Neutral citation [2021] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 May 2021

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

Claimant

-v-

DAF TRUCKS LIMITED & OTHERS

Defendants

BT GROUP PLC & OTHERS

Claimants

-v-

DAF TRUCKS LIMITED & OTHERS

Defendants

Heard remotely on 1 and 2 March 2021

JUDGMENT: EXPERT EVIDENCE AND AMENDMENT

APPEARANCES

Mr Ben Lask and Ms Anneliese Blackwood (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Claimants.

Mr Daniel Beard QC, Mr Rob Williams QC and Ms Daisy Mackersie (instructed by Travers Smith LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. A large number of claims have been brought seeking damages following on from the decision of the European Commission of 19 July 2016 in *Trucks* ("the Decision"). The first two of those claims listed for trial, to be heard together starting in April 2022, are claims by Royal Mail Group Ltd ("Royal Mail") and by three companies in the BT group ("BT") against the three companies in the DAF group which were addressees of the Decision, along with some other DAF group companies (together "DAF").

2. A case management conference ("CMC") was held in these claims on 1-2 March 2021 to deal with various outstanding issues. Some of those issues were fully determined in the course of the hearing. However, on one issue we announced our ruling with reasons to follow and we reserved our decision on a further issue. This judgment sets out the reasons for the former ruling and our decision on the latter.

B. EXPERT EVIDENCE FROM PROFESSOR NEVEN ON SUPPLY PASS-ON AND ASSOCIATED DISCLOSURE

3. Royal Mail and BT claim damages as regards trucks which they purchased from DAF based on the alleged elevated prices caused by the cartel between truck manufacturers that was the subject of the Decision ("the overcharge"). One significant issue is whether the Claimants passed-on part or all of the overcharge to customers of their products or services ("the supply pass-on issue"). It is common ground that the burden of establishing such pass-on rests on DAF but, because of the asymmetry of information in this regard as between claimants and defendants, the Claimants are under a heavy obligation of disclosure as regards this issue.

4. Both Claimants and DAF have been granted permission to adduce evidence from an expert on the calculation of such pass-on. DAF's expert for this purpose is Mr Mark Bezant, a senior managing director of FTI Consulting where he leads the economic and financial consulting practice. The Claimants' expert is Mr James Harvey of Economic Insight, who has extensive experience advising on competition and regulatory issues.

5. The method Mr Bezant intends to use is a forensic accounting exercise which involves scrutinising a very large volume of data obtained by disclosure from each Claimant.

Both Royal Mail and BT are subject to price regulation as regards a significant part of their businesses. Mr Bezant proposes to carry out his analysis separately as regards the regulated and unregulated parts of the business of Royal Mail and BT, respectively. He states in his first witness statement:

> "I anticipate my analysis in respect of the Claimants' regulated activities will provide a high degree of precision in the quantification of Supply Pass-on. This is because there is often a direct and mechanical link between the Claimants' costs and the prices that it [sic] is permitted to charge its customers in respect of products/services that are subject to regulation."

He explains that as regards the Claimants' unregulated activities, he will produce an estimate of the supply pass-on by examining the processes by which the Claimants dealt with the recovery of costs in their business. He says in his evidence:

> "Notwithstanding the likely relationship between the overall costs and prices of a business, especially over the longer term…, I would investigate the causal relationship between the Claimants' Truck costs and the prices the Claimants charged for goods and services supplied to their customers, to identify the mechanisms by which Supply Pass-on could occur (including verifying the relationship between the Claimants' Truck costs and different measures of total (or variable) average costs). I will then seek to measure, to the extent possible, the scale of Supply Pass-on over the period covered by the Claimants' claims."

6. Mr Harvey, who is an economist not an accountant, nonetheless intends to use a broadly similar form of analysis to address the supply pass-on issue. Indeed, Mr Bezant observes in his second witness statement, having read the evidence of Mr Harvey:

> "I note that Mr Harvey's proposed approach to the Supply Pass-on Analysis… is broadly similar to the approach which I intend to adopt …. I am of the view that any substantive differences in our proposed approaches relate to points of detail regarding the implementation of our respective approaches."

As a result, the Tribunal should be able at trial to focus on a single methodology to assess the strength and robustness of the respective evidence of these two experts insofar as they differ in their conclusions.

7. However, DAF applied to adduce on the supply pass-on issue, in addition, expert evidence from Professor Neven, who is a very experienced competition economist. Professor Neven proposes to use a different approach, namely a reduced form of regression analysis to examine the relationship between each Claimant's input costs and prices. That analysis would be confined to the Claimants' unregulated activities.

8. Although this would not cover the Claimants' regulated activities, such an analysis, would require very significant additional disclosure. Professor Neven says in his witness statement:

> "My analysis would rely on data which is different to the data/documents which Mr Bezant proposes to use for his analysis. In particular, my econometric analysis would use data on the Claimants' prices and costs at a more disaggregated level (i.e. by product line/service description) than that which is required for a forensic accounting analysis. Disaggregated data on revenue, costs and volume of sales is required to empirically estimate the relationship between observed changes in the Claimants' costs and observed changes in the prices that the Claimants charge their customers for the goods and services that they provide (while controlling for other important factors that determine those prices)."

9. The data required for this is set out in DAF's disclosure request where it is referred to as category PO7. After revisions to reduce its scope, PO7 comprises:

> "Detailed monthly sales data for the Claimants' unregulated products (at the lowest level of product line aggregation recorded by the Claimants) by individual units if applicable, for the Claimants' sales, which reflect directly, or indirectly, a charge for the cost of Trucks, including data relating to:
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> a) Description of the product or service provided by the Claimants;
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> b) Fixed and variable revenues;
>
> c) Not used
>
> d) Fixed and variable costs, including division between cost attributed to Trucks and to other cost sources;
>
> e) Not used
>
> f) Quantities supplied of products or services provided by the Claimants;
>
> g) Any relevant customer classification."

10. Professor Neven states:

> "I expect that my econometric analysis would provide a more precise estimate of the degree of actual pass-on than the forensic exercise, which closely reflects the Claimants' pricing decisions because it would be an *ex-post* assessment of actual cost pass-through, based on systematically observed price and input cost data, controlling for other relevant factors that determine prices".

11. The Claimants strongly opposed DAF being granted permission to call a second expert on supply pass-on and the associated disclosure. They argued that the limited regression analysis, in the way Professor Neven here proposes to conduct it, by reason of its limited

nature, would not yield robust results and that the increase in precision, if any, is likely to be small. Further, they submitted that the disclosure sought would be hugely burdensome, not only because of the breadth of the documents and data involved but because it covers a period of 23 years (i.e. 276 months). Further, they stated that it would be challenging to access various legacy systems in which such historic data was kept, especially as there have been a number of reorganisations at both corporate groups since 1996, the commencement date for this exercise.

12. We refused DAF's application. In *Sainsbury's v Mastercard* [2020] UKSC 24, the Supreme Court held that the extent to which a merchant passed-on an overcharge is a matter of estimation to which the so-called "broad axe" principle of quantification is applied. The Court stated, at [217]:

> "The court in applying the compensatory principle is charged with avoiding under-compensation and also over-compensation. Justice is not achieved if a claimant receives less or more than its actual loss. But in applying the principle the court must also have regard to another principle, enshrined in the overriding objective of the Civil Procedure Rules, that legal disputes should be dealt with at a proportionate cost. The court and the parties may have to forgo precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates. The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved…."

13. Cartel damages claims involve a large exercise in expert quantification, often, as here, over an extended time period. There are various techniques or methodologies recognised by economic experts as a means of seeking to arrive at the required quantification: see the summary of the various techniques in the European Commission's Practical Guide on Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning in the European Union (2013: C-213(3440)), and the Commission's Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019/C267/07).

14. The use of additional techniques and gathering of ever more data may assist in achieving some greater precision. However, at the end of the day, the court or tribunal will have to arrive at what can only be an estimate. The need for proportionality to which the Supreme Court referred is, in our view, particularly important, even in very large claims. Using additional experts to address the same issue by different methods

can, as here, greatly expand the scope of disclosure, significantly increase costs and result in a longer trial, thereby taking up more court time and resources.

15. Moreover, as the Tribunal stated in its earlier disclosure ruling in the *Trucks* litigation on 15 January 2020 [2020] CAT 3 at [42]:

> "If very different methods [of expert analysis] were to be used, requiring vast amounts of different data, only for one or other method then to be challenged at trial as unsound or unreliable with an invitation to the Tribunal to reject it entirely, that would be conducive to a massive and hugely expensive waste of effort on disclosure."

16. Mr Daniel Beard QC accepted that Professor Neven's proposed regression analysis was not being proposed to fill any gaps in Mr Bezant's approach or method. It was duplicative in its object, but was a different method using a very substantial quantity of different data. We note that it would cover only a part of the supply pass-on issue as it would exclude regulated sectors. The Claimants' evidence was that as regards Royal Mail, based on the regulator public price control surveys, the proportion of business that is unregulated accounted for only 10% of Royal Mail's turnover; and that as regards BT, the great majority of trucks were used by BT Wholesale or BT Openreach, of which the vast majority of activities was subject to economic regulation during the cartel period. Mr Beard sought to cast doubt on these statements as reflecting the proportions of trucks purchased that may have been used in the unregulated businesses. But even if some modification is required on that account, it seems clear to us that the large majority of both Royal Mail's and BT's businesses which used trucks were subject to regulation. It follows that Professor Neven's analysis would in any event be relevant to only a small part of the claims.

17. We bear in mind the substantial additional disclosure required for Professor Neven's proposed analysis in proceedings where the extent of disclosure being provided by the Claimants is already vast. We consider that the broad scope of the PO7 category is evident from its terms and the period concerned, especially having regard to the scale of both the Royal Mail and BT businesses. Altogether, to allow the additional expert evidence and order the disclosure which Professor Neven would understandably require to conduct his regression analysis would not, in our judgment be a proportionate approach.

C. AMENDMENT TO PLEAD MITIGATION BY COSTS REDUCTION

18. DAF applied to re-re-re-re-amend its Defence in the Royal Mail claim and re-re-re-amend its Defence in the BT claim. The amendments sought are effectively the same.

19. In those Defences, DAF denies that any overcharge of Royal Mail or BT resulted from the infringement. But if, contrary to that plea, any overcharge is proved, DAF denies that any loss was thereby caused to Royal Mail or BT. The Defences, as they stand, plead in that regard that any overcharge was passed on to the Claimants' customers and/or subsequent buyers of the trucks in question, or offset by prices for second-hand trucks traded in by the Claimants. As things stand, only supply pass-on and the re-sale of the trucks in issue is relied upon.

20. DAF now seeks permission to plead a more specific case in relation to causation and loss. In some respects, this is clarifying or particularising its existing pleaded case about burden of proof and the Claimants raise no objection to this amendment, which we therefore permit. However, in their application notice, DAF also sought to add the following additional defences:[1]

> "30(c). Further or in the alternative, DAF contends that the Claimant mitigated any Overcharge by reducing the costs which it paid to its suppliers. Without limitation, DAF avers that the Claimant will have sought to mitigate any increase in its input costs by virtue of any such Overcharge by negotiating lower input costs and/or otherwise reducing its costs of supply.
>
> 30(d). Further or in the alternative, DAF contends that any Overcharge was offset by reductions in the prices which the Claimant paid for products or services which are complementary to the purchase of a Truck, including but not limited to bodies, trailers, body work and equipment, repair and maintenance (R&M) contracts, spare parts contracts, warranties (including extended warranties) and finance contracts, whether acquired as part of the same transaction as the Truck or not."

In argument, DAF accepted that para 30(c) should more appropriately read:

> "Further or in the alternative, DAF contends that the Claimant mitigated any Overcharge by reducing the costs which it paid to its suppliers. DAF avers that the Claimant will have sought to mitigate any such Overcharge by negotiating lower input costs and/or otherwise reducing its costs of supply."

[1] The paragraph references are to the draft Re-Re-Re-Re Amended Defence in the Royal Mail action. The corresponding paragraph 28 in the draft pleading in the BT action is identically worded.

Further, DAF limited the scope of its proposed para 30(d) so that it read:

> "30(d). Further or in the alternative, DAF contends that any Overcharge was offset by reductions in the prices which the Claimant paid for bodies or trailers which are complementary to the purchase of a Truck, whether acquired as part of the same transaction as the Truck or not."

and it no longer sought permission for the originally proposed amendment.

21. The Claimants objected to those amendments. At the CMC we gave reasons for permitting the more focused amendment in para 30(d) and gave directions for expert evidence relating to that plea. We now address the proposed amendment in para 30(c).

22. There was no difference between the parties about the legal test for allowing an amendment at this stage of the preparation for an expected trial in April 2022. The test is whether there is a realistic prospect of the plea succeeding at trial, the same test as that which applies on a summary judgment application. A realistic chance is one that carries some degree of conviction and is more than merely arguable: *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]. However, the court must take into account evidence that can reasonably be expected to be available at trial, as well as the evidence before it, and should be wary of deciding difficult or new points of law in the absence of real facts: *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), as approved in *TFL Management Services Ltd v Lloyds TSB Bank plc* [2013] EWCA Civ 1415 at [26], [27].

23. DAF further pleads that it cannot particularise its case until it obtains disclosure from the Claimants relating to their methods of controlling and negotiating their supplier costs. DAF relies on a general economic theory, i.e. that a business faced with increased supply costs in one area will seek to compensate for that extra cost by reducing other costs, in order to preserve profitability. DAF says that, beyond invoking that elementary theory, until it sees how Royal Mail and BT approached issues of cost control and budgeting, it is not in a position to plead how Royal Mail and BT mitigated loss arising from the overcharge but nevertheless it contends that they "would have" done so.

24. DAF accepts, as a matter of law, that it must prove that any mitigation which in fact occurred was caused by the overcharge. As it was put in argument by Mr

Beard, there has to be a sufficient causal connection as a matter of law between the putative overcharge and the way in which the loss was mitigated.

25. The origin of the proposed amendment is the recent decision of the Supreme Court in *Sainsbury's Supermarkets Limited v Visa Europe Services LLC* [2020] UKSC 24. That case concerned losses caused to merchants by reason of the multilateral interchange fee ("MIF") charged by the card customer's bank (the "issuing bank") to the merchant's bank (the "acquiring bank"), which fee is invariably passed on by the acquiring bank to the merchant as part of the bank's merchant service charge ("MSC"). The Supreme Court's judgment concerned three separate cases involving claims by large retailers against Visa and MasterCard for breach of EU and UK competition law, claiming damages based on the level of MIFs. The only judgment at first instance to address quantification of damage (since in the other two cases it was held that there was no breach) was that of the CAT: *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2016] CAT 11 ("the CAT *Sainsbury's* judgment"). The Supreme Court expressly adopted the view of the CAT, as set out at [434] and [455] of the CAT *Sainsbury's* judgment, that as a large-scale business and sophisticated retailer, a supermarket could respond to this fee in one of four ways:

> "205…(i) a merchant can do nothing in response to the increased cost and thereby suffer a corresponding reduction of profits or an enhanced loss; or (ii) the merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or restricting its capital expenditure; or (iii) the merchant can seek to reduce its costs by negotiation with its many suppliers; or (iv) the merchant can pass on the costs by increasing the prices which it charges its customers. Which option or combination of options a merchant will adopt will depend on the markets in which it operates and its response may be influenced by whether the cost was one to which it alone was subjected or was one which was shared by its competitors…"

26. In its judgment, the Supreme Court made the following observations about pass-on and mitigation of loss:

> "206. In our view the merchants are entitled to claim the overcharge on the MSC as the prima facie measure of their loss. But if there is evidence that they have adopted either option (iii) or (iv) or a combination of both to any extent, the compensatory principle mandates the court to take account of their effect and there will be a question of mitigation of loss, to which we now turn.
>
> […]

211. We are also satisfied that the merchants are correct in their assertion that there is a legal burden on the defendants to plead and prove that the merchants have mitigated their loss. See for example, *"The World Beauty"*, 154 per Lord Denning MR; *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778; [2016] 2 Lloyd's Rep 432, para 47 per Christopher Clarke LJ. The statement of the Court of Appeal in para 324 of its judgment in the present case is an accurate statement of English law:

> "Whether or not the unlawful charge has been passed on is a question of fact, the burden of proving which lies on the defendant … who asserts it."

But in the context of these appeals, as we discuss below, the significance of the legal burden should not be overstated.

[…]

215. We are not concerned in these appeals with additional benefits resulting from a victim's response to a wrong which was an independent commercial decision or with any allegation of a failure to take reasonable commercial steps in response to a loss. The issue of mitigation which arises is whether in fact the merchants have avoided all or part of their losses. In the classic case of *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, at 689 Viscount Haldane LC described the principle that the claimant cannot recover for avoided loss in these terms:

> "[W]hen in the course of his business [the claimant] has taken action *arising out of the transaction*, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account …" (Emphasis added).

Here also a question of legal or proximate causation arises as the underlined words show. But the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting. The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein? The merchants, having acted reasonably, are entitled to recover their factual loss. If the court were to conclude on the evidence that the merchant had by reducing the cost of its supplies or by the pass-on of the cost to its customers (options (iii) and (iv) in para 205 above) transferred all or part of its loss to others, its true loss would not be the prima facie measure of the overcharge but a lesser sum.

216. The legal burden lies on the operators of the schemes to establish that the merchants have recovered the costs incurred in the MSC. But once the defendants have raised the issue of mitigation, in the form of pass-on, there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business. Most of the relevant information about what a merchant actually has done to cover its costs, including the cost of the MSC, will be exclusively in the hands of the merchant itself. The merchant must therefore produce that evidence in order to forestall adverse inferences being taken against it by the court which seeks to apply the compensatory principle."

27. The Claimants' objections to permission to amend being given are, briefly, as follows:

(a) The mitigation plea is unreal and has no realistic prospect of success, given that the Claimants were unaware of the secret cartel the overcharge was a tiny

proportion of their annual expenditure and there is no reason to believe that any attempts to negotiate cost reductions would have been successful. The overcharge would not have been detected and responded to, so the causal link cannot be proved.

(b) Cost reduction would have been pursued by a business such as the Claimants' as a matter of course (rather than the business waiting for the price of Trucks to rise), but general budgetary control is insufficient to establish a causal connection between the overcharge and any saving of other costs. There must be a direct connection between the overcharge and steps taken to mitigate the loss.

(c) There is no factual evidence to support a conclusion of such mitigation in this case, not even in relation to other supplies by DAF itself.

(d) Economic theory is not itself a sufficient basis for a defence to be pleaded, except perhaps in a case where the facts are such that it is obvious that an overcharge is a significant proportion of a claimant's expenditure and that steps would almost inevitably have been taken to mitigate its unwelcome effect and the theory is accompanied by a robust method of analysis, capable of establishing the requisite causal connection.

(e) Further, where mitigation would most obviously be expected to be visible, in negotiations for other supplies from DAF, there is no evidence of such steps being taken.

(f) The forensic accounting analysis that DAF intend to deploy to prove mitigation is an unsuitable method by which to seek to establish cost reductions of this kind. DAF have elected not to pursue disclosure of any negotiations between the Claimants and their suppliers, and no direct causal connection between the overcharge and cost cutting is therefore capable of being established.

(g) More detailed factual and expert analysis by the Claimants, of the kind that would be required to prove or disprove any causal connection, is impractical in

the time available between now and April 2022, and in any event would be hugely expensive to conduct, given the complexity of the Claimants' businesses; so the proposed amendment will cause prejudice to the claimants far exceeding the prejudice to DAF in not being able to pursue a weak defence.

(h) Delay: the claims were brought over three years ago but a draft pleading of a mitigation defence was only provided first in October 2020.

28. DAF's response to the Claimants' objections is essentially that *Sainsbury's v Visa Europe* gives it the green light to plead para 30(c) and that what is required by way of causative connection is a subtle and imprecise question that can only be determined on the known facts of the case, and must therefore be determined at trial, not at this stage. DAF also submits that the gross amount of overcharge being very large (about £80 million in the case of Royal Mail and about £10.5 million in the case of BT), it might amount to a substantial proportion of a particular cost centre within Royal Mail or BT. DAF submits that Mr Bezant's methodology is appropriate and that it is unnecessary for it to go further in terms of its expert analysis. It contends that the fact that the Claimants did not respond by seeking to negotiate down the costs to them of DAF's other supplies does not mean that other costs were not reduced. As for delay, it was only with the decision of the Supreme Court last year that it became clear that category (iii) mitigation was a defence so that it could be pleaded in the way that it has been.

29. If the observations of the Supreme Court have the consequences which DAF suggests, they would appear to us to have serious implications for claims of this kind, where a trader who supplies goods or services alleges an overcharge by a cartelist supplier. Apart from any assertion that the trader in fact passed on to its customers the burden of the overcharge which it incurred, the cartelist would be able simply to allege that the trader has reduced its other costs in response to the overcharge, so that its overall amount of input costs remains the same (or at least increased by less than the amount of the overcharge), thereby negating (or reducing) the impact of the overcharge and its recoverable damages.

30. We note that in its judgment the Supreme Court affirmed the general understanding that it is no sufficient answer to a claim for loss resulting from overcharge that the profits of a claimant's business as a whole were unaffected.

31. If a defendant were able to plead in general terms that an overcharge was mitigated by measures taken to reduce costs from other suppliers, it would throw a significant evidential burden on to a claimant to demonstrate how it conducted its business in financial terms to minimise its costs on a year by year basis. The defendant will not be able to give particulars of how the claimant mitigated its loss, save to allege that it "would have" done so in response to the overcharge. Only documents disclosed by the claimant will show what was done following the overcharge, by whom, at what levels in the claimant's business, for what reason, with what consequences for its budget and cost control processes and with what results in terms of its supply costs in following years.

32. Indeed, it is not only in follow-on claims under EU and UK competition law where this issue may arise but many commercial claims for damages by businesses, where what is alleged is that financial loss was caused by a breach of contract that left the claimant to continue to run its business with its cash balance or income adversely affected. Even with a relatively straightforward case of non-delivery of goods in breach of contract, for which the claimant obtained a replacement supply in the market at greater expense, the claim for the difference between the contract price and the market price could be met, on this basis, with an argument that the claimant mitigated its loss on that contract by reducing prices on other supply contracts.

33. The effect of a pleaded mitigation defence in general terms is to cast a significant burden on a follow-on claimant to disclose and give evidence about its business operations and procedures, which in many cases, as here, may extend over a period of many years. The process of giving disclosure and providing evidence about the financial controls of a large business is likely to be very time consuming and very expensive. The Supreme Court emphasised in the *Sainsbury's* judgment at [189]:

> "The principle of effectiveness applies to the procedural and evidential rules by which the court determines whether and to what extent the claimant has suffered loss."

We have considered whether this principle may be contravened in certain cases by such a burden imposed on the pursuit of a claim for damages against a cartelist such as DAF. In some cases, including many of the other trucks damages claims, there will not be the degree of equality of arms that exists in these claims, where not only DAF but also the Claimants are very well resourced. There is a real risk, in our view, of infringement of this principle unless there is some basis other than pure theory for believing that a defence of mitigation has some factual basis for it and so can properly be pleaded.

34. For all these reasons, we do not consider that the Supreme Court could have been intending to countenance or encourage such an approach to pleading a defence of mitigation. This aspect of mitigation was not, as we understand it, argued before the Court; the issue on the appeal was whether, contrary to the holding of the Court of Appeal, the "broad axe" principle should apply to quantify pass-on in the same way that it applies to quantify overcharge. The Supreme Court had in mind and referred at [186] to the EU law principle of equivalence. It could not therefore have been intending to suggest that the principles applying to claims under EU competition law are different from those that apply in domestic claims for breach of statutory duty, and the principles applied to mitigation of damages in such claims are not, in our view, different from those which apply to damages in tort or breach of contract. Indeed, the Court of Appeal in the *Sainsbury's v Visa* case stated that the principles applicable under EU law as regards mitigation are entirely consistent with those under the common law: [2018] EWCA Civ 1536 at [327]. We do not regard the Supreme Court judgment as casting doubt on that statement. Therefore a claimant such as Royal Mail or BT in a damages claim under competition law should not be more vulnerable than a claimant in a domestic commercial claim to a defence of mitigation.

35. Accordingly, it seems to us that it cannot be enough for a defendant to plead that a claimant's business input costs as a whole were not increased, or that as part of the claimant business's ordinary financial operations and budgetary control processes its overall expenses were balanced against sales so that profits were not reduced. There must be something more to create a proximate causative link between the overcharge and a reduction in other input costs, so as to constitute mitigation. This can be inferred from the Supreme Court's citation from the *British Westinghouse* case at [215] of its judgment, its emphasis of the underlined words "… [the claimant] has taken action

arising out of the transaction", and its comment that "a question of legal or proximate causation arises".

36. We therefore consider that, for a defendant to be permitted to raise a plea of mitigation in this way in general terms, there must be something more than broad economic or business theory to support a reasonable inference that the claimant would in the particular case have sought to mitigate its loss and that the steps taken by it were triggered by, or at least causally connected to, the overcharge in the direct manner required by the *British Westinghouse* principle.

37. As we have said, where a defendant is in a position to make specific averments about the approach that the claimant in fact took in response to the alleged overcharge, it will be bound to plead them, rather than plead a wholly general allegation of mitigation of loss. A general plea in such circumstances is liable to be struck out, or permission to amend refused. We appreciate that, as the Supreme Court noted, in many cases the information asymmetry about the claimant's business operations will be marked and the defendant will not at the stage of pleading a defence be able to particularise its case. It may, however, be able to point to circumstances on the basis of which an assertion that costs mitigation was causally linked to the overcharge carries a degree of conviction.

38. Royal Mail and BT are both very large, sophisticated businesses, where complex cost control and budgeting operations are no doubt carried on at many levels, possibly even regionally in their cases. Further, in both their cases, there are regulated and unregulated parts of their businesses where the processes for balancing income and expenditure are different. DAF cannot be expected to know the detail of their internal operations, but it is aware of its own commercial dealings with each of them.

39. We note that DAF has not pleaded, and therefore we assume is unable to plead, that either Royal Mail or BT in fact mitigated the loss caused by the alleged overcharge by negotiating reduced prices for particular items or with particular suppliers, save for the plea in para 30(d) relating to truck bodies and trailers purchased as "complements" for the trucks. DAF is not pursuing its original draft plea that the prices which the Claimants paid for body work and equipment, repair and maintenance contracts, spare

parts contracts, warranties and finance contracts, whether acquired as part of the same transaction as the truck or not ("additional items"), were reduced in consequence of the alleged overcharge.

40. An attempt to reduce the cost of such additional items would have been an obvious, if not the most obvious, response of a business in the position of the Claimants, faced with an increase in the price of trucks purchased from DAF, if the economic theory on which DAF relies had applied in the direct and immediate manner suggested to the facts of their cases. If that had occurred, this would be known to DAF since such items were frequently supplied by DAF, often under the same contract as the sale of the trucks themselves. This would be clear support for DAF's argument that mitigation of loss in fact occurred, at least to some extent, and DAF would have pleaded it. We accept that as DAF denies any overcharge, it might not aver in terms that overcharge loss was mitigated, but DAF could still plead the facts relating to the negotiated prices of complements or other purchases as a factual basis in part for its alternative plea of costs reduction mitigation.

41. There is therefore no factual support identified by DAF in these cases for the application of the general economic theory in the direct and closely linked manner that meets the *British Westinghouse* test for mitigation as a matter of law. DAF's position is simply that their defence of mitigation in these circumstances is justified by the decision of the Supreme Court and that their proposed amendment as pleaded is adequate, given their lack of information about how the Claimants did in fact set about reducing their overall costs exposure in response to the (assumed) overcharge. DAF submits that, like Mastercard, it is unable to do better, at this stage, than rely on the self-evident proposition that a substantial and sophisticated business would seek to reduce its input costs as a response to an increase in the cost of one input. As a matter of law, DAF contends that, in reliance on *Sainsbury's v Visa Europe*, the defence has a realistic prospect of success. It does, however, accept that there must be a causative connection between the overcharge and the costs reduction. As Mr Beard put it in the course of argument: "one does need to have factual evidence that it was the putative rise in prices of the product that is said to be affected, the trucks, that feed into and are causative of, materially causative of … the fall in the prices … that are entered into with other

suppliers" and that it is insufficient to allege that all input costs of the business feed into business planning and that businesses recover their costs.

42. In our judgment, before a purely general plea of mitigation through business cost-reduction processes can be pleaded, in the way that DAF seek permission to do, there must be something identifiable in the facts of the particular case that gives rise to a prima facie inference that there may well be a direct causative link between the overcharge alleged and the prices paid by the claimant for other supplies that reduced the amount of the loss resulting from the overcharge. What is sufficient to give rise to such an inference will vary from case to case, but it may be found in facts such as a claimant's knowledge of the nature and amount of the overcharge (such that it is inherently likely that a claimant would seek to address it), the gross amount of the overcharge as a proportion of the claimant's relevant expenditure (the higher the proportion, the more likely it is that some step would have been taken to mitigate the impact), the relative ease with which the claimant's business could be expected to reduce certain input costs or input costs generally, or the fact that other supplies made by the defendant or its associates to the claimant have been renegotiated in years following the increase in the prices alleged to have been caused by the anti-competitive conduct.

43. We therefore hold that it is not sufficient for a defendant in the position of DAF to plead a defence of mitigation on the basis of broad economic theory and nothing more, where the effect of that would be to place a heavy onus on a claimant to disclose and explain its financial procedures and operations during the period of the operation of the cartel (or, if shorter, the period during when the overcharge is alleged to have been mitigated). There must be some plausible basis in fact for alleging that the claimant would have reduced the amount of the overcharge loss in a manner which amounts to legal mitigation. That is not to suggest that a defendant must have documents or evidence at the pleading stage capable of proving what the claimant did in response to the overcharge or that it was effective. It is understood that this material is unlikely, by its nature, to be available in sufficient detail. What is needed is some plausible factual foundation for the application of the broad economic theory in the way required to satisfy the *British Westinghouse* test that is relied upon, and for there being a causative connection between overcharge and cost cutting.

44. In *Sainsbury's*, it was plausible that a merchant facing a transparent service charge of between 2% and 3% of income from the majority of retail sales (almost all sales paid for by credit card or debit card), would have sought to recoup that significant cost by seeking to reduce the costs of supplies and/or passing it on to customers. Here, on the other hand, where the overcharge was not only covert but a tiny fraction of Royal Mail's and BT's expenditure, it is inherently unlikely that it would have been specifically addressed, but rather fed into the overall expenditure of the regulated or unregulated parts of the business. As DAF accepts, that general principle that all costs of all inputs are fed into business planning is insufficient to establish the necessary causative connection for a plea of mitigation of loss. Indeed, we note that in the *Sainsbury's* case, the Tribunal held (at [478(4)]:

> "Because we have concluded that the way in which the costs constituting the UK MIF were dealt with by Sainsbury's is unknowable, in that it is impossible to say what proportion of the overcharge was *(i)* passed-on in higher prices; or *(ii)* paid out of cost-savings; or *(iii)* paid for by reducing expenditure and so service levels, we also conclude that MasterCard's mitigation case should fail for this reason alone. As Lord Denham CJ noted in *Jebsen*,[2] the approach suggested by MasterCard involves "difficult and complicated inquiries which in a multitude of easily suggested cases…would render any result being arrived at by a [court] practically impossible". By way of example, MasterCard is simply unable to say what proportion of the overcharge was dealt with by way of pass-on, or cost-savings, or reduction in expenditure. Yet the latter case (reduction in expenditure) is a case where Sainsbury's business may suffer real harm. The effect of MasterCard's argument is effectively to transfer the burden of showing that a loss has <u>not</u> been mitigated from MasterCard to Sainsbury's."

On appeal, the Court of Appeal upheld the Tribunal's approach of distinguishing between economic assumptions and the applicable legal principles: judgment at [339]. That aspect of the decision was not challenged on the further appeal to the Supreme Court.

45. DAF is currently unable to identify any such factors. Indeed, the facts, so far as known, tend to point the other way. Royal Mail and BT were not aware of the alleged overcharge (DAF does not suggest otherwise) and so cannot be assumed to have addressed it specifically. The amount of the overcharge claimed, although large in gross terms, is a tiny proportion of the total annual expenditure of the Claimants at the relevant time: 0.08% in the case of Royal Mail; 0.044% in the case of British

[2] *Jebsen v East and West India Dock Co* (1875) LR 10 CP 300, cited in *British Westinghouse*.

Telecommunications plc, and 0.3% in the case of BT Fleet Ltd (the third claimant in the BT action). It is hard to imagine that those increases in overall expenditure would have "triggered" (to use the expression of Mr Bezant, DAF's expert forensic accountant) any response from Royal Mail or BT by way of seeking to negotiate lower prices with other suppliers. Mr Beard could only speculate generally as to whether there might be a smaller division or sub-division within either group's operations where the trucks overcharge might constitute a significantly higher proportion of its total expenditure.

46. It is understandable and credible that the costs of inputs from the same supplier or in the case of "complements" from other suppliers may have been addressed together. However, beyond its "complements" plea in paras 30(a)(A) and 30(d), DAF has no case to plead that there was any downwards adjustment in the prices of other ancillary items. Its pleaded case of mitigation on the basis of a reduction in the costs of complements was abandoned, save in respect of truck bodies and trailers, for which permission to amend has been granted. DAF therefore has elected not to pursue a defence that the costs of body work and equipment, repair and maintenance contracts, spare parts contracts, warranties and finance contracts, whether acquired as part of the same transaction as the truck or not, have been reduced in consequence of the alleged overcharge. If there is no realistic defence capable of being advanced on that basis, a defence based on reductions in other less connected input costs does not appear plausible, given the need for DAF to prove a sufficient causative link.

47. We are therefore not persuaded that DAF currently has a sufficiently arguable case - with realistic prospects of success - that any reduction of other input costs by the Claimants was triggered by the alleged overcharge. The defence in para 30(d) based on a linked reduction of the cost of truck bodies or trailers purchased from DAF is properly arguable and will be tried. By contrast, the application for permission to plead the general mitigation defence in para 30(c) is dismissed.

48. However, there is one additional and potentially important factor. DAF has sought more extensive disclosure from the Claimants in relation to the expert analysis of the separate pass-on defence to be performed by Mr Bezant on its behalf. Those aspects of the

disclosure sought that remained in dispute, following a measure of agreement and compromise on several categories, have now been determined by the Tribunal.

49. DAF contends that no further disclosure would be necessary at this stage to enable Mr Bezant to conduct an analysis for the purpose of the mitigation defence. The only circumstances in which further disclosure might be required in this regard are described by DAF as "unlikely" and are that the disclosure which is to be given to DAF substantiates a link between overcharge and cost-cutting but the information disclosed is insufficient for the purpose of examining the cost-cutting efforts and their resulting effect. We are not sure why DAF asserts that to be an unlikely eventuality, particularly as DAF did not obtain some of the broader categories of disclosure which it sought in relation to the pass-on defence. Nonetheless, once those documents have been disclosed and analysed by DAF, if DAF then considers that there is a proper factual basis in line with this judgment for it to advance a more general mitigation defence, it is open to DAF to draft a further amendment, with proper particulars of its intended case on mitigation, and seek permission to amend in those terms.

50. We would wish to emphasise that this is not an invitation to DAF to renew an application to amend in a leisurely way. Any such application would be considered by the Tribunal on its merits, taking into account the time that remains before the start of the trial and whether any prejudice will be caused to the Claimants by allowing an amendment at that time. In the context of the complexity and size of these claims, time is relatively short between now and the start of the trial: witness statements of fact are to be exchanged by 28 May 2021 and expert reports in late October 2021. In the event that the Claimants do not consent to any further draft of the plea of mitigation of loss by costs reduction that is provided to them, DAF must seek to have an application heard without delay.

51. We should add that we have not reached this conclusion on the basis of the Claimants' objection that the application for permission to amend was already too late when it was made. In case managing these claims together with other follow-on claims of a similar nature, the Tribunal did acquiesce in or agree to the suggestion that amendments to the pleading of pass-on and other defences should await the outcome of the judgment of

the Supreme Court. Since the amendments were first proposed and consent sought in October 2020, we do not find there to be culpable or prejudicial delay.

The Hon Mr Justice Roth
President

The Hon Mr Justice Fancourt

Hodge Malek QC

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 13 May 2021