Neutral citation [2024] CAT 63

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1289/7/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

1 November 2024

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)
MR WILLIAM BISHOP
PROFESSOR STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

ROAD HAULAGE ASSOCIATION LIMITED

Class Representative

RHA USED TRUCKS LIMITED

Sub-Class Representative

- v -

(1) TRATON SE
(2) MAN TRUCK & BUS AG
(3) MAN TRUCK & BUS DEUTSCHLAND GMBH
(4) FIAT CHRYSLER AUTOMOBILES N.V.
(5) CNH INDUSTRIAL N.V.
(6) IVECO S.P.A.
(7) IVECO MAGIRUS AG
(8) PACCAR INC
(9) DAF TRUCK N.V.
(10) DAF TRUCKS DEUTSCHLAND GMBH

Defendants

- and –

(1) DAIMLER AG
(2) VOLVO LASTVAGNAR AKTIEBOLAG

Objectors

RULING: CONSEQUENTIAL MATTERS

INTRODUCTION

1. On 25 July 2023, the Court of Appeal gave judgment in these proceedings which largely dismissed the appeal of the Defendants (and of UK Trucks Claim Ltd) but held that the Tribunal's approach to addressing the potential conflict of interest between the claims for new and used trucks was inadequate and that further steps were required by the Road Haulage Association ("the RHA") to address that conflict: [2023] EWCA Civ 875 ("*Trucks Collective – CA*"). By order of 29 September 2023, the Court of Appeal remitted the matter to the Tribunal for it to give directions in relation to various matters in accordance with the guidance in its judgment.

2. For reasons which it is unnecessary to repeat here, it took some time for the RHA to develop revised proposals and for a separate proposed sub-class representative to be established who would conduct the distinct aspects of the claims for used trucks. The revised applications for the grant of a collective proceedings order ("CPO") by the RHA and for authorisation as a sub-class representative issued by RHA Used Trucks Ltd ("RUTL") were issued on 18 April 2024. Although there were 10 respondents to the applications (now defendants to the proceedings), they fall into three groups, each of which has separate representation, and to which we refer by their shorthand names: DAF, Iveco and MAN. On 13 May 2024, each of those three served grounds of opposition to the applications.

3. A hearing of the remitted matters and some other points which had arisen was held at the Tribunal on 4-5 June 2024 ("the 1st remittal hearing"). DAF, Iveco and MAN all actively opposed certification and in addition a number of ancillary points were argued.[1] Two other truck manufacturers, referred to by way of shorthand as Daimler and Volvo, were represented at the hearing as they had been objectors in the original proceedings and might well be subject to

[1] Presentation of the argument was sensibly shared out as between DAF, Iveco and MAN but each expressly adopted the submissions presented by the others.

additional claims from the defendants for contribution; however, they took no active part in the hearing.

4. The Tribunal determined a number of disputed points by rulings in the course of the 1st remittal hearing. However, we adjourned determination of the position of leases of used trucks for further submissions and also required further evidence from the RHA/RUTL regarding potential conflicts of interest in the funding arrangements. As a result, a further hearing was held on 18 July 2024, where the three respondent groups continued to oppose certification ("the 2nd remittal hearing"). As before, Daimler and Volvo were represented but took no part in the argument.

5. On 2 August 2024, the Tribunal issued its ruling authorising RUTL to act as the sub-class representative and determining that a CPO should be issued: [2024] CAT 51 ("the CPO Ruling"). The actual CPO was made on 5 August 2024.

6. The present ruling addresses two consequential matters: (a) permission to appeal; and (b) costs. We use the same abbreviations as in the CPO Ruling.

A. PERMISSION TO APPEAL

7. DAF, but not Iveco or MAN, seeks permission to appeal ("PTA") against the CPO Ruling.

8. As is well-known, an appeal from the Tribunal (save as regards the amount of an award of damages) lies only on a point of law: Competition Act 1998, s. 49(1A).

9. The ground of DAF's PTA application is that the Tribunal failed to give proper effect to the judgment in *Trucks Collective – CA* as regards the funding of new and used trucks claims. That is asserted on the basis that the Tribunal applied the wrong test in law in assessing (i) the adequacy of information barriers within the funder and (ii) Therium's internal: PTA application, para 2. No allegation is pursued that the Tribunal should not have been satisfied as to the

arrangements for (a) the sub-class representative, (b) the solicitors and counsel team, or (c) the expert advising the used trucks sub-class.

10. However, the PTA application has mischaracterised the thrust of the Court of Appeal's judgment as regards funding. The CPO Ruling paid close attention to the guidance from the Court of Appeal. The relevant passages of the judgment of the Chancellor are set out in the CPO Ruling at [32]. Further, the Chancellor there stated that "the RHA will have to be able to satisfy the CAT that the funding arrangements put in place do not interfere unreasonably with ordinary independent decision-making, including as to settlement." It was precisely in order to be so satisfied that we adjourned the matter at the 1st remittal hearing for further evidence regarding the funding arrangements. Those arrangements, involving distinct funding vehicles, were the subject of detailed evidence from Therium and received close scrutiny by the Tribunal in the CPO Ruling: see at [51]-[83]. We expressly acknowledged that the Chancellor said that "the safest way" to ensure the necessary objective is to have separate funders, which we understood to mean completely separate funders: CPO Ruling at [84]. But as also set out in the CPO Ruling, the order of the Court of Appeal was for "the Tribunal to give directions in relation to ... separate funding for the two sub-classes" in accordance with the guidance in the judgment: CPO Ruling at [85]. Having regard to the further evidence received from Therium, the Tribunal was satisfied that the fundamentally revised funding arrangements will not realistically interfere with the independent decision-making of RUTL or the conduct of the claims of members of either sub-class. We consider that this is a matter of assessment by the Tribunal and does not raise a point of law.

11. DAF seeks to convert it into a point of law by invoking the test for information barriers set out by the Court of Appeal in *Koch Shipping Inc v Richards Butler* [2002] EWCA Civ 1280, which in turn referred to the House of Lords judgment in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, [1998] UKHL 52. However, *Koch* was concerned with the protection of confidential information, which was at risk of disclosure when an individual solicitor in the firm representing the claimants in an arbitration went to work for Richards Butler, the solicitors who were acting on the other side of that case. Accordingly, the focus of inquiry there was as to the adequacy of the information barriers, and the purpose of the

injunction granted at first instance was to prevent the flow of confidential information to Richards Butler: judgment at [18]. That is very different from the concern here based on the source of the money provided to the funders. The issue is not the flow of information or protection of confidence, but a potential conflict of interest in a much more general sense, as regards the incentive of X, as an investor in the differently constituted funding vehicles, to fund the used truck sub-class when the interest of that sub-class on the question of pass-on conflicts with the interest of the new trucks claims.

12. Further and in any event, Clarke LJ there emphasised that each case on protection of confidential information turns on its facts: judgment at [25]. Hence *Koch*, involving a single solicitor, raised different considerations from the *Prince Jefri*¸case, where 11 people providing litigation support services on a project for the Brunei investment agency had previously provided litigation and forensic accountancy services for Prince Jefri and had acquired confidential information relevant to the project that was adverse to the interests of Prince Jefri. On that basis, the Court of Appeal in *Koch* readily distinguished the steps which had been held to be necessary on the very different facts of *Prince Jefri*.

13. In *Koch*, Tuckey LJ stated at [53]:

> "I think there is a danger inherent in the intensity of the adversarial process of courts being persuaded that a risk exists when, if one stands back a little, that risk is no more than fanciful or theoretical. I advocate a robust view with this in mind, so as to ensure that the line is sensibly drawn."

The Tribunal here took a robust view. We considered that with clear separation between the class representative and sub-class representative, between the legal teams, between the experts, and between the direct funding vehicles, and a provision for a binding decision of an independent KC if there is dispute between either sub-class of claimants and Therium when it comes to settlement, the risk of the sub-class members being prejudiced because a partial source of funds to the funding vehicle of the new trucks class is also the source of funds to the used trucks sub-class is so remote as to be insignificant.

14. As for the specific criticism in the PTA Application regarding the role of Mr Byrne, the CEO of Therium (PTA Application, paras 12-13), it is to be noted

that the Court of Appeal discharged the injunction in *Koch*, relying strongly on the fact that the solicitor concerned had given a personal undertaking. That is similarly the case regarding Mr Byrne, who is a solicitor and has given a signed undertaking to comply with a specific written information barrier (the terms of which are not criticised by DAF): CPO Ruling at [58] and [83]. Again, the concern raised about Mr Byrne does not appear to be about access to confidential information but about an overall conflict of financial interest.

15. Finally, in both *Koch* and *Prince Jefri* the concern was understandably raised by the party whose interests might be prejudiced if confidential information was disclosed. In sharp contrast here, no member of the used trucks sub-class is expressing opposition. The point is now pursued only by DAF, whose interest is to stifle those claims altogether. We do not suggest that the point is not open to DAF, but we think that their submissions are to be viewed with considerable scepticism.

16. Accordingly, if the PTA Application can be said to raise a point of law at all, which we doubt, we consider that it stands no real prospect of success.

B. COSTS

17. The RHA and RUTL recognise that the costs related to preparing their applications would be incurred in any event and arise from the RHA's loss on the conflicts argument in the Court of Appeal. On that basis, they each seek an order for 75% of their costs of the remitted matters from the date of the defendants' responses to their applications (i.e. 13 May 2024) to the date of the CPO Ruling (i.e. 2 August 2024), with the balance of 25% being costs in the case.

18. DAF, Iveco and MAN all contend that there should be no order for costs from the date of the Court of Appeal judgment to the end of the 1st remitted matters hearing (i.e. 5 June 2024), and that thereafter the RHA and RUTL should pay their costs to the end of the 2nd remitted matters hearing (i.e. 18 July 2024) but excluding the costs of the issue concerning leases of used trucks. As regards that distinct issue, they submit that there should be no order for costs.

19. There is no application for costs regarding the objectors, Daimler and Volvo, nor do they seek any order for costs.

20. We consider that the correct approach to costs in these circumstances is as summarised in MAN's costs submissions:

> "… the proposed defendants ought only to be ordered to pay costs if they have taken objections which were unsuccessful and which have materially increased the time and costs of the certification process.

We note that the RHA endorses that approach.

21. At the 1st remittal hearing the defendants raised a large number of distinct objections to the application for a CPO and to the authorisation of RUTL as sub-class representative. Three of the four reasoned rulings given in the course of that hearing were decided against the defendants: as regards the scope of the issues to be covered by the sub-class and its representative; as to the freedom for the expert for the sub-class to confer with the expert instructed by the RHA; and as regards the terms of the ATE policy and the right of the insurers to recover proportionately from the share of damages awarded to the RHA or RUTL on behalf of their respective sub-class members. The Tribunal also dismissed as wholly misconceived the objections advanced as to use of the term "cartel" in the proposed notice to class members. These submissions and argument undoubtedly significantly increased the RHA/RUTL's costs and extended the length of the hearing. We recognise that there were some relatively minor points on which the defendants succeeded, but for the most part those were rapidly conceded or not strongly resisted by the RHA and RUTL.

22. At the same time, there is no doubt that submissions from RHA and RUTL were required at the 1st remittal hearing to explain how they had addressed the remitted matters; and the inadequacy of certain aspects of their explanation and the evidence from Therium, along with the disputed issue concerning leased trucks, led the Tribunal to adjourn the matter for a further hearing.

23. Applying the approach set out in para 20 above and taking a broad view, we consider that the appropriate order is that 50% of the RHA and RUTL's costs from the date of their responses to the applications to the conclusion of the 1st

remittal hearing should be paid by the defendants and 30% of those costs should be costs in the case. There will be no order as to the defendants' costs.

24. The position is somewhat different for the period following the 1st remittal hearing to the date of the CPO Ruling. As noted above, the only reason for the 2nd remittal hearing was the inadequacy of the evidence filed by the RHA/RUTL for the 1st remittal hearing. However, after that further evidence had been filed, the defendants maintained their opposition to the CPO, in addition to disputing the end period for the claim regarding leased trucks, on which issue they were unsuccessful. Some of the other matters ventilated at that hearing (e.g. the position of signed-up claimants who do not opt-in, and the right of defendants to contact them) could otherwise have been dealt with on the papers without the need for a hearing.

25. Taking everything into account, and again adopting a broad brush approach, we consider that the appropriate order for this period is that the RHA and RUTL should be liable for 25% of the defendants' costs; that the defendants should be liable for the RHA/RUTL's costs of the leased trucks issue, which we assess as accounting for 25% of their costs; and that 50% of the costs of the RHA and RUTL should be costs in the case.

26. Since the costs orders that we are making are significantly less favourable to either side than sought in their respective applications, there will be no order for the costs of and occasioned by the costs applications themselves.

27. In view of the nature of the orders made, we think that summary assessment of the costs is impractical and inappropriate (and indeed only Iveco and MAN sought summary assessment and filed detailed schedules of costs). Neither the RHA and RUTL nor DAF have asked for an interim payment on account of costs and in the light of the orders for costs being made and the very partial provision of detailed costs schedules we do not have the information that would enable us to determine the amounts to be properly paid on account. We would only add that costs will fall to be assessed on the standard basis, and we find the costs set out by DAF in its schedule covering only the period 6 June 2024 to 18

July 2024, which are stated to amount to £275,575.48, wholly disproportionate and unreasonable.

CONCLUSION

28. Accordingly, for the reasons set out above:

(1) DAF is refused permission to appeal.

(2) For the period 25 July 2023 - 12 May 2024, there be no order for costs as regards the matters remitted by the Court of Appeal.

(3) As regards the period 13 May 2024 - 5 June 2024:

(i) 50% of the costs of the RHA and RUTL are to be paid by the defendants;

(ii) 30% of the costs of the RHA and RUTL are to be costs in the case;

(iii) there be no further order for costs.

(4) As regards the period 6 June 2024 - 5 August 2024:

(i) 25% of the costs of the defendants are to be paid by the RHA and RUTL;

(ii) 25% of the costs of the RHA and RUTL are to be paid by the defendants;

(iii) 50% of the costs of the RHA and RUTL are to be costs in the case;

(iv) there be no further order for costs.

(5) All such costs are to subject to detailed assessment on the standard basis, unless agreed.

(6) There be no order for the costs of and consequential to the submissions on costs.

29. This ruling is unanimous.

POSTSCRIPT

30. The written submissions for the RHA signed on 13 September 2024 opposing the PTA application bear the lead signature of Mr James Flynn KC. Very sadly, just over a month later, Mr Flynn died following a short illness. Since this is therefore the last occasion on which the Tribunal will receive submissions from Mr Flynn, we wish to pay tribute to his contribution to competition law in the UK, both through his practice at the Bar and in his role as president for many years of the Competition Law Association.

The Hon Mr Justice Roth
Acting President

Mr William Bishop

Professor Stephen Wilks

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 1 November 2024