Neutral citation [2019] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1282/7/7/18
1289/7/7/18

Victoria House
Bloomsbury Place
London WC1A 2EB

17 May 2019

Before:

THE HON MR JUSTICE ROTH
(President)
DR WILLIAM BISHOP
PROFESSOR STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

UK TRUCKS CLAIM LIMITED

Applicant / Proposed Class Representative

- v -

FIAT CHRYSLER AUTOMOBILES N.V. AND OTHERS

Respondents / Proposed Defendants

- and -

DAF TRUCKS N.V. AND OTHERS

Objectors in Case 1282

AND BETWEEN:

ROAD HAULAGE ASSOCIATION LIMITED

Applicant / Proposed Class Representative

- v -

MAN SE AND OTHERS

Respondents / Proposed Defendants

- and –

DAIMLER AG

VOLVO LASTVAGNAR AKTIEBOLAG

Objectors in Case 1289

Heard at Victoria House on 8 May 2019

JUDGMENT (ADJOURNMENT)

APPEARANCES

Mr Rhodri Thompson QC, Mr Adam Aldred and Mr Douglas Cochran (instructed by Weightmans LLP) appeared on behalf of UK Trucks Claim Limited.

Mr James Flynn QC, Mr David Went and Ms Emma Mockford (instructed by Backhouse Jones Solicitors and Addleshaw Goddard LLP) appeared on behalf of the Road Haulage Association Limited.

Ms Kelyn Bacon QC, Mr Tony Singla and Mr Matthew Kennedy (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Respondents in Cases 1282 and 1289.

Mr Daniel Beard QC, Mr Rob Williams and Mr David Gregory (instructed by Travers Smith LLP) appeared on behalf of the DAF Respondents in Case 1289 and Objectors in Case 1282.

Mr Paul Harris QC and Mr Michael Armitage (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Daimler Respondent in Case 1282 and Objector in Case 1289.

Mr Daniel Jowell QC and Mr Tom Pascoe (instructed by Slaughter and May) appeared on behalf of the MAN Respondents in Case 1289 and Objector in Case 1282.

Ms Sarah Abram and Mr Jon Lawrence (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Volvo Objector in Cases 1282 and 1289.

A. INTRODUCTION

1. Two applications have been issued before the Tribunal ("the CAT") for a Collective Proceedings Order ("CPO") regarding claims for damages following the European Commission's decision in *Trucks* of 19 July 2016 ("the Decision"). The first application is brought by UK Trucks Claim Ltd ("UKTC"), a special purpose vehicle set up to pursue these claims, and was filed on 18 May 2018. The second application is brought by the Road Haulage Association Ltd ("RHA"), the well-known trade association of those engaged in the haulage industry. That application was filed on 17 July 2018, but it was foreshadowed by a press release some two years earlier, in August 2016, announcing the RHA's intention to bring these proceedings.

2. The claims which both Applicants seek to bring are against some of the truck manufacturers who were addressees of the Decision. There is an overlap but not complete identity between the Respondents to the two applications. The UKTC application is brought against Iveco and Daimler (using the shorthand name of the corporate groups involved); the RHA application is against Iveco, MAN and DAF.

3. On 12 December 2018, the CAT gave directions for the conduct of the applications, including for responses by the Respondents and replies by the Applicants. We directed that the two applications should be heard together on the first available date after the end of May 2019, with a time estimate of five days. That hearing was subsequently fixed for the week of 3 June.

4. On 16 April 2019, the Court of Appeal handed down judgment in *Merricks v MasterCard Inc* [2019] EWCA Civ 674. That was an appeal against the judgment of the CAT refusing to certify an application for a CPO under the relevant provisions of the Competition Act 1998 ("CA 1998"). In essence, the Court of Appeal reversed the decision of the CAT and held that the legal approach which the CAT had adopted to the question of certification was incorrect.

5. The Court of Appeal refused permission to appeal to the Supreme Court but Mastercard has announced its intention of applying to the Supreme Court for permission to appeal.

6. In the light of those developments, the question arose whether the CAT should adjourn, either in whole or in part, these two applications to await the outcome of Mastercard's application and, if it is allowed, of the appeal before the Supreme Court. A further and related issue arose due to the volume of the replies served by the two Applicants on 3 May 2019. The reply by UKTC comprises 97 pages, including annexes. The reply by RHA comprises over 100 pages and it also served a reply report by its economic expert, Dr Peter Davis, of 195 pages. The Respondents say that in any event, given the unexpected length of the replies, they need more time to digest this material so that to proceed with the hearing on 3 June would be unfair and inappropriate, and that in any event seven days is now required given the extent and range of the arguments.

7. All the Respondents submitted that we should adjourn the June hearing. The two Applicants vigorously opposed any adjournment. At the conclusion of argument on this question on 8 May, we decided that we would adjourn the applications and that we would proceed in June to hear by way of preliminary issue whether the authorisation of UKTC and/or RHA as class representative should be refused, as the Respondents contend, on the grounds of their respective funding arrangements. This judgment sets out our reasons for that decision.

8. The Applicants helpfully reminded the Tribunal of what was said by Jackson LJ, with the concurrence of the other two members of the Court of Appeal, in an immigration case, *AB Sudan v Secretary of State for the Home Department* [2013] EWCA Civ 921. Noting that the question of whether or not to grant a stay is a case management decision for the court in question, Jackson LJ approved at [26] what was there said by the judge of first instance at para 27 of his judgment:

> "[…] In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters

> for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown."

9. Here, as we have observed, a stay is not agreed. The question was accordingly whether good reason is shown why we should not proceed with the hearing next month.

10. The statutory regime governing CPOs was introduced with effect from 1 October 2015 by the Consumer Rights Act 2015, which inserted various provisions into CA 1998. In providing for full class actions, including on an 'opt-out' basis, it is entirely novel in UK law. The Court of Appeal's decision in *Merricks* is the first consideration of these new statutory provisions by an appellate court, and in several respects the Court of Appeal took a materially different view from the CAT as to how the question of the eligibility of claims to be included in collective proceedings under s.47B(6) of the CA 1998 should be interpreted and determined.

11. The Court of Appeal held that a different approach from that put forward by the CAT should apply to, among other matters, the following:

    (a) the standard of scrutiny to be adopted in deciding a CPO application. The Court of Appeal held in effect that it should be the same as is applied on a strike-out application, which is clearly a distinctly lower standard than that applied by the CAT;

    (b) the test for assessing the availability of the data on which the applicant's expert proposes to rely in calculating damages. Again, the Court of Appeal held that the CAT applied too stringent an approach;

(c) what constitutes a common issue within the meaning of s.47B(6);

(d) how the certification hearing should be conducted. The approach which had been adopted in the CAT was condemned for being in effect a "mini trial", including questioning of the applicant's experts, which "therefore exposed the claim to a more vigorous process of examination than would have taken place at a strike-out application": *Merricks* at [53].

12. The present applications were prepared well before the Court of Appeal judgment and the Applicants contend that they could satisfy the more stringent requirements set out by the CAT in *Merricks.* Nothing in this judgment should be taken to express a view one way or the other in that regard. However, it is clear that if these applications were to proceed next month, they would have to be heard and determined according to the Court of Appeal's approach, which necessarily affects the procedure to be followed (e.g. as regards any questioning of the experts).

13. It is uncertain whether the Supreme Court will grant permission to appeal and, if it does, whether it will uphold the Court of Appeal's judgment, reverse it and restore the CAT's approach, or indeed set out a different approach. The Applicants go so far as to suggest that the Supreme Court is very unlikely to reverse the Court of Appeal on important aspects of its judgment. However, we consider that it is altogether impossible to engage in such speculation, especially as regards such an innovative statutory regime. All that we can say is that if the Supreme Court does hear the appeal, its judgment will be determinative as regards these fundamental aspects of the new regime.

14. Unsurprisingly, the Applicants in their Replies place considerable emphasis on the Court of Appeal judgment. It is unnecessary to set out extensive quotations but by way of example:

(a) the UKTC Reply, at para 6, summarises some of the points that emerge from the Court of Appeal judgment and then continues, at para 7:

> "These points are highly material to the approach to be adopted and the standard to be applied by the Tribunal in the assessment of the UKTC CPO Application, particularly in relation to the application for an opt-out order".

(b) The RHA Reply, at para 13, refers to the Respondents' submissions on the law governing collective actions in their Responses to the CPO application and notes that this preceded the Court of Appeal's judgment. The RHA Reply continues:

> "In consequence, much of what was said by the [Respondents] in respect of the law governing collective proceedings (at least insofar as it relied on the first instance decision in *Merricks v Mastercard* [2017] CAT 16 and, to a lesser degree, *Gibson v Pride Mobility Scooters* [2017] CAT 9) is now incorrect and should be ignored."

Further, under the heading "The approach to be taken to the eligibility requirement post *Merricks"*, the RHA Reply at para 21 refers to the reliance by Daimler on the statement by the CAT in *Merricks* regarding the fundamental approach to be adopted at the certification stage, and continues at para 22: "However, this approach to certification has been expressly disavowed by the Court of Appeal…"

15. As those passages in the Replies, and others which we need not refer to, indicate, the Court of Appeal prescribed for certification a fundamentally different approach which, as we have already observed, the CAT would necessarily adopt if these applications were to proceed in June. We do not therefore accept the submissions advanced for both UKTC and RHA that the issues in any appeal before the Supreme Court would be of limited or only indirect relevance to the present applications.

16. If we were to grant either, or both, CPOs applying the Court of Appeal test and if the Court of Appeal judgment was then reversed by the Supreme Court, it seems to us that we would have to hear argument on these applications again, no doubt formally on an application to revoke the CPOs under s.47B(9) of CA 1998. That would be avoided only if the Respondents were to concede that it would make no difference, a possibility we regard as fanciful.

17. We see considerable force in the submission that the five days set aside may now be insufficient and that the combined hearing is more likely to require seven days given the number of parties and range of arguments. But even if it could be accomplished in five days, the costs of repeating the process are very substantial indeed. We note that the RHA had apparently budgeted costs for a three day CPO hearing of £0.9 million (i.e. its own costs alone). In addition, there are of course UKTC's costs and the costs of each of the four Respondents and one objector (Volvo). We observe that Daimler's solicitors have exhibited a costs budget showing Daimler's costs of the CPO hearing alone at £1.86 million. Even if that may be unreasonably high, it is clear that the total costs, for all parties, of a five day hearing are likely to be well over £5 million. And the matter does not end there. If a CPO application were to be granted, the Applicant would doubtless wish to proceed to the next step, which involves setting a date by which all members of the class have to opt in to the proceedings or, if on UKTC's application we were to certify an opt-out collective proceedings, to serve notice that they are opting out. That involves appropriate advertising and publicity for the collective proceedings. Moreover, the Respondents would be required to plead their Defences to the substantive claims, followed by Replies by the Applicant(s). In that regard, we observe that the approval hearing for a CPO application is not necessarily a binary process. The lesson from other jurisdictions with considerable experience of class actions is that the court may sometimes indicate that it will require a modification of the class definition as a condition for certification of the proceedings. As counsel for some of the Respondents colourfully observed, if after a Supreme Court judgment the CAT were to hear the applications again, and the outcome of one or other were to be different, there would be great problems in unscrambling the egg.

18. Having regard to these considerations, we found unpersuasive the submissions for UKTC and RHA that an adjournment of the hearing would cause a lack of confidence or confusion amongst class members. In each case, the class comprises of commercial enterprises and we think that it should not be difficult to explain that the hearing of their case awaits the outcome of a potentially fundamental appeal before the UK's highest court. To the contrary, if the risk

were to materialise that the applications had to be heard again, with potentially a further process of opting-in or opting-out, we think that would be much more likely to cause concern and confusion, among class members.

19. Furthermore, aside from the potentially vast waste of money, proceeding with a full hearing in June would also potentially be hugely inefficient. In our view, that is a fact which is relevant not only for the parties but also for the resources of the CAT. The time taken up would also have an effect on other litigants in other cases.

20. We fully understand and appreciate the desire of the Applicants to progress their cases on behalf of the many thousands of small businesses who are part of their respective classes. However, at the end of the day these are damages claims, including, of course claims for interest on those damages. As we noted above, the RHA claim was some two years in preparation and the UKTC claim clearly also had a significant period of gestation before the proceedings were formally launched, given the depth and volume of material attached. Accordingly, there is no particular urgency in either application.

21. An issue was raised by Mr Thompson for UKTC regarding prejudice to the members of the class it seeks to represent in terms of limitation. As we understood it, this concerned the possibility that the limitation period applicable to the class members might expire during the period over which the application is adjourned. In that respect, we note that insofar as concerns individual claims brought before the CAT by reason of the Decision, the special two year limitation period expired in September 2018. Both these applications were launched within that limitation period. Mr Thompson expressed concern that the Respondents might argue that for members of the class who opted in or out, the limitation period was applicable to their individual decision in that respect and not to the commencement of the proceedings overall. However, the Respondents agreed to provide undertakings that they would not seek to argue that there was any limitation bar that arose for UK class members in the CAT by reason of any effluxion of time caused by the adjournment. Mr Thompson also submitted that if a class member was to sue in the High Court, where the usual six year limitation period applies, it might suffer from the effluxion of

time caused by a delay. However, it is not clear from when that six year limitation period would run, having regard to s.32 of the Limitation Act 1980: see *DSG Retail Ltd v Mastercard Inc* [2019] CAT 5. If a class member was seriously concerned about this, we would expect it to have issued a protective claim in the High Court in any event. Mr Flynn for the RHA expressly raised no domestic limitation concerns but submitted that foreign acquirers of trucks who might choose to opt in to the proceedings might be prejudiced under a foreign limitation rule, if applicable. The question of when the limitation period expires for individual claims by foreign members who might opt in to the class which RHA seeks to represent is complicated since it may depend on foreign law. But they could similarly issue protective claims in the High Court if they wished to sue here, or very possibly bring a claim in a foreign jurisdiction. However, we consider that these concerns about a limitation effect on potential individual claims is somewhat artificial: both the UKTC and the RHA claim forms assert, as part of the justification for bringing collective proceedings, that the sums at stake for many individual claimants would be insufficient for it to be cost effective for them to bring such individual proceedings.

22. We have to stand back and take a view of what is sensible and proportionate and in the interests of justice to all parties, and also to other litigants before the CAT. We do not find that any potential prejudice by reason of limitation is anywhere near sufficient to outweigh the substantial considerations that we have outlined above. In our view, there are manifestly strong reasons for an adjournment in the present circumstances.

23. However, as well as objecting to certification of the claims, the Respondents oppose both applications on the grounds that neither UKTC nor the RHA should be authorised to act as a class representative. That opposition is largely based on a series of arguments concerning the funding arrangements which the Applicants have respectively entered into. Those arguments concern, first, the application of the Damages-Based Agreements Regulations 2013, an issue raised in the Response by DAF; and secondly, detailed objections as regards the funding proposals of both Applicants set out in the Joint Costs and Funding Responses served on behalf of all the Respondents.

24. Although, all parties agreed that the first of these issues could be heard as a preliminary issue, the Respondents objected to hearing also the second, submitting that it was bound up with the overall substance of the applications. We do not agree. The points taken in the Joint Responses seem to us essentially discrete. None of those points is affected by the Court of Appeal judgment or by a potential further appeal in *Merricks.* We consider that it is eminently sensible to proceed to hear and determine those issues now, by way of preliminary issues. This has the benefit that if an unsuccessful party on those issues should seek to appeal, any potential appeal to the Court of Appeal could be heard while the *Merricks* case may be pending before the Supreme Court, thereby avoiding the further delay of an appeal on these issues later on. Carving out the funding issues for determination in June also has the advantage of shortening the time required for the eventual hearing of the balance of the CPO applications. Accordingly, that is the course which we decided to follow.

The Hon Mr Justice Roth
President

Dr William Bishop

Professor Stephen Wilks

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 17 May 2019