



Pass-on in the UK trucks litigation

Is legal causation any clearer?

In [Royal Mail & BT v DAF \[2023\] CAT 6](#) (*Royal Mail*) the UK Competition Appeal Tribunal (CAT) considered the issue of pass-on. It denied the Defendants' pass-on 'defence' because the Overcharge was a small proportion of the Claimants' overall costs and the Defendants' failure to establish a 'direct and proximate link' between the Overcharge and Claimants' downstream prices. *Royal Mail* provides an opportunity to review the English courts' treatment of pass-on in cartel cases.

The case in brief

Royal Mail is a follow-on action against DAF arising from the European Commission's settlement decision [Case AT.39824 -Trucks](#). DAF and four other truck manufacturers admitted coordinating their prices for truck chassis over the period 1998 to 2011. The Claimants had been overcharged on a large number of trucks they had leased or purchased during the cartel period. The CAT awarded the Claimants overcharge damages of 5% of the value of commerce using the 'broad axe' principle.

The Defendants raised a (supply) pass-on 'defence' that 'the Claimants mitigated their loss by passing it on to their customers by increases to the prices they charged for their own products such as postage stamps or telephone line rentals.' The Majority found that because the overcharge was a very small proportion of the Claimants' total costs, there was insufficient evidence of a direct causal link between the Overcharge and the Claimants' downstream prices. This was even though the Claimants' prices were regulated to allow the pass-through of reasonable costs. The third member of the Tribunal, an economist, dissented from the Majority's reasoning but agreed that the pass-on defence should fail.

The legal causation test

The Tribunal adhered to the CAT [Sainsbury's](#) principles for legal pass-on. The Majority (550) listed four factors 'which have to be weighed in the balance to decide if there is the requisite degree of proximity to establish a

direct causative link between the Overcharge and the prices charged by the Claimants to their customers':

- (1) Knowledge of the Overcharge or the specific increase in the cost in question.
- (2) The relative size of the Overcharge against the Claimants' overall costs and revenue;
- (3) The relationship or association between what the Overcharge is incurred on and the product whose prices have been increased; and/or
- (4) Whether there are identifiable claims by identifiable purchasers from the Claimants in respect of losses caused by the Overcharge.

The Tribunal (299) said that these were not a general, necessary or 'exhaustive list of factors ... but ... the most relevant ones to this case'. The Majority concluded that none were satisfied so the pass-on defence must fail for the following specific reasons:

Factor (1) - Knowledge of the overcharge

The Trucks cartel was a secret conspiracy, so the Claimants did not know of its existence or the Overcharges.

Factor (2) - Relative size matters

Critical to the Majority's reasoning was that the Overcharge was a small proportion of the Claimants' total costs and revenues. The Tribunal found that the Overcharge never exceeded 0.05% of total costs/revenues, and therefore was unlikely to have been passed on.

Factor (3) - Relationship between overcharge and Claimants' prices

The Majority (572) found '[N]o direct relationship between truck costs and products sold.' It reiterated that as a matter of law, the Overcharge must be a 'direct and proximate cause of an increase in specific prices' (my emphasis) and in this case, it was 'too remote from the downstream prices' (573) This was because Truck costs were only one component of the costs that were likely to influence the prices of the respective downstream products of the two Claimants. The CAT looked at the

way the regulatory process dealt with costs to conclude that the treatment of vehicle costs was not straightforward enough to trace through their effect on specific prices. The price controls disallowed some costs, allowed others and set glide paths designed to take account of inflation.

Factor (4) - Existence of 'identifiable purchasers'

Factor (4) reiterates the second limb of the CAT *Sainsbury's* test and was critical to the Majority's Opinion. It quoted the Supreme Court in *Sainsbury's* which defined pass-on as when the claimants 'transferred all or part of [their] loss to others.' While this was stated generally the Majority narrowed the 'others' to 'identifiable purchasers' together with 'an approximation as to the amount of the loss' transferred. The Majority (554) also stated confusingly that 'identifiable claims by identifiable purchasers is an important albeit not necessary factor'. Yet it treated it as the determining factor.

CAT's position on pass-on

While the Majority Opinion in *Royal Mail* is fact specific, the CAT has set some stringent conditions for pass-on to be a successful defence. The key requirement was Factor (4) that there must be identifiable downstream purchasers suffering identifiable increases in specific prices. The Majority also scotched several routine claims used to suggest pass-on, namely:

- Overcharges that are a small proportion of total costs are unlikely to be seen as passed on in the absence of very strong (nay overwhelming) evidence to the contrary.
- A regulatory price cap that allows the pass-through of reasonable costs does not establish legal pass-on.
- Showing a business made a profit and/or recovered its costs 'in itself ... tells you nothing about whether a price increase has been caused by an increase in costs' (564).
- Scatter plots (beloved by econometricians) showing a positive relationship between costs and prices 'cannot itself prove the requisite causation' (566).

The economist's dissenting opinion

The Dissenting Opinion rejected Factors (1) to (3) concluding that a significant proportion of the Overcharge had been passed-on by the regulatory price controls but accepted the Majority's view on Factor (4). It observed that while the small size of the Overcharge might make the measurement of pass-on 'empirically hopeless' (765) it does not mean it had not happened. One needed to look at the 'other contextual evidence that might reveal the existence of a likely pass-on mechanism at work' (706). This showed that '[T]ruck costs were included at a very granular level' such that

'[T]he price control operated in a way that meant that a substantial part of any Overcharge would ... have been reimbursed through the price caps and constraints.' (721). Nonetheless, the Dissenting Opinion concluded that because 'the costs and small amount of the claim would be excessively difficult or impossible' for the Claimants' customers to seek compensation the pass-on defence failed on Factor (4) as violating the principle of effectiveness.

Commentary

The Majority reiterated the CAT *Sainsbury's* principles for determining pass-on and to this extent paints a consistent picture. However, that reasoning and the factors on which Royal Mail turned are contentious and have not found universal acclaim from its own Tribunal and the higher courts. In my view the CAT's treatment of pass-on remains unsatisfactory for the following reasons:

Legal causation

- Factor (4) is the most controversial part of the judgment. The full Tribunal applied Factor (4) as a policy decision that balanced the prospect that the Claimants' would be over-compensation against the possibility that 'DAF may escape paying compensation to all those who suffered loss as a result of the Overcharge.' Its basis was set out in CAT *Sainsbury's* (484):

There is danger in presuming pass-on of costs to indirect purchasers because of the risk that any potential claim becomes either so fragmented or else so impossible to prove that the end result is that the defendant retains the overcharge. This risk of under-compensation, we consider, to be as great as the risk of overcompensation, and it informs the legal (as opposed to the economic) approach. It would also run counter to the EU principle of effectiveness in cases with an EU law element, as it would render recovery of compensation "impossible or excessively difficult".

Ironically no sooner had the ink dried on CAT *Sainsbury's* that the *Merricks* collective proceeding was launched claiming aggregate damages on behalf of 47 million indirect purchasers who are not required prove specific losses to identified individuals critical to the Majority's reasoning. So ironically the Majority's reason for denying pass-on would not be sufficient to deny pass-on the identified customers of Royal Mail and BT. Further, the Court of Appeal in [Sainsbury's \[2018\] EWCA Civ 1536](#) (338), albeit as *obiter*, rejected Factor (4) as 'not an essential condition' and 'inconsistent with the principle that

damages are compensatory.’ The compensatory principle is that claimants get no more nor less than their losses, not that the Defendants pay full compensation or that another class of potential claimants gets compensated. Factor (4) violates the compensatory principle by taking into account the Defendants’ gains and therefore incorrectly pursues restitutionary and deterrence objectives. Having said this the CAT noted that at common law pass-on – compensation for pure economic loss - would be treated as ‘too remote.’ It was a policy decision to allow it as mitigation for a breach of a statutory tort. It appears that the CAT’s default position is no pass-on which, it is noted, runs counter to the Damage Directive’s presumption of pass-on (a provision that was not transposed into UK law).

- Paradoxically the CAT’s judgment may yet still see the Overcharge passed-on. The award of the full Overcharge to the Claimants transferred the question of pass-on to the industry regulator (Ofcom). If Ofcom’s price controls take into account the Claimants’ recovery of past excessive costs (the Overcharges) it may pass these on by reducing future prices thus compensating the customers of Royal Mail and BT. Interestingly in [BritNed](#), the High Court sought to impose a clawback provision on the regulated Claimants’ damage award. The [Court of Appeal](#) overturned this because the judge had no power to impose such obligations ([Casenote, Nov 2019](#)).

Evidential issues

- The Majority did not deny that prices had increased only that specific price increases could not be identified. However, it (573) went further holding that:

Even if, as a matter of forensic accountancy, DAF is able to show that the miniscule Overcharge can be traced through the series of internal steps, judgments and regulatory intervention resulting in a higher price setting, the absence of the four factors means that the Overcharge is too remote from the downstream prices.

Thus econometric, forensic accounting and regulatory evidence that increases in truck costs were passed-on in higher average prices would not be sufficient to establish legal causation. This poses a serious evidential hurdle to the pass-on defence; higher than required to prove an Overcharge.

- On Factor (2) while it is generally claimed that a large cost increase is more likely to be passed on (see [EU Passing-on Guidelines](#) (124)ff), this does not mean that small cost increases are not, as the Dissenting Opinion stated.
- While the Majority rejected cost recovery as evidence of pass-on future Defendants and indirect purchasers will no doubt note the Supreme Court’s [Sainsbury’s \[2020\] UKSC 24](#) judgment (215) that ‘the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting’. This posits a weaker causation test for pass-on than set out by the CAT.
- The Majority continued (to the irritation of economists) the CAT [Sainsbury’s](#) misrepresentation of economic pass-on as cost recovery and different from ‘legal’ pass-on. As I have stated elsewhere (38 [ECLR](#) 2017; [Cartel Damages 2020](#) Chap 20) there is no difference between the two: both are exercises in factual causation that look at whether an identifiable increase in prices is linked to a specific cost increase as the Dissenting Opinion (698) correctly observed. The Supreme Court (211) has reiterated the ‘accurate statement of English law is that pass on is a ‘question of fact.’ This is how economists look at SPO. The difference becomes from the CAT’s contentious application of Factor (4) which is shrouded in legal uncertainties.

Cento Veljanovski is the managing partner and founder of Case Associates. For a fuller treatment of pass-on see his [Cartel Damages – Principles, Measurement, and Economics \(OUP 2020\)](#) available from [OUP](#) or [Amazon](#).

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