Neutral citation [2022] CAT 51

IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 November 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 (COSTS)

A. INTRODUCTION

1. This ruling concerns applications for costs following the Tribunal's judgment of 8 June 2022 [2022] CAT 25 (the "Judgment"). This ruling uses the same abbreviations as the Judgment.[1]

2. By the Judgment, the Tribunal determined that the application for a CPO brought by the RHA should be granted and the application for a CPO brought by UKTC should be dismissed. The respondents to the RHA application ("the RHA Respondents") were Iveco, MAN and DAF. The respondents to the UKTC application ("the UKTC Respondents") were Iveco and Daimler. However, those OEMs who were not respondents objected to the respective applications on the basis that they would become subject to additional claims for indemnity or contribution in the collective proceedings if a CPO were granted. The Tribunal allowed them to be heard as persons with an interest objecting to the grant of a CPO pursuant to r. 76(10)(c). The Tribunal further directed that the two applications be heard together. Daimler and Volvo/Renault as objectors to the RHA application ("the RHA Objectors") and DAF, MAN and Volvo/Renault as objectors to the UKTC application ("the UKTC Objectors") all took part accordingly in the joint hearing of the two applications.

3. RHA seeks an order for costs in its favour jointly and several against the RHA Respondents and the RHA Objectors. The three RHA Respondents accept that in principle they are liable for RHA's costs as from the time of service of their responses, but contend that there should be a significant discount from those costs. The two RHA Objectors submit that no order should be made against them as objectors, who should as a matter of principle be treated neutrally. However, if any order were to be made, Volvo/Renault contends that it should not be jointly and severally liable with the RHA Respondents but subject to only limited liability reflecting the role that it took in the proceedings; Daimler adopts the submissions as to the RHA's costs made by MAN and DAF.

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

4. UKTC seeks an order for costs against the UKTC Respondents. The UKTC Respondents all resist that application and contend, conversely, that UKTC should be liable for their costs of resisting UKTC's application. Of the UKTC Objectors, DAF and MAN seek an order against UKTC for their costs of opposing UKTC's application (or at least as regards those issues on which they succeeded). As in the case of the RHA application, Volvo/Renault's primary position is that no order should be made as regards the costs of an objector; but if costs are awarded in favour of DAF or MAN, Volvo/Renault submits that it should similarly be entitled to its costs of objecting to the UKTC application.

5. The RHA and UKTC both seek payment on account of any costs ordered in their favour.[2]

6. All the parties have filed submissions, of varying length, responding to the costs applications made against them.

B. PRINCIPLES

7. Rule 104 provides, insofar as relevant:

> "(2) The Tribunal may at its discretion, … at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> …
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> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of –
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> (a) the conduct of all parties in relation to the proceedings;
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> (b) any schedule of incurred or estimated costs filed by the parties;
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> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> …
>
> (e) whether costs were proportionately and reasonably incurred; and

[2] None of the OEMs have sought a payment on account of any costs ordered as against UKTC but Daimler has reserved its right to do so.

> (f) whether costs are proportionate and reasonable in amount."

Those provisions apply to collective proceedings as much as to any other proceedings before the Tribunal: r. 3(a).

8. In *Competition and Markets Authority v Flynn Pharma Ltd and Pfizer Inc* [2022] UKSC 14 ("*Flynn/Pfizer*"), Lady Rose (with whose judgment the other members of the Supreme Court agreed), summarised the varied forms of proceedings which come before the Tribunal. She proceeded to observe, at [43], that the rulings of the Tribunal on costs have stressed two factors in particular:

> "…first, that the broadly worded discretion may need to be exercised in different ways in different kinds of cases and secondly that it is important to strike a balance between on the one hand, avoiding the development of "rigid rules" about costs and on the other, the need to provide consistency and predictability in costs decisions."

It is clear that the Supreme Court there approved this general approach.

Parties to the CPO application

9. The collective proceedings regime is relatively new and the Tribunal's practice as regards costs is still developing. In *Merricks v Mastercard Inc. (Costs)* [2017] CAT 27, the Tribunal held, at [16], that the starting point as regards the costs of contested CPO applications is that the losing party is in principle liable for the relevant costs of the successful party. However, the Tribunal there emphasised that this starting point is subject to displacement or qualification on the basis of the various factors set out in r. 104(4).

10. In that ruling, given after the Tribunal had dismissed the application for a CPO (a decision subsequently set aside on appeal), the Tribunal proceeded to hold that although the respondents were (on the basis of the Tribunal's judgment) the successful party, they were not entitled to all their costs. The Tribunal held that since the respondents' challenge to the CPO application as regards the authorisation condition had failed, they should be disallowed part of their costs, and continued, at [21]:

> "Moreover, we consider that the Applicant would be entitled to recover a part of his costs of meeting the unsuccessful arguments raised against him on that

> issue. Rather than making cross-orders, the better approach is to reflect the overall position in a single deduction from the Respondents' costs."

On that basis, the respondents there were awarded 80% of their costs. This reflects what Lady Rose in *Flynn/Pfizer* noted was the Tribunal's readiness to make issues-based orders: see at [140].

11. In subsequent CPO cases, where the Tribunal held that a CPO should be granted, it has adopted the general approach that:

(1) the applicant's costs relating to the CPO application which would be incurred in any event (i.e. in absence of opposition to the CPO) should be costs in the case; and

(2) the applicant should be awarded its costs as against the respondents incurred by reason of meeting their opposition to the CPO, discounted to reflect significant or material issues on which the respondents succeeded.

In general, the start date for the award under (2) will be the date of filing of the responses objecting to the CPO application: see *Le Patourel (Consequentials)* [2021] CAT 32 at [5]-[9]; *Gutmann (Consequentials)* [2021] CAT 36 at [47]-[50]. But that is not necessarily the case where it is shown that material costs were incurred in dealing with objections previously: *McLaren (Consequentials Ruling)* [2022] CAT 18 at [26]-[28].

12. However, none of the previous cases concerned a situation where there were two, effectively competing CPO applications (what in North America is referred to as a 'carriage fight'), where the Tribunal chose between them so that one application was granted and the other was dismissed.

Objectors

13. These are the first CPO proceedings where in addition to the respondents the application has been opposed by objectors who took a substantial part in the

determination of the applications, and where the Tribunal received submissions about the objectors' position concerning costs.[3]

14. It should be noted that an objection can take various forms and can come from different quarters. An objection may be made purely in writing without any wish to take part in the hearing of the CPO application. The rules expressly envisage that an objection may be made by a potential class member: r. 76(10(c). On the present applications, the Objectors were all represented at the hearing and served experts' reports, directed not only at the application to which they were respondents but also at the other application to which they were only objectors.[4]

15. In their submissions, several of the parties refer to the position of the Tribunal as regards interveners. The Tribunal's *Guide to Proceedings* (2015) states at para 8.10:

> "The general position is that interveners are neither liable for other parties' costs, nor able to recover their own costs: see, for example, *Ryanair Holding plc v Competition Commission* [2012] CAT 29 at [7]. However, the matter remains in the discretion of the Tribunal and that approach may be departed from in appropriate circumstances: *National Grid v GEMA* [2009] CAT 24. For an example of a case where an intervener recovered part of its costs see: *Independent Media Support v OFCOM* [2008] CAT 27. For an example of a case where an intervener was ordered to pay another party's costs see: *BT v OFCOM (Ethernet Determinations)* [2014] CAT 20; note, however, that this concerned an appeal in the context of OFCOM's dispute resolution role under the 2003 Act."

However, as the various cases there cited indicate, that is directed at the position in appeals against the decision of a regulator. Hence the statement in *Ryanair* at [7] that the Tribunal "is concerned to strike a balance between not discouraging legitimate interventions and not unduly encouraging interventions

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[3] Although in the *Forex* CPO applications, neither of which was granted, one of the respondents to the O'Higgins application was only an objector to the Evans application, there was no argument regarding the treatment of that party's entitlement to costs as an objector. The Tribunal held that as the hearings were conducted on a unitary basis there was no prospect of rationally separating the costs incurred by the respondents in dealing with the O'Higgins application from the costs of the respondents in dealing with the Evans application, including the costs of the company which participated as a respondent to the one and an objector to the other. The two proposed class representatives were therefore ordered to be jointly and severally liable for the costs of all the respondents to both applications: [2022] CAT 42.

[4] Volvo/Renault was not a respondent to either application and therefore participated solely as an objector: para 2 above.

which may have implications for the expeditious conduct of proceedings to the detriment of the main parties" was made in that context. In *Flynn/Pfizer* at [42], Lady Rose also makes clear that this practice concerns appeals. We do not regard it as offering guidance as to the position in purely private proceedings, and in particular in collective proceedings which are designed to facilitate access to justice for claimants (often SMEs or consumers) for whom the pursuit of individual claims would be impracticable or disproportionate: Judgment at [22].

16. In the present proceedings, the Tribunal heard as a preliminary issue the objections to UKTC's funding arrangements. DAF and MAN as objectors, as well as the UKTC Respondents, took a full part in the hearing of that preliminary issue. However, Daimler, although a UKTC Respondent, did not adopt or participate in the fundamental challenge advanced by DAF, MAN and Iveco to UKTC's funding arrangements on the grounds that they constituted an impermissible damages-based agreement ("DBA"). The Tribunal held that DAF and MAN (although only objectors) should be jointly liable with Iveco for the proportion of UKTC's costs attributable to the DBA issue; and that along with Daimler they should be liable for a proportion of UKTC's costs of the argument as to the nature and adequacy of its funding, that proportion being heavily discounted to 60% to reflect the extent to which the OEMs' arguments had succeeded: *UKTC v Fiat Chrysler Automobiles NV (Costs)* [2019] CAT 29.

17. We do not think it is appropriate to set out any general principles as regards the position of objectors on the matter of costs. The position will very much depend on the circumstances of the particular case and the costs applications made. We therefore confine ourselves to the following observations:

    (1) The breadth of the Tribunal's power under r. 104 clearly enables it to order costs in favour of or against objectors to a CPO application, when appropriate.

    (2) Where the involvement of an objector causes the successful applicant for a CPO to incur costs which it otherwise would not have incurred,

then insofar as the grounds taken by the objector are unsuccessful, the applicant should in general be able to recover those additional costs.

(3) Where the grounds taken by an objector are successful, the Tribunal should consider the extent to which those grounds were being advanced by the respondent(s). It may be oppressive to make an applicant for a CPO liable not only for the respondent(s)' costs but also for the costs of the objector, who has chosen voluntarily to involve itself in the proceedings.

C. THE RHA APPLICATION

18. The RHA seeks as against the RHA Respondents and the RHA Objectors, jointly and severally, its costs of and occasioned by their opposition to the RHA application. On that basis, it seeks its costs only from the date of receipt of the OEMs' responses and objections to the conclusion of the hearing of the CPO applications. It excludes the costs related to the funding arguments heard as a preliminary issue since those have been separately dealt with.

19. The RHA accepts that part of those costs would have been incurred irrespective of opposition from the OEMs and that there would have been a CPO hearing at which it would have had to deal with questions from the Tribunal, so that there should be a deduction accordingly. It submits that this deduction should be 10%. It further recognises that some discount is likely given the need to replead its case following the Supreme Court decision in *Merricks*, but adopts the approach that this, along with the 10% referred to above, should be taken into account when arriving at an interim payment, not in terms of the basic order which it seeks in terms of the first sentence of para 18 above.

20. It has included in the schedule of costs served with its application a distinct section covering its costs of dealing with the UKTC application, since UKTC advanced significant submissions that if both applications would not be granted then its application was preferable to that of the RHA.

21. The three RHA Respondents do not dispute liability for RHA's costs from the date of their responses, but contend:

(1) the discount from those costs should be much higher than 10% to reflect the issues on which they succeeded; and

(2) they should not in any event be liable for the costs incurred by the RHA in dealing with the UKTC application.

They also accept that the RHA's costs up to the date of the filing of their responses should be costs in the case.

22. As regards the RHA's costs prior to service of the responses, since the RHA does not now seek any order in respect of those costs, we shall order that those costs are reserved, while noting that the RHA Respondents accept that those costs should be costs in the case.[5]

23. We agree with the RHA Respondents that they should not in any event be liable for costs incurred by the RHA in dealing with the 'competing' UKTC application. They were not responsible for that application and those costs would have been incurred irrespective of the position they adopted. The same reasoning obviously applies to the RHA Objectors.

24. We also accept that a 10% deduction is too low. Indeed, as we understand the RHA's submissions, that figure is proposed to reflect only the costs of dealing with the necessity for a hearing of the application and queries from the Tribunal. In this case, there were some discrete issues on which the RHA Respondents were to a significant degree successful: in particular, the RHA did not obtain a CPO as regards foreign trucks or for anything like the run-off period which it had sought.

25. Both DAF and MAN suggest that the appropriate deduction to reflect both the costs which the RHA would have incurred in any event and the costs of those

[5] We should record that the RHA Respondents make clear that they do not regard the costs of the RHA's "book-building exercise" as being recoverable in any event, should those costs be claimed.

issues on which it was unsuccessful should be 30%, whereas Iveco contends that it should be 35%.

26. In our judgment, such deductions would be too high. Although, according to the principles set out above, the RHA Respondents would be entitled to the costs of discrete issues on which they succeeded, and that should be reflected in the overall level of deduction, those issues here did not account for a significant part of the argument. In our view, the fair and appropriate order is that, of the RHA's costs from the date of filing of the responses to the date of the issue of the Judgment:

    (1) 15% of those costs, after excluding the costs attributable to the UKTC application, should be costs in the case;

    (2) 80% of those costs, after excluding the costs attributable to the UKTC application, should be paid jointly and severally by the RHA Respondents.

    Those costs are to be subject to assessment on the standard basis, if not agreed.

27. None of the three RHA Respondents contends that their liability should be discounted on account of the fact that the two RHA Objectors advanced arguments opposing RHA's application which RHA had to meet. There is no question about the ability of the RHA Respondents to pay the costs. Accordingly. the RHA will not fail to cover its costs insofar as those costs were any higher by reason of successfully responding to the RHA Objectors. In those circumstances, it is unnecessary to consider whether the RHA Objectors might have been liable for costs and no order is made against them.

28. There remain the costs incurred by the RHA in dealing with the arguments against them raised by UKTC and the contention that UKTC's application was preferable. By its solicitors' letter of 21 July 2022, the RHA submitted that if its costs of dealing with UKTC's application were not recoverable from the OEMs, then UKTC should be ordered to pay those costs. UKTC in its response

contended that this alternative application was made as an afterthought and should be disregarded as being made too late.

29. We have no doubt that the RHA's application for these costs as against UKTC was indeed an afterthought, prompted by the responsive submissions of the OEMs to the RHA's costs application. Those responsive submissions were filed on 13 July 2022. We therefore do not regard the RHA's application as significantly delayed. It is understandable that a party may wish to amend its application (as opposed to simply making additional submissions) in the light of the arguments raised by the opposing parties, and we do not think it would be right to dismiss the application on that account.

30. Here, a significant aspect of UKTC's case at the hearing was that its application was preferable to that of the RHA, and both in its written and oral arguments it raised a series of points as against the RHA's application. Indeed, UKTC alone put forward the argument that the RHA should not be authorised as a class representative because of an alleged conflict due to the fact that the OEMs were associate members of the RHA: see Judgment at [27]. This required the RHA to file evidence explaining the position of such associate members: [28].

31. In a situation where the unsuccessful applicant for a CPO causes the successful applicant to incur reasonable but additional costs in the certification process (i.e. over and above the costs involved in dealing with all the arguments of the respondents and any objectors), we do not think it is fair that the successful applicant (or its funder) should be left bearing those costs. In normal circumstances, we would expect those costs to be relatively modest. That is indeed the case here: in the schedule setting out its costs from the date of the filing of responses to the CPO hearing, only 4% of those costs are attributed to the "UKTC claim". We consider it is fair and reasonable in this case that UKTC should be liable to the RHA for that category of costs, to be assessed on the standard basis if not agreed.

D. THE UKTC APPLICATION

32. UKTC's primary contention is that it should be awarded its costs against the UKTC Respondents on the basis that it was the successful party. We find that a surprising submission. UKTC's application was for a CPO in its favour. That application was dismissed and the Tribunal held that no such CPO should be made. Indeed, UKTC has sought to appeal against the Judgment contending on a series of grounds that the Tribunal was wrong in refusing to grant it a CPO: see [2022] CAT 48. We do not think that, on any sensible view, UKTC can be described as the winner.

33. However, it is fair to say that UKTC succeeded on many issues on which it faced sustained opposition from the UKTC Respondents (as well as from the UKTC Objectors). Further, although the Tribunal clearly preferred the application of the RHA on numerous grounds, if it had not been for that 'competing' application the UKTC application would have been granted since UKTC met the authorisation condition and its opt-out class of claims met the eligibility condition, albeit that the Tribunal had significant concerns about the expert methodology which it put forward and which passed the *Microsoft* test only after significant clarification and refinement by Dr Lilico in the course of the hearing. The primary submission of the OEMs was that these claims were not suitable for collective proceedings at all. Therefore we do not think it would be appropriate to describe them as the "successful" parties on the UKTC application, notwithstanding that UKTC failed to obtain a CPO.

34. In these particular circumstances, we think that an issues-based approach to costs is appropriate. In that regard, we consider that UKTC should be able to recover a significant proportion of its costs. However, in approaching costs, it is important to recognise that the concerns and refinement of UKTC's expert methodology arose from the strong criticisms of Dr Lilico's earlier approach made by the OEMs and their experts. Moreover, UKTC's contention that if the Tribunal was not minded to dismiss the RHA's application, then UKTC's opt-out CPO should be granted alongside the RHA's opt-in CPO was strongly and successfully resisted by the OEMs. On that basis, the UKTC Respondents would also be entitled to a share of their costs. Rather than making cross-orders

for costs, it is more satisfactory and appropriate, as in *Merricks*, to make a single order taking account of the overall position as between the respective parties.

35. However, the costs which UKTC can seek to recover from the OEMs can only relate to costs occasioned by their opposition to its application: para 11 above. Therefore, UKTC has to bear its own costs up to the time of the filing of the responses. Moreover, as with the RHA, a proportion of the UKTC's costs after the filing of the responses would have arisen in any event as part of the costs of obtaining a CPO and satisfying the Tribunal that the statutory criteria were met: cp para 19 above.

36. As regards the balance of the costs after that date, we have regard to all the various points made in the costs submissions we have received. We do not regard this as a question of granular computation of all the various issues on which the one side or the other was successful, since some issues manifestly involved much more time and expense than others. We take more of a broad-brush approach, looking at the matter as a whole, and conclude that UKTC is entitled to recover 40% of those costs. That figure is not intended as a measure of the extent to which UKTC was successful. It represents the overall costs position, taking account, as stated above, of the liability which we think UKTC should have in costs for the issues on which it failed.

37. UKTC does not apply for costs as against the UKTC Objectors. Of the three UKTC Objectors, Volvo/Renault's primary position is that there should be no order for costs.[6] MAN submits that UKTC should pay its costs occasioned by UKTC's application, or at least that UKTC should pay its costs of those issues pursued by MAN on which MAN succeeded, referring specifically to the proposed EURO emissions claim and the question of whether there should be two overlapping CPOs. DAF seeks all its costs of and occasioned by the UKTC application.

[6] We note that this is also Daimler's primary position as regards objectors' costs, although Daimler was a respondent to the UKTC application and an objector only to the RHA application.

38. In our judgment, this is not a case where the other OEMs who intervened as objectors should receive any payment of costs. We recognise that if the UKTC collective proceedings had got under way, they would very likely have been joined as Part 20 parties. However, the question here is not whether they had a legitimate and commercial interest in the proceedings: if they did not, they would not have been allowed to serve evidence and participate in the hearing at all. But we do not see that any of the three UKTC Objectors had an interest that was materially distinct from that of the two UKTC Respondents. Those two respondents, Iveco and Daimler, were both very well resourced and able to take any point in opposition to UKTC's application. Although for the hearing the UKTC Respondents and Objectors coordinated their oral submissions and avoided duplication, that shortened the hearing for the benefit of all parties. Moreover. that did not apply to the significant expert evidence and statements of objection filed by the Objectors: see the Annex to the Judgment. We are not here seeking to criticise the UKTC Objectors for the stance they adopted, but having voluntarily chosen to take that course, in the circumstance of the present case we consider that they should bear their own costs.

39. We should add that if we had concluded that the UKTC Objectors were entitled in principle to an award of costs, that would have been limited to the costs of those issues on which they succeeded. For DAF and MAN in particular,[7] in determining the proportion of costs for which UKTC should be liable, the Tribunal would then also have taken into account the costs occasioned to UKTC by the issues on which they failed, to ascertain whether the net effect led to any award in the Objectors' favour. See in that regard our conclusion as regards the costs of the UKTC Respondents.

40. For these reasons we will order that:

    (1) 40% of UKTC's costs as from the date when the responses to its application were filed to the date of the issue of the Judgment, excluding its costs related to the RHA application and to the funding questions

[7] Volvo/Renault put forward more limited submission targeted at specific issues; but it did file two expert's reports.

dealt with as a preliminary issue, shall be recoverable jointly and severally from the UKTC Respondents, such costs to be assessed on the standard basis if not agreed;

(2) there will be no order regarding the costs of the UKTC Objectors.

E. PAYMENT ON ACCOUNT

41. Both the RHA and UKTC seek a payment on account of their costs. The RHA Respondents accept that the RHA should receive a payment, but contend that the amount sought by the RHA is excessive. The UKTC Respondents submit that if, contrary to their primary contention, UKTC is awarded any costs, the amount sought by UKTC is manifestly too high and that the UKTC has not put forward an adequate statement of costs.

42. We note that the principles governing a payment on account are not in dispute. The Tribunal should seek to reflect a provisional view of the likely level of costs that might be awarded and then err on the side of caution in determining what is reasonable: *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at [22]-[24].

The RHA

43. The RHA has served a detailed schedule of costs as from the date of service of the responses to its application, helpfully broken down as between the various stages. After deducting the costs referable to the UKTC application (para 20 above), those costs total £1,670,222.

44. DAF submits that the RHA's costs were unreasonably high due to it having used two firms of solicitors and the involvement of a large number of grade A solicitors in the drafting work. We do not accept that criticism. Backhouse Jones, based in Lancashire, are the RHA's regular solicitors who as a result presumably have familiarity with the haulage industry; but they are not competition specialists and for a case of this kind it was entirely reasonable for the RHA also to instruct competition specialists in London, and the London

solicitors charged moderate hourly rates. As regards the overall figure, we note that Iveco's schedule of its costs of responding to the UKTC application alone states that those costs were a little over £1.5 million. We do not here need to reach a view as to whether that figure is reasonable and proportionate, but those costs for a single OEM put the RHA's costs into perspective.

45. Although the RHA's costs are very high, this was an exceptionally heavy CPO application in which the RHA had faced five, separately represented opposing OEMs who, between them, served lengthy written pleadings and a plethora of experts' reports. We consider that such matters as the reasonable allocation of work between solicitors of different grades will properly be reflected in the customary discount from incurred costs for the purpose of an interim payment and do not consider that the details in the RHA schedule justify a departure from the usual approach. We do note, however, that the rates charged by the RHA's Lancashire solicitors are significantly higher than the guideline rate even for central Manchester solicitors, as set out in the Appendix to the Guide to the Summary Assessment of Costs (November 2021). Some excess over the guideline may well be justified for a case of this kind, but see *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466 at [6]. It will be for the costs judge to determine whether this degree of excess is appropriate.

46. We therefore will assess the level of interim payment at 65% of the relevant amount (as opposed to 70% as sought by the RHA). Applying the 80% ordered above to the figure in the RHA costs schedule (after deducting the costs related to UKTC) produces £1,336,177. Accordingly, we order DAF, MAN and Iveco jointly to pay by way of payment on account the sum of £868,515, within 28 days.

UKTC

47. UKTC relies on its revised costs budget submitted in February 2021. That budget showed pre-action of costs of £2,392,867.70 and estimated costs of the CPO application itself at a further £3,030,899.05. UKTC states that the second figure did not fully anticipate the amount of work that would ultimately be required for a five-day CPO hearing and therefore represents "a significant

underestimate" of the actual costs incurred. On that basis, it seeks an interim payment of 90% of £5,423,766.75, i.e. £4,881,390.08, plus VAT of £943,613.84, rounded in total to £5.825 million.

48. In the first place, for reasons explained above the pre-action costs are not here recoverable since they would have been occurred in any event as costs of preparing a CPO application. Any right to costs on the determination of a CPO application therefore generally concerns the costs from the time of the filing of responses.

49. Secondly, UKTC's costs referable to its opposition to the RHA application do not form part of the costs which it can recover from the UKTC Respondents: cp. para 23 above.

50. Thirdly, we find it extraordinary that when seeking a payment of the order of several million pounds, UKTC has not submitted a proper and itemised schedule of incurred costs, but seeks to rely on a very summary estimate of headline costs submitted over a year previously. There is no self-evident reason why UKTC's costs should be so vastly higher than the RHA's costs: UKTC used Birmingham solicitors and the same number of counsel. It appears that the £3 million figure for the costs of the CPO application is not confined to costs after the service of responses but comprises the entire costs of the CPO proceedings. It may also include the costs of the funding arguments heard as a preliminary issue. If the former, a significant proportion of those costs would not be recoverable; and if the latter, those costs have already been dealt with.

51. In its response submissions, UKTC recognises that its total costs estimate "may include costs that would not be recoverable as against the OEMs", referring to the costs of responding to points taken by the RHA and costs incurred independently of opposition from the OEMs. It therefore very substantially revises its proposal to ask for 50% of the sum originally applied for, i.e. £2.9125 million.

52. However, where it is accepted that a significant proportion of the estimated costs will not be recoverable, this is not an adequate basis on which to determine what

on any view amounts to a very substantial payment on account. It is simply impossible for the Tribunal on the material put forward to conduct any proper scrutiny of the costs claimed or to estimate what costs would be reasonable and proportionate. We can only say that we consider that a total of close to £3 million would be wholly excessive by way of a payment on account.

53. In this situation, one option would be simply to refuse to order any payment on account, and that indeed is the course which Daimler urges is appropriate. We have seriously considered taking that course. However, we think that would be unduly harsh and are prepared to proceed on the basis that UKTC's costs may be expected to be around the same level as the RHA's costs. We shall accordingly use the round figure of £1.6 million as a base. That suggests an estimate of recoverable costs of £640,000. The same points made as regards the RHA concerning the hourly rates charged compared to the relevant guideline rates (see para 45 above) apply to the UKTC's costs. We shall accordingly apply the same discount to 65% for the purpose of payment on account. We are not presently clear regarding UKTC's VAT position: the costs budget on which UKTC relies states simply that the estimate "excludes VAT (if applicable)".[8] We will give UKTC 14 days from the date of this ruling to submit a letter from its solicitors explaining its VAT status and whether it can offset VAT paid. Subject to that, Iveco and Daimler shall make an interim payment to UKTC of £416,000, potentially plus VAT, within 28 days of receipt of the letter clarifying the VAT position. If the parties cannot agree the VAT position, the matter may be referred to the chairman of the Tribunal for resolution.

F. DETAILED ASSESSMENT

54. The RHA seeks a direction that if its costs are not agreed detailed assessment can take place forthwith, so that they do not have to await the conclusion of the proceedings that may take several years. We can see force in that submission, particularly where detailed assessment of UKTC's costs can obviously proceed and there is sense in all the costs involved in the CPO applications being

[8] We note that this was a revision of the costs budget prepared for the initial CPO application, on which basis UKTC argued that it had adequate funding to conduct the collective proceedings: [2019] CAT 26, at [71(1)].

considered together. We shall direct that detailed assessment on both applications may proceed following the determination of any appeals.

The Hon Mr Justice Roth
Chair

Dr William Bishop

Professor Stephen Wilks

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 10 November 2022