JUDGMENT OF THE COURT
5 October 1988 *

In Case 238/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Chancery Division, Patents Court, London, for a preliminary ruling in the proceedings pending before that court between

AB Volvo

and

Erik Veng (UK) Ltd

on the interpretation of Article 86 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due, and J. C. Moitinho de Almeida (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet, T. F. O'Higgins and F. A. Schockweiler, Judges,

Advocate General: J. Mischo
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

AB Volvo, the plaintiff in the main proceedings, by David Vaughan, QC, Richard Miller, barrister, and William Richards, solicitor,

Erik Veng (UK) Ltd, the defendant in the main proceedings, by Robin Jacob, QC, and Peter Prescott, solicitor,

* Language of the Case: English.

the French Government, by Régis de Gouttes, acting as Agent,

the United Kingdom Government, by H. R. L. Purse of the Treasury Solicitor's Department, acting as Agent,

the Italian Government, represented by Ivo M. Braguglia, avvocato dello Stato,

the Commission, represented by Anthony McClellan and Ida Langermann, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 18 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 June 1988,

gives the following

Judgment

1 By an order of 17 July 1987, which was received at the Court on 3 August 1987, the High Court of Justice of England and Wales (Chancery Division, Patents Court) referred three questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 86 of the Treaty with a view to determining whether the refusal by the proprietor of a registered design in respect of body panels for motor vehicles to grant a licence for the import and sale of such panels may, in certain circumstances, be regarded as an abuse of a dominant position within the meaning of the abovementioned article.

2 The questions were raised in proceedings between AB Volvo (hereinafter referred to as 'Volvo') and Eric Veng (UK) Ltd (hereinafter referred to as 'Veng').

3 Volvo, the proprietor in the United Kingdom of registered design No 968895 for the front wings of Volvo series 200 cars, instituted proceedings against Veng before the High Court of Justice for infringement of its sole and exclusive rights.

Veng imports the same body panels, manufactured without authority from Volvo, and markets them in the United Kingdom.

4 In the proceedings before it, the High Court referred the following questions to the Court of Justice for a preliminary ruling:

'(1) If a substantial car manufacturer holds registered designs which, under the law of a Member State, confer on it the sole and exclusive right to make and import replacement body panels required to effect repair of the body of a car of its manufacture (if such body panels are not replaceable by body panels of any other design), is such a manufacturer, by reason of such sole and exclusive rights, in a dominant position within the meaning of Article 86 of the EEC Treaty with respect to such replacement parts?

(2) Is it prima facie an abuse of such dominant position for such a manufacturer to refuse to licence others to supply such body panels, even where they are willing to pay a reasonable royalty for all articles sold under the licence (such royalty to represent an award which is just and equitable having regard to the merits of the design and all the surrounding circumstances, and to be determined by arbitration or in such other manner as the national court shall direct)?

(3) Is such an abuse likely to affect trade between Member States within the meaning of Article 86 by reason of the fact that the intending licensee is thereby prevented from importing the body panels from a second Member State?'

5 It is apparent from the terms of the order for reference that the national court submitted those questions taking account of the undertaking given by the defendant in the main proceedings to abandon its contention that a comparison of the prices charged by it for the body panels in question and the higher prices charged for the same panels by the plaintiff in the main proceedings constitutes an abuse of a dominant position by the latter.

6 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the course of the procedure and the observations submitted to the Court, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court.

The second question

7 It must first be observed, as the Court held in its judgment of 14 September 1982 in Case 144/81 (*Keurkoop* v *Nancy Kean Gifts* [1982] ECR 2853) with respect to the protection of designs and models, that, as Community law stands at present and in the absence of Community standardization or harmonization of laws, the determination of the conditions and procedures under which protection of designs and models is granted is a matter for national rules. It is thus for the national legislature to determine which products are to benefit from protection, even where they form part of a unit which is already protected as such.

8 It must also be emphasized that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position.

9 It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.

10 In the present case no instance of any such conduct has been mentioned by the national court. Accordingly, and having regard to the answer given to the second question, it is unnecessary to give an answer to the first and third questions.

11 It must therefore be stated in reply to the second question submitted by the national court that the refusal by the proprietor of a registered design in respect of body panels to grant to third parties, even in return for reasonable royalties, a licence for the supply of parts incorporating the design cannot in itself be regarded as an abuse of a dominant position within the meaning of Article 86.

Costs

12 The costs incurred by the Government of the Federal Republic of Germany, the French Government, the United Kingdom, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the High Court of Justice of England and Wales, by order of 17 July 1987, hereby rules:

The refusal by the proprietor of a registered design in respect of body panels to grant to third parties, even in return for reasonable royalties, a licence for the

supply of parts incorporating the design cannot in itself be regarded as an abuse of a dominant position within the meaning of Article 86.

Mackenzie Stuart Bosco Due Moitinho de Almeida Koopmans

Everling Bahlmann Galmot Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 5 October 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President