



Neutral Citation Number: [2009] EWCA Civ 647

Case No: C3/2009/0815/PTA

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(Lord Carlile of Berriew QC; Mr Graham Mather and Mr Richard Prosser OBE)
[2009] CAT 7

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st July 2009

Before :

LORD JUSTICE CARNWATH
LORD JUSTICE JACOB
and
LORD JUSTICE PATTEN

Between :

ENGLISH WELSH & SCOTTISH RAILWAY LIMITED **Appellant**
- and -
ENRON COAL SERVICES LIMITED (IN **Respondent**
LIQUIDATION)

Mr Mark Brealey QC and Miss Maya Lester (instructed by Freshfields Bruckhaus Deringer
LLP) for the Appellant
Mr Daniel Beard (instructed by Orrick, Herrington & Sutcliffe) for the
Respondent

Hearing date : 16th June 2009

Judgment Approved by the Court
for handing down
(subject to editorial corrections)

Lord Justice Patten :

Introduction

1. Enron Coal Services Limited (“ECSL”) was established in 1999. Until it ceased trading in late 2001 it carried on the business of coal supply and haulage in the UK. This involved acting as what is described as a third party intermediary for coal purchase. Its customers included electricity generators operating coal-fired power stations. One of the services which it provided to these customers was the management of the entire coal supply chain. This included purchasing the coal at the loading port, shipping, rail haulage and delivery of the coal to the power station. Services of this kind are known as “end-to-end” (“E2E”) services.
2. ECSL owned no rolling stock of its own and, in order to provide E2E services, it had to contract with a rail freight operator which could provide the necessary coal haulage. Until January 2001 (when Freightliner Heavy Haul (“FHH”) began to operate in this market) the Appellant, English Welsh and Scottish Railway Limited (“EWS”), was the only company providing such services in Great Britain. It therefore enjoyed an effective monopoly in the relevant market.
3. In July 1999 ECSL entered into an E2E contract with the UK subsidiary of Edison Mission Energy (“EME”), a US company which had recently acquired two power stations at Fiddler’s Ferry and Ferrybridge from E.ON (Powergen). ECSL used EWS to haul the coal under the latter’s standard conditions of carriage at rates which were agreed in August 1999 and later embodied in a seven month formal contract on 1st December 1999. The contract therefore continued until 1st July 2000.
4. From January 2000-discussions took place between ECSL and EWS about a possible performance-based contract which would, if implemented, have superseded the existing contractual arrangements for the haulage of coal to the two EME power stations. As part of this exercise EWS in May 2000 offered rates for a wide variety of routes from the ports of Hunterston, Hull and Immingham to Fiddler’s Ferry and to the Aire Valley. This was the site of the Ferrybridge Power Station and also a power station at Eggborough owned and operated by British Energy (“BE”) which I will come to shortly. These quoted rates were in every case higher than the existing contractual rates under the 1999 contract. In the case of flows from Hunterston, the May quoted rate was £6.90 per tonne compared to the 1999 contract rate of £5.90. For flows from Hull and Immingham to Ferrybridge the May quotes were £3.40 per tonne compared to the existing contractual rate of £2.80.
5. Neither the new rates nor the performance-based contract were agreed between ECSL and EWS and no coal was hauled under them. ECSL continued to pay the 1999 contract price until July 2000. But on 26th June 2000 EME issued an invitation to tender for the rail haulage of coal to Fiddler’s Ferry and Ferrybridge for a 4-year period commencing on 1st January 2001. EWS was a competitor with ECSL for this contract. It provided EME with quotes for coal haulage to its two power stations, first in August 2000 and then on 3rd and 5th October of that year. All these quotes were directed to a contract with effect from 1st January 2001.
6. In relation to each of the routes, the August quotes were either the same or higher than the contractual rate paid by ECSL under the 1999 contract but were lower than the

May quotes provided to ECSL. The quotes supplied in October were in every case lower than the August quotes and in some but not all cases were also lower than the 1999 contract rates. So, for example, in relation to the Hull to Ferrybridge flows EWS quoted a price per tonne of £2.80 in August but £2.50 on 5th October (compared to the contract rate of £2.80 and the May quote to ECSL of £3.40). For the Immingham to Ferrybridge route, the October quotes were £2.60 (3rd October) and £2.55 (5th October) compared again to the contract price with ECSL of £2.80 and the May quote of £3.40. By contrast, for the Hunterston to Ferrybridge route, the October quote to EME was £6.20-£6.50 per tonne compared to the May quote to ECSL of £6.90; an August quote to EME of £6.25; but an ECSL contract price of £5.90.

7. EME awarded the 2001 contract to EWS. By then ECSL had no contract of its own with EWS which would cover the period of the tender and the only rates on offer to it were those which had been provided in May. These could not compete with the rates offered by EWS directly to EME.
8. The other E2E contract relevant to this appeal is the one which ECSL entered into with BE in relation to the Eggborough Power Station. This resulted from a tender process initiated in autumn 1999 for a 1-year contract. The tender process continued until spring 2000 and led to BE awarding a 1-year E2E contract to ECSL effective from 1st April 2000.
9. ECSL's bid for the tender was based on rates quoted by EWS in March 2000 but, in the case of a number of routes, EWS subsequently agreed in April, once the contract had been awarded, to charge the same rates as they had agreed in 1999 for flows on the same route to EME's Ferrybridge Power Station. So, on the Hunterston route, the March quote was £6.45 per tonne which was reduced to £5.90 on 7th April. Similarly, the rate for the Immingham to Eggborough flows was quoted at £3.03 in March but then reduced to £2.80. In the case however of the Hull to Eggborough route, there was no reduction in the March quote of £3.03 and on the Redcar to Eggborough route, the original March quote of £3.35 was raised on 28th March to £3.40 compared to the 1999 contractual rate on the same route to Ferrybridge of £3.30.
10. In May 2000 the contract rates for flows to Eggborough were included in the negotiations for the new overall performance-based contract with EWS and, as in the case of the EME flows, EWS provided new quotes for the various routes. In every case these exceeded the contractual rate. In the case of flows from Hull and Immingham the price quoted was £3.40. For Hunterston it was £6.90; and for Redcar £3.60. As already mentioned, the new contract was not agreed and no coal was hauled on any of the routes at the May prices.
11. In June 2000 ECSL entered into a contract with FHH which, from January 2001, began to operate coal haulage services in competition with EWS. When in October 2000 BE issued a new invitation to tender for coal supplies to Eggborough from 1st April 2001 (the termination date of the existing ECSL contract) EWS (in October and November 2000) quoted rates to BE which, with one exception, were considerably lower than the contractual rates for ECSL agreed in April 2000 and the prices quoted in May in connection with the negotiations for the performance-based contract.
12. For the Hull route the rates quoted were £2.55 (26th October) and £2.30 (27th November); for Immingham they were £2.55 and £2.35; and for Redcar the rates

quoted were £3.20 and £2.75. The exception was the Hunterston route where the price quoted on 27th November was £6.20 which was less than the May rate quoted to ECSL but more than the April contract price of £5.90. Notwithstanding this, ECSL was in fact awarded the 2001 contract for Eggborough on an E2E basis which it has carried out using FHH as its rail haulier.

13. On 1st February 2001 ECSL submitted a complaint to the Director of Fair Trading which (so far as material) stated that:

“English, Welsh and Scottish Railways Limited (‘EWS’), the dominant supplier of rail freight services in England, Wales and Scotland, has systematically and persistently acted to foreclose, deter or limit Enron Coal Services Limited’s (‘ECSL’) participation in the market for the supply of coal to UK industrial users, particularly in the power sector, to the serious detriment of competition in that market. The complaint concerns abusive conduct on the part of EWS as follows.

- Discriminatory pricing as between purchasers of coal rail freight services so as to disadvantage ECSL.
- Operation of exclusive long-term supply contracts with power stations so as to foreclose ECSL’s competitive prospects.
- Effective refusal to deal with ECSL in particular, in effect, refusing to agree a performance-based contract and effectively refusing to supply long-haul freight for coal.
- Attempt unfairly to influence the pricing policy of a key trading partner of Freightliner Limited (‘Freightliner’) and GB Railways Group Plc (‘GB Railways’), namely General Motors.”

14. On 14th February 2001, in accordance with his powers under the Competition Act 1998 (Concurrency) Regulations 2000 (SI 2000 No. 260), the Office of the Rail Regulator informed the Director of Fair Trading that it wished to exercise concurrent jurisdiction in relation to the investigation of the complaint and the complaint was then transferred to the Regulator with the consent of the Office of Fair Trading. On 5th July 2004 the Office of Rail Regulation (‘ORR’) replaced the Office of the Rail Regulator under the provisions of the Railways and Transport Safety Act 2003 and the investigation of the complaint continued under the ORR.

15. The Regulator rejected the fourth part of the complaint referred to above and in its Decision dated 17th November 2006 the ORR (in paragraphs 13 and 14 of the Introduction) summarised its conclusions on the remaining three heads of complaint as follows:

“13. In this Decision, ORR concentrates on three particular allegations of abusive behaviour brought to its attention by the above complaints and extending over various time periods.

- (a) Exclusionary contracts with industrial users of coal (1996-2005).
- (b) Discrimination against ECSL (May 2000 to October 2000).
- (c) Predatory behaviour directed towards FHH (July 2002 to December 2003).

14. ORR has concluded that the facts underlying the complaint of a refusal to deal and that of discrimination are the same and that the essence of the abusive conduct in question is discrimination on the part of EWS in relation to prices offered to ECSL. Taken together the conduct amounts to a sustained and deliberate campaign by EWS to protect its own dominant position from competition and to disadvantage ECSL (perceived by EWS to act as a competitor to it) and FHH (a new entrant providing haulage of coal by rail). ORR does not, therefore, find an infringement that can be characterised as a refusal to deal with ECSL.”

- 16. On this basis the ORR notified EWS that it had infringed the prohibition on abuse of dominant position contained in Chapter II (s.18) of the Competition Act 1998 (“the CA 1998”) and Article 82 of the EC Treaty. There has been no appeal by EWS against the Decision or the penalty of £4.1 million which the ORR imposed.
- 17. On 7th November 2008 ECSL issued a claim form against EWS (subsequently amended on 8th January 2009) seeking damages for the loss which it alleges it has suffered as a result of the breaches of s.18 of the CA 1998 and Article 82. The claim is brought under s.47A of the CA 1998. It is said that EWS caused ECSL loss and damage in that it:
 - (i) overcharged ECSL for coal haulage;
 - (ii) imposed additional costs upon ECSL in relation to coal haulage; and
 - (iii) prevented ECSL from obtaining new or extended business with new or existing customers and/or materially reduced the chance of obtaining such business.
- 18. Although each of these claims is denied, this application concerns only the first of them. This is because on 7th January 2009 EWS applied to the Competition Appeal Tribunal (“the Tribunal”) (which has jurisdiction to hear claims brought under s.47A) to strike out the overcharge claim under the power contained in Rule 40 of the Tribunal’s 2003 Rules. The overcharge claims (as pleaded) relate to the prices which ECSL paid EWS for the haulage of coal under the 1999 contract in respect of flows to the EME power stations at Fiddler’s Ferry and Ferrybridge and under the April 2000 contract in respect of the flows to BE’s power station at Eggborough. In the case of the EME flows, the overcharge is alleged to have occurred between summer 1999 and July 2000 when the ECSL E2E contract with EME ended. Alternatively a claim is made limited to the period between May and July 2000. In the case of BE, the period

of the alleged overcharge is 1st April 2000 to 31st March 2001 in respect of the E2E contract using EWS. Alternatively, it is limited to the period between May and November 2000. There is also a claim for an overcharge from April 2001 to November 2001 in respect of the subsequent E2E contract which ECSL obtained from BE.

19. The issue between the parties is a dispute as to what findings of infringement the ORR in fact made. EWS accepts that the ORR found that it had engaged in selective and discriminatory pricing practices which put ECSL at a competitive disadvantage in the tender negotiations for the new E2E contracts in the latter half of 2000. It has not therefore sought to strike out that part of the claim which relates to the loss of the 2001 EME contract. But it contends that, properly read, the decision contains no findings that the contract prices charged under the earlier agreements made in 1999 and April 2000 were excessive and an infringement of the Chapter II prohibition. There is therefore, they say, no basis for the overcharge claims.
20. The Tribunal (Lord Carlile of Berriew QC; Mr Graham Mather and Mr Richard Prosser OBE) struck out the claim based on the EME flows but dismissed the application so far as it related to the flows to the BE Eggborough power station. They refused permission to appeal. EWS now seeks permission to appeal from this court against the refusal to strike out this part of the claim. In response, ECSL has served a Respondents' Notice seeking permission to appeal against the Tribunal's decision to strike out paragraph 33 of the claim which is limited to the overcharge on the EME contract between May and July 2000. It does not, however, seek to pursue this application unless permission to appeal is granted to EWS on its own application.
21. Mummery LJ (after a consideration of the papers) directed that EWS's application for permission should be considered by the full court with the appeal to follow if permission is granted. We have therefore followed the usual practice in such cases of hearing full argument from both sides (including on the Respondents' Notice). It is perhaps worth stating at this stage before coming on to the details of those submissions that before the Tribunal both sides were agreed that the two parts of the overcharge claim either stood or fell together. Before us that position has been maintained. It does therefore appear to be common ground that the Tribunal should not have differentiated between the EME based claim and that relating to BE in deciding whether or not to accede to the Rule 40 application.

Jurisdiction

22. Mr Beard, on behalf of ECSL, raised a preliminary point about the jurisdiction of this court to hear an appeal against a decision of the Tribunal not to strike out a claim under Rule 40. Appeals to the Court of Appeal from a decision of the Tribunal are governed by s.49 of the CA 1998 which provides as follows:

“49 Further appeals

- (1) An appeal lies to the appropriate court —
 - (a) from a decision of the Tribunal as to the amount of a penalty under section 36;