Neutral citation [2022] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1291/5/7/18 (T)

13 January 2022

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Before:

HODGE MALEK QC
(Chairman)

BETWEEN:

(1) RYDER LIMITED
(2) HILL HIRE LIMITED

Claimants

- and -

~~**(1) MAN SE**~~
~~**(2) MAN TRUCK & BUS AG**~~
~~**(3) MAN TRUCK & BUS DEUTSCHLAND GMBH**~~
~~**(4) MAN TRUCK AND BUS UK LIMITED**~~
(5) AB VOLVO (PUBL)
(6) VOLVO LASTVAGNAR AB
(7) VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH
(8) VOLVO GROUP UK LIMITED
(9) RENAULT TRUCKS SAS
(10) DAIMLER AG
(11) MERCEDES BENZ CARS UK LIMITED
(12) STELLANTIS N.V. (FORMERLY KNOWN AS FIAT CHRYSLER AUTOMOBILES N.V.)
(13) CNH INDUSTRIAL N.V.
(14) IVECO S.P.A.
(15) IVECO MAGIRUS AG
(16) IVECO LIMITED
(17) PACCAR INC.
(18) DAF TRUCKS N.V.
(19) DAF TRUCKS DEUTSCHLAND GMBH
(20) DAF TRUCKS LIMITED

Defendants

Heard remotely on 13 January 2022

RULING: DISCLOSURE

APPEARANCES

Mr Josh Holmes QC, and Ms Fiona Banks (instructed by Ashurst LLP) appeared on behalf of the Ryder Claimants.

Mr Meredith Pickford QC and Mr David Gregory (instructed by Travers Smith LLP) appeared on behalf of the DAF Defendants.

A. INTRODUCTION

1. By its decision in case 39824 - *Trucks*, adopted on 19 July 2016 ("the Decision") the European Commission ("the Commission") found that five major European truck manufacturing groups had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") over a period of some 14 years between 1997 and 2011 ("the Infringement"). Companies in the Scania Group are also found to be parties to the Infringement by way of a separate decision of the Commission adopted on 27 September 2017, which is the subject of an appeal currently pending before the EU General Court in Case T-799/17.

2. Seven actions claiming damages against the addressees of the Decision and related companies have been transferred from the High Court to the Tribunal (the "First Wave Proceedings"). For the purposes of this ruling, the addressees of the Decision and defendants to these actions may be referred to simply by the corporate name of the group to which they belong, DAF, Daimler, Iveco and Volvo/Renault, and together they are referred to as the "OEMs", the original equipment manufacturers.

3. Six case management conferences ("CMCs") have taken place in the Tribunal, on 21 to 22 November 2018, 2 to 3 May 2019, 6 February 2020, 29 to 30 October 2020, 5-6 May 2021 and 11-12 October 2021.

4. Disclosure has featured heavily in each of the CMCs and this aspect is being closely managed by both the parties and the Tribunal given the complexities, importance and costs of the exercise.

5. The seven actions for the purposes of the trial are being split into three. The first group is Royal Mail and BT. These proceedings concern the sale of trucks in the UK and only against one OEM, which is DAF. These are due to be tried starting on 26 April 2022.

6. The second group are the Ryder and Dawsongroup proceedings, which concern the sale of trucks in the UK, and against multiple OEMs[1]. These are due to be tried starting on 13 March 2023.

7. The third set of proceedings are the Veolia, Suez and Wolseley proceedings (the "VSW proceedings"), which each involve numerous claimants and concern the sale of trucks in the UK and Europe, including for current purposes France and Germany. These proceedings are due to be tried, at least in relation to the UK, France and Germany, sometime starting no earlier than late 2023. The Suez proceedings are brought by 339 claimants against DAF and Fiat, who brought in the other OEMs, including Scania, as third parties. The Veolia proceedings are brought by 139 claimants against all five OEMs, the subject of the Decision, who in turn had brought third party proceedings against DAF and Scania. The Wolseley proceedings are brought by 154 claimants against DAF and Fiat, who had brought in the other OEMs, including Scania, as third parties. These are not the only truck actions before the Tribunal. Further waves of claims have been brought, but in the main these are all at a relatively early stage.

B. APPLICATION

8. By an application letter from the Claimants' solicitors, dated 3 December 2021, the Claimants called for the purposes of this ruling "Ryder", seek an order that the 17th to 20th Defendants ("the DAF Defendants") carry out a search of the records of the 17th ("PACCAR") and 18th ("DAF NV") Defendants for communications between or within any of the DAF Defendants relating to the sales prices for actual or potential transactions with Ryder ("the Communications Disclosure"). The Communications Disclosure was ordered by my disclosure order made on 6 November 2020 and amended on 26 November 2020.

9. Upon receipt of the application, the Tribunal determined that it was suitable to be determined by way of a Friday application to be determined by me at a short hearing with evidence limited in length. At the suggestion of the parties the

[1] By an order of the Chairman dated 13 December 2021, the claims against the MAN Defendants in Case 1291/5/7/18(T) were stayed by consent.

matter was listed to be heard by the full Tribunal on 12 and 13 January 2022 at a case management conference which had been fixed some time before. The parties managed to resolve all other issues for the January 2022 CMC so ultimately it was decided that the matter would be heard by me sitting alone on 13 January 2022 with a half day estimate (the "January 2022 CMC"). This means that the application has been dealt with in a cost-effective manner in accordance with the Tribunal's governing principles as set out in Rule 4 of the Competition Appeal Tribunal Rules 2015.

10. The application is supported by the eleventh witness statement of Mr Burrows of Ashurst LLP dated 23 December 2021. The application is opposed by the DAF Defendants, who have filed evidence of their own in the form of the sixth and seventh witness statements Ms Edwards of Travers Smith LLP dated 5 and 10 January 2022 (referred to respectively hereafter as "Edwards 6" and "Edwards 7"). The parties filed skeleton arguments on 10 January 2022 and Ryder filed a supplemental note for the January 2022 CMC. Whilst I appreciate that Edwards 7 and Ryder's supplemental note were filed late in the day and not in accordance with the Friday Application procedure (see paras 12 and 13, below), both documents have been useful in clarifying matters and narrowing down the issues in dispute.

11. At the request of the Tribunal, on 12 January 2022 the parties filed an agreed draft order setting out what issues remain in dispute and therefore fell to be determined at the January 2022 CMC.

C. BACKGROUND

(1) Approach to disclosure in the Trucks actions

12. This application for disclosure is being made pursuant to paragraphs [50] to [53] of the Tribunal's ruling on disclosure made on 15 January 2020 ([2020] CAT 3) ("the Disclosure Ruling").

> "50. To address any concerns the parties may have that there is insufficient time at a disclosure hearing and/or CMC to deal with all the disclosure issues in dispute, either the President or Mr Malek QC will be available in principle on one Friday each month to hear further disclosure applications, either matters that have been held over or new matters that may arise ("Friday Applications").

> It is envisaged that any such hearings would deal with discrete issues between individual claimants and individual defendants. Outstanding issues in dispute between individual claimants and individual defendants may also be resolved on the papers if appropriate.
>
> 51. Before making any Friday Applications, the parties should engage with each other in a co-operative manner, in accordance with the governing principles, to seek to agree, as far as possible, any of the matters in dispute. As observed by Green J in Peugeot, "the efficacy of this process involves close and sensible cooperation between the parties and the experts". Failure to do so may result in a costs order being made against the relevant party should a misconceived application be brought before the Tribunal.
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> 52. The timetable for any Friday Applications is as follows:
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> …
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> (5) No later than two weeks before the hearing date: the relevant party is to file its application with supporting evidence and an updated extract from the relevant Redfern schedule. Supporting evidence is limited to a maximum of two witness statements (including one from an expert) and an exhibit of no more than 25 pages.
>
> (6) The Tribunal will confirm in writing to the parties whether the application is of a nature that is suitable for determination at a Friday hearing.
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> (7) No later than one week before the hearing date: the respondent(s) to the application are to file any responsive evidence, which is subject to the same limits set out at (5) above.
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> (8) Short skeleton arguments and a hearing bundle are to be filed two clear days before the hearing date.
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> 53. As to the stage at which a particular disclosure application should be made, the Tribunal will adopt a common-sense approach with a view to maximising the most efficient use of the Tribunal's time and avoiding potentially inconsistent rulings on the same point. Therefore, if there are, for example, four defendants to a claim, and only three wish to pursue a disclosure application at a particular juncture, the Tribunal could well decide to proceed with hearing the application in which case the fourth defendant would need to be prepared to make submissions. Conversely, if a single defendant wishes to proceed with a disclosure application when the other defendants wish to defer it until a later stage, the Tribunal may defer consideration of the application until it can hear all defendants together."

13. The Disclosure Ruling sets out the approach which the Tribunal has adopted in relation to the disclosure across all seven "Trucks" actions, which until 2020 had been case managed together. In providing this ruling, I have followed the approach set out in the Disclosure Ruling and the procedure for dealing with the various types of disclosure applications as explained by the Tribunal in *Dawsongroup Plc v DAF Trucks NV* [2021] CAT 13 at [3]-[11].

14. The applicable rules and procedure in relation to disclosure in relation to these proceedings are set out in some detail in the Disclosure Ruling. The broad principles are summarised in the Disclosure Ruling at [35]:

> "Even in cases where broad disclosure is required, it is possible to lay down some broad principles that are applied by the CAT. These are:
>
> (1) Orders for standard disclosure will not in general be made.
>
> (2) Disclosure will be confined to relevant documents. Relevance is determined by the issues in the case, derived in general by reference to the pleadings, although in appropriate cases disclosure can be in relation to matters not specifically pleaded.
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> (3) A strong justification would be required to make any order along the lines of the 'train of enquiry' test in the classic formulation of the test for disclosure enunciated by Brett LJ in *Compagnie Financière du Pacifique v. Peruvian Guano Co*. (1882) 11 QBD 55 at 63. An example where train of enquiry disclosure may be justified is a case alleging a cartel infringement where the underlying facts are unknown to the claimants but are in the hands of the defendants.
>
> (4) Disclosure cannot be ordered in respect of a settlement submission which has not been withdrawn or a cartel leniency statement (whether or not it has been withdrawn). This does not preclude a party which made such a submission or statement providing it by way of voluntary disclosure.
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> (5) Disclosure will not be ordered in respect of a competition authority's investigation materials before the day on which the authority closes the investigation to which those materials relate.
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> (6) Ordinarily disclosure will be by reference to specific pleaded issues and specific categories of documents.
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> (7) Disclosure will only be ordered and the order will be framed to ensure that it is limited to what is reasonably necessary and proportionate bearing in mind a number of aspects, the most important of which are:
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> (a) the nature of the proceedings and the issues at stake;
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> (b) the manner in which the party bearing the burden of proof is likely to advance its case on those issues;
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> (c) the cost and burden of providing such disclosure;
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> (d) whether the information sought can be obtained by alternative means or be admitted; and
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> (e) the specific factors listed in r. 4(2)(c)."

15. The broad principles as to the Tribunal's general approach in relation to disclosure is provided in the Disclosure Ruling at [40]:

"In light of that, we set out the following broad principles as to the general approach the Tribunal will take that affects disclosure.

(1) The initial burden of proof is on the Claimants to satisfy the Tribunal on the balance of probabilities that the Infringement had an effect on prices.

(2) If that hurdle is passed, the Tribunal will seek to arrive at a reasonable estimate of what the effect might have been and what any pass-on (within the relevant legal principles) might have been, again on the balance of probabilities.

(3) A reasonable estimate in this context means an estimate that is arrived at in a proportionate manner. We recognise of course that these are very large damages claims. However, any estimate will still be reached through averages, extrapolations and aggregates. It does not mean that every logical avenue that might be relevant can be explored, or that all data which is arguably relevant must be provided. As observed by Birss J in *Vodafone v Infineon Technologies AG* [2017] EWHC 1383 (Ch), at [31]:

> "while of course more [disclosure] can be better …it is relevant to ask how much more would it be and how much better would it make the result."

The decision as to what disclosure to order is appropriate is informed by the views of the economic experts but it is not determined by what data they would like to have or what method they would like to use. It is for the Tribunal to decide.

(4) In reaching that decision, the Tribunal has regard to the principles of effectiveness, that cases should not be unreasonably difficult to bring, and of proportionality as set out in rule 60(2) read with the governing principles in rule 4 and also the Disclosure PD.

(5) It is not therefore simply a question of relevance, as some of the skeleton arguments we received seemed to suggest. Disclosure will only be ordered in relation to a specific category of documents if the Tribunal is satisfied the documents sought are relevant and that disclosure would be necessary and proportionate. The Tribunal will not make an order merely because it determines that the documents are relevant to the issues.

(6) These actions seek damages for loss on many hundreds of transactions, involving a very large number of vehicles, carried out over an extensive period, and in some of the cases by a very large number of claimants. Further, the Infringement involved contacts and communications between the participants over a 14 year period, with different involvement on the particular occasions. The approach to proof of causation and quantification, both as regards any overcharge and as regards pass-on, will therefore be very different from that which can apply where the claim is for loss on one or two very large transactions concluded following extensive negotiation: cp. *BritNed Development Ltd v ABB AB* [2018] EWHC 2913 (Ch). It is unlikely to be realistic in these cases for the issues to be approached by examining each price charged for each transaction subject to the claim and seeking to ascertain how any antecedent exchange of information or coordination between the OEMs may have influenced that price (whether directly or by reference to a gross price). Similarly, as regards pass-on, it would appear

> to be disproportionate even if it were possible to consider the resale or disposal of each truck that is subject to the claim. Accordingly, it is important to establish how in practice the issues at trial will be approached, and to do so before and not after vast time, effort and expense is devoted to yet further disclosure."

(2) Disclosure in the *Ryder* proceedings

16. Disclosure in these proceedings has been on a staged basis. On 26 November 2019, I made an order providing for disclosure by all the parties to the proceedings, including in relation to the Value of Commerce and Overcharge (the "Initial Disclosure Order"). This disclosure centred around disclosure of data from databases, but the DAF Defendants were also ordered to provide a pricing statement to explain how Trucks models were priced, which bodies took the decisions to set prices and the information that was relied upon in taking such decisions. On 4 December 2019, the DAF Defendants provided their pricing statement, which is a useful summary of how pricing decisions were made and provides a framework for deciding what searches should be undertaken for documents relating to pricing ("the Pricing Statement").

17. On 6 November 2020 I made an order providing for disclosure of documents by the Claimants and the DAF Defendants, including in relation to the Communications Disclosure. The order was amended on 26 November 2020 ("the DAF Disclosure Order"). The order envisaged that the parties would search for documents relating to the pricing for Trucks and hence was a separate exercise to the database disclosure under the Initial Disclosure Order.

18. The DAF Disclosure Order provided that by no later than 30 April 2021, Ryder and the DAF Defendants should each disclose by list in respect of any Trucks weighing 6 tonnes or above manufactured by DAF and purchased (or sought to be purchased) by Ryder during the period 17 January 1997 to 18 January 2011, the documents and categories of documents set out in the DAF Disclosure Order. Paragraph 1 of the DAF Disclosure Order is in the following terms:

> "**Communications within the DAF Defendants**
>
> 1. In respect of the DAF Defendants only, any communications between or within any of the DAF Defendants, or between the DAF Defendants and another member of DAF's corporate group, relating to, and any documents recording, any of (a) to (e) below:

(a) sales price approvals (including communications regarding the pricing parameters for proposed sales to the Claimants and seeking approval for a sale to the Claimants at a particular price);

(b) sales price approvals (including communications regarding the pricing parameters for proposed sales to dealerships and seeking approval for a sale to a dealership at a particular price);

(c) intentions in relation to sales prices;

(d) elements considered when determining and/or negotiating prices (including list prices, other price lists, costs of new technology/features (including Euro 3 to 6 standards), warranties, repair and maintenance provisions, buyback options and/or complementary products and services (including bodies whether or not manufactured by DAF)); and

(e) the calculation of proposed sales prices, sales prices negotiated and/or agreed, or previously or actually charged."

19. As set out in the Disclosure Ruling parties are expected to carry out a reasonable and proportionate search for relevant documents that are the subject of a disclosure order. Thus it is provided at [36] of the Disclosure Ruling:

> "The search required will be a reasonable and proportionate search and it will be for the disclosing party to specify what search it has carried out and why it contends any particular search would be unreasonable when it complies with the order. In appropriate cases, the Tribunal may rule on what would be required by way of a reasonable search prior to disclosure being provided. The factors relevant in deciding the reasonableness of a search include (cf. CPR r.31.7):
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> (a) the number of documents involved;
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> (b) the nature and complexity of the proceedings;
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> (c) the costs of retrieval of any particular document which is likely to be located during the search;
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> (d) the significance of any document which is likely to be located during the search;
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> (e) the location of material, and the type and nature of databases and storage involved; and
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> (f) the resources available to the disclosing party."

20. Accordingly, paragraph 7 of the DAF Disclosure Order provided:

> "The Claimants' and DAF Defendants' disclosure pursuant to this order shall be accompanied by a disclosure statement by an appropriate person which shall (a) set out the extent of the search that has been made in order to locate the data to be disclosed, (b) specify the manner in which the search has been limited on

reasonableness and proportionality grounds and why, and (c) certify to the best of his knowledge and belief that the disclosure order has been provided."

21. It is therefore for the party providing disclosure to justify any limitation in the scope of any search on reasonableness and proportionality grounds.

22. On 28 May 2021 the DAF Defendants provided disclosure pursuant to the DAF Disclosure Order, which in the usual way was accompanied by a disclosure statement ("the Disclosure Statement"). Annex 1 to the Disclosure Statement explained the searches that had been undertaken. So far as is material to the application, the Annex stated:

> "8. The DAF Defendants have limited their searches for documents in a reasonable and proportionate way as described below. A number of documents which would be responsive to the Order have already been identified and disclosed as part of previous disclosure given in these proceedings (as more particularly described below) and so the Defendants have not duplicated the previous searches already undertaken.
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> *Searches for Communications within the DAF Group*
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> 9. Paragraph 1 of the Order requires the disclosure of "*any communications between or within any of the DAF Defendants, or between the DAF Defendants and another member of DAF's corporate group"*. As set out at paragraphs 95 – 101 of Annex 2 to the Defendants' Disclosure Statement dated 4 October 2019 in the Ryder Proceedings (the "**October 2019 Statement**"), the sales prices of Trucks were determined on a transaction-by-transaction basis, with communications between the DAF Defendants about the sales prices of Trucks taking place via defined channels which can be summarised as follows:
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> a) During the period between January 1997 and November 1998, the Twentieth Defendant was solely responsible for negotiating and determining the sales prices of Trucks (including those that were purchased by the Claimants and Dealerships) with certain transactions requiring the approach of the Managing Director of the Twentieth Defendant from time to time. As such, the DAF Defendants do not expect there to have been communications between the Twentieth Defendant and the other DAF Defendants or members of DAF's corporate group in relation to the sales prices of the Trucks sold to the Claimants and Dealerships in this period;
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> b) From November 1998 onwards, the Twentieth Defendant was required to obtain approval from the Eighteenth Defendant for the sales prices of Trucks (including those that were purchased by the Claimants) in certain circumstances, and in some limited cases it also required the approval of the Seventeenth Defendant. During the period between November 1998 and December 2003, these communications took place by fax and telephone, but as set out at

paragraphs 97 of the October 2019 Statement, the DAF Defendants were unable to locate a repository of the faxes in the Eighteenth Defendant's hard copy records; and

c) From December 2003 to the end of the Relevant Period on 18 January 2011, as set out at paragraphs 98 – 100 of the October 2019 Statement, these communications predominantly took place by way of the DAF Defendants' Order Management System ("**OMS**") which was used to process and review these requests. Where the approval of certain senior individuals within the Eighteenth Defendant or the Seventeenth Defendant was required, the Twentieth Defendant would prepare and send an excel file or an internal memorandum known as a "corporate approval" memo to the Seventeenth Defendant for these purposes. The DAF Defendants have already searched for and disclosed the data/substantive documents forming part of this process that they have been able to locate, as set out at paragraphs 100 to 110 of the October 2019 Statement.

10. Due to the prescribed channels of communication through which the DAF Defendants communicated about the sales prices of Trucks as a matter of company policy, and the searches that have been carried out and the disclosure that has already been provided in relation to these communications, the DAF Defendants have limited their searches to the Twentieth Defendant's records for the purpose of this disclosure. The DAF Defendants consider this approach is reasonable and proportionate in circumstances where:

a) The Twentieth Defendant's prescribed channels for communicating about the sales prices of Trucks that were to be purchased by the Claimants and Dealerships with other DAF Defendants was through the means set out in paragraph 9 above – including by way of the OMS memo text fields which allowed for notes about pricing to be recorded;

b) There is a reasonable expectation that any correspondence outside of the prescribed communication channels would be contained within the Twentieth Defendant's records as the Twentieth Defendant was solely responsible on behalf of the DAF Defendants for the negotiation and sale of Trucks to the Claimants and therefore would have been involved in all such communications;

c) Searches of the other DAF Defendants' records that have already been carried out as part of other disclosure exercises (as set out at paragraph 9 above) and any documents relevant to the DAF Defendants' disclosure obligations under the Order have therefore already been disclosed to the Claimants; and

d) Further searches of the other DAF Defendants' electronic documents would in any event require the restoration of backup data by those DAF Defendants from a large number of backup tapes due to the automatic email deletion policy that was in place as explained at paragraph 18 below. The time and cost of undertaking such searches would be unreasonable and disproportionate in circumstances where there is a low expectation of locating any uniquely relevant documents that are responsible

to the Order and which are not contained within the Twentieth Defendant's records."

23. By letter dated 24 September 2021 Ryder's solicitors, Ashurst LLP, complained about the fact that the DAF Defendants had limited their search for Communications Disclosure to records held by the 20th Defendant, DAF Trucks Limited ("DAF UK"). They explained why searches of DAF NV and PACCAR's documents are necessary, and why it was contended that the approach of the DAF Defendants could not be justified on grounds of reasonableness and proportionality. Travers Smith LLP on behalf of the DAF Defendants responded by letter dated 10 November 2021 in essence standing by the explanation for the way disclosure has been limited that had been given in the Disclosure Statement. In view of the impasse between the parties, on 3 December 2021 Ryder issued the present application.

24. In dealing with application I bear in mind that a great deal of disclosure has already been provided by the DAF Defendants at significant cost. The Pricing Statement itself contains information as to how pricing decisions were reached during the relevant period.

D. PARTIES' SUBMISSIONS

25. In summary, Ryder submits that the DAF Defendants should now be ordered to search the records of DAF NV and PACCAR for responsive internal communications:

(1) Such a search is required by the terms of the DAF Disclosure Order. Communications within DAF NV and PACCAR will be found, if at all, in the records of DAF NV and PACCAR. The DAF Disclosure Order was made by consent and the DAF Defendants have not applied to be released from its terms.

(2) The disclosure sought is relevant and necessary. The DAF Defendants' own position is that '*evidence of the manner in which specific Truck prices were derived is likely to be relevant to the issues of determination at trial*', and that '*disclosure going to that issue... need[s] to be given*' in the Ryder proceedings. Given the role played by DAF NV and PACCAR

in approving UK sales prices, their internal communications should be included in the search.

(3) There are available records, which can be searched in a proportionate manner:

(a) Edwards 6 identifies a number of repositories that could be, but have not been, searched and disclosed. These are in the form of: (i) network drives; and (ii) extensive back-up tapes for DAF NV.

(b) The same types of repository were used in order to provide the communications disclosure which has been given from DAF UK. DAF's reluctance to search the records of DAF NV and PACCAR is not attributable to any difference in the nature of the available archives.

(c) It would not be difficult to conduct proportionate searches of the available repositories. It appears that DAF NV's network drive has already been scoped, a word-searchable overview has been prepared, and documents relating to Ryder and Hill Hire have been identified (but not collated, reviewed or offered for disclosure). As regards the back-up tapes, a sampling methodology was devised by DAF in searching DAF UK's records, and the same could be done for DAF NV.

(d) DAF's witness evidence contains certain estimates as to the potential search costs. However, no estimate is given of the cost involved in searching the network drives; and, in the case of the back-up tapes, DAF's estimates are based on restoring and reviewing every available tape, in contrast to the approach employed when preparing the DAF UK disclosure.

(e) The proportionality of the search costs should be considered in the light of (i) the scale of Ryder's claim against DAF: DAF was by far Ryder's largest supplier, accounting for approximately 62% of Ryder's truck purchases during the relevant period, with

an estimated value of £396.1 million; and (ii) the significance that DAF has attached to challenging the relationship between list prices and sales prices in its defence of Ryder's claim. This will be an important issue at trial, and it merits proper investigation through disclosure.

26. Ryder contends that the internal communications at issue are therefore relevant and necessary and can be searched for at proportionate cost. It is for the DAF Defendants to fashion reasonable and proportionate searches, but Ryder would be content for disclosure to be expressly limited by reference to a subset of the repositories identified in Edwards 6 (see paragraph 25(3)(a) above).

27. The DAF Defendants disagree and submit that it is not appropriate for the Tribunal to order further disclosure:

(1) The DAF Defendants have already completed a very significant process of disclosure in relation to Communications:

(a) Even prior to the DAF Disclosure Order, the DAF Defendants had in October 2019, disclosed to Ryder the key documents relating to the process of obtaining approvals from DAF NV and PACCAR. Namely, the DAF Defendants had made relevant disclosure of its Order Management System (which was used to process and review approvals requests) and corporate approval memos (which were sent to DAF NV or PACCAR where the approval of certain senior individuals was required). These documents notably include the rationale DAF UK presented to its parent companies to approve of a transaction and thus do answer the question why approval was given.

(b) Pursuant to the DAF Disclosure Order, over 210,000 documents were subject to manual and technology assisted review under the head of Communications Disclosure. As a result over 17,000 documents were disclosed. The exercise cost over £400,000. This is in the context of the DAF Defendants having spent well

over £15 million already on disclosure in the First Wave Proceedings.

(c) In carrying out that exercise the DAF Defendants properly focussed on DAF UK records, since DAF UK was responsible for the negotiation and sale of trucks to Ryder. Whilst the DAF Defendants were (from 1998) required to obtain approvals from DAF NV and PACCAR, the principal documents relating to those approvals would be in DAF UK's custody since – necessarily – an approval or refusal of a transaction would have been communicated to DAF UK, as the negotiating party.

(d) However, the DAF Defendants did not limit its review to DAF UK records but also searched a repository of 2.4 million non-DAF UK documents. From that repository 10,451 documents (excluding families) were included in the DAF Defendants' manual and technology assisted review for documents responsive to the DAF Disclosure Order. This led to the disclosure of c.208 documents which were communications within or between DAF NV and/or PACCAR (i.e. those that Ryder claims to have been omitted).

(e) In preparing its response to this application, the DAF Defendants have identified further documents which it will review, and where appropriate disclose. These comprise:

(i) 484 documents extracted from DAF NV back up tapes which (1) were taken from the mailboxes of seven persons with a potential role in approval of sales to the Claimants and (2) are responsive to the keywords "Ryder" or "Hill Hire";

(ii) a little over one hundred documents held on a network drive called the "S: Drive" where the file name is responsive to the keywords "Ryder" or "Hill Hire"; and

(iii) two boxes of hard-copy documents which have been identified as possibly containing documents concerning Ryder or Hill Hire.

(2) The expected benefits of further disclosure are limited. Having provided substantial disclosure to date, it is unlikely that further searches of DAF NV / PACCAR repositories will yield documents which evidence a significantly different picture from those already disclosed.

(3) The DAF Defendants have not identified searches which would be reasonable and proportionate to carry out beyond those set out below.

(a) As regards PACCAR, there are no further searches which can reasonably be undertaken:

(i) Given their urgency, internal discussions about transaction approvals typically took place by phone or in person;

(ii) PACCAR in any event, until 2017, operated a deletion policy which (unless an exemption was authorised) led to emails being deleted after no more than 18 months.

(iii) Potentially relevant individuals who remain at PACCAR have moreover confirmed that they do not have any documents from the relevant period relating to sales to Ryder and/or Hill Hire.

(iv) Unlike DAF NV, PACCAR does not have back up tapes.

(b) As regards DAF NV, whilst it likewise was subject to the same email deletion policy, it has identified 1,929 backup tapes, the overwhelming majority of which were made in 2009 ("the 2009 Tapes"). A further 95 were made in 2016 ("the 2016 Tapes") and the date on which another 166 were made is unknown ("the Additional Tapes").

(c) Significant time and cost would be required to extract the data from these tapes and run simple keyword searches over the files they contain. The DAF Defendants estimate the rough average cost of restoring a single tape to be around EUR 1,400. Merely restoring all of the DAF Defendants' back-up tapes would cost around EUR 2,500,000 and potentially taking over two and a half years. That would be before any detailed disclosure review took place. Plainly this is disproportionate and, in any event, unfeasible given the trial is listed for March 2023.

(d) As to the 2009 Tapes, 10 GB of data has been restored from these ("the Restored Data"). Within that, the DAF Defendants have identified mailbox data for seven persons who may have had a role in setting or approving prices for sales to Ryder. Those mailboxes contain 484 documents responsive to the keywords "Ryder" or "Hill Hire". The DAF Defendants' solicitors will review those documents. In the context of the disclosure exercises already undertaken, this is a sufficient and proportionate review of the data from 2009. To restore the 2009 Tapes in their entirety would cost over £2 million. Save for the 484 documents the DAF Defendants agree to review, it is not proportionate to direct any further search to be carried out in relation to the 2009 Tapes.

(e) It is not proportionate to direct any search to be carried out in relation to the 2016 Tapes given that the infringement ceased in January 2011 and the DAF Defendants' policy of deleting emails after 18 months, they are unlikely significantly to contain email communications from the infringement period. Moreover, the only information from the infringement period which they might conceivably hold that should not already be on the 2009 Tapes would be data from 2010. It would cost around EUR 133,769 to extract the data from these tapes and make them available for simple keyword searches before any detailed review for the relevant documents could begin.

(f) As regards the Additional Tapes, it would cost over EUR 200,000 to restore these tapes and potentially take 2 to 4 months before even a detailed disclosure review could commence. In the context of the disclosure exercises already undertaken, this would not be a proportionate exercise. It would also mean that further disclosure would take place after the deadline for factual witness evidence on 10 March 2022.

(g) Edwards 6 explains that there are DAF NV shared network drives which may contain a small number of documents relating to Ryder and Hill Hire. However, network drives appear not to be a significant source of Communications Disclosure. In the case of DAF UK's shared network drives, these yielded just 8% of the Communication Disclosure made pursuant to the DAF Disclosure Order, mainly in formats other than e-mail, which DAF understands to be the focus of Ryder's application. Further, the DAF Defendants' policy dictates that individuals were not supposed to keep email communications in their personal drives and all of the potentially relevant individuals who are still employed by the DAF Defendants have confirmed that they do not have any documents in their personal drives which relate to approval of transactions with Ryder. Nonetheless, as explained in Edwards 7, the DAF Defendants have identified that there may be around one hundred documents from the relevant period where the file name is responsive to "Ryder" or "Hill Hire". DAF will carry out a review of these documents and where appropriate disclose them. It would not be proportionate to order DAF to carry out a search over network drives beyond this.

(h) Finally, as explained in Edwards 7, the DAF Defendants have also been able to identify the possible existence of 2 boxes of hard-copy documents that relate to Ryder or Hill Hire. These documents are being obtained and will also be searched and where appropriate disclosed.

28. As set out above, on 11 January 2022, Ryder submitted a supplemental note ahead of the January 2022 CMC, to provide the Tribunal with an update in view of the substantial movement in the DAF Defendants' position.

29. In the supplemental note, Ryder explained that the DAF Defendants have now agreed to search DAF NV's network drives and that Ryder are content with the searches set out in Edwards 7. Further, Ryder said it welcomed the DAF Defendants' willingness to review the 484 documents from the seven mailboxes referred to at para 27(3)(d), above.

30. Ryder indicated that it is content with the additional searches that the DAF Defendants have agreed to conduct.

31. Additionally, Ryder maintains that the DAF Defendants should be ordered to rectify the fundamental inconsistency between the Disclosure Statement and Edwards 6 by explaining how "*the repository of non-DAF UK documents*" was collated, what it comprises and the nature of the searches that have been undertaken in respect of it. This could be done in a sworn statement or by an amended Disclosure Statement.

E. DISCUSSION

32. The DAF Defendants have identified further documents which they will review, and where appropriate disclose. In light of this the parties have agreed between them today that DAF NV should conduct reasonable and proportionate searches of the following:

    (a) the Network Drive referred to in paragraph 6 of Edwards 7, to consist of a review of documents whose file names are responsive to a search for "Ryder" and or "Hill Hire" carried out on an overview of the folders referred to in Edwards 7;

    (b) the 484 documents referred to in paragraph 40 of Edwards 6 and the mailbox of John Kearney as referred to in paragraph 41 of Edwards 6;

(c) in respect of the 2009 Tapes from Periods 1 and 13 (excluding the information referred to in (b) above), referred to in paragraph 38 of Edwards 6, the DAF Defendants shall either:

(i) confirm in a Disclosure Statement that the 2009 Tapes do not contain mailboxes of the Potentially Relevant Individuals as defined in paragraph 15 of Edwards 6; or

(ii) if the 2009 Tapes do contain mailboxes of the Potentially Relevant Individuals, undertake reasonable and proportionate searches of those tapes containing such information;

(d) in respect of the Additional Tapes referred to in paragraph 45 of Edwards 6, the DAF Defendants shall ascertain whether those tapes contain the personal drives of any of the Potentially Relevant Individuals. To the extent that none of the Additional Tapes contain the personal drives of any of the Potentially Relevant Individuals, that shall be confirmed by the DAF Defendants in a Disclosure Statement. However, if any of the Additional Tapes do contain the personal drives of any of the Potentially Relevant Individuals, the DAF Defendants shall undertake reasonable and proportionate searches of those tapes, to consist of a review of documents whose file names are responsive to a search for "Ryder" and or "Hill Hire" carried out on the catalogues of the Additional Tapes;

and by no later than 4 pm on 11 February 2022 provide disclosure of any documents located as a result of those searches which are responsive to paragraph 1 of the DAF Disclosure Order and/or a disclosure statement, if applicable under sub-paragraph 1(c) and (d) above. Thus most of the issues between the parties have been resolved.

33. What remains outstanding between the parties are two issues:

(1) Whether DAF NV and PACCAR should be ordered to provide a sworn statement or amendment to Annex 1 of the Disclosure Statement setting out further details of the repository of non-DAF UK documents referred to in Edwards 6.

(2) Whether PACCAR and DAF NV should pay Ryder's costs of the application.

34. Before dealing with these specific issues, it is appropriate to determine whether or not DAF NV and PACCAR acted in breach of the DAF Disclosure Order in not conducting searches in the first place. If there was a breach, then that would be a relevant factor in determining costs of the application.

35. Ryder's position is that in failing to conduct any search of the records of DAF NV and PACCAR, the DAF Defendants breached paragraph 1 of the DAF Disclosure Order. As the order was made by consent it would be a high hurdle for the DAF Defendants to seek to amend the order now in the light of the principles set out in *Tibbles v SIG Plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591.

36. I do not consider that the DAF Defendants have breached paragraph 1 of the DAF Disclosure Order. The order at paragraph 7 permitted the DAF Defendants to limit disclosure and searches on reasonableness and proportionality grounds, and if it was to do so it should explain the basis in its Disclosure Statement. This is exactly what the DAF Defendants did in their Disclosure Statement. Of course there may be circumstances where failing to do any searches may amount to a breach of a disclosure order which provides that searches may be conducted on a reasonable and proportionate basis, such as where the reasons given for limiting disclosure are made in bad faith or are manifestly incorrect or amount to flimsy grounds which indicate a desire to evade giving disclosure of documents which should be disclosed. This is not such a case. First, the DAF Defendants have given extensive disclosure from DAF UK's records. This will include communications with DAF NV and PACCAR. Secondly, the reasons given for limiting disclosure in the Disclosure Statement are put forward in good faith and are rational.

37. As regards the remaining two matters pursued by Ryder, I bear in mind the following:

(1) Communications Disclosure relates to a key central issue in the proceedings. There is a dispute between the parties as to whether or not

the activities of the Trucks cartel had any, and if so what, impact on the prices of Trucks during the relevant period. The DAF Defendants contend it had none. Evidence of how prices of Trucks were set will be relevant to the determination of that issue at trial. The role of both DAF NV and PACCAR in setting of Trucks prices will be explored at trial.

(2) Disclosure of records held by DAF UK will not capture all the relevant documents covered by paragraph 1 of the DAF Disclosure Order, not least because:

(a) The order requires disclosure of documents not just between the different DAF Defendants, but also within DAF NV and PACCAR.

(b) My experience of disclosure in the Trucks cases is that records going back so far in time are generally incomplete and the further one goes back in time the patchier the existing or available documentary evidence. Thus DAF UK's records will not be complete by any means for the period 1997 to 2011.

(3) It is neither practical nor desirable to expect the parties in these cases to search for documents without limit or regard to the cost involved. An exercise of leaving no stone unturned is self-defeating in terms of justice as it will lead to a system where justice is simply not affordable with the burden on the parties and their lawyers intolerable.

(4) A balance must be struck between getting full disclosure and dealing with matters in a practical and pragmatic way. There will be gaps in disclosure, but this is inherent in a process based on reasonable and proportionate searches.

(5) Already a significant amount of disclosure of documents has been given on pricing and this is supplemented by the Pricing Statement. In addition there will be the witness statements at trial and witnesses may be subject to cross-examination. There is no shortage of material for the parties and the Tribunal to consider and work with for trial.

(6) Significant costs have already been expended on disclosure. At this stage any further disclosure needs to be considered on a strict cost benefit basis. Thus the cost of additional searches is taken into consideration.

(7) The DAF Defendants have undertaken a very significant process of disclosure in relation to communications and at not inconsiderable cost. Pursuant to the DAF Disclosure Order, over 210,000 documents were subject to manual and technology assisted review under the head of Communications Disclosure. As a result, over 17,000 documents were disclosed. The exercise cost over £400,000. This is in the context of DAF having spent well over £15 million already on disclosure in the First Wave proceedings. In my view and my experience of disclosure exercises of a similar scale, these figures are not at all surprising and appear to me realistic.

(8) I am satisfied that the DAF Defendants have been dealing with disclosure in a fair and reasonable manner. This is not a case where a party's reluctance to carry out specific searches is born out of a fear that the searches will result in damaging or incriminating disclosure.

Issue (1): Sworn statement or amendment to Annex 1 to the DAF Disclosure Statement

38. A disclosure statement is an important document which requires careful preparation. It provides a clear record of what limitations there have been on searches and what records have been searched or not searched. Where there is an inaccuracy, it should be corrected, usually by way of a further or amended disclosure statement, rather than simply in correspondence. The DAF Defendants and their solicitors should review Annex 1 to the Disclosure Statement and if there are any material inaccuracies or matters that need to be clarified or expanded upon to ensure accuracy, then this should be done by way of a further disclosure statement as I would expect. Counsel for both parties confirmed at the hearing that they understood that this is the expectation of the Tribunal.

39. In the present case, Ryder also complains about the ambiguity in paragraph 26 of Annex 1 of the Disclosure Statement, which they correctly state may be understood as only referring to documents from DAF UK given the wording of the rest of the document. Paragraph 26 states:

> "For completeness, the search terms set out at Schedule 2 were also applied to certain contemporaneous electronic documents within the Relevant Period that are held by the DAF Defendants' current lawyers in the Netherlands. Documents that were responsive to these keyword searches were de-duplicated before a total of 10,451 documents and their family documents (totalling 27,076 documents) were transferred to the relevant Relativity workspace to allow KLD's TAR software to be used to score these documents for relevancy and prioritise batches of documents for manual review by the First level Review Team. Further information about TAR and the review process that was undertaken in relation to this data is set out below. Relevant documents and their associated family documents identified in this review have been disclosed at Annex 2."

40. However it now appears that the repository referred to is primarily of documents from multiple sources other than DAF UK, and includes documents from PACCAR for example. That this is the case only became clear from Edwards 6 at paragraph 18 which states:

> "For that reason, as set out at paragraph 12 above, while the focus of the searches was on DAF UK's documents, a readily accessible and substantial repository of non-DAF UK documents, including those of DAF NV, was identified as part of the exercise undertaken pursuant to the Order. This repository of documents contains over 2.4 million documents, including a significant number of documents sourced from the servers of DAF NV, and a substantial number of the documents (approximately 243,255) include as a sender or recipient one or more of the Potentially Relevant Individuals. Again, as explained in DAF's communications Disclosure Statement at paragraph 26, documents that were responsive to the keyword searches were de-duplicated before a total of 10,451 documents and their family documents (totalling 27,076 documents) were transferred to the Relativity workspace to allow technology assisted review software to score these documents for relevancy and prioritise batches of documents to be manually reviewed. All the documents from this repository, including those involving Potentially Relevant Individuals, have already been searched and any relevant documents resulting from these searches have been disclosed to the Ryder Claimants."

41. Further information and clarification is provided in a letter dated 12 January 2022 from Travers Smith LLP on behalf of the DAF Defendants which states:

> "Your clients' Supplemental Note alleges that there is a "fundamental inconsistency between §10 of the Disclosure Statement and §18 of Edwards 6". We do not accept this. Paragraph 26 of DAF's Communications Disclosure Statement makes it quite clear that "search terms…were also applied to certain contemporaneous electronic documents within the Relevant Period that are held by the DAF Defendants' current lawyers in the Netherlands". The natural

> interpretation of this statement is that the documents in question were held by DAF's lawyers in the Netherlands, De Brauw, on behalf of all the "DAF Defendants" (which includes DAF NV). The intention of paragraph 26 was therefore to state that one repository of documents that was not a record held by DAF UK had been searched. To the extent that there was any uncertainty, unequivocal clarity has now been provided in CFE6, to which a statement of truth is attached. Our clients do not consider that any revision to the DAF's Communications Disclosure Statement is necessary in the circumstances.
>
> In the interests of transparency, our clients can confirm that the repository of documents was collated by DAF and De Brauw in connection with the investigation by the European Commission into the trucks market which resulted in the Settlement Decision. As stated in paragraph 4(e) of our first letter of today's date, precisely how the repository was collated, what it comprises and the nature of the searches that have been undertaken in respect of it (save to the extent already explained in DAF's Communications Disclosure Statement, CFE6 and CFE7) is privileged information, to which your clients have no entitlement."

42. In view of the way matters have developed and the clarifications provided, the request of Ryder that the correct position should be set out in a disclosure statement is entirely justified. This is a reasonable request and it will not be burdensome on the DAF Defendants to provide this information which may guide Ryder as to whether or not it is worth pursuing any further disclosure application in respect of them. This information may be incorporated into the further disclosure statement that the DAF Defendants have agreed to give. Thus the request that the DAF Defendants should provide in a disclosure statement further details of the repository of non-DAF UK documents is allowed, but with the following caveats:

(1) The statement should state in broad terms what the repository comprises, including from which of the DAF Defendants the documents have been collated.

(2) The nature of the searches that have been undertaken in respect of complying with the DAF Disclosure Order should be particularised. There is no need to particularise searches done in relation to the European Commission investigation or for complying with any other order in these proceedings.

Issue (2): Costs

43. Ryder seeks an order for costs in their favour in respect of the application. In considering this application I take into account the matters set out at paragraphs 34 to 37 above and the approach I have taken in relation to similar applications for disclosure across all the Trucks cases. In general I am not making adverse costs orders in these applications unless either an earlier order has not been complied with or been breached, or where I consider that a party has responded or acted unreasonably.

44. I have already found that the DAF Defendants have not breached the DAF Disclosure Order. As regards whether or not the DAF Defendants have acted unreasonably, Ryder submits that it was incumbent upon the DAF Defendants to search the records of DAF NV and PACCAR, which they failed to do. Further, once the issue was raised in correspondence the DAF Defendants did not agree to undertake any further searches. It was only in the run-up to this hearing that DAF NV agreed finally to carry out further searches. Even though PACCAR has not been ordered to provide any further disclosure, this was only a small part of the application hence it is not a reason for refusing Ryder's costs altogether.

45. Looking at the matter in the round, I consider that the DAF Defendants, including DAF NV and PACCAR, acted reasonably in respect of this application. There has been an element of give and take by all sides in dealing with disclosure in relation to this application. The appropriate order is costs in the case.

F. CONCLUSION

46. I therefore order that there be further disclosure in terms of paragraph 32 above and that the disclosure statement in respect of such further statement should also provide details of the repository of non-DAF UK documents specified in paragraph 42. In view of the fact that the DAF Disclosure Statement has been placed before the Tribunal and has been considered as part of this application, a copy of the further statement should be filed with the Tribunal for its review. The costs of the application shall be costs in the case.

Hodge Malek QC
Chairman

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

Date: 13 January 2022