Neutral citation [2009] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1106/5/7/08

Victoria House
Bloomsbury Place
London WC1A 2EB

30 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

RULING REFUSING PERMISSION TO APPEAL

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1. On 12 March 2009 the Tribunal handed down judgment on an application by the Defendant, EWS, to reject parts of ECSL's claim form: see [2009] CAT 7, "the judgment". This ruling should be read together with the judgment which EWS seeks to appeal, and we adopt the same abbreviations. In that judgment, we gave our reasons for granting EWS's application to reject paragraphs 31 to 33 of the Claim Form (what was termed the "EME overcharge claim") but refusing the application to reject paragraphs 34 to 43 of the Claim Form (the "BE overcharge claim"). An Order to that effect was made and drawn on 12 March 2009.

2. On 19 March 2009, EWS wrote to the Tribunal requesting permission to appeal the judgment. EWS seeks permission to appeal against the Tribunal's decision at paragraph 2 of the Order of 12 March 2009 to refuse EWS's application to reject the BE overcharge claim. ECSL filed written observations on EWS's request together with a limited cross-application on 25 March 2009. Both parties were content for permission to appeal to be considered on the papers without an oral hearing.

3. In considering whether to grant permission, the Tribunal, when sitting in England and Wales, applies the test in CPR r 52.3(6). Permission may be granted only if the Tribunal considers that the ground has a real prospect of success or that there is some other compelling reason why the appeal should be heard.

4. EWS submits that the Tribunal misdirected itself at paragraphs 42 and 46 of the judgment when it "interpreted the ORR Decision as having found that failing to offer to ECSL the lower prices offered to EME and BE in itself constituted the infringement of price discrimination, as opposed to being merely one element of it".

5. In our judgment EWS's request for permission to appeal is misconceived. It appears to be based on a mis-reading of the judgment. Paragraph 42 of the judgment states:

> "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."

6. There are two points to note in respect of EWS's submission. First, it is clear from paragraph 42 that the Tribunal did not conclude that the failure to offer the lower prices to ECSL constituted price discrimination in itself. The judgment states that "EWS's failure to do so *arguably* constitutes *an element* of the price discrimination as found in the ORR Decision" (emphasis added). Secondly, it should be borne in mind that the judgment against which EWS seeks permission to appeal was on an application under Rule 40 of the Tribunal Rules to reject or strike out part of ECSL's Claim Form. At paragraph 46 of the judgment we concluded that 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, i.e. that such a claim should not be rejected or struck out at this early stage of the proceedings. We did not make any findings of fact, as is clear from paragraph 61 of the judgment. The fact that this part of the claim was not struck out does not mean that it is bound to succeed. The constituent parts of the claim, including the scope of the infringement established in the ORR Decision, will need to be established at trial. For these reasons we conclude that EWS's first ground of appeal, that the Tribunal misdirected itself, has no real prospect of success.

7. EWS's second ground of appeal is that, as a consequence of its misdirection, the Tribunal made an error of law in concluding at paragraph 55 of the judgment that it had jurisdiction to determine what prices should have been offered to ECSL, at what time and from what date. EWS submits that such a determination would amount to the Tribunal itself deciding what constituted discriminatory pricing by EWS, which is not something the Tribunal has jurisdiction to determine in claims brought under section 47A of the Competition Act 1998.

8. Since this second ground of appeal is said to arise as a consequence of the alleged misdirection identified in EWS's first ground and we have rejected EWS's first ground, the second ground would fall away. Nonetheless, we will address it briefly. Again, this ground of appeal appears to be based on a mis-reading of the judgment. The Tribunal is not, in paragraph 52 of the judgment, asserting jurisdiction to determine what constitutes an infringement. The infringement is established by the ORR in its Decision. As we noted at paragraph 14 of the judgment, the parties will no doubt wish to address us in detail on the exact scope of the infringement established in the ORR Decision, which is a long and complex document. In a follow-on damages action the

Tribunal's job is not to establish liability but to deal with causation and quantum: see paragraph 30 of the judgment. What paragraph 52 of the judgment under appeal is saying is that even if it is established at trial that the failure to offer the lower prices to ECSL did constitute an element of the price discrimination established by the ORR, that would not necessarily be the end of the matter. There would be further questions which would need to be addressed in order to establish the quantum of any loss caused by the price discrimination established by the ORR, such as what prices should have been offered to the victim of the price discrimination, when those prices should have been offered and from what date they should have been effective. We therefore conclude that EWS's second ground of appeal also has no real prospect of success.

9. In the Tribunal's judgment no important point of principle arises from EWS's request for permission to appeal, and there is no other compelling reason why the appeal should be heard.

10. ECSL included with its written observations on EWS's request for permission to appeal what it called a "limited cross-appeal". ECSL stated that if the Tribunal were minded to grant EWS permission to appeal, it would seek permission to appeal the striking out of paragraph 33 of the Claim Form (i.e. the post-May 2000 part of the EME overcharge claim: see paragraph 57 of the judgment). ECSL's cross-application is stated to be contingent on EWS's application. Had we granted permission to EWS, we would also have been minded to grant permission to ECSL on their cross-appeal. However, it follows that as we have refused EWS's application we should now refuse ECSL's application, and we do so unanimously.

11. The parties may, if so advised, renew their applications for permission to the Court of Appeal within 14 days pursuant to CPR 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling together with copies of EWS's request for permission to appeal dated 19 March 2009 and of ECSL's letter of 25 March 2009 containing its observations on EWS's request and cross-application should be placed before the Court of Appeal.

12. Accordingly, the Tribunal unanimously:

ORDERS THAT:

(1) Permission to appeal be refused.

Lord Carlile of Berriew QC
Chairman

Graham Mather

Richard Prosser

Charles Dhanowa
Registrar

Date: 30 March 2009