Neutral citation [2021] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1370/5/7/20(T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 February 2021

Before:

THE HONOURABLE MR JUSTICE TROWER
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) VATTENFALL AB
(2) VATTENFALL ELDISTRIBUTION AB
(3) VATTENFALL VINDKRAFT AB
(7) VÄSTERBERGSLAGENS ELNÄT AB
(8) THANET OFFSHORE WIND LIMITED
(10) ORMONDE ENERGY LIMITED
(11) VATTENFALL A/S
(12) VATTENFALL VINDKRAFT A/S
(13) DOTI DEUTSCHE OFFSHORE-TESTFELD UNDINFRASTRUKTUR GMBH & CO KG
(14) STROMNETZ BERLIN GMBH
(15) NOORDZEEWIND CV

Claimants

- v –

(1) PRYSMIAN S.P.A.
(2) PRYSMIAN POWERLINK S.R.L.
(3) PRYSMIAN CABLES & SYSTEMS LTD
(4) PRYSMIAN GROUP FINLAND OY
(5) PRYSMIAN KABEL UND SYSTEME GMBH
(8) PRYSMIAN CAVI E SISTEMI SRL

Defendants

- and -

(1) NEXANS FRANCE SAS.
(2) NEXANS SA

Third Parties

RULING

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1. By an application dated 11 January 2021 the Prysmian Defendants seek an order for costs management pursuant to rule 53(2)(m) of the CAT rules 2015, in conjunction with CPR 3.12(1)(e) and 3.13 to 3.18.

2. The draft order attached to the application seeks a general direction that CPR 3.13 to 3.18 and PD 3E shall apply to the main proceedings and that a timetable be set for the service and filing of costs budgets in the form prescribed by precedent H, followed by budget discussion reports. It also makes provision for a direction that a CCMC be listed after the service and filing of the budget discussion reports.

3. The parties are agreed that the application should be dealt with on the papers without an oral hearing. Both parties have adduced evidence on the application, and the application itself takes the form of a short written argument prepared by counsel for the Prysmian Defendants.

4. These proceedings were initially commenced in the Competition List of the Business and Property Courts, but were transferred to the Competition Appeal Tribunal by order of Adam Johnson J dated 13 October 2020. He was satisfied that both the main proceedings by 15 members of the Vattenfall group and the contribution proceedings by the Prysmian Defendants against members of the Nexans group relate to a claim to which section 47A of the Competition Act 1998 applies and/or an infringement issue as defined in section 16(6) of the Enterprise Act 2002.

5. At the same hearing, there was argument about costs management. In the order by which the proceedings were transferred to the CAT, Adam Johnson J made an order in the following terms:

> "By 20 November 2020, the main parties shall agree cost categories for their estimates and exchange summary statements setting out the costs which they have already incurred in connection with the proceedings, and the costs which they estimate they will incur up to and including a trial of the proceedings."

6. In making that order, Adam Johnson J said *"I am not yet satisfied that cost budgeting in this case is required, although it may be"*. He recognised that the provision of estimates of costs may provide less high-quality information than the provision of formal costs budgets, but also considered that the extent to which they were sufficient depended on the nature of the estimates to be given.

7. In reaching the conclusion that he did, it is clear that Adam Johnson J was concerned about the extent to which the costs of fighting the case to trial might turn out to be disproportionate to the real value of the claim. He was also concerned that the provision of a detailed costs budget in the form of precedent H might itself be unnecessary. He said that the provision of a detailed cost budget can be "a very significant exercise, requiring considerable resources to be expended and requiring, in some cases, material costs to be expended."

8. Summary statements of costs incurred to date and estimates of costs to be incurred up to and including trial were exchanged in accordance with Adam Johnson J's order on 20 November 2020. The form of each summary was the same, dealing with nine phases, based on the categories in precedent H. For each phase there was a separate figure for professional fees, counsel fees and disbursements (including expert fees), but otherwise the estimates were not itemised.

9. The amounts incurred and estimated by each party were very different. The Claimants' costs to date amounted to £2,191,095 (which as I understand it include amounts in respect of the claim against the NKT Defendants with whom they have settled), while the equivalent amount for the Prysmian Defendants was £502,069. The Claimants' total estimate for the period from 13 November 2020 to the end of the trial is £5,795,966, while the Prysmian Defendants' estimate for the same period is £3,844,975.

10. The exchange of summaries was followed by correspondence between the parties' solicitors, in which Macfarlanes for the Prysmian Defendants described both the costs already incurred by Stewarts (acting for the Claimants) and the estimated costs to trial as entirely disproportionate. They say in their application that they have sought clarification of the basis for these estimates, but do not understand the reasons for the high costs. In making their submission to the effect that the costs incurred and to be incurred are likely to be disproportionate to the value of the claim, they submit that the estimated value of the claim advance by the Claimants (in excess of £37 million) is significantly overstated.

11. The Claimants make a number of submissions in response. They say that the complexity and current status of the proceedings is such that it will be very difficult for the parties to provide accurate costs budgets at this stage. They submit that a better approach is for the parties to exchange updated versions of the costs estimates that they have already provided by the beginning of March. This would ensure that the Prysmian Defendants obtain appropriate clarity and detail as to the extent of their exposure to the Claimants' costs based on their present best estimates. The Claimants also suggest that a more sensible approach is for the parties to be required to provide updated figures at appropriate points in the litigation going forwards.

12. In answer to the submission of the Prysmian Defendants that the Claimants' costs are disproportionate to the pleaded value of commerce aspect of the claim, they say that if anything the value of their claim at £37 million is understated and submit that it is frequently the case in claims of this nature that claimants are unable to provide full details of quantum prior to disclosure. Secondly, the Claimants join issue with the way in which the Prysmian Defendants cast doubt on the proposed level of overcharge pleaded by the Claimants. Thirdly the Claimants point to the inherent complexity of litigation involving three separately represented parties with a five-week trial. They make a general point about the difficulties faced by claimants in cartel claims where the behaviour of the cartelists has been concealed.

13. The Claimants also submit that it will be difficult to complete precedent H with the required level of precision at this stage for a number of reasons, including the considerable uncertainty in relation to the extent of the likely disclosure and how it is that they and their experts might be able to extrapolate the relevant data from the disclosure for the purposes of the overcharge analysis. They also say that they do not currently know the precise issues which will be the subject of factual evidence or the extent to which the third parties' expert will agree with the evidence of the Prysmian Defendants' expert on overcharge and pass on.

14. The Claimants address the disparity between the incurred and estimated costs of each party by pointing out that the costs burden on claimants is often higher than that of defendants. They say that this consideration is particularly applicable in the present case because the Prysmian Defendants have already been involved in global litigation in relation to this cartel, which will enable them to harness efficiencies in their conduct of these proceedings which are not available to the Claimants. As I have already mentioned they also say that they have not separated out their costs as against the NKT Defendants, but accept that the allocation of those costs will be a matter for detailed

assessment in due course. Notwithstanding, they submit that it can be seen that in a number of respects the estimate made by the Prysmian Defendants is unrepresentative of the true costs likely to be incurred in the proceedings and should be updated.

15. The evidence adduced by the Claimants also addresses each of the phases of the litigation described in their estimates of costs to trial, explaining why it is that the inclusion of figures at the level estimated is justified. They also rely on the fact that they anticipate incurring higher costs than might otherwise be incurred as a direct result of what they describe as the Prysmian Defendants' iterative and unconstructive approach to this litigation.

16. It is clear that the parties' estimates of the costs they are likely to incur in these proceedings require to be updated; indeed the Claimants accept (and positively content) that this work should be carried out. The issue in dispute is whether the exercise of preparing cost budgets, to be followed by budget discussion reports and a CCMC, is now the right way forward.

17. I have regard to the Claimants' submissions in relation to the difficulty in completing precedent H with the required level of precision. That is sometimes the case in complex litigation but is not of itself a reason not to give directions as to costs management of the type sought by the Prysmian Defendants. In any event, it is apparent that both parties have been able to prepare their existing summaries with some degree of specificity, even if they have not yet produced breakdowns of the estimates they have given. I am not persuaded that it is not possible for them to disclose with further granularity the make-up of the aggregate amounts that they have already estimated, and I do not accept that information in the form of precedent H cannot be provided.

18. I also have regard to the significant dispute between the parties as to the real value of this claim. I do not think that it is possible to form a reliable overall assessment at this stage. Although there has been further evidence on this aspect of the case since the hearing before Adam Johnson J, it seems to me that it is appropriate for the Tribunal to proceed on the same basis as he did where he said the following: "The most one can say is that it is put forward as a substantial figure by the Claimant, but there are arguments that the figure should be much reduced at trial, if damages are in fact awarded."

19. Properly prepared costs budgets are a useful case management tool, particularly where questions of proportionality arise, as they do in the present case. In my judgment, when

considering the extent to which the greater cost scrutiny which they facilitate is a proportionate response to the proper control of the costs of this litigation, the balance in this case comes down in favour of an order in the form sought by the Prysmian Defendants.

20. I agree with the submission made on behalf of the Prysmian Defendants that the preparation of detailed cost budgets in the form of precedent H is more likely to facilitate the desirable objective of transparency as to the parties' likely costs of the proceedings than is the simpler exercise of updating the existing summary estimates. I think that these should in any event be followed by budget discussion reports. Once costs budgets and budget discussion reports have been filed, it will then be possible for the tribunal to consider the terms of any costs management order to be made in the form contemplated by CPR 3.15.

21. Overall, therefore, I am satisfied that an order substantially in the form sought by the Prysmian Defendants is now the right order to make, although I think that the reference in the draft order to 3.12(e) should be to 3.12(1A). I will direct that CPR Part 3 section II and PD 3E should apply to these proceedings pursuant to the costs management jurisdiction conferred by Rule 53(2)(m) of the CAT Rules. The right date for the filing and service of costs budgets is 5 March 2021. The right date for the filing and service of budget discussion reports is 9 April 2021. A CCMC can then be fixed for the first available date on or after 26 April 2021. A hearing is unlikely to be required if the parties agree the terms of any costs management order or that any outstanding matters can be determined on the papers.

22. The Claimants also refer to the need for any costs management to extend to the involvement of the Nexans third parties in the main proceedings. As I understand the submission, this is intended to relate to those parts of the third party proceedings which have not been deferred to trial at a later dated by paragraph 15 of the Tribunal's order of 22 January 2020.

23. While I think that it is appropriate for costs budgets prepared by the Claimants and the Prysmian Defendants to take into account the participation of the Nexans Defendants in the main action, no relief has been sought against the Nexans Defendants themselves. While that may not be a complete objection to the making of a costs management order if it was clearly the right order to make, I am not satisfied that is the case. In my view, it is not clear that the nature and extent of such parts of the contribution proceedings as

are to be tried with the main action requires the provision of costs budgets by the Nexans third parties.

The Honourable Mr Justice Trower
Chairman

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

Date: 5 February 2021