FORM 269C1

IN THE COURT OF APPEAL, CIVIL DIVISION

(500:GS:V/O:Feb 06)

Her Majesty's Court of Appeal [SEAL] -5 APR 2007

Order No. 1213 REF: C1/2007/0373
C1/2007/0374

Albion Water Limited and Another –v– Water Services Regulation Authority and Others

ORDER made by the Rt. Hon. Lord Justice Richards

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal and an extension of time

Decision: granted, refused, adjourned. An order granting permission may limit the issues to be heard or be made subject to conditions.

REFUSED

Reasons

Introduction

1. Given the staged approach adopted by the tribunal and the length of its judgments, I think it helpful to summarise at the outset my understanding of how the relevant parts of the judgments were intended to fit within the procedural framework governing appeals to the tribunal. The key provisions are in para 3 of sched 8 to the Competition Act 1998. By para 3(1) the tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal. By para 3(2) it may confirm or set aside the decision which is the subject of appeal, or any part of it, and may *inter alia* (a) remit the matter to the Director or (e) make any other decision which the Director could himself have made. In this case:
   (a) In the main judgment of 6 October 2006 (tab 3) the tribunal found, *inter alia*, that the Director's conclusion on the issue of margin squeeze was "erroneous in law and incorrect, or at least insufficient, from the point of view of the reasons given, the facts and analysis relied on and the investigation undertaken" (para 981(5)). The detailed reasons leading to that conclusion are at paras 843-918; a summary is at paras 47-56.
   (b) The tribunal left open what consequential action it should take in relation to margin squeeze, having regard to its powers under para 3(2): see main judgment, para 982. The findings in the main judgment made it inevitable that the relevant parts of the Director's decision would be set aside (as confirmed at para 283 of the further judgment); but the question whether the tribunal should then remit under para 3(2)(a) or make its own decision under para 3(2)(e) depended in part on how the issue concerning Dŵr Cymru's alleged dominance was resolved.
   (c) In the further judgment of 18 December 2006 (tab 2) the tribunal dealt first with the issue of dominance (paras 6-199). It made detailed findings as to the relevant market and as to Dŵr Cymru's position within that market. That led it (i) to set aside the paragraphs of the decision in which the Director expressed doubts or reservations on the issue of dominant position (para 183), (ii) to confirm under para 3(2) the correctness of the assumption of dominance made in the decision (paras 187, 190), and (iii) to find in any event, in the exercise of its decision-making powers under para 3(2)(e), that at all material times Dŵr Cymru had a dominant position on the relevant market (paras 188-198).
   (d) In the same judgment the tribunal proceeded, in the light of its finding on dominance, to consider what consequential action it should take in relation to margin squeeze. For the reasons given at paras 284-313, it took the view that it should reach its own decision under para 3(2)(e) on the issue, and the decision it reached was that Dŵr Cymru had abused a dominant position by imposing a margin squeeze. The tribunal then decided to continue the existing order for interim relief, pending resolution of the separate issue of excessive pricing (which was not finally resolved either by the main judgment or by the further judgment, and which is not raised directly on the present application).
   (e) In the refusal judgment dated 2 February 2007 (tab 13), the tribunal gave detailed reasons for refusing permission to appeal. The background is set out at paras 1-21 of that judgment; the margin squeeze issues are dealt with at paras 75-103; and the dominance issues at paras 113-132.

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Prematurity

2. At paras 7-8 of the refusal judgment the tribunal gives cogent reasons why it would be undesirable for any appeal to proceed until there has been a final decision on the issue of excessive pricing. Nevertheless Dŵr Cymru is entitled to apply now for leave to appeal against the final decisions that have been made on the issues of dominance and margin squeeze; and I have taken the view that the application is best considered at this stage rather than being adjourned for a lengthy period. Had I decided to grant permission to appeal, however, I would have been minded to stay any further proceedings on the appeal pending a final decision on the issue of excessive pricing and any application for permission to appeal against that decision.

Test for margin squeeze (grounds, para 3)

3. Although the main judgment and the further judgment should strictly be considered separately, since each is concerned with a different stage of decision-making, there is a high degree of consistency in the reasons given in the two, and consideration of the two together helps to illuminate the tribunal's reasoning process. Similarly, although the refusal judgment cannot, as a matter of principle, add to the reasons given in the judgments under appeal, the detailed way in which the refusal judgment addresses the arguments advanced by the applicant is of assistance. Accordingly, I refer below to relevant passages in all three judgments.
4. As to the alleged misapplication and misunderstanding of the Community law on margin squeeze (grounds, para 3.1; skeleton argument, paras 21ff.), the tribunal engaged in a detailed examination of the relevant law, including the EC decisions and guidance issued by the OFT and European Commission, and gave valid reasons why the legal test is not as limited as the applicant asserts. See main judgment, paras 861-870 and ensuing analysis, in particular at paras 898-918; further judgment, paras 290-313; and refusal judgment, paras 75-100.
5. The applicant's "illustrations" of the tribunal's alleged errors all stem from the basic disagreement about the legal test. If the tribunal was entitled to take the view it did about the legal test, it cannot be said to have erred in law in the application of that test, which was very much a matter for the tribunal's expert judgment.
6. As to the contention that the tribunal adopted an illegitimate approach to the relationship between excessive pricing and margin squeeze (grounds, para 3.2; skeleton argument, paras 53-55), it is clear that the tribunal's findings on margin squeeze do not depend on a finding that the First Access Price was excessive or abusive. Thus, what is said in the main judgment about the excessive nature of the First Access Price is only one of four reasons for the finding that the Director's decision was incorrect or inadequate on the issue of margin squeeze: see para 873 and the elaboration of the four reasons, in particular the elaboration of the fourth at paras 898ff. In the further judgment, at paras 297-301, the tribunal explains in terms why the margin squeeze issue does not depend on a finding of excessive pricing.
7. As to the tribunal's cross-reference to the Efficient Component Pricing Rule (ECPR) issue in the context of margin squeeze (grounds, para 3.3; skeleton argument, paras 56-59), the points made by the applicant do not begin to show that the tribunal fell into legal error; and in any event what the tribunal said about ECPR at paras 875 and 896-897 of the main judgment was not necessary for its findings on margin squeeze. It is to be noted, too, that paras 88-92 of the refusal judgment deal with the matter only "for completeness", not as a necessary part of the tribunal's reasoning.

Assessment of evidence in respect of margin squeeze (grounds, para 4)

8. The contention that the tribunal erred as to the applicable retail price (grounds, para 4.1; skeleton argument, para 61) appears not even to have been raised with the tribunal. The figure of 26.6 p/m^3 or thereabouts, as used in the main judgment and to which exception is now taken, is repeated in a number of places in the further judgment without any indication that an issue had been raised in relation to it (e.g. paras 288, 310, 312); and para 78 of the refusal judgment repeats the figure and states in terms that Dŵr Cymru has not challenged the finding at para 871 of the main judgment that Albion was left with a zero margin – a finding based on the same figure. It is far too late to raise a factual issue of this kind now.
9. The other point raised under this heading (grounds, para 4.2; skeleton argument, para 62) is dealt with briefly at para 101 of the refusal judgment, where the tribunal states that its view was expressed as a matter of common sense. It cannot be said that the tribunal's view on the issue fell outside the bounds of reasonable judgment.

Further alleged errors in relation to margin squeeze (grounds, paras 5.2 and 6)

10. The tribunal, having decided in the main judgment that the Director's conclusion with regard to margin squeeze was incorrect or inadequate, plainly had jurisdiction to take consequential action under para 3(2), including jurisdiction to reach its own decision on the issue under para 3(2)(e). The contention (grounds, para 5.1; skeleton argument, para 68) that it was "*functus officio* in respect of its substantive consideration of margin squeeze" and lacked jurisdiction to make its own finding of abuse in relation to margin squeeze is unsustainable.

11. There was no unfairness in the tribunal proceeding as it did (grounds, para 6; skeleton argument, paras 69-71). The position is summarised at para 284 of the further judgment and para 103 of the refusal judgment. Further, the applicant has not identified any specific additional matters which, on its case, it was denied the opportunity to put forward and which might have led the tribunal to reach a different conclusion.

Jurisdiction/discretion in relation to market definition and dominance (grounds, para 5.3)

12. On the issue of jurisdiction to make findings as to market definition and dominance (grounds, para 5.3; skeleton argument, paras 72-81), there may be force in the point that the tribunal could not lawfully "confirm" the correctness of an *assumption* as to dominance so as to produce a positive *finding* of dominance. But the tribunal went on in any event to make its own decision on the issue of dominance under para 3(2)(e) – and in the refusal judgment, at para 115, the tribunal treats that as "the main point" in its response to this ground of appeal. If the tribunal was entitled to reach such a decision under para 3(2)(e), it does not matter whether it was right or wrong on the point about confirming an assumption.
13. It cannot be said that the issue of dominance was not before the tribunal. The notice of appeal raised it (see e.g. para 70 of the further judgment). The tribunal had jurisdiction to set aside those paragraphs of the Director's decision where it found that he had erred in the doubts or reservations he had expressed (para 183 of the further judgment). It equally had jurisdiction to make its own finding on dominance as part of any decision it took in the exercise of its powers under para 3(2)(e). The existence of such jurisdiction is supported by the matters set out at paras 184-199 of the further judgment, in so far as they relate to the tribunal's powers under para 3(2)(e). See also the reasons given at paras 113-132 of the refusal judgment for refusing permission to appeal in relation to the issue of jurisdiction.
14. The same passages are also relevant to the contention that the tribunal erred in the exercise of its discretion (grounds, para 5.3; skeleton argument, paras 82-90). The tribunal gives cogent reasons for proceeding as it did. The court will be very slow indeed to interfere with an exercise of discretion by a specialist tribunal in a matter of this kind. In this case, if the tribunal had jurisdiction, its exercise of discretion to decide the issue of dominance cannot be said to have been erroneous in law.

Conclusion

15. For the reasons given above an appeal has no real prospect of success. Although the case raises issues of some importance concerning the tribunal's jurisdiction and procedures, I am not satisfied that those issues are sufficient to merit the grant of permission to appeal in the circumstances of this case, especially given the length of time the proceedings have already taken in the tribunal and the detail in which the issues have been addressed by the tribunal itself.

Information for or directions to the parties

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Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)
b) any expedition

By the Court

Signed:
Date: 3/4/07

Notes

(1) Rule 52.3(6) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Rule 52.3(4) and (5) provide that where the appeal court, without a hearing, refuses permission to appeal that decision may be reconsidered at a hearing, provided that the request for such a hearing is filed in writing within 7 days after service of the notice that permission has been refused. Note the requirement imposed on advocates by paragraph 4.14A of the Practice Direction.

(3) Where permission to appeal has been granted, the appeal bundle must be served on the respondents within 7 days of receiving this order (see para. 6.2 of the Practice Direction to CPR Part 52). A letter of notification will be sent to the appellant or his solicitors, as soon as practicable (see para. 6.3).

Case Number: **C1/2007/0373** and 0374

DATED 3RD APRIL 2007
IN THE COURT OF APPEAL

Albion Water Limited and Another
And
Water Services Regulation Authority and Others

ORDER

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