IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1106/5/7/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12th January 2009

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)

RICHARD PROSSER OBE
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

ENRON COAL SERVICES LIMITED (in liquidation)

Claimant

- v –

ENGLISH WELSH & SCOTTISH RAILWAY LIMITED

Defendant

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Daniel Beard (instructed by Orrick, Herrington & Sutcliffe) appeared for Enron Coal Services Limited (in liquidation).

Mr. Mark Brealey QC and Miss Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Defendant.

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THE CHAIRMAN: Good morning.

MR. BEARD: Sir, in this matter I appear on behalf of the claimant, Enron Coal Services Limited. My learned friends, Mr. Brealey and Miss Lester appear on behalf of English, Welsh & Scottish Railway, the defendant. Before I begin I wonder if we might deal with one or two housekeeping matters just to make sure that we have all got the same papers essentially.

THE CHAIRMAN: Yes.

MR. BEARD: The Tribunal should have a CMC bundle, cannily entitled "Bundle for the Case Management Conference".

THE CHAIRMAN: The grey bundle.

MR. BEARD: The grey bundle. I am always concerned to go by colour because some times they come in in different files from different places, but it is a bundle which has around 30 tabs.

THE CHAIRMAN: We have it.

MR. BEARD: There were some late insertions because there was a flurry of correspondence.

THE CHAIRMAN: We have it and we are grateful for it; it provided for an entertaining weekend.

MR. BEARD: I would not want to speculate on what the counterfactual weekend was then. (Laughter). There is a second bundle provided by Freshfields, which is an index of materials that the defendant would like the Tribunal to consider.

THE CHAIRMAN: Which has in it an awful lot of what was already in the grey bundle, so I found myself reading that bundle and then I decided to leave it at home as I had read almost everything in it once already.

MR. BEARD: Well I am sure if it comes to it Mr. Brealey will be able to give the entertaining commentary on particular elements of that. I think it goes to the material that EWS would like to refer to in relation to their application to have part of our claim rejected. We say that that is an application without merit but we understand from conversations last week with the Tribunal that it is not anticipated that the Tribunal wishes to deal with that today and that instead it might be sensible for a date to be set for that. Helpfully some indications were given by Mr. Wells, the Referendaire, before the hearing, as to relevant dates.

THE CHAIRMAN: Can I help you and also Mr. Brealey and Miss Lester with this? We have considered what we had in relation to the application and had formed the view that plainly it needs to be heard, and needs to be heard in a way in which we are sure there is time for it to be heard properly and on its merits, and to give us as the Tribunal some time to consider it too.

MR. BEARD: Yes.

THE CHAIRMAN: So we feel it is necessary to set aside a day for this all-in, that is to say a day for you and them and for us, hopefully with submissions not exceeding something like an hour each following full skeletons – or adequate skeletons – and we have given four dates which I hope have been communicated to you by the Referendaire.

MR. BEARD: Yes, very helpfully they have and indeed the parties have spoken and of those the preferred date for both parties I understand would be 5th February.

THE CHAIRMAN: Right, okay.

MR. BEARD: So if that is acceptable to the Tribunal ----

THE CHAIRMAN: Right, that will be dealt with on 5th February.

MR. BEARD: Obviously we have a skeleton argument from the claimants, and we will need to lodge a skeleton argument in relation ----

THE CHAIRMAN: Can we deal with that later?

MR. BEARD: Certainly. So bundles: CMC bundle slightly repetitive but an obviously delightful further bundle in relation to the strike out application. In addition to that obviously there is already the skeleton in relation to the strike out application from the claimant to which I have referred. There are skeletons pertaining to the matters arising in relation to this CMC but from the defendant and the claimant, to some extent they add to letters respectively from the defendant and claimant of the 7th and 8th December, and therefore set out essentially where the positions lie in relation to those matters.

In addition the Tribunal should have an amended claim form which has been amended by consent and that has been lodged and served on the defendant, therefore nothing further needs to be done with that. If Mr. Brealey wants to take any issue with that then, of course, he may.

That takes us rather squarely in the view of ECSL into the matters of timetabling.

THE CHAIRMAN: I agree, I was going to suggest that we work backwards after dealing with early housekeeping matters and look at the hearing date and then work backwards from that.

MR. BEARD: Of course ECSL attended as an observer at the previous FHH first CMC and of course today was to be the second CMC in relation to the FHH ----

THE CHAIRMAN: I should have said when we started that so far as the Freightliner case is concerned the CMC is simply adjourned.

MR. BEARD: I am grateful. We understand that is for reasons of discussion or agreement, we know not precisely which. We have been in communication with EWS about these matters.

THE CHAIRMAN: This is going to be one trial, not two trials heard together.

MR. BEARD: That is the key issue, so far as we are concerned no issue is taken by EWS that this is now one case and not two cases, therefore the reasons why at the first CMC this Tribunal, quite understandably, was talking about effectively accelerating the timetable for this case in order that it met the final hearing date that was being anticipated in the FHH case (which was already relatively far advanced) is perhaps not such a pressing matter, indeed, not a pressing matter at all. We quite understand, the Tribunal having previously indicated that the final hearing would be in June, that people will have earmarked that date at the very least for the hearing, but for reasons that we have articulated to some extent in the skeleton we have some difficulties with the process of disclosure being completed by 29th January, and that has knock-on effects down through the timetable.

It should be stressed at the outset of course that trying to get this matter on on 8th June would have been an accelerated timetable, and it was essentially the balancing between the desire to have the matters heard together and the fairness of pressing the procedure that obviously led the Tribunal to its provisional view at the previous CMC.

THE CHAIRMAN: Do I understand it correctly that the essential point from the claimant's position is that the claimant does not have its own documents, unlike most claimants in cases coming before this Tribunal or any court, and therefore has to obtain any documents from the liquidator?

MR. BEARD: Well that is not quite the case because, of course, the liquidator is the claimant here effectively.

THE CHAIRMAN: Sorry, yes, of course.

MR. BEARD: No, it is not that, it is the process by which the liquidation occurred meant that the sorting and arrangement of documents was not as it might have been most helpfully done, I think is the way that one can put it charitably. If one was anticipating further litigation in relation to these matters and, in particular, analysis for a disclosure exercise, where of course ----

THE CHAIRMAN: And the warehousing by the liquidator of documents.

MR. BEARD: Yes, I think in the skeleton the indication is that there are 12,000 boxes of documents – not files, boxes of files – that have been gathered. They have been broken down into three categories, and it is really only the first category, documents relating to business transactions, financial reports and so on, that are ever going to be relevant to these proceedings. Those materials are subject to a methodology for identifying where relevant documents might lie, and that first exercise has thrown up so far 8,500 documents.

Now, as I say Freshfields have asked for an account of the methodology which the ECSL is using in relation to its disclosure exercise, and that is going to be provided to Freshfields later this week in some more detail. The point is that because of the way that the documents were gathered and collated and the lack of detail in the indexing of those documents the process of, first, identifying what might be most relevant, and then scanning them on to a database so that they can be sensibly searched and each document relevantly titled and so on, is an extensive exercise. Now, it is an exercise that we have not sat back and waited until today before we commenced, in fact we have been doing this for some time, and we have done it in two parts. First, there are other documents apart from those held by the liquidator which are documents that have been obtained from the ORR itself, about 1,300 documents, which have been scanned – those were obtained and scanned some time ago, and so those are in the process of being reviewed.

The 8,500 documents so far identified from the liquidator's file, and we do not at this stage anticipate that we will be identifying more documents that we will scan and then review, but that is a matter that we will discuss with Freshfields further because of the proportionality of trying to go after more documents in the system that exists, or filing the documents with the liquidator; we do not think that is going to be sensible, and we do not think it is going to produce anything else. But those 8,500 documents have been identified as potentially relevant. They will be scanned and catalogued and then reviewed so that the disclosure process can be properly carried out. Broadly speaking we do not think that in relation to the documents we are identifying there that there is going to be much of an issue in terms of the categories of relevance that EWS have identified to us as the matters upon which we should be identifying documents as relevant and then disclosing them. So we do not think that is going to raise a great deal of debate, but it is the mechanics of carrying out the scanning and then carrying out the review of those documents, because obviously it is no good just feeding them into a computer, somebody has to actually look at them and generate the copies of documents that will constitute the list.

THE CHAIRMAN: And the bottom line is when do you say you will be ready for a trial, realistically?

MR. BEARD: Not before July, and we think that it may be sensible in those circumstances to be looking at a date in September or October depending on the Tribunal's convenience.

THE CHAIRMAN: Well if it is not July it has to be September at the earliest because August is not realistic.

MR. BEARD: Of course, but we are also conscious that people do make arrangements during July and we do not consider that that lapse of two months would make any real difference. It would also build some flexibility into the timetable. There are matters about, for instance, third party disclosure, the scheme for which is built into the draft order that we have prepared and, indeed, is built into the scheme of the draft order which EWS has prepared, but if that were to take up any time we can see that that can have an impact on timing further down the line. What we would rather have is a final trial date that is not going to be moved and some flexibility in the timetable beforehand, than pressing for an earlier trial date and then having to come back because matters arise in the course of the next two or three months that mean that there is more material that has to be digested, considered by witnesses, considered by experts and so on, having consequential impacts on the timetable as a whole.

As we understand the position, EWS says "We would like to stick to 8th June" which we quite understand but I do not think there is a positive objection to the vacation of the hearing date – of course, Mr. Brealey can articulate their position more fully. But given the difficulties that exist in relation to the processing of documents, and given the fact that we have been undertaking this for some time we cannot give a better and more sensible estimate as to when this will be completed, and we think in the light of the nature of the case, and the fact that whilst we want to dispose of it as quickly as possible we do not want to have timetables shifting later down the line, or applications to shift timetable later down the line, we consider that in the circumstances it would be more sensible to list for late July or September for a hearing date, and we make an estimate of five days – EWS say not more than four, it is a minor matter, it is perhaps prudent to list for the longer period in the circumstances.

As I say, some of the reasoning has been set out in the skeleton argument provided to the Tribunal, I am sorry it was only provided this morning

THE CHAIRMAN: That is all right.

MR. BEARD: And more discussion between the parties will occur in the light of a methodology document being prepared that will be exchanged later this week, but in the circumstances this is our most sensible estimate.

THE CHAIRMAN: What I would say to you in particular is whatever date is fixed today for the trial, and we will fix a date today for the trial, even if it is not the already indicated date, the Tribunal is clear that we will be very unsympathetic and that you would have an uphill struggle in moving it back from whatever date is determined today.

MR. BEARD: We quite understand and that is obviously a sensible position for any court or Tribunal to take because the disruption that is incurred by late changes, both to the Tribunal and the difficulties of ensuring all those involved in the case are available ----

THE CHAIRMAN: Particularly with a Tribunal of three who are not full-time judges.

MR. BEARD: We are sensitive to that and that is why we actually say it is more sensible now, given the degree of the problems that exist in relation to the disclosure process on our part, and the time we will require, and the possibility that there may be further applications which may have resonant impacts on dates further down the line, that it is prudent to build in some time into this schedule, time that previously it may not have been sensible to build in because there was the overwhelming desire to have the two hearings heard together on 8th June. That no longer exists as a driver for holding 8th June and, in the circumstances it seems to us eminently prudent at the very least to have built in more leeway into the schedule.

THE CHAIRMAN: Let us hear what Mr. Brealey wants to say about the trial date. Do you agree that what has been said is "eminently prudent to say the least"?

MR. BREALEY: We made similar points at the last case management conference and the Tribunal were, if I may respectfully say so, unsympathetic to our approach. We were under a very, very tight timetable as a result of the last CMC.

We say that the existing timetable should stand, and if I could make three points for the Tribunal to consider in support of that submission. First, the claimants have signed a statement of truth in these proceedings and it goes into some detail, and they must have had access to documents before that. If they had not it is, to say the least, regrettable that they can sign a statement of truth to bring a substantial claim like this and not have begun the disclosure exercise to begin with. So if they are in difficulty now it is of their own making; that is the first point.

Secondly, reading the skeleton that we obtained today – and I should say there is no witness statement testifying to the difficulties, it is all in a skeleton argument. There is no correspondence as such, or a witness statement that the Tribunal can accept, it is all in a skeleton argument. The real issue is that the claimants have simply not ramped up their team. As I said a moment ago, we said that it was a tight timetable last time, and the Tribunal said "No, it is going to be May/June" and so Freshfields had to put extra people on the team and, as a result of putting extra people on the team, they are ready for the May/June date which Mr. Beard and the claimants did know about as a result of the last CMC on 17th November.

One notes at para.10 of their skeleton that there is a specialist document manager; that that specialist document manager has only been there for five weeks, where as the last CMC was 17th November. So again, one does not get a sense of urgency behind this; no sense of urgency behind the statement of truth, no sense of urgency with the specialist or the team that they have together. So that is the second point. They could put more people on it, and I am only talking about four weeks. We are looking at 29th January, the claimants have deleted that and put 27th February. That four weeks now means it is not going to be the early June date, and one is looking into the autumn. So for the sake of four weeks we are now looking at an autumn date and disrupting everybody's existing timetable. That is the second point – they simply have not ramped up.

The third point is a general point, but an equality of arms-type point. The Tribunal obviously treats the claimants and the defendants fairly. We made a submission that it was going to be difficult for us to do the disclosure exercise. The Tribunal heard those submissions and still made the defendants comply with a tight timetable, the same should apply to the claimants, that is my third point – treating both parties equally; it should not be right that the defendants say: "It is going to be difficult for us" and the Tribunal says: "Well get a bigger team together", and then the claimants come along and say: "It is going to be difficult for us" and they get an autumn date.

So for those three reasons I would ask the Tribunal to consider those and to keep the existing timetable, which is workable. If the claimants are in difficulty they can easily put on more people and have a bigger team. As I say, they have their document management specialist, a few more people can work on that and they can still be working to 29th January, which is still two or three weeks away. So for those three reasons I would ask the Tribunal to not accede to the claimant's request which is going to put this claim for damages back into the autumn, and the defendants obviously want to get this heard and get it out of the way as quickly as possible.

THE CHAIRMAN: Thank you, Mr. Brealey.

MR. BEARD: Sir, do you want any response from me?

THE CHAIRMAN: No, thank you.

(The Tribunal confer)

THE CHAIRMAN: We are grateful to both counsel for submissions about the date, and we are anxious to try and do justice to both sides. We are also mindful that although ECSL attended on the last occasion, this is actually the first formal CMC involving ECSL. In order to be sure that the matter can be heard properly on a trial date which we can fix today,

we are going to put the case back a little. We would like put the case back to 15th July with an estimate of five days maximum, but if that is going to prove inconvenient then we might be persuadable to put it back to 16th September. Late July was mentioned, but I am afraid from my view point "late July" – if that means a risk of running beyond about 25th July – is not possible, so it really has to be 15th July or, failing that, the date that we have been able to identify that we would all be available is 16th September. Do counsel want us to adjourn now so you can discuss that, because I think fixing the trial date enables us to deal with all the other matters working backwards. Shall we adjourn for a few minutes?

MR. BEARD: If you would, unless Mr. Brealey has any objection that would be acceptable.

THE CHAIRMAN: Mr. Brealey?

MR. BREALEY: Yes, indeed.

THE CHAIRMAN: Let us know when you are ready.

(Short break)

THE CHAIRMAN: Mr. Beard?

MR. BEARD: I am grateful for the opportunity to discuss it with those representing EWS. The position on ECSL's part is that they are happy with either the July date, or the September date but recognise there may be issues of other people's convenience, and therefore are agnostic as between the two if there is a problem.

THE CHAIRMAN: How can you help the agnostics?

MR. BREALEY: We are happy with both. We had prepared for the June date, we have some witnesses who were lined up and we cannot for the moment contact those witnesses, and so what I respectfully would ask is that we go for the July date, but if we could have liberty to come back to the Tribunal within the next day, because it may well be that one witness is in Australia or somewhere, and the September date would be preferable. What I would ask is that we set the timetable by reference to the July date, and with the summer vacation that is going to be a September date anyway.

THE CHAIRMAN: That is fine, that is very helpful. I would ask that if it is not to be the July date that we really are told as soon as possible.

MR. BREALEY: I am sure it will be within the next 24 hours.

THE CHAIRMAN: I understand the problem.

MR. BEARD: We are entirely content with that.

THE CHAIRMAN: Right, now we can work backwards and shall we go to a combination of the draft agenda, but probably more helpfully the draft order and the track changes version of the draft order ----

MR. BEARD: Yes.

THE CHAIRMAN: The forum, I take it there is no difficulty, it is England and Wales.

MR. BEARD: Yes.

THE CHAIRMAN: The second part of the draft order relates to the strike out, dismissal application and it may help you if I tell you that we have discussed this provisionally of course, and we are minded to make an order along these lines, subject to argument, that any application to dismiss any part of the claim, or the defence, be heard on 5th February, with an estimate of a day and I know that we already have one skeleton, but we thought we might say initial skeletons to be available not later than 10 days before the hearing, and any skeleton in response one week before the hearing. That allows for both sides, if you wish, to put in new skeletons or whatever you want. Does that sound sensible?

MR. BEARD: It sounds eminently sensible, Sir. Might it be sensible to first of all attach specific dates to the 10 days and the week, just to ensure that there is no arguing about how one calculates these things, just for reference?

THE CHAIRMAN: So initial skeletons – 5th February is a Thursday, so shall we say initial skeletons by 26th January, and responses by ----

MR. BEARD: Would it be sensible to say the 30th, since that is a Friday – I realise that curtails the week slightly.

THE CHAIRMAN: Yes, responses by 30th January. Do you agree, Mr. Brealey?

MR. BREALEY: I have no problem.

MR. BEARD: Might I just raise one issue. You made it clear, Sir, that any cross applications in relation to dismissing, rejecting the claim (Rule 40) applications should be dealt with there. Obviously we have been looking at the defence that we received last week. It appears to us that, in principle, the defendant accepts that in relation to these claims, in relation to the EME contract that in principle a claim can be brought for loss of a chance in relation to these matters. It says there is no lost chance, but as a matter of legal principle it appears not to be denying that proposition.

If it is denying that proposition, and it may be that we need to clarify that in correspondence with them, it may be that that is a further issue that we would ask to be dealt with as a legal matter on that date, because we can see that that could have an influence on the way that evidence is developed and prepared at later stages in the proceedings. I am merely putting down a marker, Sir, because you were clearly indicating there that any issues relating to dismissal should be dealt with. We would not want to be kept out of saying it would be sensible for this Tribunal to consider this legal issue. Whether or not it is dealt with on 5th

February I am not pressing for at this stage. It may be prudent to do so, but nonetheless I wanted to put down a marker that we would not want to be kept out of making that application by the terms of the Tribunal's order.

THE CHAIRMAN: Mr. Brealey?

MR. BREALEY: I am not going to try and keep Mr. Beard from making any applications. I am sure we can sort it out in correspondence.

THE CHAIRMAN: Yes, the reason for provisionally saying what I said was because we had in mind precisely the sort of circumstance you are describing.

MR. BEARD: That was why I raised it, because although, Sir, you were talking in terms of dismissal and this would not strictly speaking be a dismissal point, I wanted just to clarify what it was that was being covered by the order in question. But, as I say, it is merely a marker at this stage, it is a matter that can no doubt be resolved or at least clarified.

THE CHAIRMAN: I think what I can safely say is that if there was a matter that could have been dealt with at an early stage, as of 5th February, and a large amount of time was taken up resolving it later, that might well be reflected in costs.

MR. BEARD: We are very much conscious of that fact, and it is for that reason that I place the marker as I do.

THE CHAIRMAN: Right, so that would deal with the second part of the draft order. Then there are the amendments to the claim form – that has been done by consent already. There is an issue of costs that has been raised as to that. Again, we have discussed this provisionally and, subject to argument, our view would be we are not really in a position to determine any such costs application at this stage, that we would rather leave it to the end of the case, though we certainly would not shut out, of course, a separate costs application in relation to the amendment of the claim. Simply, it is going to be much easier for the Tribunal to determine an issue of that kind when we have determined all the other issues too.

MR. BEARD: We endorse that approach, we are not trying to keep EWS from making that application, we think it is without basis and we will oppose it, but we are not trying to keep them from making that application, but we do not think it is sensible to try and deal with that today, and we would endorse that approach.

THE CHAIRMAN: Well they can certainly make the application, they may have good grounds for argument, it is just a question of the timing, Mr. Brealey.

MR. BREALEY: Maybe we can deal with this on the strike out, it is a very short point. We obviously say they have abandoned part of their claim, they issue their claim form on 6th November and then eight weeks later, after we have been getting the documents and

preparing the defence, they abandon it. In the normal course of events in the High Court, if they abandon part of their claim, they would pay the costs. So maybe the skeleton arguments that we are going to have on the strike out could deal with that? It is going to be a very short point and we can sort that out on the strike out application.

THE CHAIRMAN: Mr. Beard?

MR. BEARD: I fear it might not be quite as short as Mr. Brealey anticipates. I do not want to pre-empt any discussion of the issues, but this Tribunal has a broad discretion under Rule 55 as to the way it applies costs orders. That has been illustrated in a number of cases, both in relation to withdrawals and more generally, indeed, there are authorities where withdrawals occurred of whole cases and no costs orders were made. There is undoubtedly a question as to the sense of the conduct of the parties which is a particular matter that is canvassed in Rule 55.2 and we say that our conduct has been eminently sensible and constructive in the way that we have dealt with this litigation. We think that this matter is not going to be quite so short as Mr. Brealey anticipates and, in the circumstances, we think the approach advocated by the Tribunal is eminently sensible, and to include this in the day where strike out applications are going to be heard is going to complicate matters and is not going to be a matter that is related to any of the other issues that are going to be heard that day, it is discrete.

So in the circumstances, unless I can assist the Tribunal further, we would oppose that.

THE CHAIRMAN: Well we will reserve the costs of this matter to the end, not on the strike out application. Requests for further information – we have read the requests for further information. I had rather hoped that the Tribunal would not really have to make an order in respect of the request for further information. They look pretty reasonable requests to me; whether the information can be given or not may be quite another matter. But do you really require an order of the Tribunal on the request for further information either of you?

MR. BEARD: We say not. We say we will answer both of the requests. We apologise by oversight when we referred to the fact that we would answer the later RFI by 19th January we did not refer to the earlier RFI, but we will deal with both requests for further information by 19th January, that is a week today. We suggest that the defendants also deal with our requests for further information by 19th January. They say: "Ah, but this relates to the same sorts of matters". That may be the case, we can understand that, but we are asking questions of their pleaded case, we are entitled to that further information. In the circumstances there is really no need for an order and it would be inappropriate in our view to make any such order.

THE CHAIRMAN: Mr. Brealey?

MR. BREALEY: We do have an issue with it. We are not saying we will not give a response; it is a timing issue. We are quite content to give the response. They say they will be ready by 19th January. If we can have, say, three or four days after that then that puts us in a much better position to take a view as to what they are saying, and that goes to the heart of their claim.

THE CHAIRMAN: That sounds perfectly reasonable. 23rd?

MR. BREALEY: 23rd, I am grateful.

THE CHAIRMAN: So 19th January for the claimant, and 23rd for the defendant.

MR. BEARD: There is no difficulty with that.

THE CHAIRMAN: Right, let us go to disclosure. The proposed amendment to the very helpfully drafted order is that the date, 29th January in relation to disclosure should be put back to 27th February. Mr. Brealey, is there any difficulty over that in light of the new timetable?

MR. BREALEY: No, Sir.

THE CHAIRMAN: Thank you very much. We would be minded to make an order in accordance with the amended version so far as those dates are concerned.

MR. BEARD: I am grateful.

THE CHAIRMAN: New paragraph – well I am not sure it will be new para.6 now because we have put disclosure back in, but old para.11, there is a suggestion that the date "6th February" be replaced by 6th March 2009 – any difficulty with that, Mr. Brealey?

MR. BREALEY: No.

MR. BEARD: I am sorry, this is?

THE CHAIRMAN: This is old para.11, your new para.6, though it will not be new para.6.

MR. BEARD: Sorry, I misunderstood, thank you.

THE CHAIRMAN: Confidentiality. Again, very much provisionally we took the view that maybe one could simplify this matter from what is originally drafted by the defendants, so that the confidentiality direction might read something like this.

> "The parties seek assistance of the Tribunal in relation to any documents or category of documents if they are unable to resolve any confidentiality issue between them."

So it is, in fact, the first two words of old para. 16: "The parties", and then we go to subparagraph 3: "… seek the assistance of the Tribunal in relation to any documents or category of documents", and then as printed. What we have in mind, if I can give you the thought process in a nutshell, is that this is all quite historic and, on the face of it,

confidentiality may well be in reality less of an issue than something much more recent, but obviously we do not want to close the door, because we do understand that from the defendant's view point in particular there may well be confidentiality issues which still subsist, and we do not want to stop your side, Mr. Brealey, in bringing such documents to the attention of the Tribunal. Does that make sense?

MR. BEARD: Eminent sense, Sir. The position of the claimant is not that it wants to come to the Tribunal in open hearing, wave documents about that are of commercial sensitivity to the defendant; it is very happy to avoid that. The point that was being made by the claimant was simply given the nature of the claimant, being a liquidator not active in the market and dealing with matters that are now historical as you describe it, it seemed to us that there was a danger of over elaboration and therefore we are entirely content with an arrangement which effectively reserves the position and if EWS do have particular concerns, and they have documents they want to make clear should not be referred to in open hearing, or should not be provided to third parties without the matter being aired with the Tribunal, we have absolutely no difficulty with that. This order, to our mind on first consideration, would seem to cover that concern.

THE CHAIRMAN: I think that is a "yes", is it not?

MR. BEARD: A long one – always.

THE CHAIRMAN: A longish "yes", but very nicely put, if I may say so, Mr. Beard. Right, that is a "yes". Witness statements – Mr. Brealey, is there any difficulty for the defendants about the suggested change of date from 26th March to 24th April?

MR. BREALEY: No.

THE CHAIRMAN: Then we come to expert evidence. Mr. Beard, I think the position is strictly that you need permission in any event to submit expert evidence, so we need to start with that either side will have to obtain permission by further application to submit expert evidence. Another part of this Tribunal has, I understand, 10 expert witnesses on either side shortly, so one expert witness is fairly minimal. We anticipated every reason to expect two experts. You might find us being rather grumpy if there is a suggestion that there should be more than two experts in this case on each side.

MR. BEARD: Understood. The previous draft suggested there would only be one expert. We were saying that our present thinking was that we would need two.

THE CHAIRMAN: But you are going to have to ask permission.

MR. BEARD: We would certainly wish to be able to adduce expert evidence from two experts, and hold the position at this time, and therefore ask for the Tribunal's permission in that

regard. In broad terms it is anticipated that the two experts that may be needed one would relate to accounting matters and the other to economic matters.

THE CHAIRMAN: I think it is worth saying that both sides can expect, though it is not the greatest bedtime reading, that all members of the Tribunal will have read properly the Regulator's report and findings, albeit as far as I have it at the moment in somewhat redacted form.

MR. BEARD: Yes, although I imagine as time moves on in relation to at least the parts of the decision that are relevant to ECSL that that is unlikely to be the case and that full versions of the Decision will be before the Tribunal; I think that is everybody's working assumption at this stage.

THE CHAIRMAN: I think what we had in mind was that the sort of expert evidence we might expect to hear in this case would be something like an accountant or similar, and an economist or similar, but we might – to use the word again – be a bit "grumpy" if somebody was telling us what coal is, what a railway is, what a railway wagon is and what a power station is.

MR. BREALEY: I hope not to make you grumpy!

THE CHAIRMAN: Thank you. So we will make an order that permission be obtained by further application, which can be dealt with administratively, to submit expert evidence indicating an expectation of not more than two experts per side, but that will always be subject to liberty to apply.

The dates in old paras. 20 and 21, is there any difficulty about the new dates, Mr. Brealey, that have been added, and in old para.24? I take it Mr. Beard that you did not mean in old para.25 a hearing of 54 days?

MR. BEARD: The temptation is just enormous, but no!

THE CHAIRMAN: It would be very unpleasant, I can tell you, by the sixth day!

MR. BEARD: No, we certainly do not want to turn this into gas meters.

THE CHAIRMAN: Right, in which case the main oral hearing will be listed for 15th July, with at time estimate of up to – we will say five days. I must say that we, as a Tribunal, very much hope that the fifth of those five days will be one in which nobody will be required in here, and we will have the opportunity to deliberate. My instinct, on reading the up to date papers, as it were, was that this was probably a three to four day case and that anything over that might be tempting prolixity, which is an unpleasant medicine.

MR. BEARD: Yes, to avoid prolixity.

THE CHAIRMAN: Ah! Thank you. Of course there will be liberty to apply. So just to run through the draft order again, if I may, from the beginning: forum we have dealt with. Strike out and dismissal and skeletons we have dealt with. Requests for further information stays in in the way we have dealt with, with the dates of the 19th and 23rd January.

MR. BEARD: Sorry, stays in? I thought that the decision was that no order was going to be made.

THE CHAIRMAN: No, Mr. Brealey asked for it to stay in, I think, did you not, Mr. Brealey, or are you content for there just to be an understanding?

MR. BREALEY: I am always content for an understanding.

MR. BEARD: I had understood it merely to be that we would provide ours on 19th and they would provide theirs on 23rd and no order to that effect.

THE CHAIRMAN: Without an order?

MR. BREALEY: Yes.

THE CHAIRMAN: We will do it that way, that was our original intention in any event, I think.

MR. BEARD: Thank you.

THE CHAIRMAN: Disclosure we have dealt with, including the date amendments, confidentiality we dealt with and reduced the length of it. Witness statements we have dealt with and amended dates. Expert evidence we have amended somewhat and dealt with dates. Length of hearing we have dealt with. Security for costs, where are we on that, Mr. Brealey?

MR. BREALEY: Where we are on that, as I understand it, is that the claimants on 5th January, in their letter which is referred to in our skeleton, did offer to reserve £500,000 until the conclusion of the proceedings and given that the wasted costs – if I can call them that – of the amendment are going to be sorted out at the end of these proceedings it has extra force. That was 5th January.

Then on 7th January Freshfields wrote back and said: "Thank you very much, that's great, you are going to reserve £500,000, you are in liquidation, but just what do you mean by "reserve"?" We say there is an element of security there for any costs that may be payable. They have undertaken to reserve £500,000 so we have not made a formal application for security, but we have not heard a response to 7th January, so we are slightly in the dark as to how they are going to reserve the £500,000 for security. That is in the 7th January letter.

THE CHAIRMAN: Yes, and that is the latest letter, is it not? Or is there a letter I received this morning?

MR. BEARD: No, I am sorry, there is not a further response. The position of ECSL is relatively straight forward. We do not accept there is a proper basis for a security for costs application, and no full application has been made. This Tribunal has indicated in previous judgments its concerns about large security for costs applications being made by persons who are defendants in follow-on claims, in the BCL Old Co litigation, but we were seeking to avoid the need for any satellite application to be made. In those circumstances the liquidator, who is charged with specific duties in dealing with the liquidation has given an undertaking that he will reserve £500,000 until the end ----

THE CHAIRMAN: What does "reserve" mean? Does it mean ----

MR. BEARD: It will not be distributed until the end ----

THE CHAIRMAN: It will not be distributed ----

MR. BEARD: To creditors.

THE CHAIRMAN: It will not be distributed. I do not know the answer to this because I am not a bankruptcy and liquidation lawyer, an insolvency lawyer, but is it open to a liquidator to reserve a sum of that kind for the purposes of litigation costs in a specific action.

MR. BEARD: My understanding is "yes", it is within the discretion of the liquidator, the liquidator is doing so. That is precisely what the liquidator is doing and we say, given that undertaking there is plainly no basis for an application for security for costs.

THE CHAIRMAN: Just leaving the legal basis for an application for security aside, some other creditors might say: "What on earth is the liquidator doing putting half a million pounds for security for costs aside when we are owed £n million by Enron and that money should come to us?" I take Mr. Brealey's point that one really needs to know a little bit more about the legal basis. You may be entirely right, I am perfectly prepared – and I am sure my colleagues are – to accept that a liquidator can do this, subject only to knowing what the mechanism is for the reassurance of the other side, because this is potentially costly litigation.

MR. BEARD: It helps that I have the liquidator sitting behind me today and, in the circumstances, if it is of assistance we can revert, spelling out the basis on which we say the liquidator can give this sort of undertaking and the comfort it therefore affords to the defendant in this matter. But we do emphasise that this is a very large sum of money to be asked to be treated as security for costs and we would strenuously object to any order being made today without a full and proper application for security.

THE CHAIRMAN: I am sure there is no difficulty about that. Could we deal with it on this basis that the Tribunal might make an order that by the end of this week, which would be by close

of play on 16th the liquidator – who I think is nodding in agreement, and we are grateful for his presence today, of course – will provide through your instructing solicitors, a letter to the Tribunal and to the defendants, providing the legal basis upon which this sum can be reserved and will remain available to pay costs?

MR. BEARD: We will certainly provide that letter by the end of this week. We would suggest no order is required in relation to that matter, we understand what is being asked of us, the liquidator is here in court. We will give an undertaking to provide it, we do not see any need for any further order.

THE CHAIRMAN: I have not consulted my colleagues yet, but I would be inclined to make an order to that effect, Mr. Brealey, what do you say?

MR. BREALEY: I would prefer one, yes, I would prefer an order.

MR. BEARD: I do not press the point further, Sir.

THE CHAIRMAN: We will make an order to the effect that the claimant by letter from the liquidator, to be provided by 5 p.m. on 16th January 2009, sets out the basis upon which the reservation of £500,000 for costs would in fact ensure that there is money available to pay any costs ordered.

MR. BEARD: I am sorry, Sir, you said then in that wording a letter "from the liquidator", but earlier you referred to ----

THE CHAIRMAN: A letter from your instructing solicitors.

MR. BEARD: I am grateful.

THE CHAIRMAN: But it must be based on instructions taken from the liquidator.

MR. BEARD: Of course, it will be solicitors ordinarily working on the instructions of the liquidator.

THE CHAIRMAN: This is just a small question of insolvency law which needs to be resolved.

MR. BEARD: I understand the point being made, and we have no difficulty with that.

THE CHAIRMAN: All right. There will, of course, be liberty to apply.

MR. BEARD: Of course.

THE CHAIRMAN: Now, let us have a quick look at the draft agenda – that is the Tribunal's agenda. I am hoping that item 8 in the draft agenda can simply be glossed over – is there anything else in the draft agenda that we have not dealt with that needs to be covered in the order, please? This is the draft agenda dated 15th December, sent out by the Registrar with a letter.

MR. BREALEY: I think we have covered everything.

MR. BEARD: No, I think we have covered everything, thank you.

THE CHAIRMAN: Anything else anyone wants to deal with? In that case the order will be promulgated in the customary way. We are very grateful to the three counsel.

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