Neutral citation [2011] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A 2EB

8 June 2011

Before:

THE HONOURABLE MR JUSTICE BARLING (President)
DR ADAM SCOTT OBE TD
DR VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) EMERSON ELECTRIC Co
(2) VALEO SA
(3) ROBERT BOSCH GmbH

Claimants

-v-

(1) MORGAN CRUCIBLE COMPANY PLC
(2) SCHUNK GmbH
(3) SCHUNK KOHLENSTOFFTECHNIK GmbH
(4) SGL CARBON SE (sued as SGL CARBON AG)
(5) MERSEN SA (sued as LE CARBONE LORRAINE SA)
(6) MERSEN UK PORTSLADE LIMITED
(sued as LE CARBONE (GREAT BRITAIN) LIMITED)

Defendants

JUDGMENT (PERMISSION TO APPEAL)

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1. On 21st March 2011 the Tribunal handed down a judgment in these proceedings ([2011] CAT 4, "the Judgment"). The judgment we now give adopts the same abbreviations and terminology as, and should be read with, the Judgment, which contains the background to this matter.

2. In the Judgment the Tribunal concluded that there is no infringement decision of the European Commission within the meaning of subsection 47A(6)(d) of the Act on which the claimants can base their claims against Carbone GB, and that there are therefore no reasonable grounds for making those claims within the meaning of rule 40 of the Tribunal Rules. On this basis the Tribunal struck out the claims under the power contained in that rule (see the Order of the Tribunal dated 7 April 2011).

3. By written application dated 20th April 2011 the claimants request permission to appeal against the Judgment. The Tribunal received written observations from Carbone GB on 11 May 2011 opposing the grant of permission on any of the grounds contained in the claimants' application. None of the parties requested an oral hearing on the issue of permission and in the light of the helpful written submissions from both sides the Tribunal does not consider that an oral hearing is necessary.

4. Decisions of the Tribunal in relation to claims under section 47A of the Act, including a decision dismissing a claim pursuant to rule 40 of the Tribunal Rules, can be appealed to (in this case) the Court of Appeal under subsection 49(1) of the Act: see *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647, paragraph 24. Any such appeal requires the permission of the Tribunal or the Court of Appeal. In considering whether to grant permission when, as here, sitting in England and Wales the Tribunal applies the test in rule 52.3(6) of the Civil Procedure Rules which states that permission to appeal may be given only where: (a) the appeal appears to have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard.

5. The claimants seek permission to appeal advancing three proposed grounds of appeal:

(1) The Tribunal erred in its approach to the interpretation of the operative part of the Decision, and in treating the judgment of the Court of Justice in Joined Cases 40/73 etc *Suiker Unie and Others v Commission* [1975] ECR 1668 as "an insuperable obstacle to the claimants' proposed use of the recitals" in interpreting the operative part;

(2) The Tribunal erred in holding that, even if there is a finding of infringement against a non-addressee in the recitals of a Commission decision, it cannot be of legal effect or be the basis of a claim under section 47A of the Act; and

(3) The Tribunal was wrong to hold there was no finding of infringement by the Commission in the recitals of the Decision.

6. Proposed grounds (1) and (2) appear to be the result of a misconception as to the basis of the Judgment. It is true that a good deal of argument at the hearing was directed to the question whether and, if so, in what circumstances reference could be made to the recitals of a Commission decision in order to determine what findings of infringement had been made by the Commission for the purposes of section 47A of the Act. However, in the event it was not necessary for the Tribunal to reach a final conclusion on those points, as they were academic in the light of its conclusion that even if reference were made to the recitals, that did not assist the claimants as the recitals did not contain any finding of infringement on the part of Carbone GB.

7. Thus, the Tribunal stated at paragraph 52 of the Judgment:

> "... both parties' main arguments, as well as [the claimants'] reserved argument, would be hypothetical (and therefore better left for determination in another case) if [Carbone GB's] fall-back position is correct and there is nothing contained in the recitals which could on any view be said to amount to a finding of infringement on the part of Carbone GB. We therefore turn to [the claimants'] submissions as to the effect of the recitals."

8. Having considered the recitals the Tribunal concluded, at paragraph 58, that:

> "We agree that there is simply nothing in the recitals relied on by the claimants which could possibly justify our concluding that the Commission made the finding against Carbone GB for which [the claimants] contend ..."

9. Accordingly, the Tribunal left open the question whether subsection 47A(6)(d) of the Act applies where the recitals to a Commission decision contain a clear and unambiguous finding of infringement by the Commission against a person but that finding is not reflected in the operative part of the decision (see paragraph 62 of the Judgment).

10. The Tribunal's conclusion that the recitals do not contain a finding of infringement against Carbone GB is the subject of proposed ground of appeal (3). As to this proposed ground, the claimants' submissions in the application for permission are in essence simply a rehearsal of the arguments put before the Tribunal at the hearing, and which the Tribunal considered to be a valiant attempt to make bricks without straw. The Tribunal carefully considered all the recitals relied upon by the claimants (of which the main ones are set out in the Annex to the Judgment) and arrived at the conclusion quoted at paragraph 8 above. The Tribunal also stated that:

> "Even if '[Carbone SA's] UK subsidiary' were to be shown to be a reference to Carbone GB, that of itself would not amount to a finding by the Commission that Carbone GB had infringed Article 101. It might constitute evidence on the basis of which the Commission could so find, but that is a very different matter. Similarly, there may be material in the recitals from which it could be inferred that at the material time Carbone GB was part of the same undertaking as Carbone SA but no determination to that effect appears in the Decision." (paragraph 58)

11. The Tribunal does not consider that there is a real prospect of an appeal succeeding on proposed ground (3), nor that there is any other compelling reason for the appeal to be heard. We therefore refuse permission to appeal on that ground.

12. Nor, in these circumstances, do we consider it appropriate to grant permission in relation to proposed grounds of appeal (1) and (2), as these remain hypothetical. However, it is fair to say that had we (a) concluded that the recitals *did* contain a finding by the Commission of an infringement of Article 101(1) TFEU on the part of Carbone GB, and (b) reached final conclusions that were in accordance with the provisional views expressed in the Judgment on the points to which those proposed grounds are directed, and (c) felt thereby constrained to strike out the claimants' claims notwithstanding the contents of the recitals, we would have been likely to have granted permission to appeal on the points raised by those proposed grounds. We would have been likely to grant permission on the basis (at least) that there was a compelling reason

for the appeal to be heard. That reason would have been the *prima facie* anomaly of a claimant being unable to bring a follow-on action for damages before the Tribunal under section 47A of the Act notwithstanding a clear finding of infringement by the Commission, albeit that finding was to be found only in the recitals to the Commission decision.

13. For these reasons we unanimously refuse permission to appeal.

14. The application may be renewed to the Court of Appeal within 14 days pursuant to CPR rule 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling, along with the written submissions identified at paragraph 3 above, should be placed before the Court of Appeal.

The President Adam Scott Vindelyn Smith-Hillman

Charles Dhanowa
Registrar

Date: 8 June 2011