Neutral citation [2019] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1294/5/7/18 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

8 May 2019

Before:

THE HON MR JUSTICE ROTH
(President)
THE HON MR JUSTICE HILDYARD
HODGE MALEK QC

Sitting as a Tribunal in England and Wales

BETWEEN:

WOLSELEY UK LIMITED AND OTHERS

Claimants

- v -

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

Defendants

- and -

DAIMLER AG

Additional Defendant

Heard at Victoria House on 30 January 2019

JUDGMENT: WOLSELEY CLAIMANTS' APPLICATION IN RELATION TO DAIMLER'S ADDITIONAL CLAIM

APPEARANCES

Ms Marie Demetriou QC and Mr Tristan Jones (instructed by Hausfeld & Co. LLP) appeared on behalf of the Wolseley Claimants.

Mr Paul Harris QC, Mr Ben Rayment and Ms Alexandra Littlewood (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Daimler Additional Defendant.

A. BACKGROUND

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.

2. 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.

3. 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. That decision has not yet been published. Scania has appealed that decision on numerous grounds to the EU General Court: Case T-799/17. That appeal is pending.

4. Eight actions claiming damages against addressees of the Decision and related companies had been commenced in the High Court of England and Wales by the end of 2017. Two of those proceedings were consolidated, leaving seven independent actions. 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	-

5. The present application is made in one of those actions: the "Wolseley proceedings". That action is brought by 153 claimants that belong to six corporate groups, but for convenience they will be referred to compendiously as "Wolseley". The First and Second Defendants are members of the Iveco group (the "Iveco Defendants") and the Third and Fourth Defendants are members of the DAF group (the "DAF Defendants"). The First, Second and Third, but not the Fourth, Defendants were addressees of the Decision. Both the Iveco Defendants and the DAF Defendants have brought Part 20 claims against, among others, Daimler AG, claiming indemnity or contribution in the event that they are held liable to the Claimants. Daimler AG ("Daimler") was an addressee of the Decision.

6. As can be seen from the table above, Daimler is a Part 20 Defendant only in this action. Daimler was originally named as a Part 20 Defendant in the Suez and Veolia actions but it has been removed from those proceedings.

7. The Defences pleaded by Daimler in response to the two Part 20 Claims brought by the Iveco Defendants and by the DAF Defendants take a very similar form. Daimler denies that those Defendants are liable to Wolseley and a substantial part of Daimler's Defence to each of the Part 20 claims comprises a response to the particular allegations in Wolseley's Particulars of Claim. Under the heading "Joint and Several Liability", Daimler pleads the following:

> "[I]t is admitted that, if (which is not admitted) the Admitted Conduct caused the Claimants to suffer any proven, recoverable loss, then Daimler and the other Addressees of the Settlement Decision including the Iveco Defendants and the Third (DAF) Defendant, and (subject to content of the Scania Decision) the Addressees of the Scania Decision, are jointly and severally liable for that loss to an extent to be determined in any apportionment/contribution proceedings or otherwise agreed;..."

Defence to the Iveco Defendants, para 71(a); Defence to the DAF Defendants, para 74(a).

8. Further, each of those pleadings by Daimler includes a final section as follows:

> **"Additional Claim by Daimler against the Claimants**
>
> By reason of the matters set out above in sections C-L, which are hereby repeated, Daimler is entitled to declarations against the Claimants (and each of them) that (i) the Defendants or any of them are not liable to the Claimants for the alleged loss and damage claimed and/or (ii) Daimler is not liable to the Claimants for the alleged loss and damage claimed and/or (iii) that the Admitted Conduct or the other alleged unlawful behaviour has not caused the Claimants the alleged loss and damage claimed.
>
> Further or in the alternative, Daimler is entitled to declarations against the Claimants (and each of them) that they have not established and/or cannot and/or would not be able (e.g. if they pursued their Claim to judgment) to establish either (i) liability for the alleged loss and damage claimed as against the Defendants or any of them and/or (ii) that Daimler is liable to them for the alleged loss and damage claimed and/or (iii) that the Admitted Conduct or the other alleged unlawful behaviour has caused them the alleged loss and damage claimed."

We shall refer to this as "Daimler's Additional Claim".

9. By orders in similar form made in the High Court, all these actions were transferred to the Competition Appeal Tribunal ("the CAT") pursuant to sect 16 of the Enterprise Act 2002 and/or regulation 2(a) of the Section 16 Enterprise

Act 2002 Regulations 2015. The order in the Wolseley proceedings, made by consent on 26 July 2018, included the following provision:

> "the proceedings were and shall continue to be regarded as having been commenced in this court [i.e. the High Court]. Any further statements of case or amendments to a statement of case shall be made in accordance with the Civil Procedure Rules and not with the Competition Appeal Tribunal Rules 2015."

10. A case management conference ("CMC") was held at the CAT in all seven actions on 21-22 November 2018. By order made at that CMC, it was directed that the main claims in the Suez, Veolia and Wolseley actions would be heard together with the evidence in the one standing as evidence in the others. The claimants in those three actions are represented by the same solicitors and counsel and, unsurprisingly, the Particulars of Claim in each of the three actions take a similar form. The order also directed that the main claims will be case managed together with the additional claims in those proceedings, and further provided that:

> "The Additional Defendants, including Scania, shall be allowed to participate in the trial of the Main Claims. Insofar as the Additional Claims raise issues regarding the overall loss and damage suffered by the Claimants, or the liability of the Main Defendants to compensate the Claimants for such loss and damage, such issues shall be tried with the Main Claims. Insofar as the Additional Claims raise issues regarding the amount or apportionment of contribution which any Defendant should make to any other Defendant, such issues shall be tried separately from and subsequently to the Main Claims. The question of whether the liability of the Additional Defendants should be tried with the Main Claims is reserved until the next CMC."

B. THE APPLICATION

11. Wolseley seeks an order either determining that Daimler's Additional Claim cannot proceed because it was improperly issued, or alternatively to strike out or for summary judgment in its favour on Daimler's Additional Claim. Wolseley, by its solicitors, gave notice of this application prior to the CMC of 2018; but since it concerns only Wolseley and Daimler and in order to give time for full argument, the CAT, with the agreement of Wolseley and Daimler, directed that Wolseley's application should be listed separately to be heard after the CMC.

12. The alternatives in the application are advanced on wholly distinct grounds:

(1) Since Daimler's Additional Claim does not constitute a counterclaim for the purpose of the CPR Part 20, it cannot be raised without the permission of the High Court, which has never been sought. Daimler's Additional Claim has therefore been improperly issued and cannot proceed.

(2) Daimler's Additional Claim in the circumstances here does not satisfy the established principles for the grant of a declaratory relief so there is no real prospect that the CAT would grant the declarations sought. The Additional Claim should therefore be struck out or there should be summary judgment on it in Wolseley's favour.

13. Although logically the first ground might be addressed prior to the second, it is, as counsel for Wolseley recognise in their helpful skeleton argument, "a technical point". We shall therefore in this judgment, as in the hearing, consider first the second, substantive ground of Wolseley's application.

C. STRIKE OUT/SUMMARY JUDGMENT

(1) The Governing Principles

14. The CAT may strike out any claim in proceedings if "it considers that there are no reasonable grounds for making the claim": rule 41(1)(b) of the Competition Appeal Tribunal Rules 2015 ("the Rules"). Under rule 43(1) of the Rules, the CAT may give summary judgment against a claimant on the whole of a claim or a particular issue if:

> "(a) it considers that –
>
> (i) the claimant has no real prospect of succeeding on the claim or issue; ... and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a substantive hearing."

15. It is common ground that these powers are here to be exercised on the same basis as would apply under the corresponding rules of the CPR in the High Court, and further that for the purpose of the present application there is no material difference between the test for striking out and for summary judgment. Therefore, if Wolseley is not entitled to summary judgment, there is no basis on which Daimler's Additional Claim should be struck out.

16. The approach to be adopted to an application for summary judgment by a defendant was common ground. The principles were set out by Lewison J in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], in a formulation that has repeatedly been cited and approved:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

17. As regards declaratory relief, there was also largely common ground between the two sides as to the governing principles. The proper approach to the grant of a negative declaration was explained by a very strong Court of Appeal (Lord Woolf MR, Hale LJ and Lord Mustill) in *Messier-Dowty Ltd v Sabena SA* [2000] 1WLR 2040. In his judgment, with which the other members of the court agreed, Lord Woolf MR discussed prior authorities on negative declarations and then stated, at [41]-[42]:

> "41. … The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice. For example, where a patient is not in a position to consent to medical treatment declarations have an important role to play. Without the use of negative declarations, recent extensions in the use of declaratory relief, including the beneficial intervention of the courts in cases concerning mentally incapacitated people would not have been possible. As Sir Thomas Bingham M.R. said in *In re S. (Hospital Patient: Court's Jurisdiction)* [1996] Fam. 1, 19:
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> > "Any statutory rule, unless framed in terms so wide as to give the court an almost unlimited discretion, would be bound to impose an element of inflexibility which would in my view be wholly undesirable."
>
> He considered that the different situation he was there considering was "pre-eminently an area in which the common law should respond to social needs." So in my judgment the development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction. It should instead be kept within proper bounds by the exercise of the court's discretion.
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> 42. While negative declarations can perform a positive role, they are an unusual remedy in so far as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and vice versa. This can result in procedural complications and possible injustice to an unwilling "defendant." This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful to do so."

18. Further, dismissing one argument advanced by counsel for the defendant in that case, Lord Woolf said (at [44]):

> "…I also reject the contention of Mr. Shepherd that as a matter of principle negative declarations should not be granted (or perhaps only in wholly exceptional cases granted) in respect of possible tortious liability. I would not quarrel, however, with the judge's statement that: "It may well be that few such cases will lend themselves to relief of that kind, especially where the injured party has a choice of which defendants to sue.""

19. In *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387, a case concerning a positive not a negative declaration, Aikens LJ summarised the principles to be derived from the cases on the grant of declaratory relief, at [120]:

> "(1) The power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
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> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly "moved on" from *Meadows*).
>
> (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.
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> (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.
>
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

20. Although that was a dissenting judgment on the result in the case itself, this statement has subsequently been followed and applied by the Court of Appeal: *Milebush Properties Ltd v Tameside Metropolitan Borough Council* [2011] EWCA Civ 270, save that Moore-Bick LJ there suggested that point (2) of Aikens LJ's summary was expressed too narrowly (since the dispute could relate to rights that may come into existence in the future, and the dispute could concern not private rights of the parties but a question of public law relevant to the parties' legitimate interests).

21. Accordingly, it is clear that the grant of declaratory relief is discretionary and a central question as regards the declarations sought in Daimler's Additional Claim is whether they would serve any useful purpose. That means, of course, a useful purpose which the claimant has a legitimate interest to obtain.

(2) The Civil Liability (Contribution) Act 1978

22. Wolseley has not sued Daimler; it clearly could have done so but was under no obligation to do so. As noted above, Daimler has been brought into the proceedings by the Iveco Defendants and the DAF Defendants who have made additional claims for contribution from Daimler under the Civil Liability (Contribution) Act 1978 (the "CLCA 1978"). It is accepted that by reason of these contribution claims, and further the large number of Daimler trucks encompassed in the Wolseley claim, Daimler has a close and direct interest in the main action. As Mr Harris QC colourfully put it, Daimler has "a lot of skin in the game".

23. At the heart of the argument was sect 1 of the CLCA 1978, which it is appropriate to quote in full:

> "**1. Entitlement to contribution**
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> (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
>
> (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.
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> (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
>
> (5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.
>
> (6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action

> brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales."

24. Sect 2 CLCA 1978 concerns the assessment of contribution. Sect 2(1) provides that the amount of contribution recoverable shall be "such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."

25. The application of sect 1(4) CLCA 1978 was recently considered, as it happens in the context of a cartel damages claim, by the Court of Appeal in *WH Newson Holdings Ltd v IMI Plc* [2016] EWCA Civ 773. Because of its significance to the argument as to whether the declarations here would have any useful purpose, it is necessary to explain that case in some detail.

26. In *Newson*, the claimants brought a follow-on claim for damages against defendants ("IMI") who had been found by the Commission to have participated in a price fixing cartel for copper fittings. IMI raised a limitation defence, to which the claimants pleaded a reply relying on the postponement of the limitation period in a case of 'fraudulent concealment' under sect 32(1)(b) of the Limitation Act 1980 ("LA 1980"). IMI also served a Part 20 claim seeking contribution from Delta Ltd ("Delta"), who were also addressees of the Commission's decision although not sued by the claimants. By its defence to the Part 20 claim, Delta denied that either it or IMI had caused any loss to the claimants, and also pleaded a limitation defence, asserting that the claimants could not satisfy the conditions of sect 32 LA 1980.

27. The claimants then reached a settlement with IMI. The question arose whether in IMI's claim for contribution (now, towards the sum it had paid in settlement), Delta could maintain its limitation defence; i.e. whether under sect 1(4) CLCA 1978 Delta was precluded from advancing that defence. Delta accepted that sect 1(3) meant that it could not argue that a claim by the claimants against Delta would have been time-barred. Expiry of the limitation period would not have extinguished the claimants' right of action against Delta; it would only have barred their remedy. However, Delta submitted that it could argue that the claim by the claimants *against IMI* was time-barred so that IMI would never have been liable to the claimants.

28. In a judgment delivered by Sir Colin Rimer (with which Gross and Hamblen LJJ agreed), the Court of Appeal considered prior first instance judgments on sect 1(4), including in particular the decision of Chadwick J in *Arab Monetary Fund v Hashim (No 8)* The Times, 17 June 1993, and the background to the provision in the Law Commission's 1977 *Report on Contribution.* Using the shorthand C, D1 and D2 to refer to the parties to the main proceedings and the contribution proceedings, Sir Colin Rimer addressed the construction of sect 1(4) as follows:

> "51. On its ordinary wording ('made … or agreed to make'), section 1(2) applies also to the case in which D1 has made a *bona fide* settlement or compromise of C's claim before he brings his contribution claim against D2. If, therefore, section 1 had stopped at section 1(3), in a case such as the present D1 would be faced in contribution proceedings against D2 with the burden of proving his own liability to C at the time of the payment or the agreement to make it. Section 1(4), however, deals expressly with the case of a *bona fide* settlement or compromise and is plainly directed at qualifying the provisions of sections 1(1) and 1(2) in relation to any contribution claim by D1 that follows the making of such a settlement.
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> 52. Section 1(4) must also be read as a whole and its major part (down to the proviso) makes it clear that, subject to the proviso, a contribution claim by D1 against D2 made in the wake of D1's *bona fide* settlement or compromise of C's claim neither requires nor permits any investigation into whether or not D1 'is or ever was liable in respect of the damage …', that is whether or not he was actually liable. That is an express negation of the probative burden that, had they stood alone, section 1(1) and (2) would have imposed on D1. It is obvious that the policy underlying section 1(4) in that respect is that explained in the Law Commission report, which expressed the concern that, following a *bona fide* settlement between C and D1, D1 ought not in any contribution proceedings against D2 to have to prove its own liability to C. It wanted the law to be so reformed that, provided that D1's settlement with C was *bona fide*, D1 could recover contribution from D2, whether or not he, D1, was so liable. One driver behind that recommendation was that otherwise, as explained in paragraph 44 of the report, it would mean 'turning all the usual conventions of civil litigation upside down' – that is, it would have required D1 to prove C's case against himself. Another was that otherwise D1 might feel obliged to fight C's case to judgment in order to protect his contribution rights. Whereas the ordinary sense of section 1(1) is that, in contribution proceedings, D1 must prove his own liability to C, and section 1(2) clarifies the time at which he must do so, section 1(4) qualifies both requirements.
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> 53. The qualification is not, however, absolute because it is subject to the proviso....
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> 56. The premise of a contribution claim by D1 based on section 1(4) is that there has been a *bona fide* settlement or compromise of C's claim against D1. It will no doubt be open to D2 to argue in any contribution proceedings that the settlement or compromise was not a *bona fide* one, for example that it was a collusive, corrupt or dishonest one (see the Law Commission report, paragraph 56), and if such a case is made good the provisions of section 1(4) will not avail D1. In this case, however, there is no suggestion that D1's settlement with C was other than *bona fide* and so section 1(4) is in play.

57. If I may be forgiven for stating the trite, legal proceedings can range from the relatively simple to the very complicated. In some cases, C's claim may be based on straightforward facts and D1's Defence may do no more than deny them. In others, D1's Defence may question whether, even if proved, C's factual case would entitle C to relief; it may also deny the facts or material parts of them; it may raise a limitation or other collateral defence; and the outcome on the pleadings may be that the burden of proof on matters raised by the Defence will rest on D1 or that a burden of disproof will shift to C.

58. Whether, however, the case is simple or complicated, in arriving at a *bona fide* settlement C and D1 will respectively have assessed the relative strength or weakness of their respective cases in the litigation and have brought into account the commercial considerations bearing upon it. If the settlement involves a payment by D1 to C, then a claim by D1 for contribution to it by D2 will be one to which section 1(4) applies. The central feature of section 1(4), expressly spelt out in its main part down to the proviso, is that in any such claim there will be no question, and therefore no inquiry, as to whether or not D1 was in fact liable to C. In so providing, section 1(4) gave clear effect to the Law Commission's recommendation.

59. The proviso of course shows that D1 must still prove at least something in order to succeed against D2. That is that 'he would have been liable [to C] assuming that the factual basis of the claim against him could be established.' In my judgment the sense of that is that all that D1 needs to show is that such factual basis would have disclosed a reasonable cause of action against D1 such as to make him liable in law to C in respect of the damage. If he can do that, he will be entitled to succeed against D2. There may of course remain issues as to quantum, as to which section 1(4) makes no assumptions.

60. Chadwick J's view expressed in *Hashim* was that there was more to the proviso than that since its stated assumption as to the establishment of factual matters did not extend to an assumption in favour of C of any factual matters forming the basis of a collateral defence raised by D1 in respect of which the burden of proof was on D1. His view was, therefore, that the proviso permitted an investigation by D2 of whether any such collateral defence might have succeeded; and, if it would have done, D1 would not have been liable to C.

61. In my respectful view, that construction of the proviso is one that section 1(4) does not permit. It has provided expressly that there is to be no inquiry as to whether D1 was *or was not* actually liable to C and the proviso cannot therefore fairly be read as impliedly qualifying that prohibition so as to let in an inquiry directed at showing that D1 was not actually liable. Such an interpretation is repugnant to the express intention of the primary provision of section 1(4). In my judgment, the only permissible interpretation of the proviso, read in the context of section 1(4) as a whole, is that the limit of the inquiry it permits is as I have summarised it in [59] above."

29. At para [59], Sir Colin Rimer observed that sect 1(4) makes no assumptions as to quantum. In *J Sainsbury Plc v Broadway Malyan* [1999] PNLR 286 at 321-322, HH Judge Lloyd QC held that D2 could argue in the contribution proceedings that D1 had paid too much by way of settlement, although "the court is not required to decide what should have been the proper amount of the settlement as if the matter were being tried" since "[s]ettlements are to be

encouraged as a matter of policy so it would be a discouragement if a party had to justify them in detail." Both parties before us accepted that it is open to D2 in contribution proceedings to contend that the settlement reached by D1 with C was excessive.

(3) The Parties' Submissions

Wolseley's submissions

30. For Wolseley, Ms Demetriou QC addressed her arguments in response to the approach put forward in the skeleton argument for Daimler on the alternative bases that the main action by Wolseley against Iveco and DAF proceeded to judgment after a trial and that the main claim settled, leaving only the contribution proceedings.

31. It was now established by the CAT order made at the CMC that Daimler would be able to participate in the trial of the main action. If that case went to judgment, the first three declarations sought would achieve nothing. The judgment would establish whether Iveco and/or DAF were liable to Wolseley and for what loss, and whether the unlawful behaviour alleged caused Wolseley the alleged loss. That covered the first and third declarations sought, which were accordingly redundant. As for the question of Daimler's potential liability to Wolseley, the subject of the second declaration, Wolseley had not sued Daimler and so the only question in the contribution proceedings was whether Daimler would be liable to Wolseley for loss for which the Iveco and DAF Defendants may be held liable to Wolseley. That is a point which would be formally determined in the contribution proceedings and there is no need to have it determined in the main action in which Daimler was not sued. Even if the question of liability in the contribution proceedings were to be decided subsequently to the main action (which the CAT has reserved as a matter of case management: see para 10 above), here, Daimler's liability was alleged only as joint and several liability as a fellow participant in the cartel and addressee of the Decision along with Iveco and DAF. Accordingly, making the second declaration as part of the main action also served no purpose.

32. In the event of a settlement, sect 1(4) CLCA 1978 would apply, as explained and determined by the Court of Appeal in *Newson*. Assuming it was a bona fide settlement, and Daimler did not suggest that there was any risk of the contrary, the Iveco and DAF Defendants could seek contribution from Daimler. They were entitled, in their contribution claim, to the statutory presumption in sect 1(4). The fourth and sixth declarations effectively sought to circumvent the statutory presumption, but that was futile since the presumption was conclusive. The fifth declaration again served no purpose for the same reason as applied to the second declaration: see above.

Daimler's submissions

33. For Daimler, Mr Harris emphasised the high hurdle facing a party seeking summary judgment. Wolseley had to show that it was not even arguable that the declarations would serve a useful purpose, irrespective of what might happen in the proceedings. Moreover, the declarations did not have to serve a useful purpose to Wolseley; here, they would be useful to Daimler and to the Tribunal. This was a very large claim, and the trucks which were the subject of the claim included over 2000 Daimler trucks, which was just short of the number of DAF trucks and significantly more than the number of Iveco trucks, albeit that Wolseley had chosen not to sue Daimler. Further, in respect of the trucks sold in Ireland that were covered by the claim, only Daimler trucks were in issue. Daimler's interest and potential exposure through the Part 20 claim was therefore very significant.

34. Accordingly, Daimler had a legitimate interest in being in what was described as "the driving seat" as regards the issue of liability to Wolseley at the trial, or at least not relegated to, in effect, the position of a back-seat driver. The Iveco and DAF Defendants may not have the same interest in defending all aspects of the claim as Daimler, or might not be in a proper position to defend all aspects of the claim. Daimler might be able to show that they are not liable in respect of the Daimler manufactured trucks because for those any overcharge was much less and was completely passed through to the claimants' customers.

35. Secondly, under sect 1(1) of the CLCA 1978, Daimler is only liable to Iveco/DAF on their contribution claim if Daimler would itself be directly liable

to the claimants, Wolseley. The declarations in Daimler's Additional Claim sought to establish this issue *directly* as against Wolseley, rather than leaving it to be determined *indirectly* in the contribution proceedings as against Iveco/DAF without Wolseley's participation. Secondly, the question whether Iveco/DAF are liable to Wolseley is not a simple binary question. That will be a material issue in the contribution trial and it would be much more satisfactory for this to be determined in the main trial, with Wolseley participating, since otherwise there is a risk of inconsistent findings.

36. Thirdly, there is the situation that would arise if there is a settlement in the main action. Again, that is not a binary question. Only one of the two defendant groups might settle with Wolseley but not the other; or since there are in fact 153 claimants belonging to six corporate groups (see para 5 above), a settlement might be reached with some but not all of those claimant groups. Although sect 1(4) restricts Daimler in arguing that Iveco and/or DAF was not in fact liable to the claimants with whom it settled, that does not impede Daimler from submitting that it is not liable itself to the settling claimants: sect 1(4) of the Act creates a presumption as regards the liability of the settling defendant making the contribution claim; it does not affect the basic rule in sect 1(1) as regards the liability of the person *from whom* contribution is claimed. The question of whether Daimler would be liable to the claimants who settled would have to be determined in the contribution proceedings without the participation of those settling claimants. By the declaration sought as against the claimants, Daimler avoids that very unsatisfactory situation.

37. Unless Wolseley's claim failed altogether, the issue of apportionment would arise in the contribution proceedings, whether or not there was a settlement. The extent of Daimler's liability to Wolseley is likely to be a very relevant issue on apportionment. Apportionment of contribution to be paid by Daimler may well be significantly affected, as Mr Harris put it:

> "If I [i.e. Daimler] have established, say, that I am not liable, or that I am not liable ... in respect of X, Y and Z, or that I am not liable for the same amount because, say, the overcharge for Daimler trucks is different, or I am not liable for the same amount because, for example, it happens that on the facts, which we are all going to be learning a great deal more about as these cases progress, pass-on for Daimler trucks is much greater, or there has not been an upstream pass-on for sale of Daimler trucks to anywhere near the same extent, if at all, as there has been, say, for DAF trucks..."

It is therefore likely to be of real value to have these matters determined as between Daimler and Wolseley, and not left to later argument in the contribution proceedings in the absence of Wolseley. It was impossible to predict how the proceedings might develop, and therefore determine at this early stage that the declarations will serve no practical purpose.

38. Daimler advanced a separate justification on the basis of sect 1(5) of the CLCA 1978. Mr Harris submitted that this should be given a purposive construction and so apply equally to the situation where the claim is brought *by* a person from whom contribution is sought *against* the person who suffers the damage in question. On that interpretation, a declaration of non-liability made in Daimler's Additional Claim against Wolseley would be binding in the contribution proceedings brought by Iveco and DAF.

39. Finally, there was no concern here of Wolseley being dragged into the litigation by Daimler's Additional Claim: it had freely chosen to commence the action against Iveco and DAF and would not be the subject of Daimler's Additional Claim at all if it had not started these proceedings.

(4) Discussion

40. When there are several parties to a cartel, we appreciate that it may seem unattractive when a claimant seeking damages allegedly caused by the cartel chooses to sue only one (or in this case, two) of those parties, leaving that defendant to claim contribution from the others under the CLCA 1978. The claimant's choice may well be driven by tactical considerations as to which might be the easiest opponent, and not whether that participant in the cartel is likely to be found liable in contribution proceedings to reimburse the greatest share of the damages which the claimant has recovered. Here, as noted above, Daimler sold many more trucks to the Wolseley claimants than Iveco.

41. However, it is clear that there is no legal obligation on the claimant to sue all participants in the cartel. The claimant is entitled to rely on the joint and several liability of each participant for all the damages caused. In the light of that, the question is what useful purpose would be served by the declarations sought in Daimler's Additional Claim. That purpose must of course be a legitimate

purpose, and the purpose must be served by the declarations (if granted), and not simply be a collateral benefit of the proceedings leading up to the declarations.

42. In contribution proceedings under the CLCA 1978, three questions arise (adopting the helpful nomenclature used in *Newson*): (a) is D1 liable to C; (b) would D2 be liable to C, if sued; and if the answers to (a) and (b) are yes, then (c) what contribution should D2 pay to D1 towards the sum paid by D1 to C? We therefore consider whether the declarations sought would serve a useful purpose in respect of each of these questions. And we think it is appropriate to address this separately according to whether the main claim between C and D1 goes through trial to judgment, or whether C and D1 reach a settlement.

43. If the claim by C against D1 goes through to judgment, then question (a), whether D1 is liable to C will be determined by that judgment. As D2 may have resources or evidence that can assist D1 in making its defence, we accept that it should be entitled to engage in that issue directly as against C. But that is achieved by permitting D2 to participate in the main trial and call evidence. Here, that is the effect of the order made on 21-22 November 2018 as regards Daimler. The determination of that issue in the main trial will bind D2 in the contribution proceedings. Putting D2 in what was metaphorically referred to as the "driving seat" does not lead the declaration to serve any further purpose than the judgment as between C and D1, and effective resolution of the question is ensured by D2's involvement in the trial.

44. As regards question (b), there may be cases where a useful purpose is served in having this resolved as between C and D2 directly, rather than leaving it to be argued in the contribution proceedings between D1 and D2. We do not need to reach a concluded view on that in more general terms, since that is not the position here. The entire basis on which D2 is alleged to be liable to C is joint and several liability with D1 for the same damage. If the cartel caused loss to C, which is C's claim against D1, then all the cartel participants are jointly and severally liable for that loss. Indeed, as we have observed, Daimler admits by its defences to the contribution claims from DAF/Iveco that such joint and several liability would apply. Accordingly, if the answer to question (a) is yes,

so by definition is the answer to question (b), and vice versa. A separate declaration here sought by Daimler therefore serves no useful purpose.

45. There remains question (c), which is an issue arising directly as between D1 and D2. It goes to the sharing out of the damages D1 is held liable to pay. We can see that there may be questions, for example of the extent to which the loss was caused by an overcharge on Daimler trucks as compared to other trucks. However, the way the damages are computed should be established by the judgment as against D1, and D2's participation in the main trial will enable it to put any distinct argument it wishes to make on quantum. And in any event, none of the declarations sought in Daimler's Additional Claim address matters of quantum.

46. We turn to the situation where the claim by C against D1 does not proceed to judgment but is settled. Indeed, we suspect that it is the possibility of a settlement that is the driving force behind Daimler's Additional Claim. In that situation, question (a) is determined by sect 1(4) CLCA. The statutory presumption that D1 was liable to C is conclusive, subject only to the proviso (which is not an issue in the present case). As Sir Colin Rimer stated, in *Newson* at [58]:

> "The central feature of section 1(4), expressly spelt out in its main part down to the proviso, is that in any such claim there will be no question, and therefore no inquiry, as to whether or not D1 was in fact liable to C."

Accordingly, in determination of question (a) in the contribution claim, the declaration sought can serve no purpose: it cannot be used as a back-door means to circumvent the operation of the statute.

47. Question (b), the liability of D2 to C, of course would have to be determined, but as in the non-settlement situation discussed above, by reason of the principle of joint and several liability it follows ineluctably from the liability of D1 to C. If D1 is so liable, then D2 is jointly and severally liable to C for the same loss.

48. There remains question (c), which could be strongly in issue. Moreover, we note Sir Colin Rimer's observation at [59] in *Newson* that sect 1(4) does not apply to quantum. On that basis, it would be open to D2 to argue that D1 paid too much in its settlement with C, so that any contribution should be calculated

on a lesser sum. Although it does not appear that this aspect was subject to argument in *Newson*, the Official Referee so held in *Sainsbury's* (see para 29 above) and we think this is potentially important as it protects D2 from having to make an excessive payment by way of contribution if D1 agrees to a settlement that over-compensates C.

49. However, we do not consider that this alone can furnish a purpose for the declarations being claimed. We recognise that there is something unattractive if C, which has suffered loss as a purchaser caused by an unlawful combination of several suppliers, brings a claim against only supplier D1 as jointly and severally liable for the whole of its loss, and chooses not to sue D2 which in fact supplied C with a greater volume of the affected goods. If that claim settles, then D2 is left in the position of arguing with D1 on its contribution claim as to the reasonableness of the settlement without participation by C, although C has the evidence to establish the quantum of its loss. However, that seems to us to be a consequence of the legislative choice evident in section 1(4) CLCA 1978, as explained in *Newson*. Moreover, as Ms Demetriou pointed out in argument, even if C had sued both D1 and D2, there would be nothing to prevent C reaching a settlement with D1 which it regarded as satisfying its full claim, and therefore discontinuing against D2. D2 could not compel C to continue the proceedings even if that would assist in the dispute over contribution between D1 and D2. By analogy here, if Wolseley were to settle with the defendants, it would have no further interest in the proceedings and from its perspective any claim for declarations against it which Daimler might wish to pursue would be academic. We do not see that the Tribunal could compel Wolseley to contest the Additional Claim. By the same token, since the subject of the declaration would not be a matter of either actual or potential dispute between the only parties to Daimler's Additional Claim, under well-established principles the Tribunal would exercise its discretion to refuse to make the declaration.

50. Furthermore, question (c) is concerned with matters of quantum. There could be some forensic benefit for D2 to be able to make any challenge to the quantum of any settlement between D1 and C directly against them both, rather than against D1 alone. However, none of the declarations pleaded by Daimler addresses matters of quantum. Indeed, it is difficult to envisage how the stance

which Daimler might choose to adopt as to the amount that might eventually be agreed in any settlement could be framed *ex ante* in a form of declaration.

51. Nor do we accept Mr Harris' argument under sect 1(5) CLCA 1978. The wording of the sub-section is clear: it concerns a judgment in proceedings brought *by C against D2*. We do not see any basis on which even a purposive construction of this provision can enable it to provide conclusive effect to a judgment in proceedings brought *by D2 against C*, which is the position here. The approach of the statute follows a careful review of the underlying considerations in the Law Commission's 1977 report, and it is not for the court or this Tribunal effectively to re-cast the statutory wording by "interpretation" in a particular case. Altogether, it seems to us that the potential for contribution proceedings without the participation of C, whether direct or indirect, is inherent in the structure of the contribution regime established as a matter of policy by the CLCA.

52. Accordingly, we consider that the declarations sought in Daimler's Additional Claim would not serve any legitimate, useful purpose. Although these proceedings are at a relatively early stage, in our judgment there is no prospect of the fundamental considerations set out above changing. In those circumstances, Daimler's Additional Claim should be struck out.

D. THE ISSUANCE OF THE ADDITIONAL CLAIM

53. In view of our conclusion on the substantive issue, there is strictly no need for us to decide the distinct procedural ground. However, since it was argued, we shall address it briefly.

54. As explained above, although these proceedings are now being heard in the CAT, the statements of case continue to be governed by the CPR that prevail in the High Court: para 9 above.

55. Wolseley's argument is based on CPR Part 20, which governs "Counterclaims and other Additional Claims." The basic question is whether Daimler's Additional Claim constitutes a counterclaim governed by CPR rule 20.4 or an additional claim governed by CPR rule 20.7. The material provisions of Part 20 for this argument are as follows.

"20.2 Scope and Interpretation

(1) This Part applies to –

(a) a counterclaim by a defendant against the claimant or against the claimant and some other person;

(b) an additional claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and

(c) where an additional claim has been made against a person who is not already a party, any additional claim made by that person against any other person (whether or not already a party).

(2) In these Rules –

(a) 'additional claim' means any claim other than the claim by the claimant against the defendant; and

(b) unless the context requires otherwise, references to a claimant or defendant include a party bringing or defending an additional claim."

"**20.4 Defendant's counterclaim against the claimant**

(1) A defendant may make a counterclaim against a claimant by filing particulars of the counterclaim.

(2) A defendant may make a counterclaim against a claimant –

(a) without the court's permission if he files it with his defence…"

"20.7 Procedure for making any other additional claim

(1) This rule applies to any additional claim except –

(a) a counterclaim only against an existing party; and

(b) a claim for contribution or indemnity made in accordance with rule 20.6.

(2) An additional claim is made when the court issues the appropriate claim form…

(3) A defendant may make an additional claim –

(a) without the court's permission if the additional claim is issued before or at the same time as he files his defence;

(b) at any other time with the court's permission…"

56. The essence of Ms Demetriou's argument is that Daimler's Additional Claim is not a counterclaim within rule 20.2(1)(a): it is an additional claim within rule 20.2(1)(c). Since it is not a counterclaim, the issue of that claim is governed by rule 20.7, which requires the service of a claim form. Here, Daimler never

issued a claim form. And if the additional claim was not properly issued at the same time as the filing of the defence, it requires the permission of the court.

57. Mr Harris sought to argue that Daimler's Additional Claim constitutes a counterclaim for the purpose of rule 20.4, since it was a defendant to the contribution claims brought by DAF and Iveco and is making its claim in response to Wolseley's claim. He further sought to rely on rule 20.2(2)(b), emphasising the words "unless the context otherwise requires."

58. However, we find the construction advanced for Daimler untenable in the light of the structure of rule 20.2(1). That elaborates three distinct kinds of additional claim, of which the first is a counterclaim. The contribution claims by DAF and Iveco against Daimler clearly constitute additional claims within rule 20.2(1)(b). In the light of that, it seems to us that Daimler's Additional Claim is manifestly an additional claim within rule 20.2(1)(c). It follows that it is not a counterclaim within rule 20.2(1)(a). In our judgment, rule 20.2(2)(b) does not lead to a different conclusion, for the reason given by Wolseley's counsel in their skeleton argument:

> "... references in the CPR to 'claimants' and 'defendants' only make sense in the context of a particular claim: for instance, Iveco is a defendant in the claim brought against it but it is a claimant in the claim brought by it, and the rules need to be read and applied with that in mind. Thus, CPR 20.2(2)(b) does not have the effect of requiring one to read the definition of 'counterclaim' as though the relevant 'claimant' may be in one claim and the relevant 'defendant' a defendant to a different claim."

59. We do not accept Mr Harris' further argument that because it would be inefficient and inconvenient to require Daimler to issue a separate claim form against Wolseley who was already a claimant in the overall proceedings, Wolseley's interpretation must be rejected on the basis of rule 20.1, which states:

> "The purpose of this Part is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner."

In our judgment, such an introductory statement of purpose does not enable the court or Tribunal to override the explicit provisions of the following rules, or to interpret them contrary to their clear terms. While Mr Harris also referred to

what Daimler's solicitors were told by the staff at the High Court Registry, that manifestly cannot affect the interpretation of the rules.

60. Nor do we think that rule 20.5 advances Daimler's case. That provision concerns the procedure for making a counterclaim against a person other than the claimant. Rule 20.2(1)(a) expressly envisages that a counterclaim may be made against the claimant "and some other person." Just as rule 20.4 explains how a counterclaim may be made against the claimant, so rule 20.5 explains how a counterclaim may be made against some other person, but both rule 20.4 and rule 20.5 flow from the meaning of counterclaim set out in rule 20.2(1)(a).

61. We should add that we do not derive much assistance from the Glossary to the CPR, to which both sides referred and which defines "counterclaim" as:

> "A claim brought by a defendant in response to the claimant's claim, which is included in the same proceedings as the claimant's claim."

Other than the clarification that a counterclaim must be in the same proceedings as the claim, this does not appear to go further than rule 20.2(1)(a) and, in any event, rule 2.2(1) states:

> "The glossary at the end of these Rules is a guide to the meaning of certain legal expressions as used in the Rules, but is not to be taken as giving those expressions any meaning in the Rules which they do not have in law generally."

62. We also consider that the decision in *Law Society v Shah (No 2)* [2008] EWHC 2515 (Ch), to which Daimler referred, is of no relevance in the present context. The issue there concerned the meaning of "original... counterclaim" for the purposes of sect 35(3) of the Limitation Act 1980, in the particular circumstances where insurers had been joined by consent as defendants to claims against discharged bankrupt solicitors so as to protect their subrogation interest.

63. In consequence, the issuance of Daimler's Additional Claim is governed by rule 20.7 and not rule 20.4. It follows that it was therefore improperly issued. By letter sent shortly before the hearing and then in oral submissions, Daimler suggested that if there was a procedural error, it could be rectified under CPR rule 3.10, which gives the court a power to make an order to remedy such an error. We were not taken to any of the authorities on the proper scope of rule

3.10, but in any event, since this concerns remedying an error of procedure in failing to comply with the rule in the High Court, we do not think that the Tribunal has jurisdiction to exercise the power of the court under this rule.

64. However, as Mr Harris emphasised strongly, and Ms Demetriou conceded, this is a very technical point. While the Tribunal does not have power to give permission for the issue of a declaratory claim (since that is not within sect 47A(3) of the Competition Act 1998), Daimler could now apply for permission to issue a claim form in the High Court and if the declaratory claim were well founded then Ms Demetriou rightly accepted that such permission would be granted. The High Court could, and presumably would, then transfer Daimler's claim to the Tribunal, where it would be heard along with the existing Wolseley proceedings. Accordingly, the end result would be the same, after some delay and additional expense, which might perhaps be reflected in an appropriate costs order.

65. We would therefore have been reluctant to dispose of this application solely on the procedural ground. However, in view of our decision on the substantive ground, that eventuality does not arise.

66. This judgment is unanimous.

The Hon Mr Justice Roth
President

The Hon Mr Justice Hildyard

Hodge Malek QC

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

Date: 8 May 2019