Neutral citation [2024] CAT 56

Case No: 1431/5/7/22 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

1 October 2024

Before:

SIR MARCUS SMITH
(President)
THE HONOURABLE LORD ERICHT
THE HONOURABLE MR JUSTICE HUDDLESTON

Sitting as a Tribunal in the United Kingdom

BETWEEN:

(1)-(138) ADUR DISTRICT COUNCIL AND OTHERS

Claimants

- v -

(1) TRATON SE (SUBSTITUTED FOR MAN SE)

(2) MAN TRUCK & BUS SE (FORMERLY MAN TRUCK & BUS AG)

(3) MAN TRUCK & BUS DEUTSCHLAND GMBH

(4) AB VOLVO (PUBL)

(5) VOLVO LASTVAGNAR AKTIEBOLAG

(6) VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH

(7) RENAULT TRUCKS SAS

(8) DAIMLER AG

(9) STELLANTIS N.V. (FORMERLY FIAT CHRYSLER AUTOMOBILES N.V.)

(10) CNH INDUSTRIAL N.V.

(11) IVECO S.P.A

(12) IVECO MAGIRUS AG

(13) PACCAR INC

(14) DAF TRUCKS N.V.

(15) DAF TRUCKS DEUTSCHLAND GMBH

Defendants

- and -

(1) SCANIA AKTIEBOLAG (PUBL)

(2) SCANIA CV AKTIEBOLAG (PUBL)

(3) SCANIA DEUTSCHLAND GMBH

Third Parties

RULING (PERMISSION TO APPEAL)

A. INTRODUCTION

1. This application for permission to appeal (the "PtA Application") is made by the Adur claimants ("the Claimants") in respect of the decision of the Tribunal dated 5 July 2024 ([2024] CAT 45) (the "Judgment") which dismissed the Claimants' application for strike-out and/or summary judgment in respect of mitigation of overcharge arguments which had been raised by the Defendants.

2. The parties have indicated that they are content for the PtA Application to be dealt with on the papers.

3. For the reasons which we set out below, we refuse permission to appeal on all three grounds advanced.

B. THE TEST FOR PERMISSION TO APPEAL

4. In considering whether to grant permission to appeal, the Tribunal applies the test in Civil Procedure Rule 52.6 which provides, in summary, that permission will only be granted where: (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard.

5. The Tribunal considers that neither aspect of that test has been met in the present case.

C. GROUNDS OF APPEAL

6. Taking the grounds of appeal in turn, the Tribunal's decision is based on the following reasons.

(1) Flawed approach to the issue of factual causation in relation to Council Tax

7. The Claimants' position is that there is a real prospect that the Court of Appeal will accept that the Tribunal erred in its approach to causation. They say that

the Tribunal correctly identified the relevant principles but fell into error in applying them. In particular, they say that the Defendants' reliance upon the Claimants' statutory obligation to "balance their budgets" as being sufficient to establish that the requisite causal connection is the "sort of reliance upon broad economic theory/usual planning and budgetary processes" which has been previously rejected by the Court of Appeal as insufficient for the purposes of causation and that there is "no realistic prospect that the Defendants will establish a direct and proximate causative link between the increased truck costs caused by the overcharge and the amount of Council Tax charged to any individual council taxpayer/tax band." Indeed, specifically the Claimants say that the Tribunal failed to engage with the issue of Council Tax at all and that no explanation is provided within the Judgment as to why the Tribunal rejected the Claimants' specific submissions on legal inadequacy on that point. They say that the Tribunal was effectively adopting a "something may turn up" approach which has previously been rejected by the Court of Appeal in *TFL Management Services Ltd v Lloyds Bank* [2013] EWCA Civ 1415 ("*TFL*").

8. The starting point for the Tribunal was that within the context of the framework for a strike-out application, it is trite that a court will consider: (a) whether it is satisfied that it has all of the evidence necessary for it to allow proper determination of the question at issue; and (b) if the parties have had adequate opportunity to address that argument. It is then, and only then, that it should "grasp the nettle" and determine the issue. As *TFL* makes clear, absent that, the court should hesitate about making a final decision without a trial of those issues: see [42] of the Judgment.

9. In relation to the strike-out application, as the Judgment makes clear at [42] and [43], the Tribunal was equally cautious about conducting a mini-trial in accordance with the guidance of the Supreme Court in *Okpabi and others v Royal Dutch Shell PLC and another* [2021] UKSC 3. It was with that perspective that it approached the application for strike-out. The Tribunal was satisfied that the evidence provided by both the Defendants and the Claimants' expert was sufficient to "demonstrate a causal connection" and it was in those circumstances that it concluded that it was inappropriate to determine the matters raised on a summary basis. It was not a case of leaving it on the basis

that "something might turn up", but rather a situation where the limited evidence available as adduced by both parties not only established a connection but from that expert evidence the Tribunal was also able to discern a methodology of approach which the experts were able to highlight which would lead to a fuller exposition of the parties' respective positions and so a fuller determination of the issue. It was on that basis that the Tribunal considered the matter would properly be left to the trial: see [43] and [45] of the Judgment.

10. It was not a case, therefore, as the PTA Application suggests, of not addressing the specific issue of Council Tax as pleaded, but rather a position where the Tribunal was far from satisfied that the point raised by the Defendants was unarguable. In those circumstances, the Tribunal itself was not prepared to conduct a mini-trial on the issue and so did not further comment on the specifics.

11. The Tribunal further was not convinced that it was appropriate to deal with a single issue when the issue of: (a) commercial waste; and (b) the position of the 28 local and other authorities that were not party to the strike-out application still had to be determined.

12. For those twin reasons and as the Judgment makes clear, the Tribunal adopted the guidance of Floyd LJ in *TFL* that the court should *"... consider very carefully before accepting an invitation to deal to deal with single issues in cases where there will need to be a final trial on liability involving evidence in cross-examination in any event.*" That is the position which the Tribunal felt, very firmly, applied here in that there would need to be an assessment of the factors affecting Council Tax and its inter-relation to the question of overcharge regardless of the particularised issues raised in the strike-out application and that the Tribunal, which was one that neither the parties, nor the Tribunal could shy away from that simply because of the ensuing complexities involved – hence the reference to *Sainsbury's v Visa* [2020] UKSC 24 within the Judgment: see [44].

13. The Tribunal considered that the points raised by the Defendants were arguable and, for all of those reasons, does not consider the Claimants' position in the

PTA Application to satisfy the tests (supra) which require to be satisfied if permission is to be granted.

14. Rather than arriving at "unsustainable conclusions as to factual causation" as the Claimants say, the Tribunal made a conservative assessment of the expert evidence and was satisfied of the existence for potential argument sufficient to conclude that the debate upon causation should be explored further at trial - whilst acknowledging that any perceived difficulties that the Claimants might face could be addressed through robust and pragmatic case management.

(2) Flawed approach to legal causation

15. The Claimants argue that the Tribunal fundamentally mistook the arguments which it advanced. They say that the Defendants' case is "bad in law" and that the Tribunal should have "grasped the nettle" and decided it on the basis that it had no prospect of success. They argue that the Tribunal erred in concluding that the question of legal causation was only capable of determination when all of the evidence had been adduced.

16. They say that it is the Defendants' case, as made, which is the case which is "novel and highly suspect in policy terms" and because of that novelty ought to have been struck out because it had no prospect of success and should have been struck out without the need for the expanding of further resources on an expensive disclosure exercise.

17. As set out in the Judgment at [46], the Tribunal, without making any determination of the issue, took the view that this entire debate did raise a novel point of law and concluded that it was one that was ill-suited to adjudication in the context of a strike-out application. The Tribunal noted the Claimants' argument was not based on any previous line of authority.

18. The Tribunal was not *per se* engaging in the arguments made by either party but was simply of the view that the issues raised were better determined, in the fullness of the evidence, in the main trial - having taken into account the evidence adduced to date.

(3) Failure to address other pleaded allegations of mitigation of loss

19. This approach was, indeed, true of the other pleaded issues pertaining to mitigation of loss (as distinct from downstream pass-on). The Tribunal took the view that it would not make any determination on such issues because the points raised were arguable and, quite simply, were best argued in the course of the main trial on the basis of the very simple reason that the expert evidence – for both parties – supported the view that there was an arguable case. In that context, the Tribunal felt it was inappropriate to deal with the matter as a strike-out which, in line with the overriding objective, would allow the parties to debate the issue in the full trial.

20. As highlighted by the Defendants, the Tribunal fundamentally took the view that a granting of the strike-out application would lead to a proliferation of appeals which would delay the entire process and trajectory of the case (a point also recognised in *TFL*).

D. CONCLUSION

21. For the reasons set out above, the Tribunal considers that the tests for permission to appeal have not been satisfied that the Claimants' appeal has no prospect of success and so dismisses the PTA Application.

22. This ruling is unanimous.

Sir Marcus Smith
President

The Hon. Lord Ericht

The Hon. Mr Justice Ian Huddleston

Charles Dhanowa, OBE, KC (Hon)
Registrar

Date: 1 October 2024