Neutral citation: [2007] CAT 30

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A 2EB

16 November 2007

Before:
MARION SIMMONS QC
(Chairman)
ADAM SCOTT TD
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) EMERSON ELECTRIC Co.
(2) VALEO S.A.
(3) ROBERT BOSCH GmbH
(4) VISTEON CORPORATION
(5) ROCKWELL AUTOMATION Inc.

Claimants

-v-

(1) Morgan Crucible COMPANY plc

Defendant

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(1) EMERSON ELECTRIC Co.
(2) VALEO S.A.
(3) ROBERT BOSCH GmbH
(4) VISTEON CORPORATION
(5) ROCKWELL AUTOMATION Inc.

Proposed Claimants

-v-

(2) SCHUNK GmBH
(3) SCHUNK KOHLENSTOFFTECHNIK GmBH
(4) SGL CARBON AG

Proposed Defendants

Mr. Derek Spitz (instructed by Crowell & Moring) and Ms Jane Wessel of Crowell & Moring appeared for the Claimants.

Mr. Robert Osgood of Sullivan & Cromwell and Mr. Ben Rayment (instructed by Sullivan & Cromwell) appeared for the Defendant.

Heard at Victoria House on 26 June 2007 and 26 September 2007.

JUDGMENT (Rule 31(3) and Rule 40)

Introduction

1. In this judgment we consider:

   (i) Whether the Emerson Claimants should be granted permission to make a claim for damages under Rule 31(3) of the Competition Appeal Tribunal Rules 2003 (S.I. 2003, No. 1372) ("the Tribunal Rules"); and

   (ii) Morgan Crucible's application for that claim for damages to be rejected under Rule 40 of the Tribunal Rules.

2. This judgment follows on from our Judgment (Rule 31) handed down on 17 October 2007. We adopt the definitions used in that judgment. In that judgment we set out the relevant background and history to these proceedings. We refer in that regard to paragraphs 5-42 and 50 of that judgment.

Summary of the Tribunal's conclusion

3. In summary, for the reasons set out below, in our judgment:

   (i) The Emerson Claimants should be granted permission to make a claim for damages against Morgan Crucible under Rule 31(3) of the Tribunal Rules; and

   (ii) Morgan Crucible's Rule 40 application should be dismissed.

Rule 31(3) application

4. Rule 31 of the Tribunal Rules provides, so far as relevant:

> "**Time limit for making a claim for damages**
>
> **31.** - (1) A claim for damages must be made within a period of two years beginning with the relevant date.
>
> (2) The relevant date for the purposes of paragraph (1) is the later of the following –

(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;

(b) the date on which the cause of action accrued.

(3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant.

..."

The parties' submissions

5. The Emerson Claimants submit that having regard to the following features permission should be granted:

(a) The carbon and graphite product cartel operated from October 1988 to December 1999. The Decision on which the present claim for damages under section 47A of the 1998 Act is founded was adopted on 3 December 2003. The Emerson Claimants submit that there has been a significant period which has already elapsed since the infringement and that any further delay in bringing these proceedings would compound the prejudice already suffered. They submit that the longer it takes to be in a position to obtain disclosure and proofs of evidence and move on with the proceedings, the greater the risk is of not being able to obtain that evidence and of fading memories. They submit that one substantial area where this delay may be prejudicial is in establishing the 'bareme' price (i.e. the cartel scheme price), which may emerge from disclosure of documents but may form the subject matter of oral evidence.

(b) Any assurance from Morgan Crucible that the relevant documents will be preserved should be considered in the context of the past history of previous destruction of documents by Morgan Crucible.

(c) In response to Morgan Crucible's submission that its sales of carbon and graphite products in the EU were rather small, the Emerson Claimants submit that the commencement of section 47A proceedings

would permit disclosure and would provide a basis for the Emerson Claimants to make an assessment of what the likely recovery would be in these proceedings.

(d) The delay to date is through no fault of the Emerson Claimants and Morgan Crucible will not suffer any prejudice if permission is granted since filing a defence and making disclosure will have to be done in any event.

(e) The pending cases before the CFI in Case T-68/04, Case T-69/04 and Case T-73/04 cannot have any bearing on Morgan Crucible's liability to the Emerson Claimants, which has been conclusively established by the Decision.

(f) Commencing the UK proceedings now would allow the Tribunal to consider as a preliminary issue whether the Settlement Agreement contains a release by the Emerson Claimants of all claims for damages against Morgan Crucible, including the subject-matter of these proceedings and, if so, whether it is appropriate for this action to proceed against Morgan Crucible. The Emerson Claimants submit that the other addressees need not be parties to the proceedings for this issue to be decided.

6. Morgan Crucible submits that permission should not be granted for the following reasons:

(a) Morgan Crucible would be severely prejudiced if all defendants were not before the Tribunal because:

(i) Morgan Crucible only had a 1% share of sales, having sold approximately €2 million out of a total claim of €291 million, whereas Carbone and Schunk's share of sales are 43% and 47% respectively.

(ii) The other proposed defendants are necessary to determine any issues of joint liability and contribution.

(iii) There are joint issues of causation and quantum.

(iv) The EC proceedings brought by the other addressees of the Decision which the Emerson Claimants wish to join in the UK proceedings are pending and the outcome of the EC proceedings may affect the liability of Morgan Crucible for damages to the Emerson Claimants.

(v) The Emerson Claimants have conceded the need for some of the other addressees of the Decision to be parties to the present action.

(vi) Morgan Crucible successfully applied to the European Commission for leniency pursuant to the Leniency Notice.

(b) The Settlement Agreement issue should not be decided in isolation of the other proposed defendants and should be decided as a preliminary issue before Morgan Crucible is required to serve a defence, provide disclosure or exchange witness statements since the Settlement Agreement issue may be determinative of the whole case against Morgan Crucible. If the Settlement Agreement issue were decided in favour of Morgan Crucible, the costs of the defence, disclosure and witness statements would be avoided.

Tribunal's analysis

7. The Tribunal has carefully considered the various written submissions filed by the parties, and in particular the skeleton arguments filed by the Emerson Claimants on 17 April, 18 May, 15 June, and 17 September; the skeleton arguments filed by Morgan Crucible on 17 April, 18 May, 15 June, 31 August and 24 September 2007 and the oral submissions made at the hearings on 26 June and 26 September 2007. The Tribunal has also considered the

correspondence referred to in paragraphs 9 -12 below concerning the proposed undertaking.

The proposed undertaking

8. At the hearing on 26 September 2007 submissions were made as to whether the Emerson Claimants might be adequately protected in relation to the documents in Morgan Crucible's possession by an appropriate solicitor's undertaking being given on behalf of Morgan Crucible to preserve the documents and/or to give pre-action disclosure.

9. Following that hearing Morgan Crucible's solicitors wrote to the Tribunal on 3 October 2007. In that letter they made the following observations on behalf of Morgan Crucible:

> "i) undertakings to preserve documents should not be one–sided. We respectfully submit that there should be equivalent undertakings from both the Claimants and the First Defendant;
>
> ii) Similarly, to the extent he Tribunal directs, contrary to our submissions, that there should be disclosure of documents at this early stage, we respectfully submit that disclosure should not be one sided; rather there should be an equivalent obligation on both sides to disclose documents and
>
> iii) We set out below the form of undertaking to preserve documents that we are prepared to offer on behalf of the First Defendant. (We have been unable to agree the language with Claimants in the time available)
>
> …"

10. The undertaking proposed by Morgan Crucible is in the following terms:

> " Morgan Crucible has taken the following steps to preserve internal documents that may be relevant for these proceedings:
>
> 1) The documents submitted by Morgan Crucible to the European Commission for the purposes of its Decision of 3 December 2003 in Case C.38.359 Electrical and mechanical carbon and graphite products are preserved.
>
> 2) A document retention memo from the General Counsel of Morgan Crucible, Mr Paul Boulton, dated 12 March 2007, has been sent to over 140 employees of Morgan Crucible, including financial

controllers and certain employees identified by the financial controllers as likely to have relevant documents. The document retention memo states as follows:

"Document Retention Requirements

On February 9, 2007, five companies filed a claim against The Morgan Crucible Company plc ("Morgan") and other defendants in the Competition Appeal Tribunal (the "CAT") in London. The companies are:

- Emerson Electric Co.
- Valeo SA
- Robert Bosch GmbH
- Visteon Corporation
- Rockwell Automation, Inc.

The claim seeks damages from Morgan and others in connection with prices charged to customers for products manufactured in Europe (including the UK) and sold in Europe (including the UK) to the above customers during the period October 1988 to December 1999.

In light of this ongoing legal action, it is necessary that you retain all documents in your possession that may be relevant to the claim. In particular, you are requested to preserve, and take all appropriate steps to prevent the destruction or disposal of, all documents in your possession (wherever located) relating to any of the following subjects:

- Sales of products made to any of the above customers during the period from October 1988 to December 1999;
- Prices and other terms offered to, discussed or agreed with any of the above customers in the period from October 1988 to December 1999;
- Agreements among any of Morgan, Schunk GmbH, Le Carbone Lorraine S.A. and SGL Carbon AG and any of their subsidiaries about prices, price increases, surcharges, discounts, leadership for customer accounts, advertising bans, quantity restrictions, boycotts or price undercutting in the period from October 1988 to December 1999; and
- Communications between Morgan and any of Schunk GmbH, Le Carbone Lorraine S.A. and SGL Carbon AG and any of their subsidiaries concerning any efforts or attempts to fix prices for products in Europe in the period from October 1998 to December 1999.

For this purpose, the term "document" should be interpreted broadly and includes any communication or compilation of information of any kind, including (among other things): memoranda, correspondence, notes (handwritten or otherwise), e-mails, agreements, calculations, reports, databases, and recordings (audio, video or otherwise). The term "documents" includes any such compilations in whatever medium

they exist, including (among others) "hard copy" or electronic, and irrespective of where the documents are retained, including (among other things), in paper files, on servers, hard disks, CD-ROMs, or floppy disks, and wherever located. The term "document" includes any drafts or versions of a document. As a result, if there are multiple copies of a document, you are requested to preserve all copies until further notice. Please retain all such documents, even if you understand that others within Morgan also have taken, or are taking, steps to do so.

If you have any doubt as to whether a document should be preserved pursuant to these instructions, please err on the side of over-inclusiveness and retain the document. Please remember to preserve e-mails that may be automatically deleted under Morgan's document retention policy. If you have a question or doubt as to whether a document would be subject to an automatic deletion function, please take steps to retain the document, such as by printing out a "hard copy" of the document or saving it in some medium that is not subject to automatic deletion.

Please provide a copy of these instructions to anyone else who may have relevant documents or access to systems, archives, etc. containing such documents. If any of your assistants or subordinates has access to documents that might be covered by these preservation instructions, please provide them with a copy of this memorandum and instruct them to comply with it.

If you have any questions about these instructions, please contact Paul Boulton at Tel.: +44-1753-837-308 or paul.boulton@morganplc.com.

We earnestly require and greatly appreciate your careful and prompt cooperation in this matter.

PAUL BOULTON"

Sullivan & Cromwell will take the following additional steps that are designed to ensure that internal documents that may be relevant for these proceedings are preserved:

1) The documents submitted by Morgan Crucible to the European Commission for the purposes of its Decision of 3 December 2003 in Case C.38.359 Electrical and mechanical carbon and graphite products will remain in the custody of Sullivan & Cromwell and will be preserved.

2) Sullivan & Cromwell will itself search for and collect copies of documents identified in the document retention memo.

3) Sullivan & Cromwell will inform the Tribunal when this collection has been completed.

4) Sullivan & Cromwell will preserve copies of all documents that have been collected as a result of the search."

11. The Emerson Claimants' solicitors responded by letter dated 5 October 2007 that their clients were unable to accept the proposed undertaking as it is not drawn sufficiently broadly to protect the Emerson Claimants against the risk of severe prejudice arising from further postponement of disclosure in these proceedings. They refer to the proposed undertaking being limited to the categories of documents that were identified in the document retention manual whereas Morgan Crucible indicated at the hearing on 13 March 2007 that the preservation of documents would include "any internal documents which may be relevant to these proceedings". The Emerson Claimants in that letter reminded the Tribunal that they would be seeking early disclosure of documents and not just preservation of them and stated that for this amongst other reasons an equivalent undertaking by the Emerson Claimants does not arise.

12. Morgan Crucible's solicitors replied in their letter of 9 October 2007 maintaining that actual disclosure and production would be premature before the Tribunal has the opportunity of finally determining whether or not the claim was settled under the Release provision in the Settlement Agreement and that in any event there should be equivalent undertakings or disclosure from both parties.

13. It is clear from the response dated 11 October 2007 from the Emerson Claimants' solicitors that they do not consider the undertaking offered by Morgan Crucible to be adequate.

14. We have carefully considered this correspondence and it is clear to us from its terms that Morgan Crucible is not prepared to give an undertaking as to the preservation of the documents which satisfies the Emerson Claimants, nor is Morgan Crucible prepared to give pre-action disclosure. It seems to us from this correspondence that the concerns of the Emerson Claimants as to the terms of the undertaking are justifiable. In those circumstances it seems to us that if we do not grant permission under Rule 31(3) of the Tribunal Rules there is an enhanced risk to the Emerson Claimants that the Morgan Crucible documents will not be available at trial.

Whether permission should be granted

15. The Emerson Claimants have prevaricated as to whether or not they wish to proceed with the case to a full hearing or whether they would be applying to stay the action pending the judgment in the EC proceedings. They submitted, on the one hand, that the other proposed defendants will need to be party to the UK proceedings before this action can proceed to judgment, particularly because the addressees of the Decision are jointly and severally liable in damages to the Emerson Claimants. On the other hand, the Emerson Claimants have submitted to us that if permission is granted they will seriously consider proceeding against Morgan Crucible alone. The Emerson Claimants further submitted that an award of interest would not adequately protect them for the entire risks attendant upon such a delay in recovering their losses which were incurred from 1988 – i.e. nearly twenty years ago. However if the UK proceedings are stayed to await the other addressees of the Decision being joined, this submission as to interest has no substance. Whether this claim should proceed to a full hearing or not, is a matter which we may have to consider if we grant permission under Rule 31(3). But it does not seem to us that this is a matter which is significant to our decision whether or not to grant permission for a claim to be made.

16. We note that permission is also being sought against these proposed defendants who are parties to the EC proceedings. Morgan Crucible submit that we should not grant permission without taking into account the observations of those addressees of the Decision which the Emerson Claimants seek to join in this action. The proposed second, third and fourth defendants informed the Tribunal that they did not want to make any submissions on the issue of giving permission for a damages claim to be made against Morgan Crucible. We do not consider in the circumstances of this case that observations from these other addressees of the Decision are pertinent to our consideration of whether permission should be given to the Emerson Claimants to proceed with an action against Morgan Crucible.

17. Having taken into account the observations of Morgan Crucible we do not consider that the reasons on which they rely for their submission that we should not grant permission are persuasive and outweigh the reasons relied upon by the Emerson Claimants for submitting that we should grant permission. The reasons relied upon by Morgan Crucible for us not granting permission for the claim to be made appear to us to be more pertinent to whether proceedings against Morgan Crucible should be stayed pending the joining of other Defendants to the proceedings rather than to whether permission should be given for the claim to be made against Morgan Crucible. Morgan Crucible suggested that the EC proceedings may have a knock-on effect on the outcome of the UK proceedings and for this reason we should not grant permission. However since Morgan Crucible has not provided any particulars in support of this general submission it is not one upon which we can give much weight. Morgan Crucible's attitude to the question of the undertaking to preserve the documents and its negative approach to pre-action disclosure concerns the Tribunal. This is particularly so in the context of a previous history of destruction of documents by Morgan Crucible and the subject matter of these proceedings.

18. It also seems to us relevant to note (in the context of the length of time which has passed since the events the subject matter of this case took place) that the Emerson Claimants were not in a position to bring this follow-on action until the Decision had been published. Accordingly, they are not responsible for the time that has elapsed between the infringement and the Decision. Such delay is a feature of follow-on actions. It seems to us that Rule 31(3) of the Tribunal Rules provides the means by which a claimant, in the position of Emerson, can seek to minimise further prejudice.

19. Having carefully considered all the observations of the parties, and particularly those of Morgan Crucible, we have decided to grant permission for the claim to be made by the Emerson Claimants.

20. We now turn to the Rule 40 application made by Morgan Crucible.

Rule 40 application

21. Rule 40 provides that:

> "**Power to reject**
>
> **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 ground for making the claim;
>
> …"

22. Morgan Crucible has made an application under Rule 40 founded on the Settlement Agreement (on which, see paragraphs 21-31 of the Tribunal's judgment (Rule 31), [2007] CAT 28).

Tribunal's analysis

23. Morgan Crucible submits that under the Settlement Agreement, and in particular clause 21, the claims which are the subject-matter of the UK proceedings were settled and released by the Emerson Claimants; and on that basis there are no reasonable grounds for making the claims. Accordingly, Morgan Crucible has made an application under Rule 40 of the Tribunal Rules requesting the Tribunal to reject in whole the Emerson Claimants' claim for damages. This is disputed by the Emerson Claimants who submit that this is not the true construction and effect of the Settlement Agreement and that it would be inappropriate for the Tribunal to reject the claim at this stage of the UK proceedings.

24. The Emerson Claimants submit that the test under Rule 40 is whether the Tribunal is certain that the claim is bound to fail. No submissions were made by Morgan Crucible as to the test. Accordingly, there appears to be no dispute between the parties as to the test to be applied under Rule 40. We agree with the Emerson Claimants 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).

25. Moreover in deciding whether to reject a claim under Rule 40 the Tribunal has before it the claim for damages as set out in the claim form itself (see Rule 32 of the Tribunal Rules). No defence has yet been filed (see the Tribunal's Order of 13 March 2007 which extended the period for filing Morgan Crucible's defence until further order). Accordingly, at the present juncture, in considering an application under Rule 40 the Tribunal only has before it the claim form. It is the claim for damages as set out in the claim form which the Tribunal has power to reject under Rule 40 of the Tribunal Rules.

26. We consider that it would be inappropriate on a summary application under Rule 40 made at the commencement of proceedings, for either party to adduce further evidence before the Tribunal which has not been provided with the claim form. Where a serious live issue of fact can only be properly determined by hearing oral evidence then on an application under Rule 40 made at the commencement of the proceedings, it would not be appropriate for the Tribunal to reject the claim for damages using its powers under Rule 40 of the Tribunal Rules. Similarly where the issues of law are uncertain it is desirable that they are determined on the basis of the facts as found by the Tribunal. This approach accords with the approach taken under CPR Rule 3.4(2)(a) (see *Bridgeman v Alpine-Brown*, 19 January 2000, (CA) (unreported)).

27. There are significant disputes of fact and law between the Emerson Claimants and Morgan Crucible:

    (a) as to the date of the Settlement Agreement in particular as to when the Emerson Claimants became a party to the Settlement Agreement;

(b) as to what evidence is admissible when construing the Settlement Agreement and if admissible as to the effect of such evidence;

(c) as to the true construction of the Settlement Agreement and in particular clause 21;

(d) as to whether the doctrine of issue estoppel arises from the judgment of 30 August 2006 in the District Court for the District of New Jersey (see paragraph 29 of Tribunal's Judgment (Rule 31), [2007] CAT 28) and if so whether this judgment precludes Morgan Crucible from seeking to revisit the meaning of the Settlement Agreement in these proceedings; and

(e) given the Emerson Claimants' intention, in due course, to plead and prove an alternative case based on rectification, whether the Settlement Agreement should be rectified.

28. In our judgment these disputes of fact and law raise issues which mean that at this stage of these proceedings, we cannot be certain that the claim is bound to fail. These disputes will need to be resolved in order for us to determine the true construction of the Settlement Agreement. As we have indicated during the course of the oral hearing, if either party wishes to have the Settlement Agreement issue decided as a preliminary issue then that party can make an application. Morgan Crucible has submitted that it would be inappropriate for this preliminary issue to be decided in the absence of the other potential defendants to these proceedings. It seems to us that if the other potential defendants are not parties to the Settlement Agreement then it is unlikely that this submission has any foundation. However, that is a matter which can be considered if and when an application is made to have the Settlement Agreement issue determined as a preliminary issue.

Tribunal's conclusion

29. We give permission to the Emerson Claimants under Rule 31(3) of the Tribunal Rules to make a claim for damages against Morgan Crucible.

30. We dismiss Morgan Crucible's Rule 40 application.

Next steps

31. On 11 October 2007 the Emerson Claimants lodged an application with the Tribunal to join Carbone as a fifth proposed defendant.

32. We direct that a case management conference should take place on 13 December 2007 to consider:

    (a) The directions which should be made in the UK proceedings brought by the Emerson Claimants against Morgan Crucible; and

    (b) Whether the Tribunal should give permission under Rule 31(3) for the claims to be made against the second to fifth proposed defendants.

Marion Simmons Adam Scott Vindelyn Smith-Hillman

Charles Dhanowa 16 November 2007
Registrar