Neutral citation [2021] CAT 38

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

16 December 2021

Before:

SIR MARCUS SMITH
(President)
EAMONN DORAN
PROFESSOR JOHN CUBBIN

Sitting as a Tribunal in England and Wales

BETWEEN

DAVID COURTNEY BOYLE AND EDWARD JOHN VERMEER

Applicants / Proposed Class Representatives

-and-

(1) GOVIA THAMESLINK RAILWAY LIMITED
(2) THE GO-AHEAD GROUP PLC
(3) KEOLIS (UK) LIMITED

Respondents / Defendants

-and-

SECRETARY OF STATE FOR TRANSPORT

Proposed Intervener / Objector

Heard at Salisbury Square House on 16 December 2021

RULING (STAY, INTERVENTION & TIMETABLE)

APPEARANCES

Mr Charles Hollander QC and Mr David Went (instructed by Maitland Walker LLP) appeared on behalf of Messrs Boyle and Vermeer.

Ms Anneliese Blackwood and Ms Cliodhna Kelleher (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Govia Thameslink Railway Limited, The Go-Ahead Group PLC, and Keolis (UK) Limited.

Ms Anneli Howard QC and Mr Brendan McGurk (instructed by Eversheds Sutherland (International) LLP) appeared on behalf of the Secretary of State for Transport.

A. STAY

1. We have before us an application in proceedings brought by proposed class representatives Mr Boyle and Mr Vermeer against three proposed defendants, Govia Thameslink Railway Limited, The Go-Ahead Group PLC and Keolis (UK) Limited. This is a case management conference to determine the future conduct of these proposed class proceedings.

2. The question is whether the proceedings should be stayed at a very early stage or whether they should proceed to a certification hearing. The reason the proposed defendants apply to have the proceedings stayed at this early stage is because the collective action regime in this jurisdiction is a new regime and one which contains, as any new regime does, significant areas of uncertainty.

3. In this case, in particular, it is suggested that other proceedings which have been in part determined by the Tribunal – we are referring to the *Gutmann* proceedings (Cases 1304 and 1305/7/7/19), which also concern rail operators – are such that this Tribunal should stay the proceedings, pending the outcome of an appeal in *Gutmann*.

4. Just to fill in the background, certain issues in the *Gutmann* case have been determined by the Tribunal, and permission to appeal is sought by the proposed defendants in those proceedings, permission to appeal having been refused by the Tribunal itself: [2021] CAT 36.

5. The area of debate in *Gutmann* is one of causation. We are not going to flesh out in any great detail the grounds of appeal as they will be presented to the Court of Appeal, not least because they have not actually been framed in a form for us to consider today. Suffice it to say that they concern the extent to which, at the certification stage, the individual losses of the members of the class need to be articulated, such that each class member can show an arguable loss.

6. We do not wish to unpack the issues that may be heard by the Court of Appeal in *Gutmann*, if the Court of Appeal decides to give permission to hear the

appeal. It seems to us that to try to unpack such issues would not serve any useful purpose in these circumstances.

7. It seems to us that we should seek to test the utility of a stay by assuming *(i)* that permission to appeal to the Court of Appeal is granted and *(ii)* the worst case scenario for the proposed class representatives, were the appeal to proceed, namely that the defendants in *Gutmann* would be successful in the Court of Appeal.

8. Assuming against the proposed class representatives, and in favour of the proposed defendants here such an outcome, just how damaging would that be to the onward progression of the claim? It is trite that questions of causation are highly fact-sensitive. Of course, they are coloured by what has to be proved in connection with the individual class, but nevertheless there is a high degree of fact sensitivity in relation to the questions of causation as they arise in collective actions.

9. It seems to us that that is a very strong indicator against granting a stay. The fact is that the way in which the claim is put at the certification stage is, even at that early stage, going to be very fact-dependent. The fact is that even a swingeing articulation of the rules of causation in class actions in a manner contrary to *Gutmann* is unlikely to put a stop to this claim. Indeed, we suspect, such an outcome in the Court of Appeal would be unlikely to require great root and branch re-articulation of the claim. We may be wrong about that, but that, as it seems to us, is the likely outcome, even if things go well for the proposed appellants in *Gutmann*.

10. In these circumstances, one must ask whether it is appropriate to do the unusual thing and to stay proceedings which are otherwise capable of being brought forward. It seems to us that what we have said already rather answers that question. Before one stays proceedings that are separate from other proceedings under appeal, one must have a compelling reason that can be clearly and straightforwardly articulated as to why the stay should be granted, and the usual fast process in this Tribunal abrogated and abandoned.

11. In this case we can see no sufficient reason for ordering a stay. It seems to us that the justice of matters is that the proceedings should continue.

12. We have well in mind the theme that underlies Lord Briggs' decision, speaking for the majority, in *Merricks* ([2020] UKSC 51), when he explained that the critical rationale underlying the collective actions regime was access to justice. That he said in a different context, but it does, as it seems to us, inform the approach that Tribunal ought to take to collective proceedings going forward.

13. Access to justice is important and justice delayed is justice denied. Obviously, in an appropriate case, we will consider staying proceedings pending clarification of the law, but this is not such an appropriate case and we therefore refuse the application for a stay.

14. We would like to say a further word, however, about opportunism and the reasons which underlay the application for a stay. This is, as we have indicated, a new process that is being articulated pretty much in every case that comes before the Tribunal and then on to the Court of Appeal and beyond. We do not consider that it is inappropriate for a respondent or a proposed defendant to raise a question of a stay for consideration by the Tribunal, and we are grateful to the proposed defendants in doing so in this case. The fact that the application has failed should not be taken as any indication that it was inappropriately made.

15. The other point we would make is that – we say this so as to diffuse any criticism – there has been a reticence in the proposed defendants in responding to the claim. That is to our minds not unusual in these sort of situations. Respondents to collective proceedings tend to keep their powder dry in the course of collective proceedings, and the fact that this course has commended itself to the respondents in this case is also not a criticism that we think should be made at this stage.

16. However, neither of those points detracts from our overall conclusion that these proceedings should not be stayed but rather should continue with the timetable to trial as soon as is practically possible.

B. INTERVENTION

17. We have before us a double-barrelled application by the Secretary of State for Transport both to object to the certification of these proceedings and, if they are certified, to intervene in the proceedings going forward.

18. It is important, we think, to begin by articulating why there are two different forms of objection or intervention in the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules"). The position is that the Tribunal Rules give alternative routes for intervention or notice of objection. Thus, Rule 16 provides that:

> "Any person with sufficient interest in the outcome [that referring to the outcome of the substantive proceedings] may make a request for permission to intervene […]."

By contrast, rule 76(10)(c) provides that:

> "The Tribunal may give directions – […] as to the time by which any person with an interest (including a class member) may object to the application for a collective proceedings order or the authorisation of the proposed class representative."

19. It seems to us that there is a very clear and correct distinction between intervention post-certification and objection pre-certification because the nature of the interest that is being articulated or defended is actually very different. At the pre-certification stage, the objector will be contending that for certain reasons, additional or different to those of the proposed defendants, the proceedings should not be certified or should be certified on a different basis.

20. Post-certification, the interest lies much more in the substantive outcome of the process, and the points that will be made will, to our mind, be far more wide-ranging and different in the post-certification stage than they are in the pre-certification stage.

21. For that reason, we are going to place considerable emphasis on the distinction between intervention and objection articulated in the Tribunal Rules. That distinction does not go to the question of access to materials that are before the Tribunal. We consider that the extent to which an objector or an intervener is

entitled to participate in confidentiality rings, for example, depends not on status as objector or intervener but depends on the interests of justice and on our obligation to ensure that, if a person is legitimately objecting or intervening, they have the tools to do the job properly.

22. For those reasons we are going to reject, but on entirely technical grounds, the application to intervene pre-certification. We consider that that label is an inappropriate one for the stage these proceedings have reached. Sticking with intervention for the moment, however, we are going to indicate provisionally that if these proceedings are certified, then the Secretary of State ought to be permitted to intervene. We leave the precise basis and ambit of such intervention to be considered further at a later stage, at the certification hearing or shortly thereafter, when the Secretary of State will have a far clearer idea as to the points that it would want to bring, additional to or different from the points that the respondents themselves would want to make in the post-intervention stage.

23. However, in anticipation of that future intervention – it obviously cannot take place now because the proceedings have not been certified – but in anticipation of that future intervention, it seems to us that the Secretary of State ought, but at its own cost, to participate in the confidentiality ring that is being established now for the protection of confidential information.

24. We say that for the primary reason that we would not want the process post-certification to be slowed or delayed whilst the Secretary of State gets itself up to speed with the proceedings. We consider that it is efficient, in terms of case management, that the Secretary of State have access to the materials that the proposed class representatives and the proposed defendants are exchanging between themselves.

25. However, we consider that this should be, and we say this by way of guidance only, to enable the Secretary of State to inform itself properly as to what steps to take in the post-certification intervention phase.

26. That leaves the question of objection. It seems to us that the Secretary of State has been unable to frame precisely what objection, over and above or different to the objections being taken by the respondents, might be advanced. Now, that is entirely understandable, given the limited appreciation of the present state of the proceedings that the Secretary of State has been able to glean from all the circumstances. But it seems to us that it is important to justify and justify closely additional parties participating in the pre-certification stage, and that unless an objection can be clearly and succinctly articulated, such that the Tribunal can satisfy itself that it is an objection that is best brought by a third party to the proceedings and not by the respondents, unless that can be done, the objection should not be permitted.

27. So, the application to object to the proceedings is refused. We make clear that we would be prepared to consider a focused application to object on the papers by the Secretary of State, if so advised. We would consider that on the papers and without a hearing, but we want to make clear that for that sort of objection to be permitted, it would have to satisfy the two-stage process that we have articulated in this ruling. First, the basis for the objection would have to be absolutely clearly stated; and, secondly, it would have to be an objection that could not be brought, or not properly be brought or not helpfully be brought by the existing respondents to the application for a collective proceedings order.

28. For those reasons, on an anticipatory basis, we allow the intervention. We will direct that the Secretary of State be party to the confidentiality ring and other aspects of the proceedings to enable proper future participation, but we refuse the application to intervene prior to certification and we refuse the application to object to the application for a collective proceedings order, *pro tem* at least.

C. TIMETABLE

29. We have before us the question of the timetable in the run-up to the application for a collective proceedings order. Looking at the timetable as articulated at paragraph 31 of the applicant's written submissions, there is a date of 14 January 2022, which is the deadline for the applicant to publish the CPO

hearing announcement, and that we understand to be uncontroversial between the parties, and we would be minded to order that.

30. The first controversial date is 4 February 2022 or alternatively 11 March 2022, which is the date on which the respondents should file and serve their response to the CPO application.

31. We are concerned that the range of dates for the articulation of objections to a CPO application are being premised on the basis that this is a trial and not a heavy interlocutory application. We want to be very clear that these applications, although heavy and important and of commercial significance to all concerned, are not trials.

32. On our understanding of the decision of the Supreme Court in *Merricks*, which is binding on us, unless there is an application to strike out, the merits in the sense of what is likely to happen at trial are quite simply not relevant. There are, it is true, elements, notably the "strength of the claims", which are relevant to the discretion in terms of opting in and opting out proceedings that are going to be certified, but the suggestion that an articulation of the strength of claims is something that requires factual evidence of any detail at all is, we consider, misconceived. It seems to us that if we give a timetable that has the sort of latitude that is being anticipated by the respondents, we will be sending altogether the wrong signals as to the nature and quality of the evidence that this Tribunal requires in order properly to resolve the matters before it.

33. So, for that reason more than anything else, we are going to order a date of 4 February 2022. We will include in the order a liberty to apply to vary these dates, because we recognise that this is still a nascent jurisdiction, but we would not want that liberty to apply to be misconstrued. Any application to vary the timetable will have to be narrowly and closely justified either by reference to a misunderstanding of what is required in order properly to respond to an application for CPO or by reference to some other factor that was not properly before the Tribunal at the time this timetable was ordered.

34. 4 February will also be the date on which any application to strike out the proceedings will have to be filed and served by the respondents, if so advised. Again, the whole point about a strike-out application is that it is not evidence-based. It is the sort of application where the claim is so bad that it is unreasonable to give it life going beyond the interlocutory strike-out application, and the evidence, such as it is, in support of such an application needs to be so tailored.

35. So, it is quite clear that we are articulating – and we put this on the record so that the respondents and to the extent relevant the Secretary of State understand where the Tribunal that is going to be hearing this matter is coming from – we do not regard substantive evidence of detail going to the merits as being of assistance in this sort of case.

36. Moving back to the timetable, the remaining dates seem to us to be reasonable. We have not been addressed by the parties on them, and so we will simply end with a provisional indication that those dates beginning with 25 February 2022 and going on seem to us reasonable, but we will leave it to the parties, having identified the earlier dates that we are going to work to, to raise any points of detail in respect of those dates.

37. That will culminate in a hearing estimate of three days – again we will hear the parties if that is appropriate – not before 26th April 2022. When this hearing is finished, we will take out our diaries and try to work out a slot with the parties at which the CPO application can be determined on that basis, but we just want to put on the record that the diaries next year are tricky and we anticipate that there will be some difficulty in finding a slot shortly after 26 April 2022, but we will do our very best to accommodate the parties in that regard.

Sir Marcus Smith
President

Eamonn Doran

Prof. John Cubbin

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 16 December 2021