



[2013] CAT 22

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1173/5/7/10

BETWEEN:

- 1) DEUTSCHE BAHN AG
- 2) DB NETZ AG
- 3) DB ENERGIE GMBH
- 4) DB REGIO AG
- 5) S-BAHN BERLIN GMBH
- 6) S-BAHN HAMBURG GMBH
- 7) DB REGIO NRW GMBH
- 8) DB KOMMUNIKATIONSTECHNIK GMBH
- 9) DB SCHENKER RAIL DEUTSCHLAND AG
- 10) DB BAHNBAU GRUPPE GMBH
- 11) DB FAHRZEUGINSTANDHALTUNG GMBH
- 12) DB FERNVERKEHR AG
- 13) DB SCHENKER RAIL (UK) LTD
- 14) LOADHAUL LIMITED
- 15) MAINLINE FREIGHT LIMITED
- 16) RAIL EXPRESS SYSTEMS LIMITED
- 17) ENGLISH WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED
- 18) EMEF - EMPRESA DE MANUTENÇÃO DE EQUIPAMENTO FERROVIÁRIO SA
- 19) CP - COMBOIOS DE PORTUGAL E.P.E.
- 20) METRO DE MADRID, S.A.
- 21) ~~ANGEL TRAINS LIMITED~~
- 2122) NV NEDERLANDSE SPOORWEGEN
- 2223) NEDTRAIN B.V.
- 2324) NEDTRAIN EMATECH B.V.
- 2425) NS REIZIGERS B.V.
- 2526) DB SCHENKER RAIL NEDERLAND N.V.
- 2627) TRENITALIA, S.P.A.
- 2728) RETE FERROVIARIA ITALIANA, S.P.A.
- 2829) NORGES STATSبانER AS
- 2930) EUROMAINT RAIL AB
- 3034) GÖTEBORGS SPÅRVÄGAR AB

Claimants

-v-

- 1) MORGAN ADVANCED MATERIALS PLC (formerly MORGAN CRUCIBLE COMPANY PLC)
- 2) SCHUNK GMBH
- 3) SCHUNK KOHLENSTOFFTECHNIK GMBH
- 4) SGL CARBON SE (formerly SGL CARBON AG)
- 5) MERSEN SA (formerly LE CARBONE-LORRAINE SA)
- 6) HOFFMANN & CO ELEKTROKOHLE AG

Defendants

ORDER OF THE CHAIRMAN (PERMISSION TO APPEAL)

UPON the Tribunal handing down its Ruling of 15 August 2013 ([2013] CAT 18, the “Ruling”), which lifted the stay over the claims brought by the 13th-17th Claimants (the “UK Claimants”) against the 2nd-6th Defendants (the “Defendants”)

AND UPON the Chairman of the Tribunal making an Order dated 29 August 2013 ([2013] CAT 20, the “UK Claims Order”) giving certain case management directions in relation to the UK Claimants’ claims

AND UPON considering the applications for permission to appeal the Ruling made the Fourth Defendant (the “SGL PtA Application”) and the Fifth Defendant (the “Mersen PtA Application” and, together with the SGL PtA Application, the “PtA Applications”), both dated 6 September 2013, which also both sought a stay of the proceedings until the PtA Applications, and any ensuing appeals, are finally determined

AND UPON reading the 2nd, 3rd and 6th Defendants’ letter dated 6 September 2013 indicating that they support the PtA Applications and agree they should be granted, in the expectation that any orders or judgments to that effect would apply equally to the 2nd, 3rd and 6th Defendants

AND UPON considering the submissions of the UK Claimants, filed on 13 September 2013, opposing the PtA Applications and the replies filed by the Fourth and Fifth Defendants on 17 September 2013

IT IS ORDERED THAT:

1. Permission to appeal be refused
2. The applications for a stay of the UK Claimants’ claims be refused

REASONS

1. The Tribunal has considered the PtA Applications and has unanimously concluded that they should be refused. The Tribunal does not consider that there is a reasonable prospect of an appeal against the Ruling succeeding, nor that there is some other compelling reason why such an appeal ought to be heard. As such, the PtA Applications do not satisfy either limb of the test for granting permission to appeal, which is set out in Civil Procedure Rule 52.3(6) and applied by analogy in this Tribunal.
2. Both PtA Applications submit that the Tribunal erred in its approach to the question of whether there is jurisdiction over the UK Claimants’ claims pursuant to Article

5(3) of Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “Brussels Regulation”).

3. The test for establishing whether a claimant has a given jurisdictional base is that of a “good arguable case” (Ruling, paragraphs 30 to 32). As noted at paragraph 44(3)(i) of the Ruling, for example, the “good arguable case” test is a flexible one, and it is not one that required the Tribunal, at this stage, to determine the existence or implications of the passing-on defence one way or the other. Rather, the Tribunal had to determine that there was a good arguable case that there was jurisdiction under Article 5(3) of the Brussels Regulation. The Tribunal unanimously considered that the threshold was met in this instance and does not now consider that the Defendants have demonstrated otherwise in the PtA Applications.
4. Several points, however, deserve particular note. First, the Tribunal did not “attribute” the sales made by the Defendants’ subsidiaries to the Defendants (Mersen PtA Application, paragraphs 17-20) in the sense of treating them as actions *of* the Defendants. Rather, it held that (for the purposes of the jurisdictional questions arising in this hearing) the Defendants were liable for those sales (Ruling, paragraph 44(1)).
5. Secondly, the Ruling does not conflict with the Tribunal in *Emerson Electric* [2011] CAT 4 (as contended in the Mersen PtA Application, paragraphs 19-22), which addressed the question whether a company that was not an addressee of the relevant decision establishing the infringement could be a defendant to a section 47A claim. That is plainly a different question from the one under consideration in the Ruling.
6. Thirdly, the Mersen PtA Application objects (at paragraphs 26-28) that the Tribunal held there to be jurisdiction without any evidence as to the location or terms of the sales at issue. The Tribunal notes that, notwithstanding that the case has not yet reached the stage of disclosure and exchange of witness evidence, it had before it a witness statement given on behalf of the UK Claimants. The Defendants criticised that statement in a number of respects, but did not put in any evidence challenging it and the Tribunal concluded that the evidence before it was sufficient to establish a good arguable case that there was jurisdiction under Article 5(3) of the Brussels Regulation.

7. The Mersen PtA Application, supported by the other Defendants, also seeks permission on a number of other bases.
8. First, it is submitted that, having held in previous Orders (in particular the Order of 13 September 2012 ([2012] CAT 24)) that a stay ought to be imposed and maintained, the Tribunal was wrong to “revisit” the question in the Ruling (Mersen PtA Application, paragraphs 6-12). It is to be noted that the Order of 13 September 2012 granted the parties liberty to apply and so expressly envisaged that the matter might be “revisited”. In any event, the issues considered in the previous Order were plainly different from those determined in the Ruling. In particular, the former related to the claims brought by all the Claimants in these proceedings and not merely those of the UK Claimants against the Defendants on a different jurisdictional basis, and the timetable for the hearing of the First Defendant’s appeal to the Supreme Court has become clearer.
9. Secondly, it is contended that the Tribunal erred in ruling that there was no risk of the Defendants submitting to the jurisdiction of the Tribunal over all claims in these proceedings if the stay were lifted over the UK Claimants’ claims against the Defendants and matters allowed to proceed, subject to the Defendants as yet undetermined jurisdictional objections (Mersen PtA Application, paragraphs 30-33). The Tribunal considered that the judgment of the Court of Justice in *Elefanten Schuh* was clear (and was confirmed by the drafting changes made to the English language version of the Brussels Regulation in light of *Elefanten Schuh*) and found its view to be confirmed by the judgments given in the Court of Appeal in *Harada*. Those authorities are unequivocal and the Tribunal does not consider there is any real prospect of the Defendants demonstrating otherwise.
10. The Tribunal further notes that a similar interpretation was given to the *Elefanten Schuh* case by Michael Briggs QC, as he then was, sitting as a deputy judge of the High Court in *IBS Technologies (PVT) Ltd v APM Technologies SA* [2003] All ER (D) 105 (Apr), where it was held at [24] that:

“The thrust of *Elefanten Schuh* is ... that where a defendant launches his challenge to the jurisdiction in any particular contracting state by a method permitted by its rules of civil procedure, and does so not later than the time when he first advances his defence on the merits, then he does not thereby enter an appearance, nor by his conduct confer jurisdiction on the requested court.”
11. Finally, it is argued that the Tribunal erred in exercising its case management powers to lift the stay (Mersent PtA Application, paragraphs 34-38). The Tribunal notes that that decision constituted the exercise of a discretion by it and considers that it exercised those powers appropriately for the reasons given in the Ruling.

12. As noted, the PtA Applications also contain applications for a stay of the proceedings pending the final determination of the PtA Applications, and any ensuing appeal (SGL PtA Application, paragraph 19; Mersen PtA Application, paragraphs 41-44). Those applications are made on the basis that, if the proceedings are not stayed, the Defendants will be required to take certain actions that might amount to steps in the proceedings for the purposes of Article 24 of the Brussels Regulation, thereby rendering any appeal nugatory.
13. The Tribunal is unanimously of the view that the applications for a stay should be rejected.
14. First, as noted above, the Tribunal does not see any real prospect of the Defendants establishing that it erred in the Ruling as to the effect of Article 24.
15. Secondly, there remains almost a month before the date on which the Defendants are required to file their defences to the UK Claimants' claims, in accordance with the UK Claims Order. The Defendants having done the work in preparing the PtA Applications as filed with the Tribunal, there should be sufficient time for the Defendants, if so advised, to renew their applications before the Court of Appeal and seek a stay from that Court on an urgent basis.
16. Thirdly, the Tribunal notes the suggestion that various other steps mandated by the Tribunal might cause the Defendants to take steps in the proceedings within the meaning of Article 24. Given that these steps involved *inter partes* communication with the Claimants regarding an application being made by the Claimants to amend their Claim Form (see paragraphs 1-3 of the UK Claims Order), it is difficult to see how (even if the Tribunal erred in its interpretation of *Elefanten Schuh* and the cases following) this could amount to steps in the proceedings. The suggestion amounts to a proposition that practically any form of *inter partes* correspondence that is not directly related to a jurisdictional objection amounts to a step in the proceedings. The proposition only has to be stated to be rejected. Indeed, if it is right (and the Tribunal is firmly of the view that it is not), then the Tribunal notes that the Defendants have already taken several actions, including addressing submissions to the Tribunal on the appropriate case management directions to be given for the UK Claimants' claims, which resulted in the UK Claims Order, that might, on this basis, be considered to constitute a step in the proceedings (contrary to the view of the Tribunal).
17. The Tribunal also notes, although it does not consider the point to be determinative, that to grant the stay sought by the Defendants would effectively deprive the UK

Claimants of any benefit of the Ruling. If such a stay is to be ordered, it would be more appropriately ordered by the Court of Appeal.

Marcus Smith QC
Chairman of the Competition Appeal Tribunal

Made: 24 September 2013
Drawn: 24 September 2013