Article

Pleading competition damages claims and defences: recent guidance from the Court of Appeal and the Competition Appeal Tribunal

Mat Hughes* and Elaine Whiteford†

Abstract: The Court of Appeal and the Competition Appeal Tribunal have recently handed down guidance in *NTN v. Stellantis* and *O'Higgins and Evans*, as to the requirements that must be satisfied to plead a competition law claim or defence, whether the claim is an individual claim or a collective action. This article considers the economic and legal issues that need to be addressed in pleadings, in the light of that guidance. Both judgments make clear that economists must be consulted at the very earliest stage to ensure that the pleadings, whether a claim or defence, or in an individual claim or a collective action, reflect clearly the economic theories relied upon and do so by reference to underlying facts. If a pleading does not comply with this guidance, it risks being struck out.

Keywords: pleading, competition damages claims, *NTN v. Stellantis*, *O'Higgins and Evans FX*, cost mitigation defences, market-wide damages claims

1. Introduction

In recent years, the number and scale of competition damages claims being brought in the English courts, including the Competition Appeal Tribunal (Tribunal), has been increasing exponentially. Indeed, as at mid-January 2023, it would appear that there are approximately 55 individual competition damages claims before the Tribunal (25 of which related to the trucks cartel and 14 to interchange fees, many of which had been transferred from the High Court of England and Wales, the Court of Session or the High Court of Northern Ireland) and a further 21 collective actions brought under section 47B of the Competition Act 1998. While, for many years, judgments addressing competition litigation issues were as rare as hen's teeth, a number of important judgments have now been handed down, allowing parties and practitioners to understand better the specific requirements that need to be satisfied when bringing or defending both individual and collective claims.

Two judgments in 2022 – one from the Tribunal, the other from the Court of Appeal – have articulated the requirements that must be satisfied in order to plead a competition law claim or defence. Both judgments, in substance, require that economists be consulted at the very earliest stage to ensure that the pleadings, whether claim or defence, reflect clearly the economic theories relied upon and by reference to underlying facts or risk the claim being struck out. Although chronologically, the Court of Appeal judgment in *NTN v. Stellantis*[1] comes first, as the Tribunal judgment in *O'Higgins and Evans*[2] addresses pleadings more generally, it makes logical sense to address that judgment first.

2. *O'Higgins and Evans*: pleading market wide harm

The Tribunal's foreign exchange (Forex or FX) collective action claims judgment in *O'Higgins* and *Evans* (collectively, the Applicants) considered the requirements that must be satisfied by a claimant or a proposed class representative (PCR) in pleading a case of market wide harm in a competition damages claim, but in doing so emphasized

* Partner and Managing Director, Alix Partners UK LLP, London, UK.
† Partner, Willkie Farr & Gallagher (UK) LLP, London UK.

1 *NTN Corporation and others v. Stellantis N.V. and others* [2022] EWCA Civ 16.

2 *Michael O'Higgins FX Class Representative Limited v. Barclays Bank PLC and Phillip Evans v. Barclays Bank PLC and others (Certification, Basis of Certification and Carriage Dispute)* [2022] CAT 16. The Tribunal has given permission for its judgment that neither claim would be allowed to proceed on an opt-out basis, but only an opt-in basis, to be appealed to the Court of Appeal: [2022] CAT 42. That appeal is scheduled to be heard in April 2023.

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that its observations applied to pleading competition claims generally.

2.1. Background

The FX collective actions followed-on from two decisions adopted by the European Commission (Commission), known as the '*Three Way Banana Split*'[3] and '*Essex Express*'[4] Decisions (the Settlement Decisions), on 16 May 2019 finding that there had been information exchange and some coordination of FX trading strategies amongst participating traders of the financial institutions involved, which infringed Article 101 TFEU and Article 53 EEA.

Both O'Higgins and Evans sought to be certified as a class representative on an opt-out basis in collective claims brought against Barclays and a number of other financial institutions (the Respondents). The Respondents focused their opposition to certification on whether either, or both, actions should be certified on an opt-in or an opt-out basis, rather than on whether certification should be granted at all.[5] The Tribunal, by a majority, determined that neither application should be certified on an opt-out[6] basis but granted both Applicants permission to submit a revised application for certification on an opt-in basis.[7]

2.2. The role of pleadings in competition damages litigation

The Tribunal's judgment contains a useful reminder as to the role of pleadings in litigation. That role is to 'enable all parties, and the court, to know exactly where they stand so as to prepare for a fair trial efficiently'.[8] The pleaded cause of action 'must identify the way in which the infringement is said to have resulted in the loss or damage claimed'.[9]

More specifically, the Tribunal observed that:

> it is not appropriate for a party in individual proceedings asserting a causative link to do so without articulating that causative link in a pleading. Bare or unparticularised assertion is not enough: a pleading must set out (but does not have to prove) all material facts on which a party relies …;[10]

and

> a failure properly to assert a causal link between breach and damage will result in a claim being defective and – if that defect is not cured – liable to be struck out. That is as true of Applications for CPOs as it is in other cases.[11]

What this means, in practice, is that the pleading must spell out, by reference to particular averments of fact, how the breach of competition law caused the loss and damage in respect of which compensation is being sought.

For reasons discussed further below, the Tribunal concluded that neither O'Higgins nor Evans had satisfied these requirements,[12] but refrained from striking the pleaded cases out on the basis that the specific 'market harm' pleadings brought by the Applicants were novel and untested. It took the view that the Applicants should have the opportunity to address the Tribunal's final thinking on pleadings before any application to strike those pleadings out may be brought (if the Respondents were so advised).[13]

2.3. The Applicants' economic theory of harm

The Applicants' pleadings asserted not collusion in relation to specific trades but 'market wide' harm, i.e. harm said to have resulted from the conduct described in the Settlement Decisions, irrespective of whether the customer (i.e. a class member) had traded with the Respondents or not (non-Respondents) and irrespective of whether they had traded electronically or via voice trades (the latter, but not the former, having been the subject of the Settlement Decisions). The harm was said to have consisted of a widening of bid/ask spreads that led purchasers to pay a higher price and sellers to receive a lower price.[14]

The economic theories that underlay the Applicants' case on causation were not pleaded, but the Tribunal ascertained them from the expert reports appended to the pleadings.[15]

Both Applicants, through the reports of their economic experts, asserted that the conduct described in the Settlement Decisions would lead to a widening of

3 Case AT.40135 *Forex – Three Way Banana Split* (16 May 2019). The financial institutions found to have participated in this infringement were UBS, Royal Bank of Scotland, Barclays, Citigroup and JP Morgan.

4 Case AT.40135 *Forex – Essex Express* (16 May 2019). The financial institutions found to have participated in this infringement were UBS, Barclays, RBS and NatWest, and Mitsubishi.

5 *O'Higgins* and *Evans* (fn 2), para 77.

6 The dissentient member of the Tribunal, Paul Lomas, concluded that opt-out was more appropriate: *O'Higgins* and *Evans* (fn 2), paras 413 and 415. Mr Lomas shared the concerns of the majority, Sir Marcus Smith and Professor Anthony Neuberger, on the pleading issue: ibid, para 414.

7 *O'Higgins* and *Evans* (fn 2), para 411.

8 *O'Higgins* and *Evans* (fn 2), para 197.

9 *O'Higgins* and *Evans* (fn 2), para 198.

10 *O'Higgins* and *Evans* (fn 2), para 204.

11 *O'Higgins* and *Evans* (fn 2), para 209.

12 *O'Higgins* and *Evans* (fn 2), para 240.

13 *O'Higgins* and *Evans* (fn 2), para 241(2).

14 *O'Higgins* and *Evans* (fn 2), para 186.

15 *O'Higgins* and *Evans* (fn 2), para 140.

bid/ask spreads. That widening, it was asserted, would arise because: (i) Respondent dealers would, due to the cartel, have an informational advantage against non-Respondent dealers in the inter-dealer segment of the market, where dealers trade with one another rather than with customers; (ii) non-Respondent dealers would consequentially face greater costs of using the inter-dealer segment to lay off inventories acquired from customer trades and, as a result, would increase their bid/ask spreads; (iii) the Respondent dealers would have increased their own prices by widening their spreads, rather than undercutting their rivals; and (iv) due to these factors, dealer to customer trades would have exhibited wider bid/ask spreads across the market as a whole.[16] The Evans PCR also asserted that the unlawful conduct would have resulted in tacit coordination between the Respondents, which would also have allowed them to widen bid/ask spreads.[17]

The Tribunal expressly stated that it did 'not consider that market-wide harm cases can be pleaded at the economic theory level only'.[18] Accordingly, the Applicants were required to also plead the facts on which the economic theory in question is based.

This is not wholly surprising. In a cartel damages action, econometric techniques seek to isolate the effects of the cartel from other market factors that affect prices (here, bid/ask spreads). To be meaningful, such analysis must be grounded in the relevant facts and it is, consequently, critically important to identify those other market factors that affect prices. Having identified the key facts that influence outcomes, relevant evidence can then be sought. If a relevant market factor is omitted from the analysis, any estimates of overcharge may be unreliable,[19] either because the analysis finds a correlation between the cartel and apparent prices that is in fact spurious (as, in fact, the apparently higher prices during the cartel period are due to factors that are omitted from the model and these increased or reduced prices during the cartel period, rather than this being due to the cartel), or fails to find any correlation at all (because the model has low statistical power as it fails to control adequately for other factors that influence prices).

In the case at hand, the Tribunal identified two different ways in which the Applicants might have sought to plead their market-wide harm: finding a statistical or econometric correlation between higher bid/ask spreads and the cartel *without* identifying all the causal links[20] or identifying and considering these links.[21]

The first possibility was to aver a statistical correlation between infringement and market spreads, without articulating how that adverse effect was transmitted through the market. In such a case, the pleading would merely assert the statistical correlation between the infringement and the market was such as to amount to an arguable claim that the infringement explained the correlation.[22]

The second possibility envisaged by the Tribunal was that the pleadings could seek to articulate all the causal links that affected prices, including how the higher costs due to information asymmetries manifested themselves in the market and how these costs were passed on in terms of higher/bid ask spreads, with this being likely to include how such pass-on would occur in a competitive market. However, the Tribunal accepted that this 'would be a difficult case to make out'.[23]

In this regard, the Tribunal was willing to proceed on the basis that the claims were 'theoretically plausible',[24] but to succeed at trial, the Applicants would have to establish a number of facts.

First, it would be necessary to establish whether the FX cartel in fact provided the Respondent dealers with an advantage relative to non-Respondents in the inter-dealer market. For example, to what extent was the information illegally exchanged both useful (in terms of being timely and accurate)[25] and used (for trading purposes)?[26]

Second, since the cost specifically affected non-Respondent dealers, rather than all dealers, the pleadings needed to address intra-market competition between Respondent and non-Respondent dealers, since this is likely to affect the pass-on of any additional costs or inefficiency into higher bid/ask spreads.[27] However,

16 *O'Higgins* and *Evans* (fn 2), para 238.

17 *O'Higgins* and *Evans* (fn 2), para 196(3).

18 *O'Higgins* and *Evans* (fn 2), para 234(2).

19 This is referred to as omitted variable bias.

20 *O'Higgins* and *Evans* (fn 2), para 234(3)(i).

21 This would include how the higher costs due to information asymmetries manifested themselves in the market and how these costs were passed on in terms of higher bid/ask spreads.

22 The Tribunal also indicated that it was not confident that regression analysis would demonstrate the correlation between the cartel and the widening of bid/ask spreads to demonstrate causation between the infringement and the losses alleged: *O'Higgins and Evans* (fn 2), para 238(ix)(7). This was because it would be hard to control for the many other factors that also affect bid/ask spreads.

23 *O'Higgins* and *Evans* (fn 2), para 234(3)(i).

24 *O'Higgins* and *Evans* (fn 2), para 236.

25 In its judgment, the Tribunal quotes extracts from the Settlement Decision in *Three Way Banana Split*, indicating that the information exchanged might be relevant for up to a few hours, depending on market volatility and whether new information supersedes it: *O'Higgins and Evans* (fn 2), para 162.

26 Unless the information is somehow used by the Respondent dealers for inter-dealer trades involving non-Respondent dealers, it cannot be a source of any informational advantage.

27 Market-wide cost increases that impact suppliers similarly are more likely to be passed on to customers in the form of higher prices, than those that impact only an individual firm or a sub-set of firms. This is because if only certain suppliers are facing a cost increase, then they may lose market share if they increase their prices to firms not facing a similar cost increase. In a report commissioned by the Office of Fair Trading, it was found that 'There is

this was not covered by the pleadings. Whilst the Tribunal accepted that non-Respondent dealers might respond to higher costs by increasing their bid/ask spreads, it also observed that:

> But, again, this is a theoretical construct, for there are many other ways in which a cost may be absorbed by an FX market participant: e.g. reduced contribution to the profitability of the bank; reduced bonuses to traders for poor performance; cutting back on overheads. Even if the cost is passed on in the form of increased spreads – the question arises how the pass on occurred; in which currencies; and over what time duration? The point is, even assuming an identifiable and unlawful cost incurred by FX market participants, on what basis can it be said that this caused these market participants – the banks – to widen their spreads to customers? They could have absorbed the cost themselves. And even if they did seek to pass on the costs, would this have been achieved by a widening of FX spreads or by increasing the price of other products?[28]

2.4. Conclusion – no strike out

Despite its misgivings as to the adequacy of both pleaded cases, the Tribunal decided not to strike out either claim, in part on the basis that, prior to the hearing of a strike out application, there is generally an opportunity for the pleading party to put forward a draft amended pleading that addresses the objections being raised against the original pleading. Given that no application for strike out had been brought by any Respondent, the Tribunal considered it would be unfair to the Applicants for the Tribunal to deny them such an opportunity to amend their claims.

The Tribunal's judgment is instructive for lawyers and economists seeking to articulate the elements of a claim prior to disclosure.[29] It indicates that a high level, theoretical pleading will not do and that the basic factual building blocks not only of the infringement but also of how that infringement caused the loss must be clearly spelt out in the pleading. The Court of Appeal, a few months prior to the FX judgment, had, in *NTN v. Stellantis*, imposed similar strictures on defendants. It is to that judgment that we now turn.

3. NTN v. Stellantis

On 7 January 2022 the Court of Appeal handed down an important judgment, in *NTN v. Stellantis*, affirming that a defendant to a claim for cartel damages seeking to plead that a claimant has mitigated an overcharge by off-setting it against other costs must demonstrate a sufficient causal nexus or connection between the steps that the defendant says the claimant took by way of mitigation (the off-setting) and the overcharge. That causal nexus or connection must be 'realistic' or 'plausible', as opposed to hypothetical or theoretical, and be based on evidence that is more than merely 'arguable'.[30] Although the Court of Appeal was careful to emphasize that it should not be assumed that mitigation by off-setting can never be advanced in a pleading, the conditions it set down mean such defences are unlikely to be the norm, particularly in cases in which the primary defence is that there was no overcharge.

As a matter of English law, the pass-on defence is also a species of mitigation of loss. Although the pleading requirements of the pass-on defence were not considered by the Court of Appeal, it would be prudent for defendants to frame their pass-on defences in the light of the pleading requirements set out in *NTN v. Stellantis* to try to protect those defences against strike out applications.

3.1. Background

In 2019, the automobile manufacturer Fiat Chrysler Automobiles N.V. (known as Stellantis N.V. since its merger with Groupe PSA), with a number of affiliated companies (together, FCA) brought a claim before the English High Court against certain manufacturers of automotive bearings, including NTN, who had been found by the Commission to have engaged in a cartel in relation to those bearings.[31] In the claim, FCA sought to recover the overcharge resulting from that cartel, together with relevant interest. The claim was transferred to the Tribunal in 2020.

NTN's pleaded defence was that there was no overcharge and if there was an overcharge, it was passed on by FCA to its customers or set-off by FCA by reducing the prices it paid to other suppliers. In June 2021, FCA applied to have the off-setting defence struck out on the basis that it was theoretical, lacked realism and was implausible. In response, NTN sought to rely upon voluntary further particulars of the defence. The defence was struck out by the Tribunal, which also refused NTN permission to amend the pleading by reference to the voluntary

some empirical support for the theoretical proposition that industry-wide pass-through rates will typically be greater than firm-specific pass-through rates, though no clear evidence emerges on the extent of the difference between pass-through rates (and how this might change as the intensity of competition varies):' RBB Economics, *Cost pass-through: theory, measurement, and potential policy implications* (February 2014) 6, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/320912/Cost_Pass-Through_Report.pdf (accessed 27 January 2023).

28 *O'Higgins* and *Evans* (fn 2), para 238(3)(viii).

29 Although the Tribunal did refer to the possibility of seeking pre-action disclosure, the hurdles that have to be cleared, under the Civil Procedure Rules and the Competition Appeal Tribunal Rules 2015, mean that such disclosure is the exception, rather than the rule.

30 *NTN v. Stellantis* (fn 1), para 33.

31 Case AT.39922 *Automotive bearings* (19 May 2014).

particulars.[32] The Tribunal having refused NTN permissions to appeal,[33] NTN applied to the Court of Appeal for permission to appeal against the Tribunal's ruling.

At a rolled-up permission and appeal hearing on 14 December 2021, NTN was granted permission to appeal. The Court of Appeal granted permission as it considered the issue of mitigation by off-setting to be of significant importance more generally in cartel follow-on litigation and it was the first opportunity it had had to consider the implications on the cost mitigation defence of the Supreme Court's 2020 judgment in *Sainsbury's v. MasterCard*[34] on pass-on and mitigation.[35] Having granted NTN permission to appeal, the Court of Appeal dismissed the appeal by its judgment of 7 January 2022, which was given by Green LJ, with whom the Chancellor, Sir Julian Flaux and Whipple LJ agreed.

3.2. Pleading costs mitigation defences

The question before the Court of Appeal concerned what has to be pleaded by a defendant to be able to maintain a costs mitigation defence. NTN had argued that it sufficed to plead that FCA had in place, in the ordinary course of business, a system for monitoring and controlling costs and that to raise mitigation by off-setting NTN was not required by *Sainsbury's* to plead facts demonstrating that the overcharge had caused particular costs to be off-set. According to NTN, it was sufficient to plead on the hypothetical basis that it is a 'reasonable' inference that FCA would have mitigated any overcharge by off-setting other costs.

NTN asserted that if pleading mitigation by off-setting required evidence or particularization of causation, rather than merely hypotheses, it would be impossible to plead the defence, given the informational asymmetries between claimants and defendants in relation to these matters. If NTN was correct, FCA would have become subject to the obligation to give (extensive) disclosure as to its costs control system, and the mitigation by off-setting defence would have had to be determined as a matter of fact at trial.

The Court of Appeal rejected NTN's approach, pointing out that the Supreme Court in *Sainsbury's* had not been addressing 'the standard that a pleading had to reach before being allowed to proceed', but rather the level of precision required to prevail in the properly pleaded case.[36] There had been no dispute before the Supreme Court that the mitigation pleading in *Sainsbury's* was anything other than realistic or plausible.

In considering whether NTN's pleading disclosed a proper averment which should go to trial (and therefore should not have been struck out by the Tribunal), the Court of Appeal identified two preliminary issues that it had to consider. 'First, as to the test to be applied. Secondly, as to the evidential standard that must be applied as part of the test'.[37] In doing so, it emphasized that these issues were not specific to competition law but were equally applicable to other contractual and tortious claims.

As to the first issue, the Court of Appeal confirmed that the *British Westinghouse Electric*[38] test is applicable. In *British Westinghouse Electric*, it was held that whilst a court will order compensation for 'pecuniary loss naturally flowing from the breach', but that a claimant had a duty to take all reasonable steps to mitigate that loss and whilst this does not require it 'to take any step which a reasonable and prudent man would not take in the ordinary course of business', where it does so, the actual diminution in loss suffered may be taken into account. The Court of Appeal thus held that, in the context of a mitigation of damage defence, that test requires that there has to be a sufficient causal nexus or connection between the steps that a defendant says a claimant took by way of mitigation (the off-setting) and the overcharge.[39] The Court of Appeal held that, in *Sainsbury's*, the Supreme Court had been applying that test when it observed that 'for a defence of mitigation by off-setting to run, there had to be a "legal or proximate connection" between the breach (the overcharge) and the act of mitigation'.[40]

Turning to the second issue, the Court of Appeal held that the evidential standard that must be applied is 'whether there is a realistic prospect of the plea succeeding at trial, the same test as that which applies on a summary judgment application'.[41] In addition: 'pulling the strands together, the burden of proof when pleading

32 *Stellantis N.V. and others v. NTN Corporation and others (Strike Out)* [2021] CAT 14. In so doing, the Tribunal had regard to the earlier Tribunal judgment in *Royal Mail Group Limited v. DAF Trucks Limited* [2021] CAT 10, in which DAF was refused permission to amend its defence to plead a costs mitigation defence.

33 *Stellantis N.V. and others v. NTN Corporation and others (Permission to Appeal and Costs)* [2021] CAT 25.

34 *Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC, MasterCard Incorporated* [2020] UKSC 24, paras 205–216.

35 *NTN v. Stellantis* (fn 1), para 9. In *Royal Mail v. DAF* (fn 32), paras 25–36, the Tribunal also applied the Supreme Court judgment in *Sainsbury's* (fn 34).

36 *NTN v. Stellantis* (fn 1), para 49.

37 *NTN v. Stellantis* (fn 1), para 16.

38 *British Westinghouse Electric v. Underground Electric Railways* [1912] AC 673 at 689.

39 *NTN v. Stellantis* (fn 1), paras 17–19.

40 *NTN v. Stellantis* (fn 1), para 20.

41 *NTN v. Stellantis* (fn 1), para 22.

causation is on the defendant to demonstrate: (a) that there is a legal and proximate, causal, connection between the overcharge and the act of mitigation; and (b) that this connection is "realistic" or "plausible" (the two phrases being interchangeable) and carries some "degree of conviction"; and (c) that the evidence is more than merely "arguable"'.[42] The Court of Appeal then considered the adequacy of NTN's pleading in the light of these requirements. The original defence had pleaded that FCA had mitigated the overcharge by a variety of means, one of which involved off-setting through 'reducing other costs'. This, the Court of Appeal observed, was an assertion of fact, not evidence and it also noted that no particulars had been provided. The pleading then (wrongly) asserted that FCA had to prove, inter alia, '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 Court of Appeal underlined that 'the suggestion that the claimant must establish a negative is an erroneous interpretation of Sainsbury's … which makes clear that the burden lies throughout upon the defendant to prove its defence'.[43] In other words, merely pleading mitigation by off-setting without evidence or particularization does not suffice.

The Court of Appeal then turned to consider the voluntary particulars by which NTN had sought to add flesh to the bones of its pleaded defence. Those voluntary particulars referred to facts relating to the existence of a cost control system at FCA that used targets and those facts were assumed, for the purposes of testing the arguments, to have been realistic and plausible. However, the Court of Appeal observed that:

> NTN's primary case is that there is no overcharge at all and/or that if there was it was passed on. By its nature it is therefore hypothetical and conditional. The pleading does not therefore set out any particulars or evidence explaining how or why any element of overcharge would be identified and quantified by a customer such that the procurement teams could then, properly appraised, seek to off-set the overcharge by increased efforts to reduce costs elsewhere; nor how or why FCA would actually be successful in pushing through such cost reductions from other sources.[44]

The Court of Appeal added that, to fill this gap in the evidence on causation, 'NTN pleads a series of inferences which lead it, ultimately, to the factual conclusion that FCA would have mitigated any overcharge'.[45] The Court of Appeal defined inferences as 'conclusions that flow logically, reasonably or rationally, through a process of reasoning, from proven or admitted facts' and concluded that the inferences NTN sought to draw did not flow naturally or causally from the facts NTN could properly plead. The Court of Appeal was particularly critical of the inference that because FCA has a system for controlling costs involving targets, it would be effective in off-setting overcharges by a reduction in costs from other suppliers. This was because: 'the existence of a system to reduce costs is no guarantee of its success and it is not an inference which can therefore be inferred from the pleaded facts'.[46]

In other words, a mitigation argument cannot simply rest on a firm's procurement processes being effective at securing low prices from other suppliers. (This is disregarding for the moment that a cartel might compromise the efficacy of a procurement process by reducing the ability of a purchaser to play-off independently competing suppliers.) Instead, the costs mitigation argument would need to be more nuanced, namely that the purchaser becomes *more effective* at reducing costs from other suppliers in direct response to a cartel overcharge; the overcharge triggers the claimant seeking and achieving off-setting cost reductions from other suppliers.

However, NTN failed to explain why cost reductions would not have been secured in any event. In addition, NTN did not explain why the cartel overcharge, which NTN denied, increased FCA's ability and/or incentives to secure off-setting cost reductions.

In the abstract (i.e. in the absence of actual evidence), it is not obvious why a cartel would increase the ability of a purchaser to secure lower prices from suppliers of other products or services. The negotiation and bargaining power of these other suppliers may be wholly unaffected by a cartel concerning a different product.

Accordingly, the focus of the defence may need to be that a purchaser's incentive to reduce other suppliers' costs has increased due to the cartel overcharge. In this context, a purchaser's incentives and ability to reduce costs are linked. This is because a purchaser's ability to secure lower prices from other suppliers is a question of degree (rather than a purchaser having the ability or not) and purchasers can take proactive steps to cut their costs by enhancing their negotiating power. For example, a purchaser may be willing to invest money or effort to reduce its costs – such as investing in finding or developing lower cost suppliers, cost reducing technologies or relocating to lower cost manufacturing locations – or simply enhancing its price negotiation process (e.g. better understanding suppliers' costs and their cost drivers).

42 *NTN v. Stellantis* (fn 1), para 33.
43 *NTN v. Stellantis* (fn 1), para 53.
44 *NTN v. Stellantis* (fn 1), para 56.
45 *NTN v. Stellantis* (fn 1), para 57.
46 *NTN v. Stellantis* (fn 1), para 64.

A purchaser's incentives to undertake such efforts to lower its costs may also be influenced by a combination of the profits from doing so and the competitive pressure it faces (i.e. will it lose sales and profits to lower cost/price competitors if it does not lower its costs?). Such incentives might be increased by an unavoidable increase in the price of a key input, particularly if rival purchasers are not equally adversely affected by the cartel and the cartelized input is a material element of total costs.

In addition, as observed by Green LJ, as FCA was oblivious to any overcharge (an overcharge denied by NTN) as the cartel was secret, FCA would have had 'at least a shout' at arguing that if it secured lower prices from other suppliers, then such a benefit was a collateral advantage that was unrelated to the breach.[47]

NTN had argued that a rejection of its pleaded off-setting defence would imply that such a defence could never be raised and that the Tribunal had placed NTN in a 'Catch 22' predicament 'whereby the CAT accepted that in principle an off-setting defence could be pleaded but, simultaneously, made it impossible to plead sufficient facts to get such a defence off the ground by denying NTN the chance to obtain and review disclosure from the claimant'. The Court of Appeal gave that short shrift, observing that 'if a defendant does not have any realistic evidence of a possible defence, then it has no right to go fishing in disclosure to see if there is anything that might turn up which would help …. There has to be a properly pleadable starting point before the claimant is put to the heavy burden that disclosure involves'.[48]

Given the above, the Court of Appeal determined that the Tribunal had been correct to conclude that NTN's cost mitigation defence should be struck out.[49]

3.3. Is there a future for the cost mitigation defence?

There can be no doubt that the Court of Appeal's judgment in *NTN v. Stellantis* represents a significant set-back for defendants to cartel damage claims in England. The formulaic pleading that the claimants 'pass[ed] on any alleged loss to their own customers (or otherwise mitigate[ed] it), including through reducing their other costs' as a 'hook' for intrusive requests for sensitive costs disclosure can now expect to be struck out. Defendants will, accordingly, have to plead the 'realistic' or 'plausible' causal connection between the overcharge and the act of mitigation that is pleaded, the evidence for which will need to be more than merely 'arguable'. Doing so against the backdrop of a pleaded case that denies there was any overcharge at all will be particularly challenging, as the judgment in *NTN v. Stellantis* makes clear.

Finally, it remains to be seen what the consequences of this judgment are for pleading of the pass-on defence. As the *Sainsbury's* judgment recognizes, pass-on is a species of mitigation and it is not immediately obvious why the pleading strictures of the Court of Appeal are not equally applicable to pleading pass-on. As such, defendants wishing to maintain pass-on defences would be well advised to carefully consider the extent to which their pleaded case would withstand the Court of Appeal's analysis in *NTN v. Stellantis*.

4. Conclusions

All cases self-evidently turn on their facts: the *O'Higgins and Evans FX* and *NTN v. Stellantis* cases each involved a difficult claim or defence. However, both cases have emphasized the central role of pleadings for both claimants and defendants, particularly where the claims or defences are indirect or have multiple causal chains. Simple economic theory or assertion will not suffice: neither claimants or defendants 'have any right to go fishing in disclosure to see if there is anything that might turn up which would help' (to quote the Court of Appeal),[50] with the Tribunal echoing the same point that it is not good enough to hope 'that something will come out in the wash' on disclosure.[51]

Accordingly, the parties to competition damages cases should give careful thought to their pleadings, including pleading these in sufficient detail so that the key causal links can be understood and economic and (where appropriate) factual evidence is identified and can be sought on these points.

47 *NTN v. Stellantis* (fn 1), para 67.
48 *NTN v. Stellantis* (fn 1), para 81.
49 *NTN v. Stellantis* (fn 1), para 82.
50 *NTN v. Stellantis* (fn 1), para 81.
51 *NTN v. Stellantis* (fn 1), para 238(6).