Neutral Citation Number: [2013] EWCA Civ 1484

Case No: C3/2013/2893/2895/3063

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Marcus Smith QC
[2013] CAT 18

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2013

Before :

LORD JUSTICE RICHARDS
and
LORD JUSTICE TOMLINSON

- -

Between :

(1) Deutsche Bahn AG	**Claimants**
(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	**Respondent**
(14) Loadhaul Limited	**Respondent**
(15) Mainline Freight Limited	**Respondent**
(16) Rail Express Systems Limited	**Respondent**
(17) DB Schenker Rail International Limited (Formerly, English Welsh & Scottish Railway International Limited	**Respondent**
(18) EMEF – Empresa de Manutencão de Equipamento Ferroviário SA	
(19) CP – Comboios de Portugal EPE	
(20) Metro de Madrid SA	
~~**(21) Angel Trains Limited**~~	
(21) NV Nederlandse Spoorwegen	
(22) Nedtrain BV	
(23) Nedtrain Ematech BV	
(24) NS Reitzigers BV	
(25) DB Schenker Rail Nederland NV	
(26) Trenitalia SPA	

(27) Rete Ferroviaria Italiana SPA
(28) Norges Statsbaner AS
(29) Euromaint Rail AB
(30) Göteborgs Spårvägar AB

- and -

(1) Morgan Advanced Materials plc (formerly Morgan Crucible Company plc)	**Defendant**
(2) Schunk GmbH	**Appellant**
(3) Schunk Kohlenstofftechnik GmbH	**Appellant**
(4) SGL Carbon SE (formerly SGL Carbon AG)	**Appellant**
(5) Mersen SA (formerly Le Carbone-Lorraine SA)	**Appellant**
(6) Hoffmann & Co Elektrokohle AG	**Appellant**

Mark Hoskins QC (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **4th Appellant/Defendant**
Daniel Beard QC and **Sarah Ford** (instructed by **Hogan Lovells International Ltd**) for the **5th Appellant/Defendant**
Matthew Weiniger (instructed by **Herbert Smith Freehills LLP**) for the **2nd, 3rd and 6th Appellants/Defendants**
Jon Turner QC and **Rob Williams** (instructed by **Hausfeld & Co LLP**) for the **Respondents/Claimants**

Hearing date : 30 October 2013

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Approved Judgment

Lord Justice Tomlinson :

1. These applications concern proceedings pending before the Competition Appeal Tribunal, "the Tribunal". The fourth and fifth Defendants, SGL Carbon SE, "SGL" and Mersen SA, "Mersen", seek permission to appeal against a ruling made by the Tribunal on 15 August 2013 lifting a stay which had earlier been imposed in respect of all claims brought against them. By its ruling the Tribunal permitted the claims made against the second to sixth Defendants by the thirteenth to seventeenth Claimants, "the UK Claimants", to proceed. It did so upon the basis that the Tribunal derived jurisdiction to entertain those claims from Article 5.3 of Council Regulation EC 44/2001 of 22 December 2000, "the Regulation". There are thirty Claimants in all. All of the Claimants assert that the Tribunal has jurisdiction to entertain their claims pursuant to Article 6.1 of the Regulation, the first Defendant, Morgan Advanced Materials plc, "Morgan", being domiciled in England and thus constituting the "anchor defendant".

2. Belatedly the second, third and sixth Defendants have also applied, out of time, for permission to appeal on the same grounds as the fourth and fifth Defendants.

3. By a decision of the European Commission dated 3 December 2003, "the Decision", the Commission found that the seven addressees of the Decision had infringed Article 81(1) of the EC Treaty (now Article 101(1) of the Treaty on the Functioning of the European Union) in relation to electrical and mechanical carbon and graphite products.

4. On the basis of that decision, the first to thirtieth Claimants brought a "follow on" claim for damages in the Tribunal against six of the seven addressees of the Decision under s.47A of the Competition Act 1998. The UK Claimants are domiciled in the United Kingdom. The other Claimants are domiciled in other Member States of the European Union.

5. The claim is essentially for damages in respect of the alleged "overcharge", i.e. the difference between the amounts actually paid by the Claimants for relevant products and the amounts that they claim they would have paid in the absence of the cartel.

6. Morgan is the only Defendant domiciled in England. It sought an order that the claim against it had been brought out of time. It was successful before the Tribunal but unsuccessful before the Court of Appeal – see [2012] EWCA Civ 1055, a decision handed down on 31 July 2012. Morgan obtained permission to appeal to the Supreme Court. The hearing is listed for 11 and 12 March 2014. If Morgan's appeal is successful, there will be an issue as to whether the claimants can rely upon Article 6.1 of the Regulation to found jurisdiction against the second to sixth Defendants, "the non-UK Defendants". As I understand it, if Morgan's appeal is unsuccessful it is not disputed that the Tribunal will enjoy jurisdiction to entertain all of the claims currently brought in the proceedings, but I may be wrong about that. It is possible that paragraph 21 of the Tribunal's Ruling is misleading and that there is a missing "not" which would reverse the sense of what is there recorded. For present purposes it does not matter.

7. The second, third, fourth, fifth and sixth Defendants have all filed applications challenging the jurisdiction of the Tribunal to hear the claims against them.

8. By orders dated 26 July 2011 and 13 September 2012 the Tribunal stayed the proceedings before it pending judgment by the Supreme Court in respect of Morgan's appeal.

9. By an application dated 13 June 2013 the UK Claimants sought an order from the Tribunal lifting the stay in relation to their claims against all of the Defendants except for Morgan, i.e. the non-UK Defendants. The basis for the application was that, regardless of the outcome of Morgan's appeal to the Supreme Court, the Tribunal would have jurisdiction in respect of the claims by the UK Claimants against the non-UK Defendants under Article 5.3 of the Regulation because, putting it broadly, the relevant harm was suffered in the United Kingdom.

10. Article 5.3 of the Regulation provides:-

> "A person domiciled in a Member State may, in another Member State, be sued:
>
> . . .
>
> 3. in matters relating to tort, delict or quasi-delict in the courts for the place where the harmful event occurred or may occur;"

11. In accordance with Case 21/76 *Bier BV v Mines de Potasse d'Alsace SA* [1976] ECR 1735 at paragraphs 12-25, the "place where the harmful event occurred" has two limbs, i.e.

    a) the place where the event which gave rise to the damage occurred; and/or

    b) the place where the damage occurred.

12. In the present case, the UK Claimants rely only upon the second limb.

13. In its Ruling the Tribunal found that it did have jurisdiction to hear the claims of the UK Claimants against the non-UK Defendants under Article 5.3 of the Regulation. It also granted the application to lift the stay in relation to the claims by the UK Claimants against the non-UK Defendants. In its Directions Order it made directions in relation to the filing and serving of statements of case in relation to those claims and for the holding of a Case Management Conference.

14. SGL and Mersen sought permission to appeal from the Tribunal. This was refused in a reasoned order dated 24 September 2013.

15. Article 5.3 provides a connecting factor linking the defendant's act to the legal district to which is to be assigned jurisdiction in respect of that act – cf *Melzer v MF Global UK Ltd* [2013] 3 WLR 883. Here, the relevant connecting factor is the place where the damage for which the defendant is sought to be made responsible occurred.

16. The central question raised on these applications is whether it is arguable that it is only damage suffered by a direct purchaser from a cartelist which is sufficient to found jurisdiction pursuant to Article 5.3. The Applicants called this type of damage

"direct harm". The Applicants submit that damage suffered by an indirect purchaser, or "indirect harm", is jurisdictionally irrelevant.

17. The damage relied upon by the UK Claimants, or some of it, is said by the Applicants to be indirect in two different senses. First, it is said that a purchase from a subsidiary of a cartelist does not give rise to direct harm in the purchaser. I did not understand the Applicants to be suggesting that a cartelist can avoid liability in damages by implementing a cartel through subsidiaries, but rather that damage suffered in consequence of a purchase from a subsidiary which was not an addressee of the Commission's infringement decision could not be relied upon by the purchaser in order to found jurisdiction under Article 5.3 in respect of a claim to recover such damage, or compensation, from the cartelist.

18. Secondly, it is said that some of the claims which the UK Claimants wish to bring relate to their purchases from either Railpart or Unipart. Railpart acquired products for the British Railways Board before privatisation and for the privatised companies after 1994, in due course becoming Unipart. I should have mentioned that the cartel was found to have subsisted between 1988 and 1999. Purchases by the UK Claimants from Railpart/Unipart are characterised by the Applicants as indirect purchases, rendering the UK Claimants indirect victims of harm initially and directly suffered by the direct purchaser, Railpart/Unipart. Again, it is argued by the Applicants that the indirect harm thus suffered by the UK Claimants cannot be relied upon in order to found jurisdiction under Article 5.3 against the cartelists.

19. As I understand the evidence upon which the UK Claimants relied before the Tribunal in order to found jurisdiction, all of the damage in respect of which they seek compensation, whether characterised as direct or indirect, and by whomsoever first suffered, was damage which occurred in the UK.

20. I can see no justification for imposing upon Article 5.3 a gloss to the effect that, in order to be a relevant connecting factor between defendant and putative jurisdiction, a harmful event must be one of which the putative claimant is an immediate victim. That would seem to involve a search for a connecting factor between the claimant and the putative jurisdiction, rather than a connecting factor between the defendant and the putative jurisdiction, which is what the regulation is concerned with.

21. I do not consider it arguable that the authorities cited to us have this surprising effect. Those cases, principally case C-220/88 *Dumez France and Another v Hessische Landesbank* [1990] ECR 1-74 and case C-364/93 *Antonio Marinari v Lloyds Bank plc and Another* [1995] ECR 1-2719, are essentially concerned with situations where the adverse consequences of an event which has already caused damage in legal district A are additionally felt in legal district B. Thus paragraph 14 of the ruling of the ECJ in *Marinari* reads:-

> "Whilst it has thus been recognised that the term "place where the harmful event occurred" within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere."

That case was of course concerned with the Brussels Convention, but there is no relevant distinction for present purposes between that and the Regulation.

22. We were much pressed by the Applicants with paragraph 20 of the judgment of the ECJ in *Dumez* which reads:-

> "It follows from the foregoing considerations that, although by virtue of a previous judgment of the Court (in *Mines de potasse d'Alsace* cited above), the expression "place where the harmful event occurred" contained in Article 5(3) of the Convention may refer to the place where the damage occurred, the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event."

However in my judgment the Applicants are misreading that paragraph. The court is not there saying that it is only the immediate victim of a harmful event who may rely upon that harmful event as founding jurisdiction pursuant to Article 5.3. That would be a surprising conclusion to reach about a decision designed to establish a connecting factor between the putative jurisdiction and the intended defendant. That was a case in which French companies suffered loss following the insolvency of their subsidiaries in Germany allegedly in consequence of the wrongful cancellation of banking facilities by German banks. The question posed for decision by the ECJ was "whether the expression "place where the damage occurred" as used in the judgment in *Mines de Potasse d'Alsace* may be interpreted as referring to the place where the indirect victims of the damage ascertain the repercussions on their own assets." The conclusion of the court was that the place identified by Article 5.3 is the place where the event giving rise to the damage, and entailing liability, directly produced its harmful effects upon the immediate victim of that event. Thus if the lending banks had been domiciled in Italy rather than in Germany, the French Claimants could have relied upon Article 5.3 as founding German jurisdiction over the Italian banks. What the French Claimants could not do was to rely upon their indirect damage suffered in France to establish the jurisdiction of the French courts over the German banks. The point perhaps emerges with greater clarity from the Opinion of Advocate General Darmon in the same case, [1990] ECR 1-62 at paragraph 52:-

> "Accordingly, the foregoing considerations lead me to consider that the place where the damage occurs is, for indirect victims, the place where the *initial* damage manifested itself, in other words the place where the damage to the *direct* victim occurred."

23. In my judgment therefore the principal contention upon which these applications for permission to appeal is founded is unsound. The argument has no real prospect of success. That being so, the argument about "good arguable case" falls away. I would only say, out of fairness to the Tribunal, that I am far from convinced that it did in fact adopt the "good arguable case" approach when interpreting the Regulation. It seems to me that the Tribunal adopted that approach only in relation to the question whether the Claimants had a substantive cause of action and, at paragraph 44(3), to the

question whether all the losses, direct and indirect, had been suffered in the UK. That latter question was a question of fact, not a question of law as to the nature of the facts which required to be established in order to invoke Article 5.3.

24. I do not consider that we should grant permission to appeal on the question whether the Tribunal applied the wrong test in deciding whether to revisit and reopen its previous stay orders.

25. The background to this point is that the Tribunal's procedure for dealing with applications for permission to serve out of the jurisdiction is not the same as that prescribed by the Civil Procedure Rules and is evidently relatively informal. In its Ruling the Tribunal explains the position thus:-

> "**Failure to Plead Jurisdiction**
>
> 46. It is fair to say that the UK Claimants did not, when proceedings were commenced, intend to rely on Article 5(3) of the Brussels Regulation. As has been described, the jurisdictional base that all claimants were relying on was Article 2 combined with Article 6(1).
>
> 47. The (before this Tribunal) successful application against Morgan put paid to this and so, in time, the UK Claimants have identified an additional/alternative jurisdictional base. Does the fact that this jurisdictional base has been identified late matter? We hold that it does not.
>
> 48. In marked distinction to the Civil Procedure Rules – which contain many provisions as to what must be done when serving out of the jurisdiction, even in those cases where permission to serve out is not required – the Tribunal's rules adopt a relatively informal course, whereby a claimant seeking to serve a defendant out of the jurisdiction, applies to the Tribunal to do so. In this case, by an order dated 20 December 2010, permission to serve out of the jurisdiction was given. Obviously, that order cannot – and does not – preclude the defendants from contesting jurisdiction; but that is a different matter from in some way asserting that the claimants have failed properly to state in their originating claim, the basis on which jurisdiction is asserted.
>
> 49. It is the UK Claimants' case – which we accept – that the facts pleaded in the Amended Claim Form (amended pursuant to the Tribunal's order of 19 April 2011) are quite sufficient to ground jurisdiction under Article 5(3) of the Brussels Regulation, even though that provision is not expressly referred to in the pleading."

26. We were not shown the Tribunal's rules and it is not the purpose of this application to call them into question. This is not the occasion to consider whether the rules are in appropriate form, not least since we have not been shown them. Moreover, there may

be features of the Tribunal's jurisdiction of which I am ignorant which render it inappropriate to follow the procedures mandated by the CPR. I would merely observe that where one is concerned with the establishment of jurisdiction and thus with the establishment of the precise ambit of the dispute over which the Tribunal is invited to assume jurisdiction, there is something to be said for requiring a claimant to pin his colours to the mast so that it is clear from the outset over precisely what claims the Tribunal has assumed jurisdiction.

27. Against this background however, it is in my judgment difficult to elevate the Tribunal's approach to the belated reliance on Article 5.3 as involving a question of principle. The Tribunal has not yet embarked upon a consideration of the merits of the underlying dispute. The Tribunal gives its reasons which are now challenged under the rubric "whether there is anything in the prior conduct of the UK Claimants in relation to the stay to preclude a lifting of the stay?" In the light of the relative informality of the procedure to which I have already drawn attention, and the lack of progress towards substantive determination of the dispute, the Tribunal's conclusion is not altogether surprising. The Tribunal also took the view, in effect, that the time-scale involved in the appeal to the Supreme Court represented a material change of circumstances. I am not sure that I would necessarily have taken the same view, but my mindset would have been that of a judge used to the rigorous application of the court's rules relating to service out of the jurisdiction. In my judgment it is inappropriate for this court to be invited to interfere in what is essentially a case management decision taken by the Tribunal in the light of its own "relatively informal" procedures. An appeal on that ground has no real prospect of success.

28. That leaves only the question whether it is arguable that by taking steps in the proceedings, so far as concerns the claims of the UK Claimants alone, at the express direction of the Tribunal, the non-UK Defendants will be found to have "entered an appearance" thereby investing the Tribunal with jurisdiction pursuant to Article 24 of the Regulation so far as concerns the claims against them by the non-UK Claimants. The Tribunal thought this risk fanciful in the light of the decision of the ECJ in Case 150/80, *Elefanten Schuh GmbH v Jaqumain* [1981] ECR 1671 and of this court in *Harada Limited v Turner* [2003] EWCA Civ 1695. So do I. As the Tribunal observed at paragraph 66(3) of its Ruling it is permissible in terms of Article 24 of the Regulation to contest jurisdiction whilst at the same time contesting the merits, provided that the intention to contest jurisdiction is evinced at the outset. The non-UK Defendants are being required to deal with the merits of the claim of the UK Claimants. I do not regard it as seriously arguable that by so doing they will be submitting to the jurisdiction of the Tribunal in respect of claims by the non-UK Claimants, a fortiori where the jurisdiction of the Tribunal to entertain those claims is sought to be established on a different basis and where the non-UK Defendants have maintained a clear and consistent challenge to that jurisdiction from the outset. I would refuse permission to appeal on this ground also.

29. In these circumstances it is unnecessary to decide whether the second, third and sixth Defendants should be granted an extension of time within which to seek permission to appeal on the same grounds as the fourth and fifth Defendants. Their application too must fail.

30. It follows that I would dismiss these applications for permission to appeal and lift the stay which was imposed upon the Tribunal's Order of 29 August 2013 by Kitchin LJ pending determination of these applications.

Lord Justice Richards :

31. I agree.

32.

33. 4839-8499-8679, v. 1

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Between :

(1) Deutsche Bahn AG	**Claimants**
(2) DB Netz AG	
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(1) Morgan Advanced Materials plc (formerly Morgan Crucible Company plc)	**Defendant**
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Hearing date : 30 October 2013
- -

Ruling on Costs

Lord Justice Tomlinson :

1. This is the ruling of the court.

2. We accept that the relatively common case of an oral application for permission to appeal directed to be heard "on notice" to the respondent is not dealt with in PD52C para 20(2). In such circumstances the court does not "direct" the respondent either to file submissions or to attend the hearing, although frequently if not usually such a hearing is directed to be "on notice" to the respondent because the court anticipates that it may well be assisted by submissions from the respondent.

3. The case may be considered in the circumstances to fall within PD52C para 20(1) so that an order for costs will not normally be made in favour of respondents.

4. On the other hand it is clear, and not we think disputed, that the court has a discretion whether to depart from the normal position and to award the Respondents their costs. If that proposition is disputed, we hold that we have such a discretion.

5. It is very unhelpful for parties to mischaracterise their opponents' position in the grotesque manner achieved by Counsel for the Fifth Defendant at paragraphs 3 and 4 in their Submissions on Costs. Neither at paragraph 32 of their *Jolly v Jay* submissions nor elsewhere did the Claimants either "specifically ask" that the permission applications be dealt with at an oral hearing nor did they "press for" an oral hearing. Paragraph 32 speaks for itself.

6. The submissions made by Mr Turner QC, both in writing but more particularly orally at the hearing, were of enormous assistance to us in enabling us properly to understand the implications of the Defendants' arguments. Without the benefit of those submissions it is possible that the parties would have been condemned to incur the costs of a substantial substantive appeal the outcome of which we can now be confident would be dismissal of the Defendants' arguments. This is complex commercial litigation between substantial parties in which significant sums are sought by way of compensation. We have no hesitation in concluding that the Claimants/Respondents should be awarded their costs.

7. Ordinarily a party will not recover the costs of submitting *Jolly v Jay* submissions but here those submissions served also as the Respondents' skeleton argument for the purpose of the oral hearing.

8. We accept the submission that the costs sought by the Respondents are unreasonable and disproportionate in amount. Summary assessment is a blunt instrument. We assess the Respondents' recoverable costs of and occasioned by the Appellants' unsuccessful applications for permission to appeal in the sum of £25,000 net of VAT.

9. We do not understand the Respondents to have suggested that each Appellant group should be liable for a third of the total costs – see paragraph 13 of the submissions of Mr Mark Hoskins QC for the Fourth Defendant. We see no reason to depart from the normal form of order which renders the Appellants jointly and severally liable for the Respondents' costs. There is no basis whatever for the suggestion by the Second, Third and Sixth Defendants that they should bear no costs liability. They sought to be put in the same position as the Fourth and Fifth Defendants so far as concerns the

permission to appeal applications and they should bear the same liability in respect of the costs thereof.

10.

11. 4817-8718-3383, v. 1