Neutral citation [2009] CAT 7

**IN THE COMPETITION APPEAL TRIBUNAL**

Case Number: 1106/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

12 March 2009

Before:

LORD CARLILE OF BERRIEW QC
(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

APPEARANCES:

Mr Daniel Beard (instructed by Orrick, Herrington & Sutcliffe) appeared on behalf of the Claimant.

Mr Mark Brealey QC and Miss Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendant.

Heard at Victoria House on 5 February 2009

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**JUDGMENT (RULE 40)**

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*Introduction*

1. On 17 November 2006, the Office of Rail Regulation (the "ORR") announced a decision under the Competition Act 1998 ("the Act") that the Defendant, English Welsh and Scottish Railway Limited ("EWS"), had abused its dominant position in breach of the Chapter II prohibition imposed by section 18 of the Act and Article 82 of the EC Treaty (the "ORR Decision"[1]).

2. On 7 November 2008, the Claimant, Enron Coal Services Limited (in liquidation) ("ECSL"), filed a claim against EWS for damages under section 47A of the Act, in reliance on the ORR Decision. The claim form was amended by consent on 8 January 2009. References in this judgment to paragraph numbers of the claim form are to those in the claim form as amended.

3. EWS was and is a major supplier of rail freight services in Great Britain. The ORR Decision found that EWS was dominant in the market for coal haulage by rail in Great Britain at the material time under consideration. Until the end of 2000, EWS was a monopolist in the relevant market. The only company to compete with EWS in that market was Freightliner Heavy Haul ("FHH"), though FHH did not haul coal until January 2001 and remained capacity constrained at least until the end of 2002 (see paragraphs 517 and 518 of the ORR Decision).

4. ECSL was established in 1999 as a subsidiary of the US-based Enron Corporation. It is described in the ORR Decision and the claim form as having acted as a third party intermediary for coal purchasing, offering a range of services from simple coal trading to end-to-end ("E2E") arrangements. Under E2E arrangements, ECSL provided customers with services for the management of the entire coal supply chain, from coal purchase at the loading port through shipping, rail haulage and delivery to the customer's stockpile. In order to provide E2E services to its customers ECSL needed to procure coal haulage services from a rail freight provider. At the time ECSL became active as a supplier to UK power stations in 1999, EWS was the sole haulier of coal by rail (and remained so until FHH's entry into the market on 1 January 2001).

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[1] The ORR Decision is available on the ORR's website at: http://www.rail-reg.gov.uk/upload/pdf/ca98_decision_ews-dec06.pdf.

5. The loss and damage claimed by ECSL is divided into three main parts. First, it is claimed that EWS overcharged ECSL for coal haulage (paragraphs 30-43 of the claim form); second, that EWS imposed additional costs on ECSL (paragraphs 44-45); and third, that as a result of EWS's unlawful conduct ECSL lost contracts and/or contractual opportunities (paragraphs 46-51). In the alternative or in addition to compensatory damages, ECSL also seeks restitution and/or restitutionary damages and/or an account of profits, and interest on any sums due (paragraphs 52-57). This judgment is concerned only with the overcharge claims at paragraphs 30-43 of the claim form; the other elements of the claim are not considered further.

6. The overcharge claim is subdivided into two sections:

   (a) at paragraphs 31-33 of the claim form, ECSL sets out an overcharge claim in respect of coal hauled to two power stations, Fiddler's Ferry and Ferrybridge, owned by Edison Mission Energy ("EME");

   (b) at paragraphs 34-43 of the claim form, ECSL sets out an overcharge claim in respect of coal hauled to the Eggborough power station owned by British Energy Limited ("BE").

   In this judgment, we refer to these as "the EME overcharge claim" and "the BE overcharge claim", respectively.

7. On 7 January 2009, EWS filed an application under Rule 40 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, the "Tribunal Rules") requesting the Tribunal to reject the EME overcharge claim and the BE overcharge claim.

8. Following a case management conference and the exchange of skeleton arguments, the Tribunal heard counsel for the parties at an oral hearing on 5 February 2009.

9. At the end of that hearing the Tribunal announced its decision, and that the reasons would be provided in writing at a later date. The Tribunal's decision was that the EME overcharge claim at paragraphs 31-33 of the amended claim form would be rejected under Rule 40 of the Tribunal Rules, but that the BE overcharge claim at paragraphs 34-45 of the amended claim form would not be rejected. These are the reasons for that decision.

*The factual and legal background to the application*

10. In order to explain our decision it is necessary to have regard to Rule 40 of the Tribunal Rules, section 47A of the Act and the nature of the infringement established by the ORR in its Decision.

11. Rule 40 of the Tribunal Rules, so far as material, provides:

> **"Power to reject**
>
> 40. - (1) The Tribunal may, of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, reject in whole or in part a claim for damages at any stage of the proceedings if -
>
> (a) it considers that there are no reasonable grounds for making the claim; …"

12. Section 47A of the Act, so far as material, provides:

> **"47A Monetary claims before Tribunal**
>
> (1) This section applies to—
>
> (a) any claim for damages, or
>
> (b) any other claim for a sum of money,
>
> which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.
>
> (2) In this section "relevant prohibition" means any of the following—
>
> …
>
> (b) the Chapter II prohibition;
>
> …
>
> (d) the prohibition in Article 82 of the Treaty;
>
> …
>
> (3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.
>
> (4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.
>
> (5) But no claim may be made in such proceedings—
>
> (a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed;
>
> …

> (6) The decisions which may be relied on for the purposes of proceedings under this section are—
>
> (a) a decision of the OFT that … the Chapter II prohibition has been infringed;
>
> (b) a decision of the OFT that … Article 82 of the Treaty has been infringed;
>
> …
>
> (9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.
>
> (10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim."

13. The ORR is one of the specialist sectoral regulatory authorities with concurrent powers, alongside the OFT, to apply and enforce the provisions of the Act and Articles 81 and 82 EC. It is common ground for the purposes of these proceedings that the ORR can be read into section 47A of the Act in place of the OFT.

14. The ORR Decision is an extraordinarily long and complex document. The non-confidential version of the Decision published on the ORR's website contains no less than 409 pages. Identifying the precise nature of the findings made in the Decision and their consequences are no doubt matters that the parties will want to address in some detail at the main hearing. For the purposes of this judgment, we concentrate primarily on the section of the ORR Decision entitled "*Part IIB: Assessment of abuse of dominance - Discrimination*" (paragraphs B1-B198 of the ORR Decision), to which both parties referred extensively at the hearing.

15. In the introduction to this section of the Decision, EWS's discriminatory conduct is summarised as follows:

> "B2 EWS has engaged in abusive discrimination between its customers. In particular, EWS set an existing customer, ECSL, selectively higher prices than it charged other customers directly for the same flows without objective justification.
>
> B3 This behaviour was a further manifestation of EWS's wider strategy to exclude or limit competitive opportunities for potential new entrants to the market for coal haulage by rail in Great Britain. EWS was concerned that ECSL could facilitate such entry into this market by developing an intermediary role, including through the negotiation of E2E contracts with new owners of power

stations. EWS sought to constrain this competitive threat by ensuring that it, and not ECSL, secured direct contracts with the power stations.

…

B5 EWS's discriminatory treatment of ECSL placed ECSL at a competitive disadvantage in respect of two specific sets of flows:

(a) Flows to the Fiddler's Ferry and Ferrybridge power stations, operated by Edison Mission Energy (EME). Between May 2000 and October 2000, EWS imposed higher prices on ECSL. This placed ECSL at a competitive disadvantage in its contractual negotiations with EME relating to coal haulage supply to Fiddler's Ferry and Ferrybridge power stations. Prior to the period of discriminatory pricing, ECSL had supplied EME on these flows on an E2E basis. Following the period of discriminatory pricing, ECSL was unsuccessful in renewing that relationship.

(b) Flows to Eggborough power station, operated by British Energy (BE). Between May 2000 and November 2000, EWS imposed higher prices on ECSL which placed ECSL at a competitive disadvantage in its contractual negotiations with BE. Even though ECSL was eventually successful in the tender negotiations, EWS sought to undermine ECSL's ability to contract with BE as an intermediary."

16. The ORR's description of the evidence of EWS's exclusionary intent is set out at paragraphs B25 to B44 of the ORR Decision, followed by a section relating to EME which begins at paragraph B45. At B57 the Decision states:

> "B57 On the basis of all this evidence, EWS is found to have offered selective price reductions to EME, with prices considerably lower than those offered to ECSL in May 2000. EWS has not provided an objective justification for the price differences.
>
> B58 Taken together with the evidence of the price increases to ECSL compared to the rates ECSL had previously been granted, and the evidence above of EWS's intent to impede ECSL's ability contract directly with the generators for rail haulage, including by way of E2E supply, this evidence supports the finding that EWS discriminated against ECSL between May 2000 and November 2000 in respect of prices for coal haulage on the flows to Fiddler's Ferry and Ferrybridge."

17. The ORR Decision addresses haulage to BE's Eggborough power station from paragraph B66 onwards. At paragraph B90 it states:

> "B90 Taking together the evidence of EWS's price increases to ECSL, the evidence of the price reductions made available to BE but not ECSL and the evidence above of EWS's intent to impede ECSL's operations, EWS is found to have discriminated against ECSL between May 2000 and November 2000 in respect of prices for coal haulage on the flows to Eggborough. The section below Response to EWS's Arguments explains why the differences in prices cannot be

justified by differences in the performance regime that ECSL sought, or by any objective justification."

18. At paragraph B99 the ORR Decision states:

> "B99 For the reasons set out above (and also those discussed in the section below Effect on competition under Response to EWS's arguments) the discrimination against ECSL is found to have placed ECSL at a competitive disadvantage when it was negotiating with BE for the provision of E2E and intermediary services. The existence of the competitive disadvantage is not inconsistent with the fact that, in the end, ECSL did manage to reach an agreement with BE."

19. The initial conclusion for this section is contained at paragraph B100:

> "B100 On the basis of all the evidence set out above, and the points made in response to EWS's arguments below, it is found that between May 2000 and November 2000, EWS pursued discriminatory pricing practices against ECSL. This discriminatory pricing placed ECSL at a competitive disadvantage when negotiating intermediary contracts (including E2E deals) with generating companies. EWS's intention was to reduce the threat that ECSL posed to its position in the market for coal haulage by rail in Great Britain. EWS has advanced no credible objective justification for the higher prices charged to ECSL. EWS's conduct distorted the competitive process and is inconsistent with the obligations of a dominant company. EWS's behaviour towards ECSL is therefore found to be abusive."

20. There then follows a long section from B101 onwards in which the ORR responds to the arguments raised by EWS in its defence. This section includes the following:

> "B138 First, the finding of discriminatory abuse is confined to flows to Fiddler's Ferry, Ferrybridge and Eggborough. Taking Figure 5 of the Response at face value, it seems that flows to these destinations tend to have been flows for which EWS's calculations show a higher price to ECSL.
>
> B139 Second, EWS's calculations seem to compare average ECSL prices against average prices to other customers. However, the discrimination identified in this Decision is not discrimination against ECSL overall, but discrimination against ECSL during a particular time period. This is the time period when ECSL was seeking general terms for haulage that would allow it to then bid for direct contracts with the generators including on an E2E basis.
>
> B140 This time period was also after EWS had become concerned about the threat posed by ECSL as a potential facilitator of the entry of a new freight train competitor to EWS. This time period excludes the time of ECSL's initial operation as an E2E supplier, as well as the subsequent time period from 2001 when ECSL had won the BE contract and had the opportunity to use FHH for at least some of its coal haulage. Because of this, ORR could not rely on evidence that there was no discrimination against ECSL on average (say across 1999, 2000 and 2001) to reject the hypothesis that there had been discrimination against ECSL between May 2000 and November 2000. Thus, calculations showing average quotes to ECSL are of limited value. (Similarly, calculations of average quotes to other customers could be misleading if the quotes were provided at

> different points in time and under quite different conditions from the ECSL quotes.)"

21. In the overall conclusion on discrimination, the ORR Decision states at paragraph B198:

> "B198 For all of the above reasons, it is found that between May 2000 and November 2000, EWS pursued, without objective justification, selective and discriminatory pricing practices that placed ECSL at a competitive disadvantage in its contractual negotiations with two power generators, EME and BE. By impeding the competitive position of ECSL as a customer and a competitor, EWS's actions were capable of distorting the structure of competition in the relevant market. This conduct was contrary to both the Chapter II prohibition of the Act and Article 82 EC."

*Summary of the parties' submissions*

22. We received detailed written submissions and heard from both parties' counsel orally. The following summarises the main thrust of their arguments:

    (a) In essence, EWS's central argument in support of its application was that *the prices actually charged* by it to ECSL for coal haulage (as opposed to *other prices quoted* to ECSL) were not found by the ORR to have been discriminatory. EWS submits that, there having been no finding by the ORR that ECSL actually paid discriminatory prices, the Tribunal has no jurisdiction to entertain either the EME overcharge claim or the BE overcharge claim.

    (b) ECSL submits that EWS's argument rests on a tendentious, narrow reading of the ORR Decision which is not sustainable. The ORR Decision establishes that EWS engaged in price discrimination against ECSL. That price discrimination meant that ECSL overpaid EWS for coal haulage services in transporting coal to EME's and BE's power stations. The applicable test is whether the claims are "bound to fail". It cannot be said that ECSL's claims were bound to fail, and therefore EWS's application should be rejected.

*The Tribunal's analysis*

23. We start our analysis by considering the legal test applicable to applications of this kind. Rule 40(1)(a) of the Tribunal Rules provides that a claim or part of a claim may

be rejected if the Tribunal considers that there are "no reasonable grounds" for making the claim. We were referred to *Emerson Electric and others v. Morgan Crucible* [2007] CAT 30 at [24], where it is stated that:

> "24. …the test under Rule 40 is whether the Tribunal is certain that the claim is bound to fail. This accords with the test under Rule 3.4(2)(a) of the Civil Procedure Rules ("CPR") to strike out a claim because there are no reasonable grounds for bringing it. "The court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out" (see *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, at paragraph 22, per Peter Gibson L.J., citing *Barrett v Enfield London Borough Council* [2001] 2 AC 550, at 557 per Lord Browne-Wilkinson)."

24. In addition to considering the application of Rule 40 (power to reject) we also considered whether the application could equally have been brought under Rule 41 of the Tribunal Rules (summary judgment). Under Rule 41 the Tribunal may of its own initiative or at the application of either party reject in whole or in part a claim for damages if, inter alia, it considers that the claimant has "no real prospect of succeeding on the claim". This point was put to counsel for both parties at the hearing. Mr Brealey QC, counsel for EWS, accepted that the application could have been made under either rule and submitted that the two tests, "bound to fail" and "no realistic prospect of success" amounted to much the same thing. He referred us, by way of example, to *ICI Chemicals & Polymers v TTE Training* [2007] EWCA Civ 725, per Moore-Bick LJ at [9], where the "bound to fail" test of a strike-out application was used in the context of an application for summary judgment (Part 24 of the CPR being the equivalent of Rule 41 of the Tribunal Rules).

25. Mr Brealey explained that the application had been made under Rule 40 rather than Rule 41 because, in EWS's submission, the Tribunal lacked jurisdiction to hear the claim. If the Tribunal lacked jurisdiction there could be no reasonable grounds for making the claim and the claim was bound to fail. In any case, no prejudice would be suffered were we to decide the application under Rule 41 as opposed to Rule 40. Further, Mr Brealey submitted that the question of whether the Tribunal had jurisdiction to determine the overcharge claims was a short point of law with no issues of fact in dispute. We were referred to *ICI Chemicals & Polymers v TTE Training*, cited above, per Moore-Bick LJ at [12]:

> "… It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the

> evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

and *Price Meats v Barclays Bank* [2002] 2 All ER (Comm) 346, per Arden J at [13]:

> "… The present application raises a point of law which can be dealt with on this application and in those circumstances I do not consider it would be appropriate to leave the allegations in question in the pleadings."

26. Mr Beard, appearing for ECSL, at an early stage of the hearing accepted realistically that if the application raised a clear point of law then it would be sensible for the Tribunal to dispose of it at this stage.

27. In our consideration, there is a distinction to be drawn between the wording of Rule 40 and Rule 41 respectively; and consequently the respective tests applicable in each case. The two rules exist for different purposes: otherwise there would be no need for two separate rules. However, in these proceedings, we consider that nothing material turns on which particular test is applied and conclude that it was entirely reasonable for EWS to bring its application under Rule 40 in the circumstances of this case. Therefore we will apply the test of whether the claims are "bound to fail", rather than the "no realistic prospect of success" test, without it being necessary for us to decide to what extent those two tests may differ in law.

28. Mr Beard submits that the Tribunal should be slow to exercise its jurisdiction to reject part of a claim where the claim concerns a novel point of law or an area of law which is uncertain or developing. He relies on *Emerson v Morgan Crucible*, cited above, at paragraph [26] in support of this proposition:

> "26. We consider that it would be inappropriate on a summary application under Rule 40 made at the commencement of proceedings, for either party to adduce further evidence before the Tribunal which has not been provided with the claim form. Where a serious live issue of fact can only be properly determined by hearing oral evidence then on an application under Rule 40 made at the commencement of the proceedings, it would not be appropriate for the Tribunal to reject the claim for damages using its powers under Rule 40 of the Tribunal Rules. **Similarly where the issues of law are uncertain it is desirable that they are determined on the basis of the facts as found by the Tribunal.** This approach accords with the approach taken under CPR Rule 3.4(2)(a) (see *Bridgeman v Alpine-Brown*, 19 January 2000, (CA) (unreported))."

(Emphasis added).

29. Mr Beard submits that the scope of the Tribunal's jurisdiction to hear damages claims under section 47A(1) of the Act is just such an uncertain and developing area of law and is, so far, untested. He accepts that there needs to be an infringement decision before a damages claim can be brought before the Tribunal and that the damages claim must relate to the infringement decision. However, he submits that the extent to which a public infringement decision may give rise to claims for damages which can be heard pursuant to section 47A(1) remains unsettled as a point of law.

30. In essence, we understand these submissions to mean that the Tribunal's jurisdiction under section 47A is limited to hearing so-called "follow-on" damages actions (so called because they must follow-on from a prior existing finding that there has been an infringement of competition law) as opposed to freestanding or standalone damages actions (which do not rely on a prior finding of infringement) which must, at the present time, be brought in the High Court. Thus far, these submissions are uncontroversial and accord with what was said in *Devenish Nutrition v Sanofi-Aventis and others* [2008] EWCA Civ 1086, per Arden LJ at [7]:

> "7. … Under s47A of the Competition Act 1998 as amended by the Enterprise Act 2002, a victim of a cartel may bring a follow-on action to claim personal relief. He may do so by relying on the findings of the Commission."

and by the Tribunal in *BCL Old Co and others v BASF and others* [2008] CAT 24 at [31]:

> "The effect of section 47A is to enable a person who has suffered loss as a result of an infringement of the EC or UK competition rules to rely upon a relevant decision of the EC or UK competition authority establishing the infringement in question, rather than having to establish the infringement independently. This is achieved by subsection 47A(9), which provides that the Tribunal is bound by 'any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed'."

In a follow-on damages claim, therefore, the Tribunal's job is not to establish liability, but to deal with causation and quantum.

31. Mr Beard submitted that the question of precisely where the line is to be drawn between follow-on and standalone damages actions is not easily discernible by reference to the statute alone. It has not been the subject of a prior decision of this Tribunal or of the

Courts. We accept Mr Beard's submission that in some cases, the scope of what follows from a detailed infringement decision (and, therefore, what is within the Tribunal's jurisdiction) may only be capable of being assessed by reference to the full text of the infringement decision in question. We accept too that we should exercise caution in applying our power under Rule 40 to reject a claim. However, in our judgment, the need to adopt a cautious approach to Rule 40 is adequately encapsulated in the test which we are applying that we may only reject a claim which we are certain is "bound to fail".

32. As to the main substantive arguments raised by the parties, EWS's case is, first, that the prices actually charged to ECSL for coal haulage to EME (which as we understand it were agreed in June/July and/or December 1999) and those for coal haulage to BE (agreed in March/April 2000) were not found to be discriminatory by the ORR. EWS accepts that the prices it subsequently quoted to ECSL in May 2000 were comparatively higher than the earlier prices referred to above, but states that as the May 2000 prices were not accepted by ECSL they were never charged to ECSL, and so there can have been no overcharge as a result of prices which were quoted but not applied in practice. EWS relies on paragraph B47 of the ORR Decision which states in respect of coal hauled to EME's Fiddler's Ferry and Ferrybridge power stations:

> "B47 … The contract and related prices were not agreed between ECSL and EWS and coal was not hauled under them."

They rely too on paragraph B69 of the ORR Decision in respect of coal hauled to BE's Eggborough power station.

> "B69 …no coal was hauled at the May 2000 price quoted to ECSL."

33. Secondly, EWS argues that the price discrimination established in the ORR Decision is limited to a specific period of time, from May to November 2000. For example in its conclusion at paragraph B198, the ORR Decision states:

> "B198 For all of the above reasons, **it is found that between May 2000 and November 2000**, EWS pursued, without objective justification, selective and discriminatory pricing practices that placed ECSL at a competitive disadvantage in its contractual negotiations with two power generators, EME and BE."
>
> (emphasis added)

In a similar vein, see paragraphs B58, B90 and B100 of the ORR Decision.

34. EWS also places particular emphasis on paragraph B139 which states:

> "…the discrimination identified in this Decision is not discrimination against ECSL overall, but discrimination against ECSL during a particular time period."

35. In response, ECSL submits that EWS, by focusing solely on the prices actually charged and the time at which those prices were agreed, is concentrating on the wrong prices and is construing the ORR Decision too narrowly. The ORR Decision is not to be read as if it were a statute or some other legal document of statutory precision: see *R v MMC ex parte National House Building Association* [1993] ECC 388, (1994) 6 Admin LR 161, [1992] NPC 122 (judgment of Auld J in the Queen's Bench Division of the High Court, of 1 October 1992, upheld on appeal at [1995] ECC 89, [1994] NPC 3). But, the ORR Decision does establish that EWS was guilty of price discrimination. This is evidenced by the higher prices offered to ECSL, the lower prices offered to EME and BE, and the fact that those lower prices were not offered to ECSL. ECSL relies on paragraph B21 of the ORR Decision which states:

> "B21 The objection concerns three particular aspects of the negotiations between EWS and ECSL:
>
> (a) around May 2000, when EWS offered ECSL rates significantly higher than rates that EWS had previously offered ECSL;
>
> (b) the period between May 2000 and November 2000 when EWS offered significantly lower rates to other customers; and
>
> (c) during the same time period, when active contractual negotiations between the two parties ceased and **ECSL was not offered price reductions similar to those offered to other customers of EWS."**
>
> (emphasis added).

36. It is this last constituent element of the price discrimination which ECSL says EWS is seeking to ignore. Mr Beard characterised EWS's position as accepting paragraphs (a) and (b) of B21 but closing their eyes and pretending that (c) was not there.

37. ECSL claims that since the ORR established that it was the victim of price discrimination, it is entitled to claim losses as a result of an overcharge for the whole period during which coal was hauled for it by EWS, i.e. from July 1999 until November 2001.

38. In our judgment, having analysed the arguments, neither party is wholly right or wrong.

39. ECSL argues that in applying the test for rejection of a claim or part of a claim under Rule 40 we must err in its favour in cases where there is any doubt. With that in mind, for the purposes of this application, we accept (albeit without deciding the point) ECSL's argument that the fact that the lower prices were not offered to ECSL may form a constituent part of the price discrimination as established in the ORR Decision. We form that preliminary view in part relying on paragraph B21 of the ORR Decision, referred to above, and also, by way of further example, from paragraph B65, which states:

> "…ECSL was clearly placed at a competitive disadvantage when competing against EWS, compared to the scenario that would have prevailed had EWS been willing to treat ECSL in a non-discriminatory manner (i.e. had it offered ECSL similar rate reductions to those it had offered to EME)."

40. At the hearing, Mr Brealey submitted that the core question for the Tribunal to decide was: "Did the regulator only determine that the 2000 rates were contrary to section 18?" Our answer to that question is - not necessarily. The May 2000 rates alone were not the *only* factor which led the ORR to conclude that section 18 had been infringed. The finding was one of price discrimination (which necessarily implies a comparison of two or more different sets of prices) and not a finding that the May 2000 rates were excessive.

41. If it is correct to conclude that EWS should have offered the lower prices to ECSL, ECSL will presumably be entitled to claim some overcharge. However, that is a point that will ultimately need to be decided at trial, and in order to prove and quantify the overcharge, ECSL will presumably also need to establish, *inter alia*, precisely what prices should have been offered to it, when they should have been offered and from what date they should be deemed to have applied.

42. At this stage of these proceedings, we conclude that it is at the very least arguable that the lower prices offered to BE and EME should also have been offered to ECSL and that EWS's failure to do so arguably constitutes an element of the price discrimination as found in the ORR Decision. For present purposes, we do not have to put it any higher than that. The test to be applied under Rule 40 is whether the claim is bound to fail. It is in our judgment at least arguable that EWS should have offered the lower prices to ECSL, and therefore this part of the claim is not bound to fail.

43. However, we agree with EWS that the unlawful price discrimination as found in the ORR Decision is specifically limited in time to the period from May 2000 to November 2000. There is, in our view, no getting round what is said explicitly in paragraph B139 of the Decision, that "the discrimination identified in this Decision is not discrimination against ECSL overall, but discrimination against ECSL during a particular time period". This is further reinforced by, for example, paragraphs B58, B90, B100 and B139 of the ORR Decision, all of which are unambiguous in saying that the price discrimination as found by the ORR relates to the specific period of time from May to November 2000.

44. If, following what is said above, we assume that a price 'X' should have been offered to ECSL on, for the sake of argument, 1 May 2000, and that it should have been immediately effective on that date, the overcharge to which ECSL would potentially be entitled would be the actual prices charged, less X, for all periods from 1 May 2000 onwards. Under section 47A(1) of the Act a claimant may only claim for loss and damages suffered "as a result" of the established infringement. We note the comments of the Tribunal in *BCL v BASF*, cited above, at paragraph [33] that:

> "In considering the meaning and effect of any part of section 47A, in our view the proper approach is to consider the section as a whole, rather than to look at individual subsections in isolation".

45. Considering section 47A as a whole, loss or damage alleged to have been occasioned prior to May 2000 cannot be said to "result" from price discrimination which occurred in a carefully defined period between May and November 2000. Therefore we reject those parts of the claims which allege an overcharge in respect of any coal hauled prior to May 2000 as they are, in our judgment, bound to fail in any event.

46. Thus we conclude that (i) ECSL should be entitled to advance a claim for an overcharge based on the premise that the lower prices offered to EME and BE should also have been offered to ECSL, but (ii) ECSL's claims should be rejected in so far as they allege an overcharge in respect of any coal hauled prior to May 2000.

47. Applying these two conclusions to the two overcharge claims leads to markedly different results.

*The BE overcharge claim*

48. The BE overcharge claim is set out at paragraphs 34 to 43 of the Claim Form, supplemented by a set of calculations contained in Annex 4. ECSL used coal haulage services provided by EWS to supply coal to BE's Eggborough power station from April 2000 until March 2001. Between April and September 2001, we were told that ECSL used FHH to haul coal to the Eggborough power station rather than EWS. ECSL used EWS's coal haulage services again in October and November 2001 before then ceasing to supply BE at Eggborough.

49. ECSL claims that the prices charged to it by EWS included a discriminatory overcharge throughout the period of operation of the contract to supply BE at Eggborough. The total overcharge claimed in respect of the period from April 2000 through to November 2001 and set out in Annex 4 is estimated to be approximately £1,925,000. In the alternative, if the period in respect of which ECSL may claim an overcharge is limited to the period of price discrimination between May and November 2000 as identified in the ORR Decision, ECSL's claim is estimated to be approximately £1,100,000 (see paragraph 37 of the claim form). (As described above, and for the avoidance of doubt, we have concluded that ECSL should not be entitled to claim any overcharge in respect of coal hauled prior to May 2000. We have not, however, ruled out a claim in respect of coal hauled after November 2000, which, in the case of the BE overcharge claim would account for most of the difference between the two amounts claimed in the alternative.)

50. Both alternative figures for the amount claimed are estimates. This is in part due to the fact that when ECSL filed its claim form, and when it was amended, ECSL did not know the exact prices that EWS had offered to BE and EME. The relevant figures are contained in tables of the ORR Decision, but these figures were redacted from the published version. Prior to the hearing, EWS disclosed these figures to ECSL and we were referred to them at the hearing. The tables show for each relevant flow of coal haulage to Eggborough (i) the pre-existing contract price agreed between EWS and ECSL in March/April 2000 (if any), (ii) the higher prices quoted by EWS to ECSL in May 2000, and (iii) the prices EWS offered to BE.

51. By way of example, Table 17.D contains the prices quoted for coal hauled on the Redcar-to-Eggborough route. The price agreed between EWS and ECSL in March 2000 was £3.40 per tonne. The new, higher price quoted in May 2000 was £3.60. In March 2000, EWS had offered BE a price of £3.35. In October and November 2000, the price quoted to BE was reduced to £3.20 and then to £2.75. It is clear that, on this particular route, the price quoted to ECSL in May 2000 was both higher than the earlier price offered to BE in March 2000 and the later prices quoted to BE in October and November 2000. Had those lower prices been offered to ECSL, it is reasonable to conclude that ECSL would have paid less for coal haulage on this route for at least some of the period under consideration. The figures in Tables 17.A to 17.C show a slightly different picture. On the Hull-to-Eggborough flow (Table 17.A), EWS quoted ECSL a price of £3.40 in May 2000 (there is no earlier ECSL figure in Table 17.A). The quotes offered by EWS to BE in March, October and November 2000 were all lower, ending up at £2.30. On the Hunterston-to-Eggborough flow (Table 17.B) and the Immingham-to-Eggborough flow (Table 17.C) the prices quoted by EWS to BE in March 2000 were lower than the prices quoted to ECSL in May 2000 but were higher than the prices that EWS had quoted to ECSL in March/April 2000. In Table 17.C, the final quote offered to BE in November was lower than the lowest price offered to ECSL; whereas in Table 17.B the April 2000 ECSL price (i.e. the price actually charged to ECSL) was in fact lower than any of the prices offered to BE.

52. What the data in these tables shows is that the calculation of any total overcharge is going to be a complicated business. Even if we assume that the prices offered to BE should also have been offered to ECSL, we would still need to consider when those prices should have been offered to ECSL and when they should have taken effect. It is not necessarily a simple matter of finding the lowest price offered in respect of any particular coal flow and applying that price throughout the whole period from May 2000 to November 2001. However, in order for EWS to have succeeded in its application to have the whole BE overcharge claim rejected it would have needed to satisfy us that it had not overcharged ECSL for any coal hauled to Eggborough for that whole period. For the reasons we have given, it has failed to do so. Therefore, we reject this part of EWS's application.

*The EME overcharge claim*

53. The circumstances of the EME overcharge claim are notably different. The EME overcharge claim is set out in paragraphs 31 to 33 of the claim form, with the accompanying calculation of estimated loss contained in Annex 3.

54. ECSL supplied coal to EME's Fiddler's Ferry and Ferrybridge power stations on an E2E basis during the period from the summer of 1999 until July 2000. The estimated loss is approximately £2,350,000. In the alternative, if the time period in respect of which ECSL may claim losses were to be limited to the period of price discrimination in the ORR Decision of between May and November 2000, the loss is estimated at £312,000.

55. The main point of distinction between the two overcharge claims is in timing. The ORR Decision states that the unlawful price discrimination took place between May and November 2000. As stated above, we conclude that the consequential effects of the price discrimination must be limited to the period from May 2000 onwards. If lower prices should have been offered to ECSL in May 2000, then that will affect the amount that should have been charged from that point forwards. It cannot, however, affect the price that should have been charged for periods prior to May 2000. That is in our view an unavoidable consequence of the ORR Decision.

56. By far the greater part of the loss claimed in respect of the EME overcharge claim relates to the period prior to May 2000, (i.e. from July 1999 to April 2000). For the reasons given above, in our judgment, ECSL cannot claim that any alleged losses during this period occurred "as a result" of the price discrimination as established in the ORR Decision. The only period in respect of which the EME overcharge claim would be possible is that from May 2000 to July 2000 (when E2E supplies to EME ceased).

57. That would leave only the claim in the alternative at paragraph 33 of the claim form for estimated losses of £312,000 in respect of coal hauled in May, June and July 2000. We considered whether it would be appropriate to reject the main part of the EME overcharge claim, but to leave the alternative claim in paragraph 33 standing. However, we note two points in relation to the lower prices offered to EME and set out in Tables 15 and 16.A to 16.D of the ORR Decision. First, the lower prices offered by

EWS to EME were offered in August and October 2000, i.e. after ECSL had stopped supplying EME in July 2000 (according to the facts as stated in the claim form). Second, the lower EME prices are all stated to be applicable with effect from January 2001. We do not consider it to be seriously arguable that the prices EWS was willing to offer to EME in August and October 2000 and which were stated to apply as from January 2001 should have been offered to ECSL at an earlier date and should have applied during May, June and July 2000. We therefore conclude that the whole of the EME overcharge claim is bound to fail and accordingly, EWS's application to have the EME overcharge claim rejected should be granted.

58. In passing, we note that by rejecting the EME overcharge claim we are not depriving ECSL of the right to claim any damages at all in respect of the effects of EWS's unlawful conduct on ECSL's contractual relations with EME. ECSL was ultimately unsuccessful in tendering for coal haulage and supply to EME for a four-year period from January 2001. It lost out on the coal haulage tender to EWS. ECSL has claimed damages for the loss of that contract, the particulars of that claim being set out at paragraphs 46 to 51 of the claim form. The estimated maximum loss is stated to be £77.3 million. ECSL clearly could not claim that it was overcharged for the haulage of coal at any time after the time when it ceased to haul coal to EME. The overcharge claim that had been made in relation to EME – and which we have now rejected – related predominantly to a period of time prior to the May to November 2000 period identified in the ORR Decision as the time when price discrimination occurred. That part of the claim was always bound to fail (and we have explained above why the claim in respect of the potential overlap period of May to July 2000 was also bound to fail). It seems logical that where the principal alleged result of the unlawful conduct was the loss of a contract (as was the case here in respect of EME), the claim for damages advanced should concern the loss of that contract as opposed to an alleged overcharge on coal the large majority of which was hauled before the unlawful conduct was said to have occurred.

59. In contrast, ECSL's bid to supply BE on an ongoing basis was successful notwithstanding EWS's attempts to undermine it. ECSL continued to supply BE for several months after the unlawful price discrimination is said to have taken place, up to and until November 2001. In those circumstances the claimant could not possibly

claim damages for the loss of a contract that it did not in fact lose, but ought to be able to advance a claim for loss and damage which it alleges resulted from the discriminatory overcharge. For the reasons we have given above, the claim that EWS overcharged ECSL for coal haulage to BE from May 2000 until November 2001 must at this stage be allowed to stand, so as to be tested at trial, because it cannot be said with any certainty that this claim is bound to fail.

60. For completeness, though we have considered this application under the test applicable to Rule 40, in the circumstances of this case we would not have come to a different conclusion in respect of either of the overcharge claims had we been applying the "no real prospect of succeeding" test in Rule 41.

61. Finally, this application has concerned the question whether parts of the claim should be rejected at the outset without a detailed consideration of the facts at issue or of the evidence. Other than the rejection of the EME overcharge claim, nothing in this judgment should be interpreted as a finding of fact or law binding on the parties in the future conduct of these proceedings.

Lord Carlile of Berriew QC Graham Mather Richard Prosser
Chairman

Charles Dhanowa Date: 12 March 2009
Registrar