



Court of Appeal Hands Down Judgment in the Trucks Collective Proceedings

*Conflicts of Interest; Rival CPO Applications;
Jurisdiction to Appeal*

On 25 July 2023, the Court of Appeal handed down its judgment in UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrysler Automobiles NV) & Others [2023] EWCA Civ 875. The appeal raised important issues in the continued development of the collective proceedings regime, including as to how conflicts of interest within a class might be addressed, the willingness of the Court of Appeal to interfere with the Competition Appeal Tribunal's ("CAT") assessment of two rival applications for a collective proceedings order ("CPO"), and the scope of the statutory jurisdiction to appeal. The [judgment is accessible here](#).

BACKGROUND

1. The appeal arose in collective proceedings that 'follow-on' from the infringement of competition law found by the European Commission in Case AT.39824 *Trucks*. In particular, in 2018, two overlapping applications for a CPO were filed with the CAT: one application was brought by the Road Haulage Association Limited (the "RHA") on an opt-in basis and sought non-aggregate damages on behalf of acquirers of new trucks and

acquirers of used trucks, whilst the other application was brought by UK Trucks Claim Limited (“UKTC”) on an opt-out basis and sought aggregate damages on behalf of acquirers of new trucks.

2. Following a contested certification hearing in April 2021, the CAT concluded that both CPO applications satisfied the statutory criteria for certification but that (i) the RHA’s application was preferable to UKTC’s application and therefore (ii) only the RHA’s application would be granted. In reaching that conclusion, the CAT observed (*inter alia*) that, unlike UKTC, the RHA would represent acquirers of new trucks and acquirers of used trucks, which would “enable a large number of potentially affected SMEs to pursue their claims”. The CAT took this view notwithstanding what it described as a “*potential*” conflict of interest between acquirers of new trucks and acquirers of used trucks; namely that acquirers of new trucks have an interest in proving that they did not pass-on the alleged overcharge when their trucks were re-sold, whereas acquirers of used trucks have an interest in proving that the alleged overcharge was passed-on when trucks were re-sold. The CAT considered that the conflict could be addressed by notifying proposed class members that pass-on would be assessed by the RHA’s independent expert and by the fact that the RHA’s action was brought on an opt-in basis, thereby requiring proposed class members to pro-actively join the RHA action. The CAT also noted that any further steps to address the conflict could be taken at a later stage.
3. The appeal gave rise to a variety of issues, including whether the CAT erred in allowing the RHA to represent the interests of acquirers of new trucks and acquirers of used trucks notwithstanding the conflict described above, whether the CAT erred in preferring an opt-in action over an opt-out action, and whether the grounds of appeal fell within the statutory jurisdiction to appeal under section 49(1A) of the Competition Act 1998.

OUTCOME ON APPEAL

4. In summary, Court of Appeal found that:

Conflicts of Interest

5. The CAT had erred in describing the conflict of interest as only a “*potential*” conflict. Instead, the Court considered the conflict to be “*obvious*” and concluded that the conflict must be “*addressed at the start of the proceedings when [proposed class members] opt in, rather than at an indeterminate point in the future*”.¹
6. Nevertheless, the conflict did not bar the RHA from representing acquirers of new trucks and acquirers of used trucks, provided the RHA can establish “*a Chinese wall within the [its] organisation for the purposes of dealing with [the conflict]*”.² The Court of Appeal elaborated that this requires the creation of “*a separate team within [the RHA’s organisation] acting for each of the two sub-classes, instructing different firms of solicitors and counsel and a different expert or experts [and] a different funder will need to be involved for one of those sub-classes, given that the conflict potentially extends to funding*”.³ Arrangements of that nature were needed to protect the “*ordinary independent decision-making in the litigation including as to settlement*”.⁴
7. Additionally, the conflict would need to be clearly explained to potential class members in the notice that the RHA is required to publish pursuant to Rule 81 of the Competition Appeal Tribunal Rules 2015. In particular, the notice would need to “*explain in detail to all class members in both the sub-classes the nature and extent of the conflict in relation to resale pass-on and*

¹ Judgment, [94].

² Judgment, [88].

³ Judgment, [88].

⁴ Judgment, [88].

*how the RHA proposes to resolve the conflict by way of the Chinese wall and separate teams”.*⁵

8. In those circumstances, the RHA’s CPO application is to be remitted to the CAT for consideration of arrangements for the separate representation and separate funding of acquirers of new trucks and acquirers of used trucks (which the RHA had indicated it would be able to achieve).

Other Issues

9. **Opt-in vs opt-out:** UKTC sought permission to appeal on the additional ground that the CAT erred in preferring the RHA’s opt-in application over UKTC’s opt-out application. Permission to appeal was refused. The Court reiterated that there is no presumption in favour of either opt-in or opt-out proceedings and the Court concluded that, in advancing this additional ground of appeal, *“UKTC is simply seeking to re-run all the arguments it ran before the CAT for preferring its application to that of the RHA”*.⁶ Further, the Court emphasised that the assessment and conclusion as to which CPO application is preferred *“are matters of discretion and case management for the CAT”*.⁷
10. **Stay:** UKTC also raised an entirely new argument that the CAT should have stayed UKTC’s CPO application rather than dismissing its application. In particular, UKTC sought a stay on a variety of terms, including a stay pending the cut-off date for opting in to the RHA’s action, and a stay pending the judgment of the Supreme Court in *PACCAR v The Road Haulage Association* (appeal from the Court of Appeal’s judgment [2021] EWCA Civ

⁵ Judgment, [98].

⁶ Judgment, [100].

⁷ Judgment, [100].

299).⁸ (The detail of the aforementioned appeal in *PACCAR* – and the outcome before the Supreme Court – is beyond the scope of this alerter; however, in short, that separate appeal, which also arose in the Trucks collective proceedings, concerned whether a litigation funding agreement of the kind entered into by the RHA must comply with the Damages Based Regulations 2013.) The Court observed that UKTC had raised this point extremely late in the day and that it is doubtful whether the point “*can properly be regarded as a ground of appeal at all*”.⁹ Nevertheless, the Court concluded that UKTC’s CPO application *should* be stayed pending the CAT’s determination of the matters to be remitted (see paragraph 8 above) and pending the aforementioned judgment of the Supreme Court in *PACCAR*.¹⁰

11. **Expert methodology:** the respondents to UKTC’s appeal argued that UKTC’s expert methodology was inadequate such that UKTC could not satisfy the statutory certification criteria. In short, the Court rejected those arguments and concluded that the CAT’s assessment of UKTC’s expert methodology “*is a quintessential example of a multifactorial assessment by an expert tribunal with which this Court should not interfere unless the tribunal was plainly wrong*”.¹¹

12. **Jurisdiction:** finally, to protect against the possibility that there was no jurisdiction to appeal, each appellant brought parallel applications for judicial review which raised the same grounds as their appeals. On the issue of jurisdiction, the Court found that “*all the matters before the Court*

⁸ The judgment of the Supreme Court was ultimately handed down the day after the judgment of the Court of Appeal: [2023] UKSC 28.

⁹ Judgment, [106].

¹⁰ Judgment, [106].

¹¹ Judgment, [104].

can be dealt with by way of appeal or permission to appeal” and the Court confirmed by reference to prior authority that, where the issues raised on appeal concern whether all or part of the proceedings should have been certified, there will be jurisdiction to appeal.¹²

James White acted as junior counsel for the Iveco parties.

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¹² Judgment, [55].