



Neutral citation [2024] CAT 11

Case No: 1339/7/7/20

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18 February 2025

Before:

BRIDGET LUCAS KC
(Chair)
CAROLE BEGENT
DR MARIA MAHER

Sitting as a Tribunal in England and Wales

BETWEEN:

MARK MCLAREN CLASS REPRESENTATIVE LIMITED

Class Representative

- v -

(1) MOL (EUROPE) AFRICA LTD
(2) MITSUI O.S.K. LINES LTD
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(4) KAWASAKI KISEN KAISHA LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHELMSSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSSEN ASA
(12) COMPANIA SUD AMERICANA DE VAPORES S.A.

Defendants

Heard at Salisbury Square House on 13 February 2025

RULING (VW CONFIDENTIAL INFORMATION)

APPEARANCES

Sarah Ford KC, Nicholas Gibson and Sarah O’Keeffe (instructed by Scott+Scott (UK) LLP) appeared on behalf of the Class Representative.

Professor David Bailey, Michael Quayle and Natalie Nguyen (instructed by Arnold & Porter Kaye Scholer (UK) LLP) appeared on behalf of the First to Third Defendant.

Brendan McGurk KC and Angus Rodger (instructed by Steptoe International (UK) LLP) appeared on behalf of the Fifth Defendant.

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A. INTRODUCTION

1. This Ruling relates to a matter that arose on Day 18 of the trial in these proceedings (the “McLaren Proceedings”) and relates to the potential inadvertent disclosure of confidential information (“Confidential Information”) on Day 9 during the course of the cross-examination of one of the Class Representative’s industry expert witnesses, Mr Goss.
2. The concern raised by Volkswagen AG and others (“the VW Claimants”) is that there has been a breach of a Joint Confidentiality Ring and Document Management Order made on 30 May 2023 (the “JCRO”) for the purposes of the McLaren Proceedings and Case 1528/5/7/22: *Volkswagen AG and Others v MOL (Europe Africa) Ltd and Others* (the “VW Proceedings”). The connection between the McLaren Proceedings and the VW Proceedings is summarised in the Tribunal’s Ruling (Directions to Trial) [2023] CAT 25. In short, the McLaren Proceedings concern “follow-on” claims based upon an infringement decision of the European Commission adopted on 21 February 2018 in Case AT.40009 – Maritime Car Carriers (“the Commission Decision”) which concerns a cartel relating to the deep sea shipping of cars and light and medium weight commercial vehicles which it is said resulted in an unlawful overcharge which was ultimately passed on to purchasers of those vehicles. The VW Proceedings concerned both follow-on claims based on the Commission Decision and “standalone” claims against some of the same Defendants relating to both short sea and deep-sea shipping routes which it was said resulted in an overcharge which was borne by the VW Claimants and not ultimately passed on to purchasers.
3. The Tribunal made no formal order for consolidation in relation to the McLaren and VW Proceedings, but recognised the linkage between the two sets of proceedings in various case management directions that were made. In particular, the Tribunal ordered that there would be mutual disclosure and mutual exchange of documents between the two sets of Proceedings. That in turn necessitated the JCRO. The JCRO followed a “two tier” structure, with an Inner and Outer Confidentiality Ring. The VW Proceedings were ultimately withdrawn pursuant to the order of Mrs Justice Cockerill made on 25 June 2024.

4. The VW Claimants, through their solicitors Slaughter and May, wrote to the Registrar of the Tribunal on 13 February 2025 (the “13 February Letter”) expressing concern that “their Confidential Information has not been and is not being adequately protected in the McLaren Proceedings” and requesting that the letter be passed to the Tribunal “urgently”.
5. In particular, the VW Claimants expressed concerns relating to a “price-setting statement” dated 23 August 2023 (the “VW Pricing Statement”) disclosed to the parties in the VW and McLaren Proceedings. The VW Pricing Statement describes the price-setting practices in relation to the Volkswagen Brand of passenger cars sold in the UK market during the period from 18 October 2006 to 31 December 2019. It addresses the factors that the VW Claimants considered when determining and adjusting prices over time, price positioning and benchmarking in relation to competitors, vehicle margins, and how the VW Claimants treat certain costs and how they are factored into the VW Claimants’ pricing decisions. The VW Pricing Statement was designated by the VW Claimants for the purposes of the JCRO as containing “Inner Confidentiality Ring” information. The VW Claimants maintain that the information is highly confidential and sensitive, dissemination of which would (or at least could) cause irreparable harm to the VW Claimants’ commercial interests.
6. In light of the expressed urgency, and serious nature of the issues raised we heard submissions from the parties, but not from the VW Claimants, at the conclusion of the day’s evidence that same day (Day 18).
7. The VW Pricing Statement is included in the trial bundle in the McLaren Proceedings highlighted on every page in the electronic bundle in red, bold capital letters: “CONTAINS AND/ OR REFERS TO INNER CONFIDENTIALITY RING INFORMATION”.
8. The VW Pricing Statement is referred to in the joint report prepared by Mr Goss and Mr Whitehorn as industry experts for the Class Representative (the “Goss & Whitehorn Report”). On 29 January 2025, Day 9 of these proceedings, Mr Goss was cross-examined by Professor David Bailey, Counsel for the First to Third Defendants (the “MOL Defendants”) including by reference to the VW

Pricing Statement. Professor Bailey sought to navigate his way through the cross-examination without the contents of that document being read out in open court. It became apparent, however, that Mr Goss would be unfairly constrained in providing his answers if he were unable to refer to the terms of the VW Pricing Statement, and the Tribunal went into closed session. The issues raised by the VW Claimants relate to (1) what happened shortly before that decision was taken; and (2) an exchange towards the end of the day after the hearing had resumed in open court.

9. The challenges facing Counsel, witnesses, and the Tribunal in such circumstances were explained in a short ruling in *BGL (Holdings) Limited v Competition and Markets Authority* [2021] CAT 33. In that case, the Appellant sought a direction that part of the proceedings go into private session. The reason this was necessary was because the cross-examination of one of the CMA’s witnesses would need to be undertaken by reference to documents the subject of a confidentiality regime. That confidentiality regime related to extensive documentation and information provided by third parties to the CMA – a regime which the Tribunal considered to be far too extensive in that case (see [6]). The issue before the Tribunal was whether to review and reconsider the confidentiality regime (which would necessitate a substantial adjournment), or to go into private session for the cross-examination.
10. As the ruling makes clear, the default setting is that hearings in the Tribunal take place in public. Paraphrasing so as to fit the circumstances of the present case, in general, Counsel can skilfully, and on the whole successfully navigate any confidential material by, for example, inviting the Tribunal to read to itself confidential passages. However, the position is not the same for witnesses: “It is entirely unfair to expect a witness, who is seeking to give evidence in what can only be described as a stressful environment, to have in mind this confidentiality regime.” (see [3]).
11. The issue arose again in that case in the context of whether and to what extent excisions should be made to reflect confidential information in the judgment. In a Ruling [2022] CAT 11, the Tribunal reiterated its preference for open justice: “As all of the courts in this jurisdiction do, this Tribunal places a very high

premium on the principle of open and public justice. Hearings are – and should be – conducted in public, so that interested persons can see and understand the material on which our decisions are based. That way confidence in our system of justice is maintained and enhanced. Justice must not only be done: it must be seen to be done.” (see [4]). As regards the challenges facing Counsel: “Naturally, the Tribunal expects those advocates appearing before it to be sensitive to the confidential information they are handling. But, absent a real risk of material harm, the interest of open justice will almost always trump even legitimate interests of confidentiality.” (see [6]).

12. The facts in that case were very different to those in the present proceedings. The confidentiality regime was one that the CMA had adopted in relation to third parties providing evidence in relation to its investigations, and was very broad. The Tribunal was plainly not satisfied that, when it came to trial, it was appropriate to treat the information as confidential. In the present proceedings, we accept that the VW Pricing Statement is a document that the VW Claimants are entitled to expect should be treated, for the purposes of the trial, as containing confidential information and in accordance with the treatment that the parties have agreed should be afforded to it. However, there is a difficult line to tread. If the document can be referred to with care, and without the Tribunal having to go into closed session that is clearly preferable in light of the importance of open justice.
13. We have reviewed the transcript of Day 9, and in broad terms:
 - (1) The VW Pricing Statement was referred to in open Court on only a few occasions.
 - (2) When referring to the VW Pricing Statement, Professor Bailey was at pains to stress the confidentiality of the information in issue. So, for example, when Professor Bailey first took Mr Goss to paragraph 7.2 of the Goss & Whitehorn Report where the VW Pricing Statement is referred to, he prefaced his question with the following: “Both of us will need to be careful here because this part is confidential, this section of your report, but I do not believe the question I am going to put to you

is.” [Day 9/p25/line 24] to [Day 9/p26/line 11] (and no complaint is raised by the VW Claimants in relation to the question that followed). The relevant section heading of the Goss & Whitehorn Report is highlighted with the note “[SECTION CONTAINS INNER CONFIDENTIALITY RING MATERIAL]”.

- (3) Part of Professor Bailey’s cross-examination by reference to the VW Pricing Statement was in fact focused on establishing, and stressed, the confidentiality of it [Day 9/p41/line 16] to [Day 9/p42/ line 3]; [Day 9/p44/lines 1-4].
- (4) When Professor Bailey took Mr Goss to the VW Pricing Statement itself, which was displayed on the EPE screens, he prefaced his questions with the following “it is marked “inner confidentiality ring information”, and so I must ask you, sir --- and I must do the same – that neither of us shall refer to the contents of this.” [Day 9/p79/lines 15-19]. He also paused to ensure that he could confirm to the Tribunal who could see the EPE screens: “Madam, I am just checking that no one in the room is able to see the information that I am about to take Mr Goss to.” [Day 9/p79/lines 22-24]. EPE screens are not visible throughout the Court room, but are screens provided to the Tribunal, the parties and their professional advisors and to the witness in the witness box. Professor Bailey was therefore checking whether anyone who had not been issued with a screen could nevertheless see an EPE screen on someone else’s desk.
- (5) Professor Bailey’s questions were generally framed so as to avoid referring to the contents of the VW Pricing Statement. See, for example [Day 9/p80/line 8] to [Day 9/p81/line15].
- (6) Where it appeared that Mr Goss’s responses might stray into the contents of the VW Pricing Statement, Professor Bailey was quick to remind him of the status of the document: see for example: “Sir, can I just interrupt, we have to be careful what you say about VW because it is confidential

information, which is why I have to ask the questions the way I have.”
[Day 9/p82/line 19] to [Day 9/p84/ line 13].

(7) It having become apparent that Mr Goss wished to refer to the VW Pricing Statement in his answers, the Tribunal went into closed session, taking steps to ensure that the Court was cleared of anyone not in the Inner Confidentiality Ring. The Chair also gave a specific warning that anybody who was following the realtime transcript who had not signed the relevant confidentiality undertaking or was not in the relevant confidentiality ring should immediately stop. Questioning relating to the VW Pricing Statement then proceeded in closed session.

(8) An issue arose towards the end of the day, when the Court was no longer in closed session, relating to price elasticity. Mr Goss referred to the VW Pricing Statement (per Professor Bailey: “We need to be careful again because this is confidential” [Day 9/p186/lines 20-22]), and was then interrupted in his answer [Day 9/p187/lines 10-13] by Professor Bailey mid-sentence as follows:

Q: No, no, that is confidential information sir, so please

do not ...

A: Oh, sorry. Well ...

Q: ... repeat it in open court.

(9) At the end of the hearing, the Chair asked the parties to ensure that any confidential information that should not have been mentioned in open court was redacted from the transcript [Day 9/p195/lines 8-10], and we understand that that has been done.

B. INTER PARTES CORRESPONDENCE

14. After Court on Day 9, the Class Representative’s solicitors wrote to the Defendants’ solicitors indicating that the Defendants’ industry expert witnesses, Mr Finn, Mr Good and Mr Chaisty (the “Defendants’ Industry Experts”), ought to be admitted to the Inner Confidentiality Ring given that they had been present

in Court before the closed session (and when the VW Pricing Statement had been displayed on the EPE screens) and because, in light of the cross-examination by reference to it on behalf of the Defendants, the Class Representative would wish to cross-examine them on its contents. By letter dated 30 January 2025, the MOL Defendants' solicitors responded that the Defendants' Industry Experts were not present during the private hearing; they did not see the VW Pricing Statement (and would be willing to confirm this on oath); they had not ever had access to the VW Pricing Statement; they did not recall hearing any evidence specifically about the contents of the VW Pricing Statement, and had not seen the confidential (unredacted) version of the transcript of Day 9. The MOL Defendants did not agree that it was necessary or appropriate to add the defendants' Industry Experts to the Inner Confidentiality Ring.

15. This led the Class Representative's solicitors to write to Slaughter and May on 31 January 2025, asking whether the VW Claimants would consent to the Defendants' Industry Experts being admitted to the Inner Confidentiality Ring so that the Class Representative could cross-examine them on the VW Pricing Statement. By letter dated 3 February 2025, the VW Claimants responded declining the request on the basis that it was late in the day; the VW Pricing Statement contained highly confidential information, and the fact that the Defendants had put it to the Class Representative's witness did not mean that it was reasonable or necessary for the Class Representative to put the same to the Defendants' Industry Experts.
16. That prompted the Class Representatives to write to the VW Claimants on 4 February 2025, enclosing its correspondence with the Defendants, and to suggest that the VW Claimants liaise with the Defendants directly to ensure that information from the VW Pricing Statement was not reflected in the published transcript for Day 9 noting that not all of the cross-examination had taken place in closed session. The Class Representative drew to the VW Claimants' attention that the Defendants Industry Experts were present for the open court cross-examination that related to the VW Pricing Statement, but also enclosed the relevant correspondence, and pointed to the explanation that they did not see

the document; had not had access to it; and did not recall hearing any evidence relating to it, and had not seen the confidential transcript.

17. That letter in turn prompted Slaughter and May to write on 5 February 2025 to the Defendants and Class Representative to seek a full explanation of what had happened, and copies of the uncorrected transcripts. The Class Representative responded saying that the issue was essentially one between the Defendants and the VW Claimants, and confirming it had no issue with the transcript being provided. The MOL Defendants responded on 6 February 2025 with a copy of the relevant unredacted transcripts marked with proposed redactions to protect the VW Claimants' confidential information on which the VW Claimants' comments were requested.
18. Following a review of those transcripts, Slaughter and May sent its letter of 13 February Letter. That letter sets out various alleged breaches of the JCRO, and the VW Claimants' concerns.

C. THE 13 FEBRUARY LETTER

(1) The VW Claimants' concerns

19. The VW Claimants refer to three issues arising in cross-examination on which they maintain highly confidential and sensitive information from the VW Pricing Statement was referred to in open court. These are, in summary, short passages relating to (1) price-elasticity; (2) VW's benchmarking of prices, and (3) deep-sea shipping costs in the context of price setting by VW. The clearest example is perhaps the answer provided by Mr Goss towards the end of the day in relation to price elasticity. We do not blame Mr Goss who simply wished to provide what he considered to be the best answer to the question he had been asked at the end of a long day during which Mr Goss had been subject to the stressful experience of giving evidence.
20. Paragraph 17 of the 13 February Letter states that the concerns of the VW Claimants "are exacerbated by the fact that there have previously been other breaches of the JCRO relating to the VW Pricing Statement by the other parties

to the VW Proceedings and/ or the McLaren Proceedings, including the Class Representative”. No further explanation is provided as to this, and in the course of submissions both the Class Representative and the Defendants confirmed that they were unaware of what this referred to.

21. We have not heard detailed submissions on the three issues drawn to our specific attention as to whether there was in fact a breach of the JCRO, or of any undertaking given pursuant to the JCRO, and we therefore make no finding in that regard. The VW Claimants claim that the information disclosed is “extremely confidential and sensitive”, and that significant harm could be caused to the VW Claimants’ commercial interest, but no further detail or explanation has been given as to the likely consequences. The VW Claimants suggest that there were individuals present who would have heard the information and/or seen the VW Pricing Statement on the Opus screens “throughout the Court room”. As to this, we bear in mind the assurances provided by the MOL Defendants in this regard; Professor Bailey’s efforts to ensure no one but Inner Confidentiality Ring Members could see the screens, and the fact that remote followers online cannot see the documents being referred to. The VW Claimants also say that they were not notified under the terms of the JCRO of any inadvertent disclosure as soon as reasonably practicable, albeit that they have had the transcripts of the evidence now.

(2) Directions sought

22. The VW Claimants state that they consider that “there is a significant and serious risk that further Confidential Information of the VW Claimants could be disclosed during open court during the remainder of the Trial, in breach of the JCRO”. The immediate issue that we must decide, therefore, is the practical one of what should be done in relation to Day 9 to protect such information as was referred to; and what should be done in future as regards such evidence.
23. We are satisfied that the parties in the McLaren Proceedings are aware of the confidential nature of the VW Pricing Statement, and indeed issues of confidentiality in this case (and if there was any doubt, the correspondence with Slaughter and May has plainly put that right). In conducting the cross-

examination as he did, Professor Bailey was seeking to navigate the confidential material by, for example, inviting Mr Goss and the Tribunal to read to themselves the relatively few passages relating to the VW Pricing Statement relevant to his cross-examination and to frame his questions without expressly referring to the contents. We do not think that was an unreasonable course to take.

24. We consider that it is relevant that Mr Goss was not a factual witness, *per se*, but an industry expert witness put forward by the Class Representative to speak to issues relating to vehicle pricing, and the recovery of deep-sea shipping costs. Mr Goss was aware that some of that information was confidential, and he was a member of the Inner Confidentiality ring. That is not said in any way to seek to apportion “blame” to him in relation to the (very) rare occasions on which he began to refer to information within the VW Pricing Statement in his answers. It is simply to acknowledge that it was not unreasonable for Professor Bailey, cognisant of the need where at all possible to proceed in open court, to embark on his cross-examination in the way that he did. Professor Bailey was quick to acknowledge that, in light of Mr Goss’s answers, it would be necessary for Mr Goss to be able to refer more freely to the VW Pricing Statement such that it would be necessary to go into closed session. As we have indicated, in relation to the isolated incident that occurred towards the end of the day, we consider that it was inadvertent.
25. The parties have informed us that redactions have been applied to the transcript in relation to all cross-examination relating to the VW Pricing Statement, on which they await comment from the VW Claimants.
26. The VW Claimants seek an order prohibiting the use of all of the VW Claimants’ Confidential Information including the VW Pricing Statement, in the McLaren Proceedings, pursuant to Rule 102(5) of the CAT Rules. Given that the VW Pricing Statement is already in evidence, and has been referred to by the parties, we are not minded to grant any such order, in particular in the absence of submissions from the VW Claimants as to why this is necessary or appropriate, or indeed how it would work in practice. For all of the reasons we have explained we consider that the parties, including Professor Bailey, have

taken reasonable steps to ensure that confidential information is not referred to in open court; that any disclosure that may have been made was inadvertent, and immediately addressed by the redaction of the transcript. We are, however, conscious that we have not heard from the VW Claimants on this issue. We therefore give permission to the VW Claimants to pursue this application at an oral hearing if so advised, on condition that they notify the Tribunal by 4pm on Friday 21 February 2025 that a hearing is required.

27. In the alternative, the VW Claimants made various requests relating to the ongoing conduct of the trial, as follows:

(1) *The Tribunal should ensure that it moves into a closed/confidential session “every time the VW Pricing Statement or the VW Claimants’ Confidential Information is raised at trial”.* We consider such an approach is unnecessary and inappropriate. It is far too broad. The Tribunal cannot move into private session every time the VW Pricing Statement (or other unspecified Confidential Information) is mentioned. In the first instance, as it is likely to be the parties who will wish to refer to such information, the Tribunal will expect the parties to consider whether or not it is likely to be necessary to move to private session, bearing in mind the particular difficulties that may – but will not necessarily always – arise in relation to witnesses and experts. But the fact remains that, where at all possible, it remains the Tribunal’s preference to seek to work a way around the confidential information rather than sit in private.

(2) *The Tribunal should make a formal statement.* We will make a short statement when the Tribunal resumes on 18 February 2025 to the effect that cross-examination took place on Day 9 by reference to the VW Pricing Statement reminding the parties (and anyone attending remotely) that it is a confidential document and that, for that reason, the transcript has been redacted. The subject matter of those redactions is confidential, and must be treated as such - and that applies even if notes were taken simultaneously, and kept in another form. If any person attended the public hearings on Day 9 remotely, and they had any doubt

as to the extent of the effect of the redactions they should seek a copy of the redacted transcript from the parties. We will not attach a warning note to the Day 9 Transcript. The transcript will appear on the Tribunal's website in redacted form, and the parties are well aware of the redactions that have been made and of who is permitted to see the unredacted version and can be expected to take steps to ensure that only those entitled to do so have access to it.

- (3) *The Tribunal should direct that the remaining parties to the McLaren Proceedings must ensure there are no further references to the VW Claimants' Confidential information in open court.* We will not make such a direction. Our comments in relation to sub-paragraph (1) apply equally here.
- (4) *The Tribunal should order that the parties to the McLaren Proceedings destroy all copies of the VW Pricing Statement at the conclusion of these proceedings.* We are not minded to make such an order in circumstances where the VW Claimants acknowledge this goes further than paragraph 8.2.3 of the JCRO (which provides an exemption for evidence), and we have heard no argument as to why that should be departed from, or why we should order the destruction of evidence that has been used in this case.
- (5) *The VW Claimants should have the opportunity to review the draft judgment before it is published and propose redactions in respect of any of their Confidential Information that is referred to.* We decline to make any such order. When we circulate our judgment we will do so in draft form to the parties to the proceedings in the normal way, and they will consider what redactions if any are required to reflect the obligations that they are under pursuant to the JCRO (see *BGL Holdings Limited v the Competition and Markets Authority* [2022] CAT 11).

28. The VW Claimants also seek their costs “(both past and future)” occasioned by the alleged breaches of the JCRO described above. As we have indicated, we have made no finding as to the breaches relied upon by the VW Claimants. We

are concerned in this Ruling with whether adequate steps have been taken to protect any confidential information that may have been referred to on Day 9 in open Court, and with the way forward. We note that the MOL Defendants have sought to provide reassurance as to its industry experts' position. We also note that the parties have sought to redact all potentially relevant passages from the transcript. The VW Claimants have not explained why an order is required covering payment of unspecified and unquantified future costs - and no idea of quantum (in respect of either past or future costs) is provided. We do, however, give permission for the VW Claimants to apply for their costs at an oral hearing if so advised, on condition that they notify the Tribunal by 4pm on Friday 21 February 2025 that a hearing is required.

29. This Ruling is unanimous.

Bridget Lucas KC
Chair

Carole Begent

Dr Maria Maher

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

Date: 18 February 2025