Neutral citation [2019] CAT 22

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1298/5/7/18

Victoria House
Bloomsbury Place
London WC1A 2EB

12 September 2019

Before:

ANDREW LENON Q.C. (Chairman)
MICHAEL CUTTING
JANE BURGESS

Sitting as a Tribunal in England and Wales

BETWEEN:

ACHILLES INFORMATION LIMITED

Claimant

- v -

NETWORK RAIL INFRASTRUCTURE LIMITED

Defendant

Heard at Victoria House on 12 September 2019

RULING (PERMISSION TO APPEAL AND COSTS)

APPEARANCES

Mr Philip Woolfe (instructed by Fieldfisher LLP) appeared on behalf of the Claimant.
Mr David Went (instructed by Addleshaw Goddard LLP) appeared on behalf of the Defendant.

1. On 19 July 2019 the Tribunal handed down judgment in these proceedings ([2019] CAT 20) (the "Judgment").

2. On 26 July 2019, the Claimant, by way of a letter from its solicitors, applied for its costs. The letter also included a draft order setting out the order sought as regards costs.

3. On 2 August 2019, the Defendant, by way of a letter from its solicitors, submitted two reasons why the Claimant's summary of costs is not representative of a reasonably expected recovery.

4. On 9 August 2019, the Defendant applied for permission to appeal in respect of the Judgment (the "Application").

5. We have read and fully considered the Application and along with the various correspondence on permission to appeal and costs. We have also considered the written submissions prepared for and the oral submissions made at the hearing on 12 September 2019 on both issues.

6. This is the Tribunal's unanimous ruling on both issues.

A. PERMISSION TO APPEAL

7. Pursuant to section 49 of the Competition Act 1998 ("the 1998 Act"), an appeal lies from a decision of the Tribunal to the Court of Appeal. In deciding whether to grant permission, the Tribunal applies the same test as the High Court applies under the Civil Procedure Rules ("CPR"), namely that permission to appeal may be granted where the Tribunal considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.

8. The Defendant sets out eight grounds of appeal in its Application.

   (1) It is alleged that the Tribunal erred in finding that the each of the three schemes embodies an agreement or concerted practice within the meaning of section 2(1) of the 1998 Act.

(2) It is alleged the Tribunal misapplied the law in finding that the Defendant is an undertaking for the purposes of the conduct in question.

(3) It is alleged that the Tribunal erred in its finding as to the relevant market.

(4) It is alleged that the Tribunal erred in concluding that the RISQS-only rule has an appreciable effect on competition.

(5) It is alleged that the Tribunal erred in reaching the conclusion that the RISQS-only rule is not objectively justified.

(6) It is alleged that the Tribunal erred in finding that the RISQS-only rule does not satisfy the criteria for exemption under section 9 of the 1998 Act.

(7) It is alleged that the Tribunal erred in concluding that the RISQS-only rule constitutes abusive conduct.

(8) The Defendant also argues that there are compelling reasons as to why permission should be granted.

9. The Tribunal is not persuaded that there are valid grounds for permission to appeal. We do not accept that the Defendant has reasonable prospects of establishing that the Tribunal made any error of law or that there are any other compelling reasons for granting permission to appeal.

10. We find as follows:

(1) Grounds A (no agreement or concerted practice) and B (no undertaking) raise points that were scarcely argued at the trial and are not well founded in the Tribunal's view.

(2) Ground C (relevant market), Ground D (no appreciable effect) and Ground E (objective justification) do not identify any point of law with a reasonable prospect of success, in the Tribunal's view. The Defendant did not plead or argue reliance on the Commission's Notice on agreements of minor importance

which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice) and/or the Commission's Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Nor does it put forward any basis with reasonable prospects of undermining the Tribunal's conclusions on the evidence as to appreciable effect and objective justification.

(3) Ground F (criteria for exemption) does not raise any point with reasonable prospects of disturbing the Tribunal's conclusions on exemption. The Tribunal's conclusions were that on the facts the Defendant failed to establish that the safety purposes of the RISQS-only rule could not be achieved by less restrictive means. In the Tribunal's view, the Defendant does not have any realistic prospect of persuading the Court of Appeal to reach a different conclusion on the facts.

(4) Ground G (abuse of dominance) does not assist the Defendant unless it succeeds in relation to the Chapter I prohibition. It does not, in the Tribunal's view, disclose any reasonably arguable point of law and fails to address the point that there was no evidence that the Defendant or the RSSB tried to weigh up the loss of competition which is inherent in having competition only periodically in the form of a tender for the market (rather than in the market) against the putative benefits of a tender process.

(5) There are no other "compelling reasons" for permission to appeal to be granted under CPR 52.6. With regard to the safety issue, the Judgment contains detailed consideration, discussion and findings of fact on this issue and there is no tenable basis to suggest that these matters should be reconsidered by the Court of Appeal. The assertion that the Claimant's case involves a "novel" allegation of breach of UK antitrust rules was first made in the introduction to the Defendant's Skeleton Argument for trial (paragraph 2) but was never made good in submissions at trial nor maintained in its written Closing Submissions.

(6) The issues determined by the Tribunal were essentially matters of fact. The Tribunal considers it unlikely that the Court of Appeal would come to different conclusions on those issues. We therefore refuse permission to appeal.

B. COSTS

11. The Claimant is the overall winner. As a general rule, costs should follow the event. However, the Tribunal takes into account the submissions made in the Defendant's letter of 2 August 2019. There was some confusion as to the Claimant's case during the course of the trial as to whether it applied to the Principal Contractor Licencing Scheme. Ultimately, the Tribunal in its Judgment held that it did not. Time was taken up over this. The Tribunal also rejected the Claimant's argument that the RISQS-only rule was an object restriction, which was a significant issue in the case.

12. The Tribunal therefore orders that:

(1) The Defendant shall pay the Claimant's costs subject to a reduction of 15%, to be determined by a detailed assessment unless agreed.

(2) The Defendant shall pay the Claimant by 4pm within 14 days from the date of this Order the sum of £300,000 as an interim payment on account of the costs ordered pursuant to paragraph 12(1) above.

(3) The Claimant shall be at liberty to commence the detailed assessment proceeding referred to in paragraph 12(1) above forthwith but not before the deadline for applying for permission to appeal has expired, or if an application for permission is made, permission is denied or the appeal is dismissed.

Andrew Lenon Q.C. Jane Burgess Michael Cutting
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 12 September 2019
Registrar