Neutral Citation Number: [2011] EWCA Civ 2

Case No: C3/2010/0404

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
LORD CARLILE OF BERRIEW Q.C., GRAHAM MATHER
AND RICHARD PROSSER OBE
[2009] CAT 36

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 January 2011

Before:

LORD JUSTICE JACOB
LORD JUSTICE LLOYD
and
LORD JUSTICE PATTEN

- -

Between:

ENRON COAL SERVICES LTD (in liquidation)	**Claimant Appellant**
- and -	
ENGLISH WELSH & SCOTTISH RAILWAY LTD	**Defendant Respondent**

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- -

Paul Lasok Q.C. and Daniel Beard (instructed by
Orrick, Herrington & Sutcliffe (Europe) LLP) for the **Appellant**
Mark Brealey Q.C. and Maya Lester (instructed by
Freshfields Bruckhaus Deringer LLP) for the **Respondent**

Hearing dates: 1-2 November 2010

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Approved Judgment

Lord Justice Lloyd:

Introduction

1. On 17 November 2006 the Office of Rail Regulation (ORR) published a decision (the Decision) that the Respondent, English Welsh & Scottish Railway Ltd (EWS), was in breach of article 82 of the EC Treaty and, as from 1 March 2000, of the Chapter II prohibition in the Competition Act 1998 (the 1998 Act). It imposed a fine which has been paid. The Decision was not the subject of any appeal. In the course of the Decision the ORR decided that EWS' discriminatory treatment of the Claimant, Enron Coal Services Ltd (ECSL), had placed ECSL at a competitive disadvantage in its contractual negotiations with Edison Mission Energy Ltd (EME).

2. By these proceedings, brought before the Competition Appeal Tribunal (the Tribunal) under section 47A of the 1998 Act, ECSL claimed damages against EWS for its breach of article 82 and the Chapter II prohibition. The claim was put in various ways. The aspect which is relevant was based on the proposition that EWS' conduct deprived ECSL of a real or substantial chance of winning a contract for the supply of coal to one of EME's power stations for the period from 2001 to 2004.

3. The issue of infringement was concluded by the Decision. The Tribunal had to decide issues of causation and quantum. It held that the claim failed because causation had not been proved. Its judgment, given on 21 December 2009, has the reference [2009] CAT 36. With permission given by Lord Justice Jacob, ECSL appeals against the dismissal of its claim.

Follow-on claims for damages for anti-competitive conduct

4. Article 82 of the EC Treaty (previously article 86, and now article 102 of TFEU) prohibits conduct of an undertaking which abuses a dominant position which it holds in a given market. Like article 81 concerning cartels, it is of direct effect. Since the 1998 Act such conduct within the UK has also been a breach of the Chapter II prohibition under that Act. It has long been established that, as a matter of English law, such conduct gives rise to a private claim for damages for breach of a statutory duty on the part of a person damaged by the breach.

5. In *Iberian UK Ltd v BPB Industries plc* [1996] 2 CMLR 601 Laddie J held that a decision of the European Commission addressed to a particular undertaking to the effect that the undertaking had committed breaches of article 82 (then 86) was binding on the undertaking, and could be relied on by third parties in national courts, so that the relevant undertaking could not deny that it had committed the infringements found by the Commission to have occurred.

6. The 1998 Act introduced not only the national equivalents of articles 81 and 82 but also provisions for investigation by the Director General of Fair Trading (DGFT) into possible breaches of the Chapter I and Chapter II prohibitions. It left untouched the arrangements for claims for damages. However, it did also provide that a finding of fact by the DGFT in the course of relevant investigations or proceedings was to be binding on the parties in proceedings in respect of an alleged infringement of either prohibition, unless the court directed otherwise, once the time for an appeal had

expired without any appeal, or if an appeal tribunal had confirmed the finding. I will discuss this provision (section 58) in its present form in more detail later.

7. In due course, under the Enterprise Act 2002 (the 2002 Act), a new procedure was introduced, as an alternative to bringing a claim for damages in court. Under section 47A of the 1998 Act, introduced by amendment under the 2002 Act with effect from June 2003, a person who has suffered loss or damage as a result of the infringement of "a relevant prohibition" may make a claim for damages or any other claim for a sum of money in proceedings before the Tribunal. Relevant decisions include decisions by the Office of Fair Trading (OFT) or a sectoral regulator, such as the ORR, or a decision of the Tribunal on appeal from the OFT or other regulator, or a decision of the European Commission, that either of the two prohibitions or either of the relevant articles has been infringed. By subsection (9), to which I shall have to give closer attention later, the Tribunal is bound by any relevant decision which establishes that the relevant prohibition has been infringed.

8. The right to bring a follow-on claim before the Tribunal does not affect the right of a party to bring the sort of proceedings in court that were already possible, so a party which considers itself to have been the victim of anti-competitive behaviour, and to have suffered loss as a result, has a choice: it may bring ordinary proceedings in the High Court (I speak only of England, even though the 1998 Act applies throughout the UK), or, if a relevant regulator has held there to have been an infringement, it may bring proceedings in the Tribunal. If it proceeds in court, it can allege, and must prove, whatever infringements it wishes to rely on as having caused loss. If a regulator has found there to have been an infringement, before or during the course of the proceedings, it will have the benefit of section 58 under which it can rely on the regulator's findings of fact. On the other hand, it may proceed in the Tribunal, in which case it is limited to the infringements found by the regulator, but the question of infringement is concluded by the regulator's decision, leaving only the issues of causation and quantification of loss to be decided by the Tribunal.

9. In the present case, the limits of the procedure under section 47A were shown by a previous decision of the Court of Appeal on appeal from an interlocutory decision of the Tribunal, [2009] EWCA Civ 647, by virtue of which a claim by ECSL to have suffered loss as a result of different infringing behaviour of EWS was struck out, because the Decision did not include a finding of such an infringement on the part of the ORR.

10. The issues on the present appeal concern the effect which findings of fact in the Decision have in relation to the proceedings before the Tribunal. For ECSL Mr Lasok Q.C. contended that the Tribunal came to conclusions inconsistent with the Decision, which were not open to it. For EWS Mr Brealey Q.C. disputed that there was any such inconsistency, and also raised an issue of construction as to the effect of the relevant sections of the 1998 Act.

ECSL's claim against EWS

11. EWS was in a dominant position in 2000 on the market for coal haulage by rail. It set higher prices to ECSL for coal haulage than it did to other customers, between May and October 2000, without objective justification. This placed ECSL at a competitive disadvantage in relation, in particular, to coal haulage supply to EME at two power

stations, Fiddler's Ferry and Ferrybridge. That conduct was a breach of the Chapter II prohibition. Section 18(2)(c) of the 1998 Act is relevant:

> "(2) Conduct may, in particular, constitute such an abuse of a dominant position in a market if it consists in
>
> …
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"

12. EWS claimed that this conduct caused it to lose a real or substantial chance of gaining a profitable contract with EME in 2000 under which it would have been able to supply not only coal haulage but also coal, from the supply of which it would have made profits over a four year period.

13. The ORR's Decision is set out in a very long document, by no means all of which needs to be considered for present purposes. After an introduction, the facts are dealt with at paragraphs 18 to 62. Then the Decision turns, in what is called Part I, to the definition of the market, in paragraphs 69 to 335, after an introduction, and the assessment of dominance, at paragraphs 336 to 519. In the course of that part of the Decision the ORR concluded that the relevant market was that of coal haulage by rail in Great Britain (paragraph 335) and that at all material times EWS had a dominant position in that market (paragraph 517). In Part II the Decision deals with the assessment of the issue of abuse of the dominant position, in relation to which three separate allegations were at issue. After a short introduction (paragraphs 1 to 20) each of the three allegations is dealt with in a separate section. Only the second, discrimination against ECSL, is relevant to the appeal. That is covered in Part IIB, containing paragraphs B1 to B198. Ignoring, therefore, the other two sub-parts and a further Part C, the Decision then sets out the ORR's ultimate decision in Part D, in paragraphs D1 to D55.

14. In paragraph D1 (ignoring irrelevant material) the ORR said this:

> "ORR finds that the conduct of EWS identified above in relation to … (b) discrimination against ECSL … constitute abuses of a dominant position within the meaning of the Chapter II prohibition and Article 82 EC."

15. The ORR found that EWS acted at least negligently in the infringing conduct, so as to render it liable to a penalty under section 36(3) of the 1998 Act. At D16 the ORR specified the fine as £4.1 million. Among the reasons given for the level of the fine was this, at paragraph D17:

> "Following issue of the [Supplemental Statement of Objections] in March 2006 and subsequent to the Supplementary Response, ORR entered into discussions with EWS aimed at expediting the conclusion of ORR's investigation. EWS agreed that as a result of the significant reduction in the fine that it would otherwise have received (prompted by its co-operation in accepting that it had infringed the Act) and given

> that ORR did not, having considered EWS's representations, reach any finding in relation to an EWS Board strategy to exclude any third party from the market or as to the amount of damage that may have been suffered by ECSL or FHH [Freightliner Heavy Haul], EWS would accept the three findings of infringement now set out in this Decision."

That passage repeated text first set out at paragraph 11 of the Decision. Each version of the text carried a footnote, relevantly as follows: "EWS strongly disputed on the facts … that there was any evidence that quantified the degree to which FHH or ECSL had been affected by EWS's conduct."

16. Later, dealing specifically with EWS' conduct in relation to ECSL, the report said this at paragraph D27:

> "As regards the discriminatory conduct, ORR considers, on the basis of the available evidence, that the contracts to which they related were of importance to ECSL, because they offered to ECSL an opportunity to establish a relationship with the generating companies that might in turn facilitate further entry of competitors for EWS in the coal haulage market. ORR accepts that the proportion of the market directly affected by EWS's actions in offering discriminatory prices to ECSL was small. ORR notes, also, that ECSL's exit from the market cannot be attributed to EWS's conduct and that it has no evidence that quantifies the degree to which ECSL … was affected by EWS's conduct."

17. There were several annexes to the report, but it is not necessary to refer to any of them.

18. In hearing ECSL's claim the Tribunal was exercising first instance jurisdiction, and it heard evidence relevant to contested issues. It was bound by the decision of the ORR and (subject to a debate to which I will refer later) by the ORR's findings of fact. At paragraph 34 of the Tribunal's judgment, it set out the issues which it had to decide, in a way which both sides accept as accurate:

> "Therefore the issues falling for decision are:
>
> (i) What infringement was found by the ORR?
>
> (ii) What (if any) is the loss or damage caused by that infringement?
>
> (iii) If the claimed loss or damage was caused by that infringement, what (if any) is the quantum of that loss or damage?"

19. Later, at paragraph 85, it identified two elements in what ECSL needed to prove. Again, these were accepted as fair, subject to one criticism on the part of ECSL. They were as follows:

> "(a) The claimant has to show on the balance of probabilities what it would have done, but for the infringement. If it fails at that point to cross the relevant factual threshold, that is the end of the matter. … In the present case, ECSL must demonstrate that, in the but for world, (a)

> it would have submitted a bid to EME on the basis of terms agreed with EWS and (b) it would have sought to negotiate with EME for a four year E2E contract to supply coal to Ferrybridge C.
>
> (b) Where (as here) loss depends on what a third party would have done, but for the abuse, then the claimant must satisfy the Tribunal on the balance of probabilities that there is a real or substantial (i.e. not negligible) chance that the third party would have acted in the way which the claimant asserts: … here, ECSL must show that, absent EWS' abuse, there was a real or substantial chance that negotiations between EME and ECSL would have led to the award of a four year E2E contract to supply coal to Ferrybridge C."

20. Mr Lasok's qualification to both parts of that is that ECSL did not have to show that it would have been a four year contract; it would be sufficient to show that ECSL and EME would have been in contractual relations for coal supply for the four year period, even if it was not as the result of a single fixed term contract for that period.

21. The Tribunal dismissed ECSL's claim because it held that ECSL had failed to prove what it needed to prove on either of these issues. It accepted (at paragraph 153) as more likely than not that, but for the infringement, ECSL would have chosen to contract with EWS in connection with its bid to EME, and would have secured non-discriminatory rates and performance terms from EWS. However, there were factors in the real world (as distinct from the "but for" world), relevant to both issues, which persuaded it that ECSL had not satisfied either test.

22. ECSL contends that this conclusion is incompatible with findings made by the ORR which are binding on the Tribunal. That is the basis of the appeal.

23. In order to explain how this arises, and then to set out and analyse the respective submissions, I must start with a brief summary of the facts.

24. ECSL was in the business of coal supply and freight trading. It traded mainly imported coal, and offered customers an "end-to-end" (E2E) model of service, supplying and delivering coal from quarry or mine to generating plant. EWS was an operator of bulk rail freight services. Until 2001 EWS was the only company providing such services in Great Britain at the material times.

25. Following the privatisation of the electricity industry in England and Wales, EME acquired a number of power stations in 1999, of which two are relevant: Ferrybridge C, already mentioned, and Fiddler's Ferry. Both required large and frequent deliveries of coal. Power generators arranged their coal supplies either on what is known as a DIY basis or on an E2E basis. In the first case coal is bought from a chosen supplier and the purchaser makes its own separate arrangements for transport. If E2E is chosen, a third party intermediary will either mine the coal or buy it from the mine, and arrange transport (including shipping if necessary) so as to deliver it to the power station.

26. On acquiring the two power stations mentioned, EME entered into an E2E contract with the previous owner, Powergen (now E.ON), for the supply of indigenous coal from July 1999 to March 2003.

27. Also in 1999 EME entered into a further E2E arrangement with ECSL for the supply of coal to the two power stations. A contract was made in August 1999 under which the prices and volumes of coal to be delivered were to be agreed later in written confirmations, governed by the 1999 contract as a framework agreement. From November 1999 onwards relations between EME and ECSL deteriorated. One reason for this was that EME had contracted to purchase more coal than it needed or could even stockpile at its power stations. The difficulties and disputes which arose led to a renegotiation of the contract. A revised contract was made in June 2000.

28. In order to deliver the coal to be supplied to EME, ECSL agreed terms with EWS. During 2000 ECSL and EWS discussed a variation of that contract. In the course of that negotiation, in May 2000 EWS offered to ECSL higher rates than those which it had offered to ECSL under the earlier contract, and higher than it later offered directly to EME in October 2000. At the end of June 2000 ECSL entered into a contract with Freightliner Heavy Haul Ltd (FHH), which would enter the market for coal haulage by rail in January 2001.

29. In June 2000 EME wished to develop a new purchasing strategy for coal to be delivered to the two power stations over the period 2001-4. It issued invitations to tender for a four year contract for the haulage of coal by rail to the two power stations, from 1 January 2001. It did not expressly envisage E2E arrangements. Invitations to tender were sent to EWS in June 2000 and to ECSL in August 2000, as well as to other companies. Both EWS and ECSL submitted tenders. The ECSL tender offered a minimum discount if and to the extent that the trains carried coal supplied by ECSL. EME awarded the contract to EWS in October 2000. A contract was signed between EME and EWS in July 2001 but was back-dated to 1 January 2001.

30. Against that general background (some aspects of which I will need to examine in more detail), ECSL contended before the Tribunal that, but for EWS' infringement, and assuming no other unlawful conduct by EWS, ECSL would have been able to secure a rail haulage contract with EWS that was indistinguishable in competitive terms from that which EWS gave to EME, that it would have used the opportunity of the invitation to tender in order to negotiate the best possible E2E deal for coal supply to Ferrybridge, in particular by offering EME incentives to take coal from it, and that it would have been able to advance, and would have advanced, a bid at least as competitive as that advanced by EWS for rail haulage, if not more so. That was ECSL's case on the (a) question.

31. On the (b) question ECSL had to show that there was a real or substantial chance that in the absence of EWS' abuse, ECSL's prospects of successful negotiation with EME for an E2E contract to supply Ferrybridge would have been improved substantially. EWS contended that ECSL never had a substantial prospect of entering into an E2E contract with EME at that time.

32. ECSL contends on the appeal that in reaching the conclusion that it had not satisfied the burden on it identified in the two issues, (a) and (b) set out above, the Tribunal ignored the effect of the ORR's decision that there had been an infringement and of findings of fact made by it in the course of reaching that decision. Although Mr Lasok relied both on the decision itself and the findings of fact separately, and I will deal with both aspects of his argument, it seems to me that his argument based on what he said were findings of fact is more important. It is therefore appropriate at this

stage to set out and consider the relevant statutory provisions on which he relied. The parties are not at one as to their application and effect in principle, let alone on the facts of the case.

The statutory provisions as to the binding effect of decisions and findings

33. The starting point is section 47A itself, of which subsection (9) is critical for present purposes.

> "(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed."

34. The ORR Decision is a decision of a kind mentioned in subsection (6).

35. The other provisions which need to be considered are sections 58 and 58A, though the latter is only of incidental relevance. Section 58, which is relied on by ECSL as directly relevant, is as follows, so far as material:

> "58(1) Unless the court directs otherwise, an OFT's finding which is relevant to an issue arising in Part I proceedings is binding on the parties if—
>
> (a) the time for bringing an appeal (under section 46 or 47) in respect of the finding has expired and the relevant party has not brought such an appeal under section 46 or 47; or
>
> (b) the decision of the Tribunal on such an appeal has confirmed the finding.
>
> (2) In this section—
>
> "an OFT's finding" means a finding of fact made by the OFT in the course of conducting an investigation;
>
> "Part I proceedings" means proceedings brought otherwise than by the OFT–
>
> (a) in respect of an alleged infringement of the Chapter I prohibition or of the Chapter II prohibition; or
>
> (b) in respect of an alleged infringement of the prohibitions in Article 81(1) or Article 82;"

36. The reference to an OFT's finding includes findings by the ORR. One question is whether this section, referring expressly to the court, applies also to the Tribunal.

37. Section 58A gives similar effect in relation to proceedings in court to regulatory decisions as compared with that given by section 47A(9) in relation to proceedings under section 47A in the Tribunal, though it does not mention decisions by the European Commission.

> "58A(1) This section applies to proceedings before the court in which damages or any other sum of money is claimed in respect of an infringement of—
>
> (a) the Chapter I prohibition;
>
> (b) the Chapter II prohibition;
>
> (c) the prohibition in Article 81(1) of the Treaty;
>
> (d) the prohibition in Article 82 of the Treaty.
>
> (2) In such proceedings, the court is bound by a decision mentioned in subsection (3) once any period specified in subsection (4) which relates to the decision has elapsed.
>
> (3) The decisions are—
>
> (a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;
>
> (b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;
>
> (c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition or the Chapter II prohibition has been infringed, or that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed.
>
> (4) The periods mentioned in subsection (2) are—
>
> (a) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46 or 47;
>
> (b) in the case of a decision of the Tribunal mentioned in subsection (3)(c), the period during which a further appeal may be made under section 49;
>
> (c) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the Supreme Court from a decision on the further appeal;
>
> and, where any appeal mentioned in paragraph (a), (b) or (c) is made, the period specified in that paragraph includes the period before the appeal is determined."

38. Section 59 contains a definition of "court" but this is expressed not to apply to sections 58 and 58A.

39. Mr Lasok submitted that section 58 applies to proceedings in the Tribunal as well as in court, that the present proceedings are Part I proceedings for the purposes of the section, that the Tribunal had not directed otherwise, under subsection (1), and that

therefore each of the relevant findings made by the ORR was a "finding of fact made by the [OFT] in the course of conducting an investigation" and therefore binding on the parties under the section.

40. Mr Brealey argued that the section applied only to the court, not to the Tribunal. It does not refer to Part I proceedings before the Tribunal, whereas it does refer to the Tribunal in subsection (1)(a). When section 47A was introduced section 58 could easily have been amended to show that references to the court extend also to the Tribunal, but the amendments made did not include any such provision. Moreover, he said, proceedings under section 47A were not in respect of an alleged infringement, but of an infringement which had been found to have been committed, so they were not within the definition of Part I proceedings in section 58(2). The Tribunal accepted this argument of his, at paragraph 60 of their judgment.

41. He also argued that section 58A applies to the court, not the Tribunal, and that if section 58 were read as applying to proceedings before the Tribunal, there would be effectively no content for section 58A.

42. If section 58 did apply, he argued that the Tribunal had, in effect, directed otherwise under section 58(1).

43. I agree with Mr Brealey that the drafting of the section is odd, if it is intended to apply to proceedings before the Tribunal under section 47A as well as to stand-alone proceedings in court. Nevertheless, on balance, and differing with respect from the view of the Tribunal, I have come to the conclusion that Mr Lasok is right on this point.

44. I do not accept Mr Brealey's argument that section 47A proceedings are not in respect of an alleged infringement. Of course there must have been a finding by a regulator of an infringement, but that is the infringement which the claimant will allege in its proceedings, albeit also saying, no doubt, that the defendant cannot deny it because of section 47A(9).

45. It seems to me that it is most unlikely to have been intended that findings of fact would be binding in court proceedings but not in Tribunal proceedings under Part I. I cannot see any reason why that distinction should be made. I see that it would not otherwise be natural to read the word "court" as including the Tribunal, especially when the latter is referred to separately. But it seems to me that to read the word "court", in relation to Part I proceedings, as including both any relevant court (properly so-called) within the UK before which such proceedings can be brought but also the Tribunal when acting as a court, with Part I proceedings before it, is not unnatural, and avoids a much more odd anomaly, namely putting the claimant before the Tribunal in a less strong position as regards relevant findings of fact than it would be in before the court. I also note that section 16 of the 2002 Act allows for the possibility that proceedings under section 47A may be transferred by the Tribunal to a court and that any part of proceedings before a court which is within section 47A may be transferred by the court to the Tribunal. It would make no sense for follow-on proceedings brought in the Tribunal to be governed by section 58 (as amended by the 2002 Act) if transferred to a court, and after such transfer, but not if there were no such transfer, and not until any transfer, nor for proceedings commenced in court to

be governed by section 58 while they remain in court but to fall outside the scope of that section if they were transferred to the Tribunal.

46. Accordingly, I hold that the Tribunal was bound by findings of fact made by the ORR in the course of its investigation, unless it directed otherwise. I will deal later with the question whether it did so direct, implicitly. No express direction was made.

47. One reason why no such direction was made is that the Tribunal considered that section 58 did not have the effect which I have found. They said at paragraph 64 that the findings of fact by the ORR should not be disregarded, even though not binding. They said they had considered them and given them due weight, and that there were very few instances where the evidence before the Tribunal contradicted the findings of the ORR. They observed that the ORR Decision did not assist on causation. They also said, at paragraph 64, that if section 58 had made the findings of fact binding on the parties before the Tribunal, they would even so have reached the same findings of fact as were set out in the judgment and would have reached the same conclusion on causation.

48. Section 58A is only of tangential relevance. In that section proceedings before the court must mean what it says, not including proceedings before the Tribunal. That is because the same subject-matter is dealt with in section 47A(9) as regards proceedings before the Tribunal. That does not cast any light on the meaning of "the court" in section 58. Stand-alone proceedings may be brought in court whether or not there are or have been regulatory proceedings. If a regulator has decided that there has been an infringement, then this section gives that decision binding effect on the court, once the period for any appeal has expired, and, if there is an appeal, once that has been determined.

49. At first sight it seems odd that no reference is made in section 58A to a decision of the European Commission, but it may be that this is left to be governed by the effect of the *Iberian* case. In section 47A it needed to be mentioned separately because such a decision can be the basis of bringing follow-on proceedings.

50. Looking at the three sections together, section 47A(9) and section 58A deal with the binding effect of a decision that there has been an infringement. There may be a debate as to the scope and extent of what is made binding as part of the decision, but at least the defendant cannot deny that it has committed whatever infringement the regulator has found. Section 58 is of wider scope, because it relates to findings of fact made by the regulator in the course of the investigation. However it is less rigid, because of the court's power to direct that a particular finding shall not be binding. That is a comprehensible regime because the regulator may make findings which are directly relevant to a decision as to infringement, but it may also make findings of much less direct relevance. Findings in the former category should be regarded as binding, because to challenge them would be tantamount to challenging the finding of infringement. However, if the finding is peripheral or incidental, on the one hand to question it may not involve subverting the infringement finding and on the other it may be fair and sensible because the undertaking may not have been concerned, for the purposes of the regulatory proceedings, to contest such a point, whereas if the finding is relied on in proceedings for damages it may have a much greater importance.

51. It is also to be noted that the section speaks of an appeal in respect of the finding, in section 58(1)(a). That is puzzling because an undertaking cannot appeal against a finding itself; it can only appeal against an order or decision, for which the finding may or may not have been necessary. An appeal may put some findings of fact made by a regulator directly in issue, but other findings may not be seen as relevant. Equally, an undertaking which has been found to have infringed may conclude that it cannot sensibly appeal, or that it would be best not to appeal, even though it may not accept all of the findings of fact made by the regulator. It could be unfair in such a case for the undertaking not to be able to put in issue on a claim for damages at least some findings of fact, if they are not integral to the finding of infringement.

52. That therefore explains the need and justification for what was called in argument the safety valve of the opening words of section 58, whereby the court (or Tribunal) can direct that a particular finding of fact shall not be binding on the parties.

53. Section 47A(9) and, where relevant, section 58A have to be read consistently with section 58. In each case the decision that there was an infringement, and a particular infringement, is conclusive. That must carry with it a certain basic set of findings of fact, without which the decision could not have been made. It may not matter whether those are regarded as binding directly under sections 47A(9) or 58A, or rather as binding under section 58, that section not being disapplied as regards them because of their central importance. As regards other findings of fact, section 58 gives them binding effect, but subject to the power of the court or Tribunal to disapply that effect, leaving the fact to be proved by evidence in the ordinary way if the section is disapplied.

54. As I have mentioned, this is the second appeal to the Court of Appeal in the course of these proceedings. The issue in the first appeal was what infringement the ORR had found to have been committed. Both Patten and Carnwath LJJ referred to the need for clarity as to what infringement has been found. It seems to me that the same can be said in relation to a finding of fact which is sought to be relied on under section 58. Patten LJ said this at the end of paragraph 31:

> "The corollary to this is that the Tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of section 47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue. We were not referred to any procedure for seeking clarification of any points of uncertainty from the decision-maker. The Tribunal ought therefore, in my judgment, to be astute to recognise and reject cases where there is no clearly identifiable finding of infringement and where they are in effect being asked to make their own judgment on that issue."

55. Carnwath LJ said this at paragraph 64:

> "I would emphasise (as he does in paragraph 31) the need for a determination by the regulator of an infringement as a foundation for liability under section 47A. It is not enough to be able to point to

> findings in the decision from which an infringement might arguably be inferred."

56. In relation to findings of fact said to be binding under section 58, it seems to me that the same approach should apply: the party seeking to rely on a finding must be able to demonstrate that the regulator has made a clearly identifiable finding of fact to a given effect, and it is not enough to be able to point to passages in the decision from which a finding of fact might arguably be inferred.

The Tribunal's reasoning

57. Since the argument for ECSL is that the Tribunal's conclusions are incompatible with the ORR's findings and decision, it is appropriate to start by examining the Tribunal's reasoning, before comparing it with relevant parts of the ORR Decision.

58. I have summarised the case advanced by ECSL on the (a) question at paragraph [30] above. It argued that its case was sufficiently proved by findings made by the ORR, and that further evidence gave it further support. The Tribunal considered that the ORR Decision was not definitive on any of the points relevant to this aspect of the case.

59. The Tribunal accepted at paragraph 101 that ECSL and EWS would have agreed on a performance-based contract, on terms which involved no discrimination by EWS against ECSL, in the but for world. So far so good: ECSL's premise was accepted by the Tribunal.

60. The next point is the more controversial: what would ECSL have offered to EME, in the but for world? The Tribunal's starting point for this was what had been offered in the actual world. On 15 September 2000 ECSL submitted a tender in response to EME's invitation. In the covering letter Mr Pirozzi of ECSL said this:

> "Should you wish, we can help gain additional efficiencies, particularly given our active involvement with UK ports and our presence in the international freight markets. Any combination of our haulage, freight and port throughput services will help [EME] to streamline its import activities and minimise costs."

61. The Tribunal referred to this at paragraph 107 and went on to summarise the tender at paragraphs 108 to 110. It was for a four year contract from 1 January 2001. It set out prices per tonne for three different routes, and included a price incentive of a minimum discount of 25p per tonne for trains carrying ECSL's coal. Apart from that provision, it had no reference to coal supply, as distinct from haulage. The Tribunal had evidence that the price incentive was added at the last minute (paragraph 130).

62. The Tribunal then held that ECSL would have passed on to EME the full benefit of the rates that it had negotiated with EWS, since ECSL could assume that EWS would offer the same rates to EME: see paragraph 126. It considered that it could not come to any conclusion as to whether ECSL would have been willing to undercut those rates so as to incur losses on rail haulage or as to ECSL's expectation of earning profits from a coal supply contract with EME: paragraph 129. Having got to that stage the Tribunal stated the position as follows at paragraph 132:

> "We now turn to the crux of the (a) question in the present case, namely the manner in which ECSL would have communicated its bid to EME in the but for world; and whether the Tribunal can be satisfied that it is more likely than not that ECSL would have sought to negotiate with EME for a four year E2E contract to supply coal to Ferrybridge C. For the Tribunal to be so satisfied, it would expect to see some evidence that the contract was viewed internally within ECSL as an important opportunity worthy of pursuit (or that it would have been so viewed in the but for world) and that their bid was communicated (or would have been communicated in the but for world) in a manner that clearly signalled the intensity of their interest."

63. The Tribunal then went on to say that it had seen very little evidence from within ECSL highlighting the attractiveness for ECSL of a contract with EME, whether for rail haulage or for coal supply.

    i) One employee of ECSL reported to others a conversation with EME, just before the invitation to tender was sent to ECSL, in which he had said to EME that ECSL wanted to rebuild a long-term relationship with EME, and told them that ECSL would be happy to quote both for rail haulage and an E2E deal.

    ii) One paragraph of the invitation to tender was in these terms: "Feel free to propose imaginative solutions. We believe in working closely with our chosen suppliers as your efficiency and value for money directly impact on ours." One person within ECSL took a somewhat jaundiced view of this.

    iii) The evidence of Mr Kearney, who had been a senior employee of ECSL at the time, was that ECSL did not attach serious importance to the response to EME's invitation to tender. The employees involved in the tender were at a relatively low level in the hierarchy. If it had been intended as a tender to supply coal it would have been handled by different and more senior staff: see paragraphs 134-5.

64. The Tribunal came to the view that "there was not a high degree of enthusiasm within ECSL towards the submission of the bid" (paragraph 138) and that this was consistent with the evidence of a deteriorating relationship between EME and ECSL in connection with the E2E contract already in existence between them: paragraph 139. They concluded that ECSL's attitude to the tender would have been the same in the but for world: paragraph 140.

65. ECSL, however, argued that it was plainly seeking to win an E2E contract, and relied on the evidence of Mr Staley who said that the supply of coal to Ferrybridge C was ECSL's primary objective in bidding to EME. This was said to be supported by a passage in paragraph 390 of the ORR Decision. This is one of the two instances given by the Tribunal in which they differed from passages in the ORR Decision. The passage is as follows:

> "EME issued an ITT on 26 June 2000 for its long term coal haulage requirements to its power stations, following expiry of the previous E2E deal with ECSL. The contract was for haulage to EME's two power stations at Fiddler's Ferry and Ferrybridge for a four-year period

> with a commencement date of 1 January 2001. ECSL (on an E2E basis), FHH and EWS all bid for the contract."

66. In cross-examination Mr Staley accepted that he had not communicated any type of deal to Mr. Crosland of EME which would put him on notice that ECSL wanted a four year E2E coal supply agreement (paragraph 144). Mr Crosland had already said that he was not aware that ECSL was using the tender for the coal haulage contract in order to angle for a coal supply contract, although he would not have been surprised if they had been angling for such a contract. At paragraph 146 the Tribunal said this:

> "Notwithstanding the language used by the ORR, the Tribunal's view of the bid, and the circumstances in which it was communicated, is that it was far from clear that ECSL did, in the real world, signal its intention to enter into a four year E2E coal supply contract. We have not heard any submission from ECSL that the manner in which the bid was communicated (as distinct from the rates and terms contained in that bid) would have been materially different in the but for world. We return to this issue in more detail in connection with the (b) question below."

67. ECSL put its case in the alternative on the basis that it would have concluded a rail haulage contract with EME and then sought to negotiate a four year coal supply contract. The Tribunal addressed for this purpose the question whether ECSL would have sought to negotiate with EME at all: paragraph 147. It observed that there were some references to possible meetings, including in the covering letter sent with the tender. However the Tribunal was unable to discern any evidence that after the tender was submitted it was followed up in any way by ECSL, or that the lack of any meeting or discussion with EME was the subject of any internal comment within ECSL: paragraphs 149-150.

68. As it happened, in the real world the rates offered by ECSL in its tender to EME were in fact lower than those offered by EWS in its tender (see EME's comparative table set out in paragraph 196 of the Tribunal's decision). As the Tribunal said at paragraph 152:

> "The fact that no negotiations took place between EME and ECSL in the real world, notwithstanding a competitive price, would appear to contradict ECSL's claim that negotiations would have followed from their submission of a bid that was at least as competitive as EWS's bid, and suggests that other factors would have been relevant to the ultimate outcome."

69. Accordingly, on the (a) question the Tribunal stated its conclusion at paragraph 154:

> "We cannot therefore conclude that it was more likely than not that it would have sought to negotiate with EME for a four year E2E contract for coal supply to Ferrybridge C, and indeed cannot conclude that it was more likely than not that ECSL would have sought to negotiate with EME at all."

70. The Tribunal then went on to address the (b) question. I have identified what had to be shown in this respect at paragraph [31] above. ECSL relied on an evidential presumption, that EWS' unlawful conduct aimed against ECSL should be presumed to have caused ECSL to lose something of value. The Tribunal had in mind three important factors as relevant to the (b) question (see paragraph 158):

    (a) The findings of the ORR in the Decision;

    (b) Whether there was an opportunity for an E2E arrangement associated with the tender for haulage; and

    (c) The reasons why EME rejected ECSL's bid in the real world and whether those reasons would have differed in the but for world.

71. At this point, the Tribunal considered various paragraphs in the decision which ECSL relied on to show that they had proved their case in this respect, in the absence of adverse evidence from EWS to contradict the claim.

72. The Tribunal recognised that the ORR found that, as a result of EWS' discriminatory behaviour, ECSL suffered a competitive disadvantage in bidding to EME. That was necessary to the finding of infringement. The ORR was not able to conclude that ECSL was displaced from supplying EME as a result only of the discriminatory terms offered to it by EWS. The Tribunal also said that the ORR's finding of discrimination resulting in competitive disadvantage was not of itself a finding that the victim had suffered loss. It said this at paragraph 162:

> "The finding of competitive disadvantage (which EWS accepts, as it must) means that EWS hindered the competitive position of ECSL in relation to the EME Tender. This is certainly relevant to, but not determinative of, the question of causation. It is relevant because it means that ECSL was impeded in its ability to offer EME competitive rates for coal haulage and supply. It is not determinative because the Decision does not establish that ECSL was well-placed to win a coal supply contract with EME absent the abuse."

73. The Tribunal therefore rejected the argument for ECSL that its case was proved by the ORR's findings, and it went on to consider the evidence adduced before it.

74. EME needed coal, including imported coal. It had no arrangements in place for the supply of such coal at the relevant time. If, therefore, an E2E arrangement had provided EME with an assurance of such supply at objectively better value than other arrangements, ECSL contended that EME would have entered into such an arrangement with it.

75. However, the Tribunal had heard evidence from Mr Crosland of EME about how EME approached its supplies at the time. They accepted his evidence that EME wanted to supplement the supplies they were getting from Powergen, but to do so on an ad hoc basis, and did not want to enter into further long-term contracts for the supply of significant volumes of coal: paragraph 170.

76. The Tribunal considered the experience of both parties under the 1999 contract at paragraph 172 and following. This experience had created serious difficulties for both sides, and it generated a dispute which the Tribunal described at paragraph 180 as "serious, difficult and potentially litigious". The dispute led to a renegotiation of the contract, after which the position improved. However the Tribunal said that this experience added to Mr Crosland's view, for EME, of the need for flexibility of coal supply arrangements. EME did not reject ECSL as a possible coal supplier, and even invited it to bid in late 2000, but only for spot or short-term supplies (for which it did bid, but unsuccessfully).

77. ECSL argued that EME would have reached its decision as to whether to enter into an E2E agreement with ECSL on a rational commercial basis in relation to which the governing factor would have been price. It relied on paragraph 55 of the ORR decision, as follows:

> "Generating companies source coal according to the lowest delivered price, taking account both of the cost of the coal and the cost of transportation, and the costs associated with the qualities of the coal."

78. The Tribunal said at paragraph 199 that they accepted this as a general proposition, but that the evidence showed that:

> "so far as EME was concerned, procurement of coal was influenced by not only the lowest delivered price but also by other considerations, notably the quality and reliability of the proposed service; the preference for direct contact with suppliers or hauliers; the need for flexibility to adjust the volume of supplies under a contract and the difficulties encountered in dealing with ECSL in the past."

79. This was supported, in the Tribunal's view, by a note of a meeting between EME and EWS in August 2000, where Mr Crosland is recorded as having said that the criteria relevant to a decision on the tenders submitted would come down to three things: Price, Relationship, and Confidence in the quality of service (see the quotation in paragraph 200 of the Tribunal's judgment). It was not only a question of price.

80. The Tribunal concluded that a number of material considerations would have led EME to reject ECSL's tender for coal haulage in any event. The first was the difficult previous relationship between the parties under the 1999 contract, and the resulting acrimony (paragraph 206). The question was whether EME would have accepted ECSL's tender, not whether a hypothetical entity in its position, acting on a purely rational basis would have done so. It would be wrong to ignore the experiences and the resulting opinions of those within EME who had to make the decision.

81. A second factor was the inflexible nature of the terms offered by ECSL, involving minimum quantities of coal to be carried under the contract (paragraph 207). It is clear from EME's internal processes that the much greater flexibility of EWS' tender, as compared with either ECSL or FHH, was a significant and decisive feature in EWS' favour. A third factor was that EME was reluctant to deal with a third party intermediary for haulage services, rather than directly with the haulier (paragraphs 208-210).

82. Even if ECSL got over these hurdles and won the haulage contract with EME, the next question would be whether it would have secured a coal supply contract with EME in relation to Ferrybridge C. The Tribunal drew from the evidence the conclusion that there was no more than a negligible chance of this (paragraph 212). Mr Crosland's evidence in his witness statement supported this view. There was no suggestion from EME that a coal supply contract was or might be on offer (paragraph 213). EME did not want to enter into such a contract other than, from time to time, on a spot or short-term basis. The Tribunal pointed out that a passing reference in paragraph 390 of the ORR Decision to ECSL bidding on an E2E basis could not be taken to override the clear terms of the tender document, which was only for haulage.

83. EME had a substantial contract for the supply of coal to Ferrybridge C with Powergen (paragraph 214). Additional supplies, as necessary, were obtained on a short term or ad hoc basis. As it turned out the additional quantities of imported coal delivered to Ferrybridge C were noticeably less than those envisaged at the stage of the invitation to tender, so EME's approach turned out to be justified.

84. In addition, as already mentioned, ECSL failed to convey to EME that it wanted to enter into a coal supply agreement (paragraph 218). According to the Tribunal, that showed that ECSL was not seriously committed to, or optimistic about, such a proposition. There was no reason to suppose that its attitude would have been any different if it had had non-discriminatory terms offered to it by EWS. If a coal supply contract had been proposed, not only is it likely that the suggestion would have been rebuffed because EME did not want to enter into such a deal (as already mentioned), but also EME would have been influenced against the idea by its experience of its other dealings with ECSL, and in that respect would have been motivated by relevant non-price factors.

85. That led the Tribunal to the following conclusion on question (b) at paragraph 221:

> "Taking all this evidence together we conclude that ECSL had no real or substantial prospect of supplying coal to EME on an E2E basis. This was a speculative prospect: there is ample evidence about the unwillingness of EME to enter into a long-term coal supply contract."

86. It followed from the conclusion reached on both questions that the claim was dismissed.

The ORR Decision

87. The ORR's function was to decide whether or not there had been a breach of article 82 and of the Chapter II prohibition, and if so what it was, not to decide whether there had been any particular consequences of any breach so found as regards third parties. In order to decide that there had been such a breach, it had to review all aspects of the facts relevant to its enquiry, but these would necessarily be more limited than those relevant on a claim by an injured party for damages for a breach so found.

88. It could take a view as to the effect on the market when deciding on the level of any penalty, but it did not need to make precise findings on that aspect even if it did wish to take it into account. In fact nothing in the part of the Decision dealing with penalty has any bearing on the issue.

89. I have quoted at paragraph [15] above from paragraph D17 of the Decision, and from the footnote to that paragraph, which sets out one limitation on what the ORR considered that it was deciding. That said, and taking into account that expressed limitation, the question for the court is what the ORR did decide, and what findings of fact it made, of relevance to the claim by ECSL against EWS. That is to be ascertained by a careful reading of the Decision.

90. Mr Lasok and Mr Brealey referred us to a fair number of paragraphs in different parts of the Decision, of greater or lesser significance. At the heart of Mr Lasok's submissions was the proposition that the Tribunal's decision flew in the face of the ORR's conclusion that EWS' conduct had put ECSL at a competitive disadvantage in its approach to EME in August and September 2000. He argued that, if that proposition is accepted, as it has to be, it must follow that ECSL had suffered loss as regards its attempt to get a contract with EME which could have led to a profitable coal supply to EME lasting over 4 years, whether by way of a single long-term contract or a series of shorter or open-ended contracts.

91. I have already said something about the overall structure of the Decision. I need now to deal with some of the Decision in more detail. I will concentrate on those parts of the Decision which include passages on which one side or the other relied.

92. First there is a general introduction, paragraphs 1 to 17. This includes paragraph 11 already mentioned, corresponding to paragraph D17, quoted at paragraph [15] above. Paragraph 14, relied on by ECSL and quoted below, is also part of this. Then there is a section headed "The facts" which starts by introducing the relevant parties – EWS, ECSL and FHH – and proceeds with general observations about the products and services which are relevant, and other matters of background including a description of some features of the electricity supply industry. This includes paragraph 55, relied on by ECSL and quoted at paragraph [77] above.

93. Next, the Decision turns to deal in detail with the definition of the relevant market and thereafter with dominance on that market. Neither Counsel took us to any passages in the part dealing with the definition of the market, but Mr Lasok relied on some passages in the assessment of dominance, including paragraph 390, from which there is a quotation above at paragraph [65].

94. Having completed that part of the exercise, the Decision then addressed the issue of whether the dominant position of EWS, which it had found to exist, had been abused as alleged. That fell into three parts, of which only the second is relevant for present purposes. It is headed "Assessment of abuse of dominance – discrimination". In it the ORR focussed on two distinct aspects which it considered separately: ECSL's dealings, or would-be dealings, with EME, which are the subject of these proceedings, and its dealings with British Energy in relation to Eggborough power station, where despite the competitive disadvantage at which ECSL was placed by EWS' abuse, it was successful in a bid to supply coal on an E2E basis. The part of this section of the Decision which is concerned with ECSL's position in relation to EME is the most directly relevant to the present appeal, and both sides referred to a number of passages from it.

95. The significance of a particular passage in the Decision is to be assessed bearing in mind not just what it says but where it stands in the context of the Decision as a

whole. A general statement in an introductory passage, or a summary of other material, is likely to be of less force or significance for present purposes than one expressed in more detail in a section where a particular issue is examined directly.

96. In its introductory passage at the very beginning of the Decision, the ORR gave a summary of the conclusions which it had reached, as set out in the body of the Decision later on. Paragraph 14 is a fair summary, and can usefully be quoted at this stage, but it should not be taken as the primary source of the ORR's decision or finding on the point:

> "ORR has concluded that the facts underlying the complaint of a refusal to deal and that of discrimination are the same and that the essence of the abusive conduct in question is discrimination on the part of EWS in relation to prices offered to ECSL. Taken together the conduct amounts to a sustained and deliberate campaign by EWS to protect its own dominant position from competition and to disadvantage ECSL (perceived by EWS to act as a competitor to it) and FHH (a new entrant providing haulage of coal by rail)."

97. Moving from the general introduction to the passage in which the ORR described the relevant parties, we were shown some paragraphs which describe the position and role of ECSL, emphasising its position as a third party intermediary. Paragraphs 32 and 33 featured in Mr Lasok's submissions:

> "32. As described at Annex C, coal is supplied from a variety of sources: directly from deep and open cast indigenous mines; from overseas via UK ports; and sometimes via coal processors within the UK. Users of coal may consider a variety of coal purchasing options ranging from: (a) contracting directly with these sources of supply and separately with shippers (including the inland rail provider) and with ports for port capacity and services (full 'DIY' option); or (b) having one contract with a third party intermediary which will provide a price for traded coal or a price for 'straight to stock pile' arrangements which may include, inter alia, the cost of transport from origin to destination ('End to End' arrangements, commonly referred to as 'E2E' arrangements). There exist a range of other contractual options between these two.
>
> 33. ECSL acted as a third party intermediary for coal purchase, offering a range of services from simply coal trading to E2E deals as described above. According to ECSL, a key business strategy for ECSL was to provide 'delivered-to-stockpile' deals, providing total management of the supply chain, from coal purchase at the loading port through delivery to the customer's stockpile."

98. Mr Lasok pointed out that ECSL was, and was well known as being, an intermediary. It was not a haulier itself. It had no haulage capacity of its own. It depended, for the haulage element of the service which it offered its customers, on buying in that service from others – until 2000, in practice, from the monopolist EWS. It would therefore be perceived by others, he argued, as interested in haulage not for its own sake but in connection with the supply of coal. He sought to support that argument by

reference to several passages in the Decision, including that quoted at paragraph [65] above from paragraph 390. That paragraph forms part of the Decision's treatment of the question of dominance, where the ORR deals with EWS' argument that an effective bidding market existed once FHH was present in the market. In order to deal with that argument, the ORR had to consider the extent of the competition faced by EWS as a result of FHH's entry into the market. At paragraph 389 the ORR said:

> "In considering FHH's ability to compete in any given tender and hence provide a full and effective competitive constraint on EWS, it is therefore necessary to consider to what extent it had residual (i.e. net of existing contractual obligations) capacity to compete for the full amount of tonnage put out to tender."

99. In paragraph 390 it reviewed three significant tenders during 2000 and came to this conclusion:

> "Looking at the three significant tenders during 2000, it can be seen that because of FHH's capacity constraints, its ability to constrain EWS was significantly limited."

100. In reviewing the EME invitation to tender for this purpose, it did use the words quoted above at paragraph [65]. Mr Lasok relied on these words as amounting to a finding that when ECSL tendered to EME in response to the latter's invitation to tender, it did so on an E2E basis.

101. Mr Lasok relied heavily on those words in his submissions, as I will explain later. Despite his arguments, in my judgment those words, used in passing in describing the response to the invitation to tender, cannot properly be treated as a finding of fact to the effect that ECSL's bid was made on an E2E basis. As a matter of fact the tender plainly was not made on that basis. If a passage to this effect had appeared after a review by the ORR of the details of the tender by ECSL, and if the nature of that tender had been in issue for the purposes of the Decision, then it would have been necessary to consider whether this amounted to a finding of fact in relation to which section 58 could apply. In fact the ORR never did examine in detail in the Decision the nature or terms of ECSL's bid in response to the invitation to tender, and did not need to do so. As it is, I decline to accept the submission that these words in paragraph 390 amount to such a finding. The same is true of another passing comment at paragraph 418: "These tenders, and ECSL's involvement in bidding for them *on an E2E basis*, created FHH's route to market" (my emphasis). To take the words in parenthesis in the passage quoted from the table in paragraph 390 as a finding of fact that ECSL did bid to EME on an E2E basis would not comply with the need to which I have referred at paragraph [56] above for a specific and identifiable finding, rather than one which might arguably be inferred.

102. The point is addressed more pertinently at paragraph 499, where the Decision says: "Furthermore, the mere presence of ECSL did not provide generators with a credible alternative to EWS as ECSL was only an E2E supplier – i.e. a reseller of haulage." ECSL was an E2E supplier, not a haulier, so could properly be described as a "reseller of haulage". For that reason it was not a competitor of EWS but a customer of EWS or, eventually, of any alternative haulier in the market. However, the fact that ECSL was "only an E2E supplier" and not a haulier does not mean that any given bid, tender

or offer that it might make was necessarily to be read as an E2E proposition. Its bid to EME was plainly not an E2E proposition, whereas its bid to British Energy was on an E2E basis.

103. The ORR came to its conclusion on dominance at paragraphs 517 to 519. Hardly surprisingly, it held that EWS held a dominant position on the market for coal haulage by rail. Until the end of 2000 EWS had a monopoly and at all times material to the allegations of infringements in relation to ECSL it held a market share of more than 90%. It therefore had a very high degree of market power. The ORR noted at paragraph 519 that this was relevant to determining the scope of EWS' special responsibility not to impair competition further.

104. Then the Decision turned to the allegations of abuse of that dominant position and, in Part IIB, to the allegation on the part of ECSL as regards discrimination. This starts with five paragraphs of introduction. These deal in relatively general terms with topics covered in detail later on. At B4 and B5(a) the ORR described ECSL's role in general and the impact of EWS' discriminatory treatment of ECSL as regards EME. Bearing in mind that these are general rather than specific, they are nevertheless worth quoting:

> "B4 ECSL provided a number of services to the owners of power stations including sourcing and trading on coal and providing straight to stock-pile deals (sourcing coal and arranging its transport from source to the power station's stockpile as part of an E2E deal). An integral part of this service was the management of risk not only in the purchase of coal but also in the entire supply chain. It presented itself as a manager of risk in the 'freight' market which it achieved through buying and managing capacity at ports, in vessels and in inland transport, particularly rail. It was prepared, for example to purchase track and rail operator capacity and to take on the performance risk of that element of the deal, "[…] *even when the national rail operators cannot guarantee performance, Enron will"*.
>
> B5 EWS's discriminatory treatment of ECSL placed ECSL at a competitive disadvantage in respect of two specific sets of flows:
>
> (a) Flows to the Fiddler's Ferry and Ferrybridge power stations, operated by Edison Mission Energy (EME). Between May 2000 and October 2000, EWS imposed higher prices on ECSL. This placed ECSL at a competitive disadvantage in its contractual negotiations with EME relating to coal haulage supply to Fiddler's Ferry and Ferrybridge power stations. Prior to the period of discriminatory pricing, ECSL had supplied EME on these flows on an E2E basis. Following the period of discriminatory pricing, ECSL was unsuccessful in renewing that relationship."

105. Referring to the relevant market context, at B13 the ORR said this, again in general terms, items (b) and (d) being of particular relevance:

> "B13 As explained in part II A above – *Exclusionary Contracts*, the conduct of a dominant company has to be seen in the context of the

> prevailing market conditions. EWS's conduct in its negotiations with ECSL and the new owners of power stations has to be assessed in the light of the fact that the market was already subject to structural constraints, including the effect of the exclusionary provisions in EWS's coal carriage agreements which reduced the opportunities for new entrants. The following market developments created new coal haulage opportunities for new entrants or otherwise threatened EWS's market position:
>
> (a) The divestiture of power stations to new owners such as EME and AES.
>
> (b) The entry of ECSL as a coal trader, supply chain risk manager and E2E supplier in 1999.
>
> (c) The increase in imported coal between 1999 and 2000.
>
> (d) The possible role of ECSL as a facilitator of new entry to the relevant market."

106. Moving on to more specific points, at B42 and B43 the ORR noted evidence from within EWS as to its attitude to ECSL in relation to EME and otherwise:

> "B42 In June 2000, EME and EWS reached an agreement to negotiate towards a direct contract for coal haulage by rail (on a DIY basis), which would replace the previous indirect E2E arrangements that EME had in place with ECSL. An internal EWS e-mail noted:
>
> > "We did the deal with Edison Mission yesterday morning for LBT-Fiddlers @ £[…]/tonne as agreed. This rate until 16th September pending a contract. Enron are now off our hands so far as Edison are concerned. The Enron flows we have left are to British Energy's station at Eggborough; from Immingham, Redcar and Hull. Also to Enron's own power station at Wilton – 250,000 tonnes/year. I think we are stuck Enron [sic] on the Eggborough traffic until next April when British Energy will, hopefully take over their own coal procurement. But we have got them out of Fiddlers Ferry and Ferrybridge – a big step forward."
>
> B43 This e-mail is evidence of both EWS's intent and, indeed, its success in stopping ECSL from carrying out indirect supplies to EME, one of the new generating companies."

107. Since it was after this date that EME extended the invitation to tender to ECSL, EWS may have been premature at that time in thinking that they had already seen ECSL off as regards EME, but the fact remains, first, that this is what EWS thought and it shows their motivation, and secondly that ECSL was not successful in its bid to EME after the invitation to tender. In paragraphs B45 to B48 the ORR described the context, as regards dealings between EWS and ECSL, in 1999 and 2000, and

thereafter dealt with specific examples of discriminatory prices offered by EWS to ECSL. At paragraph B60 it came to deal with the point which is at the heart of the present claim, competitive disadvantage as regards dealings with EME. I will quote paragraphs B60 to B65. The last is particularly important but it needs to be seen in the context of the whole passage:

> "B60 ECSL had supplied EME on an E2E basis since summer 1999 when EME had taken over Fiddler's Ferry and Ferrybridge power stations following acquisition of the power station from E.ON (Powergen). In June 2000, EME issued an invitation to tender for longer-term arrangements for coal haulage to these power stations.
>
> B61 The tender negotiations between June 2000 and October 2000 were concerned with prices for the haulage element of supply, EWS, Mendip Rail, GB Railfreight, Freightliner, Direct Rail Services and ECSL were asked to bid. ECSL was, therefore, in this tender, competing directly with EWS for coal haulage by rail as well as other operators.
>
> B62 In bidding as part of these negotiations, EWS's discriminatory treatment of ECSL placed ECSL at a competitive disadvantage in two main ways:
>
> (a) First, having failed to agree the performance related contract it had sought from EWS, ECSL was in the position of having neither its own coal haulage operations nor a suitable contract with EWS (the only operator of coal haulage by rail at the time). This would have impeded ECSL's ability to offer competitive rates for coal haulage to EME. In bidding to supply EME, ECSL would have had to bear the business risks of subsequently needing to re-open negotiations with EWS and/or trying to assist the new entry of an untested rail haulage operator that had never previously carried coal (the substantial barriers to entry to the market for coal haulage by rail are discussed in part I – *Market definition* and *Assessment of dominance*).
>
> (b) Second, ECSL's ability to offer relatively attractive rates for coal haulage to EME was impeded by the fact that, between August 2000 and October 2000, EWS (i) offered EME rates for coal haulage that were lower than the rates it had offered to ECSL in May 2000 but (ii) did not make available to ECSL the reduced rates it was offering to EME.
>
> B63 Furthermore, when EWS made its lowest offer to EME, it indicated that the further rate reductions were available to EME on the assumption that EME would be using EWS on an exclusive basis:
>
> > "We have agreed to amend our prices on a number of flows on the clear understanding between our companies that EWS will become your rail haulage provider for all of your forecast tonnages as outlined in our previous correspondence."

> B64 EWS was therefore prepared to offer selective price cuts to EME as part of its "wider offer" and in exchange for exclusivity. This is further evidence of the discriminatory approach that EWS adopted towards ECSL and the intent by EWS to undermine ECSL. Moreover, such an approach would have exacerbated the competitive disadvantage faced by ECSL. Were EME to have contracted with both EWS and/or ECSL for its haulage requirements, it would have lost out on the low rates that EWS offered in October 2000. In the event, EME contracted only with EWS for coal haulage by rail.
>
> B65 It is not possible to conclude that ECSL was displaced from supplying EME as a result only of the discriminatory terms from EWS. Nonetheless, for the reasons set out above, ECSL was clearly placed at a competitive disadvantage when competing against EWS, compared to the scenario that would have prevailed had EWS been willing to treat ECSL in a non-discriminatory manner (i.e. had it offered ECSL similar rate reductions to those it had offered to EME)."

108. From the context, in particular as to the nature of the supply for which EME invited tenders, namely haulage only, it seems clear that what the ORR said at paragraph B62 and then summarised at paragraph B65 related to ECSL's position when offering haulage services to EME, rather than anything else such as an E2E contract. I will revert to this point, to which both Counsel directed submissions.

109. Then the ORR turned to dealing with the separate topic of supply to British Energy's power station at Eggborough. As already noted, in this case tenders were invited on either a DIY or an E2E basis. ECSL tendered on an E2E basis and was successful, despite EWS' discriminatory conduct. The ORR said this at B95:

> "The intermediary service that ECSL offered is therefore not simply that of an E2E supplier making margins out of favourable coal input prices, but also that of a wider intermediary across BE's coal haulage requirements. Overall, this reduced the involvement that BE needed to take in coal haulage operations, whilst allowing BE to benefit from both imported and UK coal supplies."

110. That is an example of the range of different kinds of contract that may be come to as between power generators and coal suppliers, and of ECSL's flexibility as regards supplying generators' needs in different ways. It does not cast any light on what kind of contract was, or might have been, capable of being entered into with EME.

111. Having reviewed the conduct of EWS towards ECSL as regards both EME and British Energy, the ORR expressed its conclusion at paragraph B100:

> "B100 On the basis of all the evidence set out above, and the points made in response to EWS's arguments below, it is found that between May 2000 and November 2000, EWS pursued discriminatory pricing practices against ECSL. This discriminatory pricing placed ECSL at a competitive disadvantage when negotiating intermediary contracts (including E2E deals) with generating companies. EWS's intention was to reduce the threat that ECSL posed to its position in the market

> for coal haulage by rail in Great Britain. EWS has advanced no credible objective justification for the higher prices charged to ECSL. EWS's conduct distorted the competitive process and is inconsistent with the obligations of a dominant company. EWS's behaviour towards ECSL is therefore found to be abusive."

112. Mr Lasok relied particularly on the words "(including E2E deals)". They refer, at least, to ECSL's dealings with British Energy, which were on an E2E basis. He argued that they also refer to ECSL's position in relation to EME.

113. The ORR then discussed EWS' arguments, the effect of which had been anticipated at the beginning of paragraph B100. An important element in this was EWS' attempt to justify having quoted different prices for the same service to different entities. At paragraph B109 the ORR said this:

> "Therefore, where the supply-side of two transactions is the same, that is, the supply is of the same product (i.e. coal haulage), using the same technology (i.e. haulage by rail), by the same undertaking (here, EWS), over at least the same origin-destination pair, such transactions are equivalent for the purposes of assessing price discrimination under competition law. Nonetheless, as recognised below, differences in the prices set for such transactions may be objectively justified, and would not constitute an abuse if they were incapable of placing a trading partner at a competitive disadvantage."

114. Mr Lasok based on this passage a submission to which I will refer later, to the effect that his case on causation was proved by the finding of competitive disadvantage.

115. Two parts of the ORR's review of EWS' response provided further material on which Mr Lasok relied. The first is in a section headed "Effect on competition", from B175. Here the paragraphs relied on were B178 and B179, as follows:

> "B178 ECSL was a customer of EWS. However, the power generators were willing to consider contracting for coal haulage either indirectly through an intermediary (including the E2E option) or directly with the rail operator. This meant that ECSL also competed against EWS to win contracts with the power generator (as well as competing against other suppliers of coal to the generator). As a result, the competitive disadvantage that ECSL faced was not primarily a disadvantage compared to other customers of EWS. Rather, ECSL was at a competitive disadvantage vis-à-vis other actual and potential competing suppliers to BE and EME. These parties included EWS as well as other suppliers of coal, whether on an E2E basis or not.
>
> B179 Given this structure, neither EWS's assertion that, for ECSL to have faced competitive disadvantage, ECSL "*must have been in competition with other customers of EWS who benefited from preferential EWS rates at the same point in time*" nor its assertion that "*coal haulage prices must have formed a material percentage of the […] overall 'delivered price' of coal […] of the power generators active in the downstream electricity generation market*" is valid. The

> competitive disadvantage faced by ECSL was in relation to EWS and also to other suppliers of coal."

116. Here again, it must be remembered that the comments apply to the dealings with British Energy, on an E2E basis, as well as to those with EME. It is also right to see what the ORR said at paragraphs B183 to B187:

> "B183 Furthermore, one important aspect of the competitive disadvantage that ECSL faced was that it went into tender negotiations in 2000 having failed to agree with EWS the performance-related deal for coal haulage that it had sought. As an intermediary and E2E supplier, this would have placed ECSL in a difficult position. In submitting a bid to a power generator, ECSL would have been forced to bear business risks that it would have avoided had it been treated in a non-discriminatory manner such that it was able to secure a suitable coal haulage contract with EWS.
>
> B184 Somewhat differently, at paragraphs 7.253 and 7.254 of its Response, EWS rejected the prospect of competitive disadvantage to ECSL on the basis that ECSL's principal activity was as a coal trader and the viability of its coal trading business would not be undermined by EWS because ECSL could sell coal to power generators on an un-delivered basis. In effect, EWS was saying that ECSL could choose not to be an E2E supplier and avoid the effect of high coal haulage rates.
>
> B185 This argument is rejected. As described in the *Introduction* to this part above, ECSL provided a number of services to the owners of power stations including sourcing and trading on coal and providing straight to stock-pile deals (sourcing coal and arranging its transport from source to stockpile as part of an E2E deal). It is not compatible with the Chapter II prohibition or Article 82 EC for EWS to have then used a dominant position to force ECSL to trade under a different business model. The relevant competitive disadvantage includes consideration of ECSL's operations in its legitimate and established capacity as a supplier and, more generally, as an intermediary between generating companies and EWS.
>
> B186 The positive role that ECSL had played in the market is illustrated by BE's attitude towards coal haulage when it first agreed to use ECSL. In a meeting with ORR on 19 April 2002, David Love of BE noted (paragraph 5):
>
> > "[…] before the contract with Enron was entered into BE had considered (in early 2000) different contractual structures, including the DIY option of sourcing its own coal and entering into a coal carriage agreement, however, the E2E deal was chosen as a short term option which took account of BE's early inexperience of coal procurement."

> B187 Finally, with respect to ECSL suffering competitive disadvantage, the intent of EWS is also relevant. ORR's primary concern is that:
>
> (a) EWS recognised the competitive threat that ECSL posed to EWS by establishing customer relationships with generating companies and, off the back of these relationships, seeking to facilitate entry into coal haulage by rail; and
>
> (b) EWS feared that this would therefore diminish its ability to *"control the market"* (see EWS March 2000 Board paper discussed in the discussion on contractual restraints above)."

117. The ORR's conclusion as regards this part of the Decision is set out at paragraph B198:

> "B198 For all of the above reasons, it is found that between May 2000 and November 2000, EWS pursued, without objective justification, selective and discriminatory pricing practices that placed ECSL at a competitive disadvantage in its contractual negotiations with two power generators, EME and BE. By impeding the competitive position of ECSL as a customer and a competitor, EWS's actions were capable of distorting the structure of competition in the relevant market. This conduct was contrary to both the Chapter II prohibition of the Act and Article 82 EC."

Is the Tribunal's decision inconsistent with the ORR's decision or findings?

118. The Tribunal rejected ECSL's assertion that in the but for world, it would have sought to negotiate with EME for a four year E2E contract to supply coal to Ferrybridge C and also its claim that, absent EWS' abuse, there was a real or substantial chance that negotiations between EME and ECSL would have led to the award of a four year E2E contract to supply coal to Ferrybridge C. It set out its reasons for coming to those conclusions, as I have described. Mr Lasok does not and cannot challenge that reasoning in itself. He can only attack it on the basis that it is not consistent with the binding effect of either the decision as to infringement, under section 47A(9), or of some one or more findings of fact, under section 58.

119. His arguments on this point were interrelated, but they focussed on two principal points: first, what was ECSL's objective in its approach to EME, which includes the question what was the nature of its bid, and secondly what were its chances of securing a deal for coal supply with EME. The Tribunal said that ECSL's bid to EME was for coal haulage, and that it was not very seriously interested in getting a coal supply contract with EME. It also said that it had only a negligible chance of contracting with EME on a long-term basis for coal supply. Mr Lasok argued that each of these propositions was incompatible with findings of the ORR. I do not need to refer to every passage in the Decision and in the Tribunal's judgment which were said to be mutually inconsistent. I will refer to the main examples.

120. One of the more important parts of his submission was that paragraph B65 of the ORR Decision, quoted at paragraph [107] above, shows that EWS' unlawful

discrimination was a factor, even if it may not have been the only one, which prevented ECSL from contracting successfully with EME for coal supply. He went on from this to contend that the paragraph establishes that loss was caused to ECSL in this respect, leaving only the question of quantum for determination by the Tribunal. He also submitted that this paragraph, and the relevant part of the Decision as a whole, shows that ECSL was competing seriously for EME's business, because it could not otherwise have been put at a competitive disadvantage. If ECSL had had only a negligible chance of getting EME's business then it cannot have been put at a disadvantage by what EWS did. He submitted that what was said at paragraph B65 was about a bid by ECSL to EME not just for haulage services, but for an E2E contract.

121. That ties in with his challenge to the Tribunal's finding that ECSL did not bid on an E2E basis in the real world, so that they cannot have been expected to have bid on that basis in the but for world. It is in that respect that ECSL relied heavily on the statement in paragraph 390 of the Decision that its bid to EME had been on an E2E basis. Mr Lasok argued that the Tribunal was not entitled, in its paragraph 146, quoted at paragraph [66] above, to depart from what the ORR had said at paragraph 390 of the Decision. I have already explained, at paragraph [101] above, why I cannot accept that the words "ECSL (on an E2E basis)" or similar words in paragraph 418 constitute a finding of fact which is or could be binding under section 58.

122. Nor does it seem to me that the correct analysis of the basis of ECSL's bid to EME can be said to be an integral part of the decision that there was an infringement. If it was to be so regarded, the ORR, which examined almost every conceivably relevant issue of fact with great thoroughness, must have addressed the issues of fact arising as to what was the true basis of ECSL's bid. One only has to look at the terms of the invitation to tender and the bid put in by ECSL to see that EME did not ask for an E2E bid and ECSL did not put one in. Nor does ECSL's covering letter dated 15 September 2000 convert the tender into anything other than the Coal Carriage offer to which the letter refers, though it does certainly invite discussions on a wider basis. The evidence referred to by the Tribunal as to the lack of follow-up on the part of ECSL after the tender had been put in, and the low level within ECSL at which it was handled, referred to at paragraphs [63] and following above, is also plainly relevant. Mr Lasok is of course justified in pointing out that ECSL was not a haulier, and could not readily be supposed to have had an interest in bidding for a haulage contract just for the sake of that contract. But if ECSL was serious in its wish to persuade EME to enter into another E2E contract, there must have been some overt attempt to undertake that persuasion. Instead, it seems that ECSL put in its tender, sat back and waited for the result.

123. One passage that featured in the argument was the last sentence of paragraph B5(a), quoted at paragraph [104] above. I protest at the proposition that the comment, in a general introductory passage in the Decision, to the effect that ECSL "was unsuccessful in renewing" its previous E2E relationship with EME amounts to a finding of fact, binding on the parties unless disapplied by a direction under section 58, that it made a serious attempt to do so. That exercise would not meet the requirements to which I have referred at paragraph [56] above.

124. Mr Lasok pointed also to the second sentence of paragraph B178, quoted at paragraph [115] above, and said that it was inconsistent with the Tribunal's observation at

paragraph 221 that there was "ample evidence of EME's unwillingness to enter into a long-term coal supply contract". In my judgment the two are not fairly comparable. In B178 the ORR was talking of the attitude of power generators generally as regards meeting their needs for coal supplies. It was not addressing the particular attitude of EME as such and even less so the particular attitude of EME to coal supply at the relevant time and to ECSL as a potential supplier. That argument does not assist ECSL. The same is true of other passages in the Tribunal's judgment which Mr Lasok argued were not compatible with paragraph B178: the last sentence of paragraph 162 and paragraphs 184, 186, 203, 211-2, 213, 215 and 217. In every case the submission ignores the generality of the observations in B178, and therefore places weight on the ORR's observations that they cannot properly bear. Paragraph B178 is not a trump card which Mr Lasok can use to override passages in the judgment in which the Tribunal addressed the evidence adduced before them and came to what are clearly tenable conclusions as to relevant disputes of fact.

125. I come back to the debate about the subject-matter of the ORR's more specific statement in B65: what was the nature of the supply as to which ECSL was placed at a competitive disadvantage. In my judgment the answer must be that it was for haulage of coal by rail only. It is for this that EME invited tenders, as mentioned in B60. That was the subject of the negotiations referred to in B61, as is there stated in terms. In turn paragraph B62(a) and (b) refer expressly to offers to EME for coal haulage. Again in B64 the reference is to a contract on the part of EME "for its haulage requirements". It seems to me that it must follow that the reference to ECSL "supplying EME" in paragraph B65 refer to the same kind of supply as had been mentioned in the previous paragraphs, namely a supply of haulage services, not of anything else. It follows that this finding cannot, on any basis, show that ECSL's chances of securing a coal supply agreement with EME were adversely affected by EWS' conduct. They may have been, but that is something which ECSL had to prove to the Tribunal, and for which it could not simply rely on what the ORR had said.

126. Mr Lasok drew from the ORR's statement at paragraph B109, quoted at paragraph [113] above, the proposition that EWS' conduct was not an abuse unless it was capable of placing a trading partner at a competitive disadvantage. He sought to go further, so as to say that unless a trading partner actually suffered a competitive disadvantage, there was no abuse. That is not stated in this paragraph, so it is not the basis on which the ORR proceeded. Nor is it correct as a matter of law.

127. I accept that conduct on the part of the dominant undertaking which does not and could not have an adverse effect on the market is not to be classified as an abuse of the undertaking's market power. The present is a case where a dominant undertaking discriminated in the prices it offered to different customers, without objective justification, quoting higher prices to another undertaking which the dominant undertaking could be supposed to have regarded as an actual or potential competitor who was a threat. Moreover, internal evidence (as to which see paragraph [106] above) showed that EWS did regard ECSL in that way and intended to do what it could to suppress that competition. In such a case, it does not seem to me that it is necessary to establish how real the competitive threat posed by ECSL to EWS was before finding that EWS' conduct amounted to an abuse of its dominant position and therefore an infringement of article 82 and the Chapter II prohibition. In *United Brands*, Case 27/76, the European Court of Justice said at paragraph 189:

> "Although it is true, as the applicant points out, that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it."

128. Similarly, in *Compagnie Maritime Belge* T-24/93 the CFI said this at paragraph 149:

> "Thirdly, the applicants rely on the increase in G & C's market share in order to maintain that the practice complained of had no effect and hence that there was no abuse of a dominant position. The Court however considers that, where one or more undertakings in a dominant position actually implement a practice whose aim is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterized as an abuse of a dominant position within the meaning of Article 86 of the Treaty."

129. The ECJ spoke to rather similar effect in *British Airways v Commission* C-95/04P at paragraphs 106 to 107, and also said this at paragraph 145:

> "In that respect, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually."

130. In the circumstances of this case I cannot accept Mr Lasok's argument that EWS could successfully have resisted the accusation of infringement in this respect by showing that ECSL in fact had no realistic chance of doing the deal they wanted with EME. Since a finding of infringement does not require proof that damage has in fact been caused to a rival undertaking, the fact that an infringement has been established does not show, as a necessary implication, that such damage has been caused.

131. Mr Lasok posed a related question, namely if EWS knew that ECSL had little or no chance of winning the EME contact, why did EWS discriminate against ECSL (see paragraph 166 of the Tribunal's judgment). One answer is that EWS may not have known, or if it suspected it may not have been sure. It may well not have known the extent of the deterioration of relations between EME and ECSL under the existing E2E contract. Another point is that, as the ORR found, EWS had a general strategy to exclude actual or potential competitors, but, as the Tribunal said in paragraph 166(b):

> "The existence of exclusionary intent does not, however, of itself demonstrate that EWS' discriminatory pricing produced a concrete adverse effect on the market."

and in paragraph 166(d):

> "ECSL may still have lost the EME Tender had EWS not discriminated against it; whether that is the case is a question which the Tribunal must decide."

132. I therefore reject this particular aspect of Mr Lasok's submissions. The Tribunal's conclusion is not inconsistent with a decision by the ORR that ECSL bid to EME on an E2E basis, because the ORR did not make a finding of fact to that effect, nor was such a finding part of its decision that there had been the infringement which it found.

133. Mr Lasok also criticised the Tribunal for ignoring paragraph 55 of the Decision and what followed logically from it. I have quoted paragraph 55 above at paragraph [77]. It is part of the ORR's description of the electricity supply industry. It is not part of an analysis of how EME took decisions as to the identity of its suppliers or as between different types of contract proposed to it by different suppliers.

134. No doubt as a general proposition what is said in paragraph 55 of the Decision is true. However a point formulated as generally as this is not of assistance in determining how a particular generator would have responded to an approach on hypothetical terms by a particular supplier. Mr Lasok's submission amounts to saying that it was not open to the Tribunal to consider the specific evidence put before it as to the likely reaction of EME to an approach by ECSL aimed at a long-term, or at least a medium-term, E2E contract. That is evidence which was plainly relevant on the issue of causation, but which, for reasons already mentioned, would have been of no, or at most only marginal, relevance to the issue of infringement. I cannot accept his argument that what the ORR said at paragraph 55 amounts either to a finding of fact binding under section 58 or to an integral part of the decision as to infringement, so as to be binding for the purposes of the proceedings under section 47A. In my judgment the Tribunal treated what the ORR had said at paragraph 55 correctly and legitimately in their paragraph 199, from which I have quoted at paragraph [78] above.

135. It is plain from paragraph 11 of the Decision, supported by paragraph B65, that the ORR did not set out to decide whether, and if so to what extent, EWS' conduct in fact caused loss to ECSL. They did not need to make any such finding in order to conclude that EWS had abused its dominant position. The fact that they concluded that EWS had infringed article 82 and the Chapter II prohibition does not show that they had found that the relevant conduct had caused actual loss to ECSL. Nor did they make any finding of fact, even if unnecessarily, that such damage had been caused.

136. In my judgment the Tribunal was correct in concluding that it needed to review the whole of the evidence placed before it in order to assess whether ECSL had made out its case, and it was entitled to come to the conclusion that ECSL had not succeeded in doing so.

Section 58: relying on it, and disapplying it

137. In the circumstances it is not necessary to consider whether, if the Tribunal had been bound by a relevant finding of fact under section 58, it directed otherwise under the opening words of section 58. Submissions were made to the Tribunal about that

possibility at trial, but the Tribunal did not deal with it in its judgment, nor did it make any order or direction, in terms, under the section.

138. Although it is not necessary for the decision of the appeal, I would accept a point made by Mr Lasok namely that, if a court or the Tribunal is to direct that section 58 shall not apply to a particular finding of fact, it should do so expressly, and give reasons for doing so, even if briefly and (as may be convenient) in the course of the judgment resulting from the relevant proceedings. There may be good reasons for disapplying the section in relation to a particular finding or set of findings, but the court or Tribunal and the parties before it need to know that it has been done, in relation to which findings it has been done, and to some extent why it has been done.

139. On another point which is not necessary to my decision (and on which we did not have submissions from Counsel, unlike the question of a direction under section 58), the Tribunal's rules require the Claim Form to contain a concise statement of the relevant facts, "identifying any relevant findings in the decision on the basis of which the claim for damages is being made" and also a concise statement of any contentions of law relied on: rule 32(3)(a) and (b). Moreover, the Tribunal's Guide to Proceedings tells parties to take care to identify concisely the facts found in the decision that are alleged to have caused loss: paragraph 6.82.

140. In the present case ECSL did make extensive reference in its Claim Form to the part of the Decision in which EWS' dominant position in the relevant market was established. It made much less extensive or specific reference to the Decision in support of the case on abuse of that dominant position. For example, it alleged in paragraph 46 that ECSL submitted a bid for E2E supply of coal to EME, but it did not say that this was the subject of a finding by the ORR (as Mr Lasok argued before us) nor did it refer to any part of the Decision in support of that contention. Paragraph B62 was quoted; paragraph B65 was referred to in support of the allegation that the ORR found that EWS' unlawful abuse of its dominant position had a direct and strong negative impact on ECSL's chances of renewing the contract with EME (i.e., presumably, an E2E contract). No mention was made in the Claim Form of other paragraphs which featured prominently in Mr Lasok's arguments to us, including paragraphs 55, 390, B5(a) and B178.

141. In a case in which the claimant seeks to rely not only on a finding of infringement but also on findings of fact under section 58, it seems to me particularly important that the Tribunal's rules and guidance should be complied with so as to make it reasonably clear to the other party and to the Tribunal which facts are said to have been found in a manner binding on the parties, and by virtue of what passage or passages in the regulator's decision. If what I have said in paragraph [56] above is heeded, it should be obvious what fact is found (if any) in a particular passage, but it is right that the party relying on a finding by the regulator should specify its case in this respect. The same applies, as a matter of the general obligations as regards statements of case in the CPR, where the claim is brought as a stand-alone claim in court and reliance is to be placed on the effect of a regulator's decision under section 58 in support of the claim. If this is done, it will be easier for the parties and the court or the Tribunal to see whether there is a need to apply for a direction disapplying the section and to assess the merits of such an application.

The Tribunal's jurisdiction

142. I have explained above the follow-on jurisdiction of the Tribunal under section 47A; it can also entertain claims under section 47B, though this jurisdiction seems likely to be of little use in practice, after the very limited success of the one claim brought so far. What the Tribunal cannot adjudicate on, in a claim for damages, is whether there has been any, and if so what, infringement. That is the sole preserve of the court in a stand-alone claim. It may of course be determined by a regulator, and in such a case it may turn out that the Tribunal does have to decide the issue, in effect as a first instance tribunal, on an appeal from the regulator's decision under section 46 or 47 of the 1998 Act.

143. It seems somewhat anomalous that the specialist tribunal is entrusted with the decision as to infringement or no on an appeal from a regulator, but is not allowed to touch that question in a claim for damages. As the first appeal in these proceedings showed, that can have a significant limiting effect on the scope of proceedings under section 47A. No doubt there are policy issues to be considered here, but it seems to me that the interrelationship between the jurisdiction of the court and that of the Tribunal in relation to claims for damages may merit reassessment in the light of experience to date in the use of one type of claim and of the other.

Disposition

144. For reasons set out earlier in my judgment, I accept Mr Lasok's submissions as to the scope of section 58 of the 1998 Act, but I do not accept that there were findings of fact in the ORR Decision such as he put forward. I therefore reject his argument that the Tribunal's judgment was not consistent with the ORR Decision.

145. Accordingly, I would dismiss the appeal.

Lord Justice Patten

146. I agree that the appeal should be dismissed for the reasons given by Lloyd LJ.

Lord Justice Jacob

147. I agree entirely with the judgment of Lloyd LJ and add only a few words by way of emphasis.

148. Firstly what Lloyd LJ said at paragraph [56] above cannot be emphasised enough. It is not good enough for a party claiming damages in a follow-on claim to root around in the decision of the regulator to find stray phrases or sentences and say "look, here is a finding of fact, you cannot deny it." That is essentially what Mr Lasok was seeking to do here.

149. Secondly Lloyd LJ is clearly right at paragraph [143]. I would go further: the "split" jurisdiction of regulator for infringement, tribunal for causation and assessment of damages also needs some reconsideration. Otherwise there are bound to be future battles about the borders of jurisdiction. What if, for instance, the regulator makes a clear finding of fact (e.g. about causation) which is not necessary for its determination of infringement. Would that finding arguably be outwith its jurisdiction and hence not a finding which could be relied upon in a follow-on claim?

150. In this context it must be remembered that the party claiming damages is not a party to the proceedings before the regulator. Facts about causation and damages, which will normally include an investigation into whether and if so how the infringing conduct affected that particular party, are not necessarily a part of the regulator's inquiry. If one is not careful there could be an injustice: findings made by the regulator on incomplete evidence followed by an impossibility of attacking them later. Section 58 might provide a way to alleviate this, but it is not a particularly satisfactory solution: the defendant would have to rely upon the section 58 discretion being exercised in his favour to defend himself properly.