Neutral citation [2022] CAT 18

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 April 2022

Before:

THE HONOURABLE MRS JUSTICE FALK DBE
(Chairwoman)
DR WILLIAM BISHOP
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

MARK McLAREN CLASS REPRESENTATIVE LIMITED

Applicant /
Class Representative

- v -

(1) MOL (EUROPE AFRICA) LTD
(2) MITSUI O.S.K. LINES LIMITED
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(4) KAWASAKI KISEN KAISHA LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHELMSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSEN ASA
(12) COMPANIA SUDAMERICANA DE VAPORES S.A.

Respondents /
Defendants

RULING (CLASS DEFINITION, SUB-CLASSES, PERMISSION TO APPEAL AND COSTS)

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A. INTRODUCTION

1. On 18 February 2022, the Tribunal issued its judgment ([2022] CAT 10) in respect of the Applicant's application for a CPO ("the Judgment"). The Tribunal refused MNW and KK's respective applications for summary judgment or strike out and granted the CPO, subject to: (i) the Applicant providing a plausible methodology to exclude losses attributable to certain deceased persons; and (ii) the parties providing brief submissions as to whether there is a need to identify any sub-class in relation to business customers in respect of downstream pass-on through increased prices charged for goods and services, or in relation to the Applicant's claim for compound interest for class members who acquired New Vehicles using finance.

2. The parties (save for CSAV) filed written submissions on the issues raised in the Judgment and all parties (including CSAV) made written submissions to the Tribunal in respect of the costs of the CPO Application.

3. Separately, MNW and KK each filed an application for permission to appeal the Judgment and for a stay of the proceedings pending final determination of the appeal or of any further application for permission to appeal to the Court of Appeal ("the PTA and Stay Applications").

4. The parties agreed that they were content for the Tribunal to determine the various matters on the papers.

5. This is the Tribunal's unanimous ruling, which deals with the parties' further submissions in respect of deceased persons and sub-classes, the PTA and Stay Applications and costs. This ruling uses the same abbreviations as the Judgment.

B. DECEASED PERSONS: CLASS DEFINITION AND METHODOLOGY

6. At paragraph 183 of the Judgment, the Tribunal indicated that it would be helpful for the class definition to be amended to clarify that it does not extend to persons who died before the issue of the collective proceedings claim form on 20 February 2020, but can encompass the personal representatives of those

who died thereafter. The Applicant has now put forward a proposed amendment to address this.

7. The proposed amendment to the class definition comprises wording to make clear that, in respect of a person who purchased or financed a New Vehicle or New Lease Vehicle during the Relevant Period and who died on or after 20 February 2020 (i.e. the date the s.47B CA claim was issued), his or her personal representative is a member of the class in accordance with rule 38(7)(c) of the CAT rules. "Personal Representative" is defined as the executor or administrator of an estate. However, any natural person who died before 20 February 2020 is excluded from the class.

8. The Tribunal notes that the Respondents do not object to the proposed amended class definition, and approves the proposed changes.

9. The methodology proposed by the Applicant to exclude losses attributable to deceased persons who died before 20 February 2020 can be summarised as follows. Mr Robinson proposes to obtain information on: (a) the composition of private customers in the proposed class broken down by age; and (b) the likelihood of death of private customers by age. The potential sources of data for the first category of information include survey data and data that may be available from the DVLA. Information on the second category can be estimated using actuarial tables or mortality data compiled by the Office of National Statistics. Combining this information, Mr Robinson anticipates that he could estimate the number of vehicles in each year of the Relevant Period which will have been registered by private customers who subsequently died before 20 February 2020.

10. The Respondents do not object to the Applicant's proposed methodology at this stage, subject to one refinement that they say should be made. This is that an additional step should be incorporated which entails obtaining data that reflects the preferences of individuals in particular age ranges for different New Vehicle brands, if such data is available.

11. The Tribunal notes the Respondents' reservation regarding the preferences of individuals in particular age ranges for different New Vehicle brands. The Tribunal is concerned that, even if this data were theoretically available, it could add an unwarranted level of complexity given the range of brands and different time periods in issue. In making this point the Tribunal also takes account of the fact that delivery charges were set by brand rather than by type of vehicle, such that (for example) a switch in the size of vehicle required by an older customer would not necessarily entail a different level of delivery charge.

12. If it transpired that data was readily available which could be taken into account without material cost implications, the Tribunal would be prepared to consider whether an adjustment to the proposed methodology should be made.

13. In other respects the Tribunal is satisfied that the Applicant has put forward a plausible methodology for excluding class members who died before 20 February 2020.

C. SUB-CLASSES

14. The Applicant, with whom the Respondents agreed, submitted that the identification of specific sub-classes in the CPO was unnecessary and difficult at this stage of the proceedings, and is something that ought to be revisited later in the proceedings. In the Applicant's view, all PCMs will have to satisfy the main class definition to be within the scope of the claim and this is not a case where the proposed sub-classes are alternative to one another. Although the Applicant intends to update its communications with PCMs to reflect the points that emerge from the Judgment to make clear to PCMs that any damages obtained may decrease (as a result of downstream pass-on) or increase (if the claim to compound interest succeeds), it was concerned that the identification of sub-classes in the CPO may confuse PCMs and unnecessarily complicate the Applicant's communications with them. The Respondents also queried whether the creation of a sub-class of business customers is the most efficient way to manage the pass-on issues in this case.

15. The Tribunal notes the parties' submissions on this issue. For the reasons given by the parties it does not propose to identify any sub-classes at this stage.

D. PERMISSION TO APPEAL

16. For the reasons summarised below, permission to appeal is refused on the basis that the appeal has no real prospect of success and there is no other compelling reason for an appeal to be heard.

(1) MNW's PTA Application

17. MNW (the First to Third and Fifth to Eleventh Respondents) seek permission to appeal on the ground that the Tribunal was wrong to conclude that the Applicant's methodology satisfies the *Microsoft* test and/or the tests for reverse summary judgment and strike out. Having rejected the Applicant's argument that, as a matter of law, loss could be established solely on the basis of the cartel's impact on the delivery charge (even if the overall price was unaffected by the cartel), the only conclusion open to the Tribunal was that the Applicant had not advanced any methodology for establishing loss.

18. We refuse this application. In summary, it will be for the Applicant to prove its case at trial. In particular, this will include demonstrating, in accordance with the evidence of its industry experts, that delivery charges are indeed treated as "a separate cost item which must be recovered, such that increases in delivery costs are not absorbed", and that they are "not simply wrapped up in, or considered as part of, a single undifferentiated price, but are considered separately" (Judgment at [125]). In other words, the Applicant will have to prove its case at trial that the overall price is not relevant on the facts, because delivery charges are considered separately and it was not the case that discounts were negotiated, or list prices were set, in a way that would have differed in the counterfactual (Judgment at [123]). The Respondents will obviously be fully entitled to challenge the Applicant's evidence, including by reference to evidence and submissions about the total price.

(2) KK's PTA Application

19. KK, the Fourth Respondent, seeks permission to appeal on the grounds that the Tribunal erred (i) in concluding that the Applicant had put forward a credible or plausible methodology and (ii) (due to those errors) in holding that the individual claims were "suitable" for pursuit by way of collective proceedings. The Tribunal notes that the two grounds raise the same issue.

20. KK's submissions were fully addressed in the Judgment. In particular, the Tribunal disagreed that the *Microsoft* test set the threshold as high as KK submits (see in particular paragraphs [104]-[113] of the Judgment, and the earlier analysis of the *Microsoft* test at [70]-[76]). The argument that the evidence of the Applicant's industry experts relating to NSCs benchmarking their delivery charges in line with increases in those of their competitors undermines the factual assertions that underpinned the Applicant's proposed methodology was also addressed in dealing with Mr Piccinin's submissions (see paragraphs [128]-[135] of the Judgment). We do not consider that the submissions now made have a real prospect of success or otherwise justify the grant of permission.

E. STAY

21. The Tribunal is not persuaded that the interests of justice require a stay pending the determination of any further application for permission to appeal to the Court of Appeal. In reaching that conclusion the Tribunal takes account of the lengthy period that has already elapsed since the matters complained of took place (between 2006 and 2012), and the costs protection the Respondents have through the arrangements put in place by the Applicant. Rather, the balance appears to be materially in favour of the claim now proceeding as expeditiously as is reasonable possible.

F. COSTS

22. As an initial point, the Tribunal notes the position of CSAV, the Twelfth Respondent, set out in a letter from its solicitors dated 11 March 2022, which

stated that there was no proper basis for awarding costs against it given the neutral position it adopted as to whether the CPO Application should be granted. The appropriate order in respect of CSAV is that, insofar as the order is costs in the case, it should be bound by that order.

23. Further, and for the avoidance of doubt, the decisions made below in respect of costs include the costs of the CMC on 19 March 2021, which were ordered to be costs in the CPO Application.

24. The Applicant's starting point is to take account of the costs incurred after deemed service of its CPO Application on 30 September 2020, excluding the costs of applying to serve out of the jurisdiction and subsequent service, the costs of correspondence relating to funding terms and adverse costs cover, and the amendments made to the collective proceedings claim form on 16 March 2021 (together, "Excluded Costs"). The total amount, net of Excluded Costs and inclusive of VAT, is £1,133,037.37 (the "Costs in Issue"). The Applicant submits that the Costs in Issue should be discounted by 10% to take account of the fact that some of those costs would have been incurred in any event to satisfy the Tribunal that the criteria for certification are satisfied. It therefore proposes that the Tribunal award 90% of the Costs in Issue, subject to detailed assessment if not agreed, with a payment on account of £815,786.90, being 80% of the Costs in Issue net of the 10% discount.

25. The Respondents maintain that, apart from the costs of the CMC, all costs up to the date of their responses to the CPO Application on 30 June 2021 should be costs in the case, and that for the period thereafter the Applicant should be awarded 70% of its costs (subject to detailed assessment if not agreed), with a further 20% being costs in the case and 10% not being recoverable. The Respondents also maintain that the payment on account claimed by the Applicant is excessive, both in principle and because the costs schedule produced showed that the Applicant had incurred unreasonable and disproportionate costs.

(1) "Start date"

26. As regards the "start date" for the award, on the facts of this particular case the Tribunal prefers the Applicant's submissions. An award that covers costs incurred only after the date on which the responses were served does not take account of the material expenses incurred in dealing with objections raised in correspondence before that date. The Respondents' position is also not obviously consistent with the costs order made at the CMC on 19 March 2021. The Tribunal notes that the Applicant has already excluded certain costs that would have been incurred in any event during the period between 30 September 2020 and 30 June 2021. Any further such costs are more appropriately excluded by reference to the discount discussed below.

27. The Respondents relied on the approach taken in *Le Patourel v BT Group plc* [2021] CAT 32 at [5] and *Gutmann v First MTR South Western Trains Limited & Others* [2021] CAT 36 at [43], [48] and [49], where costs were awarded as from the date of the responses to the CPO application. However, the start date was not a contentious issue in those cases, costs only being sought as from the date of the responses. We accept the Applicant's argument that it would be wrong not to take account of the substantial costs incurred in dealing with correspondence before 30 June 2021 that raised objections to the grant of the CPO, including objections that were not pursued.

28. For the avoidance of doubt, any costs in respect of funding terms and adverse costs cover, as well as service out and amendments to the collective proceedings claim form, should be excluded, irrespective of when incurred. These will be costs in the case.

(2) Discount

29. The Tribunal agrees with the Respondents that the discount proposed by the Applicant is too low, but its adjustment is more modest than the 20% proposed by the Respondents.

30. In reaching its conclusion, the Tribunal takes account of the fact that certain costs have already been excluded by the Applicant. However, realistically the Applicant would have incurred more than 10% of the balance in any event in satisfying the Tribunal that it was appropriate to grant a CPO, and in particular this would have been likely to involve a hearing.

31. The Tribunal considers that the appropriate discount is 15%. Thus, 15% of the Costs in Issue should be treated as costs in the case. In reaching this conclusion, the Tribunal has excluded from consideration the matters addressed in the next section in respect of defunct companies, compound interest and deceased persons. It should also be clarified that the Tribunal does not consider that the specific point raised by the Respondents in their submissions about needing to address sub-classes would have taken any material time. However, the Tribunal would have needed to be satisfied about a number of matters including, but not limited to, the plausibility of the methodology.

(3) Irrecoverable costs

32. The Respondents maintain that 10% of the costs claimed by the Applicant should be irrecoverable to reflect the removal of claims associated with defunct companies, the narrowing of the claim for compound interest, and the deceased persons issue.

33. The Tribunal considers that some adjustment is appropriate, particularly in respect of the inclusion of deceased persons, which was pursued at the CPO Application hearing. The Applicant not only lost on that issue, but in the Tribunal's view the legal position was relatively clear following *Merricks Remittal*.

34. Given that the issues on which the Respondents rely were relatively minor, and only one of them took time at the CPO Application hearing, the Tribunal considers that the appropriate adjustment is 5%. Therefore, 5% of the Costs in Issue should not be recoverable in any event.

(4) Costs award and payment on account

35. Given the sums involved, detailed assessment is clearly appropriate if agreement cannot be reached. Accordingly, the Tribunal awards 80% of the Costs in Issue against the First to Eleventh Respondents (that is, MNW and KK) on the standard basis, subject to detailed assessment if not agreed. Of the remaining 20%, 15% of the Costs in Issue are costs in the case (together with the Excluded Costs) and 5% are not recoverable in any event.

36. A payment on account is also clearly appropriate. The Tribunal has concluded that the appropriate award is of the order of 65% of 80% of the Costs in Issue, which it rounds slightly to an amount of £590,000 (inclusive of VAT). This reflects the fact that the costs claimed are very significant and, realistically, are likely to be scaled back to a material extent on a detailed assessment. In particular:

    (1) the hourly rates claimed are nearly 60% above guideline figures;

    (2) the Applicant's solicitors spent over 370 hours reviewing skeleton arguments and preparing and attending the CPO Application hearing, which appears very high given that the Applicant was represented by both leading and junior counsel; and

    (3) the Applicant's solicitors also spent 320 hours dealing with the Respondents' responses, which again appears very high given the heavy involvement of counsel and experts.

37. Subject to any application to vary the date, such payment on account is to be made within 21 days of the date of this ruling.

The Hon. Mrs Justice Falk DBE
Chairwoman

Dr William Bishop

Eamonn Doran

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 27 April 2022