Neutral citation [2011] CAT 22

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1173/5/7/10

Victoria House
Bloomsbury Place
London WC1A 2EB

11 July 2011

Before:

MARCUS SMITH QC
(Chairman)
MARGOT DALY
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

DEUTSCHE BAHN AG
and the other parties listed in Annex 1 to this Ruling

Claimants

- and -

(1) MORGAN CRUCIBLE COMPANY PLC
(2) SCHUNK GMBH
(3) SCHUNK KOHLENSTOFFTECHNIK GMBH
(4) SGL CARBON SE
(5) MERSEN (FORMERLY LE CARBONE-LORRAINE SA)
(6) HOFFMANN & CO ELEKTROKOHLE AG

Defendants

RULING (PERMISSION TO APPEAL AND COSTS)

INTRODUCTION

1. On 25 May 2011, the Tribunal handed down judgment ("the Judgment", [2011] CAT 16) on an application by the First Defendant, Morgan Crucible Company plc ("Morgan Crucible"), seeking an order pursuant to Rule 40 of the Competition Appeal Tribunal Rules 2003, SI 2003 No 1372 ("the 2003 Rules") rejecting the claims against it on the ground that they had not been brought within the time limit laid down by Rule 31 of the 2003 Rules. In the Judgment, the Tribunal held that Morgan Crucible's application should succeed, and the claims against Morgan Crucible were struck out in their entirety.

2. This Ruling adopts the definitions and abbreviations used in the Judgment.

3. On 22 June 2011, the Claimants made a written request for permission to appeal the Judgment. Morgan Crucible, at the invitation of the Tribunal, commented on this request, in a letter dated 30 June 2011.

4. By a letter dated 3 June 2011, Morgan Crucible sought an order obliging the Claimants to pay all of its costs of and arising out of, not only, the application, but also out of defending the claim altogether. This was logical, given the fact that the claims against Morgan Crucible had been struck out in their entirety. The Claimants, at the invitation of the Tribunal, responded to this letter on 9 June 2011, and Morgan Crucible replied on 30 June 2011.

5. We have taken these written submissions into account in this Ruling, which deals with both permission to appeal and costs.

PERMISSION TO APPEAL

6. Decisions of the Tribunal in relation to claims under section 47A of the 1998 Act, including a decision, such as this one, dismissing a claim pursuant to Rule 40 of the 2003 Rules, can be appealed to (in this case) the Court of Appeal under section 49(1) of the 1998 Act: *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647 at paragraph 24. Any such appeal requires the permission of the Tribunal or the Court of Appeal. In considering whether to grant permission, where as here the Tribunal is sitting as a Tribunal in England and Wales, the Tribunal applies the test in Rule 52.3(6) of

the Civil Procedure Rules. Essentially, permission to appeal should only be given where: *(i)* the appeal appears to have a real prospect of success; or *(ii)* there is some other compelling reason why the appeal should be heard.

7. In this case, the Judgment departed from an earlier decision of the Tribunal, namely the Tribunal's decision in *Emerson Electric Co & Ors v Morgan Crucible Company plc* [2007] CAT 28 ("*Emerson 1*"), with the consequence that time began to run earlier than it would have done had the Judgment followed the decision in *Emerson 1*.

8. Although we are satisfied – particularly given the decision in *BCL Old Co Limited & Ors v BASF SE & Ors* [2009] EWCA Civ 434 – that our decision not to follow *Emerson 1* was correct, it is unsatisfactory for claimants litigating section 47A claims before the Tribunal to be faced with divergent Tribunal decisions. This divergence, in our view, needs to be resolved, one way or the other, by the Court of Appeal, and represents a compelling reason why the appeal should be heard.

9. Moreover, even though there has been development in the case-law which is relevant to the limitation question that was both before this Tribunal and the Tribunal in *Emerson 1* (namely, the decision in the decision in *BCL Old Co Limited & Ors v BASF SE & Ors* [2009] EWCA Civ 434), and even though (as was noted in paragraph 64(1) of the Judgment, and as Morgan Crucible emphasised in its letter of 30 June 2011) the decision in *Emerson 1* was reached without the benefit of argument, we consider that the fact that there are divergent views expressed by two (differently constituted) Tribunals also demonstrates that an appeal might have a real prospect of success.

10. Accordingly, we give permission to appeal. In these circumstances, it is unnecessary to consider every point raised by the Claimants in their 22 June 2011 request for permission to appeal. We would only say this: in paragraphs 18 to 19 of the 22 June 2011 request for permission to appeal, it is suggested that the Tribunal mischaracterised the issue between the parties, and in particular the manner in which the Claimants put their case, by considering only the "narrow" and "wide" meanings of the term "decision". Although it is true to say that the Tribunal's analysis began with a consideration of the "narrow" and "wide"

meanings of the term "decision", the Tribunal also considered, and rejected, the "intermediate" position that is described in paragraphs 18 to 19 of the 22 June 2011 request for permission to appeal: see paragraphs 40 to 41 of Judgment. It was the Tribunal's understanding that the Claimants were contending for either a "wide" or an "intermediate" meaning of the term "decision", and both of these contentions failed.

11. We should make clear that this permission to appeal extends only to the question of when time begins to run under section 47A – that is, the point considered in paragraphs 1 to 61 of the Judgment. The Claimants did not seek and, in any event, we would not have given permission to appeal the abuse of process point dealt with in paragraphs 62 to 67 of the Judgment.

COSTS

12. The Tribunal's jurisdiction to award costs is set out in Rule 55 of the 2003 Rules. That rule confers on the Tribunal a discretion to make any order it thinks fit. In determining how much a party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings. However, the appropriate starting point is that a successful party will normally obtain a costs award in its favour.

13. It seems to us a ready inference that the Claimants relied upon *Emerson 1* when deciding when to bring proceedings against Morgan Crucible. Had it been possible for the Tribunal to extend the time for bringing an action under section 47A of the 1998 Act (which it is not: *BCL Old Co Limited & Ors v BASF SE & Ors* [2010] EWCA Civ 1258), then the Tribunal would have given this course very serious consideration. As it was, given the decision in *BCL Old Co*, the point was, quite rightly, not argued before us. The question is whether this fact should have an effect on the usual rule as to costs.

14. Additionally, the Claimants placed considerable reliance on Morgan Crucible's perceived conduct (in terms of the arguments it ran and the appeals it failed to bring) in *Emerson 1*. For the reasons we have given in the Judgment, we do not consider the "abuse of process" point in any way compelling, either as a basis

for preventing Morgan Crucible from making the Rule 40 application or as a basis for contending that the usual rule as to costs should be varied.

15. The first point – namely, the Claimants' reliance on the Tribunal's decision in *Emerson 1* – we find more persuasive, but at the end of the day not sufficiently so to depart from the Tribunal's usual starting point as to costs. Litigation often involves difficult questions of law, and, generally speaking, the loser pays the costs in such cases. Should the Claimants be successful in their appeal of the Judgment, they will themselves no doubt be the beneficiary of this rule.

16. For the same reasons, we can see no reason for staying any order as to costs.

ORDER

17. Accordingly, we unanimously order that:

    (1) The Claimants have permission to appeal the issue of when time begins to run under section 47A of the 1998 Act and Rule 31(1) of the 2003 Rules for the purposes of claims brought under section 47A of the 1998 Act.

    (2) The Claimants pay Morgan Crucible's costs of *(i)* the application and *(ii)* the claims against Morgan Crucible pursuant to Rule 55(3) of the 2003 Rules, such costs (if not agreed) to be assessed on the standard basis by a costs officer of the Senior Courts Costs Office.

Marcus Smith QC Margot Daly Dermot Glynn

Charles Dhanowa
Registrar Date: 11 July 2011

ANNEX 1

THE CLAIMANTS IN ADDITION TO DEUTSCHE BAHN AG

(2) **DB NETZ AG**
(3) **DB ENERGIE GmbH**
(4) **DB REGIO AG**
(5) **S-BAHN BERLIN GmbH**
(6) **S-BAHN HAMBURG GmbH**
(7) **DB REGIO NRW GmbH**
(8) **DB KOMMUNIKATIONSTECHNIK GmbH**
(9) **DB SCHENKER RAIL DEUTSCHLAND AG**
(10) **DB BAHNBAU GRUPPE GmbH**
(11) **DB FAHRZEUGSTANDHALTUNG GmbH**
(12) **DB FERNVERKEHR AG**
(13) **DB SCHENKER RAIL (UK) LIMITED**
(14) **LOADHAUL LIMITED**
(15) **MAINLINE FREIGHT LIMITED**
(16) **RAIL EXPRESS SYSTEMS LIMITED**
(17) **ENGLISH, WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED**
(18) **EMEF – EMPRESA DE MANUTENÇÃO DE EQUIPAMENTO FERROVIÁRIO SA**
(19) **CP – COMBOIOS DE PORTUGAL EPE**
(20) **METRO DE MADRID SA**
~~(21) **ANGEL TRAINS LIMITED**~~[1]
(22) **NV NEDERLANDSE SPOORWEGEN**
(23) **NEDTRAIN BV**
(24) **NEDTRAIN EMATECH BV**
(25) **ES REIZIGERS BV**
(26) **DB SCHENKER RAIL NEDERLAND NV**
(27) **TRENITALIA SPA**
(28) **RETE FERROVARIA ITALIANA SPA**
(29) **NORGES STATSBANER AS**
(30) **EUROMAINT RAIL AB**
(31) **GÖTEBORGS SPÅRVÄGAR AB**

[1] By an order dated 19 April 2011, the Tribunal gave the Twenty-First Defendant permission to withdraw its claim.