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IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1282/7/7/18
1289/7/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

28 October 2022

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
DR WILLIAM BISHOP
PROFESSOR STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

UK TRUCKS CLAIM LIMITED

Applicant / Proposed Class Representative

- v -

STELLANTIS N.V. (FORMERLY FIAT CHRYSLER AUTOMOBILES N.V.) AND OTHERS

Respondents / Proposed Defendants

- and -

DAF TRUCKS N.V. AND OTHERS

Objectors in Case 1282

AND BETWEEN:

ROAD HAULAGE ASSOCIATION LIMITED

Applicant / Proposed Class Representative

- v -

MAN SE AND OTHERS

Respondents / Proposed Defendants

- and –

DAIMLER AG

VOLVO LASTVAGNAR AKTIEBOLAG

Objectors in Case 1289

RULING (PERMISSION TO APPEAL)

A. INTRODUCTION

1. On 8 June 2022, the Tribunal issued its judgment (the "Judgment") on two overlapping applications for a collective proceedings order ("CPO") concerning follow-on damages claims based on the European Commission's decision of 19 July 2016 in Case 39824 – *Trucks*. This ruling uses the same abbreviations as the Judgment.[1] In the Judgment, the Tribunal held that the application by UKTC would be refused and that the application by the RHA would be granted, but for a more limited scope than was sought in the application.

2. There were three respondents to the collective proceedings brought by the RHA: MAN, DAF and Iveco. MAN and DAF have jointly applied for permission to appeal ("PTA") on one fundamental ground and Iveco has stated that it supports that application. DAF alone has applied for permission on an additional ground challenging a discrete aspect of the Judgment which concerns a particular term of the CPO.

3. UKTC also seeks permission to appeal. In its written PTA Application of more than 30 pages it sets out four grounds of appeal, but the purported first ground is in reality an umbrella heading for a number of distinct grounds, and the fourth ground comprises seven sub-grounds. The essential thrust of the UKTC PTA Application is that the Tribunal wrongly refused to grant a CPO in favour of UKTC, which it should have done on the basis either that the RHA's CPO application was refused altogether or alternatively granted on a much more limited basis to cover only transactions that were not within the scope of the UKTC proceedings. UKTC does not seek to suggest that the Tribunal should have granted it a CPO alongside the CPO granted in favour of the RHA. Accordingly, it effectively seeks to appeal against the decisions in the Judgment both to refuse its own CPO application and to grant the RHA's CPO application. Ground 2 of the UKTC PTA Application in part raises the same point as the MAN/DAF PTA Application.

[1] All paragraph references expressed as [x] are to the Judgment except as otherwise stated.

4. The respondents to the collective proceedings brought by UKTC were Iveco and Daimler. Daimler has served objections to UKTC's PTA Application and Iveco has referred to Daimler's submissions in stating that it also opposes UKTC's Application. MAN was given permission to intervene as an objector in the UKTC proceedings and it has served submissions contending that UKTC should be refused permission to appeal.

5. The RHA has served very full submissions in response to the PTA Applications by MAN, DAF and UKTC; and UKTC has served further brief submissions supporting the MAN/DAF PTA Application.

B. JURISDICTION

6. Section 49(1A) of CA 1998 provides, insofar as relevant:

> "An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings—
>
> (a) as to the award of damages or other sum (other than a decision on costs or expenses)…"

7. Neither the MAN/DAF PTA Application nor the additional DAF PTA Application seeks to appeal the Tribunal's decision that the RHA satisfies the condition for authorisation to act as class representative under s. 47B(5)(a) CA 1998 (the "authorisation condition"), as amplified by r. 78. The MAN/DAF Application is directed at the "eligibility condition" set out in s. 47B(5)(b) and (6), as amplified in r. 79. The separate DAF Application concerns a term which the Tribunal held should be included in the CPO addressing existing claims for damages by potential class members. In our view, that falls within the scope of "a decision … as to the award of damages", purposively interpreted. We accordingly hold that there is jurisdiction to appeal under s. 49(1A) CA 1998.

8. For the most part, the grounds raised by the UKTC PTA Application are directed at the scope of the claims and the Tribunal's determination under r. 79: to that extent we consider that the Application comes within the appellate jurisdiction although, as explained below, we consider that many of the grounds do not concern a point of law. However, ground 4(d) of the UKTC PTA Application

is very different since it concerns the conduct of the RHA and challenges its suitability as a class representative. Although not expressly stated, that appears to be a challenge to the Tribunal's decision as regards the authorisation condition. We have considerable doubt that this can properly be characterised as a decision as to the award of damages so as to come within the scope of s. 49(1A) as interpreted by the Court of Appeal in its judgment on a different aspect of these proceedings: *Paccar Inc v RHA and UKTC* [2021] EWCA Civ 299 at [34]-[60], [106-[107]. Nonetheless, as none of the submissions opposing UKTA's PTA Application raised a jurisdictional objection and contended that this point can be raised only by way of judicial review, we shall proceed on the basis that it can be challenged by way of appeal.

C. SUMMARY

9. We will grant permission to appeal on the ground set out in the joint MAN/DAF PTA Application. We also grant permission to appeal on ground 2 and the related ground 1(3) of the UKTC PTA Application insofar as (a) those grounds concern the inclusion of new and used trucks in the RHA class definition; and (b) UKTC's consequential argument that if the RHA CPO had been confined to used trucks then UKTC's application should have been allowed. However, we refuse UKTC permission as regards the allegation that there is potential conflict in the RHA class definition as regards either (i) purchasers and lessees of the same trucks, or (ii) successive lessees of the same trucks. As regards (i), the RHA class definition excludes purchasers who acquired a truck in order to rent it out (and therefore truck rental companies), and we indeed required amendment of the wording of the class definition to make this clear: [201] and [112]-[116]. Only lessees of such trucks are within the RHA class. As regards (ii), if a truck rental company (which is therefore outside the class) purchases a truck and passes on an overcharge through its rental prices to lessees, the fact that the same truck may be rented first by A, next by B and then by C does not give rise to any conflict between the claims of A, B and C that the rental prices they paid were higher as a result of the cartel. Accordingly, we do not consider that UKTC has any realistic prospect of success on this part of its ground 2, and we note that this argument is not advanced by DAF and MAN.

10. We should add that in any event we do not consider that it is open to UKTC to advance under this head of appeal (i) the criticism of the RHA Board as having specific interests which undermine their suitability to represent all members of their proposed class or (ii) the assertion that the majority of RHA members are likely to be short-term hirers or acquirers of used trucks, as asserted in the UKTC PTA Application at para 28. As regards (i), this is a factual allegation which was not advanced at the hearing, when other allegations were made regarding a conflict within the RHA which the Tribunal expressly rejected: see at [29]. There is no application for permission to appeal against that part of the Judgment. As regards (ii), there was no evidence to that effect before the Tribunal.

11. We refuse permission to appeal as regards all other grounds in the UKTC PTA Application and the separate DAF PTA Application as they do not have any real prospect of success.

12. We should explain that we have decided to grant permission as stated above not because we have doubts about the conclusion reached in the Judgment but because we recognise that this ground potentially raises an important issue in what is still a new regime, although the decision here was very dependent on the facts of this particular case. We think it therefore merits consideration by the Court of Appeal. Exceptionally, therefore, we grant permission on the basis of both criteria set out in CPR r. 52.6.[2]

13. Since permission to appeal is being granted, we do not think it is necessary or appropriate to address all the arguments raised under this head in the PTA Applications and responsive submissions. However, we think it is worth emphasising three points that are reflected in the Judgment.

14. First, it is clearly well arguable that if there was an overcharge on new trucks, this would have impacted on the price of used trucks – either by an element of direct pass-through or because of a general effect on market prices. None of the

[2] Those criteria are adopted by the Tribunal in determining permission to appeal: *Guide to Proceedings* (2015), para 8.28.

OEMs suggested the contrary and, indeed, if an overcharge were to be established they seek to rely on pass-through arguments. Accordingly, we were concerned that to have collective proceedings only for new trucks would leave a very large number of potential claimants without a remedy. In particular, the evidence before the Tribunal showed that about half the operators of medium or heavy trucks never operated new trucks and, further, that reliance on used trucks was preponderant among smaller businesses: see at [203].

15. We did not consider that the approach, now suggested by UKTC, of granting it a CPO for new trucks and granting the RHA a CPO only for used trucks would provide a suitable means of addressing the issue raised. That is because it is not simply "some class members" that acquired both new and used trucks over the period in question (as stated in the MAN/DAF PTA Application at para 10(c)): the evidence was that about 40% of the potential class members who had registered their interest with the RHA acquired *both* new *and* used trucks: see at [250]. Having two sets of proceedings would therefore result in a very substantial number of persons being represented claimants in both proceedings. Any concern to maximise their individual financial recovery would therefore still create divergent and potentially conflicting interests within each class, according to whether the individual had greater potential loss on new or on used trucks; and that is not a simple matter of the number of trucks which they acquired in each category since trucks are not fungible goods and some are much more expensive than others: see at [251].

16. Thirdly, if there were two such parallel collective proceedings, they would almost certainly have to be heard together to ensure consistency of outcomes. Here, however, UKTC and the RHA put forward very different approaches by way of expert methodology for the calculation of damages. To have two sets of collective proceedings addressing the same overcharge and pass-on issues arising from the same cartel but using very different expert methods would in our view very significantly complicate the trial. It would also lead to the exact opposite of procedural and judicial economy which is one of the objectives which the collective proceedings regime seeks to achieve: see at [194].

17. We proceed to address below the various other grounds put forward on which we are refusing permission to appeal.

D. UKTC'S PTA APPLICATION

Ground 1

(a) Class definition

18. The UKTC contends that the Tribunal "erred in law" in failing to take into account the fact that the UKTC class definition was limited to direct purchasers and long-term lessees of trucks "from the cartel" and therefore "coherent" whereas the RHA definition focused on whether potential claimants were engaged in road haulage operations, and therefore "incoherent": PTA Application, para 11(1). The Tribunal is also alleged to have failed to take into account the fact that the RHA definition included purchasers/lessees of used and foreign registered trucks and trucks outside the cartel period up to May 2019 and short-term lessees, but on the other hand excluding persons with a potential claim, in particular rental companies and cost-plus operators: PTA Application, para 11(2).

19. However, there is nothing incoherent in either the UKTC or the RHA class definitions: they are just different in scope in various ways. And far from failing to take the alleged matters into account, the Tribunal expressly referred to and considered them in the Judgment. The various differences in the two class definitions are summarised at [9(3)-(6)]. Further, the Tribunal directly took into account the fact that the classes encompassed by the UKTC and the RHA applications "*both* omit different categories of potential claimants" [199]:

    (1) as regards the RHA's inclusion of used and new trucks, the Tribunal considered that an advantage as otherwise many who potentially suffered loss (especially SMEs) would be denied the opportunity to claim: [203]-[204];

(2) the contrast between the two applications in treatment of lessees, and the categories omitted from the respective operations is discussed at [200]-[202];

(3) the inclusion of foreign registered trucks in the proposed RHA class was not only considered by the Tribunal but led to its ruling that this category should be excluded: [175]-[180];

(4) similarly, the RHA's proposed run-off period was expressly considered and the Tribunal held that only a much reduced run-off was appropriate: [207]-[213];

(5) the Tribunal separately considered the position of cost-plus operators and held that those operating exclusively on a cost-plus basis should be excluded from the RHA class: [107]-[111]. Moreover, UKTC's own evidence was that there were virtually no hauliers who operated exclusively on a cost-plus basis: [110].

20. UKTC's real complaint is not, therefore, that the Tribunal did not take these matters into account, but that it does not agree with the view which the Tribunal reached regarding them. Moreover, the Tribunal reached its view having regard also to the categories of potential claimants excluded from the UKTC's class definition. Accordingly, this ground does not concern a point of law but the Tribunal's evaluative judgment on the facts.

21. We should add that we do not accept that the UKTC's proposed class was limited "to direct purchasers/long-term lessees from the cartel": PTA Application, para 11(1). UKTC's Amended Collective Proceedings Claim Form defined the class as "persons who … acquired one or more New Medium or Heavy Trucks…."; where "New" was defined to mean acquired from a truck manufacturer *or a dealer* or a lessor which had acquired the truck from a truck manufacturer *or a dealer,* and "dealer" was defined as "any person engaged in the business of selling New Trucks, *whether such person is independent or affiliated* with one or more truck manufacturers." UKTC's class definition accordingly included indirect as well as direct purchasers.

(b) Aggregate basis of claim on opt-out basis

22. UKTC contends that the Tribunal failed to take into account the "clear advantages" of "an opt-out class of direct purchasers" being able to pursue their claims on an aggregated basis: PTA Application, para 11(4). As regards the suggestion that the UKTC class comprises only direct purchasers, see para 21 above. In all other respects, this point is repeated at greater length in grounds 4(c) and 4(f). We address it under those heads below.

(c) UKTC could have been an opt-in claim

23. UKTC contends that the Tribunal should not have treated the fact that the RHA application was made on an opt-in basis as an advantage when the UKTC had included the alternative of an opt-in CPO in its application: PTA Application, para 12. This point is repeated at greater length in ground 4(e). We address it under that head below.

Ground 3: **the run-off period**

24. UKTC seeks to challenge the decision to allow the RHA class to encompass purchases in a run-off period well beyond the date on which the infringement ended, as found in the Decision, i.e. 18 January 2011. In the Judgment, we significantly curtailed the run-off period for which the RHA proceedings could claim, so as to avoid an over-inclusive class definition, to 31 January 2014 for new trucks and any EURO emissions claims, and 31 January 2015 for used trucks: [208]-[213].

25. UKTC seeks to contend that this was an error of law on the basis that it does not satisfy rule 79(1)(a). That rule states as follows:

> "**79.**—(1) The Tribunal may certify claims as eligible for inclusion in the collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—
>
> (a) are brought on behalf of an identifiable class of persons."

26. We do not consider that this ground has any prospect of success. Extending the period of acquisition within which persons may claim from one specified date to a later specified date does not make the members of the class any less identifiable. The dividing line in the class definition is equally clear.

27. UKTC's real criticism, as is apparent from its PTA Application, is that the RHA and its expert cannot be certain that the run-off lasted for the full extent of those periods. That is of course correct and is true of virtually every cartel damages claim. Rule 79(1)(a) does not require that the Tribunal must be satisfied that the claim of every identified person in the class will be pursued to trial in any event. Indeed, such a requirement would be unworkable. It may be that as the evidence emerges on disclosure and by expert analysis the run-off is found to be shorter, just as it is possible that it emerges that certain categories of truck were not subject to an overcharge. If the former, claims in respect of trucks purchased thereafter will fail; if the latter, claims in respect of those categories of truck will fail. That of course means that any class member who acquired trucks only after such shorter run-off period, or only such categories of truck, will not recover damages. At some stage of the proceedings, the RHA may possibly have to advise some class members that their claims can no longer plausibly be pursued, just as it may have to advise some class members that their claims for *some of their trucks* can no longer plausibly be pursued. As the RHA observes in its response: "decisions not to pursue certain claims before trial are not the preserve of claims during run-off periods that might ultimately prove to be too long but could equally apply to other aspects of proposed claims." Since the RHA proceedings involve an opt-in class and it is seeking individual not aggregate damages, the RHA will be able to ascertain from each class member not only how many trucks they acquired and any distinctive features of those trucks but also the dates of acquisition. Accordingly, giving them appropriate advice and excluding recovery for trucks acquired after a particular date presents no problem.

28. The concept that the overcharge caused by a cartel may continue to inflate market prices beyond the end of the cartel is well-recognised. Indeed, UKTC itself assumed a run-off to 31 December 2011. If there was a run-off of period, then excluding those who acquired trucks in that period purely on the basis that

they had not previously acquired trucks would exclude many potential claimants from the chance to recover their loss. We regarded that as a disadvantage of UKTC's approach to run-off: [206], [208]. This factor, and the length of run-off that could reasonably be advanced, were matters for the Tribunal's evaluation and do not raise a point of law.

Ground 4

29. **(a) Failure to take into account the defect in the RHA application identified in Grounds 2 and 3**

30. This appears to add nothing to Grounds 2 and 3. If Ground 2 or 3 was valid, an appeal would succeed. If they are invalid, Ground 4(a) falls away. The Tribunal was clearly entitled to find that if the alleged conflicts were not an objection to the RHA application, the inclusion of used as well as new trucks was a factor in favour of that application as it enabled a large number of potentially affected SMEs to pursue their claims: [203]-[204]. Similarly, the Tribunal was entitled to find that UKTC's approach to run-off excluded potential claimants: [208].

(b) Failure to take into account that RHA excludes significant categories of direct purchasers and long-term leaseholders from the class

31. This is simply incorrect. The Tribunal noted the exclusion of truck rental companies from the RHA class: [9(6)]; and expressly took this into account when assessing the relative advantages and disadvantages of the RHA and UKTC class definitions: [199]-[204]. On the other hand, the Tribunal also took account of the fact that UKTC's class definition excluded claims by those who rented trucks for less than a year, although it is clearly very plausible that truck rental companies passed on at least some of the overcharge in their rental prices. UKTC's real complaint is that it disagrees with the Tribunal's determination of this balancing exercise. That is not a point of law.

32. Moreover, insofar as UKTC seeks to suggest that its class definition encompasses all purchasers of new trucks during the cartel period, that also is incorrect. The UKTC class definition excludes purchasers of a new truck who

rented it out on a lease of at least 12 months (operating lease), independent dealers who purchased trucks for resale, and converters (i.e. persons in the business of converting a truck to a specific use): see UKTC's collective proceedings claim form, para 3, and the annexed draft CPO at para 10(b) and (d).

33. As regards "cost-plus" operators, it cannot be said that the Tribunal failed to take their position into account since their exclusion was the express decision of the Tribunal: [111]. The evidence of UKTC was that such contracts are exceptional: [108].

(c) Failure to take into account of the Supreme Court case-law regarding the fundamental advantages of aggregated damages

34. This is misconceived. UKTC refers to the statement by Lord Briggs in *Merricks SC* at [57] where he emphasised the advantage of aggregated damages in collective proceedings compared to "the pursuit of a multitude of individually assessed claims for damages, which is all that is possible in individual claims under the ordinary civil procedure." However, the Tribunal expressly relied on *Merricks SC* (and referred to this passage) in rejecting the submissions of the OEMs and determining that the claims were suitable for collective proceedings: [160]-[169]. In proceeding to weigh the relative advantages and disadvantages of the UKTC and RHA applications, the Tribunal considered their different approaches to the quantification of damages. We recognised that aggregate damages have some benefits but noted that such damages depended on a satisfactory expert methodology: [215]-[216]. We regard it as a complete mischaracterisation of the approach of the RHA's expert, Dr Davis, to suggest that his method involves individuated damages corresponding to a multitude of individually brought claims. On the contrary, as Dr Davis explained in substantial detail in his reports, he would develop methods for calculating on the way overcharge should be estimated *on a common basis* varying according to the different ways in which trucks were acquired, and a *common method* for approaching damages under the EURO emissions standard head of claim, and addressed how pass-through might be approached by an econometric method reflecting different *categories* of operator. In consequence, it would then be

relatively straightforward to apply those determinations to basic data from each individual operator to arrive at its individual damages. See at [127]-[139].

35. Although s. 47C(2) CA 1998 permits the award of aggregate damages in collective proceedings, that is manifestly not a requirement: the CA 1998 clearly envisages that collective proceedings may be appropriate whether or not aggregate damages are claimed. In the circumstances of the present applications, the Tribunal had significant concerns regarding the primary approach of the UKTC's expert, Dr Lilico, to the calculation of aggregate damages: see at [141]-[157]. Although concluding that this was not a basis for rejecting Dr Lilico's method under the *Microsoft* test, the Tribunal considered that Dr Davis' approach was more robust than that of Dr Lilico. That was partly, but not only, because he would have access to much more data from class members by reason of the RHA proceedings being brought on an opt-in basis: [216].

36. There is nothing in *Merricks SC* to suggest that this is an impermissible assessment by the Tribunal. On the contrary, Lord Briggs stated at [61] that the suitability of the claims for an award of aggregate damages is only one of the many factors to be considered in deciding whether to order a CPO.

(d) Failure to take account of the "aggressive and misleading conduct of RHA's book-building process and its approach to class definition"

37. The Tribunal did not consider that the RHA was being aggressive or misleading. As regards the potential divergence of interest within the class, although that had not previously been explained by the RHA to potential class members, the Tribunal specifically addressed this and made clear that the RHA would have to explain the position when notifying potential class members of the CPO and inviting them to opt-in. The Tribunal pointed out that this notice would have to be approved by the Tribunal pursuant to r. 81: [247]-[248]. As stated in the *Guide to Proceedings* (2105) at para 6.58, the Tribunal attaches particular importance to the content of such a notice. The Tribunal has indeed since received a proposed draft notice which explains the potential divergence of interest between claims for new trucks and claims for used trucks and the

Tribunal will be able to require express opting-in after receipt of the notice, irrespective of whether the class member had registered with the RHA in advance. We do not see that this aspect of ground 4(d) gives rise to a point of law or has any real prospect of success.

38. As regards the further allegation that the RHA in its approach to class definition favours haulage operators over other categories of purchaser, it is of course correct that the RHA defined the class in terms of persons involved in road haulage operators and excluded truck rental companies. The RHA class therefore included (unlike the UKTC class) hauliers who rented rather than purchased the trucks which they used. Far from leaving this matter out of account, the Tribunal expressly considered it and concluded that there were relative advantages and disadvantages in both approaches: [9(6)], [200]-[202]. UKTC no doubt would prefer this balancing exercise to have been determined differently, but that does not disclose an error of law.

(e) The Tribunal should not have taken account of the fact that UKTC had applied for an opt-out order in assessing the relative merits of the two applications, and failed to consider the UKTC's alternative application for an opt-in order

39. UKTC seeks to put the Tribunal's approach to certification into a structural straightjacket: UKTC PTA Application, para 66. We regard that as wholly misconceived, and directly contrary to the approach set out in *Merricks SC*, where Lord Briggs stated, at [64]:

> "I regard the question of certification as involving a single, albeit multi-factorial, balancing exercise in which too much compartmentalisation may obscure the true task."

40. The Tribunal acknowledged that UKTC had included the alternative of opt-in proceedings but noted that UKTC had made very clear its preference for opt-out proceedings: [217]. The reports of UKTC's expert, Dr Lilico, were prepared on the assumption of opt-out proceedings with no explanation of how the methodology might be amended for opt-in proceedings. Furthermore, in argument UKTC sought to emphasise the advantage of its application on the

basis that it was seeking opt-out proceedings, stating that many operators were small companies or micro businesses whom, UKTC argued, would be very difficult to contact and who would be unlikely to opt-in so that many SMEs would remain uncompensated. Indeed, UKTC submitted starkly that the Tribunal was faced with a choice between (i) certifying its opt-out class action for an aggregate award and (ii) leaving the majority of members of the potential class without any realistic prospect of obtaining compensation: UKTC's skeleton argument for the CPO hearing, para 60.

41. Moreover, far from overlooking the fact that UKTC had included an opt-in alternative in its application, the Tribunal concluded after weighing all the relevant factors that the RHA proceedings were preferable "to the UKTC opt-out proceedings, or even to the UKTC proceedings on an opt-in basis": [231].

42. As for the suggestion that the Tribunal should have considered granting the RHA a CPO limited to used trucks and on that basis granting the UKTC application for a CPO for used trucks, (a) this proposal was not advanced by UKTC in the hearing; (b) the Tribunal made clear why it did not consider two CPOs, one for new trucks and the other for used trucks, would be helpful (and many truck purchasers would have to join both sets of proceedings): [251]; and (c) the Tribunal noted the particular complexity and burden of having two parallel proceedings using very different methodologies, a point that would apply as much if one comprised only new trucks and the other only used trucks, since the important question of pass-through would be an overlapping issue for both proceedings: [194].

43. Accordingly, we do not consider that ground 4(e) has any real prospect of success.

(f) Failing to take account of the advantages to class members of opt-out proceedings

44. The Tribunal expressly considered the question whether *in the circumstances of this case* opt-out or opt-in proceedings should be preferred: [217]-[223]. That included express reference to the observations in *Merricks SC.* The reference

in UKTC's PTA application to *Lloyd v Google* [2021] UKSC 50 at [29]-[32] is simply to Lord Leggatt's summary description of the contrast between potential aspects of collective proceedings in competition litigation compared to group actions under the CPR. That passage does not seek to provide guidance to the Tribunal as to how it should exercise its discretion as to whether to grant a CPO on an opt-out basis as opposed to a CPO on an opt-in basis.

45. More recently, in *BT Group PLC v Le Patourel* [2022] EWCA Civ 593, the Court of Appeal has made clear that (a) there is no presumption under the legislation in favour of opt-in or opt-out proceedings: [63]; (b) an important factor in determining whether proceedings should be opt-in or opt-out is the ability of a claimant [class representative] to convert identifiable contacts into litigants: [74]; and (c) such opt-in/opt-out decisions involve the weighing of various factors on which the Tribunal's conclusion is an exercise in judgment by the specialist body: [57].

46. Here, the Tribunal recognised that there was no presumption in favour of opt-in proceedings: [223]. We expressly considered the ability and likelihood of the RHA being able to convert potential claimants into litigants, and contrasted the position on the facts with *Merricks*: [220]-[221]. As regards UKTC's second point, set out in para 72 of its PTA Application, regarding share of recovery, that was also expressly considered in light of the actual funding arrangements here: [224]-[230]. UKTC's third point about limitation, raised at paras 73-75 of UKTC's PTA Application, has fallen away since none of the OEMs seek to appeal the provisional findings on that issue at [222].

47. Accordingly, we do not consider that this ground gives rise to a point of law: see *Le Patourel* at [84]; or, indeed, that it has any real prospect of success.

(g) The Tribunal should not have taken into account the fact that RHA's opt-in claim would benefit from greater access to data than UKTC's opt-out claim

48. This is a curious ground. UKTC recognises, as is obvious, that the nature of an opt-in claim establishes a relationship between the class representative and each

represented person (i.e. class members who opt-in), which enables the gathering of individual data. But UKTC seeks to argue that the Tribunal committed an error of law in regarding this as a factor in favour of the RHA's application in this case since "there is no legal barrier to a class representative in an opt-out claim for an aggregate award accessing suitable representative data", e.g. by a sampling exercise. Furthermore, here documents will be available from the disclosure that has taken place in the individual truck claims.

49. However, in the present case, once it had determined that the claims were suitable for collective proceedings but that it should not grant CPOs on both applications, the Tribunal was faced with a choice. In making that choice, we took account of a whole series of factors, as set out in section L of the Judgment. One of those factors was the relative strength of the very different methods put forward by the respective experts instructed by the RHA and UKTC: [216]. We find it difficult to see that this cannot properly be a relevant factor. Their different approaches are compared and analysed in some detail in section H of the Judgment. We concluded that we had more confidence in the robustness of Dr Davis' methodology. One reason for this was because of the data which would be derived from class members: [132]; but there were other reasons as well: [157]. We took account of Dr Lillico's suggestion of surveying a sample of class members but noted the challenges of assembling adequate data: [150]. We observed that Dr Lilico recognised that to address pass-through (which he had not addressed in his reports) he was dependent on obtaining such data [156]. We do not think that it is arguable that this approach to the relative assessment was wrong as a matter of law.

50. The suggestion that this position is significantly altered by the fact of the individual proceedings before the Tribunal is misconceived. As regards disclosure from the OEMs, that is not to the point: the issue here concerns information from *acquirers* of trucks. Although a very large number of claims are pending, the only claims set down for trial are brought by very large claimants who are in a very different position from the overwhelming majority of potential class members. That is not to say that the disclosure or outcome of those trials may not be of assistance to the experts in these proceedings, but it does not materially affect the consideration set out above.

51. Finally, the general submission at para 79 of UKTC's PTA Application regarding the alleged superiority of UKTC's approach in its opt-out application to the approach of the RHA seems to be a summary of all the previous grounds and does not appear to add anything. It also leaves out of account the complexity of the arrangements which would have to be set up for the fair distribution of an aggregate award as between class members, which obviously does not arise in the RHA proceedings.

52. Accordingly, we do not consider that this ground has any real chance of success.

E. DAF'S PTA APPLICATION

53. By its separate application, DAF seeks to appeal the specific determination at [105] that the RHA's class definition should be amended to exclude persons who are claimants in other actions unless they discontinue or stay or sist those claims by a specified date. As explained at [104], that reflects r. 82(4). This is clearly designed to preclude the possibility that someone who had already started an individual action might then opt into the collective proceedings but seek to pursue their individual action in parallel.

54. DAF of course does not contest that objective but submits that a claimant is not permitted to stay (or sist) their individual action since pursuant to s. 47B CA 1998 an existing claim in "proceedings under s. 47A" may be "combined" in collective proceedings and continues in that form. On that basis, DAF contends:

> "…If a claimant in such a claim opts into collective proceedings, that claim becomes part of the collective proceedings and will be case managed on that basis. While the CPO is extant, there is thus no separate claim that can be stayed, and which continues to exist in parallel with the constituent claim incorporated in the collective proceedings."

55. DAF explains that its concern is that the approach in r. 82(4) might prejudice defendants as claimants could "switch" between the collective proceedings and their individual claims should any difficulties in the collective proceedings develop, and therefore have what it terms "a second bite of the cherry".

56. DAF recognises that the decision at [105] correctly reflects the terms of r. 82(4). Its argument, in effect, is that r. 82(4) is ultra vires the statute, and it does not shrink from contending that the rule is wrong and should not be applied.

57. However, s. 47B(3)(b) in its reference to the inclusion in collective proceedings of "claims which have been made in proceedings under s. 47A", is permissive not mandatory. The scope of an individual claim may not be identical to the terms of the claims being pursued by way of collective proceedings. We do not think the statute has the effect that if an existing claimant wishes to be part of collective proceedings, whether by opting into opt-in proceedings or by not expressly opting out of opt-out proceedings, its pre-existing claim is, without more, absorbed into the collective proceedings. That is of course possible if the claimant so desires, but under the statutory scheme they are required expressly to consent to that course: s. 47B(3)(c).

58. Secondly, we consider that the concern raised by DAF is misconceived. A stay of proceedings requires a direction of the Tribunal (see r. 53(2)(k)) and the lifting of a stay obviously cannot be made unilaterally but similarly requires an order of the Tribunal. The Tribunal can be expected to be astute to ensure that a party does not seek to resume an individual action alongside its participation in collective proceedings for improper or abusive strategic reasons.

59. Finally, even if DAF's submission was valid, we doubt that is relevant in the present case. Although a very large number of individual truck claims are now pending before the Tribunal, virtually all of them are cases which were commenced in the High Court or Court of Session (and in one case, the High Court of Northern Ireland), and were then transferred to the Tribunal. Accordingly, we think that they should probably not be regarded as claims "made in proceedings under s. 47A" that would (on DAF's argument) become "combined" into the collective proceedings. Indeed, DAF's argument would have the effect that if an individual claim in the ordinary courts had not been transferred to the Tribunal (and transfer is of course not mandatory), that action would continue and require the defendant actively to seek a stay, and therefore be treated differently from actions which had been commenced by other claimants in the class that were pending before the Tribunal.

60. Accordingly, we do not consider that the ground of DAF's PTA Application has any real prospect of success.

F. RESPONDENTS' NOTICES

61. Both Daimler and Iveco, as the respondents to UKTC's CPO application, seek an order that if, contrary to their submissions, UKTC should be granted permission to appeal, the time for a Respondent's Notice should be extended pursuant to CPR r. 52.13(4) to 42 days following service of UKTC's Appellant's Notice and supportive skeleton argument. We accept that an extension beyond the usual period of 14 days is appropriate, given the scale and complexity of these proceedings, but we consider that six weeks is too long an extension. Daimler and Iveco are both represented by substantial legal teams and are well apprised of the arguments that they may wish to raise by way of additional grounds for supporting the Tribunal's decision. Moreover, for the reasons indicated above we think it is desirable that the appeal should proceed as quickly as possible, and the relevant parties may indeed wish to seek expedition from the Court of Appeal. Accordingly, we will direct that any Respondent's Notice be served within 28 days of the date when they are served with UKTC's Appellant's Notice. The RHA has not made any such application but out of fairness we think that the same period should apply, should it wish to file a Respondent's Notice to the MAN/DAF Appellant's Notice(s).

G. STAY OF PROCEEDINGS

62. All the proposed appellants submit that the RHA proceedings should be stayed pending the outcome of their appeals. RHA resists a stay.

63. We fully recognise and appreciate the RHA's concern about delay in the proceedings, especially when the matters complained of took place a very long time ago. However, given that the appeals will concern the question whether claims for both new and used trucks can properly be included in the proceedings, and whether UKTC's application should on that account have been preferred

over the RHA's application, we do not see that the proceedings can appropriately get under way before those fundamental issues are resolved.

64. Following the grant of a CPO, the next step would be the issue of a notice by the class representative to the members of the class, inviting them to opt-in or opt-out as the case may be. But that is not possible until (a) the identity of the class representative is established, (b) the scope of claims included within the proceedings is established, and (c) it has been determined whether the proceedings are opt-in or opt-out. As for pleadings, the nature of the defences will clearly be very different according to whether or not used and new trucks are included, quite aside from other differences between the RHA proceedings and potential UKTC proceedings (e.g. as regards EURO emissions).

65. Accordingly, we grant a stay of the RHA proceedings until determination of the appeals. However, not only is Iveco a respondent to both the RHA and UKTC applications but if the scope of claims covered by the RHA CPO was to be narrowed (as the OEM appellants effectively contend that it should be), MAN and DAF will remain respondents. A major part of the time before trial is devoted to the extensive disclosure exercise which these cases involve. Iveco, MAN, DAF and Daimler (a respondent to the UKTC application) were all involved in substantial disclosure regarding the alleged overcharge in the second group of individual actions, in which the trial is due to start in March 2023, albeit that the proceedings against Iveco, MAN and Daimler have now settled. Accordingly, when the appeals are determined we would expect those respondents to be in a position to proceed with disclosure according to a much tighter timeframe than normal, given that they have been through a similar exercise in those proceedings and that several of them are now on notice as to the likely need to provide such disclosure in the present collective proceedings.

66. We should add that our concern about the effect of delay on the claimants is tempered by the fact that judgment is now pending following the first individual trucks trial, and that as noted above the second individual trial raising major issues of pass-through is due to commence in March 2023. The outcome of those two trials can be expected to assist the parties to the collective proceedings in taking these proceedings forward more rapidly.

The Hon Mr Justice Roth
Chair

Dr William Bishop

Professor Stephen Wilks

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 28 October 2022