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IN THE COMPETITION
APPEAL TRIBUNAL

1076/2/5/07

Victoria House
Bloomsbury Place
London WC1A 2EB

4 April 2007

Before:
The Honourable Mr Justice Pumfrey
(Chairman)
Peter Clayton
Professor Paul Stoneman

BETWEEN:

E.ON (UK) PLC

Appellant

- v -

THE OFFICE OF RAIL REGULATION

Respondent

and

ENGLISH WELSH AND SCOTTISH RAILWAY LIMITED

Intervener

Mr. Matthew Cook (instructed by Pinsent Masons) appeared for the Appellant.

Mr. Jon Turner QC and Ms Anneli Howard (instructed by Linklaters) appeared for the Respondent.

Mr. Nicholas Green QC (instructed by English Welsh and Scottish Railway Ltd) appeared for the Intervener.

Transcript of the Shorthand notes of
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1 MR. COOK: It probably falls to me to go first. Certainly having talked with my learned friends
2 outside there is a measure of agreement between the parties given the position that E.ON is
3 taking, which is – just to repeat it – if Mr. Justice Field’s Judgment stands as is then we do
4 not see a purpose in pursuing the Appeal and will not do so. If, on the other hand, it is
5 successfully overturned, and obviously subject to the ways in which it is overturned there
6 may well be issues which we will wish to raise before this Tribunal particularly focusing
7 on the scope of the directions and points like that. So, in that context, Sir, there is a
8 measure of agreement between the parties at least that the appropriate situation at the
9 moment is to stay this appeal pending the result of any Court of Appeal claim that is
10 brought.

11 THE CHAIRMAN: I am not terribly keen on the idea of just staying it. I would like to adjourn
12 it to come back on a fixed date so that we know where we are. You can always apply in
13 writing to postpone the fixed date further if it is necessary – if the Court of Appeal,
14 horrified by the prospect of reading all that paper, have not decided whether or not to grant
15 permission. Mr. Justice Field refused permission, is that right?

16 MR. COOK: That is correct, Sir.

17 THE CHAIRMAN: Did he have a draft notice of appeal in front of him?

18 MR. COOK: No, he did not, Sir.

19 THE CHAIRMAN: Right. Thank you very much. Now, who wants to go next – Mr. Green?

20 MR. GREEN: I am the Intervener.

21 THE CHAIRMAN: I know you are, but I have a long skeleton argument saying that this is all an
22 attempt to put off the evil hour, but you are not persisting in that?

23 MR. GREEN: We have set out in the skeleton that we think the sensible course is that it be
24 adjourned/stayed pending determination by the Court of Appeal as to whether they wish to
25 hear it. If the Court of Appeal (a) wishes to hear it; and (b) hears it in favour of E.ON then
26 the landscape will change – it may still be a hopeless appeal, but the landscape will change.

27 THE CHAIRMAN: You are stuck with the “it is a hopeless appeal” submission, I think. Yes, all
28 right, thanks very much. Mr. Turner?

29 MR. TURNER: Sir, we agree that there should be a stay of proceedings, at least until the final
30 outcome of the civil proceedings, or until E.ON applies to withdraw its Appeal to this
31 Tribunal under Rule 12.

32 THE CHAIRMAN: Are you saying that I should just simply let it go and hang fire indefinitely?

33 MR. TURNER: I am happy, Sir, with an adjournment until the case comes back on a fixed date.

34 THE CHAIRMAN: Well we have to be realistic. If the Court of Appeal takes it, it may not be

1 heard for a year, or slightly less than a year. If they decide not to take it then we should
2 know in a couple of months, or even in a month. That is why I am wondering, just as a
3 matter of ordinary mechanics, what to do about it.

4 MR. TURNER: Sir, our submission would be that we may put a date in the diary for a time after
5 the Court of Appeal ought to have been able to consider the application for permission to
6 appeal, and then we can review where we are, but to put a date in the diary would be
7 sensible case management, and we have no objection to that.

8 THE CHAIRMAN: Does anybody feel strongly about what I do?

9 MR. COOK: Sir, I would not say I feel strongly about it but just in terms of timescale, certainly
10 my recent experience of the Court of Appeal is for a one day appeal, which this probably
11 would be, it probably would not be quite as long as a year, six months is my recent
12 experience, but I am to some extent in their hands.

13 THE CHAIRMAN: Yes, it depends very much what the contents of your notice of appeal look
14 like. Did I detect an element of asymmetry in what you were saying, i.e. that this may be
15 one of those agreements that is enforceable by your client but not enforceable by the guilty
16 party?

17 MR. COOK: That is absolutely right, Sir, that is what we say is general consequence of an
18 Article 82 point.

19 THE CHAIRMAN: Was that raised before Mr. Justice Field?

20 MR. COOK: Very much so. His Judgment, it is fair to say, does not go into this point in
21 particular detail.

22 THE CHAIRMAN: Yes, all right – the words “or at all” might be appropriate. Yes, fair enough.
23 In the Court of Appeal that is going to take some time. I think one day would be
24 optimistic, actually, but anyway, there it is. What I thought we might do is bring it back
25 right at the end of July. Does anybody have any problems with that? You will be told
26 through the usual channels exactly what the date towards the end of July is because you
27 will all need to negotiate, I suspect. Is there any problem with that?

28 (The Tribunal confer)

29 THE CHAIRMAN: The legal end of July being 27th July – it will be on or before that date, but
30 not much before. If the Appeal needs to be withdrawn you can withdraw it at any time
31 before that and we can just take everything out of the diary providing you have
32 everybody’s consent and all matters of costs and that sort of thing are dealt with. I think
33 that is everything is it not?

34 MR. GREEN: There should probably be a direction that E.ON notify the Tribunal once the

1 Court of Appeal has decided upon permission – somebody ought to do that, and it is logical
2 it is the Appellant.

3 THE CHAIRMAN: I think that is right. You have conducted effectively of what is going on in the
4 Court of Appeal so, yes, I will give a direction that you are to tell the Tribunal as soon as
5 you know what the Court of Appeal are going to do, whether they take the case or not.

6 MR. COOK: Sir, as a practical matter – whether you need to make a direction or not – we will
7 be notifying you of two things: (i) when the Appeal is in fact lodged; and (ii) if it is lodged,
8 when the Court of Appeal gives permission or not.

9 THE CHAIRMAN: I am not worried about lodging. You have 21 days now to put in your
10 application for permission to the Court of Appeal – unless you get an extension. So it will
11 go in within 21 days from the day the Judgment was handed down by Mr. Justice Field.

12 MR. COOK: Which becomes next Friday, Sir.

13 THE CHAIRMAN: Which is next Friday, and then it is in the hands of the Court of Appeal.

14 MR. GREEN: If they decide not to seek permission to appeal then ----

15 THE CHAIRMAN: It all ought to go without another outing.

16 MR. GREEN: It ought to go without another outing but then they will need to tell the Tribunal
17 of that, because then withdrawal ----

18 THE CHAIRMAN: Yes, as soon as you know, and certainly no more outings unless strictly
19 necessary.

20 MR. TURNER: Sir, on that there may be an outing before this Tribunal because if the Appeal is
21 withdrawn then we shall be applying for our costs and your Lordship referred to that a few
22 moments ago.

23 THE CHAIRMAN: Oh no, there will have to be an outing unless the question of costs is agreed,
24 but I would expect on a withdrawn Appeal that it should not be beyond the wit of man to
25 agree the question of costs, should it?

26 MR. TURNER: That is the costs of the Appeal to this Tribunal?

27 THE CHAIRMAN: Yes.

28 MR. TURNER: Yes, Sir.

29 THE CHAIRMAN: I would have thought – if the Appeal is then withdrawn – and the High
30 Court can look after its own costs. Is there anything else? Well I am sorry to drag
31 everybody here just to do that, but there it is. Thank you very much indeed.

32 (The hearing concluded at 11.05 a.m.)