Neutral citation [2020] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1284-1290-1295/5/7/18 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 June 2020

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
THE HONOURABLE MR JUSTICE FANCOURT
HODGE MALEK QC

Sitting as a Tribunal in England and Wales

BETWEEN:

ROYAL MAIL GROUP LIMITED v DAF TRUCKS LIMITED & OTHERS

BT GROUP PLC & OTHERS v DAF TRUCKS LIMITED & OTHERS

DAWSONGROUP PLC & OTHERS v DAF TRUCKS N.V. & OTHERS

RULING: COSTS

Introduction

1. On 4 March 2020, the Tribunal handed down judgment ("the Judgment") on a preliminary issue in seven actions claiming damages following the decision of the European Commission in Case 39824 *Trucks* ("the Decision"): [2020] CAT 7. Those seven actions are being case managed together. This is the Tribunal's ruling on an application for costs of the preliminary issue by the claimants in three of those actions. All parties are here referred to by the name of the corporate group to which they belong, using the same abbreviations as in the Judgment.

2. The preliminary issue in essence concerned the question whether, and if so to what extent, the recitals in the Decision are binding on the defendants in these damages actions. The Judgment determined, in summary, that:

   (a) by reason of Article 16 of Council Regulation 1/2003, those recitals which (i) are necessary as an aid to interpretation of the operative part of the Decision, or (ii) constitute the essential basis or provide the necessary support for the operative part of the Decision are binding;

   (b) pursuant to (a), the findings in the recitals, or derived from the recitals, as set out in the Judgment are binding;

   (c) the English law principle of abuse of process is applicable in the present cases because the Decision was a settlement decision, adopted pursuant to the Commission's settlement procedure, in which the Addressee Defendants expressly admitted the facts as outlined in the Decision;

   (d) pursuant to (c), the question whether it is an abuse of process for the Addressee Defendants to contest the findings in the other recitals (i.e. recitals which are not binding under (b) above) is to be determined according to the principles set out in the Judgment at para [141].

3. The determinations at (a) and (b) above concerned questions of EU law. The determinations at (c) and (d) above concerned questions of domestic law.

4. There is significant overlap between the defendants in the seven actions but they are not identical. In particular, of the three actions which are the subject of this Ruling, DAF is the only defendant to the claims brought by Royal Mail and BT, whose cases are being heard together through all stages. DAF, Daimler and Volvo/Renault are defendants to the claim brought by Dawsongroup; and they are for the most part also defendants, or Part 20 defendants, in the other four actions, which involve other, additional defendants.[1]

5. Royal Mail, BT and Dawsongroup are represented by the same solicitors and counsel. Each of the defendant groups is separately represented. However, although each separately represented party put in its own pleading covering both the EU and domestic law questions, for the hearing of the preliminary issue the parties on each side sensibly divided the argument between themselves to avoid repetition. Thus, the principal argument on the domestic law questions was addressed at the hearing by leading counsel for the so-called VSW claimants.

6. The VSW claimants (whose claims are being heard together throughout) and Ryder have separately reached agreement with the relevant defendants (i.e. the defendants to their claims) that the costs of the preliminary issue as between them shall be costs in the case. Royal Mail, BT and Dawsongroup ("the BCLP claimants") each seek an order:

   (a) as against DAF, of its costs of dealing with DAF's argument that none of the recitals in the Decision were binding;

   (b) as against the defendants in its action, of the costs of the domestic law questions;

   (c) that the costs of the EU law questions be costs in the case;

   and they seek a summary assessment of those costs.

7. DAF, Daimler and Volvo/Renault all submit that the appropriate order is costs in the case and they oppose any summary assessment.

[1] Daimler was originally named as a Part 20 defendant in the Suez and Veolia actions but it has been removed from those proceedings.

The Tribunal's rules as to costs

8. The Tribunal's power to award costs is governed by rule 104 of the Competition Appeal Tribunal Rules 2015. Rule 104(2) provides:

> "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."

Rule 104(4) sets out a number of factors which may be taken into account when making an order under paragraph (2), including:

> "(a) the conduct of all parties in relation to the proceedings;
>
> ...
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;"

9. The Tribunal may make a summary assessment of costs or direct that they be dealt with by the detailed assessment of, in an English case, a costs officer of the Senior Courts of England and Wales: rule 104(5).

(1) The DAF argument

10. DAF ran a distinct argument in opposition to the Claimants' case on the EU law questions, contending that only the operative part of the Decision is binding, and accordingly that none of the recitals are binding. In the alternative, DAF adopted the position of all the other defendants on the EU law questions.

11. The Judgment rejected DAF's argument: see at [28]-[31]. But this formed a small part of the consideration of the EU law questions. In almost all litigation, especially hard fought litigation of this scale, there will be a range of arguments deployed on particular issues, and a successful party will often not succeed on every argument. Although there may be good reason, as set out below, to make an issues-based order for costs, that does not mean that costs should be separately determined for each argument being deployed in respect of each issue. On the contrary, such an approach would involve an

inappropriate level of granularity and be extremely complicated to apply in practice when it came to assessment.

12. Although the DAF argument was distinct, it was a pure argument of law and took up little time. At most, as DAF puts it in its response to the present applications, it was a "sub-issue" and it relied on some of the same authorities as the EU law issue altogether. We consider that it would be wholly inappropriate to make that argument, within the broader EU law questions, the subject of a separate costs order. Accordingly, we reject this part of the BCLP claimants' application.

(2) The domestic law questions

13. These questions together formed an entirely separate part of the case. Indeed, the preliminary issue in effect was in two parts, as reflected in the structure of the Judgment: the issue under EU law and the issue as regards the abuse of process under English law. That is further illustrated by the fact that the defendants are appealing the Judgment as regards abuse of process but not as regards the decision on the EU law questions.

14. The defendants roundly contended that abuse of process has no application at all in these cases. To the question which side was the overall 'winner' of the abuse of process issue, in our view the answer is that it was the claimants. It is true that the claimants were not completely successful, in that the Tribunal held that in particular circumstances it would not be an abuse for a defendant to put forward a case or advance facts inconsistent with a recital: see paragraph 141(3)-(4) of the Judgment. Further, a defendant may be able to justify advancing a positive case inconsistent with a recital: paragraph 141(6). But those are circumscribed exceptions to the general rejection of the defendants' fundamental case on abuse of process, as again illustrated by the fact that it is the defendants who are appealing the Judgment in that regard.

15. Moreover, the domestic law questions were substantial, involving consideration of significant domestic law jurisprudence on abuse of process and of the Commission's settlement process.

16. While the appropriate treatment of costs is very case-specific, as the Tribunal noted in *UK Trucks Claim Ltd v Fiat Chrysler Automobiles NV and Others* [2019] CAT 29 at [4], it is generally appropriate for costs to be ordered in favour of the successful party

when a distinct aspect of complex litigation such as a preliminary issue is determined. Further, when a party has succeeded on a significant and discrete part of the case, we consider that it is appropriate and salutary that this is reflected in an order of costs, as rule 104(4)(c) envisages. We do not see that the fact that the issue did not involve any evidence should in itself lead to a different approach. Moreover, although the decision to order such an issue was taken as a matter of case management, the hearing of the issue and the substantial argument deployed in respect of it on all sides, leading to a substantive judgment on the law, involved the determination of an important issue arising in the cases and not case management.

17. While we therefore consider that a costs order of this part of the case in favour of the BCLP claimants is appropriate, there should be a discount from those costs to reflect the fact that the claimants were not wholly successful. In our view, having regard to the scope and extent of the arguments canvassed on abuse of process, the appropriate discount is 25%.

18. While it is often desirable instead of an issue-based order for the court or tribunal itself to assess the proportion of the case devoted to that issue and then reflect this in terms of a percentage of the overall costs, we feel unable to do so here. The fact that the oral arguments were shared out between the claimants, some of whom are not involved in these costs applications, may have involved some costs sharing arrangements between them of which we are not aware. We would only say, for the guidance of any detailed assessment (see below), that we consider that the abuse of process issue, or domestic law questions, in our view amounted to a little under half (i.e. c. 45%) of the written and oral argument on the preliminary issue.

19. We do not think that the approach to the costs of the abuse of process part of the case is here affected by the decision on the EU law questions. As regards that part of the case, we regard the outcome as approximately mid-way between the more extreme positions advanced by the claimants and by the defendants. Accordingly, for that aspect we consider that the BCLP claimants are correct (save as regards the DAF argument discussed above) in their submission that the costs be in the case.

20. We should add that the fact that the non-BCLP claimants have agreed a different order for costs with the defendants to their actions, which is relied on by DAF, Daimler and

Volvo/Renault in opposing the present applications, is not in our view of much relevance. There are all kinds of reasons why parties may agree on a particular determination of costs. We have to decide these applications on the basis of the nature of the issue, the position adopted by the parties to the BCLP actions, and the outcome as set out in the Judgment.

Assessment

21. We do not think it is appropriate for us to carry out a summary assessment of the BCLP claimants' costs of the abuse of process part of the preliminary issue. This was a substantial, multi-party hearing, lasting three days. That alone makes this less suitable to summary assessment. Further, there is the potential complication of any costs-sharing arrangement between the BCLP claimants and the other claimants, to which we refer above.

Conclusion

22. Accordingly, we will order that:

    (a) Each of Royal Mail, BT and Dawsongroup will recover 75% of their costs attributable to the domestic law questions (i.e. the abuse of process aspect) of the preliminary issue as against the defendants to their respective actions;

    (b) The costs under (a), if not agreed, are to be assessed by a costs officer of the Senior Courts of England and Wales, such assessment not to occur until after the appeals to the Court of Appeal have been determined;

    (c) Save as aforesaid, the costs of the preliminary issue of the parties to the Royal Mail, BT and Dawsongroup actions will be costs in the case.

23. Further, the BCLP claimants may seek to apply for a payment on account of their costs. As we understand their applications, they do not in any event seek payment until after the determination of the defendants' appeals to the Court of Appeal, which are now to be heard in early October. Accordingly, we give the BCLP claimants permission to make such an application following the determination of those appeals, supported by schedules of costs. The defendants will of course have an opportunity to respond to any such application.

24. Finally, in view of our resolution of these applications, we do not make any order as regards the costs of the applications themselves.

The Hon Mr Justice Roth
President

The Hon Mr Justice Fancourt

Hodge Malek QC

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 23 June 2020