



Neutral citation [2020] CAT 10

IN THE COMPETITION
APPEAL TRIBUNAL

Cases No: 1284/5/7/18
and 1290-1295/5/7/18 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 March 2020

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 v DAF TRUCKS LIMITED & OTHERS

BT GROUP PLC & OTHERS v DAF TRUCKS LIMITED & OTHERS

RYDER LIMITED & ANOTHER v MAN SE & OTHERS

**SUEZ GROUPE SAS AND OTHERS v FIAT CHRYSLER AUTOMOBILES
N.V. & OTHERS**

**VEOLIA ENVIRONNEMENT S.A. & OTHERS v FIAT CHRYSLER
AUTOMOBILES N.V. & OTHERS**

**WOLSELEY UK LIMITED & OTHERS v FIAT CHRYSLER
AUTOMOBILES N.V. & OTHERS**

DAWSONGROUP PLC & OTHERS v DAF TRUCKS N.V. & OTHERS

RULING: PERMISSION TO APPEAL

A. INTRODUCTION

1. On 4 March 2020, the Tribunal handed down judgment (“the Judgment”) on a preliminary issue in seven actions claiming damages following the decision of the European Commission in the Case 39824 *Trucks* (“the Decision”): [2020] CAT 7. The Defendants in these cases are here referred to by the name of the corporate group to which they belong. This Ruling will use the same abbreviations as the Judgment.
2. The preliminary issue in essence concerned the question whether, and if so to what extent, the recitals in the Decision are binding on the Defendants in these damages actions. The Judgment determined, in summary, that:
 - (a) by reason of Article 16 of Council Regulation 1/2003, those recitals which (i) are necessary as an aid to interpretation of the operative part of the Decision, or (ii) constitute the essential basis or provide the necessary support for the operative part of the Decision are binding;
 - (b) pursuant to (a), the findings in the recitals, or derived from the recitals, set out in the Judgment are binding;
 - (c) the English law principle of abuse of process is applicable in the present cases because the Decision was a settlement decision, adopted pursuant to the Commission’s settlement procedure, in which the Addressee Defendants expressly admitted the facts as outlined in the Decision;
 - (d) pursuant to (c), the question whether it is an abuse of process for the Addressee Defendants to contest the findings in the other recitals (i.e. recitals which are not binding under (b) above) is to be determined according to the principles set out in the Judgment at para [141].
3. The Defendants do not seek to appeal against (a) and (b) above. All the Defendants seek to appeal against (c) and (d) above. DAF, Daimler, Iveco, Volvo/Renault and MAN have each submitted short written applications for permission to appeal (“Applications”). Royal Mail, BT and Dawsongroup jointly, Ryder, and the VSW Claimants have each submitted helpful written responses opposing the Applications. All parties agree that the Applications should be determined on the papers.

B. PERMISSION TO APPEAL

4. Rather than considering each Application separately, it is convenient and proportionate to determine them together. However, while there is obviously considerable overlap between the grounds set out in the different Applications, they are expressed, and sometimes enumerated, differently: what some Defendants set out as independent grounds are expressed by other Defendants as sub-grounds, and some grounds are raised by only some Defendants. For the purpose only of determining the Applications, this Ruling seeks to identify the various grounds in summary form.
5. Two of the grounds advanced raise questions of EU law:
 - (a) That Article 16 precludes the application of national law to hold that facts in recitals in a Commission decision which are not binding by reason of Article 16, cannot be contested in national proceedings: DAF Application, Ground 1 [in part]; Daimler Application, Ground 1 [in part]; MAN Application, para 6(e).
 - (b) That it is contrary to the duty of sincere cooperation under Article 4(3) of the Treaty on European Union to hold that recitals in a Commission decision (which are not otherwise binding under Article 16) are binding for the purpose of national proceedings by reason of the decision being a settlement decision since this would undermine the policy of encouraging settlement: DAF Application, Ground 3; MAN Application, para 8; Daimler Application, para 8(b).
6. Neither of these grounds have ever been considered before by either the English courts or the Court of Justice of the European Union (“CJEU”). We do not consider that the answer to either can be considered *acte clair*. Both are of wide significance, not only for the very many damages claims brought following the Decision in the UK and in other EU Member States but also given the volume of follow-on damages claims generally and the fact that many of the Commission decisions in cartel cases are now adopted under its settlement procedure. Although we do not doubt the conclusions on these points expressed in the Judgment, we therefore give permission to appeal on these two grounds under both limbs of CPR rule 52(6): i.e. that the appeal has a real prospect of success and that there is in any event another compelling reason for granting permission.

7. The other grounds advanced are all matters of English law. The Defendants contend in summary:
- (c) That as a matter of principle, it cannot be an abuse of process to contest facts that are not binding under Article 16: DAF Application, Ground 1; Daimler Application, para 7; Iveco Application, paras 5-10; Volvo/Renault Application, Ground 1; MAN Application, para 6(a)-(d);
 - (d) That even if the doctrine of abuse of process is available in principle, the Tribunal erred in its application: DAF Application, Ground 2; Daimler Application, para 8(c); Iveco Application, paras 12-13;
 - (e) That the Tribunal erred specifically in failing to hold that there was a presumption against abuse when the parties in two sets of proceedings were not the same, alternatively failed to give sufficient weight to this factor: DAF Application, para 3(b); Iveco Application, para 11, MAN Application, para 5;
 - (f) That the Tribunal erred in finding that there were exceptional circumstances by reason of the Decision being a settlement decision: DAF Application para 3(c)-(d); Daimler Application, para 8(b); Volvo/Renault Application, Ground 2;
 - (g) That the Tribunal reversed the ordinary burden of proof by requiring the Defendants to explain their reasons for advancing a positive case that is contrary to a finding in the Decision: Daimler Application, Ground 2;
 - (h) That the Tribunal failed adequately to explain its reasons: MAN Application, para 7.
8. We express (d) above as a compendious ground in order to comprise the other bases put forward, except for those at (e)-(h).
9. As regards (c)-(f), notwithstanding the observations made by the Claimants, we consider it appropriate to grant permission to appeal. We do so essentially for the same reasons as for grounds (a)-(b). The issues raised in these cases are novel and of wide significance, well beyond the present seven cases.

10. However, we refuse permission to appeal on grounds (g) and (h). In our view, ground (g) mischaracterises the Judgment. It is clear that the burden of establishing an abuse was placed on the Claimants: the Judgment held that they had discharged this burden in showing that it would be an abuse for a Defendant simply to deny or not admit a finding in a recital or advance a positive case contesting facts in a recital without adequate explanation of its prior admission of those facts: para [141(6)]. Para [144] of the Judgment simply set out a practicable procedure for this approach to be applied as regards the individual recitals, given the complexity of the pleadings. Accordingly, this ground has no real prospect of success. As for (h), while the Defendants may seek to dispute the reasons in this part of the Judgment as being incorrect, we do not consider that MAN has a real prospect of success in its contention that there is an absence of reasons. Nor is there any other compelling reason for these grounds to be considered on appeal if they have no real prospect of success.

C. EXPEDITION

11. The question of expedition of the appeals is a matter for the Court of Appeal. But we note that DAF and Daimler expressly raise in their Applications the potential for a reference to the CJEU for a preliminary ruling. Both (a) and (b) above are clearly grounds that could be the subject of such a reference. It will be for the Court of Appeal to determine whether or not to make a reference. However, the Court of Appeal may wish to consider granting expedition of the appeals at least insofar as to determine whether to make a reference, since it will be precluded from making a reference after the end of the implementation period under the European Union (Withdrawal Agreement) Act 2020. Further, if a reference is made, notwithstanding the difficulties caused by the Covid-19 crisis, it is desirable to increase the opportunity for the CJEU to give a ruling prior to that date.

The Hon Mr Justice Roth
President

The Hon Mr Justice Fancourt

Hodge Malek QC

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 26 March 2020