



Neutral Citation Number: [2022] EWHC 2350 (Comm)

Case No: CL-2020-000780

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT**

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: Thursday, 14<sup>th</sup> July 2022

Before:  
**MR. JUSTICE PICKEN**

Between:

(1) VOLKSWAGEN AG AND OTHERS

**Claimants**

- and -

- (1) MOL (EUROPE AFRICA) LTD  
(2) WALLENIUSREDERIERNA AKTIEBOLAG  
(3) WALLENIUS WILHELMSSEN ASA  
(4) WALLENIUS LOGISTICS AB  
(5) WILHELMSSEN SHIPS HOLDING MALTA LTD  
(6) WALLENIUS WILHELMSSEN OCEAN AS  
(7) "K"-LINE HOLDING (EUROPE) LIMITED  
(8) "K"-LINE (EUROPE) LIMITED  
(9) KAWASAKI KISEN KAISHA, LTD

**Defendants**

- and -

NIPPON YUSEN KABUSHIKI KAISHA

**Third Party**

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MR. BRIAN KENNELLY QC, MR. ANDREW SCOTT QC and MR. PHILIP WOOLFE

(instructed by Slaughter and May) for the Claimants

MR. DAVID BAILEY (instructed by Arnold & Porter Kaye Scholer (UK) LLP) for the 1<sup>st</sup>  
Defendant

MR. TONY SINGLA QC (instructed by Cleary Gottlieb Steen & Hamilton LLP) for the 7<sup>th</sup>  
to 9<sup>th</sup> Defendants

MR. DANIEL PICCININ (instructed by Steptoe & Johnson LLP) for the Third Party (the  
Part 20 Defendant

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**Approved Judgment**  
**On CMC**

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,  
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**MR. JUSTICE PICKEN:**

1. This is the first CMC in relation to certain competition proceedings brought by Volkswagen AG and others against a range of different companies in relation to what has been described as a cartel concerned with RoRo operations.
2. The proceedings were commenced in, I believe, late 2020 and so the first and immediate point to note is that here we are now in the middle of 2022 and only now is there a CMC taking place.
3. That notwithstanding, the parties have to varying degrees, belatedly or not, engaged constructively, as I say, albeit in some instances sub-optimally in terms of timing in relation to particularly disclosure.
4. I should say immediately that I am being invited to make various directions including disclosure whilst recognising that the proceedings are going to go off to the Competition Appeal Tribunal hereafter. I am going to come back to whether or not a trial should be fixed in relation to the Competition Appeal Tribunal. That is not my current focus. My current focus is on certain disclosure issues.
5. I have previously dealt with some controversy in relation to disclosure between the claimants Volkswagen and the first and seventh to ninth defendants. I say no more about that, save that an accommodation has in effect been reached.
6. What I am now addressing in this short ruling is the debate between the claimants and the Third Party or Part 20 defendant, Nippon Yusen Kabushiki Kaisha, otherwise known for present purposes as NYKK.
7. Mr. Piccinin on behalf of NYKK has confirmed his client's willingness to provide documents relating to the EU Commission investigation into the alleged, and as in fact found, cartel. The debate for present purposes is not therefore as to documents concerned with that investigation, rather it is a debate concerned with NYKK's involvement in other regulatory investigations around the world including Japan, the US and Australia, to name but three of, I think, 11 identified locations.
8. Mr. Singla on behalf of the seventh to ninth defendants has confirmed that his clients will be giving disclosure in relation to those non-EU investigations. As I say, the issue there was a bespoke issue concerned with the US regulatory authorities and I have dealt with it.
9. The objection that Mr. Piccinin takes on behalf of NYKK is more fundamental. He says that it would be inappropriate at this stage to require his client, not a defendant sued by the claimants but a Part 20 defendant or third party, as I have indicated, to provide the disclosure in relation to non-EU regulatory investigations on the grounds that it is simply not necessary that that be done at this stage and on the basis that the claimants ought to have honed their disclosure ambitions so far as NYKK are concerned at this CMC.
10. My attention in this context has been drawn to Practice Direction 31(c) "Disclosure and inspection of evidence in relation to a competition claim", specifically paragraphs 1.4 and 1.5. The former is in these terms:

"1.4 The application must include a description of the evidence that is sought that is as precise and narrow as possible on the basis of the reasoned justification."

Paragraph 1.5, more pertinently given Mr. Piccinin's objections, reads as follows:

"1.5 The court may only permit disclosure or inspection that is proportionate."

11. Mr. Piccinin submits that, at present at least, it would not be proportionate (or necessary to use another similar word) for disclosure to be ordered as regards NYKK in relation to the non-EU investigations. Mr. Piccinin in this context draws my attention to *Suez Groupe Sas v Fiat Chrysler Automobiles NV & Ors* [2018] EWHC 1994 (Ch), a decision of Roth J.
12. Mr. Kennelly on behalf of the claimants had earlier in the course of submissions referred me to this decision at paragraphs 17 to 20 and in particular a passage where Roth J quotes liberally from the earlier judgment of Green J (as he then was) in *Peugeot SA & Ors* CAT 3. In paragraph 20, Roth J, in the last sentence says this:

"As such there is a more or less inevitable nexus between the workings of the cartel and the overcharge that the purchasers subsequently may seek to recover."

Mr. Piccinin suggests that this is a reference to (and only a reference to) damages rather than anything concerned with liability. I am not overly convinced by that observation. It seems to me that that sentence and the sentences which precede it do have as their focus at least liability to an extent and that it is not entirely correct to suppose that Green J in the *Peugeot* case was only talking about relevance of the workings of the cartel in relation to damages as opposed to liability.
13. Be that as it may, I do not base my conclusion in relation to the current controversy on a subtle understanding of what Green J meant, because I am persuaded that Mr. Piccinin is right that it would not be proportionate or necessary at this stage to require the further disclosure concerning other regulatory investigations to be provided by NYKK. I say that briefly for these reasons.
14. First, as Mr. Piccinin notes and as I have previously observed, it is the case that NYKK is not itself a defendant which has been brought into these proceedings by the claimants. The claimants do not therefore seek a remedy against NYKK. The position is that they have pursued nine other defendants, apparently on the basis, at least at the time that the proceedings were commenced, that they did not need disclosure to be provided by NYKK. That, at least as a starting point, causes me to be cautious as to whether or not I should now, bearing in mind the need for proportionality, be requiring a third party NYKK to be producing documents.
15. Putting that point differently, whilst Mr. Kennelly, as it were, talks up the need for the documents in order to make good the case against the seventh to ninth defendants, I am a little bit sceptical about that given that, as I say, the claimants chose not themselves to pursue NYKK.

16. Secondly, Mr. Piccinin submits that the EU documentation, which NYKK will be producing, is likely to be sufficient. I cannot know whether that is right or wrong. However, it does seem to me that, in the case of a non-primary defendant, it is an appropriate matter to weigh in the balance. In doing so, exercising what is essentially a case management discretion, I consider it sensible not at this stage to require the further disclosure to be given whilst not ruling out the possibility that an order will be made at a subsequent CMC dealing with disclosure, the matter then having been transferred to the CAT.
17. Thirdly, and related really to the previous point, it is Mr. Piccinin's submission that the claimants will be receiving documents from the seventh to ninth defendants concerned with the other regulatory investigations in relation to those defendants. In those circumstances, it seems to me again appropriate to require the claimants to pause, take stock of what they are provided with and then pursue, if they consider it appropriate, a more focused inquiry of NYKK as regards other documents in relation to other investigations.
18. I read into what Mr. Piccinin states in his skeleton and indeed into his submissions that, were there to be a more focused request after that other documentation from the seventh to ninth defendants has been provided, then NYKK is likely (and the court, I can say, would encourage it) to engage positively with whatever further focused request is then made.
19. For those various reasons, I decline to make the further disclosure as against NYKK which the Claimants have sought.

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