott has filed a statement on behalf of the NKT Defendants. He was a former employee of D13 (NKT Denmark). He explains that D12 "allowed NKT to have a permanent presence in the UK ... which I thought would be beneficial at the time in building NKT's presence and reputation in the local market." In the National Grid proceedings it is admitted by D12 that "It provided occasional administrative and marketing support to [D13] in connection with the latter's sales of power cables." The position of NKT was therefore that its role was to support the activities undertaken by other members of the NKT group rather than pursue an independent commercial strategy of its own. It appears to me arguable that



NKT UK was part of a single undertaking with the rest of the NKT corporate group.

77. The admission in the National Grid proceedings of the provision of "occasional administrative and marketing support" in connection with sales of Power Cables P&S is an initial reason for Cs alleging implementation of the Power Cables Cartel by it. Mr Scott has further explained that employees of NKT UK would "fulfil a customer liaison/international role. They would support customers, be a physical presence in the market and pass on any market information they gleaned in the course of their duties." That evidence does, in my view, as Mr Robertson submits, show that D12 was directly involved in dealing on behalf of other members of the NKT corporate group with purchasers of cartelised products and services. D12 has not provided full details of its precise role or documentary evidence substantiating its case as to the functions that it undertook in the relevant period. As already noted from the *Toshiba Carrier* case, a defendant does not need to be contractually liable for a sale of a cartelised product in order for a claim against it to have a real prospect of success.

78. In relation to implementation, Ms Demetriou makes the forcible point in relation to the evidence of Mr Scott that D12 was not involved in sales outside the UK and did not in the UK sell directly or indirectly cartel products.

79. She further argues that the provision of administrative support does not amount to selling cartelised products and would not amount to an agreement to restrict competition.
80. But it appears to me that at present in the absence of access to the unredacted Commission Decision and disclosure that the activities of D12 and the question of whether they could amount to implementation of the cartel remains a relevant issue. D12 has not satisfied me at this point that Cs have no reasonable prospect of showing implementation by D12.
81. Ms Demetriou contends that the reliance of Mr Robertson on the fact that D12 is a defendant to other proceedings such as the National Grid proceedings and has not sought a strike out in those proceedings is a hopeless argument for implementation (it denies implementation in those other proceedings). She makes the point that in the National Grid and other such proceedings the damage alleged was suffered in the UK and that had D12 successfully brought a strike out application in those proceedings that would not have affected the question of jurisdiction or the size of the claim. But again it appears to me of moment that other Claimants have involved D12 in proceedings alleging implementation of the cartel.

82. I am not satisfied on the application before me that D12's activities were equivalent to the sale of "boot polish" that had nothing to do with implementing the cartel.
83. In relation to knowledge, Ms Demetriou makes the first point that Mr Henderson, in filing evidence for Cs before me in relation for example to D12's involvement in the National Grid (and other) cartel proceedings, does not address knowledge. That is so.
84. Ms Demetriou contends that Mr Robertson is not entitled in connection with knowledge to rely on *theProvimi* point, namely that it is not necessary to prove any particular concurrence of the will of D 12 with that of NKT addressees. The obiter dicta that I have cited from the Court of Appeal in the *Toshiba* case strongly suggests that the knowledge of the addressee could not be imputed to D12 as a 50% subsidiary. The *Sainsbury's v. Mastercard* judgment does clearly suggest that it would be for Cs to prove that D12 participated in the breach of competition law.
85. But I understand Cs' case through Mr Robertson is of implementation and implementation with knowledge. For the reasons that I have been seeking to explain, I do not consider that in the absence of consideration of the unredacted Decision of the Commission and disclosure that I should be satisfied that there

is no reasonable prospect of success of the claim against D12 and thus making it an anchor Defendant.

86. In relation to the question of the unredacted version of the Commission Decision and in reply, Ms Demetriou sought and was given permission by me to file a further witness statement confirming that no employee or officer of D12 was mentioned in the unredacted version of the Commission Decision and that D12 itself is not mentioned in it. But the unredacted version will probably lead to enquiry as to any relevant involvement of named NKT employees or officers. But even assuming no relevant involvement in that regard, it may be what may emerge from proper relevant disclosure. I consider it can at this stage reasonably be expected that documents may emerge that may show assistance by D12 in relevant implementation and knowledge of cartel activities.
87. It is correct that Cs have had less allegations currently to make in respect of the implementation or knowledge relevant to the cartel against D12 than they have against D3. The case can be said to be weaker against it. Unsurprisingly Ms Demetriou and Mr Moser decided that Ms Demetriou should lead off the applications insofar as they related to facts relevant to implementation and knowledge. Nonetheless, on reviewing matters I am not satisfied at this stage that there *is* no basis whatsoever for Cs alleging that D12 can be an anchor Defendant.

88. . Further, and as I observed to Ms Demetriou in closing, it is not obvious to me how NKT Defendants generally would benefit from a strike out or summary judgment where D12 is concerned, should D3 remain an anchor Defendant.

### **Finnish Reference**

89. Since I reserved judgment and on 28 February 2018 and 05 March 2018, Ms Demetriou's solicitors on behalf of the Prysmian as well as the NKT Defendants, have through e-mails to myClerk referred me to a reference that has been made by the Finnish Supreme Court to the European Court. As I understand the communication, a Finnish Court is considering an application for cartel damages against parent companies (Skanska Industrial Solutions OY and others) where the parents on acquiring asphalt cartel subsidiaries had dissolved them. The issue apparently relates to whether the parent companies could be liable for the activities of the cartellists before dissolution. The reference seeks a preliminary ruling in relation to matters which include questions as to whether determination of liability should be determined by applying Article 101 TFEU directly or on the basis of national provisions and a question of whether EU requirements of effectiveness precludes an interpretation of a Member State's domestic law making it a condition of compensation for damage that the dissolution of a cartel should have been implemented unlawfully or artificially in order to avoid liability for compensation for damage under compensation law. As to knowledge, it

appears that Finnish law may have sought at the lowest proof that the defendant ought to have known of the competition infringement when implementing the relevant transformation which led to the dissolution of the cartel. The second question referred relates to whether when determining liability for compensation on the basis of Article 101 TFEU the same principles are to be applied as the CJEU has applied to determine parties' liability in cases concerning penalty payments "in accordance with which liability may be found in particular on belonging to the same economic unit or on economic continuity?"

90. Before me, there was common ground that a parent could be presumed to be liable for damages for which its cartel subsidiary is liable. The NKT and Prysmian Defendants' point was that the presumption would not work the other way round, thus that a subsidiary could not be presumed to influence its parent or another subsidiary.
91. Those representing the Cs have not sought to comment on the Finnish Reference.
92. In my judgment, it has been too late where the applications before me are concerned to take in effect a point that in relation to damages there should be no presumption relating to the participation or knowledge of a parent. The

parties will doubtless have to consider to what extent the outstanding reference should stay progress in this claim.

93. Further, for my part, any consideration of referring questions to the EU Court would more sensibly arise only once relevant facts have been found that give reason for doubt as to their relevant legal consequence.

### **Conclusion**

94. For the reasons I have sought to explain, I dismiss the applications before me. As indicated when reserving judgment, I shall deal on paper with applications relating to costs and permission to appeal. In context, I would expect concurrent submissions within 10 clear days of notification of the handing down of this judgment. At the same time, I would expect counsel to have drafted an order (into which I can insert my decisions on costs) for my approval or to have drawn my attention as to any issues relating to the order, which I need to resolve.
95. In directing concurrent submissions, I have not acceded to a suggestion by Mr Moser by email on 14 June 2018, that there should be sequential submissions. Should I consider on sight of concurrent submissions, that I need further input from any party, I shall seek it on paper.

Approved Judgment

I direct that pursuant to CPR PD 3A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this judgment as handed down shall be treated as authentic.

(signed)

**ANTHONY ELLERAY QC**