Neutral citation [2021] CAT 14

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)
PROFESSOR JOHN CUBBIN
EAMONN DORAN

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 14 June 2021

JUDGMENT (STRIKE OUT)

APPEARANCES

Paul Harris QC (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. The Claimants in these proceedings ("FCA") are vehicle manufacturers who claim for damages alleged to result from a cartel operated by a number of companies, including the Defendants ("NTN"), who are manufacturers and suppliers of bearings. The case is now before the Competition Appeal Tribunal as a result of a transfer from the Commercial Court. It is not necessary to summarise the background proceedings, which can be found in *Fiat Chrysler N.V. & Ors v NSK Europe Ltd & Ors* [2020] EWHC 1834 (Comm).

2. The issue before the Tribunal concerns the adequacy of a plea by NTN raising an allegation that, if any overcharge arose from the operation of the cartel, FCA mitigated its loss through reducing its other costs. The origin or inspiration of the mitigation plea, which was not pleaded in NTN's original Defence to the claim, is the judgment of the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others* [2020] UKSC 24 ("*Sainsbury's*") delivered on 17 June 2020. After a comparatively lengthy period, NTN pleaded a positive mitigation argument in paragraph 41(c) of its Amended Defence. This was in the following terms, with underlining and strike-though showing the changes to the original text:

> "In the alternative, if any Overcharge was caused, NTN avers that the Claimants passed any Overcharge through to their own customers or purchasers, or otherwise mitigated their loss (including, without limitation, through reducing their other costs). As part of their proof of loss the Claimants must prove not only that any alleged loss was passed on to them, but also that they did not pass on any alleged loss ~~(or otherwise mitigate it)~~ to their own customers or otherwise mitigate it, including through reducing their other costs. The Claimants bear the burden of providing disclosure and evidence as to how they dealt with the setting of their prices and the recovery of their costs in their business."

3. NTN's case on mitigation, as originally advanced, involved the argument that increased costs were "passed on" to FCA's own customers or purchasers. The new argument, in addition to mitigation through "pass on", is that there was a different form of mitigation, namely that FCA reduced its "other costs". The essential point is that any increased cost of bearings resulting from the cartel could be and was 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.

4. The Amended Defence containing paragraph 41(c) was filed by NTN on 12 March 2021 in response to FCA's Re-Amended Particulars of Claim served on 26 January 2021. Paragraph 41(c) of the Amended Defence was, however, a new point. It was not responsive to anything which was new in the Re-Amended Particulars of Claim. FCA did not, however, object to the amendment. It pleaded back to the Amended Defence in an Amended Reply filed on 24 March 2021. The Amended Reply referred to the new plea of mitigation through the reduction of other costs as "vague and embarrassing". The point was developed in paragraph 7.4.4A of the Amended Reply, where FCA contended that FCA at all times had an economic incentive to manage their costs to the greatest extent possible in order to maximise profitability, and that this incentive was unaffected by NTN's overcharge resulting from the cartel. FCA pleaded that paragraph 41(c) of the Amended Defence did not identify any way in which it was said that this incentive could have been affected. FCA also said that the allegation that it may have mitigated its loss in other respects was so vague as to be incapable of response.

5. No application was made, at that stage, to strike out the amendments to paragraph 41(c). The new plea in that paragraph was then the foundation of various requests for disclosure which were made by NTN, and which led to a contested hearing held remotely on Monday 10 May 2021 ("the disclosure application hearing"). Such disclosure applications can be, and was, heard by the Chairman of the Tribunal sitting alone. It was not necessary for a full Tribunal to be appointed.

6. At the disclosure application hearing on 10 May 2021, Mr. Woolfe for FCA made various points, in the context of the disclosure application, 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. He contended that this very brief and unparticularised pleading should not give rise to very wide-ranging disclosure requests. He also put forward various arguments concerning the plausibility of the case there advanced, including the

difficulties in establishing causation. In particular, if – in the real or "factual" world – FCA was putting pressure on other suppliers to reduce their costs, there was no reason why this should be regarded as causally related to the loss suffered, in terms of higher bearings prices, in consequence of the cartel. Those costs pressures, which were exerted in the "factual" world where there was a bearings cartel, would equally have been exerted in the counterfactual world where there was no such cartel.

7. In the course of the submissions made by Mr. O'Donoghue QC at that hearing, he helpfully advised the Chairman that issues similar to those canvassed in Mr. Woolfe's arguments had been raised in another case which was before the CAT, and in respect of which judgment was expected to be given later that week. That case is one of a very substantial number of cases often referred to as "*Trucks*". The relevant decision was issued on Thursday 13 May 2021: *Royal Mail Group Limited v DAF Trucks Limited & Others* [2021] CAT 10 ("*Royal Mail*"). The judgment contained, in particular at [18] - [48], a detailed discussion of the approach to be taken to amendments to plead mitigation by costs reduction. In broad terms, the approach of the Tribunal in *Royal Mail* was supportive, in the context of pleading amendments, of the arguments advanced by Mr. Woolfe for FCA at the disclosure application hearing as summarised above.

8. There were a number of other developments in the course of the week which had begun on Monday 10 May 2021 with the hearing of NTN's disclosure application.

9. First, on Wednesday 12 May 2021, NTN served (without seeking permission) a document headed "Voluntary Further Particulars of the [NTN] Defendants" ("the Voluntary Particulars"). These particulars sought to supplement the new plea in paragraph 41(c) of the Amended Defence. The material parts of the Voluntary Particulars were set out in paragraphs 3 - 9, and are reproduced below:

> "3. At all material times:
>
> a) FCA sought to control the costs of inputs purchased from its suppliers;

b) To control these costs, FCA would (among other things) set costs targets. This included:

i. Setting targets for the total cost for a particular vehicle or part of a vehicle;

ii. Setting targets for the reduction of costs by specified amounts for a particular vehicle or part of a vehicle.

c) These costs targets were set prospectively.

d) Their purposes included providing a benchmark for those persons and departments within FCA who were responsible for procurement from suppliers ('**FCA's procurement staff**'). NTN infer that FCA measured the performance of FCA's procurement staff in meeting these targets and provided incentives accordingly.

e) FCA also had in place various systems for monitoring supplier performance in the EEA. Prior to 2018, the system applied in the EEA was the SQP system. In addition to the SQP system, the FCA Purchasing Team, with the assistance of the Finance Team, measures the commercial performance of suppliers, including whether the suppliers realised the cost savings being targeted by FCA.

4. The costs targets and cost savings measures outlined above were set for the purpose of ensuring that the total input costs for a vehicle or part of a vehicle did not exceed a specific level.

5. It is inferred from the fact that FCA used such costs targets that they were an effective means of controlling FCA's costs. It is also inferred that such targets were also useful to FCA in planning overall budgeting and ensuring that they made a profit in line with their plans and expectations. FCA would set costs targets and seek to ensure that those targets were met, so that they could also plan the levels at which they priced their products.

6. If effective, a costs target would mean that FCA's procurement staff would negotiate the prices of the various inputs so that the total costs of those inputs did not exceed the target. Therefore, if one particular input cost could not be reduced through FCA's exercise of buyer power and other sophisticated procurement techniques, FCA's procurement staff would look to reduce other input costs so that the overall target was met.

7. In the premises, if, *quod non*, FCA did pay an overcharge on any bearings, the effect of the costs targets would have been that FCA's procurement staff would have negotiated lower prices with other suppliers to offset any overcharge (or part thereof). As such, any overcharge borne by FCA would have been mitigated, in whole or in part.

8. These particulars are provided based on the information available to NTN at this time. NTN reserves the right to provide further particulars following further disclosure or evidence.

9. In the light of the Amended Defence, and these further voluntary particulars, NTN will rely at trial on the heavy evidential burden on FCA to provide evidence as to how they have dealt with the recovery of their

> costs in their business. That is information within FCA's sphere, and NTN will rely upon any failure by FCA to produce such evidence in support of a plea inviting the Tribunal to draw adverse inferences against FCA at trial."

10. Secondly, in a letter dated 14 May 2021, FCA's solicitors Quinn Emanuel Urquhart & Sullivan UK LLP ("QE") wrote to the Tribunal in relation to the Voluntary Particulars that had been served. QE's letter addressed to some extent the impact of the *Royal Mail* judgment which had been published on the previous day. QE submitted that not only should the Tribunal refuse permission for the Voluntary Particulars, but also that paragraph 41(c) of the Amended Defence was "liable to be struck out" following *Royal Mail*.

11. On 17 May 2021, the Chairman gave directions for both parties to set out their respective cases as to where matters stood in the light of *Royal Mail* and, in particular, whether or not FCA was applying to strike out paragraph 41(c) of the Amended Defence. The Chairman also raised the question of whether any strike out application should be determined by the full Tribunal (see rule 110 of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules")) rather than the Chairman acting alone.

12. It is not necessary to describe the ensuing correspondence in detail. The position can in the Tribunal's view be summarised as follows.

    (1) FCA is indeed applying, in substance, to strike out the amendments to paragraph 41(c) of the Amended Defence, in so far as they raise a defence of mitigation by costs reduction. (There is no application to strike out the original case of mitigation by "passing on" that was pleaded in paragraph 41(c) of the Defence). In form, this is an application for "reverse" summary judgment on the basis that the new plea has no real prospect of success. FCA maintains its objection to the Voluntary Particulars, saying in essence that these particulars cannot and do not save the inadequate new plea in paragraph 41(c).

    (2) The full Tribunal was constituted in order to deal with FCA's application for summary judgment and the related issue of whether permission

should be granted for the Voluntary Particulars. Whilst NTN's submission was that these issues could be determined by the Chairman alone (a proposition with which FCA disagreed), NTN had no objection to the determination of the relevant issues by the full Tribunal.

(3) Any decision to strike out or disallow the new pleading of mitigation through costs reduction will impact upon the determination of NTN's disclosure application – in respect of which judgment has been reserved and was not issued in light of the developments following the disclosure application hearing. However, the disclosure application can be, and is to be, determined by the Chairman acting alone.

(4) The parties exchanged written submissions which were focused on the impact of *Royal Mail* and whether the amendments to paragraph 41(c) and the Voluntary Particulars were sustainable in the light of that decision. NTN did not invite the Tribunal to decline to follow *Royal Mail* and made no submission to the effect that the case was wrongly decided or that its reasoning should not be applied. NTN's submission was that, when *Royal Mail* was properly understood and applied, NTN's pleaded case was sufficiently sustainable for the purposes of crossing the relatively low threshold to defeat a summary judgment application.

(5) An oral hearing was held remotely before the full Tribunal on Monday 14 June 2021 at which the parties' counsel made oral submissions which developed those which had previously been made in writing.

B. THE TEST TO BE APPLIED ON THE PRESENT APPLICATION

13. We consider that the present application is to be determined by applying the same test to the new plea in paragraph 41(c), as supplemented by the Voluntary Particulars, as was applied by Tribunal in *Royal Mail* at [22]: i.e. whether there is a realistic prospect of the new plea in paragraph 41(c), as supplemented by the Voluntary Particulars, succeeding at trial. A realistic prospect is one that carries some degree of conviction and is more than merely arguable. However, the court must take into account evidence that can reasonably be expected to be

available at trial, as well as the evidence before it, and should be wary of deciding difficult or new points of law in the absence of real facts.

14. The Tribunal has no doubt that the new mitigation argument in paragraph 41(c) of the Amended Defence, if it stood alone (as it did at the time of the disclosure application hearing on 10 May 2021) would be unsustainable in the light of the principles to be derived from *Royal Mail*, as discussed below. However, paragraph 41(c) has now been supplemented by Voluntary Particulars. Permission is required to file those Voluntary Particulars, since it is a further pleading covered by rule 37 of the Tribunal Rules. Permission should only be granted if, applying the above test, there is a realistic prospect of the plea succeeding at trial. As a matter of substance, therefore, the question is whether the Voluntary Particulars put forward a case of mitigation which is sustainable (in the sense of having a realistic prospect of success) in the light of the principles in *Royal Mail*.

C. THE *ROYAL MAIL* DECISION

15. *Royal Mail* concerned an application by the defendant truck manufacturers to raise an argument to plead mitigation by costs reduction. The Tribunal in that case allowed one aspect of the amendment sought, but disallowed the other. Mr. O'Donoghue submitted that the Tribunal's reasons in *Royal Mail* are principally directed at explaining why one part of the amendment was disallowed, rather than explaining why the other part was allowed. He placed emphasis on the part that was allowed and submitted that NTN's case was stronger than that of the defendant in *Royal Mail*.

16. In our view, the Tribunal in *Royal Mail* was concerned to identify the relevant broad principles which apply to arguments of mitigation, and specifically arguments of mitigation by costs reduction in the context of follow-on damages claims such as the present. We think that it is those principles that matter, and that little assistance is to be derived by comparisons of the terms of pleadings in one case with those in another. It is also important, of course, not to read the words used by the Tribunal in *Royal Mail* as though they are a statute.

17. The central question in *Royal Mail* concerned the requirements for an adequate plea (in the sense of having a realistic prospect of success) of causation and the establishment of a proximate causative link. As described above, this arose in the context of an argument as to mitigation of an overcharge by costs reduction. Thus, in *Royal Mail* at [24], the Tribunal said:

> "DAF accepts, as a matter of law, that it must prove that any mitigation which in fact occurred was caused by the overcharge. As it was put in argument by Mr Beard, there has to be a sufficient causal connection as a matter of law between the putative overcharge and the way in which the loss was mitigated."

18. Against that background, we consider that Mr. Harris QC for FCA was correct to identify a number of aspects of the reasoning in *Royal Mail* as critical.

19. First, in *Royal Mail* at [35] and [36] , the Tribunal said (after analysing the Supreme Court's judgment in *Sainsbury's*):

> "35. Accordingly, it seems to us that it cannot be enough for a defendant to plead that a claimant's business input costs as a whole were not increased, or that as part of the claimant business's ordinary financial operations and budgetary control processes its overall expenses were balanced against sales so that profits were not reduced. There must be something more to create a proximate causative link between the overcharge and a reduction in other input costs, so as to constitute mitigation. This can be inferred from the Supreme Court's citation from the *British Westinghouse* case at [215] of its judgment, its emphasis of the underlined words "... [the claimant] has taken action arising out of the transaction", and its comment that "a question of legal or proximate causation arises".
>
> 36. We therefore consider that, for a defendant to be permitted to raise a plea of mitigation in this way in general terms, there must be something more than broad economic or business theory to support a reasonable inference that the claimant would in the particular case have sought to mitigate its loss and that the steps taken by it were triggered by, or at least causally connected to, the overcharge in the direct manner required by the *British Westinghouse* principle."

20. These paragraphs therefore indicate the need for a defendant to establish a sufficient causal connection between the overcharge and the steps that are relied upon as amounting to the relevant mitigation. If a defendant can only point to what might be regarded as ordinary financial operations and budgetary control processes, this will generally be insufficient to establish the necessary connection between the overcharge and the relevant steps. This does not mean, as Mr. Harris's submissions at times posited, that the "ordinariness" of the

financial operations and budgetary process means that mitigation by costs reduction can never be shown. It may be that there are some cases where a combination of factors, such as those addressed in *Royal Mail* at [42] as set out below, may nevertheless permit a defendant to establish a plausible case of causation, notwithstanding the ordinariness of the financial operations and budgetary processes relied upon. However, in the absence of such factors, a defendant, who only points to ordinary operations and processes for controlling costs, is unlikely to demonstrate a realistic prospect of succeeding at trial in showing proximate causation.

21. Secondly, *Royal Mail* shows that there must be some basis other than pure theory for believing that a defence of mitigation has some factual basis for it: see *Royal Mail* at [33], [36] and [43].

22. Thirdly, the relevant facts relied upon must give rise to a plausible case of causation which carries a degree of conviction. Thus, the Tribunal said in *Royal Mail* at [43]:

> "We therefore hold that it is not sufficient for a defendant in the position of DAF to plead a defence of mitigation on the basis of broad economic theory and nothing more, where the effect of that would be to place a heavy onus on a claimant to disclose and explain its financial procedures and operations during the period of the operation of the cartel (or, if shorter, the period during when the overcharge is alleged to have been mitigated). There must be some plausible basis in fact for alleging that the claimant would have reduced the amount of the overcharge loss in a manner which amounts to legal mitigation. That is not to suggest that a defendant must have documents or evidence at the pleading stage capable of proving what the claimant did in response to the overcharge or that it was effective. It is understood that this material is unlikely, by its nature, to be available in sufficient detail. What is needed is some plausible factual foundation for the application of the broad economic theory in the way required to satisfy the *British Westinghouse* test that is relied upon, and for there being a causative connection between overcharge and cost cutting."

23. Fourthly, it is possible for facts to exist from which a reasonable inference of proximate causation can be inferred. The Tribunal addressed this in *Royal Mail* at [42]:

> "In our judgment, before a purely general plea of mitigation through business cost-reduction processes can be pleaded, in the way that DAF seek permission to do, there must be something identifiable in the facts of the particular case that gives rise to a prima facie inference that there may well be a direct

> causative link between the overcharge alleged and the prices paid by the claimant for other supplies that reduced the amount of the loss resulting from the overcharge. What is sufficient to give rise to such an inference will vary from case to case, but it may be found in facts such as a claimant's knowledge of the nature and amount of the overcharge (such that it is inherently likely that a claimant would seek to address it), the gross amount of the overcharge as a proportion of the claimant's relevant expenditure (the higher the proportion, the more likely it is that some step would have been taken to mitigate the impact), the relative ease with which the claimant's business could be expected to reduce certain input costs or input costs generally, or the fact that other supplies made by the defendant or its associates to the claimant have been renegotiated in years following the increase in the prices alleged to have been caused by the anti-competitive conduct."

D. THE PARTIES' ARGUMENTS

24. In summary, Mr. Harris for FCA argued that, in the light of *Royal Mail*, the new plea in paragraph 41(c) of NTN's Amended Defence was inadequate (a proposition with which we agree). He submitted that the inadequacy of this new plea could not be, and was not, improved or saved by the Voluntary Particulars. He argued that this was the case even if the Voluntary Particulars did advance a sustainable case of mitigation, but the substance of his submission was that they did not do so. He identified a number of headline points arising from *Royal Mail*, including the need for something other than ordinary behaviour, and the importance of identifying facts which meant that the causation case was plausible and carried a degree of conviction. He submitted that NTN's case in the Voluntary Particulars relied on something which was ordinary and run-of-the mill, and it could not therefore be a consequence of overcharge. None of the particular facts identified in *Royal Mail* at [42], as potentially giving rise to an inference of a direct causative link, were present or were pleaded. Overall, although the Voluntary Particulars set out some facts, they were not facts which led to a plausible case of sufficient and direct proximate causation. In addition, and as a supplementary point, he submitted that the supposed logic of NTN's case based on the setting of targets, as set out in paragraphs 6 and 7 of the Voluntary Particulars, relied upon a series of unpleaded premises which lacked any factual basis.

25. On behalf of NTN, Mr. O'Donoghue drew attention to the pleading amendment which was permitted by the Tribunal in *Royal Mail* and submitted that NTN's causation case, as pleaded in the Voluntary Particulars, was a country mile

ahead of that plea. It was certainly not comparable with the unparticularised vacuous plea which was disallowed by the Tribunal in *Royal Mail*. He submitted that the relevant test in the present context – real prospect of success – was not particularly demanding: this Tribunal was not at this stage deciding the facts of the case, but instead should be considering whether there was a plausible basis for the relevant inference of causation. That depended on the facts, which would vary from case to case, and the decision on the facts is a matter for trial. He said that the central rationale for the *Royal Mail* judgment was the Tribunal's concern in that case to ensure that there was an effective remedy. Those concerns could be understood in *Royal Mail* in the light of the very general plea there put forward, but it had no application in the present case where NTN had put forward a particularised case and made a relatively limited disclosure request. He reminded the Tribunal of passages in case law which indicated that summary judgment should not be given in cases where the law was in a state of development: in such cases, decisions should be made on the basis of actual facts determined at trial. In the course of his submissions, he referred us to some passages in the witness evidence of Mr. Linati which had been served by NTN as part of the exchange of factual evidence.

E. DISCUSSION

26. Broadly speaking, we accept the submissions of Mr. Harris as summarised above. The essential question in the present case is whether the case advanced by NTN in its Voluntary Particulars pleads a plausible case of causation which carries a degree of conviction. We do not consider that this question raises issues of law which are in the course of development, particularly bearing in mind the thorough and careful analysis of the relevant principles of law in *Royal Mail*. The present application involves considering how those principles of law apply in the context of NTN's pleaded case. We do not consider that *Royal Mail* turns upon the particular facts of that case, or upon the Tribunal's concern in that case to give effect to the need for an effective remedy. Rather, it identifies important principles which need to be considered whenever a case of mitigation by costs reduction is raised. We gain no assistance, in considering the adequacy of the case advanced, from the factual evidence of Mr. Linati: this has not led to any amendment to the case advanced in the Voluntary Particulars.

27. NTN's case in its Voluntary Particulars focuses on costs targets: that FCA would set costs targets, both for the cost of particular vehicles or part thereof, and for the reduction of costs by specified amounts for a particular vehicle or part thereof. These were to provide a benchmark for people and departments within FCA who were responsible for procurement from suppliers. There is no dispute that such targets existed as a benchmark. NTN's case as to the setting of these targets was based upon documentation disclosed by FCA within these proceedings, and it was at least to some extent discussed at various events attended by FCA's suppliers.

28. The case on causation advanced in the Voluntary Particulars, based on the setting of these targets, is that the costs targets would lead FCA, in particular those responsible for procurement, to negotiate with suppliers, so that the total costs of inputs did not exceed the target. The consequence would be, on NTN's case, if one particular input cost could not be reduced, attempts would be made to reduce other costs, and in this way, were there any overcharge on bearings, that would be mitigated by lower prices negotiated with other suppliers.

29. We do not consider that these facts give rise to a plausible case of causation which carries any degree of conviction. There was no suggestion in NTN's submissions that the setting of targets can be regarded as being in any way an unusual business approach. In our view, it clearly is not. It is an ordinary and run-of-the-mill budgetary control process. It was not introduced in consequence of the (alleged) overcharge, of which FCA knew nothing. As an ordinary budgetary control process which operated independently and in ignorance of an overcharge on bearings, the necessary linkage between that process and the overcharge is absent and certainly implausible, at least unless there are some particular facts which plausibly give rise to the inference that the necessary causal connection existed.

30. In the Tribunal's view, there are no facts relied upon in the Voluntary Particulars which might plausibly give rise to the inference of the direct causative link required. We note that NTN's case is based upon inference: it does not assert, for example, that it was at some point in the course of its longstanding relationship with FCA told anything specific about mitigation of an overcharge

(of which it knew nothing) via costs reduction. In *Royal Mail* at [42], the Tribunal identified a number of possible examples which might give rise to the relevant inference. This is not, of course, an exhaustive list, and as we have said, it must not be read as a statute. But it is a pertinent and useful guideline as the facts which might give rise to the relevant inference that there was a direct causative link.

31. In the present case, none of the paragraph [42] examples of relevant facts are identified in the Voluntary Particulars. It is not suggested that FCA knew anything at the time about the overcharge. It was therefore not something that FCA would have been seeking to address. The gross amount of the overcharge, as a proportion of FCA's relevant expenditure, was extremely small. Again, therefore, it was not something that FCA would have been seeking to address. There is no suggestion that other supplies made by NTN or its associates to FCA were renegotiated in years following the increase in prices.

32. There was some suggestion by NTN that one matter referred to in *Royal Mail* at [42] might be relevant, namely "the relative ease with which the claimant's business could be expected to reduce certain input costs or input costs generally". There is, however, nothing in the Voluntary Particulars which suggests that this could be done with relative ease. In any event, the Tribunal does not consider that this factor, if it stood alone, would be sufficient to establish a plausible case of causation. We can more easily see the converse case: namely that if it is difficult for a party to reduce its input costs by negotiation with its suppliers, then this would be a telling factor against the plausibility of a case that it successfully mitigated an overcharge by such costs reduction. As it is, there is nothing in NTN's pleading, or evidence, which suggests that the reduction of FCA's input costs was relatively easy.

33. Ultimately, NTN can only point to the setting by FCA of benchmark targets for costs reduction. The setting of targets does not mean that those targets were achieved: in the real world, targets are often missed. If they were missed, we cannot see how the setting of the target and the work by procurement staff to meet a target that was missed could be said to have mitigated the overcharge. If the targets were achieved, we do not see how this could plausibly be linked to

the overcharge in circumstances where the overcharge was unknown. It would have been achieved, on this basis, by the hard work of procurement staff, independently of the overcharge. If the target was exceeded because the efforts to reduce other costs were very successful, then again there would be no mitigation of the overcharge: the reduction in costs would again have been achieved anyway as a consequence of the hard work of procurement staff, independently of the overcharge.

34. The theory that the setting of targets led to mitigation of the overcharge seems to us to depend, as Mr. Harris submitted, on various unpleaded facts which were speculative and without any factual foundation in any material in the evidence. In particular, the argument assumes that procurement staff would not negotiate as hard as they could for lower prices, but would only do so to the extent required to meet the target. On this theory, as we understand it, the overcharge would be in practice compensated for because the existence of the target operated as an effective cap on the costs reductions which procurement staff were seeking. If, therefore, that cap were reached, then the achievement of the overall target would mean that the reduction in other costs would have compensated for the overcharge. There is, however, nothing in NTN's pleading, or in the simple existence of a target as a "benchmark", which suggests that FCA's workforce would not negotiate to reduce costs as hard as they could, or explains why they would not wish to do so. Indeed, Mr. O'Donoghue in his submissions relied upon the sophistication and power of vehicle manufacturers as contract negotiators. NTN's implicit case that FCA's negotiators would not negotiate as hard as they could, and would stop when they had reached their target because the target operated as a cap on what they were required to do or did, is unpleaded and speculative. In our view, it is not a case which carries any degree of conviction at all. Rather, it is at best a speculative theory for which NTN are hoping to find support by way of their requests for disclosure. That is not a proper and sufficient basis to grant permission for the Voluntary Particulars to be filed.

35. Accordingly, we unanimously decline to give permission to NTN to file the Voluntary Particulars. The consequence is that the amendment to paragraph

41(c) of the Amended Defence is struck out to the extent that it relates to the new plea of mitigation through the reduction of other costs.

36. In these circumstances, it is unnecessary to address FCA's further arguments concerning NTN's delay in raising the new mitigation argument. It suffices to say that if we had considered the Voluntary Particulars to raise a sufficient case, we would not have been inclined to disallow it – with seven months still remaining before the trial takes place – on the grounds of delay.

37. Since FCA's application to strike-out has been successful, we provisionally decide that NTN should pay FCA's costs of and occasioned by the application. However, the parties can make further submissions as to costs, including in relation to the quantification thereof.

The Hon. Mr Justice Jacobs Professor John Cubbin Eamonn Doran
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 18 June 2021
Registrar