



Neutral citation [2011] CAT 18

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1166/5/7/10

Victoria House
Bloomsbury Place
London WC1A 2EB

9 June 2011

Before:

VIVIEN ROSE
(Chairman)
SHEILA HEWITT
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

ALBION WATER LIMITED

Claimant

- v -

DŴR CYMRU CYFYNGEDIG

Defendant

RULING
(APPLICATION TO AMEND PARTICULARS OF CLAIM
AND
APPLICATION TO STRIKE OUT PARTICULARS OF CLAIM)

1. This is the third ruling that the Tribunal has made in relation to the Particulars of Claim lodged by the Claimant (“Albion”) seeking damages for the breach of the Chapter II prohibition by the Defendant (“Dŵr Cymru”). On 8 December 2010 the Tribunal handed down its Rule 40 Judgment on Dŵr Cymru’s application to strike out sections of Albion’s Particulars of Claim. Since the parties could not agree what the effect of the Rule 40 Judgment was on the pleading as it then stood, the Tribunal issued the Strike Out Ruling clarifying which passages should be struck out. Albion has now applied for permission to amend the Particulars of Claim and Dŵr Cymru opposes those amendments and has put in a counter-application to strike out those parts of the claim which relate to the claim for compensatory damages. We have received full submissions in writing from the parties and we do not consider that an oral hearing is necessary or desirable to enable us to reach our conclusions. The conclusions set out below are the unanimous conclusions of the Tribunal. Attached to this ruling is a Glossary of Terms which we use in this ruling and which we request the parties to use in future pleadings, evidence and correspondence.

The proposed amendments

2. The power to allow an amendment to the Particulars of Claim is set out in rule 34 of the Tribunal’s Rules. This provides simply that the claim form can only be amended with the permission of the Tribunal. In *Enron Coal Services v English Welsh & Scottish Railways* [2009] CAT 18, the Tribunal listed a number of factors relevant to the exercise of this discretion. We note in that regard that the application to amend here is made at a very early stage of the proceedings, before the defence has been served and that there is no prejudice suggested to Dŵr Cymru arising from amendments at this stage. On the contrary, many of the amendments are designed to reduce the scope of the claim and to simplify the issues that will need to be explored if the claim proceeds. The power to strike out a claim is conferred by rule 40 which provides that the Tribunal may reject a claim in whole or in part if we consider that there are no reasonable grounds for making the claim.

3. So far as the proposed amendments to the Particulars of Claim are concerned, these can be grouped into four categories:

(a) Amendments that make consequential revisions following the Rule 40 Judgment and the Strike Out Ruling;

(b) Amendments which follow from Albion's decision not to proceed with their claim for aggravated damages or for restitutionary damages;

(c) Amendments which restate the way Albion put their claim for damages arising out of their inability to supply water on a retail basis to Shotton Paper;

(d) Amendments which restate the way Albion put their claim for damages arising out of their inability to supply Corus Shotton.

4. Dŵr Cymru does not object to most of the amendments proposed in category (a) or (b). Its main objections are to those parts of the existing or proposed pleading which set out Albion's claim for compensatory damages arising from the Shotton Paper business and the Corus Shotton business. The passages to which it objects are:

(a) the proposed amendment to include the words "both compensatory and" in paragraph 6. Other than that, it does not oppose the proposed amendments to paragraphs 1 to 59 or apply to strike out any of the original text of those paragraphs;

(b) the original paragraphs 60 to 62 which it seeks to strike out (and to which no amendments are proposed);

(c) the original paragraphs 98 to 136 in so far as they set out the claim for compensatory damages for the Shotton Paper and Corus Shotton business. In respect of these paragraphs Dŵr Cymru both opposes the proposed substantial amendments and applies to strike out the original text (except that Dŵr Cymru does not apply to strike out the original paragraphs 135 and

136 which contain the claim for exemplary damages and it does not oppose, as we understand it, the proposed amendments to those two paragraphs);

(d) those parts of original paragraphs 137 to 140 which set out the relief sought for the compensatory claims. Thus Dŵr Cymru applies to strike out - and opposes any proposed amendments to - paragraphs 137(1) and 138(1) but does not apply to strike out and does not oppose the proposed amendments to the remaining parts of paragraphs 137 to 140.

The proposed claim in respect of supply to Shotton Paper

5. So far as the compensatory claim arising from the Shotton Paper business, Dŵr Cymru's real objection is to the proposed amendment of old paragraph 101 (new 88) and to the proposed new paragraph 93. Its objections to the other passages stand or fall with the Tribunal's decision in relation to these proposed amendments.

The "common carriage scenario"

6. Albion seeks to put its claim for damages in two ways. The first is set out in the amended paragraph 101 (which would be new paragraph 88) and in what would be new paragraph 93(1). Dŵr Cymru refers to this as "the common carriage scenario" and we will adopt that term. Albion wishes to assert that if it had been able to obtain a reasonable price for common carriage from Dŵr Cymru, it would have been able to buy water from United Utilities at the same price that United Utilities was charging Dŵr Cymru. In support of this, it asserts that United Utilities would have been legally obliged to charge it the same price for water as they charged Dŵr Cymru because of "United Utilities' own obligations in law as a monopoly supplier and in the particular circumstances of this case". In the alternative, Albion argues that it would not have had to pay United Utilities more than 9p/m³ for the water and, in the further alternative, probably something less than that. Even if it had had to pay 9p/m³ for the water, it says it would still have made a profit on the business if the common carriage price had been no greater than 14.49 p/m³.

7. Dŵr Cymru attacks this proposed pleading on a variety of grounds. First, it argues that Albion has still failed to provide a proper calculation of its loss as it is required

to do by the Tribunal Rules. Rule 32(3)(c) provides that the claim form must contain a statement of the amount claimed in damages, supported with evidence of losses incurred and of any calculations which have been undertaken to arrive at the claimed amount. In our judgment this complaint is not justified. It is clear that the price that Albion would have had to pay for water is going to be a key issue in constructing the counterfactual for assessing any loss suffered by Albion. Albion is entitled to plead a number of prices in the alternative and it has pleaded that the price would have been either the same as Dŵr Cymru was paying or alternatively not more than 9p/m³. Given that other factors relevant to calculating the loss such as the volume of water supplied are known, we do not consider that this aspect of the pleading is so unclear that it deserves to be struck out. Dŵr Cymru may contend that Albion would have had to pay more than 9p/m³ for water or that it would not have made a profit whatever price it would have had to pay for water or that the calculation in Annex 1 to the claim form is incorrect for some other reason. The case that Dŵr Cymru has to meet is, in our judgment, adequately set out in the pleading for the purposes of rule 32(3)(c). It is not possible to say that it has no reasonable prospect of success.

8. Secondly, Dŵr Cymru says that Albion's assertion that it would have been able to obtain a price from United Utilities equal to or less than 9p/m³ is contrary to the evidence Albion relied on in the earlier appeal (Case 1046/2/4/04). Albion has said in its reply that the 9p/m³ was the "best evidence" that it had at the time of United Utilities' price and that its submissions in the earlier appeal have been taken out of context by Dŵr Cymru. We agree with Albion that the points that Dŵr Cymru is raising here are points that can be made in the course of Dŵr Cymru's defence. They are not grounds for striking out the claim.
9. Thirdly, Dŵr Cymru alleges that the assertion that United Utilities would have had to charge Albion the same as it charged Dŵr Cymru for water because of its legal obligations as a monopoly supplier is outside the Tribunal's remit. Dŵr Cymru says that this allegation depends on the existence of an abuse by United Utilities. There is no such finding by the Tribunal on which Albion can rely for the purposes of section 47A of the Competition Act 1998.

10. We do not agree that Albion's claim relies on any finding of abuse on the part of United Utilities. Albion is entitled to assert that when deciding what price United Utilities would have charged Albion for water, the Tribunal can take into account what United Utilities saw as its own regulatory or competition law obligations vis-à-vis its supply to Albion at the time. If Albion can show that United Utilities regarded itself as bound not to discriminate between its customers, whether because of its regulatory obligations or its competition law obligations or for whatever other reason, that would support Albion's contention that it would have had to pay only the same price as Dŵr Cymru and hence that its loss of profit should be calculated on that basis.
11. We emphasise here that this cannot involve the Tribunal in a consideration of what as a matter of law were United Utilities' obligations. The question is always what *would* United Utilities have charged Albion for water not what *should* it have charged Albion. But in so far as Albion can show that United Utilities' regulatory or other obligations were relevant at the time to that question then these are matters that can be pleaded and which do not fall outside our remit under section 47A.
12. Fourthly, Dŵr Cymru challenges Albion's assertion that, in supplying Shotton Paper, it would not have incurred any overheads which fall to be deducted when calculating its lost profit. Dŵr Cymru says that this is contrary to what it asserted when seeking interim relief. Again, in our judgment, the question of what overheads Albion would have incurred in supplying Shotton Paper under a common carriage rather than bulk supply arrangement with Dŵr Cymru is likely to be an important issue in determining whether Albion has suffered any loss. Albion's case is that there are no relevant overheads to be taken into consideration. Dŵr Cymru may wish to argue that the relevant question is not whether there were any *additional* overheads comparing the two kinds of supply but whether there were any overheads at all which fall to be deducted. In our view Albion's case on this is clear in the pleading and Dŵr Cymru can respond to it in its defence. It is not appropriate to strike the claim out on this basis.

The “bulk supply scenario”

13. The second way Albion puts its claim for damages arising from the Shotton Paper business is the “bulk supply scenario”. Under this scenario, Albion posits that following Dŵr Cymru’s offer of a reasonable common carriage price, Albion would have opened negotiations with United Utilities for the bulk supply of water. If and for so long as Albion was not actually buying bulk water from United Utilities, Albion would have continued under its bulk supply arrangement with Dŵr Cymru. Albion wishes to posit that Dŵr Cymru would have reduced the price charged for the bulk supply because it would have incorporated into that price the cost of the common carriage elements at the same reduced level as it was, under this scenario, pricing those elements for the purposes of the reasonable access price. In other words, Albion says that in the counterfactual that the Tribunal applies to establish Albion’s loss, we must assume that Dŵr Cymru would have offered not only a much lower common carriage access price (in order to avoid the abuse) but also a much lower bulk supply price.

14. Again, we do not consider that the proposed pleading falls into the same error as the earlier pleading discussed in the Rule 40 Judgment. That earlier pleading purported to claim damages for an abusively high Second Bulk Supply Price on the basis that components in that price were an abuse because they were being charged at the same rate as incorporated into the abusive First Access Price. Here Albion is not relying on an abuse in relation to the Second Bulk Supply Price. It is rather asserting that if Dŵr Cymru had offered a reasonable price in the beginning for common carriage, it would also have offered Albion a bulk supply price based on the same cost components.

15. However, in our judgment this scenario is doomed to fail and should be struck out. It is clear from what actually has happened in the years between the offer of the First Access Price and today that Dŵr Cymru has consistently refused to accept that it is under any obligation to read across from the First Access Price to the Second Bulk Supply Price for the purpose of pricing the elements that make up the common carriage service in each price. Thus it did not, in response to the Tribunal’s finding that the First Access Price was abusive, lower its Second Bulk Supply Price. Dŵr

Cymru has never accepted that it is bound to limit the costs of the individual service elements included in bulk supply to the same amounts as it is permitted to charge for those elements in common carriage. Given that fact, the Tribunal does not consider that Albion has any prospect of establishing a counterfactual based on an assumption that Dŵr Cymru would have acted in a way which flies in the face of everything that has actually happened between the parties.

16. Albion also seeks to assert that we can and should assume that the bulk supply price would have been reduced because Dŵr Cymru were *as a matter of law* required to charge a lower bulk supply price. That would, in our judgment, lead us into having to examine in effect whether the Second Bulk Supply Price is abusive. The Tribunal has not made any finding in relation to the legality of the Second Bulk Supply Price. It is not open to the Tribunal in these proceedings under section 47A to explore whether Dŵr Cymru ought to have charged a lower price for bulk supply rather than whether it would have charged a lower price for bulk supply.
17. Albion refers to a pending determination by OFWAT, a provisional version of which was published recently. That determination may include a finding that a reasonable bulk supply price is much lower than the price currently being charged by Dŵr Cymru. Even if OFWAT were to make such a finding, it would not be permissible for the Tribunal to reason backwards from that. We cannot assume for the purposes of Albion's current claim that in 2000 Dŵr Cymru would have acted in accordance with that finding when it is clear from Dŵr Cymru's response to the earlier proceedings that it does not regard the price for common carriage and the price for bulk supply as being linked in the way Albion has always contended.
18. We therefore refuse permission for the proposed paragraph 93(2) on the grounds that the counterfactual it posits has no reasonable prospect of success because it is contradicted by what has in fact happened in the period since 2000. Alternatively the passage as currently proposed would require us to make a finding that Dŵr Cymru's Second Bulk Supply Price has been abusive and this is not something that is open to us in proceedings under section 47A.

The proposed claim in respect of supply to Corus Shotton

19. Albion proposes to revise this part of their claim to ensure that it falls within the limits of what the Tribunal held was permissible in the Rule 40 Judgment. Dŵr Cymru objects to this amendment and applies to strike out the remaining original text. It argues that this part is tenuously pleaded. Further, if it is right that there is no reasonable prospect of Albion showing that it could have profitably supplied Shotton Paper, it follows that there is no possibility of Albion showing that it could have expanded its business profitably to Corus Shotton.
20. Since we have declined to strike out the whole of Albion's claim for damages for the Shotton Paper business, it follows that we do not agree that the claim in relation to Corus Shotton should be struck out. Albion is entitled to try to show that it would have made a profit on the Shotton Paper business and it would have had an opportunity to expand its business to supply Corus through the Ashgrove System.

Other points on the proposed pleading

21. There are three other aspects of Albion's pleading which call for comment. The old paragraph 110 (which would be new 99) states in its opening sentence that Albion's claim for loss arising from Corus is "conservative" because "it takes no account of the fact" that Dŵr Cymru's action was intended to deter new market entrants. Later in that paragraph Albion refer to certain matters on which it relies in respect of this point. Albion now seeks to expand this paragraph by adding a quotation from the Main Judgment. We do not see how it can be possible to rely on material, including the proposed quotation, in respect of a submission which is expressly **not** taken into account in the calculation of Albion's loss. We therefore do not allow this amendment. We will not strike out the original paragraph since it has not been challenged by Dŵr Cymru. Clearly it is not going to be helpful to complicate the proceedings by exploring whether or not the claim for loss is "conservative" or whether other items could have been claimed which are not being claimed.
22. Secondly, in paragraphs 120 to 123 (new paragraphs 106 to 108) Albion refers to the agreement between Shotton Paper and Albion to divide between them any sums recovered by Albion in accordance with clause 7.4 of that contract as amended by

the letter of 24 October 2002. Paragraph 123 of the Particulars of Claim notes that Shotton Paper is not a party to the proceedings and then states that if the Tribunal “is of the view that it would be appropriate for Shotton to be joined to this litigation” that can be considered at the first case management conference.

23. No application has been made by Shotton Paper to join the proceedings and the issue has not been raised by the parties thus far for the Tribunal’s attention. It is for the parties and not for the Tribunal to decide whether it is necessary or desirable for Shotton Paper to be a party in this case. The Tribunal has formed no view on the matter and will not do so unless or until the matter comes before us for our decision.
24. Finally, we referred at the outset of this ruling to the Glossary attached and the desirability of the parties and the Tribunal using common terminology. We invite Albion, before finalising the Amended Particulars of Claim, to include such revisions as are necessary to bring the pleading into line with the Glossary.

Conclusion and further directions

25. Albion’s application to amend its Particulars of Claim will be allowed to the extent described below. The amendments referred to below are in addition to those which reflect the Strike Out Ruling.
26. Permission is granted in respect of the proposed amendments to the first and penultimate pages (to reflect changes to Albion’s legal representatives), and in respect of the proposed amendments to the following paragraphs (using the old paragraph numbering unless otherwise stated):
 - 4, 6, 7, 15(3), 34, 37, 38, the amendment to the heading before paragraph 40, 43, 51, the amendment to the heading before paragraph 63, 63, 64 – 72, 76, 86, the insertion of the new 78, 93, 100, 102, 107, 112, 114, 117, 120, the amendment to the heading before paragraph 124, 125, the amendment to the heading before paragraph 135, 135, 136, 137 and 138.

27. In addition:

- (a) As regards the proposed amendment to paragraph 101, permission is granted except that the words in the first parentheses and the words in the final sentence should not refer to the basis of a continuing bulk supply arrangement;
- (b) As regards the proposed new paragraph 93 (to be inserted after existing paragraph 105) permission is granted for the wording in paragraph 93(1) but not for that in paragraph 93(2);
- (c) As regards the proposed new paragraph 98 (to be inserted after existing paragraph 109), the proposed amendment to paragraph 118 and the proposed amendment to paragraph 124, permission is granted except for the references therein to the bulk supply arrangements.

28. The Tribunal refuses permission for the amendments to paragraph 110.

29. Dŵr Cymru's application to strike out is dismissed.

30. The Tribunal will in due course draw up an order giving effect to this ruling. Albion should lodge with the Tribunal by 17 June 2011 a draft version of the Particulars of Claim amended in accordance with this judgment (and with the Strike Out Ruling) so that can be attached to the order. That version should include the changes needed to bring the pleading into line with the Glossary.

31. In that Order, or shortly thereafter, the Tribunal will make directions for the further conduct of the proceedings, setting a timetable for the service of the Defence and Reply, disclosure and inspection of documents and service of witness statements and experts reports (if any). The parties should provide the Tribunal with an agreed draft timetable by 24 June 2011. In the event they are unable to agree they should provide the Tribunal by that date with their respective proposals for the directions the Tribunal should make.

Vivien Rose

Sheila Hewitt

Graham Mather

Charles Dhanowa
Registrar

Date: 9 June 2011

ALBION WATER LIMITEDClaimant

- v -

DŴR CYMRU CYFYNGEDIGDefendant

GLOSSARY OF TERMS

The Tribunal judgments in the current proceedings: Case 1166/5/7/10	
The Rule 40 Judgment	<i>Albion Water Ltd v Dŵr Cymru Cyfyngedig</i> [2010] CAT 30 (8 December 2010)
The Strike Out Ruling	<i>Albion Water Ltd v Dŵr Cymru Cyfyngedig</i> [2011] CAT 1 (21 February 2011)
The Tribunal judgments in the infringement proceedings: Case 1046/2/4/04	
The Interim Judgment	<i>Albion Water Ltd v Water Services Regulation Authority</i> [2005] CAT 40 (22 December 2005)
The 1046 Main Judgment	<i>Albion Water Ltd v Water Services Regulation Authority</i> [2006] CAT 23 (6 October 2006)
The Margin Squeeze Judgment	<i>Albion Water Ltd v Water Services Regulation Authority</i> [2006] CAT 36 (18 December 2006)
The 1046 Costs Judgment	<i>Albion Water Ltd v Water Services Regulation Authority</i> [2007] CAT 1 (8 January 2007)
The 1046 Permission to Appeal Judgment	<i>Albion Water Ltd v Water Services Regulation Authority</i> [2007] CAT 8 (2 February 2007)
The 1046 Court of Appeal Judgment	<i>Dŵr Cymru Cyfyngedig v Albion Water Ltd</i> [2008] EWCA Civ 536 (22 May 2008)
The Unfair Pricing Judgment	<i>Albion Water Ltd v Water Services Regulation Authority</i> [2008] CAT 31 (7 November 2008)
The Remedies Judgment	<i>Albion Water Ltd v Water Services Regulation Authority</i> [2009] CAT 12 (9 April 2009)
Other Terms	
The Tribunal's Rules	The Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372)
The Chapter II prohibition	The prohibition of the abuse of a dominant position contained in section 18(1) of the Competition Act 1998
First Access Price	The price offered by Dŵr Cymru for

	common carriage in March 2001, namely 23.2p/m ³
Second Bulk Supply Agreement	The agreement entered into between Albion and Dŵr Cymru on 10 March 1999 for the supply of non-potable water via the Ashgrove System.
Second Bulk Supply Price	The price payable by Albion under the Second Bulk Supply Agreement, namely 26p/m ³
Ashgrove System	The system of pipes owned and operated by Dŵr Cymru through which water is supplied to Shotton Paper and Corus Shotton
Shotton Paper	A paper-making plant situated on Deeside supplied with non-potable water via the Ashgrove System
Corus Shotton	A steel producer supplied with non-potable water via the Ashgrove System
United Utilities	A water undertaker and supplier of non-potable water from the River Dee at Heronbridge to Dŵr Cymru
p/m ³	Pence per cubic metre