Neutral citation [2019] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1282/7/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

19 December 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

RULING: COSTS

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1. On 28 October 2019, the Tribunal issued its Judgment on a preliminary issue concerning the funding arrangements for two applications for a Collective Proceedings Order: [2019] CAT 26 ("the Judgment"). This ruling will use the same abbreviations as in the Judgment. One of the applicants, the RHA, has reached agreement with the Respondents and Daimler Objector regarding the costs of the preliminary issue, which has been embodied in a consent order. The other applicant, UKTC, now applies for its costs of the preliminary issue.

2. It appears from UKTC's written application that it seeks its costs against all the OEMs that were Respondents or Objectors to the application, including Volvo/Renault on the basis that the Objections filed by Volvo/Renault formally adopted the reasons put forward by the other Respondents and Objectors: see UKTC's submissions in respect of costs, fn. 2. However, Volvo/Renault were not a party to the joint Costs and Funding Responses to the CPO applications, nor were they represented at the hearing of the preliminary issue. We do not see any basis for an order against Volvo/Renault. The application will therefore be considered as against Iveco, Daimler, DAF and MAN.

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

> "The Tribunal may at its discretion, … at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings."

The Tribunal therefore has a broad discretion over costs.

4. The OEMs submit that the costs should be reserved until UKTC's application has been finally determined, so that all costs incurred on the application can be considered in the round. We do not agree. The objections to UKTC's funding arrangements formed a discrete aspect of the OEMs' response to the application, involving issues and evidence that have no bearing on the other grounds of objection to the application for a CPO. It was heard as a preliminary issue and (subject only to the possibility of an appeal, for which only DAF has sought permission) it is now over. While the appropriate treatment of costs is very case-specific, it is generally appropriate for costs to be ordered when a distinct aspect

of complex litigation is concluded. As Nugee J stated in *Merck KGaA v Merck Sharp & Dohme Corp* [2014] EWHC 3920 (Ch) at [6]:

> "It is in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do so when they lose them rather than leaving the costs to be swept up at trial."

In the present case, there is no reason to think that our view on the incidence of costs as regards the funding arguments and the preliminary issue would be influenced by anything we might later hear or decide on the other part of the opposition to a CPO. It is not without significance that the OEMs have agreed with the RHA to make a payment to it now for its costs of the preliminary issue. In our judgment, that was appropriate and it is appropriate to apply the same approach to UKTC.

5. As noted in the Judgment, the opposition to the funding arrangement was advanced in two parts:

   (1) an argument that UKTC's funding arrangements constituted a DBA and were therefore unenforceable and unlawful ("the DBA issue"); and

   (2) arguments as to the nature and adequacy of UKTC's funding arrangements ("the nature and adequacy issues").

   It is clear to us that the costs of the DBA argument have to be dealt with separately from the second group of arguments. Only DAF, Iveco and MAN put forward the DBA issue, and indeed they instructed separate counsel to advance it from counsel appearing for all the OEMs (except Volvo/Renault) on the nature and adequacy issues. Accordingly, Daimler cannot be liable for any part of the costs of the DBA issue.

6. UKTC urges us to make an issue-based costs order and the OEMs do not appear to oppose that approach. It is generally preferable to make an apportionment as between issues which are treated differently as regards costs, since it can be complex for a costs judge, who has had no involvement in the case, to determine what proportion relates to different issues. In the present case, Mr Surguy, of UKTC's solicitors, states in his witness statement supporting the application for

costs that his current understanding is that the costs spent on each of the two parts of the preliminary issue were broadly similar so that they should be allocated 50/50 for any preliminary assessment. We find that very hard to accept: not only did the argument on the DBA issue take up only one day of the three day hearing, but it was purely an argument of statutory construction and law, which therefore would have had limited involvement from the solicitors, whereas the argument on the nature and adequacy issues involved a series of witness statements from Mr Perrin and significant and successive revisions to some of the core documents. It seems clear to us that the solicitors' time would have been more heavily engaged on the second group of issues.

7. We should emphasise that the recoverable costs for present purposes are UKTC's costs of *meeting the objections* raised to the nature and adequacy of its funding arrangements; those are far from being all UKTC's costs of the funding aspects of its CPO application. The costs incurred in putting forward and explaining its funding arrangements in the first place were a necessary part of its application for a CPO and, if the application is eventually granted, will form part of its costs of the collective proceedings. However, without more information it is impossible for us to come to a fair apportionment. Accordingly, we have no alternative but to order that the costs shall be awarded on an issue basis as between the two parts of the opposition to the funding arrangements referred to above.

8. Since UKTC was wholly successful on the DBA issue, DAF, Iveco and MAN should pay the proportion of its costs attributable to that issue, to be subject to detailed assessment if not agreed.

9. As regards UKTC's costs attributed to the nature and adequacy issues, UKTC realistically recognises that there will be some discount from those costs given the extent to which it had to amend and revise its funding proposals, in response to both objections raised by the OEMs and concerns expressed by the Tribunal. UKTC suggests that this discount should be no more than 20%. In contrast, the OEMs propose a radically different approach. They submit that it was only subject to the various revisions and amendments that UKTC's funding arrangements were found by the Tribunal to be acceptable, such that they did not prevent the authorisation of UKTC as a class representative. The OEMs

therefore submit that this was like a late amendment to a claim which succeeded only on the amended basis, such that they would be entitled to their costs up to the date of the amendment and the claimant would be entitled to its costs only from the date of the amendment. Given that there were, in effect, a succession of amendments, they submit that the appropriate order is that there should be no award of costs of the nature and adequacy issues.

10. We cannot accept the OEMs' argument which we consider mischaracterises the position. Although UKTC's various amendments were essential, there were considerable challenges by the OEMs to other aspects of UKTC's funding arrangements which completely failed. In particular, there were sustained and unsuccessful challenges to the amount of UKTC's own funding and the amount of ATE cover for the OEMs' costs. The fact that UKTC's application may have been rejected without these late amendments is not the same as saying that UKTC succeeded on the preliminary issue only on the basis of the late amendments.

11. Accordingly, we think that the correct approach is that UKTC should recover its costs of the nature and adequacy issues subject to a discount but that the level of discount should be considerably more substantial than UKTC has proposed. In determining the amount, we inevitably take a broad-brush view. We have regard to the points set out at para 6 (d)-(e) of UKTC's costs submissions and paras 13-17 of the submissions in response from MAN, DAF, Iveco and Daimler. Looking at the position in the round, we consider that a 40% reduction to UKTC's recoverable costs is appropriate to reflect the extent to which the arguments from those OEMs succeeded and the funding arrangements required revision. Accordingly, we conclude that UKTC should recover 60% of its costs attributable to the nature and adequacy issues from Iveco, Daimler, DAF and MAN, to be subject to detailed assessment if not agreed.

12. Finally, UKTC submits that those costs should go for detailed assessment now whereas the OEMs argue that any assessment should wait until the conclusion of UKTC's CPO application. We recognise that the more usual course is to wait until the matter is finally resolved, so that any other assessment can be conducted at the same time and to avoid a situation where UKTC may potentially end up having to pay a higher sum back to the OEMs. However,

there is no fixed rule in that regard. In the present case, we consider it relevant that the OEMs are large multinational companies for whom the payment is no hardship and who have been found to have operated a very serious and prolonged infringement of competition law. By contrast, UKTC is a SPV reliant on outside funding and acting for many small businesses. In all the circumstances, we consider that it is just and appropriate for UKTC to be able to send the costs that it has been awarded for assessment now and not to have to wait for what may well be another year until judgment on the second part of the CPO application, which will be heard only after the Supreme Court delivers its judgment in *Merricks*. How the money recovered for UKTC's costs will be applied as between its solicitors, counsel and the outside funder are a matter as between them and, in our judgment, should not affect the time when those costs can be recovered.

13. UKTC may therefore proceed to seek detailed assessment of its costs forthwith in accordance with this Ruling.

14. On that basis, UKTC does not pursue a claim at this stage for interim payment. It reserves the right to seek a payment on account of its costs upon lodging its bill of costs and accordingly we need say nothing more in that regard.

The Hon Mr Justice Roth
President

Dr William Bishop

Professor Stephen Wilks

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 19 December 2019