Neutral citation [2009] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1106/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

19 May 2009

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

ENRON COAL SERVICES LIMITED (IN LIQUIDATION)

Claimant

-v-

ENGLISH WELSH & SCOTTISH RAILWAY LIMITED

Defendant

ORDER OF THE CHAIRMAN

THE CHAIRMAN:

1. I am dealing today with a case management issue that arises in relation to a claim by the Claimant, Enron Coal Services Limited (in liquidation) ("ECSL"), against the Defendant, English Welsh and Scottish Railway Limited ("EWS"), for damages under section 47A of the Competition Act 1998, in reliance on a decision of the Office of Rail Regulation, notified to the Defendant on 17 November 2006.

2. On 12 March 2009 the Tribunal handed down a judgment on an application by the Defendant to reject parts of the claim form: see [2009] CAT 7 ("the Judgment"). The Tribunal struck out the claim in relation to an alleged overcharge for supplying Edison Mission Energy, but refused to reject the claim based on an alleged overcharge for supply to British Energy. The latter claim was not bound to fail and must be tested at trial. ECSL is also seeking damages for additional costs EWS imposed on it in relation to coal haulage and for lost contracts and/or contractual opportunities caused by EWS's unlawful conduct. These elements of the claim form were not subject of EWS's rule 40 application. The abbreviations and terminology used by the Tribunal in the Judgment are hereafter adopted in this ruling.

3. On 1 April 2009 the Tribunal refused the requests by EWS and ECSL for permission to appeal against the Judgment: see [2009] CAT 10.

4. On 15 April 2009 EWS applied to the Court of Appeal for permission to appeal. ECSL applied to cross-appeal on the same day. The parties have been notified that their applications will be considered on the papers between 10 June and 1 July 2009. In the event that permission is refused, it is open to either party to renew their application at an oral hearing: see CPR rule 52.3(4). In the meantime, the parties are preparing for the trial set down in September. However, a dispute has arisen between them as to the possible implications of the proceedings before the Court of Appeal for the hearing of the claim by the Tribunal.

5. I have before me a contested application by the Claimant to vacate and re-fix the main oral hearing, currently listed for 16 September 2009, with a time estimate of 4 days with a further 1 day in reserve: see paragraph 22 of the Tribunal's Order of 14 January 2009, as amended on 25 March 2009. Although correspondence received by the

Tribunal on 15 May 2009 and 18 May 2009 indicated that there *may* be (a) an application by the Claimant to amend the Claim Form, and (b) an application by the Defendant for a split trial, neither application is before us at this stage.

6. The current application, to vacate, takes the form of two letters dated 8 May and 11 May 2009 from Orrick, Herrington & Sutcliffe LLP, on behalf of the Claimant. In Orrick's letters they note the following: (i) if ECSL is successful in its cross-appeal, EWS would have to disclose evidence relevant to the EME overcharge claim. Such disclosure, it is said, would not be achievable under the current timetable; (ii) if EWS is successful in its appeal, ECSL submits that substantial time and cost of producing witness statements and expert reports on the BE overcharge claim will have been needlessly wasted; (iii) the BE and EME overcharge claims form an integral part of ECSL's claim; (iv) the preparation for trial imposing a costly and unfair burden on the Claimant; and (iv) the lack of prejudice to the Defendant in deferring the trial. The Claimant therefore seeks a direction that the Tribunal vacate and re-fix the main oral hearing after the Court of Appeal determines the extant appeals. Any other approach, it argues, would be plainly contrary to the overriding objective and the proper exercise of the Tribunal's case management powers.

7. Opposing the application a number of points are made by Freshfields Bruckhaus Deringer LLP on behalf of the Defendant. It is said, first, that the parties may request expedition by the Court of Appeal, if there is any urgency. Second, even if the appeals are not determined before September, EWS sees no reason why the Tribunal cannot hear (a) the BE overcharge claim and (b) the parts of the claim which were not subject to the rule 40 application. Third, EWS has indicated that it will disclose additional documents relevant to the EME overcharge claim which should, in its view, enable ECSL to adequately prepare for trial of that claim (should its cross-appeal be successful). The fourth point made by EWS is that it has invested substantial time and money in complying with the existing timetable and has ensured that its witnesses and counsel will be available and prepared for the September hearing. In the alternative, EWS submits, fifth, that the Tribunal should order a split trial, especially in light of ECSL's indication that it intends to amend the Claim Form.

8. Both parties were content for me to consider the application on the papers, and I have carefully considered their submissions. For the reasons set out below, my decision is to

refuse the application to vacate at this stage. The present position is that there is no permission to appeal. There is no reason why work should not continue towards the fixed trial date. However, if the Court of Appeal grants permission to appeal on the papers, or after a timely oral hearing, the Tribunal will consider on its merits any fresh application to break the fixture or set down a split trial.

9. I remind the parties that by rules 19 and 62(2) of The Competition Appeal Tribunal Rules 2003 the Chairman may give directions to secure the just, expeditious and economical conduct of these proceedings. That overriding objective is reiterated in rule 44 specifically in respect of claims for damages. The Tribunal has significant powers of case management. These include powers to regulate the manner in which proceedings are conducted and to order postponement or adjournment.

10. The decision to refuse to adjourn is a case management decision founded upon the proper exercise of discretion. It is important for me to consider all the circumstances and look, in particular, for a material change in circumstances. The assessment of those circumstances and the evaluation of their effect upon the original timetable are matters of appreciation and degree.

11. The parties should not lose sight of the fact that substantial aspects of the case remain to be tried in any event, and could be tried separately if this is thought compatible with the overriding objective.

12. For all these reasons:

IT IS ORDERED THAT:

(1) The Claimant's application to vacate and re-fix the main hearing be refused

Lord Carlile of Berriew Q.C.
Chairman of the Competition Appeal Tribunal

Made: 19 May 2009
Drawn: 19 May 2009