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IN THE COMPETITION

Case No: 1435/5/7/22 (T)

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 1st October – Tuesday 29th October 2024

Before:

Justin Turner KC
Sir Iain McMillan CBE FRSE DL
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

Stellantis Auto SAS & Others

V

Defendants

Autoliv AB & Others

A P P E A R A N C E S

Colin West KC & Sean Butler (Instructed by Hausfeld) On Behalf of the Claimants.

Sarah Ford KC & Prof. David Bailey (Instructed by Macfarlanes) On Behalf of the Sixth to Tenth Defendants.

David Scannell KC & Derek Spitz (Instructed by White & Case) On Behalf of the First to Fifth Defendants.

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Monday, 21 October 2024

(10.00 am)

THE CHAIRMAN: Some of you are joining us live stream on our website so I must start with a warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make a recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Sir Iain is joining us remotely.

Mr West, why is it necessary to make any amendments to the particulars?

Application by MR WEST

MR WEST: Well, the reason really is that because we have settled with ZF, the claims against ZF are no longer maintainable, so the amendments are intended to reflect the position as it now remains. So, for example, we will wish to amend the quantum to make clear that we are no longer claiming in respect of purchases from ZF. The draft amended pleading should be in {A/12/1}, and you will see that is one of the amendments made, at paragraph 79 {A/12/45}, just clarifying, in the last sentence of page 45, paragraph 79, that:

"The Claimants no longer pursue that part of

1 the loss identified in Mr Hughes' report as
2 relating ..." --

3 THE CHAIRMAN: Hold on, just slow down. Sorry, beg your
4 pardon.

5 MR WEST: Paragraph 79. So this bundle A, tab 12, page 45.

6 THE CHAIRMAN: 79. Right.

7 MR WEST: So that clarifies the effect on quantum.

8 THE CHAIRMAN: Yes, okay. Yes, I can see that is ...

9 MR WEST: If we --

10 THE CHAIRMAN: So where have the figures changed? So where
11 are the new figures?

12 MR WEST: They are still in Mr Hughes' report. He always
13 broke out the loss by defendant, so the figures are
14 already there.

15 THE CHAIRMAN: Right.

16 MR WEST: Then if one turns back, you can see that we have
17 also withdrawn the particulars concerning the siloing
18 issue insofar as it refers to TRW, because that is
19 also --

20 THE CHAIRMAN: Which paragraph are you on?

21 MR WEST: For example, at pages 28 to 29 {A/12/28-29} of
22 the draft, you can see there were various particulars of
23 the siloing issue in relation to TRW. Those no longer
24 arise.

25 By contrast, again, just turning back, you will see

1 that the particulars of cartelisation against TRW --
2 sorry, ZF/TRW, remain in the claim, for example at
3 paragraph 40.

4 THE CHAIRMAN: Sorry, paragraph 40?

5 MR WEST: 40F, for example, and 40D {A/12/19}. So
6 the underlying principle here is that the claims against
7 ZF are being withdrawn in the sense that we no longer
8 pursue any claims for overcharge on purchases made from
9 them, but the allegation that ZF/TRW was in the cartel
10 remains in the pleading, and of course the reason for
11 that is that one cannot have a single-firm cartel, and
12 so it is necessary, when the claimant settles with
13 successive defendants in cartel cases for the claimant
14 to be able to continue to allege that the settling
15 defendants were in the cartel and we do continue to
16 allege that.

17 THE CHAIRMAN: Yes, yes, of course, yes. I am still not
18 entirely clear why any amendments are necessary at this
19 stage.

20 MR WEST: Well, the practical reason is that, as part of
21 the settlement, the Claimants have agreed to seek these
22 amendments.

23 THE CHAIRMAN: Ah.

24 MR WEST: Of course it is a matter for the Tribunal whether
25 we should be permitted to have any of them.

1 THE CHAIRMAN: Ah, right, okay. The penny has dropped. So
2 you have struck a deal with ZF which requires you to
3 amend?

4 MR WEST: Which requires us to seek to amend.

5 THE CHAIRMAN: I see.

6 MR WEST: Obviously we cannot agree that we will amend
7 because that is a matter for the Tribunal.

8 THE CHAIRMAN: Right, I understand.

9 MR WEST: The disputed amendment, as I understand, there may
10 be others, but the individual one which has been
11 identified so far as disputed, is paragraph 39 --

12 THE CHAIRMAN: Yes, I have got that in mind.

13 MR WEST: -- on page 16 {A/12/16}.

14 In relation to this, as you will see, the claimants
15 are not withdrawing their allegation that ZF was party
16 to the cartel and insofar as Autoliv seeks to suggest
17 that this amendment will be unfair to it we will hear
18 what it says, but if the Tribunal agrees with that, in
19 my submission, the obvious course is to permit the other
20 amendments, if the Tribunal was minded to permit any
21 amendments at all, but not this one.

22 THE CHAIRMAN: Can I then -- can I just hear from Autoliv.

23 Mr Scannell, it would be helpful if you would sort
24 of -- for us -- I am sure you will, whether there are
25 any amendments you are content with and if there are any

1 amendments obviously that you object to.

2 We start off with a provisional view that we have
3 some sympathy that the shape of this case should not --
4 from your perspective, that the shape of this case
5 should not change and plainly paragraph 39 is a problem,
6 but ...

7 Submissions by MR SCANNELL

8 MR SCANNELL: Yes. Given that much depends on the approach
9 that the Tribunal takes both to paragraph 39 {A/12/16}
10 and to 43 {A/12/25}, can I leave until just a little
11 later the paragraphs which may not matter all that much
12 depending on the view that the Tribunal takes in
13 relation to those paragraphs.

14 I am going to begin by departing from what I was
15 going to say, in light of what my learned friend has
16 just said, because he lightly suggests that
17 the allegation remains that ZF was within the cartel,
18 but part of the problem that we are facing with
19 paragraph 39 of the 5APOC is that is not actually what
20 39 of the 5APOC proposes to allege {A/12/16}. What it
21 actually says is that Autoliv was at all times in
22 a cartel and that as to whom it was in a cartel with,
23 nobody is identified, but at all material times, they
24 say, it was one or more of a list --

25 THE CHAIRMAN: Yes, I understand. What happened, what was

1 culled added matter, yes?

2 MR SCANNELL: Yes.

3 THE CHAIRMAN: So it is -- clearly, it is a change of scope
4 and --

5 MR SCANNELL: There is clearly a change --

6 THE CHAIRMAN: Yes.

7 MR SCANNELL: -- and it is a fundamental problem with this
8 pleading. It is axiomatic that for an Article 101 case,
9 two parties at least must be identified as the parties
10 who either entered into an agreement or concerted
11 practice, and this does not do that. Now --

12 THE CHAIRMAN: Mr Scannell, I do not understand Mr West to
13 be coming up with a clear articulation as to
14 the contrary position at the moment so we will come to
15 that.

16 MR SCANNELL: Yes.

17 Can I make this further point?

18 THE CHAIRMAN: Of course.

19 MR SCANNELL: There was a problem with this case right from
20 the very beginning in the 4APOC at paragraph 39 {A/2/17}
21 and it relates to the fact that the parenthesis that
22 existed and still exists within paragraph 39 alleged
23 that from time to time others may have participated in
24 the agreement between ZF and Autoliv. That was an
25 inadequate pleading, the parenthetical part of it,

1 because an allegation that undertakings have
2 participated in an infringement of competition law is
3 a separate statutory duty under -- and breach of
4 statutory duty under English law. There is a long line
5 of case law relating to the ingredients that must be
6 established where one alleges that an undertaking has
7 participated in an infringement committed by two or more
8 named undertakings and this pleading never actually
9 pleaded out, let alone established, participation by any
10 of those undertakings.

11 Now, we decided at an earlier stage that it was not
12 necessary to strike that out because at least one part
13 of this was triable, we always recognised that,
14 the question of whether there was an agreement between
15 ZF and Autoliv, and we fought the case on that basis.
16 But, fundamentally, the problem with what is now being
17 proposed is that ZF is now being placed into
18 the parenthesis along with all of the other companies.

19 THE CHAIRMAN: I understand the point.

20 MR SCANNELL: I do not want to overstate that, but it is
21 actually a fundamental problem with the pleading as it
22 stands, and of course it affects not only paragraph 39,
23 it also affects paragraph 43, which is the first
24 alternative case.

25 THE CHAIRMAN: Can we just turn that up? Sorry, I have not

1 got ... remind myself of the amendment. 43 is ...?

2 MR SCANNELL: So 43 is on page 25 of the draft 5APOC
3 {A/12/25} and that is the first alternative case, that
4 if it was not a global cartel, then it was separate
5 cartels. One sees that from the third line:

6 "... with the same membership as pleaded in
7 paragraph 39 ..."

8 THE CHAIRMAN: Oh, I see, so we will have to read into that,
9 yes, yes.

10 MR SCANNELL: One is parasitic on the other.

11 So --

12 THE CHAIRMAN: There is a change to 44 {A/12/26}?

13 MR SCANNELL: Yes, there is. Again, it is just this very
14 light deletion of ZF/TRW and everybody is then expected
15 to make of that what they can.

16 Now, part of the problem that existed with the --

17 THE CHAIRMAN: So are you objecting to 44, the change to 44?

18 MR SCANNELL: We can see that insofar as it is alleged that
19 the OSS decision infringements gave rise to effects,
20 then it is possible to allege that against a single
21 undertaking. One sees therein the key to what is
22 acceptable and what is unacceptable in the present
23 position. In a follow-on damages claim in the true
24 sense, where liability has already been established, it
25 is and always has been possible to sue a single

1 undertaking on the basis of joint and several liability,
2 and so in the spillover case, insofar as that is
3 a follow-on damages claim, we can see that, in theory,
4 there should not be a problem with alleging that Autoliv
5 is jointly and severally liable for the consequences, if
6 they can be established. But it is quite different in
7 respect of the standalone parts of the case.

8 THE CHAIRMAN: Yes, no, I understand that. So you are not
9 objecting to 44, the deletion?

10 MR SCANNELL: No.

11 THE CHAIRMAN: No.

12 MR SCANNELL: Not specifically, no.

13 Now, part of the problem that we face in relation
14 even to some sort of reversion to paragraph 39 of
15 the 4APOC {A/2/17}, so we then have a sort of hybrid
16 plea, which is not before the court, comprising
17 5APOC elements in paragraph 39 and presumably 43 of
18 the 4APOC {A/2/26}, is that of course we no longer have
19 ZF before the court. So right from the very beginning
20 there is a serious concern as to how it is that, for
21 example, these Claimants are happy to sign a statement
22 of truth on the 4APOC saying ZF was one of
23 the cartelists at all material times -- that is what
24 the allegation was in the 4APOC -- and simultaneously
25 they are prepared to sign a statement of truth saying,

1 "Well, actually, ZF may never have been in this cartel",
2 because the wording of the 5APOC says -- allows that to
3 be the conclusion. On the wording of the 5APOC it may
4 have been the case that what is actually alleged is that
5 the parties to the anti-competitive agreement were
6 Autoliv and Tokai Rika.

7 THE CHAIRMAN: I understand that point, Mr Scannell. Is
8 there anything else you are objecting to of the proposed
9 amendments?

10 So if we refuse the amendments to paragraph 39
11 {A/12/16}, is there anything else you are taking
12 objection to?

13 MR SCANNELL: We say there are also difficulties with
14 the pleading at paragraph 11 {A/12/6}.

15 THE CHAIRMAN: Paragraph 11. Has that changed?

16 MR SCANNELL: Bear with me just for a moment.

17 THE CHAIRMAN: So the definition of Defendants becomes
18 different?

19 MR SCANNELL: Yes, the definition of the Defendants is now
20 different because of course ZF is not one of those
21 Defendants, so it "involved collusion between
22 the Defendants", so that is collusion between,
23 presumably, entities within Autoliv, which makes no
24 sense at all, that is not possible in law.

25 THE CHAIRMAN: So that should be -- if ZF are no longer

1 Defendants, then that should be Autoliv and ZF, yes?

2 MR SCANNELL: It is really for my learned friend to say what
3 it is that he wants to allege.

4 THE CHAIRMAN: Yes, but would you be -- he says it is up to
5 the Tribunal. He says, "Look, I have to -- as a term of
6 the settlement, I have to request these amendments", so
7 I am just trying to ensure that you are not embarrassed
8 or disadvantaged by any of them, Mr Scannell, so plainly
9 you should not be. So if you want an amendment ...

10 I mean, the alternative is we make ZF continue to be
11 Defendants, which seems a little bit strange, so ...

12 MR SCANNELL: Well, we -- fundamentally, we do not disagree
13 that that is the correct approach to take. The Tribunal
14 is being asked to agree to sign off on a settlement
15 which pulls out one of the Defendants from the case
16 after the trial has been heard in a way which does
17 affect my clients' rights of defence. Ordinarily, in
18 a standalone action such as this, two defendants at
19 least are identified and both of those defendants put
20 forward their defences refuting the allegation that is
21 made.

22 Now, as to, for example, closing on ZF documents,
23 that is not for my client to do, it is for ZF to close
24 on its own documents and its own case. So we do not
25 shrink from that conclusion.

1 THE CHAIRMAN: Anything else?

2 MR SCANNELL: There is an error in paragraph 12, but it
3 arises, actually, from a time before the amendments,
4 the reference to 2004 is wrong.

5 THE CHAIRMAN: I am sorry, I beg your pardon, Mr Scannell,
6 where was that? Paragraph 12.

7 MR SCANNELL: That is paragraph 12. So there is a reference
8 to 2004 in the third line. That should never have
9 appeared, that should always have been 2006, and
10 I assume it is uncontroversial that that is an error.

11 THE CHAIRMAN: Okay, well I am not going to concern myself
12 with that now.

13 MR SCANNELL: Paragraph 46 is the next one.

14 THE CHAIRMAN: 46 {A/12/33}.

15 MR SCANNELL: So, as originally pleaded, that paragraph
16 averred that each Defendant was jointly and severally
17 liable with all other parties to the cartels that were
18 alleged "at least for the period during which it was
19 a party", and that made sense, that is a cognisable
20 position in law. But now it purports to say that each
21 of the Autoliv Defendants is jointly and severally
22 liable with any other Autoliv Defendants who were party
23 to the cartel, at least for the period during which that
24 Autoliv entity was a party, and that, we say, is legally
25 nonsensical. That actually does not make sense.

1 THE CHAIRMAN: Sorry, why does that not make sense?

2 MR SCANNELL: Well, either Autoliv is liable or Autoliv is
3 not liable --

4 THE CHAIRMAN: Well, they are different Autoliv companies,
5 are they not?

6 MR SCANNELL: Its subsidiaries do not dip in and out of
7 liability in the same way as other non-related
8 companies, that do not form part of that undertaking,
9 might.

10 THE CHAIRMAN: Sorry, let me just re-read this.

11 (Pause).

12 Can I just ask -- sorry, Mr Scannell, can I just ask
13 Mr West.

14 I do not quite understand the purpose of the change
15 at 46. So originally you were jointly and severally
16 liable with all other parties to that cartel, so that
17 could have been ZF, it could have been other parties,
18 and you are now narrowing that considerably. What is
19 the purpose of that amendment?

20 MR WEST: Well, the position now is we are no longer
21 asserting liability against anyone apart from Autoliv.

22 THE CHAIRMAN: Right, but you were never asserting liability
23 against parties other than ZF and Autoliv, but you had
24 parties there.

25 MR WEST: Yes, that may perhaps have been because this was

1 drafted in an earlier stage and had not been updated.

2 THE CHAIRMAN: Right.

3 MR WEST: But, now, alleging that any other parties are
4 liable apart from Autoliv is no longer
5 sustainable because there are not any other parties.
6 But joint and several liability is still sustainable
7 because there is joint and several liability between
8 the various Autoliv Defendants.

9 THE CHAIRMAN: Yes. Okay.

10 Sorry, Mr Scannell.

11 MR SCANNELL: Joint and several liability is sustainable but
12 not on the basis on which it is pleaded there, which
13 suggests that the joint and several liability waxes and
14 wanes depending on when the particular constituent
15 element of the undertaking participated --

16 THE CHAIRMAN: I am just not sure whether there are any --
17 I understand your points intellectually, but I am not
18 sure whether there is anything turning on this
19 particularly; if Autoliv is jointly and severally
20 liable, why does Autoliv care who else is jointly and
21 severally liable as a practical matter?

22 MR SCANNELL: Within itself?

23 THE CHAIRMAN: No, no, no, other parties.

24 MR SCANNELL: Yes.

25 THE CHAIRMAN: It may not matter.

1 MR SCANNELL: It may not matter. I do not want to overstate
2 that point, but there is an incongruity in that
3 paragraph.

4 THE CHAIRMAN: What about the end of this paragraph
5 {A/12/34}?:

6 "... and on the further ground that the Defendants
7 all formed part ..."

8 Oh, I see, okay, all right. I understand that.

9 MR SCANNELL: Paragraphs 65 to 73, which were referred to by
10 my learned friend {A/12/43-44}, if ZF is reinstated as
11 a defendant, then logically all of those paragraphs
12 should be re-included in the pleading, they should not
13 simply be struck out.

14 THE CHAIRMAN: Yes.

15 What about the changes to 79 through to 84, or
16 indeed 85 {A/12/45-46}?

17 MR SCANNELL: Well, apart from the rather mischievous
18 replacement of the reference to PSA, which was actually
19 an accurate description of what Mr Hughes had done,
20 taking the value of commerce of PSA and then
21 extrapolating from that, we do not have specific
22 objections to paragraphs 79 and 80 {A/12/45}.

23 THE CHAIRMAN: 82, 83, 84 {A/12/45-46}?

24 MR SCANNELL: I was not proposing to specifically object to
25 those.

1 THE CHAIRMAN: Okay.

2 I am just trying to work out what has happened at 85

3 {A/12/46}.

4 (Pause).

5 I see, okay. That is -- you are right, yes?

6 MR SCANNELL: Yes, that goes for (i) and (ii).

7 THE CHAIRMAN: Yes.

8 99 {A/12/51}, presumably you do not object to that,

9 and 101 {A/12/52}, you just seem to be rehearsing what

10 is in the ZF Defence?

11 MR SCANNELL: Yes. It is, of course, subject to the other

12 submissions that I have made, but apart from the other

13 submissions that I have made, no, not specifically.

14 THE CHAIRMAN: 101 ... again, I think that is probably all

15 right.

16 So, Mr West, can I just tell you where I think we

17 are. I think, because it is quite a complicated

18 pleading, I think it would be preferable in 5B to say:

19 "The former Sixth to Tenth Defendants ..."

20 Etc:

21 "The Claimant no longer brings proceedings against,

22 or seeks any relief against ZF/TRW, however ZF/TRW are

23 still identified as defendants in the rest of this

24 document."

25 Then --

1 MR WEST: Sorry, can I just clarify the basis upon which
2 ZF/TRW are still identified as defendants? One of
3 the other orders we are seeking, although I have not
4 mentioned it, is permission to withdraw the claim
5 against ZF/TRW, so they will not in fact -- assuming
6 the Tribunal assents to that, they will not in fact be
7 defendants.

8 THE CHAIRMAN: No, they are not, which is why you are
9 stating that they will nevertheless be referred to as
10 defendants, just for continuity, in the pleading,
11 otherwise ...

12 Then 11 {A/12/6} picks up defendants and there may
13 well be defendants picked up in other parts of
14 the document .

15 Then, as I understand, there is no -- I do not like
16 the amendments to paragraph 25 {A/12/13}.

17 I am currently against you on 39 {A/12/16}.

18 I will just identify the ones that -- against
19 the change at 46 {A/12/33}. This seems to be a change
20 which is unrelated to the matters that arise today. So
21 both the changes at 46.

22 I think the -- against you on 65 through to 73
23 {A/12/43}.

24 Then I think the rest, as I understand there is no
25 objection being taken to the amendments I have not

1 mentioned.

2 Could I ask you both to take instructions on that
3 and we will rise so that we can speak to Sir Iain.

4 (10.31 pm)

5 (A short break)

6 (10.39 am)

7 THE CHAIRMAN: Was there anything further you wanted to add
8 on those proposals?

9 MR WEST: No, my instructions are that we are content with
10 that. In terms of the order -- unless my friend is
11 going to rise and say otherwise.

12 In terms of the order we are seeking, it would be to
13 withdraw the claim against ZF, to amend the claim form
14 and the particulars in a form approved by the Tribunal,
15 and I would not propose there be any provision for
16 amended defences or replies at this stage.

17 THE CHAIRMAN: Mr Scannell, are you content with that?

18 MR SCANNELL: Content with that.

19 THE CHAIRMAN: Great.

20 Costs: what is happening on costs and all that?

21 MR WEST: No order in relation to ZF, obviously, and
22 otherwise costs in the case.

23 THE CHAIRMAN: Well, shall we just reserve them?

24 MR WEST: Or costs reserved.

25 THE CHAIRMAN: I think we will deal with them when we deal

1 with the costs at the end. We will see how this plays
2 out. Thank you very much.

3 MR WEST: Can I just check one point on closing submissions
4 while we are all here, which is that my understanding of
5 the current direction is that closing submissions are
6 not to address financing losses, but if the Tribunal
7 wants --

8 THE CHAIRMAN: Yes. No, no, please do not address financing
9 losses at this stage.

10 MR SCANNELL: In writing, as well as orally?

11 THE CHAIRMAN: Yes, and we will have separate written
12 submissions on financing losses in the next phase,
13 whenever that is.

14 MR SCANNELL: I am grateful.

15 Also for the avoidance of doubt and while I am on my
16 feet, our intention is to close this case on the basis
17 that we were going to close the case, so that
18 the primary case and the first alternative case is that
19 it is alleged that we were parties to a cartel targeting
20 the Claimants with ZF.

21 THE CHAIRMAN: Yes, absolutely.

22 MR SCANNELL: I am grateful.

23 Finally, I would also just like to record our
24 gratitude -- I am sure I speak for Mr West as well,
25 for -- making yourselves available, and I include

1 Sir Iain in that.

2 THE CHAIRMAN: No, not all. That is why we are here.

3 In terms of closings, we have got three days. We
4 anticipate that should be sufficient to close the case.
5 I think we have a day in reserve, but that is really in
6 reserve, so we are expecting to be closed in three days,
7 so that will be -- you will have to agree how you are
8 dividing up the time between you.

9 Very good. Thank you.

10 (10.42 am)

11 (The Court adjourned until 10.30 am on Monday,

12 28 October 2024)

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