Neutral citation [2018] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1284/5/7/18 (T) and 1290-1295/5/7/18 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

11 December 2018

Before:

THE HON MR JUSTICE ROTH
(President)
THE HON MR JUSTICE HILDYARD
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 & 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

Heard at Victoria House on 21-22 November 2018

JUDGMENT: CONFIDENTIALITY RINGS AND DISCLOSURE OF TRANSLATIONS

APPEARANCES

Mr Tim Ward QC, Mr Robert Palmer and Ms Anneliese Blackwood (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Claimants in the Royal Mail Group Limited, BT Group PLC and Dawsongroup Plc actions.

Mr Mark Brealey QC and Mr Derek Spitz (instructed by Ashurst LLP) appeared on behalf of the Claimants in the Ryder Limited action.

Ms Marie Demetriou QC, Mr Christopher Brown, Mr Tristan Jones and Mr Tim Johnston (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants in the Suez Groupe SAS, Veolia Environnement S.A. and Wolseley UK Limited actions.

Mr Meredith Pickford QC, Mr Rob Williams, Ms Daisy Mackersie, Mr James Bourke and Mr David Gregory (instructed by Travers Smith LLP) appeared on behalf of the DAF Defendants.

Mr Paul Harris QC and Mr Ben Rayment (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Daimler Defendants.

Ms Kelyn Bacon QC, Mr Tony Singla and Mr Max Schaefer (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Defendants.

Mr Daniel Jowell QC, Mr Conall Patton and Mr Tom Pascoe (instructed by Slaughter and May) appeared on behalf of the MAN Defendants.

Mr Mark Hoskins QC, Mr Daniel Piccinin and Mr Hugo Leith (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Volvo/ Renault Defendants.

Mr Brian Kennelly QC and Mr Jason Pobjoy (instructed by Allen & Overy LLP) appeared on behalf of the Scania Third Parties.

Introduction

1. By its decision in Case 39824 - *Trucks,* adopted on 19 July 2016 ("the Decision"), the European Commission ("the Commission") found that five major European truck manufacturing groups had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union over a period of some 14 years between 1997 and 2011. For the purpose of this judgment, it is sufficient to refer to the addressees of the Decision simply by reference to the corporate name of the group to which they belong: DAF, Daimler, Iveco, Volvo/Renault and MAN. The products covered by the infringement are stated in recital (5) of the Decision as being medium and heavy trucks (i.e. trucks of six tonnes and above) and the accompanying press release stated that the truck manufacturers in what is described as "the cartel" produced over the relevant period some nine out of every ten medium and heavy trucks sold in Europe. The Commission imposed what it described as a "record fine" of some €2.9 billion on companies in four of the five manufacturing groups; addressees of the Decision in the MAN group received no fine as they benefitted from full immunity for revealing the existence of the cartel. The Decision was a settlement decision: i.e., none of the addressees contested the infringement.

2. Subsequently, on 27 September 2017, the Commission adopted a further decision finding that companies in the Scania group ("Scania"), also participated in the cartel. Scania had decided not to settle the case and accordingly the Commission's second decision was adopted after a contested procedure. The Commission imposed a fine of €880,523,000 on Scania.

3. By the end of 2017, eight actions claiming damages against addressees of the Decision and related companies had been commenced in the High Court of England and Wales. Two of those proceedings were consolidated, leaving seven independent actions. Following the guidance given by the Court of Appeal in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2018] EWCA Civ 1536, those cases have been transferred, without objection, to the Competition Appeal Tribunal ("the CAT"). In some of the actions, the claimants belong to a single corporate group, whereas others combine a significant number of independent claimants; and in some of the actions the claim is brought against only one manufacturing group, whereas in others companies from two or more of the groups involved in the cartel are defendants. In some, but not all, of the actions

proceedings under Part 20 of the CPR have been brought against other addressees of the Decision and also against Scania. An outline summary of the parties to the seven actions is set out in the table below.

Claimant	**Defendant**	**Additional Part 20 Defendant**
Royal Mail	DAF	-
BT	DAF	-
Ryder	DAF Daimler Iveco MAN Volvo/Renault	-
Suez	DAF Iveco	MAN Volvo/Renault Scania
Veolia	DAF Iveco MAN Volvo/Renault	Scania
Wolseley	DAF Iveco	Daimler MAN Volvo/Renault Scania
Dawsongroup	DAF Daimler Volvo/Renault	-

4. A Case Management Conference to consider various issues arising across the seven actions was held at the CAT on 21-22 November 2018. Many of the issues were resolved by agreement and cooperation in the course of that hearing or by a decision of the Tribunal which did not require detailed reasoning. However, on two contested issues the Tribunal gave its decisions on the basis that full reasons would be given subsequently:

(a) the terms of the confidentiality rings in all the actions;

(b) disclosure of unofficial translations of disclosed documents.

This judgment sets out our reasons for the decisions on those two issues.

(a) Confidentiality Rings

5. By orders made in the High Court, confidentiality rings were established in the Royal Mail action and then in the Ryder, Suez, Veolia and Wolseley actions on, respectively, 18 December 2017 (amended on 27 February 2018) and 31 July 2018. Those orders are in similar form and provide for an Inner Confidentiality Ring and an Outer Confidentiality Ring. In essence, membership of the Inner Ring is restricted to external lawyers and economic consultants whereas the Outer Ring comprises named employees of the parties. By separate orders made in those actions, the High Court ordered disclosure by DAF of documents from the Commission file which had been provided to DAF in the course of the Commission investigation, subject to specified exclusions.

6. It is agreed by all respective parties that confidentiality rings should be established in each of the proceedings and it is common ground that the terms of those confidentiality rings should take a common form. For that purpose, various amendments have been agreed to the orders adopted in the Royal Mail and Ryder, Suez, Veolia and Wolseley cases. However, there is one issue on which the respective claimants and defendants could not agree and which the Tribunal accordingly had to decide. This concerns the procedure whereby documents disclosed from the Commission file into the Outer Confidentiality Ring may be re-classified as non-confidential documents. It is agreed that a mechanism should be set up to enable such re-classification. It is further agreed that in the first instance the addressees of the Decision and also Scania should be asked if they agree to the proposed re-classification. The issue between the parties is whether or not it is also necessary to notify any request for such re-classification of a document as non-confidential to the Commission and also the Competition Markets Authority ("the CMA"). The defendants submitted that there should be such a requirement, whereas for the claimants it was argued that this was unnecessary, cumbersome and likely to give rise to delay.

7. Mr Pickford QC, who made submissions in this regard on behalf of the defendants, based his argument on Articles 5 and 6 of Directive 2014/104/EU ("the Damages Directive"). The relevant provisions of the Damages Directive have been implemented in Part 6 of Schedule 8A of the Competition Act 1998, and further as regards the CAT by the Practice Direction relating to Disclosure and Inspection of Evidence of 14 March 2017 ("the CAT Disclosure PD").

8. Article 5 of the Damages Directive concerns disclosure of evidence generally. Article 5(3)-(4) provides as follows:

> "(3) 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 shall 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.
>
> (4) Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information."

9. Article 6 applies additionally as regards disclosure of evidence included in the file of a competition authority. Article 6(5) stipulates that national courts can order disclosure of certain categories of evidence only after a competition authority has adopted a decision or otherwise closed its proceedings. Pursuant to Article 6(6), a national court is precluded from ordering disclosure of leniency statements and settlement submissions. Article 6(11) provides as follows:

> "To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought."

By Article 2(8), "competition authority" means the Commission or a national competition authority, or both.

10. Mr. Pickford emphasised that pursuant to Article 5(3), disclosure must be limited to that which is proportionate, and that a particular element that is identified as significant when assessing proportionality is the need to protect confidential information: Art 5(3)(c). Further, he noted that the applications for disclosure of documents from the Commission file in the Ryder, Suez, Veolia and Wolseley proceedings had been served

on the Commission[1] and that the Commission had, as permitted by Article 6(11) of the Directive, submitted observations by letter dated 6 July 2018 to the Court. Since the Commission had then responded to the application by submitting observations on the basis that the documents from its file would be disclosed into a confidentiality ring, Mr. Pickford argued that it was only right that the Commission should be expressly consulted whenever it was proposed to take any of those documents out of the confidentiality ring.

11. We do not accept that submission. We would emphasise that the Tribunal is not at this point considering whether any particular document or category of documents from the Commission file should be reclassified as non-confidential where that is in dispute. Any such disputes are to be resolved on a future occasion. The issue now before the Tribunal concerns only the mechanism by which that question is to be addressed, as regards documents which have already been disclosed.

12. The issue of proportionality that is the subject of Article 5(3) of the Damages Directive has therefore already been considered as regards those documents. The Court was satisfied in making the orders referred to that disclosure of those documents from the Commission file satisfied the criterion of proportionality. And insofar as those documents are properly to be regarded as confidential, they will remain within a confidentiality ring.

13. The question whether a document which it is proportionate to disclose should be treated as confidential and thus go into a confidentiality ring, or can be disclosed without that additional protection, is a very different one. We do not see that this is a question with which it is necessary to trouble the Commission. We note that in its letter to the High Court of 6 July 2018, while making observations on the extent of the disclosure sought, the Commission did not choose to make any observations regarding questions of confidentiality. Moreover, we note that Article 6(11) refers to the competition authority stating its views on "the *proportionality* of disclosure requests" and not on whether any particular documents of which disclosure is requested should be treated as confidential.

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[1] The previous application for disclosure in the Royal Mail proceedings had not similarly been served on the Commission because the Damages Directive as implemented in the UK does not apply directly to those proceedings since they were commenced prior to 9 March 2017 when the provisions concerning disclosure in the Directive entered into force in the UK: see the judgment at [2018] EWHC 1994 (Ch) of 16 July 2018.

As for Article 5(4), that simply requires national courts to have an effective means to protect confidential information. It is beyond dispute that the existence of the confidentiality rings created by the orders made by the High Court and now proposed in the Tribunal would provide that protection.

14. Accordingly, we consider that it is unnecessary to include in the terms of the confidentiality rings any requirement to consult the Commission, and by the same token there is no necessity to consult the CMA. We further agree with the claimants that if such a requirement is unnecessary then it would be inappropriate to include it. The process of re-classification of documents may take place on a number of occasions during these substantial sets of proceedings. Incorporation of such a requirement would make the process more cumbersome, and indeed may give rise to an administrative burden for the competition authorities.

15. We make two further observations. First, we think that very different considerations apply when considering whether any material in the confidential version of a Commission decision itself might be rendered non-confidential for the purpose of English proceedings. The Commission specifically engages in the production of a non-confidential version of its decisions. It accordingly actively considers what passages or information in a decision should remain confidential on various possible grounds. The Commission's determination as to the redaction of parts of a decision in producing a non-confidential version for publication is itself a decision susceptible to challenge before the EU Courts. We recognise that it therefore would be appropriate to consult the Commission before any steps are taken that might conflict with the Commission's own determination as to the non-confidential version of the Decision. Secondly, although the applications for disclosure of documents from the Commission file made in the High Court were served on the Commission, that was pursuant to the High Court Practice Direction 31C, para 2.4. There is no similar requirement in the CAT Disclosure PD. Any party is of course free to bring any matters to the attention of the Commission, but we note that in its letter referred to above, the Commission states that for it to submit any observations regarding applications for disclosure before national courts will remain an exceptional circumstance.

(b) Disclosure of Translations

16. By order of the Tribunal, the proceedings brought by Suez, Veolia and Wolseley ("SVW") are to be heard together with the evidence in each to be admissible in the others. The claimants in the SVW cases are represented by the same solicitors and counsel.

17. A significant number of the documents from the Commission file which have been disclosed in those proceedings pursuant to the orders of 31 July 2018 are in foreign languages. It is common ground that arrangements should be made in due course to ensure that if any of those documents are referred to at trial, there should be a single, agreed translation for the purpose of all these Trucks cases. But in the meantime, the legal representatives of a number of the defendants to those proceedings have made for their own purposes unofficial translations of a number of the documents or of parts of the documents.

18. SVW applied for disclosure of those translations. Although the application was formally made against DAF, which was the respondent to the original disclosure order, it was recognised that as several of the defendants had arranged for documents to be translated and they may well not have all had the same documents translated, if the application was granted against DAF then an equivalent order might be made as against them. Further, since disclosure is a continuing obligation, even those defendants which did not presently have translations may well make translations in the future which they would then, if SVW's application was well founded, be under an obligation to disclose. The application was accordingly opposed not only by DAF but also by counsel for Daimler, Volvo/Renault, Iveco and MAN. Indeed, the submissions against granting disclosure were advanced in the first place by Mr. Harris QC, appearing on behalf of Daimler, with supplementary submission by counsel for the other defendants.

19. For SVW, Ms. Demetriou QC based her argument squarely on the Court of Appeal decision in *Sumitomo Corpn v Credit Lyonnais Rouse Ltd* [2001] EWCA Civ 1152. There, the Court rejected the contention that translations are privileged merely because of the selection made by the lawyers as to which documents should be translated. In *Lyell v Kennedy* (1884) 27 ChD 1, as subsequently explained by Bingham LJ in *Ventouris v Mountain* [1991] 1 WLR 607 at 615, for privilege to apply it would be

necessary to show that the selection of documents which the solicitor has assembled "betrays the trend of the advice which he is giving the client". In *Sumitomo,* the Court of Appeal held that the principle in *Lyell v Kennedy* was applicable only to translations of third party documents and not to translations of own client documents.

20. Mr. Harris submitted that because the documents here came from the Commission file they were not to be regarded as own client documents, and that his client had the right to put in evidence to show that the way the selection of documents for translation was made would betray legal advice so as to come within the *Lyell v Kennedy* principle. In the alternative, he wished to preserve his clients' position to argue on appeal that *Sumitomo* was wrongly decided.

21. We did not hear detailed argument from Ms. Demetriou on this issue as we are prepared to assume in SVW's favour that the documents requested are not privileged, unless *Sumitomo* is wrongly decided, which is not for us to consider as it is clearly binding on the CAT. However, we nonetheless refused the application because, in our judgment, such disclosure would not in any event be proportionate.

22. Under the former Rules of the Supreme Court, Order 24, rule 13(1) provided that: "No order for the production of any documents for inspection ... shall be made ... unless the Court is of the opinion that the order is either necessary for disposing fairly of the cause or matter or for saving costs." In his judgment in *Taylor v Anderton* [1995] 2 All ER 420 (with which Rose and Morritt LJJ agreed), Sir Thomas Bingham MR considered the meaning of the expression "disposing fairly of the cause or matter". He said (at 434):

> "Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test."

23. Although the Master of the Rolls was there addressing the rule for inspection under the former procedural rules, we consider that his observations apply with equal force in the context of modern procedure, in which the question of necessity is a relevant factor in the assessment of proportionality and application of the overriding objective. If

anything, the courts' approach to disclosure and inspection of documents has become much stricter than it was under the previous RSC. Further, as the Court of Appeal observed in *Sumitomo* at [79], an order for production of documents is a matter of the court's discretion.

24. Ms. Demetriou could not suggest that SVW would suffer an unfair litigious disadvantage by not seeing the translations made by other parties to the proceedings of some of the documents that have been disclosed to them. SVW are obviously well able, through their solicitors, to arrange for translations themselves. Her submissions were directed entirely to the benefit in terms of saving of costs. It was said that if the various defendants had already identified some of the documents which were most relevant and had accordingly been translated, then access to those translations would greatly facilitate the review of the documents by the lawyers for SVW which may be necessary if they are to seek to amend their Particulars of Claim, as Royal Mail was applying to do following its review of the documents.

25. The importance of proportionality as regards documentary disclosure is emphasised in article 5(3) of the Damages Directive and set out at para 2.3 of the CAT Disclosure PD. Article 5(3)(b) indeed includes under the head of proportionality the cost of disclosure, although that is primarily directed at the expense for the party making disclosure and not for the party receiving it.

26. We can accept, as Ms. Demetriou submitted, that receiving the translations of documents as well as the original documents would facilitate the review by SVW's legal advisors and lead to some savings in costs. However, as against that:

    (a) Since under the order of 31 July 2018 not all the documents which they have from the Commission file have been disclosed, each defendant would need to check which of the translations it has are of undisclosed documents. Further, some of the disclosure involved redactions being made from the documents, whereas the translations are frequently of the full document. Since many thousands of documents are involved, each defendant which has made translations would therefore need to check the translations which it has against the documents it has disclosed and, if necessary, make redactions from the

translations. As Mr. Hoskins QC, appearing for Volvo/Renault, pointed out, all this also involves significant costs.

(b) Some of the translations have apparently been made by external translators, while others, we were informed, were made less formally by lawyers in the various legal teams. Disclosure from all the defendants is therefore likely to lead to multiple translated versions of differing quality of the same document being disclosed. In our view, that complicates rather than facilitates an orderly conduct of the proceedings.

(c) As pointed out by Mr. Jowell QC, appearing on behalf of MAN, a continuing obligation to disclose translations of documents in the Commission file as and when they are made is likely to have an inhibitory effect on the parties' decisions as to what documents they should have translated, as opposed to relying on an explanation by a foreign language speaker of the substance of the document.

(d) SVW received disclosure of the documents in the Commission file on 25 September 2018. It seems inconceivable in litigation of this substance that SVW's lawyers have not in the period since then conducted at least a preliminary review of the documents. Ms. Demetriou did not suggest otherwise, although she said that it had been only a "first level" review and that no translations had so far been produced. But we observe, as Mr. Harris pointed out, that the solicitors to SVW have an office in Germany and if appropriate they could no doubt seek to have a German-speaking lawyer admitted to the confidentiality ring.

27. In addition to the above, we note that none of the claimants in the other actions are seeking disclosure of translations from the defendants. Indeed, Royal Mail appears sufficiently to have completed its review of the disclosed documents, no doubt relying on its own translations, so as to be able to produce a draft re-amended Particulars of Claim which relies heavily on the contents of those documents.

28. For all those reasons, quite aside from any potential disruption to the progress of these proceedings should any of the defendants seek to pursue an appeal in the hope of

overturning the effect of the judgment in *Sumitomo*, we therefore concluded that it would be disproportionate to order this disclosure.

The Hon Mr Justice Roth
President

The Hon Mr Justice Hildyard

Hodge Malek QC

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 11 December 2018