Neutral citation number: [2018] EWHC 1994 (Ch)

Claim No.: CP-2017-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Date: 16 July 2018

Before:

HONOURABLE MR. JUSTICE ROTH

BETWEEN:
- - - - - - - - - - - - - - - - -

SUEZ GROUPE SAS & OTHERS

Claimants

- and -
(1) FIAT CHRYSLER AUTOMOBILES N.V.
(2) CNH INDUSTRIAL N.V.
(3) DAF TRUCKS N.V.
(4) DAF TRUCKS LIMITED

Defendants

Claim No.: HC-2017-001941

BETWEEN:
- - - - - - - - - - - - - - - - -

VEOLIA ENVIRONNEMENT S.A. & OTHERS

Claimants

- and -

FIAT CHRYSLER AUTOMOBILES N.V. & OTHERS

Defendants

Claim No.: CP-2017-000024

BETWEEN:
- - - - - - - - - - - - - - - - -

WOLSLEY UK LIMITED & OTHERS

Claimants

- and -

FIAT CHRYSLER AUTOMOBILES N.V. & OTHERS

Defendants

Claim No.: CP-2017-000022

BETWEEN:

- - - - - - - - - - - - - - - - -

RYDER LIMITED & HILL HIRE LIMITED

Claimants

- and –

MAN SE & OTHERS

Defendants

Monday, 16 July 2018

Judgment Approved

MR JUSTICE ROTH:

1. On 19 July 2016, the European Commission adopted a decision ("the Decision") finding that five major European truck manufacturing groups infringed Article 101 of the Treaty on the Functioning of the European Union, by engaging in what may loosely be described as a cartel.

2. The Decision found that the addressees had colluded on pricing and gross price increases in the EEA for medium and heavy trucks and on the timing and the passing on of costs for the introduction of the emission technologies for medium and heavy trucks required by the relevant European standards. The cartel lasted for 14 years, between 1997 and 2011.

3. As of today, still only a provisional, non-confidential version of the Decision has been published, but the parties before me are now agreed that the confidential version, in a less redacted form, should be disclosed into a confidentiality ring, which the court will be establishing by an order in the usual way.

4. Significantly, for present purposes, this was a settlement decision. Therefore only an abbreviated description of the operation of the cartel is provided, giving far less detail than would be the case in a full infringement decision. The section of the Decision describing the cartel, marked as section 3 -- the sections are misnumbered, so it should in fact be section 4 -- comprises only 15 paragraphs. There are no redactions from the substantive text of that section: the only redacted material is in the footnotes. So the confidential version that will now be provided to the claimants, as I have just described,

will not give them any further description of the cartel. It will only give them references to documents in the file of the Commission.

5. The Decision has given rise to a significant number of damages claims, both in this jurisdiction and before the courts of other Member States. The evidence before me indicates that there are now over 160 such claims brought around the EU. Mr Singla, appearing for the Iveco defendants, said that new claims are being brought "literally on a daily basis".

6. Currently, there are eight actions pending before the courts of England and Wales and the Competition Appeal Tribunal, of which two have been consolidated. Thus, there are seven separate sets of proceedings. In some of them, there are a very large number of claimants. Those actions are brought against some or most of the addressees of the Decision.

7. The first action to be brought was started in December 2016 by the Royal Mail Group against the DAF Group ("DAF"). The other actions have been started at various times between July and December 2017.

8. In the Royal Mail action, following a case management hearing on 8 December 2016, Rose J. made an order, on 18 December 2016, for disclosure. That covered disclosure of the confidential version of the Decision. She also heard an application for disclosure of the documents in the Commission's file that had been provided to DAF. Before her, as before me, that disclosure application was strongly resisted by DAF. However, she ordered disclosure into a confidentiality ring, of the documents in the

Commission file that had been provided to DAF, subject to the exclusion of various categories of documents on the grounds of irrelevance. The categories excluded by Rose J. in her decision were:

(1) documents related solely to products other than trucks, as defined in the Decision;

(2) documents created before 17 January 1997 or after 18 January 2011, exclusive, other than documents created for the purposes of the OFT or Commission investigation;

(3) documents related solely to prices charged to customers in Member States other than the UK.

10. There are now before me applications by the claimants in four of the other proceedings, essentially seeking from DAF the same disclosure as provided to the claimant in the Royal Mail case pursuant to Rose J's order.

11. In accordance with paragraph 2.4 of CPD31.C, the Practice Direction on Disclosure and Inspection in Relation to Competition Claims, copies of those applications were served on the European Commission. As permitted by Article 6(11) of Directive 2014/104/EU (the "Damages Directive"), the Commission has sent written observations to the court concerning the proportionality of the request. In its letter, the Commission, after setting out various considerations, states:

"The Commission is concerned that the very broad scope of the disclosure of evidence requested by the claimants in the proceedings referred to above may not fulfil the proportionality requirements introduced by the Damages Directive." The Commission letter proceeds to give further explanation.

12. The court will, of course, have regard to these observations from the Commission but, also of course, it is not bound by them in any way.

13. The relevant statutory provisions from the Damages Directive have been incorporated into English law. CPD31.C, paragraph 1.4, gives effect to Article 5(2) of the Damages Directive, and states:

"The application must include a description of the evidence that is sought, that is as precise and narrow as possible, on the basis of the reasoned justification."

The "reasoned justification" is the justification to be provided, supporting the plausibility of the claim: paragraph 1.1(d). I should add that the plausibility of the claim in the present case is not in issue, since these are follow-on claims after an infringement decision.

14. Proportionality is addressed specifically in Article 5(3) of the Damages Directive, to which I shall return, and that is implemented through paragraph 1.6 of CPD31C.

15. Here, as what is sought is disclosure of evidence included in the file of the Commission, and thus of a competition authority, CPD31C, paragraph 2.7 is engaged, which gives effect to Article 6(4) of the Damages Directive.

16. I was also taken, helpfully, to recitals 16 and 21 to 23 of the Damages Directive.

17. As I have already mentioned, the Decision is a settlement decision, which therefore gives relatively sparse details about the operation of the cartel. It is

axiomatic that claimants, seeking to pursue a damages claim, may need to understand the operation of the cartel in as much detail as possible. In Peugeot SA and others and NSK Limited [2018] CAT 3, Green J. determined an application for specific disclosure in another follow-on damages claim based on a settlement decision by the Commission. In that case, there had already been an order for disclosure of the documents in the Commission file, subject to certain exclusions, including the exclusion of "material that is irrelevant, applying the approach contained in CPR rule 31.6". Having received those documents, the claimants then sought further documents by way of specific disclosure.

19. In considering what disclosure is legitimate, Green J. said this, at paras 28 to 29:

" … in any quantum case, it must surely be an elementary starting point that the court or tribunal has a full and comprehensive understanding of the detailed workings of the Cartel in question. In many follow-on cases, that detail and description is provided by the Commission's decision which establishes liability. Routinely in a full-blown liability decision, the description of the cartel might span many hundreds of paragraphs and recite voluminous documentary evidence to support the finding of liability.

But that is not applicable in this case because the purpose of the Decision was not to record in detail, how the cartel worked. To the contrary, it amounted to a short form decision, focusing upon the fines to be imposed which took account of leniency applications."

20. The same may be said of the present decision. Green J. continued at para 31:

"In my view it is obvious that a full understanding of the modus operandi of a cartel may be directly relevant to the issues which arise in a quantum case. It

does not take much imagination to see that this must be the case. Standing back, it is a proper prima facie inference for any court or tribunal to make, that the workings of a price fixing Cartel have one main ending in mind, viz, the maintenance of supra-competitive prices. It follows that the day-to-day workings of the Cartel are designed to achieve that end. As such there is a more or less inevitable nexus between the workings of the cartel and the overcharge that the purchasers subsequently may seek to recover."

21. In the Royal Mail case, Rose J. considered, as I have mentioned, the question of whether, and if so what, should be disclosed as regards the Commission's file. The Damages Directive was supposed to be implemented in the United Kingdom by 27 December 2016, a few weeks after the hearing before Rose J. In fact, it was implemented in the UK, as in some other Member States, somewhat late. It came into force in the law of the United Kingdom from 9 March 2017 on the basis that the provisions concerning disclosure would apply only to actions commenced thereafter. Thus, it did not directly apply to the application before Rose J. But she was referred to it, and indeed DAF based its opposition to the disclosure being sought heavily on the terms of the Directive.

22. I have been taken to the transcript of that hearing. It is clear that Rose J. had the Directive in mind and sought to act consistently with its terms. She stated, in the course of the hearing:

"...I am certainly leaning towards disclosure on a broader basis being made of the Commission file, on the grounds that although it could be described as a fishing expedition and that part of the purpose of it is to enable the claimants to flesh out their claim on the basis of what they can see, that does not seem to

me to be an illegitimate fishing expedition of the kind that is generally deprecated in the courts and is referred to in the Damages Directive, given that the claimants are in the position of basing their claim on what has been long-term, covert activity and that the Commission, for its own entirely understandable and laudable reasons, is not going to be publishing a full Commission decision because it has arrived at a settlement decision. That is not supposed to disadvantage claimants in Royal Mail's situation, but it seems to me that the sooner that the Commission file is got into a situation where it can be disclosed to the claimant and maybe to other claimants who may be coming along, the better. It seems to me more likely that the claimants will be able to usefully carry out that exercise than the defendants and less likely to give rise to further disputes."

23. Kitchin LJ refused permission to appeal to the Court of Appeal on 26 February 2018, well after the Damages Directive had been implemented. It is not necessary to refer to the reasons he gave, even if it were permissible to do so, other than to say that he clearly also had regard to the Damages Directive.

24. I accept that there was not such extensive argument regarding the proper application of the Directive before Rose J. as there has been before me. Nor, of course, was there a letter from the Commission. But I do not accept that her decision in the Royal Mail case is irrelevant to consideration of the present applications, as the Commission appears to imply in the penultimate paragraph of its letter.

25. At the heart of the disclosure provisions of the Damages Directive are the

criteria of relevance and proportionality. As European legislation, I think it is important to give the Directive a purposive interpretation. It was introduced in order to enable disclosure to be effected to assist claims for competition damages, particularly in the many jurisdictions across the EU where no disclosure, or no effective disclosure, was possible in civil damages claims (see recital 15), but at the same time was concerned to limit such disclosure so that it is not too expensive, burdensome or intrusive. It was not intended that it should usher in disclosure battles as a tactical game to be engaged in at interim stages of litigation, so as to prevent the effective pursuit of damages claims. It is in that context that I turn to the specific language of Articles 5 and 6.

26. Article 5(2), states:

"Member States should ensure that national courts are able to order the disclosure of specific items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification."

The reasoned justification, it will be recalled, is the justification for the plausibility of the damages claim.

27. Article 5(3) provides:

"Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts should consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider: (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; (b) the scope and

cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; (c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information."

28. Here, as regards subparagraph (a), the claim is clearly supported by available facts and evidence justifying a disclosure request. That indeed, is not really resisted, although those defendants who have appeared argue this request is being made too early. As regards subparagraph (c), the protection of confidential information is ensured by the confidentiality ring, to which I have referred, and does not give rise to any concerns on the part of these defendants.

29. Therefore the particular issue is subparagraph (b). The argument has focused on the need to limit the scope of what is sought, and in particular, to do so by what is relevant. And emphasis was placed on the reference in Article 5(2) to specific "categories of evidence" circumscribed as precisely as possible.

30. Here, as I have explained, it is relevant for the claimants to seek to understand, in as much detail as possible, the way the cartel worked and was implemented and policed. But it is not only a question of the working of the cartel with a view to the calculation of a potential overcharge for quantification of damages. In several of the cases for which there is an application before me, there is another issue raised by the Respondent to these applications in its defence. This has been described shortly as the "proper law" issue.

31. In its defence, for example, to the Veolia claim, DAF asserts that, for the period prior to 11 January 2009, and therefore for much of the period over which the cartel operated, the applicable law of the claim is German law "because the most significant elements of the events constituting the alleged tort occurred in Germany". The defence goes on to refer to the fact that it is said that the collusive arrangements were "most often" made in Germany, and then it gives some further details. That immediately invites consideration, as a relevant issue, of what are the most “significant” elements of the events giving rise to the infringement and where they occurred. It is not clear from the letter from the Commission whether the Commission appreciates that this is an issue in many of these proceedings.

32. Mr Beard QC submitted that it is contrary to Article 5, and more particularly, to paragraph 1.4 of CPD31.C, to order disclosure by reference to the file, with excluded categories. He submitted that that is the wrong way round: what the Directive requires is that the claimant seeking disclosure should specify the positive categories of documents to be disclosed, i.e. the categories to be included.

33. I do not accept that the Directive, properly interpreted, seeks to impose such a straight jacket upon the national court. Article 5(2), is dealing with disclosure generally. I shall come on in a moment to consider Article 6.

34. Here, there is a defined category. It is the file of documents held by the Commission that has been provided to DAF as part of the Commission

proceedings. Then that category has been filleted further by various exclusions. One must have regard, in my view, to what is practicable and proportionate. In the course of argument, and in response to some pressure from the Bench, although it does not appear in the witness evidence or the skeleton arguments, Mr Beard started to indicate various categories that might have been specified. He accepted that, because of the proper law issue, more categories may be relevant than might otherwise be the case. It became clear to me, as that discussion proceeded, that a large number of broad categories would be relevant, not only regarding cartel meetings, at headquarters level and among what are described in the decision as German level, but also regarding discussions at trade association meetings and trade fairs, the exchanges of emails, documents regarding the internal implementation of the cartel, pricing decisions by each of the companies, documents regarding the monitoring of competitors' compliance, and so forth.

35. Since the documents that were disclosed out of the Commission file, pursuant to the order in the Royal Mail action, constituted some 32,000 documents, which I emphasise cover a 14-year period, it is legitimate to wonder whether, at the end, very many documents would be left out. I note that for Iveco, the partner in their solicitors had selected, out of all the documents they have reviewed so far, four documents that are said to be clearly irrelevant. Presumably, those are the documents that he considered were the strongest for their case. One of those documents is a presentation given to Iveco dealers concerning performance in the previous year and targets for the coming year. It includes a table setting out Iveco's assessment of the way the volume shares of its various competitors had changed over the past period. It may be, as Mr Singla suggested, that this came

from publicly available information. I do not know. But in any event, the gathering together of such a table internally by Iveco, it seems to me, might well be relevant in looking at how competition took place under the distorted circumstances during the cartel. Therefore, I do not consider that this document can be dismissed as obviously irrelevant.

36. Of course, even if it were possible, practically, to enumerate a lot of specified categories, there might well be individual documents that end up being disclosed within those categories that are irrelevant, when viewed in isolation. That is, in my experience, always the case with disclosure, however specific it is directed to be.

37. I proceed to consider Article 6 of the Directive, which is engaged since this is disclosure of evidence in the file of the competition authority. That brings in the requirement in Article 6(4), which, as Mr Beard stressed, is additional to the requirements in Article 5. It states:

"When assessing … the proportionality of an order to disclose information, the national courts shall, in addition, consider the following:

(a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a Competition Authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

(c) in relation to paragraphs 5 and 10, or upon request of a competition

authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law."

38. The criterion set out in paragraph 4(b) is obviously fulfilled: this is disclosure in relation to an action for damages before the English court.

39. As regards the criterion in paragraph 4(c), Mr Beard submitted that it is here relevant because overbroad disclosure from the file of a competition authority could prejudice the effective public enforcement of competition law as it might make those who engage in infringements less willing to come forward and seek leniency. However, the specific reference there is to the considerations in paragraphs 5,10 or upon the request of a competition authority. In that regard, paragraph 5 deals with disclosure being allowed only after a competition authority has closed its proceedings, so that is not a problem in this case. Paragraph 10 deals with disclosure from the competition authority itself. That is not applicable on the present applications, which are not addressed to any competition authority. As for the Commission letter, that is, of course, a communication from a competition authority, but it does not suggest that granting the applications in the present case would diminish the effective public enforcement of competition law or raise any concern about leniency applications. In my view, therefore, paragraph 4(c) is not here at issue.

40. What is relevant is paragraph 4 (a). That, of course, is important. It is said by DAF and Iveco that the request here has not been formulated with specificity. But in the first place, the application specifically excludes the categories of documents excluded under the order in the Royal Mail case. That is not

insignificant. I have been told that close to 18 per cent of the documents in the Commission's file were not disclosed, or do not fall to be disclosed, pursuant to the Royal Mail order because of those specific exclusions.

41. Secondly, although I can accept that, to a degree, this is a general application, which in many cases that may be inappropriate, I would emphasise that the factors set out in Article 6(4) are factors that the national court is required to consider. The wording is no doubt deliberate. Article 6(4)(a) is not a legislative prohibition on ordering disclosure in any circumstances where the application is more general rather than formulated with specificity: compare Article 6(5) and (6), which contain specific prohibitions. Recital 23, which unsurprisingly was relied on by counsel for DAF and Iveco, is indeed expressed in more absolute terms, but it is axiomatic that a recital cannot override the operative text of a Directive.

44. In the present case, I think there are two important additional factors to be borne in mind. First, there is the question of consistency with the other actions. Mr Singla for Iveco stressed that each action is a different set of proceedings and that they have not been consolidated. Nonetheless, they arise out of the same facts concerning infringement, and the essential issues for the claimants in seeking to understand how the cartel worked and the potential effect on pricing are identical.

45. If the disclosure ordered in these actions were not to be consistent with the disclosure that has been ordered in the Royal Mail action, there would be an inequality as between the position of the various claimants due to the unusual

situation that these are actions brought spanning the bringing into effect of the Damages Directive. As the point was expressed by Mr Pickford QC, then appearing for DAF, in the proceedings before Rose J:

"There is a very strong imperative for not having different approaches to disclosure in [the Royal Mail claim] as compared to the very next claim that will be before either your Ladyship or one of her brethren very shortly in this court."

46. Secondly, the fact that these very documents have been disclosed by this very defendant in the Royal Mail action means that the disclosure now sought will impose no burden on DAF. As Ms Edwards, of DAF's solicitors, very properly recognises in her evidence, the cost for DAF will be "minimal".

47. Concern has nonetheless been expressed by the defendants regarding the costs that the claimants will incur in reviewing these documents. It is always heartening when one party shows such concern about the costs that will be borne by its opponent, but the position is that if any claimant ultimately incurs unreasonable costs and time in reviewing irrelevant documents, those costs may be disallowed on a detailed assessment.

48. For Iveco, it is submitted that there should be additional time to enable it to consider the documents in the Commission's file. These are early stages of the litigation. If that time was allowed, then Iveco could propose categories of documents for disclosure and there could be discussion with the claimants. The matter can then be reviewed, said Mr Singla, at a CMC in the course of next term when a more focused disclosure application could be brought.

49. If the matter were starting from the outset without the background of the Royal Mail case, I can see some attraction in that approach. But in the practical position of all these proceedings, it seems to me that a much more satisfactory way forward is for Iveco, and indeed DAF, to be given time to review the file and then to exclude documents, or categories of documents, that they say are clearly irrelevant, with a reasoned explanation. That proviso and protection can be incorporated into the order now so that disclosure of the balance of the file, which on any view will comprise a significant number of documents, can be given sufficiently in advance of the CMC for the claimants to review them. On that basis, rather than restarting this argument from scratch, any disputes about excluded categories could be heard and dealt with at the CMC. That approach, I note, has a parallel with the approach that had been adopted with the initial order for disclosure in the Peugeot case, to which I have referred.

50. I shall hear counsel as to the appropriate time for these defendants to conduct that process of review. It is a process that will be allowed only to the DAF and Iveco defendants. The other defendants have all been notified of these applications, with an opportunity to object, and they have not done so. Thus it is only these two defendant groups who will now be given that opportunity.

51. In conclusion, I should stress that I am dealing only with the actions brought in the United Kingdom. There may be very different considerations as regards disclosure applications in proceedings that may come before the courts of other Member States. It may well not be the case in another jurisdiction that disclosure has already been ordered in a parallel claim against the same

defendant which forms the basis of an application then brought after the coming into force of the Directive. It may well be that there are no issues of proper law justifying more extensive disclosure. And, most particularly, in this jurisdiction. Confidentiality concerns can be protected by disclosure into a confidentiality ring, which as I understand it is not a procedure that is recognised in quite a number of other Member States.

52. I therefore emphasise that the order I propose to make, for the reasons I have set out, is not establishing a precedent of general application for the future, either in the UK or, and of course I would have no authority to do so in any event, for any trucks claims that may be brought in any other jurisdiction.

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