Neutral citation [2021] CAT 13

<u>IN THE COMPETITION APPEAL TRIBUNAL</u>

Case No: 1295/5/7/18 (T)

<u>6 May 2021</u>

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
THE HONOURABLE MR JUSTICE FANCOURT
HODGE MALEK QC

Sitting as a Tribunal in England and Wales

BETWEEN:

DAWSONGROUP PLC & OTHERS

<u>Claimants</u>

V

DAF TRUCKS N.V. & OTHERS

<u>Defendants</u>

Heard remotely on 6 May 2021

RULING: DISCLOSURE

APPEARANCES

Mr Robert Palmer QC and Mr Ben Lask (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Claimants in the Dawsongroup Plc actions.

Mr Ben Rayment and Ms Alexandra Littlewood (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Daimler Defendants.

A. INTRODUCTION

1. The present proceedings are one of a number before the Tribunal which are claims for damages in respect of alleged overcharges in the sale of medium and heavy sized trucks arising from a cartel between the defendant truck manufacturers which operated in the period 1997 to 2011. Complex evidential and legal issues arise in the assessment of the claimants' claim for damages based on the alleged overcharge as well as the issues of pass-on and mitigation of such overcharge as may be proven to have occurred as a result of the cartel. In establishing any overcharge or pass-on, disclosure plays a critical and important role. However it is fair to say that disclosure of records going back so far, involving the sales and use of so many trucks across a number of jurisdictions as well as how prices are costed and accounted for, has been a very challenging process for the parties. The Tribunal has taken an active role in managing the process of disclosure and set out the relevant principles and procedure to be followed in its ruling in *Ryder Ltd & Others v MAN SE & Others* [2020] CAT 3 ("the Disclosure Ruling").

2. This is an application by Daimler for specific disclosure of documents from Dawsongroup, primarily in respect of supply pass-on categories. It is one of a number of applications for disclosure which were being sought between claimants and defendants. All the other applications were either resolved or stood over pending further discussions between the parties. The Tribunal at the hearing went through each of the categories sought by reference to the Redfern Schedule and ruled as set out in the transcript of the hearing and the subsequent order.

3. However, this application is an opportunity for the Tribunal to explain to the parties in this action as well as the other *Trucks* actions, the procedure that is being followed by the Tribunal in the light of and since the Disclosure Ruling; hence this ruling should be read in conjunction with that.

4. There are three issues which arise in relation to disclosure across each of the *Trucks* actions, as follows:

(1) the circumstances in which the Tribunal will consider applications for disclosure;

(2) statements in lieu of or in addition to disclosure of documents;

(3) explanations to make any disclosure comprehensible and of use to experts retained in the litigation.

Issue (1): Applications before the Tribunal

5. Given the complexity of disclosure in this case and the number of parties involved and the issues involved, and the paucity of data going back so far in many cases, the Tribunal considers that close case management is necessary, as set out in the Disclosure Ruling In practice, that means that the Tribunal gets involved in one of three ways.

6. The first is where there is a very short point of principle, which can be dealt with easily. These are being dealt with on paper, and the Tribunal has been dealing with a lot of applications in that way.

7. The practice varies. Sometimes the parties ask the Tribunal for an informal view as to what the Tribunal thinks, and that informal view is given. If the parties are content to follow that informal view, the Tribunal does not get involved any further, apart from approving a consent order. If the parties are not agreed, the practice has been to have more elaborate argument with the parties being able to explain their positions more fully in writing. The Tribunal then makes a short ruling.

8. The second way is where there is a more substantial point which will take up to half a day: that is going to be dealt with and has been dealt with by way of Friday applications. The Tribunal has been available one Friday a month since February 2020 to hear such applications. Most applications threatened or taken out, have been resolved by the parties without needing a formal ruling from the Tribunal. The Tribunal has made a significant number of consent orders for disclosure. A consistent approach has been adopted, in part by having Hodge Malek QC being available to deal with all matters in relation to disclosure.

9. The third route is where there is a general point which cuts across all the cases and involves multiple parties or one that needs extensive argument. This can either be heard by the full Tribunal at a CMC or it can be dealt with at a separate hearing with the full Tribunal, or sometimes with one member of the Tribunal.

10. As regards today's exercise, the Tribunal directed Redfern Schedules to be given, and they were served on 26 March 2021 and have been very helpful. But looking at those schedules, it was evident that there was more room for discussion between the parties, and there has been a gap between the 26 March 2021 schedules and the actual hearing of the CMC on 5 - 6 May 2021. This is why, on the first day of the two-day CMC, the Tribunal directed that further updated Redfern Schedules be served.

11. It is most important that it is only once a dispute or an issue has crystallised between the parties as one not being capable of resolution between them that it comes before the Tribunal for a resolution.

Issue (2): Use of statements and further information

12. One aspect that is continually coming up in these cases is whether there should be a statement in lieu of or in addition to disclosure of documents. Under Rules 52(2) and 52(3) of the Tribunal Rules 2015, the Tribunal has the power to require parties to provide statements by way of further information.

13. The approach of the Tribunal is that there may be a particular reason for a statement. For example, statements may be useful where:

    (1) the documents may simply be unavailable. In these cases, given how long ago the cartel started (1997), there have been significant gaps in the documentary record;

    (2) the treatment of costs, values and pricing and their allocation for example may not necessarily be set out in any written manual or policy of a party. A statement by way of further explanation may explain what policy or practice was in fact followed;

(3) even where documents exist, it is still very difficult for someone on the claimants' side to piece them together from documentary disclosure to get a proper understanding of how, for example, prices were set and costed; and

(4) where the statements can be produced to narrow down if not eliminate the documents that need to be disclosed.

14. The statements provided by the parties have all been helpful, and the pricing statements provided by the defendants have been extremely helpful in this case and the other *Trucks* cases. Where statements have been provided it has enabled the other parties as well as the Tribunal to consider more precisely what further documents it may be necessary and proportionate to disclose. The statements have had the effect of substantially reducing the cost and scope of disclosure of documents. In practice, where statements have been provided further clarifications have sometimes been sought and generally given in correspondence. The statements have been accompanied by a statement of truth, but often the statements contain appropriate qualifications given the circumstances.

15. It should be stressed that the statements directed by the Tribunal or agreed to between the parties are a form of disclosure or further information; they cover that ground. They are not a substitute for the witness statements at trial. It is not necessarily an answer, where there is a request for disclosure now, to say: well, you will get the answer later, when you have the witness statements.

16. Under the Rules of the Supreme Court (prior to the introduction of the Civil Procedure Rules), the court had the power to order interrogatories which were generally questions directed at an opposing party in relation to issues in the action. These, along with requests for further and better particulars of a pleading, have been replaced by information requests under CPR Part 18. In relation to interrogatories, sometimes it was held to be a sufficient answer to a specific question that it would be covered by way of witness statements for the purposes of the trial. In practice one problem with interrogatories was that quite often the witness statements either would not cover the matter at all or would cover it inadequately. Thus the mere fact that a witness may be called at trial

and provide a witness statement in advance is not necessarily a valid basis for refusing to provide a statement now by way of further information: see Matthews and Malek, *Disclosure* (5th ed., 2017), para. 20.50.

17. For a case this large and complicated, it is important for all the parties to have this type of statement, which is a form of further information, upfront now, rather than leaving it further down the line. It is more important in this particular case because of the way it has been dealt with as a form of a compromise or in lieu of physical documents, because sometimes a party needs to look at the pricing statement or whatever the statement is, and then decide whether or not it needs disclosure of documents and if so which categories. If the Tribunal or the parties were to defer that type of statement until exchange of witness statements, the Tribunal may find that it will be having disclosure applications for further documents too late in the proceedings. That is why the Tribunal is and has been directing statements by way of further information.

18. To date, the focus has been on disclosure of pricing material and costings from the defendants. The pricing statements contain a lot of useful and practical information covering a long time period using information from a number of sources and computer systems. As the focus is shifting to issues such as pass-on, which relates to what the claimants did with the trucks that they purchased and whether they passed on overcharges in hire charges or sales of used trucks, then there is a need for similar statements to be provided by the claimants. Parties negotiating disclosure appreciate that there is often a significant amount of give and take from both sides, and it should be recognised that the defendants have gone a long way in providing their pricing and other statements and voluminous disclosure at very considerable expense.

19. The Tribunal recognises that whilst the parties will endeavour to ensure that the statements by way of further information are accurate, they may not be perfect and may contain errors. This is largely due to the fact that the cartel started in 1997 and data even prior to that may be relevant. Systems will have changed, records may not have been retained or are inaccessible, and it may be difficult to track down relevant personnel who can recollect how things were done at the time. Further, the statements may be given in lieu of going through the

expensive exercise of locating and reviewing a large amount of the underlying documents in detail. When it comes to finalising witness statements for trial, a party may wish to clarify or correct what is stated in such a statement of further information. The Tribunal expects the parties to agree that such amendments may be made without the necessity of a contested application to amend. Thus it is open to any party in these proceedings who has filed a statement by way of further information to amend it to correct errors or to incorporate further clarifications. This may be because by that stage a party may have more information and reviewed more documents. The Tribunal will be mindful of this when it comes to the cross-examination of witnesses at trial.

Issue (3): Explanations

20. Much of the disclosure to date has been of technical data. Merely providing disclosure of vast amounts of data is of limited use, if the material either cannot be properly accessed, or if accessed is not capable of being understood. Thus where data has been provided, the parties have, and have been required by the Tribunal, to provide explanations so that the material can be understood and used by the experts retained by the parties. This can be by way of explaining technical terms or abbreviations, stating what various fields mean and how they are intended to operate, and how data fields interrelate with each other: see for example the order in *Wolseley UK Limited & Others v Fiat Chrysler Automobiles N.V. & Others* [2020] CAT 15. Worked examples have been found to be particularly useful in this regard and were ordered by the Tribunal in *Veolia, Suez and Wolseley v Stellantis N.V. & Others* [2021] CAT 6.

21. Finally, the Tribunal shall continue to apply the principles explained in the Disclosure Ruling and this ruling in case managing all of the *Trucks* damages claims. It also expects the parties to bear these rulings in mind when negotiating to see what can be agreed prior to the making of any disclosure applications in the future.

The Hon Mr Justice Roth President	The Hon Mr Justice Fancourt	Hodge Malek QC

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

Date: 6 May 2021