Neutral citation [2025] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1338/5/7/20 (T), etc

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8 January 2025

Before:

HODGE MALEK KC

Sitting as a Tribunal in England and Wales

IN THE MATTER OF:

THE TRUCKS SECOND WAVE PROCEEDINGS

PARTIES TO THIS RULING:

(1) THE EDWIN COE CLAIMANTS (as set out in Annex 2 to this Ruling)

(2) THE DAIMLER DEFENDANTS

Heard at Salisbury Square House on 8 January 2025

RULING (DISCLOSURE)

APPEARANCES

Alan Bates (instructed by Edwin Coe LLP) appeared on behalf of the Edwin Coe Claimants.

Ben Rayment (instructed by Macfarlanes LLP) appeared on behalf of the Daimler Defendants.

A. INTRODUCTION

1. This is an application for disclosure in the Second Wave Trucks Proceedings ("Wave 2"). The First Wave Trucks Proceedings ("Wave 1") comprised three sets of proceedings and concluded with only one trial, the other two proceedings were settled prior to trial. Wave 2 comprises all the Trucks cases which did not fall within Wave 1. There are many parties and cases within Wave 2, and it covers all levels within the supply chain and different types of purchasers of trucks. Some Claimants were in the market of hiring and leasing of trucks, but so were the Daimler Defendants ("Daimler"), one of 5 groups of trucks manufacturers found by the European Commission (the "Commission") in its decision of 19 July 2016 in Case AT.39824 - *Trucks* to have carried out a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area between 1997 and 2011 (the "Cartel").[1]

2. In these follow-on proceedings, it is alleged that as a result of the Cartel, prices for medium and heavy trucks supplied by the trucks manufacturers were higher than they would otherwise have been (the "Overcharge"). In turn the trucks manufacturers contend that any overcharge would have been passed on in whole or in part in various ways. Expert evidence plays a central role in these proceedings and the experts for the respective sides are far apart on causation and quantum, including pass-on.

3. Disclosure for Wave 1 was both a challenge and expensive. It was carried out using a conventional approach of being led by the solicitors for the parties, disclosure reports and lists being prepared, the use of Redfern Schedules, and a flexible approach by the Tribunal in the determination of disclosure applications: see [2020] CAT 3 at [40]; [2020] CAT 13 at [3]–[11].

[1] Scania, another truck manufacturer, was pursued by the Commission but did not adopt the settlement procedure. By a decision of 27 September 2017, the Commission found that Scania was part of the Cartel, and this has been upheld by the EU General Court on 2 February 2022 (Case T-799/17) and the Court of Justice of the EU on 1 February 2024 (C-251/22 P).

4. The challenges as to case management and disclosure for Wave 2 are even greater than for Wave 1 given the multiplicity of parties. In those circumstances the Tribunal decided to adopt a novel approach of expert-led disclosure: see [2024] CAT 2 at [14] (the "Mechanics Judgment").

5. It must be emphasised that such an expert-led approach is unlikely to be suitable for the majority of cases before the Tribunal. It reflects the general approach of the Tribunal that disclosure must be tailored to the specific needs of individual cases. What may be suitable for a multi-faceted case dominated by expert evidence with numerous parties and issues, may not be suitable for most cases where a more conventional approach may be more productive and hopefully less expensive. In any large-scale litigation before the Tribunal it is important for the Tribunal to have overall control of the disclosure process so that it is confined to what is necessary and proportionate. A 'no stone unturned' approach to disclosure is in no one's interest and costs should not be allowed to escalate unnecessarily in disclosure exercises. Lawyers for the parties using their experience in disclosure exercises are expected to take a major role in managing the process and to cooperate with each other.

B. THE PRESENT APPLICATION

6. A disagreement has arisen between the Edwin Coe Claimants (the "EC Claimants") and Daimler in connection with an information request application (the "Application") by one of the experts instructed in the proceedings, Mr Ian Thompson of Economic Insight, for the Defendant undertakings (which are truck manufacturers) to provide certain data and information relating to their past supplies of trucks. Mr Thompson is the EC Claimants' economics expert in relation to Third Party Rent/ Lease Pass-On (on the lessor/ supplier side). His approach includes an assessment of empirical evidence against the in-principle factors that affect the extent of pass-on. As stated in his letter to the Tribunal dated 4 October 2024:

> "My approach, as set out in my 1 December 2023 statement, includes an assessment of empirical evidence against the in-principle factors that affect the extent of pass-on. These in-principle factors include, but are not limited to, the following.
>
> (a) **The extent to which the overcharge was industry-wide.** This relates to

whether all competing truck leasing/rental suppliers incurred the overcharge. Economic theory suggests that if, for example, some truck rental companies did not incur the overcharge, it is less likely that truck rental companies that did incur the overcharge would have passed-on the overcharge to their customers.

(b) **The nature and intensity of competition in the downstream market.** This relates to the nature and intensity of competition between truck rental/leasing suppliers. Related to point (a), economic theory suggests that, for example, the more closely company A and company B compete with each other, the less likely company A would be to pass-on an overcharge if it incurred the overcharge and company B did not. Furthermore, if any overcharge was industry-wide, the nature and intensity of competition between truck rental/leasing suppliers has a bearing on the extent to which economic theory predicts pass-on would occur.

From my work so far, I understand that the Defendants and the truck rental/leasing Claimants competed with each other, i.e. that at least some of the Defendants entered into truck leases / rental agreements with third party customers, which competed with the truck rental/leasing activities of the Claimants on whose behalf I am instructed. Therefore, to properly conduct my assessment for the Positive Case, I require information in relation to whether the Defendants' truck leasing/rental businesses incurred the overcharge and how they competed with the truck rental/leasing Claimants."

7. The information sought by Mr Thompson from all 6 groups of truck manufacturers is set out in his Request for information dated 30 August 2024 in the following terms (albeit the request has been refined as a result of discussions with the representatives of the truck manufacturers apart from Daimler):

"5. For each Defendant group, I request the following information in relation to the Relevant Period (1 January 1997 to 31 December 2018) in the UK.

(a) Identification of the OEM entities involved in the renting and/or leasing of trucks, including how the entity fits in the organisation structure of the OEM. These entities will include any independent truck rental / leasing companies that the OEM acquired and subsequently held within the Relevant Period.

(b) Specification, and approximate percentage revenue split, of the rental and/or leasing services provided by each of the above identified OEM entities. Such as, whether they provided 'contract hire', 'spot hire', etc., how the OEM defined each of these services, and what proportion of the OEM's rental / leasing revenue each accounted for.

(c) Details of the operational relationship between the OEM entity that rented or leased trucks and the rest of the OEM organisation. In particular: (i) the renting / leasing entity's role during the sale of the rental / leasing agreement; and (ii) if there was an arms' length agreement between the renting / leasing entity and the rest of the OEM, how the 'price' paid for the truck was determined.

(d) The role of the following parameters in the price setting process for the rental/leasing of trucks: (i) capital cost of the truck; (ii) repair and maintenance contracts; (iii) buyback agreements; (iv) residual values; (v) any other key parameters.

> (e) The OEM's view as to the nature of competition, and extent of competition, with independent truck rental and leasing companies, including any submissions to the CMA/OFT in relation to previous acquisitions and mergers."

These requests have been refined and set out in a subsequent schedule which makes clear that Mr Thompson expects responses to include disclosure of documents. No other experts instructed by the other claimants are seeking this disclosure.

8. The disagreement relates specifically to one of the Defendant undertakings, namely Daimler. The disagreement is essentially as to whether the terms of a Settlement Agreement between Daimler and the EC Claimants exempt Daimler from having to provide data requested by Mr Thompson for informing his economic work. As the disagreement requires the Tribunal to examine the terms of the Settlement Agreement, the parties requested that the Application be adjudicated upon by a Tribunal Chairman who will not be involved in the trial of the Wave 2 proceedings, which is listed to take place in September 2026.

9. At a case management conference on 9 December 2024, the Tribunal (Lord Ericht, Huddleston J, and Derek Ridyard) ordered that the disagreement be determined by a Tribunal Chairman sitting alone. The Tribunal wrote to the EC Claimants and Daimler on 17 December 2024 informing them that I would determine the disagreement at a hearing listed to take place on 8 January 2025. Paragraph 5 of the Tribunal's Order of 30 December 2024 provides as follows:

> "By 4pm on 16 December 2024, the Edwin Coe Claimants and Daimler shall file and exchange submissions on the Daimler objections to the Thompson Application of no longer than six pages each, together with a bundle of relevant documents, for determination by a Chair who was not a member of the panel who heard the Case Management Conference on 9 December 2024."

10. There is considerable urgency for the disagreement to be determined. The timetable leading to the date for the parties in the Wave 2 proceedings to file their Positive Cases is dependent on a strict timetable under which data requested by the experts will be provided by 17 January 2025. This matter has been determined at a half day hearing as set out in this ruling.

C. THE PARTIES' SUBMISSIONS AND THE TRIBUNAL'S ANALYSIS

(1) The Settlement Objection

Daimler's submissions

11. In summary, Daimler's position is that:

    (1) The Application cannot be pursued against Daimler and should be dismissed because, under the Settlement Agreement, it is a Claim that has been released by the EC Claimants against Daimler (the "Settlement Objection").

    (2) Even if the Tribunal were minded to grant the Application against Daimler, given that, following the Settlement Agreement, Daimler is a non-party to the proceedings brought by the EC Claimants, the Application should only be granted on condition that the EC Claimants offer or are ordered to pay Daimler's costs of the Application (from the date of Settlement) and the costs of complying with any order made on the Application, in the ordinary way (the "Non-Party Costs Issue").

12. The Settlement Agreement provides for the "*full and final settlement*" of "*any and all Claims Against Daimler*". Clause 3 states:

> "**FULL AND FINAL SETTLEMENT**
>
> 3.1 With the exception of the Parties' rights and obligations under this Agreement, this Agreement and the terms set out herein (the "Settlement Terms") and their performance shall be in full and final settlement of:
>
> 3.1.1 any and all Claims Against Daimler;
>
> 3.1.2 any and all Claims Regarding Daimler Trucks;
>
> 3.1.3 any and all Share of Liability Claims;
>
> 3.1.4 any and all share of liability that the claimants and defendants in the Proceedings agree, failing which agreement as the CAT determines, that the Daimler Group would be found liable for were it to be sued under the Civil Liability (Contribution) Act 1978 or under any similar legal provision exposing the Daimler Group to make a contribution under any other applicable law, regardless of whether the Daimler Group is in fact so sued; and

3.1.5 the Share of Costs.

…

3.4 The Claimant Parties agree on their behalf and on behalf of the Claimant Parties' Groups to waive and release against any person, including for the avoidance of doubt the Daimler Companies, the Remaining Defendants and Scania, any and all:

3.4.1 Claims Against Daimler;

3.4.2 Claims Regarding Daimler Trucks;

3.4.3 Share of Liability Claims;

3.4.4 Share of liability that the claimants and defendants in the Proceedings agree, failing which agreement as the CAT determines, that the Daimler Group would be found liable for were it to be sued under the Civil Liability (Contribution) Act 1978 or under any similar legal provision exposing the Daimler Group to make a contribution under any other applicable law, regardless of whether the Daimler Group is in fact so sued; and

3.4.5 Claims arising out of or in connection with the Share of Costs.

13. A released "Claim" is widely defined in clause 1.1 as consisting of:

> "any actual or potential claim, counterclaim, right to set-off, right to payment, cause of action, or right of interest of any kind or nature whatsoever, including a right by virtue of a shareholding in a company, whether known or unknown, suspected or unsuspected, however and whenever arising, in whatever capacity or jurisdiction, under any applicable law whether or not within the contemplation of any Claimant Party (or any member of or company in their Group) at the time of the Agreement, which any of the Claimant Parties and/or any members of or companies in the Claimant Parties' Group has or may have against any person arising out of or in connection with: (i) the Proceedings and/or the Decision and/or the Scania Decision (as defined below); or (ii) the subject matter of and facts underlying the Proceedings and/or the Decision and/or the Scania Decision (as defined below); or (iii) any of the documents disclosed in these Proceedings from the Commission File in Case AT.39824 – Trucks."

14. Daimler submits that the maintenance of the Application against it by the EC Claimants is inconsistent with the commitment they gave to release and waive Claims under the Settlement Agreement: the expansive definition of "Claim" in the Settlement Agreement captures the exercise of all possible legal rights and processes connected with the subject matter of the Settlement Agreement, however, and wherever arising, not just substantive claims. Further, the meaning of the word "claim", both in an ordinary and a legal sense, is apt to encompass an application for disclosure, which is just a demand for something in another person's control or possession.

15. The scope of the word "claim" was considered by the Court of Appeal in *Gorbachev v Guriev* [2022] EWCA Civ 1270 ("*Gorbachev*"). The judgment confirms that proceedings may be originated by an application and that an application for third-party disclosure under rule 31.17 of the Civil procedure Rules ("CPR") was thus necessarily a "claim" for the purpose of paragraph 3.1 of Practice Direction 6B. The Court held where the word "claim" is not used in any "restrictive or technical sense" it includes an application for disclosure. Likewise, the Settlement Agreement defines "Claim" in the widest possible sense and does not use the word in a restrictive or technical sense. *Gorbachev* underlines the breadth of the ordinary use of the word "claim" and that its use in the Settlement Agreement covers the present Application.

16. The Settling Parties have agreed in relation to the use of disclosure that the EC Claimants could use the existing disclosure they had already obtained from Daimler as at the date of the Settlement, not disclosure they might wish to obtain at some future point. Again, this is consistent with and reinforces the nature of the Settlement Agreement, with no provision made in relation to obtaining or using any further disclosure by either party. This further indicates that any applications relating to disclosure by either of the Settling Parties were within the scope of the Claims released by the Settlement Agreement.

EC Claimants' submissions

17. The Tribunal directed that, in Wave 2, there will be "no disclosure" (Mechanics Judgment at [14(3)]). Rather, an 'expert-led' process applies, whereby each of the experts can request data from any party to the proceedings which the expert reasonably considers they require for carrying out their economic work. The parties from which an expert can request data include not only 'active parties' (i.e. the 'lead' and 'active' claimants and the defendants), but also those claimants that have elected to stay their claims. "*The Lead Economic Expert will need information (by which we mean data, documentary evidence, deposition evidence) from the other parties to the litigation. The Tribunal will lend every assistance to the Lead Economic Expert in obtaining this information …*" (Mechanics Judgment at [14(3)(iii)]).

18. The Tribunal has laid down a process for experts to make such data requests. The requesting expert is to make the request by setting it out in a table. There is then a discussion with the expert instructed by the party from whom the data has been requested (or, in the case of stayed claimants, with the claimant's solicitors). By this process, the experts concerned with addressing pass-on at the relevant place in the supply chain are to refine the data requests between themselves and seek to agree them. Where the experts are unable to agree, they are to define the points of disagreement, and set out their respective views. In cases where the experts cannot resolve their disagreement, or where the party from which the data is requested continues to object to the request on proportionality grounds, the table can be submitted to the Tribunal which will then rule on the data request.

19. Mr Thompson's request is to the various defendant undertakings for data/information they generated in connection with their truck leasing activities. The reason why the defendants may hold data that would assist Mr Thompson's work is that, during the Cartel period, trucks were leased to truck users, not only by those claimants that were truck lessors, but also by the Defendants. In other words, the Defendants operated in the leasing market and leased out trucks to customers. As the Defendants are large, sophisticated undertakings, they are more likely than relatively small enterprises (such as enterprises whose only activity was truck leasing) to have created and retained substantial volumes of usable data regarding truck leasing activities, including (for example) data as to prices and how those prices were set.

20. Mr Thompson's request does not fall within the definition of "*claim*". He is simply asking for data that he reasonably requires as an input for carrying out his intended economic work that will, in turn, inform the assistance he will, as an independent expert, be able to provide to the Tribunal at trial. Such assistance will not be for furthering any claim made by the EC Claimants against Daimler: those claims have been settled and the settlement will not be affected by any evidence given by Mr Thompson at trial.

The Tribunal's analysis

21. The principles applicable to the construction of a commercial agreement are well-established, having been stated by the Supreme Court in *Arnold v Britton and others* [2015] UKSC 36:

> "[14] Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with *Prenn v Simmonds* [1971] 1 WLR 1381 and culminating in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900.
>
> [15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* at pp 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* (trading as *HE Hansen-Tangen*) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.
>
> [16] For present purposes, I think it is important to emphasise seven factors.
>
> [17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> [18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

[19] The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

[21] The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

[22] Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).

[23] Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there…".

22. By the Settlement Agreement dated 1 October 2024, the EC Claimants and

Daimler agreed to settle the claims and proceedings between them.

23. Clause 3 of the Settlement Agreement makes clear that the settlement is a full and final settlement of all claims against Daimler.

24. Clause 5 deals with the effect on the proceedings:

> "**EFFECT ON THE PROCEEDINGS**
>
> 5.1 The Active Claimant Party agrees to:
>
> 5.1.1 stay (save for the purpose set out at Clause 5.1.2 below) and then discontinue its Proceedings against the Daimler Companies, in accordance with Clause 6 below; and
>
> 5.1.2 amend the particulars of claim and claim form in its Proceedings as set out in the A to Z Catering Proceedings draft in schedule 1 to this Agreement, which sets out amendments to the particulars of claim and claim forms in each of the Proceedings (the "Amended Statements of Case").
>
> 5.2 The Stayed Claimant Parties agree to:
>
> 5.2.1 lift the Current Stays (solely with respect to the Daimler Companies and for the purpose of enabling the Stayed Claimant Parties to amend the particulars of claim and claim forms in their respective Proceedings to take account of this Agreement), and then discontinue the Proceedings against the Daimler Companies, in accordance with Clause 6 below; and
>
> 5.2.2 amend the particulars of claim and claim forms in their respective Proceedings as set out in the Amended Statements of Case."

25. Clause 6 sets out the procedural steps that will lead to a consent order, under which the Edwin Coe proceedings against Daimler will be dismissed with no order as to costs. The consent order has yet to be made, but the proceedings between the EC Claimants and Daimler should effectively be at an end.

26. "Claim" for the purposes of the Settlement Agreement is widely defined in clause 1.1 (see paragraph 13, above).

27. "Claim" clearly includes substantive causes of action and claims for substantive relief. In effect the EC Claimants contend it goes no further and does not include an application for disclosure within these proceedings. An application for disclosure within proceedings against a party to those proceedings, may not be a substantive claim. However, one can see that a claim against a non-party, or pre-

action disclosure, or an application for *Norwich Pharmacal* or *Bankers Trust* relief are claims that fall within this definition.

28. CPR Part 6 deals with service of documents. CPR, r.6.2(c) defines "claim" as including petitions and any application made before action or to commence proceedings and "claim form", "claimant" and "defendant" are to be construed accordingly. As noted at para.6.2.3 of *Civil Procedure* (2024):

> "The definition of "claim form" does not include an application notice, except in those circumstances where it is the appropriate process for the making of an application before action."

29. Thus it is well established that an application for pre-action disclosure is a free-standing set of proceedings falling within what is currently gateway (20) for service out of the proceedings: *ED&F Man Capital Markets LLP v. Obex Securities* [2018] 1 W.L.R. 1708 (approved by the Court of Appeal in *Gorbachev*). Gateway (20) in CPR PD 6B, para.3.1 (service out of the jurisdiction where permission is required) provides:

> "(20) A claim is made –
>
> (1) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph".

30. In *Gorbachev* the Court of Appeal held that on a proper construction of gateway (20), the term "claim" was not used in any restrictive or technical sense and the term "proceeding" was to be given a natural and common sense meaning. Hence an application for third party disclosure pursuant to section 34 of the Senior Courts Act 1981 and CPR, r.31.17 constituted both a "claim" and "proceedings" for the purposes of gateway (20). On the definition of "claim" for the purposes of CPR, r.6.2 and gateway (20), the Court of Appeal agreed with the detailed reasoning of Jacobs J. The Court of Appeal reasoned as follows (at [33]-[34] after quoting the definition of "claim" in CPR, r.6.2:

> "Claim
>
> [33]. In the light of this definition, Mr Justice Jacobs held that an application for third party disclosure is a "claim" for the purpose of gateway (20). His reasoning at [60] to [64] was, in summary, as follows:
>
> (1) The word "claim" is broadly defined in CPR 6.2, the definition being non-

> exhaustive. There is, therefore, no reason to give the word a narrow meaning which excludes an application under CPR 31.17. Such an application involves the applicant seeking to invoke the court's jurisdiction, against another person, for an order that that person should provide disclosure.
>
> (2) The definition of "claim" includes any application made before action, including an application notice issued for pre-action disclosure, pursuant to section 33 of the SCA and CPR 31.16, against a person who is not yet a party to proceedings. The decision in *Obex* on this point was correct.
>
> (3) There is no good reason why an application for pre-action disclosure under section 33 and CPR 31.16 would be a "claim", but an application for third party disclosure under section 34 and CPR 31.17 would not. In both cases the applicant is seeking disclosure from a respondent who is not a party to existing proceedings.
>
> (4) It is clear from CPR 6.39 that where an application notice is issued against a third party, permission can be obtained to serve the application notice out of the jurisdiction. That provision applies generally to application notices against third parties. Generally speaking, a party who issues an application notice against a third party will not be seeking to advance a substantive cause of action against the third party, as in the examples given by Mrs Justice Cockerill in *Nix v Emerdata Ltd* at [14]. It follows that CPR 6.39 applies to applications which can be described as being of a procedural rather than substantive character, including (as the definition in CPR 6.2 contemplates) an application made before action. Nevertheless, CPR 6.39 provides implicitly that the rules for service out of the jurisdiction apply to the application against the third party. Those rules include the list of gateways in paragraph 3.1 of Practice Direction 6B, nearly all of which begin with the words "a claim is made". It follows that CPR Part 6, and in particular CPR 6.39, contemplate that a "claim" of a procedural character is nevertheless within its scope.
>
> [34]. I respectfully agree. The term "claim" in paragraph 3.1 of Practice Direction 6B is not used in any restrictive or technical sense. It includes both an application for pre-action disclosure and an application for third party disclosure."

31. It does not necessarily follow that in deciding the meaning of "claim" in this Settlement Agreement and ascertaining the objective intention of the parties, it has the same meaning as in the statutory context of the provisions for service out of proceedings in CPR Part 6, where a court may strive to find a meaning that gives effect to the purpose of the statute. That said, the Tribunal is satisfied that in the context of this Settlement Agreement an application for pre-action disclosure or non-party disclosure falls within the definition of a "claim".

32. Similarly an application for a *Norwich Pharmacal* order by way of freestanding application for relief is also a "claim" that would fall within the definition of a "claim" under the Settlement Agreement. The relief is based on showing that

the respondent is mixed up in the wrongdoing of another. Indeed under the Rules of Supreme Court, proceedings for a *Norwich Pharmacal* order could be commenced by writ or by originating summons. The current practice is for such applications to be by way of a CPR Part 8 claim form: Matthews and Malek, *Disclosure* (6th ed., 2024), para.3.29.

33. In the context of ongoing proceedings between parties, one would not ordinarily regard an application for disclosure between parties to be a "claim" in itself. However it is an application within a claim in the proceedings. In the context of the Settlement Agreement it does not matter whether one regards an application for disclosure to be a claim in itself. It is an interlocutory application in proceedings. Here the parties have agreed to settle all claims and the proceedings. This encompasses applications within those proceedings such as the present. Objectively speaking it was not in the reasonable contemplation of the parties that the EC Claimants would continue to make applications against Daimler whereby if granted Daimler would incur significant costs, particularly where it may not be able to recover those costs at the end of the day.

34. This makes sense. The Settlement Agreement was intended to end the proceedings and claims by the EC Claimants against Daimler. It cannot have been intended that despite that, the EC Claimants would continue to pursue the Daimler Defendants by way of inter partes disclosure application within those proceedings.

35. The Application was made only 3 days after the Settlement Agreement. It is by letter dated 4 October 2024 and is supported by Mr Greene's fifth witness statement which exhibits the Request for Information – OEM involvement in truck rental and leasing prepared by Ian Thompson of Economic Insight dated 30 August 2024. Thus this application was in contemplation by the EC Claimants well before the entry into the Settlement Agreement. No provision or reservation in respect of this application within the proceedings was made in the Settlement Agreement. Looking at the matter objectively it was not in the reasonable contemplation of both parties to the Settlement Agreement that such an application would be pursued by way of inter partes disclosure. Indeed the Settlement Agreement expressly provides that the claim as between the EC

Claimants and Daimler would be dismissed.

36. Whilst Daimler remains a party to the proceedings brought by the EC Claimants as well as the claims of other Wave 2 claimants, they should no longer be treated as parties to the EC Claimants' claims. The EC Claimants have contractually bound themselves to the dismissal of their claims against Daimler.

37. The EC Claimants nevertheless argue that they should be entitled to pursue the current application on the basis that Daimler remains a party to the Wave 2 proceedings, the parties are providing disclosure as between themselves even where there are no claims being pursued between requesting and disclosing parties (e.g. as between different claimants) and the disclosure will assist in resolving the issues between the parties, including in relation to Daimler who is subject to claims by other claimants. However this does not detract from the fact that the EC Claimants no longer have any claims against Daimler and that this is an application on behalf of the EC Claimants.

38. The Settlement Agreement does not of course prevent any non-settling claimant from seeking this disclosure from Daimler. Therefore even if it is not right for the EC Claimants to pursue this disclosure, it can be sought by other claimants.

39. If the disclosure sought is truly necessary and proportionate for the fair trial of the proceedings, the Tribunal is reluctant to shut out the possibility of such disclosure being provided. There is a public interest in the Tribunal having the evidence it needs to determine issues fairly in these proceedings. Thus, in my view (although the Tribunal did not hear argument on the point) if for example the EC Claimants took out a witness summons for oral and documentary evidence from Daimler (in the form of an officer or employee) the Tribunal would not set aside the witness summons simply on the ground of the provisions of the Settlement Agreement. As noted above, if a non-settling claimant takes out an application, this too would be permissible.

40. However the Tribunal is conscious that requests such as the present are expensive to comply with. The data that would need to be reviewed in order to provide the information sought goes back a long time and is potentially wide

ranging even if the disclosure exercise is confined to readily available data. In determining the application it would have assisted if Daimler had provided in advance of this hearing a rough estimate of the costs of the exercise. At the hearing Daimler provided the Tribunal with an indicative range of £150,000-£250,000. In the Tribunal's experience having regard to the amount of work that would be required to respond adequately to the request for information and documents it is quite conceivable that the actual level of costs would be towards the upper part of that range.

41. If Mr Thompson is not provided with the information sought from Daimler, this does not necessarily mean that he cannot carry out the exercise that he intends to carry out. Indeed he will have access to his own clients' data and information as well as information from the other groups of truck manufacturer defendants, who have already agreed to provide information. However at this stage it is not known what information and data will be provided by the other defendants.

42. There is another aspect that needs to be borne in mind and that is the costs of the exercise entailed by the application. The EC Claimants and Daimler have agreed to settle and for the proceedings to be dismissed. If Daimler is to carry out this exercise incurring significant costs, will it be able to recoup those costs even if it wins the proceedings as against those parties who are still claiming against it? It may be fairly argued by the non-settling claimants that they should not be expected to shoulder this cost and this is not disclosure that they themselves sought. In turn Daimler is unlikely to be able to recover such costs (in the absence of a costs order on the present application) from the EC Claimants as there would no longer be any proceedings as between them.

43. In view of the terms of the Settlement Agreement, the fact that Mr Thompson may be able to carry out his exercise without the information sought from Daimler, and the cost of the exercise which the EC Claimants are unwilling to bear, the Tribunal does not consider it fair or proportionate to require Daimler to provide the information to the EC Claimants. The Tribunal on this application is not determining whether such disclosure would or would not be necessary for Mr Thompson's exercise.

(2) The non-party costs issue

Daimler's submissions

44. Pursuant to clause 2 the Settlement Agreement is binding and fully effective from the date of execution (1 October 2024). Accordingly, the Application effectively constitutes an application against a non-party. The procedural formalities provided for in the Settlement for Daimler's dismissal are binding and in motion; pleading amendments have been agreed by Daimler and the remaining defendants. All that remains is for Edwin Coe to agree these and send them to the Tribunal, along with the draft dismissal orders in the stipulated form, for approval by the Tribunal. It is trite that the EC Claimants cannot rely on the fact that they have not yet complied with the binding requirement to submit the dismissal orders for approval to treat Daimler as a party.

45. The Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") and the CPR are drafted in the same terms regarding applications for non-party disclosure. In a case involving only English Claims (and which, therefore, ought to be treated as proceedings before the Tribunal in England and Wales), there is no good reason to take any different approach. Moreover, the general rule under the CPR is that applicants for non-party disclosure should pay the non-party's costs of the application and of complying with any order made provided the non-party does not behave unreasonably in opposing the application. In this context, it is well established that active opposition should not be equated with unreasonable conduct.

46. Daimler submits that there is no good reason to take a different approach in exercising the Tribunal's powers to award costs under Rule 104 of the Tribunal Rules in this case. Indeed, the Tribunal's Guide to Proceedings 2015 expressly refers to the fact that if the Tribunal makes an order for non-disclosure against a non-party, it may include provision for the payment of costs incurred by the non-party in making disclosure. The EC Claimants have made no offer in this regard.

EC Claimants' Submissions

47. Daimler's characterisation of the Request as being one that is, insofar as it is made to Daimler, a request for "*third party disclosure*" is inapposite.

48. As explained above, the Tribunal has established a mechanism by which the experts who will be giving evidence at trial can request data from any parties to the proceedings to inform the expert's economic work. Daimler is a party to the proceedings; and it will continue to be a party, given that it has settled only with some, not all, Wave 2 claimants. As such, Daimler should – like all the other parties to the proceedings – seek to assist the experts by providing them with data they reasonably require for their work.

49. There can be no doubt that each of the experts who will be assisting the Tribunal at the Wave 2 trial can request data from any of the parties to Wave 2, irrespective of whether the parties (whether 'lead claimants' or defendants) on whose behalf the expert has been instructed are themselves suing the parties to which the request is addressed. Such a request is made pursuant to the expert-led process the Tribunal has decided upon for Wave 2 and does not constitute a request for "*third party disclosure*".

50. This is illustrated by the following features of the Wave 2 proceedings:

(1) Not all Claimants have sued all Defendants. Many claimants chose to sue only some truck manufacturer undertakings, or only certain companies within such undertakings. Yet this has not prevented the defendants' experts from requesting data from any claimant (including claimants whose claims have been stayed) and using such data as part of developing economic reports that are likely to be relied on by all the defendants by whom those experts are instructed.

(2) An expert instructed on behalf of certain claimants can request data from other claimants. It is irrelevant that those claimants are not suing each other and are not parties to each others' claims. For example, the expert instructed on behalf of certain claimants that are manufacturers has

requested data from certain claimants that are hauliers (namely, data that had previously been provided only to the defendants' experts), and vice versa. The Tribunal has ordered that those requests be complied with.

(3) The Wave 2 trial is directed at enabling the Tribunal to determine, on a global basis across the various claims, questions as to how the burden of any overcharge was distributed across the supply chain. Daimler, like the other defendants, has a continuing interest in that question, notwithstanding that it has settled with certain claimants.

The Tribunal's analysis

51. Daimler is correct in pointing out that with non-party disclosure under Rule 63 of the Tribunal Rules and CPR r.31.17, the usual position is that the party seeking the disclosure from a non-party is ordered to pay the costs of the exercise: *Disclosure*, para. 4.67. In appropriate circumstances it is possible for the Tribunal to make a different order. However the present application is not a non-party disclosure application under Rule 63. Indeed when the application was taken out, Daimler and the EC Claimants remained parties to the same proceedings and the time for the claims to be dismissed had not yet arisen. In view of the Settlement Agreement and the definition of "claim" as including a claim for non-party disclosure, any such application would in any event be refused. The Tribunal agrees with the EC Claimants that this is not an application for non-party disclosure, but is one in the specific context of the disclosure regime established by the Tribunal in the Mechanics Judgment.

52. The fact that the Settlement Agreement is to lead to the claims of the EC Claimants being dismissed and that the EC Claimants and Daimler are no longer opposing parties, one would ordinarily expect that if such disclosure were to be ordered it should be the EC Claimants who should be ordered to pay the costs of the exercise. On a pragmatic level, if the EC Claimants are prepared to pay Daimler's costs of the disclosure exercise, it may well be that Daimler will take a constructive approach and provide the information sought. Daimler should not be expected to provide the information sought to the EC Claimants in the absence of such an offer.

D. COSTS OF THE APPLICATION

53. Having dismissed the Application, it is appropriate that the Tribunal orders the EC Claimants to pay the costs of the Application. Mr Bates on behalf of the EC Claimants does not dispute, or does not contest, an order for costs against his clients. However, he does say that one needs to take into account all the circumstances in assessing what is an appropriate figure for costs.

54. Mr Rayment for Daimler contends that if the Tribunal is inclined to give a large deduction from the costs figure claimed, then the most appropriate course of action would be to opt for a detailed assessment with an interim payment on account of costs. He points out that the Tribunal dealing with this matter may not have the full background of the Application itself and the work required in connection with the Application over the 3 months since the Settlement Agreement was concluded.

55. The Tribunal has read all the correspondence, including without prejudice correspondence as to costs, and is sufficiently aware of all the steps that have been taken in relation to the Application. The Tribunal has reviewed the bundle before it in full, considered what the main Tribunal has done to date and read the submissions at the hearing before the main Tribunal which had led to this matter coming before the Tribunal on this application.

56. Looking at the competing costs figures, the EC Claimants' figure is roughly £50,000, and the Daimler figure is roughly £140,000. The Tribunal does not need to take a view as to whether or not it was unreasonable for Daimler to have incurred £140,000 in costs as between Daimler and its own lawyers. However, what the Tribunal has to determine is what is reasonable and proportionate for the EC Claimants to have to pay on this Application. The Tribunal does not consider the figure claimed by Daimler to be reasonable or proportionate. Whilst individual items of the summary costs schedule are themselves reasonable, the overall figure on a discrete and short application such as the present is not proportionate. The costs figure of the EC Claimants is within the sort of range that the Tribunal would have anticipated and accepted.

57. Having looked at all the material, the Tribunal considers that both parties have acted reasonably on this Application, efforts have been made by both sides to be flexible, and the Tribunal does not want to have a situation whereby disclosure applications like the present are deterred for fear of large awards of costs being made.

58. The Tribunal is willing to penalise any party that it considers has acted unreasonably, but on the facts of the present case, both sides have acted reasonably. There was a bona fide dispute as to the construction of the Settlement Agreement as well as to the nature of the disclosure exercise in itself. Both disputes have been resolved by the Tribunal today.

59. Looking at matters in the round, the Tribunal considers that an award of costs of £55,000 is appropriate to be paid within 14 days of today. The Tribunal is grateful to the legal representatives for both sides for the excellent and efficient manner in which the Application was prepared and argued.

E. CONCLUSION

60. For the reasons set out above, the Application is refused. The EC Claimants are to pay Daimler's costs in the sum of £55,000 within 14 days of this ruling.

Hodge Malek KC

Charles Dhanowa, OBE, KC (Hon)
Registrar

Date: 8 January 2025

ANNEX 1: CASES INCLUDED IN THE SECOND WAVE TRUCKS PROCEEDINGS

Case Number	Case Name
Cases in England	
1296/5/7/18	Arla Foods AMBA & Others v Stellantis N.V. & Another
1338/5/7/20 (T)	Adnams PLC & Others v DAF Trucks Limited & Others
1343/5/7/20 (T)	DS Smith Paper Limited & Others v MAN SE & Others
1355/5/7/20 (T)	Hertz Autovermietung GmbH & Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others
1356/5/7/20 (T)	Balfour Beatty Group Limited & Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others
1358/5/7/20 (T)	Zamenhof Exploitation & Others v Fiat Chrysler Automobiles N.V. & Others
1360/5/7/20 (T)	BFS Group Limited & Another v DAF Trucks Limited &
1361/5/7/20 (T)	Enterprise Rent-a-Car UK Limited v DAF Trucks Limited & Others
1362/5/7/20 (T)	ABF Grain Products Limited & Others v DAF Trucks Limited & Others
1368/5/7/20 (T)	LafargeHolcim Limited & Others v Aktiebolaget Volvo (Publ) & Others
1371/5/7/20 (T)	The BOC Group Limited & Others v Stellantis N.V. & Others
1372/5/7/20 (T)	GIST Limited & Others v Stellantis N.V. & Others
1417/5/7/21 (T)	Dan Ryan Truck Rental Limited & Others v DAF Trucks Limited & Others
1420/5/7/21 (T)	A to Z Catering Supplies Limited & Others v DAF Trucks Limited & Others
1431/5/7/22 (T)	Adur District Council & Others v TRATON SE & Others
1521/5/7/22 (T)	Wm Morrison Supermarkets PLC & Others v Volvo Group UK Limited & Others
1578/5/7/23 (T)	Asda & Others v AB Volvo & Others
1594/5/7/23 (T)	GAP Group Limited and Another v DAF Trucks Limited and Others
1610/5/7/23 (T)	Rowleys of Northwich Limited and others v DAF Trucks Limited and others
1607/5/7/23 (T)	Wincanton Holdings Limited and another v DAF Trucks Limited and others
1608/5/7/23 (T)	Adnams PLC and others v DAF Trucks Limited and others
1609/5/7/23 (T)	SP0117 Limited (as Assignee) and another v DAF Trucks Limited and others
1616/5/7/23 (T)	Boots & Others v. Traton & Others
1633/5/7/24	Tesco Stores Limited & anor v Scania (Great Britain) limited & others
Cases in Northern Ireland	
1536/5/7/22 (T)	C Faulkner & Sons v Aktiebolaget Volvo (Publ)
18/78144	JH Irwin & Son (Fuels) Limited -v- AB Volvo
20/22730	McHugh's Oil Limited -v- AB Volvo
18/33243	Niall McCann trading as NMC Haulage -v- AB Volvo

20/41004	Cynthia Beattie t/a Beattie Transport -v- AB Volvo
1674/5/7/24 (T)	J.C. Campbell (N.I.) Limited –v- DAF Trucks N.V.
1675/5/7/24 (T)	Gibson Bros Limited –v- DAF Trucks N.V.
1676/5/7/24 (T)	Joseph Walls Ltd –v- DAF Trucks NV
1677/5/7/24 (T)	M.G. Oils Limited–v- DAF Trucks NV
1678/5/7/24 (T)	J.K.C. Specialist Cars Limited–v- DAF Trucks NV
1679/5/7/24 (T)	G.P. Marketing Limited trading as Patterson Oil –v- DAF Trucks NV
1680/5/7/24 (T)	J.H. Irwin & Son (Fuels) Limited –v- DAF Trucks NV
1681/5/7/24 (T)	Trevor Leckey t/a Stoneyford Concrete –v- DAF Trucks NV
20/58982	Derek O'Reilly t/a O'Reilly's The Sweet People -v- Daimler AG
20/58998	Patrick Megoran -v- Daimler AG
20/58974	Stephen Pollard -v- Daimler AG
1682/5/7/24 (T)	John Rodgers Limited -v- Daimler AG
20/58984	Andrew Ingredients Ltd -v- Daimler AG
18/78073	Kieran Quinn t/a Pomeroy Haulage -v- Daimler AG
20/58977	J.C. Campbell (N.I.) Limited -v- Daimler AG
1683/5/7/24 (T)	R Magowan & Son Limited -v- Iveco S.P.A
1684/5/7/24 (T)	C. Russell Auto Sales Ltd -v- Iveco S.P.A
1685/5/7/24 (T)	Kennedy & Morrison Limited -v- Iveco S.P.A
1686/5/7/24 (T)	Niall McCann t/a NMC Haulage -v- Iveco S.P.A
1687/5/7/24 (T)	John Rodgers Limited -v- Iveco S.P.A
Cases in Scotland	
1538/5/7/22 (T)	Clackmannanshire Council v VFS Financial Services Ltd &
1539/5/7/22 (T)	Angus Council v VFS Financial Services Limited & Others
1540/5/7/22 (T)	East Ayrshire Council v VFS Financial Services Ltd & Others
1541/5/7/22 (T)	The City of Edinburgh Council v VFS Financial Services Ltd
1542/5/7/22 (T)	East Lothian Council v VFS Financial Services Ltd & Others
1543/5/7/22 (T)	East Dunbartonshire Council v VFS Financial Services
1544/5/7/22 (T)	Fife Council v VFS Financial Services Ltd & Others
1545/5/7/22 (T)	Midlothian Council v VFS Financial Services Ltd & Others
1546/5/7/22 (T)	Glasgow City Council v VFS Financial Services Ltd & Others
1547/5/7/22 (T)	Dundee City Council v VFS Financial Services Ltd & Others
1548/5/7/22 (T)	Scottish Water v VFS Financial Services Limited & Others
1549/5/7/22 (T)	West Lothian Council v VFS Financial Services Ltd & Others
1550/5/7/22 (T)	Perth & Kinross Council v VFS Financial Services Limited
1551/5/7/22 (T)	Stirling Council v VFS Financial Services Limited & Others
1552/5/7/22 (T)	Renfrewshire Council v VFS Financial Services Ltd & Others
1553/5/7/22 (T)	South Ayrshire Council V VFS & Others
1554/5/7/22 (T)	The North Ayrshire Council v VFS Financial Services Limited

1555/5/7/22 (T)	Western Isles Council v VFS Financial Services & Others
1556/5/7/22 (T)	West Dunbartonshire Council v VFS Financial Services
1557/5/7/22 (T)	North Lanarkshire Council v VFS Financial Services Ltd
1558/5/7/22 (T)	Scottish Borders Council v VFS Financial Services Limited
1559/5/7/22 (T)	Dundee CC & Others t/a Tayside Contracts v VFS FS Ltd &
1560/5/7/22 (T)	Aberdeenshire Council v VFS Financial Services Ltd & Others
1561/5/7/22 (T)	Argyll and Bute Council v VFS Financial Services Limted
1562/5/7/22 (T)	East Renfrewshire Councill v VFS Financial Services Limited
1563/5/7/22 (T)	South Lanarkshire Council v VFS Financial Services Limited
1564/5/7/22 (T)	Grahams The Family Dairy (Processing Ltd) v CNH Industrial
1565/5/7/22 (T)	Grahams The Family Diary Ltd v CNH Industrial N.V.
1566/5/7/22 (T)	Graham's Dairies Limited v CNH Industrial N.V

ANNEX 2: OVERVIEW OF THE PARTIES

Definition	**Description**
The Edwin Coe Claimants	The Claimants in Case Nos: 1338/5/7/20 (T), 1417/5/7/21 (T), 1420/5/7/21 (T), 1594/5/7/23 (T), 1610/5/7/23 (T), 1607/5/7/23 (T), 1608/5/7/23 (T), and 1609/5/7/23 (T)