Neutral Citation Number: [2026] EWCA Civ 887

Case No: CA-2025-002911

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Mr Justice Richards, Andrew Lenon KC & Professor Anthony Neuberger
[2025] CAT 59 & [2025] CAT 74

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2026

Before :

LORD JUSTICE GREEN

- -

Between :

(1) NEXANS FRANCE SAS
(2) NEXANS SA — **Applicants**

- and -

(1) London Array Limited
(2) RWE RENEWABLES UK LONDON ARRAY LIMITED (FORMERLY KNOWN AS E.ON CLIMATE & RENEWABLES UK LONDON ARRAY LIMITED)
(3) ORSTED LONDON ARRAY LIMITED
~~(4) GREENCOAT LONDON ARRAY LIMITED (FORMERLY KNOWN AS ORSTED LONDON ARRAY II LIMITED (FORMERLY AND PRIOR TO THAT KNOWN AS DONG ENERGY LONDON ARRAY II LIMITED)~~
(5) MASDAR ENERGY UK LIMITED — **Respondents**

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Tony Singla KC & Paul Luckhurst (instructed by **White & Case LLP**) for the **Applicants**
Colin West KC (instructed by **Hausfeld & Co LLP**) for the **Respondents**

Hearing date: Tuesday 2nd June 2026

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Approved PTA Judgment

This judgment was handed down remotely at 10am on Friday 10th July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Green:

A. Introduction

1. There is before the Court an application for permission to appeal against a judgment of the Competition Appeal Tribunal ("*the CAT*") dated 10 October 2025 ("*the Judgment*"). The applicants are Nexans France SAS and Nexans SA ("*Nexans*" or the "*applicants*"). The Court ordered that the application be heard orally.

2. In the Judgment, the CAT found that the respondents, who were members of a joint venture that undertook the construction of a windfarm in the Thames Estuary ("*London Array*"), paid an unlawful overcharge in respect of certain power cables supplied to them. These cables had been supplied by Nexans Norway, a company in the same group as the applicants, who had been found by the European Commission to have participated in a worldwide cartel concerning high-voltage submarine and underground power cables ("*the Cartel*"): see Case AT.39610 - Power Cables (2 April 2014) ("*the Decision*").

B. The Decision

3. The Decision is 264 pages long and covers 1078 paragraphs. In addition, it includes two annexes. Annex I is headed "*Table of meetings and communications*". It runs to 59 pages and comprises a schedule containing 424 entries. Annex II is entitled "*Names and employment record of individuals relevant for this Decision*". It runs to 8 pages. At the risk of oversimplification, the Decision describes a long term, bid-rigging Cartel which had "*as its object the restriction of competition within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement*": Decision paragraph [644]. Bid-rigging occurs when, in response to a call for tender, undertakings which are ostensibly competing against each other to win the bid set out in the tender, covertly agree in advance who will bid and at what price thereby ensuring who the successful tenderer will be and who will lose. There are many variants of bid-rigging. The parties might, for example, agree on the actual prices to be tendered or simply set a floor price below which no tenderer will bid.

4. The Decision finds infringement by eleven undertakings of Article 101 TFEU and Article 53 EEA Treaty. Paragraph [35] says:

> "The addressees of this Decision are the main producers and suppliers of HV SM and HV UG[1] power cables worldwide. The market for HV SM and HV UG cables is very specialised and limited. Overall, there are not many companies operating in the relevant sector, especially in the EEA where many of the addressees are the only suppliers for certain of the products that are the subject of this Decision. Many of the addressees are considered or consider themselves to be global and European leaders in their respective markets."

5. The Decision found (paragraph [67]) that the members of the Cartel:

> "…allocated projects according to the geographic region or customer. In addition, they exchanged information on prices and other commercially sensitive information in order to ensure that the designated power cable supplier or

[1] High voltage submarine and (extra) high voltage underground power cables, respectively.

"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…"

6. Three addressees are relevant to this application. In paragraphs [15], [17] and [24] of the Decision, they are described as follows:

> "Nexans SA is the ultimate parent company of the Nexans Group. Nexans SA is a company based in Paris, France. The Nexans Group is one of the leading producers and suppliers of SM and UG power cables worldwide.
>
> …
>
> Prysmian Cavi e Sistemi Energia S.r.l., which on 1 December 2011 changed its name to Prysmian Cavi e Sistemi S.r.l. ("Prysmian"), is one of the leading producers and suppliers of SM and UG power cables worldwide. Prysmian forms part of the Prysmian group, headed by Prysmian S.p.A. which is based in Milan, Italy. From 18 February 1999 until 28 July 2005, Prysmian was owned by Pirelli & C. S.p.A. ("Pirelli"). In 2005, Pirelli sold its power cable activities to a subsidiary of The Goldman Sachs Group Inc. ("Goldman Sachs").
>
> …
>
> The ABB group is one of the leading producers and suppliers of SM and UG power cables worldwide. ABB AB ("ABB") produces and supplies power cables from its Swedish plant in Karlskrona. The parent company of ABB is ABB Ltd, based in Zurich, Switzerland."

7. The period of infringement found by the Commission in relation to each was as follows:[2]

   a) Nexans France SAS: 13 November 2000 – 28 January 2009.

   b) Prysmian: 18 February 1999 – 28 January 2009

   c) ABB: 1 April 2000 – 17 October 2008

8. The date of 28 January 2009 is relevant because on that date the Commission conducted dawn raids at the premises of the participants in the Cartel and, as from that date, the infringing activity ceased. The date of 17 October 2008 for ABB was the date upon which it applied for leniency to the Commission. In the event, this application was successful and ABB obtained complete immunity from fines for infringements prior to 17 October 2008. Paragraphs [47] and [48] of the Decision state:

> "On 17 October 2008, ABB applied for a marker pursuant to points 14 and 15 of the Commission Notice on Immunity from fines and reduction of fines in cartel

[2] These are the earliest and latest dates for each relevant corporate group. The relevant dates for the specific entities with the corporate groups for each of Nexans, Prysmian, and ABB are detailed at paragraph [955] and Article 1 of the Decision.

cases (the "Leniency Notice"). On that same date, ABB filed an application for immunity from fines pursuant to points 8 and 14 of the Leniency Notice. The application was supplemented by several oral corporate statements and by documentary evidence. The Commission granted ABB conditional immunity on 22 December 2008.

From 28 January to 3 February 2009, the Commission carried out unannounced inspections under Article 20(4) of Regulation (EC) No 1/2003 at the premises of Nexans (France) and Prysmian (Italy)."

9. The Decision also records at paragraph [1059]:

> "ABB cooperated fully and on a continuous and expeditious basis throughout the procedure and has gradually complemented its original application by further submissions as it proceeded with its internal investigation and conducted interviews with the individuals concerned. It remained at the disposal of the Commission to provide explanations and clarifications. There are no indications that ABB continued its involvement in the cartel after its first submission of evidence."

10. Significantly, footnote [1464] to the last of the quoted sentences in paragraph [1059] provides a caveat to the statement that ABB was not involved in the Cartel: "*Except for what was reasonably necessary to preserve the integrity of the inspections*". This indicates that, with the Commission's consent, ABB engaged in cartel activity *after* 17 October 2008 to ensure that the Commission investigation was not compromised.

11. The Commission at paragraph [112] records that the members of the Cartel "*… were aware of the illegal nature of their contacts, [and therefore] they often referred to projects inside the European home territory by means of abbreviations or code names*".

12. The Decision details interactions between members of the Cartel. Those relevant to the issues raised in this application are discussed below. An important point about what to expect from a Commission decision in the context of follow-on civil proceedings, is that such a decision is concerned with justifying a regulatory finding of infringement, and the imposition of penalties in this case, for a world-wide cartel, against eleven of the world's leading suppliers. It is however confined to finding an infringement by object: Decision paragraphs [644] and [659]. It does, in this context, set out and/or refer to a huge number of different pieces of evidence, including emails and notes of conversations etc. But it was never intended either that each and every piece of evidence on the Commission file which might, otherwise, have been inculpatory to one or more of the defendant undertakings should be recorded or discussed in the Decision; or, that it should ever be viewed as complete in the context of subsequent follow-on civil proceedings, which serve a different purpose and might well require supplemental evidence.

13. A consequence is that references in the Decision to the specific bidding process for London Array, which is merely one particular example of the Cartel in operation, are brief and do not cover every fact or matter relevant to a follow-on claim for damages in respect of that tender process. For instance, whilst the Decision sets out sufficient evidence to show that the Cartel exerted an effect upon trade between Member States

and had a more than *de minimis* potential impact upon competition (sufficient to trigger the object jurisdiction) it does not set out all the evidence needed to establish causation in a civil damages claim. Both Mr Singla KC, for the applicants, and Mr West KC, for the respondents, accepted that it was inevitable that in the course of any follow-on trial the parties would need to adduce supplemental evidence.

C. The Judgment

14. As explained in the Judgment, the respondents are participants in London Array, a project which involved the laying of two kinds of high voltage submarine cables of the kind affected by the Cartel: "*Inter-array Cables*" and "*Export Cables*".

15. The tender for the supply of Inter-array Cables was won by a company called JDR which was not a member of the Cartel. The respondents claimed they had suffered loss in respect of the Inter-array Cables because of an "*umbrella effect*" caused by the Cartel's activities. The CAT concluded that the respondents could not show that they were overcharged in respect of Inter-array Cables and there is no appeal against that finding.

16. In relation to the Export Cables tender process a summary of the relevant facts is as follows. In response to an invitation to tender sent in September 2008 the respondents received three compliant bids, in early November 2008. These were from Nexans Norway, ABB and Prysmian. The respondents invited ABB and Nexans Norway to submit final bids by 3 July 2009. Both reduced their prices in response. The respondents determined that Nexans offered the best price.

17. The following dates and events are relevant:

i) 18 February 1999: The commencement of the infringement as found by the Decision.

ii) 24 April 2008: A representative of Prysmian sent an email to a representative of Nexans discussing various power cables projects ("*the April email*").

iii) 17 October 2008: ABB applied for leniency and therefore its participation in the Cartel was formally found to have ceased.

iv) 5 – 7 November 2008: Conversations occurred between representatives of Nexans and ABB regarding bidding for London Array.

v) 11 November 2008: First round of the London Array tender process closed.

vi) 28 January 2009: The Cartel ceased operating.

vii) 1 July 2009: Second round of the London Array tender process closed.

18. The CAT accepted that the findings in the Decision were binding but also made supplementary findings.

19. First, it reviewed and analysed the interactions between the applicants and ABB. Between paragraphs [101] – [113] the CAT considered the facts surrounding ABB's successful application for leniency. Between paragraphs [114] – [120] it considered

whether there was collusion between Nexans and ABB in relation to export cables. It considered Commission Decision paragraph [444] which recorded that representatives of Nexans contacted ABB to exchange price information in relation to London Array as part of the Cartel. This occurred *after* 17 October 2008, the date ABB's participation in the Cartel was found formally in the Decision to have ceased. The CAT returned to the relationship between Nexans and ABB at paragraphs [271] – [273], explicitly addressing various arguments raised by the applicants. It found that although there was *some* competition on price between Nexans and ABB in respect of the London Array bid process, such competition took place within a rigged system.

20. Secondly, at paragraphs [121] – [130], under the heading "*Did Nexans France know that Prysmian was submitting a high first round bid?*", the CAT analysed interactions between Nexans and Prysmian. The claimants' case at trial was that, pursuant to the Cartel, Prysmian bid at an artificially high, cover, price to ensure that it did not win the tender. The CAT examined emails of 24 April 2008 and 14 May 2008 from Prysmian to Nexans which, construed in context and taking into account findings made by the Commission in the Decision, were found to be references to the participation of both companies in the Cartel. The CAT concluded, taking into account the absence of any contrary evidence from the applicants, that pursuant to the Cartel, Prysmian was not seriously seeking to win the London Array contract and that key employees within Nexans were aware of this.

21. Thirdly, at paragraphs [141] – [146], the CAT considered the extent to which Nexans Norway, the company which made the formal bid, but which was not an addressee of the Decision, was operationally independent of the applicants and might therefore have acted unilaterally of, and unaffected by, the Cartel. The CAT found that the conduct of Nexans Norway *was*, as a matter of fact, affected or tainted by the conduct of Nexans in the Cartel. Further, that, again, the applicants had not adduced any or any sufficient evidence on how Nexans or the Cartel operated to rebut such a finding and that there was no good reason for this. The CAT inferred that mechanisms did exist which ensured that bids made by Nexans Norway reflected the anti-competitive behaviour undertaken by the Cartel: See Judgment paragraphs [269] – [270]. The findings of the CAT are consistent with findings on this by the Commission in the Decision at paragraphs [716] – [717]:

> "(716). Nexans claims that its subsidiaries, such as Nexans Norway A/S, prepared their bids and executed cable sales and deliveries independently from Nexans France SAS. In addition, Nexans points to the fact that the collusive agreements were never discussed in the Nexans Group Tender Review Committee. It therefore argues that these subsidiaries cannot be considered to have implemented agreements of Nexans France SAS. In addition, Nexans claims that Nexans France SAS cannot be accused of implementing anti-competitive agreements on behalf of Nexans Norway A/S.
>
> (717). However, the following objective factors, such as (a) the decision making structure in the Nexans Group, (b) the reporting lines in place between Nexans France SAS and other Nexans SA subsidiaries, such as Nexans Iberia SL and Nexans Norway A/S and (c) the factual implementation of the cartel, demonstrate that the anticompetitive behaviour of Nexans France SAS directly encompassed HV power cable sales produced and supplied by other Nexans SA subsidiaries."

22. Fourthly, the issue of counterfactuals (relevant to causation and the question as to the prices that would have been bid absent the Cartel) is considered at paragraphs [154] – [173]. The CAT found that it was "*unable to conclude that any particular bidder, other than [the respondents], would have submitted an additional or different bid had there been no Cartel [but that this] does not mean that it was impossible, or even unlikely, that there would have been some such additional or different bids*": Judgment paragraph [164]. In essence, the counterfactual world would be substantially different absent the Cartel. Whilst it was not possible to identify any particular cable supplier as they were operating in 2008 and 2009, and conclude that such a supplier would (on a balance of probabilities) have offered a lower price, this did not prevent the CAT finding that it was "*entirely likely that* ***some*** *manufacturer*"[3] would have made a lower bid: Judgment paragraph [173]. As Mr West KC, for the respondents, pointed out on a fair reading of the Judgment a factual conclusion that something was "*entirely likely*", more than met a requirement that causation be established on a balance of probabilities.

23. The CAT then set out its findings in respect of the parties' expert evidence at paragraphs [174] – [258]. It detailed the nature of that evidence. It comprised statistical and econometric analysis, undertaken in respect of financial and other data disclosed by the applicants in respect of London Array and 107 other cable projects, concluded both before and after the Cartel terminated ("*During Cartel Projects*" and "*After Cartel Projects*" respectively).

24. Both experts – Dr Davis for the applicants and Mr Bell for the respondents – agreed that the relevant approach was to undertake a '*during-after'* comparison considering the applicants' margins (i) on Export Cables supplied to London Array, (ii) on other projects during the Cartel period, and (iii) on projects after the Cartel period: Judgment paragraph [175]. A difference between the experts was whether to conduct an analysis of the difference in <u>average</u> margin between During Cartel Projects and After Cartel Projects (a "*group to group*" or "*G2G*" comparison – the respondents' expert's approach); or, the margin that the applicants earned on London Array's Export Cables with the average margin on After Cartel Projects (an "*individual to group*" or "*I2G*" comparison – the applicants' expert's approach). The CAT decided not to adopt the methodology of either expert but instead proceeded methodically through the various issues relevant to the determination of any overcharge, sometimes preferring the approach of Dr Davis and sometimes that of Mr Bell.

25. The CAT concluded there was an overcharge in respect of the Export Cables, setting out its reasons at paragraphs [265] – [266]. It found that the expert evidence showed a higher margin for During Cartel Projects compared to After Cartel Projects. It assessed the magnitude of the overcharge on Export Cables for London Array at paragraphs [284] – [291]. It concluded that the overcharge should be discounted given the competition that occurred at the second round of the bid process in July 2009, after the Cartel had come to an end. It found that the Bank of England base rate plus 2% to be the appropriate interest rate to order: Judgment paragraphs [310] – [319].

D. <u>The proposed grounds of appeal</u>

26. I summarise the proposed grounds of appeal:

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[3] Emphasis in the original.

i) **Ground 1**: The CAT erred in finding that the applicants and ABB, had agreed a floor price and that this affected the price offered by Nexans Norway. This was contrary to the Decision, procedurally unfair, and / or an unevidenced / irrational finding.

ii) **Ground 2**: the CAT erred in finding that the bidding of Prysmian affected the price offered by Nexans Norway. This was an unevidenced / irrational finding and / or procedurally unfair.

iii) **Ground 3**: the CAT erred in its approach to the counterfactual by declining to apply a 'balance of probabilities' standard regarding individual bidders.

iv) **Ground 4**: the CAT erred by relying on a group to group averaging exercise to infer causation.

E. Ground 1

Submissions

27. The applicants put Ground 1 as follows. I have differentiated this ground into three sub-grounds:

> *"*The Tribunal erred in finding that Nexans France and ABB agreed a floor price and that this affected Nexans Norway's price for the export cables. First, the finding that ABB colluded to rig Round 1 of the tender was not open to the Tribunal as a matter of law because it is contrary to Article 1 of the Decision, which determines that ABB was not a participant in the Infringement at the time of the Round 1 bids [(*"Ground 1a"*)]. Second and alternatively, the Tribunal's findings were procedurally unfair because: (a) the ABB floor price point was not pleaded by the Respondents, thus depriving Nexans France of a fair opportunity to seek evidence on this point; and/or (b) ABB was not given the opportunity to answer the allegation [(*"Ground 1b"*)]. Third, even if (quod non) it was lawfully open to the Tribunal to find that ABB and Nexans colluded to rig Round 1 of the tender, such a finding was irrational and/or made without any evidential basis [(*"Ground 1c"*)].*"*

28. In respect of Ground 1a, Nexans argues that the CAT is only entitled to make findings on liability consistent with the Decision, both because the CAT is bound by the operative part of the Decision and the respondents only pursue a follow-on claim. They argue that a finding of bid-rigging by ABB after 17 October 2008, which is an important part of the claim, is inconsistent with Article 1 of the Decision, which specifies that ABB's participation in the Infringement ceased on that date, and the claim is therefore inconsistent with the Decision and impermissible. Insofar as there is an internal inconsistency in the Decision, Nexans argues that it is the formal determination that takes precedence over any (inconsistent) individual recitations of evidence in the preceding reasoning.

29. In respect of Ground 1b, which is a pleading and fairness point, Nexans relies upon a number of authorities, including *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041, *Popely v Ayton* [2022] EWHC 3217 (Ch) ("*Popely*"), and *Vogon International Ltd v Serious Fraud Office* [2004] EWCA Civ 104 ("*Vogon*"). These articulate the importance of parties pleading clearly the operative issues upon which the courts will

then be required to adjudicate and/or having the opportunity to respond to any allegations raised against them. It is said that the respondents did not plead that ABB infringed Article 101 TFEU after 17 October 2008 nor that ABB colluded with the applicants to rig the first round of the London Array tender. As a result, the applicants (and ABB) had no opportunity to rebut the allegations of bid-rigging in November 2008.

30. In respect of Ground 1c, it is argued that it was commercially irrational for ABB to make any unlawful agreement with Nexans and that the CAT's approach to what it perceived as an absence of evidence adduced by Nexans was unreasonable.

Analysis

- *Ground 1a and Ground 1c*

31. It is convenient to take Grounds 1a and 1c together. The short answer to both is that, by reference both to the formal determination and to the supporting reasoning, the Decision makes clear that Nexans' infringement continued until 28 January 2009 and that the conduct of Nexans in approaching ABB in order to engage in collusive behaviour between 5 and 7 November 2008, constituted a formal part of the case against Nexans. This is clear from Article 1 of the Decision and paragraphs [444], [493(b)], and [493(d)] of the Decision, all of which bound the CAT. In this connection Nexans accepted that both the formal determination of the Commission in Article 1 of the Decision against Nexans and the operative reasoning which supported that determination were binding on the CAT. The Decision provides:

    i) Paragraph [444] states: "*Between 5 and 7 November 2008 Mr Romand (Nexans) also contacted Mr Jönsson (ABB) twice by phone in order to discuss the price level that the companies should apply to their bids for the London Array project*";

    ii) Item 422 of Annex I refers to the same communication as referred to in paragraph [444]. It says: "*Phone Calls. Exchange of price information for possible bid, outsourcing/sharing of project "London Array", a large wind farm project of 33/132kV in the UK".* Paragraph [116] of the Decision states that *"Annex I forms an integral part of this Decision*"; and

    iii) Paragraphs [493(b)] and [493(d)] describe the communications referred to in paragraph [444] as being instances of specific "*cartel activities*" undertaken by both ABB and the Nexans corporate group. Specifically, these communications are referred to as instances of "*an agreement or concerted practice through which [the relevant entities] allocated territories and customers within the EEA*" and agreement "*on the prices to be offered for… power cable projects by either the establishment of a floor price or the coordination of price levels*".

32. These sections of the Decision were referred to and considered by the CAT: see Judgment paragraphs [101] – [105]. It concluded (paragraph [107]) that the Decision:

> "…includes determinations that (i) Mr Jönsson and Mr Romand actually exchanged price information relating to the London Array bid between 5 and 7

November 2008, (ii) by doing so, both were participating in the European cartel configuration and (iii) the exchange involved either the establishment of a floor price or the coordination of price levels."

33. Nexans does not challenge the findings in the Decision, including paragraph [444]. It is hence to be taken as a hard fact that Nexans did contact ABB in November 2008 with a view to rigging the bids for London Array. The fact that, for reasons explained in the Judgment, the Commission did not treat these discussions as forming part of the infringement *against ABB,* is nothing to the point. Had the present claim been against ABB then, perhaps, the point would have had some traction. But it is not, and so the point does not arise. In short the CAT fairly and appropriately construed the Decision as containing binding findings against Nexans, which included the exchanges with ABB in November 2008.

34. In relation to the effect of the Cartel upon Nexans Norway, as set out above at paragraph [21], in Decision paragraph [716] and [717] the Commission found as fact that the conduct of the applicants did result in Nexans Norway offering bids at a cartelised rate. These findings bound the CAT. It is hard to understand how these findings can be challenged on an appeal.

35. Mr Singla KC for Nexans raised a series of other points, which are variants of the discussions above which I should address.

36. First, it is said that there is internal inconsistency in the Decision and that it is the formal determination and not the reasoning which must in law prevail. The inconsistency is as between paragraph [444], which refers to ABB engaging in cartel behaviour in November 2008, and the formal determination against ABB, which records that there was no infringement by ABB after 17 October 2008. Mr Singla KC argued that, as a matter of principle, in the event of such internal inconsistency in a decision, the operative part must prevail. The analysis of the CAT, explaining away the alleged inconsistency, is found in Judgment paragraphs [109] – [113]. I agree with the CAT that there is no inconsistency. Behaviour that represents infringing conduct can occur without incurring regulatory liability where undertaken by an undertaking that has applied for leniency and where to behave otherwise would interfere with the European Commission's investigations. The procedure for this is set out in the Commission's guidance on leniency applications. In other words – in the words adopted by the CAT – ABB was required to "*play along*" with the Cartel after 17 October 2008. The CAT made a finding of fact that this was the case. ABB's conduct in engaging in Cartel behaviour along with Nexans in November 2008 was in accordance with the Commission's standard procedure as described in its guidelines on leniency applications. The CAT's conclusion is consistent with the Decision: See paragraphs [9] – [10] above.

37. Secondly, in relation to the submission that the CAT's finding was irrational the analysis above answers this. Had ABB notified the other cartelists on 17 October 2008 that it had applied for leniency then the cat would have escaped the bag. All cartel activity would have forthwith ceased. File cleaners and wipers, and document shredders, would have been on overtime. By the time the Commission conducted "*inspections*", over three months later, there was at the least a real risk that the relevant business premises would have been squeaky clean, and the raids would have become exercises in futility. We know, however, that the raids did occur and that they

were productive and a clear indication is set out in the Decision (see paragraphs [9] and [10] above) that when Nexans contacted ABB in November 2008, the latter acted in a manner consistent with an instruction from the Commission to continue to engage in cartel conduct so as to protect the integrity of the Commission investigation. There is no irrationality; instead there is a clear and logical explanation as to what happened in the Judgment.

38. Thirdly, as to the suggestion that it was wrong for the CAT to draw adverse inferences from the failure of Nexans to adduce evidence relating to the operation of the Cartel, both the CAT and this Court have now considered this scenario on a growing number of occasions. At base, an evidential burden lies on the party which holds the relevant information and evidence. Increasingly, however, in damages cases relating to cartels, the defendant cartelist declines to adduce information or evidence about the operation of the cartel and then cries foul when the decision maker draws adverse inferences from that omission.

39. There is no rule or principle that an adverse inference will necessarily be drawn; but where it is appropriate for such an inference to be made then it is proper for that to occur: see eg the consideration of the case law in *Le Patourel v BT plc* [2025] EWCA Civ 1061 at paragraphs [14] – [29], a case where on the facts no adverse inference was drawn.

40. Here, the CAT records that Nexans failed to present evidence as to how the Cartel worked in practice. In particular, at paragraphs [138] – [140], the CAT analyses the absence of such evidence and concludes that it is "*not satisfied that there is a good reason for the more general absence of evidence*" on the issues of how the Cartel operated and whether those preparing the detailed bid for the London Array tender process interacted with those with knowledge of the Cartel. The CAT infers that there were mechanisms for those with knowledge of the Cartel "*to ensure that Nexans Norway employees complied with the floor price that Nexans France and ABB had agreed would apply*" and, of relevance to Ground 2 below, to "*[bring] to bear Nexans France's knowledge that Prysmian was not genuinely seeking to win the contract for London Array export cables*": Judgment paragraph [146]. The CAT's conclusion that there was no good explanation for this absence of evidence was justified on the facts and not one this Court should interfere with. Having made this finding of fact, the CAT was entitled to draw adverse inferences: see *Prest v Petrodel Resources Ltd* [2013] UKSC 34 and *Royal Mail Group Ltd v DAF Trucks Ltd* [2024] EWCA Civ 181, [134] and [174]. And of course, the conclusion of the CAT is consistent with the findings in the Decision at paragraphs [716] – [717], see paragraph [21] above.

41. In sum, the CAT did not err when construing the Decision and identifying parts which were binding upon it and, further, in drawing an adverse inference from the applicants' failure to adduce evidence. Insofar as it is said that the CAT erred in relation to the evidence, these are disputes over facts and not law, and not matters over which this Court has jurisdiction. At all events none of the matters complained of demonstrate any irrationality over the evaluation of evidence.

Ground 1b

42. Ground 1b incorporates two complaints. The first is that the respondents did not plead the point related to ABB's behaviour. I disagree. Paragraph 29 of the respondents amended claim form refers to Decision paragraph [444]. Paragraph 30 then reads:

> "In its context, (Recital (444)) must refer to an anti-competitive exchange between Nexans and one of the other cable suppliers invited to bid under the RFQ for the London Array project. By means of this exchange, Nexans sought to fix or rig or otherwise align the tender bids for the export cables for the London Array project (which were submitted in November 2008 as pleaded above)."

43. This pleading is phrased in a way that focuses upon the behaviour of the applicants. It does not mention ABB specifically because, as published, the identity of ABB as the party with whom Nexans had made contact was redacted in the Decision as published by the Commission. However, the reference to paragraph [444] is, indirectly, a reference to ABB and Nexans would have had sight of the unredacted version of this paragraph and would in any event have known the identity of the contacted party. Reliance upon paragraph [444] by the respondents amounted to an assertion that the facts therein were to be treated as correct and binding. The pleading is sufficiently clear to put Nexans on notice of the need to address its substantive content, which refers to anti-competitive behaviour relevant to the London Array tender process associated with exchanges between 5 and 7 November 2008 between itself and ABB. The issues were squarely on the table.

44. The second complaint is that *ABB* (not Nexans) did not have the opportunity to respond to the allegations as to its behaviour in November. As to this the CAT did not go beyond the findings of the Decision about the exchanges between Nexans and ABB as part of conclusions *against* Nexans. The CAT had made no finding of liability on the part of ABB. There is no procedural unfairness to ABB.

45. For completeness, the cases of *Vogon International* and *Popley*, relied upon by Nexans in respect to this sub-ground, involve facts far removed from those in the current application. *Vogon International* involved the judge at first instance finding that the appellant's actions had been "*an opportunistic attempt to exploit*" the respondent; on appeal, it was held that these observations were "*entirely unnecessary to any decision that the judge had to reach*", were never part of the respondent's case, and were never put to the appellant in order for it to have the opportunity to respond: see paragraph [24] of that judgment. In *Popley*, the offending findings were similarly found to be "*unnecessary*", went beyond the scope of the pleaded case, and were based on a serious misunderstanding as to why a non-party had not participated in the proceedings: see paragraph [51] of that judgment.

F. <u>Ground 2</u>

Submissions

46. The applicants put Ground 2 as follows. Again, I have differentiated this ground into two sub-grounds:

> "The Tribunal erred by finding that Prysmian was not seeking to win the tender, that Nexans France knew this, and that this somehow affected Nexans Norway's price for the export cables. First, there was no evidence to support such a finding and/or the Tribunal's approach to the evidence was irrational [("*Ground 2a*")]. Second, it was procedurally unfair to make a finding that Prysmian's bid was not genuine in circumstances where the Decision contains no such finding and where Prysmian was not given an opportunity to respond to the allegation [("*Ground 2b*")]."

47. In respect of Ground 2a, Mr Singla KC acknowledged that this was an "*evidence*" point but said that it met the threshold for irrationality. The points made in support of the argument were as follows:

    i) A slide deck produced by Nexans Norway speculated that Prysmian was the bidder with which they were in competition. No such slides would have been produced if Nexans and those in their corporate group knew that Prysmian was not actually seeking to win the tender.

    ii) The Decision does not find that Prysmian submitted a non-genuine bid. Its relatively higher bidding price cannot be understood as suggesting it was a non-genuine bid, and the April email referred to in the Decision at paragraph [439] was insufficient to support the CAT's findings.

48. In respect of Ground 2b, Nexans argues that it was procedurally unfair for the CAT to make the findings it did where Prysmian was not given an opportunity to respond to these allegations.

Analysis

49. Of relevance to this proposed ground are the following parts of the Decision:

    i) Paragraph [439]: "*On 24 April 2008 [company representative A2] (Nexans) sent an email to [company representative B1] (Prysmian) in which he referred to several projects within the EEA and in the export territories that were under discussion*";

    ii) Paragraph [493(b)] describes the communications referred to in paragraph [439] as being instances of specific "*cartel activities*" as undertaken by both Prysmian and the Nexans corporate group. These communications are referred to as instances of "*an agreement or concerted practice through which [the relevant entities] allocated territories and customers within the EEA*"; and

    iii) Paragraph [632]: "*…the European cartel configuration continued for the full duration of the cartel… Section 3 contains evidence that the European cartel configuration continued until the end of the cartel arrangements (See for instance Recitals… (439)…)*".

50. The April email, referred to in paragraph [439], was sent by Mr Acquaotta of Prysmian to Mr Romand of Nexans. Mr Acquaotta was responding to Mr Romand's questions. The CAT quotes this in Judgment paragraph [121] and differentiates

between Mr Acquaotta's text (in italics) and Mr Romand's (in normal typeface) as follows:

> "need elements to day What about intermill *We are not ready and have asked one month extension* Qatar sub. We are ask 5 years guarantie or we are disqualified *Please do it* Need to talk eon *yes but not ready yet*."

E.ON was one of the companies that was involved in London Array and the respondents submitted that the reference to "*eon*" was indeed a reference to London Array.

51. On 14 May 2008, Mr Acquaotta sent an email to Mr Romand ostensibly arranging a meeting to be held the following Friday, which the CAT understood to mean 23 May 2008.

52. The CAT found that the April email was difficult to understand from a mere reading of the text. However, they also note that Prysmian's eventual bid for London Array was circa 25% higher than that of ABB and Nexans: Judgment paragraph [126].

53. The CAT then considered Nexans' arguments that: (i) the April email was not a reference to London Array; and (ii) Prysmian's bid was a genuine attempt to win the London Array tender: see Judgment paragraphs [123] – [130]. These arguments were rejected. The objections to these findings do not raise points of law which can be determined in an appeal. The CAT made findings on evidential issues which were within the scope of its legitimate discretion.

54. The CAT found there was a lack of evidence adduced by Nexans in respect of the interactions with Prysmian and drew adverse inferences from this, concluding that the Cartel, and the interactions with Prysmian in particular, did influence the London Array tender process: See Judgment paragraphs [122] and [146]. Nexans did not produce evidence as to what was being discussed by the April email or to refute the conclusion that the bids were cover bids (i.e. excessively high and not genuine attempts to win the relevant tender). This is not a reversal of the burden of proof, as alleged. Rather, having weighed the evidence before it and taken into account findings in the Decision, the CAT was simply satisfied that the likelier interpretation of the evidence was that the behaviour referred to in paragraph [439] was conduct that was anti-competitive, unlawful, and impacted adversely upon the respondents. This was an evidential evaluation the CAT was entitled to undertake and does not approach the threshold of irrationality. This proposed ground falls outside of the jurisdiction of this Court.

55. With respect to Ground 2b, this echoes the analysis arising under Ground 1b. The present claim is not against Prysmian. The Decision finds that the email exchange between Prysmian and Nexans was an example of Cartel behaviour *by Nexans*, a finding it was open to the CAT to make. No issue of procedural unfairness arises in relation to Nexans which had ample opportunity to address the allegations.

G. Ground 3

Submissions

56. The applicants put Ground 3 as follows:

> "The Tribunal erred in its approach to the counterfactual by declining to apply a "balance of probabilities" standard regarding individual bidders. The respondents bear the burden of establishing on the balance of probabilities that, but for the Infringement, they would have paid a lower price for the export cables. It is only at the stage of quantification, after causation has been established, that the Tribunal is entitled to wield a "broad axe". Assessing causation requires a counterfactual enquiry. In the context of a bespoke tender exercise with a small number of potential bidders, it was an error of law to decline to assess the likely actions of each counterfactual bidder on the balance of probabilities."

57. The CAT's conclusion on causation is found at Judgment paragraph [173]: "*…while we cannot find that any particular manufacturer would have come forward with a realistic bid for export cables in the counterfactual, we consider it entirely likely that some manufacturer would have done*".

58. Nexans argues that this conclusion is impermissibly speculative. There were only ten participants in the Cartel (other than Nexans) who could, in the counterfactual, have acted differently absent the Cartel, and the parties had filed evidence and submissions as to whether any of these would actually have made a lower bid. Nexans takes issue with the CAT's findings as to how other bidders might have acted absent the Cartel, arguing that these findings cannot be sustained by the evidence before the CAT. It was under a duty to make specific findings of fact about <u>each</u> of these potential bidders.

59. The respondents argue that this amounts to a impossible requirement that the CAT identify an exact counterfactual but that no such requirement could ever exist since the determination of a counterfactual is an evaluative exercise about a hypothetical situation which by its very nature does not, and cannot, require exactitude and precision.

Analysis

60. At its most basic, the respondents were required to prove, on the balance of probabilities, that they suffered actionable harm as a result of the relevant infringement. The CAT observed that this required an examination of what price would have been payable in the absence of the Cartel. This principle was correctly stated by the CAT at Judgment paragraph [259] and the relevant legal test for causation was not in dispute between the parties. What follows therefore is a dispute about how these agreed principles applied to the evidence before the CAT.

61. It is correct that the CAT did not conclude that in the counterfactual a *particular* cable manufacturer would have been more likely than not to have made a lower bid. Instead, it found that it was "*entirely likely*", without specifying whom, that there would have been *some* incremental competition which would have driven prices

down. The exercise of assessing the counterfactual is evaluative and involves a degree of unavoidable hypothesis. The approach, in summary, that the CAT took was to:

i) Assess (between paragraphs [154] and [173]) whether there would have been additional competitive bidders for the London Array project absent the Cartel. The CAT addresses the approach urged in this ground by Nexans and comments at paragraph [166] that: "*it focuses unduly on the actual situation in which prospective bidders found themselves without considering the very different circumstances that would have been present had there been no Cartel, involving many of the leading manufacturers of HV submarine cables, in existence for some ten years*".

ii) Rely upon paragraphs [657], [658] and [660] – [662] of the Decision which found that Japanese and Korean manufacturers, that were excluded from bidding by the Cartel, were perceived as credible competitors for European projects: Judgment paragraph [173].

iii) Note the absence of evidence adduced by the applicants which might otherwise have rebutted findings as to the existence of the adverse effects of the Cartel: Judgment paragraph [173].

iv) Rely on the findings in the Decision as to ABB's and Prysmian's behaviour on the London Array tender process specifically: Judgment paragraph [266(1)].

v) Find that the economic evidence suggested that profit margins fell following the end of the Cartel: Judgment paragraph [266(2) and (5)].

vi) Note that it was entitled to presume that participation in the Cartel did provide Nexans with some financial benefit (see the judgment of Sir Julian Flaux, CHC, in *Royal Mail Group Limited v DAF Trucks Limited and others* [2024] EWCA Civ 181) particularly where insufficient evidence on the Cartel's operations has been called by the applicants. The CAT proceeded however to find that it did not need to rely on such a presumption given the evidence before it: Judgment paragraphs [262], [268].

62. There is sufficient evidence and reasoning in the Judgment for the CAT to find on the balance of probabilities that *on the facts*, actionable harm had been suffered. There was no error of law committed by the CAT in making such a finding without also finding that such harm flowed from the absence of any particular, named, cartel member. Indeed, had the CAT embarked upon the exercise demanded now by the applicants, and arrived at conclusions as to which of the cartelists in 2008/09 would in actual fact have bid, then I strongly suspect that the proposed ground of appeal would now be that the CAT had arrived at a remote and speculative conclusion based upon woefully insufficient evidence.

63. There is no scope for this Court to grant permission on this ground which was a proper finding of fact by the CAT.

H. Ground 4

Submissions

64. Ground 4 is put as follows:

> "The Tribunal erred in its reliance on the "group to group" averaging exercise in the econometric evidence to infer causation. Given that the London Array tender was subject to vigorous post-Infringement competition it was wrong in principle to find causation based on an average of Infringement period projects. The use of such averages is also contrary to the approach of the High Court in *BritNed Development Limited v ABB AB & Another* [2019] Bus LR 718, which recognised the unique nature of tenders in this industry and the corresponding inappropriateness of averaging across multiple projects. These points are a fortiori in circumstances where the statistical results are materially impacted by contestable issues of sample selection."

65. Nexans relies on various passages of *BritNed* to argue that it was an error for the CAT to rely on the G2G averaging approach to determine an overcharge, including the paragraph [421] of that judgment:

> "In short, given the bespoke and unique nature of these projects, I find that an overcharge calculated by a model that is explicitly averaging across multiple projects to be an inappropriate one. I much prefer, all things being equal, an approach that focusses on the specific project in relation to which compensation is sought."

66. Objection is made to the inclusion of post-2018 projects and turnkey projects in the overcharge calculation, on the basis that there was no evidence to suggest the former were affected by the Cartel and the latter were qualitatively different to non-turnkey projects such as London Array. Mr West KC, for the respondents, argues that this is an impermissible attempt to impugn the CAT's evaluation of economic evidence which is to be classified as an issue of fact beyond the jurisdiction of this Court.

Analysis

67. The CAT found that both experts agreed that the relevant approach was to undertake a "*during-after"* comparison but that the respondents' expert, Mr Bell, favoured a G2G approach and the applicants' expert, Dr Davis, advocated for an I2G approach.

68. The CAT held that it was not appropriate to "*choose*" between the G2G and I2G approaches. Rather: "*both the I2G figure and the G2G figure contain evidence relevant to the determination of [the issue of overcharge]*". Both approaches had limitations and advantages: Judgment paragraphs [189] – [193]. Various issues arose in respect of the appropriate expert methodology, and the CAT addressed each, including the appropriate margin to use and which projects to include as comparators. Sometimes the CAT preferred the methodology of one expert and sometimes that of the other.

69. I would echo the reminder of this Court in *BritNed* at paragraph [123]:

> "…It is also essential for us to keep firmly in mind the well-known principles of appellate restraint in relation to questions of fact, including the evaluation of primary facts and the inferences to be drawn from them, which have been emphatically restated in a plethora of recent cases of the highest authority. Those principles apply just as much to cases in the field of competition law as they do in other areas of civil litigation. They also apply to the assessment of expert opinion evidence no less than they do to findings based on the evidence of witnesses of fact."

70. The CAT was alive to the issues with the G2G approach of which Nexans complains. For example, it noted at paragraph [190] that:

> "[the applicants are] correct to observe that the G2G figure cannot on its own substantiate either the existence of the Overcharge or its amount… [t]he G2G figure involves a comparison between two mean average figures. It is not, therefore, testing specifically for an Overcharge on the London Array Project. There might be reasons specific to London Array why, even if the Cartel caused average margins on During Cartel Projects to increase, there was no such effect on the London Array margin specifically."

71. At paragraph [275] of the Judgment it held:

> "We have explained why, in our judgment, the Cartel infected the tender process applicable to London Array specifically. That means that London Array shared relevant characteristics with other During Cartel Projects. The G2G estimate, accordingly, is relevant evidence as to the level of the Overcharge that London Array suffered, although it is not conclusive as to the level of that Overcharge as we discuss in Section H below."

72. There is no inconsistency between the approach in *BritNed* and the present case. In *BritNed* the High Court simply preferred one approach *on the facts*. The equivalent G2G estimate in *BritNed* was found to be unreliable for a variety of evidential reasons (Judgment paragraphs [417] – [420]) whereas in the present case the CAT accepted that the respondents' expert's methodology could be used, albeit with appropriate caution, to inform its eventual finding in respect of the overcharge.

73. Nexans relies on certain phrasing from the CAT's Judgment to suggest that its inclusion in the overcharge calculation of post-2018 and turnkey projects was unjustified and irrational. With respect, these arguments mischaracterise the CAT's approach:

    i) In relation to post-2018 projects, Nexans advanced the argument that they should be excluded from the G2G comparison. The CAT carefully considered and rejected their arguments at paragraphs [229] – [235]. The reasons are based upon the CAT's view of certain matters of fact. The CAT was entitled to conclude as it did.

    ii) On turnkey projects, discussion of their inclusion between the CAT and the parties' respective experts is evidenced by the trial transcript which this Court has seen. The CAT was entitled to prefer the respondents' expert's approach.

74. There is no appealable error in the CAT's analysis or findings. The analysis involved a wide array of quintessentially factual questions such as: which sets of comparables were to be taken into account; the period of time to be used to bound the comparables; the accuracy of the evidence; and the evidence that might be taken into account to make adjustments to such evidence to make it more relevant, etc. This evaluative exercise was based upon multiple layers of assumptions about facts and inference of fact drawn from these layered assumptions. The CAT's analysis was careful and nuanced. Its conclusions were well within its legitimate margin of discretion. No issue of law arises over which this court has jurisdiction.

I. Disposition

75. For the reasons set out above I refuse the application for permission to appeal.