Neutral citation [2009] CAT 18

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1106/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

16 June 2009

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

ENRON COAL SERVICES LIMITED (IN LIQUIDATION)

Claimant

-v-

ENGLISH WELSH & SCOTTISH RAILWAY LIMITED

Defendant

RULING (Permission to amend and related matters)

THE CHAIRMAN:

I. INTRODUCTION

1. The Claimant and the Defendant respectively are Enron Coal Services Limited (in liquidation) and English Welsh and Scottish Railway Limited, to whom I shall refer to as ECSL and EWS.

2. On 7 November 2008 ECSL filed a claim against EWS for damages under section 47A of the Competition Act 1998 in reliance upon a decision of the Office of Rail Regulation. That Decision found EWS to have abused its dominant position in the market for the supply and transportation of coal to United Kingdom industrial users by foreclosing that market. Accordingly, EWS was in breach of Article 82 EC and, with effect from 1 March 2000, the Chapter II prohibition contained in section 18 of the Act. The factual background and the issues in this litigation have been set out in the Tribunal's rule 40 judgment: [2009] CAT 7. The abbreviations and terminology used by the Tribunal in that judgment are adopted in the present Ruling.

3. For the purposes of this Ruling I have had to consider three applications:

   (a) In the first, dated 21 May 2009, ECSL applied for permission to amend the Claim Form. That application was opposed in part by EWS.

   (b) The second application was contingent on ECSL's application to amend being granted. In this second application, dated 22 May 2009, EWS requested a split trial in respect of the contested amendments.

   (c) By the third application, also dated 22 May 2009, EWS sought an order for the costs of, and occasioned by, those amendments to which it has consented. EWS has also applied for its costs of the application for costs.

4. On 29 May EWS's solicitors sent a letter to the Tribunal maintaining their objections to the amendment of the BE overcharge claim (i.e. ECSL's overcharge claim in respect of coal hauled to the Eggborough power station owned by British Energy Limited), and requesting that they be heard orally. The same day ECSL's solicitors submitted that the Tribunal had enough information to deal with the matter without a hearing and that it

may be desirable in costs terms to do that. There is no obligation in the Tribunal Rules requiring the Tribunal to seek or consider oral representations from each side before deciding whether to grant or refuse an application for permission to amend. In the circumstances of this case, and in light of the parties' detailed written submissions, the Tribunal did not consider an oral hearing was necessary or desirable.

5. For the reasons given below, I find that:

(a) ECSL should be permitted to amend the BE overcharge claim.

(b) The application for a split trial should be refused.

(c) The costs applications should be reserved for consideration at the conclusion of the trial.

II. THE PROPOSED AMENDMENTS

6. I consider the individual amendments proposed by ECSL with regard to the overriding objective of achieving justice to both sides, to the fact that EWS has already filed its Defence and to the additional factors mentioned in paragraph 18 of this Ruling.

7. The Claim Form was amended by consent on 8 January 2009. References in this judgment to paragraph numbers of the Claim Form are to those in that document as amended. The application to amend the Claim Form is subdivided into three parts:

(a) at paragraphs 46, 49 and 51 of the Claim Form, the effect is to reduce the estimated quantum of the EME overcharge claim. EWS has consented to these amendments;

(b) at paragraphs 34-38 and 42-43 of the Claim Form, the effect is to amend the BE overcharge claim to reflect that, apparently, ECSL mitigated the losses allegedly caused by EWS's abusive discriminatory prices quoted for coal haulage services in transporting coal to BE's power station. EWS has opposed these proposed amendments; and

(c) at paragraphs 52-55 of the Claim Form, the effect is to withdraw the alternative claim to a restitutionary award. EWS has consented to these amendments.

8. The proposed amendments to the BE overcharge claim not having been agreed, in order to explain my decision it is convenient to set out the relevant section of the Claim Form below (with deleted text struck through, and proposed new text underlined):

> "**LOSS AND DAMAGE**
>
> 27. As an intended and/or foreseeable consequence of the breaches of statutory duty and/or the use of unlawful means, the Defendant caused ECSL loss and damage in that it:
>
> (a) overcharged ECSL for coal haulage;
>
> …
>
> ***(a) Coal haulage overcharge***
>
> 30. The ORR found that the Defendant price discriminated against ECSL on rail haulage to at least three UK power generators in respect of prices for coal haulage:
>
> …
>
> (3) Eggborough (owned by BE):
>
> …
>
> ***BE***
>
> 34. Following BE's acquisition of the Eggborough power station from National Power in March 2000, ECSL successfully tendered for the contract to supply coal to BE for use at Eggborough. ECSL supplied BE with coal to its Eggborough power station under an E2E contract from 1 April 2000 to 31 March 2001. During the course of the said contract with BE, ECSL used coal haulage services provided by the Defendant at a discriminatory overcharge and rail haulage provided by Freightliner at a higher price than the Defendant's price offered to BE.
>
> 35. The overcharge is estimated as the difference between the Defendant's or Freightliner's price charged to ECSL and the Defendant's price offered to BE (see B81), or alternatively the difference between the price charged to ECSL and the price the Defendant should have charged had it not price discriminated against ECSL.
>
> 36. In the premises, the best estimate of loss in respect of the overcharging to ECSL in respect of the BE business to 31 March 2001 which ECSL can presently provide is ~~£1,810,000~~ £710,200, £664,986 of which is the estimated difference between the price charged to ECSL and the price offered to BE and £45,214 of which is the difference between the price charged to ECSL by Freightliner and

the price EWS offered to BE. Details of this calculation are attached at Annex 4 hereto.

37. Alternatively if, which is denied, the findings in the Decision are limited to price discrimination between May and November 2000, the cost to ECSL is estimated to be ~~£1,106,000~~ £333,211, based on the estimated difference between the price charged to ECSL and the price offered to BE.

38. Further, in October 2000 BE began a tender exercise for its coal haulage requirements from May 2001. ECSL submitted a bid for the said tender. ECSL intended to (and did) use the Defendant's coal rail haulage services in fulfilment of any supply contract entered into with BE. In providing prices to ECSL for coal rail haulage services in or about October 2000, the Defendant discriminated against ECSL and overcharged it for such services. ECSL also used rail haulage provided by Freightliner. Freightliner provided rail haulage at a higher price than the Defendant's price offered to BE.

39. ECSL was successful in securing the business of BE in supplying coal to Eggborough on an E2E basis. The prices charged by the Defendant of coal haulage services during the currency of the contract to supply BE at Eggborough from April 2001 were at the levels quoted by the Defendant in or about October 2000.

40. The prices charged by the Defendant to ECSL throughout the period of operation of the contract to supply BE at Eggborough were at a discriminatory overcharge.

41. ECSL ceased to supply BE at Eggborough in or about November 2001.

42. The overcharge is estimated as the difference between the Defendant's or Freightliner's price charged to ECSL and the Defendant's price offered to BE (see B81), or alternatively the difference between the price charged to ECSL and the price the Defendant should have charged had it not price discriminated against ECSL.

43. In the premises, the best estimate of loss in respect of the overcharging to ECSL in respect of the BE business from April 2001 which ECSL can presently provide is ~~£115,000~~ £220,271, £57,048 of which is the estimated difference between the price charged to ECSL and the price offered to BE and £163,223 of which is the difference between the price charged to ECSL by Freightliner and the price EWS offered to BE. Details of this calculation are attached at Annex 4 hereto."

9. In order to arrive at the amount of damages claimed to put ECSL in the position in which it would have been if there had been no discrimination, ECSL must prove that the discriminatory prices charged or offered by EWS to ECSL exceeded the prices which would have been charged if there had been no infringement.

10. In the Claim Form (as amended on 8 January 2009) the quantum of the BE overcharge claim is calculated by comparing the prices charged by EWS for ECSL for haulage to BE with the prices which, ECSL alleges, should have been charged.

11. Following disclosure, in particular of the confidential version of the ORR Decision, ECSL now says that it is clear that it mitigated the loss allegedly caused by EWS's price discrimination. ECSL was paying FHH for coal haulage services in transporting coal to BE's power station at the relevant time. The proposed amendments would adjust the quantum of the BE overcharge claim to take this into account. In other words, the proposed claim would compare the prices charged by FHH to ECSL with the prices ECSL alleges should have been charged by EWS (i.e. if EWS had not been abusing its dominant position).

III. ECSL'S APPLICATION TO AMEND THE BE OVERCHARGE CLAIM

12. The Tribunal received detailed written submissions from the parties on the partly contested application to amend. The following summarises the main thrust of the parties' arguments.

Summary of the parties' submissions

13. On behalf of ECSL, their solicitors Orrick, Herrington & Sutcliffe made the following submissions. They argued that the matters reflected in the amendments are relatively straightforward. They submitted that it was not possible to establish the difference between FHH's price to ECSL and EWS's price to BE *until after* it was given access to the confidential version of Part IIB of the ORR's Decision. In so submitting, ECSL attributed the need for the proposed amendments to: (a) the inequality of information as between EWS and ECSL, and (b) the inevitable increase in the information available to ECSL as the proceedings have progressed, specifically on the causal link between the EWS's discrimination against ECSL and the latter's contract with FHH. The liquidator of ECSL, it was said, did not know (and could not have known) about the information on which the amendments are based before the present application. Further, ECSL contended that the proposed amendments are limited. The amendments would give effect to the steps reasonably taken by ECSL to mitigate its losses and thus make a downward revision of quantum.

14. Freshfields Bruckhaus Deringer LLP, the solicitors for the Defendant, made the following objections to the application to re-amend. They argued, first, that ECSL is seeking to introduce a "wholly new claim". ECSL is now seeking to recover the difference between the prices charged to ECSL by FHH and lower prices that ECSL alleges should have been offered to it by EWS. Second, it should have been apparent to ECSL from the outset that FHH hauled coal to ECSL to BE's power station. The amendments relate to ECSL's contractual relationship with FHH, based on information that is, and has been, within its control from the outset. Third, the new issues cannot be properly determined without evidence, including in relation to ECSL's historic dealings with FHH. The amendments will require response pleadings, further disclosure and thus generate disproportionate costs. EWS submitted that it is far too late to raise the matter six months after lodging the Claim Form.

15. In reply ECSL resisted EWS's suggestion that the revised calculations are a "wholly new claim". The Defence put in issue the relationship between FHH and ECSL. ECSL submitted that the proposed amendments involve, at most, the quantification of an additional element of cost and consideration of whether that cost was caused by facts which were to be tried in any event. No further disclosure should be required. ECSL intends to prove its loss based on evidence already disclosed to EWS. The amendments give rise to no more than a short point of quantum (this claim is now estimated to be £208,000 plus interest) which, if need be, can be suitably addressed by EWS in an amended Defence and by expert evidence in due course.

The Tribunal's approach to amendment of the claim form

16. The claim form has a very important function in the procedures to be followed in claims for damages. It is the document which commences proceedings under section 47A: see rule 32(1) of the Tribunal Rules. The claim form is a document which sets out the cause of action which a claimant claims to have and wants to rely upon. Rules 32(2)-(3) set out what the claim form must include. Rule 32(3)(a) specifically requires that the claim form must, among other things, contain "a concise statement of the relevant facts" on which the claimant relies.

17. Rule 34 deals with amendments to the claim form. Rule 34 reads:

"**Amendment**

34. A claim form may only be amended -

(a) with the written consent of all the parties; or

(b) with the permission of the Tribunal."

18. Thus rule 34(a) provides that a claimant may amend his claim form – that is, without permission – with the written consent of all other parties. In all other cases, rule 34(b) provides that the claim form may be amended only with the permission of the Tribunal. The power of the Tribunal to grant applications to amend is discretionary. Each exercise of discretion must be undertaken in the context in which it arises. The Tribunal will have to consider all the circumstances, which may include:

(a) the merits of the proposed amendments;

(b) whether they could and/or should have been raised at an earlier stage;

(c) whether the amendments might require further facts to be found;

(d) the possible prejudice to the parties by granting or refusing permission to amend; and

(e) overall, the overriding objective in rules 19 and 44 to give directions to secure the just, expeditious and economical conduct of monetary claims.

19. It is possible to distinguish between different types of amendments. At one end of the spectrum, amendments may simply correct clerical and typing errors. At the other extreme, amendments may seek to advance new factual allegations which change the basis of the existing claim. The Tribunal must decide whether the amendment sought is a contextual and permissible adjustment of the claim for its more realistic and expeditious disposal, or is a substantial alteration pleading a new complaint. Permission to amend to raise an entirely new cause of action at a late stage of proceedings is only likely to be given in exceptional circumstances.

Reasons for granting permission to amend

20. I have had the benefit of full written submissions. In the particular circumstances of this case, I have reached the conclusion that ECSL should be permitted to amend the claim form for the following reasons.

21. First, as regards the merits of the proposed amendments, I consider that the Claim Form should be amended in order that it properly reflects what ECSL alleges to have actually happened. The proposed amendments do not raise a new claim in my judgment: what they do is clarify the matters already placed in issue. I consider that the just approach is to look at the totality of the documents lodged. These documents together set out the Claimant's pleaded case. ECSL has always claimed that it was entitled to damages for additional sums of money paid in respect of coal haulage services to BE as a result of EWS's unlawful price discrimination. The amendments go to how and on what basis the damages are to be measured.

22. In addition, in my judgment the matters pleaded by way of amendment from the outset have stood out as matters which might have to be resolved between the parties. This is clear both from the ORR Decision, which refers to ECSL's contractual relationship with FHH (see e.g. paragraphs 39 and B70), and, more importantly, the points made by EWS in the Defence (see e.g. paragraphs 21(e), 25(c) and 36(f)). The discovery of new information appearing from documents disclosed has enabled ECSL to give further and better particulars of the BE overcharge claim. There is no procedural principle by which a claimant is for ever tied to the stance they adopted when the claim form was lodged and cannot be released from it. That holds true *a fortiori* as regards amendments that seek to reduce the quantum of the claim following disclosure. On its face, I can therefore see no reason why, in such circumstances, the Tribunal should exercise its discretion to refuse the proposed amendments on the ground that they raise a new cause of action.

23. A further consideration is whether the amendments could have been raised at an earlier stage. In its letters of 22 and 29 May 2009 EWS submits that ECSL could, and should, have pleaded this claim from the outset. In my judgment, it is important to consider why the application was not made earlier and why it is now being made: for example,

the discovery of new facts or new information appearing from documents disclosed. It is true that the original Claim Form does not refer to ECSL's contractual relationship with FHH. This is perhaps surprising since, as already noted, the Decision expressly refers to that relationship. Further, as both sides accept, ECSL knew, or ought to have known, *some* of the relevant facts arising out of its contractual relationship with FHH at the time of filing the Claim Form.

24. Importantly, however, ECSL's written submissions showed that the original quantification of the BE overcharge claim may be explained, partly at least, by the fact that ECSL is in liquidation and thus may not have had access to, or knowledge of, *all* the relevant information. ESCL stated that the proposed amendments do not stem from belatedly 'discovering' that FHH hauled coal for ECSL to BE's power station. Instead the amendments are said to be necessary because the "causal connection between EWS' discriminatory conduct and ECSL's contract with [FHH] was not clear". Further, ECSL could not have known the confidential information contained in the ORR Decision. I am satisfied that this is a matter which could not have been pleaded prior to the process of disclosure and proper analysis of the information disclosed. On the basis of the submissions received by the Tribunal I do not accept that ECSL can be criticised with justification for having failed to carry out a proper investigation of its claim prior to commencement of the proceedings.

25. Criticism is also made of the fact that ECSL did not pursue a claim (as now pleaded) until four months after having access to the confidential version of the ORR Decision (the source of the new information). Delay in making an application to the Tribunal is a matter for the Tribunal's discretion. In this case, the failure by ECSL to deal as promptly as it might with these matters is a factor which weighs against it when determining whether or not to allow the proposed amendments, but in the context of this case in my judgment the delay is not such as to justify refusal as a form of discipline.

26. Further, in the context of amendments which involve the modification (indeed reduction) of quantum, an important question is whether to allow the amendment at the stage at which it is sought will impose prejudice to the other side. In my judgment, it will not do so if the amendment is one which can then be properly met by the other

parties at the trial; that is, that they will have sufficient time to prepare their case in answer to it. Non-essential amendments to the claim form which either imperil the trial date or which cause material prejudice to either party in maintaining the trial timetable are less likely to be permitted. In the present case, however, the amendments proposed by the Claimant ECSL involve an appropriate *reduction* in the amount of damages claimed. I consider the amendments dovetail with the practical, cooperative approach which is, surely, one of the purposes of the procedural code contained in the Tribunal Rules.

27. Another consideration put forward by EWS is that the proposed amendments will require further evidence and disclosure. This, it is said, will have a serious knock-on effect on the trial timetable: hence EWS's contingent application for a split-trial. However, I judge that ECSL has answered adequately the submission about gathering evidence (in its letters of 22 and 27 May). ECSL has confirmed that the relevant disclosure has been provided and that it will base its claim on an incomplete set of invoices, which is expected to understate its claim. It follows that the proposed amendments should not significantly impact upon the evidence required for trial. Given the reasonable co-operation the Tribunal is entitled to expect from the experienced litigators conducting this case and EWS's considerable prior knowledge of all material matters well before these applications and this Ruling, I have no doubt that this matter can be prepared for trial in the three months remaining.

28. I would add that it is in the public interest and in the interest of the parties that, so far as possible, this trial date be maintained. The longer this litigation drags on, the greater will be those costs and the more disproportionate they will become to the sums in issue. EWS argues specifically that there are some unanswered questions (e.g. the appropriate counterfactual for measuring ECSL's alleged loss caused by the BE overcharge) which will have to be followed through, in the event that the amendments are allowed. That may be so, but whether it is so or not, they are questions that can be dealt with in the trial process. I am satisfied that if the proposed amendments are allowed, EWS will be well able to deal with any additional matters raised by the amendments by the start date of the trial without suffering undue prejudice.

29. EWS claimed that significant costs have been incurred in responding to the claim as it currently stands. That may be so, but the proposed amendments seek, properly, to specify the nature and scale of alleged loss and damage more accurately. In my judgment, the expenditure of time and money should be proportionate to the objective sought to be achieved. EWS may decide to amend the Defence and file additional evidence in response. Costs arising from these processes will be considered in accordance with normal civil litigation principles.

30. I therefore grant ECSL permission to amend the Claim Form in accordance with the draft before the Tribunal. The amendments are necessary to enable the true issues between the parties to be resolved.

IV. EWS'S APPLICATION FOR A SPLIT TRIAL

Summary of the parties' submissions

31. If the Tribunal were to grant permission to amend the BE overcharge claim, EWS applied for a split trial of that claim, to be heard after the EME overcharge and additional cost claims. As a result of the amendments, EWS submitted that response pleadings would be required, so too would significant new evidence and disclosure. It follows that it would be very difficult, if impossible, to try the amended BE overcharge claim within the existing trial timetable.

32. ECSL disputed that a split trial would be appropriate in this case. ECSL argued that EWS's application would artificially split trying part of the loss and damage claimed by ECSL from other parts. The claims arise from the same liability specified in the same infringement decision. ECSL essentially submitted that there are substantive issues and substantial costs which will be common to all parts of the claim. As a result a split trial would unnecessarily raise costs for both sides and cause significant inconvenience to witnesses.

Reasons for refusing the application for a split trial

33. The issue I have to decide is whether there should be one trial in this action or two. The essential question is whether it will be less burdensome both for the parties and for the Tribunal to deal with the dispute in two stages rather than in one.

34. For the reasons given in paragraphs 26-29 above, in my judgment there is no sound reason to split the trial. The courts are generally encouraged to make directions where it can to deal with as many aspects of the case as possible on the same occasion: see, by analogy, CPR rule 1.4(2)(i). One trial can and should deal with all issues more economically and efficiently than two. Follow-on damages actions are not a two stage process. The Tribunal does have (at least) two questions to ask: did the infringement cause the claimant's alleged loss? If so, what should be the damages which compensate the claimant for loss suffered as a result of that infringement? However, there are many cases in which a court has two or more questions to ask in the course of a single hearing. The same factual issues are often relevant to each question.

35. A single trial does not, it seems to me, cause prejudice to EWS of sufficient magnitude that it can be said to be outweighed by the prejudice to ECSL if they are not able to present their case in the way that they consider appropriate. There remains sufficient time for this to be achieved, notwithstanding continuing appeal proceedings in relation to the Tribunal's decision on EWS's rule 40 application. There is no reason why preparations for trial in September should not continue alongside that appeal.

V. EWS'S APPLICATION FOR COSTS IN ANY EVENT

Summary of the parties' submissions

36. EWS sought an order for the costs of, and occasioned by, the amendments to the EME overcharge claim (to which it has consented), such costs to be assessed, if not agreed. The essential features of EWS's submissions can be summarised as follows: (a) this is the 'usual' order for the costs wasted by the original pleading and occasioned by the amendments; (b) the amendments constitute the abandonment of a significant part of the EME overcharge claim, both in terms of the issues pleaded and quantum; (c) there is no reason why the claim could not have been pleaded in the proposed manner from the outset; (d) ECSL ignored EWS's requests to investigating properly the allegations made; and (e) EWS has incurred significant costs in investigating and preparing its defence to the now abandoned parts of the EME overcharge claim.

37. EWS further submitted that its costs application would not deter future claimants from making timely and appropriate amendments to their pleadings. In fact it contended that

the reverse is true: refusing the present application for costs in any event would encourage claimants to pursue unmeritorious claims and leave defendants without protection against conduct of this kind.

38. In contrast, it was ECSL's submission that costs should be reserved, or alternatively, that the Tribunal should list a hearing of this application. What is said is that it would be more appropriate to deal with costs in light of all the circumstances at the end of the case. This is said to be consistent with the Tribunal's approach to date (see e.g. transcript of the case management conference on 12 January 2009, page 11, line 20). Further, this approach avoids the expense of satellite litigation. It was also submitted that claimants such as ECSL are at a systematic information disadvantage in bringing follow-on actions for damages. A claim is necessarily lodged on the basis of the information then available, but may well be 'refined' as more information during the proceedings. ECSL, it is said, acted responsibly in reducing the EME overcharge claim. Imposing an interim costs order, ECSL argued, would deter other claimants from following a similar approach. Therefore this is not an example of a situation when an order for costs in any event would be appropriate.

Conclusion on the costs issue

39. My conclusion on the costs issue is that this is not the time for it to be determined. This is not the only issue-specific costs matter likely to be debated in the case. I direct that it be reserved for further argument at the conclusion of the proceedings.

VI. CONCLUSION

40. For all these reasons:

IT IS ORDERED THAT:

(1) The application to amend paragraphs 34-38 and 42-43 of the Claim Form be granted.

(2) The application for a split trial be refused.

(3) Costs be reserved.

Lord Carlile of Berriew Q.C.

Charles Dhanowa
Registrar

Date: 16 June 2009