Neutral citation [2010] CAT 4

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1106/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

9 February 2010

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
GRAHAM MATHER
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

ENRON COAL SERVICES LIMITED (IN LIQUIDATION)

Claimant

-v-

ENGLISH WELSH & SCOTTISH RAILWAY LIMITED

Defendant

RULING ON REQUEST FOR PERMISSION TO APPEAL

Introduction

1. We have before us an application from the Claimant, Enron Coal Services Limited (in liquidation), dated 20 January 2010 requesting permission to appeal from the judgment of the Tribunal handed down in Case no. 1106/5/7/08 *Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited* on 21 December 2009 ([2009] CAT 36) ("the Judgment"). This ruling should be read together with the Judgment and we adopt the same abbreviations.

2. ECSL's monetary claim was brought before the Tribunal under section 47A of the Act. ECSL was claiming damages from EWS for the loss of opportunity to win a four-year contract to supply coal to a power station owned by EME. For the reasons given in the Judgment, the Tribunal held that ECSL had failed to establish that EWS' unlawful conduct had caused the loss that it claimed.

3. Appeals against decisions of the Tribunal under that section can be brought under section 49 of the Act which provides so far as relevant:

> "**49 Further appeals**
>
> (1) An appeal lies to the appropriate court—
>
> …
>
> (b) from a decision of the Tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A or included in proceedings under section 47B (other than a decision on costs or expenses) or as to the amount of any such damages or other sum
>
> ..."

4. Permission to appeal may be granted either by the Tribunal or by the appeal court: CPR 52.3(2) and Rule 58 of the Tribunal Rules. In considering whether or not to grant permission, the Tribunal, when sitting in England and Wales, applies the test in CPR 52.3(6). Permission may be granted only if the Tribunal considers that the ground of appeal has a real prospect of success or that there is some other compelling reason why the appeal should be heard by the Court of Appeal.

5. Rule 59(2) of the Tribunal's Rules provides that where a request for permission is made in writing, the Tribunal shall decide whether to grant such permission on consideration of the party's request and, unless it considers that special circumstances render a hearing desirable, in the absence of the parties. The Tribunal Registry wrote to the Defendant, EWS, inviting it to comment on ECSL's request for permission to appeal. The Tribunal received written observations from EWS on 2 February 2010 opposing the grant of permission on any of the grounds contained in ECSL's application. Neither of the parties requested an oral hearing and in light of the helpful written submissions we have received from the parties, the Tribunal is able to deal with this matter on the papers.

Ground 1 – Tribunal's jurisdiction under section 47A of the Act

6. The first ground concerns the scope of the Tribunal's jurisdiction under section 47A and is said to provide compelling reasons which justify the granting of permission. ECSL submits that this is the first case under section 47A to have gone to trial and important issues have arisen in the course of argument. Those issues include the extent to which the Tribunal is bound by findings of fact by the ORR and the relevant evidential thresholds applicable in a loss of chance case. Those issues are said to be important not only to claimants and defendants in future monetary claims; but also to competition authorities in drafting their decisions and to the Tribunal in determining future claims under section 47A.

7. The Tribunal was unanimous that ECSL's claim should be dismissed and our reasoning is set out in the Judgment. The Tribunal's findings were arrived at following a full and detailed public hearing at which both parties had the opportunity to state their case. In so far as ECSL submits that the Tribunal misinterpreted the nature and scope of the Tribunal's jurisdiction, including the extent to which it is bound by the findings of the ORR, we are confident that we have correctly interpreted the statutory provisions. In so far as ECSL takes issue with the Tribunal's approach to the relevant evidential thresholds applicable in a loss of chance case, in our judgment this claim involved the application of well-established principles of tort to the particular facts of this case. It is true that this was the first time that the Tribunal has considered an award of damages following a full hearing. However, as EWS has rightly noted, the Tribunal made clear that it did not consider that the outcome of the present case will necessarily affect future

cases: see paragraph 9 of the Judgment. We therefore conclude that there is no compelling reason why this ground of appeal should be heard by a higher court, and accordingly we reject it.

Ground 2 – Inconsistency with an earlier judgment of the Court of Appeal

8. The second ground relied on by ECSL is that the findings in the Judgment are inconsistent with the judgment of the Court of Appeal of 1 July 2009 in *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647. In our judgment, however, this argument does not assist ECSL. When the sentences extracted by ECSL are read in context, it is plain that Patten LJ is simply describing the role of the Tribunal under section 47A, which is to determine what loss (if any) was caused by an infringement of competition law found by a specified competition authority. It was not inconsistent with the judgment of the Court of Appeal for the Tribunal to hear evidence from the parties on the question of causation; indeed that is one of the Tribunal's tasks under section 47A. Nor in the Tribunal's judgment is there any real prospect of the Court of Appeal coming to a different view. We therefore refuse permission on the second ground.

Ground 3 – section 58 of the Act

9. The third ground of challenge put forward in ECSL's application concerns the proper construction of section 58 of the Act. The point was canvassed in argument, and we have already set out our views on that issue at paragraphs 53 to 65 of the Judgment. The Tribunal's judgment on the interpretation of the relevant statutory provisions constitutes a point of law. The point is novel, in the sense that the issue in question has not been the subject of any prior judicial interpretation, and it is also potentially important. However, the Tribunal expressly found that the findings in the Decision did not assist on the question of causation. Accordingly, the application of section 58 did not affect the outcome of the case: paragraph 64 of the Judgment. The Tribunal further held that even if section 58 did apply to ECSL's claim, it would have reached the same findings of fact as are contained in the Judgment: see paragraph 65 of the Judgment. (The provisions in section 58 are subject to the court directing that findings of fact by a competition authority should not be binding on the parties.) If doubt exists as to the correctness of our interpretation it would be better for it to be resolved in the context of

a case where it would make a difference to the outcome. It is therefore inappropriate to grant permission to appeal on this point.

Ground 4 – finding of competitive disadvantage and the issue of causation

10. Fourth, ECSL challenges the Tribunal's judgment on the basis that its assessment of the third part of the (a) question and the (b) question were contrary to the ORR's finding of competitive disadvantage within the meaning of section 18(2)(c) of the Act and Article 102(2)(c) of the Treaty on the Functioning of the European Union (ex Article 82(2)(c) of the EC Treaty). ECSL asserts that it was not open to the Tribunal to find that ECSL had no real chance of winning the competition for EME's business. The short answer to this ground is that the ORR expressly acknowledged that it was "not possible to conclude that [ECSL] was displaced from supplying EME as a result only of the discriminatory terms from EWS" (see B62 of the Decision). Moreover, as EWS rightly notes, this is a re-run of an argument before the Tribunal and, for the reasons given in paragraphs 160 to 167 of the Judgment, this ground does not give rise to an arguable point of law.

Ground 5 – evidential considerations

11. The fifth ground of appeal concerns whether it was necessary or appropriate for the Tribunal to consider the evidence from EWS as it did and make a number of key findings as it did. The Tribunal does not consider that the ground has a real prospect of success. In so far as this point raises the same argument about the ORR's findings, we have dealt with it above. ECSL also argued that the Tribunal failed properly to apply the relevant legal standard to the assessment of what was called the "(b) question". In our view the approach taken in the Judgment is consistent with previous authority of the Court of Appeal and, in particular, the judgment in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602. For these reasons, we do not give permission to appeal on the fifth ground of appeal.

12. In so far as ECSL takes issue with the Tribunal's findings of fact, it has not explained why the (putative) mistakes of fact give rise to unfairness and so constitute an error of law for the purposes of a statutory appeal on a point of law: see e.g. the Court of Appeal's decision in *E v Secretary of State for the Home Department* [2004] EWCA

Civ 49. Questions of evidential credibility – that is to say whom the Tribunal believed and whom it did not – are matters for the trial court, not for the Court of Appeal. The Court of Appeal does not hear oral evidence or see the witnesses giving evidence on the matter of causation: that is the role of the Tribunal under section 47A. The examples given by ECSL, such as the reason why EME entered into the December Confirmations, concern the Tribunal's expert assessment of how the relevant principles should be applied in the particular circumstances of this claim. It is not therefore a matter which should be the subject of an appeal.

Conclusion

13. For the reasons set out above we are not persuaded by the submissions made on ECSL's behalf that an appeal on any of the proposed grounds would have a real prospect of success or that there is any compelling reason why an appeal should be heard. Accordingly, we refuse ECSL's request for permission to appeal.

14. ECSL, if so advised, may renew its application for permission to the Court of Appeal within 14 days pursuant to CPR 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this Ruling together with copies of ECSL's request for permission to appeal dated 20 January 2010 and of EWS's letter of 3 February 2010 containing its observations on ECSL's request should be placed before the Court of Appeal.

15. Accordingly, the Tribunal unanimously:

ORDERS THAT:

(1) Permission to appeal be refused.

The Chairman | Graham Mather | Richard Prosser

Charles Dhanowa
Registrar

Date: 9 February 2010