

THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)



The Honourable Mr Justice Jacobs

CL-2019-000210

1st May 2020

BETWEEN:

Claim No. CL-2019-000212

(the "SSE Proceedings")

- (1) SSE plc
 - (2) SCOTTISH AND SOUTHERN ENERGY POWER DISTRIBUTION LIMITED
 - (3) SSE SERVICES plc
 - (4) SOUTHERN ELECTRIC POWER DISTRIBUTION plc
 - (5) SCOTTISH HYDRO ELECTRIC POWER DISTRIBUTION plc
 - (6) SCOTTISH HYDRO ELECTRIC TRANSMISSION plc
- (the "SSE Claimants")

Claimants

- and -

- (1) PRYSMIAN CABLES & SYSTEMS LIMITED
- (2) PRYSMIAN CAVI E SISTEMI Srl
- (3) PRYSMIAN S.p.A.
- (4) PRYSMIAN CONSTRUCTION COMPANY LIMITED
- (5) PRYSMIAN CABLES (2000) LIMITED

Defendants

AND BETWEEN

Claim No. CL-2019-000210

(the "GG Proceedings")

- (1) GREATER GABBARD OFFSHORE WINDS LIMITED
 - (2) SSE plc
 - (3) SSE RENEWABLES HOLDINGS (UK) LIMITED
 - (4) SSE RENEWABLES ONSHORE WINDFARM HOLDINGS LIMITED
 - (5) SSE RENEWABLES LIMITED
- (the "GG Claimants")

Claimants

- and -

- (1) **PRYSMIAN CAVI E SISTEMI Srl**
 - (2) **PRYSMIAN S.p.A.**
 - (3) **PRYSMIAN POWERLINK Srl**
 - (4) **PRYSMIAN CABLES & SYSTEMS LIMITED**
 - (5) **PRYSMIAN CONSTRUCTION COMPANY LIMITED**
 - (6) **PRYSMIAN CABLES (2000) LIMITED**
- Defendants**

ORDER

UPON hearing Counsel for the Claimants and the Defendants at the Case Management Conference heard jointly in these two sets of proceedings;

UPON the European Commission (the “**Commission**”) issuing a decision in *Case AT.39610 - Power Cables* (the “**Power Cables Cartel**”) on 2 April 2014 (the “**Commission’s Decision**”);

UPON the Claimants’ applications for disclosure made by Application Notices dated 26 March 2020 pursuant to Practice Direction 31C and CPR Part 23;

UPON the Defendants holding copies of the version(s) of the Commission’s Decision as disclosed in claims numbered HC-2015-000269 and HC-2015-000257 (the “**NGET/SP Proceedings**”);

UPON the Defendants holding copies of the documents on the Commission’s administrative file relating to the investigation in the Power Cables Case to which they were granted access pursuant to the *Notice to access to file* OJ C 325 of 22 December 2005, as disclosed in the NGET/ SP Proceedings (the “**Commission’s investigation file**”);

AND UPON the Court raising of its own motion the desirability of transferring the Proceedings to the Competition Appeal Tribunal (the “Tribunal”);

AND UPON the Court indicating that it proposed to give directions for the progress of the proceedings which are to apply notwithstanding any transfer to the Competition Appeal Tribunal (subject to any order made hereafter by such Tribunal);

AND UPON reading the other documents on the Court file recorded as having been read;

AND UPON the following definition applying for the purposes of this Order:

- **“Confidentiality Ring”** means the confidentiality ring established in these proceedings pursuant to an Order of the Court dated [*] April 2020 (the **“Confidentiality Ring Order”**);
- **“The NGET/SP Proceedings”** means the proceedings in claims numbered HC-2015-000269 and HC-2015-000257, to which certain of the Defendants herein are parties

IT IS ORDERED THAT:

Transfer

1. The SSE Proceedings and the GG Proceedings (together “the Proceedings”), which relate to:
 - a. a claim to which section 47A of the Competition Act 1998 applies; and/or
 - b. an infringement issue (as defined in section 16(6) of the Enterprise Act 2002);

are hereby transferred to the Tribunal for its determination of those issues pursuant to section 16(4) of the Enterprise Act 2002 and/or

section 16(1) of that Act together with Regulation 2(a) of the Section 16 Enterprise Act 2002 Regulations 2015.

2. The sending of this Order to the parties and Tribunal shall constitute notice to them for the purposes of paragraphs 8.5 and 8.12 of Practice Direction 30 and CPR Rule 30.4(1).
3. For the avoidance of doubt:
 - a. neither this Order giving effect to the said transfer, nor the transfer itself, is intended to alter, limit or exclude in any respect any element of the SSE Claimants' claim and the GG Claimants' claim as constituted in this Court prior to the transfer taking effect. If, and to the extent that, any element of either of the claims as constituted in this Court prior to the transfer taking effect is not capable of falling within the jurisdiction of the Tribunal on a transfer or would be altered, limited or excluded by this Order or the transfer, it is not subject to this Order and remains within the jurisdiction of this Court;
 - b. the Proceedings were and shall continue to be regarded as having been commenced in this Court. Any further statements of case or amendments to a statement of case shall be made in accordance with the Civil Procedure Rules and not with the Competition Appeal Tribunal Rules 2015 ("the CAT Rules");
 - c. any appeal to the Court of Appeal against the determination by the Tribunal of the issues transferred or an Order of the Court giving effect to that determination shall be governed by the rules in CPR Part 52; and
 - d. this Court may give such further directions or make such further Order as it thinks fit in connection with the transfer and/or with any such element referred to above.

Joint Case Management

4. The SSE Proceedings and GG Proceedings shall be jointly case managed, with joint directions and timetable, and shall be heard jointly, albeit not formally consolidated. The evidence in each claim shall stand as evidence in the other Claim.

Costs Management

5. The SSE Claimants' application that costs management be dispensed with in the SSE Proceedings pursuant to CPR 3.12(1)(e) is dismissed. The Parties are to seek agreement over their respective Costs Budgets, failing which they shall file and serve written submissions (limited to 2 pages for the SSE Claimants and 2 pages for the Defendants in the SSE Proceedings and showing the areas of agreement and non-agreement, together with their Costs Budgets and Budget Discussion Reports) by 7 May 2020 for determination and revision or approval (as appropriate) of any outstanding matters on the papers. That determination shall be reserved to Mr Justice Jacobs.

Pre-trial timetable

Disclosure of the Commission's Decision

6. By 4pm on 30 April 2020 or within one business day of Confidentiality Ring Order being approved and served on Parties (whichever is later), the Defendants shall disclose and provide inspection into the Confidentiality Ring of the latest version of the Commission's Decision and Annexes as disclosed in the NGET/SP Proceedings.

Disclosure of documents from the Commission's investigation file

7. By 4pm on 30 April 2020, the Defendants shall notify the Commission and the addressees of the Decision (the "**Addressees**") of the content of this Order and of their intention to disclose and provide

inspection into the Confidentiality Ring a copy of the latest version of the Commission's investigation file documents as disclosed in the NGET/SP Proceedings and subject to paragraph 9 below, providing them with a period of 14 days following such notification, to make an application to the Court that such disclosure should not be given or that certain redactions should be applied.

8. The Commission's investigation file shall be disclosed and inspection provided into the Confidentiality Ring upon the expiry of a further 7 days and by no later than 21 May 2020, unless any of the Commission or Addressees makes an application to the Court that such disclosure should not be given. In that event, until the application is determined, disclosure shall not be given of the part of the Commission's investigation file which is the subject-matter of the application.
9. The Defendants shall be entitled to redact from the documents to be disclosed pursuant to paragraphs 6-8 above information:
 - a. referring to material that is protected from disclosure under Article 48 of the Charter of Fundamental Rights of the European Union and Article 339 of the Treaty on the Functioning of the European Union as applied in Case T-474/04 *Pergan* [2007] ECR II-4225 ("**Pergan Material**");
 - b. that relate to leniency (as defined in Article 2(16) of Directive 2017/104/EU) ("**Leniency Material**"); and/or
 - c. privileged material ("**Privileged Material**").
10. If the Defendants withhold any material from inspection pursuant to paragraph 9 above over and above the redactions applied in the NGET/ SP Proceedings, they shall describe the nature of the documents or categories of documents and the reason(s) why they are withheld in sufficient detail to enable to Claimants to challenge

such assertion, if so advised. Any such description shall accompany the disclosure given pursuant to paragraphs 7-9 above.

11. Within 7 days of this Order, the SSE Claimants will provide the Defendants in the SSE Proceedings with disclosure and inspection of the documents on which the SSE Claimants' pleaded case identifying and giving details of the five submarine projects sued upon in those proceedings was based.
12. The Defendants shall have liberty to apply for further details in respect of the aforesaid submarine supplies in the event that the further documentation provided by the Claimants pursuant to paragraph 11 above does not enable them to identify those supplies.
13. By 7 May 2020, the Claimants in the SSE Proceedings will provide the Defendants in that claim with a list of Power Cable projects purchased by the Claimants indirectly from the Defendants through contractors who are not themselves power cables suppliers in the period 29 January 2009 to 31 December 2015, which shall include the following information insofar as it is reasonably available to the Claimants:
 - a. Date;
 - b. Location/project name/contract reference numbers;
 - c. Voltage and type of cable;
 - d. Main contractor;
 - e. An indication of the main elements of the project;
 - f. Value of the project.
14. By 21 May 2020, the Defendants in the SSE Proceedings will provide the Claimants in that claim with a list of Power Cable projects supplied indirectly to them in the period 18 February 1999 to 31 December 2015, which shall include the information specified in

paragraph 12 (a)-(f) above insofar as it is reasonably available to the Defendants, insofar as the Defendants identify any such projects which have not been included by the Claimants in their list.

Disclosure pursuant to Annexes 1 and 2

15. By 4pm on 25 September 2020, each of the Claimants and Defendants shall disclose and provide inspection of the documents in their control:

- a. falling within the categories of disclosure set out at Annexes 1 and 2 to this Order; and
- b. any known adverse documents.

16. By 19 June 2020 the Defendants are to supply the GG Claimants with a list of all projects falling within scope (i) of the Overcharge category in Annex 2 (GG Proceedings). In the event that such list contains at least 50 projects, the Defendants are to give disclosure in relation to such projects by 25 September 2020. In the event that such list contains fewer than 50 projects, the parties are to co-operate to seek to identify projects within scope (ii) of the Overcharge category in Annex 2 of which disclosure should be given from amongst all projects falling within such scope. For the avoidance of doubt, such selection should be on the basis that the projects so selected should be (i) relevant; and (ii) representative. The parties are to seek to agree the list of additional projects to be disclosed within scope (ii) by 17 July 2020. The Defendants are by 25 September 2020 to provide disclosure within scope (ii) of the Overcharge category in Annex 2 in respect of the additional projects identified in the list.

17. The categories of disclosure set out at Annexes 1 and 2 to this Order are without prejudice to any party's right to seek further disclosure including specific disclosure at a later date.

18. The documents to be disclosed pursuant to paragraph 15 and 16:

- a. May be confined to the best available evidence about the information which is the subject-matter of the listed categories, which may be in the form of electronic databases or other electronic documents, save where (i) the disclosing party does not in fact keep any documents in respect of the subject-matter in electronic form, or (ii) although it does keep documents in respect of the subject-matter in electronic form, the relevant information in those electronic documents is unreliable in view of the way in which it was collected, or (iii) the best available evidence falls instead to be obtained from hard copy documents or a combination of hard copy documents and electronic databases or other electronic documents. In each case, the disclosing party should explain why the evidence they are providing is the 'best available evidence' and why further disclosure is not necessary or proportionate, in particular if the excluded information is within an electronic database;
- b. If contained in the form of an electronic database or extract therefrom, should be provided in their native electronic format, together with a statement on how the relevant information has been compiled for the dataset, and, if appropriate, guidance on how it is to be examined;
- c. Shall include documents in the public domain.

19. The Defendants' and Claimants' disclosure shall be accompanied by a disclosure statement in accordance with CPR Rule 31.10(5)-(7) and (9).

Witnesses

20. By 4 pm on 29 January 2021, the Parties shall exchange signed statements of witnesses of fact, and hearsay notices where required by rule 33.2.

21. By 4 pm on 29 April 2021, the parties shall exchange factual witness statements in reply.

22. Unless otherwise ordered, witness statements are to stand as the evidence in chief of the witness at trial.

Experts

23. Permission shall be granted for each of the Claimants and the Defendants collectively to rely on the written evidence of a single expert (together, the “Experts”), each of whom will address the following issues:

- a. whether and to what extent the Defendants’ conduct identified in the Commission’s Decision caused the prices paid by the Claimants (to the Defendants and/or other suppliers) for the projects in respect of which the Claimants claim to be inflated compared to the prices that would have prevailed in the absence of that conduct (the “**Overcharge**”); and
- b. if so, whether and to what extent the Claimants passed on any part of the Overcharge (“**Pass-On**”); and
- c. the amount of interest on any losses incurred by the Claimants.

24. Signed reports of experts are to be exchanged simultaneously:

- a. The Claimants’ and Defendants’ respective expert shall serve a report in relation to the matters set out in paragraph 23 above by 2 July 2021.
- b. The Claimants’ and Defendants’ respective expert shall serve a reply report by 24 September 2021.

25. Following service of the expert reply reports, the Experts shall meet (without the Parties) and discuss on a without prejudice basis according to the provisions of Civil Procedure Rule 35.12, and identify in a joint memorandum, clearly and concisely and in terms that can

be understood by a non-expert, attaching any relevant documents, and with the assistance of the Parties' legal representatives where necessary:

- a. the areas where there is agreement between them;
- b. the areas in dispute between them;
- c. whether each area in dispute is material to the outcome of the case; and
- d. in relation to each material area in dispute:
 - i. the extent to which it is material and why;
 - ii. any assumptions underpinning each Expert's views;
 - iii. a summary of each Expert's criticism of the other Expert's position;
 - iv. all key documents and/or pieces of evidence which are relevant to the particular areas of dispute between them and its resolution;
 - v. their opinions on what the Court has to decide in order to resolve the particular areas of dispute and how this can be achieved.

26. The joint memorandum of the experts is to be completed by 29 October 2021.

27. If the experts' reports cannot be agreed, the parties are to be at liberty to call expert witnesses at the trial, limited to those experts whose reports have been exchanged pursuant to paragraph 23 above.

Pre-trial review and Trial

28. Preparation of trial bundles in electronic or hard copy form (or part electronic, part hard copy) to be completed by not later than 26 November 2021.
29. The estimated length of the trial is five weeks. This includes two days pre-trial reading time. The date for trial shall be not before 11 January 2022.
30. There is to be a pre-trial review not earlier than 6 December 2021 and not later than 21 December 2021.

Other matters

31. The Case Memorandum and List of Issues are approved by the Court in the form in the Bundles for the CMC to the extent agreed by the parties. To the extent the documents are not agreed, the parties are to use their best endeavours to agree the outstanding points within 14 days. In the event the documents are agreed, they are to be filed in the agreed form. In the event they are not agreed, the parties are to submit within a further 7 days thereafter written submissions of not more than 2 pages per side and the Court is to resolve any outstanding points of disagreement on the papers. That determination is to be reserved to Mr Justice Jacobs.
32. The parties may agree to extend any time period to which the Claims may be subject for a period or periods of up to 28 days in total without reference to the Court or, after transfer, the Tribunal, provided that this does not affect the date given for the pre-trial review or the date of the trial.
33. The parties shall notify the Court or after transfer the Tribunal in writing of the expiry date of any such extension.
34. Costs in the case.
35. Liberty to restore the Case Management Conference.

Service of the Order

The court has provided a sealed copy of this Order to the serving party:

Hausfeld & Co. LLP, 12 Gough Square, London EC4A 3DW
Solicitors for the Claimants