Neutral citation [2021] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1357/5/7/20 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18 June 2021

Before:

THE HON. MR JUSTICE JACOBS
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) STELLANTIS N.V.
(2) FCA ITALY S.P.A.
~~(3) FCA MELFI S.R.L.~~
(4) FCA SRBIJA D.O.O.
(5) FCA POLAND S.A.
(6) MASERATI S.P.A.
(7) SEVEL S.P.A.

Claimants

- v -

(9) NTN CORPORATION
(10) NTN WALZLAGER (EUROPA) GmbH
(11) NTN-SNR ROULEMENTS SA

Defendants

Heard remotely on 10 May 2021

RULING (SPECIFIC DISCLOSURE)

APPEARANCES

Philip Woolfe (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Claimants.

Robert O'Donoghue QC and Hugo Leith (instructed by White & Case LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. This ruling concerns an application by the Defendants ("NTN") for disclosure of four categories of documents. The Claimants ("FCA") are vehicle manufacturers who claim for damages alleged to result from a cartel operated by a number of companies, including the 9th to 11th Defendants ("NTN") who are manufacturers and suppliers of bearings. Other companies were previously defendants to the present proceedings, but the case now concerns NTN alone. The background to these proceedings can be seen in my judgment when the present proceedings were in the Commercial Court: see *Fiat Chrysler N.V. & Ors v NSK Europe Ltd & Ors* [2020] EWHC 1834 (Comm) ("the Commercial Court judgment").

2. At a case management conference ("CMC") in June and July 2020, held at a time when the proceedings were still before the Commercial Court, I made an order ("the July Order") for disclosure of documents following detailed arguments. I also ordered that the parts of the proceedings which relate to a claim under section 47A of the Competition Act 1998 and an infringement issue be transferred to the Competition Appeal Tribunal ("the CAT") for determination. The Commercial Court judgment was handed down in the period between the first and second days of the CMC. The parties have carried out the disclosure exercise, and there has been no application by FCA for further disclosure from NTN. The present disclosure application by NTN was made on 29 March 2021, which was within the time limit provided in a second case management order which I made at a further CMC held before the CAT in January 2021.

3. The disclosure application gave rise to an exchange of evidence and written arguments. Oral submissions were then made, at a remote hearing on 10 May 2021, by Mr. O'Donoghue QC on behalf of NTN and Mr. Woolfe on behalf of FCA. Towards the end of his submissions on 10 May, Mr. O'Donoghue told me of a pending decision in the *Trucks* proceedings before the CAT which was due to be handed down later in the week, and that this might have a bearing on the resolution of some of the arguments canvassed at the hearing on 10 May.

4. There were then further developments during the course of that week. The material developments are more fully described in the decision of the full Tribunal dated 18 June 2021 ([2021] CAT 14) ("the Strike-Out judgment"). The Strike-Out judgment concerns an application by FCA whose substance was to strike out parts of NTN's pleaded case, and for the full Tribunal to refuse permission to NTN to supplement that pleaded case with certain "Voluntary Further Particulars" which were served on 12 May 2021 ("the strike-out application"). The strike-out application was intimated on 14 May 2021, at the end of the week when the oral argument on the disclosure application had taken place. FCA's strike-out application, if successful, would undermine at least to some extent the basis for some of NTN's disclosure requests. In the light of those developments, I decided that it would be inappropriate finally to decide the issues raised by the disclosure application prior to the resolution of the strike-out application. For reasons given in the Strike-Out judgment of the full Tribunal, FCA's strike out application was successful. It therefore does impact on the resolution of NTN's disclosure application.

5. Before turning to the merits of the disclosure application, I will say something about its timing in the context of the case as a whole. It was not argued by FCA that NTN's disclosure application was impermissible on the basis that it should have been made earlier – for example, because the documents requested do not arise from amendments to the pleadings made earlier this year and that they should therefore have been requested at the first CMC held last June. However, the delay in seeking the further documents was relied upon by FCA in essentially two respects. First, FCA said that the fact that the documents now sought were not originally requested is a strong indication that they are not (as FCA contends generally) necessary for the just disposition of the present proceedings. Secondly, FCA submitted that the decision as to whether to order further disclosure, and if so to what extent, should take into account the delay which has occurred, and the fact that there was limited time prior to the 10-week trial due to commence in January 2022.

6. Here too there have been material further developments. At the time when the disclosure application was heard on 10 May 2021, the parties were occupied with the preparation of witness statements. These were served on 17 May 2021.

FCA have served statements from three witnesses, and NTN from one witness. The July Order permits the service of responsive factual evidence. In the light of submissions made at the hearing of FCA's strike-out application on 14 June 2021, it appears unlikely that a significant number of additional witnesses will provide reply evidence. It is apparent, as the full Tribunal indicated at the 14 June 2021 hearing, that the 10-week time estimate significantly overstates the time needed for the hearing, even allowing for (i) pre-reading by the full Tribunal, (ii) cross-examination of expert witnesses, whose reports have yet to be served, and (iii) time needed to prepare written closing submissions following conclusion of the evidence. It presently appears that the case could be comfortably dealt with at a hearing of no more than half of the time currently set aside, and that (even taking into account the fact that expert evidence has yet to be served) it is a good deal less complex than the 10-week time estimate would suggest.

7. In view of these matters, I do not consider that the arguments as to delay have an important impact on the resolution of NTN's disclosure application. That application should be considered on its merits. The fact that documents were not previously requested is of some relevance. But I bear in mind that it is often the case that, as a case develops, the parties identify relevant disclosure which had not previously formed part of their thinking. In the present case, even taking into account the one-month delay that has resulted from the strike-out application, there remain approximately seven months before the start of the trial. FCA is a very substantial group of companies which has engaged an experienced international law firm. If disclosure is necessary, then it should in principle be possible for reasonable and proportionate searches to be carried out for any necessary documents within the remaining time before trial.

B. THE APPROACH TO DISCLOSURE

8. The approach to disclosure before the CAT is fully explained in one of the decisions in the complex proceedings now referred to as *"Trucks"*: *Ryder Ltd and another v MAN SE and others* [2020] CAT 3 ("*Ryder*"), in particular at [23] - [44]. (This a different *Trucks* decision to that referred to in the Strike-Out judgment). *Ryder* shows, by reference to the CAT rules, that the essential

question is: what disclosure is reasonably necessary to deal with the case justly and at proportionate cost? The CAT Disclosure Practice Direction (see *Ryder* at [27]) requires the Tribunal to consider the factors set out in article 5(3) of the Damages Directive. Those factors include the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence.

9. In cases where follow-on damages are sought, the Commission has issued a Communication and Guidelines, extracts of which are set out in *Ryder* at [37] - [38]. These emphasise the inherent uncertainty and imprecision in the quantification exercise in cases such as the present and the need to consider the nature and size of the claim, the merits of the submission and the availability of data. These matters are reflected in *Ryder* at [39] - [40], where the CAT emphasised that there was no single right answer in damages claims such as the present; that the CAT would seek to arrive at a reasonable estimate of what the effect on prices might have been (if the claimant had proved that the infringement had an effect on prices) and what any pass on might have been; and that even where the sums sought are very substantial, that did not mean that every logical avenue that might be relevant can be explored. The ultimate question is whether the Tribunal is satisfied that "the documents sought are relevant and that disclosure would be necessary and proportionate" (see *Ryder* at [40(5)]).

C. THE PLEADED ISSUES TO WHICH THE DOCUMENTS SOUGHT ARE POTENTIALLY RELEVANT

10. The arguments advanced by NTN in support of its disclosure application relate to three aspects of its defence to the claim.

11. First, NTN referred in some contexts (in particular in relation to Category 2) to its "pass on" case: its general argument that FCA suffered no loss because any increased prices resulting from the cartel were passed on to FCA's customers.

12. Secondly, NTN referred (particularly in the context of Categories 1, 3 and 4) to its pleaded case as to FCA's "buyer power". Paragraph 41(b) of NTN's

Amended Defence pleads, in relation to the period after the infringement ended in July 2011:

> "… Further, it is averred that the Claimants had the means of seeking reductions in the prices they paid through the mechanism for annual price reductions and other forms of negotiation and commercial pressure. The Claimants thereby mitigated their losses and/or had the means of doing so".

Paragraph 41(b) then identified a number of matters on which NTN intended to rely in support of that case. This included the allegation that a handful of OEM (original equipment manufacturer) buyer groups held significant purchasing power, and the way in which OEMs such as FCA would approach the purchase process including the format of their RFQs (Requests for Quotation).

13. Thirdly, as described in the Strike-Out judgment, paragraph 41(c) of the Amended Defence pleaded a new mitigation argument concerning mitigation by costs reduction. NTN's case on mitigation originally advanced involved the argument that increased costs were "passed on" to FCA's own customers or purchasers. The new argument in paragraph 41(c), in addition to mitigation through "pass on", was that there was a different form or mitigation: that FCA reduced its "other costs". The essential point is that any increased cost of bearings resulting from the cartel could be mitigated by FCA reducing the costs of paying for supplies from other suppliers of goods or services, i.e. goods and services other than bearings. Thus, through this alleged reduction in costs incurred from other suppliers, any impact of the cartel on the prices paid by FCA would be negated.

14. I note two points about the pleadings at this stage.

15. First, NTN's case on "passing on" to customers, and the existence of important buyer power, is not new. FCA therefore submitted that the Tribunal should be reluctant to order further disclosure said to relate to those issues, in circumstances where those issues were squarely on the table at last year's CMC and where an order for disclosure was made after detailed argument.

16. Whilst there is some force in this submission. I must also bear in mind that the disclosure actually produced pursuant to the July Order has in one respect been

surprisingly small. FCA's entire disclosure contains only 16 e-mails, a point which Mr. O'Donoghue for NTN made on many occasions during the course of his oral submissions. I agree with him that it is appropriate to consider the further disclosure requests in the light of what the July Order has actually produced.

17. Mr. O'Donoghue also submitted in his reply submission that FCA's disclosure was "a mess". I do not accept this. Whilst the point about the absence of e-mails was made in NTN's evidence for the hearing (comprising two witness statements from Mr. Charles Balmain, a partner at White & Case LLP), there was no general complaint that FCA's disclosure was a mess or was generally deficient. Indeed, I was not referred to any correspondence showing a general history of complaints about FCA's disclosure by NTN. On the contrary, the present application was made right at the end of the period identified in the January 2021 CMC as the deadline for making further disclosure applications.

18. Secondly, Mr. Woolfe for FCA made various points as to the lack of any detailed pleading on the new point raised in paragraph 41(c) of the Amended Defence concerning costs reductions referable to other suppliers. Subsequently and pursuant to the Strike-Out judgment, the amendments to plead mitigation by cost reduction have been struck out and permission to serve Voluntary Further Particulars in support of the plea has been refused.

19. Against this background, I turn to the particular requests which are made.

D. CATEGORY 1: SUPPLIER CONVENTION DOCUMENTS

20. NTN seeks certain "Supplier convention documents":

> **"Supplier convention documents**
>
> a. As to supplier conventions hosted by the Claimants periodically between 1 January 2004 and 31 December 2018, any presentations or communications made to suppliers at those conventions insofar as they relate to:
>
> i. Any increases or reductions in the prices payable by the Claimants to their suppliers, including any proposed or anticipated pricing or discussions of pricing.

ii. Any criteria by which the Claimants measure supplier performance and/or award business to their suppliers.

b. In respect of the presentations or communications referred to in paragraph 1(a) above, any drafts or notes of such communications."

21. It is common ground that, for certain periods, FCA conducted "supplier conventions" at which FCA would host all of its major suppliers to set out its positioning in the market. The evidence of Ms. Elaine Whiteford (a partner at Quinn Emanuel Urquhart & Sullivan UK LLP) is that these conventions were suspended in 2009 for a number of years. Her evidence is that documents for the period 2014 to 2018 should be available. However, there are difficulties in obtaining records for the period 2004 through to the suspension of conventions in around 2009. FCA had sought to identify the employees responsible for organising or presenting at such conventions in order to be able to search their inboxes and hard drives for relevant documents. But the relevant employees are no longer at the company. Since laptops are scrubbed and e-mail records deleted when employees leave, there are no records of any presentations made at supplier conventions for the period 2004 to around 2009.

22. The basis for NTN's request is an argument that the presentations made by FCA at these conventions would be of assistance in an assessment of how FCA exerted its buyer power vis-à-vis its suppliers. This, in turn, is said (in paragraph 32 of NTN's skeleton argument) to be relevant to two pleaded issues: (i) an assessment of any overcharge in the bearings supplied by NTN; and (ii) an assessment of whether FCA may have mitigated against any such overcharge through reducing its other supply costs. The latter is the plea which has been struck out. The former plea remains.

23. Mr. Balmain's initial witness statement filed in relation to NTN's disclosure application ("Balmain 2") described the category of documents sought as narrow. He says that the request related to a "discrete set of occasions" and seeks disclosure of "the presentations and related communications that the Claimants prepared for their suppliers". During the course of his oral opening submissions, however, Mr. O'Donoghue indicated that the scope of what was being sought was rather wider. In particular, NTN was interested in receiving all underlying documents which related to the presentations, so as to be able to ascertain

whether FCA was bluffing in what it was saying at the supplier conventions. He submitted that a critical part of the disclosure sought was not what was divulged to suppliers at the conventions, but what was not divulged to them.

24. I am not persuaded that the disclosure sought in this category is reasonably necessary to deal with the case justly and at proportionate cost. Buyer power is not a new point. It was expressly pleaded in paragraph 41(b) of the Amended Defence, which has not been subject of amendment.

25. I agree with Mr. Woolfe's submission that sufficient disclosure of material documents relating to the exercise of buyer power has already been ordered. In particular, there was a substantial argument at the June 2020 CMC concerning the disclosure to be provided in relation to the process of contract negotiation between FCA and NTN. FCA was seeking disclosure from NTN of documents relating to the RFQ process, and NTN was resisting the extent of disclosure sought. The July Order ultimately provided in Schedule 1 for disclosure of various materials concerning the RFQ process, with FCA identifying 12 RFQs and NTN having the opportunity to identify an additional 12. Under paragraph 7(d) of Schedule 1, NTN's disclosure was then to include the:

> "process and/or strategy documents concerning the way in which the NTN Defendants went about securing business through the RFQ and negotiating the price for the RFQ (including for the avoidance of doubt general documents relating to the high level process or strategy for responding to RFQs, to the extent that these relate to any of the particular RFQs identified by the parties under this paragraph 7)."

26. Since the RFQ process involved both parties, Schedule 2 to the July Order provided for what was essentially the equivalent disclosure by FCA of its documents relating to the RFQ process. Thus, in respect of the RFQs identified pursuant to paragraph 7 of Schedule 1, FCA was to disclose a broad range of documents, including its evaluation of responses to the RFQs from tenderers, documents relating to the process or strategy for negotiating the final price with NTN in respect of RFQs, and procurement manuals or other guidance materials for procurement by RFQs.

27. There is no dispute that FCA is a sophisticated and large purchaser, as Ms. Whiteford accepts in her witness statement. NTN is able to point to various

statements of the European Commission, over some years, concerning the substantial buyer power of automotive manufacturers. Against this background, the documents now sought by NTN under this category are unlikely to advance matters at a general level.

28. What was being sought (as NTN said in paragraph 15 of its skeleton argument) are documents "showing how buyer power was exerted in practice". It seems to me, however, that the practical exertion of buyer power, to the extent it existed, will be evidenced by the documents relating to the RFQ process which disclosure have already been ordered. Those documents concern the actual negotiation between the parties, and they should enable the Tribunal to see how the negotiations proceeded and the perceptions on each side. I was told in oral submissions that instead of the 12 RFQs that FCA were going to identify pursuant to paragraph 7 of Schedule 1 to the July Order for disclosure by NTN, only five were in fact identified; apparently because FCA could not locate material on any others. However, I think that five should be sufficient to show an overall picture. Furthermore, NTN had the opportunity of identifying further RFQs beyond those identified by FCA, and I am told that it did not do so. It is therefore difficult for NTN to complain that five RFQs are insufficient.

29. By contrast, it is difficult to see how the presentations made at conventions to various suppliers will advance matters in relation to any issues as to buyer power and its practical effect. An example of the type of presentation made was exhibited by Ms. Whiteford. It comprised a number of different presentations in the form of well-prepared PowerPoint slides with copious pictures of vehicles. As might be expected, the presentations were high level. I am not persuaded that they give any real insight into the practical exertion of buyer power.

30. I also attach some importance to the fact that the documents now sought were not previously identified as being of any significance. The documents have come into focus as part of the process of NTN preparing its factual witness evidence. As I have said, it is by no means uncommon for this to happen, as parties concentrate at the witness statement stage on the evidence that they wish to adduce and the evidence that is available. However, since NTN's representatives presumably attended these conventions over the years, one

might have thought that these documents, if important, would have been identified some time ago.

31. This does not, however, entirely deal with the application in relation to Category 1, as advanced at the 10 May 2021 hearing, because NTN also contended that these documents are relevant to its amended case on mitigation through other costs reduction. Since that amended case has now been struck out, the application for Category 1 documents cannot succeed on that basis.

32. Accordingly, the application for disclosure in respect of Category 1 is refused.

E. CATEGORY 2: INSTRUCTIONS AS TO PRICING TO COVER COSTS

33. NTN seeks:

> **"Instructions as to General Price Increases and pricing to cover costs**
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> c. To the extent not already covered by paragraph 5(e) of Schedule 2 to the Order of Mr Justice Jacobs of 20 July 2020:
>
> i. Documents communicating General Price Increases (or equivalents), including the covering emails, memoranda or similar providing an explanation for those increases in the period 1 January 2004 to 31 December 2018.
>
> ii. Any other directions or instructions given by the Claimants' Pricing Directors or other members of the Claimants' Pricing Team in the period 1 January 2004 to 31 December 2018 as to the level of pricing required in order to cover the Claimants' costs."

34. The background to this request is that certain documents relating to FCA's pricing data were ordered under paragraph 5 of Schedule 2 to the July Order. These were as follows:

> "5. Documents, data or information for the period 8 April 2004 to 31 December 2012 for France, Germany, Italy, Spain and the UK, as to:
>
> a. the price books for each FCA model setting out the Recommended Retail Price ("RRP") for each model, including all options;
>
> b. invoicing/actual sales data on vehicles sold to dealers (both independent and FCA-owned dealers), including for the avoidance of doubt the actual prices paid for individual vehicle models and options;
>
> c. information on discounts by month and by model;

d. financial information on profit and loss, volume, gross revenue and target margins on vehicles at the model level; and

e. policies and/or internal guidelines used by the department responsible for vehicle pricing within FCA."

35. I was told that the financial information provided under paragraph 5(d) of Schedule 2 to the July Order comprised a single document, albeit that this was a spreadsheet which contained a large amount of data. I was also told that the disclosure under paragraph 5(e) of Schedule 2 to the July Order comprised 49 documents. This disclosure included a particular e-mail chain on which NTN placed considerable reliance. In broad terms, the e-mail chain dealt with price increases consequent upon a particular cost increase (unrelated to bearings). NTN submits that the e-mail chain is important evidence as to pass through of raw material cost increases into price to FCA's customers.

36. NTN contends that additional disclosure should now be provided which goes beyond the polices and internal guidelines covered by paragraph 5(e) of Schedule 2 to the July Order. The distinction between what was previously ordered, and was now sought, is that NTN now seeks documents which communicate increases as well as providing an explanation for price increases. NTN also seek disclosure of any other directions or instructions as to the level of pricing required in order to cover costs. NTN says that such documents will assist its case as to pass on. The e-mail chain relied upon showed FCA's senior management assessing its overall level of costs and cost increases, and then dictating that these were to be recovered through a general increase in downstream prices. It showed how decisions as to pricing were applied in practice.

37. FCA accepts that the documents sought are concerned with pass on rather than other aspects of mitigation. The issue of pass on is, however, to be addressed by the expert econometric regression analysis. What is now sought by NTN are "qualitative", as opposed to quantitative, documents, and these are not relevant to the regression analysis, which is the preferred form of analysis. The documents now sought are also unlikely to be probative. They might show what overall price increases FCA instructed the national subsidiaries to implement, but not how decisions were made within national markets as to the extent of

price increases, still less the specific individual elements that were combined together in the price increases. NTN already had disclosure of policies and guidelines under paragraph 5(e), as well as target margins under paragraph 5(d) of Schedule 2 to the July Order. It was not in issue whether, when faced with a cost increase, FCA might wish to raise its downstream prices. What is in issue is whether, in consequence of bearing prices being inflated, FCA did in fact succeed in raising its downstream prices, in a way that it would not otherwise have done. On that issue, the economic experts would opine via their econometric analyses.

38. FCA also relied upon the evidence of Ms. Whiteford as to the difficulties involved in identifying these documents. Documents are sought spanning a period of almost 17 years going back to 2004. Searches would require to be made for the particular form of documents sent to national markets. These are not centrally held and would need to be identified via custodian searches. Such custodian searches are highly burdensome in any case, but all the more so in a case which relates to periods up to 17 years ago. The work does not involve FCA or its advisers simply speaking to current responsible individuals. Rather it is an exercise in archaeology, i.e. seeking to identify who were the relevant responsible individuals over a significant period a long time ago, and then setting out to see to what extent materials which were then held by those responsible individuals can be located. Moreover, there is good reason to believe that no such target price increase documents would relate expressly or specifically to bearings, as they represent only a very small proportion of the cost of a vehicle.

39. I consider that a reasonable and proportionate search should be carried out for the documents which have been requested under Category 2. It seems to me that they are potentially important documents which go to the heart of the pass on defence to what is a very substantial claim for damages (in the region of €80 million, including interest). It may be that, at least to some extent, the documents sought fall within the scope of paragraph 5(e) of Schedule 2 to the July Order. However, any doubt on that score should be resolved by requiring the specific search which NTN has requested. It seems to me that the rationale for requiring disclosure of policies and internal guidance on vehicle pricing is equally

applicable to the documents now sought, which directly relate to the relationship between increased costs and pricing.

40. I do not accept that the disclosure is unnecessary because of the econometric analyses which will be carried out by the expert economists. Mr. Woolfe rightly accepted that "qualitative" evidence was, generally speaking, relevant in order to support the economic analyses. In Mr. Balmain's third witness statement, he says that his client's expert economist, Dr. Rosati, has advised that documents such as the e-mail chain (referred to above) "demonstrate FCA's attempts to pass on costs and are important for grounding a theoretical ability to pass on with real world examples of the Claimants doing precisely that (i.e. mitigating the effects of increased input costs through vehicle pricing amendments to achieve target margins)". Dr Rosati intends to rely on the particular e-mail chain, but it is said to be just one snapshot. I think that these are valid points.

41. I do not think that this application has been made too late. It does relate to a matter which was previously in issue (namely pass on) and in respect of which the July Order was made. I accept that (as indeed with all of NTN's present requests) it does not arise out of amendments to FCA's case, which were made in January 2021. However, it is appropriate for NTN now to pursue this request in the light of the potential importance of these documents, the amounts at stake in this litigation, and the way in which matters have developed, specifically: (i) the limited e-mail disclosure provided by FCA; (ii) the relevance of the e-mail chain which has been disclosed; and (iii) the fact that there are other documents, described by Ms. Whiteford, where notifications of price increases were sent to national markets and which have not yet been disclosed.

42. I accept that this will involve an exercise in disclosure which is not straightforward, in the light of the matters to which Ms. Whiteford has referred. However, Mr. O'Donoghue emphasised in his submissions that he was seeking a reasonable and proportionate search, and that his clients would cooperate in reaching a reasonable agreement as to custodians and search terms. As I said at [36] of the Commercial Court judgment in the context of paragraph 5(e) of Schedule 2 to the July Order, FCA and its advisers should design and organise the search, and in due course justify it in the event that there is any challenge to

its reasonableness and proportionality. It would clearly be beneficial if the scope of the search could be explained to NTN's advisers in advance and agreement reached.

F. CATEGORY 3: FCA'S MONITORING OF NTN'S PERFORMANCE

43. NTN seeks:

> **"Claimants' monitoring of the NTN Defendants' performance**
>
> d. Scorecards or reports recording the ongoing monitoring and measurement by the Claimants of the performance of the NTN Defendants as suppliers to the Claimants in the period 1 January 2004 to 31 December 2018, or other similar documents prepared periodically for that purpose and that seek to summarise the overall performance of the NTN Defendants over a particular period. These scorecards, reports or other similar documents include but are not limited to:
>
> i. Monthly Supplier Scorecards with respect to the NTN Defendants and produced by the Claimants using its SQP system (or predecessor systems);
>
> ii. Comparable or complementary periodic evaluations of the NTN Defendants' commercial performance produced by the Claimants and their Purchasing Department."

44. This request has, as with Category 1, arisen as a result of information obtained in the course of preparing witness evidence. There was no dispute that FCA used systems that produce 'scorecards' for its suppliers.

45. NTN submitted that the material provided evidence of the practical means by which FCA exerted buyer power over its suppliers. The scorecard system was an important means by which FCA managed its dealings with its suppliers. The real-time measurement and assessment of a supplier's compliance with costs savings being targeted was a highly significant commercial lever which FCA could use to reduce its costs of supply. The documents were relevant to an assessment of FCA's exercise of buyer power.

46. I do not consider that a search for these documents is reasonably necessary or proportionate. The quantitative aspects of the pass on defence are to be addressed by the parties' experts and disclosure has already been ordered to enable the experts to carry out their analyses. The qualitative aspects of buyer

power will, as discussed in the context of Category 1 above, be evidenced by the RFQ documents. The scorecard documents now sought are not part of the negotiation process, and I do not consider that they could reasonably be expected to add anything material to the picture as shown by the RFQ documents.

47. Furthermore, even if the mitigation by costs reduction plea had survived, I would not have ordered disclosure of these documents in support of that plea. The documents sought relate only to NTN's scorecards and, therefore, would not assist on the question of whether there were costs savings elsewhere by FCA.

48. Accordingly, the application for disclosure in respect of Category 3 is refused.

G. CATEGORY 4: DOCUMENTS AS TO COSTS TARGETS

49. NTN seeks:

> **"Documents as to costs targets**
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> e. Presentations and strategy documents from the Claimants' Global Purchasing Department from 1 January 2007 to 31 December 2018 setting out the Claimants' strategy as to the control of costs.
>
> f. Any other periodic instructions or criteria issued by the Global Purchasing Department (or other department(s) responsible for procurement prior to the creation of the Global Purchasing Department) that specify targets for costs and/or the total costs that the Claimants aimed to pay for particular models of vehicle in the period 1 January 2004 to 31 December 2018."

50. NTN submits that these documents are relevant to the assessment of: (i) whether the infringement resulted in any *prima facie* overcharge, and (ii) whether any overcharge would have been mitigated through reductions in other costs of supply. It seems to me, however, that the real basis of the request is the latter point, which is the plea that has now been struck out. I do not consider that the extensive disclosure exercise envisaged by this request would be justified by an argument that it was relevant to the assessment of whether the infringement resulted in any *prima facie* overcharge. In my view, that argument is sufficiently addressed by the July Order as supplemented by my decision in relation to Category 2.

51. It also seems to me that even if (which I do not accept) the request could be justified on the basis that it related to the overcharge, the second sub-category (sub-paragraph (f) above) is, as Mr. Woolfe submitted, potentially very broad – particularly bearing in mind Ms. Whiteford's evidence that FCA routinely sent cost target letters as part of the RFQ process in order to inform the relevant suppliers of FCA's cost targets for particular components and requesting the suppliers to indicate whether they had the ability to meet or improve upon those targets. Disclosure in accordance with sub-paragraph (f) above would therefore potentially require FCA to disclose all cost target letters sent to all suppliers over a 14-year period, as well as to search for documents other than the cost target letters themselves. I agree with Mr. Woolfe that responding to this request would potentially disrupt the trial process.

52. Furthermore, I am far from persuaded that such documents, even if they could be produced in a reasonable timescale, would yield any material information beyond that which has already been ordered in my July Order and in this ruling. In particular, I do not consider that they are relevant to the economists' econometric analyses, which were catered for by the July Order.

53. Accordingly, the application for disclosure in respect of Category 4 is refused.

H. CONCLUSION

54. In summary, the position is as follows. For the reasons set out in this ruling, FCA should carry out a reasonable and proportionate search for and (in so far as such documents are located by FCA) disclose to NTN the documents requested under Category 2. Otherwise NTN's application for disclosure is dismissed.

55. The parties can address in writing any consequential issues arising from this ruling, in particular in relation to the allocation and quantification of the costs of the disclosure application. I express, however, the provisional view that the costs of this application should be in the case. NTN's application has been successful in part. Whilst it has failed to a substantial extent, that failure is in substantial part a consequence of the successful strike-out application which

was made at a late stage, following the oral hearing on 10 May. Had that application not been made, I would have been minded to order at least some disclosure on the mitigation issue: on the basis that it was at that stage an issue raised on the pleadings by way of an amendment to which FCA had not objected. I express this provisional view, because it may be that the parties will be content with an order for costs in the case, and will not consider it necessary to make further submissions on costs.

The Hon. Mr Justice Jacobs
Chairman

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

Date: 18 June 2021