



Neutral citation [2012] CAT 4

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1178/5/7/11

Victoria House
Bloomsbury Place
London WC1A 2EB

1 March 2012

Before:

LORD CARLILE OF BERRIEW QC
(Chairman)
PETER FREEMAN QC
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

2 TRAVEL GROUP PLC (IN LIQUIDATION)

Claimant

- and -

CARDIFF CITY TRANSPORT SERVICES LIMITED

Defendant

RULING

APPLICATIONS BEFORE THE TRIBUNAL

1. The Tribunal has been asked to rule on two contested applications in these proceedings. First, the Claimant seeks permission to amend its Claim Form to include further heads of loss. Secondly, the Defendant seeks specific disclosure of certain documents in the control of third parties to this litigation. We deal with these two applications in turn below.

THE CLAIMANT'S APPLICATION TO AMEND ITS CLAIM FORM

2. By an application dated 8 February 2012, the Claimant applied for permission to amend its Claim Form, pursuant to rule 34(b) of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) ("the Tribunal Rules"), to include further heads of loss specifically attributable to the Claimant entering into liquidation. These heads of loss are described in a further (third) witness statement of Mr Daniel Simon Conway of BDO LLP. The Claimant proposed an amendment to the Claim Form which reflects Mr Conway's findings, which is set out at the Annex to this Ruling.
3. The Claimant submitted that the amendment was necessary in order to allow it to be properly compensated for the losses caused by the Defendant's predatory behaviour. The Claimant submitted further that the amendment would not cause any prejudice to the Defendant, in particular because:
 - (a) The Defendant was alerted to this potential head of loss in the Claimant's written opening submissions; and
 - (b) This was not a matter on which the Defendant was likely to need to obtain further evidence.
4. The Claimant submitted that, if the Tribunal were not minded to allow the Claimant to amend its Claim Form, the third witness statement of Mr Conway should be admitted as evidence in any event, as it provided the Tribunal with useful background information as to the consequences of the Defendant's actions and provided the proper context for other heads of loss claimed by the Claimant.

5. The Defendant filed observations in relation to the Claimant's application on 16 February 2012. The Defendant stated that it did not consent to the application, objecting to the very late stage at which the application was made, and pointing to the potential of the proposed amendment to cause the Defendant prejudice in light of the nature and quantum of the additional sums claimed. The Defendant submitted that it might need to instruct its expert to consider the proposed amendment and the nature of the claims advanced. The Defendant submitted further that the proposed amendment was, in places, misconceived on its own terms, and reserved the right to serve a responsive amended Defence, amended written opening submissions and supplemental expert report to address the proposed amendments.
6. The Claimant's proposed amendment to the Claim Form is significant, and would have the effect of increasing the sums claimed by the Claimant by approximately £2.65 million. The application is also made at a very late stage: the hearing in these proceedings is due to commence on 12 March 2012, and the parties are making their final preparations for trial.
7. Nevertheless, taking these points fully into account, we do not consider that the nature of the proposed amendment is such as to prejudice the Defendant in a manner that cannot be compensated for in costs. Clearly, the fact that the amendment has the effect of increasing the Claimant's claim is irrelevant: the crucial question is whether the Defendant is able to deal with this new point, and we consider that (despite the lateness of the amendment) the Defendant will be able to do so. Equally, the fact that the new claims may ultimately be unsuccessful is not a matter that ought to preclude amendment: the points are clearly arguable, and beyond this, we are not disposed, at this (late) interlocutory stage, to consider the merits further. We therefore grant the Claimant permission to amend the Claim Form and admit the third witness statement of Mr Conway.
8. Consequential upon this, we grant the Defendant permission to amend its Defence and written opening submissions and to adduce such evidence as it considers appropriate to respond to these new heads of loss. Given the very limited time before the start of the hearing, we have set a deadline for these further documents to

be provided, which is reflected in our Order below. We also order the Claimant to pay the Defendant's costs of and occasioned by the Claimant's application.

THE DEFENDANT'S APPLICATION FOR SPECIFIC DISCLOSURE

9. At paragraph 4.9 and Annex H of its claim form, the Claimant claims for the loss of a commercial opportunity to develop a depot in Swansea ("the Swansea Depot"). By its application of 16 February 2012, the Defendant applied, pursuant to rule 19(2)(d) of the Tribunal Rules, for an order that Mr David Huw Francis and Mr Nigel Vernon Short (both former directors and shareholders of the Claimant, and persons who, it is anticipated, will be giving evidence on behalf of the Claimant) provide copies of all documents (including any publicly available documents) relating to the Swansea Depot that are in their possession that have not been previously been made available in these proceedings, and specifically documents relating to the period of Mr Francis and Mr Short's ownership of the property (from 20 May 2005 to the present day).

10. The Defendant submitted that these documents are of key relevance to the Claimant's claim for loss associated with the Swansea Depot, which is the single largest head of claim in these proceedings, amounting to around half of the total amount claimed. The Defendant submitted further that the Claimant had disclosed very little documentation in relation to the development potential of the land and, in particular, documentation that evidenced the steps that would need to be taken to enable development of the land as well as the costs of those steps. In the Defendant's submission, the Claimant's claim is not limited to matters as they stood on the date of liquidation, but goes further and seeks to take into account what might have happened after the date of liquidation in the counterfactual scenario that is predicated upon the Defendant's infringements not having taken place. Thus, any documentation concerning the development potential of the land goes to the heart of the Claimant's claim for the loss of a chance to develop the land. The Defendant submitted that it would treat all documents provided by Mr Francis and Mr Short as confidential and that these would not be disclosed outside of Cardiff Bus and its advisers in these proceedings.

11. At the invitation of the Tribunal, Mr Francis and Mr Short filed (joint) observations on the Defendant's application in a letter dated 23 February 2012 (received by the Tribunal Registry on 24 February 2012). Mr Francis and Mr Short objected to the application, both because it could have been brought at a much earlier stage in the proceedings, and because the period subsequent to the Claimant's disposal of the Swansea Depot (to Mr Francis and Mr Short) is irrelevant to the present proceedings. Mr Francis and Mr Short submitted that the disclosure sought by the Defendant was also too broad in scope, and would potentially extend to a number of documents that are irrelevant to these proceedings. Mr Francis and Mr Short also expressed various concerns about the confidential nature of the documents being sought by the Defendant and the cost of complying with any order for disclosure of such documents.
12. The Claimant is seeking a substantial sum in respect of a lost opportunity to develop the Swansea Depot, and it is right that there should be full disclosure on this issue to allow the Defendant a proper opportunity to defend the claim. We consider that these documents should be disclosed.
13. We appreciate, of course, that Mr Francis and Mr Short are not party to these proceedings. They are, however, very much interested in these proceedings, not merely as witnesses but as persons who have commenced their own claims against the Defendant (which are presently stayed). For this reason, given the clear relevance of the documents sought to be disclosed, we have no hesitation in ordering these third parties to make this disclosure pursuant to rule 19 of the Tribunal Rules.
14. As regards the scope of disclosure, Mr Francis and Mr Short are ordered to disclose all documents that fall within the category described at paragraph 9 above, by reference to the test for standard disclosure under rule 31.6 of the Civil Procedure Rules ("CPR"). Accordingly, Mr Francis and Mr Short are required to disclose documents that adversely affect the Claimant's case or support the Defendant's case on this point. The date of the documents is irrelevant for these purposes: the obligation to disclose extends to contemporaneous documents.

15. The Tribunal understands the nature of the concerns expressed by Mr Francis and Mr Short regarding confidentiality and the costs of complying with an order for disclosure. In this regard, they should take comfort from the general rule (under rule 31.22 CPR) that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed. However, we are prepared to make an express order that no party may use the disclosed information for collateral purposes, and the Tribunal invites the parties to explore whether arrangements can be put in place during the hearing to avoid any reference in open court to the content of the disclosed documents.
16. As regards costs, the Tribunal orders that the Defendant pay the reasonable printing and photocopying costs of Mr Francis and Mr Short connected with the Defendant's application.

ORDER

17. For the reasons given above, we unanimously Order that:
 - (a) The Claimant be granted permission to amend its Claim Form by the insertion of the text set out at the Annex to this Ruling;
 - (b) The third witness statement of Mr Conway be admitted;
 - (c) The Defendant be granted permission (if so advised) to amend its Defence and written opening submissions in light of the amendments to the Claim Form, and to adduce further evidence in relation to those amendments, to be filed and served by 5pm on 7 March 2012;
 - (d) The Claimant pay the Defendant its costs of and occasioned by the Claimant's application;
 - (e) Mr Francis and Mr Short provide copies of all documents (including any publicly available documents) relating to the Swansea Depot that are in their possession that have not been previously been made available in these proceedings, specifically documents relating to the period of Mr Francis and

Mr Short's ownership of the property (from 20 May 2005 to the present day);

- (f) The documents disclosed pursuant to paragraph (e) above be used for the purposes of these proceedings only, and not for any other purpose; and
- (g) The Defendant pay Mr Francis and Mr Short's reasonable printing and photocopying costs in relation to the disclosure ordered at (e) above.

Lord Carlile of Berriew QC

Peter Freeman QC

Marcus Smith QC

Charles Dhanowa
Registrar

Date: 1 March 2012

ANNEX

“ANNEX I - LOSS SPECIFICALLY ATTRIBUTABLE TO 2 TRAVEL ENTERING INTO LIQUIDATION

15.1 Further to the heads of loss already claimed, 2 Travel suffered and will suffer additional losses which are specifically attributable to 2 Travel entering into liquidation. This head of loss includes both losses that have already been incurred as a result of 2 Travel entering into liquidation as well as losses which it is anticipated 2 Travel will incur as a result of it entering into liquidation. The bases for the sums claimed under this head of loss are set out and explained in the third witness statement of Mr Daniel Simon Conway.

15.2 In light of Mr Conway’s evidence, 2 Travel claims the following amounts of damages as being losses specifically attributable to it entering into liquidation:

- i. £796,932.59 – Creditor claims arising as a result of the liquidation;
- ii. £80,000 – Secretary of State fees;
- iii. Loss within the range £413,000 to £508,000 – Liquidator’s fees and expenses;
and
- iv. £1,269,000 – Interest payable on unsecured claims.”