Neutral citation [2009] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1099/1/2/08

Victoria House
Bloomsbury Place
London WC1A 2EB

30 June 2009

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR PAUL STONEMAN
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

NATIONAL GRID PLC

Appellant

- v -

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

supported by

SIEMENS PLC
CAPITAL METERS LIMITED
METER FIT (NORTH WEST) LIMITED
METER FIT (NORTH EAST) LIMITED

Interveners

RULING ON PERMISSION TO APPEAL

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1. National Grid have requested permission to appeal from the judgment of the Tribunal handed down on 29 April 2009 ([2009] CAT 14, "the Judgment"). An appeal lies from the Judgment under section 49 of the Competition Act 1998 both as to the decision of the Tribunal regarding the amount of a penalty imposed under section 36 of that Act and on a point of law arising from the Judgment. The Respondent and the Interveners oppose the grant of permission and the parties were content for us to decide this matter without an oral hearing.

2. According to CPR rule 52.3(6) which applies in this case, permission may be granted only if the Tribunal considers that the appeal would have a real prospect of success or where there is some other compelling reason why the appeal should be heard. We have in mind the comments of Buxton LJ in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] EWCA Civ 796 as to the importance of isolating within the criticised decision what is an issue of law, and what is merely a determination, by a specialist Tribunal, of a matter of fact or judgement (see paragraphs 15 to 17).

3. The Tribunal's conclusion is that none of the grounds of appeal proposed by National Grid raises an issue which is sufficiently material to the Tribunal's findings to establish a real prospect of an appeal succeeding. This is, at base, a reasonably straightforward case in which the Tribunal reached the same conclusions on the substance as the Authority reached and did so largely for the same reasons as were relied on by the Authority. We do not consider that there is any real prospect of a higher court upholding any of the grounds of appeal or varying the fine which we have imposed. There is no other compelling reason for the matter being considered by a higher court. We therefore unanimously dismiss National Grid's request. We consider below each of National Grid's grounds of appeal, as set out in its request dated 29 May 2009 ("the Request").

Ground 1: what is 'normal' competition?

4. National Grid wish to revisit the debate over what the European Court of Justice meant by the reference to "normal competition" in Case 85/76 *Hoffmann-La Roche v*

Commission [1979] ECR 461: see paragraphs 88 onwards of the Judgment. That debate was concluded by the Tribunal noting in paragraph 93 that all the parties in the case accept that *some* kind of payment protection arrangement was "normal" in this market. It cannot be argued from this that *all* kinds of payment protection arrangements must be regarded "normal" and hence not abusive. The question for the Tribunal was whether the arrangements in the Legacy MSA went too far. We do not see how the reference to "normal" competition in *Hoffmann-La Roche* or the other points raised by National Grid under Ground 1 assist in arriving at the answer to that question. Once it is accepted, as it was for the purposes of this case, that payment protection is normal, the *Hoffmann-La Roche* judgment does not take one any further. In so far as National Grid seek to reargue the point about the Legacy MSA being more attractive to customers than other arrangements, the Tribunal has explained in the Judgment why that argument was rejected as irrelevant.

Ground 2: the use of benchmarks

5. National Grid's second ground concerns the use of benchmarks by the Tribunal. As regards PPMs, they make two points. First they say that the only comparison made for PPMs was the average cost per meter of replacing 50 per cent more meters than envisaged by the glidepath. National Grid argue that this cannot amount to anti-competitive foreclosure unless there is an implicit comparison with a situation where no early replacement charges apply. We disagree that there is any such implicit comparison. We explained the exercise that the Authority had undertaken, as described by Mr Keyworth, and we rejected the specific criticisms of the exercise that National Grid put forward: see paragraphs 101 onwards of the Judgment. The point that National Grid now relies on was dealt with particularly in paragraphs 111 – 113. The Tribunal is a specialist body with particular expertise in determining whether the tests that a competition authority has devised and applied in a given case were a good way of assessing the actual or potential economic effect of the conduct in question. These issues are pre-eminently issues for the judgement of a specialist tribunal. Having regard to the comments of Baroness Hale in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49 (paragraph 30) concerning the approach of the appellate courts to the decision of an "expert tribunal charged with administering a complex area of law", we do not consider that this ground has any prospect of success.

6. National Grid's second point seems to be that the Legacy MSAs allow more free replacement of PPMs than are allowed under the CMO contracts. Although National Grid refer to this point having been raised in the 559th paragraph of their Notice of Appeal, this is not a point that was made in National Grid's skeleton argument or during the course of submissions at the hearing. It is not a point that the Tribunal was invited to consider and it is not appropriate for National Grid to rely on it now.

7. As regards DCMs, National Grid renew their attack on the Authority's counterfactual. Again, there is no error of law identified here. We agree with the point made by the Authority that much of National Grid's argument is based on the assumption that the Authority or the Tribunal must not only devise a counterfactual against which to assess the alleged abusive conduct but must ensure that the counterfactual is in effect at "the limits of acceptable non-abusive behaviour". There is no authority for the proposition that a competition authority must identify what kinds of alternative but similar conduct would be just on the right side of the Article 82 infringement line and then compare the actual conduct with that. Any such requirement would make Article 82 unworkable.

8. Finally on this ground National Grid seek to reopen the discussion about their sale counterfactual described in paragraphs 146 onwards of the Judgment. This was an issue to which a great deal of written and oral evidence and submission was devoted. In concluding that this counterfactual was unhelpful, the Tribunal took into account the note entitled "Ownership incentives under the Legacy MSA" handed up towards the end of the hearing, the discussion of this issue in course of closing speeches and the evidence of Mr Matthew. The fact that the Judgment does not expressly refer to and rebut each of these elements does not mean that the Tribunal "failed to address" them. We have, rather, borne in mind the comments of the Court of Appeal in *Argos Limited & Littlewoods Limited v Office of Fair Trading* [2006] EWCA (Civ) 1318 (paragraphs 5 and 6) that it is not always necessary for the Tribunal to set out each party's submissions in detail before explaining the reasons for deciding the case and that the Tribunal should endeavour to express its findings of fact and its reasoning in more succinct form.

Ground 3: actual foreclosure and the reduction in business of the CMOs

9. National Grid object to the finding in paragraph 182 of the Judgment to the effect that Siemens/CML could easily have accommodated significant additional volumes of work by mid-2005. The factual issue being determined by the Tribunal here was a very narrow one, concerning the reductions imposed by British Gas in May 2006 from 100 per cent of what had been provided for in their contract with CML to 85 per cent: see paragraph 181 of the Judgment. National Grid argued that this *prima facie* reduction did not actually have any real effect on CML's business because teething problems at the start of the contract meant that CML would have failed to achieve the 100 per cent contract performance in any event. The Tribunal accepted the evidence of Mr Lee that CML's teething problems had been resolved by mid 2005 (and *ex hypothesi* also by May 2006) so that CML would have carried out 100 per cent of the replacement volumes if British Gas had not pushed for the reduction. The reduction to 85 per cent was therefore evidence of actual foreclosure arising from the Legacy MSAs.

10. This point is not related to the wider issues of whether the existing CMOs could have undertaken much greater volumes of work which might have become available if the Legacy MSAs had not been concluded in their present form and the gas suppliers had decided to transfer much more of their metering work to CMOs. This point is therefore unaffected by the rulings of the Chairman of 8 October 2008 ([2008] CAT 26) and 17 October 2008 ([2008] CAT 30). Wider issues of the ability of the existing CMOs to absorb *higher volumes of work than were in fact contracted for* were, and remain, irrelevant to the case. This point was simply whether CML could have carried out *the level of work that they were originally contracted to perform*. National Grid clearly were in a position to deal with the narrow point and they did so with the evidence of Mr James. As is apparent from paragraph 182 of the Judgment, the Tribunal was aware of the conflict between Mr James' evidence and that of Mr Lee and the Tribunal preferred that of Mr Lee. There is no point of law or procedural unfairness arising from this.

Ground 4: no overall harm to consumers

11. National Grid assert that because Article 82 is aimed at enhancing consumer welfare, it follows that the regulator must show that the alleged abusive conduct has a direct

adverse effect on consumers. Since, National Grid argue, there were benefits to consumers, for example from the overall reduction in rentals on legacy meters, this element has not been established and hence the conduct is not abusive.

12. National Grid's argument is one that has been put to, and dismissed by, the Court of Justice on many occasions. The Court has robustly rejected the idea that it is necessary to show that alleged abusive conduct directly harms consumers. For example in Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, the Court of Justice confirmed that Article 82 "is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure" (paragraph 106). The Court of First Instance did not therefore need to examine whether BA's conduct had caused prejudice to consumers but could properly focus on whether the bonus schemes at issue had a restrictive effect on competition. Similarly here, once the Tribunal had upheld the findings of the Authority that the contested Legacy MSA provisions resulted in significant actual and potential foreclosure of competition and were not objectively justified, there was no need to consider further whether there was a direct adverse effect on consumers.

Ground 5: penalty

13. National Grid's point concerning deterrence is misconceived since the Authority clearly stated at paragraph 6.62 of the Decision that there had been no increase in the level of the penalty for the purpose of deterrence.

14. As to seriousness, National Grid's arguments before and at the hearing did not focus on attacking the 4 per cent starting point. Rather they simply transferred the arguments that had been originally made in support of their assertion that there was no negligent infringement here to support an argument that the Authority's involvement in the development of the Legacy MSAs should mitigate the fine imposed.

15. The Tribunal is not bound to follow the step by step approach to calculating the fine that the Authority followed: see paragraph 201 of the Judgment. The Tribunal considers that a reduction of £11.6 million in the fine imposed on National Grid is a substantial

recognition of the points made in paragraph 50 of the Request, balanced against the fact that the Tribunal upheld the finding of infringement in almost every respect.

Other matters

16. National Grid may, if so advised, renew their application for permission to the Court of Appeal within 14 days pursuant to CPR 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling together with copies of National Grid's letter of 29 May 2009 requesting permission to appeal and the Authority's and Interveners' letters opposing National Grid's request should be placed before the Court of Appeal.

17. In the light of our rejection of National Grid's request, the question of suspending the operation of the directions set out in the Decision, as revised in accordance with paragraph 229 of the Judgment, does not arise. However, in case National Grid renew their application for a stay before the Court of Appeal, we make the following comments. In their letter of 5 June, National Grid accepted that there is no reason to postpone making as much progress as possible towards negotiating new arrangements to replace the Legacy MSAs, so that the parties would be in a position to adopt such arrangements rapidly in the event that any appeal is dismissed. We entirely agree with this. The only question therefore is whether if such negotiations were effectively concluded before any appeal were disposed of, National Grid should be allowed to hold back from actually implementing the contractual changes with the gas suppliers, pending that disposal. As we indicated in correspondence, we would have considered granting such an application only if National Grid had been prepared to offer undertakings to mitigate the effect of the MSA provisions, bearing in mind that the adverse effect of those provisions is felt largely by the CMOs rather than by the gas suppliers.

Conclusion

18. For all the foregoing reasons the Tribunal unanimously:

ORDERS THAT:

National Grid's request for permission to appeal be refused.

Vivien Rose Professor Paul Stoneman David Summers

Charles Dhanowa
Registrar

Date: 30 June 2009