Neutral citation [2014] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos.: 1224/6/8/14

4 April 2014

Before:

ANDREW LENON Q.C.
(Chairman)
DR CLIVE ELPHICK
PROFESSOR GAVIN REID

Sitting as a Tribunal in England and Wales

B E T W E E N:

LAFARGE TARMAC HOLDINGS LIMITED

Applicant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (APPLICATION TO ADMIT EVIDENCE)

A P P E A R A N C E S

Lord David Pannick QC and Mr. David Segan (instructed by Slaughter and May) appeared on behalf of the Applicant (Lafarge Tarmac Holdings Limited).

Mr. Rhodri Thompson QC, Mr. Rob Williams and Mr. Nicholas Gibson (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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THE CHAIRMAN:

1. This is an application by Lafarge Tarmac Holdings Limited ("Lafarge Tarmac") for permission to rely on expert evidence which it wishes to adduce in its application under section 179 of the Enterprise Act 2002 (the "Act"). The expert evidence consists of a report by Professor Chris Higson, who is Professor of Accounting Practice at the London Business School. The report sets out Professor Higson's opinions on certain findings in the Competition and Markets Authority's (the "CMA") final report of 14 January 2014 in its aggregates, cement and ready-mix concrete market investigation.[1] In particular, it addresses the CMA's findings as to the profitability of the cement industry in Great Britain and relevant customer benefits, and it includes a cost benefits analysis of the remedies. These issues are central to the issue of the proportionality of the divesture remedy.

2. Applications under section 179 of the Act are to be determined by the application of the same principles as would be applied by a court on an application for judicial review. The limited circumstances in which fresh evidence may be admitted in traditional judicial review proceedings were laid down by the Court of Appeal in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584 at p. 595. In that case, the Court of Appeal held, in summary, that fresh evidence should only be admitted: (i) to show what material was before the minister or the inferior tribunal; (ii) to determine a jurisdictional issue of fact; or (iii) to prove that the proceedings under review were tainted by misconduct.

3. The rationale for that restrictive approach is that the reviewing court should normally be directing its attention to the material available to the body whose decision is being reviewed rather than deciding the merits of the case *de novo*.

4. The admission of fresh expert evidence is subject to the same restrictive principles. In *R (Lynch) v General Dental Council* [2004] 1 All ER 1159, Collins J cited the observations of Hale LJ on an application for permission to appeal in that case in relation to the admission of expert evidence. She said as follows:

> "*In so far as it indicates that the panel may not have taken account of relevant evidence it adds nothing to what counsel may submit. In so far as it seeks to advance an opinion that the panel was irrational, it is usurping the function of the court. However attenuated, there are still distinctions between judicial review*

[1] While the Final Report was published by the Competition Commission, this organisation ceased to exist on 1 April 2014. Accordingly, its successor - the CMA - is the correctly named respondent to these proceedings.

and appeal on a point of fact which must be taken into account in the operation of any legislative scheme."

5. Collins J went on to hold by way of narrow qualification of the *Powis* guidelines that expert evidence may be admissible in very rare cases to explain technical terms or a technical process and its significance.

6. The *Powis* decision was followed by the Competition Appeal Tribunal (the "Tribunal") in the case of *BAA Limited v Competition Commission* [2012] CAT 3 which, like the present case, involved an application under section 179 of the Act. The Tribunal had to consider an application to admit expert evidence in support of an argument that the Competition Commission had failed to take into account a relevant consideration. At paragraph 80 of its judgment, the Tribunal held as follows:

> "*In our view, attempts to introduce detailed technical expert evidence in reviews under section 179 of the Act should be strongly discouraged and disallowed other than in very clear cases. Otherwise, there is an obvious danger that costs will be wastefully multiplied with no significant benefit for the speedy and efficient dispute resolution procedure which is supposed to be provided for by a section 179 review, as with judicial review generally ... were expert evidence to be admitted on the hearing of a review under section 179, there would be a real danger that time and effort would be expended in argument upon it which does not on proper analysis advance the legal arguments in the case, but operates rather as a distraction from them (and argument about expert reports is likely to be inconclusive as well, in the absence of the contending experts being called to give oral evidence and be cross-examined, which is not in the ordinary course a procedure appropriate in proceedings which are intended to be determined by reference to judicial review principles).*"

7. Notwithstanding the general reluctance of the courts to admit fresh evidence in judicial review proceedings, Lafarge Tarmac submit that Professor Higson's report should be admitted in this case on the following grounds:

   a. Expert evidence may be admitted where the court is required to review the proportionality of a proposed measure so as to enable the court properly to review the balance which the decision maker has to strike. Lafarge Tarmac relies, in particular, upon dicta of Buxton LJ in the case of *Southampton Port Health Authority v Seahawk Marine Foods Limited* [2002] EWCA Civ 54. That case involved the judicial review of a decision by a health authority to prohibit the import of a cargo of frozen shrimps from Vietnam on public health grounds. There was unchallenged expert evidence about the process for testing for pathogens in food. At paragraph 34, Buxton LJ held as follows:

> *"34. While in some cases it will be possible for a court to reach a conclusion on an issue of proportionality on the basis of commonsense and its own understanding of the process of government and administration, I doubt whether it will often be wise for a court to undertake that task in a case involving technical or professional decision-making without the benefit of evidence as to normal practices and the practicability of the suggested alternatives. That caution is reinforced by reference to the authority relied on by Seahawk in support of a proportionality approach in this case, the speech of Lord Steyn in R(Daly) v Home Secretary [2001] 2 AC 532 at paragraph 27. Lord Steyn said, in comparing a proportionality approach with the traditional "Wednesbury" review that:*
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> > *"the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions … the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relevant weight accorded to interests and considerations"*
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> *35. It is difficult to see how, in a case involving decision-making on a technical issue, the court can pursue either of those enquiries, and in particular the first of them, without the benefit of technical evidence."*

b. Professor Higson's report is designed to assist the Tribunal in reviewing the rationality and proportionality of the decisions of the CMA in the present case. The topics of profitability assessment and cost benefit analysis are both obviously technical areas in which the Tribunal is likely to benefit considerably from the assistance of an independent expert. Moreover, this case concerns a forced divestment of property requiring an intensive proportionality analysis. All of these matters mean that this is an exceptional case.

c. Professor Higson, though he has covered certain areas in his two earlier reports, has not had the opportunity to respond to the reasons given in the CMA's final report for rejecting his view.

d. If the CMA wishes to adduce expert evidence in response, it will be at liberty to do so.

e. If the CMA wishes to make submissions regarding the weight to be given to parts of the report, it will be at liberty to do so. Finally, it submits that Professor Higson's evidence is of considerable relevance and importance to the issue of proportionality, as well as the more general issue as to whether there is a lawful finding of adverse effect upon competition at all.

8. The CMA resists the application for permission to admit Professor Higson's report on the following grounds:

   a. The *Seahawk* judgment did not directly concern the admissibility of expert evidence in judicial review, and it does not assist Lafarge Tarmac in any event for the following reasons:

      i. *Seahawk* only envisaged expert evidence going to normal practice and the practicability of the suggested alternatives. It did not provide a *carte blanche* to rely on expert evidence whenever a proportionality argument is advanced.

      ii. *Seahawk* concerned a technical issue - the risk to health posed by a cargo of shrimps - which was obviously outside the technical expertise of the High Court. In contrast, the issues raised by Lafarge Tarmac's application fall within the standard terrain of applications to the Tribunal, which is an expert tribunal, whose members have expertise and experience in economics and regulated business.

      iii. The proportionality issue in *Seahawk* was a short technical point about whether there were less onerous measures the authority could have taken to address the risk which the shrimps posed to public health. There is no comparison with the present case in which the CMA's reasoning is set out in a lengthy report following detailed representations by all parties, including Professor Higson. Competing arguments as to profitability were fully ventilated at the administrative stage. The Tribunal already has before it the CMA's fully reasoned view on the point and the competing views of Professor Higson. It cannot seriously be suggested that there is a need for the parties to adduce yet further expert evidence in order to ensure that the Tribunal understands both sides of the proportionality argument.

   b. Professor Higson's report consists essentially of a series of substantive criticisms of the CMA's conclusions and methodology. The report seeks to usurp the function of the Tribunal and the expression of contrary opinion by a third party, however well qualified, does not provide grounds for judicial review.

9. Having given careful consideration to both sides' submissions, we have come to the conclusion that we should not allow the admission of the report of Professor Higson. We are not satisfied that there is a valid basis for departing from the generally restrictive

approach to the admission of fresh evidence in judicial review proceedings as laid down in the *Powis* case and endorsed in the *BAA* case.

10. Whilst, exceptionally, expert evidence may be admissible and useful as recognised in *Lynch* in order to enable the reviewing court to understand technical issues, it does not seem to us that this is such a case. The matters covered by Professor Higson's report are matters well within the expertise and experience of the Tribunal as a specialist tribunal with cross-disciplinary expertise in law, economics, business and accountancy. If expert evidence was admitted in this case it would open the doors to applications for admission of expert evidence in many other cases involving issues of proportionality. That would not be a welcome development in our view.

11. Nor do we consider that the fact that the expert evidence goes to issues of proportionality justifies a departure from the generally restricted approach laid down in *Powis*. In the *Seahawk* case, which was the main authority relied on by Lafarge Tarmac, the court held that the expert evidence would be useful because the Tribunal needed to be educated on a highly technical issue. As I say, no such need arises in the present case.

12. As well as being inconsistent with authority, we consider, with no disrespect to Professor Higson, that his further report would not be of any real assistance to the Tribunal in resolving the issues that it must decide in this case. We agree with the CMA that there is no need for further expert evidence in order to ensure that the Tribunal understands both sides of the proportionality argument. We already have the benefit of Professor Higson's earlier reports which cover much of the same ground as his latest report. Lord Pannick QC, for Lafarge Tarmac, will no doubt be able to make the same points that Professor Higson makes in his latest report very persuasively in his submissions.

13. It also seems to us that in so far as Professor Higson's report consists of criticisms of the CMA's conclusions and seeks to advance an argument that its decision was irrational, it is usurping the function of the Tribunal.

14. We also bear in mind what was said in the *BAA* case as to the risk of time and effort, and we would add costs, being expended on inconclusive arguments arising out of disputed expert reports. I say "disputed" because if we gave permission for Professor Higson's report to be admitted, we would give permission to the CMA to adduce its own expert report which, in all likelihood, would take issue with the contents of Professor Higson's report. Such arguments would not, on a proper analysis, advance the legal arguments in the case, but in all likelihood would operate as a distraction from them.

15. For all those reasons we dismiss the application.

Andrew Lenon Q.C. (Chairman) | Dr Clive Elphick | Professor Gavin Reid

Charles Dhanowa O.B.E., Q.C. (Hon)
Registrar

Date: 4 April 2014