



Neutral citation [2018] CAT 3

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1248/5/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

5 March 2018

Before:

THE HONOURABLE MR JUSTICE GREEN
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

PEUGEOT S.A. AND OTHERS

Claimants

- v -

(1) NSK LTD.
(2) NSK EUROPE LTD.
(3) NTN CORPORATION
(4) JTEKT CORPORATION
(5) AB SKF
(6) ~~INA HOLDING SCHAEFFLER GMBH & CO. KG~~
(7) ~~SCHAEFFLER HOLDING GMBH & CO. KG~~
(8) ~~SCHAEFFLER AG~~

Defendants

Heard at Victoria House on 2 March 2018

RULING (SPECIFIC DISCLOSURE)

APPEARANCES

Mr. Tom de la Mare QC and Mr. Tristan Jones (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants

Mr Aqeel Kadri (of White & Case LLP) appeared on behalf of the Third Defendant

A. INTRODUCTION

1. In this application the Claimants seek orders of disclosure in relation to certain patent or design right licence agreements and related documents from the Third Defendant (“NTN”) and inspection of three further documents relating to such patents which were disclosed but withheld from inspection by NTN. Originally, the Claimants also sought disclosure of such documents also from the First and Second Defendants (“NSK”) and Fifth Defendant (“SKF”). However, by the time that the Application was heard the Claimants no longer pursued the request vis-à-vis NSK and had agreed a draft consent order on disclosure with SKF.
2. The Claim relates to the decision (“the Decision”) of the European Commission (“the Commission”) of 19 March 2014. NTN is one of the addressees of the Decision. In the Decision the Commission found that the NTN (and others) had engaged in a cartel which fixed the prices of automotive bearings supplied to car manufacturers between 8 April 2004 and 25 July 2011 (“the Cartel Period”). The description of the cartel in the Decision is cursory:

“(28) JTEKT, NSK, NFC, SKF, Schaeffler and NTN participated in a cartel the overall aim of which was to coordinate the pricing strategy vis-à-vis automotive customers. This included to varying degrees:

(1) the coordination of the passing-on of steel price increases to automotive customers;

(2) the coordination of responses to certain [Requests for Quotations *i.e.* tenders (“RFQs”)] issued by automotive customers, in particular with respect to determining the undertakings that would quote, the price at which they would quote and the moment at which quotes would be submitted in response to such RFQs;

(3) the coordination of responses to certain APR requests from automotive customers;

(4) the exchange of commercially sensitive information, in particular on the status of negotiations with customers on the passing-on of steel price increases, on prices quoted or to be quoted to specific customers in the context of a RFQ, on APR requests or on general or specific contract terms.

(29) There was in general a common understanding among participants not to undercut the other competitors' prices when prices increased as a result of an increase in the steel price so as to maintain existing shares of supply.

Occasionally, the participants discussed complaints about non-compliance with the anti-competitive arrangements.

(30) The evidence shows that the participants engaged in various anti-competitive practices through multilateral, trilateral and bilateral contacts.

4.1.1. Multilateral meetings

(31) In multilateral meetings (also called by some participants "steel" or "club" meetings) the participants coordinated the pass-on to automotive customers of increases in the steel price. In that context, the participants exchanged information on:

- which customers had (not yet) accepted a price increase due to the steel price increase,
- the amount of the requested or accepted increase,
- the timing of the increase, as accepted by the OEMs, and
- the status of the negotiations with their respective automotive customers, if still pending.

(32) At these multilateral meetings, the participants also coordinated certain upcoming RFQs or APR requests from customers and/or the response to be given to a specific customer request relating to the re-negotiation of contract terms.

4.1.2. Bi- and trilateral discussions

(33) The participants engaged in bi- or trilateral discussions through meetings as well as emails and/or telephone contacts, which took place when cartel members had a common interest in discussing specific customers and/or platforms either alongside the multilateral meetings or on an ad-hoc basis. In such bi- or trilateral discussions, the participants coordinated, to varying degrees, inter alia quotations to be submitted in response to specific RFQs, supply shares to specific customers of common interest, percentages of discounts to be negotiated with certain customers, and the passing-on of steel price increases with respect to specific customers.”

(Footnotes omitted)

3. There is no analysis in the Decision of the effects of the cartel and whether it did or did not lead to overcharge or as to passing on etc. These matters are outside the remit of such a decision. The Decision has come about because the Defendants admitted their participation in the unlawful cartel and sought leniency from the Commission. The Decision is for this reason very much shortened and is more abbreviated than a traditional Commission decision on liability for price fixing which ordinarily would set out at great length the evidence upon which the findings of breach are predicated. The present claim

is for damages. There is no issue as to liability. This is established by the Decision. The issues outstanding for determination focus upon: causation; overcharge; and pass-on.

4. The Claimants are 19 companies from within the Peugeot group of companies headed by the First Claimant, Peugeot S.A. (“PSA”).
5. NTN was the direct or indirect parent company of a group of subsidiaries, including NTN-SNR Roulements S.A. and NTN France S.A., that it controlled directly or indirectly.
6. As this litigation has progressed the claim has become more focused. Initially the Claimants sought “umbrella damages” which sought to reflect the possibility that non-cartelists might also have increased prices as a result of the restriction of competition brought about by the cartel. However, this and analogous issues, are no longer pursued.
7. Specifically, the Claimants seeks disclosure of the following:
 - (1) All licences or cross-licences for patents or design rights relating to the use of ASB technology (“ASB Licences”) granted or amended during the Cartel Period which were or would have been applicable to the Claimants or any of their projects.
 - (2) All ASB Licences granted or amended before the Cartel Period which were or would have been applicable to the Claimants or any of their projects during the Infringement Period.
 - (3) All other documents prepared and/or communicated during the Cartel Period and concerning ASB Licences, including *inter alia* amendments to such licences and the grant or refusal of such licences, which were or would have been applicable to the Claimants or any of their projects.
 - (4) All other documents prepared and/or communicated before the Cartel Period and concerning ASB Licences, including *inter alia* amendments

to such licences and the grant or refusal of such licences, which were or would have been applicable to the Claimants or any of their projects during the Cartel Period.

- (5) Documents referred to in an email between NTN and the NSK group of companies in 2004, and other related documents.
8. Inspection is also sought of three documents from the Commission's file (the "Access To File Documents") which were disclosed by NTN but withheld from inspection on grounds of relevance, pursuant to paragraph 7(e) of the Chairman's Order of 11 October 2016; and Documents referred to in witness statements served on behalf of NTN.
9. The application is made under Rule 60(3) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Tribunal Rules"). In relation to documents referred to in NTN's witness statements the application is made also under Rule 61(b) and Rule 64(5) of the Tribunal Rules.

B. APPLICATION

10. I turn now to the specifics of the present application.

(1) Procedural history

11. Some of the cartelists who did not bid on RFQs argue that their decision was due to the fact that they could not obtain a patent licence required from SNR. The Claimants allege that at all relevant times NTN owned patents over Active Sensor Bearing or "ASB" technology. This is incorporated into wheel bearings to capture and transmit information and data about wheel speed. This has utility in relation to, inter alia, braking, skid control, GPS and speed monitoring. The Claimants sought this technology in some of its front wheel bearings. NTN has a reciprocal licensing arrangement with SKF which was able therefore to supply the Claimants with its requirements. However other suppliers had to obtain a licence from NTN before they could supply bearings to the Claimants.

12. On 1 October 2016, the Tribunal ordered, *inter alia*, disclosure by each Defendant of the Access to File Documents. The Access to File Documents included documents supplied by the Defendants to the Commission during the latter's investigation and documents provided to the Commission by third parties.
13. Disclosure was in due course given.
14. On 15 September 2017 the parties exchanged their witness evidence and on 13 October 2017 they exchanged reply witness evidence.
15. On 19 December 2017 the Claimants' solicitors invited the Defendants to conduct a targeted search for, and provide disclosure and inspection of, all inter-cartelist patent or design right licence agreements in force during the Cartel Period (on an undertaking to undertaking basis) licensing such intellectual property for the manufacture, sale and/or distribution of automotive bearings.
16. The basis for the request was that disclosure already provided indicated that such agreements had been used as a tool to implement the cartel and were presented in the witness evidence and reply witness evidence as ostensible reasons for Defendants either not bidding or not bidding competitively in relation to the Claimants' RFQs for bearings.
17. The Defendants refused this request in categorical terms. In response the Claimants sought to limit and circumscribe the request to see whether it could be made more palatable to the Defendants.
18. In a letter dated 18 January 2018 the Claimants suggested limiting disclosure to the ASB Licences and related documents. It was said that designs used by the Claimants in bearings purchased during the Cartel Period were protected by the NTN's rights concerning the ASB technology. Further, it was apparent that NTN had granted licences to other bearing suppliers, including NSK and SKF, to use this technology with respect to the supply of bearings to the Claimants.

(2) Summary of Claimants' submissions

19. The Claimants argue that documents disclosed thus far show that: (i) the ASB patents were a device by which the cartelists enforced agreed customer allocations because NTN would deny rights to parties not allocated the particular RFQ, and possibly also a way of influencing price levels; (ii) the absence of patent licence rights was put forward by various cartelists as a reason why they could not bid for particular RFQs; (iii) commercially sensitive information regarding patents was a regular topic of conversation between the cartelists; (iv) that prior to the Cartel Period there were discussions between individuals who subsequently become the leaders of the cartel, including from NTN, as to the restrictive policy that would guide the licensing of the technology; (v) disclosure of documents concerning the patents could well shed light on how the cartel operated to raise prices above the competitive level and will provide important guidance to the Tribunal in determining at what level prices were supra-competitive. In this regard the Claimants point out that the position of NTN is that there was no overcharge at all.

(3) Summary of NTN's submissions

20. NTN opposes disclosure. NTN says that the disclosure is not relevant, the application is disproportionate and is in any event pursued far too late on.
21. As to relevance the licensing of patented technologies is not referred to in the Decision, let alone as forming part of the infringement. This demonstrates that the documents sought by the Claimants are not relevant. The Claimants' argument that the documents "are relevant as they may shed light on the way in which licence agreements were used by [NTN] and others as an excuse to conceal the operation of or to further the objectives of the cartel" (paragraph 29 of the Application) is a classic fishing expedition. The Claimants have not pleaded an allegation that licence agreements played any role in the operation of the unlawful agreement and such an allegation would be a "stand-alone" allegation falling outside the scope of the Decision.

22. The Claimants' argument that the Defendants sought to justify decisions not to bid for certain RFQs by reference to the need for licences that were not ultimately granted is not supported by the extracts referred to in the Application. None of these references to evidence afford grounds for suspicion that the grant or refusal of licences was used by the Defendants as an "instrument" of the cartel
23. The suggestion that the grant or refusal of licences furthered the objectives of the cartel is also immaterial since the Commission has already determined that there were discussions about who would bid for certain RFQs, and that the infringement was concealed from the Claimants. The licences therefore do not go to any live issue in the proceedings.
24. On proportionality, NTN argues that the exercise would be disproportionate. The disclosure sought is for documents over an undefined period of at least 7 years (from 2004-2011, and potentially longer) and would entail an extensive search exercise and process. The target - correspondence and other material relating to negotiations for licence agreements - can only be located by searching the NTN's electronic filing systems. To do this the NTN would need to:
 - (1) Identify the relevant custodians (beyond those identified to date);
 - (2) Identify the nature of discussions on licensing matters and determine how and where relevant material is stored;
 - (3) Identify the time period during which the relevant agreements were negotiated;
 - (4) Collect data from filing systems based on custodian and date range and transfer these to a document review platform;
 - (5) Apply appropriate search terms and date restrictions;
 - (6) Review the resulting documents to identify the relevant documents.

25. NTN has estimated that this would involve collecting and searching a potentially large amount of data (50-100GB), and its evidence resisting the Application estimated that the costs of this exercise would be in the region of £50,000 to £100,000. The exercise would not be completed before the end of March (*i.e.* only two weeks before the scheduled start date of the trial).
26. Finally, in relation to timing the application is made late, and without proper explanation. The application could have been made much earlier and such a tardy application, if granted, would cause considerable disruption to the efforts being made to prepare for trial.

C. DISCUSSION

27. In my judgment it is appropriate to order disclosure. This is for the following reasons.
28. The first point is that in any quantum case it must surely be an elementary starting point that the court or tribunal has a full and comprehensive understanding of the detailed workings of the cartel in question. In many follow-on cases that detail and description is provided by the Commission decision which establishes liability. Routinely in a full-blown liability decision the description of the cartel might span many hundreds of paragraphs and recite voluminous documentary evidence to support the finding of liability.
29. But that it not applicable in this case because the purpose of the Decision was not to record in detail how the cartel worked. To the contrary, it amounted to a short form decision focusing upon the fines to be imposed which took account of leniency applications.
30. I reject NTN's submission that because the Decision is silent on this issue it, cannot, thereby, be relevant or is only relevant is specifically pleaded as a standalone ground. Were this to be true it would serve to stifle the effective enforcement of follow-on damages claims and in particular those that have (as is increasingly the case) arisen in the wake of leniency applications made by the cartelists to the Commission in order to seek a reduction in fines. If NTN

were correct the court or tribunal in question would be compelled to take as its model for the illegal activity the description set out in an abbreviated decision which did not purport to provide anything other than the broadest outline of the facts giving rise to illegality. In any event the Claimants seek this disclosure not because it is alleged that it amounts to independent free-standing illegality. It is sought because it is said to be an integral part of the illegality already found in the Decision.

31. In my view it is obvious that a full understanding of the *modus operandi* of a cartel may be directly relevant to the issues which arise in a quantum case. It does not take much imagination to see that this must be the case. Standing back, it is a proper *prima facie* inference for any court or tribunal to make that the workings of a price fixing cartel have one main end in mind *viz.*, the maintenance of supra-competitive prices. It follows that the day to day workings of the cartel are designed to achieve that end. As such there is a more or less inevitable nexus between the workings of the cartel and the overcharge that purchasers subsequently may seek to recover.
32. In cartel quantum cases the usual method for computing the overcharge entails modelling how the counterfactual market would have worked absent the collusion and then comparing this with the prices and terms and conditions *actually* applied in the cartelised market. In a bidding cartel, where the cartelists seek to curtail the number of bidders, the essential logic is that the fewer the bidders the less intense the competition and, it follows, the higher the price that is paid by the customer publishing an RFQ. Knowing exactly how the cartel worked to limit the number of bidders may be of direct relevance to working out just how different the actuality was from the counterfactual.
33. In the present case the positions adopted by the experts are starkly contrasting, The Claimants' expert says that the overcharge is c. 10-12%. The Defendants' experts say that there was no overcharge at all. The task of the Tribunal will be to determine whether there was any overcharge, and if so, how much. Mr De La Mare QC, for the Claimants, argued that that the process may include a degree of educated "approximation" which takes account of qualitative

evidence and that the documents sought could be directly relevant to this exercise.

34. It is also said (to bring the analysis somewhat closer to the present facts) that if there were valid technical (*i.e.* patent related) reasons why one or more of the Defendants could not bid pursuant to an RFQ then that could legitimately affect (reduce) the number of viable bidders and the intensity of price competition in response to a RFQ. Prices might legitimately be higher because the number of viable bidders might be small. But if those technical reasons amounted to a contrivance advanced to erect a respectable veneer behind which cartelist could hide, then that is also relevant to a computation of how the market would or might have behaved absent the cartel. Once the sham reasoning for not bidding is taken out of the equation the conclusion might be that there *should have been* many more bidders with an intensification of price competition and a resultant lowering of the prices being tendered in response to the RFQ.
35. Equally, if the documents shed light on such matters as costs or profit sharing or customer allocation or the use of a refusal to grant a licence to curb or penalise a “cheating” cartelist, this could also be valuable information guiding the Tribunal’s ultimate decision.
36. My starting point is thus that *if* there is evidence that the use or misuse of intellectual property rights formed a part of the actual workings of the cartel then that evidence is intrinsically likely to be to be relevant to the quantum issues that then follow.
37. I turn therefore to whether there is *prima facie* evidence that the licensing of technology formed part of the cartel. As to this I am quite clear that there is ample *prima facie* evidence to support an order for disclosure.
38. I note in this regard that in their written submission to the Tribunal NTN says as follows:

“Indeed, the Claimants’ own evidence, served in September 2017, shows that the Claimants were fully aware that access to the ASB technology was an

obstacle for certain suppliers, and that the Claimants even deployed certain strategies to encourage [NTN] to licence the technology (Mahieu 1, §57).”

It thus seems that access to the technology was a serious practical issue and that the Claimants were pressuring NTN to facilitate licences. As such, it is accepted by NTN that the licensing policy was a key factor impacting upon the ability to bid.

39. In their application before the Tribunal the Claimants have referred to multiple instances from the already disclosed evidence where these patent licences are referred to in circumstances which, individually or at the very least collectively, convey the impression that the Defendants or some of them used these intellectual property rights as a cloak for their cartel. It is not necessary for me to refer to each of the items relied upon. It suffices to refer to a selection.
40. First, there are documents indicating that in the course of the exchange of information relating to the cartel the cartelists incorporated information about the ASB Licences:
 - (1) In a memorandum dated 6 December 2001 between JTEKT and SNR, JTEKT highlighted the “major differences [in royalty rates] between the European version and Asian version” of the ASB Licences between SNR and JTEKT, having regard to the RFQ for PSA’s project B0. This document is headed “please destroy after reading”. There is some evidence that the cartelists engaged in systematic destruction of inculcating evidence. This inference tends to lend to a premium being attached to such documents as remain which will assist the Tribunal to determine how the cartel worked.
 - (2) In a memorandum dated 17 March 2003 regarding a pre-cartel meeting between JTEKT and SNR held on 13 March 2003, JTEKT stated that, in its view, it was “difficult to reduce royalties without giving something to SNR.”

- (3) In a memorandum dated 11 September 2003 regarding a pre-cartel meeting between JTEKT and SNR, JTEKT reported with respect to SNR's rationale for granting ASB licences to co-cartelists, that the "basic rule is that in case of existing model C/O [*i.e.* carry over] design, or small changes, patent rights are not given to anyone other than current suppliers".
 - (4) In an attendance note dated 20 October 2003 regarding a conference call between JTEKT and SNR JTEKT recorded its intention to ask SNR to "refrain from giving the permission" to NSK to use the ASB technology and also from bidding for a customer's project more generally.
 - (5) In a memorandum dated 8 April 2004 regarding a cartel meeting between inter alia JTEKT, SKF, SNR, NTN and NSK held the same day, JTEKT recorded that NSK's right to use the ASB patent on the "next model of 407" (a reference to PSA's project X7), and the associated charges, were a topic of discussion. It was this meeting the Commission treated as the start of the formal cartel on 8 April 2004.
 - (6) In an internal JTEKT memorandum dated 8 June 2004, JTEKT suggested that a forthcoming cartel meeting would discuss, *inter alia*, the "SNR ASB patent".
41. There are in addition documents which provide support for the proposition that NTN, in discussion and/or consultation and/or agreement with other cartelists used its patent rights to curb under-pricing, allocate customers and share profits. Other documents referred to by the Claimants make the nexus between these intellectual property rights and the reasons for bidding or not bidding relatively explicit. For example:
- (1) In an email dated 7 December 2004, Mr Keiffer, at the time Regional Manager at NSK, reported internally on the fact that NSK had "received a request for quote for X7 wheel HUB project few months ago" but "did not quote due to SNR patent issue and...".

- (2) In an internal email of 8 December 2004, Schaeffler commented that it was confident that SNR would ensure that Schaeffler got 50% of a particular project by declining to allow NSK use of the ASB patent.
 - (3) In an email said to be dated 9 December 2004, Mr Keiffer reported internally on the fact that NSK had not provided a quote for PSA's project X7 due to the "NSK patent issue".
 - (4) In an email dated 17 May 2005, Mr Keiffer reported internally on the fact that NSK's decision to decline PSA's RFQ for the T7 project's front wheel bearings was due to NSK not obtaining "a positive answer from SNR to use the license for this program".
42. The Claimants rely in addition upon the fact that the witness statements of the Defendants refer to the ASB Licences and to attempted negotiations for such licences. There is no need for me to recite at length from these statements. References of the sort described are found in the statements of Mr Kieffer and Mr Dos Santos (served by NSK) and Mr Lefèvre (for NTN). The Defendants argue that these do not provide explicit evidence of cartel behaviour. Standing alone this might be right but in the context of the documentation as a whole they are part and parcel of a picture which *prima facie* suggests that the use or misuse of intellectual property could well have been a component of the cartel.
43. In my judgment there is more than sufficient evidence to show that, at least *prima facie*, the licensing arrangements operated by NTN formed part of the illegal arrangements that give rise to liability. For this reason, that material is intrinsically likely to be relevant to the related quantum issues.
44. The precise relevance of this material will be tested at trial. But this application is not a fishing expedition. If, contrary to expectations, the material disclosed turns out not to have any real significance at trial then the Defendants can make submissions about this in due course in relation to costs. I am not, however, persuaded that the exercise is disproportionate. Indeed, it is notable that the costs identified by NTN as attributable to the disclosure process are not vastly greater than the costs identified by NTN in its costs

schedule attributable to opposing this disclosure application before the Tribunal.

45. There is one additional matter that this disclosure might be relevant to. There are aspects of this case that might turn upon the oral evidence of witnesses of fact. As matters stand there could be a number of witnesses called by the Defendants to address issues which include the workings of the cartel and its impact upon prices. There are also many potential witnesses to be called on behalf on the Claimants. As such the Tribunal might very well have to form a view as to the veracity and credibility of these witnesses. It is a forensic truism that the probative value of oral evidence is routinely affected by its consistency (or otherwise) with the surrounding documentation and in particular contemporaneous documentation.
46. If the disclosure shows that those witnesses have deliberately and unlawfully engaged in the manipulation of intellectual property rights as part of a cartel this might be a factor which the Tribunal will wish to consider in deciding what weight to accord to that evidence. In other words, this evidence might also go to the credibility of witnesses on potential material issues.
47. I would not have treated this consideration *alone* as justifying an order for disclosure; but it is a reinforcing consideration for the conclusion that I have already arrived at.
48. Finally, NTN argues that the lateness of the disclosure will cause conspicuous unfairness to it and risk a substantial and unheralded expansion of the case, distracting its legal team from preparing for trial. I disagree. I do not consider the scale or costs of the exercise to be unmanageable. NTN could have agreed to disclosure in December 2017, some months ago. I take the point however that with the start of the trial fast approaching NTN needs to know how this new material, once disclosed, might be deployed. The directions I propose to make will ensure that the relevance to the Claimants' case on the documents is spelled out in advance of trial.

49. For all these reasons I make the following orders which are designed to take account of the limited time that now exists prior to trial and the important need to ensure the greatest degree of clarity as to relevance of this material in advance of the start of the trial:

- (1) Readily available materials (such as the patent licences themselves) will be disclosed by 9 March 2018.
- (2) Less readily available materials (such as emails relating to the negotiation of such licences) will be disclosed by NTN on 23 March 2018.
- (3) By 29 March 2018, NTN may, if it wishes, serve supplemental factual or expert evidence relating to the disclosed materials.
- (4) By 6 April 2018, the Claimants may, if they wish, serve a short supplemental report of their expert witness (of no more than five pages in substance) explaining his view of the relevance (if any) of the disclosed materials.
- (5) On the same date, 6 April 2018, the Claimants are to file a schedule identifying which of the disclosed materials they intend to rely on at trial and the relevance or inferences from each and every said document.

50. In the course of the hearing I indicated to the parties my views on which documents fell into which category. I will however leave it to the Claimants and NTN to draw up a form of order encapsulating these directions.

The Hon Mr Justice Green
Chairman

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

Date: 5 March 2018