IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1532/7/7/22

BETWEEN:

(1) RWE RENEWABLES UK ROBIN RIGG EAST LIMITED (FORMERLY E.ON UK SOLWAY OFFSHORE LIMITED)
(2) RWE RENEWABLES UK ROBIN RIGG WEST LIMITED (FORMERLY E.ON UK OFFSHORE ENERGY RESOURCES LIMITED)

Claimants

- v -

(1) PRYSMIAN CAVI E SISTEMI S.R.L.
(2) PRYSMIAN S.P.A.

Defendants

ORDER

UPON reading the Claimants claim form filed on 16 September 2022 and the Claimants' application dated 16 September 2022 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") for permission to serve the claim form on the First and Second Proposed Defendants out of the jurisdiction (the "Rule 31(2) Application")

IT IS ORDERED THAT:

1. The Claimants be permitted to serve the first and Second Defendants outside the jurisdiction.

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

REASONS

(1) The Parties

3. The Claimants are developers and owners of the Robin Rigg Wind Farm, which comprises two offshore wind turbine farms located on the Robin Rigg sandbank, in the Solway Firth, midway between the Galloway and Cumbrian coasts. They are located in Scottish waters but are connected to the shore in England.

4. The First and Second Defendants are Italian incorporated companies within the Prysmian Group, one of the largest cable manufacturing undertakings in the world. Both Defendants are domiciled in Italy and have no address for service in England and Wales.

(2) The Decision

5. The Defendants are both addressees of a decision of the European Commission in Case AT.39610 - *Power Cables* dated 2 April 2014 (the "Decision"). The Decision found that a cartel had operated in the high voltage power cables sector between 18 February 1999 and 28 January 2009 (the "Cartel Period"), contrary to Article 101 TFEU and Article 53 EEA.

6. The cartel established by the Decision was a single and continuous infringement which applied to supplies of underground power cables of 110 kV and above and to submarine power cables of 33 kV and above, as well as to all associated products, works and services supplied, where cables were sold as part of a power cable project.

7. The Claimants assert that, according to the Commission's findings, the operation of the cartel involved:

   (a) The allocation of customers and territories in that Japanese and Korean producers agreed not to bid for European projects and vice versa; and

   (b) The allocation of customers within Europe between European producers in that only the appointed producer would bid, or bids would be agreed (i.e. rigged) between producers in advance (i.e. by means of price-fixing or the unlawful

exchange of price information) to ensure that the appointed producer's bid would be the lowest and the project would thereby be awarded to the producer to which the European cartel members had previously agreed to allocate it.

8. The Decision is final, in that all appeals have been exhausted, and these proceedings, under section 47A of the Competition Act 1998, have been brought as a follow on action within two years of the Decision becoming final, as provided for by Rule 119 of the Tribunal Rules (preserving the effect of Rule 31 of the Competition Appeal Tribunal Rules 2003 in respect of claims arising before 1 October 2015).

(3) The Claim

9. The claim concerns the supply of three different types of cable to the Claimants during the construction of the Robin Rigg Wind Farm. These are:

(a) Inter array cables, which connect turbines to an offshore substation.

(b) Export cables, which connect the offshore substation to the onshore transmission and distribution system.

(c) Onshore cables, which link the export cables to the onshore substation.

10. All of these cables are said to correspond with the specification of cables which were the subject of the Decision, and to have been supplied during the period of infringement identified in the Decision.

11. The export cables were supplied to the Claimants by the First Defendant, albeit that the initial bid for the supply of these cables was submitted by jointly the First Defendant and Nexans Norway AS, a company within the Nexans Group (some members of which were also addressees of the Decision). The Claimants also rely on a reference in the Decision which identifies "an exchange of price information" between Nexans and another entity in 2002, which is said to refer to an exchange between cartel members in relation to this specific windfarm project.

12. The inter array cables were supplied to the Claimants by Scanrope Subsea Cables AS, which is not an addressee of the decision and is not alleged by the Claimants to have participated in the cartel. The Claimants rely on the effect of the cartel in inflating the price of cables in the market generally and for these cables specifically. This is referred to as an "umbrella claim" for damages, reflecting a reduced level of competition across a market, and inflated prices, by reason of a cartel.

13. The onshore cables were supplied by Nexans Deutschland Industries GmbH & Co KG (another entity within the Nexans group) as subcontractor to Balfour Beatty Power Networks Limited, pursuant to a contract between the Claimants and Balfour Beatty. The Claimants rely on the joint and several liability of the Defendants for the losses caused by the cartel, further alleging that the price set by Nexans Deutschland was by reference to the cartel mechanism. Alternatively, the Claimants assert an "umbrella claim" for the inflated pricing of the onshore cables by reason of the reduced competition caused by the cartel activity.

14. The Claimants claim loss and damage in the sum of £9.42 million. One feature of the claim is that the offshore transmission assets at Robin Rigg (which include the export and onshore cables, but not the inter array cables) were, by reason of the regulatory regime introduced by the UK Government in 2009, divested by the Claimants to TC Robin Rigg OFTO Limited in March 2011. The costs of this acquisition (including certain financing costs) are then passed back to the wind farm developer (i.e., the Claimants in this case) over time. The Claimants therefore assert that the overcharge suffered as a result of the purchase of cables will still be borne by the Claimants, despite the divestment.

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

15. The Claimants contends that the proceedings are to be treated as taking place in England and Wales. This is because:

    (a) The Claimants are incorporated in England and Wales.

    (b) The Claimants were supplied with the cables in England and Wales.

(c) The majority of the cables which are the subject of the Claimants' claim are located in English waters or the English shore.

16. This seems likely to be the correct outcome, in which case the Tribunal would approach service out of the jurisdiction on the same basis as the High Court by reference to the relevant principles in the Civil Procedure Rules 1998 (*DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7, at [17]-[18]).

17. A final determination of that issue should be made by the Tribunal which hears the first case management conference in the proceedings. However, it has been brought to my attention that, if the proceedings were regarded as taking place in Scotland, there is an equivalent gateway for service out in Scots law under Schedule 8 of the Civil Jurisdiction and Judgments Act 1982, paragraph 2. This provides that a person may be sued in matters relating to delict or quasi-delict in the courts for the place where the harmful event occurred or may occur. Accordingly, there would be power to permit service out of the jurisdiction in such a case on similar principles to the CPR, in the event the Tribunal were in due course to determine that the proceedings should be treated as taking place in Scotland. In the meantime, I will proceed on the assumption that they will be treated as taking place in England and Wales.

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

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

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

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

(a) Serious issue to be tried

19. I consider that the claim has a real prospect of success. It is based on a binding decision of the European Commission, of which both Defendants are addressees. Some of the losses are claimed as direct outcomes of the cartel infringements determined by the Decision, which covers the period in which the cables were supplied. The other claims, based on joint and several liability of the Defendants and on the "umbrella claims", are expressed in accordance with recognised legal principles.

20. Pursuant the Claimants' duty of full and frank disclosure, a number of matters are raised in the application to anticipate arguments which might be advanced against the claim. They include:

(a) The relevance of the 2002 "exchange of price information" referred to above. The Claimants note that they have only had access to the publicly available non-confidential version of the decision, so they are unable to say conclusively what this exchange amounted to, although it clearly refers to Robin Rigg.

(b) The nature of arrangements between the First Defendant and Nexans in the bid stage for the export cables. It is noted that the Defendants might argue that contacts between Prysmian and Nexans were permitted by competition law during the period that they were tendering on a joint basis.

(c) Potential arguments about the joint and several liability of the Defendants for the supply of cables by Nexans Deutschland.

(d) Potential arguments about the application of the principles relating to "umbrella claims".

(e) The effect of a document entered into between the Nexans Group and the Claimants, which contains provisions about limitation and includes a tolling period in which claims may not be commenced.

(f) The existence of a collective action filed in the Tribunal, which brings claims on behalf of UK consumers that might potentially overlap with the Claimants' claims.

21. In addition, the Claimants have described the arrangements for and effect of the divestment of Robin Rigg assists in 2011, which goes to the question of whether the Claimants have in fact suffered a loss.

22. The Defendants may choose to pursue some or all of these arguments, and I express no view on the strength of them at this stage, save to note that none of them seems so obviously fatal to the claim that it would cause me to take a different view on whether there is a serious issue to be tried.

23. Accordingly, I accept that there is a serious issue to be tried.

(b) Gateway

24. The Claimants rely on paragraph 3.1(9) of Practice direction 6B of the CPR:

"(9) A claim is made in tort where – (a) damage was sustained, or will be sustained, within the jurisdiction, or (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction"

25. I consider there to be a good arguable case that the claim falls within paragraph 3.1(9), and in particular 3.1(9)(a). This is because:

(a) The export and onshore cables were supplied to and installed in England.

(b) The Claimants are incorporated under the law of England and Wales and domiciled in this jurisdiction.

(c) To the extent that the overcharge alleged is manifested in the transmission charges payable by the Claimants under the UK regulatory regime, those are paid in England by the Claimants.

(c) Appropriate forum

26. The Claimants submit that the Tribunal is clearly and distinctly the appropriate forum in which the claim against the Defendants can suitably be tried for the interests of all the parties and for the ends of justice. They rely on the location of relevant documents and witnesses in the jurisdiction, including those relating to the procurement process, the regulatory regime and the way in which losses were suffered and financed. They note that there will likely also be evidence based in Italy, but say that the preponderance will be in England.

27. The Claimants also note that any question of whether the proceedings should take place in Scotland or England and Wales would not affect the question of appropriate forum, given that the Tribunal operates across both jurisdictions.

28. I am satisfied that the UK (and this Tribunal) is the proper place in which to bring the claim. The case involves the procurement of cables by English entities for deployment in projects located in English and Scottish waters which are subject to a UK regulatory regime. I consider that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this claim and that the Tribunal ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

Ben Tidswell Made: 12 October 2022

Chair of the Competition Appeal Tribunal Drawn: 12 October 2022