Neutral citation [2023] CAT 31

IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

16 May 2023

Before:

THE HONOURABLE MR JUSTICE MICHAEL GREEN
(Chair)
SIR IAIN MCMILLAN CBE FRSE DL
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

ROYAL MAIL GROUP LIMITED

Claimant

-and-

(1) DAF TRUCKS LIMITED
(2) DAF TRUCKS N.V.
(3) DAF TRUCKS DEUTSCHLAND GMBH
(4) PACCAR INC
(5) PACCAR FINANCIAL PLC
(6) LEYLAND TRUCKS LIMITED

Defendants

AND BETWEEN:

(1) BT GROUP PLC
(2) BRITISH TELECOMMUNICATIONS PLC
(3) BT FLEET LIMITED

Claimants

-and-

(1) DAF TRUCKS LIMITED
(2) DAF TRUCKS N.V.
(3) DAF TRUCKS DEUTSCHLAND GMBH
(4) PACCAR INC

Defendants

RULING: PERMISSION TO APPEAL AND COSTS

A. INTRODUCTION

1. On 7 February 2023, we issued our judgment [2023] CAT 6 (the "**Judgment**") following the trial of the follow-on claims brought by Royal Mail and BT against DAF in relation to the Settlement Decision of the European Commission dated 19 July 2016. We adopt in this Ruling the same abbreviations and definitions as in the Judgment.

2. In the Judgment, we found DAF liable to the Claimants in respect of the Overcharge which we valued at 5% of their respective value of commerce. We rejected all of DAF's mitigation "*defences*". We applied Royal Mail's alternative interest rate to calculate its financing losses and we awarded BT simple interest of base rate plus 2%. As embodied in Orders dated 3 March 2023, this meant that DAF was liable to the Claimants for the following amounts:

   (1) to Royal Mail, £15,702,463 in respect of Overcharge losses and £19,400,249 in respect of financing losses to 7 February 2023; and

   (2) to BT, £1,974,068 in respect of Overcharge losses and interest of £1,461,696 to 7 February 2023.

3. DAF has applied for permission to appeal to the Court of Appeal ("**PTA**") on five grounds. The Claimants resist PTA and make their own applications for the costs of the proceedings and for them to be assessed on the indemnity basis. They also seek a payment on account of their costs. DAF does not resist a payment on account, though it does challenge the amount. It also resists the indemnity based assessment and argues that the Claimants should not receive 100% of their costs because they did not succeed on every issue.

4. The parties have provided us with written submissions on both issues and we are grateful to them for those. We make this Ruling without a hearing and based on the written submissions we have received.

B. PERMISSION TO APPEAL

(1) Introduction

5. DAF seeks PTA on the following five grounds:

   (1) Supply Pass-On ("**SPO**");

   (2) Burden of proof on quantum and role of "broad axe";

   (3) Burden of proof and lack of basis in relation to Value of Commerce ("**VoC**");

   (4) Lack of reasoning or basis for including EEV trucks in the damages assessment; and

   (5) Cost of debt methodology lacking proper basis or reasoning.

6. For the reasons set out below, we grant PTA on the First Ground in relation to SPO but refuse PTA on all the other Grounds.

(2) The Test for PTA

7. Both of these claims were transferred from the High Court to the CAT. By Orders of Mr Justice Roth dated 13 June 2018 and 13 July 2018 the terms of the transfer included provisions applying the Civil Procedure Rules ("**CPR**") to the claims and in relation to appeals stated as follows: "*any appeal to the Court of Appeal against the determination by the Tribunal of the issues transferred or an order of the court giving effect to that determination shall be governed by the rules in CPR Part 52*." Accordingly the test under s.49 of the Competition Act 1998 does not apply.

8. The test for PTA under CPR 52.6(1) is whether the appeal "*would have a real prospect of success*"; alternatively, whether "*there is some other compelling reason for the appeal to be heard*".

9. As DAF points out, this was the first case heard in the UK arising out of the Settlement Decision. There are a large number of other cases proceeding both in the UK and in Europe relying on the Settlement Decision and the Judgment may therefore be of importance to those other cases. We also decided some issues that had not previously been tested at a full trial. While that in itself is insufficient to justify giving PTA, we do bear this in mind in considering, in particular, whether there is some other compelling reason for PTA to be granted.

(3) Ground One: SPO

10. Even though we were agreed as to the outcome on SPO, namely that it did not reduce the damages payable by DAF to the Claimants, we were divided as to whether DAF had proved SPO on the facts. DAF submits that Mr Ridyard's dissenting opinion on SPO is correct and that it is "*overwhelmingly likely*" that a substantial portion of the Overcharge was passed-on in the form of higher downstream prices.

11. DAF argues that the majority erred in its approach to legal causation. However, it does not identify the respects in which the majority erred, and in any event, we were unanimous as to the legal test for SPO. DAF then goes on to suggest that the majority asked the wrong question for the purpose of assessing causation. But this is a challenge to the majority's evaluative judgment as to the expert and factual evidence, upon which an appeal court would exercise substantial "*appellate restraint*" in deciding whether the Judgment was wrong. Furthermore the majority was testing, as was the minority, whether the Claimants' prices would have been lower in the counterfactual without the Overcharge.

12. As we were agreed on the outcome, it is necessary for DAF to show that the minority was wrong in concluding that there should be no reduction in damages despite the finding that there had been SPO. This was on the basis that a reduction in damages when there were no viable downstream claims by the Claimants' customers would infringe the principle of effectiveness. DAF says that that result offends the compensatory principle and fails to take account of the collective proceedings regime. However, this was expressly taken into account but the minority concluded that any such proceedings by the Claimants' customers would face extreme difficulties.

13. By reference to the above we do not consider that DAF has a real prospect of successfully overturning our Order rejecting its SPO "*defence*". Nevertheless, we recognise that these are important issues in the development of competition law damages jurisprudence and this is the first time that there has been a trial at which the practical effect of the Supreme Court's judgment in *Sainsbury's Supermarkets Ltd v Mastercard Inc and Ors* [2021] UKSC 24 has been determined. While there has been consideration of *Sainsbury's* by the Court of Appeal in *NTN Corporation and Ors v Stellantis NV* [2022] EWCA Civ 16, this was not based on a full evaluation of the evidence and was on a different type of SPO (reduction of other costs caused by the Overcharge), albeit that the Supreme Court had treated them in the same way.

14. We therefore consider that there is another "*compelling reason*" for the appeal, as it is likely to have an impact on many other competition cases where SPO is raised as an issue. The fact that we were divided as to the relative importance of certain factors means that it is sensible for this to be looked at by the Court of Appeal to determine whose approach was the correct one.

(4) Ground Two: Burden of proof on quantum and the role of the "broad axe"

15. DAF suggests that we failed "*to impose any substantive burden on the Claimants to prove the quantum of their loss*". That is not an accurate characterisation of the approach we took. We clearly decided that the Claimants had established monetary loss on the balance of probabilities, having considered the totality of the vast amounts of evidence before us. While we made some criticisms of Mr Harvey's estimates and modelling, we did not reject his analysis in its entirety and positively found that the criticisms did not "*justify the extreme approach of dismissing all positive Overcharge results*." ([477] of the Judgment). DAF is striving to find a point of principle here for which PTA could be granted when in reality there is no such point and we followed the orthodox approach.

16. Having found there to have been loss caused by the Infringement we then applied the "*broad axe*" to determine quantum. DAF does not contend that this is the wrong approach. Instead it suggests that we placed too much burden on DAF to disprove the amount of the Overcharge. Again there is no point of principle here. We applied a broad

axe judgment based on all the evidence in the experts' models together with "*a wider appreciation of the factual context and witness evidence*". The reason for being able to use the broad axe is the difficulties of proof inherent in the quantification of competition law damages and to ensure compliance with the principles of effectiveness and proportionality. It involves an evaluative judgment which is most unlikely to be interfered with by an appeal court unless the decision is not explained or cannot reasonably be justified – see e.g. *Britned Development Ltd v ABB AB and Anor* [2020] 4 CMLR 7, at [123].

17. As to DAF's more specific point that our reasoning supporting the 5% Overcharge was based only on the second half of the Infringement period, this is misconceived. We rejected the "*spurious accuracy*" of doing our own mathematical exercise which would have had to take into account the different evidence relating to different parts of the Infringement period. But our broad axe judgment was based on the entirety of the evidence, both expert and factual. DAF also criticise us for not referring to all of Professor Neven's sensitivities but we referred to the "*numerous sensitivities*" and we were not required to refer to each one specifically. That is the point of a broad axe judgment.

18. There is no real prospect of DAF succeeding on this Ground; nor is there any other reason for this issue to be considered by the Court of Appeal. We therefore refuse PTA on this Ground.

(5) Ground Three: burden of proof and lack of basis in relation to VoC

19. DAF submits that we made two errors of law in respect of the VoC. First it says that we were wrong to include bodies as being subject to the Overcharge. Second it says that we were wrong to include maintenance rentals within Royal Mail's VoC.

20. As to the first point, DAF says that we failed properly to interpret the Settlement Decision by reference to its wording, context and objective. However we referred to the fact that DAF made a tactical decision not to adduce any evidence as to how the Cartel operated, leaving us in the dark as to how the Cartel might have affected the pricing of trucks, including extras such as truck bodies. There was no dispute that bodies were

included in the invoice for the truck and that the customer negotiated a price for the whole truck, including a body. The fact that DAF did not seek to exclude bodies from the Settlement Decision could reasonably be interpreted as its acceptance that they were included. And we took into account all relevant contextual evidence including the fact that there is a separate market for bodies and trailers with approximately 20 manufacturers none of whom were part of the Cartel and Mr Ashworth's evidence about negotiating a price "*for the whole truck*" with Royal Mail.

21. The second point concerning maintenance rentals was the subject of no argument at the trial, save for a small reference to it in a footnote in the Claimants' written closing submissions. It is also virtually a *de minimis* point affecting around 0.2% of Royal Mail's total damages award, approximately £71,000 of pre-tax Overcharge. We accepted the Claimants' explanation for its inclusion and their consequent calculation. There is no point of principle here.

22. There is no real prospect of DAF succeeding on either point; nor is there any wider point of principle that needs to be considered by the Court of Appeal. We therefore refuse PTA on this Ground.

(6) Ground Four: lack of reasoning or basis for including EEV trucks in the damages assessment

23. DAF submits that we were wrong to have awarded damages on EEV emission standard trucks when the Settlement Decision made no findings of breach in relation to EEV trucks. Again this forms a tiny part of the claim: approx. 1% or £63,000 of Royal Mail's trucks acquired; and approx. 5% or £67,000 of BT's trucks. In any event the Settlement Decision applied to all medium and heavy trucks without qualification and so EEV compliant medium and heavy trucks were within the scope of the Infringement. DAF admitted several instances of collusion concerning surcharges for EEV trucks. We found there to be a "*compelling case*" for the emissions premia to be treated as part of the Overcharge and this included such premia in respect of EEV trucks.

24. There is therefore no substance to this Ground and there is no real prospect of DAF succeeding on an appeal; nor is there any point of principle of wider impact. We refuse PTA on this Ground.

(7) Ground Five: cost of debt methodology lacks proper basis or reasoning

25. DAF contends that we were wrong to have preferred Mr Earwaker's approach over its expert, Mr Delamer, as regards the weighting between short term investments and reducing debt. It says that there was no evidence to support Mr Earwaker's "*binary approach*" and that it departs from reality.

26. However we had to assess how Royal Mail would have deployed its additional funds in the counterfactual. Mr Earwaker had referred to the factual evidence about the scale of Royal Mail's short term investments and borrowing over the relevant period, together with the evidence of its treasury management policies. He then applied his expert judgment as to how a company such as Royal Mail would have behaved with those additional funds. We found that to be a credible approach and it was based on the available evidence.

27. As to whether that approach departed from reality, we believe that this was an evaluative judgment that we made based on the expert evidence that we heard. As such it is most unlikely that the Court of Appeal would interfere in such a judgment.

28. Accordingly there is no real prospect of DAF succeeding on this Ground; nor is there any wider point of principle justifying reconsideration by the Court of Appeal and that is despite DAF's point that many competition claims have very substantial interest claims. We therefore refuse PTA on this Ground.

C. COSTS

(1) Introduction

29. There are a number of issues that arise in respect of the costs of these proceedings. The Claimants are seeking 100% of their costs to be paid by DAF and for such costs to be assessed on the indemnity basis. Furthermore they seek an interim payment on account of such costs as to 80% of Royal Mail's costs and 85% of BT's costs. DAF accepts that it must pay the Claimants' costs but says that they should not be assessed on the indemnity basis and that there should be a deduction from their costs to take account of issues on which it says the Claimants lost and to reflect the fact that the Claimants only actually recovered far less in monetary terms than they had originally claimed. DAF also accepts that it should pay a sum on account of such costs, but says it should be 50% of both Claimants' claimed costs.

30. Accordingly the issues for our decision are as follows:

    (1) How much of the Claimants' costs should be paid by DAF;

    (2) Whether those costs should be assessed on the indemnity or standard basis; and

    (3) How much should be paid by way of an interim payment on account.

31. By summary schedules of their incurred costs from 2016/2017 to 27 February 2023, the Claimants say their costs are as follows:

    (1) Royal Mail's costs from 2016, including an estimate of irrecoverable VAT, £13,166,967; and

    (2) BT's costs from 2017, £6,585,183.

(2) The incidence and amount of the Claimants' costs

32. There is no doubt that the Claimants were the winners and that the general rule, and starting point, is that the successful party is entitled to recover their costs. DAF accepts

this. But it says that there should be an issues-based approach and because it succeeded on certain issues – the WACC, the Hurdle Rate, Tax and Leasing – Royal Mail should only be awarded 75% of its costs, taking into account that Royal Mail should not recover its costs of those issues and DAF should recover its reasonable costs of those issues to be offset against its overall liability to pay Royal Mail's costs. DAF also says that both claims were exaggerated and they were awarded far less than they were claiming. In relation to BT, DAF says that this should be reflected in the costs award by reducing it to 90% of its costs, which it says also takes into account that it did not achieve the simple interest rate of 8% that it was claiming.

33. For the reasons set out below, we do not think there should be any reduction in the costs payable by DAF in respect of the matters raised by it.

34. Rule 104 of the Competition Appeal Tribunal Rules 2015 ("**CAT Rules**") provides for the CAT's discretion as to costs. It is a little different to the CPR provisions (it does not contain the general rule that the unsuccessful party will pay the costs of the successful party) but the relevant factors are very similar. The Rule relevantly provides as follows:

> "(2) The Tribunal may at its discretion, subject to rules 48 and 49, 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.
>
> …
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of –
>
> (a) the conduct of all parties in relating to the proceedings;
>
> (b) any schedule of incurred or estimated costs filed by the parties;
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (d) any admissible offer to settle made by a party which is drawn to the Tribunal's attention, and which is not a Rule 45 Offer to which costs consequences under rules 48 and 49 apply;
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount."

35. DAF says that the CAT has been more willing to make issues-based orders as recorded by Lady Rose in *Competition and Markets Authority v Flynn Pharma Ltd* [2022] 1 WLR 2972, at [140], where she observed that "*the CAT has been much readier than the High Court to make issues-based orders, by which I mean orders where a significant deduction is made from the winning party's costs award to reflect costs spent by both parties on issues which were either decided in favour of the overall loser or were not dealt with in the judgment*".

36. While that may be so, the ultimate objective in relation to costs is to make an order that reflects the overall justice of the circumstances of this case. In a case as complex as this, it might be expected that the winning party would not succeed on each and every live issue. It is therefore necessary to consider the reasonableness of the issue being taken, the amount of time spent at the trial on it and whether it was a sufficiently significant issue such that an adjustment to the winning party's recoverable costs should be made.

37. In the Judgment, we upheld the Claimants' claims as to the existence of the Overcharge and rejected all of DAF's defences. DAF ran every point possible and failed on nearly all of them and standing back it would be extremely harsh on the Claimants if the subsidiary issues on which they lost meant that they are deprived of some of their costs. Those issues were not fundamental and did not go to the heart of the case.

38. The main issue in respect of which DAF asserts that Royal Mail was unsuccessful was whether its financing losses should be assessed at the WACC rate. DAF says that it was unreasonable for Royal Mail to have run the point because the law was clear, as was the economics. Furthermore, in monetary terms it was very significant, both as originally pleaded and as put by Royal Mail at trial. Therefore DAF was bound to defend itself vigorously against the WACC claim and it claims to have spent approximately £2.14 million in doing so. That figure seems extraordinary to us.

39. Royal Mail says that this ignores the context for our consideration of the WACC. It was one of two bases put forward by Royal Mail for calculating its financing losses, the other being the alternative measure based on cost of debt and foregone returns on short term investments. DAF contested both bases and the claim for financing losses in its

entirety, including the claim to compound interest. On all but the WACC, we found in Royal Mail's favour on all contested issues. Furthermore, we did not, and do not, consider that it was unreasonable of Royal Mail to pursue the WACC claim; nor did it occupy much time at the trial and there was a substantial overlap in the experts' reports between the issues on the WACC and on the alternative measure which succeeded.

40. In the circumstances, we do not propose to make any deduction because Royal Mail lost its WACC claim.

41. On tax, the experts managed to reach agreement on nearly all the complicated issues that arose. In the event, those matters on which they ultimately disagreed did not need to be decided by us because they were both dependent on Royal Mail succeeding on the WACC claim. For completeness, we dealt with those issues in one paragraph [836] and decided them in DAF's favour. But this took up a relatively miniscule amount of time at trial and the costs in relation to this are insignificant by comparison with the overall costs. There is no reasonable basis to deduct anything from Royal Mail's costs in this respect.

42. DAF also refers to the hurdle rate claim that was originally being pursued by Royal Mail. This was withdrawn by Royal Mail in February 2021, well before factual and expert reports were filed, necessarily avoiding costs being wasted on the issue. When it was withdrawn, Mr Justice Roth ordered Royal Mail to pay DAF's costs of the amendments to withdraw and of the costs thrown away as a consequence of the claim. Therefore this is already taken account of and will not form part of Royal Mail's costs claim and it recognises that DAF may be entitled to set off its costs on this issue against its liability to Royal Mail for costs. That is why Royal Mail is only seeking 80% of its costs by way of interim payment on account. We do not see why any further deduction should be made in relation to the hurdle rate claim.

43. The final point relied on by DAF is in relation to leasing. This is not an issue that was lost by Royal Mail. Rather DAF says that late disclosure or realisation by Royal Mail that a far larger proportion of trucks had been leased rather than purchased outright led to an increase in the costs of the experts' work. We do not consider that Royal Mail behaved unreasonably in this respect; in a case of this size and complexity, involving

the analysis of records going back over 25 years, it is inevitable that the true position may take some time to establish. This was a normal litigation process. In any event, its claims in relation to leased trucks succeeded along with its claims in respect of the trucks bought outright. We do not think there is any real basis for reducing Royal Mail's recoverable costs by reference to the leasing issue.

44. In relation to the level of damages that we awarded by way of a 5% Overcharge, DAF contends that this is relevant to the level of costs that should be awarded. We disagree. DAF contended that there was no Overcharge and that in fact, any overcharge was "*implausible*". Accordingly the Claimants succeeded on the existence of the Overcharge and its amount was assessed by adopting the broad axe approach. The fact that this turned out at approximately half of what the Claimants were claiming at trial, and very much less than they had claimed in their pleadings, is immaterial to the level of costs to be paid by the losing party. DAF could have protected itself by making an offer to settle but it did not do so.

45. Finally, DAF refers to BT being unsuccessful in its claim to 8% simple interest. BT was awarded 2% above base rate in respect of interest, which was its alternative position at trial. Virtually no time was spent on this at the trial and it is impossible to see why there should be any deduction to BT's costs in this respect.

46. In conclusion, we do not make any deductions as to the Claimants' claims to costs.

(3) Indemnity Costs

47. We now turn to consider the Claimants' application for their costs to be assessed on the indemnity basis. We say at the outset that we are not going to order indemnity costs. Indemnity costs means that there is no requirement to prove proportionality. We emphasised in the Judgment (see e.g. [8] and [231]) that we felt that particularly the expert evidence was excessive and disproportionate. In order to keep it within what is proportionate, we think it is important to have such a requirement governing the assessment of recoverable costs.

48. With that overarching point we now consider the particular issues that the Claimants raise in this context.

49. As to the legal principles, it is common ground that consideration of an award of costs on an indemnity basis depends on whether there is something in the conduct of the action or circumstances of the case which take it "*out of the norm*" in a way which justifies an order for indemnity costs - *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879 at [32].

50. It is also not disputed that an award of indemnity costs will not necessarily involve conduct deserving of moral condemnation. An order for costs to be assessed on an indemnity basis is, however, in its nature penal - see Sir Terence Etherton C, as he then was, in *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 at [83]. Moreover, the conduct must be: "*unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight*" (per Simon Brown LJ (as he then was) in *Kiam v MGN Ltd (No 2)* [2002] 1 WLR 2810 at [12]).

51. The cases are very fact-specific and it is not normally helpful to refer to other cases where the facts will inevitably be very different.

52. There is a specific statutory scheme in place in the CPR and in parallel in the CAT Rules which means that when a claimant makes and subsequently beats a Part 36 (CPR) or Rule 45 (CAT Rules) offer at trial, they will obtain their costs on an indemnity basis from the date of the expiry of the relevant period following the making of the offer unless the court / CAT considers it unjust (CAT Rule 49(3)(b)). In other words, a successful offer under these rules creates a (rebuttable) presumption of indemnity costs from a certain point in time.

53. In fact the Claimants do rely on offers they made to settle which they did not succeed in beating (BT's offer was very close to being beaten). The Claimants say that we can take account of those offers under Rule 104(4)(d) in this context even though they do not attract the Rules 48 and 49 consequences, because they were offers that DAF unreasonably failed to accept. We think that this is misconceived for the reasons given by DAF. It amounts to a contention that it was so unreasonable of DAF not to have

accepted an offer that was more than the Claimants obtained at trial that DAF should be penalised in costs. What is more, this is relied upon by the Claimants for the whole of their costs to assessed on the indemnity basis, not limited to the period of time after the offer had been made.

54. DAF says that the Claimants' whole approach to this question is misconceived and we have some sympathy with that submission. This was hard fought litigation pursued vigorously by both sides, sometimes excessively and disproportionately so. It was, as originally pleaded, a claim for over £500 million which DAF was entitled to defend thoroughly in every respect. DAF also fairly points out that this was the first follow on damages trial in the UK where a number of important competition law issues were to be explored and decided. The fact that DAF ultimately lost most of the issues does not mean that it was so unreasonable for DAF to have run them that it should be penalised further in costs by an assessment on the indemnity basis.

55. The Claimants' submissions refer to a number of areas which they say take DAF's conduct of this litigation out of the norm so as justify an order for indemnity costs. These are dealt with in turn below.

DAF's failure to adduce relevant evidence

56. The Claimants say that DAF's decision not to adduce any evidence as to the operation of the Cartel was outside the "*ordinary and reasonable conduct of proceedings*". We relied on DAF's failure to adduce such evidence in our findings against DAF. So in a sense DAF has already been penalised for its decision in this respect. But more fundamentally, it is up to a party what evidence it decides to adduce, and it will presumably weigh up the risk of adverse findings being made against it as a result. But the burden was on the Claimants to prove their case and DAF appears to have complied with all its obligations in relation to disclosure and the provision of further information. There is no justification for saying that DAF's failure to adduce such evidence was out of the norm and it does not provide a basis for ordering indemnity costs.

Plausibility

57. The Claimants' arguments in relation to the implausibility case put forward by DAF focus on Professor Neven's expert evidence, which we criticised, in particular for his failure to address why the Cartelists would have exposed themselves to such risk of being involved in a 14-year cartel if there was no likelihood of increasing prices and his failure to explore other matters. We were also troubled by his lack of candour as to his past involvement with DAF. However we did also criticise Mr Harvey in some respects.

58. Nevertheless, it seems to us that DAF was entitled to rely on Professor Neven's reports and evidence to pursue the issue of plausibility. There is a danger of hindsight, knowing what we do now of the findings in the Judgment. The criticisms that we made were the result of an effective trial process in which his evidence and independence were properly tested in cross examination. But this does not prove that DAF should have appreciated that the plausibility issue was bound to fail or that it was unreasonably pursued.

Gross list prices and net prices

59. The Claimants suggest that DAF should not have maintained that there was no link between gross list prices and net prices because of the binding recitals in the Settlement Decision, its own witness evidence and the use of the timelines together with Professor Neven's empirical analyses. However these were simply points on which DAF lost at trial. They cannot, in our view, be elevated into a reason for ordering indemnity costs unless DAF's pursuit of them was so out of the norm. We do not think it was.

Downstream Defences

60. Again, the Claimants are really just relying on the fact that DAF lost on its mitigation "*defences*". That is insufficient to found an application for indemnity costs. Both Complements and Resale Pass-on were accepted to be sound defences as a matter of economic theory but the models used by Professor Neven did not come up to proof. We also criticised the approach adopted by Mr Harvey in these respects. Accordingly, this

comes nowhere near establishing that DAF was acting so unreasonably in pursuing these points that its conduct was out of the norm.

Limitation

61. The final point concerns limitation, which was pleaded by DAF but only finally confirmed as not being pursued in the closing submissions on the last day of the trial. While perhaps regrettable that it remained alive until then, minimal costs were expended on it, the Claimants did not cross examine any of DAF's witnesses on it and it is difficult to see how it is relevant on the question of indemnity costs.

62. In the circumstances, we dismiss the Claimants' application for indemnity costs. And we go further and say that it should not have been pursued and the Claimants should not recover their costs of pursuing the application from DAF.

(4) Interim Payment on account of costs

63. DAF does not dispute that an interim payment on account of the Claimants' costs is appropriate. The total costs figures are approx. £20 million but we have no details as to how these figures have been arrived at. Nor do we know whether they are out of line with DAF's costs. We suspect they are not, reflecting the fact of the scale, duration and complexity of the proceedings.

64. As noted above, DAF says it should pay 50% of the costs on account to each Claimant. It alights on this figure on the basis that it reflects a more realistic estimate of the reasonable costs likely to be determined on a detailed assessment and with a margin to allow for an overestimate.

65. The Claimants say that Royal Mail should receive 80% of its costs and BT, 85% and that this is being suggested by reference to a standard basis assessment. As noted above, the difference is because of the costs order in relation to the withdrawal by Royal Mail of the hurdle rate claim and to take account of a potential set off by DAF of its costs of that claim.

66. We consider that given the scale of the costs under consideration, the Claimants' percentages are too high and do not allow a sufficient margin for overestimation, taking into account that proportionality will also be relevant. Similarly DAF's 50% is unnecessarily cautious in relation to these costs, particularly where DAF has chosen not to disclose details of its own costs.

67. In the circumstances we will maintain the same distinction between Royal Mail and BT that the Claimants have suggested and order an interim payment on account of Royal Mail's costs of 70% and of BT's costs, 75%.

(5) Conclusion

68. By way of summary in relation to costs, we order that:

(1) DAF pay the Claimants' costs of these proceedings;

(2) Such costs are to be subject to detailed assessment if not agreed, such assessment to be on the standard basis;

(3) That DAF pay by way of interim payment on account of costs:

(a) To Royal Mail, 70% of its incurred costs as per the summary schedule to 27 February 2023 which is the sum of £9,216,878;

(b) To BT, 75% of its incurred costs as per the summary schedule to 27 February 2023 which is the sum of £4,938,888.

69. We would ask the parties to agree a form of order reflecting what we have ordered above.

The Hon. Mr Justice Michael Green Chair	Sir Iain McMillan CBE FRSE DL	Derek Ridyard

Charles Dhanowa OBE KC (*Hon*)
Registrar

Date: 16 May 2023