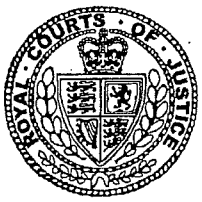

Neutral Citation Number: [2009] EWCA Civ 647

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 LIQUIDATION)	**Respondent**

- -
- -

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;

> (b) from a decision of the Tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A or included in proceedings under section 47B (other than a decision on costs or expenses) or as to the amount of any such damages or other sum; and
>
> (c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47."

23. The question is whether the rejection of a Rule 40 application to strike out a claim is a decision "as to the award of damages or other sum" under s.47A. Mr Beard accepts that a decision to strike out such a claim would be a decision as to the award of damages because it would amount to a rejection of the claim. But a refusal to strike out does no more than to leave the pleaded claim intact and to allow it to proceed to an adjudication at a full hearing. He therefore submits it is not a decision as to the award of damages because it is not determinative of the claim.

24. I think that this is too literal an approach to the construction of s.49(1). The reference in it to a decision of the Tribunal "as to the award of damages or other sum in respect of a claim made in proceedings under section of 47A" is simply descriptive of the type of relief available in such claims. It is not in my view intended to limit the disappointed party's right of appeal to decisions of the Tribunal either awarding or refusing an award of damages following a full hearing. As mentioned earlier, Mr Beard accepts that the wording is apt to include an interlocutory determination under Rule 40 that a s.47A claim to damages should be struck out and it seems to me that that concession is rightly made. However, it is difficult to believe that Parliament intended an unsuccessful claimant to be able to appeal against the dismissal of his claim after a full hearing but not to do so against its dismissal under Rule 40. Once one accepts that the wording of s.49(1) is wide enough to cover a Rule 40 determination against the viability of the claim it is hard to identify any linguistic or policy barrier to the inclusion of a decision to the opposite effect. In my view, the language of the subsection covers both.

The nature of the Rule 40 test

25. There is no real dispute about this. Rule 40 of the Competition Appeal Tribunal Rules 2003 provides that:

> "40. (1) The Tribunal may, of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, reject in whole or in part a claim for damages at any stage of the proceedings if -
>
> (a) it considers that there are no reasonable grounds for making the claim;
>
> .....

> (2) When the Tribunal rejects a claim it may enter judgment on the claim in whole or in part or make any other consequential order it considers appropriate."

26. In the present case the Tribunal followed the guidance contained in the earlier Tribunal decision in *Emerson Electric and Others v Morgan Crucible* [2007] CAT 30 at [24] where it is stated:

> "...that the test under Rule 40 is whether the Tribunal is certain that the claim is bound to fail. This accords with the test under Rule 3.4(2)(a) of the Civil Procedure Rules ("CPR") to strike out a claim because there are no reasonable grounds for bringing it. "The court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out" (see *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, at paragraph 22, per Peter Gibson L.J., citing *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 557 per Lord Browne-Wilkinson)."

27. Rule 40 has adopted the same wording as CPR 3.4(2) and I agree that the same test should be applied. Rule 40 therefore permits the Tribunal to strike out claims which are certain to fail. In the context of CPR 3.4(2), this can include claims which are bad in law even assuming that the pleaded facts are established. Mr Beard makes the point that in exercising that jurisdiction, the High Court will not usually strike out claims which depend upon a developing branch of the law and which therefore make it desirable for a trial to be held in order to establish the actual facts before considering whether the law can be extended to cover the claim: see *Barrett v Enfield LBC* [2001] 2 AC 550 at page 557 per Lord Browne-Wilkinson.

28. But in a claim before the Tribunal under s.47A, this is an unlikely scenario. As I explain below, the role of the Tribunal is limited to the determination of loss which results from a finding of infringement by a regulator. The Tribunal is not therefore concerned with the correctness of that finding but only with whether it has been made. Any challenge to the finding of infringement has to be resolved on an appeal to the Tribunal under s.46 of the CA 1998; not in proceedings under s.47A. The Tribunal is, for those purposes, bound by the finding which the regulator has made: see s.47A(9). Its function is to do no more than to identify the findings of infringement in the decision. The possibility of being faced with a developing area of the law will not normally arise.

Section 47A

29. So far as material, s.47A provides as follows:

> **"47A Monetary claims before Tribunal**
>
> (1) This section applies to—
>
> (a) any claim for damages, or
>
> (b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section "relevant prohibition" means any of the following—

(a) the Chapter I prohibition;

(b) the Chapter II prohibition;

(c) the prohibition in Article 81(1) of the Treaty;

(d) the prohibition in Article 82 of the Treaty;

(e) the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community;

(f) the prohibition in Article 66(7) of that Treaty.

.....

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings—

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are—

(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;

(b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

(c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed;

> (d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or
>
> (e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.
>
> .....
>
> (9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.
>
> (10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim."

30. The jurisdiction of the Tribunal is therefore limited to determining what are commonly referred to as follow-on claims for damages based on a finding of infringement of the Chapter II prohibition or Article 82 which has been made by the OFT or one of the sectoral regulators such as the ORR who enjoy concurrent powers of enforcement in respect of the Chapter II prohibitions: see CA 1998 s.54 and Schedule 10. The existence of such a finding is not only a pre-condition to the making of a claim under s.47A(1). It also operates to determine and define the limits of that claim and the Tribunal's jurisdiction in respect of it.

31. For there to be such a claim (and, with it, the jurisdiction of the Tribunal to adjudicate upon it) the regulator must have made a decision of the kind described in s.47A(6). The use of the word "decision" makes it clear that s.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition. It is not open to a claimant such as ECSL to seek to recover damages through the medium of s.47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the Tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of s.47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue. We were not referred to any procedure for seeking clarification of any points of uncertainty from the decision-maker. The Tribunal ought therefore, in my judgment, to be astute to recognise and reject cases where there is no clearly identifiable finding of infringement and where they are in effect being asked to make their own judgment on that issue.

The ORR decision

32. The correct interpretation of the ORR's decision is central to this application for permission to appeal. In paragraphs 31-43 of the claim form ECSL seeks damages equal to the difference between the prices charged by ECSL under the 1999 and April 2000 contracts with EWS and the prices quoted to EME and BE in October and November 2000 in connection with the tender for the 2001 contracts. In the alternative, it seeks the difference between the contract price and the price which EWS should have charged for haulage in the relevant period had it not price discriminated against ECSL.

33. Both these alternatives assume a decision by the ORR that to continue to charge for haulage at the existing contractual rates until July 2000 (in the case of the flows to the EME power stations) and until April 2001 (in the case of the flows to BE's Eggborough power station) amounted to an infringement of s.18. This is apparent from annexes 3 and 4 to the claim form which set out a calculation of the overcharge for these periods based on the difference between the contractual rate and what is described as the EME price. The general thrust of the allegation seems to be that EWS should have agreed to charge ECSL from 1999 (in the case of the EME flows) and from 1st April 2000 (in the case of BE) the same or similar prices to those which it quoted to EME and BE in October and November 2000. Put another way, it is said that to continue to charge the prices actually paid under the contract constituted an abuse of EWS's dominant position in the market which could only have been corrected by a combination of a reduction in the contractual rates charged to ECSL coupled with the repayment of the excess over the proper price. This would therefore have involved the alteration of prices contractually agreed in 1999 and April 2000.

34. The Rule 40 application was based on the submission that the abuse found by the ORR consisted of EWS quoting charges to ECSL from May to November 2000 which were discriminatory and uncompetitive. Mr Brealey submitted (as he did to the Tribunal) that the ORR did not examine whether the prices agreed in 1999 for the EME flows and in April 2000 for the BE flows placed ECSL at a competitive disadvantage and were a market abuse. The fact that its finding that uncompetitive pricing occurred was limited to the period between May and November 2000 is sufficient in itself, he says, to indicate that it did not decide that the December 1999 and April 2000 contract prices were themselves an infringement.

35. In the introduction to the Decision the ORR summarises the conclusions of its inquiry as follows:

> "B2 EWS has engaged in abusive discrimination between its customers. In particular, EWS set an existing customer, ECSL, selectively higher prices than it charged other customers directly for the same flows without objective justification.
>
> B3 This behaviour was a further manifestation of EWS's wider strategy to exclude or limit competitive opportunities for potential new entrants to the market for coal haulage by rail in Great Britain. EWS was concerned that ECSL could facilitate such entry into this market by developing an intermediary role, including through the negotiation of E2E contracts with new

> owners of power stations. EWS sought to constrain this competitive threat by ensuring that it, and not ECSL, secured direct contracts with the power stations.
>
> ...
>
> B5 EWS's discriminatory treatment of ECSL placed ECSL at a competitive disadvantage in respect of two specific sets of flows:
>
> (a) Flows to the Fiddler's Ferry and Ferrybridge power stations, operated by Edison Mission Energy (EME). Between May 2000 and October 2000, EWS imposed higher prices on ECSL. This placed ECSL at a competitive disadvantage in its contractual negotiations with EME relating to coal haulage supply to Fiddler's Ferry and Ferrybridge power stations. Prior to the period of discriminatory pricing, ECSL had supplied EME on these flows on an E2E basis. Following the period of discriminatory pricing, ECSL was unsuccessful in renewing that relationship.
>
> (b) Flows to Eggborough power station, operated by British Energy (BE). Between May 2000 and November 2000, EWS imposed higher prices on ECSL which placed ECSL at a competitive disadvantage in its contractual negotiations with BE. Even though ECSL was eventually successful in the tender negotiations, EWS sought to undermine ECSL's ability to contract with BE as an intermediary."

36. The May-October window is clearly linked to the period beginning with the May quotes to ECSL in connection with the contractual negotiations which took place then and ending with the final quotes to EWS as part of the tender process for the 2001 contracts. EWS contends that the express focus of the complaint and the only finding of competitive disadvantage related to the position of ECSL in the tender negotiations produced by the difference between the prices quoted to ECSL in May and those supplied to EME and BE in October and November. This, it is said, is confirmed by the conclusions set out in paragraph B198 of the Decision:

> "B198 For all of the above reasons, it is found that between May 2000 and November 2000, EWS pursued, without objective justification, selective and discriminatory pricing practices that placed ECSL at a competitive disadvantage in its contractual negotiations with two power generators, EME and BE. By impeding the competitive position of ECSL as a customer and a competitor, EWS's actions were capable of distorting the structure of competition in the relevant market. This conduct was contrary to both the Chapter II prohibition of the Act and Article 82 EC."

37. An abuse by an undertaking of a dominant position in the market is defined by s.18(2) of the CA 1998 as including conduct which consists in:

> "(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;"

This reproduces the provisions of Article 82(2)(c) of the EC Treaty.

38. The ORR set out this definition in paragraph B6 of its Decision together with an analysis of the forms which price discrimination may take and how it may operate as a market abuse. Mr Beard drew our attention to the EC case law under Article 82(2)(c) in relation to the requirement that the discriminatory conduct should inflict a competitive disadvantage on those affected by it. In *British Airways plc v Commission* [2007] ECR 1-2331 the ECJ ruled on a submission that concrete evidence of a competitive disadvantage was required in order to establish an infringement of Article 82(2)(c). The Court said this:

> "144 Therefore, in order for the conditions for applying subparagraph (c) of the second paragraph of Article 82 EC to be met, there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others (see, to that effect, *Suiker Unie*, paragraphs 523 and 524).
>
> 145 In that respect, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually."

39. Mr Beard submitted that it was not therefore necessary to do more than to show that the conduct complained of tended to distort competition and it was therefore unnecessary to look or find in the ORR's decision any detailed analysis of this issue. In the case of discriminatory pricing, the likelihood that it created a distortion of competition was overwhelming.

40. But we are not concerned on this application with how the ORR should have approached this issue. The ORR expressly addressed the question of competitive disadvantage in its Decision and made specific findings about it. The only question for the Tribunal (and, on this application, for us) is whether the ORR made a finding of competitive disadvantage in relation to overcharging of the kind alleged in the claim form in these proceedings. In my view, it did not.

41. One can begin with paragraph B20 of the Decision. Under the heading: "Focus of the assessment of the alleged discriminatory abuse": the ORR sets out its assessment of

whether EWS engaged in market abuse by price discrimination. In paragraph B21 it states:

> "B21 The objection concerns three particular aspects of the negotiations between EWS and ECSL:
>
> (a) around May 2000, when EWS offered ECSL rates significantly higher than rates that EWS had previously offered ECSL;
>
> (b) the period between May 2000 and November 2000 when EWS offered significantly lower rates to other customers; and
>
> (c) during the same time period, when active contractual negotiations between the two parties ceased and ECSL was not offered price reductions similar to those offered to other customers of EWS."

42. The reference in B21(a) to the rates previously offered to ECSL is a reference to the rates under the 1999 and April 2000 contracts. The price reductions mentioned in B21(c) are the rates which EWS offered to EME and BE in October and November 2000. The ORR's approach to the assessment of discriminatory conduct is summarised in paragraphs B22 and B24:

> "B22 ORR's analysis is focused on rates for coal haulage applying to certain flows to Fiddler's Ferry and Ferrybridge power stations (operated by EME) and certain flows to Eggborough power station (operated by BE). ORR presents analysis of EWS's prices on these flows to different customers and at different points in time. ORR also considers how the discriminatory prices placed ECSL at a competitive disadvantage.
>
> ...
>
> B24 The assessment demonstrates that, between May 2000 and November 2000, EWS applied dissimilar conditions to equivalent transactions, with its customers for coal haulage by rail, and placed ECSL at a competitive disadvantage."

43. The relevant transactions are then analysed in detail in relation first to the EME power stations (paragraphs B45-B65) and then in relation to Eggborough (paragraphs B66-B77). The section on EME begins with an analysis of the contractual history which I summarised earlier. In paragraph B51 the ORR observes that the initial rates agreed with ECSL in 1999 were significantly higher than existing rates to other generators at that time and led to an angry response from ECSL when they discovered it (see paragraph B52). But the ORR then goes on to examine the May 2000 rates offered in connection with the negotiations for the performance-based contract which, as mentioned earlier, were considerably higher than both the 1999 rates and the rates

subsequently offered in October and November to EME. This information is presented in tabular form (Table 15). According to the Decision (paragraph B54) the figures in the Table:

> "... demonstrate two aspects of discriminatory pricing:
>
> (a) EWS set ECSL higher prices in May 2000 (compared to those in December 1999) once ECSL started to seek quotes for the haulage of coal *generally* (i.e. in order to provide haulage prices as an intermediary, including supply on an E2E basis, and not just in respect of a pre-existing E2E contract with a specific generator) and when EWS had become more concerned about the threat posed by ECSL as a facilitator of new entry to the market for coal haulage by rail.
>
> (b) EWS in May 2000 set ECSL higher prices (in the region of 5% to 36% higher) than it subsequently set EME for direct supply in respect of the same flows."

44. The Decision therefore focuses on the May prices quoted to ECSL and makes a comparison of these rates with those previously offered and agreed in December 1999 with ECSL and those subsequently offered to EME. The conclusions from this exercise are set out in paragraphs B57-B58 as follows:

> "B57 On the basis of all this evidence, EWS is found to have offered selective price reductions to EME, with prices considerably lower than those offered to ECSL in May 2000. EWS has not provided an objective justification for the price differences.
>
> B58 Taken together with the evidence of the price increases to ECSL compared to the rates ECSL had previously been granted, and the evidence above of EWS's intent to impede ECSL's ability contract directly with the generators for rail haulage, including by way of E2E supply, this evidence supports the finding that EWS discriminated against ECSL between May 2000 and November 2000 in respect of prices for coal haulage on the flows to Fiddler's Ferry and Ferrybridge."

45. The ORR then goes on to consider the question of competitive disadvantage. Its conclusions are set out in paragraphs B62 and B65:

> "B62 In bidding as part of these negotiations, EWS's discriminatory treatment of ECSL placed ECSL at a competitive disadvantage in two main ways:
>
> (a) First, having failed to agree the performance related contract it had sought from EWS, ECSL was in the position of having neither its own coal haulage operations nor a suitable contract with EWS (the

> only operator of coal haulage by rail at the time). This would have impeded ECSL's ability to offer competitive rates for coal haulage to EME. In bidding to supply EME, ECSL would have had to bear the business risks of subsequently needing to re-open negotiations with EWS and/or trying to assist the new entry of an untested rail haulage operator that had never previously carried coal (the substantial barriers to entry to the market for coal haulage by rail are discussed in part I – *Market definition* and *Assessment of dominance*).
>
> (b) Second, ECSL's ability to offer relatively attractive rates for coal haulage to EME was impeded by the fact that, between August 2000 and October 2000, EWS (i) offered EME rates for coal haulage that were lower than the rates it had offered to ECSL in May 2000 but (ii) did not make available to ECSL the reduced rates it was offering to EME.
>
> ...
>
> B65 It is not possible to conclude that ECSL was displaced from supplying EME as a result only of the discriminatory terms from EWS. Nonetheless, for the reasons set out above, ECSL was clearly placed at a competitive disadvantage when competing against EWS, compared to the scenario that would have prevailed had EWS been willing to treat ECSL in a non-discriminatory manner (i.e had it offered ECSL similar rate reductions to those it had offered to EME)."

46. The analysis of the BE transactions takes much the same form. In paragraphs B73-B74 the ORR explains that:

> "B73 In evaluating EWS's pricing to ECSL in respect of the BE flows to Eggborough, ORR focuses on one specific time period, namely between May 2000 (when ECSL sought prices under a wider performance based contract) and November 2000, when EWS responded to the BE invitation to tender.
>
> B74 The period under consideration represents a pivotal time, occurring immediately prior to the entry of FHH. It is clear that EWS's strategy was intended not only to impose selectively higher prices on ECSL and to limit its ability to negotiate with BE on an indirect E2E basis but also to foreclose potential opportunities for FHH as a new entrant."

47. A comparison is then made between the May 2000 rates; those set under the April 2000 contract; and the rates quoted directly to BE in October and November 2000. There is no further discussion in the Decision as to whether the April 2000 prices were, in themselves, in excess of what EWS had offered relevant competitors at the

time. This comparative exercise is followed by a finding of price discrimination in the period between May and November 2000:

> "B79 Between May and November 2000, EWS pursued a practice of discriminatory pricing between ECSL and BE in the following ways: (i) it imposed large price increases on ECSL between March 2000 and May 2000; (ii) it offered lower prices to BE in October 2000 than it had offered to ECSL in May 2000 (without making these lower prices available to ECSL) and (iii) it offered BE further reduced prices in November 2000 (again, the price reductions were granted selectively to BE)."

48. Competitive disadvantage is addressed at paragraph B92 in these terms:

> "B92 In bidding as part of the BE tender in 2000, EWS's discriminatory treatment of ECSL placed ECSL at a competitive disadvantage in two main ways.
>
> (a) First, having failed to agree the performance related contract it had sought from EWS, ECSL was in the position of having neither its own coal haulage operations nor a suitable contract with EWS (the only operator of coal haulage by rail at the time). This would have impeded ECSL's ability to offer an attractive E2E (and intermediary) deal to BE, and placed ECSL at a competitive disadvantage compared to both EWS and to other coal suppliers (including other potential E2E suppliers who had coal haulage agreements already in place with EWS). In bidding to supply BE on an E2E basis, ECSL would have had to bear the business risks associated with the fact that, were it to win the tender on an E2E basis, it would subsequently need to re-open negotiations with EWS and/or try to assist the new entry of an untested rail haulage operator that had never previously carried coal (the substantial barriers to entry to the market for coal haulage by rail are discussed in part I – *Market definition* and *Assessment of dominance*).
>
> (b) Second, in seeking to reach an E2E (and intermediary) deal with BE, ECSL was effectively competing against both EWS and other suppliers of coal. ECSL's ability to offer a comparatively attractive E2E package to BE was impeded by the fact that, between October 2000 and November 2000, EWS (i) offered BE rates for coal haulage that were significantly lower than the rates it had offered to ECSL in May 2000 and (ii) EWS did

> not and would not make available to ECSL the reduced rates it was offering to BE (as is clearly demonstrated in the exchanges recorded above). This discriminatory treatment would not only have disadvantaged ECSL's E2E offer when compared against EWS's direct haulage offer, it would also have disadvantaged ECSL's E2E offer when compared against alternative E2E and coal-only offers that BE would be considering."

49. The overall conclusion on pricing is set out at paragraph B100:

> "B100 On the basis of all the evidence set out above, and the points made in response to EWS's arguments below, it is found that between May 2000 and November 2000, EWS pursued discriminatory pricing practices against ECSL. This discriminatory pricing placed ECSL at a competitive disadvantage when negotiating intermediary contracts (including E2E deals) with generating companies. EWS's intention was to reduce the threat that ECSL posed to its position in the market for coal haulage by rail in Great Britain. EWS has advanced no credible objective justification for the higher prices charged to ECSL. EWS's conduct distorted the competitive process and is inconsistent with the obligations of a dominant company. EWS's behaviour towards ECSL is therefore found to be abusive."

50. It is not possible to read these paragraphs as including a decision that the contract rates agreed in December 1999 and April 2000 were (when agreed or subsequently) discriminatory in themselves. The determination that EWS pursued discriminatory practices against ECSL between May and November 2000 is sufficient in itself to exclude any such finding. As the ORR makes it clear in paragraph B139 of its Decision:

> "the discrimination identified in this Decision is not discrimination against ECSL overall, but discrimination against ECSL during a particular time period. This is the time period when ECSL was seeking general terms for haulage that would allow it to then bid for direct contracts with the generators including on an E2E basis".

It is true that, in the case of EME, some reference is made to the December 1999 prices being considerably in excess of the prevailing market rates but the point is not developed into a finding either of discrimination or of competitive disadvantage. Instead, the contract rates are used in each case as one of the comparators to prove that the May 2000 quoted rates were discriminatory.

51. The reference in B62(b) to EWS's failure to make available to ECSL the reduced rates quoted to EME in October and November 2000 is (when read in context) a reference to the failure to offer ECSL a revised rate for use in the tender process. It is not a finding that EWS should have reduced the rates it had charged under the 1999

contract which, by then, was at an end. The same applies in relation to the situation with BE. Paragraph B79 is directed to EWS's selective discounts over the May 2000 rates previously offered to ECSL. It is clear from B92 that the finding of infringement was based on the existence of a competitive disadvantage only in relation to the tender process for the 2001 contract.

The decision of the Tribunal

52. The Tribunal correctly described its task as not to establish liability but to deal with causation and quantum. But it accepted a submission from Mr Beard:

> "that in some cases, the scope of what follows from a detailed infringement decision (and, therefore, what is within the Tribunal's jurisdiction) may only be capable of being assessed by reference to the full text of the infringement decision in question. We accept too that we should exercise caution in applying our power under Rule 40 to reject a claim. However, in our judgment, the need to adopt a cautious approach to Rule 40 is adequately encapsulated in the test which we are applying that we may only reject a claim which we are certain is "bound to fail"."

53. The main issue between the parties centred on the reference in paragraph 21(c) of the ORR's decision to the failure of EWS to offer to ECSL price reductions based on the October/November quotes to EME. This was relied upon by Mr Beard as supporting a case for an overcharge based on the December 1999 contract prices and not simply the May quotes for the 2001 tender.

54. The Tribunal said that neither party was wholly right or wrong on this issue. Their general approach to this matter is set out in paragraphs 40-43 of their Decision:

> "40. At the hearing, Mr Brealey submitted that the core question for the Tribunal to decide was: "Did the regulator only determine that the 2000 rates were contrary to section 18?" Our answer to that question is - not necessarily. The May 2000 rates alone were not the *only* factor which led the ORR to conclude that section 18 had been infringed. The finding was one of price discrimination (which necessarily implies a comparison of two or more different sets of prices) and not a finding that the May 2000 rates were excessive.
>
> 41. If it is correct to conclude that EWS should have offered the lower prices to ECSL, ECSL will presumably be entitled to claim some overcharge. However, that is a point that will ultimately need to be decided at trial, and in order to prove and quantify the overcharge, ECSL will presumably also need to establish, *inter alia*, precisely what prices should have been offered to it, when they should have been offered and from what date they should be deemed to have applied.

> 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.
>
> 43. However, we agree with EWS that the unlawful price discrimination as found in the ORR Decision is specifically limited in time to the period from May 2000 to November 2000. There is, in our view, no getting round what is said explicitly in paragraph B139 of the Decision, that "the discrimination identified in this Decision is not discrimination against ECSL overall, but discrimination against ECSL during a particular time period". This is further reinforced by, for example, paragraphs B58, B90, B100 and B139 of the ORR Decision, all of which are unambiguous in saying that the price discrimination as found by the ORR relates to the specific period of time from May to November 2000."

55. They therefore accepted that loss or damage alleged to have been caused prior to May 2000 could not be said to result from price discrimination which occurred between May and November. But they 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 in the period after May 2000.

56. They then applied this reasoning to the two overcharge claims. In the case of BE, the overcharge claim is to be allowed to proceed to a full hearing on the basis that it is arguable that the ORR's decision that the lower rates quoted to BE in October and November 2000 should have been offered earlier to ECSL. In paragraph 52 the Tribunal analysed what they saw as the triable issue in these terms:

> "What the data in these tables shows is that the calculation of any total overcharge is going to be a complicated business. Even if we assume that the prices offered to BE should also have been offered to ECSL, we would still need to consider when those prices should have been offered to ECSL and when they should have taken effect. It is not necessarily a simple matter of finding the lowest price offered in respect of any particular coal flow and applying that price throughout the whole period from May 2000 to November 2001. However, in order for EWS to have succeeded in its application to have the whole BE overcharge claim rejected it would have needed to satisfy us that it had not overcharged ECSL for any coal hauled to Eggborough for that whole period. For the reasons we have

> given, it has failed to do so. Therefore, we reject this part of EWS's application."

57. They then turned to the EME claim. Applying May to November 2000 as the cut-off period for any claim, this reduces the pleaded claim to coal hauled in May and June 2000. The Tribunal, however, rejected even this part of the claim on the basis that:

> "We do not consider it to be seriously arguable that the prices EWS was willing to offer to EME in August and October 2000 and which were stated to apply as from January 2001 should have been offered to ECSL at an earlier date and should have applied during May, June and July 2000. We therefore conclude that the whole of the EME overcharge claim is bound to fail and accordingly, EWS's application to have the EME overcharge claim rejected should be granted."

58. The reasons given as to why the October/November prices should not have been offered in May during the negotiations for the performance-based contract were that, by October, the contract between ECSL and EWS had come to an end and that the October rates quoted to EME were to be effective from 1st January 2001. Although the first of these points is not applicable to the BE overcharge claim, the second is. Both sets of prices were to operate from 2001. The intervening termination of the contract is also not obviously fatal to the EME claim as formulated. The reasoning behind the BE claim is that EWS should have offered to ECSL in May similar rates to those that were subsequently offered in October/November to BE. If this is an arguable claim (as the Tribunal held that it was) then it is unaffected by the intervening termination of the contract. It depends simply on whether the contract rates should have been reduced in May to a rate equivalent to those offered to the power generators. It was for this reason that both Counsel approached the strike out application on the basis that the two claims either stood or fell together.

59. I have already explained what I consider to be the limits of the ORR's decision. The issues raised in paragraphs 42 and 52 of the Tribunal's decision neatly illustrate the dangers of not taking a sufficiently strict approach as to what findings of infringement the regulator has in fact made. The Tribunal (applying the test in *Emerson*) ruled that the BE claim was not bound to fail because one could arguably spell out of the paragraphs of the Decision I have quoted a finding that ECSL was overcharged by not being offered the October/November rates in May. Borrowing a reference from the judgment of Auld J in *R v MMC ex p. National House Building Association* [1993] ECC 388, the Decision was not, they said, to be read as a statute or some other legal document of statutory precision.

60. But nothing can change between the Rule 40 hearing and the trial as to how to interpret the ORR's decision. The task for the Tribunal remains the same: i.e. to identify the findings of infringement and award damages for any loss or damage which they have caused. On applications to strike out which turn on points of law or similarly limited issues that do not depend on evidence or require the resolution of any disputes of fact, the decision-making tribunal has nothing to gain from a trial. It will be faced with having to make the same decision on the same material. The Tribunal should not therefore have allowed the BE claims to survive merely on the

basis that they were arguable. It should have decided whether it was clear from the Decision that a finding of infringement had been made which covered the pleaded claims.

61. For the reasons explained above, I do not consider that the Decision contains such findings. There is no reference to any competitive disadvantage being suffered by ECSL specifically in connection with the setting of the 1999 and April 2000 contract rates and a trial of issues as to what lower price should have been offered to ECSL from 1st May onwards and when seems to me necessarily to involve considerations of discrimination and objective justification not previously canvassed by the ORR. This is likely in practice to lead into the very areas of dispute which s.47A does not permit. The question whether EWS was obliged to alter its 1999 contract prices between May and November 2000 in response to the reduced rates offered to the generators for 2001 seems to me to be far more than simply an issue of causation and quantum.

62. I would therefore give EWS permission to appeal and allow its appeal. I would also give permission to ECSL to cross appeal but would dismiss that appeal.

Lord Justice Jacob:

63. I agree.

Lord Justice Carnwath:

64. I agree fully with the reasoning and conclusions of Patten LJ. I would emphasise (as he does in para 31) the need for a determination by the regulator of an infringement as a foundation for liability under section 47A. It is not enough to be able to point to findings in the decision from which an infringement might arguably be inferred. By the same token, it is important that in drafting such a decision the regulator should leave no doubt as to the nature of the infringement (if any) which has been found. In this case, although there may be some ambiguity in parts of a necessarily complex document, the conclusion (quoted by Patten LJ at para 49) makes quite clear that the "competitive disadvantage" found by the regulator (essential for the purposes of CA 1998 s 18(2)(c)) related to ECSL's position in negotiations, not to the price levels actually charged on services between May 2000 and November 2000.